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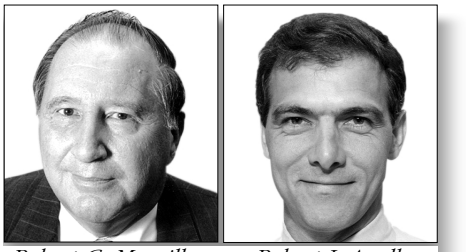
WHITE-COLLAR CRIME

BY ROBERT G. MORVILLO AND ROBERT J. ANELLO

A Few Steps Toward Fairness

In a system where a 38-year-old mid-level executive — not a CEO or CFO — simply, a "director of tax planning" — is sentenced to more than 24 years in prison for accounting fraud,[1] being able to report some positive news for white-collar defense practitioners is refreshing. Whether or not a spate of recent decisions on a variety of subjects by a number of courts including the Supreme Court and the U.S. Court of Appeals for the Second Circuit may signal a swinging of the pendulum, these opinions will affect the way with which white collar cases are dealt through all phases of the process including negotiations, indictments, evidentiary rulings, and, of course, sentencing. The Supreme Court in *Crawford v. Washington*,[2] which resuscitated the Confrontation Clause, and in its much-discussed sentencing guideline opinion in *Blakely v. Washington*,[3] and the Second Circuit in a number of recent opinions, show an overdue willingness to address government overreaching and erosion of defendants' rights, which Congress has failed to address and even has encouraged. Reaction to *Blakely* has been the focus of much of our attention in recent weeks. In lower federal courts, many judges have declared the U.S. Sentencing Guidelines unconstitutional or at the very least have found that upward enhancements should not apply. The ink is not dry on most of those opinions. Because the definitive decision is yet to be handed down by the Supreme Court, no certainty exists with respect to the application of *Blakely* to the guidelines. On the other hand, the Second Circuit recently has utilized several opportunities to emphasize the need for lower courts to scrutinize prosecutions to protect various of defendants' constitutional trial rights.



Robert G. Morvillo *Robert J. Anello*

Recent Second Circuit Opinions

In *United States v. Geibel*,[4] [where one of the authors represented Geibel on appeal], the Court of Appeals vacated the convictions of three defendants on approximately eighty insider trading counts due to improper venue and renewed its view that courts should scrutinize conspiracy charges with an eye to eliminating unfairness from prosecutors charging multiple conspiracies as one in order to pile on evidence against more remote participants. In *Geibel*, three Kentuckians were convicted in New York of numerous counts of conspiracy, insider trading, and commercial bribery. On appeal they argued, among other things, that the indictment charged multiple conspiracies and that venue in the Southern District of New York was improper due to the defendants' limited contacts with New York. The court held, as it had in *United States v. McDermott*,[5] that prosecutors wrongly had charged a series of separate insider trading schemes as one conspiracy. The Second Circuit, however, determined that the defendants in *Geibel* were not prejudiced by the improper variance. The Court then went on to analyze the government's choice of venue and found that although venue was proper for the conspiracy count, "[f]or the majority of the insider trading counts, defendants' contacts with the [Southern District of New York] are insufficient to establish venue" and that "the government submit[ted] no evidence showing that defendants directly contacted New York when they engaged in insider trading."

The court made its finding despite the fact that the government had alleged a number of contacts with New York, including the misappropriation of confidential information in New York (by a person the court found not to be a co-conspirator); the fact that the defendants' trades were the result of communications from the originating tipper in New York; defendants' contributions to cash payments that were mailed to the originating tipper in New

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York; and the execution of a few trades through the American Stock Exchange in New York. The American Stock Exchange contacts were the only ones the Court found persuasive. With regard to the majority of option trades which occurred through a Kentucky brokerage and which were executed over Chicago's Board of Exchange, the court held venue to be lacking. "To hold otherwise," the court wrote, " 'would be to in effect grant the Southern District of New York carte blanche on venue in virtually all insider trading cases.' "

In the two weeks following its decision in *Geibel,* the court reversed or vacated convictions in three additional cases. In the first, *United States v. Tin Yat Chin*,[6] the defendant was convicted of impersonating a federal employee and of tax evasion. The court found that the District Court's exclusion of customer receipts of credit card transactions proffered by the defendant to prove his alibi defense was error and vacated his conviction. Before trial, the government in *Tin Yat Chin* had alleged that the defendant had traveled in China under a pseudonym. The defendant responded with an alibi notice and moved to admit into evidence copies of credit card receipts showing that he was in Queens, New York at the time government witnesses would testify that he was in China. (The Second Circuit made a point of noting that the receipts were produced by the defendant's wife while the defendant "was detained in a federal correctional facility pending trial.") The District Court excluded the receipts as unauthenticated under Federal Rule of Evidence 901.

On appeal, the government conceded that compelling circumstantial evidence existed that the receipts were generated at the times and places designated on them. Thus, the authenticity dispute was narrowed to whether the defendant himself signed the receipts at the times and places indicated. The Court of Appeals found that, "though there could be questions about the ultimate reliability of the receipts as proof of [the] alibi," the District Court had applied "an unreasonably high standard for their authentication." Once the Second Circuit found that the receipts could have been authenticated, it noted that both "the Government and the district court [had] all but conceded that, had the records been authenticated, they would have been admissible as non-hearsay."

One week later, in *United States v. Lopez*,[7] the Court of Appeals reversed an obstruction of justice by murder conviction due to the fact that the obstruction involved only a local and not a federal investigation. Calling cases involving reversals on that basis "rare," the Court nevertheless reversed, insisting that "there must be evidence — not merely argument …that the victim plausibly might have turned to federal officials."

In *United States v. Ansaldi*,[8] the Second Circuit called the government to task. There, where the defendants had been convicted of money laundering and narcotics violations, the Court of Appeals sua sponte raised a double jeopardy issue based on multiplicitous counts, and the government conceded that the two counts were in fact multiplicitous and asked for the relevant convictions to be vacated. The court, noting that "[o]rdinarily …the district court should vacate one of the convictions," did so itself because of "potential problems" with the counts at issue. "In particular," the court expressed concern about the proof stating, "there is some question whether the government proved" that the defendants actually knew their conduct was illegal.

In a fourth case, *United States v. Williams*,[9] the Second Circuit found that the defendant — convicted of money laundering, narcotics, and firearms violations and of engaging in a continuing criminal enterprise — had pretrial legal representation that "was impaired by an actual conflict of interest." The result of this conflict — which the government conceded was that the defendant was denied the opportunity to enter into a cooperation or other plea agreement, in violation of his Sixth Amendment right to counsel. Although, as the court noted, "a defendant does not have a right to a plea agreement," and although the conflict, with a pretrial attorney, did not affect the defendant's trial, the court held that the defendant was "entitled to be resentenced 'to the terms [he] would have received had he been given proper legal advice.' " Noting that this would be a "difficult task," the Second Circuit ordered the District Court to "gather any evidence needed to reconstruct the likely result that [the defendant] would have obtained had he not had conflicted counsel."

Guidelines Confusion

Lower federal courts, legal commentators and the mainstream press have used a lot of ink with regard to the Sentencing Guidelines since *Blakely* was decided just a few weeks ago. In analyzing Washington State's version of the Guidelines, the *Blakely* court held that any factor that increases a criminal sentence above the maximum sentence a judge may impose in the absence of such factors, except for prior convictions, must be admitted by the defendant as part of his or her plea or proved to a jury beyond a reasonable doubt. The beneficial impact of *Blakely* already is being felt by many federal criminal defendants. The state of flux in the lower courts concerning the application of *Blakely* to the guidelines, and the Second Circuit's recent certification of questions to the Supreme Court to clarify its impact,[10] however, suggests that any definitive conclusions as to *Blakely's* ultimate impact on the U.S. Sentencing Guidelines is premature.

Of the slew of opinions concerning the guidelines issued during the past

few weeks, however, a few stand out-including one pre-*Blakely* decision. In a 177-page, law review-style opinion in *United States v. Green*,[11] issued just a few days before *Blakely*, District of Massachusetts Judge William G. Young declared the Sentencing Guidelines unconstitutional. Although much of the opinion is focused on *Apprendi v. New Jersey*,[12] the main thrust of Judge Young's argument is that prosecutors wield too much power: "[t]he startling, untold story," Judge Young writes, "is the extent to which the Department [of Justice] as a functional matter now can determine the sentence to be imposed upon those whom it accuses of crimes." He laments the practice of charge bargaining and accuses prosecutors of fact bargaining — i.e., lying about evidence, typically drugs or guns, in order to induce a guilty plea — a practice Judge Young calls "flat-out illegal." After considering jettisoning the guidelines or using sentencing juries, Judge Young announced that the best route would be to "*Apprendi*-ize" the guidelines and (foreshadowing *Blakely)* "require proof to a jury beyond a reasonable doubt of any fact other than a prior conviction that increases the maximum sentence beyond that in the offense of conviction box."

Judge Paul G. Cassell of the District of Utah provided the first extended judicial analysis of *Blakely,* ruling just a few days later in *United States v. Croxford*,[13] that the case rendered the guidelines unconstitutional. Since that time, several circuits have opined on *Blakely*, resulting in a split in the circuits as to the state of the guidelines post-*Blakely*.[14]

" 'Blakely' Developments"

The Second Circuit has chosen a different route. It certified three questions to the Supreme Court, in hopes of getting an answer to the general question of "whether the *Blakely* decision applies to the federal Sentencing Guidelines." In *United States v. Penaranda*,[15] the Second Circuit sitting in banc asked the Supreme Court to consider specifically (1) "*Blakely*'s applicability to judicial fact-finding that results in an upward adjustment under the federal Sentencing Guidelines" and (2) "two narrower formulations of that question pertaining specifically to the facts of these cases."

Meanwhile, judges in the Eastern and Southern Districts have been busy interpreting *Blakely* for themselves. Judge Colleen McMahon's opinion in *United States v. Einstman*[16] stands out among the many decisions issued. Judge McMahon declared the guidelines unconstitutional in a strongly-worded opinion in which she adopted the reasoning of Judge Cassell in *Croxford* and of the U.S. Court of Appeals for the Seventh Circuit in *United States v. Booker*,[17] the case in which Judge Posner found that "*Blakely* dooms the guidelines insofar as they require that sentences be based on facts found by a judge." Judge McMahon also makes forceful arguments on behalf of the "countless defendants" whose sentences are at issue after *Blakely*. Judge McMahon emphasized that her concern was not simply with the administrative and logistical costs at stake. Rather her focus was on "real people" (a term she employs three times in one paragraph) with "real constitutional rights" who are affected by a "seismic pronouncement like *Blakely*," and "who may not have an opportunity to assert latterly-found Sixth Amendment rights" because of the lack of retroactivity if a conviction is final. Though Judge McMahon did not announce the sentence she would impose in the opinion, in a separate case she reportedly sentenced a defendant with a plea agreement to 15 months instead of the negotiated 37 months.

'Crawford v. Washington'

With all of the attention swirling around *Blakely*, it is important not to overlook the impact of *Crawford v. Washington*, another watershed Supreme Court opinion that was the subject of a separate article. That 9-0 decision in March held 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. *Crawford's* reasoning has required prosecutors to rethink a number of their trial practices in addition to the admission of plea allocations including routine matters such as the use of certifications, as opposed to live testimony, to qualify documents as admissible business records.

1. Jamie Olis, a Dynegy Inc. employee. His boss and another employee pleaded guilty to charges that promised to get them fewer than five years in prison.
2. 124 SCt 1354 (2004).
3. No. 02-1632, 2004 WL 1402697 (June 24, 2004).
4. 369 F3d 682 (2d Cir. 2004). One of the authors represented Geibel on appeal.
5. There were two relevant opinions in *United States v. McDermott:* 345 F3d 133 (2d Cir. 2001) and 277 F3d 240 (2d Cir 2002).
6. 371 F3d 31 (2d Cir 2004).
7. Nos. 02-1746(L), 02-1748(CON), 2004 WL 1260056 (2d Cir. June 9, 2004).
8. Nos. 03-1259L, 03-1273(CON), 2004 WL 1336235 (2d Cir. June 16, 2004).
9. No. 02-1643, 2004 WL 1276757 (2d Cir. June 10, 2004); No. 02-3388, 2004 WL 1636960 (8th Cir July 23, 2004); No. 02-30326, 2004 WL 1635808 (9th Cir. July 21, 2004).
10. See *United States v. Penaranda*, Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir July 12, 2004).
11. Nos. CR.A. 02-10054, 01-10469, 99-10066, 2004 WL 1381101 (D Mass. June 18, 2004).
12. 530 US 466 (2000).
13. Judge Cassell has issued three opinions in the *Croxford* case. No. 2:02-CR-00302- PGC. 2004 WL 1462111 (D. Utah June 29, 2004) (original opinion); 2004 WL 1521560 (D. Utah July 7, 2004) (revised opinion); 2004 WL 1551564 (D. Utah July 12, 2004) (opinion after additional government briefing).
14. See, e.g., *United States v. Booker*, No. 03-4225, 2004 WL 1535858 (7th Cir. July 9, 2004) (holding guidelines unconstitutional); *United States v. Pineiro*, No. 03-30437, 2004 WL 1543179 (5th Cir July 12, 2004) (holding guidelines remain constitutional).
15. Nos. 03-1055(L), 03-1062(L), 2004 WL 1551369 (2d Cir July 12, 2004).
16. No. 04 CR.97(CM), 2004 WL 1576622 (SDNY July 14, 2004).
17. No. 03-4225, 2004 WL 1535858 (7th Cir July 9, 2004).