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WHITE-COLLAR CRIME

Expert Analysis

# Implications of a More Conservative Supreme Court for White-Collar Practitioners

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With the selection of Judge Amy Coney Barrett as the proposed replacement for liberal icon Justice Ruth Bader Ginsburg, a 6-3 conservative majority may shape the future direction of the U.S. Supreme Court's jurisprudence. The generally accepted wisdom is that a more liberal court equals a court more protective to the rights of a criminal defendant. But the color of the defendant's "collar" may make a significant difference. In recent years, justices of the Supreme Court have tended to rule differently in white-collar crime cases than how their traditional labels of liberal or conservative would suggest in "blue-collar" crime cases.

What one commentator has termed the "white-collar paradox"—more conservative justices generally ruling in a manner advantageous to white-collar criminal defendants—may be magnified if Barrett is confirmed. A review of recent decisions of the Roberts court and of decisions in which Barrett participated during her limited tenure on the U.S. Court of Appeals for the Seventh Circuit provides some hints regarding how the Supreme Court's future decisions may affect the law relevant to white-collar criminal practice, and suggests that the court will continue to treat white-collar defendants differently than their "blue-collar" counterparts.

> In the white-collar cases, however, the sides tend to flip, and the conservative justices oppose prosecutors' efforts in such cases to a degree not seen in "blue-collar" crime cases.

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## The Roberts Court and the 'White-Collar Paradox'

The term "white-collar paradox"—coined by Prof. J. Kelly Strader to describe justices' voting in white-collar cases appearing to be at odds with their tendencies in "blue-collar" criminal cases—fittingly describes the voting patterns of the Roberts court, especially when it comes to the conservative justices. See J. Kelly Strader, "The Judicial Politics of White Collar Crime," 50 Hastings L.J. 1199, 1202-03 (1999). We reviewed the Supreme Court's jurisprudence over the last 10 years to try to determine whether the "white-collar paradox" continued in the Roberts court. Not surprisingly, we found that in a significant majority of the "blue-collar" cases when the court was not unanimous, the conservative justices more often supported ruling in favor of the government, while the liberal justices more often supported ruling in favor of the defendant. This is consistent with a Wikipedia analysis of the justices' voting patterns in criminal pro-

cedure cases, which, as of 2017, found that justices typically considered conservative sparingly supported ruling in favor of the defendant: Justice Antonin Scalia (27.4%); Justice Anthony Kennedy (33.3%); Justice Clarence Thomas (22.4%); Chief Justice John Roberts (31.1%); and Justice Samuel Alito (18.6%); while justices typically considered liberal more often supported ruling in favor of the defendant: Justice Ginsburg (62.3%); Justice Stephen Breyer (55.6%); Justice Sonia Sotomayor (66.9%); and Justice Elena Kagan (62.5%). See Wikipedia, Ideological leanings of United States Supreme Court justices, citing Harold J. Spaeth, Lee Epstein, et al., 2017 Supreme Court Database, (Version 2017 Release 1).

In the white-collar cases, however, the sides tend to flip, and the conservative justices oppose prosecutors' efforts in such cases to a degree not seen in "blue-collar" crime cases. Indeed, over the last 10 years, out of 15 court decisions that would typically be considered white-collar criminal or enforcement cases, at least three conservative justices supported ruling against the government in nine of them. That is more than double the rate conservative justices supported ruling in favor of defendants in typical criminal cases. A full review of the court's criminal jurisprudence is beyond the scope of this article, but the following decisions exemplify the "white-collar paradox."

Thus in *Skilling v. United States*, 561 U.S. 358 (2010), justices generally viewed as conservative, Scalia, Thomas, Alito and Roberts, joined the opinion of the court rejecting the government's broad interpretation of 18 U.S.C. Section 1346, the "honest services" fraud statute, to overturn the former Enron CEO's conspiracy conviction. The decision narrowed the scope of the statute, limiting it to cover only bribery and kickback schemes. Scalia and Thomas also filed a concurrence, which Kennedy joined in part, stating they would have gone even further than the court's holding—as written by Ginsburg—and struck down the "honest services" fraud statute in its entirety as unconstitutionally vague.

In *McDonnell v. United States*, 136 S. Ct. 2355 (2016), Alito, Thomas and Kennedy joined the unanimous opinion of Chief Justice Roberts, which overturned the conviction of the ex-governor of Virginia, Bob McDonnell. When the defendant was in office, he accepted over $175,000 in loans, gifts and other benefits from a Virginia businessman. McDonnell was indicted for honest services fraud and Hobbs Act extortion. The Supreme Court interpreted the "official act" requirements of both statutes narrowly, agreeing that the defendant's actions in setting up a meeting, talking to another official, or hosting an event—without more—were not enough to amount to be "an official act," and therefore, his convictions could not stand.

In *United States v. Home Concrete & Supply,* 566 U.S. 478 (2012), Thomas, Alito, and Chief Justice Roberts joined an opinion written by Justice Stephen Breyer to affirm the decision of the U.S. Court of Appeals for the Fourth Circuit in dismissing criminal tax charges, with Scalia concurring in the judgment. The defendant taxpayers overstated the value of certain property they had sold, which caused their gross income from the sale to be understated by over 25%. Generally, the IRS must assess a deficiency against a taxpayer within three years after a return is filed, but that period can be extended to six years if the taxpayers omit an amount in excess of 25% of gross income. The Supreme Court concluded that the understatement of gross income in this case did not trigger the extended limitations period, and affirmed the dismissal.

In *United States v. Lagos*, 138 S. Ct. 1684 (2018), Justices Kennedy, Thomas, Alito, Neil Gorsuch and Chief Justice Roberts joined a unanimous decision ruling against the government's interpretation of the Mandatory Victims Restitution Act. Petitioner Sergio Lagos pleaded guilty to wire fraud and was ordered by federal prosecutors to pay $5 million in restitution to his victim General Electric for their internal investigation of the fraud and for bankruptcy litigation against Lagos. The lower courts agreed that the restitution was necessary and proper under the statute to reimburse GE for its efforts, but the court reversed, finding that the statute applied only to government investigations based on the statute's plain language.

The foregoing examples illustrate the greater tendencies of conservative justices on the Roberts court to read criminal statutes narrowly in white-collar cases. If the Senate confirms President Donald Trump's nomination of Judge Amy Coney Barrett, white-collar prosecutors might find the bench to be even less supportive in the coming years.

### Judge Amy Coney Barrett

Judge Amy Coney Barrett joined the U.S. Court of Appeals for the Seventh Circuit on Nov. 2, 2017. She has heard a number of criminal appeals, but her record in white-collar cases is rather limited. Nevertheless, a review of her opinions hints that she may prove to be tougher on "blue-collar" crime and more skeptical of the government in white-collar cases. The following two dissents are noteworthy in showing both sides of the "white-collar paradox."

In the "blue-collar" criminal case of *Sims v. Hyatte*, 914 F. 3d 1078 (7th Cir. 2019), Barrett dissented from a decision involving a defendant charged with the shooting and attempted murder of a security guard in Indiana. At an evidentiary hearing for a post-conviction relief petition, Sims learned for the first time that the deputy prosecuting attorney had withheld that the victim in the case "identified the defendant ... only after hypnotism" was used. The Seventh Circuit reversed the conviction in a 2-1 decision. In Barrett's dissent, she noted that even though the "undisclosed evidence of [the victim's] hypnosis constitutes a *Brady* violation," she nevertheless would uphold the conviction because the state court concluded that the hypnosis evidence "did not create a reasonable probability of a different result." Responding to Barrett's argument, Judge William Bauer, writing for the majority, cited a long line of post-*Brady* cases that he found to demonstrate it "beyond reasonable dispute that the prosecutor's deliberate concealment of the hypnosis evidence [would have] undermined confidence in the verdict."

In *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), a case relating to a white-collar defendant, Barrett again dissented from the majority. The appellant Rickey Kanter, who had pleaded guilty to one count of mail fraud, later brought suit in the Eastern District of Wisconsin arguing that the applicable felon gun dispossession statutes, in particular 18 U.S.C. Section 922(g)(1), was unconstitutional as applied to him—a nonviolent offender with no other criminal record. The district court granted the government's motion to dismiss. Kanter appealed and the Seventh Circuit affirmed. In her dissent, Barrett wrote that she would have found 18 U.S.C. Section 922(g)(1) unconstitutional as applied to a white-collar nonviolent felon, based on a detailed historical analysis of the Second Amendment, and her view that such a felon was not "dangerous." In doing so, she discounted several statistical studies cited in the majority opinion indicating a connection between conviction of a nonviolent felony and increased risk of future crime. Barrett found that such studies were not sufficiently tailored to Kanter's circumstances to be persuasive, and she quoted with approval a commentator's remark that "It is hard to imagine how banning Martha Stewart or Enron's Andrew Fastow from possessing a gun furthers public safety."

A longer track record would be needed to draw any firm conclusions, and perhaps Barrett's dissent in *Kanter* is better explained by her views about the Second Amendment than about white-collar crime. Nevertheless, the views Barrett expresses in these dissents suggest that her point of view in criminal cases may be impacted by the color of the defendant's collar.

### Conclusion

White-collar criminal jurisprudence will continue to evolve as the Supreme Court appears likely to swing further into the hands of the conservatives. Based on the prior voting habits of the conservative justices, white-collar criminal defendants may find the high court receptive to their arguments in ways that a "blue-collar" defendant would not.