

APPENDIX

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UNPUBLISHED**UNITED STATES COURT OF APPEALS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

No. 19-4224

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONNIE WAYNE NIPPER,

Defendant - Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Thomas D. Schroeder, Chief District Judge. (1:04-cr-00434-TDS-1)

Submitted: May 8, 2020

Decided: May 26, 2020

Before WILKINSON, NIEMEYER, and RICHARDSON, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Eugene E. Lester, III, SHARPLESS MCCLEARN LESTER DUFFY, PA, Greensboro, North Carolina, for Appellant. Brian A. Benczkowski, Assistant Attorney General, Matthew M. Miner, Deputy Assistant Attorney General, Thomas E. Booth, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Matthew G.T. Martin, United States Attorney, Angela H. Miller, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Donnie Wayne Nipper appeals his sentence of 180 months in prison imposed in the district court's amended judgment after resentencing. He pled guilty to transporting stolen vehicles and possession of a firearm by a felon, and the district court originally sentenced him as an armed career criminal to concurrent prison terms of 120 months and 195 months. In 2016, he filed a 28 U.S.C. § 2255 motion contending he was no longer an armed career criminal based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). In denying his motion, the court relied on a conviction that was not previously identified as a predicate conviction. On appeal, we vacated the decision and remanded for reconsideration of the § 2255 motion in light of *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018). On remand, the court granted his § 2255 motion, vacated his prior sentence, and ordered his resentencing. At resentencing, the court again sentenced him as an armed career criminal but imposed a lower sentence. On appeal, he contends that the court was not permitted to consider at his resentencing any conviction that was not originally designated as a predicate at his first sentencing, and the Guidelines range used to resentence him was erroneous. We affirm.

When the Government seeks an enhanced sentence pursuant to the Armed Career Criminal Act (ACCA), it bears the burden of establishing by a preponderance of the evidence that the defendant has three prior convictions for a violent felony or serious drug offense. *United States v. Rumley*, 952 F.3d 538, 547 (4th Cir. 2020). “And the sentencing court is charged with weighing the evidence to determine whether the fact of conviction has been established.” *Id.* In evaluating whether the district court properly applied the

Sentencing Guidelines, we review the district court's factual findings for clear error and its legal conclusions de novo. *United States v. Pena*, 952 F.3d 503, 507 (4th Cir. 2020).

Nipper contends he should be resentenced without the ACCA classification, and the Guidelines range used to resentence him was erroneous. He also contends the Government could not rely on any ACCA predicates at his resentencing that were not previously identified at his original sentencing. We disagree. *See Rumley*, 952 F.3d at 545-47. Because Nipper "had both notice and a meaningful opportunity to challenge the designated predicate convictions prior to the resentencing hearing," the district court did not err in considering previously unidentified ACCA predicates. *Id.* at 545. We further conclude that the court did not err in finding that Nipper had at least three qualifying predicates.

Accordingly, we deny Nipper's motion to expedite as moot and affirm the district court's amended judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: May 26, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4224
(1:04-cr-00434-TDS-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DONNIE WAYNE NIPPER

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

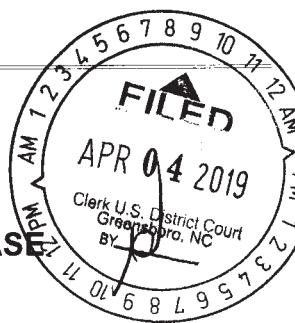
/s/ PATRICIA S. CONNOR, CLERK

United States District Court

Middle District of North Carolina

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

v.
DONNIE WAYNE NIPPERCase Number: 1:04-CR-00434-1
USM Number: 08493-018*Eugene E. Lester, III
Defendant's Attorney

Date of Original Judgment: May 12, 2005

Reason for Amendment:

* Direct Motion to District Court Pursuant to 28 U.S.C. § 2255

THE DEFENDANT:

pleaded guilty to counts 1 and 3.
 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 & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18:2312 & 2	Transported Stolen Vehicles in Interstate Commerce	August 5, 2002	1
18:922(g)(1) & 924(a)(2)	Possessed Firearm in Commerce After Felony Conviction	August 2, 2002	3

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)
 Counts 2 is dismissed on the motion of the United States.

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

March 15, 2019
Date of Imposition of Judgment

Signature of Judge

Thomas D. Schroeder, United States District Judge

Name & Title of Judge

Date

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DEFENDANT: **DONNIE WAYNE NIPPER**
CASE NUMBER: **1:04-CR-00434-1**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
***180 months.**

[120 months on Count 1 and 180 months on count 3 to run concurrent with each other. The sentence shall run consecutive to defendant's State sentence.]

The court makes the following recommendations to the Bureau of Prisons: *The Court recommends that the defendant be permitted to continue his medical treatment as soon as possible.

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 _____ am/pm 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 pm on .

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this judgment.

UNITED STATES MARSHAL

BY

DEPUTY UNITED STATES MARSHAL

DEFENDANT: DONNIE WAYNE NIPPER
CASE NUMBER: 1:04-CR-00434-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: * **Three (3) years.**

[Three (3) years on count 1 and three (3) years on count 3 to run concurrent with each other.]

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 the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
4. You must make restitution in accordance with 18 U.S.C §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check if applicable.)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
7. 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.

DEFENDANT: DONNIE WAYNE NIPPER
CASE NUMBER: 1:04-CR-00434-1

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.

Defendant's Signature _____ Date _____

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DEFENDANT: DONNIE WAYNE NIPPER
CASE NUMBER: 1:04-CR-00434-1

***SPECIAL CONDITIONS OF SUPERVISION**

The defendant shall provide any requested financial information to the probation officer.

The defendant shall submit to substance abuse testing, at any time, as directed by the probation officer. The defendant shall cooperatively participate in a substance abuse treatment program, which may include drug testing and inpatient/residential treatment, and pay for treatment services, as directed by the probation officer. During the course of treatment, the defendant shall abstain from the use of alcoholic beverages.

The defendant shall submit his person, residence, office, vehicle, or any property under his control to a warrantless search. Such search shall be conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

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DEFENDANT: DONNIE WAYNE NIPPER
 CASE NUMBER: 1:04-CR-00434-1

CRIMINAL MONETARY PENALTIES

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

TOTALS	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
	\$200.00		\$0.00	\$0.00

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

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.

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 pursuant to 18 U.S.C. Section 3612(f)(3) 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.

DEFENDANT: DONNIE WAYNE NIPPER
 CASE NUMBER: 1:04-CR-00434-1

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 \$ 200.00 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: **To the extent the defendant cannot immediately comply, the Court recommends the defendant participate in the Inmate Financial Responsibility Program.**

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk of Court, United States District Court for the Middle District of North Carolina, 324 West Market Street, Greensboro, NC 27401-2544, unless otherwise directed by the court, the probation officer, or the United States Attorney. **Nothing herein shall prohibit the United States Attorney from pursuing collection of outstanding criminal monetary penalties.**

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

Joint and Several

Defendant and Co-Defendant Names, 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:

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.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINAUNITED STATES OF AMERICA)
)
v.) 1:04CR434-1
)
DONNIE WAYNE NIPPER)ORDER

This matter comes before the Court for the appointment of counsel to represent Defendant in this matter. The Court has reviewed the record and concludes that Defendant has demonstrated eligibility for appointment of counsel at Government expense.

IT IS THEREFORE ORDERED that CJA Panel Attorney Eugene E. Lester, III is appointed to represent Defendant in this action.

This, the 15 day of January, 2019.



United States Magistrate Judge