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Tax Litigation Issues

Expert Analysis

Reading Tea Leaves: Justice Gorsuch And Criminal Tax Cases

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The legal commentariat seems to have settled on the view that newly confirmed Supreme Court Justice Neil Gorsuch will fill the seat left by the late Justice Antonin Scalia both literally and as a like-minded successor in jurisprudential spirit.[1]

While Justice Scalia is commonly considered an arch-conservative legal scholar, his commitment to originalism often led him to places one would not expect to find him based on a simple liberal-conservative dichotomy. In particular, Justice Scalia often wound up in unusual majority lineups regarding the rights of criminal defendants.[2] For example, he wrote for the court in *United States v. Dixon*, 509 U.S. 688 (1993), a 5-4 opinion holding that double jeopardy bars prosecution of conduct for which the defendant has previously been held in contempt of court; *Johnson v. United States*, 135 S. Ct. 2551 (2015), which voided the residual clause of the Armed Career Criminal Act as unconstitutionally vague; and *United States v. Santos*, 553 U.S. 507 (2008), another 5-4 opinion that interpreted the term "proceeds" under the money-laundering statute as referring only to net income/profits, and not to gross income.

Will Justice Gorsuch, acolyte of originalism, likewise defy easy assumptions on issues of criminal law? Several of his opinions while on the U.S. Court of Appeals for the Tenth Circuit suggest that, like Justice Scalia, his views on criminal justice often vary from the "law and order" approach generally associated with judicial conservatives.[3] In particular, his decision in *United States v. Farr*, 536 F.3d 1174 (10th Cir. 2008), if an incomplete record of his thinking, offers a few clues regarding his approach to criminal justice matters while posing some interesting issues for tax prosecutions.

'U.S. v. Farr'

For 15 years Skoshi Thedford Farr served as the general manager of her husband's alternative medicine clinic in Oklahoma City. During that time, the clinic managed to accurately report its quarterly wages paid and federal taxes withheld, but failed to pay the withheld taxes over to the government. After Farr's husband passed away in 1998, the IRS sought to collect the employment taxes owed by the clinic from Farr based on her responsibility as an officer or employee of the clinic. Thus, the IRS invoked 26 U.S.C. §6672 to assess as a civil penalty against Farr an amount equal to the delinquent employment taxes.

When Farr did not pay the penalty, the government pursued criminal tax evasion charges under 26 U.S.C. §7201. The indictment charging Farr, however, went beyond the generic statutory language and specified that she had willfully attempted to evade and defeat the payment of the clinic's quarterly employment tax that was "due and owing *by her*."

Throughout the ensuing trial, Farr's lawyer argued that she could not be guilty of failing to pay employment taxes because she was not the employer, and that the indictment did not encompass the "trust fund recovery penalty" imposed against Farr. While critical of the government's failure to distinguish between the tax due by the clinic and the penalty that Farr owed, the district court instructed the jury that it could convict on either theory, candidly fretting that it was thereby "pulling the case out of the ditch for the government."

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The jury convicted Farr. On appeal, she argued that the government had constructively amended the indictment. Writing for a unanimous panel of the Tenth Circuit,

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then-Judge Gorsuch threw out the conviction based on the "fatal incongruity" between the indictment's specific reliance on failure to pay employment taxes and the evidence at trial regarding the failure to pay the trust fund penalty. Although the government argued that the difference between the tax and the penalty was merely semantic, Judge Gorsuch invoked a Scalia-like strict interpretation, pointing to controlling circuit law that employment taxes are distinct from any penalty imposed for failure to pay them. Thus, Judge Gorsuch rejected the government's claim that Farr had fair notice of its intent to argue that a conviction could be based on the penalty, concluding that such gamesmanship ran afoul of the Fifth and Sixth Amendments.

Unfortunately for Farr, her luck ran out there. The panel rejected her argument that there was insufficient evidence to convict her of evading the penalty, the legal hook necessary to bar a new trial under the double jeopardy clause, as well as her claim that the government had not shown an act of evasion. Moreover, Judge Gorsuch also clarified that the trust fund recovery penalty qualifies as a tax liability and can thus be the basis of a prosecution for tax evasion.[4]

While both Judge Gorsuch in 'Farr' and Justice Scalia in 'Resendiz-Ponce' showed themselves committed to construe indictments strictly, the former did so by encouraging the government to allege fewer particulars, while the latter concluded that more details were necessary.

Lessons Learned

It is, of course, necessary to exercise caution in reading tea leaves, and a narrow sampling of cases is insufficient to conclude with confidence that Justice Gorsuch will show the same willingness as Justice Scalia to defend (certain) criminal rights. After all, *Farr* was a fairly unusually case, and Judge Gorsuch left open the possibility that the government could have avoided the constructive amendment problem that it had created by drafting a bare-bones indictment. That solution, of course, will not help criminal defendants who will be forced to rely on rarely granted bills of particulars to draw out the government's case.

In that way, *Farr* presents an interesting tension with Justice Scalia's dissent in *United States v. Resendiz-Ponce*, 549 U.S. 102, 111 (2007). Resendiz-Ponce was convicted of illegally attempting to reenter the country based on an indictment that failed to allege that he had committed any overt act in connection with his reentry. An eight-justice majority concluded that the indictment was sufficient, reasoning that "attempt" necessarily connotes both intent and some overt act. Justice Scalia refused to give the government the benefit of that doubt. Instead he found the indictment faulty on the straightforward view that it failed to satisfy the requirement that it allege the two elements of attempted reentry: both intent to commit the underlying crime and some act toward its commission. Thus, while both Judge Gorsuch in *Farr* and Justice Scalia in *Resendiz-Ponce* showed themselves committed to construe indictments strictly, the former did so by encouraging the government to allege fewer particulars, while the latter concluded that more details were necessary.

For better or worse, we will have several decades to decide whether Judge Gorsuch's strict reading of the indictment in *Farr* reflects his agreement with Justice Scalia's view that defendants are entitled to the strict construction of criminal laws, as opposed to an outlier based on the government's sloppiness in drafting the indictment.[5] *Farr* is, all the same, a good decision for practitioners to know, even if we will need to wait before deciding where Justice Gorsuch fits on the criminal law spectrum.

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1. See, e.g., Hans von Spakovsky & Elizabeth Slattery, "Trump's Supreme Court Pick Is Antonin Scalia's Mirror Image," Fortune, Feb. 1, 2017; Adam Liptak, "In Judge Neil Gorsuch, an Echo of Scalia in Philosophy and Style," The New York Times, Jan. 31, 2017.

2. See David M. Dorsen, "Antonin Scalia, part-time liberal," The Washington Post, Jan. 26, 2017.

3. See, e.g., *United States v. Rentz*, 777 F.3d 1105 (10th Cir. 2015) (Gorsuch, J.) (applying the rule of lenity to affirm dismissal of one of several charges requiring use of firearm because each charge required independent use of firearm); *United States v. Games-Perez*, 667 F.3d 1136, 1142-46 (10th Cir. 2012) (Gorsuch, J., dissenting) (criticizing the majority for upholding a felon-in-possession conviction without requiring the government to prove the defendant's knowledge that he was a convicted felon); Damon Root, "On Criminal Justice and Executive Branch Power, Neil Gorsuch May Be More 'Liberal' Than Merrick Garland," Reason, April 4, 2017; Addy R. Schmitt & Lauren Briggerman, "Where Will Gorsuch Stand on White-Collar Criminal Statute Limits?," National Law Journal, March 27, 2017 (Gorsuch's past opinions "construe[ing] criminal statutes narrowly and [holding] the prosecution to its burden of proving every element of an offense" suggest he may be in favor of limiting the reach of insider-trading prosecutions); Sam Hananel, "Neil Gorusch could be the Supreme Court's wild card in criminal justice cases," Business Insider, March 14, 2017 (positioning Gorsuch as further left on criminal justice than some critics allow, while noting reservations based on certain decisions); C. Jarrett Dieterle, "Gorsuch v. Over-criminalization," National Review, Feb. 24, 2017 (summarizing Gorsuch's arguments against the proliferation of federal criminal provisions).

4. Farr was duly re-tried and her second conviction was affirmed by a different panel of the Tenth Circuit, which rejected her attempt to resuscitate her Double Jeopardy argument.

5. Indeed, defendants looking for comfort in *Farr* have found it all too easily limited to its facts. See *United States v. Christy*, No. 15-40091-01, 2017 WL 169087 (D. Kan. Jan. 17, 2017) (no constructive amendment where indictment alleged defendant twice laundered $4,200, but trial evidence showed one incident of $1,000 and another of $3,000); *United States v. Lynch*, No. 14-CR-181, 2016 WL 4179429 (W.D. Pa. Aug. 8, 2016) (distinguishing *Farr* in dismissing charges against individual as the "person required" under 26 U.S.C. §7202 to pay over employment taxes); *United States v. McLain*, 597 F. Supp. 2d 987 (D. Minn. 2009) (same).