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WHITE-COLLAR CRIME

BY ELKAN ABRAMOWITZ AND BARRY A. BOHRER

Supreme Court Review: The 2004–2005 Term

The U.S. Supreme Court's 2004–2005 term featured two significant and much-discussed opinions that had significant impact on white-collar practice.

Arthur Andersen v. United States[1] reversed the accounting firm's conviction for witness tampering, holding that the jury instructions "failed to convey properly the elements of a 'corrup[t] persuas[ion]' conviction under §1512(b)." And *United States v. Booker*[2] applied the Court's sentencing decision from the prior term, *Blakely v. Washington*,[3] to the federal sentencing guidelines, effectively rendering those guidelines advisory rather than mandatory on Sixth Amendment grounds.

Since much has already been written on these two cases, including in this column,[4] this article focuses on three additional Supreme Court opinions that may affect those accused of, or subject to sentencing for, business crimes. One is a post-*Booker* sentencing opinion, the second addresses money laundering, and the third concerns wire fraud.

Sentencing Cases

In its watershed opinion in *Booker*, the court found that those parts of the Sentencing Reform Act that rendered the federal guidelines mandatory should be severed. The court also held, however, that sentencing judges must still "consider" the guidelines and all of the other factors listed in 18 USC §3553(a)[5] and that appellate judges must review sentences under a standard of "reasonableness."

Elkan Abramowitz *is a member of Morvillo, Abramowitz, Grand, Iason & Silberberg. He is a former chief of the criminal division in the U.S. Attorney's Office for the Southern District of New York.* **Barry A. Bohrer** *is also a member of Morvillo, Abramowitz and was formerly chief appellate attorney and chief of the major crimes unit in the U.S. Attorney's Office for the Southern District of New York.* **Elizabeth J. Carroll**, *an attorney, assisted in the preparation of this article.*

Elkan Abramowitz *Barry A. Bohrer*

Two months later, in March 2005, in *Shepard v. United States*,[6] the Court rejected the government's arguments for an enhanced sentence based upon a broad array of evidence regarding prior convictions, including a police report's description of the underlying offense. Although the decision was ultimately based on the construction of the Armed Career Criminal Act (ACCA), the majority divided over the impact of *Apprendi v. New Jersey*, 530 US 466 (2000), and the Court's other recent precedent regarding the necessity of jury findings to provide a predicate for sentencing.

Under its precedent in *Taylor v. United States*, the Court decided that it was appropriate for sentencing judges to consider the charging document and jury instructions to determine whether a prior conviction might qualify as a predicate for a mandatory minimum sentence. In *Shepard*, the Court held that sentencing judges could not consider descriptions of the prior offense in police reports or officers' applications for complaints. A plurality of the Court was concerned about the constitutionality of allowing federal sentencing judges to make findings about facts underlying prior convictions (as opposed to the fact of a prior conviction) in light of the *Jones v. United States*[7]—*Apprendi v. New Jersey*[8] decisions.

While a majority of the Court defended its rule as necessary to avoid a result that might otherwise be unconstitutional under *Apprendi*, the dissent argued that the holding extended the rule "into new territory" that *Apprendi* and succeeding cases had expressly and consistently disclaimed[9] (the "fact of a prior conviction").[10]

According to the dissent, the Court instructed federal courts "to ignore all but the narrowest evidence" regarding a defendant's prior guilty pleas under ACCA, which mandates a 15-year minimum sentence where the defendant has three prior convictions for a "violent felony." The statute's definition of violent felony and the Court's previous interpretation of its terms left the problem of how to determine whether a defendant's past conviction qualified as a predicate for the purpose of imposing a mandatory minimum sentence.

Justice Clarence Thomas went farther, declaring that the prior-conviction exception "has been eroded by this Court's subsequent Sixth Amendment jurisprudence" and that accepting the government's argument in *Shepard* would "give rise to constitutional error."[11]

As the Court explained in *Booker*, *Apprendi* and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." In Justice David Souter's words in *Shepard*, "the concern underlying *Jones* and *Apprendi*" is that "the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence."

Almendarez-Torres provides an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. Justice Souter's opinion in *Shepard* found that, "[w]hile the disputed fact [in *Shepard*] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute."

Money Laundering

In *Whitfield v. United States*,[12] issued the same day as *Booker*, Justice Sandra Day O'Connor, writing for a unanimous court, held that

conspiracy to commit money laundering under 18 USC §1956(h) does not require proof of an overt act in furtherance of the conspiracy. Affirming a ruling by the U.S. Court of Appeals for the Eleventh Circuit, the Court relied principally on its 1994 decision in *United States v. Shabani*,[13] where it found that, consistent with the common law, there was no need to prove an overt act to establish a conspiracy to commit drug crimes. The Court reasoned that because the language of 18 USC §1956(h) is "nearly identical" to that in the drug conspiracy statute, 18 USC §846, the money-laundering conspiracy statute should not require an overt act.

The defendants in *Whitfield* were convicted of conspiracy to launder money in violation of 18 USC §1956(h) after the district court denied their request to instruct the jury that the government was required to prove beyond a reasonable doubt that at least one of the co-conspirators had committed an overt act in furtherance of the money laundering conspiracy.

The Eleventh Circuit affirmed the convictions, relying on *Shabani* and holding that the jury instructions were proper because 18 USC §1956(h) does not require proof of an overt act. The Supreme Court granted certiorari to resolve a conflict among the circuits.

Justice O'Connor explained at the outset of the opinion that, as originally enacted in 1986, neither 18 USC §1956 nor 18 USC §1957—the money laundering statutes[14]—contained a conspiracy provision. Instead, the government at that time relied on the conspiracy statute—18 USC §371, which supercedes the common-law rule by expressly including an overt-act requirement to prosecute money laundering conspiracies. In 1992, Congress enacted §1956(h), which provides that "[a]ny person who conspires to commit any offense defined in [§1956] or §1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy," without any reference to an overt-act requirement.

Justice O'Connor observed that *Shabani* had distilled the governing rule for conspiracy statutes: if Congress chooses a text modeled on §371, it gets an overt-act requirement; by choosing a text modeled on the Sherman Act, 15 USC §1, (which, like the drug conspiracy statute, 21 USC §846, omits any express overt-act requirement), it dispenses with such a requirement. Thus, in *Whitfield*, the Court held that because §1956(h)'s text does not expressly make the commission of an overt act an element of the conspiracy offense, the government need not prove an overt act to obtain a conviction.

Wire Fraud

The meaning of "property" under the federal wire fraud statute was at issue in *Pasquantino v. United States*.[15] Justice Thomas, writing the 5-4 majority opinion for the court, which affirmed an en banc decision from the U.S. Court of Appeals for the Fourth Circuit, held that Canada's right to collect excise taxes on imported liquor was "property" within the meaning of the wire fraud statute and that the prosecution was not barred by the common-law revenue rule. The decision is notable for extending the reach of the wire fraud statute to cases where the victim is a foreign government—in this case Canada—or, in the words of Justice Ruth Bader Ginsburg in her dissent, for giving the wire fraud statute "exorbitant scope."

The defendants in *Pasquantino* were convicted of violating 18 USC §1343, the federal wire fraud statute, which prohibits using interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." Their convictions were based on a scheme to smuggle large quantities of liquor into the United States, thereby defrauding Canada of excise tax revenues relating to the sale and importation of liquor. Before trial and on appeal, the defendants made three arguments: (1) that the government lacked a sufficient interest in enforcing the revenue laws of Canada; (2) that their prosecution contravened the common-law revenue rule, which "generally barred courts from enforcing the tax laws of foreign sovereigns," because it required the court to take cognizance of Canadian revenue laws; and (3) that Canada's right to collect taxes was not "money or property" within the meaning of the wire fraud statute.

The U.S. Court of Appeals for the Fourth Circuit affirmed the convictions concluding that the common-law revenue rule, "rather than barring any recognition of foreign revenue law, simply allowed courts to refuse to enforce the tax judgments of foreign nations." The Supreme Court granted certiorari to resolve a conflict in the circuits over whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.

In holding that such a scheme does violate 18 USC §1343, the court distinguished *Cleveland v. United States*,[16] where the court held that state and municipal licenses do not qualify as "property" for purposes of the mail fraud statute. In *Cleveland*, the state's interest in an unissued video poker license was not "property" because the interest was purely regulatory and not economic. In *Pasquantino*, by contrast, Canada's entitlement to tax revenue was a "straightforward 'economic' interest."

As to the revenue rule, the court was "aware of no common-law revenue rule case as of 1952 [the year §1343 was enacted] that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes." While the majority opinion conceded that "this criminal prosecution 'enforces' Canadian revenue law in an attenuated sense," it was not in a sense that "clearly would contravene the revenue rule." The court further noted that its interpretation of the wire fraud statute would not give it extraterritorial effect, as Justice Ginsburg claimed in her dissent.

Pasquantino's interpretation of the wire fraud statute raises the specter of increased investigations and prosecutions of multinational corporations and individuals whose phone conversations or e-mails pass through United States wires.

Conclusion

There was no discernable pattern among the Court's decisions in cases with implications in white-collar matters. Predictions as to the future will have to await the confirmation of a new Justice and an assessment of the Court's jurisprudence in a post-O'Connor era.

1. 125 SCt. 2129 (2005).
2. 125 SCt. 738 (2005).
3. 542 US 296 (2004).
4. For more on the *Andersen* opinion, see Elkan Abramowitz & Barry A. Bohrer, "The 'Andersen' Decision and Its Effects on 18 USC §1519 and Attorneys," NYLJ, July 5, 2005. For additional discussion of *Booker* and particularly its effects in the Second Circuit, see Robert G. Morvillo & Robert J. Anello, "Post-*Booker* Sentencing of White Collar Defendants: Not What We Might Have Expected," NYLJ, Aug. 2, 2005.
5. These factors include (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the need for the sentence to reflect the seriousness of the offense, afford adequate deterrence, protect the public and provide the defendant with needed training and care; (3) the kinds of sentences available; (4) the guidelines range; (5) policy statements; (6) avoidance of sentencing disparities; and (7) restitution.
6. 125 SCt. 1254 (2005).
7. 526 US. 227 (1999).
8. 530 US. 466 (2000).
9. 125 SCt. at 1269.
10. *Blakely v. Washington*, 124 S. Ct. at 2536.
11. 125 S. Ct. at 1264.
12. 125 S. Ct. 687 (2005).
13. 513 U.S. 10 (1994).
14. Section 1956 penalizes the knowing and intentional transportation or transfer of monetary proceeds from specified unlawful activities. Section 1957 addresses transactions involving criminally derived property exceeding $10,000.
15. 125 SCt 1766 (2005). The authors analyzed the Fourth Circuit's en banc opinion in this column last year. See Elkan Abramowitz & Barry A. Bohrer, "The Meaning of 'Property' Under Federal Mail, Wire Fraud Statutes," NYLJ, March 2, 2004.
16. 531 U.S. 12 (2000).