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What To Look For In White Collar Cases This High Court Term

By **Harry Sandick and Jacob Newman** (October 3, 2019, 3:09 PM EDT)

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Some of the most notable cases from the U.S. Supreme Court's October 2018 term were those that involved criminal law issues, such as Gamble v. United States,[1] in which the court by a vote of 7-2 (with strange bedfellows Justices Ruth Bader Ginsburg and Neil Gorsuch in dissent) upheld the "dual-sovereignty doctrine," and Flowers v. Mississippi,[2] in which Justice Brett Kavanaugh wrote for a seven-justice majority (with Justices Clarence Thomas and Gorsuch in dissent) to reverse a defendant's conviction based on discrimination in jury selection.

As these cases show, one of the reasons that the court's criminal law docket is fascinating is that it is an area where the traditional liberal-conservative fault lines sometimes fall by the wayside, and strange coalitions are formed.

This is perhaps even more true in cases involving white collar criminal law issues. For example, in Yates v. United States,[3] which limited the reach of the Sarbanes-Oxley Act's obstruction provision, the five votes to reverse the conviction came from Justice Ginsburg, who wrote the plurality opinion, Chief Justice John Roberts, and Justices Stephen Breyer, Sonia Sotomayor and Samuel Alito (in a concurrence). The dissenters were Justices Elena Kagan, Anthony Kennedy, Antonin Scalia and Thomas.

In this article, we look at a few of the cases in the upcoming Supreme Court term — October term 2019 — that may have a notable impact on white collar criminal defense practice. They involve such varied issues as criminal procedure, statutory interpretation, and a major public corruption case that was the subject of national media attention.

Kansas v. Glover: Can a police officer stop your car If he or she determines that the car's owner has a suspended license?

As we have seen in recent years, white collar cases increasingly turn on Fourth Amendment issues, such as whether a search warrant is valid or whether a wiretap was obtained based on probable cause.[4] This makes Kansas v. Glover, which involves a tough question of constitutional criminal procedure, a case with relevance to white collar criminal defense.

The appeal presents a set of stipulated facts that read like a question from a criminal procedure final

exam. While on patrol, a sheriff's deputy saw a pickup truck. There was nothing suspicious about the driver or the car, but the deputy ran the license plate number through a state database and determined that the owner of the truck had a revoked driver's license. On this basis alone, the deputy stopped the truck and determined that it was driven by its owner, who admitted that he had a suspended license. Arguing that the stop violated his Fourth Amendment rights, the defendant moved to suppress evidence obtained after the car stop.

The trial court granted the motion, but this decision was reversed on appeal. On further appeal to the Kansas Supreme Court, that court ruled in the defendant's favor, holding that an officer lacks reasonable suspicion to believe that the registered owner of a vehicle is the driver of the vehicle, absent some other evidence that the owner is the driver.

On appeal to the U.S. Supreme Court, the state of Kansas contends that the most logical, common-sense inference is that the owner of a car is most likely its driver and contends that this inference should be sufficient to justify a stop under the Fourth Amendment. In opposing the grant of certiorari, the defendant argued that the Kansas Supreme Court was correct that a bright-line rule permitting a stop in this case would effectively relieve the state of its burden of proving specific and articulable facts in support of the stop. The police could stop any car whose owner has some minor violation in the system, even if they did not know who was driving the car.

At first blush, it might seem that the decision here will have little real-world impact. In most cases, one would expect the police to be able to identify more facts in support of a car stop than a revoked license held by the car's owner. So why did the Supreme Court decide to add this case to its ever-contracting docket? One of the hardest questions facing law enforcement officers is often the application of the "probable cause" standard to new and unpredictable circumstances, both in white collar and street crime contexts. And this case may be a harbinger of things to come.

Imagine if a state set up license plate scanners at toll booths and then pulled over all cars that passed through the toll where the driver had a revoked license. The technology that would make such a system possible is available now (it is used in some states to collect tolls on highways and bridges) and would make this seemingly unlikely occurrence routine. Or transpose the question to a different context: Police are able to track the location of a person's cellphone. They have evidence linking the individual to a crime, but they have no other reason to suspect that there is evidence at their home or office. Does the presence of that person's phone in a particular place (akin to the driving of their car) establish probable cause to support a search warrant for their phone's location?

Often, the Supreme Court is hesitant to intervene in areas where technology is rapidly developing, but it is possible that the wording of this court's decision may set the tone for cases involving the Fourth Amendment and technology that are coming down the road. This case will be argued on Nov. 4.

Kelly v. United States: What are the limits of public corruption prosecutions?

This is the well-publicized "Bridge-gate" prosecution. As has been reported, it arises out of a politically motivated decision to shut down certain lanes on the George Washington Bridge in apparent retaliation for a local New Jersey mayor's decision to oppose Gov. Chris Christie's reelection bid. Two state officials were convicted of fraud on the theory that they had defrauded the Port Authority (which runs the bridge) of its property (tollbooth lanes, the cost of labor) by lying about the reason for the lane reallocation and using a traffic study to conceal their true political motives. The defendants argue that the only fraud was the concealment of political motives for an official act, while the government claims

that the defendants deprived the victim — the Port Authority — of actual property.

In their petitions for certiorari, the two state officials drew an analogy to recent honest services fraud cases like Skilling v. United States[5] and McDonnell v. United States,[6] in which the Supreme Court has reversed convictions and narrowed the reach of fraud law. Indeed, an amicus brief in support of certiorari was filed by McDonnell himself, labeling the decision of the U.S. Court of Appeals for the Third Circuit affirming the convictions as an "end-run" of prior precedent (including his own case).

In response, the government points out that this is not a case about intangible property — the Port Authority was deprived of money as a result of the defendants' misconduct — nor is it a case about punishing acts based on their underlying political motivation. Whatever the defendants' motive, the loss of property belonging to the Port Authority would have been the same.

Given the Supreme Court's decision to grant certiorari, it seems as if this case may lead to further limitation of the reach of prosecutors in public corruption cases. The court is right to guard against prosecutorial overreach and the charges in this case were novel (as was the underlying conduct). At the same time, public cynicism about corruption may grow if clear abuse of the public trust by politicians is continually put beyond the reach of the criminal law.

Holguin-Hernandez v. United States: Is an objection required in order to challenge a sentence's length?

This case presents a technical issue relating to the standard of review used when hearing sentencing appeals in all cases, including those involving convictions for white collar crime. Virtually every case ending with a conviction gives rise to a possible appeal challenging the substantive reasonableness — i.e., the general fairness — of the sentence imposed.

However, in most cases, defense counsel does not object after a sentence is pronounced, as the district court has already heard argument from counsel, assessed what type and length of sentence it believes is reasonable and then imposed that sentence. To require an objection at this point seems like an empty formality. However, in a case involving a sentence for a violation of supervised release, the U.S. Court of Appeals for the Fifth Circuit followed its long-standing rule and held that, where counsel failed to object at the point of sentencing, its review of substantive reasonableness was only for plain error. This rule is sui generis in the Fifth Circuit, while eight other circuits have no such requirement.

Although the government opposed the grant of certiorari, it did so largely because the court previously had denied cert. in many prior appeals challenging this practice and also because the standard of review was likely irrelevant to the outcome of the appeal. In its brief filed in opposition to cert., the government agreed with the defense that the Fifth Circuit's rule "incorrectly extends [Rule 51's] contemporaneous-objection requirement." When the defendant argues for one sentence and the district court imposes a different sentence, the defendant has already put the court on notice as to his objection to the length of the sentence. There should be no need for further objection. It is hard to imagine why the court granted cert. here unless a majority of the justices intend to reverse and do away with this unnecessary requirement.

Carpenter v. Murphy: Does criminal law apply to the Creek Nation?

Carpenter v. Murphy has been set for reargument. This case presents the question of whether the land within the boundaries of the Creek Nation remains an Indian reservation. These boundaries were set by

treaty in the 19th century. If the defendant is right, then approximately 50% of Oklahoma would fall within the Indian reservation's boundaries. Also, if the defendant is right, then all crimes committed by Native Americans in this territory would be crimes not susceptible to prosecution in Oklahoma state or federal courts. This means ruling for the defense could cause significant turmoil in Oklahoma.

At argument, counsel for Oklahoma focused on the fact that the convictions of 155 murderers, 113 rapists and 200 felons who committed crimes against children could be reversed if the defendant prevailed. The court was concerned enough about the issues to solicit supplemental briefing after argument, asking for submissions in December 2018 about whether there might be a way to rule for the Creek Nation without disturbing all of these convictions.

Although Justice Gorsuch's recusal raises the possibility of a 4-4 split, the court's decision to schedule this case for reargument this term (rather than allowing for a 4-4 affirmance), indicates that the justices believe that a majority disposition can be cobbled together in this case. It is also hard to imagine that the court would want to leave this important question unresolved until the composition of the court changes, and so perhaps some compromise decision can be reached. The nature and breadth of that majority remains to be seen.

Peithman v. United States: What are the limits of civil asset forfeiture between co-conspirators?

Finally, although the Supreme Court has not yet granted a writ of certiorari, a petition is pending in the case of Peithman v. United States.[8]. Peithman would be a notable addition to the court's docket and would resolve a significant ambiguity in the law of asset forfeiture. In the court's recent decision in Honeycutt v. United States,[8] the Supreme Court held that there is no joint and several liability for forfeiture among co-conspirators.

The court reasoned that joint and several liability — when combined with the substitute assets provision — would allow untainted property held by co-defendants to be forfeited. Honeycutt construed 21 U.S.C. Section 853, which governs forfeiture in drug prosecutions. Peithman asks whether Honeycutt's holding should apply with respect to the general forfeiture statute, 18 U.S.C. Section 981, which governs forfeiture in non-drug related crimes.

A circuit split currently exists on this issue, and, given the ubiquity of asset forfeiture litigation, this is a case that white collar practitioners should be eager to see decided. Whether or not cert. is granted in this case, it is hard to imagine the court's avoiding this question for much longer.

Conclusion

Although we will not know for certain until June 2020, the case that seems most likely to draw the attention of the white collar community and the public at large is Kelly. The "Bridge-gate" scandal drew national attention both because of the shocking nature of the misconduct alleged and because of its impact on national politics at a time when the governor of New Jersey was running for president. It also comes at a moment in which concern over public corruption is at its highest. We know that the McDonnell decision changed the outcome of several then-pending prosecutions and investigations and led some to ask if the Supreme Court "legalized" public corruption when it imposed an "official act" requirement.[9]

We will have to wait and see if the trend of public figures' avoiding criminal liability at the Supreme Court continues. Apart from Kelly, the Glover case also seems likely to have a far-reaching impact, as the

court will be asked to craft a rule of procedure that will apply in a variety of different law enforcement contexts. It is also possible that the term's biggest white collar case may be one in which cert. has not even been granted as of now, as the court grants cert. petitions even as late as January or February, with the goal of deciding the appeal before the end of the court's calendar in June.

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[1] Gamble v. United States, 139 S. Ct. 1960 (2019).

[2] Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

[3] Yates v. United States, 135 S. Ct. 1074 (2015).

[4] See United States v. Rajaratnam, 719 F.3d 139 (2d Cir. 2013) (affirming conviction despite challenge to legality of wiretap application); United States v. Wey, 256 F. Supp. 3d 355 (S.D.N.Y. 2017) (suppressing fruits of search warrant based on an invalid warrant).

[5] Skilling v. United States, 561 U.S. 358 (2010)

[6] McDonnell v. United States, 136 S. Ct. 2355 (2016).

[7] The decision below was United States v. Peithman, 917 F.3d 635 (8th Cir. 2019).

[8] Peithman v. United States, 137 S.Ct. 1626 (2017).

[9] See, e.g., Matt Ford, "Has The Supreme Court Legalized Public Corruption?", The Atlantic (Oct. 19, 2017), found at https://www.theatlantic.com/politics/archive/2017/10/menendez-mcdonnell-supreme-court/543354/ (last visited Oct. 2, 2019).