

**UNPUBLISHED****UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 17-4589**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama,

Defendant - Appellant.

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Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, District Judge. (5:16-cr-00250-D-1)

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Submitted: December 28, 2018

Decided: January 14, 2019

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Before WILKINSON, WYNN, and THACKER, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Louis C. Allen, Acting Federal Public Defender, Jaclyn L. DiLauro, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Acting First Assistant United States Attorney, Barbara D. Kocher, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

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Unpublished opinions are not binding precedent in this circuit.

## PER CURIAM:

Rickie Markiece Atkinson appeals from his 240-month sentence imposed pursuant to his guilty plea to possession of a firearm and ammunition by a convicted felon. On appeal, Atkinson challenges his designation as an armed career criminal and argues that the district court erred in departing upwards from the calculated Sentencing Guidelines range. We affirm.

We review *de novo* the question of whether a defendant's prior convictions for breaking and entering qualify as predicate felonies under the Armed Career Criminal Act (ACCA). *United States v. Winston*, 850 F.3d 677, 683 (4th Cir. 2017). An armed career criminal is, in pertinent part, "a person who violates [18 U.S.C. § 922(g) (2012)] . . . and has three previous convictions . . . for a violent felony." 18 U.S.C. § 924(e)(1) (2012). "The ACCA defines 'violent felony' to include, as relevant here, any offense that 'is burglary.'" *United States v. Mungro*, 754 F.3d 267, 268 (4th Cir. 2014) (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). "Thus, any burglary offense is an ACCA predicate offense." *Id.* In *Mungro*, the "question presented" was "does North Carolina's 'breaking or entering' offense [under N.C. Gen. Stat. § 14-54(a)] qualify as burglary and, thus, as a predicate offense under the ACCA?" *Id.* After a thorough analysis of the statute and relevant case law, we "conclude[d] that N.C. Gen. Stat. § 14-54(a), as interpreted by the North Carolina Supreme Court, sweeps no more broadly than the generic elements of burglary" and "therefore qualifies as an ACCA predicate offense." *Id.* at 272.

Atkinson argues that *Mungro* is not controlling here because, in that case, this Court focused its analysis on the "unlawful entry element" of N.C. Gen. Stat. § 14-54(a)

## APPENDIX A

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and not on the statute's definition of the term "building." Atkinson contends that N.C. Gen. Stat. § 14-54(a) is broader than generic burglary because North Carolina courts have convicted defendants under that statute for breaking and entering into mobile homes and trailers. Generic burglary, Atkinson argues, is narrower and does not encompass, for example, burglary of a boat, motor vehicle, air vehicle, booth, tent, or railroad car. Atkinson claims that we are not bound by *Mungro* because *Mungro* did not explicitly address this issue.

We reject this argument and hold that North Carolina Breaking and Entering's "building" element sweeps no broader than generic burglary's "building" element. Accordingly, we find that Atkinson was properly treated as an armed career criminal.

Atkinson next argues that the district court's decision to upwardly depart and the extent of the departure were unwarranted. He contends that the district court's reasoning was not sufficiently compelling to support such a large departure,\* especially where certain of the district court's reasons—offense conduct, obstruction of justice, and criminal history—were adequately accounted for in the calculation of the original Guidelines range. Atkinson also notes that nearly all of his unscored convictions were more than fifteen years old.

When reviewing a departure, we consider whether the sentencing court acted reasonably both with respect to its decision to depart and with respect to the extent of the

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\* The district court departed from a 180- to 188-month Guidelines range to a range of 210 to 262 months.

divergence from the sentencing range. *United States v. Howard*, 773 F.3d 519, 529 (4th Cir. 2014) (internal quotation marks omitted). “An appellate court owes due deference to a district court’s assessment of the [18 U.S.C.] § 3553(a) [2012] factors, and mere disagreement with the sentence below is insufficient to justify reversal of the district court.” *Id.* at 531 (internal quotation marks omitted). The district court departed pursuant to United States Sentencing Guidelines Manual § 4A1.3(a)(1), p.s. (2016), which “authorizes an upward departure when reliable information indicates that the defendant’s criminal history category substantially under-represents the seriousness of the defendant’s criminal history or the likelihood that the defendant will commit other crimes.” *United States v. McCoy*, 804 F.3d 349, 352 (4th Cir. 2015) (internal quotation marks omitted). Further, once the district court reached a criminal history category of VI, the district court moved to a higher offense level appropriate to the case. USSG § 4A1.3(a)(4)(B), p.s.

Atkinson contends that the district court relied too heavily on his earlier convictions in upwardly departing. However, the district court discussed each of Atkinson’s convictions, noting his age at the time and the resulting, generally lenient sentence. It then thoroughly explained its reasoning for the departure, relying not just on Atkinson’s earlier criminal history, but on a combination of the length of Atkinson’s criminal history, the lenient sentences he received, his numerous institutional infractions, his obstruction of justice, his current and past violent behavior, and his failure to modify his behavior for any period of time.

The court correctly considered Atkinson’s unscored violations, as well as other reasons for the upward departure, including “the nature of the prior offenses” and any prior lenient treatment. USSG § 4A1.3, p.s. cmt. 2(B) (authorizing consideration of “the nature of the prior offenses rather than simply their number”); see USSG § 4A1.3, p.s. background (“[A] defendant with an extensive record of serious, assaultive conduct who had received what might now be considered extremely lenient treatment in the past might have the same criminal history category as a defendant who had a record of less serious conduct.”). Moreover, while certain circumstances discussed by the court were at least partially taken into account by the Guidelines range, the district court offered numerous reasons supported by the record for its decision to depart, as well as for the extent of the departure, and the court’s reasoning continually underscored the extraordinarily serious nature of Atkinson’s history.

For instance, the court concluded that the dates and circumstances of Atkinson’s criminal history, as well as his institutional infractions, showed a “100 percent” chance of recidivism, which the court called “extraordinary.” The court recognized that Atkinson’s violent behavior continued even in prison while awaiting disposition of the instant case. Further, the court considered the circumstances surrounding Atkinson’s criminal conduct, including his dismissed charge and his attempt to obstruct justice and avoid responsibility.

Next, the district court considered the appropriate § 3553(a) factors in imposing the 240-month sentence. Atkinson’s criminal record reflected a steady pattern of offenses, some involving violence, since he was 16. The district court also considered

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numerous other relevant factors. See 18 U.S.C. § 3553(a)(1)-(2) (2012). While Atkinson claims that the district court failed to account for mitigating circumstances like his mental health and difficult upbringing, the record reflects that the district court discussed the mitigating factors, but found Atkinson's criminal behavior in noncustodial and custodial settings more telling. While the sentence selected by the district court is significantly higher than the predeparture Guidelines range established at sentencing, the court grounded the sentence in the § 3553(a) factors. We therefore find that Atkinson's sentence is reasonable and that the district court did not err procedurally or substantively in its decision to depart.

Thus, we affirm Atkinson's sentence. We dispense with oral argument because the facts and legal contentions are adequately presented the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

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## UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA ) **JUDGMENT IN A CRIMINAL CASE**  
 v. )  
 RICKIE MARKIECE ATKINSON ) Case Number: 5:16-CR-250-1-D  
 ) USM Number: 62803-056  
 ) Jennifer A. Dominguez  
 ) Defendant's Attorney

**THE DEFENDANT:**

pleaded guilty to count(s) 1 of the Indictment

pleaded nolo contendere to count(s) \_\_\_\_\_ which was accepted by the court.

was found guilty on count(s) \_\_\_\_\_ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 922(g)(1), 18 U.S.C. § 924(e)(1)	Felon in Possession of a Firearm and Ammunition	9/10/2015	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) \_\_\_\_\_

Count(s) 2 and 3 of the Indictment  is  are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

9/12/2017  
Date of Imposition of Judgment

J. Dever  
Signature of Judge

James C. Dever III, Chief United States District Judge  
Name and Title of Judge

9/12/2017  
Date

## APPENDIX B

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D**IMPRISONMENT**

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Count 1 - 240 months

The court orders that the defendant provide support for all dependents while incarcerated.

The court makes the following recommendations to the Bureau of Prisons:

The court recommends that the defendant receive intensive substance abuse treatment and vocational and educational training opportunities. The court recommends that the defendant receive a mental health assessment and mental health treatment while incarcerated. The court recommends that he serve his term in FCI Butner, North Carolina.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at \_\_\_\_\_  a.m.  p.m. on \_\_\_\_\_

as notified by the United States Marshal.

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

before 2 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 \_\_\_\_\_

a \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

## APPENDIX B

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D**SUPERVISED RELEASE**

Upon release from imprisonment, you will be on supervised release for a term of: Count 1 - 5 years

**MANDATORY CONDITIONS**

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.  
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4.  You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5.  You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6.  You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D**STANDARD CONDITIONS OF SUPERVISION**

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

**U.S. Probation Office Use Only**

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: [www.uscourts.gov](http://www.uscourts.gov).

Defendant's Signature

Date

## APPENDIX B

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D**ADDITIONAL STANDARD CONDITIONS OF SUPERVISION**

The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation office.

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall participate as directed in a program approved by the probation office for the treatment of narcotic addiction, drug dependency, or alcohol dependency which will include urinalysis testing or other drug detection measures and may require residence or participation in a residential treatment facility.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall consent to a warrantless search by a United States probation officer or, at the request of the probation officer, any other law enforcement officer, of the defendant's person and premises, including any vehicle, to determine compliance with the conditions of this judgment.

The defendant shall participate in a vocational training program as directed by the probation office.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall support his dependents.

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D

## CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>TOTALS</u>	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 100.00	\$	\$	\$

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

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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<b>TOTALS</b>	\$ <u>0.00</u>	\$ <u>0.00</u>
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Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

the interest requirement is waived for the  fine  restitution.

the interest requirement for the  fine  restitution is modified as follows:

\* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

\*\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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DEFENDANT: RICKIE MARKIECE ATKINSON  
CASE NUMBER: 5:16-CR-250-1-D

## SCHEDULE OF PAYMENTS

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

A  Lump sum payment of \$ \_\_\_\_\_ due immediately, balance due  
 not later than \_\_\_\_\_, or  
 in accordance with  C,  D,  E, or  F below; or

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

C  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after the date of this judgment; or

D  Payment in equal \_\_\_\_\_ (*e.g., weekly, monthly, quarterly*) installments of \$ \_\_\_\_\_ over a period of \_\_\_\_\_ (*e.g., months or years*), to commence \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment to a term of supervision; or

E  Payment during the term of supervised release will commence within \_\_\_\_\_ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F  Special instructions regarding the payment of criminal monetary penalties:

The special assessment in the amount of \$100.00 shall be due in full immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:  
 The defendant shall forfeit to the United States the defendant's interest in the property specified in the Order of Forfeiture entered on September 12, 2017.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

UNITED STATES OF AMERICA )  
 )  
 v. ) 5:16-CR-250-1D  
 )  
 RICKIE MARKIECE ATKINSON )

SENTENCING HEARING  
TUESDAY, SEPTEMBER 12, 2017  
BEFORE THE HONORABLE JAMES C. DEVER III  
CHIEF UNITED STATES DISTRICT JUDGE

## APPEARANCES:

On Behalf of the Government:

ERIN C. BLONDEL, ASSISTANT U.S. ATTORNEY  
United States Attorney's Office  
310 New Bern Avenue, Suite 800  
Raleigh, North Carolina 27601

On Behalf of the Defendant:

JENNIFER A. DOMINGUEZ, FEDERAL PUBLIC DEFENDER  
Federal Public Defender's Office  
150 Fayetteville Street, Suite 450  
Raleigh, North Carolina 27601

AMY M. CONDON, CSR, RPR  
Official Court Reporter  
United States District Court  
Raleigh, North Carolina  
Stenotype with computer-aided transcription

1 move that range either up or down. I'll then consider all  
2 arguments your lawyer makes on your behalf, any statement you'd  
3 like to make, sir, and all arguments of the Assistant United  
4 States Attorney. I'll then determine your sentence and  
5 announce it here in court today. That'll be the process we'll  
6 follow.

7 Ms. Dominguez, did you receive a copy of the revised  
8 presentence report?

9 MS. DOMINGUEZ: Yes, Your Honor.

10 THE COURT: Mr. Atkinson, did you receive a copy of  
11 that report, sir?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Did you speak with your lawyer, Ms.  
14 Dominguez, about that report, sir?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: At this time the Court directs that the  
17 revised presentence report be placed in the record under seal.

18 In accordance with Rule 32 of the Federal Rules of  
19 Criminal Procedure, the Court accepts as accurate the revised  
20 presentence report, except as to matters in dispute as set  
21 forth in the addendum.

22 I have reviewed the entire report, including the  
23 addendum. The addendum does include the objection to Mr.  
24 Atkinson being an armed career criminal with a focus on the  
25 North Carolina breaking and entering convictions that Mr.

1 Atkinson sustained that are reflected in the report.

2 Is that the only objection?

3 MS. DOMINGUEZ: That is, Your Honor.

4 THE COURT: Okay. All right. I have read the  
5 materials that have been submitted. We obviously had another  
6 hearing that we started and talked about a lot of these issues.

7 MS. DOMINGUEZ: Correct, Your Honor.

8 THE COURT: Does the defense want to add anything  
9 else?

10 MS. DOMINGUEZ: We don't need to be heard further.  
11 We wish to maintain and preserve our objection to that status  
12 of armed career criminal on all the grounds from the previous  
13 hearing and the grounds raised in our motion.

14 We understand that the Court will feel bound by  
15 *Mungro* specifically in light of the *Beatty* unpublished opinion,  
16 which concludes, with respect to North Carolina's building  
17 element, that it is no broader than generic burglary.  
18 Respectfully, we disagree with the issues in that opinion. It  
19 is unpublished and we intend to pursue it, but we understand  
20 this Court's position and wish to preserve.

21 THE COURT: All those issues are preserved.

22 I have reviewed the Government's sentencing memo in  
23 response that was submitted on August 25th. And obviously, I  
24 have reviewed all the cases that we talked about last time, and  
25 here the debate is about whether Mr. Atkinson should be

1 classified as an armed career criminal. He contends that his  
2 four North Carolina breaking and entering convictions do not  
3 qualify as an enumerated offense of burglary within the meaning  
4 of the ACCA.

5 The four convictions are in the PSR at paragraphs 26,  
6 27, 28 and 34 -- excuse me, 35.

7 MS. DOMINGUEZ: Your Honor, I do believe that -- I'm  
8 sorry. You didn't say 26.

9 THE COURT: 27, 28, 29 and 35, just for the record.

10 Here, the Court has reviewed all the cases that have  
11 been cited, and in particular the *U.S. v. Mungro* case, 754 F.3d  
12 267 (4th Cir. 2014). There, the Fourth Circuit held that NC  
13 Gen Stat 14-54A, as interpreted by the Supreme Court of North  
14 Carolina, sweeps no more broadly than the generic elements of  
15 burglary. There's this debate about the building component.

16 The Fourth Circuit did take up the *United States v.*  
17 *Beatty* matter, apparently scheduled it for oral argument and  
18 then withdrew it from the oral argument calendar and published  
19 the opinion at 2017 WL 3225644, and the Fourth Circuit held  
20 that North Carolina courts construe North Carolina breaking and  
21 entering building element in a manner that tracks generic  
22 burglary building element.

23 It is the latest word from the Fourth Circuit, and I  
24 am going to follow it, but it was the Fourth Circuit affirming  
25 an opinion by Judge Beaty from the Middle District.

1 I also have found Judge Voorhees' opinion at 2017 WL  
2 2177980 from the Western District of North Carolina that he  
3 issued on May 17th, 2017, to thoroughly discuss the building  
4 issue in a comprehensive way, and I think it further supports  
5 the reasoning in *Beatty*. *Beatty* obviously was issued on  
6 July 31st, 2017, and Judge Voorhees offered his opinion on May  
7 17th, 2017.

8 So having concluded that, the objection should be and  
9 is overruled. Mr. Atkinson is an armed career criminal.

10 There being no other objections from the defense or  
11 the Government reflected in the addendum, the Total Offense  
12 Level is 30, the Criminal History Category is 5, the Advisory  
13 Guideline Range is 180 to 188 months.

14 Does the Government object to that advisory guideline  
15 range?

16 MS. BLONDEL: No, Your Honor.

17 THE COURT: And with all your arguments preserved, do  
18 you agree, as a ministerial matter, that a 30 and a 5 yields  
19 180 to 188?

20 MS. DOMINGUEZ: I agree.

21 THE COURT: The Government has moved for an upward  
22 departure under Section 4A1.3 of the guidelines, and I'll now  
23 hear from the Government on that motion.

24 MS. BLONDEL: Thank you, Your Honor.

25 The defendant's -- the top of the defendant's

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 17-4589  
(5:16-cr-00250-D-1)

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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama

Defendant - Appellant

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O R D E R

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

Entered at the direction of the panel: Judge Wilkinson, Judge Wynn, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

UNITED STATES OF AMERICA )  
 )  
 v. ) 5:16-CR-250-1D  
 )  
 RICKIE MARKIECE ATKINSON )

ARRAIGNMENT HEARING  
MONDAY, FEBRUARY 6, 2017  
BEFORE THE HONORABLE JAMES C. DEVER III  
CHIEF UNITED STATES DISTRICT JUDGE

## APPEARANCES:

On Behalf of the Government:

ERIN C. BLONDEL, ASSISTANT U.S. ATTORNEY  
United States Attorney's Office  
310 New Bern Avenue, Suite 800  
Raleigh, North Carolina 27601

Also Present: Sean Johnson, 2L Law Intern

On Behalf of the Defendant:

JENNIFER A. DOMINGUEZ, FEDERAL PUBLIC DEFENDER  
Federal Public Defender's Office  
150 Fayetteville Street, Suite 450  
Raleigh, North Carolina 27601

AMY M. CONDON, CSR, RPR  
Official Court Reporter  
United States District Court  
Raleigh, North Carolina  
Stenotype with computer-aided transcription

1 (Monday, February 6, 2017, commencing at 9:48 a.m.)

2 P R O C E E D I N G S

3 THE COURT: Each defendant shall pay close attention  
4 to what the Court is about to say. It'll be an important part  
5 of each defendant's case and each defendant will be asked if he  
6 or she heard and understood the Court's comments.

7 I now advise each defendant as follows:

8 If you are accused of a felony, you have the  
9 constitutional right to be charged by indictment returned by a  
10 Grand Jury. Unless you waive indictment, you may not be  
11 charged in Federal Court with a felony.

12 To be indicted by a Grand Jury, a Grand Jury must  
13 find there is probable cause to believe that you committed the  
14 charged crime. A Grand Jury consists of 16 to 23 persons and  
15 at least 12 grand jurors must find that there is probable cause  
16 to believe that you committed the charged crime before you may  
17 be indicted.

18 However, you may waive the right to Grand Jury  
19 indictment and consent to being charged by a Criminal  
20 Information filed by the United States Attorney.

21 If you do not waive indictment, the Government may  
22 present the case to the Grand Jury and ask the Grand Jury to  
23 indict you. The Grand Jury may or may not do so.

24 If you waive Grand Jury indictment, the case will  
25 proceed against you based on the U.S. Attorney's information

1 just as though you had been indicted.

2                   In addition to the right to be charged by indictment,  
3 the constitution and laws of the United States give you the  
4 right to plead not guilty and have a jury trial with respect to  
5 all charges against you.

6                   In that regard, you should consider the following:

7                   At first at a jury trial, you would be presumed  
8 innocent.

9                   The Government would be required to prove your guilt  
10 through competent evidence and beyond a reasonable doubt. You  
11 would not have to prove that you are innocent.

12                   Second, at a trial, witnesses for the Government  
13 would have to come to court to testify in your presence. Your  
14 lawyer could cross-examine those witnesses, object to evidence  
15 offered by the Government and offer evidence on your behalf.

16                   Third, at a trial, you have the right to use the  
17 subpoena power of the Court to make witnesses come to court,  
18 whether they wanted to or not.

19                   At trial you'd have the right to testify if you chose  
20 to do so. You also would have the right not to testify. If  
21 you chose not to testify, the Court would expressly tell the  
22 jury that no inference or suggestion of guilt could be drawn  
23 from your failure to testify.

24                   You have the right to be represented by a lawyer at  
25 trial and every other stage of the proceeding in this court.

1 If you're unable to afford a lawyer, you have the right to have  
2 the Court appoint a lawyer to represent you at trial and every  
3 other stage of the proceeding in this court.

4 Whether you plead guilty or not guilty, it will not  
5 affect the right to have a lawyer represent you. If you want  
6 to have a lawyer represent you in connection with your case  
7 here, you will have a lawyer.

8 If you plead guilty, you'll waive your right to a  
9 jury trial and these other trial rights. Instead of a jury  
10 trial, you'll be judged guilty and you'll be sentenced on the  
11 basis of your guilty plea after the Court considers all  
12 relevant sentencing factors under 18 U.S.C., Section 3553(a),  
13 considers any departure or variance motion, considers the  
14 now-advisory federal sentencing guidelines.

15 If you have reached a plea agreement with the  
16 Government, you should understand that the Court is obligated  
17 to examine carefully the plea agreement to be sure that the  
18 agreement conforms with the objectives of sentencing, including  
19 imposing a sentence within the parameters of your statute of  
20 conviction that is appropriate to the actual seriousness of  
21 your offense behavior and your past criminal conduct, if any.

22 The Court will evaluate only after it receives a  
23 detailed written presentence report for the probation office.

24 If you reached a plea agreement with the Government,  
25 you shall realize that the Court is not a party to the plea

1 agreement. Such agreements are negotiated solely between you,  
2 your lawyer and the lawyer from the Government.

3 You're advised that any stipulations contained in  
4 your plea agreement are not binding on the Court. Rather, the  
5 Court will make an independent determination as to your  
6 sentence after applying all relevant sentencing factors to your  
7 case, considering all arguments of counsel, any statement you'd  
8 like to make, any victim allocution, the advisory guidelines  
9 and any departure or variance motion.

10 A plea of guilty has the following additional  
11 consequences:

12 First, you will have to waive your right not to  
13 incriminate yourself because the Court will ask you questions  
14 about what you did and you'll have to admit your guilt.

15 Second, the Court will impose the same punishment as  
16 if you had pleaded not guilty and been convicted by a jury.

17 Third, if you're on probation or parole in another  
18 case in this or another court, by pleading guilty here, your  
19 probation or parole in that other case might be revoked and you  
20 might have to serve time in that other case in addition to any  
21 sentence of imprisonment or other punishment that you might  
22 receive here.

23 Fourth, in addition to any sentence imposed, your  
24 plea of guilty to a felony may deprive you of certain valuable  
25 civil rights; such as the right to vote, the right to hold

1 public office, the right to serve on a jury and ever possess  
2 any kind of firearm.

3 Moreover, if you are not a citizen of the United  
4 States and you're convicted of a felony, you may be removed  
5 from the United States, denied citizenship and denied future  
6 admission to the United States.

7 Furthermore, if you are ordered imprisoned due to  
8 your felony conviction, deportation or removal takes place  
9 after you served your sentence of imprisonment in the United  
10 States.

11 Additionally, unless otherwise advised, each  
12 defendant will be assessed per count a sum of not less than  
13 \$100 and any fine imposed will bear interest.

14 Fifth, in some cases, obligations in addition to a  
15 sentence of imprisonment and/or fine may be imposed. For  
16 example, you may be ordered to pay restitution to the victims  
17 of your offense. You may be required to forfeit certain  
18 property, if there's a forfeiture notice in your indictment or  
19 information.

20 Additionally, in most cases, you'll be given not only  
21 a term of imprisonment, but also a term of supervised release.

22 The term of supervised release follows imprisonment.  
23 Such release is conditioned on your non-commission of any other  
24 federal, state, or local crime and such other conditions as the  
25 Court deems appropriate. If you violate the condition of

1 supervised release, you're subject to further imprisonment.

2 Cases in which guilty pleas are tendered and accepted  
3 today are sentenced in this Court's September 25th, 2017 term  
4 of court here in Raleigh.

5 Regardless of the advisory guideline range ultimately  
6 found to be appropriate to your case, you may not withdraw a  
7 guilty plea tendered and accepted today.

8 Between now and the sentencing date just announced,  
9 the Probation Office will prepare a detailed presentence  
10 report. It is important that the presentence report be  
11 complete and accurate.

12 The presentence report will be an important tool to  
13 aid the Court in determining your sentence. You and your  
14 lawyer may give information for that report. You and your  
15 lawyer will be furnished a copy of that report and will have an  
16 opportunity to timely comment on it. Examine that report  
17 carefully.

18 Within 15 days after receiving that report, you must  
19 submit any objections that you have to any information  
20 contained in or omitted from that report. That deadline also  
21 applies to the Government. The Court will not consider any  
22 dispute which has not been the subject of such written  
23 communication.

24 Furthermore, the Court will consider and resolve only  
25 issues involving disputed sentencing factors previously stated

1 in writing to the Probation Office and additionally brought to  
2 the Court's attention at the time of sentencing.

3 At sentencing you should advise the Court orally if  
4 you have any objections to any matters contained in or omitted  
5 from the report that your lawyer has failed to raise.

6 Contentions not stated by you or your lawyer are deemed  
7 abandoned. Your failure to challenge the validity of any prior  
8 convictions for imposition of your sentence will bar your  
9 contesting those convictions at a later date.

10 In short, if you do not contest the facts set forth  
11 in the presentence report, the Court may accept those facts as  
12 accurate and may rely on them in determining your sentence.

13 You or your lawyer on your behalf may submit written  
14 memorandum, motions, or other materials, such as character  
15 letters, for the Court to consider in fashioning a sentence.  
16 The Government may submit such material as well. All such  
17 material is due not later than seven days before the date set  
18 for your sentencing.

19 After you are sentenced, the Government is limited in  
20 most instances to one year in which to move for a reduction in  
21 your sentence pursuant to Rule 35 of the Federal Rules of  
22 Criminal Procedure.

23 The Government is not required to return to court  
24 with a Rule 35(b) motion to seek a reduction of your sentence  
25 by virtue of substantial assistance rendered by you to the

1 Government.

2           If the Government decides not to make a 35(b) motion  
3 on your behalf, you're entitled to relief from the Court only  
4 in a few exceptional circumstances.

5           At sentencing, you should advise the Court whether  
6 the Government has given any indication to you or your lawyer  
7 that you might receive a Rule 35(b) motion.

8           If the Government does make a Rule 35(b) motion to  
9 seek a reduction in your sentence, the making of such motion  
10 does not extend, toll or modify the one-year statute of  
11 limitations that applies to your time for filing a  
12 post-conviction Section 2255 motion to vacate, set aside, or  
13 correct your sentencing.

14           Moreover, the Government cannot promise you that the  
15 Court will grant a 35(b) motion, nor can the United States  
16 Attorney promise you that law enforcement officers will accept  
17 or act upon your offers of cooperation.

18           If you are convicted, whether by a jury or as a  
19 result of a guilty plea, you can appeal such conviction if you  
20 believe that your conviction was somehow unlawful or if there  
21 is some other fundamental defect in the proceeding that was not  
22 waived by your guilty plea.

23           You also have a statutory right to appeal your  
24 sentence under certain circumstances, particularly if you think  
25 your sentence is contrary to law.

1                   However, you may agree to waive certain Appellate  
2 rights, both as to your conviction and your sentence in a plea  
3 agreement. We'll go over any such Appellate waiver in your  
4 plea agreement when we take up your individual case.

5                   Such waivers generally are enforceable, but if you  
6 believe the waiver in your plea agreement is unenforceable or  
7 inapplicable for any reason, you can present that theory to the  
8 Appellate Court.

9                   With few exceptions, any Notice of Appeal must be  
10 filed within 14 days of the judgment being entered on the  
11 docket in your case.

12                  If you're unable to pay the cost of an Appeal, you  
13 may apply for leave to appeal in forma pauperis. If you so  
14 request, the Clerk of Court will prepare and file a Notice of  
15 Appeal on your behalf.

16                  I'm now going to ask all defendants questions as a  
17 group. If you wish to answer any question yes, please raise  
18 your hand and address the Court orally.

19                  Counsel are admonished to take note of their clients'  
20 responses to any questions.

21                  As to any defendant pleading guilty to a charge  
22 contained in a Criminal Information, is there any such  
23 defendant who has not discussed the matter of waiving his or  
24 her right to indictment by a Grand Jury with his or her lawyer?

25                  (No hands raised.)

1                   THE COURT: Is there any defendant who does not  
2 understand his or her right to indictment by a Grand Jury?  
3 (No hands raised.)

4                   THE COURT: Is there any defendant who has been  
5 induced to waive indictment by reason of any threat or promise?  
6 (No hands raised.)

7                   THE COURT: Is there any lawyer present representing  
8 a defendant who sees any reason why his or her client should  
9 not waive indictment?

10                  (No hands raised.)

11                  THE COURT: As to all defendants, is there any  
12 defendant who has taken any drugs, medicine, pills or drunk any  
13 alcoholic beverage in the last 24 hours?

14                  (No hands raised.)

15                  THE COURT: Is there any defendant who does not  
16 understand what is happening here in court this morning?

17                  (No hands raised.)

18                  THE DEFENDANT: From my understanding, I've already  
19 been indicted. Do I have an information or do I have an  
20 indictment?

21                  THE COURT: You have an indictment. So you don't  
22 have to worry about the information.

23                  Is there any defendant who does not understand what  
24 is happening here today?

25                  (No hands raised.)

1                   THE COURT: Is there any lawyer present representing  
2 a defendant who has any doubts or questions about their  
3 client's competency to go forward today?

4                   (No hands raised.)

5                   THE COURT: Is there any defendant who has not  
6 discussed his or her case with his or her attorney?

7                   (No hands raised.)

8                   THE COURT: Is there any defendant who is not fully  
9 and completely satisfied with his or her lawyer's legal  
10 services in their case?

11                  (No hands raised.)

12                  THE COURT: Is there any defendant who needs or  
13 wishes to have the Court read their indictment or information  
14 to them for any reason?

15                  (No hands raised.)

16                  THE COURT: Is there any defendant who has any  
17 questions about their right to a jury trial or their other  
18 rights under the constitution and laws of the United States  
19 that I just explained?

20                  (No hands raised.)

21                  THE COURT: I've just concluded explaining each  
22 defendant's rights under the Constitution and laws of the  
23 United States.

24                  Good morning, Ms. Blondel. Is the Government ready?

25                  MS. BLONDEL: Good morning, Your Honor. We are.

1               May it please the Court, I'd like to introduce Shawn  
2 Johnson to the Court, Your Honor. Mr. Johnson is a 2L at  
3 Carolina Law this morning and he's going to be handling the  
4 arraignment for the Government.

5               THE COURT: Good morning, Mr. Johnson.

6               MR. JOHNSON: Good morning, Your Honor.

7               THE COURT: At this time I ask that Mr. Atkinson be  
8 sworn or affirmed.

9               (The defendant was duly sworn.)

10               THE COURT: Mr. Atkinson, do you understand that,  
11 having been sworn, that your answers to my questions are  
12 subject to the penalties of perjury, sir, and if you were to  
13 lie to me, you could be prosecuted for perjury or for making a  
14 false statement?

15               THE DEFENDENT: Yes, sir.

16               THE COURT: Please tell me your full name.

17               THE DEFENDENT: Rickie Markiece Atkinson.

18               THE COURT: How old are you, sir?

19               THE DEFENDENT: 35.

20               THE COURT: How far did you go in school?

21               THE DEFENDENT: My sophomore year.

22               THE COURT: Of high school?

23               THE DEFENDENT: High school.

24               THE COURT: You obviously can speak and understand  
25 English, right?

1                   THE DEFENDENT: Yes, sir.

2                   THE COURT: Can you read and write?

3                   THE DEFENDENT: Yes, sir.

4                   THE COURT: Did you hear me and understand me this  
5 morning, sir, when I described all the rights that you have  
6 under the Constitution and laws of the United States?

7                   THE DEFENDENT: Yes, sir.

8                   THE COURT: Did you hear and understand all those  
9 other questions that I asked the defendants as a group, sir?

10                  THE DEFENDENT: Yes.

11                  THE COURT: Ms. Dominguez, do you have any reason to  
12 doubt Mr. Atkinson's competence to go forward today?

13                  MS. DOMINGUEZ: No, Your Honor.

14                  THE COURT: Mr. Johnson, does the Government have any  
15 reason to doubt Mr. Atkinson's competence to go forward today?

16                  MR. JOHNSON: No, Your Honor.

17                  THE COURT: Based on Mr. Atkinson's answers to my  
18 questions, my observations of Mr. Atkinson and the answers from  
19 counsel, I find that he is competent to go forward here today.

20                  Mr. Atkinson, it's my understanding that you reached  
21 a plea agreement as to the charge contained in Count 1 of the  
22 indictment. Is that correct, sir?

23                  THE DEFENDENT: Yes.

24                  THE COURT: I'm going to read all the charges of the  
25 indictment and tell you about all the potential penalties for

1 all the charges and then we're going to focus in on Count 1,  
2 which is the subject of your indictment.

3 Do you understand that, sir?

4 THE DEFENDENT: Yes, sir.

5 THE COURT: The charge under Count 1 is that on or  
6 about September 10th, 2015, in the Eastern District of North  
7 Carolina, the defendant, Rickie Markiece Atkinson, having been  
8 previously convicted of a crime punishable by imprisonment for  
9 a term exceeding one year, did knowingly possess, in and  
10 affecting commerce, a firearm and ammunition in violation of  
11 Title 18, U.S. Code Section 922(g) (1) and 924.

12 Count 2 charges that on or about November 14th, 2015,  
13 in the Eastern District of North Carolina, the defendant,  
14 Rickie Markiece Atkinson, having been previously convicted of a  
15 crime punishable by imprisonment for a term exceeding one year,  
16 did knowingly possess, in and affecting commerce, a firearm and  
17 ammunition in violation of Title 18, U.S. Code, Section  
18 922(g) (1) and 924.

19 Count 3 charges that on or about November 14th, 2015,  
20 in the Eastern District of North Carolina, Rickie Markiece  
21 Atkinson, defendant therein, knowingly possessed a firearm that  
22 was shipped and transported in interstate commerce from which  
23 the manufacturer's serial number had been removed, altered and  
24 obliterated in violation of Title 18, United States Code,  
25 Sections 922(k) and 924(a) (1) (B). There's also allegation of

1 prior convictions in the indictment.

2                   Do you understand the three charges in the  
3 indictment, sir?

4                   THE DEFENDENT: Yes.

5                   THE COURT: The Court advises you as follows with  
6 respect to the penalties: If you're convicted of Count 1, the  
7 potential penalties are not more than 10 years imprisonment,  
8 fine not to exceed \$250,000 or both such fine and imprisonment,  
9 not more than three years of supervised release, you can be  
10 ordered to a pay -- you will be ordered to pay a special  
11 assessment of \$100, and you can be ordered to pay restitution.

12                  However, if you are determined to be an armed career  
13 criminal with respect to Count 1, the potential penalties  
14 increase to not less than 15 years imprisonment, no more than  
15 life imprisonment, a fine not to exceed \$250,000 or both such  
16 fine and imprisonment, not more than five years of supervised  
17 release, 100-dollar special assessment, you can be ordered to  
18 pay restitution.

19                  Do you understand those potential penalties as to  
20 Count 1?

21                  THE DEFENDENT: Yes, sir.

22                  THE COURT: And those same potential penalties apply  
23 as to Count 2; do you understand that, sir?

24                  THE DEFENDENT: Yes, sir.

25                  THE COURT: As to Count 3, the potential penalties

1 are: Not more than 10 years imprisonment, a fine not to exceed  
2 \$250,000 or both such fine and imprisonment, not more than  
3 three years of supervised release, 100-dollar special  
4 assessment, you can be ordered to pay restitution.

5 Do you understand those potential penalties as to  
6 Count 3, sir?

7 THE DEFENDENT: Yes, sir.

8 THE COURT: As to all the counts, the Government in  
9 the Grand Jury indictment has included a forfeiture notice  
10 seeking the forfeiture of firearms and ammunition, including a  
11 Lady Lavender, .38 SPL revolver, KAHR Arms Model CT45, .45  
12 caliber pistol in each of those, related ammunition. If it's  
13 not able to forfeit that specific property, it gives notice of  
14 a desire to seek a forfeiture of substitute property under the  
15 statutes listed in the forfeiture notice.

16 Do you understand all the potential penalties  
17 associated with Counts 1, 2 and 3, including the forfeiture  
18 notice, sir?

19 THE DEFENDENT: Yes, sir.

20 THE COURT: You heard me and understood me this  
21 morning when I described all the rights you have under the  
22 Constitution and laws of the United States?

23 THE DEFENDENT: Yes.

24 THE COURT: You understand you have an absolute right  
25 to plead not guilty if you want to, sir?

1                   THE DEFENDANT: Yes.

2                   THE COURT: If you did plead not guilty, you'd enjoy  
3                   all those trial rights with respect to all the charges; do you  
4                   understand that, sir?

5                   THE DEFENDANT: Yes.

6                   THE COURT: But if you plead guilty to Count 1, there  
7                   won't be a trial in your case, sir; do you understand that?

8                   THE DEFENDANT: Right.

9                   THE COURT: You will have waived or given up all your  
10                  trial rights; do you understand that, sir?

11                  THE DEFENDANT: Yes.

12                  THE COURT: Do you understand all the other  
13                  consequences of pleading guilty that we talked about here  
14                  today, sir?

15                  THE DEFENDANT: Yes.

16                  THE COURT: With respect to sentencing, the Court  
17                  advises you that at the sentencing hearing I'll rule on any  
18                  objections that there might be to the presentence report, I'll  
19                  calculate an advisory guideline range, I'll consider any motion  
20                  that might be made that might move the range either up or down,  
21                  I'll consider all arguments your lawyer makes on your behalf,  
22                  any statement you'd like to make, and all arguments of the  
23                  Assistant United States Attorney. I'll then determine your  
24                  sentence on the day of the sentencing hearing and announce it  
25                  in court on that day.

1                   Do you understand that, sir?

2                   THE DEFENDENT: Yes, sir.

3                   THE COURT: The Court advises you that even if your  
4 lawyer or anyone else has given you their best estimate as to  
5 what she thinks the advisory guideline range will be, whether  
6 she thinks there will be a departure or variance motion,  
7 whether she thinks the Court will grant or deny such a  
8 departure or variance motion, or any prediction from your  
9 lawyer or anyone else as to your actual sentence, any  
10 prediction from anyone on any sentencing topic is not binding  
11 on the Court.

12                  Do you understand that, sir?

13                  THE DEFENDENT: Yes, sir.

14                  THE COURT: If it turned out that any such prediction  
15 is incorrect, that error would not provide a basis for you to  
16 withdraw your guilty plea; do you understand that?

17                  THE DEFENDENT: Yes.

18                  THE COURT: Has anyone threatened you or anyone else  
19 or forced you to plead guilty, sir?

20                  THE DEFENDENT: No.

21                  THE COURT: Has anyone made any promises to you or  
22 anyone else that's making you decide to plead guilty, sir?

23                  THE DEFENDENT: No.

24                  THE COURT: I need you to look at the very last page  
25 of the plea agreement, I think it's page 6, and just confirm

1 for me that you, in fact, signed that agreement, sir. Did you  
2 sign it?

3 THE DEFENDENT: Yes, I did.

4 THE COURT: Did you read and discuss this entire plea  
5 agreement with your lawyer before you signed it, sir?

6 THE DEFENDENT: Yes, sir.

7 THE COURT: Does this written plea agreement  
8 constitute the entire agreement that you have with the  
9 Government about resolving your case?

10 THE DEFENDENT: Yes.

11 THE COURT: Do you understand each term in this plea  
12 agreement, sir?

13 THE DEFENDENT: Yes.

14 THE COURT: I need to go over one term in particular.  
15 It has to do with the waiver of certain appellate and other  
16 rights. It's in paragraph 2(c) at the bottom of page 1.

17 In that paragraph you agree to the following: "To  
18 waive knowingly and expressly all rights conferred by 18 U.S.C.  
19 Section 3742, to appeal the conviction and whatever sentence is  
20 imposed on any ground, including any issues that relate to the  
21 establishment of the advisory guideline range, reserving only  
22 the right to appeal from a sentence in excess of the applicable  
23 advisory guideline range that is established at sentencing  
24 and/or from a sentence that exceeds 120-months imprisonment;  
25 and further to waive all rights to contest the conviction or

1 sentence in any post-conviction proceeding, including that  
2 pursuant to 28 U.S.C. Section 2255, excepting an appeal or  
3 motion based upon grounds of ineffective assistance of counsel  
4 or prosecutorial misconduct not known to the defendant at the  
5 time of the defendant's guilty plea. The foregoing appeal  
6 waiver does not constitute or trigger a waiver by the United  
7 States within its rights to appeal provided by law."

8                   Mr. Atkinson, do you understand your appellate and  
9 other rights you're giving up in that paragraph, sir?

10                  THE DEFENDENT: Yes.

11                  THE COURT: Do you understand that if you enter a  
12 plea of guilty to this charge in Count 1 and I accept the plea  
13 of guilty to the charge in Count 1, I'd have the authority to  
14 impose the maximum penalty authorized by law for that  
15 conviction, sir?

16                  THE DEFENDENT: Yes, sir.

17                  THE COURT: If the Court were to impose such a  
18 maximum penalty sentence, you will not then be allowed to  
19 withdraw your guilty plea; do you understand that, sir?

20                  THE DEFENDENT: Yes.

21                  THE COURT: Do you understand the charge in Count 1  
22 is a felony offense, sir?

23                  THE DEFENDENT: Yes, sir.

24                  THE COURT: Do you understand that by pleading guilty  
25 to this felony offense you may be deprived of certain valuable

1 civil rights?

2 THE DEFENDENT: Yes.

3 THE COURT: Do you recall the maximum penalty  
4 authorized by law for this felony offense in Count 1?

5 THE DEFENDENT: Yes.

6 THE COURT: Do you understand that if I accept your  
7 plea of guilty to the charge in Count 1 today, you will not  
8 later be able to withdraw that plea of guilty, sir?

9 THE DEFENDENT: Yes.

10 THE COURT: Do you understand right now at this very  
11 moment you still can plead not guilty to all of these charges  
12 if you want to, sir?

13 THE DEFENDENT: Yes.

14 THE COURT: And if you did plead not guilty, you'd  
15 enjoy all the trial rights we talked about, sir; do you  
16 understand that?

17 THE DEFENDENT: Yes.

18 THE COURT: If you plead guilty to Count 1, there  
19 won't be a trial; do you understand that?

20 THE DEFENDENT: Right.

21 THE COURT: Instead you would have waived or given up  
22 all your trial rights; do you understand that, sir?

23 THE DEFENDENT: Yes.

24 THE COURT: Mr. Atkinson, have you answered all of my  
25 questions truthfully here today?

1                   THE DEFENDENT: Yes, sir.

2                   THE COURT: I'm going to read Count 1 to you and then  
3 ask you how you plead.

4                   The charge in Count 1 is that on or about  
5 September 10th, 2015, in the Eastern District of North  
6 Carolina, the defendant, Rickie Markiece Atkinson, having been  
7 previously convicted of a crime punishable by imprisonment for  
8 a term exceeding one year, did knowingly possess, in and  
9 affecting commerce, a firearm and ammunition in violation of  
10 Title 18 United States Code, Sections 922(g)(1) and 924.

11                  How do you now plead to that charge; guilty or not  
12 guilty.

13                  THE DEFENDENT: Guilty.

14                  THE COURT: Did you commit that crime, sir?

15                  THE DEFENDENT: Yes, sir.

16                  THE COURT: So you are, in fact, guilty of the charge  
17 in Count 1, sir?

18                  THE DEFENDENT: Yes, sir.

19                  THE COURT: Thank you, Mr. Atkinson. You and Ms.  
20 Dominguez may have a seat.

21                  At this time, Mr. Johnson, if you could make a  
22 proffer as to what the evidence would show if this matter went  
23 to trial so the Court may determine whether there's an  
24 independent factual basis for the plea.

25                  Mr. Johnson.

1                   MR. JOHNSON: Your Honor, this is some of the  
2 evidence that the Government believes it can prove at trial.

3                   On September 10, 2015, the defendant was arrested on  
4 warrants for possession of a firearm by a felon and assault  
5 with a deadly weapon in Raleigh, North Carolina.

6                   Prior to the arrest, officers observed the defendant  
7 leave the apartment of his girlfriend in a vehicle belonging to  
8 her. The arrest was made when the defendant exited that  
9 vehicle to access the truck while stopped at a stop sign.

10                  Law enforcement then searched the vehicle with the  
11 defendant's consent and found five .38 special hollow-point  
12 rounds in the vehicle. The defendant told officers he intended  
13 to sell the bullets.

14                  At the defendant's request, he brought the vehicle  
15 back to the defendant's girlfriend's house. The defendant's  
16 girlfriend gave consent for officers to search for a firearm.

17                  Officers found a silver and purple .38 special  
18 Charter Arms revolver in the master bedroom under the mattress.  
19 The gun was loaded with five rounds of .38 special hollow-point  
20 ammunition.

21                  The defendant's girlfriend stated that the gun did  
22 not belong to her or her daughter and had to belong to the  
23 defendant.

24                  About a month later, on November 14th, 2015, Raleigh  
25 Police Department officers assisted a bail bondsman in serving

1 a warrant on the defendant in Raleigh, North Carolina.

2 Officers located the defendant at a gas station  
3 sitting alone in the rear passenger seat of a vehicle. The  
4 defendant was hunched forward leaning toward the seat in front  
5 of him.

6 After the defendant was removed from the vehicle and  
7 handcuffed, officers contacted the driver and another  
8 passenger. The driver consented to officers searching the  
9 vehicle. In the rear pocket of the front seat and directly in  
10 front of where the defendant was sitting, officers recovered a  
11 KAHR Arms Model CT45 .45 caliber pistol containing a loaded  
12 magazine. The firearm serial number was completely  
13 obliterated.

14 Additionally, in a search of the defendant officers  
15 found another magazine containing several .45 caliber bullets  
16 in the defendant's front right-hand pocket. The driver and the  
17 other passenger stated that the gun did not belong to them.

18 An ATF Nexus expert analyzed the firearms and  
19 ammunition recovered in both the September 10th, 2015, and  
20 November 14th, 2015, incidents and determined they were  
21 manufactured outside of North Carolina and therefore traveled  
22 in and affecting interstate commerce.

23 Prior to both incidents the defendant was convicted  
24 of an offense punishable by over one year in prison.

25 Your Honor, this is some of the evidence that the

1 Government feels it could prove at trial.

2 THE COURT: Thank you, Mr. Johnson.

3 Based on the Government's summary and acknowledgment  
4 that you are, in fact, guilty as charged and because you know  
5 your right to a trial and what the maximum possible punishment  
6 is and because you're voluntarily pleading guilty, the Court  
7 will accept your plea of guilty to the charge contained in  
8 Count 1.

9 Let the record reflect that the Court is satisfied  
10 and finds as a fact that the defendant's plea was freely and  
11 voluntarily entered. At the time he entered the plea, he was  
12 fully competent and had a full and complete understanding of  
13 the nature of the charges against him and the maximum penalties  
14 authorized by law.

15 The defendant's plea is accepted and he is adjudged  
16 guilty of the charge contained in Count 1. The clerk is  
17 directed to enter a plea of not guilty as to the charges  
18 contained in Counts 2 and 3. Pursuant to the plea agreement,  
19 the Court anticipates dismissing Counts 2 and 3 at the time of  
20 sentencing.

21 The matter is set for sentencing at the May 27, 2017  
22 term of court.

23 After court today, Ms. Dominguez will contact the  
24 Probation Office to arrange a time for your interview. Ms.  
25 Dominguez can be with you during that interview. That

1 interview relates to Probation preparing the presentence  
2 report.

3 Once Probation prepares that report, you and Ms.  
4 Dominguez will get a copy of it, so will the Assistant United  
5 States Attorney. If either side thinks something in the report  
6 is incorrect, you need to timely object to it.

7 At the time of sentencing I'll rule on any objections  
8 that there might be to the presentence report, I'll calculate  
9 an advisory guideline range and we'll proceed with sentencing  
10 as I've already described.

11 Today you'll be remanded to the custody of the United  
12 States Marshal. You will continue to have access to consult  
13 with Ms. Dominguez as you prepare for sentencing in connection  
14 with your case, Ms. Atkinson.

15 Is there anything else we need to take up this  
16 morning with Mr. Atkinson's case?

17 MS. DOMINGUEZ: No, Your Honor.

18 THE COURT: Anything else from the Government, Mr.  
19 Johnson?

20 MS. BLONDEL: No, Your Honor.

21 THE COURT: I thank counsel for their work here  
22 today. That will conclude the matter involving Mr. Atkinson  
23 this morning.

24 (The proceedings concluded at 10:02 a.m.)

25

UNITED STATE DISTRICT COURT

EASTERN DISTRICT OF NORTH CAROLINA

CERTIFICATE OF OFFICIAL REPORTER

I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in  
and for the United States District Court for the Eastern  
District of North Carolina, do hereby certify that pursuant to  
Section 753, Title 28, United States Code, that the foregoing  
is a true and correct transcript of the stenographically  
reported proceedings held in the above-entitled matter and that  
the transcript page format is in conformance with the  
regulations of the Judicial Conference of the United States.

Dated this 30th day of October, 2017.

/s/ Amy M. Condon  
Amy M. Condon, CSR, RPR  
U.S. Official Court Reporter

FILED IN OPEN COURT  
ON 10/5/14 BPL  
Julie Richards Johnston, Clerk  
US District Court  
Eastern District of NC

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

NO. 5:110-CR-250-1D(1)

UNITED STATES OF AMERICA )  
 )  
 v. ) INDICTMENT  
 )  
 RICKIE MARKIECE ATKINSON )  
 a/k/a "Drama" )

The Grand Jury charges that:

**COUNT ONE**

On or about September 10, 2015, in the Eastern District of North Carolina, the defendant, RICKIE MARKIECE ATKINSON, having been previously convicted of a crime punishable by imprisonment for a term exceeding one (1) year, did knowingly possess, in and affecting commerce, a firearm and ammunition, in violation of Title 18, United States Code, Sections 922(g)(1) and 924.

COUNT TWO

On or about November 14, 2015, in the Eastern District of North Carolina, the defendant, RICKIE MARKIECE ATKINSON, having been previously convicted of a crime punishable by imprisonment for a term exceeding one (1) year, did knowingly possess, in and affecting commerce, a firearm and ammunition, in violation of Title 18, United States Code, Sections 922(g)(1) and 924.

COUNT THREE

On or about November 14, 2015, in the Eastern District of North Carolina, RICKIE MARKIECE ATKINSON, defendant herein, knowingly possessed a firearm that had been shipped and transported in interstate commerce from which the manufacturer's serial number had been removed, altered and obliterated, in violation of Title 18, United States Code, Sections 922(k) and 924(a)(1)(B).

ALLEGATION OF PRIOR CONVICTIONS

For purposes of Title 18, United States Code, Section 924(e), the defendant had, at the time of the offenses alleged herein, at least three previous convictions by any court referred to in Title 18, United States Code, Section 922(g)(1), as defined in Title 18, United States Code, Section 924(e)(2).

FORFEITURE NOTICE

Upon conviction of the offenses alleged in this Indictment, the defendant shall forfeit to the United States pursuant to Title 18, United States Code, Section 924(d) and Title 28, United States Code, Section 2461(c), any firearm and ammunition involved in the commission of the offenses, including, but not limited to:

1. Lady Lavender, .38 SPL revolver, serial number 13-49420, and related ammunition.
2. KAHR Arms Model CT45, .45 caliber pistol, partial serial number AKA\*538 and related ammunition.

## APPENDIX F

50a

If any of the property described above, as a result of any act or omission of the defendant:

- a. cannot be located upon the exercise of due diligence;
- b. has been transferred or sold to, or deposited with, a third party;
- c. has been placed beyond the jurisdiction of the court;
- d. has been substantially diminished in value; or
- e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c), all pursuant to 18 U.S.C. § 924(d) and 28 U.S.C. § 2461(c).

A TRUE BILL

**REDACTED VERSION**

Pursuant to the E-Government Act and the federal rules, the unredacted version of this document has been filed under seal.

FOREMAN

10/5/2016  
DATE

JOHN STUART BRUCE  
United States Attorney

BY: Erin C. Blondel  
ERIN C. BLONDEL  
Assistant United States Attorney