IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RANDY COLEMAN,	:	CIVIL ACTION
Petitioner,	:	NO. 04-4803
	:	
v.	:	CRIMINAL ACTION
	:	NO. 01-038
UNITED STATES OF AMERICA,	:	
Respondent.	:	

OPINION AND ORDER

Newcomer, S.J. July 5, 2005

Presently before the Court is Petitioner's Habeas Corpus Motion under 28 U.S.C. § 2255, attacking Petitioner's sentence on two grounds. First, Petitioner contends that admission of hearsay statements made by an unavailable declarant to a police officer violated the Sixth Amendment's Confrontation Clause as recently interpreted in Crawford v. Washington, 541 U.S. 36 (2004). Second, Petitioner contends that his sentence is unconstitutional in light of Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), and United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005). For the reasons stated below, Petitioner's Petition is denied. The Court's reasoning follows.

I. BACKGROUND

On April 6, 2000, Sergeant Nouman Shubbar entered an apartment building at 729 East Chelten Avenue with two backup officers in response to allegations that Avery Coleman, ("Avery"), was being beaten and held against her will by her boyfriend, Petitioner Randy Coleman. Avery's sister, Shawna, whom Shubbar described as "visibly upset, nervous, talking fast,

and . . . concerned," United States v. Coleman, No. 02-3105, 2003 U.S. App. LEXIS 11195, at *2 (3d Cir. June 3, 2003), had approached Shubbar in a nearby parking lot where he was sitting in his police car. Shawna told Shubbar that she had been to the apartment earlier that night, that the door to the apartment had been hanging open, that Petitioner's car had not been there, and that she had seen "a lot of blood" in the bedroom. Id. Shawna had left the apartment to search for Avery and recognized Petitioner's car in the lot upon her return. She pleaded with Shubbar to investigate the matter.

Once inside the building, the officers encountered Petitioner while they were climbing the stairs. Petitioner looked down the stairs, saw the officers, ran into the apartment, and then slammed the door shut. From outside the apartment Shubbar could hear "a female crying, a lot of footsteps, some kind of commotion, muffled voices, [and] yelling." Id. at *3. For three to five minutes, the officers knocked loudly and repeatedly yelled for Petitioner to open the door. Shubbar became increasingly concerned for the safety of the woman he had heard inside the apartment when the noise suddenly ceased. At that point, without a warrant, the officers kicked down the door of the apartment.

Inside the apartment, the officers found Avery on the couch, clutching her young son. She had bruises on her neck, was

visibly upset, “obviously afraid,” “crying,” “shaking,” and “almost hyperventilating.” Id. at *4. Avery told the officers that Petitioner had held her against her will, beat her up and had pointed a shotgun at her while threatening to kill her if she answered the door. She told the officers she wanted both Petitioner and the shotgun out of the apartment.

Avery led the officers to the shotgun, which was in the bedroom under the bed. While they were recovering the shotgun, the officers observed several ziplock bags that appeared to contain crack cocaine. The officers arrested Petitioner and obtained a search warrant, upon execution of which they recovered narcotics, packaging materials, and a scale. Following a jury trial, Petitioner was convicted of possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c); possession of a short-barreled shotgun in furtherance of a drug trafficking crime, in violation of the same; possession with intent to distribute more than five grams of cocaine base (crack cocaine), in violation of 21 U.S.C. § 841(a)(1); and possession of a firearm by a convicted felon, in violation 18 U.S.C. § 922(g)(1).

Avery was killed prior to Petitioner’s trial.[1] Avery’s statements to the police were admitted at trial as excited utterances. On appeal, among other things, Petitioner argued

[1]Avery’s death occurred while Petitioner was in custody and is apparently unrelated to this case.

that admission of Avery's statements violated his Sixth Amendment right to confrontation. Petitioner sought to have this Court apply a heightened reliability analysis; however, such analysis was unnecessary where the statement met the requirements of a firmly rooted exception to the hearsay rule. See White v. Illinois, 502 U.S. 346 (1992). Because Avery's statements qualified as excited utterances, both this Court and the Court of Appeals found no error in their admission.

The Supreme Court recently reinterpreted Sixth Amendment doctrine in Crawford v. Washington, 541 U.S. 36 (2004), "to reflect more accurately the original understanding of the [Confrontation] Clause." Id. at 60. In Crawford, the Court considered the admissibility of hearsay statements made to police during an interrogation. The Court had previously held that, so long as a statement bore adequate indicia of reliability, the Sixth Amendment did not bar its admission.[2] In Crawford, however, the Court refined its prior rulings and held that "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 69. The Court accordingly held "where *testimonial* evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-

[2]In Ohio v. Roberts, 448 U.S. 56 (1980), the Court held that evidence must either fall within a firmly rooted exception to the hearsay rule or bear particular guarantees of trustworthiness to be found adequately reliable.

examination." Id. at 68 (emphasis added).[3]

In another recent decision, the Supreme Court found the mandatory nature of the Federal Sentencing Guidelines to be unconstitutional when it applied Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004), to the Federal Sentencing Guidelines. See United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005). Under Apprendi, the Court held "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." Apprendi, 530

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[3]The Court further commented that states have continued flexibility in their development of hearsay law where *nontestimonial* hearsay is concerned. The Court, however, notably declined to define "testimonial". "At a minimum, [the term applies] to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." Crawford, 541 U.S. at 68.

Because this Court does not today reach the application of Crawford to the facts of this case, this Court will not address the testimonial nature of Avery's statements to the police. It is noted, however, that the nature of her statements (excited utterances) to the police presents a unique issue which courts have yet to consider in the wake of Crawford. In factually similar cases, the circuits are split regarding the testimonial nature of statements to authorities. The Third Circuit held in United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005), that unknowingly recorded statements made to a confidential informant were not testimonial, but that the informant's statements were. The court distinguished the two by examining the reasonable expectation of each speaker that their statement would be used in criminal prosecution.

The Sixth Circuit followed the work of Professor Richard Friedman when it held that where a reasonable person would anticipate the use of their statement in subsequent investigation and prosecution of the accused, the statement is testimonial. United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2005). The Sixth Circuit specifically noted and approved Professor Friedman's paradigm that "[a] statement made knowingly to authorities that describes criminal activity is almost always testimonial." Id. at 675.

Finally, the Ninth Circuit held that statements made to police by the victim of a crime during a prior investigation were *not* testimonial because "[she], not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home...." Leavitt v. Arave, 371 F.3d 663, 863-684 n.22 (9th Cir. 2005).

U.S. at 490. Blakely defined the statutory maximum discussed in Apprendi as the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Blakely, 542 U.S. at ___, 124 S.Ct. at 2537. Blakely thus found Washington State's sentencing scheme, which allowed for increased penalties based on facts other than those reflected in the jury verdict or admitted by the defendant, to violate the Sixth Amendment's guarantee to a trial by jury. See id. When considering the Federal Sentencing Guidelines in Booker, the Court followed its reasoning in Apprendi and Blakely, ultimately concluding that the Federal Sentencing Guidelines were unconstitutional and thus advisory, rather than mandatory. See Booker, 543 U.S. ___, 125 S.Ct. 738.

It is in light of Crawford that Petitioner now attacks the constitutionality of the admission of Avery's statements at his trial. He also challenges the constitutionality of his sentence on Blakely and Booker grounds.

II. STANDARD OF REVIEW

Petioner attacks his sentence under 28 U.S.C. § 2255. Where the court finds "a denial or infringement of the constitutional rights of the prisoner . . . the court shall vacate and set the judgment aside or grant a new trial or correct the sentence . . . ." 28 U.S.C. § 2255 (1996).

Because Petitioner contends his conviction and sentence are

unconstitutional in light of recent Supreme Court decisions, he must first show that the decisions apply retroactively on collateral attack. The proper framework for this inquiry is set forth in Teague v. Lane, 489 U.S. 288 (1989).

III. ANALYSIS

A. *Retroactivity of Crawford*

Crawford presents a new rule of evidence, which is barred from retroactive application to convictions finalized prior to its decision unless it satisfies one of two exceptions. Teague, considered the retroactivity of a Supreme Court decision to a habeas petition of a conviction decided under previous precedent. The Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. "A case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." Id, at 301. In finding a bar to retroactive application of new rules on collateral attack, the Court considered finality as an aim of the federal justice system, and noted that finality is a necessary element of the criminal law's deterrent effect. The Court specifically relied upon Justice Harlan's dissent in Desist v. United States, 394 U.S. 244 (1969), where he observed that "[in] order to perform this deterrence function, the . . . habeas court need only apply the constitutional standards that prevailed at

the time the original proceedings took place." Teague, 489 U.S. at 306 (quoting Desist, 394 U.S. at 263). The Court identified two exceptions to the general rule precluding retroactivity: (1) "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" Id. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)); and (2) where a watershed rule of criminal procedure is announced, it should also be applied retroactively. The second exception follows Justice Harlan's reasoning that decisions which "alter our understanding of the *bedrock procedural elements* [of the adjudicatory process] . . . must be found to vitiate the fairness of a particular conviction." Id. at 311 (quoting Mackey, 401 U.S. at 693-94) (emphasis in original). Here, Crawford announces a new rule of criminal procedure because it establishes a "clean break" from the line of precedent established by Ohio v. Roberts, 448 U.S. 56 (1980). See Brown v. Uphoff, 381 F.3d 1219, 1226 (10th Cir. 2004) (finding Crawford establishes a new rule); Mungo v. Duncan, 393 F.3d 327, 335 (2d Cir. 2004) (finding Crawford to establish a new rule of criminal procedure). Because Coleman's conviction is final, the Court must consider whether the rule in Crawford falls under one of the exceptions recognized by Teague.

"Crawford does not place types of [private] conduct outside of the criminal law-making power to punish." Bintz v. Bertrand,

No. 04-2682, 2005 U.S. App. LEXIS 5612, at *19 (7th Cir. Apr. 7, 2005). See Brown, 381 F.3d at 1226 (concluding that the first Teague exception does not apply to Crawford because Crawford does not place private conduct beyond the power of law-making authorities to proscribe). Crawford interpreted the Sixth Amendment to prescribe a new test for determining the admissibility of certain hearsay statements. Crawford's rule is a new procedural rule of evidence, *not* one affecting private, primary rights. The new rule thus fails to conform with the first exception to Teague's bar of retroactivity. The Court must therefore consider the second exception.

The rule announced in Crawford is not a watershed rule of criminal procedure. "All 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." Teague, 489 U.S. at 312 (quoting Desist, 394 at 262). The new rule must, however, be *absolutely* "central to an accurate determination of innocence or guilt." Teague, 489 U.S. at 313. The narrow exception for watershed rules functions to guarantee the accuracy of criminal convictions. Very few such exceptional elements of basic due process are likely to emerge because of the stringent requirements a watershed rule must satisfy. See Teague, 489 U.S. at 358. In Crawford, the Court expanded the implementation of pre-existing protections on fairness and accuracy in criminal

proceedings, namely the Confrontation Clause; no fundamentally new concepts were introduced. See Bintz, No. 04-2682, 2005 U.S. App. LEXIS 5612 at *20; Brown, 381 F.3d at 1226 (Crawford does not "alter our understanding of what constitutes basic due process," but merely sets out new standards for the admission of certain kinds of hearsay); Mungo, 393 F.3d at 336 (concluding that Crawford is not a watershed rule). Therefore, the rule announced in Crawford fails to qualify as a watershed rule of criminal procedure.

The rule of evidence announced in Crawford neither affects primary rights, nor does it qualify as a watershed rule. Having failed both Teague exceptions, it is evident that Crawford does not apply retroactively on collateral attack.

B. *Retroactivity of Booker*

The rule of United States v. Booker, 543 U.S. ___, 125 S.Ct. 738 (2005), holding the Federal Sentencing Guidelines unconstitutional and striking the provision of the Sentencing Reform Act making their application mandatory, is not retroactive on collateral attack. The Third Circuit specifically held in Lloyd v. United States, 407 F.3d 608 (3d Cir. 2005), that Booker does not apply retroactively to initial motions under 28 U.S.C. § 2255 where judgment was final as of January 12, 2005, the date Booker was issued. Here, Petitioner's conviction was affirmed by the Court of Appeals on June 25, 2003 and became final ninety

days later, at the expiration of the period provided under 28 U.S.C. § 2101(c) to apply for a writ of certiorari. See Clay v. United States, 537 U.S. 522, 525 (2003) (holding that judgment of conviction becomes final upon expiration of time allowed for certiorari review of the appellate court's affirmation of conviction). Therefore, because Petitioner's judgment was final prior to January 12, 2005, Booker cannot be applied retroactively on collateral review.

IV. CONCLUSION

For the reasons stated above, Petitioner's Petition attacking his conviction under Crawford and his sentence under Blakely and Booker is denied. An appropriate order follows.

/S Clarence C. Newcomer
United States District Judge

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O R D E R

AND NOW, this 5th day of July, 2005, upon consideration of Petitioner's Habeas Corpus Motion under 28 U.S.C. § 2255 (Doc. 76), the Government's Response, Petitioner's Reply to the Government's Response, the Government's Sur-Reply, and Petitioner's Letter Opposing the Government's Sur-Reply, it is hereby ORDERED that Petitioner's Motion is DENIED.

AND IT IS SO ORDERED.

/S Clarence C. Newcomer
United States District Judge