LJN LAW JOURNAL NEWSLETTERS

Business Crimes Bulletin®

An ALM Publication

Volume 27, Number 3 • November 2019

Supreme Court's October Term 2018 Contains Hints Of Things to Come

Part One of a Two-Part Article

By Harry Sandick and Tara Norris

In its recently ended October Term 2018, the U.S. Supreme Court decided several notable criminal law decisions. Although the Court refrained from reshaping criminal law in blockbuster opinions, the criminal cases from this term will have a meaningful impact on white-collar practitioners' work and, importantly, offer clues regarding the movement of the criminal law in subsequent terms. In this two-part article, we review several of the key decisions and consider their implications, both for practitioners in this area and for Court-watchers interested in future Court decisions.

Timbs v. Indiana: The Excessive Fines Clause Is Applicable To the States

In *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the Supreme Court addressed whether the Excessive Fines Clause of the Eighth Amendment bars the states, in addition to the federal government, from imposing excessive fines on criminal defendants. After Timbs pleaded guilty in Indiana state court to a minor drug trafficking offense — a crime for which the maximum fine was $10,000 — the police seized his Land Rover SUV, worth $42,000. Although Timbs had purchased the Land Rover with legitimate funds, he then used it to transport drugs. The trial judge rejected the government's attempted forfeiture of the Land Rover, ruling that the seizure was grossly disproportionate to Timbs's crime in violation of the U.S. Constitution. The Indiana Supreme Court reversed, holding that the Excessive Fines Clause was not binding on Indiana, since the Supreme Court had never expressly held that it was incorporated by the due process guarantee in the Fourteenth Amendment.

The Supreme Court reversed unanimously, finding the case for incorporation to be "overwhelming." Citing common law protections against excessive fines dating back as far as the Magna Carta, the Court held that protection against excessive fines was deeply rooted in American history and traditions. Indiana did not "meaningfully challenge" the conclusion that some prohibition on excessive fines was incorporated against the states, instead arguing that the specific application of the Excessive Fines Clause to civil *in rem* forfeiture was neither fundamental nor deeply rooted. The court rejected Indiana's argument in short order.

Timbs continued the Court's recent trend of limiting the government's civil forfeiture authority. *See*, *Honeycutt v. United States*, 137 S. Ct. 1626 (2017) (holding that the government cannot seek forfeiture of property on a joint and several liability theory); *Luis v. United States*, 136 S. Ct. 1083 (2016) (limiting the government's ability to freeze a defendant's assets on forfeiture grounds). This trend may encourage courts to consider exercising their rarely exerted authority to strike down grossly disproportionate forfeiture actions. *See*, H. Sandick et al., "Challenging Disproportionate Forfeitures," 25 *Business Crimes*

Harry Sandick, a member of the *Business Crimes Bulletin*'s Board of Editors, is a partner in the Litigation Department of Patterson Belknap Webb & Tyler LLP and a member of the firm's White Collar Defense and Investigations team. **Tara Norris** is a litigation associate at the firm.

Bulletin No. 9 (May 2018) ("only four courts of appeals have found a forfeiture to be excessive") (http://bit.ly/32HgfXT). *Timbs* also has a role to play in future incorporation debates: It has been cited by both parties in *Ramos v. Louisiana*, an October 2019 Term case in which the Supreme Court will consider whether juries in state criminal proceedings, must convict unanimously, as federal juries must.

Gamble v. United States: The Dual Sovereign Doctrine Is Not Dead After All

The Supreme Court was widely anticipated to revisit the dual sovereign doctrine — under which an individual can face successive and separate federal and state prosecutions for the same crime without running afoul of the Double Jeopardy Clause — in *Gamble v. United States*, 139 S. Ct. 1960 (2019). The dual sovereign doctrine has been recognized for nearly a century, going back at least to the Court's decision in *United States v. Lanza*, 260 U.S. 377, 382 (1922). Justices Thomas and Ginsburg, however, suggested recently that the decisions recognizing the dual sovereign doctrine should be overturned. *See*, *e.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J. concurring).

In the end, though, the Court, with a 7-2 majority, elected not to turn away from the longstanding interpretation of the Double Jeopardy Clause. Instead, *Gamble* reaffirmed the old rule that, under the federal constitution, a state court prosecution does not bar a subsequent prosecution in federal court premised on the same conduct.

The facts in *Gamble* were simple: After pleading guilty in Alabama state court to illegally possessing a firearm after a felony conviction, Gamble was charged in federal court with violating the federal felon-in-possession statute. The district court denied Gamble's motion to dismiss on double jeopardy grounds in light of the dual sovereign doctrine, and the Court of Appeals affirmed. Justice Alito wrote the majority opinion in which the Supreme Court affirmed, finding no reason to disturb existing precedent. Gamble argued that the historical record supported reversal, but the majority opinion found the record too equivocal to justify departure from the Court's prior decisions in light of the doctrine of *stare decisis*.

Notwithstanding the fact that the dual sovereign doctrine has existed for many decades, Justice Ginsburg accurately noted in her dissent that the rapid expansion of federal criminal law "has exacerbated the problems created by the separate-sovereigns doctrine." As she observed, the areas of federal-state criminal overlap (and the attendant risk of double prosecution for a single infraction) continue to grow. It is also difficult to reconcile the dual sovereign doctrine with a sense of basic fairness. To be sure, there are some instances — such as civil rights prosecutions — where the doctrine leaves a valuable safety hatch to prevent a state prosecutor from letting a wrongdoer evade justice. But on balance, as Justice Ginsburg commented, "there is little to be said for keeping" this odd rule in place. Nevertheless, it appears that the dual sovereign doctrine will continue to have force for the foreseeable future.

Rehaif v. United States: A Little Knowledge Requirement Is a Dangerous Thing

For many years, criminal justice advocates have proposed "*mens rea* reform" in order to prevent people from sustaining criminal convictions for unwittingly committed crimes. In the absence of congressional action on *mens rea* reform, *Rehaif v. United States*, 139 S. Ct. 2191 (2019), suggests that the Supreme Court is inclined to read stronger knowledge requirements into existing statutes. Although the Court stopped short of totally reconceiving the level of knowledge that federal criminal law requires for conviction, this case suggests that such a reconception may be on the way.

Rehaif entered the United States on a nonimmigrant student visa, but he lost his legal immigration status when he was kicked out of school. He later visited a shooting range and was charged with "knowingly" violating Section 922(g), which prohibits persons who are not legally in the United States from possessing a firearm. He argued that his conviction should be reversed because the district court had instructed the jury that it could convict without finding that he knew that he was present in the United States illegally. Justice Breyer, in a 7-2 decision, held that the government must prove that the defendant knew that he belonged to a category of people who were prohibited from possessing a firearm as an element of the crime. As Justice

Alito explained in an exasperated dissent, not one Circuit had interpreted Section 922(g) in the way urged by Justice Breyer.

The Court's interpretation of the criminal statute at issue was notable. Citing the Model Penal Code, it held that when a criminal statute contains a knowledge requirement (and, thus, whether the action is criminal at all depends on the defendant's knowledge), the statute should be read to require proof of the defendant's knowledge of *all* non-jurisdictional elements of the crime. Federal courts have rarely cited the Model Penal Code for guidance on interpreting federal criminal statutes. As a practical matter, this is reasonable: if Gamble was indeed unaware that he did not have a legal immigration status, springing criminal liability on him for "knowingly" engaging in an activity that would have been legal but for his then-unknown status seems unfair.

In the aftermath of *Rehaif*, we can expect to see defendants arguing that knowledge requirements should apply to the non-jurisdictional elements of the crimes with which they are charged. What criminal statutes are susceptible to a *Rehaif* analysis? The answer could be expansive, and defense lawyers will undoubtedly be creative as they explore how to make use of this decision.

Garza v. Idaho: Prejudice Is Presumed When Trial Counsel Does Not File Appeal As Directed

Plea agreements with a waiver of appeal are increasingly common. In *Garza v. Idaho*, 139 S. Ct. 738 (2019), the defendant entered into such a plea agreement and, after sentencing, nonetheless directed his defense counsel to file a notice of appeal. Garza's defense counsel did not file the requested appeal because of the appeal waiver in his plea agreement. Appeal waivers, however, are not absolute, and there are many circumstances in which an appeal is permitted notwithstanding the existence of a waiver in the defendant's plea agreement. *See*, *United States v. Burden*, 860 F.3d 45, 54 (2d Cir. 2017) (holding that waivers of appeal are construed "narrowly and … strictly against the [g]overnment").

Garza sought postconviction relief, arguing that his Sixth Amendment rights had been violated because his attorney had refused to file a notice of appeal. To obtain postconviction relief based on ineffective assistance of counsel, a defendant normally has to prove that his counsel did not provide reasonable representation and that he suffered prejudice as a result of the representation. But the Supreme Court held many years ago, in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), that when a defense attorney has failed to preserve a defendant's appeal rights by filing a notice of appeal at the defendant's direction, prejudice is presumed for purposes of seeking postconviction relief — in other words, the defendant is not required to prove that his or her appeal would have succeeded.

The question presented in *Garza v. Idaho* was whether the *Flores-Ortega* presumption of prejudice applies when the defendant has signed an appeal waiver, or whether the defendant must demonstrate that his appeal would not have been barred by the waiver. Eight of the ten Circuit courts to consider the issue ruled that prejudice was presumed even where the defendant's plea agreement contained an appeal waiver, but Idaho disagreed, holding that Garza was required to demonstrate actual prejudice in his quest for postconviction relief.

Justice Sotomayor wrote a short decision reversing the Idaho Supreme Court for a 6-3 majority. As the Court explained: "[T]he bare decision whether to appeal is ultimately the defendant's, not counsel's, to make." The bottom line is this: Defendants who want a notice of appeal to be filed should get their way, even if their counsel believes that the appeal is barred by a waiver. If counsel refuses to file such a notice upon request, the defendant need not demonstrate any additional prejudice.

—❖—