No. 17-765

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR J. STITT, II

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-55a) is reported at 860 F.3d 854. The opinion of the court of appeals panel (App., *infra*, 56a-64a) is not published in the Federal Reporter but is reprinted at 637 Fed. Appx. 927.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2017. On September 13, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 25, 2017. On October 13, 2017, Justice Kagan further extended the time to and including November 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 65a-80a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, respondent was convicted of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 290 months of imprisonment, to be followed by four years of supervised release. Judgment 1-3. A panel of the court of appeals affirmed, but the en banc court vacated that decision and remanded for resentencing. App., *infra*, 1a-64a.

1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction meets

that definition. 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. *Ibid.* If the statute of conviction consists of elements that are the same as, or narrower than, generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

2. In 2011, during an argument with his girlfriend, respondent "tried to shove a loaded handgun into [her] mouth while threatening to kill her." App., *infra*, 2a. A neighbor called the police, and respondent fled to his mother's home. *Ibid.* Law enforcement officers followed respondent, who surrendered to the authorities after a brief foot chase. *Ibid.*; see *id.* at 57a. Detectives recovered a .22 caliber handgun within arm's reach of respondent. *Id.* at 57a; see *id.* at 2a.

A federal grand jury indicted respondent on one count of unlawfully possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1). A jury subsequently found respondent guilty of that crime. App., *infra*, 2a. At sentencing, the district court

determined that respondent had nine prior state convictions that qualified as "violent felonies" under the ACCA, including six prior convictions for aggravated burglary under Tennessee Code Annotated § 39-14-403 (1997). App., *infra*, 2a, 57a. That statute criminalizes the burglary of any "habitation," Tenn. Code Ann. § 39-14-403(a) (1997), defined as (A) "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons"; (B) any "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant"; and (C) "each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle," Tenn. Code Ann. § 39-14-401(1) (Supp. 2001). The court applied the ACCA and sentenced respondent to 290 months of imprisonment. App., *infra*, 2a.

A panel of the court of appeals affirmed respondent's ACCA sentence. App., *infra*, 56a-64a. The government acknowledged that this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which held a separate portion of the ACCA's definition of "violent felony" to be unconstitutional, "invalidated the violent-felony status of three of [respondent's] prior offenses, leaving only his six aggravated-burglary convictions at issue." App., *infra*, 2a-3a. Relying on circuit precedent, the court of appeals held that a conviction under the Tennessee aggravated-burglary statute categorically qualifies as a conviction for generic burglary under the ACCA and that respondent was therefore properly sentenced as an armed career criminal. *Id.* at 64a (citing *United States* v. *Priddy*, 808 F.3d 676, 684 (6th Cir.

2015); *United States* v. *Nance*, 481 F.3d 882, 887 (6th Cir.), cert. denied, 552 U.S. 1052 (2007)).

3. The court of appeals granted respondent's petition for rehearing en banc. Over the dissent of six of the 15 judges who participated in the proceeding, the en banc majority overturned prior circuit law, concluded that the set of "habitation[s]" covered by the Tennessee aggravated-burglary statute extends beyond the "building[s] or other structure[s]" covered by generic burglary, and remanded for the imposition of a non-ACCA sentence. App., *infra*, 1a-55a.[1]

a. The en banc majority concluded that no nonpermanent or mobile structure of any sort, including the structures adapted for habitation that are protected by the Tennessee aggravated-burglary statute, can fit within *Taylor*'s reference to a "building or other structure," 495 U.S. 598. The majority reasoned that "[a]lthough the Court left 'building or other structure' undefined" in *Taylor*, "it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars,

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[1] In its briefing before the panel and its opposition to the petition for rehearing en banc, the government "acknowledge[d] that Tennessee's definition of habitation encompasses some burglary locations that may not be buildings or structures under *Taylor*," but argued that the definition is divisible and thus that the modified categorical approach applied. Gov't C.A. Br. 28 n.4; see Gov't Resp. to Pet. for Reh'g 4-5 (similar). After the court of appeals ordered supplemental briefing on divisibility in light of this Court's decision in *Mathis* v. *United States*, *supra*, see Order (June 1, 2016), the government reconsidered its position. In its supplemental brief, the government acknowledged that Tennessee's definition of "habitation" is indivisible under *Mathis*, but argued that the definition as a whole is encompassed within the locational element of generic burglary as described by *Taylor*. See Gov't C.A. Supp. Br. 6-25. The court of appeals treated that argument as having been fully preserved.

tents, and booths) fall outside the definitional sweep" of that phrase. App., *infra*, 4a; see *id.* at 4a-5a (citing *Mathis*, 136 S. Ct. at 2250; *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007); *Shepard*, 544 U.S. at 15-16; *Taylor*, 495 U.S. at 599)); see *id.* at 6a-7a. The majority stated that *Taylor*'s definition of generic burglary "emphasizes a place's form and nature—not its intended use or purpose," *id.* at 5a, and discounted the particular habitation-related limitations of the Tennessee statute.

The majority recognized that *Taylor* had described what "Congress meant by 'burglary'" as "the generic sense in which the term is now used in the criminal codes of most states." App., *infra*, 7a (quoting 495 U.S. at 598). And the majority took note of a multijurisdictional analysis submitted by the government for the purpose of illustrating that, when *Taylor* was decided, the "overwhelming majority of states included vehicles and moveable enclosures in their burglary statutes" and that "a little more than half the states' burglary statutes specifically 'covered movable structures adapted for specific purposes such as overnight accommodation, business, or education.'" *Id.* at 7a-8a. The majority also recognized that *Taylor* had likened the ACCA definition of burglary to the Model Penal Code's definition, which included occupied structures of the sort covered by the Tennessee law. *Id.* at 8a. But the majority nevertheless viewed *Taylor*'s "clear and unambiguous language" to "exclude[] *all* things mobile or transitory." *Ibid.*

b. Five judges joined one or both of two concurrences.

Judge Boggs authored a concurrence disagreeing with several points made by the dissent, namely, that

the ACCA definition of burglary is "broader" than the common-law definition, that the common-law definition applied to dwellings including vehicles adapted for overnight accommodation, and that burglary of a habitation "was a kind of burglary that the *Taylor* Court would have counted as a 'generic' ACCA burglary." App., *infra*, 16a-17a; see *id.* at 19a-26a. Judge Boggs recognized, however, that the majority's conclusion would (in conjunction with other ACCA decisions) lead to "bizarre results." *Id.* at 26a. He further noted that the courts of appeals disagree on the question whether statutes that protect nonpermanent structures adapted or used for overnight accommodation criminalize "generic burglary." *Id.* at 27a-29a. Judge Boggs therefore suggested that "perhaps the [Supreme] Court will soon clarify the question before us—a question that occupies a significant portion of the federal judiciary's docket." *Id.* at 29a.

Judge White joined Judge Boggs' concurrence, and also filed a separate concurring opinion arguing, in response to the dissent, that common-law burglary did not protect tents and vehicles. App., *infra*, 33a-43a. Judge White acknowledged, however, that "[w]hether Tennessee's aggravated-burglary offense and similarly-defined offenses fall within Congress's concept of generic burglary" is a "difficult" question with "[p]ersuasive arguments * * * on both sides." *Id.* at 43a. She also observed that the court of appeals' decision would produce "some puzzling results," but viewed the lower courts to be required to "accept" those results in the absence of intervention by this Court or Congress. *Id.* at 42a.

d. Judge Sutton, joined by five other judges, dissented. App., *infra*, 43a-55a. He reasoned that Tennessee's aggravated-burglary statute necessarily qualified as generic burglary, because generic burglary is an expansion on the common-law definition of burglary, the locational element of which encompassed "dwellings" including the sorts of habitations covered by the Tennessee law. *Id.* at 43a-46a. Judge Sutton explained that the concurring opinions' contrary assertions erroneously conflated Blackstone-era common law with the "common law in 1984, when Congress enacted the Armed Career Criminal Act." *Id.* at 53a. "By then," he observed, "the consensus of the state courts—the true authorities on American common law—was that tents and vehicles designed and used for human accommodation count as dwellings." *Ibid.* (citing examples).

Judge Sutton also observed that Tennessee's aggravated-burglary offense (1) mirrors the Model Penal Code's definition of "occupied structure," which *Taylor* cited in determining the elements of generic burglary; (2) matches the traditional meaning of "dwelling house" in *Black's Law Dictionary*; and (3) is consistent with federal cases holding that the term "burglary of a dwelling," as used in former Sentencing Guidelines § 4B1.2 (2015), reached vehicles and tents designed for human habitation. App., *infra*, at 46a-47a (citations omitted). Judge Sutton reasoned that because "*Taylor* tells us that burglary of a dwelling is always generic, and a uniform body of precedent tells us that Tennessee's definition of 'habitation' applies only to dwellings[,] * * * [t]he statute is generic" and respondent's convictions under it qualify as violent felonies. *Id.* at 47a-48a.

Judge Sutton criticized the majority for taking out of context statements by this Court that burglary statutes that "includ[e] places, such as automobiles and vending machines" cover more locations than generic burglary. App., *infra*, 48a (quoting *Taylor*, 495 U.S. at 599). He observed that those statements had not addressed statutes limited to the burglary of dwellings. *Id.* at 48a-49a. And he admonished the majority for "isolat[ing] three words from *Taylor*, lift[ing] them from their context, and in the process eliminat[ing] common law burglary of a dwelling, which *Taylor* tells us * * * is the heart of the crime," from the scope of ACCA burglary. *Id.* at 50a-51a. Judge Sutton concluded that the result of the majority's opinion was to "effectively read[] 'burglary' out of the Act"—a result that "should give us all pause." *Id.* at 52a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding—that burglary of a nonpermanent or mobile structure that is used or adapted for overnight accommodation can never qualify as generic burglary—all but erases the term "burglary" from the ACCA's text. In a sharp departure from this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), which tethered ACCA "burglary" to the "sense in which the term is now used in the criminal codes of most States," *id.* at 598, the decision below defines generic burglary in a manner that would include very few States' burglary laws. Both at the time the statutory language was enacted and now, most States have classified the intrusion of at least some nonpermanent or mobile structures, such as vehicles adapted for overnight accommodation, as burglary. The court of appeals' refusal to consider burglary of nonpermanent or mobile habitable structures a "violent felony" is also at odds

with Congress's concern about the potential for violent confrontations with the "occupants of the home," *id.* at 581 (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 3-5 (1983) (Senate Report)), a concern that applies just as much to a mobile home as to a mansion house. This Court's intervention is warranted to correct the court of appeals' error and resolve a division in the courts of appeals about the scope of this very common ACCA predicate.

A. The Court Of Appeals Erred In Holding That "Burglary" Under The ACCA Excludes Burglary Of Dwellings That Are Mobile Or Nonpermanent

1. The original 1984 version of the ACCA provided an enhanced sentence for offenders who had three previous convictions "for robbery or burglary," with "burglary" defined to include "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Armed Career Criminal Act of 1984 (1984 ACCA), Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (Supp. III 1985)) (repealed in 1986 by the Firearm Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(b), 100 Stat. 459); see *Taylor*, 495 U.S. at 581. When Congress amended the list of enumerated offenses in 1986, it left burglary in place as the first of those offenses, but deleted the preexisting definitional section. See *Taylor*, 495 U.S. at 582-585 (discussing this history); Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39; 18 U.S.C. 924(e)(2)(B).

In *Taylor*, this Court held that Congress intended "burglary" in the amended version of the ACCA to have a "uniform definition." 495 U.S. at 580; see *id.* at 591-

592. The Court declined to adopt the common law's definition of burglary—"the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony"—because that narrow definition "ha[d] little relevance to modern law enforcement concerns" that animated the ACCA. *Id.* at 580 n.3, 593 (citation omitted). The Court instead adopted a broader construction of "burglary" that encompassed any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Taylor explained that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. As the appendix to this petition illustrates, at the time of the 1986 amendments, an overwhelming majority of jurisdictions—43 States and the District of Columbia—had at least one burglary statute that protected nonpermanent or mobile structures, such as vehicles, boats, and tents, in addition to residences and other buildings. App., *infra*, 81a-97a. Like the Tennessee statute at issue here, those statutes would have covered a nonpermanent or mobile structure that had been adapted or was regularly used for overnight accommodation. See *ibid.* In so doing, they collectively reflected a consensus view that the criminal law of burglary should extend beyond its Founding-era common-law roots to "protect[] the humble tenant in his tent as well as his more fortunate neighbor in his palace." *Favro* v. *State*, 46 S.W. 932, 933 (Tex. Crim. App. 1898); see also *People* v. *Netznik*, 383 N.E.2d 640, 643 (Ill. App. Ct. 1978) ("[T]he provision was intended to secure the person or property of a tent-dweller or camper in the use of his tent to the same extent it secures that of an owner in the use of his house, church or shop.").

Taylor further explained that its definition of generic burglary "approximate[d] [the definition] adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. Since 1980, the Model Penal Code has described burglary as the unlawful entry into "a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). The phrase "occupied structure" includes "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 221.0(1). The Code's commentary accordingly makes clear that although someone could not be prosecuted for burglarizing an ordinary motor vehicle or freight car, he could be prosecuted for burglarizing a trailer home. *Id.* § 221.1 cmt. 3(b). By defining burglary to include locations with "apparent potential for regular occupancy," the drafters of the Model Penal Code directed the offense "to those intrusions that are typically the most alarming and dangerous." *Ibid.*

As *Taylor* observed, Congress's inclusion of burglary in the ACCA was similarly motivated by a concern about burglary's "inherent potential for harm to persons," 495 U.S. at 588, particularly in the context of home invasions. In drafting the original 1984 version of the statute, Congress had been disturbed by statistics showing that career criminals commit a large percentage of robbery and burglary offenses. See *id.* at 581. Congress viewed burglary, in particular, as "one of the 'most damaging crimes to society' because it involves 'invasion of victims' homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions.'" *Ibid.* (brackets omitted) (quoting

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (House Report)). Congress recognized that burglary offenses trigger the possibility of violent confrontation "depending on the fortuitous presence of the occupants of the home when the burglar enters." *Ibid.* (quoting Senate Report 4); see *id.* at 585 (discussing similar statements during hearings on 1986 amendments). And it accordingly ensured that a history of such offenses would trigger enhanced punishment under the ACCA. See *id.* at 581-582.

2. The Tennessee aggravated-burglary statute at issue here criminalizes precisely the sort of home invasions that lie at the "heart of the crime" of burglary, App., *infra*, 51a (Sutton, J., dissenting), as defined in *Taylor*. The statute prohibits burglary of a "habitation," Tenn. Code. Ann. § 39-14-403(a) (1997), defined as a "structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons" or a "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant," Tenn. Code Ann. § 39-14-401(1)(A)-(B) (Supp. 2001).

The Tennessee statute thus prohibits burglary in "the generic sense in which the term [was] used in the criminal codes of most States." *Taylor*, 495 U.S. at 598. It is comparable to or narrower than all but a small handful of state burglary statutes in existence at the time of the ACCA's 1986 amendments. The 44 jurisdictions that protected nonpermanent or mobile structures in 1986 include 19 that had expanded their statutes to nonpermanent or mobile structures generally, as well as 25 that had extended their statutes to nonpermanent

or mobile structures adapted or used for overnight accommodation (and, in some cases, other purposes as well). See App., *infra*, 81a-97a.

The Tennessee statute also fits within the Model Penal Code definition of burglary that *Taylor* described as a close analogue of generic burglary. See 495 U.S. at 598 n.8. All of the locations covered by the Tennessee statute would be considered "occupied structure[s]" under the Model Penal Code. See Model Penal Code §§ 221.0(1), 221.1(1) & cmt. 3(b) (1980). Coverage of such structures effectuates the congressional design to provide enhanced punishment for the possession of firearms by recidivist criminals who had committed particularly dangerous home-invasion offenses. Approximately 6.4% of all housing units in the United States, or roughly 8.5 million such units, are mobile homes. See American FactFinder, U.S. Census Bureau, *Selected Housing Characteristics, 2011-2015 American Community Survey 5-Year Estimates*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Nothing in the ACCA suggests that Congress intended to treat the burglary of mobile homes—and the danger such crimes pose to the people who live in them—as less serious than other types of burglary. Indeed, "the burglary of a mobile home or camper is often likely to pose a *greater* risk of violence to the occupant or owner than the burglary of a building or house because it is more difficult for the burglar to enter or escape unnoticed." *United States* v. *Spring*, 80 F.3d 1450, 1462 (10th Cir.) (emphasis added), cert. denied, 519 U.S. 963 (1996).

3. The definition of generic burglary adopted by the majority below—which excises the invasion of many common types of dwellings from the scope of the

crime—is one that most state burglary statutes cannot satisfy. The vast majority of States have at least one burglary statute penalizing the burglary of a nonpermanent or mobile structure used or adapted for overnight accommodation, and in many States, *all* burglary statutes cover those locations. Yet, the majority's rule would mean that convictions under those statutes do not qualify as "burglary" for purposes of the ACCA. That cannot be what Congress intended when it enacted the ACCA. *Taylor* explicitly rejected a construction of "burglary" that "would come close to nullifying that term's effect in the statute," 495 U.S. at 594, as would the court of appeals' decision here.

The court of appeals erred in reading this Court's decisions to require such a result. As the court of appeals observed (App., *infra*, 4a-5a, 6a-7a, 8a (citation omitted)), this Court has on several occasions stated that generic burglary does not encompass unlawful entry into "vehicles," "automobiles," and "vessel[s]." See *Mathis* v. *United States*, 136 S. Ct. 2243, 2250 (2016) (statute covering "any building, structure, [or] land, water, or air vehicle" overbroad) (citation and emphasis omitted; brackets in original); *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009) (statute covering a "vessel," rather than a "building," overbroad); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007) (statute covering vehicles, rather than a "building or structure," overbroad) (citation omitted); *Shepard* v. *United States*, 544 U.S. 13, 15-16 (2005) (statute covering "boat or motor vehicle," rather than "building or enclosed space," overbroad); *Taylor*, 495 U.S. at 599 (statute covering "automobiles and vending machines" overbroad). But none of those cases examined a state burglary statute that was lim-

ited to vehicles and other structures that are habitations. See App., *infra*, 48a-49a (Sutton, J., dissenting). The Court's repeated recognition that generic burglary does not cover *all* vehicles or vessels does not answer the more particularized question here.

The majority below was likewise wrong to premise its constricted definition of generic burglary on the view that "*Taylor* emphasizes a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a 'building or other structure.'" App., *infra*, 5a (citation omitted). That is a false dichotomy, with no foothold in *Taylor*'s use of the phrase "building or other structure." A place's "form and nature," *ibid.*, will always reflect its "intended use or purpose," *ibid.*, to at least some degree. As Judge Sutton observed, "form follows function, making it impossible for *any* definition of burglary to avoid functional considerations." *Id.* at 50a. A houseboat, for example, is different from a pleasure-boat. And the approach of the majority below would have the inexplicable result of treating burglary of a "gazebo[]," *ibid.*, but not burglary of a trailer home, as a violent felony.

The majority below also erred in focusing on the fact that the later-removed 1984 ACCA definition of "burglary" covered only "building[s]." See App., *infra*, 9a. Although the legislative history does not show that Congress intended the 1986 definition to be "something entirely different," *Taylor*, 495 U.S. at 590, *Taylor* explicitly defines "burglary" under the amended ACCA to include unlawful entry into a "building *or other structure*." *Id.* at 598 (emphasis added). And it makes clear that the set of "other structure[s]" covered by generic burglary should be defined by reference to contemporary state burglary laws and the Model Penal Code, *id.*

at 598 & n.8, both of which support coverage of the habitable vehicles and other structures protected by the Tennessee law at issue here.

The majority below also misread, and attached outsized importance to, the 1986 edition of 2 Wayne R. LaFave & Austin W. Scott, Jr.'s *Substantive Criminal Law* (LaFave) that is cited in *Taylor*. App., *infra*, 10a-11a (citing *Taylor*, 495 U.S. at 598). According to the majority, that treatise "saw vehicles as distinct from structures" because it distinguished burglary statutes whose locational element is described "as a 'building' or 'structure'" from burglary statutes "extend[ing] to still other places, such as all or some types of vehicles." *Id.* at 11a (emphasis omitted) (quoting LaFave § 8.13(c)). But the treatise in fact recognized that States had "broadly construed" the words "building" and "structure," and it explained that covering vehicles "may make sense in some circumstances, *as where the vehicle is a motor home*." LaFave § 8.13(c) & n.85 (emphasis added). Indeed, the treatise's sole example of a "situation[that] ought not be treated as burglary" is a case involving a defendant's "opening [the] hood of [a] car and taking [the] battery," *id.* § 8.13(c) n. 85 (citing *State* v. *Pierre*, 320 So. 2d 185 (La. 1975))—a situation far afield from anything covered by the Tennessee provision at issue here.

B. The Question Presented Warrants This Court's Review

The question whether burglary of a habitable structure that is nonpermanent or mobile can qualify as "burglary" under the ACCA warrants this Court's review. The question has divided the courts of appeals. And the definition of ACCA burglary—a frequently recurring ACCA predicate and the only one that Congress has consistently listed in the statute since its inception—is

a matter of exceptional importance to the consistent administration of the federal criminal law.

1. As the majority below recognized (App., *infra*, 12a-13a), a conflict exists in the courts of appeals on the question presented.

The Fourth, Eighth, and Ninth Circuits have adopted the same narrow definition of generic burglary as the decision below. See *United States* v. *Sims*, 854 F.3d 1037, 1039-1040 (8th Cir. 2017) (holding that Arkansas residential burglary statute is broader than generic burglary because it "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations"), petition for cert. pending (filed Nov. 21, 2017); *United States* v. *White*, 836 F.3d 437, 445-446 (4th Cir. 2016) (holding that West Virginia burglary statute is broader than generic burglary because it protects "dwelling house[s]," defined to include, *inter alia*, "mobile home[s]" and "house trailer[s]") (citation omitted); *United States* v. *Grisel*, 488 F.3d 844, 851 n.5 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007) ("To the extent that our precedents suggest that state statutes satisfy the categorical inquiry when they define burglary to include non-buildings adapted for overnight accommodation, they are overruled.").[2]

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[2] Contrary to the suggestion of the majority below (App., *infra*, 13a), the Third Circuit has not directly addressed the question presented here. In *United States* v. *Bennett*, 100 F.3d 1105, 1109 (1996), the court of appeals held that Pennsylvania's burglary statute, which covers "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein," 18 Pa. Cons. Stat. § 3501 (1995), is broader than generic burglary. The Third Circuit had no occasion to consider whether a statute that covers only habitable structures constitutes generic burglary; it instead relied in significant part on the business-purposes component of the Pennsylvania statute. *Ibid.*

In contrast, the Tenth Circuit has held that burglary of a "vehicle that is adapted for the overnight accommodation of persons" qualifies as generic burglary because it is "analogous to the burglary of a building or house." *Spring*, 80 F.3d at 1462 (citation omitted); see *United States* v. *Patterson*, 561 F.3d 1170, 1173 (10th Cir. 2009) (reaffirming *Spring* and finding that a conviction under a different Tennessee burglary statute "clearly qualifie[d] as a prior crime of violence" under the Sentencing Guidelines), cert. denied, 558 U.S. 1150 (2010). The Fifth Circuit has also so held, but it has recently granted rehearing en banc on that question. See *United States* v. *Herrold*, 685 Fed. Appx. 302 (2017) (per curiam), reh'g en banc granted, 693 Fed. Appx. 272 (5th Cir. 2017).

As the concurring opinions below recognized, even an en banc circuit decision cannot satisfactorily resolve the question presented. Judge Boggs described the results of the decision below as "bizarre" (App., *infra*, 26a) and Judge White similarly found them "puzzling" (*id.* at 42a). Yet Judge White took the view that even "[i]f the results are unsatisfying, we must accept them until Congress changes the ACCA or the Supreme Court its interpretation of it." *Ibid*; see *id.* at 29a (Boggs, J., concurring) ("[P]erhaps the [Supreme] Court will soon clarify the question before us."). That is because the majority's decision rests in significant part on an interpretation of this Court's precedents that only this Court (or Congress) can conclusively disavow. See *id.* at 48a (Sutton, J., dissenting) (noting that the majority "makes the mistake of reading an opinion (in truth part of an opinion) like a statute").

2. That three circuits—the Fifth, Sixth, and Ninth—have considered the question presented en banc illustrates the critical importance of the issue to the ACCA's operation.

Burglary has always played a central role in the statute. Since the ACCA's enactment in 1984, Congress has deemed enhanced prison sentences to be warranted for recidivist burglars. Burglary was one of only two offenses, along with robbery, singled out as predicates in the original version of the ACCA. See 1984 ACCA, Tit. II, ch. 18, 98 Stat. 2185 (repealed by FOPA § 104(b), 100 Stat. 459). As this Court explained in *Taylor*, that legislative choice reflected Congress's finding—amply documented in the ACCA's legislative history—that burglary was both one of "the crimes most frequently committed by * * * career criminals," 495 U.S. at 581 (citing House Report 1, 3; Senate Report 5), and one of "'the most common violent street crimes,'" *ibid.* (quoting Senate Report 5). Accordingly, even when Congress removed robbery as an explicit enumerated offense two years later, burglary remained the first enumerated offense. See 18 U.S.C. 924(e)(2)(B)(ii) (enumerating "burglary, arson, * * * extortion," and offenses "involv[ing] use of explosives").

Empirical data confirm that burglary offenses are both frequent and inherently dangerous. According to the Bureau of Justice Statistics, an estimated average 3.7 million household burglaries occurred each year between 2003 and 2007. Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Victimization During Household Burglary* 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf. In roughly one million of those burglaries (28%), a household member was present. *Ibid.* And in approximately

266,000 of them (7%), the household member became the victim of a violent crime. *Ibid.*; see also *Tennessee* v. *Garner*, 471 U.S. 1, 27 (1985) (O'Connor, J., dissenting) ("[E]ven if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the 'harsh potentialities for violence' inherent in the forced entry into a home preclude characterization of the crime as 'innocuous, inconsequential, minor, or "nonviolent."'") (quoting *Solem* v. *Helm*, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting)).

The frequency with which burglary occurs is mirrored in the frequency with which it arises as an ACCA predicate. This Office is informed that the Western District of Tennessee alone has two dozen pending appeals in which the application of the ACCA depends on whether the specific Tennessee aggravated-burglary statute here defines a generic-burglary offense. The decision below upends Congress's design and precludes the federal government from ensuring that those recidivist criminals receive the sentences Congress prescribed. And the problem is not limited to Tennessee. As Judge Sutton noted, the construction adopted by the majority below "effectively reads 'burglary' out of the [ACCA]." App., *infra*, 52a. Under the majority's rule, many jurisdictions would have *no* version or degree of burglary that qualifies as generic, *ibid.*, while others, like Tennessee, would face the "head-scratching outcome" that a lesser crime (in Tennessee, burglary of a building) would qualify as generic burglary, while an aggravated form (in Tennessee, burglary of a "habitation") would not. *Id.* at 50a.

3. This case squarely tees up the question presented and is the best available vehicle for resolving it. The question was thoroughly addressed by the en banc court

of appeals and dispositive of the result below. In conjunction with the filing of this petition, the government is also filing a petition for a writ of certiorari presenting the same question in *United States* v. *Sims*, *supra*, in which the Eighth Circuit held that a conviction under an Arkansas statute that "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations" does not qualify as a prior burglary conviction under the ACCA. 854 F.3d at 1040; see Ark. Code Ann. §§ 5-39-101(4)(A), 5-39-201(a)(1) (2013). The more thorough consideration of the question presented by the en banc court in this case makes it a better vehicle for resolving the question than *Sims*. But *Sims* would also be an adequate vehicle for deciding the question presented, and if the Court wishes to review the issue in the context of multiple state statutes, the Court could grant the petitions in both cases and consolidate them for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-6158

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VICTOR J. STITT, II, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester
No. 4:12-cr-00019-1
Harry S. Mattice Jr., District Judge

Decided and Filed: June 27, 2017

OPINION

Before: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, MCKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges[*]

COOK, Circuit Judge. In 2007, we held that a conviction under Tennessee's aggravated-burglary statute, Tenn. Code Ann. § 39-14-403, categorically qualifies as an enumerated "violent felony" that triggers a sen-

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[*] The clerk submitted this case to the en banc panel of the Sixth Circuit Court of Appeals before Judge Amul Thapar received his commission on May 25, 2017.

tencing enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007); *see also United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015). Several years later, we reached the opposite conclusion about Ohio's similarly worded burglary statute, Ohio Rev. Code § 2911.12(A)(3). *United States v. Coleman*, 655 F.3d 480, 482 (6th Cir. 2011), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). We resolve this conflict by overruling *Nance* and holding that a conviction for Tennessee aggravated burglary is not a violent felony for purposes of the ACCA.

I.

During a heated argument in 2011, Victor Stitt tried to shove a loaded handgun into his girlfriend's mouth while threatening to kill her. When a neighbor called the police, Stitt fled to his mother's home, where he surrendered to authorities after a brief foot chase. Detectives recovered the gun lying on the ground within his reach.

A jury found Stitt guilty of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). Due to his nine prior "violent felony" convictions—including six for Tennessee aggravated burglary—the court designated Stitt an armed career criminal under the ACCA and sentenced him to 290 months' imprisonment.

On appeal, Stitt argued that none of his nine convictions qualify as violent felonies. The government conceded that *Johnson v. United States* invalidated the violent-felony status of three of his prior offenses, leaving only his six aggravated-burglary convictions at

issue. *See* 135 S. Ct. at 2563. Bound by *Nance*—which held that Tennessee aggravated burglary fits the Supreme Court's definition of "generic burglary"—we affirmed his sentence. *United States v. Stitt*, 637 F. App'x 927, 931-32 (6th Cir. 2016).

Stitt comes before us now on a petition for rehearing en banc, which we granted to resolve whether a conviction for Tennessee aggravated burglary constitutes a violent felony under the ACCA. *United States v. Stitt*, 646 F. App'x 454 (6th Cir. 2016). Because we conclude that Tennessee's aggravated-burglary statute is broader than the definition of generic burglary, we hold that a conviction under the statute does not qualify as an ACCA predicate offense.

II.

The ACCA imposes a fifteen-year minimum sentence on any defendant who, having been convicted of three prior "violent felonies," is found guilty of being in possession of a firearm. *See* 18 U.S.C. §§ 922(g), 924(e). Although the ACCA enumerates burglary as one of several "violent felonies" that can lead to the fifteen-year minimum, *see* § 924(e)(2)(B)(ii), not every conviction labeled as "burglary" under state law qualifies as a violent felony. *Taylor v. United States*, 495 U.S. 575, 590-92 (1990). Instead, Congress intended to encompass only those convictions arising from burglary statutes that conform to, or are narrower than, the "generic" definition of burglary. *Id.* at 598.

To determine whether Stitt's aggravated-burglary convictions qualify, we apply the "categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Under this approach, we compare the statu-

tory elements of Tennessee aggravated burglary to the elements of "generic burglary." *See id.* If the elements of Tennessee aggravated burglary "are the same as, or narrower than, those of [generic burglary,]" Stitt's convictions count as violent felonies under the ACCA. *Id.*

A. Applying the Categorical Approach

Tennessee defines aggravated burglary as the "burglary of a habitation," Tenn. Code Ann. § 39-14-403, and defines "habitation" as "any structure . . . which is designed or adapted for the overnight accommodation of persons," *id.* § 39-14-401(1)(A). The term "habitation" includes "mobile homes, trailers, and tents," as well as any "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." *Id.*

By contrast, the Supreme Court has determined that under the ACCA, "generic burglary" means "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. Although the Court left "building or other structure" undefined, it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars, tents, and booths) fall outside the definitional sweep of "building or other structure." *See id.* at 599; *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (explaining that Iowa's burglary statute "covers more conduct than generic burglary" because it "reaches a broader range of places: 'any building, structure, *[or] land, water, or air vehicle.*'" (alteration in original) (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (differentiating between break-

ing into a "vessel," which would not qualify as generic burglary, and "breaking into a building," which would); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space . . . , not in a boat or motor vehicle.").

By including "mobile homes, trailers, and tents," as well as any "self-propelled vehicle," Tennessee's aggravated-burglary statute includes exactly the kinds of vehicles and movable enclosures that the Court excludes from generic burglary. But the statute comes with a wrinkle: it criminalizes the unauthorized entry into vehicles and movable enclosures (with criminal intent) *only if* they are "designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1). In other words, it restricts the ambit of the statute to only those vehicles and movable enclosures that are habitable.

The issue before us, then, is whether a burglary statute that covers vehicles or movable enclosures only if they are habitable fits within the bounds of generic burglary. We hold that it does not. Our reading of *Taylor* and its progeny supports this conclusion.

To start, *Taylor* emphasizes a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a "building or other structure." *Taylor*, 495 U.S. at 598; *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010) ("The definitional focus [of generic burglary]

is on the nature of the property or place, not on the nature of its use at the time of the crime."), *abrogated on other grounds as recognized by United States v. Howard*, 742 F.3d 1334, 1344-45 (11th Cir. 2014); *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016) (finding it "immaterial" to the categorical approach that West Virginia's burglary statute confines coverage to vehicles "primarily designed for human habitation").

Additionally, throughout *Taylor*, the Court repeatedly distinguishes vehicles and the like from "building[s] and other structure[s]." 495 U.S. at 598. It begins by offering California common law and Texas's burglary statute—both of which criminalize the unauthorized entry of vehicles—as examples of overly broad burglary definitions. *Id.* at 591 (describing California burglary as "so broadly [defined] as to include shoplifting and theft of goods from a 'locked' but unoccupied automobile" and Texas burglary as "includ[ing] theft from [an] . . . automobile"). The *Taylor* Court then explains that because they "includ[e] places, such as *automobiles*," they define crimes falling outside the generic definition of burglary. *Id.* at 599 (emphasis added). Similarly, in its discussion of Taylor's prior burglary convictions, the Court recognized that Missouri's second-degree burglary statute was broader than generic burglary because it included "breaking and entering 'any booth or tent, or any boat or vessel, or railroad car.'" *Id.* (citations omitted).

Finally, the Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-

Taylor decision. *See Mathis*, 136 S. Ct. at 2250[1]; *Nijhawan*, 557 U.S. at 35; *Duenas-Alvarez*, 549 U.S. at 186-87; *Shepard*, 544 U.S. at 15-16. The Court's adherence to this distinction over the course of nearly thirty years persuades us that the Court meant exactly what it said: vehicles and movable enclosures fall outside the scope of generic burglary. *See Mathis*, 136 S. Ct. at 2254 ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.").

B. The Government's Response

The government disputes our reading of *Taylor*, offering two arguments to broaden "building or other structure" so as to encompass anything "habitable," even if movable or temporary. Neither argument persuades us.

First, latching onto the *Taylor* Court's statement "that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most states," 495 U.S. at 598, the government conducts its own fifty-state survey of the burglary statutes in effect at the time the Court decided *Taylor*. It concludes that (a) the overwhelming majority of states included vehicles and movable enclosures in their burglary statutes, and (b) a little more than half the states'

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[1] Like the Tennessee statute at issue here, Iowa's burglary statute limited its scope to vehicles "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity." Iowa Code § 702.12 (2013). Nonetheless, the *Mathis* Court explained that Iowa's burglary statute did not categorically qualify as generic burglary because it criminalized the entry of "land, water, or air vehicle[s]." *See Mathis*, 136 S. Ct. at 2250.

burglary statutes specifically "covered movable structures adapted for specific purposes such as overnight accommodation, business, or education." This, the government asserts, shows that the *Taylor* Court meant to include such "movable structures" under "buildings or other structures."

Second, the government argues that because the Model Penal Code's ("MPC") burglary definition—which includes occupied structures—"served as the basis" for the *Taylor* Court's definition of generic burglary, the Court intended to include occupied structures under the phrase "building or other structure." The government hangs its entire argument on a single footnote in which the Court explains that the generic definition of burglary "approximates that adopted by the drafters of the [MPC]." *Id.* at 598 n.8.

Both the government's arguments suffer from the same problem: they ignore the Court's clear and unambiguous language that "building or other structure" excludes *all* things mobile or transitory. Indeed, the government focuses its arguments *not* on interpreting the words the Court chose to define generic burglary, but on divining Congress's intent from the MPC and state statutes. Given the Court's statement that burglary statutes that "includ[e] places, such as automobiles" fall outside the scope of generic burglary—and its steadfast repetition of similar language in later cases—we find the government's arguments unavailing. *Id.* at 599.

Moreover, even if we accept the government's invitation to focus on the *Taylor* Court's own determination of congressional intent, its arguments still fail. To understand why, start with the question addressed

in *Taylor*: how should the Court define "burglary" under the ACCA when the statute supplies no definition? *Id.* at 577. In answering the question, the Court drew on three sources: (1) a definition of "burglary" from a prior version of the ACCA, (2) the MPC, and (3) a general sense of burglary derived from a prominent criminal law treatise. We too review these three sources.

When Congress enacted the ACCA in 1984, it defined burglary as "any felony consisting of entering or remaining surreptitiously within a *building* that is property of another with intent to engage in conduct constituting a Federal or State offense." *Id.* at 581 (emphasis added) (quoting 18 U.S.C. § 1202(c)(9) (1984)). Congress's choice of "building" necessarily excluded anything movable.

Congress left out this 1984 definition of burglary when it amended the ACCA in 1986. But in formulating a replacement, the Court hewed closely to the 1984 definition because it believed Congress intended to retain the original definition's substance. It observed that "nothing in the [legislative] history [suggested] that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different."[2] *Id.* at 590, 598. The Court therefore settled on a definition of generic burglary that "[wa]s practically identical to the" one Congress had provided in 1984 (which excluded vehicles and movable enclosures). *Id.* at 598.

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[2] The Court even suggested that "the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90.

The Court's definitional emphasis on "the nature of the property or place" becomes more apparent when contrasting generic burglary with the MPC's burglary definition. *Rainer*, 616 F.3d at 1215. The MPC reads: "[a] person is guilty of burglary if he enters a building or *occupied structure*, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless . . . the actor is licensed or privileged to enter." *Taylor*, 495 U.S. at 598 n.8 (emphasis added) (quoting American Law Institute, Model Penal Code § 221.1 (1980)). The *Taylor* Court could have adopted the MPC's language of "building or *occupied* structure." *See id.* (emphasis added). Instead, it omitted "occupied," signaling that for the locational element, a place's form—rather than its adaptation for habitability—marks the dividing line between generic and non-generic burglary. *See id.* at 598.

Finally, the Court sought to craft a definition of generic burglary that captured the elements common to state burglary statutes.[3] To help distill those elements, the Court turned to the 1986 edition of Wayne LaFave's classic treatise, *Substantive Criminal Law*. *See Taylor*, 495 U.S. at 598; *see also United States v. Grisel*, 488 F.3d 844, 848-49 (9th Cir. 2007) (en banc). Regarding the locational element, LaFave found that "[m]odern statutes . . . typically describe the place

[3] "Although the exact formulations vary [for each state], the generic, contemporary meaning of burglary contains *at least* the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. *See* LaFave & Scott *supra*, n.3 . . . § 8.13(c), p. 471 (modern statutes 'typically describe the place as a "building" or "structure"'). . . ." *Taylor*, 495 U.S. at 598 (emphasis added) (footnote omitted).

as a 'building' or 'structure,'" but that some "also extend to still *other places, such as all or some types of vehicles*." Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e) (1986) (emphasis added). Clearly, LaFave viewed buildings and structures as distinct from "vehicles." And the Court, in turn, adopted the same "typical" locational element—"building" or "structure"—used by states while omitting any reference to vehicles, suggesting that it, like LaFave, saw vehicles as distinct from structures.

In sum, the *Taylor* Court's consultation of the three sources—particularly its rejection of the MPC's "occupied structure" and its adoption of LaFave's description of the locational element—refutes the government's argument that we should interpret "building and other structure" in strict conformance with the MPC and the government's fifty-state survey. *See Grisel*, 488 F.3d at 849 ("[T]he Supreme Court in *Taylor* defined burglary using a generic definition that we are bound to obey even if we think that the definition is deficient."). Accordingly, we reject the view that a state burglary statute that limits its scope to only those vehicles and movable enclosures that are habitable fits under the generic definition of burglary.

C. *Nance*

Our conclusion that Tennessee's aggravated-burglary statute sweeps more broadly than generic burglary conflicts with our decision in *Nance*, which held that the statute matches the ACCA's definition of generic burglary.[4] 481 F.3d at 888. We now overrule *Nance*.

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[4] Bound by the precedent set in *Nance*, we held in *Priddy* that a defendant's conviction for Tennessee aggravated burglary qualified

In *Nance*, we correctly stated that Tennessee "[a]ggravated burglary occurs when an individual enters a habitation 'without the effective consent of the property owner' and, . . . intends to commit a felony." *Id.* (alteration and omission in original) (quoting *United States v. Sawyers*, 409 F.3d 732, 737 (6th Cir. 2005)). We neglected, however, to scrutinize the statutory definition of "habitation," which includes vehicles, tents, and other movable enclosures. *See* Tenn. Code Ann. § 39-14-401(1). We compounded this error by comparing the elements of Tennessee's aggravated-burglary statute to the following truncated definition of generic burglary: a burglary "committed in a building or enclosed space." *Nance*, 481 F.3d at 888 (quoting *Shepard*, 544 U.S. at 16). But the full definition from *Shepard* states that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space . . . *not in a boat or motor vehicle*." 544 U.S. at 15-16 (emphasis added). As a result of comparing an incomplete definition of Tennessee aggravated burglary to an incomplete definition of generic burglary, we incorrectly concluded that a "habitation" is a "building or enclosed space" and that a conviction for Tennessee aggravated-burglary therefore constituted a violent felony. *Nance*, 481 F.3d at 888.

We were not alone in shortcutting the categorical-approach analysis. At least two other circuits committed the same error of looking at the statutory elements of burglary statutes without considering the definition of key terms such as "occupied structure" or "habitation." *See United States v. Field*, 39 F.3d 15,

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as a violent felony. 808 F.3d at 684. *Priddy* did not expand further on *Nance*'s reasoning.

20 (1st Cir. 1994); *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992).

Where courts have accounted for these statutory definitions, most have held that statutes criminalizing the burglary of vehicles and movable enclosures, even where limited to "habitations" or "occupied structures," fall outside the generic definition of burglary. *Compare White*, 836 F.3d at 446; *United States v. Bess*, 655 F. App'x 518, 519 (8th Cir. 2016) (per curiam); *Coleman*, 655 F.3d at 482; *Rainer*, 616 F.3d at 1215; *Grisel*, 488 F.3d at 851; *United States v. Bennett*, 100 F.3d 1105, 1109 (3d Cir. 1996), *with United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996).[5]

In short, we overrule *Nance* because that case misapplied the categorical approach. As explained above, a violation of Tennessee's aggravated-burglary statute is not categorically a violent felony.

III.

Our conclusion that a conviction under Tennessee's aggravated-burglary statute does not categorically qualify as a violent felony does not end our inquiry. Even if a state burglary statute criminalizes more conduct than generic burglary, it may do so by listing multiple elements in the alternative, thus setting forth different crimes, and one or more of those crimes might

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[5] The dissent rejects the way we count the circuits, arguing that the circuit split is actually more or less even. (Dissent Op. at 7-8.) But the dissent's own count misleads—two of the three cases it claims in its column shortcut the categorical-approach analysis. *See Nance*, 481 F.3d at 888; *Silva*, 957 F.2d at 162. And it fails to recognize *Grisel*—which falls in our column—as the controlling precedent in the Ninth Circuit.

match the definition of generic burglary. *Mathis*, 136 S. Ct. at 2248-49 (citing *Shepard*, 544 U.S. at 26). If the statute does list alternative elements, we apply the "modified" categorical approach to establish which of the alternative crimes forms the basis of the defendant's conviction.

Here, both parties agree that "the definition of habitation is indivisible"—that is, it lays out alternative *means* to fulfilling a single element rather than alternative *elements*. *See id.* at 2251 n.1 (abrogating *United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015)). Our review confirms that Tennessee's aggravated-burglary statute is indivisible.

To determine a statute's divisibility, we look first at the language of the statute and state-court decisions; if neither source provides a definitive answer, we turn to the record of conviction. *See id.* at 2249, 2256; *see also United States v. Ritchey*, 840 F.3d 310, 317-18 (6th Cir. 2016). If we still cannot discern whether a statute presents elements or means, the statute is indivisible. *Mathis*, 136 S. Ct. at 2257.

The *Mathis* Court explained that a statute is indivisible when it lists examples to clarify a term, as opposed to listing alternative elements to define multiple crimes. *Id.* The Court offered two cases that examined statutes deemed indivisible because they listed "illustrative examples" of various means to fulfilling a single element. *Id.* at 2256. One of those cases—*Howard*, 742 F.3d at 1348—guides our analysis here.

In *Howard*, the Eleventh Circuit reviewed Alabama's third-degree burglary statute, which defined building as "[a]ny structure which may be entered and

utilized by persons for business, public use, lodging or the storage of goods." 742 F.3d at 1348 (alteration in original) (quoting Ala. Code § 13A-7-1(2) (1979)). According to the statutory definition in force at the time, "structure . . . *includes* any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein" and also "*includes* any railroad box car or other rail equipment or trailer or tractor trailer or combination thereof." *Id.* (quoting Ala. Code § 13A-7-1(2) (1979)). Because "[t]he items that follow each use of the word 'includes' in the statute are non-exhaustive examples," the Eleventh Circuit held that Alabama's third-degree burglary statute delineated means rather than elements, rendering the statute indivisible. *Id.*

Tennessee's aggravated-burglary statute follows the pattern of Alabama's third-degree burglary statute to a tee. It defines "habitation" as "any structure . . . which is designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1)(A). Tennessee's definition of habitation "*includ[es]* . . . mobile homes, trailers, and tents"; it also "*[i]ncludes* a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons." *Id.* § 39-14-401(1)(B) (emphasis added). This non-exhaustive list of "illustrative examples" therefore sets forth means rather than elements. Additionally, our review of the case law reveals no decision suggesting otherwise. As such, Tennessee's aggravated-burglary statute is indivisible, thereby foreclosing application of the modified categorical approach.

IV.

Because Tennessee's aggravated-burglary statute is both broader than generic burglary under the categorical approach and indivisible, a conviction under the statute does not count as a violent felony under the ACCA.[6] We therefore REVERSE and REMAND for resentencing consistent with this opinion.

CONCURRENCE

BOGGS, Circuit Judge, concurring.

I

I concur with my colleagues that the Supreme Court's decision in *Taylor* and subsequent cases settle the question before us today and require us to overrule *Nance*. I write separately, however, to respond to statements made in the dissenting opinion regarding (1) whether burglary of a vehicle "designed or adapted for the overnight accommodation of persons," Tenn. Code § 39-14-401(1), was a kind of burglary that the *Taylor* Court would have counted as a "generic" ACCA burglary, and (2) whether vehicles designed or adapted for overnight accommodation are dwellings.

A

The dissent's argument, at bottom, is this: the Tennessee statute before us punishes burglary of a vehicle only when the vehicle is designed or adapted for overnight accommodation (i.e., only when the vehicle is

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[6] Stitt also argues that Tennessee's aggravated-burglary statute lacks the requisite mens rea to qualify as generic burglary. Because we hold that his conviction does not qualify as generic burglary based on the underlying statute's inclusion of vehicles and movable enclosures, we need not address this argument.

a dwelling), unlike statutes that punish burglary of *any* vehicle or burglary of vehicles designed for business, and thus the Tennessee statute before us goes no further than to punish burglary of a dwelling. Any burglary of a dwelling, the dissent reasons, must necessarily be a generic ACCA burglary, because the ACCA's definition of burglary is "broader" than (and thus wholly includes as a subset) common-law burglary of a dwelling. So the Tennessee statute is not too broad.

I will put aside, for now, the question whether these vehicles are, in fact, common-law dwellings, for even if they are, the Tennessee statute is still broader than generic ACCA burglary, and *Taylor* still requires us to reverse *Nance*.

That is because, if we are bound to follow the Supreme Court's ruling in *Taylor*, then we are bound to apply its definition of generic burglary—as the majority notes, "a good rule of thumb" for reading the Court's decisions is that what the Court says and what it means "are one and the same," *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016), and what the Court said in *Taylor* is *not*, as the dissent would have it, that generic ACCA burglary is "broader" than burglary of a dwelling. Indeed, the Court uses the term "broader" (or "broad" or "broadly") only (1) to describe definitions in the Model Penal Code as encompassing more conduct than traditional common-law burglary, *Taylor v. United States*, 495 U.S. 575, 580 (1990); (2) to discuss the extent to which Congress, in enacting the current version of the ACCA, intended to include more crimes as predicates for the career-criminal designation, *id.* at 583 ("[T]he time has come to broaden [the] definition

[of career criminal] so that we may have a greater sweep and more effective use of this important statute." (quoting 132 Cong. Rec. 7697 (1986))), 586 ("H.R. 4639, on the other hand, was seen as too broad."); (3) to cite a floor statement proposing a definition of ACCA burglary that was "intended to be broader than common law burglary"—but that was not adopted, 590 n.5 (quoting 135 Cong. Rec. 23519 (1989)); (4) to describe state statutory definitions of burglary that encompass more conduct than traditional common-law burglary, 591 (describing California statute as defining burglary "so broadly as to include shoplifting"); or—and this cuts against the dissent's argument—(5) to describe state statutes that "includ[e] places, such as automobiles," as "defin[ing] burglary more broadly" *than generic ACCA burglary*, *id.* at 599.

Never, not once, does the *Taylor* Court state or imply that generic ACCA burglary—as opposed to one of the *rejected* proposed definitions of generic burglary—is "broader" than common-law burglary of a dwelling so as to include all burglaries of dwellings within the set of generic ACCA burglaries. *Contra* Dissenting Op. at 34 (stating that the Court "opted instead for a 'broader "generic" definition' drawn from the Model Penal Code" (emphasis omitted) and citing pages 580, 592, and 599 of *Taylor*, none of which affirm the proposition that *Taylor*'s definition of generic ACCA burglary is "broader" than common-law burglary and "drawn from" the Model Penal Code).

None of the above, of course, *refutes* the dissent's argument; it merely calls into question a premise on which the dissent's argument rests. *Taylor*'s pronouncement of its definition of generic ACCA burglary,

however, *does* refute the dissent. *Taylor* supports its definition of generic ACCA burglary ("an unlawful or unprivileged entry into, or remaining in, a *building or other structure*, with intent to commit a crime," 495 U.S. at 598 (emphasis added)) with a single source: "Wayne LaFave's classic treatise," the majority notes, which identifies the place ("the place," in the singular) of a burglary as a "building" or "structure" and then notes that "[s]ome burglary statutes also extend to *still other places*, such as all *or some* types of vehicles." Wayne R. LaFave & Austin W. Scott, Jr., 2 *Substantive Criminal Law* § 8.13, at 471 (1986) (emphases added) (footnote omitted).

True, "some types of vehicles" could, in the abstract, refer to vehicles designed for trade or other purposes besides the overnight accommodation of persons. But here, "some types of vehicles" refers specifically to vehicles *adapted for* the overnight accommodation of persons. That means that vehicles, even if adapted for overnight habitation, are "other places" that *do not* fit within the definition of "building or structure" adopted by the *Taylor* Court.

We know this because, on the *very same page* of LaFave's treatise that the Supreme Court cites as the sole support for its "building or structure" definition (page 471), the treatise cites the following Texas statute as an example of a statute that punishes burglary of "other places" *rather than* buildings or structures:

§ 30.01. Definitions

In this chapter:

(1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:

(A) each separately secured or occupied portion of the structure or vehicle; and

(B) each structure appurtenant to or connected with the structure or vehicle.

§ 30.02. Burglary

(a) A person commits an offense if, without the effective consent of the owner, he:

(1) enters a *habitation*, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft;

. . . .

Tex. Penal Code §§ 30.01, 30.02 (1986) (emphasis added).

Strikingly, this Texas statute punishes the burglary of buildings or habitations, where habitation is defined as a structure or a vehicle "that is adapted for the overnight accommodation of persons." If the Supreme Court is, as it says it is, relying on LaFave's treatise to provide the "generic, contemporary meaning of burglary," *Taylor*, 495 U.S. at 598, then it would seem that the Supreme Court, like LaFave, has found that Texas's statute punishes burglary of "other places," LaFave & Scott, *supra*, at 471, other than buildings or structures.

Compare the Texas statute with the Tennessee statute before us, which defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1). Sure, the Tennessee statute is narrower than the Texas statute to the extent that it applies only when the vehicle is "actually occupied at the time of" the burglary. But this distinction is irrelevant to our analysis; as the majority opinion notes, *Taylor*'s definition is the definition of "a place's form and nature," not its *use* at the time of the crime. Majority Op. at 4. And no one argues here that the presence (or not) of an individual within a burgled vehicle temporarily *converts* the vehicle into a building or structure—rather, the question is whether the vehicle, if adapted for overnight accommodation, *is* a building or structure for the purpose of generic burglary.

Because the Supreme Court, in pronouncing the very definition of generic burglary that we must apply today to evaluate convictions under the Tennessee statute, rejected the nearly identically worded Texas statute above as too *broadly* defining burglary to qualify as generic ACCA burglary, then the majority is right to reject the Tennessee statute as broader than generic ACCA burglary for the same reason.

The dissent notes that the Supreme Court's discussions of various burglary statutes (such as Missouri's statute, in *Taylor*, or Iowa's, in *Mathis*) aren't really applicable to Tennessee's statute because those stat-

utes "covered *all* vehicles." Dissenting Op. at 36. But the Supreme Court has made clear that burglary statutes are broader than ACCA generic burglary when they include burglary of *any vehicle at all*—even just vehicles adapted for overnight accommodation. The Missouri and Iowa statutes may have been so broad as to include the entire class of vehicles, but nothing in *Taylor* or any other Supreme Court decision supports the idea that, if those statutes had limited their inclusion of vehicles to a subset of habitable vehicles, they would have been narrow enough to count as ACCA predicates. The majority opinion's discussion in Part II.B supports this point as well: the *Taylor* Court considered *and rejected* a definition such as "building or *occupied* structure." Majority Op. at 7; *see Taylor*, 495 U.S. at 598 & n.8. The Court could have said "building or structure or dwelling." It could have said "building or structure or *other* dwelling." It could have said "building or structure *or other place adapted for overnight accommodation*." But it didn't. It said "building or structure," and that is the definition that we must apply. If the burgled place is not a building or structure, then the burglary is not generic.

B

I would also note that despite *Taylor*'s *references* to the Model Penal Code, it did not *adopt* a definition of burglary "drawn from" the Model Penal Code. *Contra* Dissenting Op. at 34. The Court's "building or structure" definition *approximates* usage from the Model Penal Code, to be sure, but the Model Penal Code's definition of burglary cited in *Taylor* is undoubtedly *broader than generic ACCA burglary*

because it includes burglary of vehicles used only for business purposes:

§ 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, *or for carrying on business therein*, whether or not a person is actually present.

Model Penal Code § 221.0 (Am. Law Inst. 1985) (emphasis added).

§ 221.1. Burglary.

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code § 221.1. Thus, for example, under the Model Penal Code, an eleven-year-old's surreptitious entry into the freezer compartment of an unattended Good Humor ice cream truck would be a burglary of an occupied structure.

What *Taylor does* characterize as "practically identical" to its definition of generic burglary is the 1984 definition of burglary from the statute that preceded the ACCA. *Taylor*, 495 U.S. at 598. That statute defined burglary as "any felony consisting of entering or remaining surreptitiously within *a building* that is

property of another with intent to engage in conduct constituting a Federal or State offense." Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1803, 98 Stat. 1837, 2185 (emphasis added). No one would argue that "building" in the Armed Career Criminal Act of 1984 had so expansive a meaning as to cover vehicles, even those adapted for the overnight accommodation of persons. Rather, the Court's reference to this statute shows that it had buildings in mind, not "dwellings," when it defined the place of a generic burglary as a "building or structure."

The majority thus rightly determines that *Taylor*'s generic ACCA burglary is *not* Model Penal Code burglary, nor is it "broader" than Model Penal Code burglary (so as to include all Model Penal Code burglaries as a subset), nor is it "broader" than common-law burglary (so as to include all common-law burglaries as a subset). *Taylor*'s description of generic ACCA burglary as including structures "other than dwellings," such as warehouses, in no way requires modifying *Taylor*'s definition to include *all* burglaries of dwellings. *Taylor*, 495 U.S. at 593. Therefore, even if a vehicle outfitted for overnight accommodation is a dwelling, burglary of such a vehicle—according to *Taylor* and its definition drawn from LaFave's treatise—is *not* a generic ACCA burglary, because it is not a burglary of a building or structure.

II

The discussion above presumed that vehicles could be dwellings. But it is at least arguable that no matter how well suited for sleeping, vehicles do *not* fit within the traditional meaning of dwelling, at least for the purposes of the law of burglary. The dissent,

quoting Black's Law Dictionary (10th ed. 2014), would hold that "the traditional meaning of 'dwelling'" includes vehicles so long as they are "used or intended for use as a human habitation." Dissenting Op. at 35.

But Blackstone's Commentaries on the Laws of England—cited by *Taylor*, 495 U.S. at 580 n.3, 593 n.7, as the source of its understanding of common-law burglary—rejects the notion that a tent or a vehicle could be the subject of a burglary:

> "Neither can burglary be committed *in a tent* or booth erected in a market or fair; *though the owner may lodge therein*: for the law regards thus highly nothing but *permanent edifices*; a house or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but *his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted* [i.e., covered] *waggon in the same circumstances*."

4 William Blackstone, Commentaries *226 (emphases added) (footnotes omitted); *see also id.* at *224-26; Sir Edward Coke, 3 *Institutes of Laws of England*, ch. XIV ("A tent or booth in fair or market is not domus mansionalis [a dwelling house that may be the place of a burglary]," even though "every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed."). And, insofar as we seek to determine the traditional common-law understanding of a dwelling, Blackstone beats Black's.

Moreover, the dissent cites the *most recent* edition of Black's Law Dictionary, published in 2014; in earlier editions, however, Black's Law Dictionary defined a dwelling house—again, for the purposes of the law of

burglary—simply as "[a] house in which the occupier and his family usually reside, or, in other words, dwell and lie in." *E.g.*, *Dwelling House*, *Black's Law Dictionary* (rev. 4th ed. 1968).

What the true common-law definition of burglary was—and whether that could include "uncover[ing] a tilted waggon"—is an interesting question, and there are certainly jurisdictions that would adopt the dissent's understanding. But it is not a question for us to decide, for the Supreme Court already consulted these very same sources in deciding *Taylor*, and—at least insofar as the ACCA is concerned—the Supreme Court has made clear that no burglary of a vehicle constitutes generic burglary, not even burglary of a vehicle that serves as a primary residence.

The majority's result here is not, therefore, "contrary" to *Taylor*, as the dissent asserts. Dissenting Op. at 36. Rather, it is *compelled by Taylor*.

III

Admittedly, the Court's ACCA jurisprudence (and our adoption of it) produces bizarre results, some of which the dissent cites. There will be cases where a sentencing court, in applying the categorical approach, must, for example, turn a blind eye to a defendant's prior convictions for burgling houses merely because the applicable burglary statute allows for the *possibility* of conviction for burgling an RV, even if, factually, the court knows full well that the defendant standing before it habitually burgled houses. And Congress, surely, would have wanted to include convictions for burgling houses as ACCA predicates. But we are bound by *Taylor*, and the Court has consistently rein-

forced *Taylor*'s bright-line "building or structure" definition over the past twenty-seven years, as the majority opinion well explains. *See* Majority Op. at 4-5.

Just last year, Justice Alito compared the Court's ACCA jurisprudence to the journey of a Belgian woman who, having set out to pick up a friend at the Brussels train station 38 miles from home, followed her GPS for 900 miles in the wrong direction before realizing—in Zagreb, Croatia—"that she had gone off course," at which point she finally decided to call home. *Mathis*, 136 S. Ct. at 2267 (Alito, J., dissenting). "Along the way from *Taylor* to the present case," Justice Alito wrote, "there have been signs that the Court was off course and opportunities to alter its course. Now the Court has reached the legal equivalent of Ms. Moreau's Zagreb. But the Court, unlike Ms. Moreau, is determined to stay the course and continue on, traveling even further away from the intended destination. Who knows when, if ever, the Court will call home." *Id.* at 2271.

Perhaps the Court will call home soon: it recently vacated and remanded a Fifth Circuit decision for reconsideration where the Fifth Circuit had upheld the use of a conviction under Texas Penal Code § 30.02(a) as a generic ACCA burglary even though the Texas burglary statute incorporates the *very same* definition of "habitation" in Texas Penal Code § 30.01(1) discussed in Part I.A, *supra*. *United States v. Herrold*, 813 F.3d 595 (5th Cir.), *vacated*, 137 S. Ct. 310 (2016). On remand, in a one-page opinion that relies and rests on Fifth Circuit precedent, the Fifth Circuit reaffirmed its holding that Texas burglary of a habitation is an ACCA burglary. *United States v. Herrold*,

No. 14-11317, 2017 WL 1326242 (5th Cir. Apr. 11, 2017) (per curiam). In light of these developments, then, it seems worthy of mention that three decisions cited in the dissent as supporting the Government's position—decisions of the Fifth, Ninth, and Tenth Circuits—are ones that uphold the use of the *very same* Texas burglary statute as generic ACCA burglary. *See United States v. Silva*, 957 F.2d 157, 161-62 (5th Cir. 1992); *United States v. Sweeten*, 933 F.2d 765, 770 (9th Cir. 1991) (per curiam); *United States v. Spring*, 80 F.3d 1450, 1461-63 (10th Cir. 1996); Dissenting Op. at 38.

Moreover, the Eighth Circuit seems recently to have adopted the Supreme Court's understanding of generic ACCA burglary in two decisions in which it held that Wisconsin and Arkansas burglary statutes were broader than generic ACCA burglary. *United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017) ("[J]ust as it was inconsequential that Wisconsin's statute limited burglary to motor homes, it is inconsequential that Arkansas's statute confines residential burglary to vehicles '[i]n which any person lives' or '[t]hat [are] customarily used for overnight accommodation.' Ark. Code Ann. § 5-39-101(4)(A); *see also United States v. Forrest*, 611 F.3d 908, 913 (8th Cir. 2010) (finding a Colorado burglary statute was categorically broader than generic burglary *because* it covered vehicles adapted for overnight accommodations)." (alterations in original) (emphasis added)); *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017) (upholding use of Wisconsin burglary conviction as ACCA predicate where the Wisconsin statute was divisible, listing several separate crimes, some of which encompassed "a broader range of conduct than generic burglary as defined in *Taylor*," but where the defendant

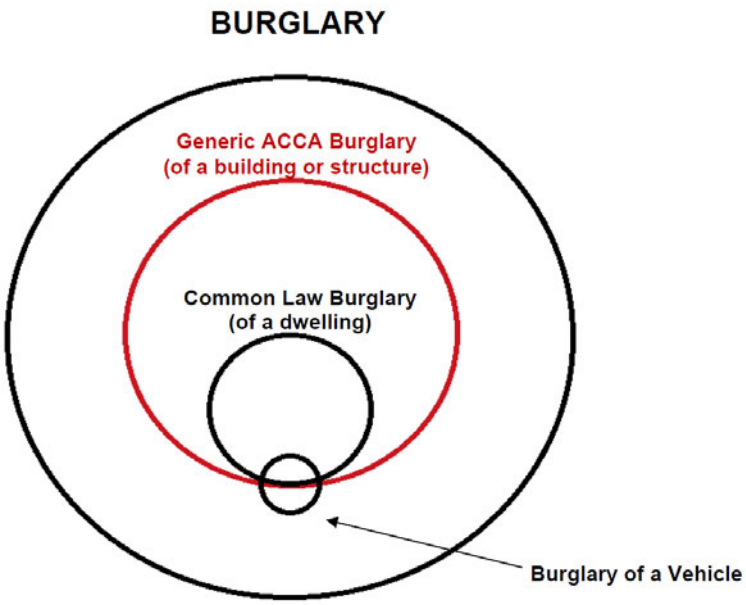
had been convicted under a subsection that was not broader than generic burglary).

Given the similarity between the Texas statute at issue in *Herrold*, *Sweeten*, and *Spring*, and the Tennessee statute at issue here, perhaps the Court will soon clarify the question before us—a question that occupies a significant portion of the federal judiciary's docket. But, until then, it is not incumbent upon us to rewrite the ACCA to include all burglaries of dwellings within its definition of burglary, even if that is what Congress would have wanted.

IV

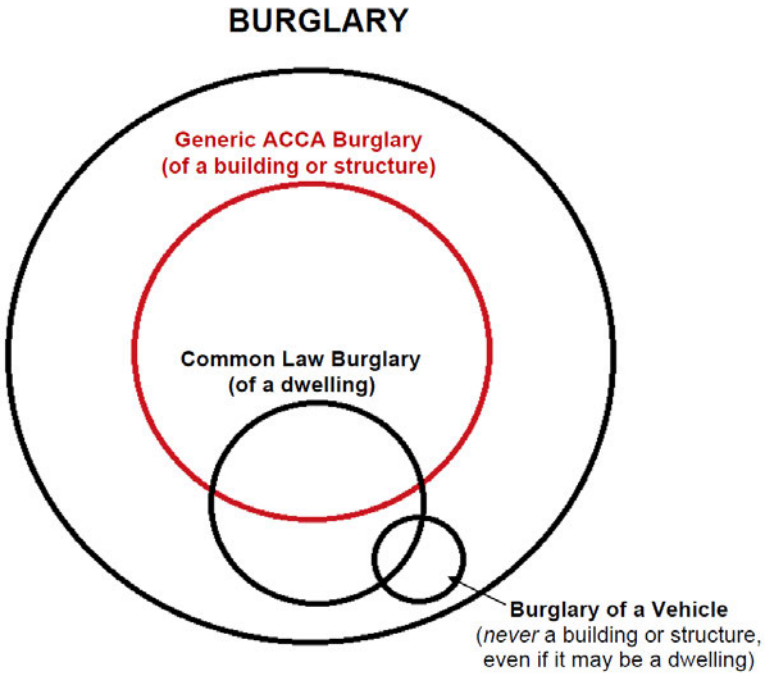
The dissent proposes an "easy way" and a "more complicated way" to resolve this case. What both ways have in common is that they presume, contrary to *Taylor*, that generic ACCA burglary must be a category of burglaries that "extends *beyond*" (so as to *include*) or "encompass[es]" common-law burglary. Dissenting Op. at 33, 34 (first quoting from the easy way, then quoting from the more complicated way).

A simple diagram illustrates the dissent's understanding:



This understanding has a certain appeal and is, admittedly, quite easy to follow—any burglary of a dwelling, whether of a vehicle or otherwise, counts as a generic ACCA burglary, so if a burgled vehicle is a dwelling, then the burglary was a generic ACCA burglary. But elegance is no substitute for accuracy.

Instead, the following diagram more correctly illustrates the Supreme Court's ACCA jurisprudence:



As this diagram indicates, the Supreme Court's test for whether a burglary is a generic ACCA burglary is whether the burgled place is a building or structure, not whether it is a dwelling, although certainly there will be significant overlap between the set of common-law burglaries and the set of generic ACCA burglaries. Having removed the presumption that *every* common-law burglary of a dwelling must be an ACCA burglary, then, it is easier to see that, even if vehicles can be dwellings (which, at common law, they arguably are not—see Part II, *supra*), they are still not buildings or structures, and so their burglary cannot be a generic ACCA burglary.

Perhaps one reason why this is so complicated is that states have defined building or structure to include things that *plainly* are not buildings or structures. *E.g.*, Ariz. Rev. Stat. § 13-1501 (defining "structure," for purpose of Arizona Criminal Trespass and Burglary laws, as "any device that accepts electronic or physical currency and that is used to conduct commercial transactions [e.g., an ATM], any vending machine [e.g., a gumball or other candy machine] or any building, object, vehicle, railroad car or *place with sides and a floor* . . . used for lodging, business, transportation [e.g., a red Radio Flyer wagon], recreation [e.g., a jai alai court] or storage [e.g., a rolling garbage bin]" (emphasis added)); Haw. Rev. Stat. § 708-800 (providing no definition for "structure," but defining "building" as "any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein"). In Arizona, then, "structures" would include such devices as credit-card payment terminals and such places as a swimming pool or a horse's trough. And in Hawaii, a state that is no stranger to red-eye flights, an aircraft—perhaps depending on how well its first-class cabin is suited for overnight accommodation—may evidently be a flying "building," for purposes of the criminal burglary laws.

But even if state legislatures, in classifying various places or objects as buildings or structures, have not always meant what they have said, presumably the Supreme Court *has*—and presumably the Supreme Court also meant what it said *about meaning what it says*. I therefore concur in the majority's opinion, even if, as the dissent charges, I thereby risk "mak[ing] the mistake of reading [a Supreme Court opinion] like a statute." Dissenting Op. at 36.

CONCURRENCE

HELENE N. WHITE, Circuit Judge, concurring. I concur in the majority's and Judge Boggs's opinions. I write separately to respond to the dissent's assertions regarding the common law.

As the majority observes, Congress originally defined burglary in the ACCA as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Taylor v. United States*, 495 U.S. 575, 581(1984) (quoting 18 U.S.C. § 1202(c)(9)). There is no question that if Congress had retained this original definition, which applied only to buildings, the challenged Tennessee statutory language—including both vehicles and tents—would not qualify as generic. Faced with the unexplained omission of the statutory definition, the *Taylor* Court opted to define generic burglary as involving a "building or structure," rather than just a building, but rejected definitions of burglary that include "places, such as automobiles . . . other than buildings." *Id.* at 599. The dissent concludes that in doing so, the Court did not intend to exclude dwellings that are not buildings or structures. We know this, according to the dissent, because "*Taylor* told us that common-law burglary *always* qualified as a violent felony under the Act." And, because "the 'habitations' covered by the Tennessee aggravated burglary statute qualify as dwellings under the common-law definition of burglary," Tennessee aggravated burglary is generic burglary covered by the ACCA.

But the dissent's basic premise—that tents and vehicles were covered by the common law—is incorrect.[1] *Black's Law Dictionary* is not the standard for defining the common law. Neither are state-court decisions interpreting the term "dwelling." Rather, Blackstone and similar treatises are the standard references for the common law. *See Taylor*, 490 U.S. at 593 n.7; *see also McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 594-95 (2008).

According to Blackstone, only permanent structures can be the subject of burglary:

> Neither can burglary be committed in a tent or booth erected in a market or fair; *though the owner may lodge therein*: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

4 William Blackstone & St. George Tucker, Blackstone's Commentaries 225 (1803) (emphasis added). Similarly, William Hawkins's Treatise of Pleas of the Crown states:

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[1] The dissent at times refers to the "traditional meaning" of dwelling, rather than the common-law meaning. Because the *Taylor* Court referred to "the traditional common-law definition," 495 U.S. at 580, and the dissent does not otherwise discuss the common-law definition of "dwelling," I assume no distinction is intended.

> From what has been said it clearly appears, That no Burglary can be committed by breaking into any Ground inclosed, or Booth, or Tent, &c. for there seems to be no Colour from any Authority ancient or modern, to make Offence Burglary that is not done either against some House, or Church, or the Walls, or Gates of some Town.

104 (3d ed. 1739). Further, in his leading 19th-century American treatise, Wharton defined dwelling-house as "any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it," and agreed that burglary "cannot be committed in a tent or booth in a market or fair, *even although the owner lodge in it*; because it is not a permanent but a temporary edifice." 2 Francis Wharton, A Treatise on the Criminal Law of the United States 369 §§ 1568, 1570 (6th ed. 1868) (emphasis added).

The evolution of Tennessee's burglary statute confirms that common-law burglary did not include tents or vehicles. Tennessee's earliest burglary statute defined burglary as "the breaking and entering into a mansion house by night with intent to commit a felony." 1829 Tenn. Pub. Acts 30. This mirrored the common-law definition of burglary, which did not include movable structures. *See* 1 Sir Edward Coke, The Third Part of the Institutes of the Laws of England 63 (15th ed. 1797) ("A burglar . . . is by the common law a felon, that in the night breaketh and entreth into a mansion house of another" with intent to commit a felony). It was not until 1885 that Tennessee's burglary statute was expanded and began to resemble its modern-day statute. In 1885, Tennessee expanded its burglary definition to include railroad cars: "[w]ho-

ever shall break and enter into any freight or passenger car, either in the daytime or night time, within this State, with intent to steal therefrom anything of value, or to commit a felony of any kind . . . shall be guilty of burglary[.]" 1885 Tenn. Pub. Acts 66-67. This and all future expansions of the statute were clear departures from common-law burglary, as freight and passenger cars were not encompassed by the common-law definition of "breaking and entering into a mansion house."

The dissent argues that references to scholars such as Blackstone are obsolete because the common-law has evolved over time, and by 1984—the year the ACCA was enacted—most states considered vehicles and tents to be dwellings. First, the *Taylor* Court rejected the dissent's method of analysis, explaining that "[t]he word 'burglary' has not been given a single accepted meaning by the state courts" and that Congress did not intend to define predicate offenses based on "technical definitions and labels under state law." 495 U.S. at 580, 590. Second, for its state-common-law proposition, the dissent cites *Kanaras v. State*, 460 A.2d 61, 70-71 (Md. Ct. Spec. App. 1983). Even under *Kanaras*, however, Tennessee's aggravated-burglary statute would be broader than common-law burglary. In *Kanaras*, Maryland's Court of Special Appeals determined that a vehicle constituted a "dwelling-house" only if it was a "regular place of abode." *Id.* at 69. It explained that "[g]enerally, a vehicle-type structure, used as a vehicle primarily for transportation purposes, should not be regarded as a dwelling house, even if occasionally used for sleeping." *Id.* Tennessee's aggravated-burglary statute draws no such distinction. Rather, its definition of "habitation" includes a "vehicle that is designed

or adapted for the overnight accommodation of persons," and it also includes all tents without qualification. Tenn. Code Ann. § 39-14-401(1)(A), (B). Thus, under Tennessee law, a tent or a vehicle adapted for overnight use can be burglarized, even if never actually used as a "regular place of abode." *Kanaras* shows at most that it was *possible* under state common law that a tent or vehicle would constitute a dwelling.

Further, state common law did not *categorically* consider tents and vehicles, even when designed for the overnight accommodation of persons, to be dwellings. The dissent cites *Kanaras* as "collecting cases" supporting the proposition that state courts "classify burglaries of motor homes and camping tents as burglaries of dwellings." Dissenting Op. at 35. *Kanaras* does no such thing. In all, *Kanaras* string cites sixteen cases for the idea that "a vehicle such as the Shasta [Winnebago]" could "be considered as a dwelling house." 460 A.2d at 69. Of these sixteen cases, eight of them do not involve burglary. *See, e.g., Copley v. Rona Enterprises, Inc.*, 423 F. Supp. 979 (S.D. Ohio 1976) (a federal court interpreting "dwelling" under the Truth in Lending Act). Three others considered burglary of mobile homes that were neither self-propelled vehicles nor tents. *See, e.g., State v. Ryun*, 549 S.W.2d 141, 142 (Mo. 1977) ("It is a typical mobile home, detached from the tow vehicle by which it may be moved. It has a 'skirt' from the floor level to the ground to block air passage under the floor, and is connected to an electricity transmission line."). Two others involved the interpretation of burglary statutes that omitted "dwelling" from their definitions of burglary, and the courts instead considered whether a tent or a "movable sheep wagon" constituted a "building" or a "house." *See,*

e.g., *State v. Ebel*, 15 P.2d 233, 234 (Mt. 1932) ("Common-law 'burglary' is defined as the breaking and entering of the dwelling of another . . . but the controlling definition here is: 'Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car . . . Here we have 'a structure which has walls on all sides and is covered by a roof'—a house, a building."). Thus, only three of the sixteen cases support the dissent's proposition, and these include two cases from the same Texas court, *see Luce v. Slate*, 81 S.W.2d 93 (Tex. Crim. App. 1935); *Martin v. State*, 57 S.W.2d 1104 (Tex. Crim. App. 1933), and one case, *United States v. Lavender*, 602 F.3d 639 (4th Cir. 1979), from a federal court of appeals that has since "adopted a 'no-vehicles-or-tents' definition." Dissenting Op. at 38; *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016).

Rather than a change in state *common* law, the inclusion of tents and vehicles in state burglary law reflects the expansion of state *statutory* law. Indeed, *Ebel* explains as much, concluding that a movable sheep wagon was a "house" and a "building" under Montana's burglary statute because the statute, unlike the common law, required only that a structure have "walls on all sides and [was] covered by a roof" to be capable of being burgled. 15 P.2d at 234. Similarly, the California Supreme Court explained that California's definition of burglary expanded to include tents and other movable structures because of a change in state statutory law, not state common law:

> The first definition of the [burglary] offense found in our statute abolishes all the nice distinctions of

> the common law by the use of this language: 'Any dwelling house, or any other house whatever, *or tent, or vessel or other water craft*'—language broad enough to include buildings of any kind and used for any purpose. . . . [T]he absence of more particular terms of description indicates an intention, on the part of the Legislature, to include every kind of building or structures 'housed in' or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family.

People v. Stickman, 34 Cal. 242, 245 (Cal. 1867) (emphasis added). Thus, the dissent's view of the common law is unsupported no matter when one considers the proper reference point to the common law to be.

Additionally, the dissent's assertion that Michigan's home-invasion statute and Kentucky's second-degree burglary statute apply to common-law dwellings is unsupported. The Michigan home-invasion statute defines dwelling as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." Mich. Comp. Laws. § 750.110a(1)(a). That this definition is broader than the common law becomes clear when one looks at Michigan's 1837 burglary statute, which adopted the common-law definition and criminalized "break[ing] and enter[ing] any dwelling-house in the night time" with the intent to commit a felony. 1837 Mich. Pub. Acts 627. In applying this definition of burglary, Michigan's Supreme Court explained that "[t]he statutory definition of burglary in a dwelling-house, is the same as that of the common law," and looked to Blackstone's Commentaries for the definition of a dwelling-house. *Pitcher v. People*, 16 Mich.

142, 146 (1867). It is true that, as the dissent observes, we have held that Michigan's home-invasion statute, which proscribes breaking and entering a dwelling with the intent to commit a crime, constitutes generic burglary. *United States v. Quarles*, 850 F.3d 836, 840 (6th Cir. 2017). However, in doing so, we explained that "it would be a stretch, rather than a realistic probability, that a tree, vehicle, boat, outcropping of rock, cave, bus stop, or suspended tarp would be considered a 'home.'" *Id.* at 839. We concluded that the home-invasion statute constitutes generic burglary because it covers no more than buildings and structures, not because its definition comported with common law.

Kentucky's second-degree burglary statute similarly does not apply to common-law dwellings. This statute defines burglary in the second degree as "with the intent to commit a crime, [a person] knowingly enters or remains unlawfully in a dwelling." Ky. Rev. Stat. § 511.030. However, the cases finding the Kentucky second-degree burglary statute to be generic made the same mistake we made in *Nance*—these unpublished opinions failed to look to the statutory definition of "dwelling." *See United States v. Moody*, 634 F. App'x 531, 534 (6th Cir. 2015); *United States v. Jenkins*, 528 F. App'x 483, 485 (6th Cir. 2013). Although Kentucky defines "dwelling" as "a building which is usually occupied by a person lodging therein," Ky. Rev. Stat. § 511.010(2), the statute further provides that "'[b]uilding, in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft: (a) Where any person lives; or (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation." Ky. Rev. Stat.

§ 511.010(1). Thus, Kentucky's definition of a "dwelling" includes vehicles, watercraft, and aircraft, and is thus broader than the common-law meaning of dwelling.

It is clear that the common law, regardless of continent or century, did not consider a tent as a dwelling that could be the subject of burglary. And, although no account of the common law discusses mobile homes and self-propelled vehicles for obvious reasons, it is apparent that the common law would not have regarded such places of habitation as permanent edifices worthy of protection as a dwelling. Thus, I reject two basic premises of the dissent's reasoning—that the habitations covered by the Tennessee statute qualify as dwellings under the common-law definition of burglary, and that because *Taylor* includes common-law burglary as a subset of generic burglary, all dwellings are covered by generic burglary.

The dissent leaps from the *Taylor* Court's inclusion of all common-law burglary in generic burglary to the conclusion that common-law burglary covers all dwellings and habitations. "The greater includes the lesser. No matter how far the federal definition of 'burglary' extends *beyond* the common law definition—by eliminating, say, the requirement that the burglary occur at night or by expanding the kinds of structures involved to cover an office building or a shed—it still covers the Tennessee law, which focuses on burglaries of dwellings or habitations. Burglary of a dwelling in its many forms, including each of the forms identified in the Tennessee law, is always a federal burglary." Dissenting Op. at 33. "By noting that modern burglary covers structures *other than dwellings*, the Court made clear that the phrase 'building or structure' in its

definition of burglary includes all dwellings. 'Structure' is the broader category; 'dwelling' is a subset." Dissenting Op. at 34. But the *Taylor* Court said no such thing. The *Taylor* Court never addressed the definition of dwelling, and never stated that either common-law or generic burglary includes all dwellings. Thus, the dissent's assertion that "*Taylor* told us that common law burglary always qualified as a violent felony under the Act" is correct, but its import is simply that breaking and entering a dwelling house during the night with intent to commit larceny is generic burglary.

I do not disagree that the outcome of today's decision leads to some puzzling results. But, as the dissent impliedly recognizes, the unsatisfactory outcomes in this area are the product of the combined effect of the requirements that we must (1) look to the elements of the offense, not the facts of the particular case, and (2) we may not look beyond the elements if a statute is indivisible. If the results are unsatisfying, we must accept them until Congress changes the ACCA or the Supreme Court its interpretation of it. Further, the dissent's approach leads to its own puzzling outcomes. A defendant who reached into someone else's unoccupied tent while camping and grabbed a granola bar would be subject to an ACCA enhancement; but a defendant who disassembled a tent and stole it and all its contents without entering it would not. And a defendant could steal a tent while it is collapsed and therefore not capable of being entered, bring it home, pitch it, enter it with the intent to use a computer to steal funds from a bank account, and be subject to the ACCA enhancement. A defendant who opened the door of a seemingly unoccupied vehicle hoping to find spare change, and then fled when confronted by the owner

who used the car as his home, would be subject to the ACCA; but a defendant who knew the car contained all the owner's possessions, waited for the owner to leave the car, then stripped it and stole all its contents would not be.

Whether Tennessee's aggravated-burglary offense and similarly-defined offenses fall within Congress's concept of generic burglary is a more difficult question. Persuasive arguments can and have been made on both sides. For me, the Model Penal Code's expansive definition of "occupied structure" provides the strongest support for the dissent. However, the majority's and Judge Boggs's thorough discussions of *Taylor* and the Supreme Court's consistent rejection of vehicles as a subject of generic burglary and emphasis on "buildings and other structures," leads me to agree that generic burglary does not include such temporary structures as tents and vehicles, even when used as a habitation.

DISSENT

SUTTON, Circuit Judge, dissenting. There is an easy way to think about this case. And there is a more complicated way. Either way, Stitt's conviction under Tennessee law for aggravated burglary counts as a "burglary" under the Armed Career Criminal Act.

The easy way. The Armed Career Criminal Act establishes a mandatory minimum sentence for firearm offenders who have three previous convictions for "violent felon[ies] or [] serious drug offense[s]." 18 U.S.C. § 924(e)(1). The Act lists "burglary" as a qualifying violent felony. *Id.* § 924(e)(2)(B)(ii). The relevant portion of Tennessee's aggravated burglary statute applies to burglary of a "habitation," defined as "any

structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1)(A), (B).

Aggravated burglary under Tennessee law counts as a crime of violence for three reasons.

One: Congress meant to use "burglary" in a way that goes beyond the common law definition of burglary: "breaking and entering of a dwelling at night, with intent to commit a felony." *See Taylor v. United States*, 495 U.S. 575, 592-94 (1990).

Two: The "habitations" covered by the Tennessee aggravated burglary statute qualify as dwellings under the common law definition of burglary.

Three: The greater includes the lesser. No matter how far the federal definition of "burglary" extends *beyond* the common law definition—by eliminating, say, the requirement that the burglary occur at night or by expanding the kinds of structures involved to cover an office building or a shed—it still covers the Tennessee law, which focuses on burglaries of dwellings or habitations. Burglary of a dwelling in its many forms, including each of the forms identified in the Tennessee law, is always a federal burglary. That's all anyone needs to know.

The more complicated way. The same conclusion applies even if we account for a few more perspectives and concepts: the categorical versus modified categorical approaches, divisible versus indivisible statutes,

and generic versus non-generic definitions of crimes. *Taylor* sought to provide a uniform definition of "burglary" for federal courts to measure state criminal statutes. *Id.* at 599. In doing so, it declined to limit its definition of burglary to "the traditional common-law definition"—"breaking and entering of *a dwelling* at night, with intent to commit a felony"—and opted instead for a "*broader* 'generic' definition" drawn from the Model Penal Code: "unlawful or unprivileged entry into, or remaining in, *a building or structure*, with intent to commit a crime." *Id.* at 580, 592, 599 (emphases added).

The Court explained that the modern definition encompassed the common law crime: "Whatever else the Members of Congress might have been thinking of, they presumably had in mind at least the 'classic' common-law definition when they considered the inclusion of burglary as a predicate offense." *Id.* at 593. The Court repeatedly described the common law definition as "narrow," *id.* at 595, 596, and said that it constituted a "subclass" of modern burglary, *id.* at 598. The problem with sticking to the common law definition was that most States had "expanded" on the definition, including "entry without a 'breaking,' structures other than dwellings, offenses committed in the daytime" and other new, more expansive elements. *Id.* at 593. By noting that modern burglary covers structures *other than dwellings*, the Court made clear that the phrase "building or structure" in its definition of burglary includes all dwellings. "Structure" is the broader category; "dwelling" is a subset. The Court even said that when "a statute is narrower than the generic view, *e.g.*, in cases of burglary convictions in common-law States . . . there is no problem." *Id.* at 599.

That's this case, which is why there is no problem here either. The Tennessee law, to repeat, defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1)(A), (B). This definition of aggravated burglary readily qualifies as burglary of a dwelling and thus as "burglary" under federal law for several reasons.

The Tennessee definition mirrors the definition of "occupied structure" in the Model Penal Code's burglary statute, on which *Taylor* based its understanding of the elements of generic burglary. *See Taylor*, 495 U.S. at 580, 598 n.8; American Law Institute, Model Penal Code § 221.0(1).

The Tennessee definition matches the traditional meaning of "dwelling." *Black's Law Dictionary* defines "dwelling house," in the criminal context, as "[a] building, a part of a building, a tent, a mobile home, or another enclosed space that is used or intended for use as a human habitation." *Id.* at 619 (10th ed. 2014). State courts agree. They classify burglaries of motor homes and camping tents as burglaries of dwellings. *See, e.g.*, *People v. Trevino*, 1 Cal. App. 5th 120, 125 (2016) (holding that a recreational vehicle was an "inhabited dwelling house"); *People v. Wilson*, 11 Cal. App. 4th 1483, 1489 (1992) (holding that a camping tent was an "inhabited dwelling house"); *Kanaras v. State*, 460 A.2d 61, 70-71 (Md. Ct. Spec. App. 1983) (collecting

cases). To my knowledge, there is no contrary state authority.

The federal courts have unanimously held that burglary of a *dwelling* covers vehicles and tents *that are designed for human habitation*. Until August 1, 2016, the Sentencing Guidelines included "burglary of a dwelling" as an enumerated offense in the definition of "crime of violence." U.S.S.G. § 4B1.2 (2015). Consistent with *Taylor*'s conclusion that burglary of a dwelling is a subset of generic burglary of a building or structure, the Commission's original commentary noted that "[c]onviction for burglary of a dwelling would be covered; conviction for burglary of *other structures* would not be covered." U.S.S.G. § 4B1.2 cmt. n.1 (1987) (emphasis added). All courts of appeals that interpreted this provision on its own terms held that statutes that criminalized burglary of tents and vehicles (such as RVs) adapted for overnight accommodation qualified as burglary of a dwelling. *See, e.g.*, *United States v. Ramirez*, 708 F.3d 295, 303 (1st Cir. 2013) (any "enclosed space for use or intended use for human habitation" is a dwelling); *United States v. Murillo-Lopez*, 444 F.3d 337, 342, 345 (5th Cir. 2006); ("dwelling" encompasses "tents and vessels used for human habitation"); *United States v. Graham*, 982 F.2d 315, 316 (8th Cir. 1992) (per curiam) (using definition from *Black's*); *United States v. Rivera-Oros*, 590 F.3d 1123, 1132-33 (10th Cir. 2009) (same); *United States v. Garcia-Martinez*, 845 F.3d 1126, 1132 (11th Cir. 2017) (vehicles "used or intended for use for human habitation" are dwellings).

All in all, *Taylor* tells us that burglary of a dwelling is always generic, and a uniform body of precedent tells

us that Tennessee's definition of "habitation" applies only to dwellings. The outcome should be clear. The statute is generic. Stitt's conviction qualifies as a violent felony.

In reaching a contrary conclusion, the court points to several statements in Supreme Court opinions and, with respect, makes the mistake of reading an opinion (in truth part of an opinion) like a statute. *Taylor* observed that some state burglary statutes go beyond the generic definition by "eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." 495 U.S. at 599. The Court gave one example of such a statute: a Missouri law that criminalized breaking and entering into "any booth or tent, or any boat or vessel, or railroad car." *Id.* at 593. The Court repeated that burglary is a violent felony under the Act "only if committed in a building or enclosed space . . . not in a boat or motor vehicle." *Shepard v. United States*, 544 U.S. 13, 15-16 (2005). And it said the same thing in *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016).

But these statements do not undermine *Taylor*'s conclusion that dwellings categorically remain structures and thus that burglary of a dwelling remains categorically generic. Just look at the context of each statement. The Missouri statute discussed in *Taylor* applied to *any* tent or boat, including a canoe or a tent for an outdoor party, not just those tents or boats used for habitation. So too of the law in *Shepard*, which applied to any "building, ship, vessel, or vehicle." 544 U.S. at 31. And of the law in *Mathis*, which applied to any "land, water, or air vehicle." 136 S. Ct. at 2250.

These statutes covered *all* vehicles, and so were clearly not generic under *Taylor* because they did not apply to dwellings—namely places used for habitation. The Court had no reason to consider recreational vehicles and houseboats when deciding *Taylor* or any case since, and thus no reason to consider that some vehicles (but not all vehicles) count as dwellings under the common law definition.

The court's decision not only goes beyond what *Taylor/Shepard/Mathis* require. It also contradicts *Taylor*'s reasoning. The court's decision stands for the proposition that simple common-law burglary—"breaking and entering into a dwelling, with intent to commit a felony"—is not generic when it comes to state courts that follow the long-held custom of treating vehicles and tents adapted for overnight accommodation as dwellings. How can that be? *Taylor* told us that common law burglary *always* qualified as a violent felony under the Act. 495 U.S. at 599. If the court is correct, generic burglary now goes beyond the common law crime but never includes it.

In this circuit alone, the majority's holding jeopardizes two statutes previously treated as generic. Consider Michigan's home invasion statute, which applies to a common law "dwelling," Mich. Comp. Laws § 750.110a, and Kentucky's second-degree burglary statute, which does the same, Ky. Rev. Stat. § 511.030. We previously treated convictions under the former as a violent felony, *United States v. Quarles*, 850 F.3d 836, 839-40 (6th Cir. 2017), and did the same for the latter, *United States v. Moody*, 634 F. App'x 531, 534-35 (6th Cir. 2015).

The majority's holding also produces this head-scratching outcome—that Tennessee's lesser crime of "burglary of a building" qualifies as generic burglary while aggravated burglary does not. A similar oddity arises within the aggravated burglary statute itself under the court's decision. It's okay if the statute covers burglary of unoccupied structures, such as tool sheds, *see United States v. Lara*, 590 F. App'x 574, 579 (6th Cir. 2014), but not if it covers places where people regularly lodge. How likely is that? That Congress meant to classify burglaries of unoccupied structures as violent felonies but not the burglary of a sleeping family's RV?

The court responds that we should concentrate on "a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a 'building or other structure.'" Maj. Op. 4. But form follows function, making it impossible for *any* definition of burglary to avoid functional considerations. Bridges, cranes, gazebos, and doll houses are all "structures," but the court would not claim that stealing from any of these locations would qualify as burglary. A would-be burglar cannot "break and enter" into those structures because, as a matter of function, they're not designed to house people and property securely. If anything, determining what structures a person can break into and enter seems to be a more difficult functional question than determining what structures are designed for human accommodation.

But all of this distracts from the key point: We should not isolate three words from *Taylor*, lift them from their context, and in the process eliminate com-

mon law burglary of a dwelling, which *Taylor* tells us in no uncertain terms is the heart of the crime.

The court claims that five courts of appeals have followed its approach and just one has gone the other way. That is not quite right. To my knowledge, only six courts of appeals have considered statutes that, like Tennessee's, apply only to vehicles and tents that serve as dwellings. In addition to our decision in *United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007), two other courts of appeals have adopted the dwelling definition, holding that burglary statutes covering vehicles and tents designed for overnight accommodation are generic under *Taylor*. *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992); *United States v. Spring*, 80 F.3d 1450, 1461-63 (10th Cir. 1996). Three other courts, it is true, have adopted a "no-vehicles-or-tents" definition. *See United States v. Henriquez*, 757 F.3d 144, 149 (4th Cir. 2014); *United States v. Sims*, 854 F.3d 1037, 1039 (8th Cir. 2017); *United States v. Cisneros*, 826 F.3d 1190, 1193-94 (9th Cir. 2016). But all three decisions come with qualifications. One comes with internal disagreement within the case itself. *Henriquez*, 757 F.3d at 151-55 (Motz, J., dissenting) (concluding that burglary of a common law dwelling is always generic). The other two are at odds with decisions from the *same* court, including one decision that involves this *same* Tennessee statute, *see United States v. Pledge*, 821 F.3d 1035, 1037 (8th Cir. 2016) (holding that Tennessee aggravated burglary is generic); *United States v. Sweeten*, 933 F.2d 765, 771 (9th Cir. 1991) (per curiam) (holding that Texas's identical statute was generic).

The stakes of this debate have grown since *Mathis*. Before *Mathis*, many courts made liberal use of the "modified categorical approach," which enabled courts to look at certain records from a prior conviction under a non-generic statute to determine whether the defendant, to use one example, in fact burglarized a home or a vehicle. *See* 136 S. Ct. at 2249. This meant that declaring a statute non-generic carried few consequences; a court often could proceed to figure out what the defendant in fact did. But *Mathis* made clear that the modified categorical approach applies only when a statute contains multiple alternative elements and therefore defines separate, divisible crimes. *Id.* at 2249-50. A statute that merely lists different means of commission—such as burglarizing a building, vehicle, or tent—is not divisible. Now, when a court declares a statute like Tennessee's non-generic, that's all there is to it. Because aggravated burglary in Tennessee can apply to the burglary of a motor home, no one convicted under the statute has committed "burglary" for purposes of the Armed Career Criminal Act.

Nor is Tennessee an outlier. The majority's no-vehicles-or-tents rule implies that *every state's basic burglary statute is non-generic*. *See* Appellee's Supp. Br., App'x B. It's a strange genus that doesn't include any species. In combination with *Mathis*, the majority's definition of generic burglary effectively reads "burglary" out of the Act. That should give us all pause.

My concurring colleagues contest one of my premises. They claim that tents (and perhaps vehicles) could never be dwellings under the common law, meaning that Tennessee aggravated burglary is not generic

even under my reading of *Taylor*. I disagree. The cited authorities from the ancient common law, Blackstone among others, go out of their way to point out that tents erected in public markets are not dwellings. They do not consider whether tents designed for human accommodation might qualify—the only claim I make here and the only reason a tent could be a dwelling under the common law.

But this argument has a broader problem: a mistaken vantage point. Blackstone and other treatise writers may be good guides to the state of the common law in their own centuries. But the very nature of the common law is that it's *never* static. That is its reason for being: It allows courts to make new law to address new circumstances. And that's why some judges complain when courts use a common-law method of interpretation in construing the Constitution or statutes. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and its Laws*, *in* A Matter of Interpretation (1997). For our purposes, the proper vantage point is the meaning of the (everevolving) common law in 1984, when Congress enacted the Armed Career Criminal Act. By then, the consensus of the state courts—the true authorities on American common law—was that tents and vehicles designed and used for human accommodation count as dwellings. *See Kanaras*, 460 A.2d at 70-71 (collecting cases); *Martin v. State*, 57 S.W.2d 1104, 1104 (Tex. Crim. App. 1933) ("That a tent may be a house within the meaning of the law is not open to serious question."); *Knowles v. State*, 98 So. 207, 208 (Ala. Ct. App. 1923) (acknowledging that a tent, depending upon its construction and use, may be a "dwel-

ling house"). *Black's Law Dictionary* accounted for this consensus by altering its definition of "dwelling" to include tents and vehicles in 1979. *See id.* at 454 (5th ed.). The Model Penal Code of 1980 also reflected this widely shared understanding. And so did the pertinent state statutes. Let them live in "mansion houses" may have been an answer to those who wanted the protection of the burglary laws for lesser dwellings a long time ago. But that has not been true for many decades.

All of this leads to one conclusion. In 1984, when Congress used the word "burglary" in ACCA, and in 1990, when *Taylor* construed the term to include the common law definition—"breaking and entering of a dwelling at night"—there was no question that tents and vehicles designed and used for human accommodation qualified as dwellings.

To their credit, my concurring colleagues recognize the strange results that follow from their adherence to the "bright-line" rule that burglary of anything besides a "building or structure" can never be generic. *See* Concurring Op. (Boggs, J.) at 20. As noted, that definition nearly renders generic burglary a null set. My colleagues assign the blame for this state of affairs to the *Taylor* Court. But we should give the Court and Congress more credit. The result the court reaches today only follows from *Taylor* if one reads "building or structure" as if it "were a statutory term." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2446 (2013). We should instead adopt "the interpretation that best fits within the highly structured framework that [*Taylor*] adopted." *Id.*

That framework tells us burglary of a dwelling is always generic, regardless of whether the dwelling is made of "stone, steel, or cloth." *People v. Netzik*, 383 N.E.2d 640, 642-43 (Ill. App. Ct. 1978). Whether a suburban home, an apartment, an RV, or a tent under a highway, all of these structures are designed for habitation. And all burglaries of them are covered. Holding otherwise hollows out generic burglary by removing the crime's common law core. I would stand by our decisions in *Nance* and *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015), which avoided each of these pitfalls and correctly resolved this issue.

For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 14-6158

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VICTOR J. STITT, II, DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Eastern District of Tennessee

Filed: Feb. 10, 2016

BEFORE: MOORE and COOK, Circuit Judges; PEARSON, District Judge.*

COOK, Circuit Judge. After Victor Stitt pulled a gun on his girlfriend, a jury convicted him of being a felon in possession of a firearm. He appeals, challenging the denial of his motion to suppress, venue in the Eastern District of Tennessee, and his sentence enhancement under the Armed Career Criminal Act (ACCA). Finding no error, we AFFIRM his conviction and sentence.

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* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

I.

In 2011, Stitt lived with his girlfriend Rebecca Hostetler in Coffee County in the Eastern District of Tennessee. During an argument, Stitt retrieved a firearm, tried to stick it in Hostetler's mouth, and threatened to kill her. When a neighbor intervened, Hostetler left, and Stitt asked another woman to drive him to his mother's home in Cannon County in the Middle District of Tennessee. The neighbor told the police that Stitt and the other woman left in a champagne-colored car.

Coffee County detectives responded to a dispatch reporting a domestic-violence incident and directing them to Stitt's mother's address. The detectives drove their unmarked car to the end of the driveway and saw the champagne-colored car in the backyard. They also saw Stitt standing at the backdoor of his mother's trailer. He fled, and the detectives chased him around both sides of the trailer. Trapped, Stitt surrendered. A .22 caliber handgun lay within arm's reach of Stitt on the ground.

A grand jury indicted Stitt on one count of being a felon in possession in violation of 18 U.S.C. § 922(g). Stitt moved to suppress evidence of the firearm, claiming that the detectives breached the trailer's constitutionally protected curtilage before spotting him at the backdoor. After a hearing, a report and recommendation, and objections, the district court denied the motion.

A jury then convicted Stitt on the felon-in-possession charge. Because Stitt's presentence report identified nine "violent felony" convictions under ACCA, the

court—over Stitt's objection—labeled him an armed career criminal and imposed a within-guidelines sentence of 290 months of imprisonment.

Stitt now appeals.

II.

Stitt first claims that the district court erred in denying his motion to suppress. He argues that the end of the driveway—where the detectives stopped their car—constituted curtilage. By entering this constitutionally protected area, the detectives violated Stitt's Fourth Amendment rights, and the court should have suppressed the evidence the detectives subsequently seized.

We review the district court's findings of fact for clear error but give de novo review to its conclusions of law. *United States v. Ray*, 803 F.3d 244, 275 (6th Cir. 2015). "A factual finding is clearly erroneous when 'a court, on reviewing the evidence, is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009)).

Curtilage includes "the area around the home to which the activity of home life extends." *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir. 1998) (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984)). Four factors govern the classification of an area as curtilage:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps

> taken by the resident to protect the area from observation by people passing.

Id. (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)). Analyzing these factors assists us in determining whether an individual "reasonably may expect that the area in question should be treated as the home itself," *i.e.*, as a place in which the individual reasonably may expect privacy. *Dunn*, 480 U.S. at 300.

The end of the driveway, or turnaround, stood in close proximity to the trailer, suggesting that Stitt reasonably could expect privacy there. *See, e.g.*, *Widgren v. Maple Grove Twp.*, 429 F.3d 575, 582 (6th Cir. 2005) (finding a cleared area four to six feet away from the house was curtilage).

But proximity alone does not suffice, and the other factors weigh against a finding of curtilage. The public could view and access the turnaround from the street, undermining Stitt's expectation of privacy. *See, e.g.*, *United States v. Galaviz*, 645 F.3d 347, 356 (6th Cir. 2011) (finding no expectation of privacy when the defendant took no steps "to protect the driveway from observation by passersby"). And though the property boasted a fence, the driveway lay outside the fence, and no gate blocked the entrance. *Id.* (concluding that the defendant lacked any expectation of privacy when the driveway was not enclosed by a fence or other barrier). Finally, the family's use of the turnaround reinforced its non-private nature. Testimony established that visitors parked cars in the turnaround —decidedly not an activity associated with the privacies of life. *Compare United States v. Estes*, 343 F. App'x 97, 101 (6th Cir. 2009) (finding that the use of a driveway as a "point of entry into the residence" "undercut a

finding that the driveway represents curtilage"), *with Pritchard v. Hamilton Twp. Bd. of Trs.*, 424 F. App'x 492, 499 (6th Cir. 2011) (finding that a backyard used for swimming could reasonably be expected to be private). Taken together, the factors suggest that Stitt lacked a reasonable expectation of privacy in the turnaround, and the turnaround therefore was not curtilage.

Stitt next alleges that the detectives ventured beyond the turnaround and entered constitutionally protected curtilage—the backyard—before spying Stitt at the backdoor. One detective admitted he "[didn't] know" whether "[his] front tires [were] in the grass" beyond the turnaround when he stopped the car. But the magistrate judge explicitly found that the detectives remained in the turnaround, noting that "there was no clear end to the driveway and [the detective] credibly testified that he stepped out onto the gravel driveway when he exited his car, which he parked in the driveway." The district court adopted these factual findings, and unless Stitt pinpoints a clear error, we cannot overturn these findings on appeal. Stitt merely asks us to reinterpret the detective's uncertain testimony in his favor and therefore fails to show clear error.

A final point. Stitt emphasizes the property's rural, low-income character, arguing that such properties lack clear divisions between curtilage and public areas. Affirming the denial of his suppression motion, he argues, would unfairly privilege wealthy homeowners who can afford fences and bushes to separate public driveways from private backyards. But a railroad tie, a large rock, or a sign would have marked the edge of

the backyard and warned visitors not to proceed further. Testimony established that no such marker existed on the property. We discern no error in the denial of Stitt's motion to suppress.

III.

Next, Stitt alleges that the district court's failure to instruct the jury on venue requires us to vacate his conviction. Because he neglected to object to the venue-instruction omission at trial, we review for plain error. *United States v. Cooper*, 40 F. App'x 39, 40 (6th Cir. 2002). A plain error affects a defendant's substantial rights and seriously questions the fairness, integrity or public reputation of the judicial proceedings. *United States v. Smith*, 601 F.3d 530, 541 (6th Cir. 2010). We reverse for plain error in jury instructions upon a showing that "taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *United States v. Semrau*, 693 F.3d 510, 528 (6th Cir. 2012) (quoting *United States v. Morrison*, 594 F.3d 543, 546 (6th Cir. 2010)). Stitt claims to meet this exacting standard because the evidence at trial insufficiently established venue in the Eastern District of Tennessee, and the jury—if properly instructed—would have found accordingly.

Venue is indeed a question of fact for the jury, *United States v. Redfearn*, 906 F.2d 352, 354 (8th Cir. 1990), but unlike other facts in the government's case, a preponderance of the evidence suffices, *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992). Here, Hostetler's identification of the gun with which Stitt threatened her in the Eastern District matched the detective's identification of the gun he found in the Middle District. Additionally, the woman who drove Stitt

from the Eastern District to the Middle District never saw Stitt stop, pick up, or discard anything. When, as here, the evidence sufficiently establishes venue, and the defendant fails to request a venue instruction, the instruction's absence is not plain error. *See United States v. Massa*, 686 F.2d 526, 530 & n.10 (7th Cir. 1982) (collecting cases).

IV.

Finally, Stitt claims that none of the nine convictions relied upon by the district court in sentencing him as an armed career criminal qualify as ACCA predicates. That misclassification, he continues, triggered the ACCA's fifteen-year minimum sentence—far exceeding the ten-year statutory maximum for felon-in-possession convictions—and requires us to vacate his sentence. *Compare* 18 U.S.C. § 924(e)(1), *with id.* § 924(a)(2). The government concedes that two convictions for facilitation of aggravated burglary and one conviction for attempted aggravated burglary are not ACCA predicate offenses. *See Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). We therefore consider whether at least three of Stitt's six convictions for Tennessee aggravated burglary qualify as violent felonies. *See* 18 U.S.C. § 924(e)(1) (requiring three previous violent- felony convictions to impose a fifteen-year minimum sentence under the ACCA).

In its enumerated-offense clause, the ACCA singles out offenses that, if "punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 924(e)(2)(B), always constitute violent felonies, including burglary, *id.* § 924(e)(2)(B)(ii). A state burglary offense falls within that clause if it describes the "generic" version of burglary. *Descamps v. United States*, 133 S. Ct.

2276, 2281 (2013). Generic burglary "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). Tennessee aggravated burglary therefore qualifies as generic burglary "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281 (the "categorical approach"). If the statute includes broader elements than generic burglary, but it "sets out one or more elements . . . in the alternative," the statute still qualifies as generic burglary if the government establishes that Stitt was necessarily convicted of the aggravated-burglary alternative that matches the elements of generic burglary. *Id.* (the "modified-categorical approach").

Tennessee aggravated burglary "is burglary of a habitation," Tenn. Code Ann. § 39-14-403, where "habitation" describes a structure for overnight accommodation; an occupied self-propelled vehicle designed for overnight accommodation; or a separately secured or occupied portion of or structure appurtenant to such a structure or vehicle, *id.* § 39-14-401(1). Both parties invite us to evaluate Stitt's aggravated-burglary convictions under the modified-categorical approach, noting that aggravated burglary's inclusion of self-propelled vehicles expands the statute beyond generic burglary, which requires buildings or structures. *See Taylor*, 495 U.S. at 599 ("A few States' burglary statutes, however, . . . define burglary more broadly [than generic burglary], *e.g.*, . . . by including places, such as automobiles and vending machines, other than buildings."); *see also United States v. Priddy*, 808 F.3d 676, 687 (6th Cir. 2015) (White, J., concurring)

("Tennessee's expansive definition of 'habitation' . . . likely renders its aggravated burglary statute broader than *Taylor*'s definition of generic burglary.").

We may not use the modified-categorical approach here—our precedents foreclose it. We repeatedly have found that "a Tennessee conviction for aggravated burglary is *categorically* a violent felony under the ACCA's enumerated-offense clause." *Priddy*, 808 F.3d at 684 (majority opinion) (emphasis added); *see also United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007) (holding that "the weight of authority indicates that Tennessee's aggravated burglary statute is generic"). Only the full court may invalidate the holdings of *Priddy* and *Nance*. Stitt's six aggravated-burglary convictions categorically qualify as ACCA predicates. The district court therefore committed no error in deeming Stitt an armed career criminal.

V.

We AFFIRM Stitt's conviction and sentence.

APPENDIX C

1. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the pro-

visions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including

any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, dur-

ing and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the pres-

ence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or

any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described

in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled

Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed deal-

er, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

2. Tenn. Code Ann. § 39-14-401 (Supp. 2001) provides:

Definitions for burglary and related offenses.—As used in this part, unless the context otherwise requires:

(1) "Habitation":

(A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

(B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; and

(C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle;

(2) "Occupied" means the condition of the lawful physical presence of any person at any time while the defendant is within the habitation or other building; and

(3) "Owner" means a person in lawful possession of property, whether the possession is actual or constructive. "Owner" does not include a person, who is restrained from the property or habitation by a valid

court order or order of protection, other than an ex parte order of protection, obtained by the person maintaining residence on the property.

3. Tenn. Code Ann. § 39-14-402 (1997) provides:

Burglary.—(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;

(2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;

(3) Enters a building and commits or attempts to commit a felony, theft or assault; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

(b) As used in this section, "enter" means:

(1) Intrusion of any part of the body; or

(2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

(c) Burglary under subdivision (a)(1), (2) or (3) is a Class D felony.

(d) Burglary under subdivision (a)(4) is a Class E felony.

4. Tenn. Code Ann. § 39-14-403 (1997) provides:

Aggravated burglary.—(a) Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.

(b) Aggravated burglary is a Class C felony.

APPENDIX D

State Burglary Statutes at the Time of 18 U.S.C. 924(e)(2)(B)(ii)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)

[*] Statutes encompassing nonpermanent or mobile structures irrespective of their purpose

[†] Statutes encompassing nonpermanent or mobile structures used for enumerated purposes

[‡] Statutes adhering to the common-law definition of burglary

[§] Statutes broader than the common-law definition that exclude or do not specifically address nonpermanent or mobile structures

Alabama[†]	Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (1982) (defining burglary as involving a "dwelling" or "building"); *id.* § 13A-7-1(2) (Supp. 1983) (defining building as "[a]ny structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, * * * includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein").

Alaska†	Alaska Stat. §§ 11.46.300, 11.46.310 (1983) (defining burglary as involving a "building"); *id.* § 11.81.900 (Supp. 1985) (defining building to include, "in addition to its usual meaning, * * * any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business").
Arizona†	Ariz. Rev. Stat. Ann. § 13-1506 (Supp. 1981) (defining burglary as involving "a nonresidential structure"); *id.* § 13-1501(8) (1978) (defining "[s]tructure" as "any building, object, vehicle, railroad car or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage").
Arkansas†	Ark. Stat. Ann. §§ 41-2001, 41-2002 (1977) (defining burglary as involving an "occupiable structure," *i.e.*, "a vehicle, building, or other structure: (a) where any person lives or carries on a business or other calling; * * * (b) where people assemble for purpose of business, government, education, religion, entertainment, or public transportation; or (c) which is customarily used for overnight accommoda-

	tion of persons").
California*	Cal. Penal Code § 459 (Deering 1985) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse[,] or other building, tent, vessel, railroad car, locked or sealed cargo container * * * , trailer coach * * * , any house car * * * , inhabited camper * * * , vehicle * * * when the doors of such vehicle are locked, aircraft * * * , [or] mine").
Colorado†	Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (1986) (defining first- and second-degree burglary as involving a "building or occupied structure," *i.e.*, "a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, * * * includ[ing] a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein" (building) or "any area, place, facility, or enclosure which * * * is in fact occupied by a person or animal, and known

	by the defendant to be thus occupied" (occupied structure)).
Connecticut*	Conn. Gen. Stat. Ann. § 53a-103 (West 1972) (defining burglary as involving a "building"); *id.* § 53a-100(a)(1) (West Supp. 1985) (defining building to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle").
Delaware*	Del. Code Ann. tit. 11, §§ 221(1), 824-825 (1979) (defining burglary as involving, *inter alia*, a "building," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft").
District of Columbia*	D.C. Code Ann. § 22-1801(b) (1973) (defining burglary as involving "any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, * * * any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade").
Florida*	Fla. Stat. chs. 810.011, 810.02(1) (1985) (defining burglary as involv-

	ing "a structure or a conveyance," *i.e.*, "a building of any kind, either temporary or permanent, which has a roof over it" (structure) or "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car" (conveyance)).
Georgia[†]	Ga. Code Ann. § 16-7-1 (Michie 1984) (defining burglary as involving "the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another").
Hawaii[†]	Haw. Rev. Stat. §§ 708-800, 708-810 (1985) (defining burglary as involving a "building," *i.e.*, "any structure, [or] * * * any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein").
Idaho[*]	Idaho Code § 18-1401 (Supp. 1981) (defining burglary as involving a "house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car").
Illinois[*]	Ill. Rev. Stat. ch. 38, paras. 2-6, 19-1(a), 19-3(a) (1983) (defining burglary as involving a "building, house-trailer, watercraft, aircraft, motor

	vehicle[,] * * * [or] railroad car," and defining residential burglary as involving a "dwelling," *i.e.*, "a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation").
Indiana[§]	Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984) (defining burglary as involving a "building or structure" without further defining those terms); see also *McCormick* v. *State*, 382 N.E.2d 172, 174-176 & nn.1-2 (Ind. Ct. App. 1978) (noting that, until 1976, Indiana separately criminalized burglary of any boat, railroad car, automobile, or building other than a dwelling).
Iowa[†]	Iowa Code §§ 702.12, 713.1-713.6 (1985) (defining burglary as involving an "occupied structure," *i.e.*, "any building, structure, * * * land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," but not an "object or device * * * too small or not designed to allow a person to physically enter or oc-

	cupy it").
Kansas*	Kan. Stat. Ann. § 21-3715 (Supp. 1974) (defining burglary to involve a "building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property").
Kentucky†	Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.030 (Michie 1985) (defining burglary as involving a "building" or "dwelling," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle, watercraft or aircraft (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (building) or "a building which is usually occupied by a person lodging therein" (dwelling)).
Louisiana*	La. Rev. Stat. Ann. § 14:62 (West 1986) (defining burglary as involving "any dwelling, vehicle, watercraft, or other structure, movable or immovable").
Maine†	Me. Rev. Stat. Ann. tit. 17-A, § 401 (West 1983 & Supp. 1986) (defining burglary as involving a

	"structure"); *id.* § 2(24) (West 1983) (defining structure as "a building or other place designed to provide protection for persons or property against weather or intrusion, but * * * not includ[ing] vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place").
Maryland[‡]	See *Sizemore* v. *State*, 272 A.2d 824, 825-826 (Md. Ct. Spec. App.) (citing Md. Ann. Code art. 27, §§ 29-30, 32-33 (1967), and noting that Maryland "recognizes six separate and distinct crimes related to the breaking of structures," including common-law burglary, daytime housebreaking, and "storehouse breaking," which "cover[s] all buildings other than dwelling houses" but is "not burglary at all"), cert. denied, 261 Md. 728 (1971).
Massachusetts[*]	Mass. Gen. L. ch. 266, § 15 (1986) (defining burglary as involving "a dwelling house"); see *id.* §§ 16, 19, 20A (separately prohibiting the "break[ing] and ent[ry]" into any "building, ship, vessel or vehicle," railroad cars, or any "truck, tractor/

	trailer unit, trailer, semi-trailer or freight container").
Michigan[*]	Mich. Comp. Laws Ann. § 750.110 (West 1968) (defining breaking and entering to involve an "occupied dwelling," as well as a "tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or * * * any unoccupied dwelling house").
Minnesota[†]	Minn. Stat. §§ 609.556, 609.582 (1986) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning[,] * * * any tent, watercraft, structure or vehicle that is customarily used for overnight lodging of a person").
Mississippi[‡]	Miss. Code Ann. § 97-17-19 (1973) (defining burglary as involving "any dwelling house").
Missouri[†]	Mo. Rev. Stat. §§ 569.010, 569.170 (1986) (defining burglary as involving a "building" or "inhabitable structure," *i.e.*, "a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling; or (b) Where people assemble for purposes of busi-

	ness, government, education, religion, entertainment or public transportation; or (c) Which is used for overnight accommodation of persons").
Montana[†]	Mont. Code Ann. §§ 45-2-101(40), 45-6-204 (1985) (defining burglary as involving an "occupied structure," *i.e.*, a "building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business").
Nebraska[§]	Neb. Rev. Stat. § 28-507 (1985) (defining burglary as involving "real estate or any improvements erected thereon").
Nevada[*]	Nev. Rev. Stat. Ann. § 205.060 (Michie 1986) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car").
New Hampshire[†]	N.H. Rev. Stat. Ann. § 635:1 (1986) (defining burglary as involving a "building or occupied structure," *i.e.*, "any structure, vehicle, boat or place adapted for overnight accommodation of per-

	sons, or for carrying on business").
New Jersey*	N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (West 1982) (defining burglary as involving a "structure," *i.e.*, "any building, room, ship, vessel, car, vehicle or airplane, and also * * * any place adapted for overnight accommodation of persons, or for carrying on business therein").
New Mexico*	N.M. Stat. Ann. § 30-16-3 (Michie 1978) (defining burglary as involving "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable").
New York†	N.Y. Penal Law § 140.20 (McKinney 1975) (defining burglary as involving a "building"); *id.* § 140.00(2) (McKinney Supp. 1986) (defining building to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer").
North Carolina‡	*State* v. *Oakman*, 388 S.E.2d 579, 581 (N.C. Ct. App. 1990) ("North Carolina retains the common law

	definition of burglary.").
North Dakota†	N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (1985) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "a structure or vehicle: a. Where any person lives or carries on business or other calling; or b. Which is used for overnight accommodation of persons").
Ohio†	Ohio Rev. Code Ann. § 2911.12 (Anderson Supp. 1985) (defining burglary as involving an "occupied structure)"; *id.* § 2909.01 (Anderson 1982) (defining occupied structure as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, * * * (A) Which is maintained as a permanent or temporary dwelling * * * ; (B) Which at the time is occupied as the permanent or temporary habitation of any person * * * ; (C) Which at the time is specially adapted for the overnight accommodation of any person * * * ; [or] (D) In which at the time any person is present or likely to be present").
Oklahoma*	Okla. Stat. Ann. tit. 21, § 1435 (West Supp. 1982) (defining bur-

	glary as involving "any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept").
Oregon†	Or. Rev. Stat. §§ 164.205(1), 164.215(1) (1983) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein").
Pennsylvania†	18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein").
Rhode Island‡	R.I. Gen. Laws § 11-8-1 (1981) (common-law definition of burglary).
South Carolina†	S.C. Code Ann. §§ 16-11-310(1), 16-11-313 (Law. Co-op. Supp. 1985) (defining burglary as involving a "building," *i.e.*, "any structure, vehicle, watercraft, or aircraft: (a) Where any person lodges or lives; or (b) Where people assem-

	ble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored").
South Dakota*	S.D. Codified Laws §§ 22-32-1, 22-32-3, 22-32-8 (1979) (defining burglary as involving a "structure"); S.D. Codified Laws Ann. § 22-1-2(46) (Supp. 1986) (defining structure as "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent, or other edifice, vehicle or shelter, or any portion thereof").
Tennessee*	Tenn. Code Ann. §§ 39-3-401, 39-3-403, 39-3-404, 39-3-406 (1982) (defining burglary as involving "a dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily" (general burglary and second-degree burglary); "a business house, outhouse, or any other house of another, other than dwelling house" (third-degree burglary); or "any freight or passenger car, automobile, truck, trailer or other motor vehicle" (breaking into vehicles)).

Texas[†]	Tex. Penal Code Ann. §§ 30.01, 30.02 (West 1974) (defining burglary as involving a "building" or "habitation," *i.e.*, "a structure or vehicle that is adapted for the overnight accommodation of persons").
Utah[†]	Utah Code Ann. §§ 76-6-201, 76-6-202 (1978) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business").
Vermont[§]	Vt. Stat. Ann. tit. 13, § 1201 (Supp. 1982) (defining burglary as involving a "building or structure" without further defining those terms beyond "their common meanings").
Virginia[†]	Va. Code Ann. § 18.2-90 (Michie Supp. 1986) (defining burglary as involving "any office, shop, storehouse, warehouse, banking house, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of

	human habitation").
Washington†	Wash. Rev. Code. §§ 9A.52.020, 9A.52.030 (1985) (defining burglary as involving a "dwelling" or a "building"); *id.* § 9A.04.110 (Supp. 1986) (defining dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging" (first-degree burglary); and defining building to include, "in addition to its ordinary meaning, * * * any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods" (second-degree burglary)).
West Virginia†	W. Va. Code Ann. § 61-3-11 (Michie 1977) (defining burglary as involving a "dwelling house," which "shall include, but not be limited to, a mobile home, house trailer, modular home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from

	time to time").
Wisconsin*	Wisc. Stat. Ann. § 943.10 (West 1982) (defining burglary as involving "[a]ny building or dwelling; * * * enclosed railroad car; * * * enclosed portion of any ship or vessel; * * * [or] motor home or other motorized type of home or a trailer home").
Wyoming*	Wyo. Stat. Ann. § 6-3-301 (Supp. 1986) (defining burglary as involving "a building, occupied structure or vehicle, or separately secured or occupied portion thereof").