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HABEAS CORPUS**Whiteside v. United States: Using 28 U.S.C. § 2255
To Correct Serious Guidelines Errors Based on New Law**

BY GRAY PROCTOR

On April 8, the U.S. Court of Appeals for the Fourth Circuit issued its opinion in *Whiteside v. United States*.¹ In *Whiteside*, the Fourth Circuit changed the ground rules for 28 U.S.C. § 2255 motions challenging sentencing errors. The most important holding was that challenges to the career-offender enhancement are cognizable in a Section 2255 motion. Additionally, the court applied the equitable-tolling doctrine, a relatively liberal way to conclude that Deangelo Whiteside's motion was timely even though it was filed more than a year after his conviction became final. Thus, Whiteside received the benefit of a change in the law that established that his North Carolina convictions were not predicate offenses because he could not have received a

¹ No. 13-7152, 95 CrL 66 (April 8, 2014).

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sentence greater than one year under that state's determinate sentencing scheme.²

The Fourth Circuit joined the Eleventh Circuit's reasoning in *Spencer v. United States*, which had recently been vacated pending rehearing en banc.³ The *Whiteside* decision conflicted with decisions from the Seventh and Eighth circuits, which had held that a challenge to a career-offender designation could not proceed in a Section 2255 motion.⁴

**Cognizability:
The 'Fundamental Miscarriage of Justice'
Threshold**

The first hurdle in *Whiteside* was cognizability. Section 2255 provides a vehicle to correct errors in applying "the Constitution or laws of the United States." However, courts may review nonconstitutional errors only if the error "results in a complete miscarriage of justice."⁵ The only defendant-friendly decision from the U.S. Supreme Court allowed review when an intervening decision interpreting statutory law established that the "conviction and punishment are for an act that the law does not make criminal."⁶ Lower courts had generally agreed that "ordinary misapplication of the Guidelines does not result in a miscarriage of justice," even

² *United States v. Simmons*, 649 F.3d 237, 89 CrL 770 (4th Cir. 2011) (en banc).

³ 727 F.3d 1076, 1088-89, 93 CrL 657 (11th Cir. 2013), vacated pending reh'g en banc (11th Cir. Mar. 7, 2014) (No. 10-10676).

⁴ *Hawkins v. United States*, 706 F.3d 820, 823, 92 CrL 538 (7th Cir. 2013), supplemented on denial of reh'g, 724 F.3d 915, 93 CrL 620 (7th Cir. 2013), cert. denied, 82 U.S.L.W. 3308 (U.S. Feb. 24, 2014) (No. 13-538); *Sun Bear v. United States*, 644 F.3d 700, 705-06, 89 CrL 643 (8th Cir. 2011) (en banc).

⁵ *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (internal quotation marks omitted).

⁶ *Davis v. United States*, 417 U.S. 333, 346 (1974).

under the mandatory guidelines regime that preceded *United States v. Booker*, 543 U.S. 220, 76 CrL 251 (2005). Nevertheless, the Fourth Circuit found that Whiteside's case presented exceptional circumstances that resulted in a complete miscarriage of justice because:

■ The career-offender enhancement is no ordinary guidelines provision. Based on a statutory directive to “assure that the guidelines specify a sentence at or near the maximum term authorized,”⁷ the career-offender enhancement uses the maximum criminal history category (VI) and ties the offense level to the statutory maximum rather than offense characteristics. The career-offender enhancement roughly doubles the guidelines range for the average defendant.

■ Although no longer mandatory, the guidelines exert considerable influence on sentencing decisions. As the Supreme Court observed last year, “Even if the judge sees a reason to vary from the Guidelines, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*”⁸

■ Whiteside was not at fault for failing to raise his claim earlier because his claim would have been futile under circuit precedent if raised during the time for direct appeal.

Timeliness: Two Possible Ways To Commence the Limitations Period At the Time of the Favorable Decision

The *Whiteside* court relied on equitable tolling, explaining that “the complete lack of any chance at success [] constitutes an ‘extraordinary circumstance’” that was caused by the court itself and was “clearly external to Whiteside.”⁹ Whiteside acted diligently to bring his claim as soon as his “right to review obtained any real significance.”¹⁰ Under the “expansive reading of the role of equity in habeas cases” recently endorsed by the Supreme Court, his motion was therefore timely.¹¹

The Eleventh Circuit used a different approach in *Spencer*. Because the *Spencer* argument relied directly on Supreme Court precedent rather than a circuit decision, the court relied on Section 2255(f)(3), which commences the limitations period on “the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to

cases on collateral review.” Despite the lack of any Supreme Court precedent (and perhaps due in part to the government's concession of the issue), the Eleventh Circuit appeared to conclude that questions of statutory interpretation (unlike new rules of constitutional criminal procedure) are retroactive under standing Supreme Court precedent.¹² Thus, the Section 2255 motion was timely because it was filed within one year of the decision in *Begay v. United States*, 553 U.S. 137, 83 CrL 76 (2008).¹³

¹² *Spencer*, 727 F.3d at 1096 (citing *Zack v. Tucker*, 704 F.3d 917, 925-26, 92 CrL 422 (11th Cir. 2013) (en banc)).

¹³ *Id.* at 283.

Practice Tips

(1) **Cognizability:** Consider using this decision to challenge erroneous guidelines calculations under Chapter Four (career offender, armed career criminal, and repeat and dangerous sex offender against minors), along with other changes that result in significantly increased sentencing ranges.

(2) **Timeliness:** Consider using equitable tolling (for challenges based on circuit law; see *Whiteside*) or the belated commencement provision in 28 U.S.C. § 2255(f)(3) (for challenges based on Supreme Court precedent; see *Spencer*). Either way, file the Section 2255 motion within one year of the case that makes the challenge to the guidelines possible.

(3) **Retroactivity:** In addition to the general rule that statutory construction applies retroactively, seek a concession on the issue as described in *Spencer*.

(4) **Successiveness:** If the defendant has already filed a Section 2255 motion that can no longer be amended, seek to use 28 U.S.C. § 2241, especially if the defendant is incarcerated or can be moved to the Eleventh or the Seventh circuit. See Gray Proctor, “Christmas Comes Early in the Eleventh Circuit: Using *Bryant* and Section 2241 When Section 2255 Is Not Adequate to Challenge Illegally Enhanced Sentences” (94 CrL 479, 1/22/14).

(5) **Appeals:** Because 28 U.S.C. § 2253(c)(2) limits appeals to cases where the defendant has “made a substantial showing of the denial of a constitutional right,” be sure to invoke any constitutional rights that may apply (e.g., due process right to accuracy in sentencing, ex post facto clause based on increased punishment due to judicial interpretation of statute, or whatever other creative arguments exist).

⁷ 28 U.S.C. § 994(h).

⁸ *Peugh v. United States*, 133 S. Ct. 2072, 2084, 93 CrL 353 (2013) (citation omitted; emphasis in original). The importance of guidelines calculations even after *Booker* is in sharp focus in the Eleventh Circuit, which found pre-*Booker* guidelines errors cognizable but did not extend that holding to post-*Booker* errors. See *Hawkins*, 724 F.3d at 919-25 (Rovner, J., dissenting from the denial of rehearing).

⁹ *Whiteside*, slip op. at 9.

¹⁰ *Id.* at 10.

¹¹ *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 648, 87 CrL 399 (2010)).

Appellate Review: Certificates of Appealability And Constitutional vs. Statutory Error

Although case law provides for review of nonconstitutional errors, the applicable statutes do not clearly provide for appellate review of these errors. Under Section 2253(c), appellants must first obtain a certificate of appealability, which may issue only “if the applicant has made a substantial showing of the denial of a constitutional right.” In *Whiteside*, the Fourth Circuit purported to have considered the constitutional question of whether the sentence was imposed in violation of the due process clause, based either on the substantive decision (*Simmons*) or on a previous Supreme Court case

holding that due process was violated when a jury was instructed that Oklahoma’s unconstitutional habitual-offender scheme required a 40-year prison term if the defendant was found guilty.¹⁴ However, as the *Whiteside* court noted (and the dissent discussed at length), relying on previous cases not on “all fours” to establish a constitutional violation may require retroactivity analysis under *Teague v. Lane*, 489 U.S. 288 (1989), as a threshold to review.¹⁵

¹⁴ *Whiteside*, slip op. at 31-32 & n.15 (citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980)); see also *Spencer*, 727 F.3d at 1091 n.34.

¹⁵ *Whiteside*, slip op. at 31-32 & n.15; slip op. at 40-43 (Wilkinson, J., dissenting).