SENTENCING UPDATE

SELECTED FOURTH CIRCUIT DECISIONS ADDRESSING *BOOKER* ISSUES

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To read the Fourth Circuit's opinions in slip format, go to http://pacer.ca4.uscourts.gov/opinions/opinion.php. For defense-oriented commentary on published opinions and other criminal defense issues, go to http://www.circuit4.blogspot.com. For a more substantive discussion of post-Booker legal issues, go to http://www.fd.org and consult the essays by Federal Sentencing Resource Counsel Amy Baron-Evans.

Booker and Admissions

United States v. Milam, 443 F.3d 382 (4th Cir. 2006) (holding that facts stated in presentence report may not, at sentencing, be deemed to be admissions by the defendant sufficient to bypass the Sixth Amendment right to a jury trial as articulated in *Booker*, even though the defendant, who had been given the presentence report before sentencing, did not object to facts)

Booker, *Shepard*, and Prior Convictions

United States v. Washington, 404 F.3d 834 (4th Cir. 2005) (determining that sentencing court's application of base offense level under U.S.S.G. § 2K1.2 for prior convictions that are crimes of violence through use of extra-indictment facts "about a prior conviction" was plain error and violated defendant's Sixth Amendment rights per *Booker* and *Shepard v. United States*, 125 S. Ct. 1254 (2005))[1]

United States v. Cheek, 415 F.3d 349 (4th Cir. 2005) (finding that enhancement of defendant's sentence on basis of three previous convictions did not violate his Sixth Amendment rights under *Booker* when the prior convictions were not alleged in the indictment or admitted by the defendant during his plea colloquy, where defendant did not challenge existence of prior convictions or their qualification as predicate offenses)

United States v. Thompson, 421 F.3d 278 (4th Cir. 2005) (finding that defendant's prior North Carolina convictions for breaking or entering buildings constituted violent felonies within meaning of ACCA

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[1] This decision provides a foundation for challenging the Fourth Circuit's "otherwise clause" jurisprudence (in escape, resisting arrest, and other cases), which is based on similar extra-record judicial fact-finding. Please contact Sarah Gannett or visit http://www.md-fd.org and review the *Henderson* briefs for more information.

as a matter of law, and that application of ACCA based on at least three convictions committed on different occasions did not require jury fact-finding to comply with Sixth Amendment)[2]

United States v. Simms, 441 F.3d 313 (4th Cir. 2006) (rejecting defendant's argument that district court misapplied ACCA in concluding, based on facts included in the charge application, that defendant's 1985 Maryland battery conviction was for a predicate felony; distinguishing *Shepard v. United States*)[3]

Resentencing After *Booker* Reversal

United States v. Williams, 444 F.3d 250 (4th Cir. 2006) (where defendant sentenced after *Blakely* without application of enhancements that were not alleged in indictment and proven to jury, there was no error in imposing higher sentence upon remand that comported with application advisory Guidelines)

Information That the District Courts May or May Not Consider

United States v. Clark, 434 F.3d 684 (4th Cir. 2006) (on appeal by government, holding that sentencing court should not consider state sentencing practice / range vis-a-vis avoidance of unwarranted disparity; perhaps can consider it with respect to other § 3553(a) factors; even if district court could consider in this case, the evidence supporting the possible state sentence was insufficient, so the district court's reliance on it was unreasonable)

United States v. Eura, 440 F.3d 625 (4th Cir. 2006) (on appeal by government, holding that sentencing court cannot vary from 100:1 crack cocaine / powder ratio, but leaving open the possibility that

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[2] This issue has not been decided by the Supreme Court, and legal commentators believe that the Court may rule in favor of the defense. Counsel should continue to preserve this issue and should appeal any sentence in which the issue is preserved to maintain the prospect of relief in the event of a favorable Supreme Court decision.

[3] A petition for writ of certiorari will be filed. The distinction drawn by the Fourth Circuit between Maryland's practice and the Massachusetts's practice at issue in *Shepard* is weak. Counsel should continue to preserve this issue. Counsel may wish to emphasize the language in *Shepard* requiring that: "[E]nquiry under the ACCA to determine whether a plea of guilty . . . necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."

a variance based on the defendant's individual characteristics compared to the assumptions underlying the crack guideline could be affirmed)[4]

Appellate Jurisdiction over Within-Range Sentencing Appeals

United States v. Montes-Pineda, 445 F.3d 375 (4th Cir. 2006) (holding that the appeals court has jurisdiction to review the reasonableness of a within-Guidelines sentence)

Appellate Review for "Reasonableness"

United States v. Green, 436 F.3d 449 (4th Cir. 2006) (holding that the district court must correctly apply pre-Booker Guidelines law and remanding due to error in granting a departure for over-representation of criminal history)[5]

United States v. Moreland, 437 F.3d 424 (4th Cir. 2006) (where the defendant qualified as a career offender and faced an advisory guideline range of 360 months to life and district court went down to mandatory minimum of 120 months, reversing sentence; while the Fourth Circuit agreed that a reduction was appropriate in the first instance, it disagreed with the extent of the reduction' case remanded for imposition of sentence of at least 240 months; in doing so, the Court implicitly approved a ten-year – or one-third – reduction in sentence in a serious drug case in which the defendant did not have an exemplary background)

United States v. Hampton, 441 F.3d 284 (4th Cir. 2006) (on appeal by government in felon-in-possession case where unchallenged advisory guideline range was 57-71 months, reversing sentence of three years' probation as unreasonable; criticizing the district court for failing to articulate how the sentence imposed would have fulfilled the goals expressed in section 3553(a))[6]

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[4] The United States Sentencing Commission's own reports provide wonderful fodder for making such distinctions. Visit http://www.fd.org and consult the resource list posted on the "Booker/FanFan" page for sources and ideas.

[5] This opinion did not address whether the district court could have granted a variance under 18 U.S.C. § 3553(a). Counsel must assure that the district court correctly applies Guidelines law and articulates an alternative § 3553(a) ground for any departure.

[6] The concurring opinion in this case emphasizes that a variance of this magnitude is not *per se* unreasonable. This points up the importance of helping the district court make a strong record tying together the facts presented in support of a lower sentence and the § 3553(a) factors. Counsel may wish to consider submitting a proposed statement of reasons for the court's consideration and (hopefully) adoption.

United States v. Johnson, 445 F.3d 339 (4th Cir. 2006) (in case involving defendant's appeal of within-range sentence, explaining why sentence within advisory guideline range is presumptively reasonable: first, because of the legislative and administrative process by which they were created; second, because the Guidelines incorporate the § 3553(a) factors; and third, because sentences are based on individualized fact-finding resulting from process that permits defendants to raise objections)[7]

United States v. Davenport, 445 F.3d 366 (4th Cir. 2006) (reversing a sentence of three times the advisory Guidelines range as unreasonable; although defendant's prior history of similar conduct may have justified a higher-than-Guidelines sentence, his history did not constitute "compelling . . . reason[]" for a variance of that magnitude)

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[7] A petition for writ of certiorari will be filed. A circuit split has developed on this issue, with the First, Second, Third, Ninth, and Eleventh Circuits holding that the Guidelines may *not* be treated as presumptively reasonable. The rationale is that doing so effectively makes the Guidelines mandatory once more, in violation of the Sixth Amendment. This issue will likely reach the Supreme Court at some point. Counsel should preserve it and file appeals to preserve the possibility of relief.

The reasonableness of the Guidelines may still be challenged as they apply to individual clients. A useful resource list identifying government reports and statistics that may help distinguish your clients is available at http://www.fd.org.