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WHITE-COLLAR CRIME

Expert Analysis

U.S. Supreme Court Term: Cases Affecting White Collar Practitioners

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The current U.S. Supreme Court docket includes a number of important cases that should be monitored closely by white collar practitioners. The Court is exploring the boundaries of the federal honest services law for the first time; re-examining the Confrontation Clause and its application to evidence sought from non-testifying forensic experts; and reviewing the ineffective assistance of counsel standard under the Sixth Amendment in the context of what attorneys must advise their clients about the collateral consequences of a guilty plea.

Trio of Honest Services Cases

The Court has granted certiorari in three separate criminal cases involving the federal "honest services" fraud statue set forth in 18 U.S.C. Section 1346. That provision was inserted as an amendment to the chapter criminalizing mail and wire fraud in response to a Supreme Court decision, *McNally v. United States*,[1] which held that such breaches of duty were not encompassed by the traditional mail and wire fraud statutes. Section 1346 states that a "scheme or artifice to defraud" includes one that deprives another of the "intangible right of honest services." Since its inception in 1988, the statute has become a sort of "catch-all" crime for federal prosecutors. In an amicus brief fled with the Court, the National Association of Criminal Defense Lawyers observed that "[f]ederal prosecutors use the honest services statute thousands of times each year to criminalize a breathtaking range of private and official conduct."[2]

The questions presented in the cases currently pending before the Supreme Court each raise a separate issue as to the government's burden in honest services prosecutions. Some predict a momentous opinion from Justice Antonin Scalia, who has been highly critical of the honest services law, and was the lone dissent in *Sorich v. United States*—an honest services case from the U.S. Court of Appeals for the Seventh Circuit in which the majority of the Court denied certiorari.

In his dissent, Justice Scalia wrote that "[t]hough it consists of only 28 words, the [honest services] statute has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries."[3] He also noted that circuit courts of appeal have struggled for two decades to define and limit the application of the statute. "Without some coherent limiting principle to defne what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." For this reason, Justice Scalia opined that he would have granted certiorari in *Sorich* in order to squarely confront both the breadth and constitutionality of section 1346.[4] The three cases currently pending before the Court afford the justices this opportunity.

> The Court's decisions will either restrict or increase prosecutions under the honest services law.

• ***Skilling v. United States.*** Jeffrey Skilling, the now infamous former CEO of Enron Corporation, was convicted of conspiracy securities fraud, making false representations to auditors, and insider trading. The government charged that one of the objectives of the conspiracy was wire fraud to deprive Enron and its shareholders of the honest services owed by its employees, alleging that when Mr. Skilling conspired to deceive Enron's shareholders about the state of Enron's fiscal health by overstating the company's financial situation and concealing certain losses, he deprived Enron of the honest services it was entitled to from its chief corporate officer. On appeal to the U.S. Court of Appeals for the Fifth Circuit, Mr. Skilling argued that the government relied on an invalid theory of honest-services fraud to convict him.[5]

Specifically, while acknowledging that he owed Enron a fiduciary duty, Mr. Skilling argued that he did not breach this duty because his fraud was in the corporate interest and he did not engage in self-dealing. Mr. Skilling asserted that he engaged in the charged conduct to achieve goals set by the company to meet certain earnings projections and achieve a higher stock price. The Fifth Circuit dismissed Mr. Skilling's argument, finding that no one at the company specifically directed Mr. Skilling's actions or explicitly instructed him to engage in the fraudulent behavior. Accordingly, a jury properly could have convicted Mr. Skilling by finding a material breach of a fiduciary duty that results in a detriment to the employer resulting from the employee's withholding of material information that would lead a reasonable employer to change its conduct.[6]

The Supreme Court granted certiorari in the case. The issue the Court agreed to address is "[w]hether the federal 'honest services' fraud

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statute required the government to prove that the defendant's conduct was intended to achieve 'private gain' rather than to advance the employer's interests, and, if not, whether §1346 is unconstitutionally vague."[7]

• ***Black v. United States.*** Conrad Black, a "newspaper titan," was the CEO of Hollinger International, which owns a number of internationally distributed newspapers. Mr. Black and the other defendants controlled Hollinger through a Canadian company, Ravelston, of which Mr. Black was the primary shareholder. At Mr. Black's direction, Hollinger's general counsel prepared and signed on behalf of APC, a subsidiary of Hollinger, an agreement to pay some of the defendants a total of $5.5 million in exchange for their promise not to compete with APC for three years after their employment with Hollinger ended. Evidence at trial showed that neither Hollinger's audit committee nor its board of directors was informed of or approved the transaction.

The government argued that the payment was a fraudulent diversion of funds. Mr. Black responded that the payment represented "management fees" owed Ravelston, characterized as compensation in the form of non-compete covenants so that the Canadian government wouldn't tax the transaction. The jury found the government's version more convincing, convicting Mr. Black, with other senior executives of Hollinger, of mail and wire fraud and obstruction of justice.

In appealing the conviction, Mr. Black argued that although he and his cohorts sought a private gain from their fraudulent behavior, their activity was purely at the expense of the Canadian government, from which the defendants sought a tax break on the income to Ravelston. Accordingly, Mr. Black argued that no violation of the honest services fraud statute occurred because no gain was obtained at the expense of persons or entities to whom the defendant owed an honest service. Noting that "no harm-no foul" arguments generally are unsuccessful in the criminal context, the Seventh Circuit found that if Mr. Black deprived his employer of the honest services he owed it, the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit from Canadian authorities) was no defense.[8]

The Supreme Court granted certiorari to resolve the issue. The question as framed by the Court is "[w]hether the 'honest services' clause of 18 U.S.C. §1346 applies in cases where the jury did not find— nor did the district court instruct them that they had to find—that the defendants 'reasonably contemplated identifiable economic harm.'"[9]

• ***Weyhrauch v. United States.*** Bruce Weyhrauch was a member of the Alaska House of Representatives. The government charged that Mr. Weyhrauch solicited future legal work from an oil field services company in exchange for voting on oil tax legislation in accordance with the company's wishes. The indictment did not allege that the defendant received any actual compensation or benefits from the oil company. Rather, the government asserted that Mr. Weyhrauch took actions favorable to the company with the understanding that the company would hire him for legal services after his return to the private sector.

In a pretrial order, the district court excluded government evidence related to whether Mr. Weyhrauch had a duty under Alaska state law to disclose conflicts of interest in negotiating for future employment. The trial court's ruling was based on its finding that state law did not require Mr. Weyhrauch to make such disclosure. In doing so, the trial court rejected the government's argument that the evidence was admissible to support the honest services fraud charge as proof that the legislator knowingly concealed a conflict of interest even if state law did not so provide. Recognizing a split in the circuits, the district court found that "any duty to disclose sufficient to support the mail and wire fraud charges must be a duty imposed by state law."[10]

The government filed an interlocutory appeal to the U.S. Court of Appeals for the Ninth Circuit which reversed the district court's decision. The court of appeals held that section 1346 "establishes a uniform standard for 'honest services' that governs every public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction."[11]

The Supreme Court granted certiorari to resolve the split among the circuits. Specifically, the Court will answer "[w]hether, to convict a state official for depriving the public of its right to the defendant's honest services through non-disclosure of material information, in violation of the mail fraud statute (18 U.S.C. §§1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law."

As noted in the brief filed by Mr. Black in support of his petition for certiorari, unless some limits are placed on the meaning of section 1346, the government is at liberty to use the federal honest services statute to prosecute almost any violation of corporate policy.[12] These cases demonstrate that the wide net the government has cast on the supposed strength of this statute requires serious review and consideration. The Court's decisions will either restrict or increase prosecutions under the honest services law.

Confrontation Clause

On June 25, 2009, the Court issued its decision in *Melendez-Diaz v. Massachusetts*,[13] ruling that affidavits of forensic analysts constituted "testimonial" statements rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment. The contours of this holding, analyzed by the authors in their review of the Supreme Court's 2008-2009 Term,[14] were up for redefinition a mere four days later when, on June 29, 2009, the Court granted certiorari in *Briscoe v. Virginia* to determine whether a state can avoid violating the Confrontation Clause by providing that the accused has a right to call the forensic analyst as his own witness.[15]

Briscoe is the appeal of three separate, consolidated Virginia state cases in which the defendants were convicted of drug crimes. In each case, the government relied on a state statute, specifically, §19.2-187 of the Virginia Code Annotated, to admit into evidence a certifcate of analysis regarding the nature of the illegal substance confiscated from each defendant.

> If the Court broadly interprets the Sixth Amendment's ineffective assistance of counsel standard in the 'Padilla' case, criminal defense lawyers may be required to be aware of and disclose the full plethora of potential collateral consequences to their clients.

Section 19.2-187.1 provides that the state shall provide notice to the accused of its intention to offer into evidence a certificate of analysis no later than 28 days prior to the hearing or trial at which it is to be admitted.[16] The accused may object to the admission of the certificate in lieu of testimony; a failure to object shall be deemed a waiver of the objection. Where a timely objection is made, the certificate is not admissible into evidence unless the affiant testifies describing the facts and results of the analysis and is subject to cross-examination by the accused.[17] The statute further provides the accused always has the right to call the affiant as an adverse witness in its own case, at the state's cost.[18]

In none of the cases consolidated before the Virginia Supreme Court, did the person who performed the particular analysis and prepared

the certificate testify at trial. In each case, the defendant objected in reliance on *Crawford v. Washington*, arguing that the certificates were testimonial. The certificates were admitted anyway and on appeal the defendants argued that their Sixth Amendment rights were violated. The highest court in Virginia disagreed, finding that the procedure provided for in section 19-2.187.1 adequately protected their rights under the Confrontation Clause and that the defendants failed to utilize that procedure by calling the analysts themselves. The Supreme Court granted certiorari to review these decisions. Some Supreme Court observers believe that the question raised in *Briscoe* appears to have been decided in *Melendez-Diaz*. Further, they speculated that the Court was "holding" the *Briscoe* case until it decided *Melendez-Diaz*, and then, according to the electronic docket, scheduled it for consideration at the final conference Monday, in the wake of *Melendez-Diaz*. In fact, five other cases were held by the Court until the resolution of *Melendez-Diaz*, and then sent back for reconsideration.[19] However, the Court did not similarly send *Briscoe* back for reconsideration, which suggests that the Court believes the issue in *Briscoe* was not decided by *Melendez-Diaz*.

Because *Melendez-Diaz* has been in effect for only a few months, the full impact it will have on the criminal trial process is difficult to ascertain. Some forensic labs report the institution of stricter requirements regarding who can testify in court and, therefore, who can perform the analysis required.[20] Although the facts presented in *Briscoe* are unique, if the Court rules in the government's favor, it is likely that state and perhaps even federal legislatures will propose legislation similar to that on the books in Virginia to avoid the requirements of *Melendez-Diaz*.

Assistance of Counsel

Padilla v. Commonwealth of Kentucky addresses the extent to which counsel must be familiar with and instruct his client about the collateral consequences of conviction prior to the entry of a guilty plea. Jose Padilla was a truck driver, stopped at a weigh station in Kentucky when a police officer found 23 Styrofoam boxes containing 1,000 pounds of marijuana among the contents of his truck. Padilla pled guilty to three drug-related charges.

Afterwards, however, he sought post-conviction relief, alleging his attorney was ineffective in misadvising him about the potential for deportation as a collateral consequence of his guilty plea. Specifically, his attorney told him he "did not have to worry about immigration status since he had been in the country so long." Contrary to these assurances, Padilla was subject to mandatory deportation as a result of his conviction.

The Kentucky Circuit Court denied Padilla's motion, but the Court of Appeals reversed and remanded. The Kentucky Supreme Court then heard the government's appeal. The Kentucky Supreme Court found that deportation is necessarily collateral and not meaningfully distinguishable from other consequences of conviction, and that the defendant's understanding or misunderstanding of such matters is not implicated with respect to the waiver of constitutional rights upon entering a guilty plea. Accordingly, counsel's failure properly to advise Padilla of such collateral issues, including deportation, provided no basis for relief.[21]

The U.S. Supreme Court granted certiorari to determine whether the Sixth Amendment's guarantee of effective assistance of counsel requires a criminal defense attorney to advise a non-citizen client that pleading guilty to an aggravated felony will trigger mandatory, automatic deportation, and if mis-advice about deportation induces a guilty plea, can that misadvice amount to ineffective assistance of counsel and warrant setting aside a guilty plea.[22]

The implications of *Padilla* on white collar practitioners may be significant. Someone convicted of a federal crime may lose a number of civil rights. In a white-collar case, however, the more significant collateral consequences of a conviction are the loss of employment opportunities resulting in considerable economic injury. For example, federal regulatory agencies have the authority to bar the employment of individuals with felony convictions and may censure, suspend or revoke the registration of registered individuals who have been convicted of a federal crime.[23]

If the Court broadly interprets the Sixth Amendment's ineffective assistance of counsel standard in the *Padilla* case, criminal defense lawyers may be required to be aware of and disclose the full plethora of potential collateral consequences to their clients. In addition, courts may be required to so instruct defendants in advising them of their rights when pleading guilty.

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1. 483 U.S. 350 (1987).
2. Amicus Curiae Brief of National Association of Criminal Defense Lawyers In Support of Petition for Writ of Certiorari, *Skilling v. United States,* No. 08-1934 (June 10, 2009).
3. 129 S.Ct. 1308 (2009).
4. Id. at 1310.
5. Because the jury returned a general verdict of guilt, the Fifth Circuit could not know which of the three objects of the conspiracy the jury relied on. Accordingly, if any of the grounds were legally insufficient, the entire conspiracy conviction would have to be set aside. *United States v. Skilling,* 554 F.3d 529, 542-43 (5th Cir. 2009).
6. 554 F.3d at 546-47.
7. S.Ct., 2009 WL 1321026 (Oct. 13, 2009).
8. *United States v. Black,* 530 F.3d 596, 601 (7th Cir. 2008).
9. 129 S.Ct. 2379 (2009).
10. *United States v. Kott,* 2007 WL 2572355 (D. Alaska Sept. 4, 2007).
11. *United States v. Weyhrauch,* 548 F.3d 1237, 1248 (9th Cir. 2008).
12. Petition for Writ of Certiorari, *Black v. United States,* No. 08-876 (Jan. 9, 2009).
13. 129 S.Ct. 2527 (2009).
14. Robert G. Morvillo and Robert J. Anello, "Supreme Court Review: The 2008-2009 Term," New York Law Journal (Aug. 4, 2009).
15. 129 S.Ct. 2858 (2009).
16. Va. Code Ann. §19.2-187.1(A).
17. Id. 19.2-187.1(B)(i). The certificate also is admissible where the objection is waived by the accuse in writing or before the court, or the parties stipulate before the court as to the admissibility of the certificate. 19.2-187.1(B)(ii-iii).
18. Id. 19.2-187.1(E).
19. Lyle Denniston, "Analysis: Is *Me-lendez-Diaz* Already Endangered?" SCO-TUSblog (June 29, 2009) (available at http://www.scotusblog.com/wp/new-lab-report-case-granted.html).
20. Sarah Bloom, "Indiana Attorney General Urges Court to Overturn Case," Indiana Daily Student (Nov. 9, 2009).
21. *Commonwealth v. Padilla,* 253 S.W.3d 482, 485 (2008).
22. S.Ct., 2009 WL 2832123 (Sept.4, 2009).
23. See Robert G. Morvillo and Robert J. Anello, "The Need for 'Second Chances' After Suffering a Federal Conviction," New York Law Journal (April 7, 2009) (detailing the collateral consequences suffered by most white-collar defendants).