

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 13 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MICHAEL WAYNE NORTHCUTT,

Defendant-Appellant.

No. 19-16182

D.C. Nos. 1:16-cv-00887-DAD

1:96-cr-05067-DAD-1

Eastern District of California,
Fresno

ORDER

Before: TASHIMA, BYBEE, and WATFORD, Circuit Judges.

We treat appellant’s briefing of an uncertified issue as a motion to expand the certificate of appealability. So treated, the motion is denied. *See* 9th Cir. R. 22-1(e); *Hiivala v. Wood*, 195 F.3d 1098, 1104-05 (9th Cir. 1999); *see also United States v. Watson*, 881 F.3d 782 (9th Cir.), *cert. denied*, 139 S. Ct. 203 (2018); *United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) (“[A]s a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.” (internal quotation marks omitted)).

Appellee’s motion for summary affirmance (Docket Entry No. 13) is granted. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard); *see also United States v. Davis*, 139 S. Ct. 2319 (2019).

Appellant's motion to stay this appeal is denied.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL NORTHCUTT,

Defendant.

No. 1:96-cr-05067-DAD

ORDER GRANTING IN PART
DEFENDANT'S MOTION FOR A
CERTIFICATE OF APPEALABILITY

(Doc. No. 48)

This matter is before the court on defendant Michael Northcutt's motion for a certificate of appealability. (Doc. No. 48.) For the reasons set forth below, defendant's motion will be granted in part.

BACKGROUND

On March 21, 1996, defendant was indicted in the United States District Court for the Eastern District of California. (Doc. No. 1.) On February 21, 1997, defendant pleaded guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and use of a firearm during a crime of violence in violation of 18 U.S.C. § 924(c). (Doc. No. 38-1.) Defendant received a total sentence of 391 months imprisonment, including 240 months imposed for defendant's conviction for violation of 18 U.S.C. § 924(c). (*Id.*)

////

On April 9, 2019, the undersigned issued an order denying defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. No. 46.) While conceding that the district court's opinion is correct as a straightforward application of binding Ninth Circuit authority, defendant nonetheless moves for a certificate of appealability on two separate issues. The first is whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague after *Johnson v. United States*, ___ U.S. ___, ___, 135 S. Ct. 2551 (2015), and the second is whether a conviction for armed bank robbery under 18 U.S.C. § 2113(a) and (d) qualifies as a crime of violence.

LEGAL STANDARD

Under Rule 11 of the Federal Rules Governing Section 2255 Cases, a district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), and the certificate must indicate which issues satisfy this standard. 28 U.S.C. § 2253(c)(3). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Additionally, for claims denied on procedural grounds, a certificate of appealability should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

DISCUSSION

With respect to whether a certificate of appealability is appropriate as to the constitutionality of 18 U.S.C. § 924(c)(3)(B), the court concludes that it is. As defendant points out, the Fourth, Fifth, Tenth, and D.C. Circuits have already concluded that . § 924(c)(3)(B) is unconstitutional, and the Supreme Court has granted certiorari. *See United States v. Simms*, 914 F.3d 229, 253 (4th Cir. 2019); *United States v. Davis*, 903 F.3d 483, 486 (5th Cir. 2018), *cert. granted*, ___ U.S. ___, 139 S. Ct. 782 (2019); *United States v. Salas*, 889 F.3d 681, 687–88 (10th

1 Cir. 2018); *United States v. Eshetu*, 898 F.3d 36, 38 (D.C. Cir. 2018). Clearly, this is a matter of
 2 some debate among jurists, because of which a certificate of appealability is plainly appropriate
 3 with respect to whether § 924(c)(3)(B) is unconstitutional.

4 However, the court disagrees with defendant's argument that the question of whether
 5 armed bank robbery under § 2113(a) and (d) is categorically a crime of violence under
 6 § 924(c)(3)(A) is debatable by reasonable jurists. Numerous courts of appeals in the country have
 7 been called upon to resolve this question after *Johnson*, and each has arrived at the same
 8 conclusion: armed bank robbery under § 2113(a) and (d) is categorically a crime of violence
 9 under 18 U.S.C. § 924(c)(3)(A). *See, e.g., United States v. Johnson*, 899 F.3d 191, 204 (3d Cir.),
 10 *cert. denied*, ___ U.S. ___, 139 S. Ct. 647 (2018); *United States v. Watson*, 881 F.3d 782, 786 (9th
 11 Cir.), *cert. denied*, ___ U.S. ___, 139 S. Ct. 203 (2018); *Hunter v. United States*, 873 F.3d 388, 390
 12 (1st Cir. 2017); *United States v. Armour*, 840 F.3d 904, 907 (7th Cir. 2016), *as amended* (June 26,
 13 2017); *In re Hines*, 824 F.3d 1334, 1337 (11th Cir. 2016). This court is aware of no circuit court
 14 holding to the contrary. Nor, having reviewed defendant's arguments in this case, does the court
 15 find that reasonable jurists would disagree with the apparently unanimous holding of these cases.

16 For these reasons,

- 17 1. The court grants defendant's motion for a certificate of appealability (Doc. No. 48)
 18 with respect to defendant's contention that 18 U.S.C. § 924(c)(3)(B) is
 19 unconstitutionally vague; and
- 20 2. The court denies defendant's motion for a certificate of appealability with respect
 21 to defendant's contention that armed bank robbery under 18 U.S.C. § 2113(a) and
 22 (d) is categorically a crime of violence for purposes of 18 U.S.C. § 924(c)(3)(A).

23 IT IS SO ORDERED.

24 Dated: **June 18, 2019**

25 
 26 UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL NORTHCUTT,

Defendant.

No. 1:96-cr-05067-DAD

ORDER DENYING DEFENDANT'S
MOTION TO VACATE, SET ASIDE, OR
CORRECT HIS SENTENCE UNDER 28
U.S.C. § 2255

(Doc. No. 38)

This matter is before the court on defendant's motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. (Doc. No. 38.) Having considered the parties' briefing, and for the reasons that follow, defendant's motion will be denied.

BACKGROUND

On March 21, 1996, defendant was indicted in the United States District Court for the Eastern District of California. (Doc. No. 1.) On February 21, 1997, defendant pleaded guilty to armed bank robbery in violation of 18 U.S.C. § 2113(a) and (d) and use of a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c). (Doc. No. 38-1.) On February 18, 1997, defendant was sentenced to an aggregate term of 391 months imprisonment, which included a 240-month sentence s imposed for defendant's violation of 18 U.S.C. § 924(c). (*Id.*)

LEGAL STANDARD

A federal prisoner making a collateral attack against the validity of his or her conviction or sentence must do so by way of a motion to vacate, set aside or correct the sentence pursuant to 28 U.S.C. § 2255, filed in the court which imposed the sentence. *United States v. Monreal*, 301 F.3d 1127, 1130 (9th Cir. 2002). Under § 2255, the federal sentencing court may grant relief if it concludes that a prisoner in custody was sentenced in violation of the Constitution or laws of the United States. *Davis v. United States*, 417 U.S. 333, 344–45 (1974); *United States v. Barron*, 172 F.3d 1153, 1157 (9th Cir. 1999). To warrant relief, a petitioner must demonstrate the existence of an error of constitutional magnitude which had a substantial and injurious effect or influence on the guilty plea or the jury’s verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *see also United States v. Montalvo*, 331 F.3d 1052, 1058 (9th Cir. 2003) (“We hold now that *Brecht*’s harmless error standard applies to habeas cases under section 2255, just as it does to those under section 2254”). Relief is warranted only where a petitioner has shown “a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis*, 417 U.S. at 346; *see also United States v. Gianelli*, 543 F.3d 1178, 1184 (9th Cir. 2008).

DISCUSSION

Defendant contends that armed bank robbery under 18 U.S.C. § 2113(a) and (d) does not constitute a crime of violence within the meaning of § 924(c). (Doc. No. 38 at 8.) As such, defendant argues that he was unlawfully sentenced to 240 months imprisonment in connection with his conviction under 18 U.S.C. § 924(c).

In *Johnson v. United States*, 559 U.S. 133 (2010) (“*Johnson I*”), the Supreme Court considered whether a Florida felony offense for battery constituted a “violent felony” under 18 U.S.C. § 924(e)(2)(B) of the Armed Career Criminal Act (“ACCA”). The defendant in that case had previously been convicted under a statute which defined battery to include “[a]ctually and intentionally touch[ing]” another person. *Id.* at 136 (citing Fla. Stat. § 784.03(1)(a)(1)). The relevant ACCA provision defines a violent felony to include a crime punishable by more than one year of imprisonment that “has 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). The defendant in *Johnson I*

1 argued that this provision—the so-called “force clause”—did not extend to his battery conviction
2 because “actually and intentionally touching” an individual does not rise to the level of “physical
3 force.” The Supreme Court agreed, holding that because the statute purported to enhance
4 sentences for “violent felonies,” the physical force required to commit the crime must mean
5 “*violent* force—that is, force capable of causing physical pain or injury to another person.”
6 *Johnson I*, 559 U.S. at 140 (citation omitted). Because actually and intentionally touching a
7 person “is satisfied by *any* intentional contact, no matter how slight,” it does not necessarily entail
8 the use, attempted use, or threatened use of violent force. *Id.* at 138 (internal quotation marks and
9 citation omitted). Therefore, the Florida statute at issue in that case was found not to constitute a
10 crime of violence.

11 More recently, the Supreme Court has weighed in on the constitutionality of the ACCA’s
12 penalization of “crimes of violence.” In *Johnson v. United States*, ___ U.S. ___, 135 S. Ct. 2551
13 (2015) (“*Johnson II*”), the petitioner challenged the legality of a mandatory sentencing
14 enhancement under § 924(e)(2)(B) of the ACCA. Under the ACCA, a defendant convicted of
15 being a felon in possession of a firearm faces more severe punishment if he has three or more
16 previous convictions for a “violent felony,” which was therein defined as any felony that
17 “involves conduct that presents a serious potential risk of physical injury to another.” *Id.* at 2555
18 (quoting 18 U.S.C. § 924(e)(2)(B)). The Court found that a mandatory sentencing enhancement
19 for conduct that “presents a serious potential risk of physical injury to another”—the so-called
20 “residual clause” of the ACCA—violated due process. *Id.* at 2557. The Court reasoned that such
21 language failed to “give ordinary people fair notice of the conduct it punish[ed],” and was
22 therefore unconstitutionally vague. *Id.* at 2556. The Supreme Court subsequently ruled that the
23 decision in *Johnson II* announced a new substantive rule which has retroactive effect on collateral
24 review. *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257 (2016).

25 As stated above, defendant here was convicted of violating 18 U.S.C. § 924(c)(1)(A), not
26 § 924(e)(2)(B). That provision provides that a person convicted of using and carrying a firearm
27 during and in relation to a “crime of violence” must be sentenced to a minimum term of
28 imprisonment of not less than five years. 18 U.S.C. § 924(c)(1)(A). Crime of violence is defined

1 by the statute in two separate provisions. The first, the force clause, states that a crime of
 2 violence includes a felony offense that “has as an element the use, attempted use, or threatened
 3 use of physical force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A). The
 4 second part, the residual clause, states that a crime of violence includes a felony offense “that by
 5 its nature, involves a substantial risk that physical force against the person or property of another
 6 may be used in the course of committing the offense.” 18 U.S.C. § 924(c)(3)(B). This language
 7 is similar to, though not the same as, the language in § 924(e)(2)(B) that was found
 8 unconstitutional in *Johnson II*.

9 Defendant was found to have violated 18 U.S.C. § 924 on the ground that his
 10 simultaneous conviction for armed robbery under 18 U.S.C. § 2113(d) constituted a crime of
 11 violence. Relying on *Johnson I*, defendant challenges this conclusion and argues that § 2113(d) is
 12 not a crime of violence.

13 After briefing on this matter was completed, and in a in a separate case, the Ninth Circuit
 14 resolved the precise question now before the court. *See United States v. Watson*, 881 F.3d 782
 15 (9th Cir.), *cert. denied*, ___ U.S. ___, ___, 139 S. Ct. 203 (2018). In *Watson*, the panel held that
 16 armed bank robbery under § 2113(a) and (d) remains a crime of violence under § 924(c) even
 17 after *Johnson I* and *II*. *Id.* at 786. In doing so, the Ninth Circuit joined every other circuit to have
 18 addressed this issue. *See United States v. Ellison*, 866 F.3d 32, 39–40 (1st Cir. 2017); *United*
 19 *States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017); *United States v. McBride*, 826 F.3d 293,
 20 296 (6th Cir. 2016); *United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016).

21 Because the Ninth Circuit’s holding in *Watson* is binding and controls this court’s
 22 decision, defendant’s motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255
 23 (Doc. No. 38) is denied.

24 IT IS SO ORDERED.

25 Dated: April 8, 2019

26 
 UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

FILED

UNITED STATES OF AMERICA
VS

MICHAEL WAYNE
NORTHCUTT
Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on
or After November 1, 1987)

FEB 21 7 38 AM '97

CLERK U.S. DIST. COURT
EASTERN DIST. OF CALIF.
AT FRESNO

Case Number: CR-F-96-5067-REC
and CR-F-97-5033-REC

DEPUTY

MARK REICHEL
ASST. FEDERAL DEFENDER

THE DEFENDANT:

- [X] Pled guilty to Count(s) One, Two and Three.
[] Pled nolo contendere to Count(s) _____ which was accepted by the Court.
[] Was found guilty on Count(s) _____ after a plea of not guilty.

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
Case CR-F-96-5067-REC			
18 USC 2113(a)(d)	Armed Bank Robbery	10/26/95 & 11/20/95	ONE & THREE
18 USC 924(c)	Use of Firearm During Crime of Violence	10/26/95	TWO
Case CR-F-97-5033-REC			
18 USC 2113(a)(d)	Armed Bank Robbery	11/10/95	ONE

The defendant is sentenced as provided in pages 2 through 6 of this Judgment.

- [] The defendant has been found not guilty on count(s) _____.
[X] Count(s) Four (is/are) dismissed on the motion of the United States.
[X] Appeal rights given.
[] Bond is ordered exonerated; [] upon surrender

It is further 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.

Defendant's Soc. Sec. Number: 558-13-6868

Defendant's Date of Birth: 01/12/67

Defendant's USM No: 0610411-097

[X] In Custody

Last known mailing address:

Fresno County Jail

February 18, 1997

Date of Imposition of Sentence

Signature of Judicial Officer

ROBERT E. COYLE
U.S. DISTRICT JUDGE

Name and Title of Judicial Officer

Date Signed

2/20/97

Defendant: Northcutt

Case Number: CR-F-96-5067-REC
CR-F-97-5033-REC**IMPRISONMENT**

The defendant is hereby committed to the custody of the Bureau of Prisons of the United States to be imprisoned for a total term of (151) months on each of counts One and Three (CR-F-96-5067-REC) and count one of CR-F-97-5033-REC to be served concurrently. It is further ordered as to Count Two (CR-F-96-5067-REC) the defendant serve (240) months, to be served consecutively to the term imposed on counts 1,2 of CR-F-96-5067-REC and Count One of CR-F-97-5033-REC. Pursuant to 5G1.3(c), so as not to impose a sentence greater than necessary to achieve adequate deterrence and to reflect the seriousness of the offenses, and in consideration of the plea agreement in this case, it is ordered that 31 months of this sentence be served concurrently with case number EDCR95-20-RJT of the Central District of California. The remaining 360 months are to be served consecutive to the case arising out of the Central District of California.

THE COURT RECOMMENDS THAT THE DEFENDANT PARTICIPATE IN A SUBSTANCE ABUSE PROGRAM WHILE INCARCERATED.

- ☒ The defendant is remanded to the custody of the United States Marshal.
- ☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons, or to the US Marshal for this district, if no institution has been designated:
- ☐ before 2:00 p.m. on ____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on ____ to ____ at ____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

Defendant: Northcutt
Case Number: CR-F-96-5067-REC
CR-F-97-5033-REC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of (60) months.

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

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

The defendant shall not illegally possess a controlled substance.

☒ [X] The defendant shall not possess a firearm as defined in 18 USC 921. (Check, if applicable.)

For offenses committed on or after September 13, 1994:

☒ [X] The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer. (Check, if applicable.)

or

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

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term(s) of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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

Defendant: Northcutt
Case Number: CR-F-96-5067-REC
CR-F-97-5033-REC

ADDITIONAL SUPERVISION TERMS

- 1) Defendant shall submit to the search of his/her person, property, home and vehicle by a U.S. Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant. Failure to submit to a search may be grounds for revocation. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- 2) Defendant shall participate in a correctional treatment program to obtain assistance for drug or alcohol abuse, as directed by the probation officer.
- 3) Defendant shall make payments on any unpaid balance of restitution heretofore ordered in installments as determined by the probation officer.
- 4) Defendant shall participate in a program of mental health counseling as directed by the probation officer.

Defendant: Northcutt
Case Number: CR-F-96-5067-REC
CR-F-97-5033-REC

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties as set forth below:

ASSESSMENT

Amount: 200.00,

Payable:

☒ [X] in full, immediately

☐ [] other: _____

RESTITUTION

IT IS FURTHER ORDERED the defendant shall pay restitution to the United States Attorney's Office in the amount of \$15,552.00, payable immediately. The U.S. Attorneys Office, Litigation Unit, 3305 Federal Building, 650 Capital Mall, Sacramento, CA 95814, shall forward the payments to the victim banks.

Stockton Savings Bank, P.O. Box 201062, Stockton, CA 95201 in the Amount of \$7,945.00

First National Bank, 1300 El Camino Real, Colma, CA 94014 in the Amount of \$7,607.00

The defendant shall pay interest on any fine of more than \$2,500, unless the fine 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 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 defendant shall pay the cost of prosecution.

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

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 as directed by the court, the probation officer, or the United States Attorney.

Defendant: Northcutt
Case Number: CR-F-96-5067-REC
CR-F-97-5033-REC

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the court:

Total Offense Level: 31
Criminal History Category: IV
Imprisonment Range: 151 to 188 months
240 months consecutive on count 2
Supervised Release Range: 3 to 5 years
Fine Range: \$ 15,000 to \$ 150,000

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution (loss) \$ 15,552.00

- ☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. 3663(d).
- ☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.
- ☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

This sentence is necessary to achieve adequate deterrence and to reflect the seriousness of the offense.

OR

☐ The sentence departs from the guideline range:

- ☐ upon motion of the government, as a result of defendant's substantial assistance.
- ☐ for the following specific reason(s):