No. _____

IN THE

Supreme Court of the United States

RICKIE MARKIECE ATKINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the Fourth Circuit:

Under 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30 of this Court, petitioner Rickie Markiece Atkinson respectfully requests a sixty-day extension of time, up to and including October 14, 2022, in which to file a petition for a writ of certiorari in this Court. The Fourth Circuit denied Mr. Atkinson's motion for initial hearing en banc, affirming his conviction and sentence, on May 17, 2022. Mr. Atkinson's time to file a petition for certiorari in this Court expires on August 15, 2022. This application is being filed more than ten days before that date. A copy of the Fourth Circuit's unpublished order in this case is attached as Exhibit 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

This case presents two important questions: *First*, whether the Fifth and Sixth Amendments require that the Armed Career Criminal Act's different-

occasions element—which requires a finding that the offenses underlying a defendant's qualifying predicate convictions occurred on three or more separate occasions—" 'must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi* v. *New Jersey*, 530 U.S. 466, 476 (2000) (quoting *Jones* v. *United States*, 526 U.S. 227, 243 (1999)). *And second,* whether North Carolina breaking or entering categorically qualifies as generic burglary for purposes of the Act. If Mr. Atkinson is correct in his answer to either or both questions, he should be resentenced without the armed career criminal designation.

1. In *Wooden* v. *United States*, 142 S. Ct. 1063 (2022), decided just one day before Mr. Atkinson filed his petition for initial hearing en banc, this Court held that the different-occasions inquiry under the Armed Career Criminal Act, 18 U.S.C. § 924(e), is "multi-factored in nature" and that "a range of circumstances may be relevant to identifying episodes of criminal activity." *Id.* at 1070-1071. In so holding, the Court declined to address "whether the Sixth Amendment requires that a jury, rather than a judge, resolve whether prior crimes occurred on a single occasion." *Id.* at 1068 n.3; *see id.* at 1087 n.7 (Gorsuch, J., concurring in the judgment). Just last week, in light of *Wooden,* and after Mr. Atkinson's petition for initial hearing en banc was denied by the Fourth Circuit, the Solicitor General stated the Government's position that a jury must find, or a defendant must admit, that a defendant's ACCA predicates were committed on occasions different from one another. *See* Notice of Supplemental Authority, *United States* v. *Rico Brown,* Fourth Cir. No. 21-4253 (docketed July 26, 2022). Because Mr. Atkinson's

indictment did not allege that his purported ACCA predicates were committed on occasions different from one another, he never made such an admission as part of his guilty plea. An extension of time will help ensure that the petition effectively presents this important issue.

2. This Court has made plain that generic burglary is a violent felony in the Armed Career Criminal Act because it "creates the possibility of a violent confrontation" between the burglar and "an occupant, caretaker, or some other person who comes to investigate." *United States* v. *Stitt*, 139 S. Ct. 399, 406 (2018) (quoting *Taylor* v. *United States*, 495 U.S. 575, 598 (1990)). If this risk is absent from the elements of a state offense, it is not a violent felony. *Id.* at 407 (citing *Mathis* v. *United States*, 136 S. Ct. 2243, 2257 (2016)).

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 in 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).

North Carolina cases confirm this fatal overbreadth. Breaking into a storage trailer for tools and equipment on a construction site qualifies. *State* v. *Bost*, 286 S.E.2d 632, 634 (N.C. Ct. App. 1982). So does breaking into a locked storage facility used to transport musical equipment. *State* v. *Batts*, 617 S.E.2d 724, at *2-*3 (N.C.

Ct. App. 2005). And so does breaking into a travel trailer temporarily made "an area of repose." *State* v. *Taylor*, 428 S.E.2d 273, 274 (N.C. Ct. App. 1993).

3. North Carolina breaking or entering is overbroad for another reason: It requires only a breaking *or* an entry, whereas generic burglary requires both. In *Taylor*, this Court explained that an "unlawful or unprivileged entry" is a required element of generic burglary. 495 U.S. at 598; *see Mathis*, 136 S. Ct. at 2248 (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* v. *United States*, 139 S. Ct. 1872, 1875, 1877 (2019) (same). If a statute permits conviction without entry, it cannot be a match for generic burglary. *See Descamps* v. *United States*, 570 U.S. 254, 277 (2013) ("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.").

Other federal courts of appeals post-*Taylor* have confirmed that statutes that criminalize breaking without entry cannot be generic burglaries under ACCA. *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* v. *United States*, 576 U.S. 591 (2015));

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 enumerated 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)"). The Fourth Circuit's affirmance of Mr. Atkinson's sentence creates a circuit split with these Circuits.

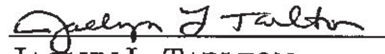
If breaking or entering is not a violent felony, Mr. Atkinson should be resentenced without the armed career criminal designation. An extension of time will help ensure that the petition effectively presents this important issue.

3. In recent weeks, the undersigned contracted and recovered from COVID-19 while pregnant and has filed the opening brief and joint appendix in *United States* v. *Nance*, Fourth Cir. No. 22-4139, and the opening and reply briefs in *United States* v. *Blount*, Fourth Cir. No. 22-6342. She is currently drafting the opening brief and joint appendix in *United States* v. *Tucker*, Fourth Cir. Nos. 19-4805, 20-4537, 21-4166, 22-4025, and 22-4026. Applicant requests this extension of time to permit counsel to research the relevant issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

For these reasons, Mr. Atkinson respectfully requests that an order be entered extending the time to petition for certiorari up to and including October 14, 2022.

This the 3rd day of August, 2022.

Respectfully submitted,



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