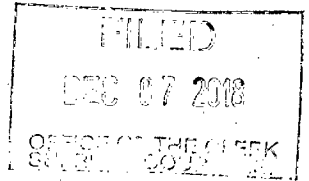


No.

18-7984



IN THE

SUPREME COURT OF THE UNITED STATES

JAMES SCOTT ERVIN, Jr., — PETITIONER  
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Fourth Circuit  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Ervin Scott, Jr. #33140-058  
(Your Name)

POB 725 FCI Edgefield  
(Address)

Edgefield, South Carolina 29824  
(City, State, Zip Code)

(Phone Number)

### **QUESTION(S) PRESENTED**

I. Did the Fourth Circuit Court of Appeals violate the Petitioner's rights to due process by not following this Court's prior holdings, when it determined that North Carolina General Statute § 14-87 was a violent felony for the purposes of sustaining a predicate offense for the Armed Career Criminal Act, although the statute does not have as an element, the use, attempted use, or threatened use of violent physical force as required under 18 U.S.C. § 924(e)(2)(B)(i)?

## LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 729 Fed. Appx. 268; 2018 U.S. APP. LEXIS 18295  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at N/A; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at N/A; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 5, 2018.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 7, 2018, and a copy of the order denying rehearing appears at Appendix B<sup>3</sup>.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act ("ACCA"), which provides in pertinent part:

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection —

\* \* \* \*

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

(i) has as an element the use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involving use of explosives; or otherwise involves use of explosives.

Section 14-87 of the North Carolina General Statute Annotated provides:

(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means; whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property, from another or from any place of business, residence, or banking institution or any other place where there is a person or persons in attendance at anytime, either day or night, or who aids; or abets any such person or persons in the commission of such crime, shall be guilty of a class D felony.

N.C. Gen. Stat. Ann. 14-87 (2016)

(Note: This statute has not been amended since Petitioner's offense.)

## STATEMENT OF THE CASE

On September 21, 2016, a grand jury indicted Mr. Ervin with One Count of Possession of a Firearm By a Felon in violation of 18 U.S.C. § 922(g)(1).

On March 16, 2017, Mr. Ervin pleaded guilty without a plea agreement in place.

Following Mr. Ervin's guilty plea the Probation Department recommended he be sentenced as an Armed Career Criminal with a guideline range between 188-235 months imprisonment.

The Petitioner objected to the Armed Career Criminal designation, but was later sentenced to a 188 term of imprisonment in November of 2017.

Mr. Ervin subsequently attempted to appeal, however appellate counsel, refused to challenge the Armed Career Criminal designation based upon the argument that Robbery With A Dangerous Weapon in North Carolina is not a violent felony under the ACCA.

The Court of Appeals for the Fourth Circuit ultimately denied the Petitioner's appeal.

## REASONS FOR GRANTING THE PETITION

This Court should grant the Writ due to the decision from the Fourth Circuit Court of Appeals finding that North Carolina General Statute §14-87, to be a violent felony under the ACCA.

This case is an important matter of criminal law and has the impact of significantly raising a defendant's statutory sentence causing the defendant to have a sentence above the maximum sentence allowed under the law pursuant to Title 18 U.S.C. §922(g).

The Fourth Circuit Court of Appeals decision in finding that G.S. §14-87 is a violent felony failed to follow this Court's procedures and the process in that decision.

~~The~~ The Fourth Circuit failed to find the minimum culpable conduct as required under *MONCRIEFFE v. HOLDER*, 569 U.S. 727 (2013).

2. The Fourth Circuit Court of Appeals failed to utilize the state court decisions from the state of North Carolina; instead opting to use South Carolina state court decisions in determining whether or not a state crime meets the criteria to be labeled a violent felony under the ACCA in violation of *JOHNSON v. UNITED STATES*, 559 U.S. 133, 130 S.Ct. 1265, 176 L. Ed. 2d 1 (2010). (*JOHNSON I*).

The Fourth Circuit did not find that N.C.G.S. §14-87 has as an element the use, attempted or threatened use of violent physical force under the ACCA as defined in *JOHNSON I*.

I.

DETERMINING IF A STATE CRIME  
IS A VIOLENT FELONY UNDER THE ACCA  
AS INSTRUCTED BY THE SUPREME COURT  
IN MONCRIEFFE V. HOLDER  
& JOHNSON V. UNITED STATES  
(Johnson I)

A crime only qualifies as a violent felony under the force clause if it has as an element the use, attempted use, threatened use of physical force against the person of another. 18 U.S.C. § 924(e)(2)(B)(i).

The Supreme Court has interpreted this language to mean that courts must take the categorical approach to determine whether a defendant's prior conviction for a certain crime satisfies the force clause. SHEPARD V. UNITED STATES, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

Using this approach, the question does not turn upon whether a defendant used, attempted to use, or threatened to use violent force in committing the crime, but on whether the use, or threatened use of violent force is required to satisfy one of the crimes elements. DESCAMPS V. UNITED STATES, 570 U.S. 254, 257, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013).

A court determining whether a crime satisfies the force clause does not focus on the name of the offense or what someone might have done in committing the offense. TAYLOR V. UNITED STATES, 495 U.S. 575, 602, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). Instead, one considers only whether the least serious conduct for which there is a realistic probability of a charge and conviction necessarily involves the use of violent force. See MONCRIEFFE V. HOLDER.

Federal courts should be informed by the state court's highest court, while the intermediate appellate court decisions constitute the next best indicia of how a state interprets its own statutes. See Johnson I, 559 U.S. at 138.

## II.

### THE

#### BURNS-JOHNSON DECISION

The Fourth Circuit Court of Appeals denied the Petitioner relief based upon the decision in UNITED STATES v. BURNS-JOHNSON, 864 F. 3d. 313 (4th Cir. 2017) on July 18, 2017.

The Fourth Circuit found that Robbery With a Dangerous Weapon (RWDW), North Carolina Gen. Stat. § 14-87 is categorically a violent felony under the ACCA.

The Fourth Circuit based the BURNS-JOHNSON decision upon another Fourth Circuit decision in UNITED STATES v. DOCTOR, 482 F. 3d. 306, 307 (4th Cir. 2016) foreclosing the BURNS-JOHNSON argument by stating that the argument is "foreclosed due to our prior decision in DOCTOR."

When determining the decision in BURNS-JOHNSON, the Fourth Circuit relied on the state court decisions from the State of South Carolina and its definition of Strong Armed Robbery from that state.

## III.

THE FOURTH CIRCUIT FAILED TO FOLLOW  
TO FOLLOW CORRECT PROCEDURE WHEN  
IT FOUND THAT N.C.G.S. § 14-87 IS  
CATEGORICALLY A VIOLENT FELONY  
UNDER THE ACCA'S FORCE CLAUSE

In determining the decision in BURNS-JOHNSON the Fourth Circuit did not find the minimum conduct as required under MONCRIEFFE v. HOLDER.

The Burns-Johnson decision relied upon a prior Fourth Circuit decision in DOCTOR v. UNITED STATES, 842 F. 3d. 306, 308, (4th Cir. 2013).

The Fourth Circuit's denial in BURNS-JOHNSON was summed up with the following:  
"BURNS-JOHNSON's argument is foreclosed by our recent decision in UNITED STATES v. DOCTOR, 842 F. 3d. 306.

IV.

ARGUMENT TO SUPPORT THAT ROBBERY WITH A  
DANGEROUS WEAPON IS NOT A VIOLENT FELONY  
UNDER THE ACCA BY FINDING THE MINIMUM CULPABLE  
CONDUCT PURSUANT TO MONCRIEFFE V. HOLDER.

Petitioner now turns to why N.C. Gen. Stat. §14-87 does not have as an element the force necessary under the ACCA force clause or JOHNSON I. Petitioner accomplishes this by reaching the minimum conduct under MONCRIEFFE v. HOLDER, 569 U.S. 184, 133 S. Ct. 1678 (2013).

Federal Courts are directed to consider the least serious conduct for which there is a "realistic probability" that the charge and conviction necessarily involves the use of violent force. Id. at 678.

North Carolina General Statute §14-87 reads as follows:

Any person who having in possession or with the use or threatened use of any firearm or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence, or banking institution or any place where there is a person or persons in attendance, aids or abets any such person or persons in the commission of such crime shall be guilty of a Class D Felony.

To prove robbery with a dangerous weapon the state has to prove the following elements: (1) the unlawful taking of the personal property of another (2) from his person or presence (3) by a person who, having in his possession, or with the use or threatened use of, a weapon (4) threatens or endangers the life of the other person. STATE v. PORTER, 303 N.C. 680, 686, 281 S.E. 2d 377, 382 (1981); see also N.C. Gen. Stat. §14-87.<sup>1</sup>

---

1..."Any person or persons who, having in possession... any firearm...whereby the life of a person is endangered or threatened...G.S. §14-87. STATE v. GIBBONS

The North Carolina General Assembly in constructing N.C.G.S. §14-87 placed the word "OR" in the first line. The 'or' is placed between "possession", "with the use", "threatened use of any firearm", "other dangerous weapon." (N.C.G.S. §14-87)

The word 'or' is a conjunction and is: (1) used to indicate, (2) an equivalent expression. In this instance, the word 'or' between the words "possession", "use", and "threatened use" indicates an equal standing between the three expressions.

Federal courts are directed to look to the elements of the crime and the state court interpretations of their own statutes, the elements therein, and what conduct satisfies those elements. JOHNSON I at 138.

Looking to North Carolina courts interpretation shows that Robbery With a Dangerous Weapon (RWDW) can be violated in three distinct ways: (1) Possession of a dangerous weapon (requiring presence) during the taking of property from another person, (2) use of a dangerous weapon (requiring display and employment) during the taking of property from another person, and (3) threatened use of a dangerous weapon (requiring one to reasonably believe that a dangerous weapon is being possessed) during the taking of property from another person.

1.

POSSESSION OF A DANGEROUS WEAPON

North Carolina courts define possession (presence) of a dangerous weapon in regards to Robbery With a Dangerous Weapon:

"Robbery with a firearm of necessity requires as a constituent element the presence of firearms." STATE v. KELLER, 214 N.C. at 449, 199 S.E. at 261, or by logical extension, the presence of a dangerous weapon. See also STATE v. JOYNER, 295 N.C. 55, 243 S.E. 2d 367 (1978) (stating that "[t]he question in an armed robbery case is whether a person's life

was in fact endangered or threatened by defendant's possession, use, or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life.")

The North Carolina Court of Appeals found that a defendant would violate the Robbery With a Dangerous Weapon Statute by possessing the dangerous weapon (without employing or displaying it) during the taking of property from another person. STATE v. LEE, 128 N.C. App. 506, 495 S.E. 2d 373 (1996) the LEE court found the following:

"A defendant may be convicted of First Degree Rape if, while committing the crime, he employed or displays a dangerous weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon."

The LEE decision further stated:

"that by contrast, a defendant may be convicted of armed robbery if he commits the robbery 'having in possession' or with the use or threatened use of a weapon."

The contrast between these two statutes are telling as the North Carolina Court of Appeals plainly found that it was unnecessary for a defendant to display or employ a dangerous or deadly weapon to violate the Robbery With a Dangerous Weapon Statute while the First Degree Rape Statute it is indeed necessary.

One can be charged and convicted under N.C.G.S. §14-87 by having in their possession a dangerous weapon while unlawfully taking property from another.

The legal standard announced in LEE is that: "[t]o obtain a conviction for armed robbery, it is not necessary for the State to prove that the defendant displayed the firearm to the victim. Proof of armed robbery requires that the victim reasonably believed that the defendant possessed, or used or threatened to use a firearm in the perpetration of the crime." STATE v. BARTLEY, Court of Appeals of North Carolina #COA02-500, (March 18, 2003.)



## USE OF A DANGEROUS WEAPON

North Carolina courts have further defined what the term "use" means within General Statute §14-87.

A North Carolina court decision in STATE v. WRIGHT, the defendant was charged with Robbery With a Dangerous Weapon after entering the Kangaroo Express. The clerk at the Kangaroo Express testified that:

"Buehner observed a gun in the defendant's right hand. Buehner also testified that at some point during the incident that the defendant told her he had a gun." STATE v. WRIGHT, COA16-1017

The testimony by the store clerk established that the defendant used the dangerous weapon by having a gun in his hand during the robbery.

The North Carolina Court of Appeals found:

"The state presented uncontradicted evidence establishing the elements of armed robbery for both the Kangaroo Express and Mike's Food Store." STATE v. WRIGHT,

## THREATENED USE OF A DANGEROUS WEAPON

North Carolina General Statute §14-87 has as a third prong: Threatened Use. We begin by referring back to the MURRELL cite.

North Carolina courts have determined that:

"The word "use" as a noun has the meaning of an "act" of employing anything, or the state of being employed; application; employment. The words 'threatened use' coupled, as they are with the proceeding words clearly indicates the threatened act of employing. Hence, construed contextually the clause 'with the use or threatened use' of a weapon, requires, in the one instance, or presupposes, in the other, the PRESENCE of the weapon with which the act may be executed or threatened." STATE v. MURRELL, (quoting STATE v. KELLER, 214 N.C. 449, 199 S.E. 261.

In STATE v. JARRET, the question of threatened act was brought

to its attention as the defendant raised the following questions:

"The issues on appeal are whether (1) the convictions must be vacated because the State failed to demonstrate defendant actually possessed a gun (firearm) during the commission of the robberies; and (2) the trial court erred by instructing the jury that defendant could be found guilty without finding he actually possessed a gun (firearm)." STATE v. JARRET,

The defendant in the case argued that convictions must be vacated because the state failed to offer evidence that defendant actually possessed a firearm during the commission of the robberies. In this the defendant was found guilty of violating N.C.G.S. §14-87. Answering the defendant's argument Judge Bryant of the North Carolina Court of Appeals wrote:

"defendant argued that the state was required to prove beyond a reasonable doubt that defendant actually possessed a firearm during the commission of the robberies. However, defendant's argument clearly ignores the disjunctive construction of this statute. Id. JARRET

Furthermore, Judge Bryant went on to state:

"Defendant cites STATE v. FAULKER, 5 N.C. App. 113, 119, 168 S.E. 2d 9, 13 (1969), in support of his argument that N.C.G.S. §14-87 requires that defendant must actually possess a firearm during the commission of a robbery, however, more recent case law articulated in LEE and BARTLEY, and N.C.G.S. §14-87, make clear threatened use of a firearm is sufficient to sustain a conviction under the statute."

The JARRET court's opinion not only speaks of the disjunctive construction of the statute but makes plain that threatened use, is a separate component of N.C.G.S. §14-87. It is plain from the opinion that all components of the statute are separate and will suffice to violate N.C.G.S. §14-87. That means that POSSESSION, OR USE, OR THREATENED USE violates the statute as each are equal parts under North Carolina law. North Carolina courts make plain that the word "use" means to "employ" and "threatened use" means to

"threaten to employ." Possession, being an equivalent expression, is a separate, and equal, aspect of the statute. Possession can be accomplished without "employment" or "displaying."

N.C.G.S. §14-87 makes possession of a dangerous weapon, use of a dangerous weapon, and threatened use of a dangerous weapon three separate acts. The possession of a dangerous weapon does not necessarily mean to use the dangerous weapon nor threaten to use the dangerous weapon.

The [or possession] within the language shows the mere fact of "possessing" not a fact of employing.

Critically, the Petitioner discussed the North Carolina Appellate Court's decision in LEE. (the LEE decision is used in the foregoing JARRET decision.) The LEE court rejected the State's analysis that would have made the "display and employ" the same as "possession". Meaning, "armed with a dangerous weapon" is different than "use of a dangerous weapon".

The LEE court definition is clear. One can be armed with a dangerous weapon under North Carolina law without using it.

The minimum conduct necessary to violate the North Carolina General Statute §14-87 is to possess a firearm (i.e. dangerous weapon) during the taking of property from the person of another.

4.

#### DANGEROUS WEAPON

The Petitioner contends that, utilizing North Carolina's statutory definition of General Statute § 14-87 that, "possession" of a dangerous weapon while taking the property of another will satisfy the elements of Robbery With a Dangerous Weapon as North Carolina law defines a "dangerous weapon" as any instrument that is capable of causing serious bodily injury [or death], and serious injury is synonymous with danger or threat to life.

Asian initial matter, the North Carolina Supreme Court found that danger or threat to life are elemental facts of the offense of G.S. §14-87.<sup>2</sup>

Under G.S. §14-87, the dangerous weapon is the basic fact. The basic fact is one that must be proven to a jury beyond a reasonable doubt.

Where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon and nothing to the contrary appears in evidence, the presumption that the victim's life was endangered or threatened is mandatory. (STATE v. THOMPSON, 297 N.C. 285, 254 S.E. 2d 526 (1979)).

So if a jury finds that a defendant possessed a dangerous weapon, (i.e., a weapon capable of endangering or threatening life), during the course of the robbery then there is a mandatory presumption that there was a danger or threat to the life of the victim. Furthermore, where the weapon was found not to be dangerous the presumption automatically disappears. A weapon that is not capable of causing death or serious injury can not threaten or endanger life for the purposes of G.S. §14-87.

A dangerous or deadly weapon is generally defined as any article, instrument, or substance which is likely to produce great bodily harm. (See STATE v. STURDIVANT, 304 N.C. 293, 283 S.E. 2d 719 (1981); also STATE v. SMALLWOOD, 337 S.E. 2d)(the definition of deadly as opposed to dangerous weapon, finding that both the terms had the "potential for producing death or great bodily harm.")

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<sup>2</sup>...The meaning of elemental fact is: a fact that is found by making an inference or deduction from finding other facts.  
(BLACK'S LAW DICTIONARY TENTH EDITION)

the same; a weapon is a dangerous weapon if it is apparently a weapon capable of inflicting a life threatening injury. STATE v. ALLEN, 343 S.E.2d 893 (1986).

Later, in STATE v. TORAIN, 340 S.E.2d 465 (1986), the defendant argued to the North Carolina Court of Appeals whether or not a weapon was deadly or dangerous was a question of fact for the jury. The TORAIN Court disagreed, finding instead, "the question of whether or not" [a weapon] "is a question of law." (Sturdivant quoting State v. Smith, 187 N.C. 469, 121 S.E.2d (1924)).

The preceding described what a dangerous weapon is as a matter of law:

As initially stated, in 1994 the North Carolina Supreme Court decided in State v. Westall, that the defendant alleged that the jury instructions defining a "dangerous weapon" were "confusing, contradictory, and erroneous." The North Carolina Court of Appeals disagreed, writing; "the trial court gave the following instructions:

from NCPI 217.30, that "a dangerous weapon is a weapon which is likely to cause [death] or serious bodily harm" and that serious bodily injury "is one which causes great pain and suffering."

The use<sup>1</sup> of a dangerous weapon need not result in death, but the instrument itself must merely be capable of taking life in the manner in which it was used.<sup>2</sup> Instructing the jury that a

FOOTNOTES 1-3: In NCPI 217.30 Jury instructions the words use and used mean: i.e. "in the manner it was used" and "depending on its use" has the meaning a gun used as a gun and not a club. See State v. Allen 343 S.E.2d 893 (1986).

weapon is dangerous when it is likely to cause death or serious bodily injury does not lower the standard for determining what is a dangerous weapon as any instrument capable of causing serious bodily injury could also cause death depending on its use. See State v. Joyner, 295 N.C. 55, 243 W.E.2d 367 (1978) "serious bodily injury is synonymous with "endangering or threatening life." (See WESTALL)

The Westall Court found that NCPI 217.30 correctly defined "how" a dangerous weapon threatened or endangered.

A dangerous weapon under North Carolina law is a weapon that is capable of causing death or serious injury, and by a dangerous weapon being capable of causing death or serious injury, it is also capable of threatening or endangering in and of itself.

The Court of Appeals found that the trial court's instruction appropriate to "aid the jury" in determining if the instrument was likely to cause death or serious bodily injury, and therefore, "to endanger or threaten life." (See Westall)

The Westall Court made the implicit finding that the jury instructions repeated the "explicit requirement that a 'weapon must in fact be capable of threatening or endangering life in order to be a dangerous weapon". (Westall.)

#### CONCLUSION OF MINIMAL CULPABLE CONDUCT

The North Carolina Supreme Court recognized that a statute should be construed so that all of its terms have meaning. STATE v. HARVEY, 281 N.C. 1, 187 S.E. 706 (1972).

N.C.G.S. § 14-87 provides as follows:

(a) Any person... who having in possession, or with the use of any firearms or other dangerous weapon, implement, or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another... shall be guilty of a Class D felony.

The terms within N.C.G.S. § 14-87 are defined as follows;

Any person... who having in possession,  
Possession: to have control over.

...any firearms or other dangerous weapon,  
Dangerous weapon: capable of causing death or serious injury.

... whereby,  
Whereby: by and through. (the dangerous weapon)

... danger,  
Danger: exposure to the risk of injury.

...threat,  
Threat: a person or thing that may cause harm.

...or,  
Or: used as a function word to indicate an alternative between different or unlike things or actions.

Any person who having in possession a dangerous weapon whereby, (by and through the dangerous weapon) exposes the victim to the risk of injury or harm (e.g. danger or threat) violates G.S. §14-87.

In assigning meaning to the foregoing terms no other conclusion can be drawn except that the danger and threat to life begins and ends with the dangerous weapon, which creates the danger and threat.

The word "or" inserted between possession and use, clearly indicates, as per definition that these terms are different or unlike things.

The offense of G.S. §14-87 begins and ends with the title of the statute. Robbery/With/A/Dangerous/Weapon, meaning a robbery while possessing a dangerous weapon.



APPLICATION OF FEDERAL LAW  
(JOHNSON I)

The Peititioner contends that a defendant will be convicted under North Carolina General Statute §14-87, having in possession a deadly or dangerous weapon, whereby the life of a person is threatened or endangered while taking personal property from another. (See STATE v. WESTALL) Furthermore, G.S. 14-87, does not have as an element the use, attempted use, or threatened use of physical force under the ACCA.

Federal Courts in determining if a state crime falls withing the scope of the force clause are directed to find the minimum culpable conduct, MONCRIEFFE v. HOLDER, and use those findings to determineng if a state court crime necessarily has the use, attempted use, or threatened use of force against the person of another. DESCAMPS v. UNITED STATES)(See also JOHNSON I).

Determining if a state court crime necessarily falls within the scope of the ACCA's force clause is one of federal law. (See JOHNSON v. UNITED STATES) The Supreme Court held that in determining if a state crime falls within the scope of the force clause, the force clause is defined as "violent physical force", that is force capable of causing physical pain or injury to another person. (JOHNSON v. UNITED STATES)(JOHNSON I).

The Fourth Circuit Court of Appeals found that G.S. §14-87 was categorically a violent felony under the ACCA's force clause without adhering to the procedure outlined in MONCRIEFFE v. HOLDER and in JOHNSON I. (See UNITED STATES v. BURNS-JOHNSON, 864 F.3d 313 (4th Cir. 2017)).

The Fourth Circuit made this determination that G.S. § 14-87 contained as an element the use, attempted use, threatened use of

physical force against another person without; (1) reviewing the elements of the state crime and statutory definition, and (2) by not consulting the interpretation of the North Carolina Supreme Court and Appellate Court decisions in regards to G.S. §14-87. The Fourth Circuit did not determine the minimum conduct and it did not find that G.S. §14-87 had as an element the use, attempted use, or threatened use of physical force against the person of another. (18 U.S.C. §924(e)(2)(B)(i)).<sup>1</sup>

The Fourth Circuit Court of Appeals based its decision in finding that G.S. §14-87 was a violent felony in the State of South Carolina court decisions and on prior decisions that determined that South Carolina Strong Armed Robbery is a violent felony. (See DOCTOR v. UNITED STATES.)<sup>2</sup>

The Fourth Circuit by basing its decision on South Carolina law, could not consequently have determined the minimum culpable conduct under North Carolina law.

Federal courts are directed to use the state court decisions from the state in question in determining if a state crime is a violent felony under the ACCA. (JOHNSON I)

To be precise, in BURNS-JOHNSON the fourth Circuit held:

"In holding that Common Law Robbery in South Carolina included the use of force as an element, we explained that robbery is a general intent crime that requires knowledge only of the (actus reus) of the offense. Accordingly, we held that, intentional taking of property, by means of violence or intimidation sufficient to overcome a person's resistance must entail more than accidental, negligent or reckless conduct. (BURNS-JOHNSON)

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1...For the sake of clarification the questions presented in BURNS-JOHNSON was could G.S. §14-87 be violated by accidental or reckless conduct, by the use of poison basing the argument on CASTLEMAN v. UNITED STATES.

2...In STATE v. ROSEMAN, which the South Carolina Supreme Court defined intimidation as requiring violent physical force.

The decision in BURNS-JOHNSON used the terms "violence" and "intimidation" (including in South Carolina Strong Armed Robbery Statute) in finding that G.S. §14-87 is a violent felony.

North Carolina G.S. §14-87 does not contain those terms as elements of the crime and statutorily does not have the same meaning or definitions afforded them. (See STATE v. PORTER) (Defining robbery with a dangerous weapon as (1) the unlawful taking of personal property of another, (2) from his personal presence (3) by a person who, having in his possession, or with the use or threatened use of, a weapon (4) threatens or endangers. (PORTER)(meaning that possessing a dangerous weapon that is capable of inflicting injury violates G.S. §14-87. (STATE v. WESTALL) Furthermore, North Carolina's Appellate courts have found that "A conviction of "Guilty as charged" may not be based on a finding that the accused "used force or intimidation sufficient to create an apprehension of danger." STATE v. KELLER, 214 N.C. 447, 199 S.E. 620 STATE v. STEWART, 255 N.C. 571, 122 S.E. 2d 355 STATE v. ROSS, 268 N.C. 282, 150 S.E. 2d 421

This Honorable Court provided procedure for federal appellate courts were directed to follow when determining what state crimes fit under the scope of the ACCA, but the Fourth Circuit ignored those procedures when it decided G.S. §14-87.

The question is not if BURNS-JOHNSON should have been decided differently, but that the Fourth Circuit failed to follow this Court's prior important holdings<sup>1</sup>.

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1...BURNS-JOHNSON was decided by the Fourth Circuit after JOHNSON v. UNITED STATES, 135 S.Ct. 2551, 192 L. Ed 2d 569 (2015)(JOHNSON II), found that the residual clause of the ACCA was unconstitutionally vague.

## AMOUNT OF FORCE

North Carolina G.S. §14-87 does not have the required amount of force that being violent physical force as required under the ACCA.

North Carolina courts have found that in violating N.C.G.S. §14-87 the amount of force is immaterial. (See STATE v. RICHARDSON, 279 N.C. 621, 185 S.E. 2d 102 (1971)(finding that the amount of force is immaterial as long as the victim surrenders the property.) Moreover, this level of force does not reach JOHNSON I force.

Federal circuits and district courts have found the same; (STARKS v. UNITED STATES, 861 F. 3d 306, (1st Cir. 2017)(finding that in Massachusetts armed robberies the amount of force is immaterial as long as the victim surrenders the property)(does not meet JOHNSON I force)(PARNELL v. UNITED STATES, 818 F. 3d 974 (9th Cir. 2016) (finding that the amount of force to violate Massachusetts armed robbery statute is immaterial)(does not meet JOHNSON I FORCE)(and UNITED STATES v. KING, 248 F. Supp. 3d 1062 (D.M. March 31, 2017). (finding that the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with the property.)(does not meet JOHNSON I).

In a separate Fourth Circuit decision, UNITED STATES v. GARDNER, 823 F.3d 793 (4th Cir. 2016), the Fourth Circuit found that the amount of force was not violent physical force for Common Law Robbery from North Carolina. (The Gardner Court found the amount of force immaterial as long as the victim surrenders the property.) Robbery With a Dangerous Weapon and Common Law Robbery closely track one another.

It must be closely noted that the state statutes of robbery

that have found to be violent require that the defendant overcome resistance. (See UNITED STATES v. FRITTS, 844 F. 3d 937 (11th Cir. 2016)(Florida robbery) and (UNITED STATES v. DOCTOR, 842 F.3d 306 (4th Cir. 2016)(South Carolina robbery))(that is not the case with robbery with a dangerous weapon as the amount of force is immaterial as long as the victim parts with the property.)

The robbery with a dangerous weapon G.S. §14-87, can be violated by possessing a dangerous or deadly weapon that is capable of inflicting serious bodily injury whereby the victim is endangered or threatened. (Note: "without display or employment.") The North Carolina Court of Appeals found that it was unnecessary for a defendant to employ or display a dangerous weapon in violating G.S. §14-87. (See STATE v. LEE, 128 N.C. App. 506, 495 S.E. 2d 373 (1996)) (finding that a dangerous weapon need not be displayed or employed under G.S. §14-87).

Under federal law the possession of a firearm during the taking of property from another without more will not suffice for the amount of force necessary under the force clause of the ACCA. (See STARKS v. UNITED STATES)(STARKS found a "defendant convicted of armed robbery must possess a weapon during the robbery, though the victim need not be aware of it. (See also UNITED STATES v. KING, 248 F. Supp. 3d 1062 (D.M. March 31, 2017))(finding that the amount of force is immaterial because in New Mexico "to commit robbery while armed with a deadly weapon" means to have the weapon in ones "possession, and not necessarily use it" during the robbery. That conduct does not have the necessary level of force as under JOHNSON I.

..Robbery With a Dangerous Weapon N.C.G.S. §14-87 is closely related to and tracks the crime of Common Law Robbery from North Carolina that was found not to necessarily have as an

element the use, attempted use, or threatened use of force under the ACCA. (See GARDNER)

North Carolina courts have found that robbery with a dangerous weapon did not create a new crime but imposed a greater punishment for defendant's that used a dangerous weapon. (STATE v. SMITH, 187 N.C. 469, 121 S.E. 737 (1924); (See also STATE v. STEWART, 255 N.C. 571, 122 S.E. 2d 355

The Petitioner contends that robbery with a dangerous weapon does not require more force than did common law robbery which is the lesser included offense of the same. The facts of a particular case should not determin whether one crime is the lesser included offense of another. In other words, all of the essential elements of the lesser crime must also be essential elements included in the greater crime. (STATE v. WEAVER, 306 N.C. 629, 295 S.E.2d 378 (1982)). Robbery with a dangerous weapon has the same elements as common law robbery with the added requirement that the defendant possess a dangerous weapon that is capable of causing serious bodily injury whereby the victim is endangered or threatened during the taking of the property of another. (See Westall).

The two forms of robbery from the state of North Carolina closely track the actual common law definition of robbery:

"Robbery: The illegal taking of property from the person of another, or in the presence, by violence or intimidation; aggravated larceny. (BLACK'S LAW TENTH EDITION)

"Armed Robbery: Robbery committed by a person carrying a dangerous weapon, regardless of whether the weapon is revealed or used. Most states punish armed robbery as an aggravated form of robbery rather than a seperate crime. (BLACK'S LAW DICTIONARY TENTH EDITION)

(That is true in North Carolina as previously stated; robbery with a dangerous weapon is an aggravated form of common law robbery.)

(See STATE v. STEWART)

Robbery with a dangerous weapon requires no more additional force than the crime of common law robbery, although there is a difference in the wording of the two statutes; 1) violence and fear, common law robbery, and 2) endangering and threatening, robbery with a dangerous weapon. Prerequisite for conviction for armed robbery the jury must find from the evidence beyond a reasonable doubt that the life of the victim was endangered or threatened by the use of threatened use [or possession] of "fire-arms or other dangerous weapon, implement or means." (STATE v. COVINGTON, 273 N.C. 699, 161 S.E. 2d 147 (1968).

Petitioner contends that robbery with a dangerous weapon contains no more force than its common law brother.

After finding the minimum culpable conduct under G.S. §14-87, and applying it against the definition of force "violent physical force" being defined in JOHNSON I, G.S. §14-87, does not have as an element the use, attempted use, or threatened use of force as required under the ACCA. The crime of robbery with a dangerous weapon can be committed with de minimus contact, the same amount of force as the common law version, which the Fourth Circuit found lacking.

The question before this court is one of first impression as the question has been left unsettled. The question is: Does N.C. G.S. §14-87, necessarily have as an element the use, attempted use, or threatened use of force as required under the ACCA's element clause and defined under JOHNSON I as being violent physical force.

By the statutory definition and North Carolina court decisions

and applied under federal law the only answer is no. By the literal definition of armed robbery the statutory language set forth by North Carolina's General Assembly, North Carolina court's interpretation and the tracking of other common law statutes and statutes based on common law, Robbery with a Dangerous Weapon North Carolina General Statute §14-87 does not have as an element the use, attempted use, or threatened use of force under the ACCA's element clause because the force required to accomplish the crime does not necessarily have the required force under JOHNSON I.

#### CONCLUSION

The truth is that G.S. §14-87 can be violated by de minimus contact or no contact at all. (See STATE v. LEE and STATE v. RICHARDSON) As with the crime of Common Law ROBbery from North Carolina, the amount of force is immaterial as long as the victim parts with the property.

By the Fourth Circuit failing in finding the minimum conduct then it would have been impossible for them to reach the question of violent physical force under JOHNSON I. Without the MONCRIEFFE finding there is no JOHNSON I finding as one is needed to find the other.



MATHIS V. UNITED STATES

The Supreme Court has explained that "elements are the constituent parts of a crime's legal definition -the things the prosecution must prove to sustain a conviction." MATHIS v. UNITED STATES, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016). Contained within Robbery With A Dangerous weapon G.S. §14-87 are the elements and means to accomplish those elements.

The Petitioner contends that the constituent parts of G.S. §14-87 are possession, or with the use, or threatened use of any firearm or dangerous weapon...unlawfully takes or attempts to take personal property from another. Those constituent parts listed above must be proved beyond a reasonable doubt and unanimously found by a jury. Listed within the statute of §14-87 are the means of accomplishing the elements that are not required to be found beyond a reasonable doubt, and that is "whereby the life of a person is endangered or threatened." The threat and danger need not be found unanimously by the jury because once it is established that a dangerous weapon was present there is a mandatory presumption that the life of the victim was endangered or threatened.

So if a jury finds that a defendant possessed a dangerous weapon, (i.e., a weapon capable of endangering or threatening life), during the course of the robbery then there is a mandatory presumption that there was a danger or threat to the life of the victim.

(STATE v. THOMPSON, 297 N.C. 285, 254 S.E. 2d 526 (1979); see also (STATE v. ALLEN, 343 S.E. 2d 893 (1986)).

The two means under G.S. §14-87 are danger and threat. Danger is described as a risk of injury thus falling under the residual clause of the ACCA which is now void for vagueness.