The Zealous

Advocate

Special Two-Volume Edition

Newsletter for the Defense
Winter 2006 - Volume II

The Editors' Message

We the editors at the Zealous Advocate are pleased to provide you with this expanded, special edition of the Winter 2006 newsletter. In the past few months, we have seen a significant number of changes go into effect in our field. New federal rules have been implemented, the U.S. Attorney's Office has revised its manual, and the Supreme Court is looking at several new cases that may alter the sentencing landscape and give us a better insight into how *Booker* should be applied. Therefore, we have compiled articles examining these changes in this second volume, and we hope you will find it handy and informative. We hope you have a happy holiday and a prosperous new year!

Vidalia Patterson and Laura Sutton
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United States v. Curry, 461 F.3d 452 (4th Cir. 2006) (J. Gregory) (E.D. Va.) [**Sentencing Variances & Standard of Review**] Curry purported to sell gold coins on Ebay, but never had any in his possession and was convicted on multiple counts of mail fraud, wire fraud, and unlawful monetary transactions. At sentencing, his guidelines range was calculated at 41-51 months; however, the judge instead imposed concurrent 12 month sentences that amounted to a 70% downward variance from the guideline range. The Court, relying on *U.S. v. Green*, found that the district court's justification that Curry didn't begin his sales on Ebay with malicious intent and presentence efforts at restitution, was unreasonable. Significantly, the Court also held that the proper standard of review was unreasonableness rather than plain error even though the Government failed to object to the sentence once imposed. Because the government had made it clear that it was advocating for a within-guidelines sentence, it properly preserved the objection to the below-guidelines sentence for appeal.

United States v. Khan, 461 F.3d 477 (4th Cir. 2006) (J. Duncan) (E.D. Va.) [**Various holdings on conspiracies, severing trials, waiver of jury trial, 5th Am. Rights, selective prosecution, and Sentencing**] Khan and codefendants were convicted after a bench trial of several offenses "related to a conspiracy to wage armed conflict against the United States" and "a country with whom the United States is at peace." The Court made several findings: (1) there was sufficient evidence to support all of the convictions against each defendant; (2) the denial of the motion to sever the trials of two of the defendants from Khan's on the basis that the Khan's ties to Al-Qaeda and the Taliban were prejudicial was not an abuse of discretion; (3) the district court's failure to obtain defendants' written waiver of jury trial rights did not render the waivers invalid under Fed.R.Crim.P.23(a); (4) the two conspiracy charges involving conspiracy to injure persons or property in foreign country and conspiracy to commit crimes of violence were valid and were not "conspiracies to conspire"; (5) un-Mirandized statements made by a defendant after being in solitary confinement for one week were voluntary; (6) when evidence demonstrates legitimate prosecutorial factors as motivating the decision to prosecute, it is not error for a district court to deny discovery on prosecutorial misconduct. The sentencing issues resulted in the following holdings: the district court accorded undue weight to the need to avoid sentencing disparities when it gave a sentence reduction to a defendant because he was "similarly situated" to a codefendant who had pleaded guilty and received a lower sentence.

United States v. Ramos, 462 F.3d 329 (4th Cir. 2006) (J. Widener) (D. Md.) [**Indictment variance, entrapment, "sentencing enhancement"**] Ramos was convicted after a jury trial of several counts of distributing cocaine base and use of a firearm during a drug trafficking offense. He argued that there was a variance between the indictment charging him with distributing or possessing a mixture or substance containing a detectable amount of cocaine base, "commonly known as crack," and evidence offered at trial failed to prove that he possessed "crack cocaine." The Court found no variance, noting that the indictments reference to "cocaine base" includes all types, and the "commonly known as crack" language was mere surplusage. The Court also found that the solicitation of a crime is not sufficient to grant an entrapment instruction. Further, defendant's "sentencing entrapment" theory was meritless as it was not "outrageous" for the government to continue to purchase drugs from a willing seller after the level of narcotics relevant for sentencing purposes had been sold.

United States v. Roper, 462 F.3d 336 (4th Cir. 2006) (J. Williams) (W.D.N.C.)[**Restitution, Special Assessments**] Two defendants' cases were consolidated for this appeal. Both involved bank fraud charges and orders to pay restitution. After their prison terms, the defendants violated their terms of supervised release. The district court, finding that they were both unable to pay the restitution and that Roper was also unable to pay the special assessment, rescinded their respective obligations to pay. The Court ruled that under the Mandatory Victim Restitution Act, the district court was

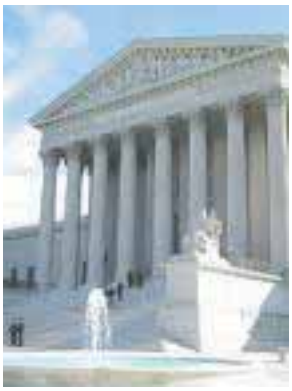
without authority to remit the restitution orders. 18 U.S.C. §§ 3663A & 3664. Moreover, because the special assessment is mandatory and the statute does not provide for rescinding it, the district court was also without authority to remit the special assessment. 18 U.S.C. § 3013.

United States v. Chase, 466 F.3d 310 (4th Cir. 2006) (J. Wilkins) (N.D.W.V.) [**Sentencing, plea agreements, acceptance of responsibility**] Chase pled guilty to distributing drugs within 1000 feet of a school. Per his plea agreement, the government would move for a third acceptance of responsibility point only if Chase paid his special assessment and fully cooperated. At sentencing, the government did not move for the point because the special assessment was not paid and Chase only provided vague information. Chase argued to the district court that since it could not award the point without the government's motion, he should nonetheless receive a receive a sentence that "reflects the additional one level." He was sentenced at the bottom of the guideline range. The Court found that the government had not breached the agreement as Chase had failed to pay the assessment and that successful cooperation was determined by the government. The Court also stated that post-Booker, the guidelines must still be followed properly and they constrain district courts from granting a reduction for acceptance of responsibility absent a government motion.

United States v. Perkins, — F.3d —, 2006 WL 3422971 (4th Cir. 2006) (J. Williams) (E.D. Va.) [**18 U.S.C. § 242, evidence, expert testimony**] Perkins was an off-duty police officer who appeared at the scene of an incident where three police officers had just chased and caught a motorist who fled on foot after being stopped. One of the officers began to kick the motorist's head and kick him in the stomach, and Perkins joined in by doing these same things. He was charged under § 242 for depriving the victim of his right to be free of excessive force and was convicted by a jury. Perkins argued on appeal that testimony fellow officers who testified as to the appropriateness of his conduct was improperly admitted opinion evidence. The Court found that the testimony of officers who were eyewitnesses was properly admitted; however, testimony based on second-hand knowledge was not. In response to Perkins' second argument, that all of the witnesses that testified to the reasonableness of his actions were offering legal conclusions, the Court held that the testimony was admissible under Fed.R.Evid. 704(a). Finally, the Court affirmed the district court's denial of Perkins' motion for acquittal finding the evidence sufficient to show that his actions caused "bodily injury" to the motorist.

This update includes summaries for opinions published between the end of August and November 2006. Comprehensive summaries for cases published before this time were presented during the Fall Criminal Practice Seminar by Diana Pereira. If you would like to obtain an electronic copy of those summaries, please send your request to vidalia_patterson@fd.org.

Supreme Court Update



The Zealous Advocate is pleased to feature a special report on the latest Supreme Court certiorari grants concerning post-Booker sentencing issues. Steve Gordon has graciously provided an editorial on these upcoming cases for this edition's Supreme Court Update.

Harry Potter and the Presumption of Reasonableness: *Rita* and *Claiborne*

Early next year, the United States Supreme Court will hear arguments in two cases with the potential to reduce the central role the guidelines have continued to play in federal sentencing after *United States v. Booker*. *United States v. Claiborne*, No. 06-5618, and *United States v. Rita*, No. 06-5754, will address the "presumption of reasonableness" that some appellate courts, including the Fourth Circuit, have accorded to within-guidelines sentences. The cases hold out the promise of giving district courts greater discretion to fashion sentences that comport with 18 U.S.C. § 3553(a)'s "parsimony provision." That provision states that sentences should be "sufficient, but not greater than necessary" to comply with the purposes of the sentencing statute.

Rita will be argued by Assistant Federal Public Defender Thomas N. Cochran of the Middle District of North Carolina. The case involved a within-guidelines sentence that *Rita* argued, on appeal, was unreasonable. The Fourth Circuit affirmed the sentence, stating that because the district court had "sentenced *Rita* within the applicable guideline range and the statutory maximum. . . the sentence of thirty-three months' imprisonment is reasonable." In his petition for a writ of certiorari, *Rita* argued that for appellate courts to treat the guidelines as presumptively reasonable is to "effectively make mandatory the 'advisory' guideline range."
The Supreme Court will address three questions when it considers *Rita*: (1) Was the district court's choice of a within-guidelines sentence reasonable; (2) In making that determination, is it consistent with *Booker* to accord a presumption of reasonableness to within-guidelines sentences; and; (3) If so, can that presumption justify a sentence imposed without an explicit analysis by the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?

The last question presented by *Rita* is potentially significant. *Rita* argued that he merited a downward variance from the guidelines on the basis of his age, poor health, his record of distinguished military service, and because his employment with the government made him a potential target in prison. He contended that because of the presumption of reasonableness accorded the guidelines, the district court did not give adequate consideration nor appropriate weight to the remaining factors under § 3553(a) when it sentenced him. Appellate courts generally do not require sentencing judges, when those judges sentence within the guidelines, to address explicitly § 3553(a) nor other defense arguments in favor of a downward variance.

Claiborne concerned a defendant who faced a guideline imprisonment range of 37 to 46 months after he pled guilty to distributing a small amount of crack cocaine on two occasions. The district court varied downward and sentenced *Claiborne* to a 15-month term on the ground that the guideline term was "excessive" given the defendant's age, his lack of a criminal record, the small quantity of drugs involved in his crime, and the unlikelihood that *Claiborne* would recidivate. In fact, the court said that to sentence *Claiborne* within the guideline range "would be tantamount to throwing [him] away." The government appealed the sentence, and the Eighth Circuit held that the district court's variance was unreasonable. The court of appeals said that a sentence that varies from the guideline range is reasonable "so long as the judge offers appropriate justification under the factors specified at 18 U.S.C. § 3553(a)." The court added that "[h]ow proportional that justification must be is proportional to the extent of the difference between the advisory range and the

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In his petition to the Supreme Court, Claiborne argued that *Booker's* establishment of "advisory guidelines" did not establish, at the same time, "presumptive guideline sentencing," a system he claimed that appellate court decisions had effectively instituted after Booker. "The shift in appellate focus from the reasonableness of a district court's chosen sentence in light of all the § 3553(a) factors to the reasonableness of not using the guidelines range and the reasonableness of the degree of guidelines variance," he contended, "elevates the guidelines calculation. . . above all other 3553(a) considerations without any justification in the language or reasoning of *Booker*." *Claiborne* will address two questions: (1) Was the district court's choice of a below-guidelines sentence reasonable; and (2) In making that determination, is it consistent with *Booker* to require that a sentence which constitutes a substantial variance from the guidelines be justified by extraordinary circumstances?

As always, Professor Douglas Berman's law blog will provide all of the latest, breaking news on *Claiborne* and *Rita* at: http://sentencing.typepad.com/. Amicus briefs and other documents of interest will appear as they become available at the following websites: http://www.nycdl.org/newsDetails_public.ihtml?itemID=368 and http://www.fd.org.

Comprehensive summaries for Supreme Court cases published before December 2006 were presented during the Fall Criminal Practice Seminar by Diana Pereira. If you would like to obtain an electronic copy of those summaries, please send your request to vidalia_patterson@fd.org.

New Federal Rules

There are several changes to the Federal Rules of Criminal Procedure, Appellate Procedure, and Evidence that went into effect December 1, 2006. A summary of the changes are listed below, but the full text, (along with Bankruptcy and Civil Procedure rules) can be found in PDF format at: http://www.uscourts.gov/rules/newrules6.html.

Criminal Procedure

- Rules 5(c), 32.1, and 41 have been amended to allow for the filing of certain documents (warrants and orders related to out-of-district arrests) with a magistrate judge by "reliable electronic means"
- Rule 6 has been amended stylistically, only to conform with the conventions adopted during the recent overhaul of the Rules
- Rule 40 has been amended to allow a magistrate judge to set bond for a person arrested for violating bond conditions set in another district (the current rule precluded release except, oddly, if the violation was for failing to appear)
- Rule 41 has been amended, setting forth procedural guidance for the issuance of tracking device warrants
- Rule 58 has been amended to clarify that a defendant's right to a preliminary hearing is governed by Rule 5.1 and is not limited to those in custody

Appellate Procedure

- Rule 25 has been amended to allow the Circuits to allow filing by electronic means
- Rule 32.1 has been added dealing with citation to "unpublished" decisions. Prohibitions on citation to such opinions will no longer be valid for opinions handed down after January 1, 2007. However, the rule does not require the Circuits to give such opinions any precedential weight (or prohibit them from doing so).

Evidence

- Rule 404 has been amended to clarify the use of character evidence in civil cases
- Rule 408 has been amended to resolve several conflicts among the Circuits. Of relevance to criminal practice (perhaps), the amended rule prohibits statements made by a party during settlement negotiations from being used to impeach a witness as a prior inconsistent statement.
- Rule 606 has been amended to provide that testimony from jurors regarding their verdict is proper only when there is an allegation of "mistake in entering the verdict onto the verdict form."
- Rule 609 has been amended to provide that automatic impeachment of a witness via prior convictions is proper only "if it is readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness."

Summary of rules reprinted with permission from Jonathan Byrne, Appellate Counsel for the Office of the Federal Public Defender for the Southern District of West Virginia and regular contributor to the Fourth Circuit Blog, found at: http://circuit4.blogspot.com/.

Changes to U.S. Attorney's Manual: Disclosure of Exculpatory and Impeachment Evidence

On October 19, 2006, the U.S. Department of Justice issued changes to the United States Attorney's Manual section 9-5.100 and drafted a new section, 9-5.001. Section 9-5.100, entitled "Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('*Giglio* Policy')," underwent few substantive changes:

- The policy was established for "investigative agencies," including the FBI, Drug Enforcement Administration, Immigration and Naturalization Service, the U.S. Marshals Service, the DOJ Office of the Inspector General, and the DOJ Office of Professional Responsibility. The new version now includes the Bureau of Alcohol, Tobacco, Firearms and Explosives which replaces the Immigration and Naturalization Service (Immigration and Customs Enforcement has not been added to this list).
- In addition to ensuring that prosecutors meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), the purpose of the policy now includes "ensur[ing] that trials are fair."
- The definition of "potential impeachment information" has been expanded to include "information that either casts a substantial doubt upon the accuracy of any evidence – including witness testimony – the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence."

New section 9-5.001 is entitled "Policy Regarding Disclosure of Exculpatory and Impeachment Information. Below are some highlights:

- The purpose of 9-5.001 is to "promote regularity in disclosure practices" concerning exculpatory and impeachment information. However, the policy acknowledges a competing interest in witness security and national security interests, stating that protection of these may warrant delaying or restricting disclosure.
- The section on materiality and admissibility explains that exculpatory and impeachment evidence must be disclosed "when there is a reasonable probability that effective use of the evidence will result in acquittal." Prosecutors are encouraged to take a "broad view of materiality and err on the side of disclosing" such information if admissibility is a close question.
- The new policy also "requires disclosure by prosecutors of information beyond that which is 'material' to guilt." However, information considered "irrelevant or not significantly probative" need not be disclosed. This section further defines the type of information to be disclosed and instances in which the cumulative effect of separate items of information may require disclosure of all.
- The policy's section on timing indicates that the disclosure must "be made in sufficient time to permit the defendant to make effective use of that information," and in "most cases . . . will be made in advance of trial." This section further discusses the limitations on disclosure where national security information is involved and the effect of the policy on sentencing.

Attorneys are advised to review the full text of these provisions as they provide both case law and policy statements that may be helpful in negotiating a disclosure issue. For the full text of these new provisions, go to: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm, or for a copy of the DOJ memorandum introducing these new and revised provisions, go to: http://www.dcfpd.org/sentencing/brady.pdf.

Major New Sex Offense Bill

Congress recently passed, and the President signed, "The Adam Walsh* Child Protection and Safety Act of 2006." Here are some highlights of the Act, which has as its primary purpose the development of state sex offender registries and a federal database to collect the information therein. All section references are to the Act, not the US Code:

- Section 141 creates a new offense, failing to register as a sex offender, at 18 USC 2250. The penalizes a person who "knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act" where that person has either (a) been convicted of certain sexual offenses in federal court or (b) "travels in interstate or foreign commerce, or enters or leave, or resides in, Indian country." Penalties for conviction are 0 10 years in prison or 5 30 years if the person commits a crime of violence.
- Section 141 also increases the punishment in false statement cases (18 USC 1001) to 8 years if the matter at issue related to a specifically listed federal sex offense.
- Section 141 also makes changes to supervised release terms for sex offenses. First, it requires the supervised release term in sex offense cases to be at least 5 years long (up to life). Second, if a person on SR is supposed to be a registered sex offender and he commits a crime that is one of the listed federal offenses, the court is required to revoke his term of supervised release and imposed a minimum sentence of 5 years, regardless of other limitations on imprisonment for SR violations.
- Section 201 specifically provides a sentence of 0 20 years in prison for distribution of "date rape drugs" (as defined by the Act) over the Internet.
- Section 202 sets forth mandatory minimum sentences for persons "convicted of a Federal offense that is a crime of violence" against a minor. If the crime of violence is murder, the minimum is 30 years; kidnapping or maiming receives a 25 year minimum; any other crime of violence that involves serious bodily injury or a dangerous weapon produces a 10 year minimum. These mandatories apply unless greater mandatory minimums are provided elsewhere.
- Section 203 increases the penalty for violations of 18 USC 2422(b) (coercion and enticement) to 10 years to life in prison.
- Section 204 increases the penalty for violations of 18 USC 2423(a) (child prostitution) to 10 years to life in prison.
- Section 205 changes the penalty for violations of 18 USC 2242 (sexual abuse) from 0 20 years to "any term of years or for life."
- Section 206 creates a mandatory minimum of 30 years in prison for violations of 18 USC 2241(c) (sexual abuse). Is also creates a 30 year mandatory minimum for violations of 18 USC 2251(e) where death results.
- Section 210 allows a district court to impose as a condition of supervised release that a registered sex offender submit to warrantless searches by law enforcement or probation officers "at any time." However, such searches still require "reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct." Whether that matters under Samson, anyway, is unknown.
- Section 213 expands federal jurisdiction for kidnapping offenses.
- Section 214 directs a committee of the Judicial Conference to review whether the "marital communication and adverse spousal privileges" should be abolished in child abuse, spousal abuse, or child custody cases.
- Section 216 amends the Bail Reform Act by adding to the cases in which the Government may seek detention "any felony that is not otherwise a crime of violence that involves a minor victim or involves the possession of a firearm or destructive device, or any other dangerous weapon . . .."
- Section 302 provides for civil commitment of sexually dangerous persons within the custody of BOP or committed to the custody of the Attorney General after examination and hearing. If the court determines by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit the person to the custody of the Attorney General in a suitable facility until: (a) a state will assume responsibility for the person, or (b) the person's condition is such that he is no longer dangerous to others or will not be if released under medical, psychiatric, or psychological treatment.

• Section 504 regulates the reproduction of child porn for discovery purposes.
• Section 701 creates the offense of a "child exploitation enterprise" and provides a 20 life penalty for those engaged in such enterprises.
• Section 702 provides a 10 year mandatory minimum, to be imposed consecutively to any other penalty, in cases where a person required to register under the Act commits one of the listed federal sex offenses.
• Section 704(b) provides for an increase of "not less than 200 the number of attorneys in the United States Attorneys' Offices" who shall be assigned to prosecute "offenses relating to the sexual exploitation of children.

*Adam Walsh was the son of John Walsh, of America's Most Wanted fame, whose abduction led to the show.

Highlights of this new law were reprinted with permission from Jonathan Byrne, Appellate Counsel for the Office of the Federal Public Defender for the Southern District of West Virginia and regular contributor to the Fourth Circuit Blog, found at: http://circuit4.blogspot.com/.

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