THE FOURTH CIRCUIT:
A DIVIDED COURT

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Recent Fourth Circuit sentencing case law supports three observations: (1) There is a debate between judges of the Circuit who are more willing to entertain constitutional and other legal challenges to strict application of the guidelines and those who are not; (2) there is a deeper split in attitudes about the guidelines; and (3) the Circuit defers to a district court's factual guideline decision as long as the record reveals some basis for the decision, but reverses decisions revealing inadequate fact-finding. These observations are apparent in opinions involving Chapter Three of the guidelines, Adjustments.

A. WILLFULLY OBLITERATING PROCEEDINGS

The best known case revealing the Circuit's debate over challenges to the guidelines is United States v. Dunnigan, 944 F.2d 178 (4th Cir.), rehearing en banc denied, 950 F.2d 149 (4th Cir. 1991), reversed, 113 S. Ct. 1111 (1993). The issue in Dunnigan was whether an obstruction of justice enhancement can apply to convicted defendants based on their disbelieved testimony of factual innocence at trial.

Disagreeing with seven circuits that previously addressed the issue, the Fourth Circuit panel in Dunnigan held that “the rigidity of the guidelines makes the § 3C1.1 enhancement for a disbelieved denial of guilt under oath an intolerable burden upon the defendant's right to testify in his own behalf.” Dunnigan thereby prevented § 3C1.1 enhancements based on a convicted defendant's denial of guilt at trial.

The court distinguished United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978), a Supreme Court decision allowing sentencing judges to take into account a defendant's untruthful trial testimony. The court noted that Grayson, a pre-guidelines decision, had disallowed "wooden or reflex [enhancements of] the sentences of all defendants whose testimony is deemed false." Dunnigan, 944 F.2d at 184 (quoting Grayson, 438 U.S. at 55, 98 S.Ct. at 2618). The court expressed concern that "this enhancement will become the commonplace punishment for a convicted defendant who has had the audacity to deny the charges against him."

The government petitioned for rehearing en banc, which the court rejected by an evenly-divided six to six vote. Chief Judge Ervin and Judges Russell, Phillips, Murnaghan, Sprouse and Hall voted against rehearing en banc. Judge Hall had written the opinion for the Dunnigan panel, which also included Judge Phillips and District Judge Williams of the Eastern District of Pennsylvania. Judges Widener, Wilkinson, Wilkins, Niemeyer, Hamilton and Luttig voted to rehear the case in banc.1 Judge Wilkins, the Chairman of the Sentencing Commission, dissented from the denial of rehearing en banc in an opinion joined by Judges Wilkinson, Niemeyer and Luttig.

The Supreme Court granted certiorari to resolve the circuit split and, revealing none of the spirited debate apparent in the court below, reversed in a unanimous opinion. United States v. Dunnigan, 113 S. Ct. 1111 (1993). Both Judge Wilkins and the Supreme Court argued that the Fourth Circuit panel had overstated the chance that section 3C1.1 enhancements would become commonplace whenever a convicted defendant denied the crime at trial. The Supreme Court explained that “not every accused who testifies at trial and is convicted will incur an enhanced sentence under §3C1.1 for committing perjury,” because some inaccuracies may be due to confusion, mistake or faulty memory or relate to defenses other than factual innocence. Judge Wilkins had presented essentially the same analysis in his dissent to the denial of en banc reconsideration.

The position of Judge Wilkins and the Supreme Court seems to be that holding trial courts may enhance a sentence based on a particular factor will not necessarily encourage trial courts to do so, and that trial courts will continue to carefully assess close questions about enhancements in later cases.

A different perspective would suggest that once a particular sentencing enhancement has been approved, the mechanical nature of guideline calculations will encourage courts to apply the factor without carefully assessing the facts of each case.

B. ACQUITTED CONDUCT

The Dunnigan panel's concern about enhancements becoming automatic has been borne out in at least one area of Fourth Circuit guideline opinions—acquitted conduct. The court first recognized that guidelines sentences could be enhanced based on acquitted conduct in United States v. Isom, 886 F.2d 736, 738-39 (4th Cir. 1989). In Isom, an acquaintance asked the defendant if he was interested in working at a new print shop, and Isom agreed to inspect and attempt to operate the printing press. The acquaintance suggested that they test the machinery using twenty dollar bills, and Isom performed the actual printing. Indictments for counterfeiting, dealing with counterfeit obligations, and conspiracy soon followed. At trial, Isom testified that he had agreed to copy the money only to test the machinery and upon assurances that the copies would be destroyed. The jury acquitted him of counterfeiting and convicted him of the other two charges. The district court enhanced his

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base offense level by 6 points to 15, pursuant to §2B5.1(b)(2), which states:

If the defendant manufactured or produced any counterfeit obligation or security of the United States, or possessed or had custody of or control over a counterfeit device or materials used for counterfeiting, and the offense level ... is less than 15, increase to 15.

On appeal, Isom contended that an enhancement based on conduct for which the jury had acquitted him violated due process. The court disagreed, reasoning that an acquittal does not necessarily establish a defendant's innocence and noting that Isom never disputed the fact that he operated the printing press.

Since Isom, the court has affirmed several enhancements based on acquitted conduct. See United States v. Nelson, 6 F.3d 1049, 1057 (4th Cir. 1993); United States v. Romulus, 949 F.2d 713, 717 (4th Cir. 1991); United States v. Johnson, 943 F.2d 383, 386 (4th Cir. 1991); United States v. Talbott, 902 F.2d 1129, 1133-34 (4th Cir. 1990). Unlike Isom, which contained a rather lengthy discussion, later opinions have rejected attacks on the use of acquitted conduct with little comment. In a recent opinion, the court extended Isom to affirm a 2-level enhancement in the sentences of two defendants based on the foreseeability that their co-conspirator possessed a firearm. United States v. Kimberlin, 1994 WL 62107 (4th Cir. Mar. 3, 1994). With little analysis, the court concluded, "Just as there is no requirement at sentencing that the court consider only activity for which [the] defendant has been convicted, there is no requirement that the court consider only activity for which the defendant has been charged."

In a recent unpublished opinion, however, Judge Hall concurred to express his hope that the court would "reconsider the precedents" that permitted the use of acquitted conduct at sentencing. United States v. Hunter, 1994 WL 62245, at *3 (4th Cir. Feb. 28, 1994). In Hunter, a surveillance team observed Hunter during a drug sale and arrested him as he attempted to drive away in an acquaintance's car. A gun was found under the driver's seat. Hunter was charged with several drug offenses and carrying a firearm during a drug crime. The jury convicted on the drug offenses, but acquitted him of the firearms charge. The district court enhanced Hunter's sentence for possession of a firearm in connection with a drug offense, under §2D1.1(b)(1).

On appeal, Hunter argued that he did not "possess" a firearm in connection with a drug offense merely by fleeing from the scene of a drug transaction in another's car with a firearm under the driver's seat, a seemingly reasonable argument, but the Fourth Circuit affirmed. In his concurring opinion, Judge Hall authored one of the most scathing critiques of the guidelines yet produced within the Fourth Circuit:

There was a time when "[t]he law 'attache[d] particular significance to an acquittal." United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (quoting United States v. Scott, 437 U.S. 82, 91 (1978)). That was a time before the advent of the sentencing guidelines, under which punishment is methodically tallied up and meted out with little regard for acquittals, and sometimes with no regard at all.

... The only important role the actual offense of conviction plays is to set an absolute upper or lower statutory limit on the sentence. The sentence can be based on all manner of other "relevant" criminal conduct, uncharged or even charged and acquitted. The sentencing hearing is at bottom a mini-trial of the defendant's guilt or innocence of these many charges, initiated not by a grand jury but by a probation officer, with facts found by a preponderance rather than beyond a reasonable doubt, and with no right to a jury as finder of fact. . . .

In short, though it stands alone against the crescendo of the other courts of appeals, I agree with the Ninth Circuit that a defendant ought not be punished for a charge on which he has been acquitted in the very same proceeding. United States v. Brady, 928 F.2d 844 (9th Cir. 1991). . . .

I know that the momentum of the age is against me, and the circuit "split" is as one-sided as it could be. Nonetheless, we have taken no oath to hew to the well-worn path or ride like flotsam on the current tide of opinion. I hope that, in this or some future case, our court will reconsider the precedents that permit Hunter to be punished for possession of a firearm, notwithstanding his acquittal of the charge and the guidelines' tenuous presumption that the "presence" of a firearm equals its possession.

C. ABUSE OF POSITION OF TRUST OR USE OF SPECIAL SKILL

The Fourth Circuit has reviewed a number of decisions requiring application of section 3B1.3, "Abuse of Position of Trust or Use of Special Skill." The opinions have upheld district court decisions both to apply and not apply this enhancement.

One of the earliest decisions, United States v. Talbott, 902 F.2d 1129 (1990), involved a defendant convicted of various firearm possession counts and one count of making a false statement to obtain a firearm, and acquitted of illegally manufacturing firearms. A search of the defendant's residence had uncovered blank drivers' licenses and birth certificates and false drivers' licenses, as well as books about bomb manufacture. At sentencing, the district court applied a two-level increase for use of special skill for two reasons: (1) the defendant's skill in
changing his identity allowed him to purchase firearms under a different name, and (2) his skill in manufacturing the pipebombs in question. The Fourth Circuit affirmed, holding that the special skills increase was properly based on both of the stated reasons, despite the defendant's argument that acquittal on the illegal manufacturing count precluded an enhancement for making the pipebombs.

_United States v. Hummer_, 916 F.2d 186, 191 (1990), established that the Circuit would apply the clear error standard of review to district court “special skill” adjustments. An inventor of tamper-resistant consumer product lids sent extortion letters to Coca-Cola threatening to poison its products. One letter explicitly described the method Hummer proposed to use, which, the district court found, would have been feasible and difficult to detect. After Hummer was convicted on several counts, the district court applied the “special skill” sentence enhancement. The Circuit affirmed, rejecting Hummer’s arguments that he did not acquire his skill through substantial education and that it did not “significantly facilitate” the commission of his crimes.

In _United States v. Helton_, 953 F.2d 867 (1992), the Circuit applied _Hummer_ and held that it would review district court decisions on the “abuse of position of trust” enhancement under the clearly erroneous standard. Helton was a 23 year old imprest fund cashier at a federal agency, in charge of managing $125,000 in travelers checks and $55,000 in cash. Over an 11 month period, she embezzled $20,000 simply by signing and countersigning travelers checks. Her supervisor had never examined monthly bank inventories, giving them to Helton for verification instead. After Helton was convicted of theft of government property, the district court decided not to apply the two-level “abuse of position of trust” enhancement. On appeal, the government argued that she had been in a position of trust because her supervisor had trusted her and had not audited the travelers check fund. The court rejected that argument:

Helton’s superiors would have quickly detected the embezzlement had they not been, as the district court found, “inert,” J.A. at 58, “sloppy,” and “derelict in their duty.” J.A. at 72. Under the government’s reasoning, any cashier not subject to effective auditing would hold a “position of trust.” Helton obviously should have been closely supervised, but being subject to lax supervision alone does not convert one’s job into a “position of trust” under section 3B1.3.

In a recent case involving the skimming of bingo profits, the court affirmed a decision to apply the “position of trust” enhancement. _United States v. Marcum_, 16 F.3d 599 (4th Cir. 1994). The defendant was president of a charitable organization that conducted public bingo games. He was in charge of administering the games and filled out financial reports required by the state. Soon after his organization became the sole sponsor of the games he began to take ten percent of the gross proceeds to distribute to himself and others. He was convicted of mail fraud and his sentence was enhanced two levels under section 3B1.3. On appeal, faced with a challenge to the “position of trust” enhancement, the court had little difficulty affirming:

Marcum’s abuse of his status as LCDSA president, a position entrusted him by his fellow deputies, facilitated the commission of the offense. As president, Marcum was responsible for running the games and completing and mailing the financial returns; without this position of trust, he would not have had the opportunity to commit the crime for which he stands convicted.3

In its “special skill” and “position of trust” opinions, the Circuit has consistently affirmed district court decisions. The Circuit defers to decisions not to apply enhancements as well. In _United States v. Ellen_, 961 F.2d 462, 469 (1992), it affirmed a decision not to apply enhancement to a person convicted of illegally discharging pollutants into wetlands who had extensive experience in wetlands construction and permit acquisition.

These opinions reveal a strong appellate preference for deferring to trial court fact-finding. In addition to the usual appellate deference, there is an especially strong interplay in the Fourth Circuit between district and appellate judges. For example, newly appointed district judges are usually asked to sit for a week as a Circuit panel member within their first year on the bench, and many other district judges routinely sit on Fourth Circuit panels one or more weeks per term.

D. ACCEPTANCE OF RESPONSIBILITY

The “acceptance of responsibility” reduction has produced a large number of published Fourth Circuit opinions, most affirming denials under the clearly erroneous standard.4 One issue the court has addressed, which has produced a split among the circuits, is whether a defendant must accept responsibility for all of his criminal conduct or whether accepting responsibility for the count to which he pled guilty is sufficient. _See United States v. Frazier_, 971 F.2d 1076 (1992); _United States v. Gordon_, 895 F.2d 932 (1990).

In _Gordon_, the defendant admitted at sentencing that he was guilty of simple possession of cocaine, but did not admit intent to distribute. The district court denied an “acceptance of responsibility” reduction, and the defendant appealed. The Fourth Circuit stated “that in order for section 3E1.1 of the guidelines to apply, a defendant must first accept responsibility for all of his criminal conduct.” In so holding, the court declined to follow _United States v. Perez-Franco_, 873 F.2d 455 (1st Cir. 1989), aligning itself instead with the
Circuit has most always affirmed the district courts decision. See cases cited in endnote 5. One exception is United States v. Harriott, 976 F.2d 198 (4th Cir. 1992), where the defendant was convicted of conspiracy to possess with intent to distribute crack and possession with intent to distribute crack, after he drove to New York City, purchased 17 ounces of the drug, and returned to Norfolk, Virginia. The sentencing judge made the following observations regarding the defendant’s acceptance of responsibility:

I’m considering . . . that he understands — he accepts the responsibility for the fact that he’s involved here. He hasn’t really talked in the sense that he would — because he says — he agrees that he’s been convicted; he’s got to serve the sentence; and that he just doesn’t see that there would be any advantage to him to talk about it, and I’m considering counting that as acceptance of responsibility and getting him down to 32, which is as low as I can go. That’s 121 months.

The district judge also expressed concern about imposing a lengthy guideline sentence in view of the facts that the defendant had no prior record and was a college graduate. When the government’s attorney attempted to establish through the probation officer’s testimony that the defendant had not in fact accepted responsibility, the judge interrupted:

THE COURT: Oh, I think that’s accepting responsibility, Miss Marx. I don’t have any trouble with that. I’m coming off with the 2 points. And I’ll tell you that I pressed [the probation officer] to try to get the information that would let me come down 2 points. So you’re in a losing situation.

. . .

Be my guest [and appeal]. The Fourth Circuit’s just upstairs.

The government did appeal; the Fourth Circuit reversed, holding it was clear error to find that the probation officer’s statements supported the acceptance of responsibility reduction. This is one of the very few published opinions in which the court has reversed an acceptance of responsibility decision.7

CONCLUSION

Fourth Circuit decisions offer hints of a wide divergence in attitudes about the guidelines among its member judges, ranging from the Chairman of the Sentencing Commission to judges who express downright hostility to the guidelines. The Circuit’s attitude toward the guidelines may have been best captured in a concluding section in Harriott, where the court, in an opinion by Chief Judge Ervin, found it necessary to remand for resentencing:

It is perhaps understandable for sentencing judges, especially those familiar with pre- Guideline sentencing, to feel constrained by the
Guidelines (as well as mandatory minimum sentences) on occasion. There may be a temptation to work backwards: to decide what sentence a defendant would have received before the Guidelines came into effect and then to apply various Guidelines' provisions in order to approximate that sentence as closely as possible. While we recognize that such an approach may have personal appeal, we must admonish district courts instead to apply the Guidelines as written. Attempts, in effect, to manipulate the Guidelines in order to achieve the "right result" in a given case are inconsistent with the Guidelines' goal of creating uniformity in sentencing. A belief that a given sentence is too harsh (or too lenient) is more appropriately a legislative concern when, as in this case, there are no legal grounds for adjusting that sentence.

The Harrington conclusion offers a testament to the traditional judicial function of applying, rather than making, the law, while acknowledging that changes to the guidelines must come from legislation. It is hoped that, in the future, those Fourth Circuit judges who have reservations about the guidelines will more often make their opinions known to Congress and the Sentencing Commission through articles, speeches, or opinions such as Judge Hall's recent concurrence in Hunter.

FOOTNOTES

1 Although it is difficult to generalize about any given judge's judicial philosophy (and, from a practitioner's standpoint, unwise), the Dannigan split reflects the conventional wisdom about how judges on the Fourth Circuit view criminal matters. Those who voted against rehearing en banc, with the possible exception of Judge Russell, are generally more skeptical of prosecutors, while those who voted to rehear the panel opinion are generally more inclined to favor the prosecution.

2 The Fourth Circuit issues a maddeningly high percentage of unpublished opinions, which of course have very limited precedential value, in cases with seemingly significant concurring or dissenting opinions.

3 The government did not appeal an intriguing downward departure:

We note that the district court subtracted six points from Marcum's offense level because it found that the guidelines had not taken into consideration that West Virginia had failed to diligently regulate bingo. The district court ruled, in effect, that the state's laxity encouraged crimes like Marcum's. The government does not challenge this downward departure.

4 Ellen was one of the first decisions upholding a sentence of imprisonment for an individual convicted of an environmental crime and was in fact featured in a segment of CBS's 60 Minutes. The court again emphasized the seriousness with which it views environmental crimes in United States v. Strandquist, 993 F.2d 395, 399 (4th Cir. 1993). The court's interpretation of the new environmental crimes sentencing guidelines remains to be seen.

5 See, e.g., United States v. Kidd, 12 F.3d 30 (4th Cir. 1993); United States v. Schuilom, 998 F.2d 196 (4th Cir. 1993); United States v. Strandquist, 993 F.2d 395 (4th Cir. 1993); United States v. Melton, 970 F.2d 1328 (4th Cir. 1992); United States v. Curtis, 934 F.2d 353 (4th Cir. 1991); United States v. Martinez, 901 F.2d 374 (4th Cir. 1990); United States v. Cusack, 901 F.2d 29 (4th Cir. 1990); United States v. Harris, 882 F.2d 902 (4th Cir. 1989); United States v. Urrego-Linares, 879 F.2d 1234 (4th Cir. 1989); United States v. White, 875 F.2d 427 (4th Cir. 1989).

6 Ironically, in his dissent from denial of rehearing en banc in Dannigan, Judge Wilkins chided the court for creating a split in the circuits. 950 F.2d at 150 & n.2. Unnecessary circuit splits, it would seem, are in the eye of the dissenter!

7 For an example of another opinion in which the court reversed an acceptance of responsibility determination, see United States v. Braxton, 903 F.2d 292, 294-96 (4th Cir. 1990) (district court erred in denying reduction to borderline insane defendant on the ground that he could not be rehabilitated, "because rehabilitation is not a factor in the consideration of acceptance of responsibility").