

FOURTH CIRCUIT UPDATE
February 21, 2007

Extent of upward variance unreasonable

United States v. Tucker, Docket No. 06-4122 (16 January 2007)

A panel of the Fourth Circuit vacated and remanded, based on an unreasonable upward variance. Ms. Tucker was convicted of bank fraud with a Guideline range of 24 to 30 months. The district court sentenced her to 144 months' imprisonment, because she had committed similar crimes previously and because she embezzled a significant amount of money.

For variance sentences, the Court considers “whether the district court acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance.” Slip op. at 8 (quoting *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006)). The Court emphasized that in the case of larger variances, district courts must provide more compelling reasons for the variances. The Court compared Ms. Tucker's case to that of the defendant in *United States v. Davenport*, 445 F.3d 366 (4th Cir. 2006), where the defendant also had a history of committing the same types of crimes in the past. There, the Court found that while an upward variance was appropriate, the district court's variance to over three times his Guideline range was unreasonable. Similarly, the Court here found the extent of district court's variance in Ms. Tucker's case unreasonable, based on the district court's failure to adequately explain the connection between the purposes of 18 U.S.C. § 3553(a) and its sentence. Citing *Booker's* goal to better link real offense conduct and federal sentences, the Court vacated and remanded Ms. Tucker's sentence.

State habeas case—no ineffective assistance of counsel

Emmett v. Kelly, Docket No. 06-14 (23 January 2007)

A state habeas case, a panel of the Fourth Circuit affirmed, although one judge dissented in part. The defendant had been convicted of capital murder for a robbery in which he killed a coworker for money to buy drugs. At trial, the defense presented evidence of Mr. Emmett's abusive childhood and his unusual behavior as observed by family members prior to the incident. Following the trial, Mr. Emmett argued his counsel was ineffective for failing to conduct sufficient mitigation investigation and failure to provide expert testimony on Mr. Emmett's intoxication at the time of the offense.

Mr. Emmett argued that his attorney should have interviewed his siblings and requested his childhood counseling records, to show the terrible conditions of Mr. Emmett's childhood. The Court found counsel was not constitutionally ineffective, as Mr. Emmett and his family denied abuse and neglect, so counsel instead used a mitigation strategy of humanizing Mr. Emmett. The Court found counsel's strategy reasonable, and furthermore, found that even if it were not, the Court would have held against Mr. Emmett because he did not show that absent his

counsel's errors there would have been a different result. Also, the Court found reasonable counsel's decision not to use Mr. Emmett's intoxication as mitigation evidence.

Judge Gregory concurred in part, but dissented finding that Mr. Emmett was prejudiced by his attorney's inadequate mitigation investigation. The Judge described at length the deplorable conditions of Mr. Emmett's childhood, including a sibling's death from neglect and regular beatings of all of the children, which was not presented during sentencing.

State habeas case—relief denied on various bases

McNeill v. Polk, Docket No. 05-12 (31 January 2007)

The Court of Appeals reviewed six issues in this North Carolina capital case: 1) whether counsel was ineffective for admitting without Mr. McNeill's consent that McNeill was guilty of breaking and entering, 2) whether counsel was ineffective also for admitting without Mr. McNeill's consent that he was guilty of second-degree murder, 3) whether a due process violation occurred when the jury was allowed to find the death penalty appropriate if it found the aggravating and mitigating factors weighed the same, 4) whether Mr. McNeill's due process rights were violated when a juror looked up "mitigate" in the dictionary, 5) whether counsel's failure to provide adequate mitigation investigation amounted to ineffective assistance of counsel, and 6) whether there was a due process violation when a juror failed to reveal a murder in his family similar to the one allegedly committed by McNeill.

The Court found claims 4) and 6) above were procedurally defaulted. On the other claims, the Court found counsel was not constitutionally ineffective based on the defense strategy counsel elected to pursue. Judge Gregory dissented that the Court should have granted Mr. McNeill an evidentiary hearing on his claims of juror misconduct.

State habeas case—relief denied on other acts evidence and Miranda claim

Cummings v. Polk, Docket No. 06-11 (1 February 2007)

A panel of the Fourth Circuit denied habeas relief where Mr. Cummings claimed evidence of a previous uncharged murder should not have been introduced and that a detective gave an improper *Miranda* warning. Evidence of an uncharged murder was introduced as an aggravating factor in Mr. Cummings' capital case, as part of a violent course of conduct resulting in the murder that was subject of the trial. Mr. Cummings' *Miranda* argument was that the detective advised Mr. Cummings that although he was entitled to a court-appointed attorney, he might have to pay for the attorney if he was found guilty.

The Court held that evidence of unadjudicated crimes, like the murder here, could be properly introduced in a capital sentencing hearing. Further, based on the deferential standard of review under AEDPA, the Court found reasonable the state court's decision that the *Miranda* warnings were adequate and accurate.

28 U.S.C. § 2255 motion—attorney had actual conflict

United States v. Nicholson, Docket No. 04-6092 (2 February 2007)

A panel of the Fourth Circuit reversed and remanded in a 28 U.S.C. § 2255 case, finding the defense attorney had an actual conflict of interest during sentencing. Mr. Nicholson was charged with possession of a firearm by a felon, and he alleged that he carried the weapon to protect himself against an individual, Mr. Butts, who was also represented by Mr. Nicholson's lawyer. Mr. Nicholson asserted in his § 2255 motion that Mr. Butts had threatened and/ or attempted to kill Mr. Nicholson and various family members, but his counsel would not argue this at sentencing, in order to avoid arguing his other client had taken part in this conduct. Mr. Nicholson had told arresting officers that his brother had been cooperating with law enforcement when he was shot seven times by Mr. Butts' son and then another person later tried to kill Mr. Nicholson's brother in the hospital. There was a contract put out on some of Mr. Nicholson's family members by Mr. Butts, and another was killed. Mr. Nicholson got a handgun after all of these incidents.

Mr. Nicholson asserted he explained all of this to his attorney. However, his attorney denied learning that Mr. Nicholson or his family members feared Mr. Butts, although discovery included Mr. Nicholson's statements about this to law enforcement. Mr. Nicholson's attorney did not tell Mr. Nicholson he represented Mr. Butts on state charges or seek consent from the clients to represent them both. Mr. Butts went on to hire the attorney in his federal case and the attorney continued to represent Mr. Nicholson through sentencing and Mr. Butts through his direct appeal. At Mr. Nicholson's sentencing, although the government indicated to the court that people were trying to kill Mr. Nicholson when he was arrested, defense counsel did not present evidence on this or move for a related downward departure.

Although the district court found that the lawyer did not have an actual conflict, this Court found his clients' interests were in "total opposition to each other." Slip op. at 11. The Court remanded for a finding on the facts consistent with *Mickens v. Taylor*, 240 F.3d (4th Cir. 2001) as to whether the attorney's conflict had an adverse effect on Mr. Nicholson's representation.

After successful 2255 motion, defendant not entitled to resentencing

United States v. Hadden, Docket No. 03-7508 (7 February 2007)

Defendant was convicted of drug conspiracy and possession of a firearm during and in relation to a drug trafficking crime. Mr. Hadden unsuccessfully appealed his convictions and sentence, and then filed a 28 U.S.C. § 2255 motion raising ineffective assistance of counsel on the charge that he used a gun in furtherance of a drug trafficking crime. As a result, that charge was dismissed. The district court, without a resentencing hearing, imposed a new sentence of 168 months in place of Mr. Hadden's earlier 228-month sentence, and Mr. Hadden appealed.

The Court first considered whether they had jurisdiction over the appeal, determining that they did because Mr. Hadden's appeal of the Amended Judgment was part of his criminal case. Slip op. at 19. The Court held that Mr. Hadden was not entitled to a resentencing because § 2255 allows the district court to correct a sentence, there was no *Booker* error even though Hadden was sentenced under a mandatory sentencing regime, and although there was judicial factfinding on the drug amount, because a jury would have found that same amount, there was no clear error.