

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1665

UNITED STATES OF AMERICA

v.

RYAN MCCARTY

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 03-cr-00817)
District Judge: Honorable Robert B. Kugler

Argued November 2, 2004

Before: ALITO, FUENTES, and STAPLETON, Circuit Judges.

(Filed: May 2, 2005)

Richard Coughlin
John H. Yauch (Argued)
Candace M. Hom
Federal Public Defender, District of New Jersey
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ATTORNEYS FOR APPELLANT

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OPINION OF THE COURT

FUENTES, Circuit Judge.

Ryan McCarty challenges his sentence for mail fraud and mail theft. He argues that his sentence violates the ex post facto clause of the Constitution, that one of the conditions of his supervised release is overly broad, and that he is entitled to resentencing under United States v. Booker, 543 U.S. ___, 125 S. Ct. 738 (2005).

Having determined that issues with respect to Booker are best determined by the District Court in the first instance, we vacate the sentence and remand for resentencing in accordance with that opinion. Because we vacate the sentence, we do not reach McCarty's non-Booker sentencing challenges. We note, however, that any challenge to the conviction has been waived, and we therefore affirm the conviction.

TO THE CLERK OF THE COURT:

Kindly file the foregoing opinion.

/s/ Julio M. Fuentes
Circuit Judge