

Tuesday, November 17, 2009

[Fourth Circuit Scrutinizes ACCA Predicate and Holds in Favor of Defendant](#)

Today, the Fourth Circuit held in favor of a defendant in a case involving whether an offense can be deemed an ACCA predicate. The opinion in *United States v. Harcum*, No. 07-4890 (Decided November 17, 2009) is available [here](#).

First, some background on ACCA:

The Armed Career Criminal Act (“ACCA”) requires defendants to serve a mandatory minimum fifteen-year prison sentence if they have been convicted of unlawful possession of a firearm and have had three previous convictions for violent felonies or serious drug offenses. (The offenses also must have been committed on separate occasions.)

ACCA defines a “violent felony” as (1) a crime punishable by more than one year imprisonment (except for state misdemeanor offenses carrying a maximum penalty of two years – those don’t count) (2) that has as an element “the use, attempted use, or threatened use of physical force against the person of another.”

Given the severe mandatory minimum at stake for defendants potentially subject to ACCA, a court’s determination of whether an offense qualifies as a predicate is often a hotly contested issue. Courts can engage in two types of analysis to determine whether a conviction is an ACCA predicate: First, courts determine whether the elements of given crime, on the books, qualify an offense as a serious drug offense or a violent felony under ACCA. Second, if a court is unable to determine whether an offense qualifies as an ACCA predicate by examining the statutory language of the count of conviction, a court may be entitled to examine underlying charging documents and jury instructions.

Without going in to too much detail, a sentencing court cannot look to just any type of underlying document to determine whether an offense is an ACCA predicate, but only to “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”

This second type of analysis – dubbed the “modified categorical” approach – underlies the problems addressed in *Harcum*.

Here’s what happened:

Harcum had previously been convicted of second degree assault in Maryland state court. In Maryland, second degree assault is a misdemeanor, but one that carries a maximum sentence of imprisonment of 10 years. In Maryland, the statutory definition for second degree assault prohibits a person from “commit[ting] an assault.” By itself, this definition is insufficient to qualify an offense as an ACCA predicate.

Before his conviction for second degree assault, the defendant had been charged in the district

court with second degree assault, and the statement of charges filed in district court contained facts that would have made the offense, if he had been convicted, an ACCA predicate.

At the defendant's federal sentencing, the government argued that the statement of charges that had been filed in the district court corresponded to the charge that the defendant had pled guilty to in the circuit court. As such, the government argued, the conviction for second degree assault was an ACCA predicate. The sentencing court agreed.

On appeal, the Fourth Circuit held that because the statement of charges was never incorporated into the Information (that the defendant pled guilty to), there was not enough information for the sentencing court to conclude that the offense was an ACCA predicate. The Fourth Circuit recognized that in Maryland, a statement of charges may be supplanted by the filing of a criminal information – as it was in Harcum's case.

What is worth noting is that the crime described in the Information that the defendant pled guilty to seemed to be the same crime as laid out in the statement of charges – the dates and the offenses were the same. The Fourth Circuit, however, said that this could have been a coincidence, and was not sufficient to rely upon to qualify the offense for ACCA. "Mere similarities in such documents . . . fail to explicitly incorporate their contents, and they do not authorize a sentencing court to bypass the "court of conviction" requirement" of the Supreme Court in Shepard and Taylor, two cases dealing with ACCA predicate offenses.

Congratulations are owed to Sapna Mirchandani and (probably) Paresh Patel for this victory.

Posted by [Brennan Sullivan and McKenna](#)