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Federal Criminal Sentencing and Overview for Ohio New Lawyer Training

I. Crawford v. Washington, 541 U.S. 36 (2004)

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), dramatically changed the legal framework for analysis of out-of-court statements. If a statement is "testimonial," it cannot be admitted against a defendant at trial unless the government establishes both that the declarant is unavailable and the defendant had an adequate opportunity to cross-examine the declarant. If the statement is not testimonial, its admissibility is governed by the rules of evidence and the reliability requirements of due process.

In attempting to exclude the government's proffered statements, counsel must be sure to object on at least three separate grounds: 1) the evidence is testimonial and admission violates the Sixth Amendment right to confrontation, 2) the evidence is unreliable and therefore admission violates the Due Process Clause of the Fifth Amendment, and 3) the government has failed to establish that the evidence is admissible under the rules of evidence (hearsay, etc.). This paper addresses the Sixth Amendment implications of *Crawford*, as well as its applicability to rules of evidence governing prior statements.

Petitioner was tried for assault and attempted murder. The State sought to introduce a recorded statement that petitioner's wife Sylvia had made during police interrogation, as evidence that the stabbing was not in self-defense. Sylvia did not testify at trial because of Washington's marital privilege. Petitioner argued that admitting the evidence would violate his Sixth Amendment right to be "confronted with the witnesses against him." Under *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, that right does not bar admission of an unavailable witness's 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." *Id.*, at 66, 65 L. Ed. 2d 597, 100 S. Ct. 2531.

The trial court admitted the statement on the latter ground. The State Supreme Court upheld the conviction, deeming the statement reliable because it was nearly identical to, *i.e.*, interlocked with, petitioner's own statement to the police, in that both were ambiguous as to whether the victim had drawn a weapon before petitioner assaulted him.

The State's use of Sylvia's statement violated the Confrontation Clause because, where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation.

II. Apprendi vs. New Jersey, 530 U.S. 466 (2000)

The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. The Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, entitle a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.

Petitioner Apprendi fired several shots into the home of an African-American family and made a statement -- which he later retracted -- that he did not want the family in his neighborhood because of their race. He was charged under New Jersey law with, *inter alia*, second degree possession of a firearm for an unlawful purpose, which carries a prison term of 5 to 10 years. The count did not refer to the State's hate crime statute, which provides for an enhanced sentence if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia*, race. After Apprendi pleaded guilty, the prosecutor filed a motion to enhance the sentence. The court found by a preponderance of the evidence that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms count. In upholding the sentence, the appeals court rejected Apprendi's claim that the Due Process Clause requires that a bias finding be proved to a jury beyond a reasonable doubt.

III. United States vs. Booker, 543 U.S. 125 (2005)

Under the Federal Sentencing Guidelines, the sentence authorized by the jury verdict in respondent Booker's drug case was 210-to-262 months in prison. At the sentencing hearing, the judge found additional facts by a preponderance of the

evidence. Because these findings mandated a sentence between 360 months and life, the judge gave Booker a 30-year sentence instead of the 21-year, 10-month sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The Seventh Circuit held that this application of the Guidelines conflicted with the *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348, holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Relying on *Blakeley v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S Ct. 2531, the court held that the sentence violated the Sixth Amendment and instructed the District Court either to sentence Booker within the sentencing range supported by the jury's findings or to hold a separate sentencing hearing before a jury. In respondent Fanfan's case, the maximum sentence authorized by the jury verdict under the Guidelines was 78 months in prison. At the sentencing hearing, the District Judge found by a preponderance of the evidence additional facts authorizing a sentence in the 188-to-235-month range, which would have required him to impose a 15- or 16-year sentence instead of the 5 or 6 years authorized by the jury verdict alone. Relying on *Blakeley's* majority opinion, statements in its dissenting opinions, and the Solicitor General's brief in *Blakeley*, the judge concluded that he could not follow the Guidelines and imposed a sentence based solely upon the guilty verdict in the case. The Government filed a notice of appeal in the First Circuit and a petition for certiorari before judgment in this Court.

IV. Koon vs. United States, 518 U.S. 81 (1996)

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable Guideline range in an ordinary case, 18 U.S.C. § 3553(a), it does not eliminate all of the district court's traditional sentencing discretion. Rather, it allows a departure from the range if the court finds "there exists an aggravating or mitigating circumstance of a kind, to a degree, not adequately taken into consideration" by the Sentencing Commission in formulating the Guidelines, § 3553(b). The Commission states that it has formulated each Guideline to apply to a "heartland" of typical cases and that it did not "adequately . . . consider" atypical cases, 1995 USSG ch. 1, pt. A., intro. comment. 4(b). The Commission prohibits consideration of a few factors, and it provides guidance as to the factors that are likely to make a case atypical by delineating certain of them as "encouraged" bases for departure and others as "discouraged" bases for departure.

Courts may depart on the basis of an encouraged factor if the applicable Guideline does not already take the factor into account. A court may depart on the basis of a discouraged factor, or an encouraged factor already taken into account, however, only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case. If the Guidelines do not mention a factor, the court must, after considering the structure and theory of relevant individual Guidelines and the Guidelines as a whole, decide whether the factor is sufficiently unusual to take the case out of the Guideline's heartland, bearing in mind the Commission's expectation that departures based on factors not mentioned in the Guidelines will be "highly infrequent."

Although § 3742 established a limited appellate review of sentencing decisions, § 3742(e)(4)'s direction to "give due deference to the district court's application of the guidelines to the facts" demonstrates that the Act was not intended to vest in appellate courts wide ranging authority over district court sentencing decisions. See, e. g., *Williams v. United States*, 503 U.S. 193, 205. The deference that is due depends on the nature of the question presented. A departure decision will in most cases be due substantial deference, for it embodies the sentencing court's traditional exercise of discretion. See *Mistretta v. United States*, 488 U.S. 361, 367. To determine if a departure is appropriate, the district court must make a refined assessment of the many facts that bear on the outcome, informed by its vantage point and day-to-day sentencing experience. Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases. District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially given that they see so many more Guidelines cases. Such considerations require adoption of the abuse-of-discretion standard of review, not *de novo* review. See, e. g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403. Pp. 96-100.

V. Proffers

A) Proffers of client;

B) Proffers of Attorney with or without client's presence; and

C.) Reverse Proffers

D) *Giglio v. United States*, 405 U.S. 150 (1972), and the statutory requirements of the *Jencks Act* when a defendant requests disclosure of a prospective government witnesses' statement because it contains material favorable to

the accused or contains impeachment material. If a witness statement is impeachment material, it must be produced before trial.

E) If a defendant has been compelled to provide testimony and/or a statement, *Kastigar v. United States*, 406 U.S. 441 (1972), requires a hearing, sometimes known as a “*Kastigar* hearing,” at which the government must establish that its evidence is untainted by the compelled testimony or statement and comes from a source independent of the testimony or statement.

VI. Guns

18 U.S.C. § 924(c) – Operations ‘*Safe Streets*’ (Detroit & Oakland)
(mandatory minimum)

18 U.S.C. § 922(g) – Felon in possession (no mandatory minimum)