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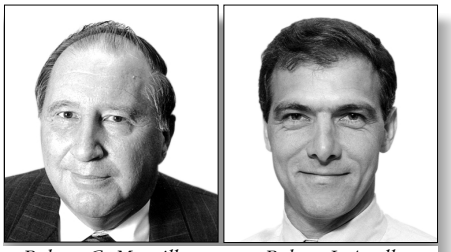
WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

Death of the Crafted Plea Allocution

ALMOST AS in defiance of the Confrontation Clause, federal prosecutors in the Southern District of New York developed the constitutionally dubious practice of crafting plea allocutions of some defendants so that their words later could be used unchallenged against co-defendants who choose to go to trial. This contrived method of developing "reliable" hearsay to assist in prosecutions had received unfortunate support from the courts of this Circuit. The U.S. Supreme Court's 9-0 decision in *Crawford v. Washington*[1] last month — applauded by criminal defense lawyers around the country — hopefully has sounded the death knell to such a dubious practice.

The crafted allocution practice developed as a result of case law that essentially equated a criminal defendant's Sixth Amendment right to confront witnesses with the rules on hearsay applicable in both civil and criminal cases. Under the practice, when a criminal defendant agreed to plead guilty, prosecutors intending to take advantage of the hearsay exception for statements against one's penal interest would craft a plea allocution that satisfied the needs of the case. Specifically, the government sculpted allocutions for the pleading defendants that contained facts implicating others, which prosecutors later could introduce at their trial.



Robert G. Morvillo *Robert J. Anello*

Controlling the Plea Allocution

At trial, the government offered the plea allocution asserting that the individual who already had pleaded guilty was "unavailable" to testify within the meaning of Federal Rule of Evidence 804(b) because, despite the guilty plea, they were not yet sentenced and therefore continued to have available their Fifth Amendment right against self-incrimination.

Although the Sixth Amendment's Confrontation Clause requires that a defendant be confronted with the witnesses against him, plea allocutions have been admitted as hearsay statements against penal interest under Federal Rule of Evidence 804(b)(3). Thus, by controlling the drafting of plea allocutions, the government has been permitted to introduce statements into evidence that say exactly what prosecutors want. Defendants, on the other hand, have been denied the opportunity to cross examine the declarant.

In at least one instance, an attorney representing the defendant proceeding to trial sought permission to cross examine the defendant entering the plea on his allocution but her application was rejected.

In sanctioning this practice, the U.S. Court of Appeals for the Second Circuit relied on the U.S. Supreme Court's analysis in a 1980 case, *Ohio v. Roberts*,[2] and a subsequent Supreme Court decision, *Lilly v. Virginia*.[3] In *Roberts*, the Supreme Court held that the Confrontation Clause does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability." According to the Supreme Court, such reliability is established if the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness."

In 1999, in *Lilly v. Virginia*, a plurality of the Supreme Court held that an accomplice's confession did not meet either of the two *Roberts* tests. Writing for four members of the Court, Justice Stevens concluded that "presumptive unreliability …attach[ed] to accomplices' confessions that shift or spread blame." Although the opinion noted that such unreliability could be rebutted, it also said that it was "highly unlikely" that a rebuttal would be successful

Robert G. Morvillo *and* **Robert J. Anello** *are members of Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C.* **Elizabeth J. Carroll**, *an attorney, assisted in the preparation of this article.*

"when the government is involved in the statements' production."

Second Circuit

Despite the Supreme Court's cautionary language in *Lilly* regarding government involvement in statements, the Second Circuit has issued four significant post-*Lilly* opinions approving the use of government-crafted plea allocutions: *United States v. Gallego*,[4] *United States v. Moskowitz*,[5] *United States v. Petrillo*[6] and *United States v. Dolah*.[7] These pre-*Crawford* decisions are prime examples of what the *Crawford* opinion calls "the unpardonable vice of the *Roberts* test: its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Indeed, these four opinions are cited in *Crawford* as examples of cases where "[c]ourts have invoked *Roberts* to admit other sorts of plainly testimonial statements despite the absence of any opportunity to cross-examine."

In *Gallego*, decided in 1999, the Second Circuit upheld the lower court's determination that the self-inculpatory portion of a plea allocution of an alleged co-conspirator possessed "sufficient guarantees of trustworthiness" to justify its admission at trial as a statement against penal interest. Among the lower court's findings of trustworthiness were that the plea undeniably subjected the alleged co-conspirator to the risk of a lengthy term of imprisonment, even if it was made in the hope of obtaining a more lenient sentence; that the plea allocution was given under oath; and that the allocution was corroborated by a co-defendant's previous plea of guilty with respect to the same incident. The Second Circuit also noted that the lower court had "limited the impact of those excerpts by instructing the jury to consider [the co-defendant's] allocution only as evidence of a conspiracy."

In *Moskowitz*, the Second Circuit found that the district court had not abused its discretion under Rule 804(b)(3) in admitting parts of an alleged co-conspirator's plea allocution "[g]iven that the allocution was clearly against [the alleged co-conspirator's] penal interest, that the only blame-shifting portion of the allocution was redacted, and that the court gave a limiting instruction that we must presume the jury followed." The court went on to conclude that the statement did not violate the Confrontation Clause because the plea allocution possessed "the same 'sufficient guarantees of trustworthiness' found sufficient in *Gallego*" to justify its admission at trial as a statement against penal interest.

In *Petrillo*, the Second Circuit again agreed with the district court, finding that the allocutions at issue "were accompanied by such 'particularized guarantees of trustworthiness' that cross examination would have added little to an evaluation of their reliability." The court distinguished *Lilly* by pointing out that the accomplices' statements in *Petrillo* were redacted so that they did not implicate the defendant.

Petrillo sets out the defense's argument as to why these types of guilty plea allocutions are inherently untrustworthy. The defendant, the court wrote, "point[ed] to the unequal bargaining power of the government and the co-defendants during plea negotiations." The defense had suggested in *Petrillo* that the two pleading defendants "had a substantial incentive to provide the [g]overnment with allocutions containing inculpatory information [about their co-defendant] given the fact that they simultaneously negotiated pleas to charges in the present indictment together with pleas to charges for securities fraud under a separate indictment." The court conceded that "the potential for coercion or misrepresentation during the negotiations over guilty plea allocutions may be present in theory" but concluded — citing *Gallego*, *Moskowitz* and the fact that the jury was "repeatedly instructed on the limited permissible use of this evidence" — that the district court had not abused its discretion in admitting the evidence.

In *Dolah v. United States*, decided in 2001, the Second Circuit faced a slightly different issue concerning admission of plea allocutions. There, the two defendants argued that non-immunized co-defendants were not truly "unavailable" to the government under Rule 804(b) where the government (1) had selectively immunized other co-defendants who testified "live" and (2) could have immunized the non-immunized, "unavailable" ones. The non-immunized co-defendants had pleaded guilty prior to trial and were awaiting sentencing. They had indicated an intention to assert their privilege against self-incrimination if called to testify and were not given immunity.

The defendants also made the Confrontation Clause argument that *Lilly* "should be understood to mean that hearsay cannot be admitted against a defendant whenever the [g]overnment has played a role in the production of the statement." In *Dolah*, the defendants argued, the government played such a role "because its decision not to confer immunity on the co-defendants maintained their unavailability, rendering their allocutions admissible."

Over the defendants' objections, the district court admitted redacted plea allocutions of the non-immunized co-defendants, under a limiting instruction, to prove the existence of a conspiracy and the role of the non-testifying defendants. The defendants were found guilty on all counts.

The Second Circuit held that, "as a general matter, non-testifying witnesses who invoke the privilege against self-incrimination remain unavailable to the Government, despite its authority to confer immunity on them," and that the government had not engaged in "wrongdoing" within the meaning of Rule 804(a).

The court noted that the defendants had suggested on appeal that "a prosecutor has some opportunity to manipulate co-defendants' sentencing dates to make

sure that the risk of self-incrimination at sentencing remains at the time of another defendant's trial," but found "nothing in the record to indicate such tactics in this case."

As to the Confrontation Clause argument, the court found that "[o]ur Circuit has not read *Lilly* so broadly," and that the allocutions admitted in *Dolah* were "as reliable as those accepted in *Petrillo, Moskowitz*, and *Gallego*."

Crawford should put an end to this unseemly practice. In *Crawford* the Supreme Court expressly overruled *Roberts* and its progeny by holding that out-of-court "testimonial" statements by witnesses are barred under the Confrontation Clause, unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine them, regardless of whether courts deem such statements reliable. The Supreme Court chose not to "spell out a comprehensive definition of 'testimonial,' " but it did refer to plea allocutions as "plainly testimonial statements."

The *Crawford* facts were as follows. The defendant was charged with assault and attempted murder. At trial, he claimed he had stabbed the victim in self-defense. His wife did not testify because of the state marital privilege. Under Washington state law, however, that privilege does not extend to out-of-court statements admissible under a hearsay exception. Accordingly, the state attempted to introduce a recorded statement that the defendant's wife made to the police during interrogation as evidence that the stabbing was not in self-defense, invoking the hearsay exception for statements against penal interest. The defendant argued that admitting the evidence would violate his Sixth Amendment right to be confronted with the witnesses against him.

The trial court admitted the statement because it found the statement bore "particularized guarantees of trustworthiness." The Washington State Supreme Court upheld the conviction, deeming the statement reliable because it was virtually identical to the defendant's own statement to the police, which also was ambiguous as to the timing of the stabbing.

Justice Antonin Scalia's opinion for a unanimous Supreme Court[8] in *Crawford* covers the historical background of the Confrontation Clause in some depth before turning to the merits. The history, the Court found, 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." Thus, the Court rejected the view that the Clause applies only to in-court testimony and concluded that testimonial hearsay is the Clause's "primary object." The Court also pointed out that not all hearsay implicates the Sixth Amendment's core concerns.

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." Historical sources, according to the Court, suggest that a prior opportunity to cross-examine was a necessary condition for admissibility of testimonial statements.

After finding that Supreme Court cases, at least in their results (even *Roberts*), have been consistent with these two historical principles, the Court noted how the rationales of some of those cases (*Roberts* in particular) had led to an untenable situation: under the *Roberts* test, a jury is allowed "to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability." Or, as the Court concluded even more plainly: "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

The Court then turned its attention to showing, through specific case citations, how the "general reliability exception" perpetuated by *Roberts* and lower federal and state courts following *Roberts*, is "so unpredictable that it fails to provide meaningful protection from even core confrontation violations." Among the cases it cited were *Gallego, Moskowitz, Petrillo* and *Dolah*.

Conclusion

The implications of *Crawford* in the Second Circuit — and around the country — will be far-reaching. Though defendants had made convincing arguments, in cases like *Dolah* and *Petrillo*, that the government had an unfair advantage in its ability to present a co-conspirator's testimony in the form of a plea allocution it often had a hand in drafting, without the burden of any cross-examination, the Second Circuit felt differently. Although federal prosecutors no doubt will attempt to find ways around *Crawford*, the Supreme Court's reasoning seems designed to thwart such efforts.

1. No 02-9410, 2004 WL 413301 (Mar. 8, 2004).
2. 448 US. 56 (1980).
3. 527 US. 116 (1999) (plurality opinion).
4. 191 F3d 156 (2d Cir. 1999), cert. denied, 528 U.S. 1127 (2000).
5. 215 F3d 265 (2d Cir.), cert. denied, 531 U.S. 1014 (2000).
6 237 F3d 119 (2d Cir. 2000).
7 245 F3d 98 (2d Cir. 2001).
8 Although the decision was 9-0, Chief Justice Rehnquist filed a concurring opinion, in which Justice O'Connor joined Justice Rehnquist disagreed with the Court's decision to overrule *Roberts*. He lamented the Court's decision not to "spell out a comprehensive definition of 'testimonial' " for "the thousands of federal prosecutors and the tens of thousands of state prosecutors [who] need answers as to what beyond the specific kinds of 'testimony' the Court lists …is covered by the new rule."

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