
No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

August 15, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

CARLTON F. GUNN
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Attorney for the Petitioner

QUESTION PRESENTED

Whether a state aiding and abetting statute that is broader than generic aiding and abetting and incorporated within the state's substantive criminal offenses prevents those state criminal offenses from qualifying as "crimes of violence" under the "force clause" used in the sentencing guidelines and various criminal statutory provisions.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kenneth Randale Door petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, which is published at 917 F.3d 1146, is included in the appendix as Appendix 1. An order denying a petition for rehearing en banc is included in the appendix as Appendix 2. The transcript of the sentencing hearing is attached as Appendix 3.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 12, 2019, *see* App. A001, and a timely petition

for rehearing en banc was denied on May 22, 2019, *see* App. A018. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

U.S.S.G. § 4B1.2(a) provides – in language that tracks criminal statutes including 18 U.S.C. § 16, 18 U.S.C. § 924(c), and the Armed Career Criminal Act codified in 18 U.S.C. § 924(e):

> (a) The term "crime of violence" means any 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, . . .

See also 18 U.S.C. § 16 (defining "crime of violence" to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. § 924(c)(3) (defining "crime of violence" to include any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another"); 18 U.S.C. § 924(e)(2)(B) (defining "violent felony" to include any crime punishable by more than year of imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

Application Note 1 in the commentary to U.S.S.G. § 4B1.2(a) provides that "'[c]rime of violence' and 'controlled substance offense' include the

offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. § 4B1.2, comment. (n.1).

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED.

Petitioner was convicted in the district court of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); violent felon in possession of body armor, in violation of 18 U.S.C. § 931(a); and felon in possession of an explosive, in violation of 18 U.S.C. § 842(i)(1). *See* App. A054. He was sentenced to 25 years in prison under the Armed Career Criminal Act (hereinafter "ACCA"),[1] based on prior Washington state convictions for second-degree assault and burglary. *See* App. A059-60. Petitioner appealed,

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[1] The ACCA increases the sentence for being a felon in possession of a firearm from a maximum of 10 years to a mandatory minimum of 15 years and a maximum of life when the defendant has three prior convictions for either a "violent felony" or a "serious drug offense." *See* 18 U.S.C. § 924(e)(1).

and his conviction was affirmed, *see United States v. Door*, 647 Fed. Appx. 755, 757 (9th Cir.) (unpublished), *amended*, 668 Fed. Appx. 784 (9th Cir. 2016) (unpublished), but his sentence was reversed, on the ground that the burglary convictions did not qualify as ACCA predicates under this Court's decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), *see United States v. Door*, 656 Fed. Appx. 376 (9th Cir. 2016) (unpublished). App. A060-61.

On remand, the probation office acknowledged the inapplicability of the ACCA, but continued to apply a sentencing guidelines enhancement based on Petitioner's prior convictions. App. A061. The enhancement increased Petitioner's base offense level from 14 to 24, based on two prior convictions for "crimes of violence."[2] *See* App. A061. The prior convictions the probation office treated as "crimes of violence" were the second-degree assault convictions and a conviction for "felony harassment" under Wash. Rev. Code § 9A.46.020(2)(b). App. A061. The enhanced base offense level combined with other guideline enhancements and Petitioner's guidelines criminal history score produced a guideline range of 210 to 262 months. App. A061. Based on this guideline range and other factors it viewed as aggravating, the probation

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[2] The applicable guideline – for felon in possession of a firearm – is § 2K2.1. It provides for a base offense level of 14 for possession of ordinary firearms by ordinary prohibited persons and then increases the base offense level by various amounts for more serious firearms and prohibited persons with more serious criminal records. *See* U.S.S.G. § 2K2.1(a). The increase is to 24 when the defendant has "at least two felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 2K2.1(a)(2). The definitions of "crime of violence" and "controlled substance offense" are drawn from U.S.S.G. § 4B1.2. *See* U.S.S.G. § 2K2.1, comment. (n.1).

office recommended a statutory maximum sentence of 23 years.[3] App. A061.

The district court imposed the recommended sentence, *see* App. A042, and Petitioner again appealed. In addition to challenging two other guidelines enhancements, he challenged the categorization of the assault convictions and the felony harassment conviction as "crimes of violence." *See* App. A068-75. He argued the assault convictions did not qualify as "crimes of violence" under the Ninth Circuit's intervening decision in *United States v. Robinson*, 869 F.3d 933, 936 (9th Cir. 2017). *See* App. A068-70. *Robinson* held the Washington second-degree assault statute was overbroad under the categorical approach first outlined in *Taylor v. United States*, 495 U.S. 575 (1990), and later clarified in *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis*. *See* App. 069.

Petitioner argued the felony harassment conviction did not qualify as a "crime of violence" based on another intervening decision – *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). *See* App. A070-74. *Valdivia-Flores* recognized (1) "[t]he implicit nature of aiding and abetting liability in every criminal charge is . . . well-settled," *id.* at 1207; (2) the Washington definition of aiding and abetting is broader than the generic definition, because the Washington definition requires only knowledge that an act will facilitate the commission of a crime, while the generic definition requires a specific intent, or purpose, that the act will facilitate the commission

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[3] This consisted of the maximum 10-year sentence allowed for the felon in possession of a firearm count, the maximum 10-year sentence allowed for the felon in possession of an explosive count, and the maximum 3-year sentence allowed for the violent felon in possession of body armor count, all to run consecutively. App. A061.

of a crime, *id.* at 1207-08; and (3) acting as an aider and abettor and acting as a principal are not separate offenses but are merely alternative means of committing the same offense, because "Washington law is clear that jurors need not agree on whether a defendant is a principal or accomplice," *id.* at 1210. App. A072. This latter case law means a criminal statute "is not divisible so far as the distinction between those roles is concerned, so the modified categorical approach may not be applied," *Valdivia-Flores*, 876 F.3d at 1210. App. A072.[4]

The court of appeals agreed the assault convictions did not qualify as "crimes of violence," *see* App. A014-16, but disagreed with Petitioner's argument regarding the felony harassment conviction, *see* App. A010-13.[5] The explanation the court gave was:

> The categorical analysis in *Valdivia-Flores* involved comparing the elements of the Washington drug trafficking crime with the generic federal offenses of drug trafficking because "drug trafficking" is listed in the [Immigration and Nationality Act] as an "aggravated felony." *See id.* at 1206-07. In other words, the categorical analysis employed in *Valdivia-Flores* mirrors the inquiry under the *enumerated offenses* clause of U.S.S.G. § 4B1.2(a)(2). [*United States v.*] *Werle*[, 877 F.3d 879 (9th Cir. 2017)], on the other hand, held that a prior conviction for Washington felony harassment constitutes a crime of violence pursuant to the *force* clause of § 4B1.2(a)(1). Because a conviction for violating Wash. Rev. Code § 9A.46.020(2)(b) necessarily entails the threatened use of violent physical force, it qualifies as a crime of violence pursuant to the

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[4] The "modified categorical approach" allows a court to look to certain limited records of the prior conviction if the statute is "divisible," meaning that it lists only alternative means, not alternative elements. *See Mathis*, 136 S. Ct. at 2248-49.

[5] The court also rejected Petitioner's challenge to the other guidelines enhancements. *See* App. A004.

> force clause, and our inquiry ends there. We need not compare the elements of the crime of conviction with the elements of the generic federal crime when analyzing whether an offense qualifies as a crime of violence pursuant to the force clause of § 4B1.2(a). (Citations omitted.)

App. A013 (emphasis in original). The "enumerated offenses clause" to which the court was referring is in subsection (2) of § 4B1.2 (a), which enumerates specific offenses that are "crimes of violence," and the "force clause" is a more general provision in subsection (1) of § 4B1.2 (a), which includes offenses that "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." *See* App. A006-07.[6]

Petitioner thereafter filed a petition for rehearing and suggestion for rehearing en banc. He pointed out he was not seeking comparison to some generic form of felony harassment.

> The defense is not seeking to compare the elements of Washington felony harassment with some generic version of felony harassment. What the defense is comparing is the elements of Washington aiding and abetting felony harassment to the force clause. The defense argument is that Washington aiding and abetting felony harassment does not include the threatened use of force as an element.

App. A116. He argued that "[t]he question then becomes whether Washington *aiding and abetting* felony harassment, as opposed to commission of felony harassment as a principal, includes the threatened use of force as an element." App. A116 (emphasis in original). He argued that question is answered by

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[6] At the time of Petitioner's original sentencing, subsection (2) also included a "residual clause," including any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," *see* App. A006-07 & n.2 (quoting U.S.S.G. § 4B1.2(a) (2013)), but that clause has since been removed and is not relevant to the question presented in this petition.

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), and *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993). *See* App. A116. *Gonzales* acknowledged that a state conviction for aiding and abetting theft would not qualify as generic theft if the state aiding and abetting statute was broader than generic aiding and abetting. *See* App. A102 (citing *Gonzales*, 549 U.S. at 190-91). *Innie* rejected the argument that force was an element of the accessory after the fact offense just because it was an element of the underlying murder for hire offense. App. A116 (citing *Innie*, 7 F.3d at 850-51).

The petition for rehearing was denied in spite of this authority.

V.

REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS DECISION IS WRONG.

The court of appeals decision is wrong for the reasons set forth in the petition for rehearing. The force clause requires that the use, attempted use, or threatened use of force be an "element" of the offense. *See supra* p. 7. Conduct is an "element" only if it "is a 'constituent part' of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a given statute." *United States v. Sherbondy*, 865 F.2d 996, 1010 (9th Cir. 1988) (emphasis in original) (quoting *Black's Law Dictionary* 467 (5th ed. 1979)). *See also Innie*, 7 F.3d at 850 (quoting *Sherbondy*). As applied to the force clause, the use, attempted use, or threatened use of force must be something that is required *in every case*.

Innie recognized this is not true of accessory after the fact because the accessory after the fact statute, 18 U.S.C. § 3, is a general statute that "merely requires that *some* federal offense have been committed." *Innie*, 7 F.3d at 851 (emphasis in original). The same is true of the aiding and abetting statute, 18 U.S.C. § 2. It also is a general statute that merely requires that some federal offense have been committed. *See* 18 U.S.C. § 2 ("Whoever commits *an offense* against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." (Emphasis added.))

This Court's opinion in *Gonzales* is also instructive. The issue in *Gonzales* was whether aiding and abetting theft qualified as theft under the "aggravated felony" provisions of the immigration statutes. *See id.*, 549 U.S. at 185. The Court held it did qualify, but at the same time acknowledged it would not have qualified if the state aiding and abetting statute was broader than generic aiding and abetting. *See id.* at 190-91. This would not have been a concern if it were sufficient for the offense aided to have the required elements.

There is also another problem with the court of appeals' reasoning. Its suggestion that there is no generic offense at all to compare in the present case, *see supra* p. 7, ignores the commentary to the "crime of violence" guideline. It is true there is no need to compare the elements of the crime of conviction with the elements of a generic "felony harassment," because "felony harassment" does not appear in the guideline. "Aiding and abetting" does appear in the guideline, however. It is set forth in Application Note 1 to the guideline, which provides that "crime of violence" "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." U.S.S.G. §

4B1.2, comment. (n.1). Such commentary is as much a part of the guidelines as the guidelines themselves, at least when it is not flatly inconsistent with the guideline. *Stinson v. United States*, 508 U.S. 36, 37 (1993). It may "interpret [a] guideline," "explain how it is to be applied," "suggest circumstances which . . . may warrant departure from the guidelines," or "provide background information." *Id.* at 41 (quoting U.S.S.G. § 1B1.7).

The application note here interprets the guideline – to include "aiding and abetting." In the absence of a specific definition, this must mean generic aiding and abetting. *See Valdivia-Flores*, 876 F.3d at 1206-07 (using "federal analogue" for aiding and abetting). *See generally Moncrieffe v. Holder*, 569 U.S. 184, 194 (2013) (noting categorical approach compares statute under which defendant convicted with "generic" federal definition). *That* generic offense does have to be compared, since it is expressly listed. And Washington aiding and abetting falls short when the comparison is made, as recognized in *Valdivia-Flores*. This makes Washington criminal statutes, including the felony harassment statute, overbroad, because every Washington criminal statute implicitly includes aiding and abetting, as also recognized in *Valdivia-Flores*.[7]

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[7] This overbreadth would appear to extend to all Washington criminal statutes, since the incorporation of aiding and abetting appears to be general. Indeed, the government itself has recognized this. An argument it made in *Valdivia-Flores* that was acknowledged by the court of appeals was that "no Washington state conviction can serve as an aggravated felony at all because of [the] accomplice liability statute." *Valdivia-Flores*, 876 F.3d at 1209. And the court of appeals implicitly – indeed, rather explicitly – agreed.

> The government here merely joins a chorus of those who "have raised concerns about [the] line of decisions" applying the categorical approach, "[b]ut whether for good

B. THE QUESTION PRESENTED WARRANTS REVIEW BECAUSE IT AFFECTS ALL CRIMINAL CONVICTIONS IN WASHINGTON AND SEVERAL OTHER STATES.

The court of appeals' error is not just a case-specific error affecting only Petitioner. It is quite the opposite. It will affect *every* Washington criminal conviction, because "[t]he implicit nature of aiding and abetting liability in every criminal charge is . . . well-settled." *Valdivia-Flores*, 876 F.3d at 1207.

The government itself has recognized this. In fact, it expressed this precise concern in a petition for writ of certiorari filed in another case earlier this year. It opined:

> That reasoning, which relies on Washington's general standard for accomplice liability, implies that many if not all other Washington offenses could not qualify as predicates. The court of appeals' decision thus threatens largely or completely to preclude Washington state-law offenses from constituting predicates under ACCA and potentially other federal statutes.

Petition for Writ of Certiorari, at 19-20, *United States v. Franklin*, No. 18-1131 (U.S. Feb. 28, 2019).

And it is not just Washington convictions that are affected. While most

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> or for ill, the elements-based approach remains the law." *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243, 2257, 195 L. Ed. 2d 604 (2016). Indeed, Justice Kennedy wrote separately in *Mathis* to note specifically that Congress "could not have intended vast . . . disparities for defendants convicted of identical criminal conduct in different jurisdictions"; but he concurred in the opinion that held that the categorical approach required just that result. *Id.* at 2258 (Kennedy, J., concurring).

Valdivia-Flores, 876 F.3d at 1209.

states use the generic definition of aiding and abetting, there are several others in addition to Washington which do not. Those include Indiana, Iowa, Nebraska, and possibly Oklahoma. *See* Indiana Stat. § 35-41-2-4; Iowa Code Ann. § 703.1; *State v. Tangle*, 616 N.W.2d 564, 574 (Iowa 2000); Neb. Rev. Stat. § 28-206; *State v. Becerra*, 624 N.W.2d 21, 29 (Neb. 2001) ; *Williams v. Trammell*, 782 F.3d 1184, 1193-94 (10th Cir. 2015) (expressing confusion over requirements of Oklahoma law). The question presented affects all convictions in these states as well.

The question presented also sweeps far beyond the sentencing guidelines definition of "crime of violence," which can be amended by the Sentencing Commission if it becomes too difficult to apply, *see* U.S.S.G. App. C, amend. 798 (amending guideline to eliminate problematic "residual clause"). An identical force clause is used in the ACCA, *see* 18 U.S.C. § 924(e)(2)(B) (defining "violent felony" to include any crime punishable by more than year of imprisonment that "has as an element the use, attempted use, or threatened use of physical force against the person of another"), and an almost identical force clause is used in 18 U.S.C. § 16 and 18 U.S.C. § 924(c), *see* 18 U.S.C. § 16 (defining "crime of violence" to include "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" (emphasis added)); 18 U.S.C. § 924(c)(3) (defining "crime of violence" to include any felony offense that "has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another" (emphasis added)). The court of appeals' interpretation of the force clause in the guidelines "crime of violence" definition will be readily extended to these criminal statutes, *see United States*

v. Crews, 621 F.3d 849, 852-53 n.4 (9th Cir. 2010) (recognizing interchangeability of guidelines "crime of violence" case law and ACCA "violent felony" case law), which only *Congress* can amend, *see Mathis*, 136 S. Ct. at 2257 (Kennedy, J., concurring) (noting "*Congress* remains free to overturn" Court's statutory precedents and "*Congress* is capable of amending the ACCA to resolve these concerns" (emphasis added)).

C. THIS CASE IS A GOOD VEHICLE FOR DECIDING THE QUESTION PRESENTED.

Petitioner's case is an excellent vehicle for deciding the question presented because it squarely presents the general question. There is nothing unusual or special about the Washington felony harassment offense at issue here. It is part of the general Washington criminal code. It is an ordinary criminal offense of moderate severity. The rule that applies to it should apply to all other Washington criminal statutes and all criminal statutes in the other states listed *supra* p. 12.

* * *

VI.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

DATED: August 15, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. KENNETH RANDALE DOOR, *Defendant-Appellant.*	No. 17-30165 D.C. No. 3:12-cr-05126-RBL-1 OPINION

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted December 7, 2018
Seattle, Washington

Filed March 12, 2019

Before: Sidney R. Thomas, Chief Judge, and M. Margaret McKeown and Morgan Christen, Circuit Judges.

Opinion by Judge Christen

SUMMARY*

Criminal Law

Vacating a sentence and remanding for resentencing, the panel held that, in setting the defendant's base offense level under U.S.S.G. § 2K2.1(a)(2), his prior Washington State conviction for felony harassment qualified as a crime of violence but his prior conviction for second degree assault did not.

Consistent with *United States v. Werle*, 877 F.3d 879 (9th Cir. 2017), the panel held that the defendant's 1997 conviction for felony harassment, in violation of Wash. Rev. Code §§ 9A.46.020(1)(a)(i) and (2)(B), qualified as a crime of violence, as defined in U.S.S.G. § 4B1.2. Applying the categorical approach, the panel held that the conviction qualified as a crime of violence under § 4B1.2(a)'s force clause because it necessarily entailed the threatened use of violent physical force.

The panel held that the district court erred in concluding that the defendant's 2002 conviction for second degree assault, in violation of Wash. Rev. Code § 9A.36.021(1)(c), qualified as a crime of violence. Under *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), the conviction did not qualify under the force clause of § 4B1.2(a). The panel held that second degree assault also did not qualify as a crime of violence under § 4B1.2(a)'s residual clause because the offense, in the ordinary case, does not present a serious

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

potential risk of physical injury to another, and it is not similar in kind to the crimes listed in the enumerated offenses clause.

The panel therefore vacated the sentence and remanded for resentencing. The panel addressed other issues in a concurrently-filed memorandum disposition.

COUNSEL

Carlton Gunn (argued), Pasadena, California, for Defendant-Appellant.

Helen J. Brunner (argued), First Assistant United States Attorney; Annette L. Hayes, United States Attorney; United States Attorney's Office, Seattle, Washington; for Plaintiff-Appellee.

OPINION

CHRISTEN, Circuit Judge:

Defendant Kenneth Randale Door appeals the sentence the district court imposed after he was convicted of several offenses in 2014. At his 2017 sentencing hearing, the district court determined that Door's base offense level should be 24 pursuant to United States Sentencing Guideline (U.S.S.G.) § 2K2.1(a)(2) after concluding that Door's prior Washington state convictions for second-degree assault and felony harassment qualify as crimes of violence. Door contends these offenses do not constitute crimes of violence and that his offense level was thus calculated incorrectly. Consistent

with *United States v. Werle*, 877 F.3d 879, 884 (9th Cir. 2017), we hold that Door's 1997 conviction for felony harassment, in violation of the Revised Code of Washington (Wash. Rev. Code) §§ 9A.46.020(1)(a)(i) and (2)(b), qualifies as a crime of violence. Door's argument to the contrary disregards that the framework for the "crime of violence" analysis differs depending on whether the prior offense is alleged to constitute a crime of violence pursuant to the force clause, the enumerated offenses clause, or the residual clause of U.S.S.G. § 4B1.2(a). The district court did err, however, in concluding that Door's 2002 conviction for second-degree assault, in violation of Wash. Rev. Code. § 9A.36.021(1)(c), qualifies as a crime of violence. *See United States v. Robinson*, 869 F.3d 933, 941 (9th Cir. 2017); *see also United States v. Vederoff*, 914 F.3d 1238, 1244–46 (9th Cir. 2019). Accordingly, we vacate Door's sentence and remand for resentencing.[1]

FACTUAL AND PROCEDURAL BACKGROUND

A search of Door's home in 2011 led to the discovery of two handguns, some magazines loaded with ammunition, two military grade ballistic vests (body armor), an explosive device known as a "seal bomb," two digital scales, drug packaging materials, and two drug pipes containing methamphetamine residue. These discoveries led to Door's indictment in 2012; he was charged with being a Felon in

[1] Door also contends that he was improperly convicted of possessing body armor, challenges the application of an enhancement for possessing a firearm in connection with another felony, and argues that his case should be reassigned if remanded. In a concurrently filed memorandum disposition, we affirm the body armor conviction and sentencing enhancement, and decline to reassign the case on remand.

Possession of a Firearm, a Violent Felon in Possession of Body Armor, and a Felon in Possession of an Explosive. In 2014, a jury convicted Door of each count. Door received a 300-month sentence, but for reasons not pertinent to this appeal, we vacated Door's sentence and remanded for resentencing.

On remand, the probation officer recommended a base offense level of 24 because the officer concluded that Door's prior Washington state convictions for second-degree assault and felony harassment constitute crimes of violence. *See* U.S.S.G. § 2K2.1(a)(2) (providing that a base offense level of 24 applies "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense"). A total offense level of 32 and Door's criminal history category of VI yielded a guideline imprisonment range of 210 to 262 months. The probation officer recommended 276 months of imprisonment due to Door's extensive criminal history. This represented the maximum sentence for each count, served consecutively. Door argued that his prior convictions for second-degree assault and felony harassment were not "crime[s] of violence" as defined in U.S.S.G. § 4B1.2, and thus his base offense level should only be 14.

At the resentencing hearing held in 2017, the district court ruled that Door's prior convictions for second-degree assault and felony harassment qualified as crimes of violence pursuant to U.S.S.G. § 4B1.2. The court concluded that Door had a total offense level of 32 and imposed a sentence of 276 months.

ANALYSIS

We have jurisdiction pursuant to 28 U.S.C. § 1291. "We review de novo whether a state-law crime constitutes a crime of violence under the [Federal Sentencing] Guidelines." *Robinson*, 869 F.3d at 936.

To determine whether a prior conviction qualifies as a crime of violence, we apply the categorical approach first outlined in *Taylor v. United States*, 495 U.S. 575 (1990). The categorical approach requires courts to compare the elements of the statute of conviction with the federal definition of "crime of violence" to determine whether the statute of conviction criminalizes a broader range of conduct than the federal definition captures. *United States v. Edling*, 895 F.3d 1153, 1155 (9th Cir. 2018). The 2013 Sentencing Guidelines define the term "crime of violence" as follows:

> [A]ny 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 [*known as the force clause or the elements clause*], or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [*known as the enumerated offenses clause*], or otherwise involves conduct that presents a serious potential risk of

> physical injury to another [*known as the residual clause*].

U.S.S.G. § 4B1.2(a) (2013).[2]

When determining whether a prior conviction constitutes a crime of violence, the precise inquiry differs depending on whether the offense is alleged to qualify as a crime of violence pursuant to the force clause, the enumerated offenses clause, or the residual clause. *See, e.g.*, *Edling*, 895 F.3d at 1156–58 (determining whether prior convictions qualified as crimes of violence pursuant to the force clause and the enumerated offenses clause); *United States v. Adkins*, 883 F.3d 1207, 1213–15 (9th Cir. 2018) (determining whether prior convictions qualified as crimes of violence pursuant to the residual clause). An offense constitutes a "crime of violence" if it qualifies under any one of the three clauses. *See Edling*, 895 F.3d at 1155. Throughout this analysis, we "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized" by the statute of conviction. *Moncrieffe v. Holder*, 569 U.S. 184, 191–92 (2013) (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

[2] The relevant Sentencing Guidelines are those in effect on the date of the defendant's first sentencing hearing. *See* 18 U.S.C. § 3742(g)(1). Door's first sentencing hearing occurred when the 2013 Guidelines were in effect. Although the residual clause was later omitted from the Guidelines' definition of a crime of violence, we do not apply the amendment retroactively because it substantively changed the Guidelines. *United States v. Adkins*, 883 F.3d 1207, 1211–12 (9th Cir. 2018).

A. Applying the Categorical Analysis to the Sentencing Guidelines' Force Clause, Enumerated Offenses Clause, and Residual Clause

To determine whether a prior conviction qualifies pursuant to the force clause, the question is whether the crime of conviction "has as an element the use or threatened use of physical force against the person of another, with 'physical force' understood to mean in this context '*violent* force—that is, force capable of causing physical pain or injury to another person.'" *Edling*, 895 F.3d at 1156 (quoting *Johnson*, 559 U.S. at 140). If the crime of conviction necessarily entails the use or threatened use of violent physical force, it is considered a categorical match for a crime of violence pursuant to the force clause of § 4B1.2(a)(1), and the inquiry ends. *See id.*; *see also Stokeling v. United States*, 139 S. Ct. 544, 554–55 (2019).

A prior offense constitutes a crime of violence pursuant to the enumerated offenses clause if the elements of one of the generic federal crimes listed in that clause fully subsume the elements of the crime of conviction. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *United States v. Peterson*, 902 F.3d 1016, 1021–22 (9th Cir. 2018). A generic federal crime is defined by looking to the common law, the Model Penal Code, treatises, and the laws of other states. *See Vederoff*, 914 F.3d at 1245; *United States v. Esparza-Herrera*, 557 F.3d 1019, 1022–23 (9th Cir. 2009). If the crime of conviction falls within the generic federal definition—meaning it does not punish a broader range of conduct than the generic offense—the conviction qualifies as a crime of violence. *See, e.g.*, *Mathis*, 136 S. Ct. at 2248.

We use a two-part test to assess whether an offense is categorically a crime of violence pursuant to the residual clause in § 4B1.2(a)(2). *Adkins*, 883 F.3d at 1213. "First, the 'conduct encompassed by the elements of the offense, in the ordinary case, must present a serious potential risk of physical injury to another.'" *Id.* (quoting *United States v. Park*, 649 F.3d 1175, 1177–78 (9th Cir. 2011)). "Second, the prior offense must be 'roughly similar, in kind as well as in degree of risk posed'" to the crimes listed in the enumerated offenses clause. *Id.* (quoting *Park*, 649 F.3d at 1178). To determine whether the offense is "similar in kind" to the listed crimes, we consider "whether the predicate offense involves 'purposeful, violent, and aggressive conduct.'" *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 145 (2008)). Both criteria must be satisfied for a prior offense to constitute a crime of violence pursuant to the residual clause of § 4B1.2(a)(2). *Id.*

If the statute of conviction does not qualify as a categorical match pursuant to the force clause, the enumerated offenses clause, or the residual clause, the court considers whether the statute of conviction's elements are divisible. *See, e.g.*, *Edling*, 895 F.3d at 1156, 1159; *Adkins*, 883 F.3d at 1215; *Robinson*, 869 F.3d at 938. A statute is divisible if it "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis*, 136 S. Ct. at 2249. If the statute of conviction is not a categorical match and is indivisible, it is not a crime of violence. *See id*. at 2248–49. If the statute of conviction is not a categorical match and is divisible, then the court applies the modified categorical approach and "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id*. at 2249 (citing *Shepard v.*

United States, 544 U.S. 13, 26 (2005)). We then apply the force clause, the enumerated offenses clause, or the residual clause analysis to the *specific crime of conviction* to determine whether it is a crime of violence. *See id.*

B. Door's Prior Conviction for the Washington Crime of Felony Harassment Qualifies as a Crime of Violence Pursuant to the Force Clause.

Door was convicted in 1997 of felony harassment in violation of Wash. Rev. Code §§ 9A.46.020(1)(a)(i) and (2)(b) for "threatening to kill" a person.[3] We previously

[3] At the time of Door's conviction in 1997, the Washington harassment statute provided the following:

> (1) A person is guilty of harassment if:
>
> > (a) Without lawful authority, the person knowingly threatens:
> >
> > > (i) To cause bodily injury in the future to the person threatened or to any other person; or
> > >
> > > (ii) To cause physical damage to the property of a person other than the actor; or
> > >
> > > (iii) To subject the person threatened or any other person to physical confinement or restraint; or
> > >
> > > (iv) Maliciously to do any other act which is intended to substantially harm the person threatened or another with respect to his or her physical or mental health or safety; and

analyzed this statute in *Werle*, and held that a conviction pursuant to the "threat to kill" subsection of the statute constitutes a crime of violence pursuant to the force clause of § 4B1.2(a)(1).[4] *Werle*, 877 F.3d at 883–84. Because a conviction pursuant to Wash. Rev. Code § 9A.46.020(2)(b) requires that a defendant be found guilty of knowingly threatening to kill a person, this offense necessarily entails the threatened use of violent physical force against another person, as required by § 4B1.2(a)(1). *Id.* Thus, Door's

> (b) The person by words or conduct places the person threatened in reasonable fear that the threat will be carried out.
>
> (2) A person who harasses another is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW, except that the person is guilty of a class C felony if either of the following applies:
>
> (a) The person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order; or
>
> (b) the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person.

Wash. Rev. Code § 9A.46.020.

[4] In *Werle*, we assessed the amended version of Wash. Rev. Code § 9A.46.020. 877 F.3d at 882. Although Door's conviction occurred prior to the statutory amendment, the relevant language in the earlier version of the felony harassment statute is substantially the same as the amended version reviewed in *Werle*.

conviction for the Washington crime of felony harassment qualifies as a crime of violence for sentencing purposes.

Door contends that we are not bound by *Werle*'s holding, observing that in *Werle*, the defendant never argued his prior Washington felony harassment conviction failed to qualify as a crime of violence on account of Washington's version of aiding and abetting, which is broader than the federal definition of aiding and abetting. As Door's argument goes, because every Washington criminal statute incorporates aiding and abetting, all Washington criminal statutes are overbroad, and therefore *all* Washington state convictions fail to qualify as crimes of violence—an argument inspired by *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). Door's argument, however, overlooks the analytical difference between the force clause and the enumerated offenses clause of U.S.S.G. § 4B1.2(a).

In *Valdivia-Flores*, this court assessed whether a conviction for violating a Washington drug-trafficking law, Wash. Rev. Code § 69.50.401, constituted an "aggravated felony" for purposes of the Immigration and Nationality Act (INA). *Valdivia-Flores*, 876 F.3d at 1206. Applying *Taylor*'s categorical approach, we considered "whether the state statute defining the crime of conviction categorically fit[] within the generic federal definition of a corresponding aggravated felony." *Id.* (quoting *Roman-Suaste v. Holder*, 766 F.3d 1035, 1038 (9th Cir. 2014)). Valdivia-Flores's crime of conviction was overbroad because: (1) aiding and abetting is included in every Washington criminal statute; (2) Washington defines aiding and abetting more broadly than federal law because it merely requires knowledge, whereas federal law requires a mens rea of specific intent; and (3) accomplice and principal liability are indivisible under

Washington law. *Id.* at 1207–10. Concluding that Valdivia-Flores's prior offense did not qualify as an "aggravated felony," we observed that it may be that "no Washington state conviction can serve as an aggravated felony at all." *Id.* at 1209–10.

Door's reliance on *Valdivia-Flores* is misplaced. The categorical analysis in *Valdivia-Flores* involved comparing the elements of the Washington drug trafficking crime with the generic federal offense of drug trafficking because "drug trafficking" is listed in the INA as an "aggravated felony." *See id.* at 1206–07. In other words, the categorical analysis employed in *Valdivia-Flores* mirrors the inquiry under the *enumerated offenses* clause of U.S.S.G. § 4B1.2(a)(2). *Werle*, on the other hand, held that a prior conviction for Washington felony harassment constitutes a crime of violence pursuant to the *force* clause of § 4B1.2(a)(1). Because a conviction for violating Wash. Rev. Code § 9A.46.020(2)(b) necessarily entails the threatened use of violent physical force, it qualifies as a crime of violence pursuant to the force clause, and our inquiry ends there. We need not compare the elements of the crime of conviction with the elements of the generic federal crime when analyzing whether an offense qualifies as a crime of violence pursuant to the force clause of § 4B1.2(a). *Compare Peterson*, 902 F.3d at 1016, 1021–22, *with Edling*, 895 F.3d at 1156–58. *Valdivia-Flores* is consistent with *Werle*.

C. Door's Prior Conviction for the Washington Crime of Second-Degree Assault Does Not Qualify as a Crime of Violence.

Door was convicted in 2002 of second-degree assault in violation of Wash. Rev. Code § 9A.36.021(1)(c).[5] In *Robinson*, we held that Washington's crime of second-degree assault did not qualify as a crime of violence pursuant to the

---

[5] At the time of Door's conviction in 2002, the Washington second-degree assault statute provided the following:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, assaults another; or
>
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

Wash. Rev. Code § 9A.36.021(1).

force clause of U.S.S.G. § 4B1.2(a)(1).[6] 869 F.3d at 937–38. However, *Robinson* did not address whether second-degree assault constitutes a crime of violence pursuant to the residual clause of § 4B1.2(a)(2).[7]

Applying the two-part residual clause test, we hold that Wash. Rev. Code § 9A.36.021(1) is not a crime of violence because the offense, in the ordinary case, does not "present a serious potential risk of physical injury to another." *Adkins*, 883 F.3d at 1213 (quoting *Park*, 649 F.3d at 1177–78). The Washington second-degree assault statute encompasses assault with intent to commit a felony. Wash. Rev. Code § 9A.36.021(1)(e). This includes the intent to commit any non-violent felony offense. The "assault" may also be non-violent because Washington defines assault broadly to include "an intentional touching . . . that is harmful or offensive regardless of whether any physical injury is done to the person." *State v. Smith*, 154 P.3d 873, 875 (Wash. 2007) (en banc); *see also Robinson*, 869 F.3d at 938 n.7. Thus, a defendant may violate Wash. Rev. Code § 9A.36.021(1)(e) in

[6] In *Robinson*, we assessed the amended version of Wash. Rev. Code § 9A.36.021(1). 869 F.3d at 937 n.6. The statute was amended after Door's conviction to include a seventh subsection, (1)(g) which prohibits "[a]ssaults . . . by strangulation or suffocation." *Id.*

[7] *Robinson* also did not address the enumerated offenses clause. To the extent the government argues that second-degree assault qualifies as a crime of violence pursuant to the enumerated offenses clause, we decline to address this argument, raised for the first time on appeal. *See United States v. Fomichev*, 899 F.3d 766, 770 (9th Cir. 2018), *as amended by* 909 F.3d 1078 (9th Cir. 2018). Further, the argument is foreclosed by *Vederoff*. *See Vederoff*, 914 F.3d at 1246.

a way that poses no serious risk of physical injury to others.[8] Because Door "could have been convicted on the basis of conduct that did not present a serious risk of physical injury to another," a prior conviction for Washington second-degree assault does not qualify as a crime of violence. *See United States v. Simmons*, 782 F.3d 510, 519 (9th Cir. 2015) (quoting *United States v. Kelly*, 422 F.3d 889, 893 (9th Cir. 2005)); *see also United States v. Lee*, 821 F.3d 1124, 1128–29 (9th Cir. 2016) (holding that California's crime of battery committed against a custodial officer does not qualify as a crime of violence pursuant to the residual clause because "the least touching may constitute battery" (quoting *People v. Mesce*, 60 Cal. Rptr. 2d 745, 756 (Cal. Ct. App. 1997)).

Wash. Rev. Code § 9A.36.021(1) also fails to satisfy the second part of the residual clause test because it is not "similar in kind" to the crimes listed in the enumerated offenses clause, which typically involve "purposeful, violent, and aggressive conduct." *Adkins*, 883 F.3d at 1213 (quoting *Begay*, 553 U.S. at 145). As discussed, the Washington crime of second-degree assault can be committed by offensive touching, *see Smith*, 154 P.3d at 875, which would not involve "violent" or "aggressive" conduct.

The Washington second-degree assault statute is indivisible, thus the modified categorical approach is inapplicable. *Robinson*, 869 F.3d at 941. The district court erred by concluding that Door's prior second-degree assault conviction qualifies as a crime of violence pursuant to the residual clause.

[8] For example, a defendant may be convicted of assault with intent to commit a felony for touching a minor's body in a sexual manner. *See Robinson*, 869 F.3d at 938 n.7.

D. Remand is Required

The Sentencing Guidelines direct that a base offense level of 24 applies if the defendant has two or more felony convictions that qualify as a "crime of violence." U.S.S.G. § 2K2.1(a)(2). A mistake in calculating the Guidelines sentencing range generally requires us to remand for resentencing. *United States v. Bankston*, 901 F.3d 1100, 1107 (9th Cir. 2018). Door's conviction for the Washington crime of felony harassment qualifies as a crime of violence, but the district court erred in holding that Door's conviction for the Washington crime of second-degree assault constitutes a crime of violence. Because Door only had one conviction that qualified as a crime of violence, his base offense level should have been 20. *See* U.S.S.G. § 2K2.1(a)(4). The district court therefore erred in calculating Door's base offense level and remand is required.

Sentence VACATED; REMANDED for resentencing.

A P P E N D I X 2

FILED

MAY 22 2019

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. KENNETH RANDALE DOOR, Defendant-Appellant.	No. 17-30165 D.C. No. 3:12-cr-05126-RBL-1 Western District of Washington, Tacoma ORDER

Before: THOMAS, Chief Judge, and McKEOWN and CHRISTEN, Circuit Judges.

The panel has unanimously voted to deny Defendant-Appellant Kenneth Randale Door's petition for panel rehearing and petition for rehearing en banc. The full court has been advised of Defendant-Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

A P P E N D I X 3

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

UNITED STATES OF AMERICA,	**NO. CR12-5126 RBL**
Plaintiff,	
vs.	**August 18, 2017**
	Tacoma, Washington
KENNETH DOOR,	**10:30 a.m.**
Defendant.	

TRANSCRIPT OF FELONY RE-SENTENCING PROCEEDINGS
BEFORE THE HONORABLE RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

For the Plaintiff:	**MR.NORMAN BARBOSA** **Assistant United States Attorney** **-and-** **MR. STEVEN MASADA** **Assistant United States Attorney** **700 Stewart Street, Ste 5220** **Seattle, Washington 98101**
For the Defendant:	**MR.TIMOTHY R. LOHRAFF** **Law Office of Timothy R. Lohraff** **1001 Fourth Avenue, Suite 3200** **Seattle, Washington 98154**
U.S. Probation Office:	**MR.STEVEN McNICKLE** **U.S. Probation Officer**
Court Reporter:	**Leslie A. Waltzer, CSR** **3641 North Pearl Street** **Tacoma, WA 98407**

(Proceedings recorded by mechanical stenography; transcript produced with aid of computer.)

(Defendant Present, in Custody)

THE CLERK: All rise. Court is now in session, the Honorable Ronald B. Leighton presiding.

THE COURT: Please be seated. Good morning.

THE CLERK: This is in the matter of *United States of America versus Kenneth Door*, cause number CR12-5126 RBL.

Counsel, please make your appearances.

MR. BARBOSA: Norman Barbosa and Steven Masada on behalf of the United States, Your Honor.

THE COURT: Good morning.

MR. LOHRAFF: Good morning, Your Honor. Tim Lohraff on behalf of Mr. Door, seated to my left.

THE COURT: Mr. Lohraff, Mr. Door, good morning.

Let me get my papers out. I'll be right back. I got another file --

All right. Now let me get my music out, so I can conduct this pièce de résistance.

This is the matter before the Court for re-sentence. I have reviewed the Revised Memorandum on resentencing, I've reviewed the government's Memorandum and attachments, the Defendant's attachments and Memorandum, and I've read the Sentencing Memorandum filed last night. Are there any documents that I should have reviewed that I have not reviewed?

MR. BARBOSA: Nothing from the government, Your Honor.

MR. LOHRAFF: I believe you have everything, Your Honor.

THE COURT: Okay. Very well.

And, Mr. Lohraff, did you have an opportunity to review with Mr. Door the -- the sum and substance of the recommendation?

MR. LOHRAFF: Yes.

THE COURT: Okay. And, Mr. Door, do you believe you understand the recommendation?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Very well.

Mr. Door was sentenced August 15, 2014 to 300 months as an Armed Career Criminal, and as was the case with other people who were -- around the country who were sentenced as Armed Career Criminals, we're impacted by the *Johnson* case, and the -- the position articulated in *Johnson* that the definition of an armed career criminal is unconstitutionally vague. And I will not recite my long-standing criticism of that jurisprudence. It has been moderated lately that some awareness of reality overcame the Supreme Court and the Court of Appeals but, nevertheless, I am duty bound to re-sentence Mr. Door and to deal with the enhancements of Possession of a Firearm

in Connection with Another Felony offense and for Obstruction of Justice. So I've got to put that aside.

MR. BARBOSA: Just one other enhancement, Your Honor, the stolen gun enhancement.

THE COURT: Right. But the Court of Appeals singled out those two enhancements.

MR. BARBOSA: Correct. I would just ask that the Court make or adopt findings regarding all three.

THE COURT: I'll deal with all three, but this is what the Court of Appeals set out.

The PSR establishes the base offense level of 24, a two-level enhancement for Possession of a Stolen Firearm, a four-level enhancement for Possession of a Firearm in Connection with Another Felony, and a two-level enhancement for Obstruction of Justice, which achieves a total offense level of 32, and the criminal history category is six. The range in the Guidelines is for 210 to 262 months, but the maximum is Count 1, Felon in Possession of a Firearm, 120 months; Violent Felon in Possession of Body Armor, Count 2, 36; Felon in Possession of an Explosive, which is Count 3, is 120 months, and the recommendation is they all be served consecutive for 276 months. The government endorses that recommendation.

The Defendant advocates that the base offense level

is 14, because they advocate that there are -- the two underlying so-called violent offenses do not meet the standard, and thus the base offense level should be 14, and the range is 84 to 105 months. So I think that's what I understand.

Mr. Lohraff, I'll hear from you first.

MR. LOHRAFF: Thank you, Your Honor. Because there's a lot to cover, I'm just wondering if the Court has any specific questions before I start?

THE COURT: From my perusal I think the big issue is whether the Washington Assault Second Degree and the Felony Harassment do not qualify as crimes of violence. I would -- I will say it now that the Washington Assault in the Second Degree is -- qualifies under the residual clause. It involves serious risk of physical injury with use of violent force. And the Felony Harassment, I think it qualifies in the elements clause. It's overbroad, but it's divisible, ultimately requiring threatened use of physical force.

That's my perspective, and you can -- you can argue against that. Otherwise, we can go directly to the enhancements. But I'm satisfied probably the base offense level should be 22, not 24, but -- okay.

MR. LOHRAFF: All right. Your Honor, there's a pretty significant difference. The government cited a

number of cases that I -- I think there's a fairly significant legal difference between how they view the legal landscape right now post *Beckles* and how I view it.

I think that because of the applicability of *Johnson I*, which is still good case law, and the fact that the Ninth Circuit still has two pending cases, *Robinson* and *Ryncarz* that are still outstanding, if *Beckles* controlled, those cases would have been decided, and it would be done. They wouldn't keep -- and they've been sitting on those cases for a while. So if *Beckles* controls, I don't understand why *Robinson* and *Ryncarz* haven't been released.

In *Robinson* the issue is exactly the same as the issue in Mr. Door's case. It's a 2K2.1(a) Felon in Possession case. The crime is second-degree assault, and it was raising the base offense level from 14 to either 20 or 24. I don't remember. But it's essentially -- it couldn't get more exact.

Robinson has been fully briefed; it's been argued. So if *Beckles* simply controlled, and that was the end-all-be-all, I'm at a loss as to why they haven't just released a Memorandum Decision saying *Beckles* controls this, and this is not the solution -- or this is the solution. And *Ryncarz* actually raises the other issue. It's a -- there's other issues in *Ryncarz*, but that issue

is also raised by the lawyers in that case.

I won't go through the whole argument in my Sentencing Memorandum, but I think what I'm -- the essence of my argument is that -- and which I think the Ninth Circuit found in *Harrison*, which is the Memorandum case that it issued, *Harrison*, went through the second-degree assault statute under *Descamps*, and in *Harrison* the Ninth Circuit found that, you know, *Descamps* didn't allow for a categorical analysis under *Taylor*. And I think the analysis used in *Harrison* is the same one that the Court should apply here, that it's both overbroad and it's indivisible, that it's not divisible, under *Mathis* and *Descamps*. So I understand that -- that reasonable minds can differ, I guess, but --

THE COURT: What if -- what if I got the base offense level to 14? Doing all the calculus, the recommendation should be somewhere, you know, in the high hundreds, 100 to 200 months. The maximum penalties are -- they are what they are. And I'm convinced beyond a shadow of a doubt -- not the sophistry that we play with *Descamps*, *Taylor, Johnson* -- he's a bad man. He's a dangerous man. He should be locked up for as long as I can lock him up. What -- what would you argue about that? Because he's not a Boy Scout. He is not -- he's not anything remotely similar.

MR. LOHRAFF: He's not, Your Honor. Here's the point. Here's the thing. Mr. Door has one significant criminal incident in his past where there was, you know, shooting at police or Pierce County Sheriffs. The vast majority of his crimes --

THE DEFENDANT: His talk.

MR. LOHRAFF: I'm sorry?

THE DEFENDANT: His talk.

MR. LOHRAFF: I was going over the PSR last night. It's stealing cars, it's burglaries, it's possession of stolen things, it's theft. He did not -- I have represented people in federal court who have five, six, seven armed robberies, who have five bank robberies. Their entire life is using guns to rob people or to rape women or to do violent things. That's not -- Door is not that. It's not a commendable background by any means, but it is not a background of since he's been 15 or 16 of using guns to pistol whip people, rob people, armed home invasions, rapes, bank robberies, armed bank robberies. It's -- it's a bunch of property crimes.

And, you know, you don't get the gold medal for that, but I think the government has kind of -- I don't think he's as demonic and as -- you know, he's a bad guy, but there's relativity. There's -- there's a wide range of bad guys. I mean, there's guys that, you know, plow

their cars into people at demonstrations and stuff, and then there's guys that steal a lot and rip people's cars off, and take stuff at burglaries. So I guess what I'm saying is he's not as bad a guy as it may at first look. He had one really bad incident, but his -- if you look at his entire criminal history, it really is not replete with violence over and over and over and over with guns and drugs. It's really not.

There's also that Mr. Door talks a lot, but the people in the case talk a lot too. I mean, Joe Jacobs has made absolutely in my opinion ridiculous statements that when Michael Powell went out to the casino, Joe Jacobs spun this story about Mr. Door brandishing a gun and kidnapping his wife. I mean, it's ludicrous. My investigator talked to the head of security. The head of security said, "We have a million cameras here. This is a casino. There's a lot of money. There's not a single shred of this. We have a security force. There's not a single report of this."

You know, it's -- so there's people around Kenny Door that like to talk also and like to make Mr. Door out to be, like, this worst guy in the world, and when you look at some of their claims, they don't always hold up.

And even the guns that were found at his house, he wasn't caught robbing a store with them. He wasn't

caught mugging someone with them. He wasn't caught in the act of shooting at police. They were in his house. And to give him consecutive a hundred and -- 10 years on a fisherman's seal bomb just doesn't sit right with me. It just seems like to give 10 years for having a thing you light and throw in the water to scare away seals when you're trying to catch salmon, it just doesn't seem like that's fair to me.

So I guess the issue becomes the law under federal courts for deciding whether a statute should run consecutive or concurrent, and it tells you to look at the same factors. It tells the Court to look at 3553(a), which is what the Court is looking at anyway for the other sentences, the regular sentence, so you're kind of doing a double duty 3553(a) analysis. One is what should the sentence be and then, two, do I need to run the sentences concurrent or consecutive?

I don't think that maxing him out is the answer, and I don't think it's just. I think that maybe if the Court wants to give him more than 120 months, that that might -- if the Court thinks that's appropriate, but I don't think giving him consecutive consecutive sentences, all three of them, is appropriate, particularly when he wasn't caught using these guns.

The four-point enhancement for being a drug dealer,

there isn't a single report from a single police agency saying, "Here's the customers he sold drugs to. We caught them outside his house. Here's the people that sold him drugs. Here's the drugs." They found a couple of -- what? Scales and plastic bags in his house. There weren't even drugs in his house. And he's living in a pretty -- this isn't a drug dealer's house, Your Honor. It's a little box.

THE COURT: I remember it.

MR. LOHRAFF: He's not driving a BMW or Mercedes. He's not living in a nice place. He's not taking trips to the Caribbean. He's not wearing huge gold chains. He's not -- he doesn't have the accoutrements of a drug dealer. I know the Court has seen people that have come into this Court that have used guns to do bad things. That's not him. So did he have the guns? Yeah. Did he have the body armor? Yes. Should he have had them? No. Did he actively use them to do something? We don't have a victim in here that says that he did.

So when you get away from the legal analysis, and you just look at the 3553 case law and the factors, which is what the Court is asking me to do, I guess what I'm saying is it's my opinion, having represented a lot of people, some of whom have done repellant, abhorrent,

pretty terrible things, he's not in the Pantheon of my former clients. He's not there. He's not in my super top ten baddies list. You know, he's not in my misdemeanor shoplifting-on-the-base-guy either but -- so I guess the ultimate case is what the Court thinks is fair and just, and I don't think that a maximum sentence in this case is fair and just.

When the Court talked about the one -- I absolutely do not believe that he should be susceptible to the stolen gun case, and I attached that report. The guy never reported it stolen, and I don't even believe that -- we don't even know if the gun was stolen, because the owner moved here from Florida. First he said it was in his truck console in the middle compartment, which is a, you know, genius place to keep a gun. Then he said it as in the U-Haul trailer, and then he said it was in his storage unit. But as Agent Hansen -- as the guy told Agent Hansen, "I never reported it stolen," and my impression from reading that is I don't know that the guy knows that it was stolen. So at the very least, getting back to the legal part for a minute, I think that provision is inapplicable.

But on the big picture, I don't think that -- especially since one of the convictions is for possession of a seal bomb -- that 120 months in prison on its own

for that is fair and just. So I will let my Memo speak for the legal stuff, and I know that Mr. Door does want to address the Court.

THE COURT: Thank you, Mr. Lohraff. Thank you for your role in the process, and your writing and your advocacy. You're a straight shooter, and I admire you greatly.

MR. LOHRAFF: Thank you, Your Honor.

THE COURT: Mr. Barbosa?

MR. BARBOSA: Your Honor, I think we're generally on the same page here. Although the law has changed, the facts of this case have not changed. Mr. Door's history of violent crime has not changed, and that I believe is what has drove the sentence before and should be driving the sentence now, who Mr. Door is and the crimes that he actually committed in this case.

Mr. Lohraff suggested that he has not used guns in his past, that this is just talk. That he hasn't been actually violent, and this is just talk. But if we review several of his convictions, he backs up his talk with action. His felony harassment involved punching his girlfriend. His prison behavior itself suggests that he is a violent individual. He was found committing a three-on-one assault on another inmate in the prison, and it wasn't simply a fistfight. This was ganging up on one

other inmate. He was hauled back into the cell while one other inmate -- while one of Mr. Door's cohorts held the cell closed as they beat him.

One of his other crimes, a 1990 burglary conviction, involved breaking into somebody's house and pointing a gun at the people. And we also have very good evidence of what Mr. Door was doing with these guns and how they were connected to other crimes. In his own words he told his friends, "I'm going to get guns, a vest, and I'm going to rob people," the typical behavior of somebody committing drug rip-offs using body armor that he was not allowed to possess.

The police vest that was found in another probation search suggests very strongly that he had these guns for a purpose, and then in his house supporting the finding that he was using these drugs -- or using these guns in furtherance of drug dealing is what the agents found in his house. Drug paraphernalia was scattered throughout the living room of the house or, as Mr. Door also described, thrashed all over his living room.

We're recommending a 276-month term of imprisonment, which is the maximum term that can be imposed under the statutes of conviction, and we're basing that 14-month variance over the Sentencing Guidelines as we believe they calculate on that history of violence the nature and

circumstances of these offenses, which are truly extraordinary. The criminal history of this Defendant is through the roof, convictions going back most of his adult life. If he hasn't been in prison, he's been out committing other crimes. And even when in prison, he managed to concoct a fraud scheme to steal tens of thousands of dollars that he orchestrated while in jail.

We just simply believe that with this history of extremely violent behavior, he presents an extreme risk to society, and a sentence at the maximum term is necessary to protect the public.

THE COURT: We addressed the three enhancements --

MR. BARBOSA: Absolutely.

THE COURT: -- in your language, and if you want to start with the possession of stolen firearm.

MR. BARBOSA: Absolutely. Even Mr. Door thought that that gun was stolen. He told Agent Hansen that the gun was stolen from an older guy and, in fact, it did previously belong to an older man who did believe it was probably stolen. The fact that he didn't file an official report means nothing. He didn't give it to Mr. Door. That's for sure. That was a stolen firearm, and the enhancement clearly applies.

The enhancement for possessing the guns in connection

with other crimes I've just addressed.

THE COURT: Three different underlying felonies, drug -- drug -- drug trafficking --

MR. BARBOSA: Robberies.

THE COURT: -- robberies and -- and harassment.

MR. BARBOSA: Exactly. We have testimony from multiple witnesses that he had used weapons, that he threatened them with weapons. And then finally the enhancement for obstruction of justice I think also clearly applies based on those threats as well as the threat to the case agent, which I think that's just the quintessential act of obstruction of justice and clearly would support --

THE COURT: Mr. Door told Mr. Schwartz that he was going to have Mr. -- Agent Hansen killed.

MR. BARBOSA: Yes. So all three of those I think are well supported by the facts. If -- if the Court were to adopt the findings in the PSR and/or the government's reasoning in our Sentencing Memo, I think that fully supports those enhancements.

THE COURT: Thank you.

MR. BARBOSA: Thank you.

THE COURT: Mr. McNickle, anything you want to add to your report?

MR. McNICKLE: I don't, Your Honor.

THE COURT: Mr. Door, anything you want to say to me before I pass judgment?

THE DEFENDANT: Yes, sir.

If you remember my first sentencing, I never spoke up. I never said anything. I think now it's time for me to speak up about this serious situation.

The government would have you believe that I'm public enemy number one, and, yes, they would not be wrong if they were looking at the old me from 20 plus years ago. When I did that last ten years I came out the day of my release a changed man. Yes, I broke the law while I was in prison with the tax scheme, and I'm sorry for the people that I got in trouble and for the damage that I caused to them and to the government, but something snapped on that day of July 23, '09 and made me want to do right for the first time in my life.

If you look at my past, it's only been a couple of weeks or months at the most before I got into trouble after my release, but this time I was out for two-and-a-half years and doing good until the last month before my arrest. Yes, I broke the law by possessing things I knew I shouldn't have, and I wasn't -- but I was not committing crimes with these things. Yes, I totally knew that the guns and bullet-proof vest were illegal for me to possess, but the seal bomb I had no knowledge it

was illegal. A five-year-old can have firecrackers. They come in packs of bricks. The Black Cat Firecrackers have a gram-and-a-half of gunpowder in them, and they come in bricks of 10,000, yet one seal bomb has two grams of flash powder. So, no, I never knew or had any idea that it was illegal.

Before my arrest I'd been injured on the job and was collecting pay from Labor & Industries. I was arrested on November 9, 2011. Through Labor & Industries I was about to be retrained. I was scheduled to start class on November 14th, five days away. I wasn't being like my normal past and running around and committing lots of property crimes. I was doing without a lot, trying to keep my life on track, living on $1,200 a month and whatever help my mom could give me just to pay my bills. I lived in a 500-square foot house, but I was making it.

I don't do drugs, use or sell. That was the reason for the breakup of my marriage, because my wife wouldn't stop. Look at my criminal history. Don't you think if I sold and did drugs there would be at least one charge there? I never had a dirty UA ever. My PO even states that I was a model probationer until this charge.

I'm currently enrolled in the apprenticeship plumbing program at Victorville USP. I'm not aware of any other jobs or any of these other jobs Probation says I have.

You don't just get a job handed to you right off the bus. It takes time, and I've been at it for 11 months out of the two years I've been there. Three years and one month until I get certified.

You know, everybody always talks about how hindsight is 20/20, and to a certain extent I do believe that. I am more angry at myself for being in this situation because of my mom. She has always been there for me and was really proud because I was doing good. So I feel bad about letting her and myself down.

You only hear the bad things about me, the bad things I've done in my life. You don't hear the good things I do like always being there to help family and friends and being a hard worker. I've never had a problem getting a job because of my dogged determination. All of the phone calls you have of me talking stupid is me always trying to be the tough guy, lying to sound tough because of either my situation in life or where I happen to be at.

Your Honor, I'm not trying to change your mind on the several issues that keep getting brought up, but I'm hoping you'll allow me to speak my mind and say my piece, so to speak, about them. First, the 2001 issue of the five second-degree assaults. Yes, that was a serious issue, but after a jury heard three days of testimony, they found it not to be as serious as charged. In fact,

no one was hurt.

Second, the misdemeanor assault on my brother. The things he stated were lies. In fact, he talked about them, and that was why the charges were dropped to misdemeanor. Yes, I did push him and, yes, I was wrong. But to be brutally honest, if the same situation presented itself today, I would do the same. My mom is my best friend, and I would do anything to protect her. I'm sorry, but that's how I feel.

These threatening phone calls that keep getting brought up, they're untrue, made to paint a bad picture even worse. All the phone calls I have made since my incarceration have been recorded. In fact, the government has all of them, even calls I made nine years ago, yet no one has been able to point at any call and show this Court or myself any threats. If there was any validity to the issues of the threats being made against Special Agent Mr. Hansen by myself, I would have been charged.

Mr. Schwartz would have you believe that he accidentally erased a phone call, but as I'm sure everyone in this courtroom is aware, if you erase a call, it asks you on a prompt if you want to undelete the call to press a number. Finally, Your Honor, all of this stems from my interaction with the woman and her jealous

ex and my own stupidity to possess things that are illegal.

This -- that is all I'm guilty of here today is being stupid and possessing things I shouldn't. I hope that you will see all of this and take into account when deciding my sentence. I have looked through a guide for downward departures, and I see several that could apply to myself along with the way I was raised, but it comes down to this. I'm a little too old to cry about how I was raised. I know right from wrong and, yes, I was stupid and broke the law, and I need to pay for my actions, but do I deserve to lose my life for this? I don't believe so.

Well, Your Honor, I've said my piece to you and to this Court, and I hope that you will think about what I have said before passing sentence. Thank you.

THE COURT: Thank you, Mr. Door.

For the reasons stated before, the Washington Assault Second Degree is a violent crime under the elements clause and under the residual clause that involve serious risk of physical injury, use of violent force. The felony harassment is overbroad but divisible, ultimately requiring threatened use of physical force, threat to kill.

I think that the PSR should more accurately establish

the base offense level as 22. The Possession of a Stolen Firearm of two levels is confirmed. The Defendant's story that he told that he stole it from an older gentleman was confirmed. He admitted that it was stolen, and that two-level enhancement will be applied.

The four-level is -- is an -- an enhancement for Possession of a Firearm in Connection with Another Felony, and there were a myriad of felonies that were -- were committed or anticipated. The one of choice right now is the drug trafficking.

I remember Mr. Door saying that he needed money because his mom had already spent thousands and thousands of dollars on him, he needed a lawyer, and he was going to deal drugs. There's also evidence and words, talk, that he was going to -- or was ripping off Mexican drug dealers, and that there was the always-present big talk and threats of using a weapon to harm or kill.

And Obstruction of Justice is a two-level enhancement, and that is met by telling his lawyer and now Judge Schwartz that he was going to kill Mr. Hansen. There was also a threat to escape and to intimidate Mr. Jacobs, so those offenses -- those enhancements are valid, and they will be adopted.

So the total offense level should be 30, a criminal history category of 6, 168 to 210 months.

MR. BARBOSA: Your Honor --
THE COURT: Yes.
MR. BARBOSA: -- just for clarification, are you finding that the felony harassment is not a violent -- crime of violence, then?
THE COURT: The felony harassment?
MR. BARBOSA: Yes.
THE COURT: Is a -- is a crime of violence.
MR. BARBOSA: So that should support the 24 base offense level, because that together with the *Washington* Assault Second Degree would be two crimes of violence under 2K1.1(a)(2).
THE COURT: All right. Well, then, I'll adopt the 24 base, but I'll -- that's 32, a criminal history category of six, 210 to 262.

It is -- well, I don't want to criticize the work of the Sentencing Commission in their hard work to overcomplicate what a straight-forward common sense world would look like both in favor of defendants' rights and then in pursuit of the rule of law by law enforcement, so 32, a criminal history category of six, 210 to 262.

The maximum is Count 1, Felon in Possession of a Firearm, 120 months; Violent Felon in Possession of Body Armor, Count 2, is 36 months; Felon in possession of Explosive, Count 3, is 120 months. I am -- given the

seriousness of the offenses and the related conduct and the tenacity and the persistence with which Mr. Door conducted himself in an antisocial way for a long portion of his life, I am going to impose the recommended sentence of 276 months and imposing the same supervised release -- period of supervised release with the same conditions that I imposed back on August 15, 2014.

It's -- the biggest component for this decision is general deterrence -- specific deterrence to keep Mr. Door from preying on the community. I don't think he is all talk. Everywhere he goes he sooner or later engages in violent conduct. I -- I suppose I have said enough for my reasons for adopting the recommendation propounded by Probation, Pretrial Services, and the government, and is there are any reason why judgment should not been entered at this time?

MR. BARBOSA: No, not from the government, Your Honor.

THE COURT: Mr. Barbosa, look at, before we sign this, under USSG, Section 2K2.1(a)(5).

MR. BARBOSA: I'm looking at the November 2016 Guidelines so -- which enhancement is that, Your Honor?

THE COURT: The 2K2.1 is -- is it 2K2.1(a)(5)? "The offense involved a semiautomatic firearm that is" -- yeah. "The defendant committed any part of the

instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense," and the offense level is 22.

MR. BARBOSA: Yes, Your Honor. That's if there's just one conviction. 2K2.1(a)(2), however -- we're looking at two different Guidelines books. I apologize -- "if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance, 24."

THE COURT: All right. I'll bow to the government's interpretation.

MR. BARBOSA: Well, are you looking at -- which version of the Guidelines are you looking at?

THE COURT: 2015, but I don't -- I didn't think it was different, so --

MR. BARBOSA: Your Honor, that is -- that is the correct assessment, 24 for two convictions.

THE COURT: All right.

MR. BARBOSA: I've prepared the Judgment, and I'll show it to him.

MR. LOHRAFF: Your Honor, I've reviewed the conformed Judgment.

MR. BARBOSA: May I approach?

THE COURT: All right. Mr. Door, you have the

right to appeal the sentence imposed by this Court, and if you wish to pursue that avenue, I urge you to seek the advice of Mr. Lohraff. And if -- in any event, you have the right to appeal -- file a Notice of Appeal within 14 days. Anything further?

MR. BARBOSA: No, Your Honor. Thank you.

MR. LOHRAFF: Nothing further. Thank you, Your Honor.

THE COURT: Court is in recess.

(End of Proceedings.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
County of King)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the foregoing verbatim transcript of proceedings was transcribed under my direction; that the transcript is a full, true and complete transcript of the testimony of said witness, including all questions, answers, objections, motions and exceptions;

That I am not a relative, employee, attorney or counsel of any party to this action or relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

That I am herewith securely sealing and digitally signing this transcript and delivering the same via electronic filing to the Clerk of the Court.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 29th day of August, 2017.

/S/ Leslie Waltzer
Notary Public in and for the State of Washington, residing at Issaquah

A P P E N D I X 4

CA NO. 17-30165

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

APPELLANT'S OPENING BRIEF

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

HONORABLE RONALD B. LEIGHTON
United States District Judge

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CA NO. 17-30165

IN THE UNITED STATES COURT OF APPEALS

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UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

I.

STATEMENT OF JURISDICTION

This is a second appeal from convictions and sentences for felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); violent felon in possession of body armor, in violation of 18 U.S.C. § 931(a); and felon in possession of an explosive, in violation of 18 U.S.C. § 842(i)(1). The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. Mr. Door was sentenced on August 18, 2017, *see* ER 1-27, and filed a timely notice of appeal on August 24, 2017, *see* ER 30-36.

II.

STATEMENT OF ISSUES PRESENTED

A. DID THE DISTRICT COURT ERR IN FINDING MR. DOOR'S BASE OFFENSE LEVEL TO BE 24 UNDER § 2K2.1(a)(2) BASED ON AT LEAST TWO PRIOR CONVICTIONS FOR "CRIMES OF VIOLENCE" BECAUSE, FIRST, WASHINGTON SECOND-DEGREE ASSAULT FAILS TO QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE CATEGORICAL APPROACH, AND, SECOND, WASHINGTON FELONY HARASSMENT FAILS TO QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE CATEGORICAL APPROACH?

1. Is Mr. Door's Base Offense Level No More than 20 Under § 2K2.1(a)(4) Because Washington Second-Degree Assault Fails to Qualify as a "Crime of Violence" Under the Categorical Approach?

2. Is Mr. Door's Base Offense Level Only 14 Under § 2K2.1(a)(6) Because Washington Felony Harassment Also Fails to Qualify as a "Crime of Violence" Under the Categorical Approach?

B. MUST MR. DOOR'S CONVICTION FOR BEING A VIOLENT FELON IN POSSESSION OF BODY ARMOR BE VACATED BECAUSE THE FAILURE OF BOTH WASHINGTON SECOND-DEGREE ASSAULT AND WASHINGTON FELONY HARASSMENT TO QUALIFY AS "CRIMES OF VIOLENCE" MEANS THE PREDICATE "CRIME OF VIOLENCE" REQUIRED FOR THE POSSESSION OF BODY ARMOR OFFENSE DOES NOT EXIST?

C. DID THE DISTRICT COURT ERR IN APPLYING THE 4-LEVEL ENHANCEMENT UNDER § 2K2.1(b)(6)(B) OF THE GUIDELINES FOR POSSESSION OF FIREARMS IN CONNECTION WITH ANOTHER FELONY OFFENSE?

1. Can Contested Witness Statements Not Be Considered Because, First, the District Court Did Not Rely Upon Them, and, Second, if the Court Implicitly Relied Upon Them, It Erred by Failing to Make the Express Findings Required by Rule 32 of the Federal Rules of Criminal Procedure?

2. Did the District Court Err in Applying the Enhancement Because the Contested Evidence the Court Did Rely Upon and Additional Uncontested Evidence Was Drug Activity Well in the Past and/or Not Tied to the Possession of the Firearms?

D. SHOULD THE COURT ORDER REASSIGNMENT TO A DIFFERENT DISTRICT JUDGE ON REMAND BECAUSE THE PRESENTLY ASSIGNED JUDGE EXPRESSED GREAT DISDAIN FOR THE CONTROLLING CASE LAW – NOTING HIS "LONG-STANDING CRITICISM" OF IT AND LABELING IT "SOPHISTRY" – AND SUGGESTED HE WOULD GIVE ITS EFFECT ABSOLUTELY NO WEIGHT?

Pursuant to Circuit Rule 28-2.7, the pertinent statutory and guidelines provisions are set forth in the Statutory Appendix.

III.

BAIL STATUS OF DEFENDANT

Mr. Door is presently serving the 276-month sentence imposed by the district court. His projected release date is November 8, 2033.

IV.

STATEMENT OF THE CASE

A. THE SEARCH, INDICTMENT, AND TRIAL.

In the fall of 2011, an informant provided information to an ATF agent that Mr. Door was in possession of firearms and selling methamphetamine. ER 66; RT(12/7/12) 189-94. The ATF agent contacted a Washington State Community Corrections officer who was supervising Mr. Door on probation, and that officer decided to conduct a probation search of Mr. Door's home. ER 67. In the kitchen, the officers found a black duffel bag which contained two pistols, ammunition for the pistols, and two ballistic vests. ER 68. In the living room, the officers found an explosive device known as a "seal bomb," which is used to scare away marine mammals, and two digital scales, methamphetamine pipes, and clear plastic bags. ER 68.

The state community corrections officer placed Mr. Door under arrest for violating his probation, and he was taken to the Pierce County Jail. ER 68-69. Allegedly in response to a message that Mr. Door wanted to talk to him, the ATF agent, who had helped with the search, went to the jail to interview Mr. Door. ER

69. The agent testified Mr. Door wanted to talk about information he could provide, but the agent told him he would first have to answer questions about the items found in his home. RT(3/6/14) 182. Mr. Door admitted possessing the guns, body armor, and seal bomb, ER 69, and the agent claimed he also admitted he had been selling methamphetamine until about a month and a half before the arrest, *see* ER 69-70.

Soon after this, Mr. Door was indicted in federal court for being a felon in possession of a firearm, being a felon in possession of explosives, and being a violent felon in possession of body armor. *See* ER 105-08. He made a motion to suppress the evidence found in the search and a motion to suppress statements, *see* CR 32, 184, 185; RT(3/6/14) 162, but those motions were denied, *see* RT(12/7/12) 154; RT(3/6/14) 171, 173. After initially pleading guilty but then withdrawing his plea, *see* CR 126, 134, 161, Mr. Door proceeded to trial and was convicted of all counts, CR 208.

B. SENTENCING AND THE FIRST APPEAL.

The presentence report prepared by the federal probation office recommended a sentencing guidelines base offense level of 24, based on "at least two felony convictions of either a crime of violence or controlled substance offense." PSR, ¶ 12 (citing U.S.S.G. § 2K2.1(a)(2)).[1] The report also

[1] The presentence report and subsequent revisions and related materials are being filed concurrently with this brief in chronological order in one packet. The final presentence report submitted for the first sentencing is cited in this brief as "PSR"; the final addendum to that report is cited as "PSR Addendum"; a "Revised Memorandum on Resentencing" filed after remand is cited as "Revised PSR"; and

recommended multiple guidelines enhancements, including a 2-level enhancement under § 2K2.1(b)(3), for possession of a destructive device, based on the seal bomb, *see* PSR, ¶ 13; a 2-level enhancement under § 2K2.1(b)(4), for possession of a firearm which was stolen, *see* PSR, ¶ 14; a 4-level enhancement under § 2K2.1(b)(6)(B), for possession of the firearms "in connection with another felony offense (drug trafficking)," PSR, ¶ 15; and a 2-level enhancement under § 3C1.1 for obstruction of justice, *see* PSR, ¶ 18. This made the total offense level 34, *see* PSR, ¶ 20, which produced a guideline range of 262 to 327 months when combined with Mr. Door's criminal history category of VI, *see* PSR, ¶ 99.

The presentence report also concluded Mr. Door was an armed career criminal under the Armed Career Criminal Act in 18 U.S.C. § 924(e) (hereinafter "ACCA"), *see* PSR, ¶ 20, which requires three prior convictions for either "violent felonies" or "controlled substance offenses," 18 U.S.C. § 924(e). The prior convictions the presentence report relied upon were convictions for attempting to elude a pursuing police vehicle, second-degree burglary, and second-degree assault. *See* PSR, ¶ 20. The ACCA categorization did not increase the guidelines offense level, *compare* PSR, ¶ 20 (ACCA offense level) *with* PSR, ¶ 19 (pre-ACCA offense level), but it did increase the statutory maximum sentence to life and trigger a statutory mandatory minimum sentence of 15 years, *see* PSR, ¶ 98; 18 U.S.C. § 924(e).

The defense objected to both the ACCA categorization and the guidelines enhancements. As to the enhancements, it argued the seal bomb did not qualify as a destructive device and there was not reliable evidence supporting the other

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an addendum to the revised memorandum is cited as "Revised PSR Addendum."

enhancements. *See* CR 154, at 20-22. As to the ACCA, it argued Mr. Door's prior burglary convictions and attempting to elude conviction did not qualify as "violent felonies" under the categorical approach which is required by the ACCA. *See* CR 154, at 5-19. The district court rejected the defense arguments, found the enhancements and the ACCA did apply, and sentenced Mr. Door to 300 months, or 25 years, in prison. *See* RT(8/15/14) 20-21.

Mr. Door thereafter appealed. In addition to challenging the denial of his motions to suppress evidence, he challenged application of the ACCA and several of the guidelines enhancements. *See* Appellant's Opening Brief, *United States v. Kenneth Randale Door*, No. 14-30170 (9th Cir. Jan. 27, 2015), ECF No. 12-1. The government conceded the attempting to elude conviction did not qualify as a violent felony – in light of the Supreme Court's intervening decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated the ACCA "residual clause" – but argued the ACCA still applied because the assault convictions and the burglary convictions qualified as violent felonies. *See* Answering Brief for the United States, at 54-61, *United States v. Kenneth Randale Door*, No. 14-30170 (9th Cir. July 6, 2015), ECF No. 26-1. The government also defended the guidelines enhancements challenged by the defense. *See id.* at 61-70.

This Court affirmed the denial of the motions to suppress evidence, but vacated Mr. Door's sentence. It held the destructive device enhancement did not apply to the seal bomb and there were insufficient findings on the obstruction of justice and "in connection with another felony" enhancements. *See United States v. Door*, 647 Fed. Appx. 755, 757 (9th Cir.) (unpublished), *amended*, 668 Fed. Appx. 784 (9th Cir. 2016) (unpublished). It initially deferred ruling on the ACCA issue pending the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct.

2243 (2016), *see Door*, 647 Fed. Appx. at 756-57, but subsequently held Mr. Door's burglary convictions were not violent felonies and so the ACCA did not apply when *Mathis* was decided favorably to the defense, *see United States v. Door*, 656 Fed. Appx. 376 (9th Cir. 2016) (unpublished).

C. RESENTENCING ON REMAND.

On remand, the probation office prepared a "Revised Memorandum on Resentencing" (hereinafter "Revised PSR"). It again recommended a base offense level of 24 for "at least two felony convictions of either a crime of violence or controlled substance offense," this time based on the assault convictions it had previously characterized as violent felonies and a felony harassment conviction it had not previously characterized as a violent felony. Revised PSR, at 1. It also recommended the enhancement for possession of a stolen firearm and the enhancements this Court had left open for reconsideration on remand – obstruction of justice and possession of the firearms in connection with another felony offense. *See* Revised PSR, at 1-2. The other felony it asserted the guns were connected with was, once again, "drug trafficking." Revised PSR, at 2.

Adding these enhancements to the base offense level of 24 made the total offense level 32. *See* Revised PSR, at 2. This produced a guideline range of 210 to 262 months when combined with Mr. Door's criminal history category of VI. *See* Revised PSR, at 2. The specific sentence the probation office recommended was the statutory maximum sentence of 276 months – made up of consecutive maximum sentences on the individual counts of 10 years, 3 years, and 10 years. *See* Revised PSR, at 2.

The government agreed with the presentence report's guideline calculation and sentence recommendation. It offered legal argument to support the probation office's categorization of the assault and felony harassment convictions as crimes of violence. *See* ER 76-84. It also offered argument and evidence in support of the enhancements. *See* ER 84-88. For the "in connection with another felony" enhancement, it asserted there were "a litany of other potential felony offenses." ER 85. It pointed to the possession of the body armor with the gun in the same duffel bag, evidence at trial that it claimed "establish[ed] that Mr. Door used firearms to assault and threaten others," and "as noted by the Probation Office, . . . significant evidence that Mr. Door possessed the firearms and ammunition in connection with drug possession and trafficking." ER 85-86. For the last of these, the government pointed to (1) witnesses who "reported that Mr. Door was dealing methamphetamine"; (2) a recorded jail conversation in which Mr. Door had said he "had to pay an attorney," "wasn't gonna go ask my mom," and "[s]o, . . . , I'm gonna sell some dope"; (3) "other recorded conversations" described in the presentence report in which Mr. Door "spoke . . . about his history of robbing Mexican drug dealers"; and (4) the scales, pipes, and baggies found in Mr. Door's living room at the time of the search. ER 85-87.

The defense objected to the enhancements on the ground that the evidence offered by the government and described in the presentence report was not reliable. *See* ER 49-55. It also argued Mr. Door's assault and felony harassment convictions should not be categorized as crimes of violence, which would make his base offense level only 14, *see* U.S.S.G. § 2K2.1(a)(6) (setting base offense level of 14 where no prior convictions for crime of violence or controlled substance offense and only more ordinary firearms possessed). Relying on the

categorical approach developed and refined in *Taylor v. United States*, 495 U.S. 575 (1990), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016), the defense argued the assault and felony harassment statutes were categorically overbroad and indivisible, so convictions under those statutes could never qualify as crimes of violence. *See* ER 38-49.

The district judge rejected the defense arguments. Initially, he found both the assault and felony harassment convictions qualified as crimes of violence under the required categorical approach. *See* ER 21. He did this only after having severely criticized the categorical approach case law earlier, however. He began the hearing by stating:

> Mr. Door was sentenced August 15, 2014 to 300 months as an Armed Career Criminal, and as was the case with other people who were – around the country who were sentenced as Armed Career Criminals, we're impacted by the *Johnson* case, and the – the position articulated in *Johnson* that the definition of an armed career criminal is unconstitutionally vague. And I will not recite my long-standing criticism of that jurisprudence. It has been moderated lately that some awareness of reality overcame the Supreme Court and the Court of Appeals but, nevertheless, I am duty bound to re-sentence Mr. Door . . . ."

ER 3. And a short time later, in response to defense counsel's further argument about the categorical approach and its effect on Mr. Door's base offense level, the district judge again criticized the case law, and also suggested he would give its effect little, if any, weight:

> What if – what if I got the base offense level to 14? Doing all the calculus, the recommendation should be somewhere, you know, in the high hundreds, 100 to 200 months. The maximum penalties are – they are what they are. And I am convinced beyond a shadow of a doubt – not the sophistry that we play with *Descamps*, *Taylor*, *Johnson* – he is a bad man. He is a dangerous man. He should be locked up for as long as I can lock him up.

ER 7.[2]

The district judge also ruled the various guidelines enhancements were supported by sufficient evidence. *See* ER 22. His explanation of the ruling on the "in connection with another felony" enhancement – which is the only enhancement being challenged in this second appeal – was:

> [T]here were a myriad of felonies that were – were committed or anticipated. The one of choice right now is the drug trafficking.
>
> I remember Mr. Door saying that he needed money because his mom had already spent thousands and thousands of dollars on them, he needed a lawyer, and he was going to deal drugs. There is also evidence and words, talk, that he was going to – or was ripping off Mexican drug dealers, and that there was the always-present big talk and threats of using a weapon to harm or kill.

ER 22.

V.

SUMMARY OF ARGUMENT

The district court's first error was in finding Mr. Door's Washington second-degree assault and felony harassment convictions to be crimes of violence. As to the second-degree assault convictions, this Court recently applied the

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[2] The guideline range with a base offense level of 14 would actually be 84 to 105 months at most, based on a criminal history category of VI and an offense level of the 14 base offense level plus 2 levels for a stolen firearm plus 4 levels for the "in connection with another felony" enhancement plus 2 levels for obstruction of justice. *See* Revised PSR (listing applicable specific offense characteristics); U.S.S.G. Ch. 5, Pt. A (setting guideline range for offense level 22 and criminal history category VI as 84-105). If the "in connection with another felony" enhancement does not apply, as argued *infra* pp. 25-32, the 4 levels for that enhancement would not be added, the total offense level would be just 18, and the guideline range would be only 57 to 71 months. *See* U.S.S.G. Ch. 5, Pt. A (setting guideline range for offense level 18 and criminal history category VI as 57-71).

required categorical approach to the very Washington assault statute under which Mr. Door was convicted – in *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017). The Court held the statute was overbroad and indivisible, so that a conviction under the statute could never qualify as a crime of violence. As to Mr. Door's felony harassment conviction, there is a different, more general, recent opinion to consider – *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). *Valdivia-Flores* recognized: (1) aiding and abetting is implied in every criminal charge; (2) the Washington definition of aiding and abetting is broader than the federal, generic definition; and (3) aiding and abetting and acting as a principal are not separate offenses but merely alternative means under Washington law, so statutes are "not divisible so far as the distinction between those roles is concerned," *Valdivia-Flores*, 876 F.3d at 1210. Since aiding and abetting is implicitly included in every criminal charge, it is implied in Washington felony harassment and makes Washington felony harassment overbroad and indivisible just as it made the offense at issue in *Valdivia-Flores* – a drug offense – overbroad and indivisible.

In the case of the possession of body armor count, the failure of Mr. Door's prior convictions to qualify as crimes of violence invalidates the conviction as well as the sentence. Unlike possession of a firearm, possession of body armor by a felon is a crime only if the felon has a crime of violence conviction. That means not just the sentence, but also the conviction must be vacated for the possession of body armor count.

The district court also erred in applying the 4-level enhancement for possession of the firearms in connection with another felony offense. To begin, contested witness statements to which the government and probation office

pointed cannot be considered because, first, the district court did not rely upon them, and second, if the court implicitly relied upon them, it erred by failing to make express findings. Rule 32 of the Federal Rules of Criminal Procedure requires express findings on disputed issues and this Court requires strict compliance with Rule 32. And the evidence the district court did rely upon – recorded conversations in which Mr. Door talked about selling drugs because he needed money for a lawyer and talked about "ripping off Mexican drug dealers" – did not support the enhancement because that conduct was not temporally connected to the possession of the firearms. The conversation about ripping off Mexican drug dealers took place while Mr. Door was serving the sentence for his 2001 assault convictions, so it had to refer to activity which took place before he went to prison almost a decade earlier. The timing of the need for a lawyer was unclear from the statements the district court quoted, but Mr. Door's last court case had ended nine months earlier. Even if it did refer to activity closer in time to the possession of the firearms, mere simultaneous possession of firearms and drug paraphernalia is not enough for the "in connection with another felony" enhancement. The government must show the firearm somehow facilitated the other offense.

There was the uncontested evidence of the scales, methamphetamine pipes, and clear plastic bags found in Mr. Door's home at the same time the guns were found, and there is a guideline application note stating close proximity of drugs or drug paraphernalia is enough. But the proximity which has been found sufficient in the Court's cases relying on this application note has been much closer than the proximity in the present case. The simultaneous possession of firearms and drugs or drug paraphernalia in different rooms of a house is not sufficient.

Finally, the Court should order reassignment to a different district judge on remand. Such reassignment is appropriate when necessary to maintain the appearance of justice. It is necessary here because the district judge (1) expressed great disdain for the categorical approach case law he will have to apply on remand – noting his "long-standing criticism" of it and labeling it "sophistry" – and (2) suggested he would give little, if any, weight, to the case law's impact, by asking, "what if I got the base offense level to 14?," and going on to answer "the maximum penalties are . . . what they are" and "[h]e should be locked up for as long as I can lock him up."

The appearance of justice requires an appearance that the district judge will follow the law. In the context of sentencing, that means both respecting the case law interpreting the guidelines and giving the guidelines weight, as a "starting point," "initial benchmark," and "anchor," that plays a "central role in sentencing." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016) (internal quotations omitted). There can be no such appearance in resentencing by a district judge who has expressed open disdain for the case law he will have to apply on remand and already decided the defendant "should be locked up for as long as I can lock him up."

* * *

VI.

ARGUMENT

A. THE DISTRICT COURT ERRED IN FINDING MR. DOOR'S BASE OFFENSE LEVEL TO BE 24 BECAUSE, FIRST, WASHINGTON SECOND-DEGREE ASSAULT FAILS TO QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE CATEGORICAL APPROACH, AND, SECOND, WASHINGTON FELONY HARASSMENT FAILS TO QUALIFY AS A "CRIME OF VIOLENCE" UNDER THE CATEGORICAL APPROACH.

1. Reviewability and Standard of Review.

As noted *supra* pp. 9-10, the defense argued that neither the assault convictions nor the felony harassment conviction qualified as crimes of violence. As noted *supra* p. 10, the district court rejected the defense arguments and found both the assault and felony harassment convictions were crimes of violence. Such rulings are subject to de novo review. *United States v. Robinson*, 869 F.3d 933, 936 (9th Cir. 2017).

2. Mr. Door's Base Offense Level Is No More than 20 Because Washington Second-Degree Assault Fails to Qualify as a "Crime of Violence" Under the Categorical Approach.

The process for determining whether a prior conviction qualifies as a crime of violence under the sentencing guidelines – and the Supreme Court cases which

have established the process – are well summarized in *Robinson*.

> To determine whether a defendant's prior conviction is a crime of violence under the Guidelines, we apply the categorical approach first outlined in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), and later clarified in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), and *Mathis v. United States*, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). Under this approach, "we inquire first 'whether the elements of the crime of conviction sufficiently match the elements of the generic federal [definition of a crime of violence].'" *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1198-99 (9th Cir. 2017) (alterations omitted) (quoting *Mathis*, 136 S. Ct. at 2248). Then, "[i]f the statute is overbroad and thus not a categorical match, we next ask whether the statute's elements are also an indivisible set." *Id.* at 1199. "Finally, if the statute is divisible, then the modified categorical approach applies and 'a sentencing court looks to a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of.'" *Id.* (quoting *Mathis*, 136 S. Ct. at 2249). If that crime falls within the generic federal definition, then the defendant's conviction qualifies as a crime of violence.

Robinson, 869 F.3d at 936.

Robinson provides more than just this general guidance, moreover. It applied the general analysis to the very assault statute under which Mr. Door was convicted – Washington second-degree assault. It held in three steps: (1) the Washington second-degree assault statute is overbroad, *see id.* at 937-38; (2) the statute is indivisible, *see id.* at 938-41; and (3) a conviction under the statute therefore does not qualify as a crime of violence, *see id.* at 941.

This means Mr. Door's second-degree assault convictions fail to qualify as crimes of violence. This reduces his base offense level to no more than 20 because the base offense level is 24 only when the defendant has at least two prior convictions for crimes of violence or controlled substance offenses. *See* U.S.S.G. § 2K2.1(a)(2). Without the assault convictions, Mr. Door has at most one prior conviction for a crime of violence, and the base offense level for a defendant with

just one such conviction is only 20, *see* U.S.S.G. § 2K2.1(a)(4).

3. Mr. Door's Base Offense Level Is Only 14 Because Washington Felony Harassment Also Fails to Qualify as a "Crime of Violence" Under the Categorical Approach.

Mr. Door's base offense level is actually an even lower 14, however, because his felony harassment conviction also fails to qualify as a crime of violence.[3] The reason is that every Washington criminal statute incorporates aiding and abetting, and Washington aiding and abetting is broader than the federal, generic definition of aiding and abetting.[4] A recent opinion holding

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[3] Where a defendant has no prior convictions for a crime of violence or controlled substance offense – and he possesses only more ordinary firearms like those Mr. Door possessed – the base offense level is only 14. *See* U.S.S.G. § 2K2.1(a)(6). Section 2K2.1(a) is set out in full in the statutory appendix.

[4] This specific argument was not made in the defense challenge to the felony harassment conviction, but it is nonetheless fully reviewable. First, "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). *See, e.g., United States v. Wahid*, 614 F.3d 1009, 1016 (9th Cir. 2010) (reviewing argument de novo even though based on different guideline because "[the defendant's] basic claim remains the same: his prior convictions are not serious enough to warrant his placement in criminal history category III"). Second, a court is "not limited to [a plain error] standard of review where the appeal presents a pure question of law and there is no prejudice to the opposing party." *United States v. Joseph*, 716 F.3d 1273, 1276 n.4 (9th Cir. 2013) (quoting *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 426 (9th Cir. 2011)). Third, such review is even more appropriate where the argument is based on new case law, such as the *Valdivia-Flores* opinion which is discussed below. *See United States v. Thomas*, 726 F.3d 1086, 1092 n.5 (9th Cir. 2013) ("Our court will review an issue raised for the first time on appeal 'when a change in law raises a new [purely legal] issue while an appeal is

Washington felony harassment does qualify as a crime of violence – *United States v. Werle*, 877 F.3d 879 (9th Cir. 2017) – failed to consider this argument, *see id.*, and so cannot be treated as deciding the question, *see United States v. Valdivia-Flores*, 876 F.3d 1201, 1209 n.3 (9th Cir. 2017) (prior case rejecting overbreadth challenge to statute at issue "irrelevant" where challenge in prior case "was based on an argument unrelated to the overbreadth of the aiding and abetting component of the statute"). *See also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."), *quoted in United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004).[5]

The effect of the Washington aiding and abetting standard was recognized in this Court's recent opinion in *Valdivia-Flores*. While the issue there was whether a prior conviction qualified as an "aggravated felony" under immigration law, *see id.*, 876 F.3d at 1203, 1206, that determination turns on the same categorical approach rules as guidelines and Armed Career Criminal Act prior conviction enhancements, *see Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 185

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pending,' and it is not inequitable to take it up." (Quoting *Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012).)). If the Court is not willing to review the argument de novo, it can and should leave the argument to be addressed on remand.

[5] The aiding and abetting argument was suggested in a citation of supplemental authorities in *Werle*, *see* Citation of Supplemental Authorities, *United States v. Werle*, No. 16-30181 (9th Cir. Dec. 8, 2017), ECF No. 32, but it was not considered in the opinion, presumably because of the rule that arguments not made in the opening brief are waived, *see, e.g., United States v. Murillo-Alvarado*, 876 F.3d 1022, 1026-27 n.2 (9th Cir. 2017).

(2007); *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011) (en banc), *abrogated on other grounds*, *Descamps v. United States*, 570 U.S. 254, 259-60 (2013).

Like the Court's analysis in *Robinson*, the analysis in *Valdivia-Flores* proceeded in three logical steps. First, the Court noted that "[t]he implicit nature of aiding and abetting liability in every criminal charge is . . . well-settled." *Valdivia-Flores*, 876 F.3d at 1207. Second, the Court noted that the Washington definition of aiding and abetting is broader than the federal, generic definition, because the Washington definition requires only knowledge that an act will facilitate the commission of a crime, while the federal, generic definition requires a specific intent, or purpose, that the act facilitate the commission of a crime. *See id.* at 1207-08 (citing Wash. Rev. Code § 9A.08.020(3)(a)(i)-(ii) (1997); *United States v. Garcia*, 400 F.3d 816, 819 (9th Cir. 2005); *State v. Thomas*, 208 P.3d 1107, 1111 (Wash. 2009); *State v. Roberts*, 14 P.3d 713, 731-32 (Wash. 2000); and *State v. Gocken*, 896 P.2d 1267, 1273-74 (Wash. 1995)). Third, the Court held that acting as an aider and abettor and acting as a principal are not separate offenses but are merely alternative means of committing the same offense, because "Washington law is clear that jurors need not agree on whether a defendant is a principal or accomplice." *Valdivia-Flores*, 876 F.3d at 1210 (citing *State v. Hoffman*, 804 P.2d 577, 605 (Wash. 1991)). This means the statute "is not divisible so far as the distinction between those roles is concerned, so the modified categorical approach may not be applied." *Valdivia-Flores*, 876 F.3d at 1210.

The prior conviction considered in *Valdivia-Flores* was a drug conviction, *see id.*, 876 F.3d 1203, while the prior conviction at issue here is a felony harassment conviction, but nothing in *Valdivia-Flores*'s analysis was unique to the

nature of the offense. Aiding and abetting is implicitly included "in *every* criminal charge," *id.* at 1207 (emphasis added), and the Washington statute and Washington case law relied upon in *Valdivia-Flores* were not specific to drug offenses, but general aiding and abetting law which applies to all offenses, *see Thomas*, 208 P.3d at 1111 (murder); *Roberts*, 14 P.3d at 731-32 (murder); *Gocken*, 896 P.2d at 1273-74 (theft); *Hoffman*, 804 P.2d at 582 (murder); Wash. Rev. Code § 9A.08.020(3)(a)(i)-(ii) (1997) (generally defining aiding and abetting). As the government pointed out in an argument acknowledged by the Court, "no Washington state conviction can serve as an aggravated felony at all because of [the] accomplice liability statute." *Valdivia-Flores*, 876 F.3d at 1209. And the Court's response to this argument was not that it is incorrect. To the contrary, the Court implicitly – indeed, rather explicitly – agreed.

> The government here merely joins a chorus of those who "have raised concerns about [the] line of decisions" applying the categorical approach, "[b]ut whether for good or for ill, the elements-based approach remains the law." *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243, 2257, 195 L. Ed. 2d 604 (2016). Indeed, Justice Kennedy wrote separately in *Mathis* to note specifically that Congress "could not have intended vast . . . disparities for defendants convicted of identical criminal conduct in different jurisdictions"; but he concurred in the opinion that held that the categorical approach required just that result. *Id.* at 2258 (Kennedy, J., concurring).

Valdivia-Flores, 876 F.3d at 1209.

The bottom line is that the inclusion of an overbroad aiding and abetting alternative in Washington offenses and the indivisibility of accomplice and principal liability under Washington law make felony harassment categorically overbroad just like the drug statute at issue in *Valdivia-Flores* was categorically overbroad. Mr. Door's felony harassment conviction cannot be treated as a crime

of violence, and this reduces his base offense level to 14.[6]

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[6] Washington felony harassment also fails to qualify as a crime of violence because the felony harassment statute itself is overbroad and indivisible. Even in a narrower form in effect at the time Mr. Door was convicted, harassment was a felony if *either* "the person has previously been convicted in this or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a no-contact or no-harassment order," *or* "the person harasses another person under subsection (1)(a)(i) of this section by threatening to kill the person threatened or any other person." Wash. Rev. Code § 9A.46.020(2)(b)(i)(ii) (1992) (full statute set forth in statutory appendix). The *Werle* case which held felony harassment was a crime of violence suggested these alternatives were divisible based on Washington case law it characterized as holding "that felony harassment under § 9A.46.020(2)(b)(ii) is a separate crime that requires a unanimous jury to find a threat to kill beyond a reasonable doubt." *See Werle*, 877 F.3d at 882 (citing *State v. Mills*, 109 P.3d 415, 419 (Wash. 2005)). But the case cited – *Mills* – was considering the question of whether this requirement had to be included in a "to convict" jury instruction rather than a special verdict form, in a case where only the "threat to kill" alternative was charged. *See id.*, 109 P.3d at 416, 417-18. It was not considering the question of whether a jury has to unanimously agree on one felony harassment alternative when multiple alternatives are charged.

This unanimity question was addressed in a case decided just a year after *Mills* – *State v. Kibby*, 131 Wash. App. 1034, 2006 WL 322230 (2006) (unpublished), *review granted and remanded for reconsideration on other grounds*, 156 P.3d 905 (Wash. 2007). *Kibby* held unanimity was not required.

> Kibby was charged with committing felony harassment by two alternative means, both of which were submitted to the jury for consideration. The alternative means were based on (1) Kibby's threat to kill Goodwin [the victim], or (2) Kibby's prior conviction of assault in the fourth degree against Goodwin. When a defendant is charged with committing a crime by two or more alternative means, unanimity is not required as to the means by which the crime was committed so long as substantial evidence supports each alternative means. (Footnote omitted.)

Id., 2006 WL 322230, at *2.

Werle thus erred in its reading of Washington case law. While the panel

B. MR. DOOR'S CONVICTION FOR BEING A VIOLENT FELON IN POSSESSION OF BODY ARMOR MUST BE VACATED BECAUSE THE FAILURE OF BOTH WASHINGTON SECOND-DEGREE ASSAULT AND WASHINGTON FELONY HARASSMENT TO QUALIFY AS "CRIMES OF VIOLENCE" MEANS THE PREDICATE CRIME OF VIOLENCE REQUIRED FOR THE POSSESSION OF BODY ARMOR OFFENSE DOES NOT EXIST.

1. Reviewability and Standard of Review.

The defense made a general motion for judgment of acquittal on all counts at the close of the government's case and again at the end of trial, which the district court denied. *See* RT(3/7/14) 335; RT(3/10/14) 419. The defense did not renew any challenge in the first appeal or on remand in the district court, but plain error review does not apply where an argument is purely legal and/or based on an intervening change in the law like the *Robinson* and *Valdivia-Flores* cases discussed both above and below. *See United States v. Thomas*, 726 F.3d 1086, 1092 n.5 (9th Cir. 2013); *United States v. Joseph*, 716 F.3d 1273, 1276 n.4 (9th Cir. 2013). In any event, the difference between the ordinary standard of review and plain error review is "largely academic" for sufficiency of evidence claims, *United States v. Pelisamen*, 641 F.3d 399, 409 n.6 (9th Cir. 2011), because "it is difficult . . . to envision a case in which the result would be different because of the application of one rather than the other of the standards," *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1010 (9th Cir. 1995). Finally, "[w]here an

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assigned to this case must follow *Werle*, the issue is raised here to preserve it for en banc review if necessary.

A P P E N D I X 5

CA NO. 17-30165

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

APPELLANT'S REPLY BRIEF

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

HONORABLE RONALD B. LEIGHTON
United States District Judge

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CA NO. 17-30165

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 3:12-cr-05126-RBL

I.

ARGUMENT

A. THE SECOND DEGREE ASSAULT CONVICTION CANNOT BE FOUND TO BE A CRIME OF VIOLENCE BECAUSE THERE IS CONTROLLING PRECEDENT AND THE GOVERNMENT'S ARGUMENTS FAIL ON THE MERITS IN ANY EVENT.

1. *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), Is Controlling.

The first reason the Court should reject the government's argument that Mr. Door's assault conviction is a crime of violence is that *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), is controlling precedent to the contrary. The

government's effort to limit *Robinson* is just a poorly disguised effort to change litigation strategy. The holding of *Robinson* was: "[B]ecause section 9A.36.021 covers more conduct than the generic federal definition of a crime of violence under Guidelines section 2K2.1, it does not define a crime that categorically satisfies that definition." *Id.* at 941. The holding was not: "[B]ecause section 9A.36.021 covers more conduct than [the force clause in] the generic federal definition of a crime of violence under Guidelines section 2K2.1, it does not define a crime that categorically satisfies that definition."

That the government chose to focus its argument in *Robinson* on the force clause and divisibility instead of also making an affirmative argument based on the residual clause[1] does not mean the government somehow limited the holding of *Robinson*. As this Court has stated:

> The matter was put magisterially long ago by Justice Brandeis speaking for the Supreme Court and refusing to be controlled by a stipulation entered into by the parties. Justice Brandeis wrote: "If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative, since the court cannot be controlled by agreement of counsel on a subsidiary question of law." *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289, 61 L. Ed. 722, 37 S. Ct. 287 (1917).
>
> Where, as in this case the question is "the legal effect of admitted facts," the court cannot be controlled by a concession of counsel. "We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties." *Smith Engineering Co. v. Rice*, 102 F.2d 492, 499 (9th Cir. 1938), *cert. denied*, 307 U.S. 637, 83 L. Ed. 1519, 59 S. Ct. 1034 (1939). The rule has been repeated in a variety of

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[1] The government brief in *Robinson* did not disavow a residual clause argument – or cite a "policy" like the government cites in the present case, Answering Brief of United States, at 32 – but said nothing one way or the other about the residual clause. *See* Answering Brief of United States, *United States v. Robby Robinson*, No. 16-30096 (9th Cir. Nov. 10, 2016), ECF No. 20.

> circumstances. Even if a concession is made by the government, we are not bound by the government's "erroneous view of the law." *Flamingo Resort, Inc. v. United States*, 664 F.2d 1387, 1391 n.5 (9th Cir. 1982), *cert. denied*, 459 U.S. 1036, 74 L. Ed. 2d 602, 103 S. Ct. 446 (1983).

United States v. Miller, 822 F.2d 828, 832 (9th Cir. 1987). The Court has continued to apply this principle of jurisprudence in both categorical approach cases, *see, e.g., United States v. Espinoza-Morales*, 621 F.3d 1141, 1145 (9th Cir. 2010); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 n.3 (9th Cir. 2007), and others, *see, e.g., Hernandez v. Holland*, 750 F.3d 843, 856 (9th Cir. 2014).

This is not a case in which there was a change in the law after the Court's decision, moreover. The case upon which the government justifies its new argument – *Beckles v. United States*, 137 S. Ct. 886 (2017) – was decided not only before *Robinson* was decided but before *Robinson* was *argued* – in fact, two months before it was argued. *Compare Beckles* (opinion dated March 17, 2017) *with Robinson* (opinion dated August 25, 2017, after being argued and submitted May 11, 2017). To blithely assume this Court simply ignored *Beckles* when it decided *Robinson* would be making an assumption grossly inconsistent with the jurisprudential principles discussed in the preceding paragraph. The more appropriate assumption is that the Court – and the government – were well aware of *Beckles* and concluded it made no difference.

2. The Government's Arguments Fail Even if *Robinson* Is Not Controlling.

Even if *Robinson* were not controlling, the government's arguments would have to be rejected.

a. The commentary listing "aggravated assault" as a crime of violence does not make the assault conviction a crime of violence.

The government's argument that Washington second degree assault qualifies as a crime of violence because it is a type of "aggravated assault" and "aggravated assault" is a crime of violence listed in the commentary fails for multiple reasons. As a preliminary matter, it is particularly hard to defend the position that this argument is not covered by *Robinson*'s holding. The government's excuse that it was relying on a pre-*Beckles* policy conceding the vagueness of the guidelines residual clause does not extend to its argument based on the express reference to "aggravated assault" in the guideline commentary. That commentary provided guidance not just for the residual clause but for the entire definition of "crime of violence," *see* U.S.S.G. § 4B1.2, cmt. n.1 (2013) (defining "crime of violence" generally to include "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling"), so it had to be considered in *Robinson* even if *Robinson* were limited to the force clause.

The government's argument fails in any event, moreover. The suggestion that "aggravated assault" in the crime of violence commentary has the same meaning as "aggravated assault" in the separate "aggravated assault" guideline – § 2A2.2 – ignores the fact that § 2A2.2 limits its definition to § 2A2.2. It states that "[f]or purposes of this guideline," aggravated assault includes, inter alia, "assault that involved . . . an intent to commit another felony." U.S.S.G. § 2A2.2, cmt. n.1. Section 2A2.2 had to address this alternative because § 2A2.2 applies to the offense of conviction, which will generally be under a federal assault statute. And

the federal assault statutes specifically include "[a]ssault with intent to commit any felony," 18 U.S.C. § 113(a)(2).

The crime of violence guideline is a very different animal. First, it applies to *prior* convictions, so it includes not only convictions under the federal assault statutes which specifically include assault with intent to commit a felony, but convictions under the 50 different states' assault statutes as well. Second, it is part of the career offender guideline, which this Court recognized in *United States v. Faulkner*, 952 F.2d 1066 (9th Cir. 1991), is "strong medicine indeed." *Id.* at 1072. As the Court explained:

> Once the prerequisites for becoming a career offender are met, the sentence takes an extraordinary leap; *both* the base offense level *and* the criminal history category simultaneously increase. No other enhancement in the guidelines operates that way.

Id. at 1073 (emphasis in original). All the aggravated assault guideline does, in contrast, is create a base offense level of 14 instead of a base offense level of 7. *Compare* U.S.S.G. § 2A2.2(a) (aggravated assault) *with* U.S.S.G. § 2A2.3(a) (ordinary assault).

The guidelines themselves caution about extending guideline-specific definitions to other guidelines. Definitions intended to have general applicability are placed in § 1B1.1. *See* U.S.S.G. § 1B1.1, cmt. n.1. That provision also expressly cautions:

> Definitions of terms also may appear in other sections. Such definitions are *not* designed for general applicability; therefore, their applicability to sections other than those expressly referenced must be determined on a case by case basis.

U.S.S.G. § 1B1.1, cmt. n.2 (emphasis added). *See, e.g., United States v. Cintron-Fernandez*, 356 F.3d 340, 347 n.7 (1st Cir. 2004) (cautioning that "[o]ur interpretation of imprisonment does not necessarily apply to provisions other than

§ 5C1.1," and citing § 1B1.1 commentary); *United States v. Rasco*, 963 F.2d 132, 136-37 (6th Cir. 1992) (adopting different meaning of "imprisonment" in § 4A1.1(k) from meaning of "imprisonment" adopted for § 5C1.1, and citing § 1B1.1 commentary). Extension of the guideline-specific definition is not appropriate in this instance, where there is the expressly limiting "[f]or purposes of this guideline" language in § 2A2.2 and where § 2A2.2 and the career offender guideline have different purposes. *Accord United States v. Carmichael*, 267 Fed. Appx. 290, 292 (4th Cir. 2008) (unpublished) (declining to extend § 2A2.2 definition of "aggravated assault" to application note for § 3A1.2 "official victim" enhancement).

Extending the § 2A2.2 definition to an enhancement provision like that here would also be completely inconsistent with this Court's opinions in *United States v. Esparza-Herrera*, 557 F.3d 1019 (9th Cir. 2009), and *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015). Those opinions interpreted and applied another guideline enhancement provision – in the illegal reentry guideline – with an application note that uses the exact same "aggravated assault" language. *See* U.S.S.G. § 2L1.2, cmt. n.1(B)(iii) (2015).[2] And there was no suggestion interpretation of the term was controlled by the § 2A2.2 definition. What the Court looked to was what it always looks to in determining the generic definition of a guidelines enhancement term, namely, the common law, the Model Penal Code, criminal law treatises, and the various states' statutes. *See Garcia-Jimenez*,

[2] This language was moved as part of an amendment to the guidelines effective November 1, 2016, so it now appears in application note 2. *See* U.S.S.G. App. C, amend. 802.

807 F.3d at 1085-87; *Esparza-Herrera*, 557 F.3d at 1022-25.[3] *See generally United States v. Gonzalez-Perez*, 472 F.3d 1158, 1161 (9th Cir. 2007) (stating general rule that "where, as here, the enhancement provision does not specifically define the enumerated offense, we must define it according to its 'generic, contemporary meaning'" (quoting *Taylor v. United States*, 495 U.S. 575, 598 (1990)).

That is the approach the Court must take here. The proper inquiry is whether the common law, the Model Penal Code, criminal law treatises, and most states define aggravated assault to include the assault with intent to commit a felony that *Robinson* held made Washington second degree assault overbroad. The answer to this inquiry is they do not.

The common law is not helpful, as "aggravated assault" is largely a statutory creation. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.1(b) (3d ed. 2018). Professor LaFave discusses the statutory creations, however, and describes the most typical statutes as including assault with intent to commit particularly serious felonies, such as murder or robbery or rape; assault with a dangerous weapon; and, in a smaller number of jurisdictions, assault upon a particular type of person such as a law enforcement officer. *See id.*, § 16.3(d). *But see United States v. Fierro-Reyna*, 466 F.3d 324, 328-29 (5th Cir. 2006) (concluding generic aggravated assault does not include assault on law

[3] The government distinguishes the assault statutes in *Garcia-Jimenez* and *Esparza-Herrera* on the ground they criminalized reckless assault and so lacked the intent requirement of the Washington statute. *See* Answering Brief of the United States, at 38-40. But that is not what matters about these cases. What matters is the cases' method of determining the definition of "aggravated assault." They looked to the common law, the Model Penal Code, criminal law treatises, and the various states' statutes.

enforcement officer). And the Model Penal Code aggravated assault offense includes only assault causing or attempting to cause bodily injury and/or with a deadly weapon and does not include assault with intent to commit another felony. *See Model Penal Code* § 211.1(2).[4]

Finally, the vast majority of state statutes fail to include assault with intent to commit a felony. Looking to the statutes the Court considered in its survey in *Garcia-Jimenez* along with other relevant statutes reveals that only six other states in addition to Washington include assault with intent to commit a felony in an aggravated assault statute.[5] Seven other states have an aggravated assault statute including some assaults based on their relationship to a felony, two including assault with intent to commit specified felonies[6] and five including assault in the commission or attempted commission of a felony.[7] The other 37 states do not

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[4] The commentary to this provision recognizes assault with intent to commit another crime is really just a form of attempt and so better dealt with directly in an attempt statute. *See Model Penal Code* § 211.1(2), comment. *See also* LaFave, *supra* p. 7, § 16.2(d) (noting that "virtually all modern codes" have eliminated battery with intent to commit another crime from aggravated battery statutes "because the problem has been resolved by grading the crime of attempt according to the seriousness of the objective crime"). That would make assault with intent to commit a felony a crime of violence only when an attempt to commit the felony is a crime of violence.

[5] *See* D.C. Code §§ 22-403, 22-404.01; Fla. Stat. §§ 784.011, 784.021; Kan. Stat. Ann. § 21-3412; Mass. Gen. Laws ch. 265 §§ 13A, 29; Mich. Comp. Laws Ann. § 750.84; N.M. Stat. Ann. § 30-3-2.

[6] *See* Cal. Penal Code §§ 220, 245; R.I. Gen. Laws §§ 11-5-1, 11-5-2, 11-5-3.

[7] *See* Del. Code Ann. tit. 11, § 613; Iowa Code §§ 708.1, 708.2, 708.3; N.Y. Penal Law § 120.10; S.C. Code Ann. § 16-3-600; W. Va. Code §§ 61-2-9, 61-2-10.

include assault with intent to commit a felony in any form.[8] In sum, 37 statutes do not include assault with intent to commit a felony in any form, and only six other states' statutes sweep as broadly as Washington's.

This leads to a conclusion about assault with intent to commit a felony comparable to the conclusion the Court reached about reckless assault in *Garcia-Jimenez* and *Esparza-Herrera* – that aggravated assault does not include it. This means Washington second degree assault is broader than generic aggravated assault and so does not qualify as a crime of violence.[9]

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[8] *See* Ala. Code § 13A-6-20; Alaska Stat. § 11.41.200; Ariz. Rev. Stat. Ann. §§ 13-1203, 13-1204; Ark. Code Ann. § 5-13-204; Colo. Rev. Stat. Ann. § 18-3-202; Conn. Gen. Stat. Ann. § 53A-59; Ga. Code Ann. §§ 16-5-20, 16-5-21; Haw. Rev. Stat. §§ 707-710, 707-711; Idaho Code Ann. §§ 18-901, 18-902, 18-905; 720 Ill. Comp. Stat. 5/12-1, 5/12-2; Ind. Code § 35-42-2-1.5; Ky. Rev. Stat. Ann. § 508.010; La. Rev. Stat. Ann. §§ 14:36, 14:37; Me. Rev. Stat. Ann. tit. 17-A, § 208; Md. Code Ann. Crim. Law § 3-202; Minn. Stat. Ann. §§ 609.02, 609.221, 609.222; Miss. Code Ann. § 97-3-7; Mo. Ann. Stat. § 565.050; Mont. Code Ann. § 45-5-202; Neb. Rev. Stat. §§ 28-308, 28-309; Nev. Rev. Stat. § 200.471; N.H. Rev. Stat. Ann. §§ 631:1, 631:2; N.J. Stat. Ann. § 2C:12-1; N.C. Gen. Stat. Ann. §§ 14-32, 14-33, 14-34; N.D. Cent. Code § 12.1-17-02; Ohio Rev. Code Ann. § 2903.12; Okla. Stat. tit. 21, §§ 641, 646; Or. Rev. Stat. § 163.175; 18 Pa. Cons. Stat. § 2702; S.D. Codified Laws § 22-18-1.1; Tenn. Code §§ 39-13-101, 39-13-102; Tex. Penal Code Ann. §§ 22.01, 22.02; Utah Code Ann. § 76-5-103; Vt. Stat. Ann. tit. 13, § 1024; Va. Code Ann. §§ 18.2-51.2, 18.2-57; Wis. Stat. § 940.19; Wyo. Stat. Ann. § 6-2-502.

[9] Though the court need not reach this alternative ground, there is also the reasoning of *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), which is discussed in more depth in the discussion of Mr. Door's felony harassment conviction, *see* Appellant's Opening Brief, at 17-21; *infra* pp. 15-17. *Valdivia-Flores* recognized aiding and abetting is included in every federal offense and every Washington state offense, *see id.*, 876 F.3d at 1207, so aiding and abetting is included in guidelines "aggravated assault" and Washington aiding and abetting is included in Washington second degree assault. *Valdivia-Flores* also recognized the Washington definition of aiding and abetting is broader than

b. The residual clause does not make the assault conviction a crime of violence.

The government's other argument – that Washington second degree assault qualifies as a crime of violence under the residual clause – also fails on the merits even if *Robinson* were not controlling. The Court has already held that assault involving minimal force like that required for Washington assault with intent to commit a felony does not satisfy the residual clause requirement of "present[ing] a serious potential risk of physical injury to another," U.S.S.G. § 4B1.2(a)(2) (2013). *See United States v. Lee*, 821 F.3d 1124, 1128-29 (9th Cir. 2016). *See also Johnson v. United States*, 559 U.S. 133, 145 (2010) (noting as alternative basis for not addressing residual clause argument lower court holding that Florida assault statute qualified as "violent felony" only if it satisfied force clause). The question then becomes whether assault rises to the level of satisfying this

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the generic federal definition of aiding and abetting. *See id.* at 1207-08. That makes Washington second degree assault broader than generic aggravated assault because it contains a broader aiding and abetting means, regardless of whether the underlying substantive definitions of assault match. This is an additional and independent reason Washington second degree assault does not categorically qualify as generic aggravated assault.

The government's suggestion this additional argument is waived because it was not argued in the opening brief, *see* Answering Brief of United States, at 44 n.16, fails because the argument is part of a response to an argument raised for the first time by the government in its brief on appeal. All the government argued in the district court was the residual clause, *see* ER 77-78, and the force clause, *see* ER 78-82. The reply brief is the only place an appellant can respond to an argument raised for the first time in an appellee's brief. *Cf. Rodriguez v. Hayes*, 591 F.3d 1105, 1118 n.3 (9th Cir. 2010) (describing as "groundless" a contention appellant had waived argument addressing alternative justification in appellee's brief upon which district court had not relied).

requirement simply because intent to commit a felony is added. The answer to this question is no.

The problem is the statute applies to assault with intent to commit any of the multitude of offenses the Washington criminal code makes a felony. This includes not only clearly violent felonies like murder and rape, where the victim knows the crime is happening, and/or felonies like residential burglary or theft from the person, where there is a clear risk the victim might discover the offense as it is being committed and then resist, *see United States v. Park*, 649 F.3d 1175, 1179 (9th Cir. 2011); *United States v. Alderman*, 601 F.3d 949, 952 (9th Cir. 2010), but also felonies that are not violent or open and are relatively unlikely to be discovered and/or resisted.

Examples can be found in both the Washington case law and through a simple survey of the Washington criminal code. One example found in the case law is assault with intent to escape, *see State v. Gosser*, 656 P.2d 514 (Wash. App. 1982), which includes simply not returning to custody from work release, *State v. Kent*, 814 P.2d 1195, 1196-97 (Wash. App. 1991), bail jumping, *State v. Lanphfar*, 102 P.3d 864, 867 (Wash. App. 2004), and, in certain instances, simply leaving home confinement, violating the terms of an electronic monitoring program, and/or leaving the state while on conditional release, *see* Wash. Rev. Code §§ 9A76.010(2), 9A76.115(b),(c), 9A76.120(c), 9A76.130(1)(b),(3)(a). This sort of "escape" has been expressly found by the Supreme Court not to satisfy the residual clause. *See Chambers v. United States*, 555 U.S. 122 (2009). *See also United States v. Simmons*, 782 F.3d 510, 518-19 (9th Cir. 2015) (holding similarly broad Hawaii escape statute does not satisfy residual clause).

Examples can also be found through a simple survey of the Washington

criminal code. Related to the assault with intent to escape example just discussed, there is a Washington statute titled "Rendering criminal assistance in the first degree," which makes it a felony to conceal or provide certain other forms of assistance to certain escapees or fugitives *See* Wash. Rev. Code § 9A.76.070. Washington also makes it a felony to defraud a public utility if the amount of loss is in excess of $500. *See* Wash. Rev. Code §§ 9A.61.030, 9A.61.040. There are also the multiple other fraud and fraud-type offenses codified in Chapter 9A.56 and Chapter 9A.60 of the Washington Code.

Pushing someone aside, holding someone to physically restrain him or her, and a multitude of other forms of non-violent physical touching for the purpose of committing any one of these non-violent offenses would qualify as second degree assault in Washington. And certainly not every one of these possible intended felonies can make the minimal touching required for assault satisfy the residual clause requirement that the offense be "roughly similar, in kind as well as degree of risk posed," *Begay v. United States*, 553 U.S. 137, 143 (2008), to the enumerated offenses preceding the clause. *See, e.g., Simmons*, 782 F.3d at 519 (explaining why escape from custody does not satisfy "roughly similar" requirement).[10]

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[10] There is an "ordinary case" qualifier in the residual clause case law, but that is an additional requirement, not an alternative requirement. *See Simmons*, 782 F.3d at 518 (noting that "two criteria must be satisfied"). It could not be used to exclude entire categories of intended felonies from the analysis of assault with intent to commit a felony in any event – for several reasons. First, it is highly problematic to use the "ordinary course" limitation to exclude entire categories of offenses. *See United States v. Spencer*, 724 F.3d 1133, 1143-44 (9th Cir. 2013) (recognizing "much easier to conceptualize the 'ordinary case'" in Supreme Court residual clause cases because of "more monolithic nature of the crimes at issue" and avoiding problem in case at bar only because crime "involve[d] the level of

In addition, the assault and intended felony apparently can be quite separate in time. The Washington courts have held in construing the Washington attempt statute that the "substantial step" toward the intended crime which is required for attempt may be far removed from the crime. *See United States v. Weekley*, 24 F.3d 1125, 1127 (9th Cir. 1994) (citing *State v. Vermillion*, 832 P.2d 95, 105 (Wash. App. 1992), and *State v. Henderson*, 792 P.2d 514 (Wash. 1990)). Assuming this analysis extends to assault with intent to commit a felony, which is an attempt-type crime, *see supra* p. 8 n.4; *infra* p. 14, the pushing, holding, or other touching could not only be non-violent but could be far removed from the intended felony. It also appears from the plain language of the statute that the person pushed, held, or otherwise touched need not be the victim of the intended felony, so the statute could apply to pushing aside a bystander who has no stake in the matter and thus

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risk required every time"). Second, using the "ordinary case" qualifier to exclude entire statutory categories would be inconsistent with the controlling weight the Court gives to explicit statutory language in applying the other clauses of the crime of violence definition. *See Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015) (reiterating rule that "when a 'state statute's greater breadth is evident from its text,' a [defendant] need not point to an actual case" (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)). Third, it would be extremely difficult, if not impossible, to determine how often each of the multiple possible Washington felonies is the underlying felony in actual assault with intent to commit a felony prosecutions. *Compare Chambers*, 555 U.S. at 129 (relying on collection of cases in Sentencing Commission report). *See also Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015) ("How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"" (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, J., dissenting from denial of rehearing en banc)); *United States v. Lee*, 821 F.3d at 1136 (Ikuta, J., dissenting) (opining that "the residual clause's inscrutability in the ACCA context" would make it procedural error and an abuse of discretion to use residual clause to calculate guidelines range).

no reason to try to prevent the intended offense. *See Logan v. Weatherly*, No. CV-04-214-FVS, 2006 WL 1582379, at *6 (E.D. Wash. June 6, 2006) (recognizing that Washington second degree assault statute "does not match specific intent with a specific victim").

Finally, the commentary, which the government recognizes can be used to interpret the guideline, weighs against including assault to commit any felony of any type. Initially, the inclusion of only "*aggravated* assault" (emphasis added) means *some* assaults must be excluded. *Cf. Beckles*, 137 S. Ct. at 898 (Sotomayor, J., concurring in judgment) (agreeing defendant not entitled to relief even if guidelines subject to vagueness challenge where commentary explicitly included defendant's prior offense). Secondly, the commentary includes attempt only when it is an attempt to commit an offense which is otherwise a crime of violence or controlled substance offense. *See* U.S.S.G. § 4B1.2, cmt. n.1 ("'Crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit *such offenses*." (Emphasis added.)). This is significant because assault with intent to commit a felony is really just a form of attempt, as recognized in the Model Penal Code provision and LaFave treatise discussed *supra* p. 8 n.4. If other attempts are limited to attempts to commit an offense which is otherwise a crime of violence, it makes sense to limit assault with intent to commit a felony similarly, at least where, as here, the actual assault may be merely pushing, holding, or otherwise touching someone.

B. THE FELONY HARASSMENT CONVICTION CANNOT BE FOUND TO BE A CRIME OF VIOLENCE BECAUSE ALL CRIMINAL STATUTES INCLUDE AIDING AND ABETTING AND WASHINGTON AIDING AND ABETTING IS BROADER THAN GENERIC AIDING AND ABETTING.

To begin, review of the felony harassment question is de novo, not just for plain error. As this Court has recognized, "it is claims that are deemed waived or forfeited, not arguments." *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004). Further, a court is "not limited to [a plain error] standard of review where the appeal presents a pure question of law and there is no prejudice to the opposing party." *United States v. Joseph*, 716 F.3d 1273, 1276 n.4 (9th Cir. 2013) (quoting *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 426 (9th Cir. 2011)). *See also United States v. Thomas*, 726 F.3d 1086, 1092 n.5 (9th Cir. 2013) ("Our court will review an issue raised for the first time on appeal 'when a change in law raises a new [purely legal] issue while an appeal is pending,' and it is not inequitable to take it up." (Quoting *Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012).)). The Court has applied these principles to categorical approach challenges to prior conviction enhancements as recently as this year. *See, e.g., United States v. Studhorse*, 883 F.3d 1198, 1203 n.3 (9th Cir. 2018); *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018).

On the merits, the government argues *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), is not controlling because the underlying crime has the threatened use of force as an element. But both the Supreme Court and this Court have implicitly recognized the elements of an underlying offense that is aided are not sufficient to satisfy the requirements of the force clause. The Supreme Court

recognized this in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), in which the Court acknowledged a state conviction for aiding and abetting theft would not qualify as generic theft if the state aiding and abetting statute were broader than generic aiding and abetting. *See id.* at 190-91. This would not have been a concern if it were sufficient for the offense aided to have the required elements.

In this Court's precedent, there is *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993). The Court held in *Innie* that a conviction for accessory after the fact to murder for hire did not qualify as a crime of violence. *See id.* at 849-52. In so holding, the Court specifically rejected the argument that force was an element of the accessory after the fact offense just because it was an element of the underlying murder for hire offense. *See id.* at 850-51. The Court did distinguish accessory after the fact from aiding and abetting, but that is because aiding and abetting is expressly included in the crime of violence guideline. *See id.* at 852 (citing U.S.S.G. § 4B1.2, cmt. n.1). This does not help the government here because the aiding and abetting included in the guideline is generic aiding and abetting, and the aiding and abetting included in a Washington offense is the broader Washington aiding and abetting.

The government also argues *United States v. Werle*, 877 F.3d 879 (9th Cir. 2017), is controlling on the argument made here because "[t]he panel that rendered that decision was aware of *Valdivia-Flores* and nonetheless concluded to the contrary." Answering Brief of United States, at 48 (quoting *United States v. Binford*, 716 Fed. Appx. 742 (9th Cir. 2018) (unpublished)).[11] There is another explanation for *Werle*'s silence, however. That is the explanation suggested in

[11] The unpublished opinion the government quotes is of course not controlling precedent.

Appellant's Opening Brief – that the argument was made in *Werle* only in a supplemental authority letter and there is a general rule that arguments not made in the opening brief are waived. *See, e.g., United States v. Murillo-Alvarado*, 876 F.3d 1022, 1026-27 n.2 (9th Cir. 2017), *cited in* Appellant's Opening Brief, at 18 n.5.

C. MR. DOOR'S BODY ARMOR CONVICTION MUST BE VACATED.

The government's argument Mr. Door waived his challenge to the body armor conviction fails as a matter of basic justice. If both the assault conviction and the felony harassment conviction fail to qualify as "crimes of violence" under 18 U.S.C. § 16, Mr. Door is serving time in prison for something that is not a crime. That is not something to which a citizen can agree, or which our society can countenance. As the Supreme Court said in the 28 U.S.C. § 2255 case of *Davis v. United States*, 417 U.S. 333 (1974):

> If this contention is well taken, then [the defendant's] conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify . . . relief.

Id. at 346-47. *See also United States v. Moore*, 136 F.3d 1343, 1345 (9th Cir. 1998) (applying *Davis* to claim raised on direct appeal that was not raised in district court).

The government implicitly concedes the assault conviction does not qualify as a crime of violence, because it concedes it does not satisfy the "force clause," and the residual clause of § 16 has been held unconstitutional, *see Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). The validity of the body armor conviction

A P P E N D I X 6

CA No. 17-30165

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant.	D.C. No. 2:12-cr-05126-RBL

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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

HONORABLE RONALD B. LEIGHTON
United States District Judge

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KENNETH RANDALE DOOR, Defendant-Appellant	)	D.C. No. 2:12-cr-05126-RBL

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Defendant-appellant, Kenneth Randale Door, hereby petitions for rehearing and suggests rehearing en banc if the panel declines to rehear the case. Panel rehearing is appropriate because the panel opinion overlooks the nature of the defense argument, which is that the elements of aiding and abetting a crime do not include the elements of the underlying crime. If the panel did consider and reject this argument, rehearing en banc is appropriate because a conclusion that the elements of aiding and abetting a crime do include the elements of the underlying crime conflicts with this Court's decision in *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993). *Innie* held the elements of the crime of accessory after the fact do not include the elements of the underlying crime, and reasoning in *Innie* applies

equally to aiding and abetting. This conflict, if not corrected by the panel, warrants en banc review under Rule 35(a)(1) of the Federal Rules of Appellate Procedure.

Respectfully submitted,

DATED: April 17, 2019

By s/ Carlton F. Gunn
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I.

STATEMENT OF CASE

A. FACTS.

Mr. Door was convicted of felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1); violent felon in possession of body armor, in violation of 18 U.S.C. § 931(a); and felon in possession of an explosive, in violation of 18 U.S.C. § 842(i)(1). The sentencing guideline that controlled Mr. Door's sentencing guidelines offense level was § 2K2.1. That guideline provides for a base offense level of 24 when a defendant has two prior convictions for a crime of violence, 20 when a defendant has just one such conviction, and 14 when a defendant has no such convictions. *See* U.S.S.G. § 2K2.1(a).[1]

At resentencing after an initial appeal vacating an erroneous Armed Career Criminal Act statutory enhancement, *see United States v. Door*, 656 Fed. Appx. 376 (9th Cir. 2016) (unpublished), the presentence report recommended a base offense level of 24 for two prior crime of violence convictions. *See* Revised PSR, at 1.[2] First, there was a group of convictions under the Washington second-degree

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[1] The base offense level is also enhanced for controlled substance convictions and certain types of more dangerous firearms, *see id.*, but Mr. Door had no controlled substance convictions, he possessed only ordinary handguns, and the explosive he possessed was just a "seal bomb" used by fishermen to scare away marine mammals.

[2] The presentence report and subsequent revisions and related materials were filed concurrently with the opening brief in chronological order in one

assault statute. Revised PSR, at 1. Second, there was a conviction under the Washington felony harassment statute. *See* Revised PSR, at 1.

The defense objected to the enhanced base offense level and argued the base offense level should be 14 because neither the assault convictions nor the felony harassment conviction qualified as crimes of violence under the categorical approach developed and refined in *Taylor v. United States*, 495 U.S. 575 (1990), *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See* ER 38-49. The district court rejected this argument and adopted the presentence report recommendation of a base offense level of 24. *See* ER 21-23. Additional enhancements increased the offense level to 32, *see* ER 21-23; Revised PSR, at 1-2, which produced a guideline range of 210-262 months when combined with Mr. Door's criminal history category of VI, *see* ER 23; Revised PSR, at 2. The district court then varied upward slightly to impose a sentence of 276 months. *See* ER 24.

B. THE APPEAL AND THE PANEL OPINION.

Mr. Door appealed, and the defense continued to argue the prior assault convictions and sexual harassment conviction did not qualify as crimes of violence. The defense argued the assault convictions did not qualify under this Court's intervening decision in *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017). *Robinson* summarized the well-established process for determining

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packet. A "Revised Memorandum on Resentencing" filed after remand that was included in the packet was cited as "Revised PSR."

whether a prior conviction qualifies as a crime of violence as follows:

> To determine whether a defendant's prior conviction is a crime of violence under the Guidelines, we apply the categorical approach first outlined in *Taylor v. United States*, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), and later clarified in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), and *Mathis v. United States*, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). Under this approach, "we inquire first 'whether the elements of the crime of conviction sufficiently match the elements of the generic federal [definition of a crime of violence].'" *United States v. Arriaga-Pinon*, 852 F.3d 1195, 1198-99 (9th Cir. 2017) (alterations omitted) (quoting *Mathis*, 136 S. Ct. at 2248). Then, "[i]f the statute is overbroad and thus not a categorical match, we next ask whether the statute's elements are also an indivisible set." *Id.* at 1199. "Finally, if the statute is divisible, then the modified categorical approach applies and 'a sentencing court looks to a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of.'" *Id.* (quoting *Mathis*, 136 S. Ct. at 2249). If that crime falls within the generic federal definition, then the defendant's conviction qualifies as a crime of violence.

Robinson, 869 F.3d at 936, *quoted in* Appellant's Opening Brief, at 16. *Robinson* then held (1) the Washington second-degree assault statute is overbroad, *see id.* at 937-38; (2) the statute is indivisible, *see id.* at 938-41; and (3) a conviction under the statute therefore does not qualify as a crime of violence, *see id.* at 941. *See* Appellant's Opening Brief, at 16.

The defense then cited another intervening decision – *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017) – in support of its argument that the felony harassment conviction did not qualify as a crime of violence. *Valdivia-Flores* recognized that (1) the alternative of aiding and abetting is included in every criminal charge; (2) the Washington definition of aiding and abetting is broader than the federal, generic definition, because the Washington definition requires only knowledge that an act will facilitate the commission of a crime; and

(3) acting as an aider and abettor and acting as a principal are not separate offenses under Washington law but are merely alternative means of committing the same offense, so the aiding and abetting and acting as a principal alternatives are not divisible for the categorical approach. *See* Appellant's Opening Brief, at 18-19 (citing *Valdivia-Flores*, 876 F.3d at 1207-08, 1210). *Valdivia-Flores* also acknowledged a government argument that "no Washington state conviction can serve as an aggravated felony at all because of [the] accomplice liability statute." *Valdivia-Flores*, 876 F.3d at 1209, *quoted in* Appellant's Opening Brief, at 20. It explained:

> The government here merely joins a chorus of those who "have raised concerns about [the] line of decisions" applying the categorical approach, "[b]ut whether for good or for ill, the elements-based approach remains the law." *Mathis v. United States*, ___ U.S. ___, 136 S. Ct. 2243, 2257, 195 L. Ed. 2d 604 (2016). Indeed, Justice Kennedy wrote separately in *Mathis* to note specifically that Congress "could not have intended vast . . . disparities for defendants convicted of identical criminal conduct in different jurisdictions"; but he concurred in the opinion that held that the categorical approach required just that result. *Id.* at 2258 (Kennedy, J., concurring).

Valdivia-Flores, 876 F.3d at 1209, *quoted in* Appellant's Opening Brief, at 20.

The government sought to distinguish *Valdivia-Flores* by arguing the substantive crime of felony harassment has threatened use of force as an element. The defense responded that both the Supreme Court and this Court have implicitly recognized the elements of an underlying offense that is aided are not sufficient to satisfy the requirements of the force clause. The defense first pointed to *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), in which the Supreme Court acknowledged a state conviction for aiding and abetting theft would not qualify as generic theft if the state aiding and abetting statute were broader than generic

aiding and abetting. *See* Appellant's Reply Brief, at 16 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. at 190-91). The defense then pointed to *United States v. Innie*, 7 F.3d 840 (9th Cir. 1993), in which this Court (a) held a conviction for accessory after the fact to murder for hire did not qualify as a crime of violence and (b) specifically rejected the argument that force was an element of the accessory after the fact offense just because it was an element of the underlying murder for hire offense. *See* Appellant's Reply Brief, at 16 (citing *Innie*, 7 F.3d at 850-51).

The panel assigned to the appeal agreed with the defense argument that the assault convictions do not qualify as crimes of violence but disagreed with the defense argument that the felony harassment conviction does not qualify. It began by noting there are three different clauses in the guidelines crime of violence definition applicable to Mr. Door: (1) a "force clause," or "elements clause," including any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) an "enumerated offenses clause" which includes burglary of a dwelling, arson, extortion and offenses involving the use of explosives; and (3) a "residual clause" which includes any other offense that "involves conduct that presents a serious potential risk of physical injury to another." Panel Opinion, at 6-7 (quoting U.S.S.G. § 4B1.2(a) (2013)). The panel then reasoned:

> The categorical analysis in *Valdivia-Flores* involved comparing the elements of the Washington drug trafficking crime with the generic federal offense of drug trafficking because "drug trafficking" is listed in the [Immigration and Nationality Act] as an "aggravated felony." *See id.* at 1206-07. In other words, the categorical analysis employed in *Valdivia-Flores* mirrors the inquiry under the *enumerated offenses* clause of U.S.S.G. § 4B1.2(a)(2). [*United States v.*] *Werle* [,

> 877 F.3d 879 (9th Cir. 2017)], on the other hand, held that a prior conviction for Washington felony harassment constitutes a crime of violence pursuant to the *force* clause of § 4B1.2(a)(1). Because a conviction for violating [the Washington felony harassment statute] necessarily entails the threatened use of violent physical force, it qualifies as a crime of violence pursuant to the force clause, and our inquiry ends there. We need not compare the elements of the crime of conviction with the elements of the generic federal crime when analyzing whether an offense qualifies as a crime of violence pursuant to the force clause of § 4B1.2(a). (Citations omitted.)

Panel Opinion, at 13 (emphasis in original).[3]

II.

ARGUMENT

A. THE PANEL SHOULD REHEAR THE CASE BECAUSE ITS REASONING OVERLOOKS THE DEFENSE ARGUMENT THAT THE ELEMENTS OF AIDING AND ABETTING DO NOT INCLUDE THE ELEMENTS OF THE UNDERLYING CRIME.

The panel opinion misapprehends the defense argument when it distinguishes *Valdivia-Flores* on the ground *Valdivia-Flores* was based on the enumerated offenses clause and Mr. Door's case turns on the force clause, so the

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[3] The panel acknowledged that the appellant in the Washington felony harassment case it cited – *Werle* – never made the aiding and abetting argument made by Mr. Door. *See* Panel Opinion, at 12. *Werle* therefore is not controlling precedent on that argument. *See Valdivia-Flores*, 876 F.3d at 1209 n.3 (prior case rejecting overbreadth challenge to statute at issue "irrelevant" where challenge in prior case "was based on an argument unrelated to the overbreadth of the aiding and abetting component of the statute")

court "need not compare the elements of the crime of conviction with the elements of the generic federal crime." The defense is not seeking to compare the elements of Washington felony harassment with some generic version of felony harassment. What the defense is comparing is the elements of Washington aiding and abetting felony harassment to the force clause. The defense argument is that Washington aiding and abetting felony harassment does not include the threatened use of force as an element.

What is relevant about *Valdivia-Flores* is its holding that any Washington offense, including Washington felony harassment, includes aiding and abetting, and the aiding and abetting version of the offense is not divisible from commission of the offense as a principal. The question then becomes whether Washington *aiding and abetting* felony harassment, as opposed to commission of felony harassment as a principal, includes the threatened use of force as an element. That question is answered not by *Valdivia-Flores*, but by the *Gonzales* and *Innie* opinions the defense cited in Appellant's Reply Brief, *see supra* pp. 6-7. *Innie* specifically rejected the argument that force was an element of the accessory after the fact offense just because it was an element of the underlying murder for hire offense. *See Innie*, 7 F.3d at 850-51. In other words, the mere fact the government must prove a principal used force does not make force an element. Similarly, with aiding and abetting, the mere fact the government must prove a principal used force or threats of force does not make the force or threats of force an element of aiding and abetting. So aiding and abetting felony harassment does not include the threatened use of force element of the substantive felony harassment offense.

In most jurisdictions, this is not a problem because the sentencing guidelines definition of crime of violence independently includes aiding and abetting. *See* U.S.S.G. § 4B1.2, comment. (n.1). It is a problem in Washington because of an additional key holding in *Valdivia-Flores* – that Washington aiding and abetting is broader than generic aiding and abetting. This takes Washington aiding and abetting outside the generic aiding and abetting included in the sentencing guideline. This overbreadth prevents Washington aiding and abetting from being brought into the guidelines crime of violence definition by the guideline's aiding and abetting provision.

The panel opinion overlooks the distinction between the elements of aiding and abetting and the elements of the substantive offense. It should reconsider its holding in light of that distinction.

B. IF THE PANEL DOES NOT REHEAR THE CASE, THE EN BANC COURT SHOULD REHEAR IT BECAUSE ANY IMPLICIT HOLDING THAT THE ELEMENTS OF AIDING AND ABETTING INCLUDE THE ELEMENTS OF THE UNDERLYING CRIME CONFLICTS WITH *INNIE*.

If the panel does not rehear the case, the en banc Court should rehear it en banc. This is because any implicit rejection of the defense argument conflicts with *Innie*.

While *Innie* considered a conviction for accessory after the fact rather than a conviction for aiding and abetting at the time of the underlying offense, reasoning in *Innie* readily extends. The government made an argument in *Innie* similar to the

argument it could make here, namely, that "[c]ommission of the underlying offense is a prerequisite for conviction as an accessory after the fact," and "an indictment charging one as an accessory after the fact must plead the underlying offense." *Id.* at 850. The Court held this did not make the elements of the underlying offense elements of the accessory offense. *See id.* at 851-52. It so held after noting the Court "has defined 'an "element" of a crime' as 'a "constituent part" of the offense which must be proved by the prosecution *in every case* to sustain a conviction under a given statute.'" *Id.* at 850 (quoting *United States v. Sherbondy*, 865 F.2d 996, 1010 (9th Cir. 1988) (emphasis in original)). Just as the accessory after the fact statute, 18 U.S.C. § 3, is a general statute that "merely requires that *some* federal offense have been committed," *Innie*, 7 F.3d at 851 (emphasis in original), the aiding and abetting statute, 18 U.S.C. § 2, is a general statute that merely requires that some federal offense have been committed, *see* 18 U.S.C. § 2 ("Whoever commits *an offense* against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." (Emphasis added.))

Innie did note that accessory after the fact offenders are not punished as principals while aiding and abetting defendants are punished as principals. *See id.* at 851. But how aiding and abetting is punished cannot control the analysis of what constitutes "elements." For one thing, while federal aiding and abetting offenders are *usually* punishable in exactly the same way principals are, that is not *always* the case. *See United States v. Angwin*, 271 F.3d 786, 801-03 (9th Cir. 2001) (recognizing and discussing different punishment of principals and aiders and abettors under 8 U.S.C. § 1324(a)(1)(B)). Secondly, being subject to the

identical punishment does not mean aiding and abetting has the same *elements* as committing the crime as a principal. In fact, this Court has expressly held the contrary, stating that "the elements necessary to convict an individual as a traditional principal . . . *differ* from the elements necessary to show the individual aided and abetted that crime." *United States v. Armstrong*, 909 F.2d 1238, 1242 (9th Cir. 1990) (emphasis added). *See also United States v. Gaskins*, 849 F.2d 454, 459-60 (9th Cir. 1988) (describing the "different elements" of aiding and abetting theory and principal theory).

Innie also distinguished aiding and abetting from accessory after the fact based on the guidelines provision that expressly includes aiding and abetting as a crime of violence. *See id.*, 7 F.3d at 852. This will save most aiding and abetting convictions, as noted *supra* p. 10, because most jurisdictions use the generic definition of aiding and abetting. Washington does not use the generic definition, however, as recognized in *Valdivia-Flores*. Washington aiding and abetting convictions such as Mr. Door's are therefore not saved by the aiding and abetting provision.

The crime of violence guideline's express inclusion of aiding and abetting is instructive in another way, moreover. If the elements of aiding and abetting included the elements of the underlying offense, there would be no reason to expressly include aiding and abetting in the crime of violence guideline. It must be expressly included only because it would not be included otherwise.

In sum, a panel rejection of the defense argument that the elements of aiding and abetting do not include the elements of the underlying offense would conflict with *Innie*. That is a ground for en banc review if the panel declines to rehear the

case on its own.

III.

CONCLUSION

The panel should rehear the case because the panel opinion misapprehends the defense argument. If the panel does not rehear the case, the en banc court should rehear it because the panel opinion conflicts with *Innie*.

Respectfully submitted,

DATED: April 17, 2019

By s/ Carlton F. Gunn
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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Rule 32 of the Federal Rules of Appellate Procedure, Circuit Rule 32-1, and Circuit Rule 40-1, that this petition is proportionally spaced, has a typeface of 14 points or less, and does not exceed 15 pages in length.

DATED: April 17, 2019

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH RANDALE DOOR, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this 15th day of August, 2019, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

August 15, 2019

s/ Carlton F. Gunn
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