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WHITE-COLLAR CRIME

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High Court Roundup


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All of the tumult surrounding the Supreme Court's decision in *Blakely v. Washington*,[1] which appears to have sounded the death knell for the application of the U.S. Sentencing Guidelines as we know them, has overshadowed the Court's other important decisions affecting white-collar crime. These decisions include *Crawford v. Washington*,[2] which dealt a strong blow to the government's long-standing practice of introducing co-conspirators' plea allocutions at trial. Three additional opinions also impact white-collar cases — one dealing with the constitutionality of a federal bribery statute, another that considers the definition of a "security" under the federal securities laws and a third that addresses the standard for granting a reversal of a conviction after a guilty plea. These five cases made this past term a significant one for the white-collar practitioner.

Sentencing Guidelines

As we all know by now, the Supreme Court in *Blakely v. Washington*, in a case involving Washington State's sentencing guidelines, held that any factor that increases a criminal sentence, except for prior convictions, must be admitted by the defendant or proved to a jury beyond a reasonable doubt.

Petitioner Ralph Blakely pleaded guilty to kidnapping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months under Washington law. The sentencing judge, however, after finding that Blakely had acted with deliberate cruelty — a statutorily enumerated ground for departure — imposed a 90-month sentence, which was still well below the statutory maximum and which was upheld by the state appeals court. Justice Antonin Scalia, writing for a 5-4 majority, held that the lower court, by making the factual finding of deliberate cruelty, had violated Blakely's Sixth Amendment right to a jury trial. The Court was troubled by the circumstance that "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact."

Citing frequently to *Apprendi v. New Jersey*,[3] where the Court four years ago struck down a New Jersey hate-crime law that increased the sentence for an ordinary crime if a judge found that the act was motivated by bias, the Court emphasized the importance of protecting the Sixth Amendment right to a jury trial from excessive government regulation and from judicial overreaching, "to the extent that the claimed judicial power infringes on the province of the jury." The Court noted the "need to give intelligible content to the right of jury trial," a right that is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." This need is grounded in the "longstanding tenet[] of common law jurisprudence" — also reflected in the reasoning of *Apprendi* — that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.' " Indeed, *Apprendi* "carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict."

The Court, not once, but twice, referred to the concept of whether the government should be "trusted." The "Framers' decision," the Court writes, "to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area." The Court later explained that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."

The Court concluded by alluding to the "Framers' paradigm for criminal justice," about which "[t]here is not one shred of doubt." That is "the common-law ideal of limited state power accomplished by strict division of authority between judge and jury." Under *Apprendi*, "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to

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the punishment."

Justice Sandra Day O'Connor, in her dissent,[4] presciently predicted the uncertainty the reasoning of *Blakely* would bring to the application of the federal guidelines. She said: "the practical consequences of [the] decision may be disastrous" and would be "unsettling" and "as far reaching as they are disturbing." Obviously as a result of this uncertainty — which is impacting all federal prosecutions — on Aug. 2 the Supreme Court granted certiorari in two post-*Blakely* sentencing guidelines cases and will hear arguments on Oct. 4, the opening day of the 2004-2005 term. The resulting opinion will hopefully resolve at least some of the confusion that has ensued.[5]

Confrontation Clause

In *Crawford v. Washington*, another opinion authored by Justice Scalia, the Court dealt a blow to prosecutors, ruling unanimously that an out-of-court testimonial statement of a witness is per se inadmissible unless the witness is unavailable and the defendant had a prior opportunity to cross-examine him. The Court declined to "spell out a comprehensive definition of 'testimonial.' " It did, however, specifically refer to plea allocutions as "plainly testimonial statements" and wrote that the term "testimonial" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

The Court's opinion overruled *Ohio v. Roberts*[6] and its progeny. *Roberts*, a 1980 Supreme Court decision, held that the Confrontation Clause does not bar admission of an unavailable witness' statement against a criminal defendant if the statement bears "adequate indicia of reliability" — a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

The defendant in *Crawford* was charged with assault and attempted murder in connection with a stabbing. The state attempted to introduce as evidence that the stabbing was not in self-defense a recorded statement the defendant's wife had made during a police interrogation. The defendant argued that admitting the evidence would violate his Sixth Amendment right. The Washington State trial court admitted the statement, finding that it bore "particularized guarantees of trustworthiness." The Washington State Supreme Court deemed the statement reliable and upheld the conviction.

The historical background of the Confrontation Clause, the Supreme Court wrote, supports two inferences about the meaning of the Sixth Amendment. The first is that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused." The second inference is that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination."

Five cases, including 'Blakely,' made the past term an important one for white-collar practitioners.

After finding that Supreme Court cases, at least in their results (even *Roberts*), had been consistent with the two historical principles, the Court noted how the rationales of some of those cases (*Roberts* in particular) had led to an untenable situation. "Dispensing with confrontation because testimony is obviously reliable," the Court wrote, "is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Justice Scalia's opinion in *Crawford* reflects a concern, similar to one he expresses in *Blakely*, that judges are usurping a function that does not belong to them and that they are thereby interfering with fundamental constitutional rights of defendants: in *Blakely*, the right to a jury trial; in *Crawford*, the defendant's right to face his accusers. "Admitting statements deemed reliable by a judge," the Court wrote in *Crawford,* "is fundamentally at odds with the right of confrontation." The problem with the *Roberts* test, the opinion goes on to state, is that the judge is the decision maker: *Roberts* "allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." The reliability of evidence, in Justice Scalia's view, must instead "be assessed in a particular manner: by testing in the crucible of cross-examination."

Bribery of Officials

In *Sabri v. United States*,[7] the Court, in an opinion by Justice David H. Souter, upheld the constitutionality of 18 USC §666(a)(2), which proscribes bribery of state and local officials of entities that receive at least $10,000 in federal funds. The defendant in *Sabri*, a real estate developer in Minnesota who, "lack[ing] confidence … in his ability to adapt to the lawful administration of licensing and zoning laws" offered three separate bribes to a city councilman. Before trial, the defendant moved to dismiss his indictment on the ground that 18 USC §666(a)(2) is unconstitutional on its face because it does not require proof of a connection between the federal funds and the alleged bribe. The District Court agreed with the developer, but the U.S. Court of Appeals for the Eighth Circuit reversed, holding that there was nothing facially fatal in the absence of an express requirement to prove such a connection. The Supreme Court granted certiorari to resolve a split among the circuits and affirmed, holding that no such connection on the face of statute is required.

The Court "readily dispose[d]" of the "facial challenge" to §666(a)(2), holding that the statute qualified as a valid exercise of Article I power. "We simply do not presume," wrote the Court, "the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook." The Court supported its position by citing to the Spending Clause[8] and the Necessary and Proper Clause,[9] which together give Congress authority "to see to it that taxpayer dollars

appropriated under that power are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." The Court noted that "Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity" and rather cynically referred to an authentic federal desire to rid the nation of "the menace of local administrators on the take."

Securities Law

In *SEC v. Edwards*,[10] the Court held that an investment scheme providing a fixed rate of return can be an "investment contract" and thus a "security" under the Securities Act of 1933 and the Securities Exchange Act of 1934. The Acts define a "security" to include an "investment contract" but do not define the term "investment contract."[11]

Charles Edwards was the chairman, CEO and sole shareholder of ETS, a company that sold pay phones to the public through independent distributors. Most purchasers accepted a package that included a site lease, a buyback agreement, and a leaseback and management agreement that paid a 14 percent annual return. In an SEC civil enforcement action alleging various securities law violations, the District Court concluded that the pay phone sale and leaseback arrangement was an "investment contract" and subject to the federal securities laws. The U.S. Court of Appeals for the Eleventh Circuit reversed, and the Supreme Court reversed the Eleventh Circuit.

Relying especially on *SEC v. W.J. Howey Co.*,[12] the Court broadly construed the securities laws in determining whether a particular scheme is an investment contract under those laws. In *Howey*, the Court set forth the test for whether an investment scheme is an investment contract: "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." By this, the Court in *Howey* meant "the profits that investors seek on their investment, not the profits of the scheme in which they invest" — i.e., "in the sense of income or return," including periodic payments of all sorts. Thus, the Court found that the pay phone sale and lease-back arrangement involved in *Edwards*, was an investment contract, holding that "[t]here is no reason to distinguish between promises of fixed returns and promises of variable returns" for purposes of defining the term under the securities laws.

In another opinion by Justice Souter, the Court in *United States v. Dominguez Benitez*[13] held that a defendant who seeks a reversal of his conviction after entering a guilty plea, on the ground that the District Court committed plain error under Rule 11 in connection with the warnings given, must show a reasonable probability that, but for the error, he would not have entered his guilty plea.

The defendant in *Dominguez Benitez* pleaded guilty to one conspiracy count, and the government stipulated that he would receive a two-level "safety-valve" reduction of his sentence, the defendant's only chance at a sentence below the mandatory minimum. This chance, however, was dependent on the defendant satisfying five conditions, including one relating to his criminal history, which the agreement did not address. In the plea colloquy, the District Court judge gave almost all of the Rule 11 warnings-including that the plea agreement did not bind the Court — but failed to mention that the defendant could not withdraw his plea if the Court did not accept the government's recommendations.

It turned out that the defendant had three prior convictions and was ineligible for the safety valve. He was sentenced to the mandatory minimum. On appeal, he argued that the District Court's failure to warn him, as required by Rule 11(c)(3)(B), that he could not withdraw his guilty plea if the Court did not accept the government's recommendations, required reversal. The U.S. Court of Appeals for the Ninth Circuit held that the District Court had erred and that "the error was plain, affected [the defendant's] substantial rights, and required correction in the interests of justice."

Relying on *United States v. Vonn*[14] where the Supreme Court held that a defendant who is dilatory in raising an objection to a trial judge's error in conducting a guilty-plea colloquy bears the burden of proving that the Rule 11 error was plain and affected his substantial rights-the Court found that the burden of establishing relief for plain error is on the defendant and "should not be too easy." The Court further found that the Ninth Circuit's reasoning "fell short," because it did not allow consideration of evidence showing "that a misunderstanding was inconsequential to a defendant's decision" or indicating "the relative significance of other facts" that may have affected his choice regardless of any Rule 11 error. In reversing, the Court noted that the defendant had stated to the District Court that he did not intend to go to trial. The Court also suggested that the Ninth Circuit had not discussed possibly relevant evidence including the overall strength of the government's case and whether there were any possible defenses.

1. No. 02-1632, 2004 WL 1402697 (June 24, 2004).
2. 124 SCt 1354 (2004).
3. 530 US 466 (2000). For an argument that the *Blakely* opinion is based solely on the Constitution and not on *Apprendi*, see *Simpson v. United States*, No. 04-2700, 2004 WL 1588085 (7th Cir. July 16, 2004).
4. Justices Breyer and Kennedy and Chief Justice Rehnquist joined in most of Justice O'Connor's opinion. Justices Breyer and Kennedy also wrote separate dissenting opinions.
5. *U.S. v. Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004); *U.S. v. Fanfan*, No. 03-00047, 2000 WL 864100 (D. Me. June 30, 2004).
6. 448 US 56 (1980).
7. 124 SCt 1941 (2004).
8. US Const. art. I, §8, cl. 1.
9. US Const. art. I, §8, cl. 18.
10. 124 S. Ct. 892 (2004).
11. See §2(a)(1), Securities Act of 1933, 15 U.S.C. §77b(a)(1); §3(a)(10), Securities Ex-change Act of 1934, 15 U.S.C. §78c(a)(10).
12. 328 US 293 (1946).
13. 124 SCt 2333 (2004).
14. 535 US 55 (2002).