NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BRUMBACH,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Armed Career Criminal Act's mandatory penalty can be triggered by prior convictions for "burglary." "Burglary" carries the meaning that the majority of jurisdictions were giving it in 1986 when the ACCA was enacted. At that time, the majority rule held that to count as burglary an offense must involve an entry by the person or by an instrument being used to commit the felony therein, not merely by an instrument being used to try to make entry. Tennessee law makes the last scenario—the use of an instrument in an attempt to make entry—a burglary. Is Sixth Circuit precedent that counts Tennessee aggravated burglary as a generic burglary in error?

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PRAYER

Petitioner Brian Brumbach prays that a writ of certiorari issue to review the judgment entered by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion in petitioner's case is attached in the Appendix, as is the order denying rehearing en banc.

JURISDICTION

The Court of Appeals entered its judgment on July 11, 2019, vacating relief granted by the district court. It denied Brumbach's petition for rehearing en banc on October 8, 2019. This petition is filed within 90 days of that denial as required by Supreme Court Rule 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial[] by . . . jury[.]."

The Armed Career Criminal Act provides that a prior conviction qualifies as a "violent felony" if it is a conviction for "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

BACKGROUND

In May 2009, Brian Brumbach, a convicted felon, was arrested with a firearm and charged with violating 18 U.S.C. § 922(g). App. 2. He pled guilty and was classified as an Armed Career Criminal based on the belief that he had three prior convictions—each of which was for Tennessee aggravated burglary—that qualified as a "violent felony" under the Armed Career Criminal Act (ACCA). *Id.* That was believed because precedent stated that Tennessee aggravated burglary counted as a generic "burglary" and hence as a violent felony. Brumbach was sentenced to the minimum 15 years mandated by the ACCA. *Id.*

After this Court struck down the ACCA's residual clause in *Johnson v. United States,* 135 S. Ct. 2551 (2015), Brumbach filed a § 2255 motion, and in June 2018 he won relief based on an en banc Sixth Circuit decision that had held that Tennessee aggravated burglary does *not* count as a generic burglary because Tennessee defines "habitation" so broadly. *United States v. Stitt,* 860 F.3d 854 (6th Cir. 2017) (en banc) (*Stitt I*) *reversed by United States v. Stitt* 139 S. Ct. 399 (2018) (*Stitt II*). Brumbach was resentenced to time served and released. App. 3. The government appealed. *Id.*

In December 2018, while the government's appeal of Brumbach's case was pending, the Supreme Court reversed *Stitt I*. On appeal, Brumbach raised a new argument as to why Tennessee aggravated burglary does not count as generic burglary, *viz.,* because Tennessee defines "entry" so broadly. The Sixth Circuit did not address the merits of his argument on entry, instead simply ruling that pre-*Stitt I* precedent required it to hold that Tennessee aggravated burglary does qualify as generic burglary, regardless whether the argument regarding "entry" is correct. App. 6.

Brumbach sought rehearing en banc, which was denied. App. 7.

ARGUMENT

The Court should grant certiorari because the Sixth Circuit has made an important error that is requiring many defendants in Mr. Brumbach's shoes to return to prison.

Many defendants received reduced sentences—some to time served—due to the combined effect of *Johnson* and *Stitt I*. *See, e.g.*, *Dawson v. United States*, Nos. 17-5930/5931, 2019 U.S. App. LEXIS 34627 (6th Cir. Nov. 20, 2019); *United States v. Merriweather*, No. 18-5567, 2019 U.S. App. LEXIS 32520 (6th Cir. Oct. 29, 2019); *United States v. Johnson*, Nos. 18-6006/6123, 2019 U.S. App. LEXIS 32246 (6th Cir. Oct. 25, 2019); *United States v. Ammons*, No. 17-5920/17-5922, 2019 U.S. App. LEXIS 32243 (6th Cir. Oct. 25, 2019); *United States v. Bateman*, 780 F. App'x 355 (6th Cir. 2019). Defendants like Brumbach have already returned to society, and are now, due to the reversal of *Stitt I*, being forced to return to prison for at least five more years. As explained below, the Sixth Circuit should have held that the reversal of *Stitt I* was immaterial because Tennessee aggravated burglary, notwithstanding this Court's ruling on Tennessee's "habitation" requirement, fails to qualify as a violent felony due to Tennessee's broad definition of "entry."

The issue turns on whether a prior conviction for Tennessee aggravated burglary qualifies as an ACCA predicate under the "categorical approach," which requires the courts to compare the statutory elements of the Tennessee offense with the elements of "generic" burglary. *Descamps v. United States*, 570 U.S. 254, 257 (2013). "The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Id.* Here, the Tennessee burglary offense does not qualify as an ACCA predicate because its elements are broader than—not equivalent to or narrower than—those of the generic offense.

That mismatch is due to Tennessee's unusual definition of "entry." Generic burglary, of course, is "an unlawful or unprivileged *entry* into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990) (italics added). Because generic burglary requires an entry, a mere attempted burglary—*e.g.*, when someone merely tries unsuccessfully to make entry—does not qualify as generic burglary. *James v. United States*, 550 U.S. 192, 198 (2007). But, as explained below, even though the traditional and modern majority rule on "entry" requires the making of an actual entry by a person or instrument to commit the intended crime therein, Tennessee's unusual rule does not. Tennessee treats some attempted burglaries as if they were completed burglaries, and for that reason the Tennessee burglary offense does not qualify as a generic burglary or, hence, as an ACCA predicate.

A. Generic burglary requires an entry by the person or by an instrument being used to commit the intended felony.

With respect to the crime of burglary, what counts as making "entry"? Common law and a majority of jurisdictions make it clear that an entry is made when, for example, any part of the person, such as a hand, crosses the threshold of the structure as that person is trying to commit the felony. *Commonwealth v. Cotto*, 752 N.E.2d 768, 771 (Mass. App. 2001).

But how does the law address a situation where only an instrument—such as a coat hanger or a screwdriver—crosses the threshold of the structure? For purposes of defining an "entry," the law on burglary has long made a distinction based on the defendant's purpose in using the threshold-crossing instrument. As discussed below, if that instrument is used in an effort to commit the intended felony inside the structure (*e.g.* a coat hanger used to snag an item), then an "entry" is made when the instrument crosses the threshold and thus a burglary is committed, assuming the other elements are established. But if that instrument is used only in an

effort to make entry (*e.g.*, a screwdriver used to pry at the door), then no "entry" is made even when the instrument crosses the threshold, and a mere attempted burglary is committed. In short, the controlling distinction is between an instrument used in an effort to commit the intended felony (which Brumbach will call the "instrument-for-crime rule"), and in contrast an instrument used only in an attempt to make entry (the "any-instrument rule").

This distinction started with the common law. The common law adopted the instrument-for-crime rule. *Cotto*, 752 N.E.2d. at 771 (summarizing common law sources); *see Commonwealth v Burke*, 467 N.E.2d 846, 849 (Mass. 1984) (quoting *Rex* v. *Hughes*, 1 Leach 406, 407 (1785)); *Russell v. State*, 255 S.W.2d 881, 884 (Tex. Crim. App. 1953) (adhering to common-law rule as stated in *Hughes*); *Walker v. State*, 63 Ala. 49, 51 (1879) (citing 1 Matthew Hale, *The History of the Pleas of the Crown*, 555 (1736)).

As of 1986, when Congress enacted the ACCA,[1] the vast majority of states defined burglary in their respective codes as requiring an entry, without any statutory definition of "entry." *See infra* p. 11. Because a court should presume that an undefined statutory term comports with the common law, *Morissette v. United States*, 342 U.S. 246, 263 (1952), it would naturally follow that the vast majority of states were following the instrument-for-crime rule as of 1986. Indeed, almost every single court that had interpreted "entry" by 1986 had endorsed the common law's instrument-for-crime rule, typically citing either the common law or one of the many treatises stating that the blackletter rule is the instrument-for-crime rule. *See, e.g.*, *State v. Hodges*, 575 S.W.2d 769, 772 (Mo. Ct. App. 1978); *People v Davis*, 279 N.E.2d 179, 180 (Ill. Ct. App. 1972); *State v. Liberty*, 280 A.2d 805, 808 (Me. 1971); *State v. O'Leary*, 107 A.2d 13,

[1] When defining generic "burglary," the courts must ascertain the majority rule as of the date of the ACCA's enactment in 1986. *See United States v. Stitt*, 139 S. Ct. 399, 405 (2018).

15-16 (N.J. 1954); *Foster v. State*, 220 So.2d 406, 407 (Fla. Dist. Ct. App. 1969); *Mattox v. State*, 100 N.E. 1009 (Ind. 1913); *State v. Crawford*, 80 N.W. 193, 194 (N.D. 1899); *Walker v. State*, 63 Ala. 49, 51 (1879); *People v. Tragani*, 449 N.Y.S.2d 923, 925-28 (N.Y. Sup. Ct. 1982) ("it must be assumed that the drafters . . . really envisioned . . . an adoption by the courts of common-law, common-usage, and common-sense definitions of both bodily and instrumental entry"); *see also* Nev. Rev. Stat. § 193.0145 (1985); Wash. Rev. Code § 9A.52.010(2) (1985).[2]

Accordingly, the leading modern treatise on the subject—Wayne R. LaFave, *Substantive Criminal Law*—reports that the instrument-for-crime rule is the blackletter rule on burglary "entry." *Id.* § 21.1(b) (2 ed. 2003); *see Taylor v. United States*, 495 U.S. 575, 580, 593, 598 & nn.3-4 (1990) (placing significant reliance on LaFave's treatise to define generic burglary).[3]

As of 1986, states deviating from that rule were few. By statute, four states had defined "entry" to include entry by any instrument, thereby adopting, against the grain, the any-instrument rule. 11 Del. Code § 829(c);[4] Ariz. Rev. Stat. Ann. § 13-1501(3); Tex. Penal Code Ann. § 30.02(b); Utah Code Ann. § 76-6-201(4). Plus, just two courts had authoritatively

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[2] Prior to 1986, three additional states also indicated they would follow the instrument-for-crime rule: *State v. Sneed*, 247 S.E.2d 658, 659 (N.C. App. 1978); *Stamps v. Commonwealth*, 602 S.W.2d 172, 173 (Ky. 1980); *Sears v. State*, 713 P.2d 1218 (Alaska Ct. App. 1986). After 1986, three additional states clearly followed that rule, giving no reason to think that they were adopting a rule that was new: *State v. Williams*, 873 P.2d 471, 473-74 (Ore. App. 1994); Iowa J.I. Crim. § 1300.12; and OUJI-CR § 5-18 (Oklahoma). And, after 1986, two additional states indicated they would follow that rule, with no hint they were adopting a rule that was new: *State v. Faria*, 60 P.3d 333, 339 (2002) and *People v. Rhodus*, 303 P.3d 109, 113 (Colo. App. 2012).

[3] Professor LaFave explains: "If the actor . . . used some instrument which protruded into the structure, no entry occurred unless he was simultaneously using the instrument to achieve his felonious purpose. Thus there was no entry where an instrument was used to pry open the building, even though it protruded into the structure; but if the actor was also using the instrument to reach some property therein, then it constituted an entry." *Id.*

[4] In *Bailey v. State*, 231 A.2d 469 (Del. 1967), the Delaware Supreme Court interpreted a materially-equivalent precursor to 11 Del. Code § 829(c). *Id.* at 469. The court acknowledged that the common law followed the instrument-for-crime rule. *Id.* at 470. But in light of the statute's broader language, it adopted the any-instrument rule.

interpreted "entry"—when it was undefined by statute—to mean any instrument, rather than an instrument in use for the intended felony. One was an intermediate court of appeals in New Mexico that, after acknowledging the common-law and majority rule, simply announced that in its "opinion" an any-instrument rule was better. *State v. Tixier*, 551 P.2d 987, 989 (N.M. Ct. App. 1976). The other was the Tennessee Supreme Court which issued binding language endorsing the any-instrument rule without explaining why it was doing so.[5] *State v. Crow*, 517 S.W.2d 753, 755 (Tenn. 1974). So, as of 1986, just six jurisdictions had deviated from the long-standing and traditional instrument-for-crime rule.

In sum, as of 1986, the common law, the clear majority of jurisdictions, and the LaFave treatise and others all took the very same approach to burglary's entry requirement: they all followed the instrument-for-crime rule. Accordingly, this Court should hold that a "generic" burglary requires an entry by the person or by an instrument in use to commit the felony.

B. By 1989, Tennessee certainly adopted the broader, any-instrument rule.

In 1989, the Tennessee legislature defined "entry" in terms indistinguishable from those of the codes in Delaware, Arizona, Texas and Utah, cited above:

> "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.

Tenn. Code Ann. § 39-14-402(b). The government itself argued in the Sixth Circuit that, when a state code uses this "any" instrument language, the state (*e.g.*, Delaware, Arizona, Texas or Utah) has certainly adopted the any-instrument rule. (Gov't Reply Br. at 9.) Accordingly, by using the

[5] An intermediate California court had so interpreted "entry" but did so by misreading the holding of a previous California precedent. *Compare People v. Osegueda*, 210 Cal. Rptr. 182, 185-86 (Cal. App. Dep't Super. Ct. 1984) *with People v. Walters*, 249 Cal. App. 2d 547, 551 (Cal. App. 2nd App. Dist. 1967).

"any" instrument language, the Tennessee code makes it clear that, at least by 1989, Tennessee had likewise certainly adopted the any-instrument rule.

Although there is no need to further establish this point, it is reassuring that, ever since the Tennessee Supreme Court issued *Crow* in 1974, this any-instrument rule has been reiterated repeatedly by Tennessee cases and jury instructions. *Hall v. State*, 584 S.W.2d 819, 821 (Tenn. Crim. App. 1979); *State v. Summers*, 1990 Tenn. Crim. App. LEXIS 681, *3-4 (Tenn. Crim. App. Oct. 10, 1990); *State v. Moore*, 1990 Tenn. Crim. App. LEXIS 96, *4 (Tenn. Crim. App. Feb. 7, 1990); Tennessee Pattern Jury Instructions, Vol. 7 at 93 (2nd Ed. 1988); *see also Ferguson v. State*, 530 S.W.2d 100, 101-02 (Tenn. Crim. App. 1975) (sustaining burglary conviction on any-instrument facts).

C. The government's counterargument conflicts with *James*.

Generic burglary incorporates the instrument-for-crime rule, yet Tennessee follows the broader any-instrument rule. Thus, a prior conviction for post-1989 Tennessee burglary—whether aggravated or not—does not constitute generic burglary and does not count as an ACCA predicate. *Descamps*, 570 U.S. at 257. It was correct to reduce Brumbach's sentence to ten years.

In response, the government has argued that when someone sticks a screwdriver through a doorframe to try to make entry, that crime is just as dangerous as sticking a coat hanger through a window to snag an item, and so the distinction between the instrument-for-crime rule and the any-instrument rule is not significant enough to define the contours of generic burglary. It calls the distinction "arcane." (Gov't Reply Br. at 10.)

What the government ignores, however, is that there is a simple and clear conceptual difference between the two rules, which is why the distinction has been repeated over and over again by courts and treatises for centuries. The coat-hanger scenario is a *completed* burglary

because the defendant made entry in the manner intended to commit the crime therein; in contrast, the screwdriver scenario is an *attempted* burglary because the defendant only tried to make the desired entry.

Congress and this Court have recognized that a completed burglary and an attempted burglary are two different crimes. Congress rejected an amendment to define the ACCA's "violent felony" to include attempted burglary, thereby restricting the ACCA to completed burglary. *See James v. United States*, 550 U.S. 192, 200 (2007). Accordingly, the *James* Court held that Florida attempted burglary does not qualify as a generic burglary. *Id.* at 197.

Plus, *James* made it clear that the degree of dangerousness could not be of controlling significance. The Florida attempt offense required the defendant to fail in a burglary after having made an "'overt act directed towards entering or remaining in a structure[.]'" *Id.* at 202 (quoting Florida law). Due to this required overt act, the *James* Court presumed the offense was at least as dangerous, if not more dangerous, than a completed generic burglary. *Id.* at 203-04. But that degree of danger did not render the Florida attempt offense (which could be sticking a screwdriver through a doorframe) a generic burglary since a federal sentencing court's task is to define "burglary" as understood by Congress in 1986, not to classify as "burglary" any dangerous crime that is similar to burglary. *See id.* at 197. In sum, *James* establishes that generic burglary does not include attempted burglary, and that attempts that are as dangerous as burglary are covered by the residual clause. *Id.* at 197, 202-04; *see Taylor*, 495 U.S. at 600 n.9 (explaining the residual clause might cover break-in crimes falling beyond scope of "burglary").

The government has, in effect, sought to compensate for the loss of the residual clause by ignoring an age-old distinction between burglary and attempted burglary and by, consequently, lumping the two crimes together. This Court should reject that effort.

The Sixth Circuit did not reject it; but nor did it endorse it. The Sixth Circuit avoided this issue by simply holding that pre-*Stitt I* precedent compelled it to deny relief. And it refused to review the issue en banc, thereby forcing Brumbach to come to this Court for review of pre-*Stitt I* precedent that the circuit court refrains from even claiming is correct. Because this issue is of great importance to the many defendants in Brumbach's shoes who are being sent back to prison based on *Stitt II*, this Court should grant review.

CONCLUSION

For the foregoing reasons, petitioner Brian Brumbach respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

December 13, 2019

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