

Metamorphosis of the Sentencing Landscape: Changes in Procedure Affect Judges, Attorneys, and Defendants

By Hon. G. Ross Anderson Jr.

Recent legal developments, specifically those emanating from the U.S. Court of Appeals for the Fourth Circuit, are changing the way prosecutors, defense attorneys, and federal judges approach the sentencing of defendants. Keeping abreast of this transforming landscape is crucial for all attorneys. Effective representation is impossible without understanding these recent developments.



Recent legal developments, specifically those emanating from the U.S. Court of Appeals for the Fourth Circuit, are changing the way prosecutors, defense attorneys, and federal judges approach the sentencing of defendants. The Fourth Circuit itself has noted that “[i]t is indeed true that the law as it relates to federal sentencing is in a state of flux, and that this Court ... is still in the process of implementing many of the Supreme Court’s recent pronouncements.” *United States v. Thompson*, 595 F.3d 544, 548 (4th Cir. 2010).

Several recent federal appellate court decisions have

addressed a number of critical issues, including which standard of review applies when appealing sentencing errors; how detailed a district court must be when imposing sentences above, below, and within the guidelines; and what process should be followed for effectively waiving appellate rights.

Keeping abreast of this transforming landscape is crucial for all attorneys. For federal prosecutors, federal public defenders, and federal judges, sentencing is a routine aspect of the job. Additionally, more and more attorneys are being required to represent defendants in federal

court under the Criminal Justice Act (CJA). In addition to CJA appointments, a lawyer never knows when he or she might end up with a client facing criminal charges in federal court. Effective representation is impossible without understanding these recent developments.

Developing a Standard of Review

What should be of preliminary importance within this changing regime is which standard of review a court employs, because the standard of review chiefly determines the ultimate direction of the appeal. Although appellate courts examine substantive errors in sentencing for an abuse of discretion, the Fourth Circuit has historically been less clear on how it reviews alleged procedural errors.

In *United States v. Lynn*, 592 F.3d 572 (4th Cir. 2010), the Fourth Circuit recently articulated which standard of review would be implicated, depending on the procedural posture of an objection. If a party raises an issue before the court of appeals that was properly raised at the district court, the standard of review is for abuse of discretion. If such an abuse exists, the court will reverse the ruling unless it finds the error harmless.

If an alleged sentencing error is raised for the first time on appeal, the standard of review is plain error. *See* Fed. R. Crim. P. 52(b). To establish plain error, the appealing party must show that an error (1) was made, (2) is plain, and (3) affects substantial rights. *United States v. Massenburg*, 564 F.3d 337, 342–43 (4th Cir. 2009). Even if this showing is made, an appeals court may correct the error only if it “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 343 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)). To reach this threshold, a defendant would have to show that, absent the error, a different sentence might have been imposed. *See Lynn*, 592 F.3d at 580.

Because appellate courts place less deference on a district court’s decision when the issue for review was properly raised at the district court level, attorneys should be well-versed on how to properly preserve any issues for appellate review. In *Lynn*, the government argued that to properly preserve a claim, a party must object after a district court rejects the party’s arguments, thus triggering the abuse of discretion standard. *See Lynn*, 592 F.3d at 578. The Fourth Circuit disagreed, and from a policy standpoint, said that forcing parties to make objections after a district court’s explanation would “saddle busy district courts with the burden of sitting through an objection—probably formulaic—in every criminal case.” *Lynn*, 592 F.3d at 578 (quoting *United States v. Castro-Juarez*, 425 F.3d 430, 433–34 (7th Cir. 2005)).

Instead, the Fourth Circuit decided to remain in accord with Fed. R. Crim. P. 51(b). This rule allows a party to preserve a claim of error by “informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party’s objection to the court’s action and the grounds for that objection.” Fed. R. Crim. P. 51(b). Therefore, it is not necessary for a party to wait until after the court makes its ruling to properly preserve any issues for appeal, as Rule 51(b) “abandon[s]

the requirement of formulaic ‘exceptions’—after the fact—to court rulings.” *Lynn*, 592 F.3d at 578.

Lynn showcases the importance of properly preserving an issue because the standard of review often dictates the outcome of a case. Although all defendants in *Lynn* made basically the same claim, the court remanded the claims of defendants who properly raised the issue at sentencing under an abuse of discretion standard. However, using a plain error standard, the court dismissed the claims of defendants who failed to properly object during the sentencing proceedings.

A timely objection is only the beginning. A substantively sound objection requires understanding the role the U.S. Sentencing Guidelines play in sentencing. Historically, that role has been marked by fluctuation.

Rise of the Individualized Assessment

In 2005, the U.S. Supreme Court made the previously mandatory Federal Sentencing Guidelines advisory and required a district court’s sentence to pass only a “reasonableness” test. *United States v. Booker*, 543 U.S. 220, 245 (2005). Unfortunately, *Booker* also began a period of uncertainty about how much emphasis a district court should place on 18 U.S.C. § 3553(a), which lays out several factors a district court should consider before imposing a sentence. These factors include the following:

- the nature and circumstances of the offense and the history and characteristics of the defendant;
- the need to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment;
- the need to afford adequate deterrence;
- the need to protect the public from further crimes of the defendant;
- provision of needed training and care for the defendant;
- the kinds of sentences available;
- the range in the guidelines;
- pertinent policy statements from the Sentencing Commission;
- the need to avoid unwarranted sentence disparities; and
- restitution to any victims.

18 U.S.C. § 3553(a).

Two years after *Booker*, in *Gall v. United States*, 552 U.S. 38, 51 (2007), the Supreme Court helped clarify the § 3553(a) factors’ role in a reasonableness test. The *Gall* Court explained that reasonableness review has procedural and substantive components. Procedurally, a district court must make an “individualized assessment”—that is, the court must properly calculate the range in the guidelines, properly consider the § 3553(a) factors, and adequately explain any sentence or deviation from the range found in the guidelines. *Id.* at 51. Substantively, appellate courts review a district court’s decision by taking into account the totality of the circumstances. *Id.* at 51.

Although *Booker* and *Gall* provided a basic procedural framework for sentencing defendants, the cases did

not explain how a district court should specifically and practically make an individualized assessment. As a result, many district judges, especially when imposing a sentence within the guidelines range, would simply declare that the range was correct and that the court had considered the § 3553(a) factors. Several courts of appeal, including the Fourth Circuit, appeared to implicitly endorse this approach. In an earlier case, the Fourth Circuit held that “[w]hile the district court’s specific reference to § 3553 was certainly not required, it may well have been sufficient.” *United States v. Johnson*, 445 F.3d 339, 345 (4th Cir. 2006). (internal citations omitted); see also *United States v. Alonzo*, 435 F.3d 551, 552, 554 (5th Cir. 2006); *United States v. Scott*, 426 F.3d 1324, 1330 (11th Cir. 2005).

However, on Jan. 28, 2010, the Fourth Circuit ruled that a district court’s statement that it had considered the § 3553(a) factors did not meet *Gall*’s requirement for an individualized assessment. *Lynn*, 592 F.3d at 584. This was not the first time the Fourth Circuit required individualized assessments in sentencing. In *United States v. Carter*, 564 F.3d 325, 330 (4th Cir. 2009), the court held that “[r]egardless of whether the district court imposes an above, below, or within-Guidelines sentence, it must place on the record an ‘individualized assessment’ based on the particular facts of the case before it. This individualized assessment ... must provide a rationale tailored to the particular case at hand. ...” 564 F.3d at 330 (footnote and internal citation omitted).

Still, *Carter* ultimately dealt with a sentence outside the guidelines range. *Lynn* took *Carter* a step further by actually remanding a sentence imposed *within* the range. In *Lynn*’s progeny, when applying an abuse of discretion review, the Fourth Circuit has often found sentences handed down by district courts to be procedurally unreasonable because the courts did not offer adequate individualized assessments.

Within-the-Guidelines Sentences after *Lynn*

“[W]hile sentencing courts must always conduct an individualized assessment, they are permitted to provide more abbreviated explanations when they sentence within the Guidelines.” *United States v. Mendoza-Mendoza*, 597 F.3d 212, 217 (4th Cir. 2010) (citing *Lynn*, 592 F.3d at 576); *United States v. Johnson*, 587 F.3d 625, 639 (4th Cir. 2009). “This is because guidelines sentences themselves are in many ways tailored to the individual and reflect approximately two decades of close attention to federal sentencing policy.” *United States v. Johnson*, 587 F.3d at 639 (internal quotation marks and citation omitted).

In *United States v. Taylor*, 371 Fed. App’x 375, 386 (4th Cir. 2010), the Fourth Circuit remanded a district court’s within-the-guidelines sentence even though the court had given all parties an ample opportunity to make several arguments regarding a downward departure. An attorney for one of the defendants had argued for the statutory minimum, which was below the range provided in the Sentencing Guidelines, because the record showed that

the defendant’s involvement in the underlying drug trafficking crimes had been limited. *Id.* at 384. The Fourth Circuit explained its reason for remanding the case:

while the district court commendably allowed counsel a full opportunity to make vigorous arguments to aid the court in determining an appropriate sentence, the court never explicated its reasons for imposing a twenty year sentence. The court’s failure is especially striking in light of the non-spurious bases identified in detail by counsel for a variance sentence, to which the court never adverts.

Id. at *9.

In *Mendoza-Mendoza*, the district court sentenced the defendant to a term of 46 months for illegal reentry—the minimum provided in the guidelines. *Mendoza-Mendoza*, 597 F.3d at 215. However, in passing the sentence, the district judge stated that the range was correct, and, unless he found a reason for departure or a variance based on the § 3553(a) factors, he was obligated to hand down a sentence within that range. *Id.* The Fourth Circuit determined that the sentence was procedurally unreasonable because “the district court accorded the Guidelines a quasi-mandatory effect, and that is impermissible. ...” *Id.* at 219.

The Fourth Circuit offered an example of what constitutes a proper individualized assessment in *United States v. Shippy*, No. 09-5097, 2010 WL 2034530, at *1 (4th Cir. May 24, 2010). Over the defendant’s objections, the district court sentenced her to a within-the-guidelines term of 30 months. *Id.* In affirming the lower court, the Fourth Circuit held that “while a district court must consider the statutory factors and explain its sentence, it need not explicitly reference 18 U.S.C. § 3553(a) ... or discuss every factor on the record, particularly when the district court imposes a sentence within a properly calculated Guidelines range.” *Id.* at *2. The Fourth Circuit ruled that it was sufficient that the district court had expressly considered the defendant’s evidence and arguments, had reasons for rejecting those arguments, and determined that the sentence accomplished the goals embodied in the § 3553(a) factors. *Id.* at *3. See also *United States v. Davis*, No. 09-4348, 2010 WL 2034359, at *2 (4th Cir. May 21, 2010).

In *United States v. Boulware*, 604 F.3d 832, 837 (4th Cir. 2010), the government acknowledged that the district court had not properly explained its within-the-guidelines sentence for perjury. Nonetheless, the Fourth Circuit held that this error was harmless and affirmed the sentence for two reasons. First, even if a procedural error did exist, the record in the case showed that the judge had considered the defendant’s arguments in the context of the § 3553(a) factors. The court noted on the record that it had read letters from various parties, had listened to statements from all the parties involved, and stated that it had arrived at the sentence by considering all the § 3553(a) factors. *Id.* at 839. Second, the Fourth Circuit found that the defendant’s arguments for a sentence below the guidelines were particularly weak. *Id.* The defendant misrepresented her

record and argued only that her incarceration would hurt other people. *Id.* at 339–340.

Outside-the-Guidelines Sentences after *Lynn*

The bulk of the post-*Lynn* cases involve sentences imposed outside the guidelines. Accordingly, the Fourth Circuit has been more searching in its review of such cases. See *Mendoza-Mendoza*, 597 F.3d at 217.

In *United States v. Morace*, 594 F.3d 340, 344 (4th Cir. 2010), both the prosecutor and the defense attorney requested a 41-month sentence—which was the low end of the guidelines range—for a defendant who had been found guilty of possessing child pornography. However, the court sentenced the defendant to probation because of his limited criminal history and his attempts to become a productive member of society. *Id.* at 350. The Fourth Circuit held that, even though the defendant had enrolled in college and had no prior criminal history, this did not make him any different from child pornographers who typically received prison sentences. *Id.* The circuit court also noted that the district court had failed to address several policy statements issued by the U.S. Congress and the Sentencing Commission that offenses involving child pornography should be treated severely. *Id.* at 350–351; see also *United States v. Engle*, 592 F.3d 495, 505 (4th Cir. 2010) (remanding a sentence when the district court did not address policy statements supporting incarceration for tax evaders).

The Fourth Circuit affirmed a district court's outside-the-guidelines sentence for bank robbery in *United States v. Reddick*, No. 08-5219, 2010 WL 2465179, at *4 (4th Cir. June 16, 2010). In that case, the district court imposed a sentence that was greater than the guidelines range; but, in doing so, it made several specific findings: (1) bank robbery was a serious offense, (2) the defendant had three prior armed robbery convictions, and (3) the defendant was a recidivist because he had committed the offense within months of the date his probation ended. *Id.* at *3.

Sentencing Procedure after *Lynn* and its Progeny

Examining *Lynn* and its progeny produces a five-step process that district courts should follow in order to ensure a defendant receives an appropriate, individualized assessment, and, accordingly, a procedurally reasonable sentence. District courts should do the following:

- determine the correct range provided in the Sentencing Guidelines;
- allow the parties to argue for what they believe to be an appropriate sentence;
- consider arguments made for a particular sentence under § 3553(a);
- determine the appropriate sentence; and
- using § 3553(a) factors as a guide, adequately explain every sentence—a requirement that extends to revocation of supervised release and imposition of supervised release. *Thompson*, 595 F.3d at 546–47; *United States v. Valle*, No. 09-4381, 2010 WL 1734971, at *1 (4th Cir. April 30, 2010).

The last step is the most problematic. However, a careful examination of the Fourth Circuit's post-*Lynn* jurisprudence reveals several crucial principles that inform whether a sentence will withstand appellate scrutiny.

The role of the standard of review cannot be overstated. In virtually every post-*Lynn* case where parties failed to preserve an objection to sentencing, the resulting plain error standard led the Fourth Circuit to affirm sentences even when it found that the district court's underlying explanation lacked specificity.

Sentences that are within the range provided in the Sentencing Guidelines are generally affirmed when a court addresses any arguments lodged by the parties and discusses two or three unique facts of a case as they relate to the § 3553(a) factors. When deviating from the guidelines range, courts should be particularly mindful of how the facts of the case under review differ from the facts in cases envisioned in pertinent policy statements. In cases in which the Fourth Circuit seemed most critical and came closest to finding sentences substantively flawed, courts had disregarded the pertinent policy behind the advisory sentence provided in the guidelines.

In theory, under the abuse of discretion standard, the Fourth Circuit will affirm even an inadequately explained sentence if the resulting error is harmless. In practice, the Fourth Circuit has found an inadequately explained sentence harmless in only a handful of cases. See, e.g., *United State v. Pineda-Mendez*, No. 09-4536, 2010 WL 2640352, at *2 (4th Cir. July 1, 2010); *Boulware*, 604 F.3d at 835.

District courts seeking sentencing efficiency might consider adopting the arguments of a particular party as a factual basis for satisfying the § 3553(a) factors. Although this might accelerate the sentencing process, courts should be leery about employing this approach. The Fourth Circuit's holding in *Carter* seems to imply that the assessment must come from the court itself. According to the Fourth Circuit, “the Supreme Court’s recent sentencing jurisprudence plainly precludes any presumption that, when imposing a sentence, the district court has silently adopted arguments presented by a party. ‘Rather, ‘the district judge, ... must make an individualized assessment based on the facts presented’ to him.” *Carter*, 564 F.3d at 329 (internal citations omitted).

Ensuring an Effective Waiver

Waiving appellate rights is one key way to avoid issues stemming from inadequate assessments. More than 96 percent of convictions in federal court come by way of guilty pleas. See Jeffrey M. Brandt, *Addressing Errors in Entering Appeal Waivers*, FED. LAW., June 2010, at 42. “Many of these convictions—if not most of them—were the result of plea agreements.” *Id.* Appellate waivers are routinely part of these agreements.

Either the defense or the prosecution can waive its appellate rights. See *United States v. Allen*, 450 F.3d 565, 566 (4th Cir. 2006). The Fourth Circuit will enforce these waivers if the issue appealed is within the waiver's scope and if the defendant knowingly and intelligently agreed to the waiver. *United States v. Blick*, 408 F.3d 162, 168–69 (4th

Cir. 2005). Whether a waiver is knowingly and intelligently agreed to “must be evaluated by reference to the totality of the circumstances.” *United States v. General*, 278 F.3d 389, 400 (4th Cir. 2002). However, two days before the Fourth Circuit decided *Lynn*, it held in *United States v. Manigan*, 592 F.3d 621, 628 (4th Cir. 2010), that an appellate waiver was unenforceable when the district court advised a defendant he had a right to appeal and the prosecution neglected to inform the court that the defendant had signed an appellate waiver in the case.

This opinion has caused considerable consternation among lawyers, prosecutors, and district judges. Given that a district court routinely reads appellate rights after a sentence, it is easy to foresee situations where the court might inadvertently read appellate rights to a defendant who has signed an appellate waiver. This inadvertent reading now has the effect of nullifying a district court’s previous finding that an appellate waiver was knowing and voluntary.

Attorneys should also be aware that even if a plea agreement is valid and enforceable the sentence could still be subject to collateral attack. For example, the U.S. Supreme Court recently decided that an attorney’s failure to advise his client about the ramifications of his immigration status could amount to ineffective assistance of counsel. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010). This case is critically important because an increasing number of district court cases involve defendants who are immigrants.

Continued Evolution of Sentencing

Since August 2010, the Fourth Circuit has published several cases that further clarify and expound on its holding in *Lynn* and similar cases. It is a virtual certainty that, by the time this article makes it from the computer screen to the printed page, another few dozen cases will have changed the sentencing landscape even more.

Most post-*Lynn* cases have focused on the procedural reasonableness of a sentence, especially the role of the § 3553(a) factors in making an individualized assessment in each case. The Fourth Circuit has not spent a great deal of time analyzing the substantive reasonableness of sentencing since the Supreme Court’s decisions in *Booker* and *Gall*. It is logical that the Fourth Circuit will soon begin examining this area of sentencing jurisprudence.

In order to keep abreast of this changing landscape, attorneys and judges must stay vigilant and remain adaptable. They should be aware that, when it comes to sentencing defendants, a new day is dawning in federal courts. **TFL**

Judge Anderson is a senior U.S. district judge in Anderson, S.C. Judge Anderson’s law clerks, Derek A. Shoemaker and Margaret E. Baker, contributed to this article. © 2010 Hon. G. Ross Anderson Jr. All rights reserved.



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aware that simply flowing down the SCA requirements to subcontractors may not be enough. As noted, the SCA applies with equal force and effect to subcontractors. The DOL has the right to audit subcontractors for SCA compliance, and prime contractors are directly liable for any violations by their subcontractors. As discussed above, contracting agencies are required to make offsets against a prime contractor’s contract payments to cover any such failures by their subcontractors, forcing the prime contractor to chase the subcontractor for reimbursement and also placing the prime contractor at risk of debarment. **TFL**

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fice of Patton Boggs, where she practices in the areas of business, regulatory, and employment law. © 2010 Robert K. Tompkins, Elizabeth M. Gill, and Lindsey D. Weber. All rights reserved.

Endnotes

- ¹29 C.F.R. § 4.111.
- ²41 U.S.C. § 356; 29 C.F.R. §§ 4.116-4.122; 29 C.F.R. § 4.133.
- ³29 C.F.R. § 4.123(e).
- ⁴29 C.F.R. § 4.112.
- ⁵29 C.F.R. § 4.3(b).
- ⁶29 C.F.R. § 4.4(b)(5), (c)(4).
- ⁷48 C.F.R. §§ 22.1018(b), 52.222-41(g).
- ⁸48 C.F.R. § 52.222-43(c).
- ⁹29 C.F.R. § 4.4(a)(1)(iv).
- ¹⁰29 C.F.R. § 4.4.
- ¹¹29 C.F.R. § 4.6(g)(3).
- ¹²48 C.F.R. § 52.222-43.
- ¹³48 C.F.R. § 52.222-43.

