No. _____

IN THE
Supreme Court of the United States

RICKIE MARKIECE ATKINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether North Carolina breaking or entering is categorically broader than generic burglary and cannot be a violent felony under the Armed Career Criminal Act because entry is not a required element of the offense.

II. Whether North Carolina breaking or entering is categorically broader than generic burglary and cannot be a felony under the Armed Career Criminal Act because it can be committed by breaking into vehicles and structures that house only property and no people and does not present the necessary risk of violent confrontation.

III. Whether, in light of this Court's decision in *Wooden* v. *United States*, Mr. Atkinson's Fifth and Sixth Amendment rights were violated when he was sentenced as an Armed Career Criminal without the Government alleging the different-occasions element in an indictment or acquiring a knowing and voluntary guilty plea that it could have proven that element to a jury beyond a reasonable doubt.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit: *United States* v. *Atkinson*, No. 17-4589 (judgment entered Sept. 26, 2022)

United States District Court for the Eastern District of North Carolina: *United States* v. *Atkinson*, No. 5:16-CR-250-D-1 (judgment entered Sept. 15, 2017)

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Petitioner Rickie Markiece Atkinson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's opinion is unreported, but is available at 2022 WL 4463152 (4th Cir. 2022). Pet. App. 1a-6a. The District Court's judgment is available at Pet. App. 14a-20a.

JURISDICTION

The District Court entered final judgment on September 15, 2017. Pet. App. 14a-20a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on September 26, 2022. Pet. App. 1a-6a. On December 23, 2022, the Chief Justice extended the time for filing a petition for writ of certiorari to and including February 23, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

North Carolina General Statutes §14-54 provides, in relevant part:

> (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.
>
> ***
>
> (b) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

18 U.S.C. § 922(g) provides, in relevant part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year.
>
> *** to ship or transport in interstate or foreign commerce, or possess in and affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(a)(2) provides:

> [T]he term "violent felony" means any crime punishable by imprisonment for a term exceeding one year * * * 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. § 924(e)(1) provides:

> 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).

INTRODUCTION

For a single felon-in-possession offense, which normally carried a maximum penalty of ten years of imprisonment[1], Mr. Atkinson was sentenced to *twenty* years. That sentence was possible only because the District Court sentenced him as an armed career criminal, increasing the applicable penalty to fifteen years to life imprisonment. The Fourth Circuit affirmed that designation, defying this Court's decisions in *Taylor* v. *United States*, *Mathis* v. *United States*, and *United States* v. *Stitt*, and breaking from authoritative decisions of other federal courts of appeals. What is more, the Fourth Circuit did not have the opportunity to address this

[1] At the time of the offense and at sentencing, felon-in-possession offenses were subject to a statutory maximum sentence of ten years, absent an Armed Career Criminal designation. 18 U.S.C. § 924(a)(2) (2018). Since then, Congress has increased the maximum penalty to fifteen years. 18 U.S.C. § 924(a)(8) (2022).

Court's decision in *Wooden* v. *United States*, which makes plain that the "different occasions" element of the Armed Career Criminal Act must be alleged in the indictment and either proven to a jury or admitted as part of a knowing and voluntary guilty plea.

Mr. Atkinson is not an armed career criminal for three independent reasons. *First*, North Carolina breaking or entering is broader than generic burglary because it does not require an unprivileged entry. In *Taylor*, this Court explained that an "unlawful or unprivileged entry" is a required element of generic burglary. 495 U.S. 575, 598 (1990). But in North Carolina, breaking without an unprivileged entry is enough. The Fourth Circuit's decision conflicts with *Taylor* and the decisions of other federal courts of appeals post-*Taylor* holding that statutes that criminalize breaking without entry cannot be generic burglaries under ACCA.

Second, North Carolina breaking or entering is broader than generic burglary because it includes breaking into any vehicle or structure "designed to house or secure within it any activity or property," N.C. Gen. Stat. § 14-54(a)—including a storage trailer for tools and equipment, a trailer used to transport musical equipment, and a travel trailer temporarily made "an area of repose." These locations do not present the risk of "violent confrontation" that are the touchstone of generic burglary. *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018) (quoting *Taylor*, 495 U.S. at 598); *id.* at 407 (citing *Mathis* v. *United States*, 579 U.S. 500, 507 (2016)). The Fourth Circuit's decision conflicts with *Taylor*, *Stitt* and *Mathis*.

Finally, Mr. Atkinson is not an armed career criminal for a third, more fundamental reason, namely that the Government did not include in its indictment an allegation that Mr. Atkinson satisfied a necessary element of the Armed Career Criminal Act—that his qualifying felony convictions occurred on "occasions different" from one another. Neither did Mr. Atkinson plead guilty to that necessary element. These omissions violated Mr. Atkinson's Fifth and Sixth Amendment rights and conflict with this Court's decision in *Wooden*, 142 S. Ct. 1063 (2022).

This Court should grant certiorari because the Fourth Circuit's breaking-or-entering holding conflicts with this Court's decisions in *Taylor*, *Mathis*, and *Stitt* and with the authoritative decisions of other federal courts of appeals addressing statutes that criminalize breaking without entry.

These issues are also extraordinarily important: ACCA has drastic consequences for criminal defendants. It dramatically increases the statutory penalties from a *statutory maximum* of ten or fifteen years to a *statutory minimum* of fifteen years. 18 U.S.C. § 924(e)(1). In Mr. Atkinson's case, his twenty-year sentence would have been capped at *half* that term if he had not been deemed an armed career criminal.

The issues are also frequently recurring. In recent years, the Fourth Circuit has decided more than thirty cases raising objections to North Carolina breaking or entering as an ACCA predicate. And many of the courts of appeals have already denied post-*Wooden* challenges to ACCA designations based on pre-*Wooden* circuit

precedent they claim to be bound by. Further percolation is unlikely to resolve these issues. The time for the Court's intervention is now.

The petition should be granted.

STATEMENT

1. The Armed Career Criminal Act imposes a dramatically increased punishment for persons convicted of being a felon in possession of a firearm if they have three or more previous convictions for "violent felonies." 18 U.S.C. § 924(e). Although, at the time of Mr. Atkinson's offense and sentencing, violations of 18 U.S.C. § 922(g) were normally subject to a statutory maximum penalty of ten years of imprisonment, ACCA provides that armed career criminals must be sentenced to a term of *at least* fifteen years (up to life), a longer term of supervised release, and a significantly increased offense level and criminal history category if they have the requisite prior convictions. Those convictions include any crime "punishable by imprisonment for a term exceeding one year" 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.

18 U.S.C. §924(e)(2)(B). These provisions are known as the "force clause," the "enumerated-offense clause," and the "residual clause." This Court struck down the residual clause as unconstitutionally vague in *Johnson* v. *United States*, 576 U.S. 591, 606 (2015).

2. In October 2016, Rickie Atkinson was charged in a three-count indictment. Pet. App. 109a-111a. Relevant to this petition, he was charged in count one with being a felon in possession of a firearm and ammunition in September 2015. Pet. App. 109a. The indictment alleged that, at the time of the offense, Mr. Atkinson had "at least three previous convictions * * * referred to in * * * [18 U.S.C. § 922(g)(1)], as defined in [18 U.S.C. § 924(e)(2)]." But it made no fact-specific allegation that those prior convictions were for offenses that occurred on "occasions different from one another."

3. In February 2017, Rickie Atkinson pleaded guilty, pursuant to a written plea agreement, to count one. That plea agreement referenced the penalties applicable if Mr. Atkinson was or was not deemed to be an armed career criminal, but it reflected no agreement about whether he qualified under the statute's terms. It reserved his right "to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing and/or from a sentence that exceeds 120 months' imprisonment." CAJA142[2]. At the plea hearing, the District Court also referenced the applicable penalties with or without the designation, but did not ask Mr. Atkinson to admit that his prior felony convictions were for offenses that occurred on "occasions different from one another." Pet. App. 81a-108a.

4. The presentence report concluded that Mr. Atkinson was an armed career criminal because of four prior convictions for North Carolina breaking or entering. CAJA166. North Carolina defines "breaking or entering" as "any person who

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[2] CAJA refers to the joint appendix filed in the Court of Appeals.

breaks or enters any building with intent to commit any felony or larceny therein." N.C. Gen. Stat. § 14-54(a). It defines "building" as "any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." *Id.* § 14-54(c).

Mr. Atkinson objected to his armed career criminal designation, but the District Court overruled the objection, calculating the advisory guideline range to be 180 to 188 months. The court upwardly departed under U.S.S.G. § 4A1.3(a) to an advisory guideline range of 210 to 262 months. The District Court sentenced Mr. Atkinson to 240 months of imprisonment, to be followed by a five-year term of supervised release. Pet. App. 14a-20a.

5. Mr. Atkinson appealed. After briefing was completed, this Court granted certiorari in a pair of cases, *United States* v. *Sims* and *United States* v. *Stitt*, to consider the definition of generic burglary under the Armed Career Criminal Act. Mr. Atkinson's case was held in abeyance.

6. This Court issued its decision in *Sims* and *Stitt* in December 2018, holding that generic burglary "includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *United States* v. *Stitt*, 139 S. Ct. 399, 403 (2018). The Court confirmed that each statute must be evaluated on its own merits and, if its elements are broader than those of generic burglary, it does not qualify as generic burglary under the Act. *Id.* at 403-404. The Court reaffirmed its holding in *Taylor*, 495 U.S. at 599, that Missouri breaking and

entering falls outside the Act because it includes breaking and entering into "*any* boat or vessel or railroad care" and thus includes "ordinary boats and vessels often at sea (and railroad cars often filled with cargo, not people)." *Id.* at 407. And it reaffirmed its holding in *Mathis*, 579 U.S. at 520, that an Iowa statute including breaking into vehicles or similar structures used "for the storage or safekeeping of anything of value" was broader than generic burglary. *Id.* The Court vacated and remanded Sims's sentence to explore his argument that Arkansas residential burglary is overbroad because it covers burglary of a vehicle where a homeless person occasionally sleeps. *Stitt*, 139 S. Ct. at 407-408.

7. The panel in Mr. Atkinson's case issued an unpublished per curiam opinion affirming his sentence without referencing *Taylor*, *Mathis*, *Sims*, or *Stitt* at all. Pet. App. 1a-6a. It rejected Mr. Atkinson's argument without explanation, holding only that "North Carolina Breaking and Entering's 'building' element sweeps no broader than generic burglary's 'building' element" and that Mr. Atkinson was properly designated as an armed career criminal. Pet. App. 8a-13a.

Mr. Atkinson filed a petition for rehearing and rehearing en banc, explaining the panel decision's conflict with *Taylor* and *Mathis*, but the court declined to order rehearing. Pet. App. 80a.

8. After the Fourth Circuit denied Mr. Atkinson's petition for rehearing, this Court decided *Rehaif* v. *United States*, 139 S. Ct. 2191 (June 21, 2019), reversing longstanding circuit precedent and explaining that 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." 139 S. Ct. at 2194 (emphasis added). Mr. Atkinson petitioned for certiorari, arguing that he was not an armed career criminal under *Taylor*, *Mathis*, and *Stitt*, and also that the Fourth Circuit should have the opportunity to reconsider the propriety of his conviction in light of *Rehaif*. This Court granted certiorari, vacated the Fourth Circuit's judgment, and remanded to that court for reconsideration. Pet. App. 7a.

9. On remand, the case was held in abeyance pending a decision in *Greer* v. *United States*, 141 S. Ct. 2090 (2021). In *Greer*, this Court reversed the Fourth Circuit and held that *Rehaif* errors are not structural and even plain *Rehaif* errors must be accompanied by a showing that "if the District Court had correctly advised him of the *mens rea* element of the offense, there is a 'reasonable probability' that he would not have pled guilty." *Id.* at 2097.

10. In light of this decision, Mr. Atkinson filed a petition for initial hearing en banc, acknowledging that *Greer* foreclosed relief on his *Rehaif* claim and reasserting his argument that North Carolina breaking or entering is not a violent felony under ACCA. The Fourth Circuit declined to hear the case en banc and issued an opinion relying on its pre-*Mathis* and *Stitt* decision in *United States* v. *Mungro*, 754 F.3d 267 (4th Cir. 2014), to hold that North Carolina breaking or entering is a violent felony and Mr. Atkinson's armed career criminal designation was therefore appropriate. Pet. App. 2a-4a. The Fourth Circuit panel also affirmed the District Court's upward departure. Pet. App. 4a-6a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION CONTRAVENES *TAYLOR*, *MATHIS*, AND *STITT*

To determine whether a prior conviction is a violent felony under the ACCA, this Court applies the categorical approach. *Quarles* v. *United States*, 139 S. Ct. 1872 (2019). Under the categorical approach, the court "focus[es] solely on whether the elements of the crime of conviction sufficiently match the elements of generic burglary, while ignoring the particular facts of the case." *Mathis*, 59 U.S. at 504; *see also Descamps* v. *United States*, 570 U.S. 254, 265 (2013) (applying the categorical approach to hold that state offense is overbroad and noting that defendant's actual conduct "makes no difference"). A prior state conviction is a proper ACCA predicate only if it has the same elements, or is defined more narrowly than, the generic federal crime. *Descamps*, 570 U.S. at 261. If, by contrast, the prior offense "sweeps more broadly than the generic crime," *id.*, the prior offense cannot serve as a predicate "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits within the generic offense's boundaries." *Mathis*, 579 U.S. at 504.

A. The "entry" element of North Carolina breaking or entering is overbroad because an unprivileged entry is not required.

North Carolina breaking or entering is broader than generic burglary because it can be completed without entry. In *Taylor*, this Court defined generic burglary as having "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598; *see*

Mathis, 579 U.S. at 504 (generic burglary consists of "unlawful or unprivileged entry into * * * a building or other structure, with intent to commit a crime.") (quoting *Taylor*, 495 U.S. at 598); *Shepard* v. *United States*, 544 U.S. 13, 17 (2005) (same); *James* v. *United States*, 550 U.S. 192, 197 (2007) (same); *Begay* v. *United States*, 553 U.S. 137, 145 (2008) (same); *Stitt*, 139 S. Ct. at 405 (same); *Quarles*, 139 S. Ct. at 1875, 1877 (same). If a statute permits conviction without entry, it cannot be a match for generic burglary. *See Descamps*, 570 U.S. at 277 ("Because generic unlawful entry is not an element, or an alternative element, of [California Penal Code Ann.] § 459, a conviction under that statute is never for generic burglary.").

But North Carolina breaking or entering can be completed by breaking alone. The plain text of Section 14-54(a) permits conviction on a finding of *either* breaking or entry. The North Carolina Supreme Court confirms that understanding: "[B]y the disjunctive language of [14-54(a)], the state meets its burden by offering substantial evidence that defendant either 'broke' or 'entered' the building with the requisite unlawful intent." *State* v. *Myrick*, 291 S.E.2d 577, 579 (N.C. 1982); *see also State* v. *Jones*, 157 S.E.2d 610, 611 (N.C. 1967) (per curiam) (breaking a window with intent to commit a felony "therein completes the offense even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building"); *see also State* v. *Watkins*, 720 S.E.2d 844, 850 (N.C. Ct. App. 2012) (vacating first-degree burglary conviction and entering judgment on the lesser included offense of breaking or entering because the State presented evidence of breaking but not of entry); *State* v. *Lucas*, 758 S.E.2d 672, 678 (N.C. Ct. App. 2014)

("Although * * * the State failed to prove that either Defendant actually entered the home * * * the entry of judgment on felonious breaking or entering is appropriate.").

Although North Carolina's scheme is rare, it is not unique. Arkansas and Iowa also have statutes whose text can be satisfied by proof of breaking alone. *See* Ark. Stat. Ann. § 5-39-202(a) ("A person commits the offense of breaking or entering if for the purpose of committing a theft or felony he or she breaks or enters into any [enumerated structure or vehicle]."); Iowa Code Ann. § 713.1 ("[O]r any person having such intent [to commit a felony, assault, or theft therein] who breaks an occupied structure, commits burglary."). These statutes have been deemed categorically broader than burglary, albeit on other grounds. *See Mathis*, 579 U.S. at 520 ("Because the elements of Iowa's burglary law are broader than those of generic burglary [by covering vehicles in addition to structures], Mathis's convictions under that law cannot give rise to an ACCA sentence."); *United States* v. *Livingston*, 442 F.3d 1082, 1087 (8th Cir. 2006) ("We hold that breaking or entering a vehicle for purposes of committing a theft under Arkansas law [§ 5-39-202]) is not a violent felony for purposes of the ACCA.").

Courts considering attempted burglary statutes provide more guidance. Breaking, but not entering, is typically categorized as attempted burglary or attempted breaking and entering. *See*, *e.g.*, *Commonwealth* v. *Cotto*, 752 N.E.2d 768, 772 (Mass App. Ct. 2001) ("[A]ssume in the case at bar that the defendant had broken the window, but upon seeing [a witness], dropped the infernal device and ran. In this scenario, he may be found guilty of attempted breaking and entering as

well as attempted arson, but not of arson or breaking and entering."). Indeed the North Carolina Supreme Court has described breaking or entering in terms strikingly similar to attempt, finding that when defendants "opened the door[,] although [they] had not entered" the building, felonious breaking or entering "was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence." *State* v. *Nichols*, 150 S.E.2d 21, 22 (N.C. 1996).

Attempted burglary is not a violent felony under ACCA. This Court, in *James*, 550 U.S. 192, explained that Florida attempted burglary "is not 'burglary' because it does not meet the definition of burglary under ACCA that this Court set forth in *Taylor* v. *United States*." *James*, 550 U.S. at 197[3]. This was so because Florida attempted burglary could be satisfied when a defendant committed an act toward commission of burglary but fell short of "entering or remaining in a structure or conveyance with the intent to commit an offense therein." *Id.*; Fla. Stat. §§ 810.02(1), 777.04(1); *see James*, 550 U.S. at 227 (Scalia, J., dissenting) ("the full extent of the risk that burglary poses—the entry into the home that makes burglary such a threat to the physical safety of its victim—is necessarily absent in attempted burglary, however 'attempt' is defined").

The Second, Fourth, Fifth, Seventh, Eighth, and Tenth Circuits, analyzing attempted burglary statutes, have held those statutes similarly do not qualify as

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[3] Although this Court ultimately held that the offense qualified as a violent felony under the residual clause, that holding was abrogated by *Johnson*, 576 U.S. at 606.

enumerated burglary. *See United States* v. *Evans*, 924 F.3d 21, 24 (2d Cir. 2019) (New York attempted burglary "qualified as a violent felony only under ACCA's voided residual clause"); *United States* v. *Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (New Jersey's attempted burglary statute "does not contain the elements required for 'burglary' as that term is used in 924(e)"); *United States* v. *Martinez*, 954 F.2d 1050, 1053 (5th Cir. 1992) (Texas's attempted burglary statute "does not require that the offender enter (or remain in) a building or structure" and therefore cannot qualify as enumerated burglary); *Van Cannon* v. *United States*, 890 F.3d 656, 658 (7th Cir. 2018) ("Iowa attempted burglary was a residual-clause offense and no longer counted toward Van Cannon's ACCA total" following *Johnson*); *United States* v. *Smith*, 645 F.3d 998, 1003 (8th Cir. 2011) (Minnesota attempted burglary could only qualify as a violent felony under the residual clause because "[a]ttempted burglary is not an enumerated offense"); *United States* v. *Strahl*, 958 F.2d 980 (10th Cir. 1992) (Utah's attempted burglary statute did not qualify as attempted burglary because the Tenth Circuit could "not conclude that Congress intended implicitly to include attempted burglary as a violent offense when it specified burglary as a violent felony under § 924(e)(2)(B)(ii)").

This Court and other federal courts of appeals confirm that breaking without entry is not a qualifying violent felony under ACCA. Certiorari is warranted to resolve this conflict.

B. The "building" element of North Carolina breaking or entering is overbroad because it reaches vehicles and structures that house only property and no people and thus does not present the necessary risk of violent confrontation to qualify as generic "burglary."

The touchstone of generic burglary's locational element is whether committing the offense in a particular vehicle or structure "present[s] a serious risk of violence" to another person. *Stitt*, 139 S. Ct. at 407; *see Quarles*, 139 S. Ct. at 1879 ("Congress 'singled out burglary' because of its 'inherent potential for harm to persons.' ") (quoting *Taylor*, 495 U.S. at 588); *James*, 550 U.S. at 203, *overruled by Johnson*, 576 U.S. 591 ("'The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party—whether an occupant, a police officer, or a bystander—who comes to investigate."); *Taylor*, 495 U.S. at 588 ("The fact that an offender enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.").

Illustrating this focus on the risk of "violent confrontation," the Missouri statute at issue in *Taylor* was "beyond the scope" of ACCA because the law "criminalized breaking and entering '*any* boat or vessel, or railroad car' " and thus included "ordinary boats and vessels, often at sea (and railroad cars often filled with cargo, not people)." *Stitt*, 139 S. Ct. at 407 (explaining that the burglary statute in *Taylor* was broader than generic burglary because it was not limited to "circumstances where burglary is likely to present a serious risk of violence"). The Iowa burglary statute in *Mathis* was similarly overbroad because it covered "ordinary vehicles"

and other structures that were used "for the storage or safekeeping of anything of value." *Id.* Unlike these two statutes, the one at issue in *Stitt* was no broader than generic burglary because it was limited to burglaries of vehicles or other structures "customarily used or adapted for overnight accommodation" and was therefore "more clearly focus[ed] upon circumstances where burglary is likely to present a serious risk of violence." *Id.*

North Carolina's breaking or entering statute suffers from the very same flaws that rendered those in *Taylor* and *Mathis* fatally overbroad. Like the Missouri breaking and entering statute in *Taylor*, North Carolina's covers "*any* dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and *any* other structure designed to house or secure within it any activity or property," N.C. Gen. Stat. § 14-54(c) (emphasis added), and "nowhere restrict[s] its coverage * * * [only] to vehicles or structures customarily used or adapted for overnight accommodations." *See Stitt*, 139 S. Ct. at 407 (noting that the Missouri statute's use of the word 'any' " rendered it broader than generic burglary). And just like the Iowa statute in *Mathis*, which was overbroad for encompassing structures and vehicles used "for the storage or safekeeping of anything of value," *id.*, North Carolina's breaking or entering statute expressly covers vehicles or structures that are "designed to house or secure within [them] any activity or *property*," N.C. Gen. Stat. § 14-54(c) (emphasis added); *see State* v. *Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982) (breaking into a storage trailer for tools and equipment on a construction site); *State* v. *Batts*, 617 S.E.2d 724, at *2-*3

(N.C. Ct. App. 2005) (breaking into a trailer used to transport musical equipment); *State* v. *Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993) (breaking into a travel trailer temporarily made "an area of repose").

Several Circuits have faithfully applied *Stitt*, *Mathis*, and *Taylor* to conclude that statutes that allow for conviction based on burglary of structures and vehicles that house only property and no people are categorically broader than generic burglary and are not violent felonies. *See United States* v. *Jones*, 951 F.3d 1138 (9th Cir. 2019) (focusing on risk of violent confrontation post-*Stitt*); *Greer* v. *United States*, 938 F.3d 766 (6th Cir. 2019) (same); *United States* v. *Sims*, 933 F.3d 1009 (8th Cir. 2019) (same); *United States* v. *Montgomery*, 974 F.3d 587 (5th Cir. 2020) (same).

II. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

As explained above, the consequences of an ACCA designation are enormous: A fifteen-year mandatory minimum applies to a crime that Congress otherwise caps at ten (or fifteen) years, a longer term of supervised release is authorized, and both the offense level and criminal history category under the Guidelines increase. Mr. Atkinson's is a case in point: His sentence is twice as long as it otherwise would have been.

What is more, this issue recurs often. The Fourth Circuit has resolved more than thirty cases presenting the issue since *Mungro* was decided[4].

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[4] *United States* v. *Demby*, No. 21-4711, 2022 WL 17975014 (4th Cir. 2022); *United States* v. *Hammonds*, No. 21-4316, 2022 WL 16835639 (4th Cir. 2022); *United States* v. *Atkinson*, No. 17-4589, 2022 WL 4463152 (4th Cir. 2022); *United*

This Court's review is needed.

III. THIS CASE IS AN EXCELLENT VEHICLE TO DECIDE THE QUESTION PRESENTED

The issue is squarely presented in this case. If it were not for prior convictions for North Carolina breaking or entering, Mr. Atkinson would not be an armed career criminal and the sentence he received would have been in excess of the statutory maximum sentence and illegal. Mr. Atkinson expressly preserved the right to challenge his sentence in his plea agreement, and the issue has been fully presented to the lower courts in a sentencing memorandum and oral argument in the district court, as well as briefing on the merits and in a petition for initial

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States v. *Holden*, No. 18-4804, 2022 WL 2901729 (4th Cir. 2022); *United States* v. *Mendez*, No. 19-4050, 2022 WL 843900 (4th Cir. 2022); *United States* v. *Enyinnaya*, No. 18-4400, 2022 WL 396020 (4th Cir. 2022); *United States* v. *Molette*, No. 18-4209, 2022 WL 563256 (4th Cir. 2022); *United States* v. *Goins*, No. 21-4686, 2022 WL 1552135 (4th Cir. 2022); *United States* v. *Lowery*, No. 20-4458, 2022 WL 72724 (4th Cir. 2022); *United States* v. *Brooks*, 857 F. App'x 159 (4th Cir. 2021); *United States* v. *Fayson*, 834 F. App'x 48 (4th Cir. 2021); *United States* v. *Dunlow*, 834 F. App'x 47 (4th Cir. 2021); *United States* v. *Simon*, 827 F. App'x 341 (4th Cir. 2020); *United States* v. *Marion*, 821 F. App'x 264 (4th Cir. 2020); *United States* v. *Dodge*, 963 F.3d 379 (4th Cir. 2020); *United States* v. *Davidson*, 802 F. App'x 800 (4th Cir. 2020); *United States* v. *Denton*, 773 F. App'x 134 (4th Cir. 2019); *United States* v. *Joy*, 771 F. App'x 307 (4th Cir. 2019); *United States* v. *Hill*, 771 F. App'x 195 (4th Cir. 2019); *United States* v. *Maham*, 767 F. App'x 532 (4th Cir. 2019); *United States* v. *Ingram*, 758 F. App'x 332 (4th Cir. 2019); *United States* v. *Street*, 756 F. App'x 310 (4th Cir. 2019); *United States* v. *McNatt*, 727 F. App'x 68 (4th Cir. 2018); *United States* v. *Robinson*, 714 F. App'x 275 (4th Cir. 2018), *vacated on other grounds by Robinson* v. *United States*, 140 S. Ct. 129 (2019); *United States* v. *Alexis*, 697 F. App'x 239 (4th Cir. 2017); *United States* v. *Solomon*, 694 F. App'x 186 (4th Cir. 2017); *United States* v. *Beatty*, 702 F. App'x 148 (4th Cir. 2017); *United States* v. *Jones*, 669 F. App'x 110 (4th Cir. 2016); *United States* v. *Thompson*, 615 F. App'x 160 (4th Cir. 2015); *United States* v. *Lockamy*, 613 F. App'x 227 (4th Cir. 2015); *United States* v. *Ingram*, 597 F. App'x 151 (4th Cir. 2015); *In re Whitley*, 577 F. App'x 212 (4th Cir. 2014).

hearing en banc in the court of appeals. The issue is cleanly presented and the Court should grant the petition to set this issue to rights.

IV. IN THE ALTERNATIVE, THE COURT SHOULD GRANT THE PETITION, VACATE THE FOURTH CIRCUIT'S JUDGMENT, AND REMAND FOR RECONSIDERATION IN LIGHT OF *WOODEN* V. *UNITED STATES*

Mr. Atkinson's armed career criminal designation cannot stand for another reason: The Government never alleged in the indictment facts necessary to establish that his qualifying prior felony convictions were for crimes that occurred on occasions different from one another and those facts were never admitted as part of Mr. Atkinson's guilty plea.

Last Term, this Court explained that the Armed Career Criminal Act has "two separate statutory conditions." *Wooden*, 142 S. Ct. at 1070[5]. The Government must first prove that the defendant "has previously been convicted of three violent felonies" and must then prove that "those three felonies were committed on 'occasions different from one another.' " *Id.* (quoting 18 U.S.C. § 924(e)(1)). That second element requires a factfinding inquiry that is "multi-factored in nature" and must consider "a range of circumstances * * * relevant to identifying episodes of criminal activity." *Id.* at 1070-1071. Because this element goes beyond "the simple fact of a prior conviction," *Mathis*, 579 U.S. at 511, the Government must allege the different-occasions element in an indictment and either prove it to the jury beyond a

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[5] *Wooden* was decided the day before Mr. Atkinson's petition for initial hearing en banc was filed; the petition did not address *Wooden* and the panel did not address its impact on Mr. Atkinson's case.

reasonable doubt or secure an admission to it as part of a guilty plea. The Government has conceded as much in its filings before this Court. *See*, *e.g.*, Brief in Opposition, *Reed* v. *United States*, No. 22-336, at 6 (Dec. 12, 2022) ("the government agrees that the different-occasions inquiry requires a finding of fact by a jury or an admission by the defendant"). And it has conceded the issue "is important and frequently recurring and may eventually warrant this Court's review in an appropriate case." *Id.*

In *Wooden*, the Court did not reach this question because the defendant "did not raise it." 142 S. Ct. at 1068 n.3. But Justice Gorsuch explained that the question "simmers beneath the surface" of every ACCA case, leaving "little doubt" that courts will need to address it "soon." *Id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment).

Many have done so. And the courts that have considered the issue identified in *Wooden* have largely confirmed that further percolation is unlikely to be fruitful. The Sixth and Tenth Circuits have published opinions that adhere to prior precedent allowing judicial determination of the different-occasions element. *United States* v. *Williams*, 39 F.4th 342, 351 (6th Cir. 2022); *United States* v. *Reed*, 39 F.4th 1285, 1295-1296 (10th Cir. 2022). The Ninth and Eleventh Circuits have done so in unpublished decisions. *United States* v. *Barrera*, No. 20-10368, 2022 WL 1239052, at *2 (9th Cir. 2022), *petition for certiorari pending*, Supreme Ct. No. __-____ (Feb. 17, 2023); *United States* v. *Haynes*, No. 19-12335, 2022 WL 3643740, at *5 (11th Cir. 2022), *petition for certiorari pending*, Supreme Ct. No. 22-6682. But

the Ninth Circuit has also assumed without holding, in an unpublished decision, that a judge's determination that violent felonies were committed on different occasions was a prejudicial *Apprendi* error. *United States* v. *Man*, No. 21-10241, 2022 WL 17260489, at *1-*2 (9th Cir. 2022).

In *United States* v. *Stowell*, 40 F.4th 882 (2022), a divided Eighth Circuit panel concluded that it was bound by circuit precedent to conclude that the occasions different element involves "recidivism-related facts" that do not need to be submitted to the jury. *Stowell*, 40 F.4th at 885 (quoting *United States* v. *Harris*, 794 F.3d 885, 887 (8th Cir. 2015)). Judge Kelly dissented, explaining that she would have vacated and remanded for resentencing to allow the district court to consider the question in the first instance, with the benefit of *Wooden*. *Id.* at 886-887. The Eighth Circuit has since granted Mr. Stowell's petition for rehearing en banc but has not yet set a date for oral argument. *Stowell*, No. 21-2234, 2022 WL 16942355 (8th Cir. Nov. 15, 2022)

The Fourth Circuit has scheduled oral argument in a case raising this issue for March 10, 2023. *United States* v. *Rico Brown*, 4th Cir. No. 21-4253.

The Court should grant the petition, vacate the Fourth Circuit's decision, and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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