

FOURTH CIRCUIT UPDATE  
December 19, 2006

**Admission of evidence and sufficiency of evidence challenges fail for defendant in 18 U.S.C. § 242 willful deprivation of right to be free from unreasonable force case**

*United States v. Perkins*, Docket No. 05-4798 (29 November 2006)

Convicted of 18 U.S.C. § 242 by a jury, defendant police officer challenged the evidence admitted by the district court. The case involved an individual who had been apprehended by the police after a foot pursuit. When the defendant joined the apprehension, the individual subject of the above action was “bloodied” and “motionless” and, without talking with other officers, defendant “delivered a running kick” to the individual’s side and later kicked the individual again. Slip op. at 3. The activities of the police officers resulted in various injuries including broken bones in the individual’s skull and face, a punctured lung, and brain bleeding. Slip op. at 4.

Defendant argued at trial that his kicking the individual was reasonable. The government offered lay testimony by officers some of whom had witnessed and others of whom had not witnessed the incident, that the defendant’s kicks were unreasonable. The government also offered expert testimony by an officer who was a “force expert” and medical expert testimony about the cause of the individual’s injuries. Slip op. at 6.

Defendant challenged the admission by the district court of the lay opinions by the officers regarding the reasonableness of his use of force, as lacking proper foundation. Reviewing for plain error, the Fourth Circuit held that the lay testimony by the officers who had witnessed the incident was proper, but the lay testimony by those who had not witnessed the incident entered into the realm of expert testimony because they lacked personal knowledge. Slip op. at 9-10. However, the Court held this error to be harmless. Defendant also challenged the lay and expert testimony as stating a legal conclusion. The Court held that as ultimate issue evidence is admissible if it is helpful to the trier of fact, this evidence was not admitted in error. Defendant also failed on a sufficiency of the evidence challenge.

**District court erroneously sentenced defendant under mandatory sentencing scheme of Protect Act; directing webcam to computer screen showing child pornography constituted “distribution” of child pornography**

*United States v. Hecht*, Docket No. 05-4939 (4 December 2006)

Defendant pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) and was sentenced under the 2003 version of the United States Sentencing Guidelines. Defendant challenged the district court’s treatment of the guidelines as mandatory under part of the Protect Act (18 U.S.C. 3553(b)(2)). Defendant also challenged the two-level increase to his total offense level, arguing that directing his webcam at his computer screen

which displayed child pornography was not “distribution.” The Fourth Circuit affirmed on the latter basis, but vacated defendant’s sentence and remanded on the former basis, holding that section 3553(b)(2) was subject to the same remedy as section 3553(b)(1) in *Booker*.

At sentencing, defense counsel objected that section 3553(b)(2) violated *Booker* and was unconstitutional. Slip op. at 6. Defense counsel also argued that the Protect Act as applied to the defendant was unconstitutional. Slip op. at 6-7. The district court responded that it was “constrained” to deny the first objection and declined to rule on the latter. *Id.*

The Fourth Circuit, reviewing *de novo*, held that *Booker* applied to section 3553(b)(2) and its mandatory language should be “excis[ed]” and “sever[ed]” and “replac[ed] with an advisory Guidelines regime under which sentences are reviewed for reasonableness.” Slip op. at 6 (quoting *United States v. Grigg*, 442 F.3d 560, 564 (7th Cir. 2006)). The district court’s mandatory treatment of the sentencing guidelines warranted remand for resentencing. Slip op. at 7.

Defendant also objected to the two-level increase to his offense level based on distribution of child pornography under the 2003 Sentencing Guidelines. The Fourth Circuit engaged in *de novo* review, holding the district court did not err by interpreting defendant’s acts as distribution, also indicating that language in the later editions of the Sentencing Guidelines did not impact their analysis. Slip op. at 9 n. 3. The defendant needed only to take part in an act “related to the transfer” of the child pornography and his directing the webcam to the computer screen was sufficient. Slip op. at 9.