CA NO. 13-30252

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JAMES QUINCY WILKINSON, Defendant-Appellant.	DC No. 3:12-cr-05088-BHS-1

Appellant's Reply Brief

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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Reply Brief

I. The Search of Mr. Wilkinson's Girlfriend's Apartment was Unlawful

A. The Officers Did Not Have Probable Cause that Mr. Wilkinson's Girlfriend's Apartment was His Residence

Members of the South Sound Gang Task Force searched a private residence without a warrant, based only on their purported belief that Mr. Wilkinson lived there, even though no officer had ever seen him there despite months of surveillance. In response to Mr. Wilkinson's motion to suppress, the officers claimed that, two months before the search, Mr. Wilkinson's girlfriend had told them Mr. Wilkinson lived with her. In view of the implausibility of the officers' post hoc claim, the government ultimately contends the officers had probable cause "even absent S.C.'s remark." (Answer 41).

That contention is patently wrong:

- Mr. Wilkinson had officially and consistently reported a different residence;
- Community Corrections Officer Steven Pyka (the officer charged with supervising Mr. Wilkinson) had regular contact with Mr. Wilkinson and regularly visited his reported residence, without

suspecting Mr. Wilkinson was not living there;[1]

- Mr. Wilkinson had *never* been seen by any officer at the Tacoma apartment, despite regular surveillance not only by the search officers but also by a Task Force officer who patrolled the area; and

- Although the manager of the Tacoma apartment advised that Mr. Wilkinson had paid his girlfriend's rent when she was late, she never suggested it was Mr. Wilkinson's rent he was paying or that Mr. Wilkinson lived there.

The officers had probable cause, *if at all,* only if their claim regarding S.C.'s statement was true.

But, as set forth in Appellant's Opening Brief, the officers' words and actions–both before and after the search–are wholly inconsistent with this post hoc claim. (AOB 23-28). In response, the government argues only that officers are not required to write down everything any witness tells them. (Answer 41). This is no answer at all. The point is not that officers must document every detail of an

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[1]The government makes much of the fact that the motel manager reported having seen him at only two of the last ten visits. (Answer 6, 29, 37). Actually, after *three* of the last ten visits, CCO Pyka recorded her having seen Mr. Wilkinson earlier that day. (July 28, September 29, October 13). More importantly, what is relevant is not what CCO Pyka wrote down after each visit, but that these visits never caused him to suspect Mr. Wilkinson's whereabouts. *See United States v. Howard*, 447 F.3d 1257, 1267 (9th Cir. 2006) (supervising officer's lack of suspicion significant).

At the beginning of his supervision, CCO Pyka wrote down after each visit that the motel manager reported Mr. Wilkinson would come home each night and leave each morning. (February 24, March 17, March 31, April 14, May 19). CCO Pyka's failure to continue writing this down could have been an indication that he stopped recording this information or that he stopped asking for it. Had the Task Force officers wished to confirm, they could have spoken to CCO Pyka or the motel manager themselves. Or, they could have surveilled the motel to see if Mr. Wilkinson came home at night. Having done none of these things, they were not free to interpret CCO Pyka's notes to create suspicion where Pyka had none.

investigation, but that, when setting forth the basis for a warrantless search of a residence, officers do not leave out the most probative piece of information they have. In both his police report and his criminal complaint, CCS Brady reported who lived in that apartment. In each instance, what he reported was that S.C. lived there: "RO had information that Wilkinson fiancée, S.C., was actually living in the apartment that was rented by Brown" (ER 123); "Wilkinson had a fiancee, S.C., who was known to live in unit 2-102 of an apartment" (ER 58). If the officers had reliable information that Mr. Wilkinson lived there, these reports would surely have included it.

Moreover, even crediting the officers' claim, the totality of the circumstances did not support probable cause Mr. Wilkinson was living at the apartment when the search was conducted more than two months later. The undisputed fact is that no officer ever saw Mr. Wilkinson at S.C.'s apartment at any time–before or after S.C.'s alleged statement. In *Howard*, this Court discounted both the officer's sighting of the supervisee's car at the apartment at 5:00 a.m. a month and a half earlier, and a neighbor's report that she had seen him there at least eighty to ninety percent of the time right before the search. *Howard*, 447 F.3d at 1259, 1262. The earlier sighting was too early to establish probable cause and the neighbor's report was not credible in light of the fact that the officers had not seen him there at all. *Id.* at 1267. Similarly, here, S.C.'s statement cannot outweigh the substantial evidence to the contrary.

B. The Argument that Mr. Wilkinson Had Multiple Residences Does not Justify the Search

Citing cases involving *Payton* entries, the government argues next that it is irrelevant that Mr. Wilkinson was still living at his reported residence in Auburn because he could have been living in Tacoma, too. (Answer 32, 33-35). But the

search in this case was not a *Payton* entry authorized by an arrest warrant. It was authorized, if at all, by Mr. Wilkinson's search condition, which authorized warrantless searches only of his residence, not his residence plus any other location investigating officers believed he might be staying. Further, the officers here did not profess a belief that Mr. Wilkinson had multiple residences, but rather that his reported residence was a sham. In any event, the evidence did not establish the Tacoma apartment was Mr. Wilkinson's second residence.

1. Mr. Wilkinson's Search Condition Did Not Authorize Searches of Any Residence where Mr. Wilkinson Stayed

Warrantless searches based on search conditions are governed by those conditions; they are constitutional because the supervisee has notice of and has agreed to the terms of the condition. *Samson v. California*, 547 U.S. 843, 852 (2006); *United States v. Knights*, 534 U.S. 112, 119-20 (2001). "*Samson* and *Knights* stand for the principle that under parole conditions a parolee has notice of and agrees to, officers may conduct a warrantless, suspicionless search of a parolee's person or residence." *United States v. Lopez*, 474 F.3d 1208, 1214 (9th Cir. 2007). Although a supervisee has diminished Fourth Amendment protections against searches performed pursuant to "the plain terms of the parole search condition," this diminution does not extend "to any and all searches and seizures of a parolee's property or places associated with the parolee, whether covered by the parole condition or not." *Grandberry*, 730 F.3d at 975 (citation omitted).

Mr. Wilkinson's search condition authorized the search of his "person, residence, automobile, or other personal property." (ER 75). It did not authorize the search of multiple residences on the theory that he might be staying in any one of them. Like this Court, the Washington Supreme Court allows searches pursuant to DOC search conditions only when officers have probable cause to believe that

the probationer lives at the residence they seek to search. *State v. Winterstein*, 220 P.3d 1226, 1230 (Wash. 2009). In *Winterstein*, a DOC probation officer searched the reported residence of one of his supervisees. Prior to the search, he announced his presence and was invited into the home. Once inside, he was told that the probationer was not there, but that he still lived there. The search uncovered contraband and the probationer was charged and convicted. After trial, defense counsel learned that, three weeks before the search, the probationer had reported an unauthorized change of address to a mobile home on the same property. The defendant filed a post-conviction suppression motion. The trial court denied the motion holding the unauthorized change of address was a ruse. On appeal, the Washington Supreme Court remanded for a determination whether the officers had probable cause to believe that the probationer still lived in the home. *Id.* at 631. At no point does the court suggest the search would have been authorized if the home searched was, along with the mobile home on the same property, one of the probationer's multiple residences.

Nor does *Case v. Kitsap Co. Sheriff's Dept.*, 249 F.3d 921, 931 (9th Cir. 2001), hold that a search condition authorizing the search of a supervisee's "residence" actually authorizes the search of multiple residences. (Answer 32, 33). *Case* involved neither a search condition nor multiple residences. Rather, *Case* involved the execution of an arrest warrant, pursuant to *Payton v. New York*, 445 U.S. 573 (1980), at the only residence Case acknowledged. *Case*, 249 F.3d at 924, 930-31. In *Payton*, the United States Supreme Court held that an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter the suspect's home if there is reason to believe he is there: "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to

open his doors to the officers of the law." *Payton*, 445 U.S. at 602-03.

This case does not involve an entry into a residence to execute an arrest warrant. Here, there was no "interpos[ition of] the magistrate's determination of probable cause between the zealous officer and the citizen." *Payton*, 445 U.S. at 602. There was only a search condition authorizing the search of Mr. Wilkinson's "residence." This Court has never held that such a condition would authorize the search of multiple residences. To the contrary, this Court has repeatedly identified as key to the constitutionality of the search of an unreported residence confirmation that the supervisee does not live at his reported residence: "In more than thirty years of assessing whether officers had probable cause to believe that a parolee or probationer lived at a searched residence, we have never found probable cause where, as here, the parolee officially and consistently reported a residential address other than the one searched, unless there was an affirmative and substantial basis for concluding that he did not live there." *Grandberry*, 730 F.3d at 977. Because there was no basis to conclude Mr. Wilkinson did not live as reported, the search was unlawful.

2. The Officers Never Claimed Mr. Wilkinson Lived in Multiple Residences

Further, even if the search condition authorized warrantless searches of multiple residences, the officers here never claimed Mr. Wilkinson had multiple residences. In *Grandberry*, this Court rejected the government's argument that the search was justified despite the officers' paltry effort to determine whether the parolee lived at his reported residence because "the Officers never claimed that they believed he had multiple residences, only that his reported address was likely a 'sham one, listed to divert attention from his illegal activities.'" 730 F.3d at 978 n. 9. Here, too, the officers never claimed they believed Mr. Wilkinson had two

residences. Rather, CCS Brady explained that "people that are on probation often do this, they often use a residence because they know that residence is going to be searched. So they give a false residence." (ER 152). In other words, CCS Brady never tried to determine whether Mr. Wilkinson lived in the motel, because he believed the motel was a false residence. "[T]he Officers' paltry effort to determine whether [Mr. Wilkinson] lived at his reported address weighs against a determination the Officers reasonably believed he did not." *Grandberry*, 730 F.3d at 978 n.9.

3. There Was Not Probable Cause to Believe The Tacoma Apartment Was One of Mr. Wilkinson's Residences

In any event, the evidence did not support probable cause that Mr. Wilkinson had multiple residences. He officially and consistently reported one residence. The manager there reported he came home each night and left in the morning. Whenever CCO Pyka would leave his card there, Mr. Wilkinson would call as directed. Despite a concerted effort by the SSGTF to locate Mr. Wilkinson at the Tacoma apartment, no officer ever saw him there. The Tacoma apartment manager did not report that Mr. Wilkinson lived there. He did not have a key. Given this Court's stringent standards, these facts "simply do not track the exacting fact patterns" this Court has previously approved. *Howard*, 447 F.3d at 1267.

The government quotes the portion of *Case* that notes, in the context of a *Payton* search, that "when an individual 'possesses common authority over, or some significant relationship to, the . . . residence, that dwelling can certainly be considered . . . "home" for Fourth Amendment purposes, even if . . . [the individual] concurrently maintains a residence elsewhere as well.'" (Answer 33 (quoting *Case*, 249 F.3d at 931 (quoting *United States v. Risse*, 83 F.3d 212, 217

(8th Cir. 1996))). But this Court has squarely held, in the context of a parole search, that much more is required: the parolee must *live* there. *Grandberry*, 730 F.3d at 978; *Howard*, 447 F.3d at 1262. Thus, in *Howard*, it was not enough that the parolee's girlfriend lived there; that neighbors reported seeing him there frequently; or that, on the date of the search, the officer saw him come out of the apartment without a shirt on, stand in the doorway stretching for ten to fifteen minutes, before returning to the apartment and closing the door. And, in *Grandberry*, it was not enough that the officers saw the parolee enter the apartment at least six and perhaps as many as ten times using keys, almost always alone. Both clearly had common authority or a substantial relationship to the property searched. But to be covered by a residential search condition, the supervisee must actually reside at the premises searched: visiting a girlfriend is not enough.

* * *

Because the officers did not have probable cause as to residence, the search was illegal, and the district court erred in denying Mr. Wilkinson's motion.

II. Mr. Wilkinson Is Not An Armed Career Criminal

To constitute a "violent felony" under ACCA, Mr. Wilkinson's 1994 conviction for residential burglary must have been for a crime (a) punishable by more than one-year imprisonment, (b) that included, as an element, the generic element of unlawful entry or remaining in, and (c) that included, as an element, the generic element of building or structure. If it fails any one of these requirements, it does not trigger the ACCA.

A. The Crime Was Not Punishable By More than One Year

1. A Crime is Not Punishable By More than One Year Unless the Crime–as Prosecuted–Was Punishable By More Than One Year

Under the binding law of the United States Supreme Court, a crime is not "punishable" by a term exceeding one year unless the crime–as prosecuted–could be punished by a term exceeding one year. *See Moncrieffe v. Holder,* __U.S. __, 133 S.Ct. 1678, 1687 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 572 (2010). Although these cases are immigration cases, the Supreme Court expressly applied the same analysis it applies in analyzing convictions under ACCA. *Carachuri-Rosendo*, 560 U.S. at 577 n.12. The holding of these cases resolves this issue: As prosecuted, Mr. Wilkinson's 1994 burglary conviction was not punishable by imprisonment for a term exceeding one year.

In overturning its prior precedent to the contrary, the Tenth Circuit has recently observed that all three Courts of Appeals to reach this issue in light of *Carachuri-Rosendo* have held for the defendant. *United States v. Brooks*, __F.3d __, 2014 WL 2443032, *8 (10th Cir. June 2, 2014) (citing *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc); *United States v, Haltiwanger*, 637 F.3d 811 (8th Cir. 2011); *United States v. Pruitt*, 545 F.3d 415 (6th Cir. 2008) (anticipating *Carachuri-Rosendo*)). Further, the United States Supreme Court has remanded three cases involving collateral relief in light of the Solicitor General's position that the lower courts should have allowed the government the opportunity to waive procedural bars to relief for prisoners whose sentences were erroneously enhanced by prior convictions that were not, in light of *Carachuri-Rosendo*, felonies. *See Shaeffer v. United States*, __ U.S. __, 134 S.Ct. 1874 (2014); *Story v. United States*, __ U.S. __, 134 S.Ct. 1281 (2014); *Snipes v. United States*, __ U.S.__, 113 S.Ct. 1278 (2014). In short, the Fourth, Sixth, Eighth, and Tenth

Circuits, along with the Solicitor General, would all appear to agree that Mr. Wilkinson's sentence is unlawful.[2]

Nevertheless, the government here attempts to distinguish *Moncrieffe* and *Carachuri-Rosendo* by explaining as follows:

> In both cases, the Court directed that courts avoid 'a sort of post hoc investigation' by looking to 'facts outside of the record of conviction' in applying the categorical analysis. *Carachuri-Rosendo*, 560 U.S. at 582; *Moncrieffe*, 133 S.Ct. at 1690. But that is precisely what Wilkinson invites this Court to do. He asks this Court to consider not the statutory provision and its maximum penalty but rather the sentencing guideline applicable to each individual defendant based on the facts of the case.

(Answer 51). To the extent the government suggests the Supreme Court *prohibits* later courts from determining what the maximum sentence for the prior offense was based on the facts necessarily established by the record of conviction, the government has it backwards. In holding that later courts should not look to facts outside the record of conviction, the Supreme Court directed courts to determine what sentence was available based on "the conviction itself," not "what might have or could have been charged." *Carachuri-Rosendo*, 560 U.S. at 576. Likewise, in *Moncrieffe*, the Supreme Court required courts to determine "whether the conditions" that would make the offense a felony "are present or absent" based only on the "fact of a conviction . . . standing alone." *Moncrieffe*, 133 S.Ct. at 1686.

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[2]In view of the Solicitor General's waiver of procedural defenses in cases seeking collateral relief, *see, e.g., Shaeffer v. United States,* Brief of the United States, 2014 WL 1571934, at *17-18 (collecting cases where relief has been granted after government waived procedural defenses), the government's position in this case is odd. Mr. Wilkinson objected that this prior conviction did not trigger the ACCA, and thus review is de novo. *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 1095) (issues are waived, not arguments.). In any event, the error here meets all requirements for reversal even under plain error review.

Applying these rules here, the record of conviction establishes that (1) the offense of conviction was a level IV offense, (2) the offender score was I, and (3) there were no reasons for imposing an exceptional sentence. These facts–the only facts established by the record of conviction–made the crime punishable by no more than twelve months. Under *Moncrieffe* and *Carachuri-Rosendo*, the inquiry ends here.

2. The Plain Language Does Not Support the Government's Interpretation

The government argues the statute "by its terms" requires the Court to determine not whether Mr. Wilkinson's specific crime was punishable by more than one year, but whether an abstract defendant in a hypothetical prosecution under the same statute could face punishment over one year. (Answer 47). But the government identifies no specific language that supports this conclusion, which runs directly counter to the Supreme Court's teachings on this issue. *Brooks*, *supra*, at *8 ("Although we are not unsympathetic to the dissent's appeal to plain language, we are not analyzing this case in a vacuum. Rather, Supreme Court precedent binds us.").

The government suggests that, if Congress had intended to focus on an individual offender's sentence, it could have defined "violent felony" by the sentence received. (Answer 47). This suggestion responds to an argument Mr. Wilkinson has not made. Mr. Wilkinson received a six-month sentence for this prior conviction. (ER 3). He does not argue that, because he was sentenced to six months, his crime was not punishable by a term exceeding six months. Rather, he argues that, because the crime as prosecuted carried a potential sentence between 6 and 12 months, the crime was not "punishable by imprisonment for a term exceeding one year."

3. *Murillo* is Clearly Irreconcilable with *Carachuri-Rosendo* and *Moncrieffe*

The government next suggests that this Court's decision in *United States v. Murillo,* 422 F.3d 1152 (9th Cir. 2005), and the Fourth Circuit's decision in *United States v. Harp*, 406 F.3d 242 (4th Cir. 2005), should apply here. (Answer 48). In *Murillo*, 422 F.3d at 1155, this Court held that the determination whether a prior conviction was punishable by more than one year was based on the potential maximum defined by the statute, "not the maximum which could have been imposed against the particular defendant for his commission of that crime according to the state's sentencing guidelines." *Harp*, 406 F.3d at 246, held the same with regard to the North Carolina sentencing system: "to determine whether a conviction is for a crime punishable by a prison term exceeding one year, [circuit precedent] dictates that we consider the maximum *aggravated* sentence that could be imposed for that crime upon a defendant with the worst possible criminal history."

Both *Murillo* and *Harp* predate *Carachuri-Rosendo* and *Moncrieffe*, and the Fourth Circuit has already overruled *Harp* as irreconcilable with *Carachuri-Rosendo*. *Simmons*, 649 F.3d at 241. The Tenth Circuit, too, has overruled its prior similar precedent, *United States v. Hill*. 539 F.3d 1213 (10th Cir. 2008), as irreconcilable with *Carachuri-Rosendo*. *Brooks*, *supra*, at *6. To the extent *Murillo* is relevant here, it cannot survive *Carachuri-Rosendo* and *Moncrieffe*.

In *Simmons*, the Fourth Circuit held that a prior conviction for an offense not punishable–as prosecuted–by imprisonment for more than one year under the North Carolina Structured Sentencing Act was not a prior conviction for an offense "punishable by imprisonment for more than one year." In *Simmons*, 649 F.3d at 240, the prior conviction was for possession with intent to sell no more

than ten pounds of marijuana. Based on the facts of the offense, the defendant's criminal history, and the lack of any aggravating circumstances, the maximum punishment the defendant could have received was eight months' community punishment. *Id.* at 243. It was possible to receive a higher sentence if the defendant had a criminal history, but his conviction did not establish a criminal history. *Id.* It was also possible to receive a higher sentence if there had been aggravating factors, but his conviction did not establish aggravating factors, either. *Id.* at 244. "As in *Carachuri*, 'the mere possibility that [Simmons's] conduct, coupled with facts outside the record of conviction, could have authorized' a conviction of a crime punishable by more than one year's imprisonment cannot and does not demonstrate that Simmons was actually convicted of such a crime." *Id.* at 244-45 (citing *Carachuri-Rosendo*, 130 S.Ct. at 2589). The Tenth Circuit held the same in *Brooks*, *supra*, at *6 (overruling *Hill*).

The same reasoning applies here. *Murillo*, like *Harp* and *Hill*, has been overruled by *Carachuri-Rosendo*.

4. *Rodriquez* Has Been Limited By *Carachuri-Rosendo*

The government next turns to *United States v. Rodriquez*, 553 U.S. 377 (2008), for support. (Answer 48-49). But Mr. Wilkinson's conviction exemplifies the hypothetical to which the Supreme Court alluded in *Rodriquez*, i.e., a case "in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement." *Rodriquez*, 553 U.S. at 389. In such a situation, the Supreme Court has held that the government is "precluded from establishing that a conviction was for a qualifying offense" on the basis of such a hypothetical enhancement. *Id.*; *see also Carachuri-Rosendo*, 130 S.Ct. at 2587 n. 12; *Brooks*, *supra*, at *6 ("the Supreme Court has now interpreted *Rodriquez* to mean a recidivist increase can *only* apply *to the extent that a*

particular defendant was found to be a recidivist") (emphasis in original). Here, neither a potential recidivist enhancement nor any substantial or compelling reason to justify an exceptional sentence is part of the record of conviction. This Court may not hypothesize facts to turn the conviction into one for a crime punishable by more than one year.

* * *

Because Mr. Wilkinson could not have been sentenced to more than 12 months for his conviction, it was not a conviction for a "violent felony" and could not trigger the ACCA.

B. Washington's Residential Burglary Statute Covers a Broader Swath of Conduct than Generic Burglary and, Because It Is Indivisible, the Modified Categorical Approach Does Not Apply

Mr. Wilkinson's 1994 conviction did not trigger the ACCA for the additional reason that Wash. Rev. Code § 9A.52.025, Residential Burglary, criminalizes a broader swath of conduct than generic burglary does; because the statute is not divisible, the modified categorical approach does not apply. (AOB 32-43). In its Answer, the government suggests in passing that Washington burglary's definition of "enters or remains unlawfully" matches the generic definition. (Answer 54-55, 56-57). But its primary argument is that, because the statute sets forth alternate means by which the government may prove its elements, the statute is divisible–divisible as to "enters unlawfully" offenses versus "remains unlawfully" offenses, (Answer 55-56, 57-59), and divisible as to each of the items listed in its definition of "building" (Answer 60-62). The government's argument represents a fundamental misunderstanding of *Descamps v. United States*, __ U.S. __, 133 S.Ct. 2276 (2013).

1. The Modified Categorical Approach Applies Only to Statutes that are Divisible: That Set Forth Multiple, Alternate Elements, And So Effectively Create Several Different Crimes

In *Descamps*, the Supreme Court held that a statute is divisible–and thus subject to the modified categorical approach–*only* if it sets forth *elements* in the alternative, such that it effectively defines several distinct crimes, some of which match the generic definition and some of which do not:

> All the modified categorical approach adds [to the categorical approach] is a mechanism for making that comparison when a statute lists multiple, alternative, elements, and so effectively creates "several different . . . crimes." *Nijhawan*, 557 U.S. at 41, 129 S.Ct. 2294. If at least one, but not all of those crimes, matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified categorical approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.

Descamps, 133 S.Ct. at 2285.[3] Or, stated in the negative: "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282.

The mantra of *Descamps*–repeated throughout the opinion–is that what matters is elements. It is not facts, not means, not methods: "the key . . . is

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[3] *See also Descamps*, 133 S.Ct at 2284 (modified categorical approach applies "when a statute . . . refers to several different crimes"), 2285 (purpose of modified categorical approach is to "discover which statutory phrase, contained within a statute listing several different crimes, covered a prior conviction"), 2285 n.2 ("All those decisions rested on the explicit premise that the laws contained statutory phrases that cover several different . . . crimes, not several different methods of committing one offense"), 2286 (where a statute is divisible, "a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction"), 2288 ("Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction . . .").

elements, not facts." 133 S.Ct. at 2283.[4] This Court, too, now recognizes that, if a statute lists "'alternative means' of satisfying an indivisible set of elements," the statute is not divisible and the modified categorical approach does not apply. *Coronado v. Holder*, 747 F.3d 662, 669 & n.4 (9th Cir. 2014).

What makes a statutory phrase an element–rather than a means, a method, or a legally extraneous fact–is the requirement that it be found by the jury, "unanimously and beyond a reasonable doubt." *Descamps*, 133 S.Ct. at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).[5] The Fourth Circuit has stated the rule cleanly: "By 'elements,' the Court meant factual circumstances of the offense that the jury must find 'unanimously and beyond a reasonable doubt.'" *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (citing *Descamps*, 133 S.Ct. at 2288). Therefore, "alternative means of committing an offense, rather than elements, are simply irrelevant to our inquiry under the ACCA." *United States v. Hemingway*, 734 F.3d 323, 334 (4th Cir.

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[4] *See also Descamps*, 133 S.Ct. at 2283 (modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction"), 2284 (describing "elements-based rationale–applicable only to divisible statutes"); 2285 (modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime"), 2289 ("A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense"), 2290 ("only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime"), 2293 ("A court may use the modified categorical approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction.").

[5] *See also Descamps*, 133 S.Ct. at 2290 ("the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt"); 2290 (in an overbroad, indivisible statute, "all the jury must find to convict the defendant" is the single, overbroad element).

2013) (internal quotation marks and citation omitted).

2.1 Washington Residential Burglary Contains a Single, Overbroad, Indivisible Element of "Dwelling"

The government's error in conflating means with elements is most stark in its assertion that, "because at least one alternative means of committing burglary, that is burglary of a personal residence, matches *Descamps* formulation of the generic crime, it is a divisible statute and the modified categorical approach is appropriate." (Answer 62).

The government is wrong because the Washington residential burglary statute contains the single, overbroad, indivisible element of "dwelling." The essential *element* of residential burglary is burglary of a "dwelling other than a vehicle." R.C.W. § 9A.52.025; *see State v. J.P.*, 125 P.3d 215, 217 (Wash. App. 2005) (elements are "(1) that he entered or remained unlawfully in a dwelling, and (2) that he intended to commit a crime against a person or property therein."); *State v. Stinton*, 89 P.3d 717, 719 (Wash. App. 2004) (same). A jury sitting on a residential burglary trial in Washington is required to find only that the defendant burglarized a "dwelling." 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 60.02.02 (3d Ed.).

The government suggests that, because Washington law defines dwelling and building to encompass a wide range of premises, this definition renders the burglary statute divisible. (Answer 60). But, under Washington law, "[d]efinition statutes do not create additional alternative means of committing an offense." *State v. Linehan*, 56 P.3d 542, 546 (Wash. 2002) (collecting cases and setting forth uniform rule). Jurors are *never* required, under Washington law, to unanimously agree regarding any fact that is part of a definition statute, as opposed to an element of the offense. *Id.* at 547-549.

Nevertheless, the government suggests that "an overbroad definition of building . . . is the paradigm example of a divisible burglary statute." (Answer 60). This argument merely repeats the district court's erroneous assumption that all overbroad burglary statutes are divisible (ER 19-20), takes no account of either Washington's specific statute or Washington law (AOB 42-43), and represents a fundamental misreading of *Descamps*.

In *Descamps*, the Supreme Court explained that if a statute defined the elements of burglary to require entry into a building or an automobile in the alternative, the statute would be divisible and the modified categorical approach could be used to determine which element was established by the defendant's conviction. *Descamps*, 133 S.Ct. at 2281. As an example, the Court pointed to the Massachusetts burglary statute involved in *Shepard*. That statute provided that "[w]hoever, in the night time, breaks and enters a building, ship, vessel or vehicle, with intent to commit a felony . . ." is guilty of burglary. Mass. Gen. Laws Ann. ch. 266, §§ 16, 18. The statutory elements cover separate crimes: breaking and entering into a building, which qualifies as generic burglary under the ACCA, and breaking into a ship, vehicle, or vessel, which does not. In *Descamps* the Supreme Court explained that when a statute sets out alternative *elements*, as the Massachusetts statute does, no one can know just from looking at the statute which version of the offense the defendant has been convicted of. In that limited situation, a modified categorical analysis is appropriate. *Id.* at 2284.

Here, by contrast, Washington's residential burglary statute does not define several different crimes. It does not define residential burglary as entering or remaining unlawfully in a building, fenced area, or cargo trailer. "Dwelling" is the element the jury must find, and under Washington law, the various terms listed in the definition of "dwelling" and "building" are not alternate elements. Thus,

unlike the Massachusetts statute discussed in *Descamps*, the Washington residential burglary statute is not divisible and the modified categorical approach is not available.

2.2 Washington's Definition of Building is Non-Exhaustive

The government's argument would fail even if the sole question were whether Washington's definition of "building" is itself divisible. This is because, the government's argument notwithstanding, Washington's definition of "building" does not set forth a "finite list of definitions." (Answer 60).

Washington's definition of "building" reads as follows:

> "Building," in addition to its ordinary meaning, *includes* any dwelling, fenced area, vehicle, railway car, cargo container, *or any other structure* used for lodging of persons or for carrying on business therein

R.C.W. § 9A.04.110(5) (emphases added). This definition is not a finite list. Its use of the term "includes" denotes a non-exhaustive list of things that fall under the definition. *See State v. Hall*, 112 48 P.3d 350, 352 (Wash. App. 2002) (holding that "includes" is a term of expansion not limitation); *United States v. Lynn*, 636 F.3d 1127, 1134 (9th Cir. 2011) (same). In addition, the catch-all phrase "any other structure" further expands the list to an infinite number of other types of structure. *See, e.g.*, *State v. Gans*, 886 P.2d 578, 582-83 (Wash. App. 1994) ("any other structure" includes structures not specifically listed, including animal shelters).

As the government recognizes, it matters whether a statutory definition provides a finite set of alternative elements or a non-exhaustive list of potential alternatives. (Answer 60). In *Descamps*, the Supreme Court expressly rejected this Court's previous approach to statutory elements, which refused to distinguish between a divisible statute, which "creates an *explicitly* finite list of possible

means of commission," from an indivisible statute, which "creates an *implied* list of every means of commission that otherwise fits the definition of a given crime." *Descamps*, 133 S.Ct. at 2289 (quoting *United States v. Aguila-Montes de Oca*, 655 F.2d 915, 927 (9th Cir. 2011) (en banc)). Under *Descamps*, 133 S.Ct. at 2290, the modified categorical approach is available only where the statute sets forth a finite list of alternative elements; Washington's definition of building does not.

On this issue, the Eleventh Circuit's decision in *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), is instructive. In *Howard*, 742 F.3d at 1349, the Eleventh Circuit held the modified categorical approach does not apply to convictions for third-degree burglary in Alabama because Alabama's definition of "building" contains a non-exhaustive list of things that fall under the definition. Similar to Washington's statute, Alabama's third-degree burglary statute requires proof of the single element of a "building." Ala. Code § 13A-7-7(a). As in Washington, "building" is defined to "include" a number of structures that would not qualify under the generic definition. Ala. Code § 13A-7-1(2). The Eleventh Circuit, thus, had to determine whether the burglary statute is divisible. *Howard*, 742 F.3d at 1348. Because the definition was not a finite list of alternative elements, but rather a non-exhaustive list of "included" items that met the definition, it was not: "In light of the *Descamps* decision, illustrative examples are not alternative elements." *Id.* (citation omitted).

Here, too, Washington's definition of building is non-exhaustive. In light of *Descamps*, the illustrative examples are not alternate elements.

2.3 No Item On the List Matches Generic Burglary

Finally, even if the statute were divisible and the list finite, no item on the list is as narrow as the generic definition of building and structure. As a result, even if applicable, the modified categorical approach could not render any

conviction a categorical match with generic burglary.

The government argues that "at least one alternative means of committing residential burglary, that is burglary of a personal residence, matches *Descamps* formulation of the generic crime." (Answer 62). But nowhere in the definition of "burglary," "dwelling," or "building" does the statute list "personal residence." "Personal residence" is not self-defining, and if a personal residence is in, for example, a fenced area, it meets Washington's definition of "dwelling," without meeting the generic definition of "building or structure."

To the extent the government means to suggest that the word "building" in its "ordinary meaning," Wash. Rev. Code § 9A.04.110(5), matches the generic definition, and thus that a conviction involving a "building" in its "ordinary meaning" would establish a conviction for generic burglary, that too would be wrong. Under Washington law, even a locomotive is a "'building,' under its ordinary meaning," as are "any structures or premises that are (1) enclosed, (2) large enough to enter, and (3) able to accommodate a human being." *State v. Johnson*, 247 P.3d 11, 14 (Wash. App. 2011). Such "buildings" do not meet the generic requirement that a building be "designed for occupancy and intended for use in one place." *United States v. Grisel*, 488 F.3d 844, 848 (9th Cir. 2007).

3. Washington Burglary's Element of "Enters or Remains Unlawfully" Is Also Broader than Generic Burglary and Not Divisible

As to Washington's definition of "enters or remains unlawfully," the government claims that it is a categorical match with generic burglary and that, even if it were not, the statute is divisible and the record here establishes a conviction for the "enters . . . unlawfully" version of the statute. (Answer 53-59). The government is wrong as to all three arguments.

First, Washington burglary's element of entering or remaining unlawfully is

broader than generic burglary because, as interpreted by the Washington Supreme Court, it includes cases where the defendant enters the premises with a license but then exceeds the implied limitations on that license by committing a crime therein. *State v. Collins*, 751 P.2d 837, 838 (Wash. 1988). Washington courts have affirmed burglary convictions in multiple instances where the defendant was invited onto the premises to use the phone, pray, look for keys, eat in a restaurant, and use the restroom, holding the defendant was properly convicted for conduct that exceeded the scope of that invitation. (AOB 36-37). Not all Washington burglaries require "breaking or entering or similar unlawful activity." *Descamps*, 133 S.Ct. at 2292.

The government next argues–as it does with the definition of building–that the court may use the modified categorical approach because "there are two alternative means to commit burglary." (Answer 55 (citing *State v. Gonzales*, 148 P.2d 1046, 1049 (Wash. App. 2006)). But it is precisely *because* Wash. Rev. Code § 9A.52.025 sets out, at most,[6] "alternative means, and not alternative elements," that the statute is not divisible, and the modified categorical approach cannot be utilized. *Descamps,* 133 S.Ct. at 2285 n.2. Under Washington law, as under federal law, where a statute sets forth alternative means of committing a single crime, jury unanimity as to the means of commission is not required. *See Linehan*, 56 P.3d at 545; *Richardson*, 526 U.S. at 817. Because the jury need not be unanimous as to the alternative means, these alternatives are not elements, and the statute is indivisible.

Finally, for the reasons set forth below, even if the statute were divisible as

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[6]The Washington courts are actually divided as to whether Washington burglary is even an "alternative means" crime, with the trend toward viewing "enter or remains unlawfully" as a single unitary element. (AOB 39 n. 4).

to entering unlawfully, on the one hand, or remaining unlawfully, on the other, the record would not establish which one was involved in this conviction.

C. Even if the Modified Categorical Approach Applied, the Record Would Not Establish Generic Burglary

The government is simply incorrect that, by entering an *Alford* plea, a defendant admits all the factual allegations in both the charging document and the factual proffer for the plea. (Answer 58-59).

As support for its argument regarding the charging document, the government cites this Court's 2006 opinion in *United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1197 (9th Cir. 2006). (Answer 59). To the extent that *Guerrero-Velasquez* ever stood for that proposition, it has been superseded in two respects relevant here. First, the Ninth Circuit, sitting en banc, has held that a defendant entering an *Alford* plea "does *not* admit the specific details about his conduct." *United States v. Vidal*, 504 F.3d 1072, 1089 (9th Cir. 2007) (en banc). Second, the Ninth Circuit, again sitting en banc, has also held that, when a conjunctively phrased charging document alleges several theories of the crime, a guilty plea establishes conviction under at least one of those theories, but not necessarily all of them. *Young v. Holder*, 697 F.3d 976, 986 (9th Cir. 2012). Here, the charging document alleged that Mr. Wilkinson "did enter and remain unlawfully in" the premises. (ER 354). Thus, if Mr. Wilkinson had pleaded guilty, he could be said to have admitted one, but not necessarily both, entering and remaining unlawfully. (Answer 59 ("These judicially noticeable document show Wilkinson admitted to generic burglary: unlawfully entering or remaining . . .")). An *Alford* plea can hardly be said to have established more.

The government's argument regarding the factual basis is equally unavailing. Mr. Wilkinson's agreement that the trial court could consider the

certification for determination of probable cause for purposes of accepting the plea does not mean either that he admitted all the allegations contained therein or that the district court found them. *See, e.g.*, *United States v. McMurray*, 653 F.3d 367, 377-82 (6th Cir. 2011); *United States v. Alston*, 611 F.3d 219, 226-28 (4th Cir. 2010); *United States v. De Jesus Ventura*, 565 F.3d 870, 878-79 (D.C.Cir. 2009); *United States v. Savage*, 542 F.3d 959, 966-67 (2d Cir. 2008). In determining that a factual basis exists for a plea, the trial court is not finding facts but rather establishing the voluntariness of the plea. *State v. Zhao*, 137 P.3d 835, 841 (Wash. 2006). That Mr. Wilkinson's plea was voluntary does not establish that he was convicted based on any particular fact.

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In sum, the district court erred in determining Mr. Wilkinson's 1994 conviction was for a violent felony. The crime, as prosecuted, was not punishable by more than one year. The crime of conviction, as defined by the legislature, is overbroad in at least two respects. The statute, as written by the legislature and interpreted by Washington courts, is indivisible. And, even if the statute were divisible, the judicially noticeable records did not establish Mr. Wilkinson was convicted of generic burglary.

III. This Court Should Remand for the District Court to Consider Whether the Convictions Set Forth at PSR ¶¶ 32, 48 Are Violent Felonies

The government asks this Court to deny review of Mr. Wilkinson's argument that the district court plainly erred in sentencing him to a 15-year mandatory minimum sentence without knowing the statutes of conviction that underlay two of the three triggering offenses. If this Court finds the district court erred in considering the burglary conviction a violent felony, it need not reach this

issue because the matter must be remanded for resentencing.

If it reaches this issue, this Court must nevertheless remand because the objection was not waived, the convictions described do not categorically establish violent felonies, and the district court should consider the State court records in the first instance.

First, the issue was forfeited, not waived. In *United States v. Castillo-Marin*, 684 F.3d 914 (9th Cir. 2012), this Court considered an objection raised for the first time on appeal to the district court's reliance on a presentence report's characterization of an offense to determine it was a crime of violence. There, as here, defense counsel had raised *other* issues at sentencing, but had never objected to the presentence report's characterization of the prior conviction. *Id.* at 920. It is true that here, unlike in *Castillo-Marin*, the defendant actually conceded that the two convictions in question constituted ACCA predicates. (ER 330, 332). But, to constitute a waiver, not only must the defendant have "induced or caused the error," but the record must also reflect that he "intentionally relinquished or abandoned a known right." *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). That is, to constitute a waiver, the record must reflect that the "defendant considered the controlling law . . . and, in spite of being aware of the applicable law, proposed or accepted a flawed" application of the law to his case. *Id.* There is no evidence of this here. Indeed, the government cites no case, and undersigned counsel is aware of none, where a defendant has been held to inadvertently waive an objection to an erroneously imposed mandatory minimum sentence.

Second, although it is arguable that "the title of the offenses as contained in the presentence report is alone sufficient to determine the relevant statutory provision of Washington law" (Answer 65), those statutory provisions are

themselves overbroad. Both convictions in question involve Second Degree Assault, the latter of a child. (Final PSR ¶¶ 32, 48). Under Washington law, a person can be convicted of assault in the second degree "if he or she . . . with intent to commit a felony, assaults another." Wash. Rev. Code § 9A.36.021(1)(f) (1994). Such a conviction would not categorically make out a violent felony. (AOB 44-45). The government observes that this Court held in *United States v. Lawrence*, 627 F.3d 1281 (9th Cir. 2010), that Washington's assault in the second degree statute was categorically a violent felony under ACCA. (Answer 67-68). But *Lawrence* addressed only subsection (1)(a) of Wash. Rev. Code § 9A.36.021. *Id.* at 1287. Because the PSR does not set forth the subsection of Mr. Wilkinson's conviction, *Lawrence* does not establish that the offenses described in the PSR are categorically violent felonies.

Third, this Court should remand for the district court to determine in the first instance whether the prior convictions qualify as violent felonies. In *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1193 (9th Cir. 2011), the government asked this Court to take judicial notice of prior State court records for the purpose of affirming an ACCA sentence. This Court denied the motion because this Court (1) rarely takes notice of facts presented for the first time on appeal, (2) takes judicial notice of a fact only if it is "not subject to reasonable dispute," and (3) is not a sentencing court. *Id.* Here, given that both pleas in question were *Alford* pleas (SER 18, 56), and that Washington law interprets the subsections of §9A.36.021 as setting forth alternative means, not alternate elements, *see State v. Smith*, 154 P.3d 873, 876 (Wash. 2007), there is reasonable dispute as to what the

State court documents establish. "[T]hese questions are best left to the sentencing court for consideration in the first instance." *Reina-Rodriguez*, 655 F.3d at 1193.

Respectfully submitted,

DATED: June 30, 2014

s/ *Davina T. Chen*
Davina T. Chen

Certificate of Type Volume

Pursuant to Rule 32(a)(7)(c) of the Federal Rules of Appellate Procedure, I certify that this brief is proportionately spaced, has a typeface of 14 points or more, and contains approximately 7,945 words.

I am concurrently filing a motion to file oversized brief

DATED: June 30, 2014

s/ *Davina T. Chen*
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