NO. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

_____

TERRY LAMELL EZELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

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

_____

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

_____

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TABLE OF APPENDICES

APPENDIX A

FILED

OCT 25 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-35685 D.C. No. 2:17-cv-00255-RSM Western District of Washington, Seattle ORDER

Before: FERNANDEZ, CLIFTON, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

Judge Nguyen has voted to deny the petition for rehearing en banc, and Judges Fernandez and Clifton have so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

FILED

OCT 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-35685 D.C. No. 2:17-cv-00255-RSM Western District of Washington, Seattle ORDER

Before: FERNANDEZ, CLIFTON, and NGUYEN, Circuit Judges.

Judge Clifton and Judge Nguyen have voted to grant Appellant's motion for extension of time to file a petition for rehearing with suggestion for rehearing en banc, and Judge Fernandez has voted to deny it.

Appellant's motion for extension of time to file a petition for rehearing with suggestion for rehearing en banc [Dkt. 40] is GRANTED. Any such petition should be filed on or before October 5, 2018.

NOT FOR PUBLICATION

FILED

JUL 30 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 17-35685 D.C. No. 2:17-cv-00255-RSM MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief Judge, Presiding

Argued and Submitted July 11, 2018
Seattle, Washington

Before: FERNANDEZ, CLIFTON, and NGUYEN, Circuit Judges.

Terry Ezell appeals the district court's denial of his second petition for habeas relief pursuant to 28 U.S.C. § 2255. We have jurisdiction pursuant to 28 U.S.C. § 2253(a), and we affirm.

1. Ezell failed to contest the constitutionality of his enhanced sentence at sentencing and on direct appeal but his procedural default is excused by "cause"

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

and "prejudice." *See Bousley v. United States*, 523 U.S. 614, 621–22 (1998). Ezell had cause not to challenge because at that time, Supreme Court precedent[1] foreclosed the argument that the residual clause of 18 U.S.C. § 924(e)(2)(B)(ii) was unconstitutionally vague. *Reed v. Ross*, 468 U.S. 1, 17 (1984). Ezell was prejudiced because any error under *Johnson v. United States*, 135 S. Ct. 2551 (2015), subjected him to a heightened mandatory minimum sentence. *See* 18 U.S.C. § 924(e)(1).

2. The "threshold question" here is whether Ezell's second § 2255 petition relies on the rule announced in *Johnson*. *United States v. Geozos*, 870 F.3d 890, 894 (9th Cir. 2017); *see also* 28 U.S.C. § 2255(h)(2). In *United States v. Geozos*, we set forth the applicable framework for answering that question. 870 F.3d at 895–96. If the sentencing record makes clear that the district court did not rely on the residual clause to find that a prior offense qualified as a predicate offense under the Armed Career Criminal Act, the petition does not rely on *Johnson* as to that offense. *Id.* at 895. If the record is unclear whether the district court relied on the residual or another clause, we look to whether there is any controlling law that would allow us to infer that the district court relied on something other than the residual clause. *Id.* at 896. If we cannot draw such an inference because the

[1] *See James v. United States*, 550 U.S. 192 (2007), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015).

relevant legal background is mixed, the claim relies on *Johnson* for § 2255(h)(2) purposes. *Id.*

Here, the record is clear that the district court relied on the enumerated offense clause of 18 U.S.C. § 924(e)(2(B)(ii) to find that Ezell's two convictions for second-degree burglary qualified as predicate offenses for purposes of the Armed Career Criminal Act. The district court specifically referenced the Supreme Court's decision in *Taylor v. United States*, 495 U.S. 575 (1990), and our decision in *United States v. Kilgore*, 7 F.3d 854 (9th Cir. 1993) (per curium), both of which are enumerated offense cases.

The record is unclear which clause the district court relied on for the two second-degree assault convictions, but the relevant legal background indicates that Ezell's conviction for intentional assault resulting in substantial bodily harm under Washington Revised Code § 9A.36.021(1)(a) qualified as a predicate offense under the elements clause. *See United States v. Hermoso-Garcia*, 413 F.3d 1085, 1088–89 (9th Cir. 2005) (holding that such an assault was a crime of violence under then-sentencing guideline § 2L1.2(b)(1)(A)(ii)'s nearly identically worded residual clause).

Because the district court did not rely on the residual clause for three predicate offenses, Ezell's claim does not rely on the rule announced in *Johnson*. *Id.* at 896 ("[A] claim does not 'rely on' *Johnson*[] if it is possible to conclude,

using both the record before the sentencing court and the relevant background legal environment at the time of sentencing, that the sentencing court's ACCA determination did not rest on the residual clause.").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TERRY LAMELL EZELL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CASE NO. C17-255RSM ORDER DENYING PETITIONER'S MOTION UNDER 28 U.S.C. § 2255

I. INTRODUCTION

Before the Court is Petitioner's second or successive 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence. Dkt. #1. Petitioner Terry Lamell Ezell challenges the 262-month sentence imposed on him by this Court following his conviction for possession of cocaine base with the intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(l)(B)(iii) and felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(l) and 924(e). *Id.* at 4. Petitioner challenges his sentence on the basis that the United States Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), applies retroactively to his case and requires that the Court resentence him. This is Mr. Ezell's fourth § 2255 motion;

all of his prior § 2255 motions were denied. *Id*. at 5-7. After full consideration of the record, and for the reasons set forth below, the Court DENIES Mr. Ezell's § 2255 motion.

II. BACKGROUND

Mr. Ezell was charged in his underlying criminal case with possession of crack cocaine with Intent to Distribute, in violation of 21 U.S.C. §§841(a)(1) and 841(b)(1)(B)(iii) (Count 1); carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. §924(c) (Count 2); and being a felon in possession of a firearm as an armed career criminal, in violation of 18 U.S.C. §§922(g)(1) and 924(e) (Count 3). Case No. 2:05-cr-00273-RSM, Dkt. #79. On March 10, 2008, following a bench trial, the Court acquitted Mr. Ezell of Count 2, but convicted him of the remaining charges. Case No. 2:05-cr-00273-RSM, Dkts. #108 and #112.

Mr. Ezell's sentencing took place on July 11, 2008. Case No. 2:05-cr-00273-RSM, Dkt. #118. Given the amount of crack cocaine at issue in Count 1, Ezell faced a 5-year mandatory minimum sentence, and a maximum sentence of 40 years. 21 U.S.C. §841(b)(1)(B)(iii) (2005). Mr. Ezell's felon-in-possession charge in Count 3 normally carries a 10-year maximum sentence. 18 U.S.C. §924(a)(2). However, if subject to sentencing under ACCA, Ezell faced a 15-year mandatory minimum, and a maximum sentence of life. 18 U.S.C. §924(e)(1).

In its sentencing memoranda the government urged that Mr. Ezell's criminal history rendered him a career offender under the Guidelines, given his conviction of a controlled substance offense in Count 1. Case No. 2:05-cr-00273-RSM, Dkts. #114 and #116. The government also argued Mr. Ezell was subject to sentencing under the ACCA for his felon-in-possession conviction in Count 3. *Id.* To qualify as a career offender, a defendant must have two prior convictions for a "crime of violence or a controlled substance offense," USSG

§4B1.1(a), while a defendant needs three prior convictions for "a violent felony or a serious drug offense" to qualify for sentencing under ACCA. 18 U.S.C. §922(e)(1).

The government identified four prior Washington State convictions that met these definitions:

1) 1994 conviction for Assault in the Second Degree and Burglary in the First Degree;

2) 1991 conviction for Assault in the Second Degree;

3) 1987 conviction for Burglary in the Second Degree, involving a personal residence;

4) 1987 conviction for Burglary in the Second Degree, involving a church.

Case No. 2:05-cr-00273-RSM, Dkts. #114 and #116. Mr. Ezell's 1994 second-degree assault conviction was for assault with a deadly weapon, in violation of RCW 9A.36.021(1)(c), and his 1991 second-degree assault conviction was for an intentional assault resulting in substantial bodily harm, in violation of RCW 9A.36.021(1)(a). The government argued that Mr. Ezell's assault convictions were categorically violent felonies/crimes of violence under the elements clause of ACCA and USSG §4B1.2(a)(1), and also argued, in the alternative, that these convictions were qualifying predicates under ACCA's and Former USSG §4B1.2(a)(2)'s residual clauses. Case No. 2:05-cr-00273-RSM, Dkt. #114 at 4-5, 8-9, 13-14. Regarding Mr. Ezell's burglary convictions, the government argued the *Shepard* documents showed these convictions matched ACCA's generic definition of burglary under the modified categorical approach, and also argued that they were violent felonies under ACCA's residual clause. *Id.* at 5-8, 9-12. The government further argued that the 1994 first-degree burglary conviction and the 1987 second-degree burglary conviction involving a residence matched Former USSG §4B1.2(a)(2)'s generic crime of burglary of a dwelling under the modified categorical

approach, and the 1987 second-degree burglary conviction involving a church was a crime of violence based on the residual clause. *Id.* at 13-14.

At sentencing, the Court determined that Ezell should be sentenced under the ACCA and as a career offender. Case No. 2:05-cr-00273-RSM, Dkts. #130 at 33. The Court determined Ezell's second-degree assault convictions were categorically crimes of violence/violent felonies, *id.* at 29, and, after reviewing the *Shepard* documents, the Court found Ezell's second-degree burglary convictions qualified under the modified categorical approach, *id.* at 29-33. While the Court made these rulings "for the reasons basically set out in the probation officer's presentence report, and the government's memorandum," *id.* at 33, the Court did not explicitly rely on the residual clause, nor did the Court make any findings about Ezell's first-degree burglary conviction, *see id.* at 29-33.

Adopting the Probation Office's calculation, the Court set Mr. Ezell's total offense level at 34 and placed him in Criminal History Category VI, resulting in an advisory Guidelines range of 262 to 327 months. *Id.* at 33. The Court imposed a 262-month prison term, followed by 5 years of supervised release. *Id.* at 36-38. A little over two weeks later the Court entered an amended judgment clarifying that concurrent 262-month sentences had been imposed on Counts 1 and 3. Case No. 2:05-cr-00273-RSM, Dkt. #123.

Mr. Ezell subsequently filed his direct appeal arguing, *inter alia*, that the Court erred in finding his two second-degree burglary convictions were violent felonies, and thus that the ACCA-enhanced sentence imposed on Count 3 was illegal. *See* Opening Brief, *United States v. Ezell*, 9th Cir. Case No. 08-30265. Mr. Ezell did not dispute that he was properly found to be a career offender for Guidelines purposes, nor did he claim there was any problem with the concurrent 262-month sentence imposed on Count 1. *See id.* On June 15, 2009, the Ninth

Circuit affirmed Mr. Ezell's conviction and sentence. *United States v. Ezell*, 337 F. App'x 623 (9th Cir. 2009). The Court held that, applying the "modified categorical approach," it was clear Ezell's second-degree burglary convictions "were generic burglaries of 'buildings' under the ACCA." *Id*. at 624. As such, the Court "conclude[d] that he is an armed career offender under the ACCA." *Id*. The Supreme Court denied Ezell's petition for certiorari. 559 U.S. 917 (2010).

Mr. Ezell has subsequently filed several §2255 petitions, all of which have been denied.

In June of 2016, based on the U.S. Supreme Court decisions in *Johnson*, *supra*, and *Welch v. United States*, 136 S. Ct. 1257 (2016), Mr. Ezell filed the instant § 2255 motion with this Court. Dkt. #1. The Ninth Circuit authorized this second or successive § 2255 motion on February 17, 2017. Dkt. #5.

III. DISCUSSION

A. Legal Standard

A motion under 28 U.S.C. § 2255 permits a federal prisoner in custody to collaterally challenge his sentence on the grounds that it was imposed in violation of the Constitution or laws of the United States, or that the Court lacked jurisdiction to impose the sentence or that the sentence exceeded the maximum authorized by law. A petitioner seeking relief under § 2255 must file his motion with the one-year statute of limitations set forth in § 2255(f). That section provides, *inter alia,* that a motion is timely if it is filed within one year of the underlying judgment or "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." § 2255(f).

28 U.S.C. §2244(b)(4) provides that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." This statute applies in §2255 proceedings, *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164 (9th Cir. 2000), and precludes the Court from granting relief on any claim not based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, unless petitioner is making a claim of actual innocence of the crime of conviction. *See* 28 U.S.C. §§2244(b)(2), 2255(h)(2); *Villa-Gonzalez*, 208 F.3d at 1164.

B. Mr. Ezell's Motion

Mr. Ezell has filed a second or successive § 2255 petition, and does not claim he is actually innocent of his narcotics or felon-in-possession convictions.[1] Dkt. #1. Therefore, the Court must determine whether his claims are based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

As noted above, Petitioner's motion to vacate cites the Supreme Court's decision in *Johnson v. United States*, *supra*. In *Johnson*, the Supreme Court ruled on a section of the Armed Career Criminal Act ("ACCA") known as the "residual clause," which provided a definition of "violent felony." Under the ACCA, a defendant convicted of being a felon in possession of a firearm faces a mandatory minimum sentence of 15 years if he has three prior convictions for "violent felonies." 18 U.S.C. § 924(e)(1). The ACCA residual clause provided that a violent felony was one that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the Supreme

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[1] Mr. Ezell does, however claim that he is "actually innocent of being an Armed Career Criminal" and "actually innocent of the designation as a career offender under the Sentencing Guidelines." Dkt. #1 at 9 and 12.

Court held that this clause was "unconstitutionally vague." 135 S. Ct. at 2557. In doing so, the Court necessarily found the clause "vague in all its applications," *id.* at 2561, and concluded that "[i]ncreasing a defendant's sentence under the clause denies due process of law," *id.* at 2557. Subsequently, in *Welch v. United States*, the Court held that *Johnson* applies retroactively to defendants whose sentences were enhanced under the ACCA's residual clause. 136 S. Ct. at 1265.

a. Count 1 Career Offender Enhancement

The Government argues that Mr. Ezell's sentence under Count 1 was not based on the residual clause and that this is fatal to his claim. Rather, the Court deemed his prior assault convictions to be categorical crimes of violence under USSG §4B1.2(a)(1)'s elements clause, and his burglary convictions were found to meet the definition of "burglary of a dwelling" in Former USSG 4B1.2(a)(2) by employing the modified categorical approach. Dkt. #8 at 15. The Government argues that "while Ezell advances a variety of arguments for why, in light of *Descamps* and *Mathis*, his predicate convictions purportedly do not qualify as crimes of violence under USSG §4B1.2(a)(1)'s elements clause or as the enumerated offense of 'burglary of a dwelling' under Former USSG §4B1.2(a)(1) [citing Dkt. #3 at 16-36], these claims cannot be a basis for relief in this second §2255 motion…. [because] *Descamps* and *Mathis* are cases about statutory construction, not constitutional holdings, and thus claims based on those decisions are not cognizable in a second §2255 motion." *Id.* (citing 28 U.S.C. §§2244(b)(2)(A), 2244(b)(4), 2255(h)(2); *Ezell*, 778 F.3d at 766-67). On Reply, Mr. Ezell argues that "the mere fact that a claim rests on *Johnson II* does not mean that courts should ignore Supreme Court precedent and forego the three-part analysis outlined in *Descamps* and *Mathis*." Dkt. #12 (citing *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867-68 (9th Cir. 2015)).

The Government also argues that even if Mr. Ezell could demonstrate that the Court relied on Former USSG §4B1.2(a)(2)'s residual clause when evaluating his predicate convictions, he would still not have a viable *Johnson* claim pertaining to his career offender adjudication for Count 1 given *Beckles v. United States*, 137 S. Ct. 886 (2017), which holds that *Johnson* does not invalidate the residual clause in Former USSG §4B1.2(a)(2). On Reply, Mr. Ezell concedes this point and drops this claim as to his career offender enhancement. Dkt. #12 at 1 n.1. Accordingly, Mr. Ezell will not be resentenced as to Count 1.

b. Count 3 ACCA Enhancement

The Government begins by noting that this challenge is "academic" because even if successful on this claim, Mr. Ezell would still face the concurrent 262-month sentence imposed for his narcotics conviction, Count 1. Dkt. #8 at 16. The Government argues that it should fail regardless because:

> The record makes clear the Court did not rely on ACCA's residual clause in evaluating Ezell's burglary convictions, but rather relied on the *Shepard* documents and the modified categorical approach, and a fair reading of the record also supports the conclusion that the Court found Ezell's assault convictions are categorically violent felonies under ACCA's elements clause. And, even if Ezell could show the Court relied on the residual clause in evaluating his assault convictions, any such error would be harmless because those convictions are indeed violent felonies under ACCA's elements clause.

Id. at 18.

The Government argues that Petitioner's motion is procedurally barred because he failed to raise this issue at sentencing or on direct appeal. *Id*. (citing *United States v. Mejia-Mesa*, 153 F.3d 925, 929 (9th Cir. 1998); *Bousley v. United States*, 523 U.S. 614, 622 (1998)). Petitioner's claim is thus procedurally defaulted unless he can "show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains."

Id. (citing *United States v. Frady*, 456 U.S. 152, 168 (1982)). The Government argues there was no "cause" based on ineffective assistance of counsel because Petitioner's current claim was futile at the time. *Id*. at 18-19. The Government next goes on to argue at length that Mr. Ezell cannot show that the ACCA's residual clause played a prejudicial role at his sentencing, and that he is required to meet this burden to proceed. Dkt. #8 at 22 (citing, *inter alia*, *Simmons v. Blodgett*, 110 F.3d 39, 42 (9th Cir. 1997); *Williams v. United States*, C16-0939RSM, Dkt. #12 at 5-7; *In re Henry*, 757 F.3d 1151, 1162 (11th Cir. 2014)). The Government argues that:

> With respect to Ezell's two second-degree burglary predicates, the record is crystal clear: the Court conducted a modified categorical analysis on the record and concluded, after reviewing the *Shepard* documents, that these convictions were violent felonies because they met ACCA's generic definition of burglary. CR_130 at 29-32.[2] The Court never mentioned the residual clause when evaluating these convictions, and the Ninth Circuit's ruling on Ezell's direct appeal confirms the Court's ruling was that these convictions "qualify as 'burglaries' under the modified categorical approach." *Ezell*, 337 F. App'x at 624.

Id. at 24. Although the Court reviewed presentencing reports that mentioned the residual clause, the Government argues that "[b]ecause the Court expressly ruled that Ezell's burglary convictions were violent felonies because they met ACCA's generic definition of burglary under a modified categorical analysis, the Court's actual ruling shows the Court did not rely on the residual clause in evaluating those convictions." *Id*. at 25. The Government goes on to argue that, even if Mr. Ezell could show that the Court relied on the residual clause, any such error would be harmless, thus barring Mr. Ezell's §2255 claim. *Id.* (citing *United States v. Montalvo*, 331 F.3d 1052, 1057-58 (9th Cir. 2003)). The Government argues that Mr. Ezell must show, but

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[2] Case No. 2:05-cr-00273-RSM, Dkt. #130 at 29-32.

cannot, that the prior convictions at issue do not independently qualify as violent felonies under another provision of the ACCA. *Id*. at 26-37.

Mr. Ezell argues that he can show cause and actual prejudice. Dkt. #12 at 3-9 (citing, *inter alia*, *Bousley v. United States*, 523 U.S. 614, 622 (1998), and *Reed v. Ross*, 468 U.S. 1, 16 (1984)). Mr. Ezell argues that he should be able to proceed on an actual innocence claim, not because he can show factual innocence, but because he "is 'actually innocent[of being an armed career criminal because he received a sentence, and was improperly designated as an armed career criminal, for which he was statutorily ineligible." *Id*. at 9-11. Mr. Ezell argues that the Court should apply the same logic as it did in *Kilgore v. United States*, 2016 WL 7180306, at *4-*5 (W.D. Wash. Dec. 9, 2016), to find that Petitioner does not bear the burden to prove reliance on the residual clause when the record was silent. *Id*. at 23. Mr. Ezell argues why his *Johnson* claim is not academic given the recent holding in *Dean v. United States*, 137 S. Ct. 1170 (2017).

The Court agrees with Mr. Ezell that he can show cause and prejudice to get over the first procedural bar cited by the Government based on this Court's prior reading of *Bousley* and *Reed*. However, the Government is also correct that Mr. Ezell must still show that the ACCA's residual clause played a prejudicial role at his sentencing, and that he has failed to do. *See Simmons, supra*. Although the Court has applied the *Brecht/O'Neal*[3] standard in prior cases where it was unclear if the Government relied on the now-unconstitutional residual clause, *see Kilgore supra*, this case is factually distinct. The record is silent on whether the Court explicitly considered the residual clause at sentencing. Although the Court agrees with Petitioner that the benefit of the doubt should accrue to the Petitioner, unlike in *Kilgore*, there is no doubt that the Court could

[3] *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

have reached the guidelines range conclusion that it did without reliance on the now-unconstitutional residual clause for the reasons stated by the Government. Mr. Ezell's actual-innocence-without-factual-innocence argument is not supported by Ninth Circuit precedence and will not serve to overcome the lack of prejudice above.

c. Certificate of Appealability

A defendant may not appeal a decision denying a motion under 28 U.S.C. §2255 without obtaining a certificate of appealability. 28 U.S.C. §2253(c)(1)(B). The decision whether to grant a certificate of appealability must be made by this Court in the first instance. *See* Ninth Circuit Rule 22-1(a); *see also* Fed. R. App. P. 22(b)(1). To obtain a certificate of appealability, the defendant must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). If any of the defendant's claims are found procedurally defective, he must also show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*.

Given the potential application of the *Brecht/O'Neal* standard above and Mr. Ezell's arguments why his motion is not academic, the Court finds that Mr. Ezell has advanced a colorable claim for relief, upon which reasonable jurists could disagree, and that he is therefore entitled to a certificate of appealability.

IV. CONCLUSION

Having considered Petitioner's motion, Respondent's answer thereto, and the remainder of the record, the Court hereby finds and ORDERS:

1. Petitioner's Motion under § 2255 (Dkt. #1) is DENIED.
2. Petitioner is GRANTED a Certificate of Appealability in this matter.

3. The Clerk of the Court is directed to forward a copy of this Order to Petitioner and all counsel of record.

DATED this 8 day of August 2017.

RICARDO S. MARTINEZ
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

FILED

FEB 16 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. 16-72054 D.C. No. 2:05-cr-00273-RSM Western District of Washington, Seattle ORDER

Before: GOODWIN, FARRIS, and FERNANDEZ, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2255 motion makes a prima facie showing for relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The application is granted. *See Welch v. United States*, 136 S. Ct. 1257, 1264-68 (2016) (*Johnson* announced a new substantive rule that has retroactive effect in cases on collateral review).

The district court is authorized to proceed with the identical section 2255 motion, protectively filed in case number No. 2:05-cr-00273-RSM, on June 24, 2016. The motion shall be deemed filed in the district court on June 23, 2016, the date the application was filed in this court. *See Orona v. United States*, 826 F.3d 1196 (9th Cir. 2016).

The Clerk shall serve this order and the application directly on the chambers of the Honorable Ricardo S. Martinez.

No further filings will be entertained in this case.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	No. 14-71696 OPINION

Application to File Second or Successive
Petition Under 28 U.S.C. § 2255

Submitted December 11, 2014*
Seattle, Washington

Filed January 23, 2015

Before: M. Margaret Mckeown, Richard C. Tallman, and John B. Owens, Circuit Judges.

Opinion by Judge Tallman

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* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY[**]

Habeas Corpus

The panel denied a motion for certification to file a second or successive 28 U.S.C. § 2255 motion to set aside a sentence imposed under the Armed Career Criminal Act.

The panel held that when a motion pursuant to 28 U.S.C. § 2255(h) to file a second or successive petition presents a complex issue, this court may exceed the thirty-day time limit set forth in 28 U.S.C. § 2244(b)(3)(D) for granting or denying the authorization.

The panel held that the Supreme Court did not announce a new rule of constitutional law in *Descamps v. United States*, 133 S. Ct. 2276 (2013), but rather clarified – as a matter of statutory interpretation – application of the ACCA in light of existing precedent.

COUNSEL

Howard Lee Phillips, Esq., Phillips Law LLC, Seattle, Washington; Jonathan D. Libby, Esq., Deputy Federal Public Defender, Los Angeles, California, for Petitioner.

Carl Andrew Colasurdo, Assistant United States Attorney, Seattle, Washington; Michael Symington Morgan, Assistant United States Attorney, Seattle, Washington, for Respondent.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

TALLMAN, Circuit Judge:

Terry L. Ezell asks us to certify his filing of a second or successive 28 U.S.C. § 2255 petition in the Western District of Washington, where he was convicted in 2008 of being a felon in possession of a firearm. The district court sentenced Ezell under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Ezell argues that his second or successive petition is warranted because in *Descamps v. United States*, 133 S. Ct. 2276 (2013), the Supreme Court announced a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2255(h)(2), and under which the district court could abrogate his ACCA sentence. We disagree. We hold that the Supreme Court did not announce a new rule of constitutional law in *Descamps*. Rather, it clarified—as a matter of statutory interpretation—application of the ACCA in light of existing precedent. For that reason, we deny Ezell's motion for certification to file another habeas corpus petition.

I

Terry Ezell was convicted in 2008 of being a felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1), and for possession with intent to distribute cocaine, *see* 21 U.S.C. § 841(a)(1), (b)(1)(B)(iii). Am. Mem. & Decision 11–12, Case No. CR05-273RSM, ECF No. 113 (W.D. Wash. Mar. 26, 2008). For the felon in possession charge, the district court sentenced Ezell to 262 months' imprisonment under the

ACCA.[1] *See* 18 U.S.C. § 924(e)(1) ("In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony . . . , such person shall be fined under this title and imprisoned not less than fifteen years . . . ."). It based this enhancement, in part, on Ezell's two prior Washington state burglary convictions. Because Washington's burglary statute is broader than the generic federal definition, the district court—in keeping with then-Ninth Circuit precedent—applied the modified categorical approach. After considering underlying charging documents, the district court determined that both burglaries qualified as violent felonies and could therefore serve as predicates to impose § 924(e)'s mandatory minimum.

Ezell exhausted his direct appeal in 2010. *See United States v. Ezell*, 337 F. App'x 623, 624 (9th Cir. 2009) (affirming district court). He filed an unsuccessful § 2255 petition later that year. *See Ezell v. United States*, Nos. C10-467RSM, CR05-273RSM, 2011 WL 1900155 (W.D. Wash. May 18, 2011). Two years later, he asked us for authorization to file a second or successive § 2255 petition. Finding that Ezell's motion did not satisfy § 2255(h), we summarily denied it. *Ezell v. United States*, No. 12-73464 (9th Cir. Jan. 25, 2013) (order denying motion).

The Supreme Court decided *Descamps* on June 20, 2013. The Court held that the modified categorical approach applies only to statutes that are divisible. *Descamps*, 133 S. Ct. at 2282–83 (abrogating *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam)). Ezell

[1] The district court also sentenced Ezell to a concurrent 262-month sentence for the drug possession charge under the career offender guideline, U.S.S.G. § 4B1.1.

filed the § 2255(h)(2) motion currently before us less than one year later. He argues that we should permit him to file a second or successive § 2255 petition in the district court because *Descamps* is a "new rule of constitutional law" under which the court could abrogate his 262-month sentence. Section 2255(h) gives us original jurisdiction over the motion.

II

Before considering whether Ezell's petition presents "a new rule of constitutional law," we address whether a statutory time bar prevents us from ruling on Ezell's motion. Second or successive § 2255 motions are subject to the gatekeeping procedures "provided in section 2244." 28 U.S.C. § 2255(h). Section 2244 states that "[t]he court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion." 28 U.S.C. § 2244(b)(3)(D). More than thirty days have passed since Ezell filed his motion, so whether § 2244(b)(3)(D) is mandatory or hortatory is a key threshold issue. It is also an issue of first impression in the Ninth Circuit.[2]

The majority of our sister circuits to have considered § 2244(b)(3)(D)'s time limit have held that it is hortatory, not

[2] We have cited § 2244(b)(3)(D) only once, and in our discussion we did not explicitly consider whether the thirty-day time frame is mandatory. *See Nevius v. McDaniel*, 104 F.3d 1120, 1121–22 (9th Cir. 1996). And although we have not given the issue express consideration, we have repeatedly ruled on § 2244(b)(3) motions well after the expiration of the thirty-day period. *See, e.g.*, *Gulbrandson v. Ryan*, 738 F.3d 976, 996 (9th Cir. 2013) (ruling on the § 2244(b)(3) motion more than three years after it was filed).

mandatory. *See Word v. Lord*, 648 F.3d 129, 129 n.1 (2d Cir. 2011) (per curiam); *Ochoa v. Sirmons*, 485 F.3d 538, 539 n.1 (10th Cir. 2007) (per curiam); *Gray-Bey v. United States*, 201 F.3d 866, 867–70 (7th Cir. 2000); *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 272–73 (1st Cir. 1998), *abrogated on other grounds as recognized in Simpson v. Matesanz*, 175 F.3d 200 (1st Cir. 1999); *In re Siggers*, 132 F.3d 333, 336 (6th Cir. 1997); *In re Vial*, 115 F.3d 1192, 1194 n.3 (4th Cir. 1997) (en banc); *cf. Gray-Bey*, 201 F.3d at 871 (Easterbrook, J., dissenting) (arguing that the thirty-day limit is mandatory and faulting the majority for ignoring the limit).

But some of our sister circuits have cited this provision as mandatory. *See, e.g.*, *In re Henry*, 757 F.3d 1151, 1157 n.9 (11th Cir. 2014) ("[T]his Court necessarily must apply § 2244(b)(2) under a tight time limit in all cases, since the statute expressly requires us to resolve this application within 30 days, no matter the case.").

We agree with the majority of our sister circuits and hold that when a § 2255(h) motion presents a complex issue, we may exceed § 2244(b)(3)(D)'s thirty-day time limit. As the Sixth Circuit noted in *In re Siggers*, a statutory time period providing a directive to an agency or public official is not ordinarily mandatory "unless it *both* expressly requires [the] agency or public official to act within a particular time period *and* specifies a consequence for failure to comply with the provision." 132 F.3d at 336 (internal quotation marks omitted); *accord* 3 *Sutherland Statutory Construction* § 57:19 (7th ed. 2013) ("[I]f a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory."). And because Congress "has failed to specify a consequence

for noncompliance with the thirty-day time limit imposed by 28 U.S.C. § 2244(b)(3)(D)," failure to comply with that time limit "does not deprive this Court of the power to grant or deny" a motion to file a second or successive petition. *In re Siggers*, 132 F.3d at 336.

Because the thirty-day statutory time limit is hortatory, we reach the merits of Ezell's motion.

III

A

The Antiterrorism and Effective Death Penalty Act ("AEDPA") "imposes significant limitations on the power of federal courts to award relief to prisoners who file 'second or successive' habeas petitions." *United States v. Lopez*, 577 F.3d 1053, 1059 (9th Cir. 2009). Under AEDPA, a federal prisoner may not file a second or successive § 2255 petition unless he or she makes a prima facie showing to the appropriate court of appeals that the petition is based on: (1) "a new rule," (2) "of constitutional law," (3) "made retroactive to cases on collateral review by the Supreme Court," (4) "that was previously unavailable." 28 U.S.C. § 2255(h)(2);[3] *Tyler v. Cain*, 533 U.S. 656, 662, 121 S. Ct.

[3] The appeals court may also permit a prisoner to file a second or successive § 2255 petition if it contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." 28 U.S.C. § 2255(h)(1). We do not consider that section here. Nor do we consider or foreclose the possibility that someone who was sentenced under an erroneous interpretation of the ACCA might obtain relief via 28 U.S.C. §§ 2241 and 2255(e). *See Gilbert v. United States*, 640 F.3d 1293,

2478, 2482 (2001). Section 2255(h)(2) creates a jurisdictional bar to the petitioner's claims: "If the petitioner does not first obtain our authorization, the district court lacks jurisdiction to consider the second or successive application." *Lopez*, 577 F.3d at 1061.

Ezell's motion fails on the first two prongs of § 2255(h). The Supreme Court in *Descamps* did not announce a new rule, and even if it did, *Descamps* is not a constitutional case.[4] We therefore deny Ezell's motion.

B

A new rule is a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or is otherwise "not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989) (plurality opinion). A case also announces a new rule if it "expressly overrules a prior decision." *Jones v. Ryan*, 733 F.3d 825, 843 (9th Cir. 2013) (internal quotation marks omitted), *cert. denied*, 134 S. Ct. 503.

1305–15 (11th Cir. 2011) (en banc) (discussing the potential availability of such writs); *see also Marrero v. Ives*, 682 F.3d 1190, 1194–95 (9th Cir. 2012) (declining to address whether a petitioner may obtain relief via §§ 2241 and 2255(e) if "he received a sentence for which he was statutorily ineligible"). But any further attempts by Ezell to challenge his ACCA sentence would be futile, as he was also sentenced to 262 months' imprisonment for his drug conviction, which is unrelated to the validity of his ACCA sentence.

[4] Because Ezell's motion fails to meet § 2255(h)'s first two prongs, we do not consider whether *Descamps* announced a rule "made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 18 U.S.C. § 2255(h)(2).

The Supreme Court did not announce a new rule in *Descamps*. *Descamps* did not impose a new obligation nor did it break new ground. Rather, as both the Supreme Court and we have recognized, *Descamps* clarified application of the modified categorical approach in light of existing precedent. *Descamps*, 133 S. Ct. at 2283 ("Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case."); *United States v. Quintero-Junco*, 754 F.3d 746, 751 (9th Cir. 2014) ("As the Supreme Court recently *clarified* in *Descamps*, courts may employ the modified categorical approach only when the statute of conviction is 'divisible . . . .'" (emphasis added)); *accord United States v. Davis*, 751 F.3d 769, 775 (6th Cir. 2014) (noting that "[t]he Supreme Court in *Descamps* explained that it was not announcing a new rule, but was simply reaffirming" its prior interpretation of the ACCA).

But even if the Supreme Court did announce a new rule in *Descamps*, that rule is not constitutional. *Descamps* is a statutory interpretation case: It clarifies when certain crimes qualify as violent felonies under the ACCA, a congressional enactment. *See Descamps*, 133 S. Ct. at 2281 (framing the issue as one arising under the ACCA); *Shepard v. United States*, 544 U.S. 13, 16–17, 125 S. Ct. 1254, 1257 (2005) (clarifying application of the modified categorical approach under the ACCA and framing the issue as one of statutory interpretation).

Although *Descamps* discusses the Sixth Amendment, the discussion does not make the decision "constitutional" within the meaning of 28 U.S.C. § 2255(h)(2). *Descamps* explains that the modified categorical approach applies only to divisible statutes in part because a broader application may raise Sixth Amendment issues under *Apprendi v. New Jersey*.

Descamps, 133 S. Ct. at 2288 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362–63 (2000)). But this discussion does not make *Descamps* "constitutional": "Under the statute, it is the 'new rule' itself that must be one 'of constitutional law,' not the effect of failing to apply that rule to successive petitions." *In re Dorsainvil*, 119 F.3d 245, 248 (3d Cir. 1997); *see also United States v. Reyes*, 358 F.3d 1095, 1097 (9th Cir. 2004) (per curiam) (holding that *Richardson v. United States*, 526 U.S. 813, 119 S. Ct. 1707 (1999), is a statutory interpretation case even though it discusses constitutional issues).

The Court's decision in *Shepard* confirms that *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143 (1990), and its progeny—including *Descamps*—are statutory interpretation cases. A majority of the Justices in *Shepard* concluded that a broad application of the modified categorical approach may implicate the Sixth Amendment. *Shepard*, 544 U.S. at 24 (plurality opinion) (noting that it would raise Sixth Amendment concerns to permit sentencing courts to examine documents outside of charging papers, plea agreements, or other similar documents); *id.* at 28 (Thomas, J., concurring) ("[T]he factfinding procedure the Court rejects gives rise to constitutional error, not doubt . . . ."). Nevertheless, circuit courts to consider the issue consistently hold that *Shepard* is a statutory interpretation case. *See United States v. Cantellano*, 430 F.3d 1142, 1147 (11th Cir. 2005) ("*Shepard* was not a constitutional decision. *Shepard* decided an issue of statutory interpretation."); *see also United States v. Christensen*, 456 F.3d 1205, 1207 (10th Cir. 2006) (same). *Shepard* itself confirms this: "We are, after all, dealing with an issue of statutory interpretation." 544 U.S. at 23. That conclusion applies with equal force to *Descamps*, notwithstanding the Court's Sixth Amendment discussion.

IV

In sum, *Descamps* did not announce a new rule, and even if it did, that rule is not constitutional. Ezell has therefore failed to make a prima facie showing that he meets § 2255(h)(2)'s first two prongs. His § 2255(h)(2) motion is thus

DENIED.

FILED

JAN 25 2013

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LAMELL EZELL, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. 12-73464 ORDER

Before: CANBY, CLIFTON, and N.R. SMITH, Circuit Judges.

The application for authorization to file a second or successive 28 U.S.C. § 2255 motion in the district court is denied. Petitioner has not made a prima facie showing under 28 U.S.C. § 2255 of:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the defendant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

No petition for rehearing or motion for reconsideration shall be filed or entertained in this case. *See* 28 U.S.C. § 2244(b)(3)(E).

jp/MOATT

FILED

JAN 26 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TERRY LAMELL EZELL, Defendant - Appellant.	No. 11-35607 D.C. Nos. 2:10-cv-00467-RSM 2:05-cr-00273-RSM Western District of Washington, Seattle ORDER

Before: BERZON and BEA, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2). All pending motions, if any, are denied as moot.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 15 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. TERRY LAMELL EZELL, Defendant - Appellant.	No. 08-30265 D.C. No. 2:05-cr-00273-RSM MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted June 1, 2009
Seattle, Washington

Before: CANBY, THOMPSON and CALLAHAN, Circuit Judges.

Terry Lamell Ezell ("Ezell") appeals the district court's denial of his motion to exclude evidence, and challenges the district court's imposition of a 262-month sentence pursuant the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).[1]

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[1] Because the parties are familiar with the facts of this case, we repeat them here only as necessary to the disposition of this case.

The district court did not abuse its discretion in denying Ezell's motion to exclude evidence found on his person and in his truck on the night of the arrest. *See United States v. McFall*, 558 F.3d 951, 960 (9th Cir. 2009). The disputed evidence was relevant to Ezell's credibility and state of mind, and tended to undermine his assertion that he was in a "sleep state" prior to his arrest.

Neither did the district court err in imposing a 262-month sentence under the ACCA. A defendant with three prior violent felony convictions who is convicted under 18 U.S.C. § 922(g)(1) qualifies as an armed career criminal under the ACCA. *See United States v. Kilgore*, 7 F.3d 854, 855 (9th Cir. 1993). Ezell was convicted of violating 18 U.S.C. § 922(g)(1) and has the requisite three prior violent felony convictions. Two of those convictions are undisputed. Accordingly, either of his 1987 convictions under Washington's second degree burglary statute will qualify as the necessary third conviction.

The ACCA defines "violent felony" to include burglary, *see* 18 U.S.C. § 924(e)(2)(B)(ii), and both of Ezell's convictions qualify as "burglaries" under the modified categorical approach. Although the Washington statute's definition of "building" makes it broader than the generic definition of burglary, the records of conviction show that Ezell pled guilty to second degree burglary "as charged in the information." *See United States v. Werner*, 351 F.3d 969, 972-73 (9th Cir. 2003)

The presence of a street address in each information is sufficient to show that Ezell's convictions were generic burglaries of "buildings" under the ACCA. *Kilgore*, 7 F.3d at 855-56.[2] Because Ezell's has at least three qualifying prior violent felony convictions, we conclude that he is an armed career offender under the ACCA.

AFFIRMED.

[2] At oral argument, Ezell withdrew his contention that under *Begay v. United States*, 128 S. Ct. 1581 (2008), neither 1987 conviction qualified as "violent felony convictions" under the ACCA. Therefore, we do not address that argument here.

APPENDIX E

UNITED STATES DISTRICT COURT

Western District of Washington

UNITED STATES OF AMERICA
V.
TERRY L. EZELL

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: CR05-00273RSM-001

USM Number: 35187-086

Howard Phillips
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 and 3 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii)	Possession of Cocaine Base, in the form of Crack Cocaine, with the Intent to Distribute	02/26/2005	1
18 U.S.C. §§ 922(g)(1) and 924(e)	Felon in Possession of a Firearm - Armed Career Criminal	02/26/2005	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2

☐ Count(s) _____ ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Assistant United States Attorney C. Andrew Colasurdo

July 25, 2008
Date of Imposition of Judgment

Signature of Judge

The Honorable Ricardo S. Martinez
United States District Judge

July 25, 2008
Date

05-CR-00273-TN

DEFENDANT: TERRY L. EZELL
CASE NUMBER: CR05-00273RSM-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 262 months on Count 1 and 262 months on Count 2 w/ the sentences to run concurrent w/ each other for a total sentence of 262 months.

☒ The court makes the following recommendations to the Bureau of Prisons:

Federal Medical Center (FMC) in Devens, Massachusetts
Butner Federal Correctional Complex in Butner, North Carolina

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: TERRY L. EZELL
CASE NUMBER: CR05-00273RSM-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug and/or alcohol test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight valid tests per month, pursuant to 18 U.S.C. § 3563(a)(5) and 18 U.S.C. § 3583(d).

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: TERRY L. EZELL
CASE NUMBER: CR05-00273RSM-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate as instructed by the U.S. Probation Officer in a program approved by the probation office for treatment of narcotic addiction, drug dependency, or substance abuse, which may include testing to determine if defendant has reverted to the use of drugs or alcohol. The defendant shall also abstain from the use of alcohol and/or other intoxicants during the term of supervision. Defendant must contribute towards the cost of any programs, to the extent defendant is financially able to do so, as determined by the U.S. Probation Officer.

The defendant shall submit to a search of his person, residence, office, property, storage unit or vehicle conducted in a reasonable manner and at a reasonable time by a probation officer.

The defendant shall participate as directed in a mental health program approved by the United States Probation Office. The defendant must contribute towards the cost of any programs, to the extent the defendant is financially able to do so, as determined by the U.S. Probation Officer.

The defendant shall provide his probation officer with access to any requested financial information including authorization to conduct credit checks and obtain copies of the defendant's Federal Income Tax Returns.

The defendant shall not obtain or possess any driver's license, social security number, birth certificate, passport or any other form of identification in any other name other than the defendant's true legal name, without the prior written approval of the Probation Officer.

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DEFENDANT: TERRY L. EZELL
CASE NUMBER: CR05-00273RSM-001

CRIMINAL MONETARY PENALTIES

	Assessment	Fine	Restitution
TOTALS	$ 200	$ Waived	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
	N/A	N/A	
TOTALS	$ 0	$ 0	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

☒ The court finds that the defendant is financially unable and is unlikely to become able to pay a fine and, accordingly, the imposition of a fine is waived

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

41a

DEFENDANT: TERRY L. EZELL
CASE NUMBER: CR05-00273RSM-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

☒ PAYMENT IS DUE IMMEDIATELY. Any unpaid amount shall be paid to Clerk's Office, United States District Court, 700 Stewart Street, Seattle, WA 98101.

☒ During the period of imprisonment, no less than 25% of their inmate gross monthly income or $25.00 per quarter, whichever is greater, to be collected and disbursed in accordance with the Inmate Financial Responsibility Program.

☒ During the period of supervised release, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after release from imprisonment.

☐ During the period of probation, in monthly installments amounting to not less than 10% of the defendant's gross monthly household income, to commence 30 days after the date of this judgment.

The payment schedule above is the minimum amount that the defendant is expected to pay towards the monetary penalties imposed by the Court. The defendant shall pay more than the amount established whenever possible. The defendant must notify the Court, the United States Probation Office, and the United States Attorney's Office of any material change in the defendant's financial circumstances that might affect the ability to pay restitution.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program are made to the United States District Court, Western District of Washington. For restitution payments, the Clerk of the Court is to forward money received to the party(ies) designated to receive restitution specified on the Criminal Monetaries (Sheet 5) page.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

UNITED STATES OF AMERICA,	)	Cause No. 05-273RSM
Plaintiff,	)	Seattle, Washington
vs.	)	July 11, 2008
TERRY LAMELL EZELL,	)	
Defendant.	)	

SENTENCING HEARING
VERBATIM REPORT OF PROCEEDINGS
BEFORE THE HONORABLE RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: CARL A. COLASURDO
NICHOLAS BROWN

For the Defendant: HOWARD PHILLIPS

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A F T E R N O O N S E S S I O N
July 11, 2008 - 2:24 p.m.

THE CLERK: This is the sentencing hearing in United States versus Terry L. Ezell, Cause No. 05-273, assigned to this Court.

Will counsel please rise and make your appearances.

MR. COLASURDO: Good afternoon, Your Honor. Andy Colasurdo and Nicholas Brown on behalf of the United States.

THE COURT: Gentlemen.

MR. PHILLIPS: Good afternoon, Your Honor. Howard Phillips for Terry Ezell. He's seated to my left.

THE COURT: Mr. Phillips, thank you.

Counsel, let me indicate for you and for our record exactly what the Court has had a chance to read and fully consider prior to our sentencing hearing scheduled for this afternoon. The Court has reviewed the government's sentencing memorandum, the government's memo regarding the defendant's status as an armed career criminal and a career offender. The Court has reviewed the defendant's sentencing memorandum, the attachments to the affidavits, the letters, the documents, copies of prior certifications for determination of probable cause in some of the underlying cases, statement of defendant on plea of guilty, etcetera.

The Court has also reviewed the defendant's supplemental sentencing memorandum and, of course, the Court has reviewed the presentence report prepared by U.S. Probation Officer Sara Moore, also present in the court today.

Trusting that all parties have had that same opportunity to fully review all of those materials, if I could have the government's recommendation for sentencing, first of all.

MR. COLASURDO: Thank you, Your Honor. I'm -- I want to discuss initially Count 3, the felon in possession and the offense level as calculated, and more specifically the application of the Armed Career Criminal Act. The defendant qualifies because of the three prior felony convictions that he has that are listed in presentence report and in the government's sentencing memorandum.

The violent felony, which is contrasted to a crime of violence and sometimes there's some confusion about that, but when you're looking in terms of an armed career criminal, for a felon in possession of a firearm you're dealing with violent felonies. When you're dealing with career offenders for offenses such as drug charges will have a Count 1 I'll discuss later, you deal with crimes of violence. And there's just a slight difference there, but it's a distinction worth making.

Mr. Ezell has three prior violent felony convictions. And that term "violent felony" is defined under 18 U.S.C. Section

924(e)(2)(B) to include any crime punishable by imprisonment for a term exceeding one year that, in (I) it reads, has as an element the use -- attempted use or a threatened use of physical force against another person. Or, and then in (2) it lists, it's burglary arson, or extortion involves the use of explosives or otherwise involves conduct that presents a serious risk of injury to another.

Now, Mr. Ezell actually has four convictions that qualify as a violent felony under that definition. You only need three to be an armed career criminal. The first is the assault 2 and burglary in the first degree under the '93 cause number.

Now, I made reference in the government's memorandum that both of those crimes qualify. Now, that's one conviction or one case. But each one of those crimes meets the definition of violent felony. Now, they only count as a single offense or single predicate offense, because they were committed on the same occasion. I just want that to be clear.

Clearly, an assault 2 that he pled to, which was an intentional assault involving a deadly weapon clearly satisfies the first subsection, subsection I. It includes the -- as an element the use, attempted use or threatened use of physical force against another person. The burglary in the first degree, a burglary that was charged in the first degree because it involved a deadly weapon also qualifies.

And I'm going to get into more specifically the burglaries in a little bit.

So I'd like to move on to the second crime that qualifies, which is the assault in the second degree. This is the '90 cause number. Again, in that particular case, he was charged and convicted of intentionally assaulting another person and thereby recklessly inflicting substantial bodily harm. Again, clearly those elements satisfy the definition of violent felony in that it had, again, the use, attempted use or threatened use of physical force against another person.

Now, the defense submitted a recantation from the victim in this case. But that doesn't change anything. The Court is to look at the facts or what elements were involved or the fact of conviction, not the particular facts from the case. These aren't supposed to be mini trials and we're not litigating these offenses. You look at what he was convicted of, that crime and whether it meets that definition and it does.

In addition, I just wanted to point out to the Court just to make things clear, and there was some reference in defense counsel's brief about the distinction between what was described in the certification, the broken bone versus the fracture that was later found in medical reports. And how there may have been ineffective assistance of counsel down below for failing to negotiate that.

One thing I wanted to bring to the Court's attention is the definition of substantial bodily harm under the RCW. Under RCW 9A041104(a), substantial bodily harm is defined as bodily injury that involves a temporary or substantial disfigurement, or that causes a temporary or substantial loss or impairment of a function of any bodily part of organ or it causes a fracture of any bodily part.

So, I don't know where the defense was going with drawing the distinction between what was referenced as a broken bone versus what was referenced as a fracture. The injury itself met the definition of substantial bodily harm for assault in the second degree.

That brings us to the burglary in the second degree convictions, both of them occurring in '87 separately. As I explained in the government's brief, the Washington statute for burglary and how it defines a building is broader than how that -- broader than the generic burglary that you need to have for purposes for a criminal act. It's broader because -- Washington's burglaries are broader because burglary crimes include the word "building", and the word building includes, by the Washington definition, fenced areas, railway cars, cargo containers.

So all that means is that there is no categorical match with the burglary as it's laid out under 924(e)(2)(B). But they do qualify under the modified categorical approach in

that, and as you can see that from Kilgore, in Kilgore the Court basically said when you have a common street address in information or in the plea of guilty, that's sufficient for the purpose of establishing that the burglary the individual was convicted of was a burglary of the building that met the federal definition of the generic burglary and wasn't a cargo container, it wasn't a railway car, it wasn't a fenced area.

And you have that in each of the cases here going back to the burglary in the first degree you have a dwelling of the mother of -- and the victim's name is there. Located at [redacted] Avenue South. In the burglary of the residence in '87, it's charged as the [redacted] residence located at [redacted] in Seattle, again, a common street address.

And finally with respect to the church, the burglary of the church, the information reads the Church of Seattle located at [redacted], Seattle, and in the plea it references the business office of the Church of Seattle. Again, the reference to the common street address and in this particular case referencing an office clearly illustrated that this was a building. What the common thinking is of a building and not a fenced area, railway car, cargo container.

So it does meet the definition under the modified categorical approach as a burglary. But it also satisfies or meets the definition of the otherwise clause, or satisfies it that way. If you look at the definition again it says after

listing burglary, arson, extortion, it says otherwise involves conduct that presents a serious risk of injury to another. Again, as stated in Matthews, which is a Ninth Circuit case, in James, which is a supreme court case, the main risk of a burglary arises from the -- not from the physical act of entering the building, but from being there and the risk of confrontation between the burglar and the third party, whether that be the occupant of the house, police officer, or just the -- a bystander that comes to investigate. Those -- that danger was present in these cases as well. And so not only do they qualify as burglary, they also qualify under the otherwise prong.

The defense makes some reference to the fact that burglary in the second degree specifically excludes dwellings. But fortunately that is true today. But the burglary in the second degree at the time the defendant was convicted, this was burglary in the second degree which encompassed basically what is now the burglary and second-degree statute and residential burglary statute. The effective date of the residential burglary statute was July 1st of 1990. So this version the defense is referring to the new version of the burglary and second-degree statute, not the version that was in effect when the defendant was convicted.

And I'm not going to go into detail about this unless the Court has some questions about it. But the Begay opinion

does not affect any of these crimes whatsoever. That case, it was a New Mexico case, where they were reviewing whether or not a person qualifies as a criminal who had been convicted of felony DUI out of the state of New Mexico. And they said no. They said it was -- it was too unlike -- the crime was too unlike, but the provision has listed examples for us to believe that Congress intended the provisions to cover it. And so it has no effect on burglary conviction, which is one of the listed examples.

So if the Court has questions about that I'd be more than happy to address it. But I think it's clear that the Begay does not apply to this situation.

So he has four prior violent felonies. And again, you need three to qualify as an armed career criminal. So Mr. Ezell is an armed career criminal.

With respect to the career offender. Again, career offender, we're not dealing with violent felonies but crimes of violence. Again, as I reference in my brief the definitions are essentially the same with the exception that burglaries under the career offender and as they're defined as the crime of violence is defined under the guidelines, Section 4(b)(1.2)(A)(2), the burglary must be in the dwelling. So the only effect this has on the analysis that we've just done for purposes of the Armed Career Criminal Act is that the burglary of the church doesn't qualify as a

burglary under that because it involved the church and not a dwelling. It still qualifies under the otherwise clause. So he still has four crimes of violence for purposes of the career offender.

Before I move on, does the Court have any questions with respect to those?

THE COURT: I do not.

MR. COLASURDO: Now, I'd like to explain how we the United States came up with the recommendation that we did, which is a recommendation for 300 months, 25 years. And we came up with that recommendation through this process. And I want to kind of take you through the process. First, we want to calculate the range and look at what the range was. And in this particular case, there are -- we basically got to about the same offense level four different ways. If you look at him as an armed career criminal, the offense level is 34. If you look at him as a career offender, the offense level is 34. So that's why I included in the government's submission a calculation of the offense level had those provisions not applied.

And if you look at the felony possession, his offense level, the total would have been 32, very similar to what he is as an armed career criminal because of the prior convictions that base offense level would be 24, because it was stolen, it would be two-point increase. Because he

possessed a firearm in connection with another felony, that's the drug offense, you increase it by four. And because he obstructed justice by testifying falsely at the trial you add two. So you get 32.

As in looking at the drug case, again, not looking at his career offender but just calculating the numbers as you would for the guidelines, the amount of drugs gives you a base offense level of 28, the adjustments give you plus two for possessing a dangerous weapon, and plus two again because he obstructed justice by testifying falsely at trial.

And the reason I -- we calculated it this way and did it these multiple ways is to see how -- see what strength there is to this offense level. And I think when you look at the Armed Career Criminal Act and the career offender, the focus is not so much on the offense but on the defendant and the defendant's history. And so in calculating, for example, you could deliver a tenth of a gram of crack cocaine, but if you have these convictions you're a career offender. And that's what you get.

So it doesn't matter really what the offense, the severity of the offense. Where if you calculate it most recently with just the guideline, stripping away the Armed Career Criminal Act and the career offender, the focus there is on the defendant's behavior, the nuances of the particular crime. What occurred.

And the interesting thing is whether you're looking at the defendant and his history or the defendant and the crimes he committed, you're getting essentially the same offense level, 32 or 34, which, again, you arrived at that four different ways by looking at the defendant and his possession of a firearm, by looking at the facts of the firearm, by looking at the defendant and his delivery of drug -- or his possession of the drugs by looking at the drugs themselves.

So I think that gives strength to the guideline range which is 262 to 327 months. Once you have the guideline range we looked at whether there are any reasons why that range was just not appropriate. Was there something that was overvalued? Was there something that was undervalued? Was there something that was overlooked? Now, I'm sure the defendant's going to say that his mental condition is overlooked. As I'll argue in a little bit, there is no mental condition. First of all, narcolepsy is not a mental condition. And narcolepsy had nothing to do with the events that took place on this particular occasion.

So there's nothing here that seems amiss. So now that we've calculated the range, we've determined that the range is appropriate, there's no reason to say that it isn't. Now, we look at the third thing, which is where does he belong within that range? How does he compare to other people who would be put in that range? And what we looked at was both

the number and nature of the convictions. We're looking at a man who has 17 felony convictions. And 26 non-felony convictions. And let's then look at the nature. You know, does he have a lot of drug convictions or is it just possessions or he's dealing a very small amount of drugs, you know, a tenth of a gram to an undercover police officer. No, we don't have any of those offenses. We have burglaries, and we have violent crimes. Crimes where he's assaulted people. Used a gun. So when you look at the crimes sometimes you look at things that are classified as violent, but then look at the facts and say truly are -- were those crimes really violent crimes. And in this particular case, yes. Yes, they were.

And so after factoring all that in we believe that 300 months is appropriate. Throughout the course of this case we have not seen any signs that the defendant is changing. Either through this case or after his release from his most recent sentence, which was in excess of ten years. He sure -- he presents himself very well. He's somewhat charming in the way that he can engage you in a discussion. But that just makes him all the more dangerous. It allows him to get back into the good graces of the women that he's abused. It's allowed him to perpetrate the crimes of fraud that he has. And it's hard -- when we were thinking of it, it's hard to think of a redeemable quality that this man has.

And we don't say that -- I think this is perhaps the first defendant I know that I've said that with. You look at his history, it's filled with financial crimes. Where he's involved in burglaries, stealing wallets, purses, credit cards, targeting personal information. Has that changed in 20 years since his 1987 convictions? No. When he was arrested on this occasion he had two stolen checks in his pocket. He had a credit card in another woman's name and he had a duffle bag full of receipts, not to mention the truckload of equipment that could be used to utilize those receipts.

And that's not even counting the other investigation that's referenced in the presentence report where he has other pending charges for identity theft. But what's most concerning is the violent side of Mr. Ezell -- the incident in 1990.

Now, I know that there's this declaration. There's this recantation, but you can't fake a fractured wrist. You can't fake bruised ribs. And you can't fake a burn on the back of the leg, the injuries that she sustained. And that four-year sentence that he received had no effect because when he was released in 1994 he did something even worse to his next girlfriend. He went over to her house, he beat her up, chased her into a back bedroom. She tried to close the door, he kicked the door down, knocking her to the ground. He then

kicked her in the face. She scrambled to a bathroom, tried to lock that door, again, he kicked that door in. He put the gun to her head and as he had previously during the course of the assault threatened to kill her. Put the gun to her head and pulled the trigger. Luckily she dropped to the ground and the bullet missed her.

Not only has he committed crimes of violence, he's committed crimes of violence with a firearm. He's exactly the type of individual who should never go near a firearm. But he had one in 2005.

And has that violence changed? No. You've heard during the course of the trial from Cherie Ezell describe the violence that she suffered at the hand of the defendant. In a conversation she had with myself and a couple agents she said that she was lucky to go two days without being assaulted. And there was numerous police reports that she had filed due to those assaults and an incredible number of other instances that went unreported. And none of that behavior is burglaries, it's the stuff he's done to commit fraud, the identity theft, his assaultive behavior, none of that is due to any mental condition.

That mental condition is a farce. And we know that because when he was arrested and convicted in 1994 for assaulting, putting the gun to the head of that girlfriend, he says that he doesn't have any memory of that; that that

was another episode similar to the one here.

Yet that was never raised in the negotiations. Never raised at the time of plea. Never raised after sentencing. It was never raised at all. Until this case. And we know from the experts that the behavior he exhibited that day was inconsistent with the disorder he's wanted everyone to believe he suffered from.

He also never complained of these symptoms to Stacy Moritz. And I attached the notes as an exhibit. This was one week after he had basically lost an hour of his life in driving from Kent or Covington into the Rainier Valley, having no memory of that and getting pulled over and arrested for having a gun and drugs in his car.

An hour that he lost, an hour that caused him to be arrested. Yet when she asked him if he has any problems with memory his answer is, Sometimes I forget my name or my phone number or I forget my phone number for about 30 seconds. Nothing about losing an hour of his life to seven days earlier, nothing about losing a couple hours of his life in 1994 that caused him to be incarcerated for over ten years. And even later in that interview, if you've got it, he goes on to describe basically this incident to her. That he left his house with a gun and was arrested. And he characterized, chock that up to a lapse in judgment, not a lapse of memory.

And then further information, you have the interview that

he did with Dr. Lowe, where he didn't complain of sleepwalking. His complaint was that he was sleepy during the day and that he would fall asleep suddenly.

Now, it's true that Mr. Ezell very well may have narcolepsy. In fact, we're willing to give him that, despite the fact no conclusive diagnosis can be made because of the problems with the sleep study and the fact that he left and the fact that he was on marijuana at the time. But giving him that, that is not a mental condition that causes someone to fall asleep suddenly. It doesn't cause someone to be violent. It doesn't cause the behavior that we saw in this case. But he took that and ran with it. He tried to turn narcolepsy into something else. He tried to use that and an extension of that as a shield. He tried to fool the government into trying to give him a plea offer. And ultimately, he tried to fool this Court at trial.

Mr. Ezell never has and likely never will accept responsibility for what he has done. Right now the responsibility is yours, Your Honor, to hold him accountable and to protect the public. And we ask that you sentence him to 300 months.

THE COURT: Thank you.

Mr. Phillips?

MR. PHILLIPS: Thank you, Your Honor.

THE COURT: Mr. Phillips, I read the government's

material very, very carefully regarding their allegation that he fits both the armed career criminal status and career offender status, and just as carefully I read your responses. I even looked at some of the case law. I just want to make sure we both agree exactly what it is we're discussing here. You admit that the assaults, the assault and the burglary were Count 1, predicate offense burglary in the first degree?

MR. PHILLIPS: Yes.

THE COURT: That would certainly qualify him under both career offender and armed career offender.

MR. PHILLIPS: That's correct.

THE COURT: You agree that the assault in the second degree that -- well, let me give you the specific cause number here, 90-106625-4, January 1981, that also qualifies?

MR. PHILLIPS: Kind of.

THE COURT: All right. And you disagree as to the burglaries in the second degree, August 1987, and then there was a May 1987, the church and the other building, you disagree on those?

MR. PHILLIPS: That's correct, Your Honor.

THE COURT: All right. Go ahead. Starting with the assault and the second degree, tell me why you disagree that that qualifies under both the armed career criminal or career offender.

MR. PHILLIPS: Why it does not, Your Honor?

THE COURT: Yes.

MR. PHILLIPS: Okay. Well, our position, Your Honor, is that it does not qualify. Basically, I'm analogizing it to a life-without-parole cases where you actually -- a person is looking at life and basically you're looking at 30 years. The Court follows -- 300 months the Court follows recommendation of the prosecution. In life-without-parole cases, you look to see if the prior convictions, really if there were any constitutional issues or due process matters or ineffective assistance of counsel.

So my client's position, Your Honor, is that that case he was violated -- his due process rights were violated, the case was negotiated with the allegations that were made by Ms. Gaswitch (phonetic) were told to the detective puts them in the certificate of probable cause, then he pleads guilty to a substantial bodily injury.

And it's my client's position, Your Honor, that Mr. Minor -- there was an issue of ineffective assistance of counsel. And that's going to be --

THE COURT: All right. I understand. Now talk to me about the burglaries.

MR. PHILLIPS: About the burglaries, Your Honor, I think -- it's really important I think, Your Honor, to note that Mr. Colasurdo kind of gets short tripped to the case of Begay because U.S. versus Begay was right on point and the

key case in this matter is the most recent supreme court case on the issue of the armed control -- the Armed Career Criminal Act. And Mr. Colasurdo chose to talk about the DUI and that DUI is not one of the enumerated crimes listed in the statute.

However, the second part of that goes to not only that but Begay also talks about purposeful prior conviction, that it has to be purposeful, violent, and aggressive behavior. And the behavior that we're talking about here is Blaine, which was the house on Blaine Street as well as the church. There is nothing in any document that I've seen in any document that the government has been able to produce that would be indicia that he was purposely acting in a violent and aggressive manner during those cases.

Apparently the government does concede that the category -- the categorical approach under Taylor doesn't apply. We would also argue that the -- the moderated modified approach does not apply either. What the modified approach allows the Court to look at other than the fact of conviction in the statute are jury instructions, police statements, and that sort of thing. The government has entered -- has presented to this Court with a ton of stuff about my client's history that really is not relevant and is not relevant to the issue of armed career criminal or the career criminal. Clearly, under the categorical approach the

Washington statute is broader. And we also cite in our supplemental State v. Wenner, which said the residential burglary and is under the categorical approach is not a predicate crime sustaining of the armed career criminal act either.

The Blaine house incident, basically I'm not going to be as loquacious as Mr. Colasurdo. I promised myself that I would not do so, as we presented the Court with a lot of facts and a lot of pleadings on the issue. So I don't need to go over that far. Other than to say as to residual catchall would seem to be what the government is relying on, that has been basically overturned or subsumed by the United States versus Begay case where the -- it's in the conjunctive, it has to be one of the enumerated and the conjunctive and not or, and that it be a purposeful, violent, and aggressive act at the conviction -- at the time the burglary occurred. That is not here.

Burglary 1, easy, yes. Burglary 2, no.

The United States v. Matthews, under the pleading of the otherwise cause or the residual cause, the catchall phrase or what they call it, the Court has considered the conduct expressly the charge of which the defendant was committed. But U.S. v. Matthews limits that the inquiry to -- in other words, it limits what the Court can look at on the residual matter. It does not open the door to any theories that the

prosecutor can conjure up. And that citing is U.S. v. Matthews.

And our analysis, Your Honor, that doesn't apply as well. Neither one of those references apply under either one of the approaches. And Begay trumps all of them. Begay clearly doesn't fit.

Now, going to the mental. If I just touch on that briefly. Because this is my client's most important issue to him. The government has professed in his briefings that my client has attempted to perpetuate some sort of a fraud upon this Court. I vehemently oppose that analysis or that characterization of what he's attempting to do.

And obviously, the government is doing so because of its limited life experiences. And not knowing exactly what even happened to someone. I have a personal experience, two personal experiences, which is one of the reasons I'm so fortunate that I think Mr. Ezell is fortunate as well as having me as an attorney, because none of his attorneys would ever listen to him on this other issue. And my personal experience is that I attacked my commanding officer when I was in the military. I was in the tent with my commander officer. And then an orderly -- in my sleep when I was dreaming that track 117 was coming to the tank. I jumped up and attacked my commanding officer, put my hands around his throat and started choking him. And I woke up. And my

orderly was saying, Sergeant Phillips, Sergeant Phillips, Sergeant Phillips, like that. And I woke up. Had my commander been a different kind of man and had I not had the relationship with him that I did have, my life would have been severely different than it is now. Had he charged me with assaulting my commanding officer and put me in the brig and court marshaled me because of that behavior...

In addition, I have a major scar on my arm where I was asleep, I thought someone was going to bomb our apartment building. I put my arm through the window and it was huge cut on my arm where I was bleeding profusely. I was finally awakened when I hit the lights which blood had been splattered all over the room. So I do know, in fact, that the issues that the mental conditions that Mr. Ezell has described do in fact happen.

Now, I thought that the government did a very good job of minimizing the defense experts. And I believe the Court maybe even accepted some of their arguments. Their basic argument is, well, if you didn't know what a bad guy he is therefore your analysis is no good. Well, Dr. Christian Harris, who the Court found not credible did not -- I purposely did not taint Dr. Christian Harris with a lot of the things that Terry has done bad in his life that were tainted. His analysis of my client. Christian Harris spent more time with my client than any other doctor who had

seen him.

In addition, Your Honor, Dr. Tye Hunter, and I think the Court mentioned he did not actually find post-traumatic stress disorder. He found there were indicia of post-traumatic stress disorder, even though he did not find it. And the government's position is, well, what if you had known that he's such a bad guy.

Well, the fact that he is a bad guy, he has all this bad history does not change the fact that he had a two-year old daughter murdered by a babysitter. That his father was killed or died when he was a very young man. That his niece just prior to this was -- was -- had -- was -- died. That his stepbrother -- stepfather had his throat cut by the boyfriend of the niece. And that ties in with the drugs, who the person who actually cut his stepfather's throat had the drugs -- the car and all that situation.

I'm a little -- I'm going to stop now, Your Honor, because I believe I presented enough briefing. But I do want to tell the Court that I am proud of Terry Ezell. I've known Terry Ezell for many years now; I've represented him since 2005. That I've walked with him throughout this entire process. That I do believe that his concern for his mental condition are valid and they're real. And that no matter what Mr. Colasurdo or anyone else says, I believe that with more analysis and that when he gets out of treatment and drugs

he's going to be able to get through this. I personally outgrew mine. Obviously, I've gotten much older. And so you change over time. I don't do that sort of thing. But as recently as five year ago I was experiencing night terrors.

So I know Mr. Ezell will grow through this; he will get by this. But to totally discount his mental condition and that goes to the acceptance of responsibility. Mr. Ezell has pled guilty to a myriad of cases. I believe there's only one case where he went to trial and that was one where he fell asleep and he did not -- he could not remember.

And also we presented the Court with an affidavit from his mother made contemporaneous that she didn't understand that Terry was just asleep and all of sudden he started throwing rocks. I think that's clear indicia back in 1993 that something was going on with Terry Ezell that nobody knew.

When you add that to the fact that he was abandoned, that he was beaten by his mother, that he was abandoned by his mother, that he was tortured emotionally and abused. And his other brothers and sisters go off and have better lives and he's left to fend with an alcoholic and drunken mother who beats him. When you add all those things up, we cited a lot of cases, U.S. v. Shore and all those cases, Menyweather, where people had a lot less trauma in their lives and they were downward departures and based on that. That's why we're asking this Court to find that his criminal history range is

120 to 150 months and that we're asking the Court to sentence Mr. Ezell to 60 months. And I believe he has something he wants to say to the Court as well, Your Honor.

THE COURT: Thank you.

Mr. Ezell, I read the letter that you submitted. I read all the other materials that were sent to me as well. Is there anything else you would like to add today?

THE DEFENDANT: Yes. Briefly.

I wrote here that I would like to thank the Court and Your Honor for -- and my attorney, Howard Phillips, for allowing me the opportunity to develop some kind of insight into what's been going on in my life. This insight has allowed me to address some much needed issues intelligently opposed to recklessly. I have learned that there has been a lot things that had happened in my life that require some much needed counseling. Some things that I had suppressed because of them being too hurtful, too shameful, or just too disturbing to deal with.

But in the past three years that I've been incarcerated I have chosen to deal with some of these much needed issues. Not just for myself but for my daughter as well. She has been exposed to the same losses and abandonment issues that has plagued my life with suppressed resentments. My first daughter that was murdered was her sister. My father that was attacked viciously was her grandfather. My niece that

passed away was her cousin. And she was also abandoned by her mother due to drug addiction. And just last month she lost her grandmother. And now today she stands a good chance of losing me.

So I'm begging the Court and Your Honor to see the mountain of disorders and issues that are in front of you that have affected some of my actions and so many of my decisions throughout my life. And I'm begging you for an opportunity to salvage the remainder of my life and possibly save my daughter's in the process.

Thank you.

THE COURT: Thank you.

Counsel, let me check with our probation officer.

Ms. Moore, thank you, very much for a very thorough report. Having heard from government counsel and defense counsel, anything else you'd like to change, anything else you'd like to add to your -- you still agree that he is an armed career criminal and falls within the career offender.

THE PROBATION OFFICER: I do. I do, Your Honor. I agree that he has qualifications for both of those.

We do recognize the defendant has had a difficult past, includes the father in the early age and his daughter; however, he has spent the past 20 years in and out of custody for serious violent offenses which we're here for today. We therefore feel 240 months would be appropriate in this

matter. We believe it's sufficient but not greater than necessary to satisfy the sentencing structure.

THE COURT: Thank you, Ms. Moore.

All right, Counsel, as indicated earlier, the Court spent a substantial amount of time looking at the legal issues in this particular case. Before we even get to the sentencing factors, and that is because the first step prior to sentencing under current federal law is that the Court must determine and calculate the applicable guideline range. And following that the Court needs to consider whether or not any traditional departure factors apply. And finally, the Court needs to consider all factors that impact sentencing, specifically those set out within 3553(a).

Of course, the ultimate objective of the Court is to impose a sentence that is sufficient but not more than necessary to accomplish the reasonable objectives of sentencing. The first issue is to calculate the appropriate guideline range. Both the government and Probation indicate that the defendant qualifies as an armed career criminal and as a career offender because he has the necessary predicate offenses convictions for those necessary predicate offenses in his history. Let's break those down.

The Armed Career Criminal Act provides that a defendant who has been convicted of the crime of felon in possession of a firearm and has three or more prior convictions for a

violent felony or a serious drug offense or both, committed on occasions different from one another, is subject to a mandatory minimum term of imprisonment of 15 years and up to a maximum term of life. The designated armed career criminal.

In this case, the Court is looking at the following convictions: Assault in the second degree, burglary in the first degree, both committed on April 29th, 1994. Now, even though those were separate convictions, I mean, separate crimes, because they were -- they occurred at exactly the same time in the same act, if you will, in the same day from the single event, they were not committed on occasions different from one another, they are considered together and they count as a single predicate offense. So that's one.

In January 18, 1991, the defendant was convicted of assault in the second degree in Cause No. 90-106625-4. And notwithstanding the objections of Mr. Phillips, indicating that the Court should look at the potential constitutional violations or ineffective assistance of counsel issues, that certainly qualifies as a predicate offense under federal law. That's two.

The real issue is more the burglary in the second degree committed on August 4th, 1987, and the burglary in the second degree committed May 26, 1987. So let's look at those specifically. The reason we have to look at those and look

at the underlying information in those particular offenses is because of the fact that in Washington statute is broader than the generic definition set forth in Taylor. Due to the fact that the definition of a building is used in context of the burglary statute, it's also included offense there is railway cars, cargo containers, in addition to the traditional buildings or dwellings.

And as Mr. Colasurdo pointed out, there was a change in the law and residential burglaries were broken away to a separate category. So as a result of all this, Washington burglary convictions are not simply a categorical mass. The Court needs to examine other potential documents in the record to see whether or not they qualify under what is known as the modified categorical approach set out in United States versus Kilgore. In Kilgore the Ninth Circuit ruled that Washington burglary convictions satisfy the federal definition of the generic burglary as required by Taylor. Whenever a common street address is included in the charging document explaining that the inclusion of that address makes it clear that the defendant entered a building, not a railroad car, railway container, cargo container, or a fenced area.

In looking at that, the August 1987 conviction, the documents the Court looked at show that Mr. Ezell entered the personal residence of a woman he did not know without

permission. When confronted inside that residence he posed as an individual looking for work and asked if she had any work for him to do. She told him that she did not, asked him to leave, he left. A short lime later she discovered her purse and the contents that had been taken from the house.

Subsequently, Mr. Ezell was seen by two passerbys a short distance away carrying a woman's purse and they watched him as he stuffed credit cards taken from the purse into the pants. He was restrained and arrested, charged a few days later with one count of burglary in the second degree, entered a plea of guilty to that particular charge. The Court has reviewed the judgment and sentence in a statement of defendant on plea of guilty as well. Court is satisfied that under the legal test that conviction qualifies as a crime of violence.

Let's look at the church burglary. And that one occurred on March 24th, 1987. In Cause No. 87-101401-7. In that particular case, the church member arrived at the church, noticed that the main door appeared to be propped open. Upon entering the office -- upon entering the church he saw that the -- one of the doors to the main office looked as if the lock had been broken in. Upon entering that office, obviously all of this inside the church itself, he observed the defendant crouched behind the counter. When confronted Mr. Ezell claimed to be a member of the maintenance crew or a

company that was there to clean up. The church member was aware the church did not have any janitorial service. They kept him at the scene until the police arrived and he was arrested.

On March 27th, 1987, he was charged with one count of burglary in the second degree. The Court has reviewed the information, has reviewed the plea of guilty, has reviewed the statement of the defendant on the plea of guilty.

This one as indicated by Mr. Colasurdo does not qualify as a generic burglary due to the overly broad definition of the term "building" used in the Washington statute. So, however, it does qualify under the modified categorical approach because the charging document states that Mr. Ezell did enter and remained unlawfully in a building located at [redacted], Seattle. And then moreover, in his guilty plea he admits that he enters the business office of the Church of Seattle. We have the common street address, the charging document, his admission he entered an office inside a building with the intent to commit a crime. That also qualifies as a violent felony.

Under the career offender statute a defendant qualifies as a career offender if he was at least 18 years old at the time the defendant committed the incident offense. He was. The incident offense is a felony, either a crime of violence or a controlled substance offense. It is. And he has at least

two prior felony convictions for either a crime of violence or a controlled substance offense. Given what the Court has just found regarding the armed career criminal statute, he certainly qualifies also as a career offender.

Counsel, for the reasons basically set out in the probation officer's presentence report, and the government's memorandum, the Court is satisfied that in this particular case, because he qualifies under both armed career criminal, career offender, the total offense level is 34. Criminal History Category automatically goes to VI. That gives the Court an advisory imprisonment range of 262 months to 327 months. Of course, there is a 15-year mandatory minimum the Court may not go below. Up to five years of supervised release, potentially up to a $2 million fine.

Having found calculated the applicable guideline range, there is only the first step. Now the Court needs to look at all sentencing factors. The Court needs to look at the nature and circumstances of this offense, the history and characteristics of the defendant. Whether or not we call it a mental defect, a mental issue, the Court is satisfied that Mr. Ezell definitely does suffer from some sort of sleep disorder. 3553(a) does not limit it to a mental defect or a mental disorder. The court is to look at all the history and characteristics of that defendant.

The Court is also asked to consider that the sentence

needs to reflect the seriousness of the offense, promote respect for the law and provide just punishment to that offense. The Court needs to be cognizant of the fact that the sentence needs to support adequate deterrence to criminal conduct, the need for the sentence to protect the public from the defendant in future crimes, the need to provide the defendant with any type of educational, vocational training, or any other correctional treatment in the most effective manner, including medical care as well. The court is to be cognizant of the kinds of sentences that are available. The need to avoid any unwarranted sentence disparity among defendants involved in similar conduct who have similar records. This Court has looked at all of that. This Court heard this trial.

And as indicated, the Court feels that Mr. Ezell does suffer from some sort of sleep disorder. Whether or not that is any justification for his actions or whether or not that in any way predisposes him to engage in this type of behavior is a huge jump.

As the government points out in their sentencing memo and orally here in court today, Mr. Ezell has a 25-year history of committing offenses -- 17, I believe, felonies, 26 non-felonies during that period of time. Mr. Ezell was convicted of his first felony offense as a juvenile at the age of 14 or 15 for committing a robbery, if I remember

correctly. He's been in and out of prison for years at a time. And as indicated by the government even in this particular case, arrested, convicted of two separate violations of law while in possession of all kinds of material that obviously was meant to be used for other violations of law: the printer, the computer, the magnetic strips, the receipts, credit card receipts, the -- all of that, the stolen checks.

The government points out to the Court that he has a very troubling assaultive history. Absolutely true. Aside from simply the number of offenses and the types of offenses that we're talking about, the Court is seriously concerned about his violent predilection, whether or not he suffers from any parasomnia, any sleep disorder, any other mental issue. Not the point. The point is that he displays conscious interactive behavior at the time when he engages people and many of his victims end up suffering the wrath of his anger and his assaults. I'm not even sure he understands himself the depth of that particular anger or where it stems from, what causes it, or how he can even change or stop that.

One of the incidents that the Court finds especially troubling is the one that led to his conviction for assault in the second degree in the burglary in the first degree. And that is especially troubling because he in effect is approaching his girlfriend and they had split up. He

violently kicks the door down, enters the home; stating that he wants to apologize for beating her up the prior Sunday. He's there to apologize. And because she won't accept his apology or she's so scared of him at that point in time that she in his eyes is not accepting his apology, he pulls out the gun out of his back pocket, chases her throughout the house, and for all intents and purposes attempts to shoot her in the head. But for the fact that she drops to the floor just as that happened and the bullet goes over her head into the wall. In all likelihood, he would have been convicted of murder in that particular case.

Counsel, the Court has looked very, very carefully at all the factors under 3553. The Court is not discounting his mental issues at all, the fact that he does have some sort of sleep disorder, taking that into account. The Court has looked at his background, his history, yes, it has not been easy. The flip side of that is for the last 25 years he's run rampant through this community, leaving victims in his wake, in every step of the way. And the minute he gets out, the minute he get done with his sentence he goes right back to committing other crimes.

This Court will impose the following sentence after consideration of all these factors: He will be placed in five years of supervised release. Restitution is not applicable. The Court waives the imposition of any fine,

finding he does not have the ability to pay a fine. The Court cannot waive the special assessment. That is $100 per count, there are two counts here. The Court imposes special assessment of $200.

Ms. Moore recommends eight special conditions of supervised release. The Court has reviewed those, will impose them exactly as set out in her presentence report. As I feel that they are appropriate in view of the history and characteristics of the defendant, and the offenses of conviction in this case.

Let me briefly summarize them for the purposes of this record. The defendant is to cooperate in the collection of DNA. He is prohibited from possessing any firearms or destructive devices. Within 15 days of placement on supervised release he'll submit to one drug and alcohol test, at least two thereafter, never to exceed eight valid tests per month.

If so instructed by Probation, he will participate in any program approved by them for treatment of addiction dependency or substance abuse. He is to abstain completely from using any alcohol or any other intoxicants for the entire period of supervision. He'll submit to reasonable searches conducted in a reasonable manner and a reasonable time by Probation. If so instructed by Probation he will participate in any mental health program approved by them.

He will provide probation with access to any and all requested financial information, including the authority to conduct credit checks and obtain copies of any income tax returns filed. He shall not obtain or possess any driver's license, Social Security numbers, birth certificates, passports, or any other form of identification in any other name, other than his true legal name without the prior written approval of U.S. Probation.

That only leaves the amount of custody time to be imposed. As indicated, the range the Court finds is 262 to 327 months. The government's recommending a mid-range sentence. The Court has seriously considered that. And I think there are very good reasons for imposing a sentence in the mid range. However, in looking at the background, the nature and history and characteristics of the defendant, his upbringing, his lack of education, the mental issues noted by Mr. Phillips, the Court feels that 300 months would be more than necessary to accomplish the reasonable objectives for sentencing.

So the Court is going to stay within the guideline range and impose a sentence of 262 months. Credit for all time served. And I believe that up to now is approximately 1085 days of custody credit.

Mr. Ezell, Mr. Colasurdo is preparing the written judgment form that reflects the oral sentence just imposed. It's going to be handed to Mr. Phillips for his review. I need to

advise you that since you went to trial on this matter you have an absolute right to appeal the convictions the Court determined you were guilty of. You also have an absolute right to appeal the sentence or any aspect of the sentence this Court has just imposed. If you wish to file a notice of appeal simply let your attorney know. Mr. Phillips is quite aware of how to do that. You can do it yourself. Just indicate to the clerk of our court you wish to file a notice of appeal, either the sentence or the convictions or both. The critical thing is that you do not file a notice of appeal within ten days of today's date, today being the 11th of July, 2008. You may forever waive or give up any right to appeal the conviction or the sentence.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: Counsel?

MR. COLASURDO: May I approach?

THE COURT: Please.

MR. COLASURDO: There are two things that I would like to address real quickly.

THE COURT: All right.

MR. COLASURDO: One is for purposes of an appeal. I know the Court recited some of the facts related to, in particular the burglaries when addressing whether or not they qualify as predicate offenses. Whether or not the Court can

look at a certification is of some debate. But I think from the government's perspective, the documents of conviction being the certification -- or the judgment and sentence, the charging document, the information and the statement defendant pleaded guilty in those cases or the jury instructions in the other days, were sufficient in and of themselves to establish that they were violent felonies and/or crime of violence. And the Court didn't need to go to or reach, even look to the certification. We would ask the Court to make that finding.

THE COURT: I agree, Counsel. I think the documents themselves that are part of the certified documents that were a part of your exhibit that were attached to your memo were sufficient in and of themselves.

MR. COLASURDO: Right. I think that the information part of the certified document that is contained within the information, charging document is the certification, which I think is part of the document that the Court can't review. Of course, the charging document itself, the charge is something the Court can't. So I want to make that abundantly clear.

The second thing is the government's expert in this case, Dr. Appleton, has still not been paid for the time that he set aside and did an interview with defense counsel. Government has paid all the defense experts for their time.

We would appreciate and expect the defendant to -- defense counsel to pay Dr. Appleton for his time.

THE COURT: Counsel, the Court has reviewed the judgment form as it accurately reflects the sentence imposed and Counts 1 and 3 have been dated and signed.

We'll be at recess. Thank you.

(Proceedings concluded.)

* * * * *

C E R T I F I C A T E

I, Nichole Rhynard, Federal Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Nichole Rhynard, CCR, CRR, RMR

JUDGE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, *Plaintiff*, V TERRY LAMELL EZELL, *Defendant*	)	CR05-00273RSM DEFENDANT SUPPLEMENTAL SENTENCING MEMORANDUM

I. INTRODUCTION

The defense submits the following supplemental presentence memorandum in response to the government's memorandum related to the Armed Career Criminal Act. In addition, the defense submits a declaration of Marjorie Guess[1], the victim, in Mr. Ezell's 1993 assault conviction. Mr. Ezell takes full responsibility for his conduct giving rise to this prosecution. Ezell chose to exercise his right to a trial to maintain, preserve his mental condition issues. To this end he chose to proceed by judge and not jury trial thereby saving the court and the parties

[1] Affidavit of Margit Guess Exh 1

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significant time and expense of a jury trial. [2] Therefore this court should accept his letter accepting responsibility and calculate a three (3) level reduction in his guideline range.

II. ARGUMENT

The defense was unable to find a case where the 9th circuit addressed the issue of Washington's Burglary Second Degree Statute. However, in *U.S. v. Wenner,* 351 F.3d 969 *(9th* Cir. 2003) The Court of Appeals for the 9th circuit was asked to decide whether Washington residential burglary is a "crime of violence" under the Sentencing Guidelines. The court concluded that it is not.

Even though Ezell's burglary conviction are for second degree burglary, the court analysis of the residential burglary statute is helpful to this court because neither are burglary first degree, and involve similar conduct, only the location of the burglary is different.

The *Wenner* court was looking at U.S.S.G. sec 4B1.2 in this case. In *Wenner* the defendant pleaded guilty to felon in possession of a firearm. He had a residential burglary and attempted residential burglary convictions. The court did an analysis under the **Categorical Approach and Modified Category Approach**. The Residential Burglary statute is defined as "enter[ing] or remain[ing] unlawfully in a dwelling other than a vehicle" with the intent to commit a crime. Wash. Rev. Code § 9A.52.025 (1).

[2] Ezell Letter of Acceptance, Exh 2.

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A. Categorical Approach

The defense was unable to find a 9th circuit court case interpreting Washing second degree statute. But the court of appeals has considered Washington's residential in *U. S. v Wenner* 351 F.3d 969 (9th Cir 2003) The *Wenner* court cites *Taylor* holding that "burglary" under the Armed Career Criminal Act (ACCA) is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598.[3]

The *Wenner* court agreed with the defendant Wenner that the Washington statute is broader than federal law; burglarizing a fenced area that doubles as a dwelling is a residential burglary under Washington law, but not a "burglary" under *Taylor,* and thus not a burglary of a dwelling under the Guidelines. *Wenner at* Page 973.

Likewise Washington's burglary two statute is broader than the federal definition of "crime of violence" The Washington second degree burglary statute expressly excludes "dwelling". The history of *Taylor* and its progeny clearly include burglaries of dwellings as violent felonies therefore Washington's second degree burglary statue is broader that the applicable federal statute.

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[3] The court looks only to the fact of conviction and the statutory definition of the prior offense to determine whether the prior conviction necessarily satisfies 18 U.S.C. § 924(e). *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143.

B. Modified Category Approach

It is well-established that the courts may not rely on an Information alone to determine the elements of conviction. *See United States v. Parker,* 5 F.3d 1322, 1327 (9th Cir. 1993). In *Wenner,* the trial court did not perform a "Modified" analysis, but the court did point out that the government has the burden of proving the defendant committed a violent offense under the ACCA.

In this case the government in the memorandum spends a good deal of time and energy relating an exaggeration of Ezell's entire criminal history in the most negative light possible, without taking into consideration Ezell's mental health and psychological issues, instead of presenting convincing argument that statutorily Washington's burglary second degree statute fits the federal definition of a "crime of violence".

On the contrary, even given the facts as related by the evidence proffered by the government, there is no reasonable argument that Washington's second degree statute is not broader that the federal statute. There is nothing the government can present that would make the Ezell's second degree burglary conviction fit squarely within the four corners of the federal definition of violent felony.

The residual, or "otherwise clause" was dealt with in the defense presentence report. For this court to hold burglary of a "building" and excluding residence or dwelling meets *Taylor* would render as surplusage the language of the statute related to burglary of a "dwelling"

Lastly, given the recent US Supreme court case *Begay* it is even more clear that Washington's burglary second degree statute meet the federal definition necessary for the

ACCA to apply. Moreover, *Begay*, requires that the relevant predicate offense involve "purposeful, violent and aggressive" conduct.

Even looking beyond the Information and other documents appropriately before the court, it is clear that Ezell did not exhibit purposefully violent and aggressive behavior when the Blaine and Church burglaries were being committed or in flight there from. The altercation that occurred between Ezell and others were more than one half mile away from the Blaine address, and time to walk that distance had passed. Furthermore, no criminal charges arose from that event. Therefore, this incident is, time and place too attenuated to be considered by this court as part of the burglary at Blaine Street.

C. Disproportionality-Standard of Proof

Ezell was convicted on intending to deliver/return crack cocaine to another and he possessed a handgun. He argues that the application of ACCA enhancements would result in a "disproportionate" sentence.

The government is recommending a disproportionate amount of incarceration time for his conduct, present and past. Ezell therefore argues that the Government may present facts to support its position, but court must apply a "clear and convincing" standard to the evidence, not the lesser "preponderance of the evidence" *US v Ronald Jordan* 256 F. 3rd 922, (9th Cir 2001). (See also *US v Lawrence*, 916 F. 2 553. (9th Cir 1990), downward departure is appropriate when defendant's career criminal's sentence is disproportionate and does not comport with likelihood of recidivism).

D. Common Scheme or Plan Convictions

The government seems to argue, apparently disingenuously, that Ezell's burglary first degree and assault two convictions from 1990 should count separately, even though the conduct involved the same victim, and occurred at the same place and time and involved one prosecution with a single cause number. The US Probation Office correctly presented that the statute (ACCA) applies to a person who…has three previous convictions…committed on different occasions[4]. (See *US. v. Naylor*, 359 F. Supp. 2d 521 (W.D. Va., 2005) (USSG sec. 4A1.2 cmt. N.3) (See also *US v Breckenridge* 93 F. 3d 132,138 (4th Cir 1996))

III. CONCLUSION

The defense submits the above in order to assist this court in deliberating on whether the enhancement urged by the government are inapposite, and would result in a disproportionate sentence. Finally that Ezell did not act in a purposefully violent and aggressive manner.

RESPECTFULLY SUBMITTED this 9th Day of July, 2007

PHILLIPS LAW LLC

/s/ Howard L. Phillips
Howard L. Phillips
Attorney for Defendant
Terry L. Ezell

[4] US Probation Presentence Report, Page 8, Para. 40.

CERTIFICATION

I certify that on July 8, 2007, I electronically filed the foregoing Sentencing Memorandum with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney of record for the United States of America, Assistant United States Attorneys, Nicholas Brown and Carl A. Colasurdo.

/s/ Howard L. Phillips
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JUDGE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, *Plaintiff*, V TERRY LAMELL EZELL, *Defendant*	)	CR05-00273RSM DEFENDANT SENTENCING MEMORANDUM

I. RECOMMENDATION

Defendant, Terry Ezell, by and through his undersigned counsel of record, Howard L. Phillips, submits this Memorandum in anticipation of his sentencing on June 11, 2008. He respectfully asks this court to sentence him to the defense recommendation. The defense recommendation for a downward departure is premised of the factors found in USSG §3553(a)(6), § 5K2.13 and Ezell's verifiable mental conditions.

The defense recommends incarceration in a Federal Prison for **60 months,** to be followed by a reasonable and appropriate period of supervision. This sentence is ample, proportionate to

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his offense, fair, and comports with the requirements and purpose of the United States Sentencing Guidelines (USSG§ 3553).

Terry Ezell has been found guilty, by bench trial, OF Possession of Cocaine base with the intent to distribute, in violation of Title 21, United States Code, § 841(b)(1)(B)(iii) and Felon in Possession of a Firearm, in violation of Title 18, United States Code, §§ 922(g)(1).

Mr. Ezell was initially arraigned on August 4, 2005, and ordered detained following a detention hearing. Mr. Ezell remains in custody at the Federal Detention Center, SeaTac, Washington. At the time of sentencing Mr. Ezell will have served over 1,085 days.

II. BASIS FOR RECOMMENDATION

Terry Ezell's life has been thus far has been plagued with physical and mental parental abuse, loss of his father at an early age; loss of infant daughter, (murdered); abandonment by family, loss of close niece. This is in addition to some significant emotional and psychological problem to include symptoms indicating Post Traumatic Stress Disorder, a panoply of sleep disorders, paranoia, and hypervigilence in domestic relationships and fixed false belief systems that has resulted in a waste of his intellect, talents and ability. Terry Ezell is a bright, articulate, engaging young man whose criminal history is commensurate with the life he was dealt as a young child, throughout his adolescence, until now. Ezell now knows that he has treatable mental and psychological conditions. The emphasis being on, "treatable". Ezell now realizes why his life has been the way it has been, and that he can change it.

Ezell posits that his mental conditions contributed significantly to his criminal history, to include his domestic violence. He has not posed a threat or harm or injury generally to society or

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his community in any way. He has been, since a child, a thief of opportunity. His burglary convictions were clearly crimes of opportunity presenting itself and Ezell doing what he has done all his life, saw the opportunity to get something, like the shoes he stole as a child, [1] His burglaries of buildings, not dwellings, were not **purposeful, aggressive or violent.**

Terry has had strained and at times violent domestic relationships to say the least[2], with filled with suspicion, and paranoia, and extramarital affairs and a child out of wedlock. His family relationships have also been strained, and because of his behavior Ezell's immediate family just thought that Terry was "just crazy".

Now that Terry has been diagnosed by mental health professionals it is clear that there is hope for his future. With medication Terry will be more able to deal with his sleep versus reality issues, and will as gain control of his undeniable paranoia which lead to his possession a firearm for protection, even though there was no reason for him to do so, and even though he many multiple felony conviction prohibiting his possession of a firearm.

Terry Ezell's criminal conduct for which he now before this court, and is facing significant years in federal prison is summarized as follows.

On February 26, 2005 Terry Ezell drove to Seattle and was speeding on Rainier Avenue when an SPD Officer E. C. Werner. Ezell was allegedly driving a vehicle at 51MPH in a 30 MPH zone. The officer conducted a search of Ezell's person. After Ezell was removed from the vehicle and placed under arrest the officers conducted a non consensual search of his vehicle. As a result of this search the officers allegedly located controlled substances with the use of a

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[1] See Ezell Trial Testimony and Dr. Appleton's report and testimony related to Ezell's anti-social behavior..

[2] Albeit the exaggeration of Margie Guess description of her sustain a broken arm.

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narcotics canine. The police reported finding Glock 22. handgun was also located in a large gym bag found in the vehicle.

The handgun was tested for DNA evidence. The DNA results were provided to the defense. The results indicate that Mr. Ezell is a possible contributor of the DNA found on the handgun found in his wife's vehicle. Moreover, the DNA report points out that there was a mixture of at least three or more donors and that one in six (1:6) humans alive could be possible contributor with the profile results.

Moreover, Mr. Ezell's DNA profile was compared to the COIS index of unknown forensics and he was not matched to an unknown profile presumably linked to an unsolved crime. Mr. Ezell was not linked by DNA to any unsolved, known crime in Washington state with forensic evidence.

In addition, the handgun was tested for prints. There is no latent fingerprint evidence indicating Ezell had handled the handgun.

Mr. Ezell testified, that he did not make the statements attributed to him by the police. This includes that alleged statement about throwing "shit' where the police could find it, and he was getting his "hustle" on. He maintains that he did not make these statements to the police.

In addition, Mr. Ezell reported suffering from a disorder unknown to him, before, not after he was arrested as noted in the USPO Presentence Report. As stated in the USPO presentence reports there are **no identifiable victims.**

A. SENTENCING GUIDELINES CALCULATION

In *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005), the Supreme Court rendered the Sentencing Guidelines "effectively advisory." A district court must engage in a guideline analysis, but that is only one part of the § 3553(a) inquiry. *Id.*, 125 S. Ct. at

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757. Previously impermissible departures can now be considered. *Id*. Thus, under the post-*Booker* discretionary sentencing regime, the advisory guideline range is only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence. For instance, the Sentencing Guidelines' limitations on the factors a court may consider in sentencing -- e.g., the impermissible grounds for departure set forth in §5K2.0 (d) -- no longer constrain the court's discretion in fashioning a sentence within the statutory range. United States v. Ameline, 400 F.3d 646 (9th Cir. 2004), *affirmed*, 409 F.3d 1073 (2005).

In exercising their discretion: . . . district judges must consider, along with the advisory guideline range the goals and purposes of sentencing as reflected in USSG §3553(a) and fashion an appropriate sentence that furthers these objectives. See 18 U.S.C. §3553(c).*Id*. 400 F.3d at 656.

CONTROLLED SUBSTANCE		**HANDGUN**	
Base level is based on 42.4 grms	28	Base level	24
Possession of a Dangerous Weapon	+2	Stolen Gun	+2
	30 Offense level	Other Felony	+4
Acceptance of Responsibility	-3	Responsibility	-3
Adjusted offense Level	27		27

Criminal History Category V.

Guideline Range 120-150 Months

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B. ACCEPTANCE OF RESPONSIBILITY

Even though Ezell chose to exercise his right to trial he still should receive benefit for acceptance of responsibility. He participated in two good faith settlement conferences with the government. The government chose to not recognize his mental condition in negotiations however and no settlement was reached. Therefore, in order for Ezell to assert his mental condition he was compelled to choose to have a trial. He also chose to go forward by bench trial thereby saving the court significant trial time, and preparation for a jury trial.

In fact, at trial Ezell testified that he intended to "deliver" the drugs he had in his possession as security on a car payment. This was an admission that resulted in a conviction based on his admission. He also admitted that he possessed a handgun and would carry it around the house with him, even to the bathroom. Ezell maintained that the specific handgun seized, which was not forensically connected to his possession, was not his. He did admit facts sufficient to find him guilty of possession of a firearm however.

§3E1.1 Commentary notes provides:

> *2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. <u>This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.</u>*
> EMPHASIS ADDED

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In this case the defendant participated, in good faith, in settlement conferences with the government on two occasions in an attempt to resolve this matter short of trial. The issues he went to trial on, which the government refused to recognize, was the important issues related to his multiple mental conditions. Furthermore, Mr. Ezell admitted on the stand fact sufficient for this court to find him guilty of possession with the intent to deliver.[3]

III. ARMED CAREER CRIMINAL ACT

A. STANDARD OF REVIEW

The appellate court reviews the "district court's interpretation of the Sentencing Guidelines and its determination that . . . [the defendant] is a career offender de novo." *United States v.Kovac,* 367 F.3d 1116, 2004 WL 1058201 at * 1 (9th Cir. 2004)(quoting *United States v. Shumate,* 329 F.3d 1026, 1028 (9th Cir. 2003)). Specifically, the court reviews de novo whether a prior conviction is a predicate felony under the ACCA. *United States v. Bonat*, 106 F.3d 1472, 1474 (9th Cir.1997).

B. ACCA

Sentences recommended by the career offender guidelines are among the most severe and least likely to promote sentencing purposes in the Guideline Manual. One problem with the career offender guidelines is that "it has defined a class of offenders much more broadly than the

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[3] . Ezell testified that he was holding the controlled substance, and the he was to give the cocaine to an acquaintance in exchange for the balance owed him for the sale of a car.

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statute requires or sound judgment would suggest" Deconstructing the Career Offender Guideline, at 1, Evans, Noonan, (2008).

The definition of "crime of violence" and its commentary is broader than the definition under 18 USC sec 16 or the definition of "violent felony" under 18 U.S.C. sec 924(e)(2)(B), there are then numerous offenses of "crimes of violence under USSG sec 4B1.2 that do not meet the definition under either statute above. The result has been the guideline that recommends the maximum punishment based on offenses that are not violent. Id., at 11. Moreover the career offender guideline does not reflect empirical data and National experience, and does not exemplify the Sentencing Guideline Commission's exercise of its characteristic institutional role. Id. At 2, (citing *Kimbrough v US* 127 S.Ct. 2456, (2007))

In order for the armed career offender statute to be applicable to Ezell he must have three (3) "violent felonies" or "serious drug offense". He does not.

The US Probation Office posits that Ezell is an armed career criminal based on the following convictions.

1. Assault 2, and Burg 1, 93-1-07476-6 SEA
2. Assault 2, 90-1-06625-4 SEA
3. Burglary 2, 87-1-02835-2 SEA (Church)

The government attorneys on the other hand, claim that Ezell has nine felony convictions four of which arguably qualify as a predicate armed career offender "violent felony" offenses. [4]

1. Assault second Degree/Burglary First Degree (same offense) 93-1-07476-6,

[4] Government Objection USPO Presentence Report, page 7, Para 34

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2. Assault Second degree, 90-1-06625-4 ,

3. Burglary Second Degree, 87-1-01401-7 (Blaine Street) and,

4. Burglary Second Degree, 87-1-02835-2. (Church)

C. *BEGAY APPROACH*

The Armed Career Criminal imposes a stringent mandatory 15-year prison term upon a felon who unlawfully possesses a firearm and who has three or more prior convictions for committing certain drug crimes or "a violent felony." *Begay v. United States*, 128 S. Ct. 1581, 1583(2008) (brackets in original) (quoting 18 U. S. C. § 924(e) (1).

The Act defines "violent felony" as, *inter alia*, a crime punishable by more than one year's imprisonment that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e) (2) (B) (ii)

The recent United States Supreme court decision Begay *v U.S.*, 128 S. ct. 1581 (2008) changed the analysis of how prior convictions are to be determined for purposes of an Armed Career Criminal Act determination. *Begay* stands for the proposition that in order for and to qualify as a "violent offense", it must be a "purposeful, violent and aggressive behavior", *Begay* at 1586, as well as be one of the enumerated offenses in the Act.

Ezell's second degree burglaries of buildings, not dwellings, were clearly not purposefully violent and aggressive behavior. It cannot be reasonably argued otherwise.

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The Begay court held that New Mexico's felony DUI crime falls outside the scope of the Act's clause (ii) "violent felony" definition in the main because DUI is not one of the enumerated offenses. It is axiomatic that DUI presents a danger of serious potential risk of physical injury.

In *Begay v US 128* S. Ct 1581 (2008) the court interpreted §924 (e) to look to the "risk of physical injury" rather than the "risk that physical force… may be used. *Begay* at 1585 However, the *Begay* court opined: "[I]n our view, the provisions's listed examples in §924(e) (2) (B) (ii), indicate not "every crime that "presents a serious potential risk of physical injury to another" comes under the act.

The court explained that (a) Whether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion. *Begay*

The court further explained that the listed crimes all typically involve purposeful "violent" and "aggressive" conduct *Begay* at____

D. *BURGLARY SECOND DEGREE- CATEGORICAL APPROACH*

The court in *U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007) explained that it took that case, en banc, primarily to reexamine the validity of *United States v. Cunningham*, 911 F.2d 361 (9th Cir.1990) (per curiam).

In *Cunningham*, The 9th Circuit court held that second-degree burglary under Oregon law is a categorical burglary offense under the analysis required by *Taylor v.United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), for purposes of applying the Armed Career

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Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e).*Cunningham*, 911 F.2d at 363. In *Grisel* the court held that *Cunningham* was wrongly decided, and expressly overruled it.

The court acknowledged that the ACCA identifies "burglary" as a violent felony for purposes of the mandatory minimum enhancement. 18 U.S.C. § 924(e) (2) (B) (ii).

In *Taylor*, the Supreme Court established a method of analysis to determine whether a prior conviction is a predicate felony under the ACCA. Using a categorical approach, a court "look[s] only to the fact of conviction and the statutory definition of the prior offense" to determine whether the prior conviction necessarily satisfies 18 U.S.C. § 924(e). *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143.

In *U.S. v. Grisel*, the court concluded that second-degree burglary under Oregon law is not a categorical burglary for purposes of the ACCA because it encompasses crimes that fall outside the federal definition of generic burglary. The court therefore overruled its contrary holding in *Cunningham*, 911 F.2d 361.

The Washington second degree burglary statute expressly excludes “dwelling”. The history of *Taylor* and its progeny clearly include burglaries of dwellings as violent felonies. Because the Washington statute does not include dwellings it cannot qualify as a predicate violent felony under the categorical approach. Both of Ezell’s burglaries, at issue, were pursuant to Washington’s second degree burglary statute and therefore cannot qualify as predicate offenses.

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Ezell, prior burglary first degree conviction, probably would qualify under *Begay* and *Taylor*. But that conviction is subsumed in the assault second degree conviction and is not to be considered in this analysis independent of the assault second degree.

E. *BURGLARY SECOND DEGREE-MODIFIED CATEGORICAL APPROACH*

If the state statute defines the offense more broadly than the federal statute, encompassing crimes both listed and not listed in § 924(e), a court may "go beyond the mere fact of conviction in a narrow range of cases." *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143. Under this modified categorical approach, a prior conviction established after a jury trial is a predicate felony "if the indictment or information and jury instructions show that the defendant was charged only with a [crime listed in § 924(e)], and . . . the jury necessarily had to find [the elements of the crime listed in § 924(e)] to convict." *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143.

With respect to the Blaine burglary, the information, certificate of probable cause demonstrate that Ezell was charged and pleaded guilty to burglary second degree. There were no jury instructions for this court to review. Notwithstanding the lack of jury instructions it is clear by the pleadings that even under the modified approach Washington/s second degree statute, and Ezell's conduct at the Blaine street location qualify as a predicate violent felony. The only instance of violence even tangentially related to the Blaine street matter is significantly attenuated by time and location. Moreover, Ezell was approached and accosted by three men and two dogs.

The same can be said about the church incident, Ezell was crouching behind a desk when he was confronted about being in the church office with a broken lock and door. He was

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surrounded by several men and merely waited for the police to arrive. There was no violent behavior on his part.

F. *BURGLARY OF AN OFFICE*

Ezell has a conviction for second degree burglary of a church. In the Statement of Defendant of Plea of Guilty, Ezell pleaded guilty to "unlawfully entered the business office of The Church of Seattle and while inside considered the possibility of stealing something"[5]. There was no evidence that his entry into the church building was forced. In fact, the witness and Ezell in his corroborative declaration indicate that the door to the church was propped open and there were no indications that entry into the church building was not permitted. Ezell however, broke a door and lock to the church office. he was in the office, crouching behind a desk, when he was confronted by someone else in the church.

In *US v Barney,* 955 F.2d 635, (10th Cir.) one of the defendants had two convictions in 1980. The court held that both 1980 convictions could not be counted as predicate crime. Id at 640. The court decided the Wyoming statute was too broad to be categorically within the Federal statute, and then looked to the underlying Information and guilty plea to determine whether the specific comports with *Taylor's* generic definition of burglary. In both cases the defendant entered the backroom of a building. For instance while in a fast food restaurant, Barney entered an area off limits to the public, with the intent to steal. There was no indication of breaking into either building. The court noted "a back room is not a building", (EMPHASIS ADDED) (Citing *TAYLOR,* 110 S. Ct. at 2158).

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[5] Guilty Plea Statement, 87-1-01401-7, Para. 18, Pg 6. Exh #1

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It was then not clear whether Barney pleaded guilty to conduct which falls, without question within the ambit of *Taylor's* generic definition. Most importantly, the court declared that "In the absence of clarity, *Taylor* bars sentencing court from engaging detailed fact finding concerning a specific felony, and prevents conviction under a non-conforming statute from being employed for enhancement purposes". *Barney* at 642, citing *Taylor* at 2159.

In the church case, it is clear that Terry was found in a place; clearly not open the public, because it had a looked door. The office, however, was not a "building" for purposes of federal sentencing enhancement. In addition, the front door was propped open on a hot day, there is no evidence that entering the open door of the church was impermissible, but clearly entering the office was no permissible. If there is any uncertainty of whether this conduct meets the generic definition of burglary, it cannot be used as a predicate offense to enhance Ezell's sentence.

G. *OTHERWISE CLAUSE*

In determining if a conviction satisfies the "otherwise" clause, "courts may consider the statutory definition of the crime and may also consider the conduct `expressly charged in the count of which the defendant was convicted.'" *United States v. Young,* 990 F.2d 469, 472 (9th Cir. 1993) (quoting U.S.S.G. § 4B1.2, cmt. n. 1). The 9th Circuit court of appeals has prior to *Young* held that the latter inquiry may consider "conduct charged in the indictment or information, the defendant's guilty plea or plea agreement, and any jury instructions," but that courts "may not . . . make a wide ranging inquiry into the specific circumstances surrounding a

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conviction." *United States v. Wood,* 52 F.3d 272, 275 (9th Cir. 1995) (internal quotations omitted). *US v Matthews* at Page 875

Matthews was charged with and pleaded guilty to "willfully, unlawfully, and feloniously enter[ing], with intent to commit larceny, a building occupied by another. The issue was whether Matthews' burglary of an "occupied building" qualifies as a crime of violence because it "otherwise involves conduct that presents a serious potential risk of physical injury to another". The *Matthews* court expressed reluctance to decide that all burglaries of non-abandoned buildings are *per se* crimes of violence. The *Young* court adopted a case-by-case approach (or, perhaps more accurately, a category-by-category approach) to determining whether particular burglaries qualify as crimes of violence under the "otherwise" clause of U.S.S.G. § 4B1.2 (a) Matthews at 880.

Presently, *Young* may itself be in doubt because the court considered whether "otherwise involves conduct that presents a serious potential risk of physical injury to another". The US Supreme Court has altered this test to include "purposeful aggression and violence" as part of the analysis of whether a conviction qualifies as a "violent" felony within the meaning of the statute.

Although some burglaries of non-abandoned buildings that are not dwellings might involve conduct that presents a sufficiently serious risk of physical injury to qualify them as crimes of violence under the "otherwise" clause, *see, e.g., Sherman,* 928 F.2d at 327, the court declined to find that *all* such burglaries necessarily qualify. *Matthews at 880*

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In the 9th circuit, particular burglaries of non dwelling constitute a crime of violence, is determined on a case by case basis. *United States v. Matthews* 374 F.3 872, 9th Cir. (2004) USSG.

. 1. **Assault Second Degree, Burglary First Degree 93-1-07476-6 SEA**

This is the case where Ezell was told that he had committed assault and burglary. Ezell testified during trial that he had no memory of this event[6]. Because he failed to remember the incident, he did not believe that he was guilty. [7] Consequently he turned down a substantial reduction in his sentence if he pleaded guilty. He however, chose to go to trial and was convicted and sentenced to ten (10 Years) This is evidence giving reasonable inference of his sleep disorder years before his diagnosis by DR. Pascualy.

Ezell's mother in 1996 made a statement recounting the events, which support Mr. Ezell's present contention that he was suffering from a sleep episode when he committed that offense in 1993. She recounts that he had just been sleeping and had apparently left his shoes when he left his mother's house.

This is an assault two/burglary one conviction and therefore qualifies and "violent felony" offense.

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[6] See Mrs. Ezell's contemporaneous statement relevant to the arrest of Ezell after he had been sleeping in her home. Exh. #2

[7] Ezell has accepted responsibility for his extensive criminal history and has pleaded guilty for his conduct, and has rarely exercised his right to a trial.

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2. Assault 2, 90-1-06625-4 SEA

In King County Superior Court cause 90-1-06625-4 SEA, Ezell was charged by Information with, Burglary first degree; alleging Ezell entered and remained in the dwelling of Marjorie Guess, with the intent to commit a crime,[8] and assault two with reckless infliction of substantial bodily harm upon Margeriem Guess (Margie)[9] Notwithstanding, the recantation, and the above recitation, the assault conviction may not qualify as a " violent" offense, because Ezell may have been denied due process and received ineffective assistance of counsel. This is because he pleaded guilty to inflicting substantial physical harm as reflected in the Information certificate of probable cause. On the other hand, the US Probation investigation reveals that the medical records show that the "victim" had a wrist fracture, contusions on her chest, and a thermal burn.

These injuries may not be sufficient for an assault second degree finding. If the attorney had reviewed the medical records he would have seen a discrepancy between what was reported to the police and what was actually found by medical staff.

Ms Guess has recanted her allegations to the police, the consequence of which was a substantial loss of Ezell's liberty interest[10]. Ezell pleaded guilty to assault two, admitting the

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[8] Information, King County Superior Court #90-1-06625-4 SEA. Exh #3

[9] Id.

[10] Statement, Margie Guess, Exhibit___

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elements of the offense and the Burglary first degree charge was dismissed. [11] He was sentenced to the top of the state guideline range, forty three (43) months[12]

As noted above Mr. Ezell pleaded guilty of Assault Second Degree, The language in paragraph 17 of the plea statement is "In King County, Washington, on or about August 13, 1990, I did intentionally assault (SIC) Margarie Guess and thereby recklessly inflicted substantial bodily injury to her[13] The Certificate of probable cause for this case, indicates that the victim was thrown headfirst on to the concrete. That Ezell picked up a skillet and "threw it at Adams (Guess' cousin), a witness, causing a burn on the back of her leg.

The Certificate of Probable cause indicates that Ezell had broken Guess' right arm and bruised her ribs and inflicted numerous scrapes and scratches.

The Certificate of probable cause clearly appears to be a derivative of the Detective's report of what Ms. Guess told him she suffered. We know this because the Detective's report provides….., On the other hand, the United States Probation presentence report indicates "Medical records indicate she sustained a fracture of her right wrist and a contusion on her chest…thermal burn on her…thigh, as well as abrasions on her chin and right ear.

The defense posits that there is a substantial difference between a broken arm and fracture wrist, which could be a minor non treatable event that could occur in a slight fall . As opposed to breaking one of the major bones of the arm.

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[11] Statement of Plea of Guilty, #90-1-06625-4 SEA. Dated December 12, 1990. Exh #3

[12] Judgment and Sentence #90-1-06625-4 SEA. Exh #3

[13] Statement of Defendant on Plea of Guilty, Para. 17, Assault 2, Exh #3

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The defense counsel may have provided ineffective assistance of counsel, and Ezell may have been denied due process when he pleaded to assault two, established by the police report and Certificate of probable cause, as well as the defendant statement on Plea of guilty. However, a review of the medical records would have revealed that Ms. Guess exaggerated her injuries. It appears that Defense counsel failed to review the medical records to confirm that Guess actually sustained a substantial bodily injury, such as a broken arm.

At this point there could only be speculation that Ezell may have pleaded to a lesser offense, such as an assault four, if the medical records were made part of the plea negotiations. Nevertheless, it appears that the medical records do not confirm the substantial injuries Ezell pleaded guilty to. He could have received a misdemeanor conviction instead of the felony.

If there is an uncertainty of whether the predicate crime clearly qualifies as a "violent" felony, this court should not consider the conviction during its deliberations on the Armed Career Criminal Act.

One of Ezell's two assault convictions is not at issue. With respect to "armed career criminal" enhancement, now the question before this court for sentencing is whether either of Ezell's two burglary convictions qualify as "violent felony" convictions. They do not, because neither incident involved purposeful or deliberate violent or aggressive conduct.[14], neither do the fit with in the generic definition of burglary under the categorical or modified categorical analysis. Pointing a gun at another may suffice for an assault second degree conviction under Washington law.

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[14] See *Begay v United States*, 128 S.Ct. 1581 (2008)

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1. Burglary Second Degree, 87-1-02835-2 (Church)

On May 26 1987 Ezell was convicted of Burglary Second Degree for an incident that occurred two months earlier. He was charged by Information for entering and remaining unlawfully in a Church Building on May 24, 1987. He was sentenced to twenty nine (29) days, "all time served"[15].

RCW 9A.52.030 Burglary in the second degree provides.

> (1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling.
>
> (2) Burglary in the second degree is a class B felony.
> (Emphasis Added)

The Certificate of probable Cause prepared by the King County Prosecuting attorneys office alleges that a witness noticed the front door propped open, and it looked as if an interior office door lock was broken. The witness did not state that Ezell broke a lock to enter the church. Just that it was unusual that the door was propped open.[16] He did not state that it was locked or not open to the public, in general. It was alleged in the Certificate that the witness says that Ezell did not have permission to be in the building, but, there is nothing indicating that he was the pastor or had the authority to exclude Ezell or any other member of the public. Church

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[15] Judgment and Sentence, King County Superior Court # 87-1-01401-7, Exh.#1A

[16] Certificate of Probable Cause, King County Superior Court # 87-1-01401-7, Exh.#1A

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members stood by until the police arrived. There is no indication that Ezell became violent or aggressive with the presumably unarmed church members of the police.

Ezell entered an Alford plea consequently, the court relied on the certificate of probable cause to establish a factual basis for the plea. Ezell did not make a plea statement at that time. He however, submits an affidavit as to how he came to be in the church and subsequently the church office.[17]

In *US Barney*, 955 F.2d 635 (10th Cir. 1992), the appellant/defendant was sentenced to serve fifteen (15) years in prison in accord with the enhancement of 18 U.S.C. sec, 924, 924 (e). In *Barney* at 640, the defendant entered that back room, or portion of a building on two separate occasions. The court held that the enhancement did not apply in both situations The court citing *Taylor* stated, Not only is there no indication of a breaking into either building, but the back room is not a "building" of "structure". [18]

Mr. Ezell's burglary conviction of the church, is nearly indistinguishable from the Barney case. The witness and Ezell spoke of the front door of the church being propped open, there was no evidence of a break in. The door that was forced open by Ezell was a locked interior office door. There is clear indication that the office was not open to the public, whereas a church door propped open on a hot day does not convey permission is required to enter. There is no evidence that there was a no trespassing sign or any notice to the general public not to enter the church with an open door.

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[17] Ezell , Declaration, King County Superior Court # 87-1-01401-7, Exh.#4

[18] (See Discussion Section F, above)

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2. Burglary Second Degree, 87-1-02835-2.

Ezell was charged by Information in King County Superior Court for an incident that occurred in a building owned by another on Blaine Street in Seattle. In this case the building was under construction. Ezell entered the empty house that was open, and inquired about work. When he was told that there was no work for him he left. There is no allegation that the owners were living in the building. According to SPD Officer Neal, the house was in the state of a new owner moving in, there were no curtains on the windows and the people in the house were cleaning and painting.[19] There was no allegation that the worker, Ms Denadel objected to his presence at the time of his entry, refused his entry, or asked him to leave. Ezell left on his own volition after being told that there was no work for him.

The burglary second degree occurred at [redacted]e. People saw Ezell stuffing credit cards down his pants and tried to throw away a wallet on [redacted]. and [redacted][20] [21]. On the face of it is clear who initiated contact because the vigilantes were intent on stopping Ezell and taking the wallet and contents from him. There is nothing indicating that Ezell was fleeing the scene or that he approached these people. The office reported that he saw men holding Ezell down on the ground.[22] The vigilantes attempted to stop Ezell from throwing away

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[19] Incident Report #87-327327, SPD Officer Neal, pg 868, Exh #5

[20] Arresting Agency Affidavit, King County Superior Court # 87-1-01401-7, Exh #6

[21] The Estimated distance between [redacted] and [redacted] is: 0.61 miles, http://www.mapquest.com/maps?=INTERSECTION

[22] Seattle Police Report, Appendage "A" pg 862, Exh #5

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the wallet, as described in the police incident report, initiated the contact with Ezell. Moreover, Ezell was not charged with assault.

Ezell entered a plea by filing a plea statement to the charge of burglary second degree. In the plea statement Ezell admitted that on July 3, 1987 he entered a building, (Not Residence or Dwelling) with the intent to commit theft. [23]

IV. MENTAL CONDITION

Mr. Ezell respectfully requests a downward departure from his guideline range . he makes this request pursuant to § 5K2.13, because his panoply of mental conditions distorted his reasoning, and clearly interfered with ability to make considered decisions, and contributed to the commission of the offense in some way.

A. POST TRAUMATIC STRESS

Mr. Ezell was diagnosed by a psychologist, Tye Hunter, whom this court found credible. [24] Hunter diagnosed Ezell exhibited indicators of post traumatic stress disorder. He based his analysis on the fact that Ezell' s father died at an early age, physical, mental abuse and abandonment by his mother, murder of his daughter, death of his niece and brutal attack on his stepfather, by the boyfriend of his niece recently deceased. These fats are irrefutable and undisputed; surely, there have been enough traumas in Ezell's history to verify a diagnosis of post traumatic stress disorder.

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[23] Plea Statement Blaine, Exh #6

[24] See Tye Hunter Report

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Defendant, Cantu, was Viet Nam veteran. He was diagnosed with Post Traumatic Stress Disorder brought on by his experiences in Viet Nam. After a dispute in a bar, Jose Garza Cantu, a Vietnam veteran, was questioned by police and searched. The search revealed a loaded .22 caliber pistol tucked in his waistband. Cantu pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), 924(a). *U.S. v. Cantu*, 12 F.3d 1506 (9th Cir. 1993)

In *Cantu* the court of appeals held that post-traumatic stress disorder can be the basis for a departure under § 5K2.13, if the "ailment distorted [Defendant's] reasoning [,] interfered with [her] ability to make considered decisions," and contributed to the commission of the offense in some way. *United States v. Cantu,* 12 F.3d 1506, 1513, 1515 (9th Cir. 1993). *U.S. v. Menyweather*, 447 F.3d 625 (9th Cir. 2005)(EMPHASIS ADDED)

In *Menyweather*, the Defendant began working as an administrative employee at the United States Attorney's office in Los Angeles in 1990. In 2000, she was indicted on 10 counts of theft of government funds, mail fraud, and wire fraud. She pleaded guilty to one count of mail fraud and admitted to having used government credit cards for unauthorized personal purchases of between $350,000 and $500,000.

Menyweather was examined by a psychologist who characterized her as suffering from "severe symptoms of post-traumatic stress" occasioned by two events: her abandonment by her parents as a child and the violent murder of her fiancé, the bloody aftermath of which she witnessed while five months pregnant with their child in 1989.

In Ezell's case he has had multiple traumatic events in his life, not just two. He was not only abandoned by his mother, he was physically beaten and abused by his mother before she

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abandoned him. His father died when he was a child. His daughter was murdered by the baby-sitter, and shortly before this incident a close niece died and his stepfather had his throat cut by his niece's boyfriend. The "boyfriend of his niece is also the person who Ezell was holding the cocaine for as security on money that was owed in payment for a car he sold his niece. Ezell life trauma substantially exceeded Menyweather's. Furthermore, he has other mental and psychological issues that exacerbate his distorted reality and ability to make considered decisions.

In *Menyweather* the defendant's theft offense, according to Dr. Counter, was part of a "manic denial of psychic trauma accompanied by compulsive coping behaviors." Dr. Counter had evaluated Defendant for three-and-one-half hours, administered and reviewed a psychological test, spoken with Defendant's counsel, and reviewed letters submitted by Defendant's family members *Menyweather at* 694. In that case that was sufficient information for the mental health expert to make a diagnosis. In this case the government has relied on Ezell's criminal history in the attempt to refute his claims. However, Ezell's personal history of trauma is irrefutable and no amount of additional information will alter it.

B. PARANOIA/HANDGUN

In this case is clear that Ezell is paranoid and exhibits symptoms of PTSD. His mental condition distorted his reasoning. Dr. Appleton testified that Ezell had a false fixed belief system that could not be changed in the face of reality. In addition Ezell testified to carrying a handgun around with him out of fear. He did not like being left home alone. His paranoia and false beliefs clearly distorted his reasoning. Interfered with his ability to make a considered

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decision to not possess a weapon for his defense and definitely contributed to his common of this crime of unlawful possession of a firearm.

Mrs. Ezell testified that Mr. Ezell was extremely paranoid and believed people were out to kill him, she reported seeing the gun in the house in whatever areal he was in and at night he would sleep with it under his pillow. She reported seeing Mr. Ezell getting out of bed several times throughout the night checking every window and door repeatedly. As well as turning the television off and any other appliance that would prevent him from hearing what was going on.

Mr. Ezell testified that he is paranoid to the point to when he would take the garbage out he would place his gun in his robe pocket. He also reported that when he would take a bath he would place his gun on the toilet seat; he then went on to say how he would sleep with his gun under his pillow to feel safe.

Dr. Tye Hunter whom this court found to be a creditable witness diagnosed Mr. Ezell with a paranoid disorder and stated related to but beyond his characteristic level of emotional responsively. This man appears to have been confronted with an event or events in which he was exposed to a severe threat to his wife. A traumatic experience that precipitated intense fear or horror on his part. In "Dreams" or "Nightmares", he may become terrified, exhibiting a number of symptoms of intense panic attacks, **hyper vigilance**, exaggerated startle response.

Dr. Ralph Pascualy reported there is a strong history from the patient's wife and apparently from his mother, that he has "always been crazy and had paranoid beliefs". Paranoid disorder are among the most difficult to diagnose in clinical consultation because individuals as

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part of their difficulty are simply unable to reveal their concerns. However, this court has sufficient evidence that Ezell is suffering from paranoia.

C. SLEEP STUDY

Dr. Pascualy testified that Mr. Ezell's sleep study did confirm pathological day time sleepiness despite otherwise normal total sleep time of 7.7 hours. He showed significant disturbance in his sleep with a large increase in NROM Stage 1 light sleep during the night. He stated that the clinical history was consistent with a diagnosis of narcolepsy with cataplexy and sleep paralysis as well as a parasomnia disorder. His conclusion from these studies were that Mr. Ezell probably suffers from narcolepsy as well as some type of parasomnia and that Mr. Ezell was in some kind of parasomnia state when he awoke on the day in question.

Although Dr. Pascualy stated after hearing additional information it was unlikely that Mr. Ezell was in a parasomnia state throughout the whole ordeal. Based on Mr. Ezell's description of having cataplexy, involuntary loss of muscle tone, with strong emotion, as well as sleep paralysis and automatic behavior coming out of sleep state. Along with the sleep study confirming pathological sleepiness. His opinion of Mr. Ezell suffering from narcolepsy would not change. He went on to state that these symptoms could only be described by somebody actually experiencing them, and it was unlikely that Mr. Ezell was fabricating them.

In addition to this, Mrs. Ezell established the history of sleep-walking and abnormal behaviors that begin with Mr. Ezell being awakened from sleep episodes. Cherie Ezell notes that her husband does have a history of sleep walking and described several episodes when he

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behaved in a "crazy manner" when awakened. She also included that Mr. Ezell would often wake up confused and that he had trouble deciphering dreams from reality.

Dr. Pascualy touched on one final note that reinforced his opinion that Mr. Ezell unequivocally suffers from narcolepsy. He reported in a sleep study conducted by Dr. Daniel Loube the Associate Medical Director for the Swedish Sleep Medicine Institute. That after Mr. Ezell had slept for 7.7 hours Mr. Ezell was not only able to fall asleep on call in 1.5 minutes. He was also able to reach REM sleep in that amount of time. This is highly unlikely and mutually impossible unless one is suffering from narcolepsy or some kind of parasomnia.

D. MAJOR DEPRESSION/ §5K2.13

"The goal of § 5K2.13 is lenity toward defendants whose ability to make reasoned decisions is impaired." *United States v. Cantu,* 12 F.3d 1506, 1512 (9th Cir. 1993); *see McBroom,* 124 F.3d at 548. As such, a district court may depart downward to "reflect the extent to which the reduced mental capacity contributed to the commission of the offense." U.S.S.G. § 5K2.13. The court has held explicitly that § 5K2.13 requires only that the district court find *some* degree, not a *particular* degree, of causation" between the defendant's mental condition and the commission of the offense in question. *Cantu,* 12 F.3d at 1515.). *U.S. v. Schneider*, 429 F.3d 888, 892 (9th Cir. 2005)

In *Schneider* the Court considered the causal connection between Schneider's mental condition and the commission of the crime (defrauding the SSA). The Court specifically found that "*whatever diminished capacity* [Schneider] had did not affect his commission of this crime" because the Court believed that "it was totally built within him an intent to live off someone else,

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including the Government, and not face his own responsibility". In addition, without assessing the nature of Schneider's mental illness, the Court found an absence of a causal link between that illness and the commission of the offense. In so doing, the Court effectively concluded that there existed no possibility that any mental condition Schneider had, "whatever" that might be, and could have contributed to the commission of the offense since he was essentially born with an intent to cheat others without accepting his own responsibility. This blanket conclusion derives from an erroneous application of § 5K2.13.

In this case the government has argued that Ezell does not have a valid mental condition justifying recognition by this court. In addition, even if he does , there is no causal connection between his condition and his conduct. Moreover, the government erroneously argues that Ezell did not exhibit symptoms, or seek treatment for symptoms until he was incarcerated on this matter.

Ezell has proffered valid and credible evidence of his multitude of mental and psychological conditions, and this court should find a causal link.

Dr. Tye Hunter, whom the court found credible, diagnosed Mr. Ezell with having major depression disorder. He reported that Mr. Ezell may be demonstrating a somatoform disorder. Because of low self-esteem and a fear of further rejection. He may have difficulty expressing his resentment towards others either directly or consistently. Hence, his emotions remain bottled up, largely un discharged. Their constant presence makes relaxation difficult for him.

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Dr. Appleton reported on a mental status examination conducted on 11/26/2007, that on rare occasions when talking about the lost of Mr. Ezell's 2 year old child (murdered) He would appear dysphoric and his eyes would become glossy.

Dr. Harris reported that during a mental examination on April 19, 2007 Mr. Ezell would tear up as he talked about his mother. In a Swedish mental health report by Nagel, dated march 7, 2005 described Mr. Ezell crying as he waited for Mrs. Ezell, the impression was a "major depressive disorder"

A contract psychiatrist at the Federal Detention Center, conducted a mental status examination on August 9, 2005 and reported that Mr. Ezell. "Reveals sad affect at times as tears roll down his face", "Impression was Axis I – major depression – and medication was prescribed."

In *US v. Greenfield* 244 F.3d 158 (D.C. Cir.2001) Dr. Clark Hubak a PhD, testified that in some cases, if a depression is severe enough it can impair ones capacity and could significantly reduce someone's mental capacity. In *US v. Shore* 143 F.supp.2d 74 (D.Mass, 2001) Dr. Whaley, a psychiatrist with appropriate and unchallenged credentials an entirely credible witness, described shore as suffering from a major depressive disorder and post traumatic stress syndrome, deriving from years of intense grief since the death of her 12-year-old daughter from incurable leukemia in 1982. According to Dr. Whaley, the manifestation of Shore's condition included severe emotional numbness, a preoccupation with a loss, and a heightened sense of anxiety and distress when faced with anything uncertain especially having to do with her family.

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The court found that in *US v. Herbert*, 902 F.Supp. 827 N.D. III. (1995) that the defendant, Herbert's, psychological problems caused a "depressed state prompting her to question her own shortcomings." According to the testifying psychiatrist. Herbert's mental impairment affected her at the time of the offense and contributed to its commission.

In *US v. Derbes* 369 F. 3d 579 (1st cir. 2004) Dr. Chartock a clinical psychiatrist stated that he had been treating Frank Derbes since 1997 for major depression and generalized anxiety disorder. Dr. Chartock explained that if had taken several years to find the right combination of medications to effectively stabilize Derbes, and that it is very important to maintain the current medical regime. Dr. Chartock noted that these substances, Paxil, Effexor, and Serax might not be available in prison and he said that altering treatment regime may result in destabilizing Mr. Derbes, causing him to revert to a deep depression and significant panic and anxiety. In this case, Terry Ezell has only received cursory treatment for his depressive disorder.

Dr. Pascualy and Harris identified medications that would be helpful for Ezell in coping with his mental issues to include his depression. These medication are apparently not available in federal prison. Terry was given by FDC medical staff, over the counter drugs for his complaints.

At trial the defense relied on the parasomnia aspect of Ezell's mental condition however, there is substantial evidence that Mr. Ezell was suffering from a combination of disorders and psychological problems at the time of the incident and continues today.

For example, Cherie Ezell reported that Mr. Ezell was having all kinds of sleep related issues. She went on to say that Mr. Ezell was having trouble deciphering dreams from reality

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and gave several examples. One example that she gave, she said Mr. Ezell came to pick her up from work one day and before she could get out to the car he was asleep. She reported waking him up and during the ride home he was quiet and she knew something was wrong. After asking him several times what was wrong. He replied that he had a dream and asked her when was the last time she had been Sprint store across the street from her job. She said that they did business with Qwest and she didn't have any reason to go over there and asked him why? He stated that he had a dream that she was cheating on him with one of the guy's over at the Sprint store. She said you know it was just a dream right? He shook his head, yea acknowledging that it was but she said that he kept questioning her about the events that took place in the dream until he got so upset he threw a glass Snapple bottle through the rear window while they were driving. She said that Mr. Ezell was unable to shake off the fact that it was just a dream.

She reported that the same thing occurred in the present offense, after he had fallen asleep, she stated that when she answered Mr. Ezell's phone call she could hear glass breaking in the back ground and he was upset and confused. He thought she had been out overnight cheating on him. When she had only been away from the house a few hours, and she could not get him to remember that he had just seen her. Her mother, her daughter and another family member went to do a matinee that day, but could she not convince Ezell that it was the same day.

In relation to this, Dr. Appleton, the government's clinical psychologist/psychiatrist reported that Mr. Ezell has significant anger issues when becoming concerned that his wife may cheat on him. In fact his level of jealousy may be to the level where it is delusional. (A fixed false belief system in which no explanation or rationalization may change his mind.) But it

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appears to not be related to any other psychotic process. It appears as is his irritable, impulsive, angry behavior is primarily in relation to jealous issues within the context of a relationship and does not occur with little or no provocation (in his mind) Such as seen in the intermittent explosive disorders.

Additionally, Dr. Tye Hunter a clinical and forensic psychologist reports practically an identical psychological evaluation of Mr. Ezell. He reports that Mr. Ezell had a number of delusional facets to his thinking (transient ideas of reference, mixed jealousy and persecutory beliefs) He believes that he has been betrayed or forsaken by person's whose support he had hoped to gain. His repressed resentments may have slipped through once adequate controls, breaking through as irrational but brief expressions of anger and suspicion, tensions are likely to accumulate, compelling him to be touchy and irritable.

Dr. Pascualy, Medical Director at the Swedish Sleep Medicine Institute in Seattle, WA, reported that while the polysomnography sleep study evidence and the clinical history of cataplexy, sleep attacks, sleep paralysis and hypnagogic hallucinations meet all the criteria for a clinical diagnosis of narcolepsy, additional assessment relevant to psychiatric status would need to be completed.

There is a strong history from patient's wife and apparently from his mother that he has "always been crazy", and that he has paranoid beliefs. Paranoid disorders are among the most difficult to diagnose in clinical consultation because individuals, as part of there difficulty, are simply unable to reveal their concerns. The combination of narcolepsy, a parasomnia disorder,

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as well as a confusional parasomnia disorder could clearly create a complex medical situation leading to abnormal behavior that could be misinterpreted by family members.

In this instance, it appears that during the confusional episode preceding his arrest Mr. Ezell had a false beliefs about what was going on with his wife. "Which led to erratic behavior." This has been a long standing pattern of Mr. Ezell's which was heretofore not recognized, diagnosed or treated. But in Terry Ezell's future that will no longer be the case.

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II. CONCLUSION

The defense implore this court to find that the Ezell does not have three (3) "violent felony" conviction , in the main, because his burglary two conviction to no qualify as a predicate offense under *Begay,* the categorical approach or under the modified categorical approach. Further, that this court find that a downward departure is appropriate because the purpose unpinning USSG 3553 and § 5K2.13 apply to Ezell's verifiable mental and psychological conditions. The defense therefore, and on the basis above, recommends Sixty (60) months in Federal custody, to be followed with supervision, and a fine of only the mandatory assessment.

RESPECTFULLY SUBMITTED this 7th Day of July, 2007

PHILLIPS LAW LLC

/s/ Howard L. Phillips
Howard L. Phillips
Attorney for Defendant
Terry L. Ezell

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CERTIFICATION

I certify that on July 7, 2007, I electronically filed the foregoing Sentencing Memorandum with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney of record for the United States of America, Assistant United States Attorneys, Nicholas Brown and Carl A. Colasurdo.

/s/ Howard L. Phillips

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Judge Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. TERRY LAMELL EZELL, Defendant.	NO. CR05-0273RSM GOVERNMENT'S MEMORANDUM REGARDING DEFENDANT'S STATUS AS AN ARMED CAREER CRIMINAL AND AS A CAREER OFFENDER

I. INTRODUCTION

The United States of America, by and through Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and C. Andrew Colasurdo, Special Assistant United States Attorney, and Nicholas W. Brown, Assistant United States Attorney, for said District, files this Government's Memorandum Regarding Defendant's Status as an Armed Career Criminal and as a Career Offender.

II. BACKGROUND

The defendant, Terry Lamell Ezell, was found guilty on March 10, 2008, of one count of *felon in possession of a firearm,* in violation of Title 18, United States Code, Section 922(g)(1), and one count of *possession of cocaine base in the form of crack cocaine with the intent to distribute (greater than five grams)*, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii). The events giving rise to these charges occurred on February 26, 2005. The defendant is scheduled to be sentenced for this crime on Friday, July 11, 2008, at 2:30 p.m.

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III. EZELL IS AN ARMED CAREER CRIMINAL

The Armed Career Criminal Act provides that a defendant who has been convicted of the crime of *felon in possession of a firearm* and has three or more prior convictions for a "violent felony" or a "serious drug offense," or both, committed on occasions different from one another, is subject to a mandatory minimum term of imprisonment of fifteen years up to a maximum term of life. 18 U.S.C. § 924(e)(1). As will be explained in detail below, Ezell has been convicted of five offenses that satisfy the definition of a "violent felony" and, as a result, he qualifies as an "armed career criminal."

Ezell's convictions include the following from King County Superior Court, State of Washington:

OFFENSE	CAUSE NUMBER	DATE OF SENTENCE
Assault in the Second Degree	93-1-07476-6	April 29, 1994
Burglary in the First Degree	93-1-07476-6	April 29, 1994
Assault in the Second Degree	90-1-06625-4	January 18, 1991
Burglary in the Second Degree	87-1-02835-2	August 4, 1987
Burglary in the Second Degree	87-1-01401-7	May 26, 1987

Because the assault and burglary convictions under cause number 93-1-07476-6 arose from a single event and were not committed on occasions different from one another, they are considered together and count as a single prior violent felony. So, while Ezell has been convicted of five crimes that satisfy the definition of a "violent felony," he has, for armed career criminal purposes, four qualifying convictions.

Title 18, United States Code, Section 924(e)(2)(B) defines the term "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year that (i) has as an element the use, attempted use, or threatened use of physical force against another person or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious risk of injury to another . . .

To determine whether or not a prior conviction was "punishable by imprisonment for a term exceeding one year" as defined in Title 18, United States Code, Section

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924(e)(2)(B), the Ninth Circuit has repeatedly held that the district court is to look at the maximum penalty allowed by the statute, not the maximum under the state sentencing guidelines or the actual sentence imposed. *United States v. Murillo*, 422 F.3d 1152, 1155 (9th Cir. 2005); *United States v. Horodner*, 993 F.2d 191, 194 (9th Cir. 1993); *United States v. Rios-Beltran*, 361 F.3d 1204, 1208 (9th Cir. 2004).

For offenses punishable by imprisonment for a term exceeding one year, the Supreme Court has directed the district courts to use a "categorical approach" in determining whether a given conviction qualifies as a predicate -- a violent felony or a serious drug offense -- under the Armed Career Criminal Act. *Taylor v. United States*, 495 U.S. 575, 602 (1990). The "categorical approach" requires courts to look only to the fact of conviction and "the statutory definitions of the prior offenses, . . . not to the particular facts underlying those convictions." *Taylor*, 495 U.S. at 602.

However, where a statute criminalizes some conduct that would qualify as a predicate offense and some conduct that would not, the sentencing court may go beyond the mere fact of conviction. *Taylor*, 495 U.S. at 602. Where the statute is deemed over-inclusive, the court embarks upon what is known as the "modified categorical approach." Under the "modified categorical approach" the court must perform a limited examination of documents in the record of conviction to determine whether there is sufficient evidence to conclude that a defendant was convicted of a crime that meets the definition of a violent felony or serious drug offense as defined by the statute. *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002). In so doing, the court may look beyond the statutory definition to certain judicially noticeable facts or documentation, such as the charging documents, jury instructions, a written plea agreement, and/or transcript of the plea of guilty. *Shepard v. United States*, 544 U.S. 13, 22 (2005); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002).

The United States will now address each of Ezell's four qualifying "violent felony" convictions.

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A. *Assault in the Second Degree* and *Burglary in the First Degree*, 93-1-07476-6

1. Factual Background and Procedural History.

On October 21, 1993, Ezell kicked in the door of his ex-girlfriend's mother's house and, once inside, violently assaulted his ex-girlfriend. Armed with gun, Ezell repeatedly threatened to kill her as he chased her from room to room, eventually knocking her down to the ground and kicking her in her face. Then, after cornering his ex-girlfriend in the bathroom, Ezell pressed his gun to her head, pulled the trigger, and fired one shot. Fortunately, the ex-girlfriend dropped to the ground just as he pulled the trigger and the bullet missed. Ezell left after firing the shot, but not before firing four bullets into her car. Exhibit A-1: Information and Certification for Determination of Probable Cause.

On November 4, 1993, Ezell was charged with one count of *Assault in the Second Degree* (with a firearm enhancement) and one count of *Felony Harassment*. Exhibit A-1: Information. On February 7, 1994, the charges were amended to one count of *Assault in the Second Degree* (with a firearm enhancement), one count of *Burglary in the First Degree* (with a firearm enhancement) and one count of *Intimidating a Witness*. Exhibit A-2: Amended Information. Ezell went to trial and a jury convicted him of *Assault in the Second Degree* (with a firearm enhancement) and *Burglary in the First Degree* (with a firearm enhancement). Exhibit A-4: Verdict Forms. On April 29, 1994, Ezell was sentenced to 85 months of imprisonment on the assault charge and 130 months of imprisonment on the burglary charge. Exhibit A-5: Judgment and Sentence.

2. Ezell's Assault in the Second Degree and Burglary in the First Degree Convictions Both Qualify as Violent Felonies.

(a) Assault in the Second Degree

Ezell was convicted of *Assault in the Second Degree* under RCW 9A.36.021(1)(c) which, pursuant to RCW 9A.36.021(2) and RCW 9A.20.021(1)(b), is a class B felony punishable by up to ten years' imprisonment. That, in conjunction with Ezell's 85-month sentence, establishes that this was a crime punishable by imprisonment for a term exceeding one year. Exhibit A-5: Judgment and Sentence.

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There is no question that *Assault in the Second Degree* qualifies as a violent felony under the categorical approach. The judgment states that Ezell was being sentenced for committing an *Assault in the Second Degree* under RCW 9A.36.021(1)(c). Exhibit A-5: Judgment and Sentence. That statute makes it a violation of law to "assault another with a deadly weapon." RCW 9A.36.021(1)(c). Moreover, a review of the jury instructions and the verdict forms establish that the jury had to find, and in fact did find, that Ezell "intentionally assaulted" the victim and that "the assault was committed with a deadly weapon." Exhibit A-3: Court's Instructions to the Jury; Exhibit A-4: Verdict Forms.

Clearly, assaulting another person with a deadly weapon "has as an element the use, attempted use, or threatened use of physical force against another person" and also "involves conduct that presents a serious risk of injury to another." 18 U.S.C. §§ 924(e)(2)(B)(i) and (ii). As a result, Ezell's conviction for *Assault in the Second Degree* satisfies the definition of a violent felony under the Armed Career Criminal Act.

(b) Burglary in the First Degree

Ezell was also convicted of *Burglary in the First Degree* under RCW 9A.52.020(1)(a) which, pursuant to RCW 9A.52.020(2) and RCW 9A.20.021(1)(a), is a class A felony punishable by up to life imprisonment. Exhibit A-5: Judgment and Sentence. Again, viewing the statutory maximum possible punishment, in conjunction with the 130-month sentence he received, this offense was obviously a crime punishable by imprisonment for a term exceeding one year. Exhibit A-5: Judgment and Sentence.

In *Taylor v. United States*, 495 U.S. 575, 598 (1990), the Supreme Court held that in order for a conviction to qualify as a "burglary" under the Armed Career Criminal Act the prior conviction, "regardless of its exact definition or label," must have "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or other structure, with the intent to commit a crime." The Court then acknowledged that there would be complications in applying their decision to cases where a defendant was convicted under a state statute that defined burglary more broadly. *Taylor*, 495 U.S. at 599. As a result, the Court ruled that in such a case, the courts could look at other

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documents in the record of conviction to determine whether or not the defendant was convicted of a crime that satisfies the "generic" definition of a burglary. *Taylor*, 495 U.S. at 602. This approach is referred to as the modified categorical approach. As mentioned earlier, under this approach the courts must look at other documents in the record of conviction, such as the charging document and jury instructions when the conviction resulted from a trial and to documents such as the charging document, written plea agreement, transcript of the plea colloquy, and any explicit findings by the court when the conviction resulted from a plea. *Taylor*, 495 U.S. at 602; *Shepard v. United States*, 544 U.S. 13, 26 (2005).

Washington's definition of burglary is broader than the generic definition set forth in *Taylor* due to the fact that the definition of a "building" as used in the context of its burglary statutes includes fenced areas, railway cars, and cargo containers in addition to the traditional building. *See United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003) (Ninth Circuit held that a *Residential Burglary* conviction in Washington, pursuant to RCW 9A.52.025(1), could not be considered a "crime of violence" under the Sentencing Guidelines).[1] As a result, Washington burglary convictions are not a categorical match. However, after examining other documents in the record, burglary convictions in Washington can qualify under the modified categorical approach. *United States v. Kilgore*, 7 F.3d 854 (9th Cir. 1993). In *Kilgore*, the Ninth Circuit ruled that Washington burglary convictions satisfy the federal definition of a generic burglary, as required in *Taylor*, when a common street address is included in the charging document, explaining that the inclusion of the address makes it clear that the defendant entered a "building" and not a "fenced area." *See also United States v. Guerrero-Velasquez*, 434 F.3d 1193, 1196-97 (2005).

[1] The analysis is the same whether you are determining if a burglary conviction qualifies as a "crime of violence" under the guidelines or if the conviction qualifies as a "violent felony" under the Armed Career Criminal Act.

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Upon applying the modified categorical approach and reviewing the other documents in the record of conviction, it is clear that Ezell's conviction for *Burglary in the First Degree* qualifies as a generic burglary. The charging document in Ezell's case specifically lists the street address of the building he entered, "the dwelling of the mother of [the ex-girlfriend], located at [redacted]." This is identical to the situation addressed in *United States v. Kilgore*, 7 F.3d 854 (9th Cir. 1993).

Moreover, even if his *Burglary in the First Degree* conviction did not satisfy the definition of a generic burglary under *Taylor*, the conviction would qualify as a violent felony under the catchall provision as it certainly involved "conduct that present[ed] a serious risk of injury to another." 18 U.S.C. § 924(e)(2)(B)(ii); *See James v. United States*, 127 S.Ct. 1586, 1589 (2007) ("the main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party-whether an occupant, a police officer, or a bystander-who comes to investigate"); *United States v. Matthews*, 374 F.3d 872 (2004). Looking at the statutory definition, RCW 9A.52.020(1) makes it a violation of law to:

> with intent to commit a crime against a person or property therein, enter or remain unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

Here, Ezell was found guilty under subsection (a) -- he was armed with a deadly weapon. Exhibit A-5: Judgment and Sentence. Moreover, a review of the jury instructions establishes that in answering "yes" to the question of whether or not Ezell was carrying a "deadly weapon," the jury was first instructed that a "deadly weapon" was an implement or instrument which has the capacity to inflict death and, from the manner in which it is used, it is likely to produce or may easily and readily produce death." Exhibit A-3: Court's Instructions to the Jury; Exhibit A-4: Verdict Forms.

Again, Ezell's conviction qualifies as a generic burglary due to the inclusion of the street address in the charging document and, even in the absence of such language, there

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is little doubt that entering a building with the intent to commit a crime against a person or property therein while armed with a deadly weapon involves conduct that presents a serious risk of injury to another. As a result, Ezell's conviction for *Burglary in the First Degree* qualifies as a violent felony under the Armed Career Criminal Act.

B. *Assault in the Second Degree*, 90-1-06625-4

1. Factual Background and Procedural History.

On August 13, 1990, Ezell went over to a different ex-girlfriend's house and, when she refused to let him inside, he kicked in the door, breaking the screen door and door frame. Once inside, he repeatedly punched the ex-girlfriend in the presence of her five year old daughter and a friend. The friend quickly intervened and was able to pull Ezell off of the ex-girlfriend. The ex-girlfriend then picked up a hot skillet off the stove and ran outside. Undeterred, Ezell ran after her, struck her again, and then picked her up and threw her head-first into the concrete. When the friend intervened, Ezell picked up the skillet dropped by the ex-girlfriend and threw it at the friend, causing a burn on the back of her leg. As a result of this vicious attack the ex-girlfriend suffered a broken arm and serval bruised ribs, along with other minor injuries. Exhibit B-1: Information and Certification for Determination of Probable Cause.

On September 27, 1990, Ezell was charged with one count of *Burglary in the First Degree* and one count of *Assault in the Second Degree*. Exhibit B-1: Information. On December 12, 1990, Ezell pleaded guilty to one count of *Assault in the Second Degree*; the *Burglary in the First Degree* charged was dismissed. Exhibit B-2: Statement of Defendant on Plea of Guilty. On January 18, 1991, Ezell was sentenced to 43 months of imprisonment. Exhibit B-3: Judgment and Sentence.

2. Ezell's Assault in the Second Degree Conviction Qualifies as a Violent Felony.

Ezell was convicted of *Assault in the Second Degree* under RCW 9A.36.021(1)(a) which, pursuant to RCW 9A.36.021(2) and RCW 9A.20.021(1)(b), is a class B felony punishable by up to ten years' imprisonment. That, in conjunction with Ezell's 43-month

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sentence, again establishes that this was a crime punishable by imprisonment for a term exceeding one year. Exhibit B-3: Judgment and Sentence.

Although this conviction was under a different prong of Washington's assault in the second degree statute, there is no question that this conviction also qualifies under the categorical approach. The judgment clearly states that Ezell was being sentenced for committing an *Assault in the Second Degree* under RCW 9A.36.021(1)(a). Exhibit B-3: Judgment and Sentence. This statute makes it a violation of law to "intentionally assault another and thereby recklessly inflict substantial bodily harm" and Ezell admitted to doing so in his plea. RCW 9A.36.021(1)(a); Exhibit B-2: Statement of Defendant on Plea of Guilty.

There is no question that intentionally assaulting another person and inflicting substantial bodily harm "has as an element the use, attempted use, or threatened use of physical force against another person" and also "involves conduct that presents a serious risk of injury to another." 18 U.S.C. §§ 924(e)(2)(B)(i) and (ii). Thus, Ezell's conviction for *Assault in the Second Degree* qualifies as a violent felony under the Armed Career Criminal Act.

C. *Burglary in the Second Degree*, 87-1-02835-2

1. Factual Background and Procedural History.

On July 3, 1987, Ezell entered the personal residence of a woman he did not know without her permission. When confronted inside her home, Ezell posed as an individual looking for work and asked her if she had any work for him to do. The woman told him she did not, and Ezell left. A short time later the woman discovered that her purse and its contents had been taken from the house. Meanwhile, a short distance away, two men saw Ezell carrying a woman's purse and watched him as he stuffed credit cards down his pants. The two men restrained Ezell and when the police arrived they recovered the woman's credit cards and wallet. Exhibit C-1: Information and Certification for Determination of Probable Cause.

On July 8, 1987, Ezell was charged with one count of *Burglary in the Second*

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Degree. Exhibit C-1: Information. On July 23, 1987, Ezell entered a plea of guilty to the charge. Exhibit C-2: Statement of Defendant on Plea of Guilty. On August 6, 1987, he was sentenced to 90 days of imprisonment. Exhibit C-3: Judgment and Sentence.

2. Ezell's Burglary in the Second Degree Conviction Qualifies as a Violent Felony.

Ezell was convicted of *Burglary in the Second Degree* under RCW 9A.52.030, which, pursuant to RCW 9A.52.030(2) and RCW 9A.20.021(1)(b), is a class B felony punishable by up to ten years imprisonment. Despite the fact that Ezell was sentenced to only 90 days imprisonment, the maximum possible term of imprisonment establishes that the offense of *Burglary in the Second Degree* was a crime punishable by imprisonment for a term exceeding one year.

The offense of *Burglary in the Second Degree* is virtually indistinguishable from the offense of *Residential Burglary*, the state statute at issue in *United States v. Wenner*, 351 F.3d 969 (9th Cir. 2003), discussed above.[2] Thus, Ezell's conviction does not qualify under the categorical approach. However, based on the Ninth Circuits's decision in *Kilgore*, this conviction satisfies the definition of a generic burglary under the modified categorical approach because the charging document establishes that Ezell "did enter and remain unlawfully in a building, [redacted] residence, located at [redacted], Seattle ..." Exhibit C-1: Information. Again, under *Kilgore*, the inclusion of the common street address makes it abundantly clear that Ezell entered a "building" and not a "fenced area." *United States v. Kilgore*, 7 F.3d 854 (9th Cir. 1993).

Following the guidance set forth in *Kilgore*, this *Burglary in the Second Degree* conviction meets the federal definition of a "generic burglary"and, as argued above, even in the absence of such language it would still qualify as a violent felony under the

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[2] RCW 9A.52.030 (*Burglary in the Second Degree*) makes it unlawful to enter or remain unlawfully in a building other than a vehicle or a dwelling, whereas RCW 9A.52.025 (*Residential Burglary*) makes unlawful to enter or remain unlawfully in a dwelling other than a vehicle.

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catchall provision as the offense involves conduct that presents a serious risk of injury to another.

D. *Burglary in the Second Degree*, 87-1-01401-7

1. Factual Background and Procedural History.

On March 24, 1987, a member of the Church of Seattle arrived at the church and noticed that one of the doors to the main business office looked as if the lock had been broken. Upon entering the office, he saw Ezell crouched behind the counter. When confronted, Ezell claimed to be a member of "American Maintenance Company" and explained that he was there cleaning up. The church member, aware that the church did not have a janitorial service, kept Ezell at the scene until the police arrived and arrested him. Exhibit D-1: Information and Certification for Determination of Probable Cause.

On March 27, 1987, Ezell was charged with one count of *Burglary in the Second Degree*. Exhibit D-1: Information. On, April 14, 1987, Ezell entered a plea of guilty to the charge. Exhibit D-2: Statement of Defendant on Plea of Guilty. On May 27, 1987, he was sentenced to 29 days of imprisonment. Exhibit D-3: Judgment and Sentence.

2. Ezell's Burglary in the Second Degree Conviction Qualifies as a Violent Felony.

Again, Ezell was convicted of *Burglary in the Second Degree* under RCW 9A.52.030 which, pursuant to RCW 9A.52.030(2) and RCW 9A.20.021(1)(b), is a class B felony punishable by up to ten years imprisonment. Notwithstanding the fact that Ezell was sentenced to only 29 days of imprisonment, the offense itself is punishable by a maximum of ten years and, therefore, establishes that *Burglary in the Second Degree* is a crime punishable by imprisonment for a term exceeding one year.

Again, this offense does not qualify as a "generic burglary" due to the overly broad definition of the term "building" used in Washington's burglary statutes. However, as argued above, this conviction does qualify under the modified categorical approach because the charging document stated that Ezell "did enter and remain unlawfully in a building,

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Church of Seattle, located at 6900 Woodlawn, Seattle ..." Exhibit D-1: Information. Moreover, in his guilty plea, Ezell admitted that he entered "the business office of the Church of Seattle." Exhibit D-2: Statement of Defendant on Plea of Guilty. The inclusion of the common street address in the charging document and Ezell's admission that he entered an office inside a building, establish that he committed a generic burglary as defined in *Taylor*. Again, the standard set forth in *Kilgore* is more than satisfied. Furthermore, even in the absence of such language, this offense would still qualify as a violent felony under the catchall provision as it involves conduct that presents a serious risk of injury to another. As a result, Ezell's conviction for *Burglary in the Second Degree* also qualifies as a "violent felony."

IV. EZELL IS A CAREER OFFENDER

In addition to qualifying as an armed career criminal for purposes of Count 3 (*felon in possession of a firearm*), Ezell also qualifies as a career offender for purposes of Count 1 (*possession of cocaine base in the form of crack cocaine with the intent to distribute*).

A defendant qualifies as a career offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). Ezell qualifies as a "career offender" since (1) he was 38 when he committed the offense of *possession of cocaine base in the form of crack cocaine with the intent to distribute*, (2) the offense of *possession of cocaine base in the form of crack cocaine with the intent to distribute* is a "controlled substance offense," and (3) he has four prior convictions for a "crime of violence." U.S.S.G. § 4B1.1(a).

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A. Ezell's Conviction in Count 1 for *Possession of Cocaine Base in the Form of Crack Cocaine With the Intent to Distribute* is a "Controlled Substance Offense"

U.S.S.G. § 4B1.2(b) defines a "controlled substance offense" as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit controlled substance) or the possession of a controlled substance (or counterfeit controlled substance) with intent to manufacture, import, export, distribute, or dispense.

In Count 1, the Court found Ezell guilty of *Possession of Cocaine Base in the Form of Crack Cocaine With the Intent to Distribute*, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(iii), which is punishable by a term of imprisonment up to 40 years and has a mandatory minimum sentence of 5 years. As a result, this offense is clearly punishable by imprisonment for a term exceeding one year. It is also equally clear that the offense of conviction involved the possession of a controlled substance (cocaine base in the form of crack cocaine) with the intent to distribute it and, therefore, satisfies the definition of a "controlled substance offense" under U.S.S.G. § 4B1.2(b).

B. Ezell Has Four Prior Convictions that Qualify as a "Crime of Violence"

U.S.S.G. § 4B1.2(a) defines a "crime of violence" as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

The only real difference between the definition of a "crime of violence" for career offender purposes and the definition of a "violent felony" for armed career criminal purposes is that a burglary conviction must involve a "dwelling" to qualify as a "crime of violence" for career offender purposes, whereas it need only involve a "building" to qualify as a "violent felony" for armed career criminal purposes.

As a result, the analysis of Ezell's prior convictions here for career offender purposes is very similar to the analysis just performed above for purposes of the armed career criminal act. In fact, each of the four "violent felony" convictions discussed above also qualify as a "crime of violence." The only difference is that Ezell's *Burglary in the*

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Second Degree conviction under cause number 87-1-01401-7 only qualifies under the catchall provision, not the burglary provision, because the burglary involved a church, not a dwelling.

IV. CONCLUSION

For the reasons set forth above the United States asks this Court to find that the defendant, Terry Lamell Ezell, qualifies as an armed career criminal and a career offender.

DATED this 7th day of July, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant(s).

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