

APPENDIX A**1a****UNPUBLISHED****UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-4589

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama,

Defendant - Appellant.

On Remand from the Supreme Court of the United States.
(S. Ct. No. 19-5572)

Submitted: September 15, 2022

Decided: September 26, 2022

Before GREGORY, Chief Judge, and WYNN and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: 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, Michael F. Easley, Jr., United States Attorney, Jennifer P. May-Parker, Acting First Assistant United States Attorney, Barbara D. Kocher, Assistant United States Attorney, David A. Bragdon, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

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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, in violation of 18 U.S.C. § 922(g). On appeal, Atkinson challenged his designation as an armed career criminal, asserting that his prior North Carolina break or entering convictions were not proper predicates. He also argued that the district court erred in departing upwards from the calculated Sentencing Guidelines range. We affirmed Atkinson’s sentence. *United States v. Atkinson*, 759 F. App’x 174 (4th Cir. 2019) (No. 17-4589). The Supreme Court granted certiorari, vacated our judgment, and remanded for further consideration in light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019). We again affirm.

First, Atkinson concedes that his *Rehaif* claim is without merit after *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021) (“[A] *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.”). Next, Atkinson makes no further argument regarding his sentence departure. Finally, Atkinson admits that his challenge to his armed career criminal status is foreclosed by *United States v. Dodge*, 963 F.3d 379 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1445 (2021), and *United States v. Mungro*, 754 F.3d 267 (4th Cir. 2014).¹ As such, we affirm for the reasons stated in our previous opinion, and we set them forth here again in updated form.

¹ Recognizing that a panel cannot overturn another panel’s decision, Atkinson filed for initial hearing en banc. We previously denied that petition. We note further that, when the Supreme Court remands a case “with specific instructions, [the appellate] court must (Continued)

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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. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016). An armed career criminal is, in pertinent part, "a person who violates [§ 922(g)] . . . and has three previous convictions . . . for a violent felony." 18 U.S.C. § 924(e)(1). "The ACCA defines 'violent felony' to include, as relevant here, any offense that 'is burglary.'" *Mungro*, 754 F.3d at 268. "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 it cannot be reconciled with the Supreme Court's decisions in *United States v. Stitt*, 139 S. Ct. 399 (2018); *Mathis v. United States*, 579 U.S. 500 (2016); and *Taylor v. United States*, 495 U.S. 575 (1990) (decided prior to *Mungro*). However, we ruled in *Dodge* that *Stitt* and *Mathis* did not overrule *Mungro*. Accordingly, *Mungro* remains controlling precedent. *See Dodge*,

confine its review to the limitations established by the Supreme Court's remand order." *United States v. Duarte-Juarez*, 441 F.3d 336, 340 (5th Cir. 2006). Accordingly, absent an argument that there has been intervening controlling precedent, Atkinson's sentencing issues are not properly before us for reconsideration. *See United States v. Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993).

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963 F.3d at 385. As such, 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,² 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 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) 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., 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

² The district court departed from a 180- to 188-month Guidelines range to a range of 210 to 262 months.

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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,

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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, noting that Atkinson's criminal record reflected a steady pattern of offenses, some involving violence, since he was 16. 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 conviction and 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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Supreme Court of the United States

No. 19-5572

RICKIE MARKIECE ATKINSON,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Rehaif v. United States*, 588 U. S. ____ (2019).

October 15, 2019



A True copy SCOTT S. HARRIS

Clerk of the Supreme Court of the United States

Scott S. Harris

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UNPUBLISHED

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

No. 17-4589

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama,

Defendant - Appellant.

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)

Submitted: December 28, 2018

Decided: January 14, 2019

Before WILKINSON, WYNN, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX C

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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)

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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

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

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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.

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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

UNITED STATES DISTRICT COURT

Eastern District of North Carolina

UNITED STATES OF AMERICA

v.

RICKIE MARKIECE ATKINSON

JUDGMENT IN A CRIMINAL CASE

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 & 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

Signature of Judge

James C. Dever III, Chief United States District Judge

Name and Title of Judge

9/12/2017

Date

APPENDIX D

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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

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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.

Defendant's Signature _____

Date _____

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

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) JVT A assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3 WESTERN DIVISION

3 UNITED STATES OF AMERICA,)
4)
4 V.) 5:16-CR-250-1-D
5)
5 RICKIE MARKIECE ATKINSON,)
6 -----

7 SENTENCING HEARING
8 TUESDAY, MAY 23, 2017
9 BEFORE THE HONORABLE JAMES C. DEVER III
10 CHIEF UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 On Behalf of the Government:

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17 On Behalf of the Defendant:

18 JENNIFER A. DOMINGUEZ, FEDERAL PUBLIC DEFENDER
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22
23 AMY M. CONDON, CSR, RPR
24 Official Court Reporter
25 United States District Court
Raleigh, North Carolina
Stenotype with computer-aided transcription

1 (TUESDAY, MAY 23, 2017, commencing at 1:00 p.m.)

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

3 THE COURT: Good afternoon and welcome to the United
4 States District Court for the Eastern District of North
5 Carolina.

6 The first matter we'll take up is the sentencing of
7 Ricky Atkinson.

8 Good afternoon, Mrs. Dominguez.

9 MS. DOMINGUEZ: Good afternoon, Your Honor.

10 THE COURT: Is the defense ready?

11 MS. DOMINGUEZ: We are, Your Honor.

12 THE COURT: Good afternoon, Ms. Blondel. Is the
13 United States ready?

14 MS. BLONDEL: Good afternoon. We are.

15 THE COURT: At this time I'd ask that Mr. Atkinson be
16 sworn or affirmed.

17 (The defendant, Rickie Markiece Atkinson, was duly sworn.)

18 THE COURT: Mr. Atkinson, do you understand, that
19 having been sworn, that your answers to my questions are
20 subject to the penalty of perjury, sir?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you taken any kind of medicine or
23 any other substance in the last 48 hours that would affect your
24 ability to hear and understand these proceedings?

25 THE DEFENDANT: No, sir.

1 THE COURT: Do you know why you're here today?

2 THE DEFENDANT: Yes, sir.

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

5 MS. DOMINGUEZ: No, Your Honor.

6 THE COURT: Does the Government have any reason to
7 doubt Mr. Atkinson's competence to go forward today.

8 MS. BLONDEL: No, Your Honor.

9 THE COURT: Based on Mr. Atkinson's answers to my
10 questions, my observations of Mr. Atkinson, and the answers of
11 counsel, I find that he is competent to go forward today.

12 Mr. Atkinson, as you know, you're here today having
13 entered a plea of guilty to the charge of being a felon in
14 position of a firearm and ammunition.

15 In light of some cases from the Supreme Court of the
16 United States, including the *Booker*, *Rita*, *Gall*, *Kimbrough*,
17 *Spears* and *Nelson* cases, the sentencing guidelines are no
18 longer mandatory. They're advisory.

19 Nevertheless, in accordance with those cases and
20 numerous cases from the Fourth Circuit interpreting those
21 cases, including the *Carter*, *Pauley*, and *Evans* cases, a
22 sentencing Court still must take into account the now-advisory
23 guidelines.

24 The Court does this by initially making findings of
25 fact and calculating the advisory guideline range. I'll then

1 consider any motion that might be made that might move the
2 range either up or down. I'll then consider all arguments your
3 lawyer makes, any statement you'd like to make, and all
4 arguments that the Government's lawyer makes.

5 I'll then determine your sentence and announce it
6 here in court. So that will be the process we'll follow.

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

9 MS. DOMINGUEZ: We did, 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 it?

15 THE DEFENDANT: Yes.

16 THE COURT: At this time the Court directs that the
17 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
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 contain one objection as to the
24 applicability of the Armed Career Criminal Act.

25 Mr. Atkinson, we'll take up that legal issue. You

1 can have a seat while we do so.

2 Ms. Dominguez, did you want to say anything further
3 about that beyond what was in your brief?

4 MS. DOMINGUEZ: Your Honor, nothing beyond the brief.

5 I would just kind of note for the record and for this
6 Court that the argument is that North Carolina breaking and
7 entering is broader than the generic burglary because by its
8 text and in State Court interprets applications of that
9 statute, it has at least the realistic probability that it
10 includes things such as vehicles, boats, trailers within its
11 definition of building.

12 We cited in our brief that mobile homes and travel
13 trailers, two items that had been previously determined by the
14 North Carolina Court of Appeals and then one of those cases
15 assented to by the North Carolina Supreme Court, mobile homes
16 and travel trailers are classified as motor vehicles in North
17 Carolina for all sorts of registration and other purposes.

18 Because it's broader than generic burglary, it
19 doesn't fit the enumerated offenses clause under armed career
20 criminal. And with the residual clause being struck down in
21 *Johnson*, B and E can't be an act of predicate under that clause
22 either.

23 We understand that the issue for this Court will
24 likely be *Monroe* and that our argument there is that *Monroe*
25 doesn't control this issue, and that's because *Monroe* never

1 reached the issue that we're raising here, which speaks to the
2 locational element.

3 THE COURT: What about the Fourth Circuit's decision,
4 though, in *Thompson* where the whole issue was briefed and the
5 United States took the position -- and then the Fourth
6 Circuit -- albeit unpublished, but this very argument was
7 raised by your colleagues in the Western District, and I read
8 the briefing in it. And, again, it's an unpublished panel
9 decision that says *Monroe* controls.

10 MS. DOMINGUEZ: A pre curiam?

11 THE COURT: Right.

12 MS. DOMINGUEZ: I would point to there is only one
13 published opinion post *Monroe* that mentions *Monroe*. Everything
14 else is pre curiam unpublished opinion.

15 THE COURT: Is that *Mack*?

16 MS. DOMINGUEZ: No, it's not bad.

17 THE COURT: No, no. Is it *Mack*? Is that the case
18 you're talking about?

19 MS. DOMINGUEZ: Yes. Actually, the one that I'm
20 speaking of --

21 THE COURT: *Mack* they just mention it in Footnote 2.

22 MS. DOMINGUEZ: It mentions it in the footnote, but
23 if you notice in the footnote -- it does mention it in the
24 footnote. It says that the holding of it was that North
25 Carolina breaking and entering qualifies as generic burglary

1 for the purposes of ACCA because it requires this unlawful or
2 unprivileged entry. And when -- it kind of classified it that
3 way, right, and it described it that way. I think in the one
4 published opinion -- granted, it's just a footnote, it's just
5 said in passing -- it speaks to the very issue that we're
6 speaking to is that the locational element has not been
7 handled.

8 THE COURT: What footnote are you talking about?

9 MS. DOMINGUEZ: Let me see, Your Honor. I'm sorry.

10 THE COURT: It's *Mack*. Is it Footnote 2?

11 MS. DOMINGUEZ: I looked at this case last night,
12 Your Honor, and I don't think I have it printed, but it says
13 it -- I wrote that it noted in a footnote that the holding of
14 North Carolina breaking and entering -- or that the holding was
15 that North Carolina B and E qualified as generic burglary for
16 purposes of armed career criminal as it requires an unlawful or
17 unprivileged entry, and I quoted that. I'm sorry. I believe
18 it was only mentioned in one footnote.

19 THE COURT: Right. Basically -- I have it right
20 here, and I'm going to ask Ms. Blondel about it, too, because
21 the Government, after oral argument in *Mack*, sent a letter
22 dated March 8th, 2017, to the Fourth Circuit and said -- and
23 this is the Middle District of North Carolina -- an Assistant
24 U.S. Attorney Named Kyle Posand (phonetic) said, and I'm
25 quoting the letter, quote, "The government further notes that

1 since oral argument in this case it has abandoned the position
2 that North Carolina breaking and entering constitutes the
3 enumerated offense of burglary of a dwelling under Section
4 4B1.2." Which is again, they weren't actually dealing with the
5 Armed Career Criminal Act, but you have the case law that says
6 you look at case law for both.

7 The letter then goes on to state, quote, "This
8 concession was made in the case of *United States v. Royster*,
9 Number 15-4757 in light of *Mathis v. United States*, 136 Supreme
10 Court 2243 (2016). However, after *Beckles* this Court can find
11 that North Carolina breaking and entering is a crime of
12 violence under the residual clause. See *Leocal v. Ashcroft*,
13 543 U.S. 1, 10 (2004) (burglary is a classic example of a crime
14 that falls under the residual clause.)

15 So *Mack* itself doesn't really deal with it -- deal
16 with the Armed Career Criminal Act.

17 Let me just hear from Ms. Blondel. What is the
18 Government's position? Because I also realize -- well, this
19 was position was taken on March 8th, 2017, so it was after the
20 election so...

21 MS. BLONDEL: Your Honor, I'm not aware of any
22 guidance that would prohibit us -- preclude us from arguing
23 that the defendant is an armed career criminal today, and that
24 is my position.

25 THE COURT: That he is?

1 MS. BLONDEL: Yes. The Government's position is that
2 the defendant is an armed career criminal; and as this Court
3 has already acknowledged, Fourth Circuit case law is clear that
4 breaking and entering under North Carolina law is categorically
5 the generic offense of burglary as stated in the Armed Career
6 Criminal Act.

7 Now, the guidelines are a different issue, as Your
8 Honor is aware. Those specify burglary of a dwelling, which
9 the Armed Career Criminal Act is not so restricted to dwelling
10 and that's where some of the issue arises between what is an
11 enumerated offense under the guidelines versus the Armed Career
12 Criminal Act. But Your Honor, today we're dealing with the
13 Armed Career Criminal Act, and the Government's position is the
14 defendant is an armed career criminal because breaking and
15 entering is, and for several years now, has been
16 well-acknowledged under Fourth Circuit case law as an
17 enumerated offense.

18 If it would assist the Court, I'm happy to briefly
19 address Ms. Dominguez's arguments about why this Court should
20 find differently today or I can do so at a later time.

21 THE COURT: Let me hear what else Ms. Dominguez has
22 to say. That is at least helpful for me to know.

23 MS. DOMINGUEZ: Your Honor, I was merely going to
24 reiterate the final point about *Monroe* that I make in my
25 sentencing memorandum, which is that because it dealt

1 exclusively with the unlawful entry element and it's clear, and
2 I would not contest, that Court announces its holding rather
3 broadly and announces the question --

4 THE COURT: Right. In the second paragraph and then
5 in the last paragraph.

6 MS. DOMINGUEZ: Exactly. In the second paragraph and
7 the last paragraph, exactly.

8 But yet, what it's dealing with and what it's
9 analyzing is simply the unlawful entry element. And at one
10 point, I believe Judge Duncan, says, you know, says we don't
11 really have to get into the weeds here. She doesn't say it
12 quite that way because the Supreme Court already has in *Taylor*,
13 but it kind of shows that they don't get into the weeds, right,
14 and they don't really dig deep. And I understand that it's
15 been consistently upheld by these unpublished per curiam
16 opinions, but I think about *Mathis* and its impactful statement
17 about the locational element.

18 And then you look at *White*, which is a Fourth Circuit
19 opinion, where they go, they delve in -- I know it's not our
20 statute, it's not North Carolina. I understand it's Iowa; I
21 understand it's West Virginia -- but they are delving into that
22 locational aspect and then you just turn and take *White's*
23 analysis and kind of imprint it on the North Carolina case law
24 and you say, wow, this is a marriage right here. You know, the
25 North Carolina law also allows for mobile homes and the North

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1 Carolina law also allows for trailers. And North Carolina
2 discusses some sort of mobility aspect, but I would say once
3 you're allowing it for trailers or you're allowing it for
4 mobile homes, well, then, you've reached a point where you
5 exceed the generic definition.

6 So I noted the -- and I don't know how to pronounce
7 it -- the *McLeod* case, just to point out that like the Fourth
8 Circuit does this, right? The Fourth Circuit will say, hey, we
9 know we have a prior published decision on point but yet we
10 didn't really reach that issue, right? They did that in this
11 *McLeod* case where they said that South Carolina second degree
12 burglary of a dwelling was generic burglary, and then they held
13 that crime was overbroad and say, well, the issue wasn't
14 presented to us before.

15 So I ask this Court in that stance to consider the
16 arguments being raised here today.

17 THE COURT: In terms of where I sit in the judicial
18 hierarchy, because at least in cases that are argued --
19 actually, I'm not positive if there is unpublished ones, too.
20 But I know in argued cases the circuit circulates all the
21 decisions to all the judges, and so that they basically will
22 see -- the other judges will see if somebody, in theory, is
23 trying to kind of overwrite a precedent and be able to weigh in
24 about whether it maybe needs to go en banc sua sponte because,
25 I mean, the Supreme Court has been pretty clear -- I understand

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1 your argument. I read all these cases. I mean, it's a very
2 interesting issue.

3 The Supreme Court and the Fourth Circuit have both
4 said, quote, "If a precedent of this Court has direct
5 application in a case it appears to rest on reasons rejected in
6 some other line of decisions, the Court of Appeals should
7 follow the case which directly controls leaving to this Court
8 the prerogative of overruling its own decisions." And then the
9 Fourth Circuit says, oh, by the way, district judges heed this
10 language.

11 So I get what you're saying about, well, the circuit
12 did this in connection with a South Carolina statute, but you
13 think that I have license to do it?

14 MS. DOMINGUEZ: So I think that what I would point to
15 is that in my view there's intervening controlling authority
16 from *Mathis* and from *White*. I know it doesn't address the
17 exact statute, and I believe it's the *McMellon* case that --
18 well, let me see if it's the *McMellon* on case. I kind of was
19 thinking along these lines and thinking about how was I going
20 to answer Your Honor's question and I was also thinking of
21 *Williams*. I wasn't finding it exactly on point, but in *United*
22 *States versus Williams* in the Fourth Circuit 2015 8 F.3d 253, a
23 panel is not bound by a prior panel's decision when it rests on
24 authority that subsequently proves untenable, right, that's the
25 kind of holding of that case.

1 And I was looking for a way to say obviously then,
2 that kind of translates down to the District Court level, but I
3 do think that when there is --

4 THE COURT: I haven't found that case. I've looked
5 for it.

6 MS. DOMINGUEZ: Imagine a scenario where the Supreme
7 Court answered the question and the Fourth Circuit's panel was
8 still -- I mean, then I guess you would have a higher court.

9 THE COURT: The case that I quoted from is *Rodriguez*
10 *de Quijas versus Shearson/American Express*, 490 U.S. 441 (1989)
11 case. And interestingly in that case, the lower court -- I
12 think it was Fifth Circuit -- had basically said we've examined
13 all of these intervening Supreme Court cases interpreting this
14 statute and find that this Supreme Court case from years ago is
15 not viable, so we're not going to follow it. The Supreme Court
16 takes the case on cert. and says, in the first part of it's
17 opinion, in light of all these various things that's happened
18 since then, our decision from years ago is not viable and we
19 overrule it. And then they have part two of the opinion, they
20 say, but we remind all lower courts, it is not your view, it's
21 not your role to basically do this and you shouldn't do this,
22 even though we're affirming the circuit court that did this;
23 that you basically should follow precedent and then let us
24 overrule it.

25 MS. DOMINGUEZ: So I think what I would say to this

1 Court, then, is that the precedent that exists is that North
2 Carolina breaking and entering is generic burglary as it
3 pertains to the unlawful entry element. And that what I'm
4 asking this Court to consider is an argument that has not been
5 determined. I would ask you to view the decision in *Monroe*
6 narrowly, not to --

7 THE COURT: See, that's why I asked about this
8 *Thompson* case, which, again, I realize it's unpublished, 615
9 Fed.Appx. 160 decided on September 9th, 2015, where when you
10 read the briefing, these are the arguments that were made to
11 the circuit and they said *Monroe* controls.

12 So a panel -- now, it wasn't argued -- as I
13 understand the way the internal operating procedures of the
14 circuit, if they don't argue a case, they don't publish a
15 result. So it's an unpublished case, but they basically said
16 *Monroe* held that this conviction under North Carolina's
17 breaking and entering offense qualifies as burglary; therefore,
18 this sentence -- again, it's sort of like this case in the
19 sense of, therefore 15 years is the minimum as opposed to 10
20 years being the maximum.

21 MS. DOMINGUEZ: So the briefing covered it but the
22 pre curiam decision didn't really mention any of the arguments;
23 it just held consistently with *Monroe*?

24 THE COURT: It did. I mean, it basically -- that's,
25 I think, a fair characterization. They just said we have

1 already answered this issue whether North Carolina breaking and
2 entering offense is broader than generic burglary, was
3 contested and decided in *Monroe* and we conclude that Thompson's
4 claim is foreclosed.

5 Now, again, although the briefing focused -- I mean,
6 the briefing was all about what "building" meant and under
7 North Carolina law citing a lot of these same cases that are
8 cited in your brief and the panel, at least in *Thompson*, said,
9 we've answered this question.

10 MS. DOMINGUEZ: So to that point I would just say
11 it's an unpublished opinion. It has no binding precedent.

12 THE COURT: Do you know -- because I know with
13 *Johnson* counsel being appointed, are you aware of your office
14 because -- because I know just the reality of *Monroe* and the
15 effect and ambiguity of breaking and entering convictions in
16 North Carolina and how they apply to the Armed Career Criminal
17 Act, are you aware of your office seeking a certificate of
18 appealability in any these where somebody basically raises this
19 claim in a habeas case, a successive petition loses, as a
20 district judge says, *Monroe* controls and either says you ought
21 to get a certificate of appealability on this or --

22 MS. DOMINGUEZ: Sorry. I'm not aware of that.

23 THE COURT: Ms. Blondel, do you know if the United
24 States is -- what position it has taken? I'm also aware there
25 was a Mandamus petition that was denied sort of raising this

1 same issue associated with what does *Mathis* mean, how *Mathis*
2 undercut *Monroe*, do you know -- you may not, but do you know if
3 the Appellate sections of any of your colleagues or maybe even
4 your office is taking a position on this issue?

5 MS. BLONDEL: Your Honor, I do not know of the status
6 of any of our 2255s. I do know this: The defendant's plea
7 agreement in this case permits him to appeal this issue. We
8 did build that into the plea agreement recognizing that, you
9 know, there's an argument here.

10 My position is, and I'm not aware of anybody in our
11 office taking a different position, is that breaking and
12 entering in North Carolina categorically is a violent felony
13 under the Armed Career Criminal Act because it satisfies the
14 generic definition of burglary. I believe that remains our
15 office's position.

16 THE COURT: Do you know -- I guess you don't know.
17 Do you know whether the Solicitor General, in terms of all
18 these other offices -- this issue, I'm sure, is not only being
19 argued here right now but somewhere else in other district
20 courts, basically. I know it is in the habeas context.

21 MS. BLONDEL: Your Honor I'm not aware of any
22 official guidance from DC on this issue one way or the other.

23 I did find some case law I think in the Eastern
24 District of Tennessee and Western District of North Carolina
25 rejecting these issues and the Government -- this very argument

1 about North Carolina's breaking and entering, and the
2 Government's position was that it qualified.

3 THE COURT: Right. I know Judge Fox just did in a
4 pretty recently -- again, reading *Thompson* and saying this was
5 raised and I'm bound, I'm a district judge and --

6 MS. BLONDEL: But, Your Honor --

7 THE COURT: Those -- I know some of them at least
8 have been denoted as being appealed basically, so Westlaw
9 indicates that. All that really means is the prisoner is
10 basically seeking a certificate of appealability so at least
11 the Circuit would have to try and say, hey, do we want to
12 address this.

13 MS. BLONDEL: I'm sorry. I do not know of any -- I
14 have not received any guidance that would contradict the
15 Government's position today, which is that it qualifies. And
16 I'm not aware of any national guidance other -- to that effect
17 either.

18 THE COURT: Well, I doubt they would ever be
19 national. Well, I guess they could, maybe national guidance
20 about the North Carolina statute, but it would seem to me it
21 would be whoever within the Solicitor General's Office who
22 deals with criminal matters and come out of the Fourth Circuit
23 would probably be the person to talk to.

24 Ms. Dominguez, do you want to tell me anything else?

25 MS. DOMINGUEZ: No, Your Honor.

1 THE COURT: On this issue?

2 MS. DOMINGUEZ: I'm sorry?

3 THE COURT: On this issue?

4 MS. DOMINGUEZ: No, Your Honor. I will rest on my
5 argument and my filing.

6 THE COURT: Ms. Blondel?

7 MS. BLONDEL: Briefly, Your Honor.

8 The reason the Government didn't respond with a
9 substantive brief is because the Government's position is that
10 *Monroe* controls; that Fourth Circuit case law controls here;
11 and therefore, the defendant is, under current case law, an
12 armed career criminal.

13 I did want to address briefly the underlying
14 substance of Ms. Dominguez's argument. This case I think --
15 this legal issue boils down to a problem of buildings that are
16 built out of mobile materials, Your Honor.

17 For a couple of examples, you know, on my way to the
18 grocery store every day I pass a mobile home park where people
19 built carports and children park their tricycles out front.
20 These are homes. These are not something that people are
21 driving. They're homes. There's a house on Bloodworth Street
22 a few blocks from here that was moved on to the lot, the
23 physical house was not there and then the whole thing had
24 clearly been transported on to the lot.

25 I will confess to watching HGTV from time to time,

1 and they have a series about people who take old railroad cars
2 and convert them into sustainable green homes. So people build
3 homes. So people build homes, buildings out of materials that
4 also can be used to be mobile, Your Honor. And frankly, it's
5 people with lower incomes, can't afford to go and build a big
6 house so they buy a -- purchase a mobile home, Your Honor. But
7 they are homes.

8 So North Carolina has had to confront the question of
9 when is a trailer not really a trailer but actually build a
10 structure on the curtilage that we all agree qualifies or a
11 house that we all agree qualifies. And the *Bost* case cited in
12 the defense's brief I think sums up the sensible conclusion
13 that North Carolina has taken to this factual problem. The
14 answer depends on the circumstances.

15 This is *State v. Bost*, 286 S.E.2d 632, I'm at
16 page 635. Depends -- quote, "depends on the circumstances in
17 each case. They may qualify as buildings, if under the
18 circumstances of their use and location at the time in question
19 they have lost their character of mobility and have obtained a
20 character of permanence."

21 So basically, the North Carolina law is drawing the
22 exact lines that the courts in *Taylor* and *Shepard* and Fourth
23 Circuit interpreting those decisions in cases like *White*,
24 mobility doesn't qualify; permanence does.

25 All the State of North Carolina has said is basically

1 this is a fact question. It's a fact question whether it's
2 really a permanent building; and, therefore, meets the
3 standards up for a breaking and entering conviction or whether
4 it's really a mobile item; and, therefore, should be charged
5 under a different statute, Your Honor.

6 So I would submit that what North Carolina here is
7 doing has come up with a common sense approach to a factual
8 problem that is totally in line with the case law and with the
9 definition of generic burglary. And therefore, Your Honor,
10 breaking and entering under North Carolina law qualifies as
11 generic burglary.

12 If the Court doesn't have any further questions, that
13 concludes my argument on this issue, Your Honor.

14 THE COURT: Maybe you already told me this. You're
15 not aware of your office taking a position one way or the other
16 or they take the same position you've taken here in connection
17 with arguments about *Mathis* and *Monroe*.

18 Again, part of the reason I ask is the Middle
19 District -- I take your point that, obviously, they're dealing
20 with the guideline provision that the U.S. Attorney's Office in
21 the Middle District makes this post-argument concession in the
22 *Mack* case that then yields Footnote 2; that your Appellate
23 section in connection with 2255s basically takes the same
24 position you take now, as far as you know.

25 MS. BLONDEL: As far as I know, Your Honor. I am not

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1 involved in 2255 litigation. But I can say this: I have yet
2 to meet anybody in my office who doesn't think that breaking
3 and entering -- everybody in my office that I have ever spoken
4 to thinks breaking --

5 THE COURT: And I'm sure Ms. Dominguez would tell me
6 everybody in her office disagrees.

7 MS. BLONDEL: This is the position we're all taking
8 in courts, Your Honor.

9 THE COURT: I understand, because of *Monroe*?

10 MS. BLONDEL: Yes, Your Honor.

11 THE COURT: *Monroe* is binding?

12 MS. BLONDEL: Yes, Your Honor.

13 Frankly, when Ms. Dominguez mentioned this
14 argument -- general argument to me I said, okay, you can make
15 that argument but my understanding is the Fourth Circuit has
16 been clear on this point and it's my understanding that that is
17 the view within the office.

18 THE COURT: What I'd like you to do is to check. I'm
19 going to continue this, because I do think -- maybe this is the
20 case. I do have to decide in light of this *Rodriguez de Quijas*
21 *versus Shearson/American Express* precedent saying depending on
22 where you sit in the judicial hierarchy, it's not your role to
23 overrule precedent; you follow it.

24 Certainly, *Monroe* as construed in *Thompson*,
25 especially in light of the briefing in *Thompson*, I completely

1 understand the Government's position, but I also understand the
2 defense arguments in their brief about *Mathis* and the case from
3 West Virginia.

4 So it's a significant legal issue, and I really would
5 like to know -- for you to check formally with your Appellate
6 chief and maybe the Solicitor General's Office if, particularly
7 in light of the letter that was sent on March 8th, 2017, at
8 Appellate Docket Entry 35 in the *Mack* case making this
9 concession, about whether the Department of Justice's position
10 is perhaps changing. Again, if it is, it's a concession that,
11 frankly, probably needs to be made to the circuit because then
12 the circuit can deal with basically saying *Monroe* doesn't mean
13 what it says, because the dialogue I just had with Ms.
14 Dominguez, and she is spot on, as always, in saying you look at
15 the breadth of the second paragraph and the final paragraph,
16 there's not a lot of wiggle room in terms of what the Court
17 held, but then you sort of read the briefs in that case and
18 kind of what they were talking about, what was briefed didn't
19 focus on this building issue.

20 MS. BLONDEL: Yes, I understand that, Your Honor.

21 THE COURT: So I think it would be prudent to have
22 you check and then just to continue it for -- I'd continue it
23 for four weeks because after you check, I actually would like a
24 written response and then Ms. Dominguez can reply if she wants.

25 I'm not looking for some tremendously long brief; but

1 again, dealing with these cases that are cited by the defense,
2 formally finding out from probably within the Solicitor
3 General's Office what the Attorney General's position is. And
4 then the other issue, then, as well, I think that has to come
5 up from where I sit is even if the Department of Justice
6 concedes an error, if there's binding precedent the Supreme
7 Court seems to have certainly said to lower court judges follow
8 the binding precedent and let the higher court overrule itself,
9 which, by virtue of the preservation in the plea agreement, it
10 certainly can be done. But I think by checking, at least, it
11 may well be there may be an issue. And I know I checked on the
12 cases that you all cited -- that you cited, Ms. Dominguez,
13 about some case being held in abeyance and that case ended up
14 just getting remanded for resentencing without any guidance
15 from the circuit. So I suspect the district judge in that case
16 would be asking herself in a month or so what does *Monroe* mean.

17 MS. BLONDEL: I'll be happy to provide that
18 information.

19 THE COURT: I do thank you both for your preparation
20 and your argument and your thoughts.

21 So this matter will be continued.

22 (The proceedings concluded at 1:31 p.m.)
23
24
25

1 UNITED STATE DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3
4

5 CERTIFICATE OF OFFICIAL REPORTER

6 I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in
7 and for the United States District Court for the Eastern
8 District of North Carolina, do hereby certify that pursuant to
9 Section 753, Title 28, United States Code, that the foregoing
10 is a true and correct transcript of the stenographically
11 reported proceedings held in the above-entitled matter and that
12 the transcript page format is in conformance with the
13 regulations of the Judicial Conference of the United States.
14

15 Dated this 7th day of June, 2017.
16
17

18 /s/ Amy M. Condon
19 Amy M. Condon, CSR, RPR
20 U.S. Official Court Reporter
21
22
23
24
25

1 (Tuesday, September 12, 2017, commencing at 2:41 p.m.)

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

3 THE COURT: We'll next take up the Atkinson
4 sentencing.

5 Ms. Dominguez, are you and Mr. Atkinson ready to
6 proceed?

7 MS. DOMINGUEZ: We are, Your Honor.

8 THE COURT: Is the Government ready?

9 MS. BLONDEL: Yes, Your Honor.

10 THE COURT: At this time, I ask that Mr. Atkinson be
11 sworn or affirmed.

12 (The defendant was duly sworn.)

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

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Have you taken any kind of medicine or
20 any other substance in the last 48 hours that would affect your
21 ability to hear and understand these proceedings?

22 THE DEFENDANT: No, sir.

23 THE COURT: Do you know why you're here today?

24 THE DEFENDANT: Yes.

25 THE COURT: Ms. Dominguez, do you have any reason to

1 doubt Mr. Atkinson's competence to go forward today?

2 MS. DOMINGUEZ: No, Your Honor.

3 THE COURT: Does the Government have any reason to
4 doubt Mr. Atkinson's competence to go forward today?

5 MS. BLONDEL: No, Your Honor.

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

10 Mr. Atkinson, you're here today having entered a plea
11 of guilty to the charge of being a felon in possession of a
12 firearm and ammunition. You entered a plea of guilty to that
13 charge in this court.

14 In light of some cases from the Supreme Court of the
15 United States, including the *Booker*, *Rita*, *Gall*, *Kimbrough*,
16 *Spears* and *Nelson* cases, the sentencing guidelines are no
17 longer mandatory; they're advisory.

18 Nevertheless, in accordance with those cases and
19 numerous cases from the Fourth Circuit interpreting them,
20 including the *Carter*, *Pauley*, and *Evans* cases, a sentencing
21 Court still must take into account the now-advisory guideline
22 range.

23 The Court does this by initially making findings of
24 fact and calculating the advisory guideline range. The Court
25 will then consider any motion that might be made that might

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.

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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

1 guideline range is just eight months above the statutory
2 mandatory minimum for an armed career criminal.

3 I contend the Government's position is that his
4 criminal history and his conduct, especially his conduct
5 beginning when these incidents -- underlying indictment first
6 began shows that he is a danger to the community, he has no
7 respect for the law, he does not heed repeated and increasingly
8 serious warnings to conform his conduct to the law; and
9 therefore, an upward departure or variance is appropriate in
10 this case.

11 I know the Court is well familiar with the
12 presentence report and the material in the Government's
13 briefing so I'll try to be brief.

14 The presentence report details the defendant's long,
15 violent, serious criminal history. His repeated revocations of
16 probation and parole and his astonishing number of infractions
17 while he was in custody, and as I'll talk about in a moment as
18 the Court is familiar with our brief, we have an indicator why
19 he might have had so many infractions while incarcerated.

20 Your Honor, the last conviction he sustained before
21 the offense involved in this case was for breaking and
22 entering; one of the predicate convictions for an armed career
23 criminal. During that incident he broke into a woman's home,
24 pushed her down and stole her firearm.

25 Prison for doing exactly that apparently did nothing

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1 for the defendant. In early September, he got into an
2 altercation with a female which led into her stabbing him and
3 then him shooting her. Warrants were issued for him. The
4 police went to arrest him, they caught him with bullets in his
5 vehicle. They went back to find the gun at the home where he
6 was living at the time at his girlfriend's residence and there
7 was a firearm basically underneath where he slept, Your Honor.

8 He was released after his arrest for that incident on
9 the same day. Rather than realizing he needs to stop, this
10 defendant stole his brother's firearm, and was caught again
11 with a firearm after police received a tip. And those are the
12 two charges that were at the basis of this indictment, Your
13 Honor.

14 I would also point out, as Probation notes, the
15 Government submitted the defendant's -- a printout of portions
16 of the defendant's Facebook page. And in between the time of
17 the first incident in September and the second in November, I
18 think we have a photograph of a firearm here and -- posted
19 around October 10th, 2015, and then a photograph of the
20 defendant not wearing very many clothes proudly showing himself
21 with a shotgun.

22 So he's arrested for being -- possessing a firearm as
23 a felon, and we have two incidents of him being photographed
24 with a gun and then him being caught with a gun.

25 Finally, he is detained at the State level. Just

1 days before we were going to take him into Federal custody,
2 Your Honor, he got into the first of the jail fights. That --
3 he was -- we were aware of that at the detention hearing, Your
4 Honor. In fact, I discussed it with Ms. Dominguez, so he was
5 made well-aware that he needed not to be getting in jail fights
6 while in Federal custody. That's exactly what he did, Your
7 Honor.

8 We submitted the video of that incident -- I
9 submitted that video, either I'm not a good enough writer or
10 words couldn't capture the brutality of that incident. It's
11 very clear that the defendant coordinated with another inmate
12 to capture somebody, hold -- his co-conspirator held that man
13 so he couldn't escape while the defendant violently beat on
14 him. They tried to drag the victim into his own jail cell so
15 they can have a private place to attack this person. And you
16 can see on the video that the victim is trying as best he can
17 to escape this beating. And this goes on for a full minute
18 before it stops, Your Honor.

19 In addition to that, the defendant's Facebook posts
20 show his total lack of remorse for this incident. He is
21 posting repeatedly discovery in this case that names names, it
22 names witness names, it names law enforcement names.

23 I do want to correct something. Ms. Dominguez and
24 Probation point out to me, they are correct, one of those posts
25 I said was posted in March of 2016. Based on the comments it

1 looked like it was posted more like February, early February,
2 2016. So I apologize to the Court, that was a factual error in
3 my brief. The formatting of this makes it a little hard to
4 tell what the timing of it all is.

5 But I think it's very clear, and we can see from the
6 fact that in one of these he's got a picture of himself
7 basically telling somebody to post this. The commentary
8 associated with it makes it very clear this is the defendant
9 calling out snitches. These are threatening posts, this is
10 witness intimidation, and he's doing this after he's entered a
11 guilty plea in this case and admitted his guilt.

12 This defendant has yet to show any -- oh, and I
13 didn't mention, he also, we had him on a jail call trying to
14 convince his girlfriend, who is a respectable citizen, to take
15 a gun charge for him.

16 So this is somebody who just doesn't want to take
17 responsibility for his actions. He's violent. He's dangerous.
18 Even being in federal custody hasn't sent him the message to
19 stop beating on people. So we respectfully ask this Court to
20 vary or depart upward in this case.

21 THE COURT: Thank you.

22 Ms. Dominguez, on the upward departure?

23 MS. DOMINGUEZ: Mr. Atkinson was supposed to be
24 sentenced here May 23rd, 2017, and we appeared for sentencing
25 and we were ready to be sentenced and this Court continued the

1 hearing because it wanted more information from the Government.
2 The Government failed to respond to my objection and failed to
3 respond to my sentencing memo and wanted more information.

4 So then the sentencing hearing got set for July and
5 in July the Government -- counsel was out of the country and
6 the case was rescheduled for September.

7 I'm talking about all these dates just to say that
8 all of the information that the Government has presented to you
9 was available to it at its last sentencing hearing and yet this
10 motion for upward departure was never filed.

11 The only thing that's different between then, that
12 hearing and this hearing, is these Facebook posts. So these
13 Facebook posts that took place between November 2016 and
14 February 2017 that are on Rickie Atkinson's Facebook page could
15 not have been actually put on Facebook by him because he was in
16 custody. These all took place, again, before the main hearing
17 and could have been discovered by the Government, but they
18 weren't discovered by the Government until a later date.

19 So when I look at the Facebook posts what I see
20 and -- I say all this because I believe the Government is wrong
21 to move for this now.

22 When I look at them, what we know is this: We know
23 that Rickie allowed those -- portions of his discovery to be
24 photographed. So that we know, because it's held up to the
25 jailhouse visitation window. And we know that he wrote a

1 letter that said, make sure you post this and tag my family and
2 close friends. So we know that.

3 That's what we know, and we know that there's
4 pictures of him giving the finger. The commentary that's
5 posted on Facebook can't be posted by him. There's no evidence
6 that the Government can point to that says he told anyone what
7 words to write, okay? And the words that were written, Your
8 Honor, the Government wants to call them threatening, but the
9 words are actually these people are the police, they're the
10 police, it is outing that someone is a cooperator, but there is
11 no threat.

12 And I understand -- we didn't object to adding it the
13 obstruction of justice. He was already getting obstruction of
14 justice. That's not my point. My point is really to say that
15 what we know is that all of this happens briefly, except for
16 one page that gets posted post-plea, but there's no indication
17 that he enters this plea and walks -- in that one day or in
18 that one evening and says, hey, post this. There is no
19 indication that any of his providing of this material was done
20 post-plea.

21 And, you know, even the messages themselves, the
22 girlfriend says in response to a post, I'm hacking Rickie's
23 page. And so the commentary are things like, witness ruined my
24 life, but it's an exploitive instead of witness, right? It
25 could be Rickie's life, could be girlfriend's life that's

1 ruined. But the point is, is that a threatening message? Is
2 this a sort of straw that breaks the camel's back? I submit to
3 you that it shouldn't be.

4 You actually can read one portion of something that
5 you want to attribute or at least the Government wants to
6 attribute to Rickie and, in fact, where it says that -- where
7 the message purportedly that would be revealed to Facebook
8 friends says, Put your all into being far from the presence of
9 these sad, salty, exploitive, right, that does me no good
10 because their whole intention is to push you away. So what is
11 it saying? It might be insulting, but it's not threatening.
12 It's telling family members and friends to stay away.

13 I think while it's always super easy to always
14 prescribe the worst motive to our clients that, in fact, here
15 with respect to the Facebook stuff it's equally plausible, in
16 fact, probable that he just wants his family to avoid these
17 people that are giving information to the Government.

18 So then you have the other conduct, right.
19 Understandably, one of my points was this wasn't raised before.

20 THE COURT: The PSR, Ms. Dominguez, raised a 4A1.3
21 upward departure in the original -- let me tell you, and you
22 know because you've been around, I don't have to have a motion
23 from the Government to upwardly depart. You have to have
24 notice of a Rule 32(h). There was notice in here.

25 Put aside all this Facebook nonsense, this is an

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1 extraordinarily violent man whose likelihood of recidivism is
2 100 percent. So if you want to focus your argument where I
3 think it would be helpful to your client, it would be on 4A1.3
4 which has been in play since the original PSR. It's in play
5 here. I was thinking about it when we were last together, but
6 I didn't get to that part of the hearing. I don't need a
7 motion from Ms. Blondel or any other Assistant U.S. Attorney to
8 upwardly departure and you know that.

9 So let's focus on 4A1.3 and why you believe that he
10 doesn't present an extraordinary risk of recidivism. I mean, I
11 watched that video which also was referenced. It was
12 outrageous what this man did in jail, much less before I even
13 start talking about his behavior on the planet Earth when he's
14 not in jail.

15 I mean, in jail -- he's out of control everywhere.
16 So tell me why the conclusion should not be that he has nearly,
17 if not 100 percent, as close to 100 percent as it can be in
18 terms of a risk of recidivism, it's all he's ever done. He's a
19 violent man, a violent criminal and tell me why under 4A1.3 I
20 shouldn't upwardly depart.

21 MS. DOMINGUEZ: I believe that if you were to --
22 well, if you have the information that I have, which is that on
23 each of those occasions, right, when I look at when he's in
24 jail, even when he's in jail having these assaults or when he's
25 in jail, in prison previously and having assaults, he's never

1 properly medicated. That's literally Rickie Atkinson's
2 problem. When has he been medicated since we've been in this
3 case? April of 2017 when he got into New Hanover County Jail.

4 And so I think what Rickie poses and why he poses
5 violent -- you know, why he is threatening in these ways and
6 why you could conclude that he might be violent forever is
7 because I think that people that have mental health issues that
8 aren't medically treated for those mental health issues do have
9 problems controlling their behavior. And I do agree that that
10 is a problem, but that is a problem that can be remedied.

11 And why an upward departure is not necessarily here
12 is because the guideline itself, 180 to 188 is an enormous
13 amount of time, and I think that sometimes in these courtrooms
14 we forget it is an enormous amount of time. It is certainly
15 double any time he has ever served. It's extraordinarily five
16 times more than his guideline range would be had he not been an
17 armed career criminal. I think it sufficiently captures the
18 underlying conduct in the case and the conduct when you realize
19 that -- and the conduct you're concerned about right now and
20 Ms. Blondel is concerned about -- when we realize that with
21 proper intervention, this does not have to be his destiny, it
22 doesn't have to be. It just needs -- somebody needs to care
23 enough to put those pieces of the puzzle together to get him
24 the assistance he needs.

25 THE COURT: Thank you.

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1 Anything else, Ms. Blondel?

2 MS. BLONDEL: The defendant is 35 years old at this
3 point in his life. His criminal history has been going on for
4 quite a long time. I agree that somebody needs to care enough
5 for the defendant to change and that person is the defendant,
6 and I don't think he cares and I think the record in this case
7 is clear. We therefore ask for an upward departure or
8 variance.

9 THE COURT: An upward departure may be warranted when
10 a defendant's criminal history category substantially
11 underrepresents the seriousness of the defendant's criminal
12 history or the likelihood that he would commit other crimes.

13 This principle is discussed in Section 4A1.3(a)(1) of
14 the guidelines and also discussed in *United States v. Myers*,
15 589 F.3d 117, 125 (4th Cir. 2009), in *U.S. v. Lawrence*, 349
16 F.3d 724, 726-27 (4th Cir. 2003).

17 Under 4A1.3(a), the Court shall determine the extent
18 of the departure under this subsection by using as a reference
19 the criminal history category applicable to defendants whose
20 criminal history or likelihood to recidivate most closely
21 resembles that of the defendant's. See 4A1.3(a)(4)(A).

22 The background commentary of Section 4A1.3 recognizes
23 that the criminal history score is unlikely to take into
24 account all the variations and the seriousness of criminal
25 history that may occur. For example, a defendant with an

1 extensive record of serious assaultive conduct who had received
2 what might now be considered extremely lenient treatment in the
3 past might have the same criminal history category as a
4 defendant who had a record of less serious conduct.

5 In conducting this determination the Court may move
6 to successively higher categories only upon finding that the
7 prior category does not provide a sentence that adequately
8 reflects the seriousness of the defendant's criminal conduct.
9 See *United States v. Cash*, 983 F.2d 558, 561 (4th Cir. 1992.)

10 The Court does find that an upward departure under
11 4A1.3(a) is appropriate in this case.

12 Mr. Atkinson is 35 years old, has a deeply, deeply
13 troubling criminal history, and I do think the criminal history
14 category in the report substantially underrepresents the
15 seriousness of his criminal history and it also substantially
16 underrepresents the likelihood that he will commit other
17 crimes.

18 In looking at his criminal history, his criminal
19 behavior reflected in the report began at age 16 with an injury
20 to real property conviction. He then at age 16 also had an
21 assault with a deadly weapon conviction; for that he received
22 an extraordinary lenient sentence, 10 days in custody,
23 suspended 60 months of unsupervised probation. His probation
24 was later revoked.

25 He had an assault conviction at age 16, he pled

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1 guilty, got time served; again, another extraordinary lenient
2 sentence. Had another assault conviction at age 16, another
3 lenient sentence; a breaking and entering conviction at age 18,
4 another lenient sentence; possession of stolen goods at age 18,
5 another lenient sentence; breaking and entering a motor
6 vehicle, seven counts, pled guilty, six to eight months,
7 custody, suspended, 24 months probation. His probation gets
8 revoked. Again, more leniency, nothing changing.

9 Then he has the larceny conviction at age 19, pleads
10 guilty, gets 9 to 11 months custody, serves that sentence.
11 Again, it's extremely lenient. But even while he's
12 incarcerated, he has 30 infractions as reflected in paragraph
13 24 of the PSR.

14 Age 19, larceny after breaking and entering and
15 possession of stolen goods, pleads guilty, gets a lenient
16 sentence, gets released. While he's incarcerated, he has 27
17 infractions.

18 Age 20, breaking and entering, he pleads guilty to
19 that. We have these consolidated matters. In paragraph 28 he
20 has a different breaking and entering on a different date
21 that's reflected in the PSR; and on paragraph 29 in the revised
22 PSR, another breaking and entering and he gets a sentence, his
23 post-release supervision begins, but while he's incarcerated,
24 including as a habitual felon, as reflected in paragraph 30, he
25 has 93 infractions. He then also violates post-release

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1 supervision by committing new criminal conduct as reflected in
2 paragraph 30.

3 Paragraph 31 has an assault on a Government employee;
4 again, leniency, nothing changing.

5 Paragraph 32, assault on a Government employee;
6 leniency, nothing changing.

7 Age 27, assault on Government employee; leniency,
8 nothing changing.

9 Age 31, felony possession of cocaine, gets another
10 what I consider to be a lenient sentence and then he has the
11 breaking and entering conviction at paragraph 35 when he was
12 31.

13 We then have -- when we think about issues associated
14 with both his criminal history category underrepresenting the
15 seriousness of his criminal history or the likelihood of
16 recidivism, we have the offense conduct reflected in Count 1,
17 which is conduct on or about September 10th, 2015; the
18 dismissed count for conduct on or about November 14th, 2015;
19 the obstruction of justice that took place with respect to
20 trying to get his girlfriend to lie for him as discussed in
21 paragraph 5 of the report, even putting aside issues associated
22 with these Facebook posts.

23 We then have the video, which I did watch and is
24 utterly, utterly chilling, of the assault that he participated
25 in, the violent assault, while in jail awaiting disposition of

1 his case in this court.

2 So I think that an upward departure is absolutely
3 appropriate in this case and find it to be appropriate under
4 4A1.3.

5 The Court under Fourth Circuit precedent notes that
6 it doesn't have to go through a ritualistic exercise in which
7 it mechanically discusses each criminal history category or
8 offense level. It rejects en route to the ultimate combination
9 that it selects. The Fourth Circuit discussed these principles
10 in *Dalton*, 477 F.3d 199.

11 The Court here does find that an upward departure to
12 Criminal History Category 6 is appropriate. I don't think that
13 is a sufficient criminal history category for this defendant in
14 light of all the things that I've talked about to date.

15 Under 4A1.3, given that his criminal history does
16 substantially underrepresent the seriousness of his criminal
17 history and it also substantially underrepresents the
18 likelihood to commit other crimes, I'm allowed, once I get to
19 Criminal History Category 6, to then move to a higher offense
20 levels as appropriate. These principles are discussed in the
21 *Dalton* case that I mentioned.

22 Here, I do think moving to Total Offense Level 32 and
23 Criminal History Category 6 is appropriate in light of the
24 serious and extensive criminal conduct, his history of lenient
25 treatment, his extraordinary risk of recidivism as reflected in

1 the record that I discussed.

2 This departure is supported by existing case law to
3 include cases, the *Myers* case from the Fourth Circuit, 589 F.3d
4 125-126; *U.S. v. Grubs*, 585 F.3d 793, 803-805 (4th Cir. 2009);
5 *United States v. Worely*, 550 F.3d 326, 339-43 (4th Cir. 2008);
6 the *Evans* case, 526 F.3d 159-156; the *U.S. v. Harris* case, 241
7 F. App'x 88, 91 (4th Cir. 2007); the *U.S. v. Den Kirk* case, 232
8 F. App'x 336, 340-41 (4th Cir. 2007); the *U.S. v. Lamb* case,
9 1998 WL 413995 at page 4 (4th Cir. 1998).

10 Thus, the new advisory guideline is based on a Total
11 Offense Level of 32, a Criminal History Category of 6. The new
12 Advisory Guideline Range is 210 to 262 months.

13 The objection of the defense is noted and preserved.

14 Does the Government agree that as a ministerial
15 matter that a 32 and a 6 yields a 210 to 262 range?

16 MS. BLONDEL: No objection, Your Honor.

17 THE COURT: Do you agree that a 32 and a 6 yields a
18 210 to 262, from the defense?

19 MS. DOMINGUEZ: Yes, Your Honor.

20 THE COURT: All right. I'll now hear from Ms.
21 Dominguez on 3553(a) factors, I'll then hear from Mr. Atkinson,
22 I'll then hear from Ms. Blondel.

23 MS. DOMINGUEZ: Your Honor, we were here before and
24 his mother was here and his girlfriend and a friend and today
25 just his mother and girlfriend are here. Letters have been

1 sent to you back in May.

2 THE COURT: I reviewed those.

3 THE DEFENDANT: Sister.

4 MS. DOMINGUEZ: Sister is here today. Sorry.

5 So you know that Rickie is 35 and he's in the
6 unenviable position of being sentenced here today not only as
7 an armed career criminal but with an upward departure and
8 facing the most significant prison sentence of his life.

9 So I think the single biggest take-away from Rickie
10 Atkinson's life is that he's been suffering from mental health
11 issues that are heretofore either ignored or inadequately or
12 improperly treated or intermittently treated.

13 And I think when you read the PSR, that's only part
14 of the problem. His life is riddled with abuse and neglect and
15 abandonment when he was a child as well as some substance abuse
16 issues, institutionalization starting early in his teen years
17 when he was ejected from his home. From my vantage point, it's
18 hardly surprising when you have those kind of coupled elements
19 in your life that you find yourself in a courtroom when you
20 consider the entirety of his life circumstances, and it's from
21 that vantage point that I ask this Court to look at him and
22 look at the criminal history and behavior that brings him here
23 and think about some of the root causes for some of that.

24 You know, he hasn't behaved in custodial settings,
25 but yet in the most recent period of time, he has and he's been

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1 taking medication. So prior, when he wasn't behaving and when
2 you're looking at videos of assaultive conduct that you see,
3 he's not taking medication. And I think that all of these
4 things that he suffers can be properly treated in the Bureau of
5 Prisons.

6 I ask that he get proper mental health treatment and
7 care because I believe that his behaviors can be ameliorated,
8 and I personally see it because he is more in control. He is
9 less reactive, he's more contemplated since he's been taking
10 medication that he started in April of 2017. And these things
11 in getting that kind of piece of his life under control is not
12 only good for him, but obviously for society in general, if
13 indeed we can control mental health issues in this country,
14 then I think we will see a dropping of criminal history in that
15 segment of society.

16 So I can't excuse his criminal history or his
17 behavior on probation or supervision or the infractions he's
18 had in custody, but I do think that his circumstances and how
19 he was raised and his bipolar disorder and anxiety disorders
20 are impacting that.

21 Substance abuse treatment will hopefully also provide
22 him with coping tools to avoid the pitfalls of his past. I
23 think you can see from the report there's self medication with
24 marijuana and prescription pills. And even though he had that
25 lengthy period of incarceration in the North Carolina

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1 Department of Corrections, there was no substance abuse
2 treatment provided during that time.

3 So we ask for that recommendation as well.

4 He has held down some jobs in the past in the food
5 service industry, car detailing and landscaping. We discussed
6 he needs to have some goals for while he's in the Bureau of
7 Prisons so that he can get some more lasting skills. He is
8 resolutely set on getting his GED and from there he talks about
9 wanting to work in Unicor and wanting skills in both culinary
10 arts, landscaping, tailoring and carpentry.

11 I ask this Court to sentence him to the very bottom
12 of the upward departure guideline range. I think that 210
13 months is two-and-a-half years greater than the bottom of the
14 guideline range that was contemplated and greater than his
15 mandatory minimum sentence. I think it's an enormous sentence.

16 And, you know, for Rickie, he hasn't seen the likes
17 of a sentence like that. You know, at some point you wonder,
18 what are the returns of how long a sentence is? Do you really
19 get that more returns? I think you get more protection for
20 society, but in terms of the behaviors that we're trying to
21 impact on offenders, what are the returns that we get for
22 increasing the sentence? Rickie is going to get out of prison
23 at this rate at 52. And I know I've heard this quite a bit
24 with this Court countless times where you talk about recidivism
25 statistics and you talk about people that defy recidivism

1 statistics. I think that if he gets the proper tools and care
2 in custody that he can be someone who doesn't defy those
3 statistics.

4 So we ask for the bottom of that guideline range, we
5 ask for substance abuse treatment, mental health treatment,
6 vocational and educational opportunities, and we ask that you
7 recommend Butner.

8 THE COURT: Thank you, Ms. Dominguez.

9 THE DEFENDANT: Should I stand up?

10 THE COURT: Yes, sir.

11 THE DEFENDANT: Yes, sir. First I want to apologize
12 to you, to my mother --

13 THE COURT: At least look your mom in the face. She
14 deserves that. Look your mom in the face and apologize to her.
15 She came here again today.

16 THE DEFENDANT: I really do. I really do. I
17 definitely haven't been the best person.

18 I agree with what Ms. Blondel said about if I really
19 want to change I need to seek those changes within myself and
20 that's the only way it's going to happen.

21 I have had mental health issues in past. I'm trying
22 to deal with it and cope with it better. I'm taking medication
23 that I'm going to continue taking because I can notice the
24 changes that it's had in me, and I mean, you reading the PSR
25 just blew me away, man, just brought me back about all the bad

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1 things I've done and there's no way I can change that and I
2 know society is looking at me like I'm just this menace or
3 whatever, but I really am trying to change and do better things
4 and -- I'm kind of -- you got me anxious with the wording of
5 everything, but I'm just trying to do better things, man, and
6 get back in rotation with my children and be something, be
7 something better than what I've been for them and my mother
8 definitely.

9 And I also wanted to say I don't want her to feel
10 like she did the worst with me throughout my upbringing. I
11 just want to let her know she did the best, I feel like she did
12 the best she could do with me throughout my youth up until the
13 point where I am now. That's -- just have mercy.

14 THE COURT: Thank you, Mr. Atkinson.

15 At this time I'll hear from Ms. Blondel on behalf of
16 the United States.

17 MS. BLONDEL: Thank you, Your Honor.

18 We've covered pretty much what the Government wants
19 to cover in this case. I do think it comes down to two things:
20 As the Court said, the statistical or common sense probability
21 that he's going to hurt other people. This man presents a
22 danger to the community and I hope that he's right that he
23 wants to change, but I can't guarantee that and I think his
24 record is very much to the contrary.

25 I keep coming back to the fact that he gets into a

1 jail fight a few days before coming into federal custody, we
2 warn him, his attorney warned him, because I spoke to her,
3 don't do that again. He gets into another jail fight where he
4 brutally beats another inmate. He was disciplined in the jail,
5 he had words with his attorney and he continues to post things
6 on Facebook that I do consider to be threatening witnesses. I
7 have seen no evidence that he's gotten the message, Your Honor,
8 and I do believe the threat to the community is just too great.

9 We ask this Court to impose the top of the guideline
10 range. Thank you.

11 THE COURT: All right, Mr. Atkinson.

12 The Court recognizes its obligation to impose a
13 sentence sufficient, but not greater than necessary, to comply
14 with the purposes set forth in the statute.

15 I have considered all arguments that Ms. Dominguez
16 raised on your behalf, I have considered your statement, sir, I
17 have considered the position of the United States, I have
18 considered the advisory guideline range.

19 Among other things, I'm to consider the nature and
20 circumstances of the offense and the history and
21 characteristics of the defendant, the need for the sentence
22 imposed to reflect the seriousness of the offense, to promote
23 respect for the law and to provide just punishment.

24 The need for the sentence imposed to deter others who
25 might choose to engage in the criminal behavior that brings you

1 here; the need for the sentence imposed to protect the public
2 from further crime by you; the need for the sentence imposed to
3 provide you with needed education or vocational training,
4 medical care or other correction treatment in the most
5 effective manner.

6 The statute lists numerous other factors. I have
7 considered all those factors, although I won't mention each one
8 individually.

9 As for the nature and circumstances of the offense,
10 you pled guilty to a felon in possession of a firearm and
11 ammunition charge arising from the incident on or about
12 September 10th, 2015; that there was the dismissed charged as
13 to the weapon. I think that it involved your brother with
14 conduct on or about November 14th, 2015. It is serious
15 conduct.

16 You obviously had sustained felony convictions, you
17 weren't supposed to have these firearms and the conduct itself
18 described in paragraphs 5 and 6 of the revised PSR reflect the
19 serious nature of that conduct.

20 You then have that issue in paragraph 5 where you're
21 trying to get your girlfriend to essentially lie for you and
22 that's not good. So it's very serious conduct.

23 As for your history and characteristics, we talked
24 about a lot of it, you're 35 years old, your mom is here, your
25 sister is here, you haven't gotten your GED yet. You're an

1 intelligent man.

2 I've taken into account what Ms. Dominguez said about
3 your mental health history, about what you said about feeling
4 better on the medicine that you're on right now, but I think
5 Ms. Blondel made a fair point about at the end of the day,
6 whether you're in custody, particularly when you're out of
7 custody, but either way you're responsible for your behavior.
8 And when I look at your history and characteristics in terms of
9 the behavior and I already went through all of it, and it is
10 shocking.

11 I know you have two little girls. I know you are an
12 intelligent enough man that you wouldn't want them to do
13 remotely any of the kind of things you've done or to be with a
14 guy who did any of that kind of stuff, that lived that kind of
15 life that is reflected in this report. You're too smart for
16 that. You're too smart to say I hope my girls find somebody
17 like me in terms of the behavior that's reflected in this
18 report. You're too smart to want that for them. No parent
19 wants that for a child and yet, here it is.

20 Again, it's not just little stuff. It is really
21 harmful stuff in terms of physical violence and violent
22 offenses. And then all these infractions and ridiculous
23 behavior in custody and then the criminal behavior in custody.
24 So it's all very serious, and I think there is a great need for
25 incapacitation in this case and just punishment as a result of

1 that behavior and the serious nature of the offense conduct.

2 I'm not going to go as high as the Government asked
3 for. I'm not going to go as low as Ms. Dominguez requested. I
4 think a sentence in this case of 240 months is the sentence
5 that is sufficient, but not greater than necessary, for Mr.
6 Atkinson in light of the totality of the 3553(a) factors, the
7 serious offense behavior, his history and characteristics, the
8 need to incapacitate, critical need in this case, the need to
9 impose just punishment.

10 I'm going to make all the recommendations that Ms.
11 Dominguez asked for. I'm going to recommend
12 vocational/educational. You have to get your GED, that opens
13 up everything for you in terms of all the other skills you must
14 learn.

15 I'm going to recommend substance abuse treatment.
16 The report says you are smoking about four blunts a day.
17 Again, I can't imagine that you would want your daughters to do
18 that. And while you would do it, I don't know. You need to
19 get the substance abuse issues under control.

20 I recommend a mental health evaluation treatment,
21 appropriate medication. I'll recommend FCI Butner so your mom,
22 sister, and family members can come visit you and they can be a
23 part of your life because you're going to get out and Ms.
24 Dominguez is right, at the end of the day we'll see; and you're
25 right, at least there is some self-awareness. You've got to

1 control yourself. I mean, your mom and sister have been hoping
2 for you a long time, and hoping not to come back to court, but
3 they are, because they are supportive of you. To their credit,
4 to their character that they are here for you. I read the
5 letters. There are a lot of people that still care for you,
6 but you got to make a lot better choices than you've been
7 making so far, Mr. Atkinson.

8 Having fully considered the entire record in the
9 case, it's the judgment of the Court that Mr. Atkinson is to be
10 imprisoned on Count 1 for 240 months, Counts 2 and 3 are
11 dismissed. You'll be on five years of supervised release,
12 you'll comply with the standard conditions and following
13 additional conditions: You'll participate in a narcotic
14 addiction treatment program, a mental health treatment program,
15 you'll consent to warrantless search in accordance with the
16 standard conditions of the district, you'll participate in
17 vocational training program, you'll cooperate in the collection
18 of DNA, you'll support your daughters, they deserve that from
19 you. You'll pay a special assessment of \$100. I'm not going
20 to impose a fine. You'll have a job while you're incarcerated,
21 Mr. Atkinson. It's going to be very different here as it is in
22 State prison. And the money you've earned, your little girls
23 deserve you to help support them with the financial resources
24 you make and earn while you're incarcerated.

25 To the extent I haven't mentioned it, I recommend the

1 intensive substance abuse, mental health, vocational;
2 educational; FCI Butner.

3 You can appeal your conviction if you believe your
4 guilty plea was somehow unlawful or involuntary or if there is
5 some other fundamental defect in your proceeding that was not
6 waived by your guilty plea.

7 You also have a statutory right to appeal your
8 sentence under certain circumstances, particularly if you think
9 the sentence is contrary to law.

10 Any Notice of Appeal must be filed within 14 days of
11 the judgment being entered on the docket of your case. If
12 you're unable to pay the cost of an appeal, you may apply for
13 leave to appeal in forma pauperis. If you so request, the
14 Clerk of Court will prepare and file a Notice of Appeal on your
15 behalf.

16 I think I made all the recommendations you asked for.
17 Ms. Dominguez, were there any others that you wanted me to make
18 on behalf of Mr. Atkinson?

19 MS. DOMINGUEZ: No, you made them all. Thank you.

20 THE COURT: Anything else from the United States?

21 MS. BLONDEL: No. Your Honor, Your Honor.

22 THE COURT: I thank counsel for their work here
23 today.

24 We'll be in recess until 9:00 a.m.

25 (The proceedings concluded at 3:30 p.m.)

1 UNITED STATE DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3
4

5 CERTIFICATE OF OFFICIAL REPORTER

6 I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in
7 and for the United States District Court for the Eastern
8 District of North Carolina, do hereby certify that pursuant to
9 Section 753, Title 28, United States Code, that the foregoing
10 is a true and correct transcript of the stenographically
11 reported proceedings held in the above-entitled matter and that
12 the transcript page format is in conformance with the
13 regulations of the Judicial Conference of the United States.
14

15 Dated this 30th day of October, 2017.
16
17

18 /s/ Amy M. Condon
19 Amy M. Condon, CSR, RPR
20 U.S. Official Court Reporter
21
22
23
24
25

APPENDIX G

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FILED: May 17, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama

Defendant - Appellant

O R D E R

The court denies the motion for hearing en banc petition.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX H

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FILED: March 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RICKIE MARKIECE ATKINSON, a/k/a Drama

Defendant - Appellant

O R D E R

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

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.

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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.

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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.)

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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 DEFENDENT: 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 DEFENDENT: 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 DEFENDENT: Right.

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

11 THE DEFENDENT: 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 DEFENDENT: 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?

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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

1 UNITED STATE DISTRICT COURT
2 EASTERN DISTRICT OF NORTH CAROLINA
3
4

5 CERTIFICATE OF OFFICIAL REPORTER

6 I, Amy M. Condon, RPR, CSR, Federal Official Court Reporter, in
7 and for the United States District Court for the Eastern
8 District of North Carolina, do hereby certify that pursuant to
9 Section 753, Title 28, United States Code, that the foregoing
10 is a true and correct transcript of the stenographically
11 reported proceedings held in the above-entitled matter and that
12 the transcript page format is in conformance with the
13 regulations of the Judicial Conference of the United States.
14

15 Dated this 30th day of October, 2017.
16
17

18 /s/ Amy M. Condon
19 Amy M. Condon, CSR, RPR
20 U.S. Official Court Reporter
21
22
23
24
25

APPENDIX J

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FILED IN OPEN COURT
ON 10/5/16 BRH
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. 5:16-cr-250-ID(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.

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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 J

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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

DATE

10/5/2016

JOHN STUART BRUCE
United States Attorney

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