

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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CECIL RICHARDSON : No. 00-251

MEMORANDUM

Dalzell, J.

February 28, 2001

On October 18, 2000, a jury found Cecil Richardson guilty of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). At the sentencing today, Richardson's able defense counsel interposed a number of objections to the February 26, 2001 presentence investigation report (the "PSI"), as well as made a motion for downward departure.

Given the seriousness of defendant's objections and of the motion for downward departure, we set forth the constellation of reasons that led to our imposition of a sentence of 235 months.

I. OBJECTIONS TO THE PRESENTENCE
 INVESTIGATION REPORT AND TO THE SENTENCE CALCULATION

Richardson first takes the position that his criminal history category was not properly calculated. He contends that the fifteen year mandatory minimum does not apply, and that the proper Guideline range is actually 92-115 months, with a statutory maximum of ten years. He reaches this conclusion on

the basis that the proper Guidelines offense level here is 26¹ (the PSI calculates it as 33 because of the § 924(e) enhancement) and that he has in reality 9 criminal history points for a Category of IV, and not a category of VI as the PSI concludes.

Richardson sets forth a number of specific objections to the PSI, namely:

- Paragraphs² 18, 20, 48, 49, and 54 are incorrect because the Armed Career Criminal Act does not apply.
- Paragraphs 21, 22, and 23 should not add criminal history points (for his juvenile adjudication) because juvenile adjudications without a right to a jury trial are unconstitutional and unreliable.
- Paragraph 23 should add that Richardson did not personally "use or carry" a knife [the probation officer subsequently modified the paragraph to report that the Family Court records "appear to be incomplete" on the issue of whether or not he held the knife].

¹Although Richardson does not object to the relevant paragraph, it is not clear why the offense level that the probation officer chose for this offense, prior to taking into account the career criminal provisions, is 26 instead of 24. He cites to U.S.S.G. § 2K2.1(a)(2), but this provision (which applies when the defendant has at least two prior felony convictions of a crime of violence or a controlled substance offense) only lists an offense level of 24.

²A note with respect to paragraph numbers is necessary here. The papers submitted by the Government and by Richardson were written with reference to the original PSI, of which we did not receive a copy. On February 26, 2001 we received the revised PSI, which had been revised in response to at least some of the contentions of the parties in their papers. In these revisions, the probation officer added new paragraphs 4 and 42. Thus, in examining the allegedly defective paragraphs identified by Richardson, we have added one to every identified paragraph number between 4 and 42 and two to every identified paragraph number above 42 to compensate for the newly added paragraphs.

- Paragraph 27 should reflect only nine total criminal history, and not twelve, points because the juvenile adjudications are unconstitutional and not reliable.
- Paragraph 28 should note that Richardson was not on parole at the time of this offense, as he "maxed out" his state parole on January 14, 2000 [the calculation of Criminal History points that the probation officer makes in the revised report do not assign any points for a parole status, instead, he assigns two points for Richardson's being on probation and one point because the offense occurred within two years after his release from custody, see PSI ¶¶ 28, 29.³
- Paragraph 30 should show a total of nine criminal history points, rather than fifteen, thus the criminal history category should be IV, not VI.
- Paragraphs 48 and 49 should not apply 18 U.S.C. § 924(e).

APPLICATION OF 18 U.S.C.
§ 924(e) AND GUIDELINES CALCULATIONS

A. Defendant's Argument

In order for the fifteen year mandatory minimum provided by § 924(e), as well as the enhanced Guidelines offense level provided in U.S.S.G. § 4B1.4(b), to apply, a defendant must have three prior convictions, committed on occasions different from one another, for serious drug offenses or violent felonies. Richardson does not dispute that his two adult convictions qualify as such crimes. He argues, however, that none of his three juvenile adjudications can count as a third.

Richardson contends that the juvenile drug offense stated in paragraph 21 is not a predicate under § 924(e) because

³It would therefore seem that this objection is moot.

§ 924(e)(2)(A) does not include juvenile adjudications as "serious drug offenses." He also argues that the juvenile robbery alleged in paragraph 22 is not a predicate under § 924(e) because no gun, knife, or destructive device was used or carried.

Richardson states that the juvenile robbery alleged in paragraph 23 is not a predicate under § 924(e) for three reasons. First, the records of that offense do not confirm he personally "used or carried" a knife, and § 924(e) is not meant to go to the acts of co-conspirators. Second, he argues that the use of a juvenile conviction to satisfy the requirements of § 924(e) is a violation of Due Process under the Fifth and Fourteenth Amendments because juveniles in Pennsylvania do not have a right to jury trial. Therefore, so the argument goes, the use here of Richardson's juvenile adjudications creates an arbitrary result with no justification given the differing goals of the juvenile and adult criminal justice systems. Moreover, the case law that found that juveniles have no right to a jury trial is outmoded (to the extent it wasn't wrong in the first place) now that juvenile convictions are, as we see in this case, used in adult criminal sentencings. Lastly, Richardson stresses that the three "violent felonies" or "serious drug offenses" were not proved beyond a reasonable doubt at trial and therefore their use to increase Richardson's sentence violates Apprendi. Richardson argues that while the fact of the prior convictions does not fall under Apprendi, whether they are properly characterized as § 924(e) predicate offenses is indeed a jury question since it

requires a consideration of the facts of the underlying conviction.

B. Government's Response

With respect to whether the juvenile knife-point robbery, discussed in paragraph 23 of the PSI, qualifies under § 924(e), the Government counters that it gave pre-trial notice of its intended use of the conviction, which included the assertion that Richardson used the knife.⁴ The Government also argues that even if Richardson did not hold the knife, his status as a coconspirator warrants the designation of the crime as a "violent felony".

With respect to the use of juvenile conviction in enhancements pursuant to the Armed Career Criminal Act, such as those provided in § 924(e), the Government responds that the statute itself, at § 924(e)(2)(C), expressly permits the use of juvenile adjudications as "violent felonies". The Government also notes that Constitutional challenges to the use of Pennsylvania juvenile adjudications in criminal sentencing have been rejected.

With respect to the Apprendi argument, the Government contends that it is for the court, and not a jury, to determine whether a given prior conviction meets the requirements of § 924(e).

⁴This appears to be some form of an estoppel argument. As detailed below, we need not rely on this in reaching our finding with respect to Richardson's sentence.

Analysis

A. Use of the Juvenile Adjudications in the Calculation of Criminal History Category for Guidelines Purposes

Richardson does not devote much of his argument to the specific issue of the use of juvenile adjudications in Guidelines criminal history calculations, but instead focuses more closely on the question, discussed below, of their use in the § 924(e) calculation since it is that provision that ultimately drives the fifteen year mandatory minimum and the increase in offense level to 33.⁵

As Richardson acknowledges, our Court of Appeals has held unambiguously that the use of juvenile adjudications for the purposes of calculating Guidelines criminal history category is not a due process violation, United States v. Davis, 929 F.2d 930, 932-33 (3d Cir. 1991); United States v. Bucaro, 898 F.2d 368, 370-72 (3d Cir. 1990). Richardson articulates a claim that the use of juvenile adjudications for sentencing purposes is an equal protection violation where juveniles do not have a right to a jury trial, and that such use of juvenile adjudications should be subject to strict scrutiny, but he does not identify any case law directly on point to support this specific contention.

⁵On the other hand, the use of the juvenile adjudications in the bare Guidelines calculation is not trivial, since without those adjudications Richardson's criminal history category is III (nine points), while with them it is Category VI (fifteen points).

Richardson has not made any argument that would justify undermining the Third Circuit precedent identified above which holds that juvenile adjudications can be used in Guidelines calculations of criminal history. Therefore, since he has twelve criminal history points arising from the nature of the prior convictions and adjudications, plus two points for being on probation, plus one point because this offense was within two years of his release from custody, Richardson has a total of fifteen points and is properly in criminal history category VI.

B. Which Juvenile Adjudications Could Qualify as "Violent Felonies" or "Serious Drug Offenses" Pursuant to § 924(e)?

In its pre-trial "notice of prior convictions" for § 924(e) purposes, the Government only included the two adult convictions (whose application to § 924(e) Richardson does not dispute) and the last of his juvenile adjudications, which was for robbery, criminal conspiracy, theft by unlawful taking, theft by receiving stolen property, simple assault, and possession an instrument of crime. The Government does not appear to proffer any argument that either of Richardson's two earlier juvenile adjudications (the first for drug sales, and the second for a robbery where no weapon was involved, see PSI ¶¶ 21, 22) applies to § 924(e).

Section 924(e)(2)(C) states, "the term 'conviction' includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." This provision would

seem to effectively provide, by exclusion, that juvenile drug offenses do not count for § 924(e) purposes, and therefore the first of Richardson's juvenile adjudications (recorded at paragraph 21 of the PSI) is immaterial to § 924(e).

Moving to consider whether either of the two robbery juvenile offenses fall under § 924(e), we observe that § 924(e)(2)(B) provides:

the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that -
(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another,

There is nothing in the record to suggest that Richardson's earlier juvenile adjudication for robbery (see paragraph 22 of the revised PSI) involved the use of a firearm, knife, or destructive device, and therefore it does not fall under the provisions of § 924(e). However, Richardson's later robbery juvenile adjudication does involve a robbery at knifepoint, and, therefore, on the language of the statute, it meets the characteristics of a "violent felony".

C. Was Richardson Holding
the Knife, and Does It Matter?

We begin by setting forth what we know about the knifepoint robbery, which occurred on October 5, 1994 when Richardson was 17. According to the delinquency complaint the Assistant District Attorney prepared:

[Wh]ile at Overbrook H.S., 5900 Lancaster Ave., the deft, in concert with [an]other/others did forcibly take from the Complainant, Dawud Harrigan, [hi]s property, to wit; the defendant demanded money from Complainant, and then [at] point of knife did go through the Complainant's pocket and did take [\$40] USC.

Ex. A., Govt. Sent. Mem.

This description does not clarify whether it was Richardson holding the knife.⁶ In the revised PSI, based on an examination of court records, the probation officer states that during the robbery the point of the knife pierced the victim's pocket, but he also states that the Family Court records do not state whether Richardson was holding that knife.

Richardson's primary argument on this issue is based on lenity: since § 924(e) does not say specifically that co-conspirators are vicariously liable for someone else's "use and carrying" of a weapon, we must construe the provision in defendants' favor and find that co-conspirators are not included

⁶The Government argued in its memorandum that the locution that the defendant "at point of knife did go through" shows that it was indeed Richardson who held the knife, but it is not at all clear that this really can be logically inferred from these pidgin notes. At the sentencing hearing this day, the Government retreated from the aggressive reading of the record, in light of the newly discovered police report that shows it was Richardson's accomplice who held the knife.

in § 924(e)'s reach. In his argument, Richardson cites Taylor v. United States, 495 U.S. 575, 110 S. Ct. 2143 (1990), in which the Supreme Court interpreted the meaning of the term "burglary" as used in § 924(e). In that case, the Court ultimately decided that the proper definition was a "generic", or categorical definition that approximated the definition given in the Model Penal Code and was similar to a definition of "burglary" originally written into § 924(e) but later deleted, Taylor, 495 U.S. at 598, 110 S. Ct. at 2158. In so holding, the Court rejected, inter alia, using the definition of "burglary" given by the particular State involved or using the traditional common law meaning.

Taylor also addressed the defendant's claim that the rule of lenity demanded that the Court give a narrow definition to "burglary". To this the Court answered, "This maxim of statutory construction [lenity], however, cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term," Taylor, 495 U.S. at 596, 110 S. Ct. at 2157.

It is unclear how Taylor -- which, again, Richardson cites in support of his argument -- affects our interpretation of § 924(e)'s reach here. The Supreme Court was seemingly not driven by a goal of giving the statute a narrow construction, but we also note that in the case of the term "burglary" there was a long history of that word's use in the statute, a history upon which the Court drew in reaching its conclusion. Turning to the

question before us, the phrase, "involving the use or carrying", is itself very broad, particularly given its use of the expansive term "involving". The language of the statute is thus broad enough to encompass a juvenile who conducts a robbery in which someone else is actually holding the knife or firearm. In any event, there appears no question that it was Richardson who went through the pockets, and thus he was hardly a passive bystander to this crime.⁷

With respect to Richardson's lenity argument, it is important to recall that "[t]he rule of lenity . . . is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seize[d] everything from which aid can be derived, it is still left with an ambiguous statute." Chapman v. United

⁷The Government argues that co-conspirators are indeed held accountable under § 924(e). The cases it cites in support of this claim are not controlling because they involve adult, as opposed to juvenile, offenses. For example, the Government cites United States v. Preston, 910 F.2d 81, 86 (3d Cir. 1990), in which the panel held that a Pennsylvania conviction to commit robbery was a predicate "violent felony" for the purposes of § 924(e). The conviction in question was, however, an adult conviction. This distinction is significant because § 924(e) requires that for a juvenile offense to count as a "violent felony" it must meet the characteristics required of the adult crimes (e.g., punishable by more than one year imprisonment, has an element the use, attempted use, or threat of force, etc.) and it must "involv[e] the use or carrying of a firearm, knife, or destructive device". Thus the fact that an adult robbery co-conspirator falls under § 924(e) does not tell us, necessarily, about the status of a juvenile who may not have physically handled the firearm or knife. Irrespective of this, though, we find that the § 924(e) language itself demonstrates that a juvenile co-conspirator like Richardson falls within the "violent felon" category.

States, 500 U.S. 453, 463, 111 S. Ct. 1919, 1926 (1991)(internal quotation marks and citations omitted). We cannot find that he definition of "violent felony" in § 924(e) puts us in such a position, and the rule of lenity is inapplicable to our interpretation of § 924(e)'s expansive language.

D. Can Juvenile Adjudications be Used
As Predicate Offenses Under § 924(e)?

There can be no question that the statute itself permits the use of juvenile adjudications, as it specifically mentions them, see 18 U.S.C. § 924(e)(2)(B) & (e)(2)(C). Richardson's challenge to their use here is therefore primarily Constitutional in nature, and he argues that the use of juvenile adjudications for § 924(e) purposes offends Due Process and Equal Protection under the 5th and 14th Amendments.

As noted above, Richardson's argument rests on the fact that juvenile offenders in Pennsylvania have no right to a jury trial, and that therefore juveniles are treated differently than adults with respect to future § 924(e) sentence enhancements. Moreover, Richardson maintains, since the various organs of the juvenile criminal justice system operate in pursuit of goals such as rehabilitation, and seek in many respects to place the Commonwealth as the juveniles' guardian, the juvenile adjudications produced by this system assume an arbitrary character when later applied to a sentencing enhancement scheme.

In connection with this argument, Richardson cites Chapman v. United States, 500 U.S. 453, 111 S. Ct. 1919 (1991),

in which the Supreme Court held that the weight of the carrier medium is properly included in drug weights for sentencing purposes. In the course of so holding, the Court rejected the petitioner's claims under due process, noting that "a person who has been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context . . . an argument based on equal protection essentially duplicates an argument based on due process." Chapman, 500 U.S. at 465, 111 S. Ct. at 1927 (citations omitted).

Chapman would thus seem to demonstrate that the resolution of Richardson's objection here comes down to a question of whether the use in sentencing of juvenile non-jury adjudications, together with adult convictions subject to jury adjudication, amounts to an "arbitrary distinction".⁸ Richardson

⁸Notwithstanding this holding, Richardson goes on to argue that we should engage in an equal protection analysis. In particular, he claims that juveniles who were adjudicated under the juvenile justice system should be given heightened protection because they were adjudicated under a disability; namely, they had no right to a jury trial. However, to a large extent this misses the point, since it is not those juveniles who are impacted, but rather their later adult selves who find themselves up for federal sentencing. Thus, the class that Richardson's analysis would protect is in fact not the juveniles, but the adults who have been found or pleaded guilty to crimes and where sentence may turn in part on their juvenile record. His claim must be that those convicted adults who had juvenile adjudications are positioned differently than those convicted adults who did not. This does not appear to be arbitrary, nor is

(continued...)

does not cite any case law so holding, and we cannot see how we can find such arbitrariness here. For example, to the extent that the Third Circuit cases of Bucaro and Davis cited above held unambiguously that the use of juvenile adjudications is appropriate in Guidelines calculations, it is unclear why their application to § 924(e) would not be equally permissible. The use of juvenile adjudications as a sentencing enhancement pursuant to § 924(e) is part of a rational scheme, since only certain, more serious, juvenile adjudications qualify, cf. United States v. Inglesi, 988 F.2d 500, 503 (4th Cir. 1993) (finding that use of juvenile adjudications for career criminal enhancements within the Guidelines scheme pursuant to U.S.S.G. § 4A1.2(d) does not offend due process or equal protection because such use is within a rational sentencing scheme).

Also, although Richardson maintains that the use of the juvenile adjudications in sentencing calculations does indeed lead to arbitrary sentences, he does not point to any particular constitutional deficiency in his own juvenile adjudications that would render them arbitrary. As Richardson admits, the Supreme Court has held that a defendant's ability to constitutionally challenge § 924(e) predicate adult convictions is limited to those challenges that raise the issue of the right to counsel,

⁸(...continued)
it at all clear why that former class of convicted adults would deserve heightened protection.

It has not escaped our attention that Richardson does not cite any case law to support his contention that we should engage in an equal protection analysis.

Custis v. United States, 511 U.S. 485, 497, 114 S. Ct. 1732, 1739 (1994); see also United States v. Thomas, 42 F.3d 823, 825 (3d Cir. 1994) (holding that a defendant can only challenge the constitutionality of § 924(e) predicate crimes at the time of sentencing if the challenge involves the right to counsel or if the applicable statute or Sentencing Guideline provides for such a challenge). We therefore find that in Richardson's specific case, as well as more generally, the use of juvenile adjudications in sentencing does not render such sentences "arbitrary" so as to imply constitutional infirmity.

Notwithstanding the limit set forth in Custis on challenges at the time of sentencing to the validity of prior convictions, Richardson argues in a slightly different vein that we may decline to consider the effect at sentencing of any conviction we feel is "unreliable", in order to ensure that the sentence comports with the requirements of Due Process. With respect to this, he argues that the juvenile adjudications are unconstitutional⁹ and therefore unreliable and should be disregarded at a later sentencing. Richardson does not cite any cases in which a court has explicitly done this.

⁹In so arguing, Richardson seems to be encouraging us to challenge the validity of Pennsylvania's non-jury juvenile justice system. In 1971, the Supreme Court found that this non-jury system does not offend the Constitution, McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976 (1971), and we see no cause on the facts of this case to reexamine this well-settled jurisprudence, much less to rule contrary to it.

The Government correctly observes that Bucaro and Davis found no constitutional infirmity with the use of juvenile adjudications. It also cites to cases from other circuits allowing the use of juvenile adjudications for Guidelines and § 924(e) enhancements. In the face of this authority, we cannot hold that Richardson's juvenile adjudications, by virtue of their non-jury nature, were not proper § 924(e) predicate offenses.

E. That Dirty Word: "Apprendi"

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Court held that,

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215 (1999)]: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' 526 U.S. at 252-53, 119 S. Ct. 1215 (opinion of Stevens, J.); see also id., at 253, 119 S. Ct. 1215 (opinion of Scalia, J.).

Apprendi, 120 S.Ct. at 2362-63.

Chief Judge Becker has identified two steps in the inquiry Apprendi mandated:

A court must first determine the "prescribed statutory maximum" sentence for the crime of which the defendant was convicted and assess whether the defendant's ultimate sentence exceeded it. If it did, the court must consider the second-order Apprendi question:

whether the enhanced sentence was based on "the fact of a prior conviction." If it was, then the sentence is constitutional. If it was not, then the sentence is unconstitutional.

United States v. Mack, 229 F.3d 226, 238 (3d Cir. 2000)(Becker, C.J. concurring)(footnote omitted). In a footnote, Chief Judge Becker stated that it was unclear to him how long the first part of this test would obtain, since it depended on Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219 (1998), a decision on which Apprendi itself cast doubt.

In any event, Mack addressed circumstances similar to what we face here: a defendant was sentenced under the felon-in-possession statute and his sentence was increased under the provisions of § 924(e) because he had at least three prior "violent felonies" or "serious drug offenses". The panel decision did not directly address any Apprendi implications that are material to Richardson's case; however, Chief Judge Becker's long concurring opinion did, and we will therefore discuss it at some length.

In going through the two-step analysis, Chief Judge Becker first concluded that the § 924(e) enhancement does indeed increase the maximum sentence for the offense. Absent the § 924(e) enhancement, the maximum penalty for being a felon in possession is ten years, 18 U.S.C. § 924(a)(2); however, the maximum penalty after the § 924(e) enhancement is applied is life imprisonment, Mack, 229 F.3d at 239 (citing Custis, 511 U.S. at 487).

Chief Judge Becker rejected the reasoning¹⁰ that because the Armed Career Criminal Act itself increased the felon-in-possession sentence for those defendants who had committed three prior crimes meeting the § 924(e) standards, the "statutory maximum" for being a felon in possession was therefore actually life, since the enhancement was built into the statute. Chief Judge Becker argued that this reasoning was the same as was built into the New Jersey sentencing standard that the Apprendi Court had rejected, Mack, 229 F.3d at 239-40. Chief Judge Becker also rejected the rhetorical theory that § 924(a)(2) implicitly incorporated the § 924(e) standards, so that the enhancements might be said to "determine" but not "increase" the possible sentence.

After concluding that application of § 924(e) does indeed increase the maximum sentence, Chief Judge Becker went on to discuss whether it was a "fact of prior conviction" that had increased Mack's sentence. In Mack's case, this inquiry involved two distinct parts. Mack had received two enhancements, the § 924(e) enhancement for prior convictions, and a separate enhancement for possessing a firearm in connection with a crime of violence. With respect to the second enhancement, the district court applied it on the basis of an uncharged shooting involving the defendant, which Chief Judge Becker felt raised substantial questions under Apprendi.

¹⁰Which he felt was implicitly endorsed by the Mack panel opinion.

On the other hand, Chief Judge Becker felt that the § 924(e) enhancement was non-problematic, at least for now, on the basis of Almendarez-Torres. Notably, no party in Mack had questioned that the defendant had in fact been convicted of at least three violent felonies, so the precise question that Richardson has now placed before us was not before that panel. We therefore look to Almendarez-Torres for guidance.

In Almendarez-Torres, the Supreme Court considered the situation of an alien charged with reentering the country without permission, having previously been deported. The statute authorized a maximum sentence of two years for the crime, but another section of the statute stated that the maximum penalty was increased to twenty years if the initial deportation was subsequent to a conviction for commission of an aggravated felony. The Court held that the increase in sentence based on the prior commission of an "aggravated felony" was part of a penalty provision, and was not a necessary element of the offense. The Court noted that "the relevant statutory subject matter is recidivism. That subject matter - prior commission of a serious crime - is as typical a sentencing factor as one might imagine," 523 U.S. at 230, 118 S. Ct. at 1219. On the other hand, Almendarez-Torres did not appear to discuss a specific situation where the defendant challenged the categorization of his prior crime; rather, the defendant there simply claimed that the conviction should have been put before a jury. In making its decision, however, the Court discussed an earlier case, McMillan

v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411 (1986), in which the Court had upheld a Pennsylvania statute which allowed a judge to impose a mandatory minimum sentence if he found that a sentencing factor of "visibly possessing a firearm" was met, Almendarez-Torres, 523 U.S. at 242, 118 S. Ct. at 1230 (discussing McMillan).

Richardson's claim here is that what is at issue is not the fact of his prior conviction, but rather the circumstances and situations surrounding that crime: namely, whether or not his crime involved the use or carrying of a knife. Based on the case law discussed above, we think that the question of what the Court of Appeals would do with this is actually rather close.

On the other hand, given the law as it now stands, particularly given Almendarez-Torres's reference to McMillan, we must conclude that the designation of a crime as a "violent felony" pursuant to the statutory definition in § 924(e) is something for us, and not for the jury. It is not at all clear how this could be otherwise, since placing this in a jury's hands would put district courts in the position of holding mini-trials regarding the facts of old cases each time the Government sought to prosecute under § 924(e). At a minimum, such an enterprise would overthrow the jurisprudence of cases like Taylor v. United States, supra, which in our view is simply unthinkable.¹¹ On the

¹¹Taking Taylor's inquiry as an example, it is possible that five Justices of the Supreme Court would have us admit, e.g., the Model Penal Code as a candidate for the jury's decision
(continued...)

logic of Apprendi, however, we are indeed making, as Richardson contends, what amount to factual findings about the circumstances of these past crimes, and this is particularly vexing in this case because the record from the juvenile conviction is to a certain extent ambiguous on the matter. Nonetheless, this is our call to make, and as discussed above, we find that Richardson's juvenile adjudication for robbery qualifies as a "violent felony" under § 924(e).

II. MOTION FOR DOWNWARD DEPARTURE

Richardson claims that his criminal history point assignment, and in particular his identification as an armed career criminal, overrepresents the seriousness of his criminal history and the likelihood that he will commit further crimes.

Richardson argues that his entire past criminal "career" occurred in a very narrow timeframe. He contends that his conviction history started with a juvenile arrest on June 29, 1994 (for selling crack) and ended with an arrest on February 26, 1996 (for aggravated assault on a police officer and drug sales). Thus, the total time span for the five offenses that have been included in the PSI -- three juvenile (one drug and two robbery) and two adult (one drug and one aggravated assault plus drugs) -- actually occurred over less than two years. As Richardson puts it, "Mr. Richardson is twenty three years old. His prior

¹¹(...continued)
as to what definition of burglary to apply??

criminal history of 'convictions' represents less than 10% [of] his life. In other words over 90% of Mr. Richardson's existence on this planet was conviction free." Def.'s Mem. at 9.

Richardson urges that in light of this, plus his age and the fact that none of his prior offenses involved a gun, a downward departure is warranted.

The Government maintains that Richardson in fact has a history of repeated assaultive behavior. This is reflected not only in his sentences following juvenile adjudications and adult convictions, but also in his history of assaultive behavior inside the penal institutions where he has been placed.

Analysis

Section 5H of the Guidelines identifies, in a non-exhaustive list, various defendant characteristics and provides policy statements as to whether these can properly be considered in deciding whether to depart from the Guidelines. In Koon v. United States, 518 U.S. 81, 116 S. Ct. 2035 (1996), the Supreme Court discussed departures in general, noting:

If the special factor is a forbidden factor, the sentencing court cannot use it as a basis for departure. If the special factor is an encouraged factor, the court is authorized to depart if the applicable Guideline does not already take it into account. If the special factor is a discouraged factor, or an encouraged factor already taken into account by the applicable Guideline, the court should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present. If a factor is unmentioned in the Guidelines, the court

must, after considering the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole, decide whether it is sufficient to take the case out of the Guidelines heartland. The court must bear in mind the Commission's expectation that departures based on grounds not mentioned in the Guidelines will be "highly infrequent".

Koon, 518 U.S. at 95-96, 116 S. Ct. at 2045 (citations and some internal quotation marks omitted).

Here, Richardson argues that his criminal history points overstate his actual criminal history. Prior to the Court's decision in Koon, the Third Circuit held in United States v. Shoupe, 35 F.3d 835 (3d Cir. 1994) that where a defendant's offense level has been augmented by the career offender provision, a sentencing court may depart downward in both the criminal history and offense level categories under U.S.S.G. § 4A1.3, which permits a court to depart if the criminal history category does not adequately reflect the defendant's crime history, Shoupe, 35 F.3d at 839.

Since U.S.S.G. § 4A1.3 discusses the possibility of departure based on an inadequate reflection of criminal history, this history is an "encouraged" factor.¹² Under Koon, we therefore may take it into account if the applicable Guideline has not incorporated it.

Section 4A1.3 discusses the possibility that the criminal history score may over-represent actual criminality.

¹²See also U.S.S.G. § 5H1.8 ("A defendant's criminal history is relevant in determining the appropriate sentence.").

"There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period." U.S.S.G. § 4A1.3 at 317 (2000). In the Commentary to § 4A1.3, however, the Guidelines also caution us that some young defendants who have been given lenient treatment in the past may actually have criminal history categories that understate their true criminality. Although the Government cites to this provision in arguing that the Guidelines take into account Richardson's concerns, we cannot see how this is so, particularly as there is nothing in the record to suggest that Richardson actually did get any lenient treatment in the adjudications for his three juvenile offenses, as each resulted in incarceration for over sixty days, and each earned him two criminal history points.

As discussed above, Richardson's argument here is that his criminality has really only occurred within a short time, and that he is, for the most part, law-abiding. The record belies this contention.

It appears true that unlike many criminal defendants we see, Richardson stayed away from the criminal justice system until he was seventeen. Unfortunately, once he turned seventeen

he made up for lost time. While the three juvenile offenses were indeed temporally close together, we cannot ignore that they were three distinct offenses, and that two of them were for two separate robberies. If all three offenses were for lesser offenses, we would be more inclined to side with Richardson. But that is not what we have here: two of the offenses were for separate strong-arm robberies, which are much more troubling than, say, low-level, small-time marijuana distribution episodes.

Moreover, Richardson is one who doesn't seem to learn his lesson. Not only did he continue to commit robberies after he was first convicted for selling drugs (but before his juvenile trial occurred), but less than ninety days after he was released from juvenile detention he was again arrested for drugs, and a little over a month after that he assaulted a police officer while the officer was trying to arrest him, again for drugs.

Finally, days after he finished three years in prison, Richardson was picked up on this gun charge. A reasonable inference from this would be that the only reason Richardson hasn't continuously committed crimes since the age of seventeen (he is now twenty-three) is because he was jailed for much of that time.¹³

¹³We note in passing, as the Government does, that Richardson's record in juvenile detention (placed into seclusion for attempted assault) and at the Federal Detention Center (once disciplined for failing to follow orders, once disciplined for fighting) also suggest that he has not learned how to live with others even in the regimented world of jail.

Moreover, while Richardson points out that he has not used firearms in his offenses, there is no gainsaying that his strong-arm and knifepoint robberies, not to mention his assault on a police officer, were violent.

Under the circumstances, the criminal history category of VI -- the product of the criminal history alone, and not of any "violent offender" status -- does not overstate Richardson's prior criminality.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION
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CECIL RICHARDSON : No. 00-251

ORDER

AND NOW, this 28th day of February, 2001, upon consideration of defendant's objections to the Presentence Investigation Report and motion for downward departure, and the Government's response thereto, and after a sentencing hearing this day, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendant's objections to ¶¶ 18, 20-23, 27, 28, 30, 48, 49 and 54 of the February 26, 2001 Presentence Investigation Report are OVERRULED; and
2. The motion for downward departure is DENIED.

BY THE COURT:

Stewart Dalzell, J.

