RECORD NO._____

In The
Supreme Court of The United States

RICHARD ARTHUR ORR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Johnson v. United States*, 559 U.S. 133 (2010), this Court held that the force clause of the Armed Career Criminal Act ("ACCA") requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Id.* at 140 (emphasis in original). The question presented is:

Do the elements of a robbery offense satisfy the "violent force" threshold if state law requires only that the robber use "any degree" of force to overcome the victim's resistance, such as the force exerted by a "bump" of the victim's shoulder while snatching her purse or the force needed to snatch cash from the victim's grasp?

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Petitioner Richard Arthur Orr respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

DECISIONS BELOW

The Fourth Circuit's unpublished opinion in this case is reprinted at App. 1a-7a. The district court's oral ruling can be found at App. 29a, and its written judgment at 9a-14a.

JURISDICTION

The court of appeals entered its judgment on April 21, 2017, and it denied Orr's petition for panel or en banc rehearing on June 12, 2017. App. 1a, 8a. On September 6, 2017, the Chief Justice extended the time for filing this petition for a writ of certiorari until October 26, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides the following in relevant part:

> (1) In the case of a person who violates section 922 (g) of this title and has three previous convictions by any court referred to in section 922 (g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .
>
> (2) As used in this subsection—

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

Florida's robbery statute, codified at Fla. Stat. Ann. § 812.13(a), says the following in relevant part:

> "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

STATEMENT OF THE CASE

Like many states, Florida's robbery offense requires only that the robber use the quantum of force needed to prevent or overcome the victim's resistance, no matter how slight. The courts of appeals have reached conflicting opinions about whether a robbery offense defined in this manner satisfies the ACCA's requirement of "violent force" as articulated by this Court in *Johnson v. United States*, 559 U.S. 133 (2010) ("*Johnson 2010*"). The Court should use this case to resolve that conflict and provide much-needed guidance on the proper interpretation of the ACCA's force clause.

1. Richard Orr pled guilty to a single charge of possessing a firearm after a felony conviction in violation of 18 U.S.C. § 922(g)(1). That offense typically carries a 10-year statutory maximum, but the ACCA enhances the penalty to a 15-year minimum if the defendant has three prior convictions for "a violent felony or a serious drug offense" that were "committed on occasions different from one another." 18 U.S.C. § 924(e).

Before sentencing, the Probation Office prepared a Presentence Investigation Report, which concluded that Orr was subject to the ACCA enhancement. In support, the Report identified eight qualifying convictions: six convictions for Florida robbery based on offenses committed in March and April of 1981, when Orr was 17 years old; a Florida robbery conviction from 1987; and a federal bank robbery conviction from 1988. CAJA 71-76.[1]

Orr objected to the ACCA designation. Although the Florida robbery statute requires "the use of force, violence, assault, or putting in fear," Fla. Stat. Ann. § 812.13(a), Orr argued that the Florida case law interpreted the statute's "force" component to cover offenses that involve only a minimal amount of force. Such offenses, he contended, do not qualify as ACCA predicates under this Court's decision in *Johnson 2010*, which held that the ACCA's force clause requires "*violent* force—that is, force capable of causing physical pain or injury to another person." 559 U.S.at 140 (emphasis in original). He thus contended that he has no more than

[1] CAJA refers to the Joint Appendix filed in the Court of Appeals.

one conviction—the 1988 conviction for federal bank robbery—that qualifies as an ACCA predicate.

The district court rejected Orr's argument and applied the ACCA. It did not explain the legal basis for its conclusion, saying only that "the law . . . favors the government." App. 29a. Absent the ACCA enhancement, Orr would have faced a 120-month statutory maximum and an advisory guidelines range of no more than 46 to 57 months. Based on the district court's ACCA determination, however, the court imposed the mandatory minimum sentence of 180 months. App. 10a, 35a.

2. On appeal, Orr renewed his contention that his prior Florida robbery convictions do not qualify as ACCA predicates. As relevant here, he argued first that no Florida robbery conviction can ever qualify because the state's courts interpret the offense to cover offenses that involve only minimal force. In *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997), the Florida Supreme Court interpreted the "force" component of the robbery statute to require only the amount of "force sufficient to overcome a victim's resistance," no matter how slight that resistance is. The decision in *Sanders v. State*, 769 So. 2d 506 (Fla. Dist. Ct. App. 2000), illustrates the real-world application of this standard. In *Sanders*, the defendant approached the victim outside a convenience store and "asked him for a quarter to make a phone call." *Id.* at 507. While the victim "was going through his change, [the defendant] reached over and grabbed the paper money out of [the victim's] right hand." *Id.* The defendant argued on appeal that the force involved in this incident was too minimal to sustain a robbery conviction under the *Robinson* standard. But

the Florida appeals court disagreed, reasoning that the victim's "clutching of his bills in his fist . . . could have been viewed by the jury as an act of resistance." *Id.*

In addition to *Sanders*, Orr cited several other post-*Robinson* cases that affirm robbery convictions based on minimal-force robberies that fall short of *Johnson 2010*'s "violent force" threshold. *See Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. Dist. Ct. App. 2011) (holding that "a conviction for robbery may be based on a defendant's act of engaging in a tug-of-war over the victim's purse"); *Hayes v. State*, 780 So. 2d 918, 919 (Fla. Dist. Ct. App. 2001) (affirming a robbery-by-force conviction based on testimony from the victim "that her assailant 'bumped' her from behind with his shoulder and probably would have caused her to fall to the ground but for the fact that she was in between rows of cars when the robbery occurred"); *Rigell v. State*, 782 So. 2d 440, 441-42 (Fla. Dist. Ct. App. 2001) (interpreting the *Robinson* standard to cover "the pickpocket who 'jostles' the victim in the course of taking the wallet from the victim's pocket").

In the alternative, Orr argued that even if these minimal-force cases could somehow be read to satisfy *Johnson 2010*'s "violent force" standard, his prior convictions still do not qualify as ACCA predicates because state law at the time of his convictions allowed a no-resistance snatching to be prosecuted as robbery. And, under *McNeill v. United States*, the courts must determine whether a prior conviction qualifies as an ACCA predicate by "consult[ing] the law that applied at the time of [the prior] conviction." 563 U.S. 816, 820 (2011). Before the Florida Supreme Court decided *Robinson* in 1997, the state's lower courts had divided on

the scope of the state's robbery offense. The divide arose in the aftermath of the Florida Supreme Court's decision in *McCloud v. State*, which stated that "[a]ny degree of force suffices to convert larceny into a robbery." 335 So. 2d 257, 258 (Fla. 1976). Relying on that principle, several of the state's intermediate appeals courts concluded that even a no-resistance snatching qualified as robbery. *See Robinson v. State*, 680 So. 2d 481 (Fla. Dist. Ct. App. 1996); *Larkins v. State*, 476 So. 2d 1383 (Fla. Dist. Ct. App. 1985); *Andre v. State*, 431 So. 2d 1042 (Fla. Dist. Ct. App. 1983). Because all of Orr's robbery convictions occurred between 1981 and 1987—after *McCloud* and long before *Robinson*—he argued that those convictions did not satisfy the "violent force" threshold under *Johnson 2010*.

3. The Fourth Circuit rejected Orr's arguments and affirmed his ACCA sentence. In doing so, the panel expressly followed three recent Eleventh Circuit decisions holding that Florida robbery qualifies as an ACCA predicate. App. 3a-4a. (citing *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); and *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016)).

The panel also expressly rejected Orr's argument that the *Robinson* standard—requiring "resistance by the victim that is overcome by the physical force of the offender"—encompassed conduct that fell short of *Johnson 2010*'s "violent force" standard. App. 4a. Although the panel did not specifically address the cases that apply *Robinson* to seemingly non-violent force—such as snatching money from the victim's grasp in *Sanders*—the panel found that "the weight of the case law"

requires "more than *de minimis* force." App. 4a. The panel went on to reject Orr's alternative argument by adopting the Eleventh Circuit's conclusion that the Florida Supreme Court's decision in *Robinson* "stated 'what the statute always meant.'" App. 5a (quoting *Fritts*, 841 F.3d at 943).

4. Orr filed a petition for panel or en banc rehearing, which the Fourth Circuit denied on June 12, 2017.

REASONS FOR GRANTING THE WRIT

I. The question presented has divided the courts of appeals.

Before this Court struck down the ACCA's residual clause in *Johnson v. United States*, 135 S. Ct. 2551 (2015) (*Johnson 2015*), the federal courts routinely held that state-law robbery offenses qualified as ACCA predicates under the residual clause. Now, with the residual clause out of the picture, the federal courts are repeatedly being asked to determine whether robbery offenses—including those that require only minimal force—satisfy the ACCA's force clause. In fact, since this Court struck the residual clause in June 2015, the courts of appeals have decided at least 27 cases addressing whether a robbery offense satisfies the ACCA's force clause.[2] Many more circuit-court cases analyze robbery offenses under the force

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[2] *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017) (Massachusetts armed robbery); *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (Maine robbery); *United States v. Scott*, --- F. App'x ---, 2017 WL 4547130 (4th Cir. 2017) (South Carolina armed robbery); *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017) (North Carolina robbery with a dangerous weapon); *United States v. Doctor*, 842 F.3d 306 (4th Cir. 2016) (South Carolina robbery); *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) (Virginia robbery); *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (North Carolina robbery); *United States v. Johnson*, --- F. App'x ----, 2017 WL 4005117 (6th Cir. 2017)

clause in other contexts, including under the Sentencing Guidelines and 18 U.S.C. § 924(c).[3] And district courts around the country are addressing these issues on a near-daily basis, most often in the type of oral ruling entered at the sentencing hearing in this case. App. 29a.

The analysis in these cases turns on the principles announced in this Court's previous categorical-approach cases. In *Moncrieffe v. Holder*, the Court explained that the categorical approach "focus[es] on the minimum conduct criminalized by the state statute." 569 U.S. 184, 191 (2013). Thus, the first step is to identify "'the

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(Ohio robbery); *United States v. Matthews*, 689 F. App'x 840 (6th Cir. 2017) (Michigan robbery); *United States v. Southers*, 866 F.3d 364 (6th Cir. 2017) (Tennessee robbery); *United States v. Patterson*, 853 F.3d 298 (6th Cir. 2017) (Ohio aggravated robbery); *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016) (Indiana robbery); *United States v. Swopes*, 850 F.3d 979 (8th Cir. 2017), *reh'g en banc granted, opinion vacated* (June 17, 2017) (Missouri second-degree robbery); *United States v. Johnson*, 688 F. App'x 404 (8th Cir. 2017) (Minnesota second-degree aggravated robbery); *United States v. Eason*, 829 F.3d 633 (8th Cir. 2016) (Arkansas robbery); *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) (Florida robbery); *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (California robbery); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery); *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017) (Oregon third-degree robbery); *United States v. Harris*, 844 F.3d 1260 (10th Cir. 2017) (Colorado robbery); *United States v. Nicholas*, 686 F. App'x 570 (10th Cir. 2017) (Kansas robbery); *United States v. Cherry*, 641 F. App'x 829 (10th Cir. 2016) (Oklahoma robbery); *United States v. Stokeling*, 684 F. App'x 870 (11th Cir. 2017) (Florida robbery); *United States v. Conde*, 686 F. App'x 755 (11th Cir. 2017); *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016) (Florida robbery); *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016) (Florida robbery); *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016) (Maryland robbery with a deadly weapon).

[3] *E.g., United States v. Salmons*, --- F.3d ---, 2017 WL 4542646 (4th Cir. 2017) (U.S.S.G. §§ 2K2.1 & 4B1.2); *United States v. Jones*, 854 F.3d 737 (5th Cir. 2017) (18 U.S.C. § 924(c)); *United States v. Chagoya-Morales*, 859 F.3d 411 (7th Cir. 2017) (U.S.S.G. § 2L1.2); *United States v. Bell*, 840 F.3d 963 (8th Cir. 2016) (U.S.S.G. §§ 2K2.1 & 4B1.2); *United States v. Maxwell*, 823 F.3d 1057 (7th Cir. 2016) (U.S.S.G. § 4B1.2); *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) (18 U.S.C. § 924(c)); *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016) (18 U.S.C. § 924(c)).

least of th[e] acts' criminalized" by the defendant's prior offense. *Id.* (quoting *Johnson 2010*, 559 U.S. at 137). For purposes of this analysis, "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute'" to the conduct identified as the least culpable. *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The courts must "then determine whether even those [least-culpable] acts are encompassed" within the relevant crime-of-violence definition. *Id.* (citing *Johnson 2010*, 559 U.S. at 137). In the force-clause context, this requires the courts to analyze whether the least-culpable conduct requires "*violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson 2010*, 559 U.S. at 140 (emphasis in original).

The courts of appeals are squarely divided on how these principles apply where a robbery offense, like Florida's, requires only the amount of force necessary to overcome a victim's resistance, no matter how minimal. The Ninth Circuit addressed the issue most recently in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017). Its analysis began with the text of the state statute, which requires "a taking of money or other property" through "the use of force, violence, assault, or putting in fear." Fla. Stat. Ann. § 812.13(1). The court observed that the statute "uses the terms 'force' and 'violence' separately, which suggests that not all 'force' that is covered by the statute is 'violent force.'" 870 F.3d at 900. Although not dispositive, the court stated that this construction provides "reason to doubt whether a conviction" under the statute "qualifies as a conviction for a 'violent felony.'" *Id.*

The court then analyzed the Florida Supreme Court's decision in *Robinson*, which interpreted the statute's force prong to require "resistance by the victim that is overcome by the physical force of the offender." *Id.* (quoting *Robinson*, 692 So. 2d at 886). Under *Robinson*, the court observed, "the amount of resistance can be minimal." *Id.* In setting out the overcomes-resistance standard, *Robinson* cited with approval a lower-court decision that explained the standard as follows:

> Although purse snatching is not robbery if no more force or violence is used than necessary to physically remove the property from a person who does not resist, if the victim does resist *in any degree* and this resistance is overcome by the physical force of the perpetrator, the crime of robbery is complete.

Id. (quoting *Mims v. State*, 342 So. 2d 116, 117 (Fla. Dist. Ct. App. 1977)) (emphasis added by *Geozos*). Thus, Florida law provides that "a person who engages in a non-violent tug-of-war with a victim over the victim's purse has committed robbery." *Id.* (citing *Benitez-Saldana v. State*, 67 So. 3d 320, 323 (Fla. Dist. Ct. App. 2011)). "[S]uch an act," the Ninth Circuit explained, "does not involve the use of violent force within the meaning of ACCA." *Id.* Thus, "Florida caselaw makes it clear that one can violate section 812.13 without using violent force." *Id.*

The Ninth Circuit acknowledged that its decision in *Geozos* creates a direct split with the Eleventh Circuit. Shortly after *Johnson 2010*, the Eleventh Circuit held in *United States v. Lockley*, 632 F.3d 1238 (11th Cir. 2011), that Florida robbery categorically satisfies the force clause. Relying on the state statute's requirement that the offense involve "the use of force, violence, assault, or putting in fear," the court reasoned that "the bare elements of § 812.13(1)" are enough to

satisfy the force clause. *Id.* at 1245. The court reached this conclusion without analyzing any of the state case law interpreting the statute's "force" component. *Id.*

In the wake of *Johnson 2015*'s voiding of the residual clause, the Eleventh Circuit has repeatedly reaffirmed *Lockley*'s holding. *See United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016); *United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016); *United States v. Stokeling*, 684 F. App'x 870 (11th Cir. 2017); *United States v. Conde*, 686 F. App'x 755 (11th Cir. 2017). In doing so, the court reasoned that the "overcomes resistance" standard adopted by the Florida Supreme Court in *Robinson* meets the requirements of the ACCA's force clause. *E.g.*, *Seabrooks*, 839 F.3d at 1343-44. As noted above, the Fourth Circuit expressly followed these Eleventh Circuit decisions in this case. App. 3a-4a.

The Ninth Circuit specifically addressed this rationale in *Geozos*. 870 F.3d at 901. In its view, the Eleventh Circuit's reasoning "overlooked the fact that, if the resistance itself is minimal, then the force used to overcome that resistance is not necessarily *violent* force." *Id.* (emphasis in original) (citing *Montsdoca v. State*, 84 Fla. 82, 93 So. 157, 159 (1922) ("The degree of force used is immaterial. All the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance.").

Besides contributing to this direct split on the ACCA status of a Florida robbery offense, the decision below illustrates some of the broader tensions among the various courts of appeals regarding the categorical approach's application in the context of robbery offenses. Granting review in this case would thus allow the Court

not only to resolve the specific question presented, but also to provide much-needed clarity on the contours of the force-clause analysis.

For example, the decision below reflects confusion about the role of the "realistic probability" standard. Some courts deem that standard satisfied if the reasoning of a state court decision would logically permit a prosecution for less-than-violent conduct, even if no such prosecution has resulted in a written appellate-court decision. *E.g.*, *United States v. Bell*, 840 F.3d 963, 966-67 (8th Cir. 2016). Others, including the Fourth Circuit in a prior decision, suggest that the standard can only be satisfied if the defendant identifies a particular case that sustains a conviction based on less-than-violent force. *E.g.*, *United States v. Doctor*, 842 F.3d 306, 311 (4th Cir. 2016); *United States v. Maxwell*, 823 F.3d 1057, 1062 (7th Cir. 2016); *United States v. Redrick*, 841 F.3d 478, 484-85 (D.C. Cir. 2016).

The decision below goes even further. Although Orr cited several state cases that affirmed robbery convictions based on less-than-violent force, the court did not address those decisions and instead held that the "weight of the case law" requires "more than *de minimis* force." App. 4a. The court further determined that the specific examples of no-resistance snatching cited by the Florida Supreme Court in *Robinson* were not enough to satisfy the "realistic probability" standard. App. 5a. This approach reflects the one taken by *United States v. Southers*, 866 F.3d 364, 367-68 (6th Cir. 2017), which likewise refused to consider state intermediate-appellate court decisions that applied a general standard announced by the state's highest court.

The decision below also illustrates the lingering uncertainty among the courts of appeals about how the categorical-approach analysis works when a state court decision (like *Robinson*) narrows the scope of an offense's elements after a defendant's conviction for that offense has become final. As explained above, the Fourth Circuit here joined the Eleventh Circuit in concluding that *Robinson*'s holding represented "what the statute always meant"—even though there had been a split of authority among the lower courts before the decision. App. 5a (quoting *Fritts*, 841 F.3d at 943).

Judge Martin disagreed with the Eleventh Circuit's decision on this point. *See Seabrooks*, 839 F.3d at 1346-52 (Martin, J., concurring in the judgment); *Stokeling*, 684 F. App'x at 872-76 (Martin, J., concurring). He interpreted this Court's decision in *McNeill* as requiring the courts "to analyze 'the version of state law that the defendant was actually convicted of violating.'" *Stokeling*, 684 F. App'x at 873 (quoting *McNeill*, 563 U.S. at 821). Applying that principle, he recognized that "[f]rom 1976 to 1997, the controlling precedent from the Florida Supreme Court held that '[a]ny degree of force suffices to convert larceny into a robbery." *Id.* at 874 (quoting *McCloud*, 335 So. 2d at 258). He then pointed to specific examples of robbery prosecutions involving less-than-violent force during the *McCloud* era to support his conclusion that *McCloud*-era robbery convictions should not be treated as ACCA predicates. *Id.* at 875 ("there is no erasing the fact that conduct involving minimal force was prosecuted as robbery when *McCloud* was the controlling precedent"); *Seabrooks*, 839 F.3d at 1351 ("So in the real world, people were being

prosecuted and convicted under Florida's robbery statute for using minimal force during the time that McCloud was the controlling precedent.").

Judge Martin's application of *McNeill* finds support in other recent categorical-approach cases. *See United States v. Roblero-Ramirez*, 716 F.3d 1122 (8th Cir. 2013) (considering Nebraska case law in effect at the time of defendant's conviction, even though the Nebraska Supreme Court later overruled that case law); *Bell*, 840 F.3d at 970 (Gruender, J., dissenting) (arguing that the categorical-approach analysis must be "based on Missouri law at the time of Bell's conviction").

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In sum, the decision below is part of an acknowledged conflict among the circuit courts on the specific question presented. Resolving that conflict would ensure uniformity in the law while also providing this Court with an opportunity to provide much-needed guidance on applying the general principles of the categorical approach in the force-clause context.

II. The question presented is important and frequently recurring, and this case presents an excellent vehicle to resolve it.

The ACCA is a frequently applied federal statute that carries harsh mandatory penalties, and this Court routinely grants certiorari to resolve disputes about its meaning. In the past 10 years, the Court has decided 11 cases that presented questions about the proper interpretation of the ACCA. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Sykes v. United States*,

564 U.S. 1 (2011); *McNeill v. United States*, 563 U.S. 816 (2011); *Johnson v. United States*, 559 U.S. 133 (2010); *Chambers v. United States*, 555 U.S. 122 (2009); *United States v. Rodriquez*, 553 U.S. 377 (2008); *Begay v. United States*, 553 U.S. 137 (2008); *Logan v. United States*, 552 U.S. 23 (2007); *James v. United States*, 550 U.S. 192 (2007).

The current split among the circuits arises in part because robbery is among the most common offenses invoked as a basis for the ACCA enhancement. Although the states' robbery statutes vary in some respects, the specific question presented here is certain to recur with great frequency because "the rule prevailing in most jurisdictions" requires resistance by the victim to sustain a robbery conviction. *Commonwealth v. Jones*, 283 N.E.2d 840, 844 (Mass. 1972) (citing, among other things, LaFave and Scott's well-known Criminal Law treatise). Two circuits have already addressed other state statutes that incorporate similar standards, and both have concluded that the offenses do not qualify as ACCA predicates. *United States v. Mulkern*, 854 F.3d 87 (1st Cir. 2017) (addressing Maine robbery statute that requires the intent to prevent or overcome resistance); *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017) (addressing similar Oregon robbery statute).

At least 26 states appear to define robbery using an overcomes-resistance standard similar to the one that Florida employs.[4] Thus, if the Eleventh Circuit's

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[4] Many states incorporate this standard directly into their robbery statutes. *See* Ala. Code § 13A-8-43; Alaska Stat. Ann. § 11.41.510(a)(1); Ariz. Rev. Stat. Ann. § 13-1902; Conn. Gen. Stat. Ann. § 53a-133; Del. Code Ann. tit. 11, § 831; D.C. Code Ann. § 22-2801; Haw. Rev. Stat. Ann. § 708-840; Me. Rev. Stat. tit. 17-A, § 651; Minn.

decisions are correct, these state offenses categorically satisfy the ACCA's force clause—even if the state courts interpret the overcomes-resistance standard to cover offenses involving less-than-violent force. On the other hand, if the Ninth Circuit is correct, then the categorical-approach analysis requires the courts to determine whether each state applies this standard (as Florida does) to cases involving less-than-violent force. Only this Court can resolve this conflict and ensure uniform application of the ACCA's harsh mandatory minimum penalties.

Moreover, this case is an excellent vehicle to resolve the question presented for at least two reasons. First, the question presented is dispositive: if Orr's Florida robbery convictions do not qualify as ACCA predicates, he would not be subject to the ACCA enhancement. Second, the issue comes before the Court on direct appeal and, thus, does not require the Court to parse through the unrelated issues that necessarily arise in the collateral-review context. In *Geozos*, for example, the Ninth Circuit resolved a hotly disputed issue about the circumstances in which collateral review is available for a second-or-successive petition under 28 U.S.C. § 2255(h)(2). 870 F.3d at 894-97. Because those knotty issues are absent in this case, it provides

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Stat. Ann. § 609.24; Mo. Rev. Stat. § 570.010; Nev. Rev. Stat. Ann. § 200.380; N.Y. Penal Law § 160.00; Okla. Stat. Ann. tit. 21, § 792; Or. Rev. Stat. § 164.395; S.D. Codified Laws § 22-30-2; Wash. Rev. Code Ann. § 9A.56.190; Wis. Stat. Ann. § 943.32. Others do so through case law. *See Gordon v. State*, 187 S.W. 913, 915 (Ark. 1916); *People v. Burns*, 92 Cal. Rptr. 3d 51, 56 (Cal. Dist. Ct. App. 2009); *Robinson v. State*, 692 So. 2d 883, 887 (Fla. 1997); *Bellamy v. State*, 750 S.E.2d 395, 396 (Ga. Ct. App. 2013); *People v. Taylor*, 541 N.E.2d 677, 679 (Ill. 1989); *Fetrow v. State*, 847 A.2d 1249, 1257 (Md. Ct. Spec. App. 2004); *State v. Welchel*, 299 N.W.2d 155, 159 (Neb. 1980); *State v. Curley*, 939 P.2d 1103, 1105 (N.M. Ct. App. 1997); *Durham v. Commonwealth*, 198 S.E.2d 603, 606 (Va. 1973).

a clean vehicle to resolve the question presented and provide guidance on the categorical approach's application in this context.

III. The decision below conflicts with this Court's precedent.

The Ninth Circuit's decision in *Geozos* faithfully applies this Court's precedent and resolves the question presented correctly. Applying *Moncrieffe*'s directive, it identifies the "least of the acts criminalized"—that is, a robbery effectuated by the use of "minimal" force to overcome a victim's "minimal" resistance. 870 F.3d at 899-901. To provide a real-world example of such conduct, the court highlighted a recent state-court decision affirming a robbery conviction against a defendant "who engage[d] in a non-violent tug-of-war with a victim over the victim's purse." *Id.* at 900 (citing *Benitez-Saldana*, 67 So. 3d at 323). This type of prosecution, the court reasoned, shows that the statute covers conduct that does not satisfy *Johnson 2010*'s "violent force" threshold. *Id.* at 901. It thus does not qualify as an ACCA predicate under the categorical approach. *Id.*

The decision below reached the contrary conclusion by misapplying this Court's categorical-approach precedent. First, the court did not identify the "least of the acts criminalized," as *Moncrieffe* requires. Instead, it asserted that the overcomes-resistance standard requires "more than *de minimis* force" without analyzing the real-world application of that standard. App. 4a. That approach conflicts with this Court's precedent, which has always considered the manner in which a state's lower courts implement abstract legal principles. *See James*, 550 U.S. at 202-03 ("Florida's lower courts appear to have consistently applied this

heightened standard [announced by the state supreme court]."); *Duenas-Alvarez*, 549 U.S. at 190-93 (analyzing California intermediate-appellate-court decisions to determine the scope of a state offense); *Moncrieffe*, 569 U.S. at 194 (citing Georgia intermediate-appellate-court decisions to confirm that "we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana").

Second, rather than analyze the least-culpable conduct covered by the statute, the court below relied on its conclusion that "the weight of the case law" required "more than *de minimis* force." App. 4a. Aside from lacking support in this Court's precedent, a "weight of the case law" approach veers perilously close to resurrecting the "ordinary case" analysis that bedeviled this Court (and others) in the residual-clause context before the *Johnson 2015* ruling. After all, how can a defendant know in advance what a sentencing judge will perceive the "weight of the case law" to require? And "[h]ow does one go about [this weighing]? A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *Johnson*, 135 S. Ct. at 2557. This Court has never used a "weight of the case law" approach under the force clause, and this case provides an important opportunity to provide clarity on that point.

Third, the court below concluded that Orr's examples of state prosecutions involving less-than-violent force were not enough to satisfy the "realistic probability" standard. App. 5a. That reasoning conflicts with this Court's decision in *Duenas-Alvarez*, which explains that a defendant may satisfy the "realistic

probability" standard by "point[ing] to . . . other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." 549 U.S. at 187. Orr met that burden by identifying both pre- and post-*Robinson* cases involving minimal force, and the district court erred by requiring more.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

October 26, 2017

Respectfully submitted,

Anthony Martinez
Federal Public Defender
Western District of North Carolina

Joshua B. Carpenter*
Appellate Chief
Federal Public Defender
Western District of North Carolina
One Page Ave., Suite 210
Asheville, C 28801
(828) 232-9992
*Counsel of Record for Petitioner

RECORD NO._____

In The
Supreme Court of The United States

RICHARD ARTHUR ORR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Federal Public Defender for the
Western District of North Carolina

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4455

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RICHARD ARTHUR ORR,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Statesville. Richard L. Voorhees, District Judge. (5:15-cr-00059-RLV-DCK-1)

Submitted: March 31, 2017 Decided: April 21, 2017

Before WILKINSON, NIEMEYER, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

John Parke Davis, Interim Executive Director, Joshua B. Carpenter, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Asheville, North Carolina, for Appellant. Jill Westmoreland Rose, United States Attorney, Amy E. Ray, Assistant United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Richard Arthur Orr appeals from his 180-month sentence, entered pursuant to his guilty plea to possession of a firearm by a convicted felon. At sentencing, Orr was found to be an armed career criminal. On appeal, he contends that his prior Florida robbery convictions were improper predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2012), and, as such, he was wrongly sentenced under the ACCA. We affirm.

The ACCA applies only if the defendant "has three previous convictions . . . for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). A felony is considered "violent" only if it "has as an element the use, attempted use, or threatened use of physical force against the person of another" or "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B). The Supreme Court has held that "'physical force' means violent force – that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

We look to state law to determine the minimum conduct required to commit an offense. *United States v. Doctor*, 842 F.3d 306, 309 (4th Cir. 2016), *petition for cert. filed* (Mar. 17, 2017) (No. 16-8435). Florida law defines robbery as

> the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear.

Fla. Stat. § 812.13(1).

Orr proffers various arguments in support of his contention that his Florida robbery convictions do not satisfy the ACCA's definition of a violent felony. First, Orr relies on our decision in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), which held that North Carolina common-law robbery is categorically not an ACCA predicate. In *Gardner*, we first examined whether "the minimum conduct necessary for a violation under state law" satisfies the "violent force" threshold described in *Johnson*. We concluded that, because "even de minimis contact can constitute the 'violence' necessary for a [North Carolina] common law robbery conviction," the offense does not qualify as an ACCA predicate. *Gardner*, 823 F.3d at 803. Orr contends that the Florida and North Carolina statutes and interpreting case law are functionally equivalent.

However, the Eleventh Circuit has concluded that a Florida robbery conviction under § 812.13(1) categorically qualifies as a "crime of violence" under the force clause of the career offender guidelines, which contains a force clause identical to the force clause in the ACCA. *United States v. Lockley*, 632 F.3d 1238, 1240 & n.1 (11th Cir. 2011). The court explained that § 812.13(1) requires either the use of force or violence, the threat of imminent force or violence coupled with apparent ability, "or some act that puts the victim in fear of death or great bodily harm." *Id.* at 1245. The court found "it inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force." *Id.* Thus, the Eleventh Circuit held that a conviction under § 812.13(1) categorically qualified as a predicate under the force clause of the career offender guidelines. *Id.* The Eleventh Circuit has since confirmed the continued validity of *Lockley*'s holding, even in light of more recent

developments. *United States v. Fritts*, 841 F.3d 937, 942 (11th Cir. 2016) (finding that *Lockley* was binding on the question of whether the defendant's Florida robbery conviction qualified as an ACCA predicate under the force clause), *petition for cert. filed* (Nov. 8, 2016) (No. 16-7883); *United States v. Seabrooks*, 839 F.3d 1326, 1342–43 (11th Cir. 2016) (same), *petition for cert. filed* (Feb. 16, 2017) (No. 16-8072).

While Orr correctly notes that these cases did not explicitly address whether the force required under the Florida robbery statute encompassed minimal-force offenses, all of the cited Eleventh Circuit cases were decided after the Supreme Court's decision in *Johnson*, which outlined the level of force required by the ACCA. Moreover, Florida state court decisions also support the conclusion that more than de minimis force is required for a robbery conviction. *See Robinson v. Florida*, 692 So. 2d 883, 886-87 (Fla. 1997) (holding that robbery requires showing of more force than that required simply to remove the property from the victim and that "there must be resistance by the victim that is overcome by the physical force of the offender"); *Owens v. Florida*, 787 So. 2d 143, 144 (Fla. Dist. Ct. App. 2001) (finding that, absent resistance or the holding or striking of the victim, the showing of force was insufficient to sustain conviction). Given the weight of the case law, we find that, contrary to Orr's argument, more than *de minimis* force is required under the Florida robbery statute, thus distinguishing this case from *Gardner*.

Next, Orr argues that, even if Florida's robbery statute currently requires more than *de minimis* force, this was not the case prior to the *Robinson* decision in 1997. Thus, all of Orr's Florida convictions which took place prior to 1997 (all but one of his robbery convictions) were improper ACCA predicates. The ACCA analysis is indeed a

backwards-looking inquiry that requires the court to consult the law at the time of the prior conviction. *McNeill v. United States*, 563 U.S. 816, 820 (2011). If there is a "realistic probability, not a theoretical possibility" that the state statute would have applied to conduct outside of the ACCA's definition of a "violent felony," then the state conviction is not an appropriate predicate. *See Gardner*, 823 F.3d at 803.

In *Fritts*, the Eleventh Circuit rejected a claim identical to Orr's, ruling that Florida's robbery statute has never included "mere snatching" because such a theft does not involve the degree of physical force necessary to sustain a robbery conviction. 841 F.3d at 942. The Eleventh Circuit ruled that, when the Florida Supreme Court decided *Robinson*, the Florida Supreme Court stated "what the statute always meant." *Id.* at 943. Based on the decision in *Fritt* and the limited relevance of Orr's cited supporting case law regarding pre-1997 law, we find that he has failed to show a "realistic probability" that, prior to 1997, the Florida robbery statute would be extended to non-violent crimes outside of the ACCA's definition.

Next, Orr contends that, even if the Florida statute has always required "violent" force, the offense would still not qualify as an ACCA predicate because the "putting in fear" component does not satisfy the force clause. Orr points to a "robbery by poison" to demonstrate a crime that would satisfy the Florida statute but not arise from violent, physical force. Orr relies on *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), which examined a California statute criminalizing a threat "to commit a crime which will result in death or great bodily injury." We ruled that the crime did not constitute a crime of violence under the Guidelines, reasoning that a crime may result in

death or serious injury without the use of physical force, such as in a case of poisoning. *Id.* at 166-69.

However, after *Torres-Miguel*, the Supreme Court held that the use of force in a poisoning is the "act of employing poison knowingly as a device to cause physical harm"; thus the administration of poison is the use of force, just as pulling the trigger of a gun is the use of force. *Castleman v. United States*, 134 S.Ct. 1405, 1414-15 (2014) (considering a state force clause and expressly declining to determine whether the statute required violent force under *Johnson*'s definition). Moreover, we have even more recently rejected the same argument proffered by Orr as applied to the federal bank robbery statute, noting that defendants failed to identify "a single bank robbery prosecution where the victim feared bodily harm from something other than violent physical force." *United States v. McNeal*, 818 F.3d 141, 156 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 164 (2016); *see also Lockley*, 632 F.3d at 1245 (finding "it inconceivable that any act which causes the victim to fear death or great bodily harm would not involve the use or threatened use of physical force"). Again, Orr's supporting case law is too equivocal to show a realistic probability that the Florida robbery statute would be applied to actions insufficient to satisfy the ACCA definition of a crime of violence.

Finally, Orr contends that his robbery convictions do not satisfy the force clause because the offense does not require an intentional use of force. Orr admits that our decision in *Doctor* is essentially fatal to his claim. In *Doctor*, we held that, because the defendant had not identified a single South Carolina robbery case "based on accidental,

negligent or reckless conduct," there was not a "realistic probability" that South Carolina would punish that conduct. 842 F.3d at 311. While Orr contends that the "realistic probability" test is not applicable to a determination of whether a state predicate is a crime of violence, we decided otherwise in *Gardner*. 823 F.3d at 803. In both *Gardner* and *Doctor*, we looked to the lack of actual prosecutions for non-violent conduct under the relevant statute as one factor to be considered, along with state case law interpreting the statute, in determining the breadth of the statute. *See id.*; 842 F.3d at 311. Because Orr concedes that, if *Doctor* is applied, his claim is foreclosed, his claim is without merit.

Accordingly, we find that Orr's prior Florida robbery convictions constituted crimes of violence under the ACCA.* Thus, Orr was properly sentenced as an armed career criminal, and we affirm his sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* Because Orr was sentenced to the statutory mandatory minimum under the ACCA, we decline to address Orr's claim that his Guidelines range was incorrectly calculated.

FILED: June 12, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4455
(5:15-cr-00059-RLV-DCK-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICHARD ARTHUR ORR

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Niemeyer, and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
Western District of North Carolina

UNITED STATES OF AMERICA	)	**JUDGMENT IN A CRIMINAL CASE**
	)	(For Offenses Committed On or After November 1, 1987)
V.	)	
	)	
RICHARD ARTHUR ORR	)	Case Number: DNCW515CR000059-001
	)	USM Number: 30408-058
	)	
	)	Cecilia Oseguera
	)	Defendant's Attorney

THE DEFENDANT:

☒ Pleaded guilty to count(s) 1.

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

☐ Was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:922(g)(1) & 924(e)	Unlawful possession of a firearm, in and affecting commerce by a convicted felon	5/2/15	1

The Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

☐ The defendant has been found not guilty on count(s).

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

IT IS ORDERED that the Defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 7/18/2016

Signed: July 20, 2016

Richard L. Voorhees
United States District Judge

Defendant: Richard Arthur Orr
Case Number: DNCW515CR000059-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED EIGHTY (180) MONTHS.

☒ The Court makes the following recommendations to the Bureau of Prisons:
- Participation in any available educational and vocational opportunities.
- Placed in a facility as close to Newton, NC, as possible, consistent with the needs of BOP.

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

☐ The Defendant shall surrender to the United States Marshal for this District:

☐ As notified by the United States Marshal.
☐ At _ on _.

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

☐ As notified by the United States Marshal.
☐ Before 2 p.m. on _.
☐ As notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____
United States Marshal

By: _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

☐ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the Court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively; The defendant shall refrain from obstructing or attempting to obstruct or tamper, in any fashion, with the efficiency and accuracy of any prohibited substance testing or monitoring which is (are) required as a condition of supervision.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office, vehicle and/or any computer system including computer data storage media, or any electronic device capable of storing, retrieving, and/or accessing data to which they have access or control, to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.
25. The defendant shall participate in transitional support services under the guidance and supervision of the U.S. Probation Officer. The defendant shall remain in the services until satisfactorily discharged by the service provider and/or with the approval of the U.S. Probation Officer.

Defendant: Richard Arthur Orr
Case Number: DNCW515CR000059-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$100.00	$0.00	$0.00

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

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

☐ The defendant shall pay court appointed counsel fees.

☐ The defendant shall pay $0.00 towards court appointed fees.

Defendant: Richard Arthur Orr
Case Number: DNCW515CR000059-001

SCHEDULE OF PAYMENTS

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

A ☐ Lump sum payment of $___ due immediately, balance due
☐ Not later than_____
☐ In accordance ☐ (C), ☐ (D) below; or

B ☒ Payment to begin immediately (may be combined with ☐ (C), ☐ (D) below); or

C ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $50.00 to commence 60 (E.g. 30 or 60) days after the date of this judgment; or

D ☐ Payment in equal Monthly (E.g. weekly, monthly, quarterly) installments of $ 50.00 to commence 60 (E.g. 30 or 60) days after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: any properties identified by the United States. The Consent Order and Judgment of Forfeiture filed on 2/23/16, document number 17, will be incorporated into this judgment.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 200 West Broad Street, Room 100, Statesville, NC 28677, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

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

STATEMENT OF ACKNOWLEDGMENT

I understand that my term of supervision is for a period of _____months, commencing on _____.

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I understand that revocation of probation and supervised release is mandatory for possession of a controlled substance, possession of a firearm and/or refusal to comply with drug testing.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ Date: _____
Defendant

(Signed) _____ Date: _____
U.S. Probation Office/Designated Witness

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
(Statesville Division)

UNITED STATES OF AMERICA, Plaintiff,	:	
vs	:	Criminal Action:5:15-CR-59
RICHARD ORR, Defendant.	:	

Monday, July 18, 2016
Statesville, North Carolina

The above-entitled action came on for a Sentencing Hearing Proceeding before the HONORABLE RICHARD L. VOORHEES United States District Judge, commencing at 2:10 p.m.

APPEARANCES:
On behalf of the Plaintiff:
JENNIFER DILLON, Esquire
U. S. Attorney's Office
227 W. Trade Street, Suite 1650
Charlotte, North Carolina 28202

On behalf of the Defendant:
CECILIA OSEGUERA, Esquire
Federal Defenders of Western NC
129 W. Trade Street, Suite 300
Charlotte, North Carolina 28202

I N D E X

P R O C E E D I N G S

THE COURT: Is your name Richard Arthur Orr?

THE DEFENDANT: Yes, sir.

THE COURT: Did you come before Judge Keesler back on February 23rd 2016 and plead guilty in your case?

THE DEFENDANT: Yes, sir.

THE COURT: Are you pleading guilty to the charge in Count One of the Bill of Indictment, a charge of possession of a firearm by a felon?

THE DEFENDANT: Yes, sir.

THE COURT: Do you think you understand the nature of that charge and the possible penalties?

THE DEFENDANT: Yes, sir.

THE COURT: And are you fully satisfied with the services of your attorney in this matter?

THE DEFENDANT: I am.

THE COURT: Are you pleading guilty freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Did you commit that offense?

THE DEFENDANT: Yes, sir.

THE COURT: Is there a stipulation between the parties to the existence of an independent basis in fact to support the plea containing the essential elements of the offense charged?

MS. DILLON: Yes, Your Honor.

MS. OSEGUERA: So stipulated by the defendant subject to any objections, Your Honor.

THE COURT: Thank you. Given the stipulation, the plea of guilty, and the admissions of defendant, the Court finds there is such a factual basis and will adjudge the defendant guilty and reaffirm its acceptance of the plea. Would you be heard on your objections?

MS. OSEGUERA: Yes, Your Honor, please.

THE COURT: You may proceed.

MS. OSEGUERA: Thank you, Your Honor. I did e-mail the prosecutor earlier this afternoon. I just wanted to note two objections for the record just briefly before I get into the objections that are more substantive. The first one my client wanted me to note Your Honor was that federal bank robbery is no longer a crime of violence or a violent felony.

THE COURT: Would you pull that mike over in your direction? Thank you.

MS. OSEGUERA: Yes, Your Honor. I just wanted to make first two brief -- one brief objection. I just wanted it noted for the record that -- and my client wanted me to make this argument, that federal bank robbery is no longer a crime of violence or violent felony. I acknowledge, Your Honor, that the Fourth

Circuit has ruled against us in *McNeil,* and so I just wanted to note the objection on the record for my client.

The other objection that my client wanted me to note, or he wanted me to preserve, actually, was the *Apprendi* issue in this matter, and I wanted to note that for the record as well.

THE COURT: All right.

MS. OSEGUERA: I do now want to get into my substantive arguments. The first argument, Your Honor, is the four level enhancement for using the firearm. There was an allegation that my client used the firearm in connection to a felony. The presentence report increased the base offense level by four levels at paragraph 17. My client argues, Your Honor, that there was no felony offense being committed, it was a misdemeanor breaking and entering, and that the four level enhancement should not apply for committing this offense, which is the gun offense, subsequent to committing or while or during committing another felony offense.

THE COURT: Do you want to be heard on that or do you stand on the presentence report?

MS. DILLON: We'll stand on the presentence report, Your Honor.

THE COURT: All right. That objection is

overruled, the Court finding that the matter does qualify for the enhancement by the preponderance of the evidence.

MS. OSEGUERA: Your Honor, the second objection I have was to PSR in paragraph 23. The argument is that my client is not -- is not an armed career criminal. And I'm only discussing the state of Florida robbery convictions in this case. I acknowledge that under the *McNeil* case that the Fourth Circuit has held that federal bank robbery is a crime of violence. So that -- I am not addressing that issue in the arguments, that charge. Your Honor, with regards to the prior Florida convictions. Those are not violent felonies. And I said crimes of violence, but I'm arguing they are not violent felonies for armed career criminal purposes.

Just recently, in June of this year, Your Honor, the Supreme Court in *Mathis* discussed an issue similar to this. This had to do with the elements of the offenses and what constitutes a violent felony for armed career criminal purposes. And in that case, Your Honor, the Court -- the Court held that if the crime of conviction -- and in this case the crimes of conviction which are the federal -- I'm sorry, the state of Florida, prior convictions covers more conduct than the generic offense then it's not an Armed Career Criminal Act crime even if the defendant's actual conduct fits within the generic

offense's boundaries.

So the issue here is looking at these federal -- these Florida state robbery convictions. And there's a little confusion here because my client was convicted of these state robbery convictions at a time when the statute was clearly indivisible. And what I mean, Your Honor, is that at the time of my client's convictions in the early 1980s and until, I believe, like 1987, 1988, that particular statute, the robbery statute in the state of Florida, set out a single set of elements to define this single crime of robbery.

And in this case Your Honor, my client -- the degree of force that was necessary to commit this state court robbery is not the same degree of force that's necessary to violate the Armed Career Criminal Act, the 924(e) statute, because, Your Honor, prior to the 1990s when my client committed the state offense, the robbery, all that was required was de minimus force to commit the offense. And because of that, Your Honor, the Supreme Court has also held in *Moncrieffe*, if I'm pronouncing that right, that we have to look at the least culpable conduct, the least culpable conduct in that state's statute. And the least culpable conduct in that state's statute could be committed, that robbery conviction, by committing -- it's de minimus force, Your Honor. So that

is not enough to satisfy the force required under the armed career criminal statute.

Your Honor, since that statute, that state statute in Florida, is not divisible, we have to assume here that my client did not commit a robbery -- the robbery that's required under the Armed Career Criminal Act -- did not commit the crime with the required force for armed career criminal. And at this point I am not going to make anymore argument. I do want to hear what the government has to say, and I will more than likely respond to the government's argument once they're finished.

THE COURT: All right. We'll hear from the government.

MS. DILLON: Thank you, Your Honor. Your Honor, the government does agree that the statute is not divisible in this case. It wasn't divisible in the 1980s and it's not divisible today. Looking at the statutes, Your Honor, the part of the statute that is important is the language that in 1981 required that the means of taking be done by force, violence assault, or putting in fear. Both statutes required that, both the statute in the '80s and the statute today. Your Honor, that language has been found in the Eleventh Circuit to require violent force. And the case law currently in the Eleventh Circuit is that categorically the statute

satisfies the elements clause because the use of force, violence assault, or putting in fear require, per Florida robbery, necessarily requires the use, attempted use, or threatened use of physical force against the person of another as set forth in Title 18, United States Code, Section 924(e)(2)(B)(i).

So, Your Honor, we are saying -- the government is saying that this statute is categorically a crime of violence, that the elements that are set forth back in the '80s and still today require an attempted use or threatened use of physical force against another person. Specifically, Your Honor, in *United States versus Lockley*, which is 632, F.3d, 1238, an Eleventh Circuit case in 2011. That was a post-*Johnson* one decision. And that case held that Florida attempted robbery is a crime of violence under the sentencing guidelines elements clause.

There has been no case, Your Honor, that is directly on point holding that this statute in the '80s or today is overly broad and includes conduct that is de minimus. There was a case that the defense has cited, which is *Welch*, 683, F.3d -- I'm only seeing a pin cite, Your Honor, but one of the pages is 1,312. That case discussed the matter slightly but declined to distinguish *Lockley*, saying that we see no reason not to apply

Lockley to a case addressing whether Florida robbery is a violent felony under the Armed Career Criminal Act. We also see no reason not to apply *Lockley* to the 1996 Florida robbery statute. I believe they're discussing even if robbery at the time could be accomplished by mere snatching. So one of the things that they were discussing, Your Honor, in *Welch* was whether mere snatching, let's say, of a pocketbook could constitute a robbery under Florida law.

There is a case, Your Honor, that I found today which is *Robinson versus State of Florida*. It's a Supreme Court case *692, South 2d, 883* decided in 1997. In that case, Your Honor, the court explained that in order for snatching of property of another -- in order to amount to robbery under the Florida robbery statute, the perpetrator must employ more than the force necessary to employ the force to remove the property from the force. There must be the force of the victim that is overcome by the force of the offender. And the statute itself, Your Honor, and why the government says that this is categorically a violent felony is that the statute itself requires that it be by force, violence assault, or putting in fear.

So when *Welch* was looking at whether the mere purse snatching was going to be -- was a violent felony

and whether that was in keeping with the statute as it is laid out, the court said that that isn't a cut and dry issue. It declined to address it and just found that -- found it under the residual clause at that time. Obviously now the residual clause is no longer. But the Eleventh Circuit is currently looking at this issue itself, Your Honor, which is why the government waited until last week to file a response, because we were hoping that a decision would have come out before today.

That all being said, Your Honor, back in a case in 1922 of -- I think it's *Montsdoca versus State* -- M O N T S D O C A -- *93, South 157-158*. Even in that case, Your Honor, in 1922 it stated that Florida's robbery conviction, the force that is required to make the offense of a robbery is such force as is actually sufficient to overcome the victim's resistance. So going back even in the history of the Florida robbery statute dating back to 1922, Your Honor, it shows that some kind of force and violent force of overcoming the victim was required.

For all these reasons, Your Honor, and for all the reasons stated in the government's response, the government does believe that the Florida robbery statute, as it is today and as it was in the 1980s, is a crime of violence. It sets forth that it is a crime of violence

in the actual words of the statute itself. That language clearly falls under the use the attempted use of physical force as required by the armed career criminal statute. For all those reasons, Your Honor, we ask that the objection be overruled. Thank you.

THE COURT: Do you want to be heard any further?

MS. OSEGUERA: Yeah. May I briefly respond, Your Honor? With regards to the *Lockley* case that the government cited to. We also cited to that case in our brief. The Eleventh Circuit, Your Honor, has not held that the Florida -- this Florida statute in question has satisfied the elements clause. That's the big issue right now in the Eleventh Circuit. *Lockley*, Your Honor, is discussing the amendment or the robbery statute after it was amended, not when my client pled guilty. So *Lockley* applies to after the 1990s and the Florida robbery statute in question, not when my client was convicted of the charge.

The other issue, Your Honor, I wanted to address we cited Your Honor to *McLeod versus State*. It is -- it's a Florida Supreme Court case and it does state -- and this is a case for from 1976, Your Honor, with regards to the Florida state statute that any degree of force suffices to convert the larceny into a robbery. Your Honor, that's important because that means that when

my client was convicted of that state robbery statute that included purse snatching, snatching someone's purse. It did not, it absolutely did not -- did not require that force necessary under the Armed Career Criminal Act.

The other issue, Your Honor, the government did provide me with a case from 1997, it's the *Robinson* case, Supreme Court of Florida. Again, Your Honor, this is a 1997 case. And that -- the force there again does not rise to the violence that's required under *Johnson*. *Johnson* 2010 requires physical pain and is a substantial degree of force. That was not required in the Florida statute pre-1990s when my client was convicted of the offense.

So I'm asking Your Honor to take all those into consideration. That Florida statute at this point cannot be interpreted -- the state statute cannot be interpreted to require the force that's required by the armed career criminal clause act.

MS. DILLON: Your Honor, if I could just respond to the issue in *McLeod*, because I just want our position on the record. In *Robinson*, Your Honor, it's stated that in interpreting the robbery statute this court has recognized force, violence assault, or putting in fear as a necessary element of robbery citing numerous cases. It does say that in *McLeod versus State, 335, South 2d, 257*

Florida 1976, any degree of force, including that used to snatch money from a person's hand, was force sufficient to satisfy the force element in robbery citing and ray another case.

In *McLeod* we did say any force suffices to convert robbery into robbery, citing *McLeod*. However, the perpetrator in *McLeod* gained possession of his victim's purse by exerting physical force to extract it from her grasp. The victim carried her handbag by a strap which she continued to hold onto after the perpetrator seized the handbag. She released the strap only after she fell to the ground, thus taking -- thus, the taking was accomplished with more than the force necessary to remove the property from the victim. The Court went on to say: In accord did with our decision in *McLeod* we find that in order for the removing of property from another to amount to robbery the perpetrator must employ more than the force necessary to remove the property from the person. Rather, there must be resistance by the person that is overcome by the physical force of the offender. The snatching or grabbing of property without such resistance by the victim amounts to theft rather than robbery.

And I think, Your Honor, the court made this distinction because they want their case law and wanted their case law to be in accordance with the statute which

requires by -- that the taking be by force, violence, assault, or putting in fear. That's why the Supreme Court in *Robinson* made it very clear that the mere snatching of someone's property without their knowledge is going to be a theft. However, the taking with resistance and by use of force is going to be a robbery. Thank you.

THE COURT: All right. The Court finds that the objection is not meritorious and is therefore overruled. The evidence and much more importantly the law, which has been well vetted by the parties, favors the government. Consequently, the objection will not be sustained, and the calculations in the presentence report are adopted.

The Court finds the presentence report is credible and reliable and that it accurately scores the offense level at 30, criminal history category of IV, putting the defendant in a guideline range where 180 months is the low end and high end as far as guidelines are concerned.

You may be heard, Ms. Oseguera.

MS. OSEGUERA: Thank you, Your Honor. A sentence at the low end of the guidelines in this case of 180 months, which is statutory mandatory, is sufficient but not more than necessary to satisfy the 3553(a) factors. Your Honor, I'll be heard just briefly. My client was working before he was placed in custody. He would still

have a job today. His employer is in -- is ill right now, I believe in hospital, Mr. Mike Faulkner, so he wasn't able to come today. I just want -- it's important to note that, you know, once my client was released from prison he seemed to be, up until this offense, leading a law-abiding life, and so that's very important to note also for the record. He has a job.

A sentence, Your Honor, at the low end of the guideline range, or in this case the mandatory minimum, will promote respect for the law and will serve as adequate deterrence. That's a significant amount of time in custody for my client. It reflects his history and characteristics. His lifelong partner would like to address the Court. Would now be a proper time for that?

THE COURT: Yes.

MS. OSEGUERA: Her name is Dawn George, Your Honor. I'm mispronouncing her name. Her name is Dawn Gouge, Your Honor.

MS. GOUGE: Your Honor, thank you.

THE COURT: Yes, ma'am.

MS. GOUGE: I lived and worked with Richard for three years. And I don't know if you've ever done that, but you really get to know somebody when you're with them that amount of time. Richard is -- first of all, he was honest with me. I know he was honest with me about his

past from the very beginning. I know all about it. He was -- he is not that person. He's absolutely not that person. He would get up at 3:30 in the morning and would type daily notes. We worked on a billion-dollar job site. They were -- we were building the data center, and he would type up daily notes. He knew every sub on the job. He knew every piece of material. He knew everything. He had everyone's respect on that job site, and that superintendent leaned on him for every answer. The job wouldn't have gotten done had it not been for him. I am a worker but he's ridiculous.

He told me once -- I was a foreman on the job, also, and he called me on the radio and he said you need to go here and clean up this water. And I said, on the radio, across the radio where everybody could hear, I said you mean the sewer water? So he caught me later and he said, Dawn you have no finesse. I said I know but I have truth. See, I've watched my brother lie for years and get in trouble for it so I learned how to tell the truth at an early age. So I hope what I'm going to tell you about Richard sinks in. Okay?

I'm going to say this. He told me, he said, when I was young and had a suitcase full of money I used to look around and wonder why these people were working. And he looked at me and he said now I know. He is not

that person anymore. He's better than you know, better than you know. Children gravitate to him, and animals. He is the most gentle, loving, giving, supportive, intelligent man I have ever met.

I always considered myself one hell of a worker but he puts me to shame. Just so you know, I am not -- I was raised by my mother and father. My mom was a stay at home mom. So I am not -- we moved all over the world, so I have a good education and I'm well traveled. I'm not stupid and I don't let people pull the wool over my eyes. I know the man, and I pray that you show him as much mercy as possible because he did what he did because my purse had been stolen and -- but he did what he did because of his love for me. So please, please show him some mercy.

THE COURT: Thank you.

MS. GOUGE: I beg you and thank you for the opportunity to speak.

THE COURT: Yes, ma'am.

THE DEFENDANT: Yes, sir. Thank you for this opportunity to address the Court. As Dawn was saying, I'll try to make this short. I was sentenced to 30 years. I did 15 years. That was enough for me. I would have never thought I would get in trouble again. In 2010 I had my own construction company and 15 acres. I had

that gun because I had 15 acres. There was great big dogs, animals, everything. I tried to throw that gun away two or three times but I never did. I didn't want to throw it out the window and have some kid pick it up, or throw it in a dumpster and get 15 years for it. It's inexcusable to even have that gun.

I was in charge, solely in charge, of three, four, 500 people on the job site. I was the only one in the field that they would report to. I only say that to say this, that I was totally in charge of the situation at the time. I did not go to that house to hurt nobody, and I would not -- yeah. I'm 52 years old. It's inexcusable. No excuse. Thank you.

THE COURT: All right, sir. Thank you.

MS. DILLON: Thank you, Your Honor. Your Honor, the government agrees with the 180-month sentence today. The defendant, Your Honor, has been convicted of, I believe, approximately ten robberies. One of them, Your Honor, in 1988, was prosecuted federally in The Southern District of Florida. I believe the defendant was found to be an armed career criminal then and received 15 years' imprisonment for that offense. Mr. Orr, on May 2nd of 2015, went over to a home of a person that he believed took or stole his girlfriend's pocketbook. He went over there with a firearm, I believe a loaded

revolver, that had three rounds in it.

He went into that home, knocked on -- went to that home, knocked on the door, and asked for a specific person. The person's father said that he was not home, and Mr. Orr then opened the door and went into the house. There were five residents that were at the home at the time. Each of the witnesses in the residence confirmed that Mr. Orr pointed the gun in their direction when he entered the home. One of the individuals spoke with Mr. Orr and convinced him to go outside, and that individual and Mr. Orr did go out to the carport. At that time, or very soon after, deputies arrived and ordered Mr. Orr to drop the firearm.

You know it's sad to see someone like Mr. Orr who seems to have a job and may have for a while gotten his life back on track make the mistake of possessing a firearm when he knew that he couldn't, Your Honor, because people like Mr. Orr are the types of people that the government has deemed that are unfit to have firearms and that's why Mr. Orr is facing the 180-month sentence that he is today. Mr. Orr is still young, Your Honor, and we're hoping that during his time of incarceration that he will learn his lesson and come out better and prepared to engage himself in society once again in a nonviolent manner, and that he will refrain from

possessing firearms in the future. The government does believe, Your Honor, that the 180-month sentence does comport with all the factors set forth in 3553(a). Thank you.

THE COURT: All right. Thank you. The Court will sentence at the mandatory minimum, finding that is a sentence that will address the conduct and history and characteristics of the defendant in accordance with the scoring of the offense level under the guidelines. So, pursuant to the Sentencing Reform Act of 1984, the *Booker* case, and *18, U.S. Code 3553(a)*, the defendant is committed to custody for a term of 180 months.

He will be allowed to participate in any educational and vocational opportunities while incarcerated.

Upon release he'll be on supervised release for five years. Within 72 hours of release from custody he shall report in person to the probation office in the district to which he is released. While on supervised release he shall not commit another federal, state or local crime and shall comply with the standard conditions that adopted by this court.

It is further ordered that he pay the United States a special assessment of $100.

He does not have the ability to pay a fine or

interest or attorney's fees.

Other factors supporting the sentence would be, in particular, protection of the public, and reflecting the defendant's criminal history.

He shall forfeit his interest in any properties identified by the United States. If there is a forfeiture judgment in the file that would be incorporated into the judgment that would be document number 17.

Would he wish to be placed at a particular location?

MS. OSEGUERA: Yes, Your Honor. He's asking as close to Newton, North Carolina as possible.

THE COURT: All right. I'll make that recommendation.

MS. OSEGUERA: Thank you, Your Honor.

THE COURT: You have a right to appeal to the Fourth Circuit Court of Appeals. Would you be filing a notice of appeal?

MS. OSEGUERA: Yes, Your Honor, he will.

THE COURT: All right. You will take care of that for us.

MS. OSEGUERA: I will do that.

THE COURT: Anything further?

MS. OSEGUERA: Nothing further, Your Honor.

Thank you.

MS. DILLON: No, Your Honor. Thank you.

THE COURT: All right.

(Off the record at 2:45 p.m.)

CERTIFICATE

I, Tracy Rae Dunlap, RMR, CRR, an Official Court Reporter for the United States District Court for the Western District of North Carolina, Asheville Division, do hereby certify that I transcribed, by machine shorthand, the proceedings had in the case of UNITED STATES OF AMERICA versus RICHARD ORR, Criminal Action 5:15-CR-59, on July 18, 2016.

In witness whereof, I have hereto subscribed my name, this 12th day of August, 2016.

__/S/__Tracy Rae Dunlap__
TRACY RAE DUNLAP, RMR, CRR
OFFICIAL COURT REPORTER