

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN JAMES WALSH,

Defendant.

No. 1:13-cr-00325-MC

ORDER

MCSHANE, J.

On June 2, 2014, defendant Ryan James Walsh pleaded guilty to Felon in Possession of a Firearm, violating 18 U.S.C. § 924(g)(1). At the time of sentencing, his criminal history included three predicate felony convictions under the Armed Career Criminal Act (ACCA): specifically, two drug convictions and one conviction for Burglary in the First Degree. Consequently, he received a fifteen-year mandatory minimum sentence under the ACCA. *See* 18 U.S.C. § 924(e) (requiring fifteen-year mandatory minimum sentence for defendants convicted of possession of a firearm who have at least three prior convictions for serious drug crimes or violent felonies).

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At the time of sentencing, binding Ninth Circuit authority held that a conviction for Burglary in the First Degree under Oregon law was a violent felony under the ACCA's "residual clause." *United States v. Mayer*, 560 F.3d 948, 958-63 (9th Cir. 2009) (under the residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), Burglary in the First Degree was a violent felony because it "involv[ed] conduct that presents a serious potential risk of physical injury to another"). Pending Defendant's appeal, however, the Supreme Court struck down the residual clause as unconstitutionally vague. *United States v. Johnson*, ___ U.S. ___, 135 S. Ct. 2551, 2563 (2015). The Ninth Circuit then remanded this case for resentencing in light of *Johnson*.

On remand, the issue is whether Defendant's conviction for Burglary in First Degree burglary qualifies as a violent felony because it is equivalent to the "generic" crime of burglary under federal law. I conclude that Burglary in the First Degree under Oregon law is not a violent felony for ACCA purposes because the Oregon burglary statute criminalizes conduct that would not be generic burglary. See *United States v. Bayya*, No. 3:13-cr-00558-HZ, 2015 WL 8751795, at *2 (D. Or. Dec. 14, 2015); *Summers v. Feather*, No. 3:14-cv-00390-SU, 2015 WL 4663277, at *6 (D. Or. Aug. 5, 2015); *United States v. Snyder*, 5 F. Supp. 3d 1258, 1263-64 (D. Or. 2014) (*Snyder II*). Because Defendant does not have three prior qualifying prior felony convictions, he is not subject to the ACCA's fifteen-year mandatory minimum sentence.

THE CATEGORICAL APPROACH

As relevant here, the ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, [or] involves the use of explosives." 18 U.S.C. § 924(e)(2)(B) (the ACCA's enumerated offense clause). To determine whether a crime is a violent felony under the ACCA, the court uses the "categorical approach," which "compare[s] the elements of the statute forming the basis of the

defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.” *Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276, 2281 (2013). The court first “compare[s] the elements of the state offense to the elements of the generic offense defined by federal law.” *Almanza-Arenas v. Lynch*, ___ F.3d ___, 2015 WL 9462976, at *2 (9th Cir. Dec. 28, 2015 (en banc) (quoting *Lopez-Valencia v. Lynch*, 798 F.3d 863, 867-68 (9th Cir. 2015) (omitting internal citations)). If this comparison shows that “the elements of the state crime are the same as or narrower than the elements of the federal offense, then the state crime is a categorical match and every conviction under that statute qualifies” as a violent felony. *Id.* But if the state statute is broader than the generic crime, “criminaliz[ing] conduct that goes beyond the elements of the federal offense,” the court then must determine “whether the statute is ‘divisible’ or ‘indivisible.’” *Id.*

If the statute is indivisible, “our inquiry ends, because a conviction under an indivisible, overbroad statute can *never* serve as a predicate offense.” Only when a statute is overbroad and divisible do we turn to step three—the “modified categorical approach.” At this step, we may examine certain documents from the defendant’s record of conviction to determine what elements of the divisible statute he was convicted of violating.

Id. (internal citations omitted).

I. First Step: Oregon Burglary Is Broader Than Generic Burglary

The first step of the analysis requires the court to compare the elements of the Oregon burglary statute with the elements of generic burglary. Under Oregon law, “A person commits the crime of burglary in the first degree if the person violated ORS 164.215 [the second-degree burglary statute] and the building is a dwelling” Or. Rev. Stat. § 164.225(1). “[A] person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime therein.” Or. Rev. Stat. § 164.215(1).

The Supreme Court defines “generic burglary” as the “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)). “In using the term ‘building or structure,’ the Court encapsulated the common understanding of the word ‘building’—a structure designed for occupancy that is intended for use in one place.” *United States v. Grisel*, 488 F.3d 844, 848 (9th Cir. 2007) (en banc).

Although the elements of the Oregon burglary statutes appear to match the elements of generic burglary, Oregon defines “building” more broadly than generic burglary to include non-structures: “building, *in addition to its ordinary meaning* includes any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodations of persons or for carrying on business therein.” Or. Rev. Stat. § 164.205(1) (emphasis added). And for Burglary in the First Degree, Oregon’s definition of “dwelling” incorporates the overbroad definition of “building,” defining “dwelling” as “a *building* which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present.” Or. Rev. Stat. § 164.205(2) (emphasis added). Because the Oregon burglary statute defines the elements of “dwelling” and “building” more broadly than generic burglary to include non-structures such as vehicles or boats, burglary under Oregon law is not generic burglary. *Grisel*, 488 F.3d at 850; *Mayer*, 560 F.3d at 959 (“first degree burglary in violation of Oregon Revised Statutes section 164.225 does not categorically satisfy the generic definition of burglary”) (overruled on other grounds).

II. Second Step: The Building Element of the Oregon Burglary Statute Is Indivisible

Because the Oregon burglary statute criminalizes conduct that is not covered by generic burglary, this court must determine whether the statute is “divisible” or “indivisible.” “The critical distinction [between divisible and indivisible statutes] is that while indivisible statutes

may contain multiple, alternative *means* of committing the crime, only divisible statutes contain multiple, alternative *elements* of functionally separate crimes.” *Rendon v. Holder*, 764 F.3d 1077, 1084-85 (9th Cir. 2014). A jury must unanimously agree on each element of a crime, but the jury may convict even if jurors disagree on the means of committing the crime. *Id.* at 1085-86.

Although federal law governs whether a prior conviction is a “violent felony” under the ACCA, federal courts are bound by “the state courts’ interpretations of state criminal statutes” in determining “the meaning or scope of the crime of conviction.” *United States v. Flores-Cordero*, 723 F.3d 1085, 1087 (9th Cir. 2013); *United States v. Dixon*, 805 F.3d 1193, 1195 (9th Cir. 2015) (to determine whether a state statute is divisible, court looks to the wording of the statute and judicial opinions interpreting the statute). The Ninth Circuit recently held that in determining divisibility, the court may also look to certain court documents, including the charging document, the plea agreement or transcript of the plea proceeding, and comparable judicial records, “to see whether the statute displays alternative elements instead of alternative means of committing the same crime.” *Armanza-Arenas*, 2015 WL 9462976 at *5 (citing *Descamps*, 133 S. Ct. at 2285 n.2) (footnote omitted); see *Shepard v. United States*, 544 U.S. 13, 26 (2005) (listing documents the court may examine).

Under Oregon law, to determine whether a statute sets out multiple crimes (i.e., is a divisible statute), or multiple means of committing a single crime (i.e., is an indivisible statute), the court looks to “the text and context of the statute.” *State v. White*, 346 Or. 275, 285, 211 P.3d 248, 254 (2009). I have not found Oregon decisions directly addressing whether “building” or “dwelling” are indivisible. *Cf. State v. Nollen*, 196 Or. App. 141, 145, 100 P.3d 788, 789

(2004) (detached tractor-trailer is a “‘building’ as that term is used as an element of the offense of second degree burglary”).

Looking first to the statute itself, I conclude that “building” is a single indivisible element, encompassing structures and non-structures. And because Oregon defines “dwelling” as a “building” “which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present,” the “dwelling” element also encompasses non-structures. For example, under the Oregon statute, a dwelling could be a boat “which regularly or intermittently is occupied by a person lodging therein at night.” An Oregon prosecutor charging a defendant with first-degree burglary need not allege that the “dwelling” is a physical structure (a generic building), rather than a boat or airplane used as a “dwelling.”

Oregon’s model criminal jury instructions support my conclusion that “building” is an indivisible element of the burglary statute. *See Almanza-Arenas*, 2015 WL 9462976 at *8 (relying on California model jury instructions to determine that a statute was indivisible). The Oregon model jury instruction for Burglary in the First Degree involving an alleged dwelling requires proof that the defendant entered or remained unlawfully “in the premises described in the charge” and that “[t]he premises described in the charge is a dwelling.” Or. Unif. Crim. Jury Instr. No. 1901 (2013 revision). The instructions define “dwelling” as it is defined in the statute, while defining “premises” as including “any building and any real property, whether privately or publicly owned.” *See id.* at 1900(3), (9). Under these model jury instructions, there is no need for the jury to unanimously agree on whether an alleged “dwelling” is a generic structure or not.

The government contends the Oregon statute for Burglary in the First Degree is divisible because it contains multiple definitions of building, some of which would match the “building” element of generic burglary. The government notes the state court indictment here charged

Defendant with breaking into a “dwelling” at a particular street address. The government contends that the indictment shows that Defendant was convicted of generic burglary because the alleged “dwelling,” with a street address, must have been a “structure” as required for generic burglary

In support of this argument, the government cites *United States v. Snyder*, 643 F.3d 694, 698 (9th Cir. 2011) (*Snyder I*). In *Snyder I*, the indictment charged the defendant with Burglary in the Second Degree under Oregon law, using the word “building” together with a street address. The Ninth Circuit looked to the indictment rather than first determining whether the statute was divisible. The court found that the indictment’s allegation that the burglary occurred in a “building” at a particular street address showed the defendant had been convicted of entering or remaining in a generic “building.” *Id.*; see also *United States v. Stephens*, 237 F.3d 1031, 1034 (9th Cir. 2001) (similar holding as to Alaska burglary statute).

When *Snyder I* and *Stephens* were decided, however, the Ninth Circuit was applying a fact-based categorical approach decisively overruled by the Supreme Court in *Descamps*. See *Descamps*, 133 S. Ct. at 2287 (Ninth Circuit “subverted” Supreme Court precedent on the proper use of the categorical approach, going beyond the statutory elements “in every case to evaluate the facts that the judge or jury found”). Because *Descamps* overruled *Snyder I* and *Stephens* on this point, they are not binding here.

This categorical analysis may seem too technical. The burglary indictment here does allege that Defendant entered a “dwelling” with a specific address. Judge Panner explained in *Snyder II* that the distinction between divisible and indivisible statutes is meant to ensure that the federal sentencing court does not improperly make factual findings about a defendant’s prior conviction:

Judge Tashima's reluctant concurrence [in *Snyder I*] illustrates why the modified categorical approach does not work with indivisible statutes. The problem is that "just because the broad statutory term 'building' is accompanied by a street address does not necessarily make the statutory term more narrow or precise. *"Building" still means "building," as defined in the statute.*" [*Snyder I*], 643 F.3d at 700 (Tashima, J., concurring) (emphasis added). Judge Tashima explained that "accompanying the statutory term 'building' with a street address" cannot "narrow[] the meaning of the term to mean less than what the statute defines it to mean." *Id.* The indictment

could just as well have alleged that the defendant entered a trailer located at 1341 Rogue River Highway. Any term can be accompanied by a street address. For all we know from the indictment, 1341 Rogue River Highway could be the address of a five or ten acre lot full of trucks, trailers, RVs, booths, and sheds, as well as the site of a generic building. Thus, for purposes of the modified categorical approach, accompanying the statutory term "building" with a street address does nothing, categorically, to aid the analysis.

Id.

Snyder II, 5 F. Supp. 3d at 1263-64 (alterations in *Snyder II*). Similarly, accompanying the statutory term "dwelling" with a street address does not narrow the definition of "dwelling" to a generic structure, because "dwelling" incorporates the overbroad "building" element. This is not merely a semantic distinction. A jury determining whether a defendant is guilty of Burglary in the First Degree under Oregon law could convict a defendant even if they do not agree whether or not a generic structure was involved.

The parties also dispute whether the burglary statute's breaking and entering element is broader than the corresponding element of generic burglary. I need not address this dispute in light of my conclusion on the "dwelling" and "building" elements of the Oregon statutes.

CONCLUSION

Defendant's conviction for Burglary in the First Degree is not a violent felony under the ACCA. When Defendant is resentenced on January 14, 2016, he will not be subject to the ACCA's fifteen-year mandatory minimum sentence.

IT IS SO ORDERED.

DATED this 11th day of January, 2016.



MICHAEL MCSHANE
U.S. DISTRICT JUDGE