

WHITE-COLLAR CRIME

Expert Analysis

White-Collar Practitioner's Guide to the Supreme Court's Term

The Supreme Court's 2015 Term promises significant developments for the white-collar bar. The court already has issued three decisions that are noteworthy for white-collar practitioners, with the most significant likely yet to come. The death of Justice Antonin Scalia and the resulting vacant seat seems to have had little impact on the court's direction so far—two of the cases were decided by a 5-3 majority and one was unanimous.

Two of the three decisions consider the contours of the Sixth Amendment's procedural protections for criminal defendants; the third addresses the substantive law of extortion under the Hobbs Act. The first of the Sixth Amendment cases has significant potential implications for a white-collar defendant's practical ability to defend criminal charges: In *Luis v. United States*, the court found that the right to counsel limits the government's ability to restrain a defendant's assets pretrial,

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In *Betterman v. Montana*, on the other hand, the court found that the Sixth Amendment's speedy trial provision offered no protection to criminal

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defendants in the post-conviction stage of a criminal proceeding, but left open the possibility that other constitutional protections might apply. Finally, in *Ocasio v. United States* the court broadened the government's

prosecutorial reach by expanding the reach of the Hobbs Act extortion statute to cover the receipt of secret kickbacks from a co-conspirator.

Although the three decisions issued so far this term are significant, perhaps the most anticipated white-collar decision of the term has yet to be rendered. In *McDonnell v. United States*, the court will review the conviction of former Virginia Governor Robert McDonnell. Hopefully, the court will use the opportunity to more clearly delineate the difference between an illegal quid pro quo arrangement and the lawful political contributions.² The court is also expected to render an important white-collar decision in its 2016 term. In *Salman v. United States*, the court will address the scope of the personal benefit requirement in insider trading law, which has vexed the courts since the U.S. Court of Appeals for the Second Circuit's much-discussed 2014 decision in *United States v. Newman*.

Funds to Pay for Lawyers

On March 30 2016, in *Luis v. United States*,³ a divided court (5-3) held that the government's pretrial freeze

of a criminal defendant's legitimate, untainted assets violates the Sixth Amendment right to counsel of choice. The court examined a federal statute that allows for the pretrial freeze of certain assets belonging to a defendant accused of violations of federal health care or banking laws. Under 18 U.S.C. §1345(a)(2), upon application of the government, a court can freeze: (1) property "obtained as a result of" the crime, (2) property "traceable" to the crime, and (3) other "property of equivalent value." In *Luis v. United States*, the court considered the third category of property, commonly referred to as "substitute assets."

Sila Luis was charged with paying kickbacks, conspiring to commit fraud, and engaging in other crimes related to health care. The government alleged that she had obtained almost \$45 million from these crimes and sought to preserve \$2 million of her funds—funds that could not be traced to criminal conduct—for payment of restitution and other criminal penalties under Section 1345. Although the trial court recognized that the institution of a pretrial freeze on those assets might prevent Luis from obtaining counsel of her choice, it found "no Sixth Amendment right to use untainted, substitute assets to hire counsel."⁴ The Eleventh Circuit affirmed.

The government did not dispute Luis' fundamental right to be represented by a qualified attorney whom she chooses and can afford. It argued that the countervailing interest in preserving the defendant's funds for the payment of statutory penalties

was greater. Focusing on the nature of the assets at issue, a plurality of the court disagreed. Where assets in the defendant's possession are tainted because they can be traced to the underlying criminal conduct, a defendant's ownership interest is "imperfect" and the government has a "substantial interest" in the property. Accordingly, the plurality decision reasoned, such funds properly can be frozen and any subsequent impact on a defendant's ability to hire counsel of his choosing does not violate the Sixth Amendment.⁵

Writing for the plurality, Justice Stephen Breyer wrote, "Here, by contrast, the Government seeks to impose restrictions upon Luis' untainted property without any showing of any equivalent governmental interest in the property."⁶ The plurality held that insofar as innocent funds are needed to obtain counsel of choice, the Sixth Amendment prohibits the government from freezing the assets for preservation.⁷

The ruling in *Luis* resolves a long-disputed issue impinging on defendants' ability to retain their counsel of choice, particularly significant where financial crimes are alleged. The decision also raises an important question for the future: whether the regular compensation received by individuals charged with work-related misconduct may be considered "tainted" assets.

Speedy Trial Clause

The question raised in *Betterman v. Montana*,⁸ a decision issued on May 19, 2016, was whether the Sixth

Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution. Justice Ruth Bader Ginsburg, writing for a unanimous court, held that the constitutional speedy trial guarantee does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.

Petitioner Brandon Betterman pleaded guilty to bail jumping in a Montana state court after failing to appear on domestic assault charges. Betterman then waited 14 months in jail to be sentenced, due mostly to "institutional delay." He ultimately was sentenced to seven years in prison, with four years of the sentence suspended. Betterman appealed, arguing that the 14-month gap between conviction and sentencing violated his right to a speedy trial. The Montana Supreme Court affirmed the conviction.

In its analysis, the court divided a criminal proceeding into three discrete phases: 1) the pre-arrest/indictment phase, which includes the investigation and decision whether to arrest and charge a suspect; 2) the post-arrest/indictment phase, which concludes upon a guilty verdict; and 3) the sentencing phase. The court noted that "checks" against delay existed in each phase.

Statutes of limitation prevent unreasonable extension of the pre-indictment phase, and the Sixth Amendment's Speedy Trial Clause "hones in on the second period: from arrest or indictment through conviction." The court reasoned, however, that the right to a speedy trial "detaches upon conviction" because that Sixth

Amendment provision implements the presumption of innocence, which no longer exists once a conviction is secured or a defendant pleads guilty. The court also noted that the sole remedy for a violation of the speedy trial right—dismissal of the charges—does not fit the post-conviction phase of a criminal proceeding.⁹

With respect to post-conviction delays in the sentencing process, the court pointed to various state and federal statutes and rules, including Federal Rule of Criminal Procedure 32(b)(1), which directs courts to “impose sentence without unnecessary delay,” that offer protection. In addition, the court noted that although a defendant’s due process right to liberty is diminished after conviction, it is still present. “[A defendant] retains an interest in a sentencing proceeding that is fundamentally fair. But because *Betterman* advanced no due process claim here, we express no opinion on how he might fare under that more pliable standard.”¹⁰

Thus, the court left the door open to an alternative due-process clause challenge by those defendants, familiar to many experienced practitioners, whose cases somehow get lost in the abyss of the criminal justice system prior to sentencing. Indeed, Justice Sonia Sotomayor’s concurrence effectively lays out an argument that sentencing delays are a violation of a defendant’s due process rights.

Extortion

On May 2, 2016, the court issued another 5-3 decision in *Ocasio v. United States*¹¹ answering the

question whether a conspiracy to commit extortion requires that the conspirators agree to obtain property from someone outside the conspiracy. The Hobbs Act, pursuant to which the petitioner was convicted, defines extortion as “the obtaining of property from another, with his consent, ... under the color of official right.”¹² A public official violates this statute when he or she receives property to which he or she was not entitled, knowing that the property was given in return for official acts.¹³

The court in ‘*Betterman*’ reasoned that the right to a speedy trial “detaches upon conviction” because the Sixth Amendment’s Speedy Trial Clause implements the presumption of innocence, which no longer exists once a conviction is secured or a defendant pleads guilty.

The conspiracy in *Ocasio* involved police officers and the owners of an auto repair shop. The petitioner, Samuel Ocasio, and other police officers persuaded individuals involved in auto accidents to take their cars to the auto repair shop. The officers were paid between \$150 and \$300 for every car that was brought in for repair. At trial, Ocasio argued that because the Hobbs Act prohibits obtaining property “from another,” the government was required to prove that the alleged conspirators agreed to obtain property from someone outside the conspiracy. In this case, Ocasio and the other officers

received the funds from their alleged co-conspirators. The district court disagreed, as did the U.S. Court of Appeals for the Fourth Circuit when Ocasio appealed his conviction.

The court granted certiorari to resolve a split in the circuits, and held that a defendant may be convicted of conspiring to commit Hobbs Act extortion under color of official right based on proof that he entered into a conspiracy that had as its objective the obtaining of property from another conspirator. The court reasoned that in *Ocasio* the conspirators held a common criminal objective—the officers agreed to obtain property “from another” and the auto shop owners agreed to help commit this crime.

Justice Sotomayor wrote a dissenting opinion, joined by Chief Justice John Roberts, taking issue with the notion that a group of conspirators can agree to obtain property “from another” even if they agree only to transfer property among themselves. Amici briefs filed by the National Association of Criminal Defense Attorneys and former U.S. Attorneys argued in part that the government’s construction eliminating the requirement of proof of an agreement to obtain property from a third party improperly broadened the unambiguous text of the Hobbs Act and resulted in prosecutorial overreaching.

Decisions on the Horizon

The court’s expansive reading of the statute in *Ocasio* is notable in light of the justices apparent

struggle with the government's broad enforcement efforts in other areas. On April 27, 2016, the court heard oral argument in the case of former Virginia Governor, Robert F. McDonnell, regarding his conviction under the federal corruption laws. In July 2015, the Fourth Circuit upheld McDonnell's conviction and sentence of two years in prison based on his receipt of gifts and loans from a campaign donor. The court accepted the case to consider whether McDonnell's admitted actions, which included arranging meetings for donors, taking their calls, and meeting with donors to hear about their business activities, constitute "official action" under the controlling fraud statutes.

McDonnell argues that the Fourth Circuit "construed 'official action' so broadly that it made ... commonplace actions federal felonies whenever a jury infers a link to the donor's contributions."¹⁴ The case has sparked debate about the nature and character of political favors and the decision, which may be issued before the court recesses for the summer, is highly anticipated.

The court also has granted certiorari in two white-collar cases, both from the U.S. Court of Appeals for the Ninth Circuit, to be heard during the 2016 term of the court. In *Shaw v. United States*,¹⁵ the court will resolve a split among lower courts regarding the provision of the bank-fraud statute, 18 U.S.C. §1344(1), prohibiting a "scheme to defraud a financial institution." The question before the court is whether the statute requires

proof of a specific intent not only to deceive, but also to cheat, a bank, as nine circuits have held.

In *Salman v. United States*,¹⁶ the court will consider whether the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC* requires proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, or whether it is enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case.

Conclusion

Although Justice Scalia's absence and an eight-justice court did not directly impact the three white-collar decisions issued to date, its impact on upcoming decisions, including McDonnell and Salman, which many perceive as the most important white-collar cases to be decided in the coming year, remains to be seen.



1. *Luis* was decided by a 5-3 vote comprised of a four-justice plurality opinion and solo concurrence. Although Justice Scalia's participation might have resulted in a majority opinion, it would not have changed the result.

2. See Robert J. Anello and Richard F. Albert, "Potential Impact of Supreme Court's Upcoming Political Quid Pro Quo Case," NYLJ (Feb. 2, 2016) (discussing case against McDonnell).

3. 136 S.Ct. 1083 (2016).

4. 966 F.Supp.2d 1321, 1334 (S.D. Fla. 2013).

5. See Robert Anello, "Destitute Before Proven Guilty: Supreme Court OKs Asset Seizure in White-Collar Cases That Bars Defendants' Ability to Retain Counsel," The Insider Blog, Forbes.com (Mar. 6, 2014).

6. 136 S.Ct. at 1092 (emphasis in original).

7. The 4-3 plurality opinion, written by Justice Stephen Breyer and joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor, relied heavily on property law to reach its conclusion. Justice Clarence Thomas wrote a separate opinion, concurring in the judgment, that rested strictly on the Sixth Amendment's text and common law.

8. ___ S.Ct. ___, 2016 WL 2903423 (May 19, 2016).

9. Rejecting the defendant's suggestion that an appropriate remedy for the delay would be a reduction of his sentence by the period of delay, the court stated, "We have not read the Speedy Trial Clause, however, to call for a flexible or tailored remedy. Instead, we have held that violation of the right demands termination of the prosecution." *Id.* at *4 n. 6.

10. *Id.* at *5.

11. 136 S.Ct. 1423 (2016).

12. 18 U.S.C. §1951(b)(2).

13. *Evans v. United States*, 504 U.S. 255, 268 (1992).

14. Petition for a Writ of Certiorari, *McDonnell v. United States*, 15-474 at 2 (Oct. 13, 2015).

15. 781 F.3d 1130 (9th Cir. 2015).

16. 792 F.3d 1087 (9th Cir. 2015).