NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR STITT, II,

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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QUESTIONS PRESENTED

I.

Whether the Court should grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019).

II.

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 Victor Stitt 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 panel rehearing.

JURISDICTION

The Court of Appeals entered its judgment on July 15, 2019, vacating relief granted by the district court. It denied Stitt's petition for panel rehearing on September 26, 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).

Section 922(g)(1) of Title 18 of the U.S. Code provides that "[i]t shall be unlawful for any person . . . who has been convicted" of a felony to possess a firearm. Section 924(a)(2) provides that "[w]hoever knowingly violates subsection . . . (g) . . . of section 922 shall be . . . imprisoned not more than 10 years."

BACKGROUND

In 2012, Victor Stitt was indicted on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). App. 13. The grand jury charged that Stitt, "having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, a firearm; in violation of 18 United States Code, Section 922(g)(1)." *Id.* Notably, the indictment alleged only that Stitt knowingly possessed a firearm and ammunition; it did not allege that he knew of his status as a felon.

Consistent with the indictment, at trial the court refrained from instructing the jury that, to be guilty of the charged offense, Stitt had to know of his status as a felon. App. 25-26. The jury convicted Stitt without finding he had such knowledge. *Id.*; *see also* App. 38.

At sentencing, it was determined that Stitt had six prior convictions for Tennessee aggravated burglary. App. 3. The presentence report recommended that he be subject to the statutory penalties of the Armed Career Criminal Act (ACCA) based on the belief that Tennessee aggravated burglary must qualify as a "violent felony," giving Stitt at least the requisite three prior qualifying convictions to trigger the ACCA's fifteen-year mandatory minimum sentence. App. 3. At sentencing, the district court overruled his objections to his ACCA designation and imposed a sentence of 290 months. *Id.*

On direct appeal of his sentence, the Sixth Circuit, sitting en banc, 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*). It, consequently, held that Stitt's ACCA designation was in error, and it did not reach his other arguments attacking the premise that Tennessee aggravated burglary is a violent felony. *See id.*

Stitt I, however, was reversed by this Court in *United States v. Stitt* 139 S. Ct. 399 (2018) (*Stitt II*).

On remand, the Sixth Circuit addressed Stitt's remaining arguments, and rejected them. App. 3-11. In a motion for panel rehearing, Stitt 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 denying rehearing. App. 12.

In June 2019, this Court decided *Rehaif v. United States*, 139 S. Ct. 2191 (2019), which held that, to prove a violation of 18 U.S.C. § 922(g)(1) and 924(a)(2), the government "must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2191. Because this case is still on direct appeal, Stitt now seeks the benefit of that intervening decision, which overruled circuit precedent. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

ARGUMENT

I. The Court should grant relief in light of *Rehaif*.

Under 18 U.S.C. § 922(g), nine categories of persons—felons being the first—are prohibited from possessing a firearm or ammunition by virtue of their status. But while § 922(g) prohibits felons (and eight other categories of persons) from possessing a firearm or ammunition, that provision does not actually criminalize such conduct. Rather, that work is done by 18 U.S.C. § 924(a)(2), which provides that whoever "knowingly violates" § 922(g) "shall be fined as provided in this title, imprisoned not more than 10 years, or both." *Rehaif* has now made clear that a valid prosecution depends on both § 922(g) and § 924(a)(2).

In *Rehaif*, this Court addressed "whether, in prosecutions under § 922(g) and § 924(a)(2), the government must prove that a defendant knows of his status as a person barred from possessing a firearm." 139 S. Ct. at 2195. The Court answered affirmatively, "hold[ing] that the

word 'knowingly' [in § 924(a)(2)] applies to both the defendant's conduct and to the defendant's status. To convict a defendant, the Government therefore must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* at 2194; *see id.* at 2200 (repeating that holding).

The Court relied on the "longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state regarding each of the statutory elements that criminalize otherwise innocent conduct." *Id.* at 2195 (citation omitted). Rather than "find [any] convincing reason to depart from the ordinary presumption in favor of scienter," the Court found that the statutory text "support[ed] the presumption." *Id.* The Court emphasized that "[t]he term 'knowingly' in § 924(a)(2) modifies the verb 'violates' and its direct object, which in this case is § 922(g)." *Id.* And the Court saw "no basis to interpret 'knowingly' as applying to the second § 922(g) element [on possession] but not the first [on status]. To the contrary, we think that by specifying that a defendant may be convicted only if he 'knowingly violates' § 922(g), Congress intended to require the Government to establish that the defendant knew he violated the material elements of § 922(g)." *Id.* at 2196.

In light of *Rehaif*, the indictment in this case was fatally flawed. It alleged that Stitt, "having previously been convicted in a court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, a firearm; in violation of 18 United States Code, Section 922(g)(1)." App. 13. Those allegations do not state a federal offense.

While the grand jury alleged that Stitt was in fact a felon, it did not allege he knew he was a felon. *Rehaif* held that such knowledge is an essential element of the offense. Here, the only *mens rea* alleged was that Stitt knew he possessed a firearm. Under *Rehaif*, that conduct is

not a crime. Moreover, the indictment cited § 922(g)(1) but not § 924(a)(2). Yet *Rehaif* made clear that § 922(g) is not a free-standing offense. Rather, a valid prosecution must be brought under both § 992(g), which prohibits certain conduct by certain people and § 924(a)(2), which criminalizes the "knowing violation" of that prohibition. Those complementary deficiencies are fatal.

Admittedly, Stitt did not raise this argument below. After all, the Sixth Circuit had long held that knowledge of status was not an element, *United States v. Olender*, 338 F.3d 629 (6th Cir. 2003), and every other circuit had agreed. *Rehaif*, 139 S. Ct. at 2210 n.6 (Alito, J., dissenting) (citing cases). But his failure to raise the issue does not bar relief. This Court has held that it is "fatal error" to permit an individual to be "convicted on a charge the grand jury never made against him." *Stirone v. United States*, 361 U.S. 212, 219 (1960).

Moreover, all four prongs of plain-error review would be satisfied even if it applied; there is error; that error is now plain under *Rehaif*, *see Henderson v. United States*, 568 U.S. 266 (2013); it affected Stitt's substantial rights , as "[t]he right to have a grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment," *Stirone*, 361 U.S. at 219; and convicting him of an unindicated offense seriously affected the fairness, integrity, and public reputation of judicial proceedings.

Finally, not only was the indictment fatally flawed, but Stitt's jury verdict was constitutionally invalid. That verdict was unquestionably based on an impermissible theory of guilt because the jury was not instructed that it had to find that Stitt knew of his prohibited status. *See Boyd v. California*, 494 U.S. 370, 379-80 (1990). Yet *Rehaif* makes clear that this was an essential element of the offense. Because the jury was not so instructed, the conviction is

invalid. And, again, while Stitt did not make this argument below, that is no bar to relief now because it is a fatal flaw.

Notably, the defendant in *United States v. Stacy*, 771 F. App'x 956 (11th Cir. 2019), argued for the first time in his certiorari petition that his indictment and conviction were invalid under *Rehaif*. On August 30, 2019, the Solicitor General agreed that certiorari should be granted, the judgment vacated and the case remanded for further consideration in light of *Rehaif*, and that is what this Court did. *Stacy v. United States*, 205 L. Ed. 2d 210 (2019). The Court should do the same here.

II. The Court should grant certiorari because the Sixth Circuit has made an important error that is requiring many defendants to return to prison.

Many defendants received reduced sentences—some to time served—based on *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 that 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

[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).

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, 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]

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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.*

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 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:

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[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.

[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).

> "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 "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 Victor Stitt respectfully prays that this Court grant certiorari to review the judgment of the Sixth Circuit.

December 23, 2019

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