

ORIGINAL

NO. 20-6458

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

Clayton Waagner, pro se – Petitioner,

vs.

Unites States of America – Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals from the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

QUESTIONS PRESENTED FOR REVIEW

Whether the "statute of conviction" must be used for an ACCA predicate offense, or can the district court use the statute listed on the indictment instead?

Whether, in light of *Stitt*, Ohio aggravated burglary is broader than the generic burglary definition under the ACCA's enumerated offense clause?

Does the doctrine of Collateral Estoppel prevent the government and district court from reversing position on an issue of law after holding a contrary position in an earlier proceeding within the same case?

RELATED CASES

United States v. Waagner, No. 99-CR-20042 - Central District of Illinois, Decided 2002

United States v. Waagner, 329 F.3d 962, 966 - Seventh Circuit Court of Appeals, Decided 2003

Waagner v. United States, No. 13-cv-2277- Central District of Illinois, Decided Dec, 18, 2013

Waagner v. United States, No. 16-2074 - Seventh Circuit Court of Appeals, Decided Jun 3, 2016

Waagner v. United States, No. 16-cv-2156 - Central District of Illinois, Decided Sep 12, 2019

Waagner v. United States, No. 19-3008 - Seventh Circuit Court of Appeals, Decided Aug 20, 2020

TABLE OF CONTENTS

Questions Presented.....	ii
Related Cases.....	iii
Citations.....	v
Petition for Writ of Certiorari.....	1
Opinion Below.....	1
Jurisdiction.....	1
Statutory Provisions.....	2
Statement of the case.....	3
Reasons for Granting Writ.....	4
Conclusion.....	5
Appendix.....	6

CITATIONS

<u>Cases:</u>	<u>Page(s):</u>
<i>Bravo-Fernandex</i> , 137 S.Ct. 352, 358 (2016)	9
<i>Descamps v. United States</i> , 570 U.S. 254 (2013)	8, 9, 10
<i>Greer v. United States</i> , 938 F.3d 766 (6th Cir. 2019)	6, 7, 8, 13
<i>Hill c. United States</i> , 319 F.3d 962, 966 (7th Cir. 2017)	5
<i>Johnson v. United States</i> , 135 S.Ct. 2551 (2015)	3, 5, 6, 9, 13
<i>Shepard v. United States</i> , 544 U.S. 13, 15-15 (2005)	6
<i>State v. Waagner</i> , Case No. 91-CR-6898 (Ohio 1991)	4
<i>Stitt v. United States</i> , 139 S.Ct. 399 (2018)	6, 7, 8, 10, 12, 13, 14
<i>Taylor v. United States</i> , 495 U.S. 575 (1990)	6, 10, 14
<i>United States v. Coleman</i> , 655 F.3d 480 (6th Cir. 2011)	6
<i>United States v. Lane</i> , 909 F.2d 895, 902 (6th Cir. 1990)	6
<i>United States v. Mathis</i> , 136 S.Ct. 2243, 2254 (2016)	10, 14
<i>United States v. Waagner</i> , 99-CR-20042 (C.D. Ill. Jan 25, 2002)	1
<i>United States v. Waagner</i> , 319 F.3d 962, 966 (7th Cir. 2003)	1
<i>Waagner v. United States</i> , No. 1:01-CR-191 (M.D. PA. Dec 19, 2016)	13
<i>Waagner v. United States</i> , No. 13-cv-2277 (C.D. Ill. Dec 18, 2013)	8, 9, 10
<i>Waagner v. United States</i> , No. 16-2074 (7th Cir. June 3, 2016)	4
<i>Waagner v. United States</i> , No. 16-cv-2156 (C.D. Ill. Sep 12, 2019)	9, 10
<i>Waagner v. United States</i> , No. 19-3008, 7th Cir. August 20, 2020)	1

<u>Statutes and Rules:</u>	<u>Page(s):</u>
18 U.S.C. 922(g)(1)	2
18 U.S.C. 924(e)	2
18 U.S.C. 924(e)(1)	2
18 U.S.C. 924(e)(1)(B)(i)	9
18 U.S.C. 924(e)(2)	9
18 U.S.C. 924(e)(2)(B)(ii) "Four Enumerated Offenses"	9
Ohio Revised Code § 2923.02(A) "Attempt"	4
Ohio Revised Code § 2911.02(A) "Robbery"	4
Ohio Revised Code § 2911.11(A)(3) "Aggravated Burglary"	2, 4, 5
Ohio Revised Code § 2909.01 "Structure defined"	2, 3, 7
Tenn. Code Ann. § 39-14-401 "Agg Burglary" (of a habitation)	3, 7, 9
Tenn. Code Ann. § 39-14-401(1)(A), (B) "Habitation defined"	3, 7, 9
Tenn. Code Ann. § 39-14-402.....	8
Tenn. Code Ann. § 39-14-403(a) "Aggravated Burglary"	8
Ark. Code Ann. §5-39-101(4)(A) "Burglary"	8
Ark. Code Ann. §5-39-201(a)(1)	8

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On Petition for a Writ of Certiorari to the
United States Court of Appeals from the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Clayton Waagner, respectfully prays that the United States Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, Case No. 19-3008, entered on August 20, 2020. Petitioner did not request an en banc hearing.

OPINION BELOW

On August 20, 2020, a panel of the Court of Appeals for the Seventh Circuit entered its opinion affirming the judgment of the United States District Court for the Central District of Illinois. The opinion of the Court of Appeals is reported as *United States v. Waagner*, No. 19-3008 (7th Cir. August 20, 2020).

JURISDICTION

The Seventh Circuit Court of Appeals entered its judgment on August 20, 2020. Petitioner did not request an en banc hearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS

18 U.S.C. § 924(e)(1)

In the case of a person who violates §922(g) of this title and has three previous convictions by any court referred to in §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 a person with respect to the conviction under §922(g).

18 U.S.C. §924(e)(2)

As used in this subsection –

* * *

- (B) the term "violent felony" means any crime punishable by imprisonment of a term exceeding one year, or any act of juvenile delinquencies 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 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;...

Ohio Revised Code §2911.02(A) Ohio "Attempt" statute 1992 (which Waagner was convicted): “No person purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which if successful, would constitute or result in the offense.”

Ohio Revised Code §2911.11 Ohio Burglary statute 1978 (which Waagner was convicted under)

- (A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in §2909.01 of the Revised Code, or in a separately secured or occupied portion thereof, with purpose to commit therein any

theft offense as defined in §2913.01 of the Revised Code, or any felony, when any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance as defined in §2923.11 of the Revised Code on or about his person or under his control;
- (3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

In 1978, "occupied structure" was defined as:

As used in sections 2909.01 to 2909.07 of the Revised Code, an "occupied structure" is any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

- (A) Which is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied, and whether or not any person is actually present;
- (B) Which at the time is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present;
- (C) Which at the time is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.
- (D) *In which at the time any person is present or likely to be present.* Ohio Rev Code §2909.01.

STATEMENT OF THE CASE

Petitioner filed a 28 U.S.C. 2255 motion with the Central District of Illinois on June 6, 2016 (*Waagner v. United States*, No. 16-cv-2156) challenging his ACCA predicates in light of *Johnson*, 135 570 U.S. 254 (2015). The PSR enumerated the priors used for an ACCA enhanced sentence (PSR ¶ 41): two 1978 Ohio burglary convictions (PSR ¶¶48, 49), and a 1991 Ohio

conviction called "attempted robbery" (PSR ¶ 51). Petitioner argued all three Ohio convictions were only ACCA predicates under the residual clause.

The Seventh Circuit granted COA and the district court appointed counsel, who filed a supplemental motion (13-cv-2277, C.D. Ill., June 3, 2016). On Sept 19, 2019, the district court denied the 2255, holding Ohio burglary qualified as an ACCA predicate under the enumerated clause, and Ohio robbery qualified under the use of force clause. Petitioner filed a timely appeal and on August 20, 2020, the Seventh Circuit Court of Appeals affirmed the district court's decision.

QUESTION ONE: Whether the "statute of conviction" must be used for an ACCA predicate offense, or can the district court use the statute listed on the indictment instead?

In 1991, Petitioner was convicted under Ohio Revised Code §2923.02(A), the Ohio "Attempt" statute, which does not have "as an element the use, attempted use, or threatened use of physical force against the person of another." The Ohio "Attempt" statute covers everything from misdemeanor property violations to murder. Given the statute's wording and broad usage, it can never be an ACCA predicate offense.

Ohio Revised Code §2923.02(A): "No person purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense."

Petitioner was indicted for unarmed robbery under O.R.C. 2911.02(A), which was dismissed. (*State v. Waagner*, No. 91-CR-6898 (Ohio 1991)) The robbery statute does not appear on the sentencing minutes, which clearly describe the statute of conviction: "having heretofore plead "guilty" to the crime of "Attempt", in violation of Ohio Revised Code §2923.02(A), as it

relates to "Robbery." Ohio's "Attempt" statute lacks the requisite language to be considered a crime of violence under the ACCA, therefore, cannot be an ACCA predicate offense."

In the COA granted by the Seventh Circuit, Petitioner argued the Ohio Attempt statute was not an ACCA predicate without the residual clause. This was again argued before the district court, who ruled on the issue, holding Petitioner's Ohio "Attempted Robbery" conviction qualified as an ACCA predicate under the "Use of Force Clause. The Seventh Circuit touched on the issue (Document 26, page 28) after holding Waagner's Ohio burglary convictions were based on *Johnson*, thus challengeable. "The same is not necessarily true, however, for his challenges to the other prior convictions. Each claim must be evaluated individually. (cite omitted).

Regardless, we need not consider whether *Johnson* opened the door for us to review anew Mr. Waagner's prior conviction for Ohio attempted robbery. *Id.* His challenge in this regard must fail. He contends that the offense of attempted robbery cannot be counted as a violent felony under the element's clause. While Ohio's attempted robbery statute requires the use, attempted use, or threatened use of force, he submits, the state's "attempt statute" does not. As Mr. Waagner himself acknowledges, this argument is foreclosed by *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017)." (after short discussion on Hill). "We see no reason to revisit that decision."

At every stage of these proceedings Petitioner argued Ohio's Attempt statute could only be a violent felony under the Residual Clause. Neither the district court nor the Seventh Circuit specifically held that he could or could not challenge the issue based on *Johnson*, yet both courts denied the challenge to Ohio's "Attempt" statute based on the merits. Both ignored the basic question of the statute of conviction and held Ohio's "Attempted Robbery" statute was a qualifying offense. By not holding otherwise, and ruling against Petitioner on the merits, the

question of Ohio's unique "Attempt" statute was allowed under a *Johnson* challenge, thus is active and ripe for review.

Question Two: Whether, in light of *Johnson*, Ohio aggravated burglary is broader than the generic definition of burglary under the ACCA's enumerated offense clause?

Central to this question is whether *Stitt*, 139 S.Ct. 399 (2018) applies to Ohio's burglary statute. *Stitt* held Tennessee's burglary statute is generic burglary under ACCA's enumerated clause. In doing so the Court expanded the Sixth Circuit's application of this issue. Prior to *Stitt*, the Sixth Circuit long held Ohio's burglary statute non-generic, not divisible, and only an ACCA predicate under the residual clause. (*Lane*, 909 F.2d at 902-03 (6th Cir. 1990) and *Coleman*, 655 F.3d 480 (6th Cir. 2011)) After *Johnson*, courts across the nation reversed ACCA sentences based on Ohio burglary. This changed after *Stitt*. In *Greer*, 938, F.3d 766 (6th Cir. 2019) the Sixth Circuit held that, in light of *Stitt*, Ohio burglary's use of vehicles as an "occupied structure" was no longer an obstacle, so O.R.C. §2911.11, and now qualified as an ACCA predicate under the enumerated offense clause. The Seventh Circuit followed, relying on *Stitt*, in *Waagner*, No. 19-3008, August 20, 2020. (The case before the Court.)

The *Stitt* Court did not overturn *Taylor*, 495 U.S. 575 (1990) or *Shepard*, 544 U.S. 13, 15-16 (2005) but rather introduced "other structures" that can, with a narrow exception, qualify as ACCA generic burglary. The *Stitt* Court's exception can apply to those state statutes in which "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." Other than this narrow exception, *Taylor*, *Shepard*, and all their related cases still stand. Burglary statutes which include vehicles did not automatically become ACCA generic burglaries unless the state statute fell within the *Stitt* exception, namely, "designed or adapted or is customarily used for overnight accommodation."

Stitt's holding closely follows the Tennessee burglary statute; "which is designed or adapted for the overnight accommodation of persons." However, Ohio's burglary statute makes no such requirement, a distinction not addressed by the Sixth Circuit in *Greer*, or the Seventh Circuit in *Waagner*.

O.R.C. 2909.01 defines an occupied structure as:

"an occupied structure is any house, building, outbuilding, watercraft, aircraft, railroad car, truck, tent, or other vehicle, or shelter, or any portion thereof, to which any of the following applies:

- (A) Which is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied, and whether or not any person is actually present;
- (B) Which at the time is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present;
- (C) Which at the time is specially adapted for the overnight accommodation of any person, whether or not any person is actually present;
- (D) In which at the time any person is present or likely to be present. Ohio Revised Code §2909.01."

Only one of the A thru D subsections of O.R.C. 2909.01 are needed to qualify as an occupied structure for a conviction under the Ohio burglary statute, thus the wording: "any of the following." to apply for a location to qualify as an "occupied structure" Subsection (C) has similar language to *Stitt*: "adapted for the overnight accommodation of any person." However, the other three have no such requirement. In fact, subsection (D) is vague and lacks the *Stitt* exception. Under Ohio law, a person can be convicted of burglary if, by "deception" (one of four possible requirements) he opens the door of a Cessna 152 (a two seat airplane included under 2909.01) to commit a theft offense, as long as "a person is likely to be present (2909.01 (D)). Ohio's burglary statute does not comport to the Court's holding in *Stitt*. Ohio's definition of an "occupied structure" is substantially different than Tennessee's statute. The *Stitt* Court held that

Tennessee's burglary statute was generic under ACCA because "a structure or vehicle that has been adapted or is customarily used for overnight accommodation." The narrow holding in *Stitt* does not affect the overly broad language of the Ohio burglary statute. The Sixth and Seventh Circuits erred in *Greer* and *Waagner*.

Given the Court's inclusion of *Sims*, 17-766, on certiorari to the United States Court of Appeals for the Eighth Circuit, a comparison between Ohio burglary to Arkansas' burglary statute is necessary.

Ark. Code Ann. §5-39-201(a)(1), Arkansas "prohibits burglary of a residential occupied structure. That term encompasses a vehicle, building, or other structure ... where any person lives or which is customarily used for overnight accommodations of persons whether or not a person is actually present."

Like Tennessee's burglary statute, the Arkansas' burglary statute includes the term "customarily used for overnight accommodations of persons," as covered in *Stitt*'s holding. Arkansas burglary fits firmly within the narrow framework of *Stitt* and adds nothing to the comparison between *Stitt* and Ohio's burglary statute.

QUESTION THREE: Does the doctrine of collateral estoppel prevent the government and district court from reversing position on an issue of law after holding a contrary position in an earlier proceeding within the same case?

In *Waagner v. United States*, Civil No. 13-2277, C.D. Ill, Apr. 8, 2014 (*Waagner I*) Petitioner challenged that an Ohio aggravated burglary conviction, in light of *Descamps*, 570 U.S. 254 (2013), did not constitute a violent felony under the Armed Career Criminal Act, because Ohio's burglary statute was broader than generic burglary and was indivisible. The government conceded this point, specifically: "Waagner correctly observes that neither Ohio

burglary statute meets the definition of generic burglary (i.e., "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime," *Descamps*, 133 S.Ct.at 2283 (quoting *Taylor*)), because it includes the burglary of habitations, like tents, that are not buildings or structures." *Id* at 24. The government went on to note that both the Sixth and Tenth Circuits had held the Ohio statutes involved conduct that presents a serious potential risk of physical injury to another and therefore were violent felonies under ACCA's residual clause, 18 U.S.C. §924(e)(2)(B)(ii), *Id*.

The district court adopted the government's argument, holding Petitioner's Ohio burglary convictions violent felonies because the offenses "involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. §924(e)(2)(B)(ii)." (Citing the now defunct residual clause,).

One year later *Johnson*, 135 S.Ct. 2251 (2015) held ACCA's residual clause unconstitutional, prompting Petitioner to file a timely second 2255 motion, *Waagner v. United States*, No. 16-2156 (*Waagner2*). Here, Petitioner sought to vacate his ACCA sentence as it was dependent on two Ohio burglary convictions which, according to his sentencing judge and the government, only qualified as an ACCA predicate under the residual clause. In *Waagner2* the government reversed its position from *Waagner1*, now arguing Ohio aggravated burglary is generic burglary. The district court also reversed its earlier position, now holding Ohio burglary generic, and as such an ACCA predicate offense under the enumerated clause.

Collateral Estoppel "ordinarily bars re-litigation of an issue of fact or law raised and necessarily resolved by a prior judgment." *Bravo-Fernandex*, 137 S.Ct. 352, 358 (2016). "When one party affirmatively concedes the other party's argument is correct, and the court then acts according to that concession, the issue has been determined." In *Waagner1* the district court went

so far as to discuss generic burglary in detail. App. at 48-49, and the government affirmatively conceded the Ohio burglaries were not convictions for generic burglary, to which the court agreed in its Order denying *Waagner1* by using the Residual Clause.

With the issue of collateral estoppel raised in *Waagner2*, the government's defense for taking a contrary position was that, in *Waagner1* it conceded Ohio burglary was not generic because "the Department of Justice's guidance to prosecutors was to concede that burglary statutes that included entries into vehicles did not meet the generic definition of burglary, but nonetheless, may qualify as violent felonies under the ACCA's residual clause." Gov. Br. at 42. The government's concession that Ohio Burglary was only an ACCA violent felony under the residual clause was not a mere convent argument after *Descamps*, but was indeed a planned national strategic litigation strategy.

The government further claimed the legal landscape changed dramatically in the two years between *Waagner's* pair of 2255 motions, specifically citing *Mathis*, 136, S.Ct. 2243, 2254 (2016). But in *Stitt* the Supreme Court rejected the argument that *Mathis* and *Taylor* had already decided the issue of whether a burglary's statute's coverage of a vehicle designed or adapted for overnight use "takes the statute outside the generic burglary definition." In point of fact, the United States made a strong argument to this point in *Stitt*, where an entire section of the United States' reply brief argued that none of the Supreme Court's prior decisions, including *Mathis*, addressed the issue. According to the government's own brief in *Stitt*, *Taylor* has remained unchanged, thus the legal landscape had not changed between *Waagner1* and *Waagner2*, as the government now argues. The government had every opportunity to argue Ohio burglary generic in *Waagner1*, yet they chose to concede it non-generic.

The district court violate the doctrine of Collateral Estoppel by reversing its earlier holding that Ohio burglary did not meet the definition of generic burglary.

It is important to note that Petitioner's PSR listed two additional priors not at issue here: A 1975 Virginia burglary conviction (PSR ¶ 45) and a 1979 Georgia burglary conviction (PSR ¶ 50). In its September 12, 2019 denial of the case now before the Court, the district court specifically held Petitioner's burglary convictions in Virginia and Georgia were not generic burglaries, and neither qualified as ACCA predicate violent felonies.

REASONS FOR GRANTING THE WRIT

The Armed Career Criminal Act's dependence on interpretation of various state laws make the Act difficult to understand. Federal defendants, defense lawyers, district courts, even Circuit Courts often disagree on what is or is not an ACCA predicate violent felony. The Supreme Court has issued numerous rulings to clarify ACCA, yet challenges to the Act pollute every federal court in the country.

The writ of certiorari before the Court is not based on complex issues, but rather on errors in the application of judicial law handed down by this Court. All three issues herein represent prime examples of the Court's ACCA holding being misapplied by lower courts, giving this Writ an import beyond Petitioner.

ISSUE ONE threatens the central theme of ACCA doctrine: The "Statute of Conviction," is the cornerstone of an ACCA predicate offense. Few ACCA issues are as clear: It is the statute of conviction, not the indictment. In this case, the district court, the government and the Seventh Circuit Court of Appeals ignored this basic tenant of judicial law. The record is clear and it is uncontested that Petitioner's 1991 conviction was under Ohio's Attempt statute. A statute that can never be considered either a crime of violence or a violent felony. Yet Petitioner has an ACCA enhanced sentence of 27 years based on the statute he was indicted under, while the statute of conviction is ignored. Not hearing this issue would allow an injustice to stand, but it would also embolden a continued slide away from basic ACCA doctrine: The statute of conviction is weighed and measured, not a lesser statute used in the indictment. If the statute of conviction is found wanting, then the inquiry ends there.

ISSUE TWO is the result of an error made by the Sixth and Seventh Circuits in applying this Court's narrow exception in *Stitt*. In *Stitt*, the Court held a burglary statute can be an ACCA

generic burglary when the statute includes burglary of a structure or vehicle "that has been adapted or is customarily used for overnight accommodation." Relying on *Stitt*, the Sixth and Seventh Circuits have held that Ohio burglary now qualifies as generic burglary (*Greer*, 938 F.3d 766 (6th Cir. 2019) and *Waagner*, No. 19-3008 (7th Cir. 2020). Both Circuits leaned heavily on *Stitt*, yet ignored the fact that the Ohio burglary statute considers vehicles of various types to be structures without the *Stitt* requirement of being "adapted or customarily used for overnight accommodation."

The Court should grant this Writ of Certiorari to clarify the matter as lower court misunderstanding of ACCA jurisprudence will cause unnecessarily loaded dockets. Judicial expedience alone suggest this matter should be resolved in a timely fashion.

ISSUE THREE brings the doctrine of collateral estoppel into the ACCA landscape. The government and the district court to reversed positions: same Petitioner, same case, same prior. Collateral estoppel, as exemplified in this case, is indicative of uncertainty within ACCA doctrine. The issue presented here, Ohio Burglary's rapid evolution from "only a violent crime under the residual clause" pre-*Johnson*, to "a violent felony under the enumerated clause" post-*Johnson*, has not occurred in a vacuum. As outlined herein, the Petitioner experienced collateral estoppel in the Seventh Circuit, but also similar circumstances in the Sixth Circuit. Ironically, Petitioner was granted relief with the same issue in the Third Circuit, and has been re-sentenced without an ACCA enhancement. (*Waagner v. United States*, No. 1:010-cr-191, M.D. PA. Dec. 19, 2016. Few cases make a better example of unequally applied jurisprudence, so this case would serve as an instructive example.

CONCLUSION

Addressed herein are ACCA sentencing errors of accepted Supreme Court precedence.

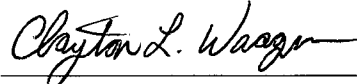
Issue One sees the district court and the Seventh Circuit ignore the most basic ACCA tenant: The district court must weigh and measure the statute of conviction. It is uncontested that the statute of conviction is Ohio's Attempt statute, which can never serve as an ACCA predicate offense. Yet the district court circumvented the statute of conviction in favor of the more useful (to the government) statute listed on the indictment. This error should never be allowed to stand.

Issue Two follows the Court's narrow holding in *Stitt*. The *Stitt* Court issued a subtle change in longstanding Court precedence regarding a state statutes' definition of vehicles and "other structures" as "designed or adapted, or is customarily used for overnight accommodation." That *Stitt* is narrow seems well founded, based on the language in *Stitt*, but also by the Court's guidance that *Stitt* did not reverse *Taylor* or *Mathis*. If *Stitt* is indeed a narrow holding, then both the Sixth and Seventh Circuits error in overturning thirty years of precedence. If the Sixth and Seventh Circuits can hold that *Stitt* made Ohio burglary an ACCA generic burglary, then more Circuits will follow as additional state burglary statutes erroneously become generic.

Collateral estoppel seems insignificant compared to the scope of the above. Yet the collateral estoppel presented here is so egregious it challenges the fundamental balance of fairness in a criminal case. It will not equal the national impact of the above issues, however, it would be equally wrong to allow this judicial double-dealing to stand.

For the foregoing reasons, Petitioner respectfully request this Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

 11-11-2020

Clayton L. Waagner