

No. _____

**In The
Supreme Court of the United States**

JASON LYDELL ORR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

Donna Lee Elm
Federal Defender

Robert Godfrey,
Counsel of Record
Assistant Federal Defender
Federal Defender's Office
201 South Orange Avenue, Suite 300
Orlando, FL 32801
Telephone:(407) 648-6338
E-mail: robert_godfrey@fd.org

QUESTIONS PRESENTED

Under the U.S. Sentencing Guidelines, a “controlled substance offense” means, in relevant part, an offense that prohibits the possession of a controlled substance with intent to distribute. U.S.S.G. § 4B1.2(b). Intent to distribute is required for a possession-based drug offense to be considered a “controlled substance offense.”

In Florida, the offense of “trafficking in cocaine” is committed by the mere possession of 28 grams or more of cocaine. Fla. Stat. § 893.135(1)(b)(1). An intent to distribute the cocaine is not required. In the Eleventh Circuit, though, a prior conviction under § 893.135(1)(b)(1) qualifies as a controlled substance offense based on the court’s reasoning that “Florida’s drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more” of cocaine.

The questions presented are:

- i. Can a state statute that prohibits trafficking by possession of a specified quantity of drugs, but lacks an element of intent to distribute, nonetheless qualify as a “controlled substance offense” for federal sentencing enhancement purposes because an intent to distribute can be “inferred” from the quantity of drugs?
- ii. If the answer to (i) is yes, how is a federal judge supposed to determine, empirically or otherwise, whether a particular quantity of drugs allows him or her to infer that a person necessarily had an intent to distribute?

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Jason Lydell Orr, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Eleventh Circuit's opinion is unpublished and is provided in the Appendix. Pet. App.

1a. It can also be found at *United States v. Orr*, 705 F. App'x 892 (11th Cir. 2017).

JURISDICTION

The Eleventh Circuit issued its opinion on August 24, 2017. Pet. App. 1a. A timely filed petition for rehearing or rehearing en banc was denied on November 2, 2017. Pet. App. 8a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT GUIDELINES AND STATUTORY PROVISIONS

Section 2K2.1(a)(2) of the U.S. Sentencing Guidelines provides for an increased base offense level when a defendant has at least two prior convictions of either a crime of violence or a "controlled substance offense."

A "controlled substance offense" is defined as:

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

U.S.S.G. § 4B1.2(b); see U.S.S.G. § 2K2.1 cmt. n.1 (providing that the term "controlled substance offense" "has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1)").

Florida's drug trafficking statute provides:

Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28

grams or more of cocaine, as described in s. 893.03(2)(a)4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as “trafficking in cocaine,” punishable as provided in s. 775.082, s. 775.083, or s. 775.084. If the quantity involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 3 years, and the defendant shall be ordered to pay a fine of \$50,000.
- b. Is 200 grams or more, but less than 400 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of 7 years, and the defendant shall be ordered to pay a fine of \$100,000.
- c. Is 400 grams or more, but less than 150 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of \$250,000.

Fla. Stat. § 893.135(1)(b)(1) (2017).¹

STATEMENT OF THE CASE

1. Petitioner was charged with and convicted of being a felon in possession of a firearm. Docs. 13, 63. The Presentence Investigation Report (“PSR”) recommended an enhanced base offense level of 24 pursuant to U.S.S.G. § 2K2.1(a)(2) because Petitioner had prior Florida felony convictions for a crime of violence (not challenged here) and a controlled substance offense. PSR ¶ 24. The latter conviction was for trafficking in cocaine in 1997 by being in possession of 28 grams or more, but less than 200 grams, of cocaine, contrary to Fla. Stat. § 893.135(1)(b). Pet. App. 9a, 10a. The plea colloquy transcript, a *Shepard*-approved document,²

¹ The 1997 version of the statute contained the same definition of “trafficking in cocaine” and the same scheme of greater punishment as the amount of cocaine involved increased. The only difference is that the 1997 version provided that if the quantity of cocaine involved was between 28 and 200 grams or between 200 and 400 grams, then the person was to be “sentenced pursuant to the [Florida state] sentencing guidelines,” not given a mandatory minimum term of imprisonment.

² *Shepard v. United States*, 544 U.S. 13, 16, 26 (2005).

“contained Orr’s admission that he possessed more than 28 grams of cocaine.” Pet. App. 6a.; see also *id.* at 32a (Court: “Did you have in your possession more than 28 grams of cocaine?” Orr: “Yes, sir.”).

2. At sentencing, defense counsel opposed the enhanced offense level, arguing that the Guidelines’ definition of a controlled substance offense “does not proscribe mere possession of a controlled substance, but instead proscribes possession with intent to manufacture or distribute.” Doc. 93 at 9-10. Counsel argued that possessing 28 grams of cocaine, the least culpable conduct as must be assumed under the categorical approach,³ could lead to a reasonable inference of intent to distribute or a reasonable inference of an intent to possess for personal use. *Id.* at 10. “The conduct that Mr. Orr necessarily admitted to when pleading guilty to trafficking then does not inherently involve an intent to manufacture or distribute, which would be necessary for his prior conviction to be considered a controlled substance offense.” *Id.* In support of his argument, counsel cited *United States v. Brandon*, 247 F.3d 186 (4th Cir 2001), which held that a conviction for trafficking between 28 to 200 grams of cocaine under a North Carolina trafficking statute very similar to Florida’s was not a controlled substance offense. Doc. 93 at 10-11.

The district court, though, found it was bound by controlling precedent, *United States v. James*, 430 F.3d 1150 (11th Cir. 2005), *overruled on other grounds by James v. United States*, 550 U.S. 197 (2007). Doc. 96 at 7-8 (“while this Court believes *Brandon* is a better reasoned opinion, I’m bound by the Eleventh Circuit opinion in *James*, which I think is controlling”). In *James*, the court construed the definition of a “serious drug offense” under 18 U.S.C. §

³ See *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

924(e)(2)(A), the Armed Career Criminal Act (ACCA).⁴ The court held that James’s Florida conviction for trafficking in cocaine by possession of between 200 and 400 grams of cocaine was a serious drug offense because “Florida’s drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.” 430 F.3d at 1155. In so holding, the court relied on its earlier decision in *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003), where the court construed the definition of a “drug trafficking offense” as that term is found in U.S.S.G. § 2L1.2,⁵ and held that “Georgia’s trafficking statute necessarily infers an intent to distribute once a defendant possesses a certain amount of drugs.” 333 F.3d at 1232.

Having determined that *James* controlled, the district court overruled Petitioner’s objection to the enhanced offense level. The district court sentenced Petitioner to 90 months in prison, below the advisory Guidelines range of 120 months in prison. Doc. 81, Doc. 96 at 21. Without the enhancement for a prior controlled substance offense, Petitioner’s base offense level would have been 20, not 24, *see* U.S.S.G. § 2K2.1(a)(4), and his Guidelines range would have been 84 to 105 months in prison.

3. On appeal, Petitioner renewed his arguments that a prior Florida trafficking offense was not a “controlled substance offense.” He further argued that “as a matter of policy, federal courts should strive for a uniform definition of a controlled substance offense. A uniform definition is not attainable if what qualifies as a controlled substance offense is dependent on the

⁴ A “serious drug offense” is defined in pertinent part as “an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.” 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

⁵ A “drug trafficking offense” is defined in pertinent part as “an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.” U.S.S.G. § 2L1.2, cmt. n.2 [previously n.1(B)(iv)].

amounts of cocaine deemed by each state to constitute trafficking.” Initial Brief of Appellant at 37, *United States v. Orr*, No. 14-12240, 2014 WL 4252419 at *37-38 (11th Cir. Aug. 25, 2014).

The Eleventh Circuit did not address the policy argument. On the merits, the circuit court agreed that it had to “look at the elements of the convicted offense, not the conduct underlying the conviction, to determine if a prior conviction is a controlled substance offense under § 4B1.2(b).” Pet. App. 3a. The circuit court also agreed that “§ 893.135 does not include an express element of intent.” Pet. App. 5a. Nonetheless, the court affirmed on the basis of the inference of intent to distribute that the court found in *Madera-Madera* and *James* once a defendant possesses 28 grams or more of drugs:

After the court established that Orr’s conviction was premised upon possession of more than 28 grams of cocaine, it correctly applied the inference of intent to distribute, as set forth by *James*. See *James*, 430 F.3d at 1155. Because the prohibition of possession of cocaine with intent to distribute under § 893.135 meets the Guidelines definition of a controlled substance offense, the court properly applied a base offense level of 24.

Pet. App. 7a.

The Eleventh Circuit issued two other unpublished decisions around the same time, each concluding that a non-elemental inference may be relied upon to determine that a prior conviction under Fla. Stat. § 893.135, resting upon the possession of a specified quantity of drugs, constitutes a “controlled substance offense.” See *United States v. Kitchen*, 705 F. App’x 842, 843-45 (11th Cir. 2017); *United States v. Dover*, No. 16-17650, 2017 WL 4334038, at *2 (11th Cir. Sept. 29, 2017). Petitioner, and each of these other appellants, filed petitions for rehearing en banc, contending that the Eleventh Circuit’s decisions (i) directly conflict with the Fifth Circuit’s decision in *United States v. Sarabia-Martinez*, 779 F.3d 274, 276-77 (5th Cir. 2015) (holding that a prior conviction under § 893.135 resting upon possession does not qualify as a Guidelines predicate); and (ii) conflict with decisions of other circuits that reject the reliance

upon a non-elemental inference for Guidelines enhancement purposes.⁶ The Eleventh Circuit denied rehearing en banc in all three cases.⁷

Mr. Kitchen has recently filed a petition for a writ of certiorari. No. 17-7521 (docketed Jan. 22, 2018). A petition for a writ of certiorari is expected to be filed by Mr. Dover. Other cases with pending petitions raising related arguments in the ACCA context are *United States v. White*, 837 F.3d 1225 (11th Cir. 2016), *pet. for cert. filed*, No. 17-6668 (U.S. Nov. 3, 2017), and *United States v. Wilcoxson*, 699 F. App'x 888 (11th Cir. 2017), *pet. for cert. filed*, No. 17-669 (U.S. Nov. 6, 2017).⁸

REASONS FOR GRANTING THE WRIT

I. There is a circuit conflict over whether a prior conviction for drug trafficking based solely on possession of the requisite amount of drugs may be used to “infer” an intent to distribute and thus satisfy the definition of a “controlled substance offense” for sentencing purposes.

A. The conflict among the circuit courts.

The Eleventh Circuit acknowledged below that a court must “look at the elements of the convicted offense, not the conduct underlying the conviction, to determine if a prior conviction is

⁶ See Petition for Rehearing and Rehearing En Banc, *United States v. Kitchen*, No. 16-13691 (11th Cir. Sept. 5, 2017); Petition for Rehearing En Banc, *United States v. Orr*, No. 14-12240 (11th Cir. Sept. 21, 2017); Petition for Rehearing En Banc, *United States v. Dover*, No. 16-17650 (11th Cir. Oct. 20, 2017).

⁷ See Pet. App. 8a; Order, *United States v. Kitchen*, No. 16-13691 (11th Cir. Oct. 20, 2017); Order, *United States v. Dover*, No. 16-17650 (11th Cir. Dec. 6, 2017).

⁸ The ACCA’s definition of a “serious drug offense” is broader than the Guidelines’ definition of a “controlled substance” because the former is expansively defined to include offenses “involving” possession with intent to distribute, while the latter is more narrowly defined as an offense that “prohibits” possession with intent to distribute. Thus, if an inference of intent to distribute is not permissible in ACCA cases, then it should likewise not be permissible in Guidelines cases. Should the Court grant certiorari in either *White* or *Wilcoxson*, then, Petitioner requests that the Court hold this petition in abeyance until a decision is issued in that case.

a controlled substance offense under § 4B1.2(b).” Pet. App. 3a. Intent to distribute is not an element of Florida’s offense of trafficking by possession of 28 grams or more of cocaine. Florida law is clear on that point. *See, e.g., In re Standard Jury Instructions in Criminal Cases* (No. 2005-3), 969 So. 2d 245, 265-66 (Fla. 2007); *Greenwade v. State*, 124 So. 3d 215, 220 (Fla. 2013) (explaining that violation of § 893.135(1)(b)(1) can be proven by possession alone provided “the quantity of the substance met the statutory weight threshold”); *Johnson v. State*, 712 So. 2d 380, 381 (Fla. 1998) (concluding that the possession component of § 893.135 does not have as an element the intent to sell); *Pallin v. State*, 965 So. 2d 1226, 1228 (Fla. 1st DCA 2007) (“under Florida law, a conviction for trafficking may be obtained based on mere possession”).

Federal courts are “bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of” Florida crimes. *Johnson v. United States*, 559 U.S. 133, 138 (2010). Based upon the statute’s elements, then, a prior conviction under Fla. Stat. § 893.135 for trafficking by possession should never qualify as a controlled substance offense because it lacks the element of intent to distribute the drugs. *See Salinas v. United States*, 547 U.S. 188, 188 (2006) (vacating and remanding because “the Fifth Circuit erred in treating petitioner’s conviction for simple possession as a ‘controlled substance offense’”).

The Eleventh Circuit, though, has found that a prior conviction under Fla. Stat. § 893.135 resting upon possession qualifies as a controlled substance offense because the missing element of intent to distribute can be inferred from Florida’s statutory scheme. The Eleventh Circuit’s reasoning begins with this:

Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses. Under Florida law, those three tiers are the following: (1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking

in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b). *James*, 430 F.3d at 1154; *see also Madera-Madera*, 333 F.3d at 1231 (noting that Georgia law provides similar “three-tiered scheme for punishing those persons involved with drugs”). Because drug trafficking “is a more serious offense” than the other two tiers, the statute “necessarily infers an intent to distribute” once a defendant possesses the requisite amount of cocaine. *James*, 430 F.3d at 1155; *Madera-Madera*, 333 F.3d at 1231-32. Also, there would be “an anomaly” if the State’s “most serious drug offense” was not a predicate for enhanced sentencing while a “lesser” offense such as possession with intent to distribute was a predicate for enhanced sentencing. *James*, 430 F.3d at 1155; *Madera-Madera*, 333 F.3d at 1233-34. Therefore, according to the Eleventh Circuit, a conviction for trafficking by possessing the requisite amount of drugs is a qualifying conviction for sentence enhancement purposes. *James*, 430 F.3d at 1156; *Madera-Madera*, 333 F.3d at 1232-34.

Other circuits disagree with the Eleventh Circuit’s inference of an intent to distribute and instead apply this Court’s categorical approach for sentencing enhancement purposes, which requires looking only at the elements of the prior offense. *See Taylor v. United States*, 495 U.S. 575, 599-602 (1990); *Descamps v. United States*, 570 U.S. 254, 260-67 & n.3 (2013) (rejecting dissent’s contention that “a sentencing court should be able to make reasonable ‘inference[s]’ about what the factfinder really (even though not necessarily) found” and noting that “the dissent nowhere explains how a factfinder can have ‘necessarily found’ a non-element—that is, a fact that by definition is not necessary to support a conviction”); *Mathis v. United States*, 136 S. Ct. 2243, 2251-56 & n.6 (2016).

Thus, in *United States v. Herrera-Roldan*, 414 F.3d 1238 (10th Cir. 2005), the government, relying on *Madera-Madera*, asked the Tenth Circuit to infer an intent to distribute

and find that a conviction for possessing more than 50 pounds of marijuana constituted a drug trafficking offense for Guidelines’ purposes. *Id.* at 1240-42.⁹ The Tenth Circuit rejected the reasoning of *Madera-Madera* and refused to look beyond the elements of the Texas statute. The court stated the appropriate focus was on “what the state law prohibits,” which “confines [the] inquiry to the terms of the statute of conviction just as much as the phrase . . . ‘that has as an element.’” *Id.* at 1241. The court also rejected the argument that its decision would produce anomalous sentencing results. *Id.* at 1244 (“We cannot rewrite the Sentencing Guidelines simply because they might, in future cases, produce an anomalous result. . . . If the government is concerned that a straightforward reading of the Guidelines might produce anomalous results in future cases, it should direct its argument to the Sentencing Commission.”).

In *United States v. Montanez*, 442 F.3d 485 (6th Cir. 2006), the Sixth Circuit, reviewing Ohio state convictions to determine if they were controlled substance offenses, held that “under the Guidelines, simple possession – that is, possession without the proof beyond a reasonable doubt of the requisite intent to ‘manufacture, import, export, distribute, or dispense’ – is not a controlled substance offense.” *Id.* at 488. The circuit court stated: “For federal sentencing purposes, a sentencing court looks to the *elements* of the prior offense to determine whether it qualifies under the Guidelines.” *Id.* at 492. The title of a state statute “is simply irrelevant” as it “is the *elements* of the crimes that matter.” *Id.* at 492-93. The court added, “we will simply not read into an offense an element that is not in the prior statute of conviction, nor admitted to by the defendant, nor found beyond a reasonable doubt by a jury. Neither of the defendant’s prior convictions contained an element of intent to distribute that would allow his current sentence to be enhanced.” *Id.* at 494.

⁹ See n.5, *supra*, for the definition of a “drug trafficking offense.”

In *United States v. Villa-Lara*, 451 F.3d 963 (9th Cir. 2006), the issue was whether a prior conviction in Nevada state court for the felony of possessing a “trafficking quantity” of a controlled substance constituted a drug trafficking crime for federal Guidelines purposes. *Id.* at 964. The Ninth Circuit held that the Nevada conviction “does not qualify as a drug trafficking offense under the categorical approach” because the statute “criminalizes mere possession of certain amounts of controlled substances without proof of any trafficking intent.” *Id.* at 965. The circuit court noted the holding in *Madera-Madera*, but was critical of its reasoning: “But *Madera-Madera* failed to cite *Taylor* or undertake a proper *Taylor* categorical analysis of only the statutory definition of the prior offense. We therefore find its holding unpersuasive.” 451 F.3d at 965 n.2.

In *United States v. Lopez-Salas*, 513 F.3d 174 (5th Cir. 2008), the Fifth Circuit addressed “The Circuit Split” between *Madera-Madera* and the cases discussed above, and concluded that it “agree[d] with the reasoning of the Sixth, Ninth, and Tenth Circuits.” *Id.* at 179-80. The court also agreed with *Herrera-Roldan*, that “the Guidelines cannot be rewritten simply because they might produce an anomalous result.” *Id.* at 181 (internal brackets, quotation marks, and ellipses omitted; citation omitted).

More recently, in *United States v. Sarabia-Martinez*, 779 F.3d 274 (5th Cir. 2015), the Fifth Circuit concluded that “[b]y classifying mere possession as drug trafficking, the Florida statute [§ 893.135] defines drug trafficking more broadly than does the guidelines.” *Id.* at 276. The Fifth Circuit rejected the government’s attempt to rely upon the argument that “Florida presumes intent to distribute” based upon the drug quantity, maintaining its disagreement with the Eleventh Circuit’s non-elemental approach. *Id.* at 277.

There is thus a clear split between the Eleventh Circuit on one hand, and the Fifth, Sixth,

Ninth, and Tenth Circuits on the other hand. The Eleventh Circuit has, in fact, acknowledged that “[f]or the most part,” *Lopez-Salas, Montanez, Villa-Lara and Herrera-Roldan* “do reject the rationale underlying *Madera-Madera*.” *United States v. White*, 837 F.3d 1225, 1234-35 (11th Cir. 2016). As shown by the denials of the petitions for rehearing en banc in *Kitchen, Dover*, and this case, however, the Eleventh Circuit is not going to reconsider its holding in *Madera-Madera*, which in turn formed the basis of the reasoning behind the decision in *James*. Only this Court can resolve the intractable conflict between the circuits.

B. The decision below is wrong.

Even assuming *arguendo* that the Florida statute “infers” an intent to distribute, such an inference is irrelevant to whether an offense qualifies as a “controlled substance offense.” See *Lopez-Salas*, 513 F.3d at 179–80 (rejecting argument that “a state’s presumption of intent can create a drug trafficking offense under the Guidelines”). An inference does not need to be proven in every case, and therefore is not an element. An elements-based approach, though, which is used to determine whether prior convictions qualify as sentence enhancers, examines only the elements of the statute. See *Descamps*, 570 U.S. at 260-67 & n.3; *Mathis*, 136 S. Ct. at 2251-56 & n.6. Because the Guidelines define a “controlled substance offense” to include possession only when it is done “with intent to . . . distribute, or dispense,” U.S.S.G. § 4B1.2(b), a prior drug trafficking conviction resting upon possession without the element of intent to distribute is not a controlled substance offense.

II. If the Eleventh Circuit’s inference of intent is permissible, then this Court should establish a uniform standard for applying the inference because there is no set standard for determining the quantity of drugs needed to invoke the inference and state laws vary widely in the amount of drugs needed to constitute a trafficking by possession offense.

As a matter of policy, federal courts should strive for consistency in the determination of

whether a trafficking by possession conviction qualifies as a controlled substance offense.

Consistency is not attainable if what qualifies as a controlled substance offense is dependent on the views of judges as to the requisite amount that must be possessed or on the amounts of cocaine deemed by each state to constitute “trafficking” by possession.

For example, here the Eleventh Circuit found an inference of intent to distribute based on the possession of the statutory minimum trafficking amount of cocaine, 28 to 200 grams. *See* Pet. App. 6a (stating that the district court “properly considered the plea colloquy transcripts, which contained Orr’s admission that he possessed more than 28 grams of cocaine”); *see also id.* at 32a (Court: “Did you have in your possession more than 28 grams of cocaine?” Orr: “Yes, sir.”). But in *United States v. Brandon*, 247 F.3d 186 (4th Cir 2001), the Fourth Circuit held that a conviction for trafficking between 28 to 200 grams of cocaine under a North Carolina trafficking statute very similar to Florida’s¹⁰ was not a “serious drug offense” under the ACCA. The circuit court found it “natural and reasonable to assume that those who possess very large quantities of drugs intend to distribute those drugs.” 247 F.3d at 192. However, the court reasoned,

Brandon was alleged to have been in possession of between twenty-eight grams (which is just under an ounce) and two hundred grams of cocaine. Quantities at the lower end of this range are not so large that the only reasonable inference is that one who possesses that amount must intend to distribute it. While that may be a reasonable inference, another reasonable inference is that an ounce of cocaine, or even more, is intended for personal use only.

Id. “Given the range of drug quantities covered by the North Carolina statute,” the court continued, “we simply cannot say that the typical conduct reached by that statute inherently involves an intent to manufacture or distribute that cocaine,” and so the prior conviction could

¹⁰ See N.C. Gen. Stat. § 90-95(h)(3) (“Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine . . . shall be guilty of a felony, which felony shall be known as ‘trafficking in cocaine.’”).

not serve as a serious drug offense. *Id.* at 193.

Two different circuits, then, considering the same amount of drugs – between 28 and 200 grams of cocaine – have reached opposite conclusions as to whether intent to distribute could be inferred.¹¹ Judge Martin of the Eleventh Circuit has pointed to this discrepancy as evidence that “federal judges are not naturally possessed of empirical data about what drug amounts indicate an intent to consume the drug, or on the other hand, distribute it.” *United States v. White*, 868 F.3d 1285, 1289 (11th Cir. 2017) (Martin J., dissenting from the denial of rehearing en banc). The decision in *James*, however, “forces federal judges to make empirical determinations that are beyond our institutional competence.” *Id.* at 1286.

Further, the amounts of cocaine deemed by each state to constitute trafficking by possession vary widely. For example, the threshold for a cocaine “trafficking” offense by possession is ten grams in South Carolina,¹² 28 grams in Florida, Georgia, Alabama, and North Carolina,¹³ 150 grams in Missouri,¹⁴ and 200 grams in Arkansas.¹⁵ Federal sentencing courts, then, obviously cannot use the various state legislatures’ determinations of what constitutes trafficking to achieve a uniform federal definition of what constitutes a “controlled substance offense” when the offense only requires possession. As Judge Martin pointed out, “odd results” would occur if federal courts incorporated the judgments of state legislatures as to what

¹¹ And, as discussed above, applying an inferred intent in any case is contrary to the holdings of the Fifth, Sixth, Ninth, and Tenth Circuits.

¹² S.C. Code § 44-53-370(e)(2).

¹³ Fla. Stat. § 893.135(1)(b)(1); Ga. Code § 16-13-31(a)(1); Ala. Code § 13A-12-231(2); N.C. Gen. Stat. § 90-95(h)(3).

¹⁴ Mo Ann. Stat. § 579.068.1(2).

¹⁵ Ark. Code § 5-64-440(b)(1).

constitutes trafficking by possession into the definition of federal sentencing enhancements: “*James’s* interpretation of the ACCA requires our courts to rely on state labels and empirical judgments in such a way that the possession of the exact same amount of cocaine might count as a ‘serious drug offense’ if committed in Delaware or Alabama, but not if committed in Missouri.” *White*, 868 F.3d at 1290-92. Judge Martin described this result as “an affront to Congress’s intent to have a uniform national system for setting federal sentences.” *Id.* at 1292.

Should this Court conclude that an inference of intent to distribute may be used to find a prior conviction constitutes a “controlled substance offense,” then, this Court should provide guidance to the lower courts by setting out what evidence the courts should examine to determine if a particular quantity of drugs allows the court to infer that a person necessarily had an intent to distribute.

III. This case is a good vehicle for resolving the circuit conflict and addressing the policy argument.

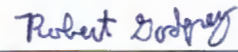
Whether a state offense for trafficking is a “controlled substance offense” where the trafficking conviction rested upon the mere possession of the requisite amount of drugs was fully litigated and preserved in the district court. On appeal, the circuit split on the issue was presented to the Eleventh Circuit, as was the policy argument for a uniform definition of a controlled substance offense. The circuit split has been acknowledged, is evident, and needs resolution by this Court. This case is an ideal vehicle for resolving the split on the merits.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Donna Lee Elm
Federal Defender



Robert Godfrey
Assistant Federal Defender
Florida Bar No. 0162795
Federal Defender's Office
201 South Orange Ave., Suite 300
Orlando, FL 32801
Telephone: (407) 648-6338
E-mail: robert_godfrey@fd.org
Counsel of Record for Petitioner

Appendix A

Decision Below

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-12240
Non-Argument Calendar

D.C. Docket No. 6:13-cr-00237-GAP-KRS-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JASON LYDELL ORR,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 24, 2017)

Before TJOFLAT, MARTIN and ANDERSON, Circuit Judges.

PER CURIAM:

A jury found Jason Lydell Orr guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and the District Court sentenced him to a prison term of 90 months, well below the applicable Guidelines sentence range of 120 to 150 months' imprisonment.¹ Orr appeals his sentence, arguing that the court erred by determining that his prior conviction for drug trafficking, under Fla. Stat. § 893.135(1)(b)(1), qualified as a controlled substance offense for the purpose of applying a base offense level of 24, pursuant to U.S.S.G. § 2K2.1(a)(2).

We review *de novo* whether a prior conviction qualifies as a controlled substance offense under the Sentencing Guidelines for purposes of applying § 2K2.1(a)(2). *See United States v. Travis*, 747 F.3d 1312, 1314 (11th Cir.) (per curiam), *cert. denied*, 135 S. Ct. 148 (2014) (reviewing *de novo* whether a prior conviction qualified as a crime of violence under the Guidelines for purposes of applying § 2K2.1(a)(2)).

Under the Guidelines, a defendant convicted of unlawful possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), ordinarily receives a base offense level of 14. U.S.S.G. § 2K2.1(a)(6) & comment. (n3). The base offense level increases to 24 where the defendant's conviction occurred after the defendant had sustained "at least two felony convictions of either a crime of violence or a controlled substance offense." *Id.* § 2K2.1(a)(2).

¹ The Probation Office's presentence investigation report fixed Orr's total offense level at 26 and his criminal history category at VI, resulting in the 120-150 months' sentence range.

For purposes of applying § 2K2.1(a)(2), a “controlled substance offense” is defined in the Guidelines Manual as:

an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Id. § 4B1.2(b).

We look at the elements of the convicted offense, not the conduct underlying the conviction, to determine if a prior conviction is a controlled substance offense under § 4B1.2(b). *United States v. Lipsey*, 40 F.3d 1200, 1201 (11th Cir. 1994) (per curiam). Recently, in *Descamps*, the Supreme Court reiterated that this categorical approach is used to determine whether a prior conviction qualifies as a predicate offense for sentence enhancement where a defendant’s prior conviction was under an “indivisible” state statute with a single set of elements. *Descamps v. United States*, ___ U.S. ___, ___, 133 S. Ct. 2276, 2281–83, 2293, 186 L. Ed. 2d 438 (2013). However, when the prior conviction was under a “divisible” statute—*i.e.* comprised of multiple, alternative versions of the crime—the sentencing court, “as a tool for implementing the categorical approach,” may examine the limited class of *Shepard*²-approved documents to determine which of the statute’s alternative elements formed the basis of the defendant’s prior conviction. *Id.* at ___, 133 S. Ct.

² *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

at 2284–85. “The modified approach thus acts not as an exception, but instead as a tool [and i]t retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime.” *Id.* at ___, 133 S. Ct. at 2285.

At issue in this appeal is Fla. Stat. § 893.135(1)(b)(1), which provides, in pertinent part:

“Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine . . . , commits a felony of the first degree, which felony shall be known as ‘trafficking in cocaine[.]’”

Fla. Stat. § 893.135(1)(b)(1) (emphasis added). Because the statute provides alternative elements of the crime of trafficking in cocaine, and some of the alternate elements do not meet the Guidelines’ definition of controlled substance offense (*i.e.* “purchases”), it is divisible and, therefore, subject to the modified categorical approach. *See Descamps*, 570 U.S. ___, 133 S. Ct. at 2284–85; *see also United States v. Shannon*, 631 F.3d 1187, 1188–90 (11th Cir. 2011) (recognizing the alternative elements in § 893.135(1)(b)(1) and concluding that, because the district court could not determine which statutorily-prohibited act established the conviction, it had to be assumed that the defendant had only purchased the cocaine, and, thus, the conviction did not meet the definition of controlled substance offense for purposes of being sentenced as a career offender under the Guidelines).

Although § 893.135 does not include an express element of intent, in *United States v. James*, 430 F.3d 1150 (11th Cir. 2005), we held that a conviction under § 893.135 for possessing between 200 and 400 grams of cocaine with intent to distribute qualified as a “serious drug offense” for purposes of the Armed Career Criminal Act (the “ACCA”) because “Florida’s drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more.” *Id.* at 1155–56. In reaching this conclusion, we relied upon our decision in *United States v. Madera-Madera*, 333 F.3d 1228 (11th Cir. 2003), which analyzed a similarly structured Georgia drug trafficking statute. *James*, 430 F.3d at 1154–55. We observed that Florida, like Georgia, has a three-tiered scheme for punishing drug-related offenses: “(1) possession of any amount of a controlled substance, Fla. Stat. § 893.13(6)(a); (2) possession with intent to distribute a controlled substance, § 893.13(1)(a); and (3) trafficking in cocaine by possession of 28 grams or more of the drug, § 893.135(1)(b).” *Id.* at 1154. We noted that, under both the Georgia and Florida statutory schemes, “the defendant must be in possession of a significant quantity of drugs, namely 28 grams, before the state deems the offense to be trafficking.” *Id.* at 1154–55 (quotation marks omitted). Moreover, “drug trafficking is a more serious offense, and is punished more harshly, than either simple possession or possession with intent to distribute.” *Id.* at 1155. We also observed that to hold that a defendant convicted of drug trafficking, the most

serious offense in the statutory scheme, was not subject to the ACCA, while a defendant convicted of the lesser offense of possession with intent to distribute was subject to the ACCA, would create an anomaly that was contrary to the ACCA's purpose. *Id.* at 1155; *see also Madera-Madera*, 333 F.3d at 1233–34 (discussing the potential anomalous result with respect to an enhancement under the Guidelines). Accordingly, we held that “Florida’s drug trafficking statute necessarily infers an intent to distribute once a defendant possesses 28 grams or more,” and, thus, James’s conviction qualified under the ACCA. *James*, 430 F.3d at 1155–56; *see also Brunson v. State*, 31 So.3d 926, 930 (Fla. Dist. Ct. App. 2010) (observing that, under § 893.135, “the possession of large amounts of cocaine infers the intent to sell or distribute at some point”).

We find no error in the District Court’s determination that Orr’s conviction under § 893.195 qualified as a controlled substance offense for purposes of applying a base offense level of 24, pursuant to § 2K2.1(a)(2). Because § 893.135 presents alternative elements to establish a violation, it is divisible and, thus, a modified categorical approach was appropriate to determine if Orr’s conviction qualified as a controlled substance offense. *See Descamps*, 570 U.S. at ___, 133 S. Ct. at 2284–85. Accordingly, the court properly considered the plea colloquy transcript, which contained Orr’s admission that he possessed more than 28 grams of cocaine. *See id.*

After the court established that Orr's conviction was premised upon possession of more than 28 grams of cocaine, it correctly applied the inference of intent to distribute, as set forth by *James*. See *James*, 430 F.3d at 1155. Because the prohibition of possession of cocaine with intent to distribute under § 893.135 meets the Guidelines definition of a controlled substance offense, the court properly applied a base offense level of 24. See U.S.S.G. §§ 4B1.2(b), 2K2.1(a)(2).

AFFIRMED.

Appendix B

Denial of Rehearing and Rehearing En Banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-12240-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JASON LYDELL ORR,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

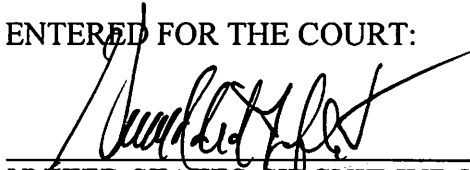
ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, MARTIN and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42

Appendix C

Shepard Documents for the
Prior Conviction at Issue

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA

NO CAPIAS

VS.

CASE NUMBER. 97-17991-CF-A-S

JASON LYDELL ORR

AMENDED INFORMATION

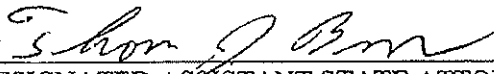
TRAFFICKING IN COCAINE (28 GRAMS OR MORE, BUT LESS THAN 200 GRAMS) (F1)

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA, NORMAN R. WOLFINGER, STATE ATTORNEY, THROUGH THE UNDERSIGNED DESIGNATED ASSISTANT STATE ATTORNEY, CHARGES THAT:

In the County of BREVARD, State of Florida, on June 12, 1997, JASON LYDELL ORR, did knowingly sell, purchase, manufacture, deliver, or bring into the State of Florida, or was knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in Florida Statute 893.03(2)(a)4, or a mixture containing cocaine, to wit: 28 GRAMS OR MORE, BUT LESS THAN 200 GRAMS, contrary to Section 893.135(1)(b), Florida Statutes, and had in his possession a semiautomatic firearm,

and against the peace and dignity of the State of Florida.

I HEREBY state under oath that I am instituting this prosecution in good faith.


DESIGNATED ASSISTANT STATE ATTORNEY
EIGHTEENTH JUDICIAL CIRCUIT
Florida Bar No. 0910295

Personally appeared before me, Designated Assistant State Attorney THOMAS J. BROWN, who is personally known to me, who being first duly sworn, says that this prosecution is instituted in good faith, and certifies that testimony under oath has been received from the material witness or witnesses for the offense(s), and says that the allegations as set forth in the foregoing information are based upon facts that have been sworn to as true and which, if true, would constitute the offense(s) therein charged. Sworn to and subscribed before me this 10th day of April, 1998


Signature of Notary

Amy M. George
Print, Type or Stamp Name of Notary

1088

Sandy Crawford

Clerk Of Courts, Brevard County

#Pgs: 9 #Names: 2 Serv: 0.00
 Trust: 0.00 Rec: 0.00 Excise: 0.00
 Deed: 0.00 Int Tax: 0.00
 Mtg: 0.00



CFN:2000035759 03-08-2000 08:08 am
 OR Book/Page. 4130 / 0444

☒ IN THE CIRCUIT COURT, EIGHTEENTH JUDICIAL CIRCUIT, BREVARD COUNTY, FLORIDA ☐ IN THE COUNTY COURT, BREVARD COUNTY, FLORIDA		
DIVISION ☐ CIVIL ☒ CRIMINAL ☐ JUVENILE ☐ TRAFFIC	☒ JUDGMENT ☐ JUDGMENT/ORDER OF PROBATION ☐ JUDGMENT/ORDER OF COMMUNITY CONTROL	CASE NUMBER 97-17991-CFA FILED IN OPEN COURT This <u>16</u> day of <u>Dec.</u> 19 <u>99</u> at <u>10A</u> M. SANDY CRAWFORD CLERK OF COURTS BY <u>CB</u> DC
PLAINTIFF STATE OF FLORIDA		DEFENDANT <u>Jason Lydell Orr.</u> OBTS NO. <u>[REDACTED]</u>

☐ PROBATION VIOLATOR ☐ COMMUNITY CONTROL VIOLATOR ☐ RETRIAL	☐ RESENTENCE ☐ AMENDED AS TO _____
--	---

Court was opened with the honorable Justice Lober presiding, and in attendance:
 State Attorney [Signature]; Trial Clerk Rev. San
 Court Reporter [Signature]

The defendant, Jason R. Orr., being personally before the court represented by [Signature], his attorney of record, and having

- ☐ Been tried and found guilty ☐ by jury ☐ by court of the following crime(s)
☒ Entered a plea of guilty to the following crime(s)
☒ Entered a plea of nolo contendere to the following crime(s)

COUNT	CRIME	OFFENSE STATUTE NUMBER(S)	DEGREE OF CRIME
<u>I</u>	<u>Trafficking in Cocaine</u>	<u>892.135(1)(b)</u>	<u>1F</u>
	Case #: 05-1997-CF-017991-XXXX-XX		
	Document Page #: 80		
	020856261		

- ☐ THE ☐ PROBATION ☐ COMMUNITY CONTROL PREVIOUSLY ORDERED IN THIS CASE IS REVOKED.
☐ THE PRIOR ADJUDICATION OF GUILT IN THIS CASE IS CONFIRMED.
 and no cause having been shown why the defendant should not be adjudicated guilty.
☒ IT IS ORDERED THAT ADJUDICATION OF GUILT BE WITHHELD.
☐ IT IS ORDERED THAT the defendant is hereby ADJUDICATED GUILTY of the above crime(s).
 and having been convicted or found guilty of, or having entered a plea of nolo contendere or guilty, regardless of adjudication, to attempts or offenses relating to sexual battery (ch.794), lewd and lascivious conduct (ch.800), or murder (s. 782.04), aggravated battery (s. 784.045), carjacking (s. 812.133), or home invasion robbery (s. 812.135), or any other offense specified in section 943.325, the defendant shall be required to submit blood specimens.

DONE AND ORDERED BREVARD COUNTY, FL	<u>[Signature]</u> JUDGE	DATE <u>12-16-99</u>
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VR000000 05/03/2013 12:14
 LAW 172
 (REV. 6/98)

DISTRIBUTION: ORIGINAL COURT FILE ☒ DEFENDANT ☒ PROBATION & PAROLE ☒
 SHERIFF ☒ DEFENSE ATTORNEY/PD ☒ STATE ATTORNEY ☒ DEPT. OF CORRECTIONS(2) ☒

SCANNED

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CFN.2000035759

OR Book/Page: 4130 / 0447

DEFENDANT <i>Jason L Orr</i>	SENTENCE <i>I</i>	CASE NUMBER <i>97-1799/CFA</i>
--	-----------------------------	--

(AS TO COUNT(S) *I*)

The defendant, *M. Brasso*, being personally before this court, accompanied by the defendant's attorney of record, _____, and having been adjudicated guilty herein, and the court having given the defendant an opportunity to be heard and to offer matters in mitigation of sentence, and to show cause why the defendant should not be sentenced as provided by law, and no cause being shown,

☐ and the court having on _____ deferred imposition of sentence until this date (date)

(Check applicable provision) ☐ and the court having previously entered a judgment in this case on _____ now resentsences the defendant (date)

☐ and the court having placed the defendant on probation/community control and having subsequently revoked the defendant's probation/community control

IT IS THE SENTENCE OF THE COURT that:

☐ The defendant pay a fine pursuant to section 775.083, Florida Statutes, plus a 5% surcharge pursuant to section 938.04 Florida Statutes, as indicated on the Fine/Costs/Fee Page.

☒ The defendant is hereby committed to the custody of the Department of Corrections.

☐ The defendant is hereby committed to the custody of the Sheriff of Brevard County, Florida.

☐ The defendant is sentenced as a youthful offender in accordance with section 958.04, Florida Statutes.

TO BE IMPRISONED (check one; unmarked sections are inapplicable):

☐ For a term of natural life.

☒ For a term of *10 years*

☐ Said SENTENCE SUSPENDED for a period of _____ subject to conditions set forth in this order.

IF "SPLIT" SENTENCE, complete the appropriate paragraph:

☒ Followed by a period of *5 years* on ☒ probation ☐ community control under the supervision of the Department of Corrections according to the terms and conditions of supervision set forth in the order entered herein.

☐ However, after serving a period of _____ imprisonment in the Department of Corrections, the balance of the sentence shall be suspended and the defendant shall be placed on ☐ probation ☐ community control for a period of _____ under supervision of the Department of Corrections according to the terms and conditions of ☐ probation ☐ community control set forth in the order entered herein.

In the event the defendant is ordered to serve additional split sentences, all incarceration portions shall be satisfied before the defendant begins service of the supervision terms.

4 of 8



CFN:2000035759

OR Book/Page: 4130 / 0448

DEFENDANT <i>Jason L Orr</i>	OTHER PROVISIONS	CASE NUMBER <i>97-179910FA</i>
OBT'S NO.		
(AS TO COUNT <u>I</u>)		
☐ RETENTION OF JURISDICTION	The Court retains jurisdiction over the defendant pursuant to section 947.16(3), Florida Statutes (1983).	
☒ ORIGINAL JAIL CREDIT	It is further ordered that the defendant shall be allowed a total of <u>318</u> days credit for such time incarcerated before imposition of this sentence.	
☐ Consecutive/Concurrent AS TO OTHER COUNTS	It is further ordered that the sentence imposed for this count shall run ☐ consecutive to ☐ concurrent with (check one) the sentence set forth in count _____ of this case above.	
☒ Consecutive/Concurrent AS TO OTHER CASES	It is further ordered that the composite term of all sentences imposed for the counts specified in this order shall run ☐ consecutive ☒ concurrent with ☐ any active sentence being served ☒ specific sentences: <u>99-24640CFA</u>	

VRAAKAP58.05/03
LAW 341
(REV. 11/96)

SCANNED

012a

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR BREVARD COUNTY,
FLORIDA

STATE OF FLORIDA

CASE NO 97-17991 CFA-S

-VS-

Jason Orr

PLEA AGREEMENT
(Fla R Crm P 3.171)

The undersigned defendant withdraws the previously entered plea(s) of not guilty and tenders a plea of
() guilty, (X) no contest as follows

Case Number	Offense	Maximum Sentence	Mandatory Minimum
<u>97-17991 CFA-S</u>	<u>Trafficking First</u> <u>Over 28 grams of Cocaine</u>		<u>0</u>

The State of Florida and I have agreed upon the following sentence to be imposed as a condition of this plea

Case Number	Offense	Sentence
<u>97-17991 CFA-S</u>	<u>Trafficking</u>	<u>1) UP TO Court</u> <u>2) Det Remains out on Bond</u> <u>3) Firearm Points apply</u> <u>Only if convicted</u> <u>of Assault & Assault</u> <u>with a Firearm</u>

I understand that if I am not a United States citizen, entry of this plea may subject me to deportation by the United States Immigration Service

I understand that probation may be part of my sentence unless specifically excluded by this agreement

I understand that if probation is a part of my sentence, the Court may impose conditions of probation authorized by law and, unless conditions are specifically attached hereto, those conditions are by this agreement left to the discretion of the Court. I further understand that statutory costs may be imposed as part of my sentence unless those costs are waived by the Court

I understand that if probation is a part of my sentence, unless excluded by this agreement, the Court may impose a term of imprisonment in the County Jail as a condition of probation or community control up to 364 days

I understand that I have the right to plead not guilty and to be tried by a jury with the assistance of counsel, the right to compel attendance of witnesses on my behalf, the right to confront and cross examine witnesses against me, the right to present defenses to the jury, and the right not to take the stand and testify, I waive those rights by entering this plea

I understand that if I enter a plea without reserving the right to appeal, I will give up my right to appeal all matters relating to the judgment, including the issue of guilt or innocence, except for the limited review available by collateral attack

I understand that I may be asked questions by the Court under oath about this plea and that my answers may be used against me later in a prosecution for perjury

CASE NO 97-1799/CAA

I enter this plea freely and voluntarily No person has threatened or coerced me into entering this plea No person has made any promises to me that induced me to enter this plea, except those matters specifically set forth in this plea agreement

I have fully discussed my case with my lawyer and I am satisfied with the representation my lawyer has given me I fully understand the nature of the charges against me

I am in good physical and mental health and I am not under the influence of alcohol or any drug at this time

I hereby waive my right to speedy trial

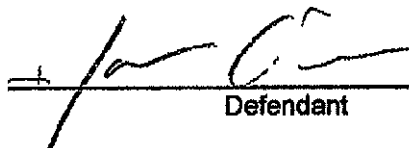
I acknowledge that if part of this plea agreement includes my release or my continued release on recognizance then this portion of the plea agreement is conditioned upon the following requirements

- (1) I must appear at the probation office at 840 N Cocoa Blvd , Cocoa, FL 32922, (407) 690-3200 and schedule a presentence investigation interview no later than the first business day following the entry of my plea
- (2) I must obey the Order of the Court requiring me to undergo drug or alcohol screening or for other evaluation if such an order has been made in my case
- (3) I must appear on time for all appointments with the assigned probation officer and not be under the influence of any illegal drugs or alcohol
- (4) I must appear in court on time for sentencing and not be under the influence of any illegal drugs or alcohol
- (5) I must have no contact with the victim (Direct or Indirect)
- (6) I must not be arrested for a violation of any criminal law If clear and convincing evidence is found to support my arrest, the arrest will constitute a violation of this plea agreement

I realize that this agreement is subject to being accepted or rejected by the Court, and if it is rejected for any reason other than for a breach of the agreement, I may withdraw my plea and go to trial

I understand and agree that if I fail to comply with any of the conditions set forth above I will have breached my plea agreement In that event I will not be allowed to withdraw my plea and the Court may sentence me to any sentence authorized by law for the offense(s) to which I have pled including the statutory maximum penalty for each crime to which I have pled under this document

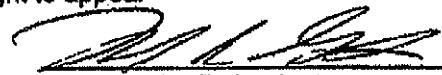
SWORN TO, SIGNED AND FILED IN
OPEN COURT, IN MY PRESENCE THIS
____ DAY OF _____ 19____


Defendant

Circuit Judge

CERTIFICATE OF DEFENSE ATTORNEY

I certify that I have fully discussed this case with the defendant including the nature of the charges, their elements, the evidence of which I am aware, any possible defenses, the maximum penalties which may be imposed, the probable guideline range and the defendant's right to appeal


Counsel for Defendant

CERTIFICATE OF PROSECUTION

The state accepts the terms of this agreement


Assistant State Attorney

IN THE CIRCUIT COURT IN THE
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY,
FLORIDA

CASE NUMBERS: 98-07728-CF-A
98-13529-CF-A
97-17991-CF-A
97-11068-CF-A

STATE OF FLORIDA,

Plaintiff,

versus

JASON ORR,

Defendant.

JUDY CRAWFORD
CLERK OF CIR. CT.
BREVARD CO. FLA.

1999 APR - 6 P 2:21

LED IN OFFICE
VIERA BRANCH

TRANSCRIPT OF PLEA

The transcript of the Plea taken in the
above-styled cause in the Brevard County Courthouse,
2825 Judge Fran Jamieson Way, Viera, Florida, on the
22nd day of March, 1999, before the Honorable J.
Preston Silvernail.

GERARD F. RYAN & ASSOCIATES
OFFICIAL COURT REPORTERS

1670 S. FISKE BLVD.
ROCKLEDGE, FLORIDA 32955

100 RIALTO PLACE, SUITE 700
MELBOURNE, FLORIDA 32901

(407) 636-4450
FAX: (407) 633-0972

(407) 723-8538
FAX: (407) 725-6315

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TH

A P P E A R A N C E S

MICHAEL DOYLE, ESQ.,
Assistant State Attorney
2725 Judge Fran Jamieson Way
Building D
Viera, Florida 32940

Appearing for
Plaintiff

TAD KOKOSZKA, ESQ.,
Kokoszka & Gutin
640 Brevard Avenue
Cocoa, Florida 32922

Appearing for
Defendant

JASON ORR, Defendant, present

DAWN DAVIS, Official Court Reporter

* * * * *

1 THE COURT: Okay. Ready on Orr? Orr
2 going to be a plea?

3 MR. DOYLE: According to Mr. Kokoszka.

4 THE COURT: What's the deal.

5 MR. DOYLE: Y.O. max out.

6 THE CLERK: Are you going to sentence
7 today, your Honor?

8 MR. DOYLE: Well, we should probably
9 get a P.S.I.

10 THE CLERK: Okay.

11 THE COURT: We've got a P.S.I., but --

12 MR. DOYLE: Yeah, but it doesn't
13 include the other two offenses.

14 MR. KOKOSZKA: Does this not include
15 all the offenses?

16 MR. DOYLE: It includes all the
17 offenses, but the P.S.I. we've got does not.

18 MR. KOKOSZKA: Okay.

19 THE COURT: So, we'll have to sentence
20 him on another day.

21 MR. KOKOSZKA: Right. And that's what
22 he wants, Judge, he'll agree to a Quarterman.
23 He has a bullet in his face he wants to take
24 care of that.

25 THE CLERK: I'm missing one file.

1 MR. DOYLE: Yeah, we've got 97-11068,
2 98-07749.

3 THE CLERK: What was that again, 98 --
4 what?

5 MR. DOYLE: 98-07749, you ready?

6 THE CLERK: That's the one I'm missing.

7 THE COURT: I believe we've got the
8 others. Okay. Mr. Orr raise your right
9 hand, please, to be sworn.

10 MR. KOKOSZKA: Judge, he's signing the
11 agreement.

12 THE COURT: Yeah.

13 THEREUPON,

14 JASON ORR,
15 called herein on behalf of the Court, having been first
16 duly sworn, was examined and testified upon his oath as
17 follows:

18 THE DEFENDANT: Yes, sir.

19 DIRECT EXAMINATION

20 BY THE COURT:

21 Q. Okay. Mr. Orr, you are here on a number of
22 cases -- are these all originals or --

23 MR. KOKOSZKA: Judge, yeah. There's no
24 VOPs.

25 THE COURT: All original cases. I'm

1 going to tell you about the cases now: First
2 there's 97-11068-CF-A, discharging a firearm
3 from a vehicle, a second degree felony;
4 aggravated assault, a third degree felony;
5 resisting arrest without violence on that
6 one, a first degree misdemeanor. Then you've
7 got 97-17991, trafficking in cocaine 28 grams
8 or more, but less than two hundred. And then
9 you have 98-13529, that's a possession of
10 cocaine case, a simple possession. Then you
11 have one more, what's the charge on that
12 other one?

13 MR. KOKOSZKA: Judge, the other one, I
14 believe, would be carrying a concealed
15 firearm and improper exhibition of a firearm.

16 BY THE COURT:

17 Q. Do you understand all these charges against
18 you?

19 A. Yes, sir.

20 Q. As a result of being here on those cases,
21 you have a right to a trial by jury, a trial by jury on
22 each of the four cases. That's a trial by jury of
23 peers, peers selected by those licensed to drive here
24 in Brevard County, Florida, or who have qualified for
25 jury service through a filing of an affidavit of some

1 nature or who have been issued a State of Florida
2 identifications. They would then be examined by the
3 Court, by the Assistant State Attorney charged with
4 your case, and by your good counsel to determine that
5 no prejudice or bias exists in the jury panel and that
6 they qualify for jury service here in Brevard County,
7 Florida.

8 You have the right to confront the witnesses
9 against you, see and hear their testimony,
10 cross-examine them on that testimony, have them
11 cross-examined on your behalf by your attorney. You
12 have the right to present defenses and evidence of your
13 own. Including the testimony of persons who, if they
14 will not voluntarily attend for you, you can compel to
15 attend through the subpoena power of the Court. Which
16 subpoena power you can use to compel other forms of
17 evidence on your behalf as well.

18 You have the right to make the state prove
19 these charges against you with competent, admissible
20 evidence beyond and to the exclusion of a reasonable
21 doubt. You have the right to be represented by an
22 attorney. If you can not afford one and meet the
23 financial guidelines of Florida, an attorney would be
24 appointed to represent you and you are here with an
25 attorney in representation this morning.

1 Finally, you have the very important right
2 to remain silent. This under the Fifth Amendment to
3 the United States Constitution and under the laws and
4 Constitution of the State of Florida, you may remain
5 silent not having that silence held or interrupted
6 against you. This is your right against
7 self-incrimination, that is against testifying against
8 yourself. Do you understand all of these rights?

9 A. Yes, sir.

10 Q. You have all of these rights on each of
11 these cases; do you understand that?

12 A. Yes, sir.

13 Q. Your choices in responding are to plead
14 guilty, no contest, or not guilty. Do you understand
15 your choices?

16 A. Yes, sir.

17 Q. What's your full name?

18 A. Jason Lydell Orr.

19 Q. And your date of birth?

20 A. 1-21-79.

21 Q. 1-21 --

22 A. -- 79.

23 Q. 1-21-79?

24 A. Yes, sir.

25 Q. Okay. And your place of birth?

1 A. Rockledge.

2 Q. In Brevard County, Florida?

3 A. Yes, sir.

4 Q. Are you a citizen of the United States?

5 A. Yes, sir.

6 Q. Do you read, write, speak, and understand
7 the English language?

8 A. Yes, sir.

9 Q. Did you read and did you understand the
10 written form of the plea agreement?

11 A. Yes.

12 Q. That is handed to the Court on your behalf?

13 A. Yes, sir.

14 Q. Is that your signature on it?

15 A. Yes, sir.

16 Q. Is everything contained in that plea
17 agreement true and correct?

18 A. Yes, sir.

19 Q. The Court will acknowledge your signature at
20 this time. Are you satisfied with the services your
21 attorney has provided you with regard to this case?

22 A. Yes, sir.

23 Q. And has anyone, including your own attorney,
24 made you any promises, assurances, told you anything of
25 any nature to get you to enter this plea agreement

1 which is not contained in the plea agreement itself?

2 A. No, sir.

3 Q. Has anyone threatened you, coerced you, or
4 forced you to enter this plea agreement?

5 A. No, sir.

6 Q. Is this plea agreement knowing, freely, and
7 voluntarily entered?

8 A. Yes, sir.

9 Q. Are you under the influence of any drugs,
10 narcotics, intoxicants, alcohol beverages, any
11 medications, any other substances which would affect
12 your judgment?

13 A. No, sir.

14 Q. Do you have any mental or emotional
15 disabilities of any nature to your knowledge?

16 A. No, sir.

17 Q. Do you understand that you have a right to a
18 jury trial on each one of these cases?

19 A. Yes, sir.

20 Q. And assert all the rights I told you about
21 on each case, but you'll be giving up that jury trial
22 on each case and all those other rights on each case by
23 entering pleas on them at this time?

24 A. Yes, sir.

25 Q. Do you understand that if the Court accepts

1 you plea agreement, adjudicates you, and sentences you
2 in conformity with the terms of the plea agreement,
3 you'll be giving up your right to a direct appeal on
4 these cases?

5 A. Yes, sir.

6 THE COURT: What are the terms of the
7 plea agreement?

8 MR. KOKOSZKA: Judge, on all cases, all
9 cases and all charges, the terms are these:
10 Any misdemeanor charges gets time served,
11 there would be no fines imposed. There would
12 be four years D.O.C. with credit for time
13 served as a youthful offender with two years
14 youthful offender probation to follow. And
15 that about sums it up, sir.

16 THE COURT: So, he has to go to D.O.C.
17 and they would process him through?

18 MR. DOYLE: Judge, there was one
19 proviso that I wrote down, there is
20 absolutely no boot camp eligibility. Because
21 all he gets is basic gain time, he's got to
22 do 85 percent of the four years.

23 MR. KOKOSZKA: And he is, Judge, I
24 would request -- I mean I know the Court
25 probably can't recommend it or maybe you

1 could. He wants to use this time as best he
2 can. If there is a youthful offender
3 facility which would allow him, he has a
4 G.E.D., to do some schooling, college
5 classes. He wants to go to college when he
6 gets out. If there is such a place, I would
7 ask that he be sent to a place where he could
8 maximize that. And also there is a
9 Quarterman release pending sentencing and
10 part of the reason for that is he wants to --
11 he's got a bullet lodged in his face and he
12 wants to go see a doctor and take care of
13 that.

14 MR. DOYLE: Judge, I need to speak
15 further, because of the number of cases and
16 counts, the plea agreement doesn't have
17 everything on there. I just want to make
18 sure, as long as we could get them all the
19 same day, Judge. Orally, we're addressing
20 case number 97-11068, in which Mr. Orr is
21 charged with count one, discharging a firearm
22 from a vehicle, it's a second degree felony,
23 aggravated assault, a third degree felony,
24 and resisting arrest without violence. On
25 97-17991-CF-A, Mr. Orr had previously pled to

1 the Court on April 20, 1998, it's our
2 understanding, at this point, that this plea
3 is going to supersede that plea. And in that
4 case, he is charged with trafficking cocaine
5 28 grams or more, but less than the 200
6 grams, but as a trafficking offense, it is a
7 level seven. Judge, in 98-07728-CF-A, Mr.
8 Orr stands charged with carrying a concealed
9 firearm and improper exhibition of a
10 dangerous weapon. And in 98-13529-CF-A,
11 Mr. Orr is charged simply with possession of
12 cocaine.

13 MR. KOKOSZKA: We agree. And we would
14 agree that the plea agreement encompasses all
15 those charges and we wrote all the serious
16 ones on there.

17 THE COURT: Mr. Orr, are the terms as
18 announced acceptable to you?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And to the State of
21 Florida?

22 MR. DOYLE: Yes, your Honor.

23 THE COURT: Now, sir, I want to remind
24 you of the Quarterman's conditions, at this
25 time. They are, essentially, that you are

1 promising the Court that you will do three
2 things: One, that you will not violate the
3 law between now and the date of your
4 sentencing; two, that you will appear at the
5 Department of Correction's Office within 72
6 hours of your release so that they can
7 prepare a proper presentence investigation
8 and score sheet herein; and three, that you
9 will timely and properly appear here for
10 sentencing. If you do not do all of these
11 things, if you violate any of these
12 conditions, then the Court can sentence you
13 to the maximum statutory period for each one
14 and every one of these charges. In your
15 case, that would be --

16 MR. KOKOSZKA: Judge, I told him it
17 would be in excess of 50 years.

18 THE COURT: It would be in excess of 50
19 years Department of Corrections, that's a
20 long time in the Department of Corrections.
21 What does that mean for you?

22 THE DEFENDANT: I am going to be here
23 on time.

24 THE COURT: Okay. It means you better
25 stay away from violations of the law during

1 this period. For example, if you happen to
2 be in your friend's car or something and they
3 have some cocaine in there or something of
4 that nature, and you become aware of that,
5 that's a violation of your condition. You
6 could get up to 50 years on that, 50 years
7 incarceration in the Department of
8 Corrections, merely for doing something like
9 that. For that reason, you'll want to be
10 very careful during this period when you're
11 out; do you understand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right.

14 MR. DOYLE: Judge, actually he'd score
15 62, it would be 62 years if you give him a
16 year for each misdemeanor, it's 62 years.

17 THE COURT: A long time in the
18 Department of Corrections, 62 years. Do you
19 agree to meet these terms of the Quarterman
20 release?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Are you sure you want to be
23 released under these terms? Wouldn't you be
24 better off just staying until your
25 sentencing?

1 THE DEFENDANT: No, sir. I want to go
2 ahead and get this out. I was supposed to
3 get it out a couple months ago.

4 MR. DOYLE: Judge, we would agree that
5 there is no doubt that Mr. Orr has a bullet
6 lodged in his skull from a prior shooting
7 incident in which he was not charged.

8 THE DEFENDANT: It is a 38 slug.

9 BY THE COURT:

10 Q. All right. Just stay out of trouble, okay.
11 All right. The Court will accept that. Sir, do you
12 believe this plea is in your best interest?

13 A. Yes, sir.

14 Q. And have the maximum possible sentences in
15 all these cases been explained to you?

16 A. Yes, sir.

17 Q. Let's go through them. Now, what's the
18 charge on the one I don't have, is that a concealed?

19 MR. KOKOSZKA: If it is, Judge, that
20 would be five years, five thousand dollars?

21 THE COURT: Well, I need to ask him on
22 the plea. Anybody got the information on
23 that case.

24 MR. DOYLE: Yes, sir.

25 (Passing a document to the Court.)

1 BY THE COURT:

2 Q. Sir, in this case 98-07728-CF-A, count one,
3 carrying a concealed firearm; how do you plea?

4 A. Guilty.

5 Q. Count two, improper exhibition of a
6 dangerous weapon or a firearm; how do you plea?

7 A. Guilty.

8 Q. What did you do to be guilty of these
9 things?

10 A. I carried a concealed weapon.

11 Q. What kind of weapon was it?

12 A. I can't remember.

13 Q. A pistol?

14 A. A pistol.

15 Q. Was that in Brevard County on April 21,
16 1998?

17 A. Yes.

18 THE COURT: Anything else from the
19 state on that?

20 MR. DOYLE: Yes, your Honor. If the
21 matter were called to trial, the state would
22 show through competent and admissible
23 evidence that on the 21st day of April 1998,
24 Deputy Bruce Dowdy with the Brevard County
25 Sheriff's Office was on routine patrol at or

1 near the 200 block of Chandler Avenue, in
2 Cape Canaveral, Florida. He was flagged down
3 by two individuals who indicated to him that
4 they had just been threatened by two other
5 individuals both carrying firearms and gave a
6 very detailed description. Deputy Dowdy then
7 began to search the area, two blocks away he
8 found the defendant and the co-defendant,
9 Betty Thomas Wayne. Judge, he patted them
10 down and he found no weapons, but in the
11 immediate area just next to where the search
12 took place, he found two firearms stashed
13 under a couch -- in a pillow of an abandoned
14 couch. Judge, all events occurred in Brevard
15 County, Florida.

16 MR. KOKOSZKA: Plus, Judge, about six
17 witnesses identified him and there was some
18 statements made in the back of a police car
19 in reference to what they were going to say.

20 BY THE COURT:

21 Q. In this regard, there is a factual basis,
22 the Court so finds. Sir, in this case 98-13529-CF-A,
23 possession of cocaine; how do you plea?

24 A. Guilty.

25 Q. What'd you do to be guilty of that?

1 A. Possessed cocaine.

2 Q. Was than on or about June 7, 1998 in Brevard
3 County, Florida?

4 A. Yes, sir.

5 THE COURT: Anything from the state on
6 that?

7 MR. DOYLE: Judge, if the case were
8 called to trial, we have the testimony of
9 Officer Richard T. Lee, from Rockledge Police
10 Department and the date and time that Officer
11 Lee would testify Mr. Orr was in actual
12 possession of cocaine.

13 BY THE COURT:

14 Q. There is a factual basis, herein. Sir, with
15 regard to case number 97-17991, of trafficking in
16 cocaine 28 grams or more, but less than 200 grams; how
17 do you plea?

18 A. Guilty.

19 Q. What did you do to be guilty of that charge?

20 A. I was trafficking cocaine.

21 Q. Did you have in your possession more than 28
22 grams of cocaine?

23 A. Yes, sir.

24 Q. Was that on June 12, 1997?

25 A. Yes, sir.

1 Q. What was your intent with regard to that
2 cocaine, were you hoping to sell it?

3 A. I was just holding it.

4 Q. Okay.

5 A. I guess to sell it, yeah.

6 THE COURT: Okay, state.

7 MR. DOYLE: Judge, if the matter were
8 called to trial, we would show through
9 competent and admissible evidence that on the
10 12th day of June 1997, Mr. Orr was the
11 subject of a controlled operation by the
12 Cocoa Police Department. Basically, the
13 police had received tips that Mr. Orr or
14 others were serving -- selling cocaine out of
15 a residence -- actually the residence was 913
16 Acacia Way. Judge, they knocked on the door,
17 Mr. Orr gave consent to search, the cocaine
18 was located in the residence and was weighed
19 in excess of 28 grams, but less than 200
20 grams.

21 BY THE COURT:

22 Q. There is a factual basis herein. Sir, in
23 this case 97-11068-CF-A, how do you plead to count one
24 discharging a firearm from a vehicle?

25 A. Guilty.

1 Q. How do you plead to count two aggravated
2 assault?

3 A. Guilty.

4 Q. How do you plea to count three resisting
5 arrest without violence?

6 A. Guilty.

7 Q. What did you do to be guilty of these
8 things?

9 A. I shot at somebody or discharged a firearm.

10 Q. Was that in Brevard County, Florida?

11 A. Yes, sir.

12 Q. Was it on May 3, 1997?

13 A. Yes, sir.

14 Q. What about the aggravated assault?

15 MR. KOKOSZKA: That's the same thing,

16 he shot out of a vehicle -- I think it was

17 without intent to kill, too, Judge, but --

18 BY THE COURT:

19 Q. Count three resisting arrest without
20 violence, what'd you do there?

21 A. I resisted arrest without violence.

22 Q. How did you do that?

23 MR. DOYLE: He ran away from the scene
24 after he was shot, your Honor.

25 THE COURT: All right. Anything else

1 from the state on those?

2 MR. DOYLE: Yes, your Honor, as far as
3 this case, 97-11068-CF-A, this case was
4 previously nol prossed on the day of trial,
5 due to witness unavailability. We have
6 filed -- refiled information as of the third
7 day of February 1999. Accord to my records,
8 Mr. Orr has not been served with the refiled
9 information and at this time, and unless
10 expressly stated on the record that he will
11 waive formal service.

12 MR. KOKOSZKA: Judge, I'll waive it.
13 Will you waive it?

14 THE DEFENDANT: Yeah.

15 MR. KOKOSZKA: Okay. He said it. Oh,
16 Judge, this plea also -- I don't know if it
17 says it or not, but it also would provide
18 that there is no three year minimum
19 mandatory, the state is waiving that.

20 THE COURT: That true state?

21 MR. DOYLE: Judge, no objection to a
22 waiver of the three year minimum mandatory
23 for use of a firearm during commission of a
24 felony; however, that would not affect the
25 fact that he is going to do four years at a

1 boot camp.

2 THE COURT: All right. In this regard,
3 the Court finds a factual basis in the last
4 of the cases charged herein. The Court finds
5 as well, the defendant's able, alert, and
6 intelligent, represented by competent counsel
7 with whom he is satisfied. The plea has been
8 knowingly, freely, and voluntarily entered.
9 The defendant believing the plea in his best
10 interest. The Court therefore accepts the
11 plea, ordering preparation of a P.S.I. and
12 score sheet.

13 I present the stipulation of the
14 parties herein, the state and the defense
15 allowing him to be released on Quarterman
16 conditions. Don't violate your Quarterman
17 conditions. If you feel like you are tempted
18 to violate the Quarterman conditions just get
19 back in jail, you'll be a lot better off; all
20 right?

21 MR. KOKOSZKA: And I'll set that up for
22 you, if you need to.

23 THE COURT: Good luck to you Mr. Orr,
24 we wish the absolute best for you.

25 MR. DOYLE: Judge, can we go back on

1 the record? According to the clerk, Mr. Orr
2 has been formally served with that case I was
3 just talking about, so we don't have to worry
4 about it.

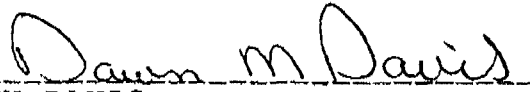
5 THE COURT: All right.
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C E R T I F I C A T E

STATE OF FLORIDA)
(
COUNTY OF BREVARD)

I, DAWN DAVIS, Deputy Official Court Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that I was authorized to and did report in stenotype the foregoing proceedings, consisting of pages numbered 1 through 24, inclusive; that said pages contain a true and correct transcript of the Plea taken in the aforementioned styled cause at the time and date hereinabove mentioned.

WITNESS MY HAND and Official Seal of Office in the City of Rockledge, County of Brevard, State of Florida, this 31st day of March, 1999.



DAWN DAVIS

Deputy Official Court Reporter

Notary Public:

My Commission Expires 1-12-01

