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Constitutional Sentencing Options

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Confrontation Clause Implications of Constitutional Sentencing Options

The Supreme Court's recent decisions regarding sentencing,¹ on one hand, and the Confrontation Clause,² on the other, have generated much discussion. Despite the vigorous litigation over and commentary regarding these issues, a possible relationship between them is uncertain and largely has been neglected thus far.³ Although the Supreme Court has not answered definitively whether a confrontation right ever applies at sentencing, several federal circuits have concluded that it does not.⁴ Courts have adhered to this result post-*Booker* and post-*Crawford*.⁵ One implication of the Supreme Court's recent sentencing and confrontation cases, however, is that whenever a factual issue must be decided in order to impose a particular sentence, then a confrontation right should exist as to that issue. And the reverse implication follows as well: A confrontation right does not apply to issues that are not necessary to sentences.

This article attempts to demonstrate these implications and, more generally, detail when the right should and should not apply at sentencing. Part I outlines the main rules and principles from the Court's decisions in these two areas; it then shows where and how the two issues intersect. Part II presents several examples of apparently permissible sentencing options and explains when a confrontation right should apply and when it should not. The examples reveal the potentially significant effect that a confrontation right could have on sentencing. It may exclude categories of hearsay statements that are frequently admitted against defendants at sentencing such as statements made in presentence reports by probation officers⁶ and testimony from officers summarizing statements made by out-of-court witnesses.⁷ One area where the right could become particularly significant is in capital sentencing where an "aggravating factor" must first be found before a defendant is eligible for the death penalty.⁸

I. The Intersection between *Crawford* and the Sentencing Decisions

Before turning to the Court's recent cases, it is first necessary to understand why courts do not extend the Confrontation Clause to sentencing. In *Williams v. New York*, prior to applying the Clause to the states,⁹ the Court considered a defendant's challenge to the use of informa-

tion reported as a part of a presentence investigation, which stated additional crimes the defendant had (allegedly) committed but for which he had not been convicted.¹⁰ The Court concluded that due process does not restrict the information a sentencing judge may consider and is not "a device for freezing the evidential procedure of sentencing in the mold of trial procedure." In addition, the Court explained that access to more information than would be available at trial is necessary in order to fashion more individualized sentences. Courts declining to extend a confrontation right to sentencing continue to cite *Williams*.¹¹

The above rationales for not extending the Confrontation Clause to sentencing rest upon two assumptions. First, trial and sentencing are different procedures that raise fundamentally different types of evidentiary demands and requirements. And second, the confrontation right is just a constitutionally required hearsay rule and thus no different from other evidence rules, which typically do not apply at sentencing.¹² The Court's recent sentencing decisions, from *Apprendi* to *Booker*, have vitiated the first assumption, and *Crawford* has explicitly rejected the second. Without these assumptions, the rationales for not extending the confrontation right no longer make sense, and, indeed, point in the opposite direction.

The Court's sentencing decisions have concluded that some factual issues decided during sentencing may, in effect, be leftover trial issues. The Court has created a functional test for delineating which sentencing issues may in essence be "elements" of the underlying offense, namely, those that require additional factual findings in order to impose a particular sentence. First, in *Apprendi*, the defendant was convicted of a crime with a statutory sentencing range of five to ten years, but he was then sentenced to twelve years (and eligible for a range of ten to twenty years) after the sentencing judge found by a preponderance of the evidence that the defendant's crime fell under a statutory definition of a "hate crime." The Court announced the now-familiar rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt." Next, in *Ring*, the Court concluded that under a state capital-sentencing scheme that required an "aggravating factor" to make a defendant death eligible, *Apprendi*



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mandated that the finding of this additional factor must be submitted to a jury and proven beyond a reasonable doubt.¹³ Finally, *Blakely* and *Booker* extended *Apprendi*'s rule to sentencing guidelines that specified fixed ranges, within the statutory maximum, based on additional findings.¹⁴ By contrast, in *Harris v. United States*, the Court concluded that mandatory minimum sentences, based on an additional factual finding (in this case, whether the defendant "brandished" a weapon), did not violate the *Apprendi* rule because the sentence was authorized even without the additional finding.¹⁵

All these cases stand for the proposition that any additional findings that increase a defendant's sentence beyond what state or federal law authorizes based solely on the jury's verdict are, in effect, "elements" that must be submitted to a jury and proven beyond a reasonable doubt. More generally, they suggest that any factual issue that must be decided in order to impose a sentence is, despite its label, a trial issue. Thus, even a "mitigating factor" that must be found to be absent before imposing a sentence at the higher end of a sentencing range would likely qualify. This is so even if the defendant has the burden to prove that such a mitigating factor exists—rather than being the functional equivalent of an "element," it would be the functional equivalent of an "affirmative defense."¹⁶ It would function like an affirmative defense because, like affirmative defenses at trial, if proven by the defendant it would eliminate or lessen higher levels of statutorily authorized punishment. In any event, the important point for this discussion is the Court's recognition that, despite their labels and when they occur, some issues at "sentencing" function as as-yet-undecided "trial" issues.

Turning to confrontation, the Court's recent decision in *Crawford* separated the confrontation right from being nearly coextensive with hearsay rules, thus appearing to create a right at trial independent from other issues within evidence law.¹⁷ Prior to *Crawford*, the Court's test for assessing whether the introduction at trial against a defendant of out-of-court statements (from a declarant who did not testify at trial) turned on the perceived "reliability" of the statements.¹⁸ This test considered whether the statements fell within traditionally recognized ("firmly rooted") hearsay exceptions or were otherwise "trustworthy," which eventually applied to many of the current hearsay exceptions.¹⁹ Thus, a defendant's right to confront witnesses against him very often evaporated once the out-of-court statements were found to be admissible hearsay. *Crawford*, however, explained that the hearsay rules were both under- and over-inclusive in protecting the confrontation right. Rather, the Court stated, the Confrontation Clause applies only to a subset of hearsay statements, but it does so categorically. It applies only to "testimonial" statements, and it precludes their introduction at trial unless the declarant testifies or was subject to cross-examination by the defendant—regardless of whether they otherwise fall within a particular hearsay exception. Although the Court did not define "testimonial," it did specify that it applies

primarily to ex parte statements made to and elicited by the government such as formal statements or those made during interrogation.²⁰ Even a narrow definition of "testimonial" may prohibit many out-of-court statements introduced at sentencing, most obviously, information in presentence reports by probation officers or hearsay statements contained in police reports or officer testimony.

The implications for a confrontation right at sentencing should now be evident. Because some sentencing issues really are "elements" or trial issues, and because the Confrontation Clause provides a constitutionally mandated right independent from extant evidence rules, the confrontation right should apply to any sentencing issues that function as "elements" or trial issues. Unlike other sentencing issues, factual findings necessary for a particular sentence arise because of a legislative decision making those findings function like other issues of operative substantive law, similar to those adjudicated at trial. To deny the right with regard to these sentencing issues is, in effect, to deny a defendant's constitutional right for part of the offense for which he is convicted. Everyone agrees the right applies at trial; therefore, it should also apply to those sentencing issues that function as trial issues. This is not to suggest that other evidence rules should apply at sentencing as well, nor is it a counterargument that, because other evidence rules do not apply, the confrontation right should not either. Evidence rules in general are matters of legislative or judicial discretion, and the Court has made clear that such discretion may be exercised to the extent that it does not violate constitutional limits.²¹ Hence, it is irrelevant, and not inconsistent, to conclude that the Confrontation Clause should apply at sentencing because it is a constitutionally mandated requirement, while other evidence rules (such as those involving hearsay, character, and impeachment) may not apply.

II. Illustrating the Scope of Confrontation at Sentencing

This section further explicates the scope of the proposed confrontation right at sentencing by presenting several examples of constitutionally permissible sentencing options to explain when the right would and would not apply.

Two examples of where the Confrontation Clause would apply would be to facts that raise a sentence beyond the statutory maximum (as in *Apprendi*) or to a higher sentencing guideline range within the statutory maximum for the crime (as in *Blakely* or *Booker*).

Example 1: The statutory maximum for crime X is five to ten years, but if fact Y is also found, then the sentencing range increases to ten to fifteen years. Fact Y must be submitted to a jury and proven beyond a reasonable doubt. The Confrontation Clause would thus apply with regard to fact Y and the government would be precluded from using any out-of-court "testimonial" statements to prove Y unless the declarant testifies or the defendant had a prior opportunity to cross-examine the declarant.

Example 2: The statutory maximum for crime X is five to ten years, but a mandatory guideline scheme specifies that a defendant should receive five years unless he has committed any uncharged “relevant conduct,” in which case he should receive ten years. The issue of “relevant conduct” would need to be submitted to a jury and proven beyond a reasonable doubt. Therefore, the Confrontation Clause would apply to the government’s proof of the relevant conduct.

In these examples, as in the Court’s sentencing cases, a crucial component is that the law does not authorize the higher sentence without the additional findings. Thus, if the sentencing judges had discretion to impose the higher sentences even without the findings, then the findings are not necessary “elements” of the offense and hence a confrontation right would not apply. Likewise, the right would not apply to facts necessary to establish minimum sentences so long as the sentence is one that is authorized even without the particular findings.

As with the test for what counts as an element, however, the Court should also take a functional approach as to whether guideline ranges are mandatory or discretionary, rather than relying on simple labels.

Example 3: This is the same as Example 2 above, but the guideline range is “advisory,” not “mandatory.” If courts that deviate from the nonmandatory guidelines are routinely reversed for not finding “relevant conduct” before imposing ten-year sentences, then the findings may in effect be functioning as leftover trial issues and hence a confrontation right should apply when the government attempts to prove relevant conduct to justify a higher sentence. This scenario is a possible consequence of Justice Breyer’s opinion in *Booker* declaring the guidelines nonmandatory but making sentencing decisions subject to appellate review for “reasonableness.”²²

Example 4: The statutory maximum for crime X is five to ten years. The judge must impose a ten-year sentence unless the defendant can prove a “mitigating factor” by a preponderance of the evidence, in which case the sentence must be five years. The judge may not impose a ten-year sentence until after concluding that the defendant has proven no mitigating factors. Assuming the following scenario is constitutional (as it appears to be under *Apprendi-Booker*), and even though the defendant has the burden, a confrontation right should still apply to the issue of mitigating factors. Even though the issue is not functioning as an “element,” it is functioning as a leftover trial issue (namely, an affirmative defense). The judge could not impose a sentence of ten years based solely on the jury’s verdict; the judge would first have to find that no mitigating factor had been proven. Because the issue is functioning like an affirmative defense, then, as would be the case with this issue at trial, a confrontation right would apply. Therefore, the government would be precluded from offering “testimonial” statements to rebut the defendant on this issue.²³

The above considerations apply with particular force in the death-penalty context because additional findings are

required. The Supreme Court has invalidated “mandatory” death penalties,²⁴ and, in order to comply with the Eighth Amendment,²⁵ capital sentencing at both federal and state levels mandates proof of “aggravating” and “mitigating” factors in considering whether a defendant is eligible for the death penalty.²⁶

Example 5: Suppose a jurisdiction authorizes the death penalty only after a jury has found at least one aggravating factor and may do so only in the absence of proven mitigating factors or if aggravating factors “sufficiently outweigh” mitigating factors.²⁷ Because these aggravating and mitigating factors function as leftover trial issues (i.e., elements and affirmative defenses, respectively), the Confrontation Clause should apply to their proof. Therefore, the government would be precluded from offering “testimonial” statements to prove aggravating factors or to rebut mitigating factors—regardless of how the relevant statutes structure other evidence rules or issues.²⁸

III. Conclusion

The Supreme Court’s recent recognition that some sentencing issues function as trial issues, on one hand, and that a confrontation right exists independent from other evidentiary rules, on the other, implies that the Confrontation Clause should apply to those sentencing issues that function as trial issues. This article has attempted to draw attention to the largely unnoticed relationship between these lines of cases and to specify the contours of that relationship.

Notes

My thanks to Joseph Colquitt for helpful comments.

- ¹ *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
- ² *Crawford v. Washington*, 541 U.S. 124 (2004).
- ³ For a notable exception, see John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005) (arguing that all Sixth Amendment trial rights should apply at capital-sentencing hearings). For pre-*Crawford* commentary suggesting a confrontation right at sentencing, see Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1481-82 (2002); Adam Thurschwell, *After Ring*, 15 FED. SENT. REP. 97, 102 (2002); Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the “Elements of the Sentence,”* 35 WM. & MARY L. REV. 147 (1993); Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880 (1992).
- ⁴ See, e.g., *United States v. Rodriguez*, 336 F.3d 67, 71 (1st Cir. 2003); *United States v. Navarro*, 169 F.3d 228, 236 (5th Cir. 1999); *United States v. Francis*, 39 F.3d 803, 810 (7th Cir. 1994); *United States v. Petty*, 982 F.2d 1365, 1369-70 (9th Cir. 1993); *United States v. Silverman*, 976 F.2d 1502 (6th Cir. 1992); *United States v. Wise*, 976 F.2d 393, 401 (8th Cir. 1992).
- ⁵ See *United States v. Luciano*, 414 F.3d 174 (1st Cir. 2005); *United States v. Martinez*, 413 F.3d 239 (2d Cir. 2005). But see *United States v. Jordan*, 357 F. Supp. 2d 889, 903 (E.D. Va. 2005) (applying the Confrontation Clause at sentencing).
- ⁶ Fed. R. Crim. P. 32 (in general probation officers must prepare a presentence investigation report prior to sentencing).

- ⁷ See, e.g., *Luciano*, 414 F.3d at 178 (sentencing court considered officer testimony and police report presenting assertions of a nontestifying declarant); *Martinez*, 413 F.3d at 240 (court “considered during sentencing several out-of-court statements that witnesses made to police”).
- ⁸ See 18 U.S.C. § 3593(c); *Ring*, 536 U.S. at 593.
- ⁹ See *Pointer v. Texas*, 380 U.S. 400 (1965) (applying the Confrontation Clause to the States).
- ¹⁰ 337 U.S. 241, 244 (1949).
- ¹¹ See, e.g., *Martinez*, 413 F.3d at 242-44; *Luciano*, 414 F.3d at 178-79.
- ¹² Fed. R. Evid. 1101(d)(3) provides that the federal rules of evidence do not apply at sentencing.
- ¹³ 536 U.S. at 609.
- ¹⁴ 542 U.S. at 301-08; 543 U.S. at 227-37.
- ¹⁵ 536 U.S. 545, 551, 560 (2002).
- ¹⁶ Although the burden would be on the defendant, taking the issue from the jury may still violate a Sixth Amendment right to a jury when the defendant has sufficient evidence from which a reasonable jury could find the defense satisfied. See *United States v. Bailey*, 444 U.S. 394, 416 (1980) (recognizing the jury’s traditional function in deciding factual issues relating to affirmative defenses).
- ¹⁷ 541 U.S. at 60.
- ¹⁸ *Ohio v. Roberts*, 448 U.S. 56 (1980).
- ¹⁹ *Id.* at 66; see also *Lilly v. Virginia*, 527 U.S. 116 (1999); *Bourjaily v. United States*, 483 U.S. 171 (1987).
- ²⁰ 541 U.S. at 68. The Court has granted cert. on two cases this term that may further help to define “testimonial” for purposes of confrontation. See *Washington v. Davis*, 111 P.3d 844 (Wash. 2005), cert. granted, 126 S. Ct. 547 (Oct. 31, 2005) (statements made during 911 call); *Indiana v. Hammond*, 829 N.E.2d 444 (Ind. 2005), cert. granted, 126 S. Ct. 552 (Oct. 31, 2005) (oral statements made to police).
- ²¹ See *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (“state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.”)
- ²² 543 U.S. at 245-46, 259-65.
- ²³ If, in the above example, the sentencing judge could impose a ten-year sentence either after finding a mitigating factor or without considering them, then the right would not apply.
- ²⁴ See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).
- ²⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976).
- ²⁶ See, e.g., the National Death Penalty Act, 18 USC § 3593(c); *Ring*, 536 U.S. at 591-95.
- ²⁷ See, e.g., 18 USC § 3593(e).
- ²⁸ See, e.g., 18 USC § 3593(c) (“Information is admissible regardless of its admissibility under the rules governing admission of evidence at trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing issues, or misleading the jury.”) See also *United States v. Fell*, 360 F.3d 135, 143-46 (2d Cir. 2004) (concluding that the evidentiary standard in § 2593(c) is constitutional).