

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**UNITED STATES OF AMERICA**

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v.

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**Criminal No. MJG-03-0109**

**JEROME HENDERSON**

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**DEFENSE SENTENCING MEMORANDUM**

Jerome Henderson, by and through his counsel, James Wyda, Federal Public Defender, Joanna Silver, Assistant Federal Public Defender, and Sarah Gannett, Staff Attorney, hereby submits this sentencing memorandum for the Court’s consideration.

**INTRODUCTION**

On June 23, 2004, Mr. Henderson was convicted at a jury trial of one count of possession of a firearm by a prohibited person, in violation of 18 U.S.C. section 922(g)(1). PSR ¶2. Pending before the Court is the question whether Mr. Henderson should be sentenced to a mandatory fifteen years in prison under the Armed Career Criminal Act, 18 U.S.C. 924(e) (“ACCA”). The Court continued the sentencing hearing on January 12, 2006, to permit the defense to brief two questions: (1) whether Mr. Henderson’s now-vacated prior conviction for possession with intent to distribute narcotics may be considered as an ACCA predicate; and (2) whether the ACCA may be applied at all in this case in the wake of the Supreme Court’s decision in *Shepard v. United States*, \_\_ U.S. \_\_, 125 S.Ct. 1254 (2005). In addition, by this memorandum, the defense has taken the opportunity to answer the government’s allegation in its sentencing memorandum of January 11, 2006 that Mr. Henderson is “a terror to the citizens of Maryland” who should be sentenced to the top of the advisory guidelines range—235 months.

## **I. Factual Background**

Mr. Henderson is forty-two years old and is a lifetime resident of Baltimore City. PSR ¶ 74. He was raised in the notorious Arthur G. Murphy Homes housing project. *Id.* By the time he was thirteen, he had lost his mother and grandmother. *Id.* By age fifteen, Mr. Henderson was living on his own. *Id.* As a seventeen year-old, he acquired the heroin and alcohol addictions that plagued him until his arrest in this case. PSR ¶¶ 89-90. At the time of his arrest, he was awaiting placement in a substance abuse treatment program. PSR ¶ 92. Unfortunately, he never received the treatment he so desperately needed.

Given this history, it is perhaps not surprising that Mr. Henderson accumulated a lengthy criminal record. However, most of his prior convictions appear to have been minor or drug-related, including a 1982 destruction of property for which he received a suspended sentence, PSR ¶ 30; a 1982 storehouse breaking for which he received a suspended sentence, PSR ¶ 31; a 1986 battery for which he received a suspended sentence, PSR ¶ 33; a 1989 assault and theft for which he received concurrent one-year sentences, PSR ¶ 38; a 1996 using falsified registration plate for which he received a suspended sentence, PSR ¶ 41; and two 2000 possessions of heroin for which he received brief sentences, PSR ¶¶ 42 & 44.

Even the more serious offenses, which the government alleges form the basis for the Armed Career Criminal sentence, are relatively modest. Mr. Henderson received only a one-year sentence for the robbery, which involved a cohort grabbing the victim while Mr. Henderson drove off with a motorcycle. PSR ¶35. He received a three-year sentence plus probation for the aiding and abetting second degree murder, PSR ¶ 36, and the police reports and our conversations with the Assistant State's Attorney who prosecuted that case suggest that his role in the offense may have been quite

peripheral. And, he received a two-year sentence for the possession with intent to distribute 21 gel caps of heroin (a sentence that was subsequently vacated). PSR ¶ 63. The parties and the Court have all seen far more serious prior records

The conduct at issue in this case may be the best indicator of whether Mr. Henderson is, as the government asserts, “an armed career criminal in fact as well as in designation.” As the Court will recall, Mr. Henderson was arrested after an unknown individual pointed him out to police and claimed that Mr. Henderson attempted to rob him. The testimony at the motions hearing and at trial revealed, however, that the anonymous tipster then fled the scene. The officers had made no effort to identify this individual—they did not take his name, they did not record his license plate number—and they did not attempt to follow him when he fled, all of which suggests that the officers did not take seriously the attempted robbery allegation.

Moreover, the evidence at trial revealed that the gun recovered near the site of Mr. Henderson’s arrest was vintage 1934, with a rusted bore, a broken grip that had been duct-taped together, and a missing magazine. The city firearms examiner was unable to fire the pistol without repeatedly applying penetrant oil to its works.<sup>1</sup> At the motions hearing, the officers testified that they remarked to Mr. Henderson on “how old [the gun] looked and even if it worked.” *Mots. Tx.* at 22. In fact, they found the pistol so laughable that they “made little jokes that it was a messed up gun.” *Id.* at 92.

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<sup>1</sup> Months later, the defense firearms examiner opined, “this Beretta pistol is in very poor condition. It is badly rusted, has broken grips that are held together with duct tape, and it’s magazine is missing . . . . Attempts to test fire this pistol were unsuccessful until penetrating fluid was liberally applied . . . . After several attempts this pistol did fire, but would not extract and eject the fired cartridge as designed.” PSR ¶ 12.

It is against this backdrop that the Court must sentence Mr. Henderson. Although the defense recognizes that application of the Armed Career Criminal Act rests on the legal issues discussed in Sections II and III of this memorandum, for the reasons discussed in this section and in Section IV, the defense submits that a non-ACCA guidelines sentence is perfectly appropriate and that a 235-month sentence would be grossly excessive.

## **II. The Vacated Predicate**

When the first post-trial presentence report was filed on August 19, 2004, Probation relied on Mr. Henderson's 2001 conviction for possession with intent to distribute heroin as one of the three predicate convictions for application of the Armed Career Criminal Act to this case. 8/19/94 PSR ¶ 24. Upon reviewing the transcript of the guilty plea underlying that conviction, the defense filed a petition for a writ of error coram nobis in the Circuit Court for Baltimore City, alleging that the conviction was unconstitutionally obtained. After holding an evidentiary hearing, the Honorable Kaye A. Allison, Circuit Court for Baltimore City, issued a written opinion on August 30, 2005, vacating the conviction on the ground that the guilty plea had not been knowing or voluntary. A copy of Judge Allison's ruling is attached to this memorandum as Exhibit A.<sup>2</sup> Following the vacating of the conviction, Probation properly revised the presentence report to reflect that this conviction should not affect Mr. Henderson's criminal history score or serve as the basis for an ACCA sentence.

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<sup>2</sup> The government's characterization of Judge Allison's ruling, *see* Govt. Sent. Mem. at 5 (“[t]he state court's decision is erroneous, unjust, and a blatant attempt by a state Judge to circumvent Congress' intent in passing the ACCA's stiff mandatory minimum sentencing enhancement.”), is insulting and unwarranted. Judge Allison's ruling was based on a review of the complete record, including testimony presented by the state in support of the validity of the conviction. The Court found that “the complete record establishes that [Mr. Henderson] was not advised, at the time of his guilty plea, of his presumption of innocence”—a critical advisement under both federal and state constitutional law.

The government contends that this Court may consider the vacated conviction as an ACCA predicate, citing *United States v. Kahoe*, 134 F.3d 1230 (4<sup>th</sup> Cir. 1998). In *Kahoe*, the Fourth Circuit held that the vacating of a felony conviction subsequent to a defendant's possession of a firearm did not prevent conviction under the felon-in-possession statute. *See id.* at 1235. That ruling was based on the narrow language of 18 U.S.C. section 921(a)(20), which states that a conviction that has been set aside can *no longer* be disabling. The Court held that "the language does not provide that such a conviction was not disabling *between the time it was obtained and the time it was set aside*," and cited legislative history demonstrating that Congress intended to make precisely this distinction. *See id.* at 1233 (emphasis added). Nothing in *Kahoe* suggests that its holding could or should be extended to the ACCA context. In fact, the Fourth Circuit's jurisprudence since *Kahoe* assumes that a vacated conviction may not be used as an ACCA predicate. *See, e.g., United States v. Gadsen*, 332 F.3d 224 (4<sup>th</sup> Cir. 2003).

Interestingly, the government's argument in this case is contrary even to the position taken by the Solicitor General and the Department of Justice as recently as last year in an analogous case. In *Johnson v. United States*, which considered the statute of limitations for filing for federal habeas relief after the vacating of state convictions that formed the basis for an career offender sentence, the Supreme Court noted that "the Government shares Johnson's preliminary assumption that if he filed his § 2255 motion in time, he is entitled to federal resentencing now that the State has vacated one of the judgments supporting his enhanced sentence." \_\_ U.S. \_\_, 125 S. Ct. 1571, 1577 (2005).

The Supreme Court in *Johnson* went on to address the very argument made by the government here. The Court wrote: "Neither the enhancement provision of the Sentencing Guidelines applied here, nor the mandatory enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C.

section 924(e), has been read to mean that the validity of a prior conviction supporting an enhanced federal sentence is beyond challenge.” *Id.* By way of contrast, the Court noted in *Lewis v. United States*, 445 U.S. 55 (1980), on which the *Kahoe* decision relies, which held that the validity of a prior conviction was irrelevant for purposes of the felon-in-possession statute. *See id.* The Court continued, “Our cases applying these provisions assume the contrary, that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated. *Custis v. United States*, 511 U.S. 485 . . . (1994); *Daniels v. United States*, 532 U.S. 374 . . . (2001).”

Given the Supreme Court’s statements on the question, this Court should reject the government’s position and adopt the presentence report’s finding that the 2001 conviction for possession with intent to distribute heroin is not an ACCA predicate.

### **III. The Shepard Challenge**

The vacating of the 2001 conviction for possession with intent to distribute heroin leaves the government with only three possible predicates to support an ACCA sentence in this case.<sup>3</sup> The defense has conceded that, under current law, the Court may find the robbery conviction to be a predicate, and the Court has overruled the defense objections to consideration of the aiding and abetting conviction, leaving only the 1982 resisting arrest conviction, which is discussed at ¶ 29 of the

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<sup>3</sup> The government’s discussion of Mr. Henderson’s assault and battery convictions as possible predicates is misleading. Although assault and battery may be predicates under some circumstances, the government cannot meet the exacting requirements set by the Supreme Court and the Fourth Circuit with reference to these convictions. *See Shepard v. United States*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1254 (2005); *United States v. Coleman*, 158 F.3d 199 (4<sup>th</sup> Cir. 1998); *United States v. Kirksey*, 138 F.3d 120 (4<sup>th</sup> Cir. 1998). Although the text of the government’s memorandum suggests otherwise, the government admits as much in its footnotes. *See* Govt. Sent. Mem. at n.1 & n.2.

presentence report.<sup>4</sup> In the wake of recent Supreme Court decisions, treating that conviction as a predicate violent felony would be constitutional error because, in qualifying resisting arrest as a predicate, the Fourth Circuit engaged in impermissible judicial fact-finding.

In 2003, the Fourth Circuit held that resisting arrest is a violent felony that may serve as a predicate for an Armed Career Criminal Act sentence. *See United States v. Wardrick*, 350 F.3d 446, 455 (4<sup>th</sup> Cir. 2003). Although, under Maryland law, resisting arrest does not have as an element “the use, attempted use, or threatened use of force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i),<sup>5</sup> the Court held that it “otherwise involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii). The Court reasoned that, “the act of resisting arrest poses a threat of direct confrontation between a police officer and the subject of the arrest, creating the potential for serious physical injury to the officer and others.” *Wardrick*, 350 F.3d at 455.

In finding that resisting arrest was a qualifying violent felony under the ACCA, the Fourth Circuit cited to its earlier decision in *United States v. James*, 337 F.3d 387 (4<sup>th</sup> Cir. 2003), which held that a South Carolina conviction for failure to stop for a blue light was a violent felony because the prohibited conduct created the potential for confrontation and violence. *See Wardrick*, 350 F.3d at 455. In *James*, the Court described its approach to the “otherwise clause” as requiring the Court to “make ‘common sense judgments about whether a given offense proscribes generic conduct with the

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<sup>4</sup> The Court also overruled Mr. Henderson’s objection to the sufficiency of the government’s proof of this conviction at the hearing on January 12, 2006.

<sup>5</sup> *See Purnell v. State*, 375 Md. 678, 690 & 698, 827 A.2d 68, 74 & 78 (2003); *Barnhard v. State*, 325 Md. 602, 609-10, 602 A.2d 701, 705 (1992). A conviction for resisting arrest in Maryland requires merely findings that the defendant was arrested, the arrest was lawful, and the defendant resisted or refused to submit to the arrest. *See id.*

potential for serious physical injury to another.” *James*, 337 F.3d at 390 (citing *United States v. Custis*, 988 F.2d 1355, 1363 (4<sup>th</sup> Cir. 1993)). The Court made its judgment by reference to its experience with blue light cases, finding that “most cases of failing to stop for a blue light involve the deliberate choice by the driver to disobey the police officer’s signal. This disobedience poses a threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, occupants of the vehicle, and even bystanders.” *Id.* at 391. The Court has also followed this approach with respect to the crimes of escape, *see United States v. Hairston*, 71 F.3d 115 (4<sup>th</sup> Cir. 1995), and pickpocketing, *see United States v. Mobley*, 40 F.3d 688 (4<sup>th</sup> Cir. 1994).

The Fourth Circuit’s method of analysis under the otherwise clause does not withstand scrutiny under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or its most recent progeny, *Shepard v. United States*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1254 (2005), because it requires the Court to engage in a factual inquiry about the manner in which an offense is “usually” committed. Under *Apprendi*, “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.” 530 U.S. at 490; *United States v. Booker*, \_\_\_ U.S. \_\_\_, 125 S.Ct. 738 (2005). Although *Apprendi* recognizes an exception for enhancements based on the “fact of a prior conviction,” 530 U.S. at 490 (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)), *Shepard*, and Fourth Circuit cases applying *Shepard*, show that the *Apprendi* “fact of a prior conviction” exception is quite narrow, and does not extend to speculation about the nature of the crime committed.

In *Shepard*, the Court limited a judge’s ability to resolve factual disputes about a prior conviction, holding that any findings about the fact of a conviction must rest on a conclusive prior

judicial record. *See* 125 S. Ct. at 1262. A sentencing court cannot look beyond the charging document, the terms of a plea agreement, the plea colloquy, the statutory definition, or any explicit finding of the trial judge to which the defendant assented to determine a disputed fact about a prior conviction. *See Shepard*, \_\_ U.S. \_\_, 125 S. Ct. at 1263; *see also United States v. Thompson*. 421 F.3d 278, 282 (4<sup>th</sup> Cir. 2005) (citing *Shepard* for this proposition). The Court prohibited judges from making disputed findings of fact about a prior conviction by resort to other documents, such as complaint applications or police reports. Permitting such judicial fact-finding about the character of a prior plea would come too close to the findings subject to *Apprendi*, thus raising serious doubts about the constitutionality of the statute. Hence, the Supreme Court elected to “limit the scope of judicial fact-finding on the disputed generic character of a prior plea.” \_\_ U.S. \_\_, 125 S.Ct. at 1263.

The Fourth Circuit has acknowledged the importance of *Shepard*, and its constitutional significance. *See United States v. Washington*, 404 F.3d 834 (4<sup>th</sup> Cir. 2005) (finding that judge erred in fact-finding regarding breaking and entering conviction); *Thompson*, 421 F.3d at 282, n.3 (noting that rule announced in *Shepard* has constitutional implications). The Fourth Circuit also has recognized how *Shepard* raises difficulties for a court determining whether a prior conviction “involve[d] conduct that presents a serious potential risk of physical injury to another.” As the Court pointed out in *Thompson*, “such a nebulous standard cries out for speculation regarding facts extraneous to the prior conviction.” *Thompson*, 421 F.3d at 286; *see also id.* (analysis under the catch-all clause is “fact-intensive”).

Pre-*Shepard* cases construing the otherwise clause have unquestionably relied upon facts extraneous to the prior conviction in determining whether it “involved conduct that presents a serious potential risk of physical injury to another.” As discussed above, the Fourth Circuit’s cases stray far

beyond the data inherent in the “fact of conviction,” speculating about how others are likely to respond to the defendant’s conduct, and relying on cases far removed from the conviction before it to determine how the offense is committed in “most instances.”

*Shepard’s* limitation of the *Apprendi* exception for facts about a prior conviction places substantial doubt on whether a court may constitutionally assess the risk of physical injury posed by certain offenses. Whether an offense involves conduct that poses a serious risk of physical injury to another is a factual question, which is “too much like the findings subject to *Jones* and *Apprendi*.” *Washington*, 404 F.3d at 842 (citing *Shepard*, \_\_ U.S. \_\_, 125 U.S. at 1262). To reach the conclusion that an offense poses such a risk, the court must collect data, survey cases, make findings about the ways in which the offense is generally committed in most instances, and speculate about the actions that another person may take in response to the defendant’s offense conduct and/or that the defendant may take in turn. These are quintessential findings of fact, which a judge cannot constitutionally make under the Sixth Amendment. *Cf. Washington*, 404 F.3d at 842 n.9 (“The Court’s characterization of its findings . . . as derived from ‘common experience’ does not make them any less ‘facts.’”)

The Court’s decision in *United States v. Pierce*, 278 F.3d 282 (4<sup>th</sup> Cir. 2002), is illustrative. In *Pierce*, the court relied upon what it described as “empirical data relating to the application of the North Carolina indecent liberties statute” to decide whether a conviction under that statute constituted a violent felony. *See Pierce*, 278 F.3d at 289. This “empirical data” included 150 reported state appellate decisions over a twenty-two year period. It did not include cases where the facts were not described sufficiently or where the subsection of the indecent liberties statute was not specified. Based upon this “empirical data,” the court concluded that “in 98% of the cases, the crime is committed in situations where the victim is in such close proximity to the perpetrator that the victim was exposed

to the serious risk of injury.” *Id.* This kind of examination and reliance upon “empirical data” is the kind of fact-finding about a prior conviction that is forbidden under *Shepard*.

In *Wardrick*, the resisting arrest case, the Court’s fact-finding was not as careful or explicit as in *Pierce*, but its approach was similar. Without reference to the elements of the offense, the Court determined, based on its experience, that resisting arrest poses a threat of direct confrontation that creates the risk of serious physical injury. This type of risk analysis, which is inherent in the otherwise clause of section 924(e), has historically been treated as a question of fact in both civil and criminal contexts. *See, e.g., Byrd v. Blue Ridge Rural Elec. Co-op., Inc.* 356 U.S. 525, 539 n. 3 (1958). (“The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.’ § 5, Art. 18, A.R.S.”); *Imperial Fire Ins. Co. of London v. Coos County*, 151 U.S. 452, 464 (1894); *Waffen v. U.S. Dept. of Health and Human Services*, 799 F.2d 911, 922 (4<sup>th</sup> Cir. 1986) (in medical malpractice case, whether increased risk of harm posed by defendant’s conduct amounted to loss of substantial possibility of survival is question for the fact finder), *abrogated on other grounds by Hurley v. United States*, 923 F.2d 1091 (4<sup>th</sup> Cir. 1991); *Flores v. City of Palacios*, 381 F.3d 391, 399 (5<sup>th</sup> Cir. 2004) (whether particular use of force is “deadly force,” *i.e.*, carrying with it a substantial risk of causing death or serious bodily harm, is a question of fact, not one of law); *O’Dell v. Hercules, Inc.*, 904 F.2d 1194, 1201 (8<sup>th</sup> Cir. 1990) (risk of harm associated with exposure to dioxin, compared to risk associated with use of controlled substances, was question of fact integral to determination of risk of harm). *Wardrick* therefore also contains the kind of judicial fact-finding prohibited by *Shepard*. *Cf. Washington*, 404 F.3d at 842-43.

In the wake of *Shepard*, with the otherwise clause analysis subject to serious constitutional question, resisting arrest should be considered like any other non-categorical crime because it may, but does not have to, involve the use of force. *Cf. Taylor v. United States*, 495 U.S. 575 (1990); *United States v. Coleman*, 158 F.3d 199 (4<sup>th</sup> Cir. 1998); *see also United States v. Kirksey*, 138 F.3d 120, 125 (4<sup>th</sup> Cir. 1998) (noting non-violent means of committing battery). In such non-categorical cases, the sentencing court may turn to a limited set of judicial records indicating that the defendant “necessarily admitted” the element required to establish the offense as a violent felony. *See Shepard*, \_\_\_ U.S. \_\_\_, 125 S. Ct. at 1263. None of the judicial records approved by the Court in *Shepard*—“the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or [ ] some comparable judicial record,” *see id.*—is available in this case. As a result, this Court should decline to treat the resisting arrest conviction as an ACCA predicate.<sup>6</sup>

If the resisting arrest conviction is not treated as a predicate, Mr. Henderson may not be sentenced as an Armed Career Criminal.

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<sup>6</sup> Mr. Henderson also submits that enhancing his sentence based on the court’s findings regarding any of his prior convictions is unconstitutional. The practice of enhancing a defendant’s maximum sentence based on judicial findings regarding the defendant’s prior convictions was upheld by a sharply divided United States Supreme Court, 5-4, in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In light of the *Apprendi-Shepard* line of cases, recognizing a defendant’s right to have a jury make any factual finding that triggers a higher maximum sentence based on proof beyond a reasonable doubt, it is Mr. Henderson’s position that the *Almendarez-Torres* decision has been effectively overruled. Mr. Henderson understands that the Fourth Circuit has recently rejected this argument. *See United States v. Cheek*, 415 F.3d 349 (4<sup>th</sup> Cir. 2005). He recognizes and acknowledges the *Cheek* decision, but raises the issue to preserve his rights in the Supreme Court, and to put himself in the best possible position should the Court issue a favorable decision in the future.

#### **IV. Mitigation**

Whether Mr. Henderson is sentenced under the Armed Career Criminal Act or pursuant to the advisory sentencing guidelines,<sup>7</sup> the defense requests that the Court take into consideration the substantial mitigating evidence in this case relating to Mr. Henderson's individual characteristics, family circumstances, conditions of confinement, and the nature of this offense. Much of that evidence is before the Court in the presentence report and the attachments to the defense sentencing letter of January 11, 2006. Prior to sentencing, Mr. Henderson requests the opportunity for counsel to argue on his behalf in mitigation.

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<sup>7</sup> The defense's proposed advisory guidelines calculations are attached at Exhibit B.

## CONCLUSION

For the foregoing reasons, and any others that may be presented at a hearing on this matter, Mr. Henderson respectfully requests that this Honorable Court decline to sentence him as an Armed Career Criminal and instead impose a sentence within the non-ACCA advisory sentencing guidelines range.

Respectfully submitted,

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Federal Public Defender

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of September, 2007, a copy of the foregoing memorandum in support of motion to suppress was hand-delivered, to Michael Leotta & Harry Gruber, Assistant United States Attorneys, 36 S. Charles Street, Fourth Floor, Baltimore, MD 21201.

\_\_\_\_\_  
SARAH S. GANNETT  
Staff Attorney

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FOR THE DISTRICT OF MARYLAND**

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**DEFENSE REPLY MEMORANDUM IN AID OF SENTENCING**

Jerome Henderson, by and through his counsel, James Wyda, Federal Public Defender, Joanna Silver, Assistant Federal Public Defender, and Sarah Gannett, Staff Attorney, hereby submits this reply memorandum for the Court’s consideration in aid of sentencing and in response to the government’s recent memorandum.

There are two legal issues before the Court: (1) the validity of using Mr. Henderson’s vacated conviction as an ACCA predicate; and (2) the viability of the Fourth Circuit opinion classifying resisting arrest as an ACCA predicate given the Supreme Court’s *Shepard* opinion. We address these issues in turn.

**I. The Government’s Attempt to Extend *Kahoe* to the ACCA Context Is Incorrect, Unconstitutional, and Contrary to Law.**

In response to the reality that Mr. Henderson does not meet the requirements for Armed Career Criminal sentencing, the government has offered an argument—novel in this district, and rejected wherever else it has been considered—in favor of permitting illegal convictions to enhance sentences. This Court should join other jurisdictions in refusing to impose fifteen-year mandatory-minimum sentences based on convictions that have been adjudged unreliable, unfair, and

unconstitutional. It should also refuse to allow the government's dissatisfaction with the result in one case upset the common understanding of, and settled practice under, the ACCA.

**A. Mr. Henderson's Prior Conviction Was Vacated For Good Reason And Only After Full And Fair Consideration Of The Issues And The Evidence.**

The government's description of the coram nobis proceedings in state court invites some elaboration for the sake of accuracy. To begin with, as this Court may know, Maryland law *requires* a petitioner in coram nobis to establish that he faces "significant collateral consequences" as a result of the conviction being challenged." *See Skok v. State*, 361 Md. 52, 78, 760 A.2d 647, 661 (2001). What the government characterizes as "bemoan[ing]," *see* Govt. Opp. at 3, was necessary to establish a prerequisite for relief. And, as the government acknowledges, *see id.*, at the time that the coram nobis petition was filed, the parties understood that the conviction being challenged was a necessary predicate to the mandatory minimum federal sentence. *See also* PSR of Aug. 18, 2004 at ¶ 24.

The government was aware from the outset that Mr. Henderson was seeking coram nobis relief, and was reminded of that fact by at least four status reports filed in the federal case. The assertion that the government "had no opportunity to contest the Judge's findings . . . because we were not a party to the state-court action," is simply untrue. Nothing prevented the government from coordinating with the state's attorney in defending the state conviction; indeed, the Office of the United States Attorney now has a policy of doing so in similar cases. *See* Baltimore Exile—A Comprehensive Strategy to Reduce Gun Violence, *available at* [www.usdoj.gov/usao/md/front\\_page/Baltimore%20exile](http://www.usdoj.gov/usao/md/front_page/Baltimore%20exile).

Had the government participated, it would understand that Mr. Henderson’s former attorney, Linwood Hedgepeth, testified not for Mr. Henderson, but for the state, in support of the state conviction. From the witness stand, Mr. Hedgepeth steadfastly defended himself, not Mr. Henderson. Only after vigorous cross-examination did he admit that he had no specific recollection of properly advising Mr. Henderson. But the state court did not have to rely solely on the testimony of Mr. Hedgepeth. The court also had the benefit of the transcript of the plea colloquy and heard the testimony of Mr. Henderson—who took the stand and subjected himself to cross-examination—and of former state public defender Creston Smith.

Under Maryland law, “[e]vidence that [a defendant] was not advised as to the burden of proof, [including] the standard of proof [and] the presumption of innocence[, is] sufficient evidence to support a lack of voluntariness finding.” *State v. Hicks*, 139 Md. App. 1, 11, 773 A.2d 1056, 1062 (2001). The record and testimony in Mr. Henderson’s case supported such a finding. Notably, the State elected not to appeal Judge Allison’s ruling. The government’s efforts to undermine that ruling through its misinformed mischaracterizations of the proceeding cannot change the reality that Mr. Henderson’s conviction has been vacated and that Judge Allison’s ruling is final.

The only question before this Court is the legal significance of the vacated conviction.

**B. The Government’s Position That Illegal Convictions May Serve As ACCA Predicates Contravenes Well-Established Legal Precedent**

As the government acknowledges at page seven of its sentencing memorandum, “other Circuit Courts of Appeal have adopted the defendant’s view” that a vacated conviction may not serve as an ACCA predicate. In fact, every circuit that has addressed this issue has taken this

position. See, e.g., *United States v. Walker*, 198 F.3d 811, 814 (11<sup>th</sup> Cir. 1999); *United States v. Pettiford*, 101 F.3d 199, 201-202 (1<sup>st</sup> Cir. 1996); *Clawson v. United States*, 52 F.3d 806, 807 (9<sup>th</sup> Cir. 1995) (per curiam). None has taken the government’s position.<sup>8</sup>

Indeed, in *Kahoe*, which forms the centerpiece of the government’s argument, the Fourth Circuit conceded that its decision did not answer the question here—“whether a defendant is entitled to . . . relief if a district court relied upon a prior conviction to enhance a federal sentence and subsequently the prior conviction was set aside.” See 134 F.3d 1230, 1235 n.2 (4<sup>th</sup> Cir. 1998). This is because, as the Fourth Circuit correctly noted, there is an important distinction between the use of prior convictions under 922(g) and their use under 924(e): “[h]ere, as in *Lewis*, the prior conviction was used to impose a civil firearms disability, not in a way that depended upon the reliability of the prior conviction.” *Id.*

The Fourth Circuit’s embrace of the Supreme Court’s decision in *Lewis v. United States*, 445 U.S. 55 (1980) is significant. In *Lewis*, the Supreme Court explicitly recognized that vacated prior convictions may not be used “for certain purposes,” including to enhance sentences under recidivist statutes. See 445 U.S. at 66 (citing *Burgett v. Texas*, 389 U.S. 109 (1967), which held that the use of uncounseled convictions to support a recidivist enhancement was unconstitutional). *Lewis* distinguished the felon-in-possession statute, on the basis that “[e]nforcement of that essentially civil disability through a criminal sanction does not support guilt or enhance

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<sup>8</sup> To counsel’s knowledge, this is the first time that the government has raised this argument in the District of Maryland. The novelty of the issue itself suggests that it is borne of the government’s dissatisfaction with the result in this case. Cf. Matthew Dolan, “Technical Move Cuts US Prison Sentences,” *The Baltimore Sun*, Feb.28, 2006 at A1 (citing government comments in sentencing memorandum in this case criticizing Judge Allison’s decision to vacate Mr. Henderson’s conviction).

punishment . . . .” *Id.* at 67. Put simply, “[t]he two situations call for differential treatment.” *United States v. Snyder*, 235 F.3d 42, 52 (1<sup>st</sup> Cir. 2000) (distinguishing *Pettiford*’s holding regarding the ACCA from a holding agreeing with *Kahoe* regarding section 922(g)).

As the Supreme Court has repeatedly recognized, this differential treatment is required as a matter of fundamental fairness and just punishment. Enhancing sentences based on illegal and/or vacated convictions raises a spectre of constitutional problems rooted in the Fifth, Sixth, and Eighth Amendments. *See Johnson v. Mississippi*, 485 U.S. 578, 584-585 (1988) (reversing death sentence based on vacated conviction as in violation of Eighth Amendment prohibition against cruel and unusual punishment); *United States v. Tucker*, 404 U.S. 443, 591-92 (1971) (remanding for resentencing because sentence was founded on information that was “materially untrue”). In a long line of cases culminating in *Custis v. United States*, 511 U.S. 485 (1994), the Supreme Court has emphasized that using a constitutionally infirm conviction to enhance a sentence only “erodes [constitutional] principle[s]” and deprives the defendant of his right “anew.” *Burgett v. Texas*, 389 U.S. 109, 115-116 (1967). Thus, even if the government’s interpretation were correct, it could not be applied because it is unconstitutional.

The Supreme Court’s recent decisions regarding the use of vacated convictions in sentencing bolster the distinction made in *Lewis* and Mr. Henderson’s request for relief here. Although the government spends considerable time parsing the opinions in an effort to undercut them, the Supreme Court’s rulings in *Custis*, *Daniels*, and *Johnson* “assume” that there is a remedy in these circumstances. *Johnson v. United States*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1571, 1577 (2005). This assumption is rooted in decades of Supreme Court jurisprudence emphasizing the importance of

reliability in sentencing. *See Custis*, 511 U.S. at 493-97 (1994). It cannot be undone by the government's misapplication of inapposite case law, however creative the briefing may be.

Some correction to the government's briefing is warranted, however. To begin with, the government makes too much of the inclusion of the word "previous" in the ACCA. *See Govt. Opp.* at 10-11. The career offender provision of the United States Sentencing Guidelines contains parallel language, *see* U.S.S.G. § 4B1.1, yet no court has ever read this language to preclude a defendant from getting post-sentencing relief based on a prior conviction that has been later invalidated. If the government's "moment-of-sentencing" theory about the career offender guidelines were correct, *see Govt. Opp.* at 19, defendants would be prohibited from returning to federal court upon the vacating of a prior conviction because the vacating would have occurred too late. This is not the law. *See Govt. Opp.* at 19-20 (citing Supreme Court and Fourth Circuit authority for the proposition that career offenders may seek resentencing after their predicate convictions are vacated).

The Fourth Circuit was very clear about this in *United States v. Mobley*, 96 Fed. Appx. 127 (4<sup>th</sup> Cir. 2004) (unpublished) (per curiam).<sup>9</sup> The Court held, "we conclude that the Supreme Court's decisions in *Custis* and *Daniels* allow a prisoner . . . to seek reopening of his federal sentence when a state court conviction, for which criminal history points were assessed, has been overturned." *Id.* at 129. It is significant that the *Mobley* court cited *Daniels* for this proposition, because *Daniels* was an ACCA case. Had the Fourth Circuit intended *Kahoe* to be applied in the ACCA context, it would not have cited *Daniels* this way. Indeed, in *United States v. Gadsen*, cited in the defense's opening memorandum, the Fourth Circuit commented that the analysis should be

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<sup>9</sup> Pursuant to local rule, a copy of the *Mobley* opinion is attached to this memorandum.

the same whether the vacated conviction had been applied in the career offender or ACCA context. See 332 F.3d 224, 228 n.3 (4<sup>th</sup> Cir. 2003) (“*Daniels* and *Custis* apply ‘whether the sentence enhancement was imposed because of [the] ACCA or because of the Sentencing Guidelines.’”).<sup>10</sup>

*United States v. Pressley*, 359 F.3d 347 (4<sup>th</sup> Cir. 2004), in which the Fourth Circuit considered whether convictions obtained after commission of the offense qualify as ACCA predicates, is instructive in this regard. In defining “previous convictions,” the Court applied a two-step analysis, looking first to whether the defendant has a conviction at the time of sentencing, and second to when that conviction was sustained in comparison to the section 922(g) offense. *Id.* at 349 (“[u]ntil a defendant is actually *convicted* of three applicable offenses, this sentencing enhancement statute remains inoperative. Further, even if there is a ‘conviction’ . . . it will not be counted for purposes of the statute unless it is ‘previous.’” (emphasis in original)). This approach assumes that only convictions that exist at the time of sentencing are potential predicates. *Cf. id.* at 350 (noting that counting “*all* convictions existing at the time of sentencing” would render the term “previous” unnecessary (emphasis in original)). A conviction that has been vacated through a writ of error *coram nobis* no longer exists and may not be counted.<sup>11</sup>

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<sup>10</sup> The references to section 851 and the “Three Strikes” laws also fail to support the government’s argument. Section 851 is irrelevant; it establishes a limited right to conduct a collateral challenge at the federal sentencing, which has nothing to do with this issue. *Cf. Custis*, 511 U.S. at 497 (distinguishing between the right to conduct a collateral attack in federal court and the right to seek relief in federal court following a successful collateral attack in state court). Section 3559 does contain a provision dealing with resentencing, but the absence of any similar provision in the sentencing guidelines has not prevented the Fourth Circuit from finding a right to resentencing in the career offender context, nor should it prevent this Court from finding a right to relief in this case.

<sup>11</sup> The Fourth Circuit’s approach in *Pressley* is consistent with rules of common usage. A sentence may involve two temporal dimensions. One pertains to the event time the sentence denotes, for example, “John F. Kennedy was assassinated in 1963.” The other pertains to the

This case law, and the long-standing practice in the District of Maryland and other district courts of granting relief in ACCA cases in which convictions have been vacated, supports Mr. Henderson's position that the correct interpretation of the ACCA's previous conviction language is the common sense one—convictions are predicates if they occur before commission of the offense and are valid at the time of sentencing.<sup>12</sup> This common understanding is further evidence that the government's interpretation is tortured and incorrect.

The government also makes too much of the language in *Custis* and *Daniels* expressing “no opinion on the appropriate disposition of [an application for relief after the vacating of a predicate].” *Daniels*, 532 U.S. at 382; *Custis*, 511 U.S. at 497. Post-conviction litigation is fraught with perils for the petitioner, including the statute of limitations, procedural default, and numerous other obstacles to relief. *See generally* Hertz, Randy & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (4<sup>th</sup> ed. 1998). Even if a defendant were substantively entitled to relief, there might be legal reasons that he could not obtain it. *Cf. Johnson*, 125 S. Ct. at 1582 (affirming denial of relief for violation of the statute of limitations); *United States v. LaValle*, 175 F.3d 1106, 1108 (9<sup>th</sup> Cir. 1999) (“Just as the Supreme Court expressed ‘no opinion on the

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speech time that anchors the sentence, for example, in the sentence, “Tomorrow, you will go home,” the word “tomorrow” is understood with respect to “today”—the time at which the sentence is spoken. In this case, as suggested by the *Pressley* opinion, “has three previous convictions” is temporally linked with the phrase “shall be sentenced,” which indicates when the defendant must have the convictions. The term “previous,” which modifies conviction, is temporally linked to the commission of the 922(g) offense.

<sup>12</sup> Should the Court determine that there is any question about the meaning of the statute, it should apply the rule of lenity to find in favor of Mr. Henderson. *See United States v. Pettiford*, 101 F.3d 199, 201 (1<sup>st</sup> Cir. 1996); *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992).

appropriate disposition of . . . an application to reopen,’ *Custis*, 511 U.S. at 497, we express no opinion on an appropriate sentence for [the defendant] once his sentence is reopened.”].

The Supreme Court’s instructions in *Custis* and *Daniels* were clear: petitioners were to attack their predicate convictions in state court. Adopting the government’s view “would be punishing [the defendant] and other litigants like him for having faithfully followed these instructions.” See *Gadsen*, 332 F.3d at 228. Although *Gadsen* involved a statute of limitations question, the Fourth Circuit’s dramatic language in granting relief is just as appropriate in this case:

As the Massachusetts district court indicated in addressing the implications of *Custis* for a different procedural question, “[i]t would be an illogical, if not cruel, gesture for the Supreme Court to invite prisoners to attack their predicate convictions and then inform them that their efforts must go for naught and their enhanced sentences must stand.” *United States v. Payne*, 894 F. Supp. 534, 543 (D. Mass. 1995) (internal citations omitted). We do not believe the Supreme Court would countenance such a result.<sup>13</sup>

*Id.*

## **II. In The Wake of *Shepard v. United States*, Resisting Arrest May Not Be Treated As An ACCA Predicate Because The Fourth Circuit’s Holding In *Wardrick* Is Based On Impermissible Judicial Fact-Finding.**

In recent years, sentencing law has changed considerably due to the Supreme Court’s expanding view of the defendant’s Sixth Amendment rights at sentencing. In a series of cases, beginning with *Jones v. United States*, 526 U.S. 227 (1999), and developed in *Apprendi v. New*

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<sup>13</sup> As the government notes, the Supreme Court’s decision in *Johnson* limits the ultimate holding in *Gadsen* that “the federal statute of limitations begins running when the state court conviction is conclusively invalidated.” 332 F.3d at 229. *Johnson* held that a petitioner will not have the benefit of that statute of limitations unless he acts with due diligence in pursuing the vacating of the predicate conviction. See 125 S. Ct. at 1582. It does not undermine the principle, seized upon by the Fourth Circuit, that the Supreme Court would not issue an invitation only to turn away all guests at the door.

*Jersey*, 530 U.S. 466 (2000), *United States v. Booker*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 738 (2005), and most recently *Shepard v. United States*, \_\_\_ U.S. \_\_\_, 125 S. Ct. 1254 (2005), the Court has strictly limited judicial fact-finding at sentencing. Courts are no longer permitted to make disputed findings of fact that are essential to increase the ceiling of a potential sentence. *See Shepard*, \_\_\_ U.S. \_\_\_, 125 S. Ct. at 1263-1264.

Although *Shepard* does not speak directly to the question at issue in this case, neither did *Jones* speak directly to the question in *Apprendi*, nor *Apprendi* to the question in *Booker*, nor *Booker* to the question in *Shepard*. What this Court must evaluate is whether the Fourth Circuit's approach in *Wardrick* is "too much like the findings subject to *Jones* and *Apprendi*, to say that [*Taylor* or ] *Almendarez-Torres* clearly authorizes a judge to resolve the dispute." *See id.* The decisions in *Shepard*, and in the Fourth Circuit in *United States v. Washington*, 404 F.3d 834 (4<sup>th</sup> Cir. 2005), and *United States v. Thompson*, 421 F.3d 278, 282 (4<sup>th</sup> Cir. 2005), suggest that it is.

Such a ruling does not require the Court to "eschew the . . . categorical approach." Govt. Opp. at 34. "The categorical approach" refers to the manner in which a court assesses whether a particular type of conviction is a violent felony for purposes of the ACCA. The court is to look at "the statutory definitions of prior offenses" to make that determination. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). Post-*Shepard*, the categorical approach is still constitutionally valid in cases in which Congress has specified that an offense is violent—as with burglary—and the court must determine whether a conviction for something called burglary in a particular state is the kind of "generic burglary" to which Congress referred. *See id.* at 602. The court does this by comparing the statutory definition to the generic definition, rather than by examining the facts of an individual case. *See id.*

In cases in which Congress has not specified that an offense is violent, and in which force is not an element, Congress directed courts to evaluate whether the offense “otherwise involves conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii). This is what the Fourth Circuit did in *Wardrick* with respect to resisting arrest. The government does not dispute that in applying the “otherwise” clause, the Fourth Circuit was forced to resort to judicial fact-finding. There is no other way to make such an evaluation. *See* Def. Mem. at 7-9. The government appears to suggest that because the court’s fact-finding applied to a category of cases instead of an individual case, it is constitutionally permissible. The case law provides no basis for making that distinction.

The very sorts of information relied upon by the Fourth Circuit in *Wardrick* and similar “otherwise” clause cases<sup>14</sup> were at issue in *United States v. Washington*, 404 F.3d 834 (4<sup>th</sup> Cir. 2005). In *Washington*, the Fourth Circuit found that resort to the court’s “common experience” and to “extra-indictment information,” *id.* at 842, in determining whether a prior conviction “involves conduct that presents a serious potential risk of physical injury to another,” *id.* at 836, in an individual case violated *Shepard*’s Sixth Amendment dictates, *id.* at 831, 841-42.

It is only a small step from *Washington*’s holding regarding consideration of individual cases in the career offender context to a holding regarding categories of cases in the ACCA context. The Fourth Circuit alluded to this in *Thompson*, contrasting the “nebulous” career offender “catch-all” clause—which is virtually identical to the ACCA “otherwise” clause—with the finding required in determining an “occasion” under the ACCA. *See* 421 F.3d at 286. According

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<sup>14</sup> *See United States v. Mobley*, 40 F.3d 688 (4<sup>th</sup> Cir. 1994) (pickpocketing); *United States v. Hairston*, 71 F.3d 115 (4<sup>th</sup> Cir. 1995) (escape); *United States v. James*, 337 F.3d 387 (4<sup>th</sup> Cir. 2003) (failure to stop for a blue light).

to the Fourth Circuit: “such a nebulous standard cries out for speculation regarding facts extraneous to the prior conviction,” *id.*, which is exactly what Mr. Henderson complains of here, and exactly what the *Jones-Shepard* line of Sixth Amendment cases prohibits, *see id.*

The suggestion that this Court may not recognize the implications of *Shepard* and its progeny for *Wardrick* simply because *Wardrick* is “binding Fourth Circuit precedent,” Govt. Opp. at 33, is incorrect. Indeed, the Fourth Circuit has held in other contexts that intervening Supreme Court case law can effectively overrule earlier circuit court rulings. *See, e.g., United States v. Armstrong*, 197 F.3d 392, 394-95 (4<sup>th</sup> Cir. 1999) (finding that Supreme Court decision holding that the exclusionary rule did not apply in state parole hearings effectively overruled panel decision applying the rule in federal supervised release hearings). The Circuit’s post-*Shepard* decisions in *Washington* and *Thompson* put the law in this jurisdiction on a clear path toward the result Mr. Henderson advocates here. *Compare United States v. Prince-Obiyo*, 320 F.3d 394, 501 (4<sup>th</sup> Cir. 2003) (noting that related circuit decisions coming after a change in Supreme Court authority may shed light on the viability of prior circuit precedent).

## CONCLUSION

For the foregoing reasons, and any others that may be presented at a hearing on this matter, Mr. Henderson respectfully requests that this Honorable Court decline to sentence him as an Armed Career Criminal and instead impose a sentence within the non-ACCA advisory sentencing guidelines range.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_\_ day of September, 2007, a copy of the foregoing memorandum in support of motion to suppress was hand-delivered to the Office of the United States Attorney for the District of Maryland, 36 S. Charles Street, Fourth Floor, Baltimore, MD 21201, attn: Michael Leotta & Harry Gruber, Assistant United States Attorneys.

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SARAH S. GANNETT  
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