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 Opening Brief

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

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Issues Presented

I. Before officers may perform a warrantless search of a private residence pursuant to a community supervision condition, they must have probable cause to believe the individual subject to the condition *lives* at the residence.

Did the district court err in holding that the officers' belated claim that Mr. Wilkinson's girlfriend had previously told them he lived with her gave them probable cause to believe Mr. Wilkinson lived in her apartment, where no officer had ever seen Mr. Wilkinson there, where Mr. Wilkinson did not even have a key, and where Mr. Wilkinson's probation officer made regular visits to his reported residence without concern?

II. To be sentenced under the Armed Career Criminal Act, an individual must have three triggering convictions.

A. Did the district court err in holding that Mr. Wilkinson's 1994 conviction was for a "crime punishable by imprisonment for a term exceeding one year," where as prosecuted the crime was punishable by no more than one year?

B. Did the district court err in holding that a Washington conviction for residential burglary was a conviction for generic burglary, where the state's definitions of "unlawful entry into or remaining" and "building or structure" are broader than generic burglary's and the statute is indivisible?

C. Did the district court plainly err in determining that Mr. Wilkinson had suffered two other triggering convictions without any information about, or analysis of, the statutes of conviction?

Relevant Statutory Provisions

See addendum.

Statement of the Case

Statement of Jurisdiction

This appeal is from the judgment rendered by the Honorable Benjamin H. Settle, United States District Judge, on September 10, 2013, sentencing James Quincy Wilkinson to fifteen years' imprisonment followed by five years of supervised release, for his conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g), 924(e)(1). (ER 49). Judgment was entered on September 10, 2013, and Mr. Wilkinson filed a timely notice of appeal. (ER 49, 55).

The district court had jurisdiction pursuant to 18 U.S.C. § 3231; this court has jurisdiction pursuant to 28 U.S.C. § 1291.

Custody Status

Mr. Wilkinson is in the custody of the Bureau of Prisons with a projected release date in March 2025.

Course of Proceedings

On March 8, 2012, Mr. Wilkinson was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1). (ER 1-2). He filed a motion to suppress evidence, which was denied. (CR 54). He was then convicted pursuant to stipulated facts. (CR 58).

At sentencing, he disputed he qualified as an armed career criminal. (ER 326). The district court held he did and sentenced him to the mandatory minimum term of fifteen years. (ER 19-21, 42-43). This appeal follows.

Statement of Facts

A. Facts Relevant to the Search

The firearms charged in this case were seized during a warrantless search of Mr. Wilkinson's girlfriend's apartment conducted by members of the Pierce

County South Sound Gang Task Force (Task Force), including Washington Department of Corrections (DOC) Community Corrections Specialist Evan Brady (CCS Brady) and Tacoma Police Department homicide detective John Ringer. The South Sound Gang Task Force was an FBI task force that "tr[ied] to target the most violent criminals in the City of Tacoma and Pierce County." (ER 192).

It is undisputed that Mr. Wilkinson was on Washington DOC community supervision and that, as a condition of his supervision, *his* residence was subject to warrantless compliance searches. (ER 75). But it is hotly disputed whether the officers had probable cause to believe that *his girlfriend's* apartment was his residence.

1. Mr. Wilkinson's Residence

Mr. Wilkinson was released from prison on January 26, 2011. Starting the next day, Mr. Wilkinson consistently reported a motel room in Auburn, Washington, as his residence. (ER 92). Mr. Wilkinson's supervising probation officer, Community Corrections Officer Steven Pyka (CCO Pyka), made regular unannounced visits to that address. (ER 80-91). Although CCO Pyka encountered Mr. Wilkinson at home only twice during these random visits, he never visited late in the evening or early in the morning. (ER 86, 91). Each time he missed Mr. Wilkinson, CCO Pyka spoke with the motel manager, who confirmed that Mr. Wilkinson was still living there, that she saw him come home at night and leave in the morning, and on several occasions that she had seen him earlier that day. (ER 80-91). When CCO Pyka would leave his card at the motel, Mr. Wilkinson would call him as directed. (ER 171-72).

During all his interactions with Mr. Wilkinson, CCO Pyka never developed a concern that Mr. Wilkinson might not be living at his reported address. He had last visited there on November 29, 2011 (ER 81), two days before the Task Force

searched Mr. Wilkinson's girlfriend's apartment. CCO Pyka documented all his contacts and interactions with Mr. Wilkinson in a DOC "chrono report," which CCS Brady of the Task Force frequently reviewed as part of his separate investigation of Mr. Wilkinson. (ER 150). No member of the Task Force ever discussed Mr. Wilkinson with CCO Pyka. (ER 172)

2. Mr. Wilkinson's Girlfriend's Apartment

On December 1, 2011, two days after CCO Pyka's most recent visit to Mr. Wilkinson's home, the Task Force purported to conduct a "compliance search" of Mr. Wilkinson's girlfriend's apartment in Tacoma.

Mr. Wilkinson's girlfriend, S.C.[1], was a Task Force informant, although she was unaware that Mr. Wilkinson was one of the Task Force's targets. Both officers claimed at the suppression hearing that, about two months prior to the December 1 search, on September 28, 2011, S.C. had told them during a debriefing that Mr. Wilkinson lived with her in an apartment she shared with her cousin and children, unit 2-102 of an apartment complex in Tacoma, Washington (Unit 2-102). (ER 146, 195). This information about Mr. Wilkinson's residence would have been important to the officers because they claimed to have received information from a couple of informants that Mr. Wilkinson was dealing large quantities of narcotics in Tacoma, that he was always packing a gun, and that he had pointed a gun at several people. (ER 144, 148, 149, 151, 194). They testified that, for several months prior to the December 1 search, they had been trying for some time to find an opportunity to safely arrest Mr. Wilkinson. (ER 148, 151-152, 199). (ER 194). According to Detective Ringer, as of September 28, Mr. Wilkinson "was the current hot topic in Tacoma as far as violence went at that

[1]The full name is redacted at the request of the government.

point in time." (ER 194).

Detective Ringer's notes of his September 28 debrief do reflect that the officers spoke with S.C. at some length about Mr. Wilkinson, but they do not reflect that S.C. said Mr. Wilkinson lived with her. (ER 324-325). Nor do the police reports or criminal complaint CCS Brady prepared in the weeks and months after the search support the officers' claim that S.C. had previously told the officers that Mr. Wilkinson lived with her. (ER 56-60, 117-125). In the police report, CCS Brady notes only that he "had information that Wilkinson *fiancee*, S[]C[], was actually living in the apartment [unit 2-102] that was rented by Brown." (ER 123) (emphasis added). The complaint similarly states only that "Wilkinson had a *fiancee*, S.C[.], who was known to live in unit 2-102 of an apartment complex in the City of Tacoma." (ER 58) (emphasis added). The claim that the officers had information that *Mr. Wilkinson* was actually living in the apartment, or that *Mr. Wilkinson* was known to live in unit 2-102 was not asserted until the actual suppression motion proceedings.

The officers also testified that they had independently investigated the question of Mr. Wilkinson's residence. CCS Brady testified that on three unspecified occasions during October or November 2011, he had driven by the Auburn motel Mr. Wilkinson was reporting as his residence without seeing a car he believed was associated with Mr. Wilkinson parked in the parking lot there. (ER 152-54). He did not knock on Mr. Wilkinson's door or talk to the motel manager; he did not visit during the late night or early morning hours; and he did not ask CCO Pyka about Mr. Wilkinson. (ER 152-154).

CCS Brady testified that he and Detective Ringer surveilled S.C.'s apartment also. He testified that, whenever an informant would give him license plate numbers, he would relay that information to a Task Force officer who

worked in the area of S.C.'s apartment and ask him to drive by randomly to check whether a vehicle with that license plate number was there. (ER 154-55). CCS Brady testified that, on at least three unspecified occasions during the month of November, he and Detective Ringer set up surveillance on the apartment complex when a vehicle with the reported license plate number was there, but they never saw Mr. Wilkinson. (ER 155). Nor did they ever check to see if that license number was, in fact, associated with Mr. Wilkinson. Detective Ringer testified that, sometime during the week before the search, they had surveilled the apartment for some time, but had to leave because both he and CCS Brady had to go to their kids' football games. (ER 196-197). Neither officer had any notes or reports corroborating this surveillance.

3. The Task Force Officer's "Compliance Check" of Mr. Wilkinson's Girlfriend's Apartment

Finally, the officers testified that, on December 1, 2011, they learned of a complaint about marijuana smoke and a lot of foot traffic coming from unit 2-102. (ER 157). They went to the apartment and saw a black SUV parked in the visitor's parking lot, which when they ran the plates came back to Enterprise car rental. (ER 177). They also brought a picture of Mr. Wilkinson to the apartment manager, who agreed that she had seen him and who told them that he had paid S.C.'s rent more than once when her rent was late. (ER 157). The officers then set up a ruse to get Mr. Wilkinson out of the apartment. (ER 158). Unfortunately, a different individual came out of the apartment. (ER 158). They detained that individual and went to the door and knocked again. (ER 158). Eventually, S.C. came out. (ER 158-59).

Then, depending on whether one credits CCS Brady's sworn affidavit in support of the criminal complaint, on the one hand, or his sworn testimony at the

suppression hearing, on the other, the officers either entered the apartment, found Mr. Wilkinson in the bedroom, detained him, and escorted him to the living room (ER 59 (criminal complaint)), or they stood at the doorway calling on Mr. Wilkinson to come out:

> We're at the doorway, we call him out, call, call, call, he finally sticks his head out and says, "What do you want?" "Mr. Wilkinson, you come out." He comes out we put him in . . . restraints at that time.

(ER 159 (suppression hearing)). Either way, it was only after they detained Mr. Wilkinson and brought him to his living room that the officers sought and obtained permission to perform a compliance search of the apartment. (ER 159-160, 163). According to the police report, the criminal complaint, and the officers' testimony, the officers sought permission to search the apartment based in large part on men's personal items they saw inside the apartment after they had already entered. (ER 124 (police report); ER 59 (criminal complaint); ER 160, 187 (Brady testimony at hearing); ER 198 (Ringer testimony at hearing)).

During their search the officers did not see or smell any marijuana, nor did they find any evidence of drug dealing. They did find two guns.

4. The District Court's Decision

The district held the officers had probable cause to believe S.C.'s apartment was one of Mr. Wilkinson's residences. The court rejected the officers' reliance on their observation of what they believed to be Mr. Wilkinson's personal property at the apartment, because they did not make those observations until after they had effected a warrantless entry into the apartment. (ER 303). Nevertheless, the court found probable cause based on (1) S.C.'s statements, (2) the statements of the apartment manager, (3) the officers' surveillance of Mr. Wilkinson's vehicles at the apartment parking lot, and (4) the absence of Mr. Wilkinson at his reported residence when visited by his CCO. (ER 302-303). The district noted,

finally, that Mr. Wilkinson's residence in the motel did not prove that the motel was his only residence. (ER 303). Ultimately, the district court concluded that "there's ample evidence that the officers had information . . . to arrive at the conclusion that he lived at least part-time at the apartment." (ER 304).

Upon denial of the motion, Mr. Wilkinson was convicted based on stipulated facts. (ER 313-321).

B. Facts Relevant to the Sentence

At sentencing, Mr. Wilkinson contested that he had the requisite criminal record to be subject to the Armed Career Criminal Act. (ER 326). The district court overruled the objection and sentenced Mr. Wilkinson to the mandatory minimum fifteen-year term. (ER 9-10, 43).

The court held that Mr. Wilkinson's prior conviction for residential burglary was properly considered a "violent felony," and thus an ACCA predicate, because Washington's burglary statute was divisible and the record of conviction revealed that the burglary was of a "dwelling." (ER 20). The court did not state which other convictions it found to be violent felonies subjecting Mr. Wilkinson to the fifteen-year mandatory minimum. Neither the indictment, nor the presentence report, nor the parties' submissions set forth the statutes for Mr. Wilkinson's other prior convictions.

Summary of Argument

I.

This Court must vacate Mr. Wilkinson's conviction because the evidence was obtained during an unlawful search of Mr. Wilkinson's girlfriend's apartment. Because Mr. Wilkinson was on community supervision, his residence was subject to warrantless searches. But that condition applied only to *his* residence, not his girlfriend's.

Before the officers searched Mr. Wilkinson's girlfriend's apartment, they had never seen him there; his supervising probation officer had, however, repeatedly confirmed his residence at a different location. Where officers search a residence other than the residence the supervisee has consistently reported, this Court has found probable cause to search the different location only where (1) the officers had a substantial and affirmative basis for believing he did not live at the reported residence, (2) the individual had a key to the location searched, and (3) the officers directly observed something that gave them good reason to suspect the individual was using the unreported location as his home base. Here, Mr. Wilkinson's probation officer regularly visited his reported residence without developing any concern he was not residing there. Mr. Wilkinson did not have a key to his girlfriend's apartment. Indeed, despite regular surveillance, no officer had *ever* seen Mr. Wilkinson at his girlfriend's apartment before the search in question. The only basis the officers claimed to have for believing Mr. Wilkinson lived there was their testimony that, several months previous, his girlfriend had told them he lived with her. Even accepting this testimony at face value, this Court's cases make clear it would be insufficient to make out probable cause. Moreover, the officers' post hoc testimony was illogical, implausible, and without support in the record.

Because the search was unlawful, this Court must reverse Mr. Wilkinson's conviction.

II.

The sentence was also unlawful.

The maximum penalty for a conviction for being a felon in possession of a firearm is ten years. But, if a defendant has suffered three prior convictions that satisfy the stringent requirements of the Armed Career Criminal Act, he is subject

to a fifteen-year mandatory minimum.

Here, the district court erred in determining that Mr. Wilkinson's prior conviction for residential burglary was a conviction for a violent felony. First, because the crime as charged and sentenced was not punishable by more than a year, it was not a felony. Second, it was not a conviction for "generic burglary" for two reasons. Under Washington law, an individual can be convicted of residential burglary even if he has a privilege that allows him to be in the residence, if he takes actions therein inconsistent with that privilege. A conviction based on this theory would not constitute generic burglary. In addition, under Washington law, residences other than structures or buildings are covered, whereas under generic burglary they are not. Because the Washington residential burglary statute is indivisible, the overbreadth of the statute is conclusive. The modified categorical approach does not apply.

The district court also plainly erred in determining that Mr. Wilkinson had two other triggering convictions, without any information about the statutes of conviction.

Argument

I. The District Court Erred in Denying Mr. Wilkinson's Suppression Motion

A. Standard of Review

This Court reviews de novo a district court's denial of a motion to suppress. *United States v. Howard*, 447 F.2d 1257, 1262 n.4 (9th Cir. 2006), overruled in part on other grounds, *United States v. King*, 687 F.3d 1189 (9th Cir. 2012) (en banc). It reviews underlying findings of fact for clear error. *Id.* The question of probable cause is a legal question subject to de novo review. *United States v. Borowy*, 595 F.3d 1045, 1047 (9th Cir. 2010).

B. Law Enforcement Officers May Not Search a Private Residence Pursuant to a Community Supervision Condition Without "Strong Evidence" the Individual Subject to the Condition Lives There

The government's only theory of legality for the officers' warrantless search of S.C.'s private residence was that the search fell within the exception to the Fourth Amendment warrant requirement for the residences of individuals subject to "community custody." There are two requirements before this exception applies. First, the individual must be subject to a provision authorizing such warrantless searches. *United States v. Grandberry*, 730 F.3d 968, 973 (9th Cir. 2013) (internal citation omitted). Mr. Wilkinson was subject to such a condition. (ER 75). Second, "before conducting a warrantless search of a residence pursuant to [a search] condition, law enforcement must have probable cause to believe that the [individual] is a resident of the house to be searched." *Id.* (internal quotation marks and citation omitted). A "relatively stringent standard [applies] in determining what constitutes probable cause that a residence belongs to a person" on supervision. *Howard*, 447 F.3d at 1262 (internal quotation marks and citation omitted). "It is insufficient to show that the parolee may have spent the night there occasionally." *Id.* For warrantless parole searches to be constitutional, "[t]here must be strong evidence that the parolee resides at the address." *Grandberry*, 730 F.3d at 976 (internal quotation marks and citation omitted).

In implementing this standard, this Court has been guided by its identification of "certain patterns" that have combined to make out probable cause as to residence, and it has refused to sanction searches that fall outside "the exacting fact patterns" it has previously approved. *Grandberry*, 730 F.3d at 976-80; *Howard*, 447 F.3d at 1266-68. This Court has generally required a combination of the following before finding probable cause: (1) the individual did not appear to be residing at any address other than the one searched; (2) the

officers had directly observed something that gave them good reason to suspect the individual was using the unreported residence as his home base; (3) the individual had a key to the residence in question; and (4) either the individual's co-resident or the individual himself identified the location in question as the residence of the individual. *Grandberry*, 730 F.3d at 976; *Howard*, 447 F.3d at 1265-66. These factors are viewed cumulatively and must be applied to the facts known to the officers before they conducted their search. *Id.*

C. The Evidence Here Falls Far Short of the "Exacting Fact Patterns" this Court Requires to Satisfy the "Stringent Standard" Applicable to Warrantless Searches of Residences

Applying the factors here, the officers did not have probable cause to believe Mr. Wilkinson resided in unit 2-102. Of the four factors, only the officers' belated claim that S.C. had previously told them Mr. Wilkinson lived with her weighs in favor of probable cause. But, even taking that claim at face value, the totality of the circumstances do not support probable cause that Mr. Wilkinson lived at the apartment searched. Moreover, the record contains good reason to doubt the officers' testimony.

1. Mr. Wilkinson Lived At His Reported Address

This Court recently noted that, "[i]n more than thirty years of assessing whether officers had probable cause to believe that a parolee or probationer lived at a searched residence," this Court has "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 actually live there." *Grandberry*, 730 F.3d at 977 (citations omitted). Mr. Wilkinson officially and consistently reported the Auburn motel as his address. His supervising CCO visited that address regularly without concern that Mr. Wilkinson did not actually live there. And CCS Brady and

Detective Ringer's surveillance of that address was perfunctory, at best. Because they had no basis, much less "an affirmative and substantial basis," for concluding Mr. Wilkinson did not actually live at his reported address, validating the officers' purported "compliance search" of Mr. Wilkinson's girlfriend's apartment would break new constitutional ground. Such a radical departure from existing law is not warranted here.

There was no basis here for believing Mr. Wilkinson did not live at his reported address. Quite the contrary. Mr. Wilkinson was released on community supervision on January 26, 2011, and he began residing at the motel the following day. (ER 92). From that date until November 29, 2011–just two days before the search in question–CCO Pyka visited that address seventeen times. (ER 81-92). He encountered Mr. Wilkinson during two unannounced visits (ER 86, 91), and nothing about those two visits gave CCO Pyka any concern that Mr. Wilkinson might not be living there. *Compare United States v. Watts*, 67 F.3d 790, 795 (9th Cir. 1995) (reported residence had no clothing or personal belongings); *United States v. Conway,* 122 F.3d 841, 843 (9th Cir. 1997) (only possession at reported residence was single pair of socks). CCO Pyka never visited Mr. Wilkinson late in the evening or early in the morning, and thus it was not surprising that he usually missed him there. *See Howard*, 447 F.3d at 1260 (probation officer noted that a high percentage of visits to supervisees were unsuccessful). Moreover, given that Mr. Wilkinson was regularly attending chemical dependency and domestic violence treatment classes every week and Alcoholics Anonymous/Sober Support meetings four days a week (ER 72-93), CCO Pyka had no reason to expect Mr. Wilkinson would be found sitting around his motel room.

Moreover, each time he missed Mr. Wilkinson, CCO Pyka confirmed with the manager of the motel that Mr. Wilkinson was still living there. (ER 81-92).

The manager repeatedly advised CCO Pyka that Mr. Wilkinson came home at night and left in the morning. (ER 87, 88). On several occasions, she told CCO Pyka that she had seen him earlier that day or the night before. (ER 82, 83, 85, 88, 90).

These facts are similar to *Howard*, where this Court rejected a finding of probable cause as to residence partly because the parole officer did not suspect the parolee was not living at home until a confidential informant advised that he was living elsewhere. 447 F.3d at 1260. In *Howard*, as here, although the parole officer encountered the parolee only twice at his reported address in ten random visits, the residence gave no indication that it was a sham residence address, and the officer had confirmed with neighbors that the parolee was still living there. *Id.*

And the facts here contrast sharply with *Watts* and *Conway,* where this Court did find probable cause. In *Watts*, 67 F.3d at 793, on the one occasion the parole officer found the parolee at his reported address, the residence "lacked the usual signs of residence, such as clothing and personal belongings." Moreover, the police once saw the parolee go to the address reported as his residence, knock on the door, then leave when no one responded. *Id.* at 795. In *Conway*, 122 F.3d at 843, on the single occasion the probation officer found the probationer at his reported address, the only possession there that belonged to him was a single pair of socks.

In contrast to CCO Pyka's regular visits, the Task Force officers made no real effort to ascertain whether Mr. Wilkinson was living at his reported residence. Despite testifying that they frequently reviewed Mr. Wilkinson's DOC chronological report (ER 150), the officers never spoke with either CCO Pyka or with the motel manager who figures prominently in those reports. Detective Ringer testified he assumed CCS Brady had contacted CCO Pyka because they

would typically advise the supervising CCO of an investigation, but CCS Brady testified he saw no reason to contact CCO Pyka and did not. (ER 208, 172). Although CCS Brady testified that the chronological reports indicated CCO Pyka found Mr. Wilkinson at home only when the visit was preplanned (ER 152), this testimony was directly refuted by the chronological report itself, which reflects that CCO Pyka twice encountered Mr. Wilkinson at home during unannounced field visits. (ER 86, 91). Nor, when testifying that CCO Pyka rarely found Mr. Wilkinson at home, did the officers explain to the court that CCO Pyka repeatedly spoke to the manager who confirmed, as recently as two days before the search, Mr. Wilkinson was still living there.

Although CCS Brady claimed to have visited the Auburn motel on three unspecified dates between October and November (ER 154), he acknowledged he did not spend any time at the location, never spoke to the manager or other residents, never even knocked on the door of the motel room. (ER 152, 154). Rather, his entire effort consisted of looking to see if a car he believed was associated with Mr. Wilkinson was in the motel parking lot. (ER 152, 154). This can hardly be described as a "substantial and affirmative basis" for concluding Mr. Wilkinson did not live at his reported address. *See Grandberry*, 730 F.3d at 977-78 (refusing to credit perfunctory surveillance lasting one or two hours).

Perhaps recognizing the weakness of the officers' claim that Mr. Wilkinson did not live at the motel, the *prosecutor* suggested in his opposition to the motion that Mr. Wilkinson might have had more than one residence. (ER 135). Although the prosecutor made this suggestion, the officers themselves never claimed they believed Mr. Wilkinson had multiple residences. Rather, they testified 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). Under this Court's precedent, it is significant that the officers' contention was that the motel was a false residence, as opposed to one of multiple residences. In these circumstances, "the Officers' paltry effort to determine whether [Mr. Wilkinson] lived at his reported address weighs against a determination that the Officers reasonably believed he did not." *Grandberry*, 730 F.3d at 978 n. 9.

Because there was no basis for believing Mr. Wilkinson did not live at his own reported residence, this Court should not sanction the warrantless search of his girlfriend's residence. It has never done so in the past, *id.* at 977, and it should not start now.

2. The Task Force Officers Never Saw Mr. Wilkinson at his Girlfriend's Apartment

The Task Force officers did not see Mr. Wilkinson at home the two or three times they drove by, but they never saw him at his girlfriend's apartment either. A second common denominator among those cases in which this Court has found probable cause is that, in each of those cases, the "officers had directly observed something that gave them good reason to suspect that the parolee was using his unreported residence as his home base." *Grandberry*, 730 F.3d at 976 (quoting *Howard*, 447 F.3d at 1265-66). Here, no officer ever saw Mr. Wilkinson at the Tacoma apartment before the day of the search. Much less did they observe anything that gave them "good reason to suspect" he was using unit 2-102 as "his home base." *Id.*

In *United States v. Dally*, 606 F.2d 861, 862 (9th Cir. 1979), this Court found probable cause based in part on law enforcement officers' observations of the parolee taking out the garbage, bringing in his laundry, and then taking out and bringing in dry cleaning. In *United States v. Harper*, 928 F.2d 894, 896 (9th Cir.

1991), this Court found probable cause when officers saw "cars belonging to known associates" of the parolee parked at the location, which was the family home. By contrast, this Court rejected a finding of probable cause in *Howard*, even though the officers saw the probationer come out of the apartment early in the morning on the day of the search, stand in the doorway with no shirt on, and stretch for ten to fifteen minutes before returning into the apartment, shutting the door behind him. *Howard*, 447 F.3d at 1257, 1268; *Grandberry*, 730 F.3d at 978. Taking out the garbage and bringing in and taking out laundry are actions consistent with "home base." *Dally*, 606 F.2d at 862. Having associates over to visit is some indication that this is one's residence. *Harper*, 928 F.2d at 896. Spending the night with a girlfriend and then coming out in the morning to stretch is not. *Howard*, 447 F.3d at 1267.

Here, no officer ever saw Mr. Wilkinson at the Tacoma apartment even once, much less saw him treating unit 2-102 as his home base. A Task Force officer who worked in the area was directed to drive by the apartment regularly to see if Mr. Wilkinson's car was there. In CCS Brady's report, he wrote that "within the last two months, the RO had seen a rental vehicle that Wilkinson was driving in the parking lot of the apartment complex." (ER 123). At the hearing, CCS Brady increased that to having seen such a car on at least three occasions in the month of November. (ER 155). Whichever is true, this Court has been careful to "distinguish between evidence that a parolee had 'visited' a particular residence and evidence that a parolee '*lived* there.'" *Grandberry*, 730 F.3d at 978 (quoting *Howard*, 447 F.3d at 1267) (emphasis in original). While the observation of "cars belonging to known associates" of the parolee parked at the location might add something to a probable-cause equation, *Harper,* 928 F.2d at 896, having one's associates visit may be a marker of living someplace, whereas visiting one's

girlfriend at that location is not. That Mr. Wilkinson might have visited S.C. at her apartment is no evidence that he *lived* there.

Because no officer ever saw Mr. Wilkinson at S.C.'s apartment, much less "directly observed" anything that gave them "good reason to suspect" he was using his girlfriend's apartment as his "home base," this factor also weighs heavily against probable cause. *Grandberry*, 730 F.3d at 976 (quoting *Howard*, 447 F.3d at 1265-66).

3. Mr. Wilkinson Did Not Have a Key to the Apartment

The third factor this Court has identified is, in all cases where this Court has found probable cause as to residence, the individual had a key, and in most of them the officers had seen the individual use it to enter the residence. *See Howard*, 447 F.3d at 1266 (citing *Conway*, 122 F.3d at 843; *Watts*, 67 F.3d at 793; *Harper*, 928 F.2d at 896; *Dally*, 606 F.2d at 862). Here, it is undisputed that Mr. Wilkinson did not have a key to S.C.'s apartment. (ER 259). This fact also weighs heavily against probable cause.

4. The Task Force Officers' Post Hoc Testimony that S.C. had Previously Told them Mr. Wilkinson Lived With Her Was Suspect And, Even if Credited, Did Not Make Out Probable Cause

The only factor that arguably weighs in favor of probable cause is the officers' testimony that, on September 28, 2011, during a debriefing of S.C., she told them Mr. Wilkinson lived with her. But this testimony does not make out probable cause. Taking the officers' testimony at face value, the totality of the facts do not approximate the "exacting fact patterns" this Court has previously approved. *Howard*, 447 F.3d at 1267. In addition, there is good reason to doubt the officers' testimony: indeed, the officers' own reports contradict their testimony that S.C. told them Mr. Wilkinson lived there.

a. Taking The Officers' Testimony At Face Value, The Evidence Does Not Make Out Probable Cause

S.C. testified that she did not, on September 28 or at any other time, tell the officers Mr. Wilkinson lived with her. (ER 235). But, even crediting the officers' testimony, the evidence here still falls far short of the "exacting fact pattern" this Court requires to satisfy the "stringent standard" of probable cause to perform an unwarranted, non-consensual search of a private residence.

Two days before the search, CCO Pyka had talked to the manager of the motel where Mr. Wilkinson lived, and the manager confirmed Mr. Wilkinson was living there. This was consistent with her explanations to the CCO over many months. It was also consistent with the CCO's experience that when he would leave a card, Mr. Wilkinson would call as directed. To counter this strong evidence of residence, the officers testified that they had driven by the motel perhaps three times without seeing what they believed to be Mr. Wilkinson's rental car. Although they had asked a Task Force officer who worked in the area of S.C.'s apartment to drive by and check on it randomly during his shift, he never saw Mr. Wilkinson there. On the perhaps three times during the months of October and November the Task Force officer reported seeing a car that was said to be associated with Mr. Wilkinson in the visitor parking space there, CCS Brady and Detective Ringer set up surveillance on the apartment. But they never saw him.

On the date of the search, the apartment manager claimed Mr. Wilkinson would sometimes pay S.C.'s rent, if she was behind, but she did not describe the apartment as Mr. Wilkinson's. And, although the officers claimed during the suppression proceedings that S.C. had told them two months earlier that Mr. Wilkinson lived with her, as detailed *infra* at 23-27, they did not think that

information was important enough to record in the notes of the debrief when she purportedly said it, the police report documenting the probable cause for the search, or the criminal complaint setting forth the legal justification. Nor did they mention it when the district judge pointedly asked what their probable cause was based on.

This is less evidence of residence than the officers had in either *Howard* or *Grandberry*, cases where this Court rejected a probable cause finding. In *Howard*, as here, the officer had information that the probationer's *girlfriend* lived in the searched apartment. 447 F.3d at 1259. A confidential informant had told the probation officer the probationer was living there also, and the officer had seen the probationer's car there once as early as 5:00 a.m. *Id.* at 1260. At 6:30 a.m. on the morning of the search, the officer saw the probationer come out of the apartment with no shirt on, stretch, and return to the apartment. *Id.* at 1260-61.

Nevertheless, this Court found no probable cause. *Id.* at 1268. Although, on the day of the search, a neighbor reported having seen the probationer at the apartment "at least eighty to ninety percent of the time," *id.* at 1261, this Court refused to credit that statement because the officers had surveilled the apartment and had not seen the probationer there in over a month and the complex manager had not seen him in a week and a half. *Id.* at 1267. Here, even crediting the officers' testimony that, more than two months earlier, S.C. had told them Mr. Wilkinson lived with her, this information was certainly outweighed by the fact that, despite regular surveillance at the apartment, no officer had *ever* seen Mr. Wilkinson there.

The evidence here is also far weaker than it was in *Grandberry*, another recent case in which this Court found no probable cause as to residence. In *Grandberry,* the officers had seen the supervisee go to the apartment in question

repeatedly over an eleven-day period and, significantly, let himself in with his own key from six to ten times. 730 F.3d at 971. On the day of the search, the officers saw the parolee leave the apartment and drive away. *Id.* at 972. When he returned and stepped out of the car, but before he entered the building, the officers identified themselves as police. The parolee ran and tossed his keys to the ground. They chased him and detained him. One of them picked up the keys and told him, "You are on parole with search conditions. We are going to search your place now." *Id.* At the hearing, the officer testified that the parolee responded, "Do what you gotta do," which the officers took as an admission of residence. *Id.*

Nevertheless, because the officers had never spoken to the parolee's supervising parole officer about his reported residence, had only surveilled that reported residence once for one to two hours, and had never seen the parolee at the searched residence late at night or early in the morning, this Court found no probable cause as to residence. *Id.* at 975-80. Again, the evidence Mr. Wilkinson lived in S.C.'s apartment was far weaker. The officers here testified that they frequently reviewed Mr. Wilkinson's chronological report, which documented that just two days before the search the motel manager had confirmed Mr. Wilkinson's continued residence there. Their surveillance at Mr. Wilkinson's reported residence was even more cursory than in *Grandberry*. And, unlike in *Grandberry*, where the officers had seen the parolee repeatedly let himself into the apartment with a key, no officer had ever seen Mr. Wilkinson at S.C.'s apartment at all, much less let himself in with a key. As there was no probable cause in *Grandberry*, there is surely no probable cause here.

b. The Task Officers' Testimony that S.C. Told them Mr. Wilkinson Lived With Her Is Not Supported By the Record

Moreover, the officers' testimony that S.C. told them Mr. Wilkinson lived with her is not supported by the record. The district court credited the officers' testimony, but this was based on its view that "the officer's testimony is more credible" than S.C.'s because "she had a more likely motive to misrepresent the facts because of her special relationship with the defendant than believing the officers committed perjury in making false statements in order to validate their activities." (ER 300). In other words, the district court did not find the officers *credible*, but only *more credible* than S.C., and even that view was based not on demeanor or inflection, but rather an assessment of relative motive to fabricate.

Although a district court's decision to credit one version over another is accorded deference, this deference is not without limit:

> The trial judge may [not] insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Anderson v. Bessemer City, 470 U.S. 564, 575 (1985). Where a lower court's factual finding is illogical, implausible, or without support in the record, it is clearly erroneous. *United States v. Loew*, 593 F.3d 1136, 1139 (9th Cir. 2010).

Here, the officers' own reports contradict their claim that S.C. told them, on September 28, that Mr. Wilkinson lived with her, and tend to show rather that they added this claim post hoc to shore up their weak probable cause showing. There are three relevant documents. First, there are Detective Ringer's notes of the debriefing. (ER 324-25). Those notes do not reflect that S.C. stated Mr.

Wilkinson lived with her. The report was highly detailed and contained numerous details about Mr. Wilkinson's extended family and his plans. (ER 324-325). That it did not include what would have been the most important detail–that S.C. said Mr. Wilkinson lived with her–is some indication that S.C. did not say that.

The omission takes on increased significance when read against Detective Ringer's claim that, at the time of the September 28 debrief, he had reliable information Mr. Wilkinson was "dealing large quantities of narcotics in Tacoma, [was] always packing a gun, [and] had pointed a gun at several people," which made Mr. Wilkinson "the current hot topic in Tacoma as far as violence went at that point in time." (ER 194). If the officers had probable cause to believe this current "hot topic," Mr. Wilkinson, was currently living with S.C., that would have subjected her apartment to a warrantless search. If she had made it, S.C.'s statement that Mr. Wilkinson lived with her would certainly have been in the report. It was not. When pressed on this omission at the hearing, Detective Ringer pointed to the notation, "moving out in 2 days," as corroborating S.C. had said the two of them were moving out in two days and thus that Mr. Wilkinson had been living with her. It does not.

Second, even more revealing are the police report CCS Brady prepared and Detective Ringer submitted *after* the search and the criminal complaint CCS Brady swore out when Mr. Wilkinson was arrested, which also make no mention of previous knowledge that Mr. Wilkinson lived at unit 2-102. In the police report, prepared in the week after the search, the officers devote a good deal of attention to detailing the evidence they had that the apartment they searched was Mr. Wilkinson's residence and, thus, subject to warrantless DOC compliance searches:

- the officers had seen Mr. Wilkinson's rental car in the parking lot of the complex within the last two months;

- the apartment manager recognized Mr. Wilkinson's photograph as the person who paid S.C.'s rent if she was behind in rent;
- the officers noticed men's shoes, cologne and clothing throughout the house;
- there was paperwork with Mr. Wilkinson's name on it throughout the apartment;
- S.C. admitted that the male items in the residence belonged to Mr. Wilkinson and that she was engaged to him.

(ER 123-124). "With all of these facts, RO contacted Community Corrections Supervisor Michael Poston who authorized a DOC compliance check." (ER 124).

The purpose of this recitation was to set forth the officers' basis for probable cause. The omission of the claim that the officers had previous information Mr. Wilkinson lived there is, thus, telling. CCS Brady's report notes at the outset that "RO had information that Wilkinson fiancée, S[.]C[.], was actually living in the apartment that was rented by Brown." (ER 123). Had S.C. actually told the officers that Mr. Wilkinson lived with her, the report would surely have read, "RO had information that Wilkinson and his fiancée, S.C., were actually living in the apartment that was rented by Brown." It does not because she did not. Where the district court credits an officer's testimony that is contradicted by his own statements at the time of the events, the district court commits clear error. *Cf. United States v. Prokupek,* 632 F.3d 460 (8th Cir. 2011) (reversing denial of suppression motion where district court erroneously credited officer's statement that was contradicted by officer's own statements at the time of the event).

The criminal complaint sworn out by CCS Brady at the time of Mr. Wilkinson's arrest similarly contradicts the officers' claim. As the officers' basis for believing Mr. Wilkinson lived in unit 2-102, the complaint notes that Mr. Wilkinson's *fiancee* lived in unit 2-102; that the apartment manager explained that

S.C. lived in the unit but that Mr. Wilkinson had paid the rent several times when S.C. was late; and that paperwork addressed to Mr. Wilkinson, men's clothing, shoes, and cologne were in the apartment. (ER 56-60). It does not include any indication that the officers had previous knowledge from a reliable source that Mr. Wilkinson lived there. That is, in the document setting forth the legal justification for the search, the officers did not include this critical claim.

Indeed, although the officers testified S.C. had told them Mr. Wilkinson lived with her, when examined specifically and pointedly about the source of probable cause, CCS Brady did not cite S.C.'s statement as even a contributing factor. In response to the district judge's inquiries as to the basis for probable cause, CCS Brady explained, "Everything that we saw I used as my probable cause. I mean, it's an ongoing–that probable cause we had with Mr. Wilkinson was several different things. It all started with him being out of Pierce County–I mean, out of King County into Pierce County. Then when we got there I confirmed he was staying at a residence that he wasn't living at." (ER 189). The claim that S.C. had told the officers Mr. Wilkinson lived there did not even merit mention. This is because it was not true.

The implausibility of the officers' testimony in this respect is reinforced by the officers' claims to have had other information about Mr. Wilkinson, which were also implausible in view of the record. They testified they were looking to arrest Mr. Wilkinson because, for months, they had been receiving reliable information that Mr. Wilkinson– an individual under community supervision–was dealing drugs, carrying a gun, smoking crack, and pointing a gun at people. (ER 144, 147-48, 149, 151-152, 194, 199). If any of this were true, it is inexplicable that they waited months before arresting Mr. Wilkinson. CCS Brady testified that, as a "probation officer, you know that's my first and foremost job, is to protect the

community." (ER 156). But he never took any of the easy steps available to "get [Mr. Wilkinson] under control." (ER 156).

For months prior to December 1, Mr. Wilkinson was providing random urinalysis as well as attending regular appointments with CCO Pyka, and had weekly scheduled chemical dependency and domestic violence treatment classes (ER 72-93), many of which were at DOC offices. The officers never asked CCO Pyka to call Mr. Wilkinson in for a urinalysis so they could arrest him there. They never sought him coming or going from his classes. Indeed, Detective Ringer testified that, at some point during their investigation, he had seen Mr. Wilkinson outside on the phone on Tyler Street. (ER 199). If the task force had reliable information that Mr. Wilkinson was selling drugs, carrying a firearm, *and pointing the gun at people*, it is beyond question that it would have sought his immediate arrest, as his DOC conditions allowed, and as DOC policies required. *See* Washington DOC Policy 460.130 (requiring a CCO to respond to offender violation behavior at the earliest opportunity, but no more than 3 business days after determining a violation has occurred). The reason the officers did not arrest Mr. Wilkinson out on Tyler street or on his way to urinalysis is they did not have any information that he was committing crimes. Their testimony to the contrary was implausible in view of the record as a whole.[2]

Without probable cause that Mr. Wilkinson *lived* at unit 2-102, the officers

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[2]The officers' testimony about how they recorded information they received about Mr. Wilkinson itself raises questions. CCS Brady testified that, because he was busy with other targets, when he received information, he would "make a file" on Mr. Wilkinson he could come back to later. (ER 148) He testified he gave all the notes he had regarding Mr. Wilkinson to the prosecutor. (ER 166). But, in the end, CCS Brady admitted he never wrote down anything and thus had nothing to turn over. (ER 175-76).

had no right to conduct a warrantless search of this private residence. The district court erred in denying Mr. Wilkinson's suppression motion.

II. The District Court Erred In Sentencing Mr. Wilkinson As An Armed Career Criminal

The Armed Career Criminal Act, 18 U.S.C. § 924(e) (ACCA), increases the sentence from a ten-year maximum to a fifteen-year minimum where a defendant has three prior convictions for a "serious drug offense" or a "violent felony." *Descamps v. United States*, __ U.S. __, 133 S.Ct. 2276, 2281 (2013). Mr. Wilkinson had no prior convictions for drug offenses. The district court erred in determining he had three prior convictions for violent felonies, as defined by the ACCA.

A. Standard of Review

This Court reviews de novo the legal question whether a prior conviction triggers a sentence enhancement. *United States v. Acosta-Chavez*, 727 F.3d 903, 907 (9th Cir. 2013). Where an appellant raises on appeal an alternative argument to support what has been his consistent claim, review is still de novo. *United States . Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). This is because, "it is claims that are deemed waived or forfeited, not arguments." *Id.* (citations omitted). Where there has been no objection at all below, this Court generally reviews for plain error. *United States v. Pimentel-Flores*, 339 F.3d 959 (9th. Cir. 2003). However, where an appeal presents a pure question of law and where defendant's failure to object results in no prejudice to the opposing party, this Court is not limited to a plain error standard of review. *United States v. Evans-Martinez*, 611 F.3d 635, 642 (9th Cir. 2010).

This Court should review de novo whether Mr. Wilkinson's 1994 conviction for residential burglary constitutes a violent felony because he has

consistently claimed that it did not, and because it presents a pure question of law. It should review for plain error the district court's determination Mr. Wilkinson had two other qualifying convictions, because that issue was not contested below.

B. Mr. Wilkinson's 1994 Conviction was Not a Prior Conviction for a Crime Punishable By Imprisonment Exceeding One Year

To qualify as a "violent felony" for the purpose of the ACCA, a crime must be "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(1), (2)(B). Mr. Wilkinson received a six-month sentence for his 1994 conviction for residential burglary. (ER 350). The standard range was 6-12 months, and the sentencing court did not make any findings that would justify a sentence above the standard range. (ER 349). Under Washington law, because there was no grounds for an "exceptional sentence," the crime was not punishable by imprisonment exceeding one year. RCW § 9.94A.120(3)(1994); *see also Blakely v. Washington*, 542 U.S. 296, 299 (2004). Therefore, it did not qualify as a violent felony triggering the ACCA enhancement.

The United States Supreme Court requires that, to be "punishable" as a felony–that is, by imprisonment for a term exceeding one year–a prior state conviction must establish all the elements and sentencing factors necessary to authorize the punishment beyond one year. *See Moncrieffe v. Holder*, __U.S. ___, 133 S.Ct. 1678 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). Specifically, in *Moncrieffe*, the High Court held that a prior state conviction for possession of marijuana with intent to distribute was not "punishable by more than one year's imprisonment" under the federal Controlled Substances Act (CSA), 133 S.Ct. at 1683, because the prior conviction did not establish that the offense had involved more than a small amount of marijuana or distribution for remuneration, facts necessary for the offense to be punishable by more than one year's

imprisonment under the federal CSA. 133 S.Ct. at 1686. That was true even though the involvement of more than a small amount of marijuana or distribution for remuneration are elements not of the federal felony, but rather of an affirmative defense the defendant is required to prove to be entitled to treatment as a misdemeanor. *Id.* at 1688-89. Citing its earlier decision in *Carachuri-Rosendo*, the Court held that, where an offense is punishable as a felony only if "an 'amalgam' of offense elements and sentencing factors" are present, for a prior conviction to constitute a conviction for such a felony, that amalgam of elements and sentencing factors must actually be established by the prior conviction. *Id.* at 1287 (quoting *Carachuri-Rosendo*, 560 U.S. at 572).

In *Carachuri-Rosendo*, the Court had held that a prior state conviction for simple possession of marijuana was not a conviction for a crime punishable by imprisonment for more than one year under the federal CSA because the prior conviction did not establish that the defendant had previously been convicted of a controlled substance offense, a sentencing factor required to expose the defendant under federal law to a sentence of more than one year. *Id.* at 576-77.

In each case, it was not enough that, in a "hypothetical" prosecution for the prior offense, a sentence of more than one year could have been imposed. *Moncrieffe,* 133 S.Ct. at 1688; *Carachuri-Rosendo*, 130 S.Ct. at 572-73,575-76, 580-81. Rather, the Supreme Court held that a prior conviction was not for an offense punishable as a felony where the record of conviction did not establish each of the elements and sentencing factors needed for the offense to be punished as a felony. *Moncrieffe*, 133 S.Ct. at 1287; *Carachuri-Rosendo*, 560 U.S. at 572.

Although the question here is whether Mr. Wilkinson's 1994 conviction was punishable by more than one year under *Washington* law, whereas in *Moncrieffe* and *Carachuri-Rosendo*, the question was whether the prior state conviction was

punishable by more than one year under *federal* law, the analysis is the same. Washington's sentencing system before the Supreme Court's 2004 decision in *Blakely v. Washington* was a guideline system. A defendant's standard range was calculated based on the offense level seriousness, which was determined by statute, and the offender score, which was based on the defendant's criminal history. *Blakely*, 542 U.S. at 299. Although a court could hypothetically impose a sentence above the standard range, it could do so only if it found "substantial and compelling reasons justifying an exceptional sentence." RCW § 9.94A.120(3) (1994). Only factors *other* than those used in computing the standard range for the offense could be used to justify an exceptional sentence. *State v. Gore*, 143 Wash.2d 288, 315-216, 21 P.3d 262, 277 (2001). And the court would have been required to set forth the reasons for its decision to impose an exceptional sentence in written findings of fact and conclusions of law. RCW § 9.94A.120(3) (1994).

The statutory maximum term of imprisonment for a hypothetical conviction for residential burglary is ten years. RCW §§ 9A.52.025, 9A.20.021 (1994). But "other provisions of state law . . . further limit[ed] the range of sentences a judge may impose. *Blakely,* 542 U.S. at 299. As prosecuted, Mr. Wilkinson's crime was not punishable by more than one year. This is because, under Washington law at the time, the standard range for an individual with an offender score of 1, like Mr. Wilkinson, who committed residential burglary was 6-12 months imprisonment. (ER 349). *See* RCW § 9.94A.310 (1994) (sentencing grid setting 6-12 month range for seriousness level IV, offender score 1); RCW § 9.94A.320 (placing residential burglary in seriousness level IV). To increase the standard range above 12 months, a higher offender score would be required. RCW § 9.94A.210 (1994). Thus, although residential burglary could hypothetically be punished by a ten-year prison term, as charged and sentenced, Mr. Wilkinson's 1994 conviction

was not for a crime punishable by a prison term exceeding one year because the standard range was 6-12 months and the judge made no findings to justify a higher sentence. (ER 349).

As in *Moncrieffe* and *Carachuri-Rosendo*, it does not matter that there are hypothetical facts that could have supported an exceptional sentence in a different prosecution. What matters is the record of conviction for this crime. Because the facts established by the record of conviction for this crime were punishable by no more than 12 months, Mr. Wilkinson's 1994 conviction was not for a "crime punishable by imprisonment for a term exceeding one year."[3]

C. Washington Residential Burglary Does Not Constitute Generic Burglary

Mr. Wilkinson's 1994 conviction was not for a "violent felony" for the separate and independent reason that it was not a conviction for generic burglary. To qualify as burglary for the purpose of the ACCA, a prior conviction must be for an offense that has "the 'basic elements' of generic burglary–*i.e.*, 'unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime.'" *Descamps*, 133 S.Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

To determine whether a prior conviction is for generic burglary, courts use a "formal categorical approach." *Id.* at 2283. They look to the statutory

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[3]The Supreme Court's decision in *United States v. Rodriquez*, 553 U.S. 377 (2008), does not hold otherwise. In *Rodriquez*, the Court interpreted the language, "the maximum term of imprisonment . . . prescribed by law" and held that it referred to the maximum sentence available under Washington law. That language is not at issue in this case. Moreover, in *Carachuri-Rosendo*, the Court interpreted *Rodriquez* as holding "that a recidivist finding could set the 'maximum term of imprisonment,' but only when the finding is a part of the record of conviction." *Carachuri-Rosendo*, 130 S.Ct. at 2587 n.12. Here, any substantial and compelling reason to justify an exceptional sentence is not part of the record of conviction.

definitions–that is, the elements–of a defendant's prior offense and not to the particular facts of the facts underlying those convictions. *Id.* If the relevant statute has the same elements as, or more narrow elements than, generic burglary, the prior conviction can serve as an ACCA predicate. *Id.* "But if the statute sweeps more broadly" than generic burglary, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Id.* The key is elements, not facts.

In a "narrow range of cases" where there is no categorical match, the Court may use the "modified categorical approach." *Id.* at 2283. As explained in *Descamps*, the modified categorical approach may be utilized only "when a statute lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id.* at 2285 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). In those instances, "[i]f at least one, but not all of those crimes matches the generic version," a court may use 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." *Id.* The modified 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." *Id.* at 2283. But courts may not use the modified categorical approach "when a defendant was convicted under an 'indivisible' statute–*i.e.*, one not containing alternative elements–that criminalizes a broader swath of conduct than the relevant generic offense." *Id.* at 2281, 2283, 2285-86.

Residential burglary, as defined in Washington state, is broader than generic burglary for two different reasons. First, Washington's definition of "unlawful entry into or remaining in" is broader than the generic definition because it covers individuals who possess a limited license to enter the premises and do not form the

intent to commit the crime until after their entry. As this Court held in *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997), such an expansive interpretation goes beyond generic burglary. Second, as this Court has previously recognized, Washington's definition of "dwelling" is broader than the generic definition of "building or structure" because it includes temporary movable structures. *See United States v. Wenner*, 351 F.3d 969, 972-73 (9th Cir. 2003).

Because Washington's statute is not divisible either with respect to the form of unlawful entry/remaining or the target of the burglary, following *Descamps*, the modified categorical approach does not apply. As a result, Washington's residential burglary statute is categorically overbroad and is not generic burglary.

1. Mr. Wilkinson's 1994 Conviction Did Not Establish the Generic Element of Unlawful Entry or Remaining

a. Washington's Definition of "Unlawful Entry Into or Remaining In" Is Broader than Generic Burglary's

Generic burglary requires an unlawful or unprivileged entry into, or remaining in, a premises. *Taylor*, 495 U.S. at 599. In *Taylor*, the Supreme Court explained that its definition of burglary approximated the definition adopted by the drafters of the American Law Institute, Model Penal Code (1980) (MPC), wherein a person commits burglary "if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." *Taylor*, 495 U.S. 598 n.8 (quoting MPC § 221.1). The MPC elaborates on those instances that–because there is no unlawful entry or remaining–do not constitute burglary:

> a servant enters his employer's house as he normally is privileged to do, intending on the occasion to steal some silver; a shoplifter enters a department store during business hours to steal from the counters; a litigant enters the courthouse with intent to commit perjury; a fireman called on to put out a fire resolves, as he breaks down the door of the

> burning house, to misappropriate some of the householder's belongings.

MPC § 221.1 cmt. at 69. Under *Taylor*, unlawful entry and remaining excludes those situations where an individual has a license or privilege to enter a building or structure for a limited purpose, but exceeds that purpose with the intent to commit a crime.

In *Descamps*, the Supreme Court cited 3 W. LaFave, Substantive Criminal Law (2d ed. 2003) (LaFave), as its source during an extended discussion of the unlawful entry requirement for generic burglary: generic burglary "requires an unlawful entry along the lines of breaking and entering," 133 S.Ct. at 2285 (citing 3 LaFave § 21.1(a)); "generic burglary's unlawful-entry requirement excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity," *id.* at 2292. Like the MPC, LaFave notes that modern burglary statutes "generally require that the entry be unprivileged," and suggests that "[a] more precise way of describing this situation is by excluding those entries of premises when they are open to the public or by a person licensed or privileged to enter." LaFave § 21.1. In addition, LaFave notes with approval that this approach, adopted by the MPC, "'retains the core of the common-law conception' of breaking but yet excludes those situations which 'involve no surreptitious intrusion' and 'no element of aggravation of the crime that the actor proposes to carry out.'" *Id.* (quoting MPC § 221.1 cmt. at 69). In *Descamps*, therefore, the Supreme Court reiterated that generic burglary's requirement of unlawful entry or remaining excludes privileged entries.

As interpreted by the Washington courts, Washington's residential burglary statute does not exclude privileged entries. Washington's statute appears on its

face similar to generic burglary. "A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW § 9A.52.025(1) (1994). And "enters or remains unlawfully" is defined as being "in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain." RCW § 9A.52.010(3)(1994). But under longstanding and well-established Washington law, the element of "enters and remains unlawfully" sweeps far more broadly than generic burglary. Under Washington law, the element of "enters or remains unlawfully" includes situations where an individual "receives an invitation to the premises which is not expressly qualified as to area or purpose, and commits a crime while on the premises" because "an implied limitation on the scope of the invitation or license may be recognized." *State v. Collins*, 110 Wash. 2d 253, 254, 751 P.2d 837, 838 (1988).

In *Collins*, the Washington Supreme Court held the defendant had properly been convicted of first-degree burglary, second-degree rape, and second-degree assault when he was invited into a home to make a phone call but then attacked two women inside the home. 110 Wash. 2d at 261, 751 P.2d at 841. The Court held it could be inferred the invitation or license was limited to a single purpose: to make a phone call. *Id.* When the defendant attacked the women, he exceeded the scope of the invitation. *Id.* By exceeding the scope of the invitation, the defendant entered or remained unlawfully on the premises with the intent to commit a crime and thereby committed residential burglary under Washington law. *Id.* Similarly, in *State v. McDaniels*, 39 Wash.App. 236, 240, 692 P.2d 894 (1984), the Washington Court of Appeals sustained a conviction for second degree burglary in connection with the theft of a coat from a church because the evidence established that the church was open solely for the purpose of worship and prayer.

See also, *e.g., State v. Trice*, 168 Wash.App. 1009, 2012 WL 16998858 (Wash. App. Div. 2 May 15, 2012) (unpublished) (affirming conviction where neighbor was invited into apartment to look for his keys, but once inside molested child); *State v. Monk*, 163 Wash. App. 1028, 2011 WL 4036686 (Wash. App. Div. 2 Sep. 13, 2011) (unpublished) (affirming second degree burglary conviction where customer reached over counter and into cash register drawer of restaurant); *State v. Blood*, 131 Wash. App. 1055, 2006 WL 533827 (Wash. App. Div. 1 Mar. 6, 2006*)* (unpublished) (affirming second degree burglary where defendant was allowed into fitness club locker room to use the restroom but instead tried to break into a locker).

Accordingly, unlike generic burglary, under Washington law, "a servant [who] enters his employer's house as he normally is privileged to do" may nevertheless be convicted of residential burglary for stealing the silver because there is an implied limitation on the scope of his privilege that he not steal silver while he is there. Because the element of entering or remaining unlawfully is broader under Washington law than for generic burglary, the elements of Washington burglary do not match, nor are they narrower than, generic burglary. Therefore, Washington residential burglary is not a categorical match to generic burglary.

b. Because the Statute is Broader than Generic Burglary, and is not Divisible, the Modified Categorical Approach Does Not Apply

Prior to *Descamps*, this Court's next step would be to determine whether the judicially noticeable documents proved that Mr. Wilkinson's offense actually involved all the elements of generic burglary. *United States v. Aguila Montes de Oca,* 655 F.3d 915, 936-37 (9th Cir. 2011) (en banc), *overruled by Descmaps*, 133 S.Ct. at 2283. That is, despite the fact that Washington's definition of entering or

remaining unlawfully is broader than the generic definition, this Court would have applied the modified categorical approach in an attempt to determine whether Mr. Wilkinson's conviction could nevertheless be said to establish generic burglary. *Id.* But, following the rule set forth in *Descamps*, the modified categorical approach may not be utilized because Washington's statute is broader than generic burglary, and it is not divisible.

Washington law recognizes that criminal statutes fall into one of three categories: (1) statutes in which the elements are single (i.e., there are no elements that may constitute separate and distinct offenses or that may be satisfied by alternative means); (2) statutes that set forth multiple offenses, each constituting a separate and distinct crime; and (3) statutes that set forth a single offense that may be committed by alternative means. 11 Wash. Prac., Pattern Jury Inst. Crim. WPIC 4.20 (3d Ed.); *State v. Arndt*, 87 Wash.2d 374, 553 P.2d 1328 (1976). Jury unanimity is required only as to guilt for the single crime charged. *State v. Linehan*, 147 Wash. 2d 638, 56 P.3d 542 (2002); *Arndt*, 87 Wash. 2d. at 377-78, 553 P.2d at 1330-31. Even where a statute sets forth a single offense that may be committed by alternative means (category three above), there must be unanimity *only* as to guilt for the single crime charged. *Linehan*, 147 Wash. 2d 638, 56 P.3d 542 ; *Arndt*, 87 Wash. 2d. at 377-78, 553 P.2d at 1330-31(1976). Under *Descamps*, the modified categorical approach can be utilized only on those statutes that fall into category two, because they are divisible into separate and distinct crimes. *Descamps*, 133 S.Ct. at 2288 ("the only facts the court can be sure the jury [found unanimously beyond a reasonable doubt] are those constituting elements of the offense."). The Fourth Circuit has stated the rule succinctly: "'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. 2013).

Under Washington law, residential burglary sets forth one indivisible crime. Washington's general burglary statute is divisible into three separate crimes: first degree burglary, residential burglary, and second degree burglary. RCW §§ 9A.52.020, 9A.52.025, 9A.52.030. But each degree of burglary, including as relevant here residential burglary, is not further divisible into the separate crimes of entering a residence unlawfully, remaining in the residence unlawfully, or acting outside the scope of one's privilege or license inside a residence.[4] Accordingly, to convict a defendant of residential burglary under RCW § 9A.52.025(1), the jury need be unanimous only that the defendant has committed residential burglary, not whether this was accomplished through unlawful entry, unlawful remaining, breaking and entering, surreptitious entry, or exceeding an express or implied license. *Accord* 11A Wash. Prac. Wash. Pattern Jury Instr. Crim. WPIC 60.02.02 (3d Ed.) (instructing jury as to single element that "defendant entered or remained unlawfully"). Because Washington's definition of unlawfully entering and remaining is broader than generic burglary, the statute is overbroad. Because the statute is indivisible, the modified categorical approach cannot be utilized. Washington burglary is not generic burglary. The district

[4] There has been some uncertainty within Washington's lower courts as to whether burglary is an "alternative means" crime, but it has never been interpreted as setting forth multiple offenses, each constituting a separate and distinct crime. *See, e.g.*, *State v. Johnson*, 132 Wash. App. 400, 409-410, 132 P.3d 737 (2006) (even if burglary were an alternative means crime, no jury unanimity required so long as there was sufficient evidence to support each means); *State v. Allen*, 127 Wash. App. 125, 127, 110 P.3d 849 (2005) (in most cases, burglary is not an alternative means crime, so jury unanimity not required even if there was no evidence to support one of the means); *Trice*, *supra*, 2012 WL 1699858, at *8 (opining that burglary is not an alternative means crime)

court erred in concluding otherwise.[5]

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[5]Even if the modified categorical approach applied, the conviction was not for generic burglary. Under the modified categorical approach, the court may look to a limited number of documents to determine whether the jury *necessarily* had to find or, in the case of a plea, the defendant *necessarily* admitted the elements of the generic offense. *See Descamps*, 133 S.Ct. at 2284, 2286 n. 3; *Taylor*, 495 U.S. at 602; *Shepard v. United States*, 544 U.S. 13, 21, 24, 26 (2005).

Mr. Wilkinson pleaded pursuant to *Alford v. North Carolina* to an amended information that charged that he "did enter and remain unlawfully" in a dwelling "with intent to commit a crime against a person or property therein." (ER 354, 360). Under Washington law, "[a]cts or conduct described in a penal statute in the disjunctive or alternative, may be pleaded in the conjunctive." *State v. Dixon*, 78 Wash. 2d 796, 802, 479 P.2d 931, 935 (1971); *see also State v. Munson*, 120 Wash. App. 103, 107, 83 P.3d 1057, 1959 (2004). "If the charge is in the conjunctive, the information is held to charge a single crime committed in any one or all of the ways charged." *Dixon*, 78 Wash. 2d at 802, 479 P.2d at 935. Here, Mr. Wilkinson's conviction for entering *and* remaining unlawfully required proof that he entered *or* remained unlawfully–not both. Because Mr. Wilkinson pleaded pursuant to *Alford*, he did not admit anything. *See State v. Newton*, 87 Wash.2d 363, 372, 552 P. 2d 682, 687 (1976). Therefore, he did not admit the elements of generic burglary.

Nor did the trial court find the elements of generic burglary. Under Washington law, the trial court was required to find a factual basis for the plea existed, but it was not required to find Mr. Wilkinson's guilt beyond a reasonable doubt. *Newton*, 87 Wash. 2d at 686, 552 P.2d at 370. Much less was the court required to find the elements of generic burglary beyond a reasonable doubt. *Id.* Indeed, under Washington law, a trial court can accept a plea to an offense without a factual basis for the specific offense so long as it is satisfied that there is a factual basis to a more serious charge. *State v. Zhao*, 157 Wash.2d 188, 200, 137 P.3d 835, 841 (2006); *In re Barr*, 102 Wash. 2d 265, 270, 684 P.2d 712, 715 (1984). Moreover, in Washington, an *Alford* plea is not probative of the commission of a crime, much less any particular aspect of the crime. *United States v. Williams*, __ F.3d __, 2014 WL 350078 (9th Cir. Feb. 3, 2014) (citing *Clark v. Baines*, 150 Wash.2d 905, 916, 85 P.3d 245, 251 (2004)). Therefore, the trial court did not find the elements of generic burglary.

2. Mr. Wilkinson's 1994 Conviction Did Not Establish the Generic Element of a Building Or Structure

Mr. Wilkinson's conviction did not constitute a conviction for generic burglary for the separate and independent reason that Washington's residential burglary statute covers residences other than buildings or structures and, under *Descamps*, is not divisible.

a. Washington's Definition of "Building or Structure" Is Broader Than Generic Burglary's

This Court has previously held that Washington's definition of dwelling includes dwellings that would not be buildings or structures under *Taylor*. *United States v. Wenner*, 351 F.3d 969, 972-73 (9th Cir. 2003). Under *Taylor,* 495 U.S. at 599, only burglaries of building and structures are covered. Washington residential burglary criminalizes burglary of a "dwelling other than a vehicle." RCW § 9A.52.025(1). "Dwelling" is defined as "any building or structure, though removable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW § 9A.04.110(7)(1994). And "building" is defined to include, "in addition to its ordinary meaning," "any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods." RCW § 9A.04.110(5)(1994). In short, Washington's definition of dwelling is broader than the generic definition of building or structure.

b. Because The Statute Is Not Divisible As To Type of Building Or Structure, the Modified Categorical Approach Does Not Apply

The district court cited *Nijhawan v. Holder,* 557 U.S. 29 (2009), for the proposition that a court may always use the modified categorical approach to determine the target of a burglary and opined that this portion of *Nijhawan* was unaffected by *Descamps*. (ER 19-20). It went on to hold that, because the record

in this case revealed that Mr. Wilkinson was convicted under the "dwelling alternative to the Washington statute, using the modified categorical approach," and because a "[d]welling is a building or structure designed for occupancy and intended for use in one place," Mr. Wilkinson's prior conviction was a conviction for generic burglary under the ACCA. (ER 20). The court's analysis was flawed.

The threshold problem with the court's analysis is that, under Washington law, determining that something is "dwelling" or even a "building or structure" does not mean that the conviction was for the burglary of a building or structure under *Taylor*. *Wenner*, 351 F.3d at 972-973. This is because the definition of a building or structure is broader under Washington law than under *Taylor*. *Id.*

But there is also a more fundamental problem: the district court's reliance on *Nijhawan* both over-reads *Nijhawan* and under-reads *Descamps*. In *Nijhawan*, the Supreme Court did not hold that a court may always utilize the modified categorical approach when a burglary statute lists different targets. Rather, the High Court held that, where the statute "refer[s] to several different *crimes*, each described separately," and "some of these *crimes* involve violence while others do not," a court could utilize the modified categorical approach to determine *which crime* the defendant has been convicted of. *Nijhawan*, 557 U.S. at 35 (emphasis added). In *Descamps*, the Supreme Court reiterated that it had recognized in *Nijhawan* "that when a statute. . . 'refer[s] to several different *crimes*,' not all of which qualify as an ACCA predicate, a court must determine which *crime* formed the basis of the defendant's conviction." 133 S.Ct. at 2284 (quoting *Nijhawan*, 557 U.S. at 35) (emphasis added). Thus, after *Descamps*, it is clear that the modified categorical approach may be utilized to determine the target of a burglary only where the burglary statute describes several different crimes and is, thus, divisible. *See Descamps,* 133 S.Ct. at 2285.

Washington's residential burglary statute is not divisible as to the target of the burglary. As set forth above, Washington residential burglary criminalizes burglary of a single type of target: "a dwelling other than a vehicle." RCW § 9A.52.025(1). The non-exhaustive lists of locations considered buildings, and thus dwellings, under Washington law are definition statutes. *See* RCW §§ 9A.04.110(5), (7). Under Washington law, definition statutes do not create alternative elements that the jury must find unanimously and beyond a reasonable doubt. Indeed, "[d]efinition statutes do not create [even] additional alternative means of committing an offense." *Linehan*, 147 Wash.2d at 646, 56 P.3d 542.

Thus, burglary of an "ordinary" building and burglary of a "fenced area" that doubles as a dwelling are not different crimes under Washington law (or even alternative means of committing the crime). Accordingly, Washington's residential burglary statute is not divisible in this respect either. Therefore, the district court erred in applying the modified categorical approach to determine the target involved in Mr. Wilkinson's prior conviction.

Because Mr. Wilkinson's prior burglary conviction did not constitute generic burglary, the district court erred in sentencing him as an Armed Career Criminal.

D. The District Court Plainly Erred in Determining Mr. Wilkinson Was an Armed Career Criminal Without Any Information as to the Statutes of Conviction for the Other Triggering Convictions

Finally, the district court also plainly erred in relying on the presentence report to conclude Mr. Wilkinson had two other prior convictions for violent felonies, because the report did not list even the statutes of conviction. Under plain error review, this Court may reverse when (1) there was error; (2) the error was plain, that is, clear or obvious; (3) the error affected substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial

proceedings. *Pimental-Flores*, 339 F.3d at 967 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)).

The other two offenses that could have triggered the ACCA mandatory minimum were two convictions for second degree assault. The presentence report did not list the statutes of conviction, but only the offense descriptions: "Assault 2nd Degree" (PSR ¶27) and "Assault of a Child 2nd Degree" (PSR ¶37). This Court has long held that a district court plainly errs by relying on a presentence report's factual description of a defendant's prior offense to determine whether the defendant was convicted of a violent felony, even where the defendant fails to object. *See United States v. Castillo-Marin*, 684 F.3d 914, 919 (9th Cir. 2012); *Pimentel-Flores*, 339 F.3d at 968. Therefore, the district court's reliance on the presentence report's characterization of the offenses alone was error, which was clear and obvious.

The error affected Mr. Wilkinson's substantial rights and requires reversal because not all second degree assaults under Washington law constitute "violent felonies." Under Washington law, an individual may be convicted of second degree assault if he, "[w]ith intent to commit a felony, assaults another." RCW § 9A.36.021(1)(e). The Supreme Court of Washington has adopted the common law definition of assault, which includes "an unlawful touching with criminal intent." *Clark v. Baines*, 150 Wash.2d 905, 908 n. 3, 84 P.3d 245, 247 (2004) (internal quotation marks and citations omitted). And this Court has held that "an unlawful touching with criminal intent" does not constitute a use of force as required to make out a violent felony under the ACCA. *United States v. Lawrence*, 627 F.3d 1281, 1286 (9th Cir. 2010) (citing *State v. Humphries*, 21 Wash. App. 405, 407, 586 P.2d 130, 133 (1978)). Accordingly, in Washington State, a conviction for second degree assault can be committed by an unlawful

touching with intent to commit a felony. This would not constitute a violent felony for the purpose of the ACCA.

Because not all convictions for second degree assaults are violent felonies, Mr. Wilkinson's substantial rights were affected by the district court's reliance on the presentence report's description of the offense because some convictions covered by that description are not violent felonies. This Court should exercise its discretion to recognize this plain prejudicial error and reverse.

Conclusion

For the foregoing reasons, this Court should reverse Mr. Wilkinson's conviction because the district court erred in denying his suppression motion. Even if this Court were to affirm the conviction, it should nevertheless vacate Mr. Wilkinson's fifteen-year sentence because the district court erred in concluding that his conviction for burglary triggered the Armed Career Criminal Act. Finally, even if this Court does not find the characterization of Mr. Wilkinson's 1994 conviction as a violent felony to be error, it must nevertheless reverse because the district court committed plain error in relying solely on the presentence report to determine that Mr. Wilkinson's convictions for second degree assault constituted violent felonies.

Respectfully submitted,

DATED: February 11, 2014

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

Certificate of Compliance

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,763 words.

DATED: February 11, 2014

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

Certificate of Related Cases

Counsel for appellant certifies that she is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: February 11, 2014

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

Statutory Addendum

United States Constitution, Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 924(e) (Armed Career Criminal Act)

(e)(1) 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).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has 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; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Revised Code of Washington § 9.94A.120, Sentencing (1994)

When a person is convicted of a felony, the court shall impose punishment as provided in this section.

(1) Except as authorized in subsections (2), (5), and (7) of this section, the court shall impose a sentence within the sentence range for the offense.

(2) The court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.

(3) Whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard range shall be a determinate sentence.

Revised Code of Washington § 9A.52.025, Residential Burglary (1994)

(1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

(2) Residential burglary is a class B felony. In establishing sentencing guidelines and disposition standards, the sentencing guidelines commission and the juvenile disposition standards commission shall consider residential burglary as a more serious offense than second degree burglary.

Revised Code of Washington § 9A.52.010(3), Definitions (1994)

(3) "Enters or remains unlawfully". A person "enters or remains unlawfully" in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of a building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of the land or some other authorized person, or unless notice is given by posting in a conspicuous manner. Land that is used for commercial aquaculture or for growing an agricultural crop or crops, other than timber, is not unimproved and

apparently unused land if a crop or any other sign of cultivation is clearly visible or if notice is given by posting in a conspicuous manner. Similarly, a field fenced in any manner is not unimproved and apparently unused land;

Revised Code of Washington § 9A.04.110(5),(7), Definitions (1994)

In this title unless a different meaning plainly is required:

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(5) "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, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;

***

(7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging