

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

UNITED STATES OF AMERICA,)
)
 Plaintiff-Appellee,) DOCKET NO. 16-4134
)
 v.)
)
 JEFFREY DEAN TUCKER,)
)
 Defendant-Appellant.)

JOINT MOTION FOR PARTIAL REMAND

Appellant Jeffrey Dean Tucker and the United States, through undersigned counsel, hereby move the Court to suspend the briefing schedule in this case, vacate Tucker's sentence, and remand for the limited purpose of resentencing Tucker in light of *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016). In support of this motion, the parties submit the following:

1. On May 7, 2015, Tucker was convicted of one count of Possession of a Firearm by a Convicted Felon in violation of 18 U.S.C. § 922(g)(1). On February 29, 2016, the district court concluded that Tucker was subject to an enhanced sentence under the Armed Career Criminal Act ("ACCA") based in part on his prior conviction for North Carolina common law robbery. The court then imposed a sentence of 188 months. Absent the ACCA enhancement, Tucker faced a statutory maximum sentence of 120 months.

2. In *Gardner*, this Court held that North Carolina common law robbery does not qualify as an ACCA predicate. 823 F.3d at 804. As a result of *Gardner*, Tucker does not have three prior convictions that support the ACCA enhancement. The government therefore concedes that this Court must vacate his current ACCA sentence and remand the case for resentencing.

3. The parties respectfully request that this Court remand the case for resentencing while retaining jurisdiction over the appeal. This Court and others have followed a similar procedure when the parties agree that a remand for resentencing is appropriate. E.g., Order (Dkt. No. 24), *United States v. Morrison*, No. 10-4807 (4th Cir. Nov. 2, 2010) (remanding for resentencing issue while retaining jurisdiction over appeal challenging conviction); Order, *United States v. John*, No. 11-2179 (3d Cir. 2011) (same).

4. Remanding the case for a resentencing at this point would serve the interests of justice and judicial efficiency for at least three reasons. First, such a remand will allow this Court to consider any remaining contested issues in this case—whether related to the conviction or the sentence—in a single proceeding rather than in two separate proceedings. Second, a remand will allow the district court to clarify the record on whether Tucker’s federal sentence is to run concurrent or consecutive to the state sentence he is currently serving on related charges. Third, given that Tucker has likely served more time already than is called for by the non-ACCA guidelines range, it is possible that he would choose to voluntarily dismiss his appeal if the district court imposes a sentence of time served on remand.

WHEREFORE, the parties respectfully request that the Court suspend the briefing schedule in this case, vacate Tucker's sentence, and remand for resentencing without the ACCA enhancement.

Date: August 15, 2016

Respectfully submitted,

<p>Ross Hall Richardson, Executive Director Federal Defenders of Western North Carolina, Inc</p> <p><u>/s/Joshua B. Carpenter</u> Joshua B. Carpenter Appellate Chief Federal Defenders of Western North Carolina, Inc. 1 Page Avenue, Suite 210 Asheville, NC 28801 Joshua_Carpenter@fd.org</p>	<p>Jill Westmoreland Rose United States Attorney</p> <p><u>/s/Amy E. Ray</u> Amy E. Ray Assistant United States Attorney U.S. Courthouse, Room 233 100 Otis Street Asheville, North Carolina 28801 Amy.Ray@usdoj.gov</p>
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CERTIFICATE OF SERVICE

Undersigned counsel certifies that the foregoing Motion was served on the government's counsel by ECF filing.

Date: August 15, 2016

s/Joshua B. Carpenter
Joshua B. Carpenter
Appellate Chief
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