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WHITE-COLLAR CRIME

Expert Analysis

Supreme Court Review: The 2008-2009 Term

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The U.S. Supreme Court's 2008-2009 term featured three significant opinions that have an impact on white-collar practice. Despite the fact that many believe the current Court is conservative in criminal matters, two of those three decisions were decided in favor of defendants. The first deals with the admissibility of scientific forensic reports which offer evidence against a defendant and the constitutional right to confrontation. The second addresses the Double Jeopardy Clause and a defendant's exposure to reprosecution when a jury has rendered an acquittal on some counts, yet hung on the others. Finally, the Supreme Court addressed the meaning of "aggravated felony" in connection with economic crimes as contained in the immigration statute allowing for the deportation of an individual convicted of such a felony.

In *Melendez-Diaz v. Massachu-setts*,[1] the Court discussed the impact of *Crawford v. Washington* on certificates introduced to support government test results. In *Crawford*, the Court held that testimonial statements are inadmissible against a criminal defendant unless the declarant appears at trial or the defendant had a prior opportunity to cross-examine an unavailable declarant.[2] The question presented in *Melendez-Diaz* was whether affidavits or certificates reporting the results of forensic analysis are "testimonial," rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment.

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Melendez-Diaz was charged with distributing cocaine. At his state trial, the prosecution submitted three "certificates of analysis" from the state's forensic lab which indicated that the substance seized from the defendant was cocaine. Melendez-Diaz objected to the admission of the certificates arguing that under *Crawford* the analysts were required to testify in person. The objection was overruled, the certificates were admitted, and the defendant was convicted. The appellate court rejected his appeal, including the argument that his Sixth Amendment rights had been violated.

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In *Crawford*, the Supreme Court defined the core class of "testimonial" statements to include "formalized testimonial materials, such as affidavits."[3] Noting that the documents at issue in Melendez-Diaz were plainly affidavits or "declarations of facts written down and sworn to by the declarant before an officer authorized to administer oaths," the Court's majority opinion, authored by Justice Antonin Scalia, held that the documents were the functional equivalent of live, in-court testimony. Because the sole purpose of the affidavits was to provide prima facie evidence, the Court held that they were testimonial statements and that, absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them, Melendez-Diaz was entitled to "be confronted" with the witnesses at trial.[4]

After this fairly straightforward analysis, the remainder of the majority opinion addresses the arguments put forth by the government and in the dissenting opinion by Justice Anthony Kennedy. The Court noted the government and dissenters' attempts "to avoid this rather straightforward application of our holding in *Crawford*." The majority noted that almost all of the cases relied upon by the dissent were based on the Court's 1980 decision in *Ohio v. Roberts*[5] and its since-rejected theory that unconfronted testimony was admissible as long as it bore an indicia of reliability. The Court rejected the attempt to resurrect *Roberts* "a mere five years after it was rejected in *Crawford*."[6] Although the Court acknowledged that better ways to challenge or verify the results of a scientific forensic test may exist, "the Constitution guarantees one way: confrontation."[7]

The Court reasoned that confrontation was one way to assure the accuracy of forensic analysis, designed to "weed out" both fraudulent and incompetent reports. Noting the wide variability in "forensic science disciplines with regard to techniques, methodologies, reliabilities, types and numbers of potential errors, research, general acceptability, and published materials,"

the majority found that confrontation as allowed through cross-examination by defense counsel would prove useful in testing an analyst's honesty, proficiency and methodology.[8]

The government asserted that the affidavits they sought to admit were akin to the types of official and business records admissible at common law. Under Federal Rule of Evidence 803(6), business records of regularly conducted activity are exceptions to the hearsay rule and may be admissible even if the declarant is available as a witness. Some dispute exists among the circuits as to whether documents that qualify as business records under Rule 803(6) can be considered testimonial for purposes of analysis under *Crawford*. The Second Circuit has held that "a statement properly admitted under [Rule] 803(6) cannot be testimonial because a business record is fundamentally inconsistent with what the Supreme Court has suggested comprise the defining characteristics of testimonial evidence."[9]

The majority did not resolve this outstanding issue, but stated that business and public records generally are admissible absent confrontation "not because they qualify under an exception to the hearsay rules, but because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial." This did not apply to the affidavits at issue in this case, however, as they were prepared specifically for use at Melendez-Diaz's trial and thus were testimonial.[10]

The majority also addressed the government's assertion that the constitutional requirements as set forth in the Confrontation Clause should be relaxed with respect to such forensic reports to accommodate the "necessities of trial and the adversary process." Specifically, the government argued that criminal prosecutions would become more burdensome as a result of the majority's decision. The Court found the government's "dire predictions," which were echoed by the dissent, to be inaccurate. Rather, the Court noted that many states already have adopted the constitutional rule requiring forensic analysts to testify in person. "Despite these widespread practices, there is no evidence that the criminal justice system has ground to a halt in the States that…empower a defendant to insist upon the analyst's appearance at trial."[11]

White-collar practitioners should be mindful of the Court's ruling in *Melendez-Diaz* and its impact on forensic expert practitioners. Frequently employed to retrieve digital evidence, including documents and e-mails, or testify regarding handwriting samples, the government's experts will be spending more time in court as witnesses.[12]

Double Jeopardy

Yeager v. United States[13] presented an issue on which the circuits were split. In December 2008, we wrote about the Fifth Circuit's opinion in *United States v. Yeager* and the arguments as briefed before the Supreme Court.[14]

Yeager addressed whether an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment.

Generally, where a mistrial has occurred because a jury has failed to reach a verdict, jeopardy does not attach to the mistried counts and the government can seek to reprosecute the individual. Where, however, a mixed verdict of acquittal on some counts and a hung jury on others occurs, a disagreement among courts existed as to whether this general rule should apply, especially where the acquittals decided an "essential issue" that also is relevant to the counts on which the jury was hung.

In *Yeager*, the U.S. Supreme Court rejected the government's argument that it could retry Yeager for the hung insider trading and money laundering counts despite the otherwise preclusive effect of the jury's acquittal. Instead, the Court held that for purposes of determining whether jeopardy has attached to a criminal charge, the hung verdict is a "non-event" and should play no role in a court's determination as to whether the issue that was necessarily decided by the jury's acquittal and precludes reprosecution by the government on the hung counts.

Yeager was a senior vice president at Enron Broadband Services (EBS). He was indicted on various counts of conspiracy to commit securities and wire fraud, substantive counts of securities and wire fraud, as well as insider trading and money laundering. The jury acquitted the defendant of the fraud counts, but was hung on the remaining insider trading and money laundering charges. The district court declared a mistrial as to those counts on which the jury could not reach a verdict. The government issued a new indictment against Yeager, more specifically recharging him with some of the mistried counts. Yeager argued that his acquittals on the fraud counts collaterally estopped the government from pursuing the mistried charges. The district court denied the motion and the defendant took an interlocutory appeal to the Fifth Circuit, which affirmed.

The Supreme Court opined that in analyzing the Double Jeopardy Clause's application to Yeager's case, it was required to "determine whether the interest in preserving the finality of the jury's judgment on the fraud counts…bars a retrial on the insider trading counts."[15] In other words, should the insider trading charges be treated as the "same offense" as the fraud charges on which Yeager was acquitted. In *Ashe v. Swenson*,[16] the Supreme Court held that the Double Jeopardy Clause precludes the government from relitigating any issue that necessarily was decided by a jury's acquittal in a prior trial. If the jury, in acquitting on the various fraud counts, "necessarily decided" an issue essential to the insider trading issue, jeopardy had attached to those claims.

The district court had determined that the jury likely concluded that Yeager "did not knowingly and willfully participate in the scheme to defraud" described in the fraud counts, leaving open the question of whether petitioner possessed insider information.[17]

Although it affirmed the district court's holding, the appellate court disagreed with the district court's assessment of the jury's decision. Rather, it concluded that "the jury must have found when it acquitted that [Yeager] did not have any insider information that contradicted what was presented to the public." Nevertheless, the Fifth Circuit found the jury's failure to

acquit on the insider trading counts, as well, contradictory, making it impossible to "decide with any certainty what the jury necessarily determined." Relying on its own precedent, the circuit court concluded that the conflict between the acquittals and the hung counts barred the application of issue preclusion in Yeager's case.[18]

The Supreme Court has stated that in deciphering what a jury has necessarily decided, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration."[19]

Applying this analysis to Yeager's case, the Supreme Court's majority determined that the circuit erred when it considered the hung counts as part of the record of the prior proceeding. "Because a jury speaks only through its verdict, its failure to reach a verdict cannot— by negative implication—yield a piece of information that helps put together the trial puzzle. A mistrial count is therefore nothing like the other forms of record material that *Ashe* suggested should be part of the preclusion inquiry. [T]here is no way to decipher what a hung count represents."[20]

Courts were admonished to avoid guesswork and conjecture about possible reasons for a jury's failure to reach a decision in deciding matters of issue preclusion. Considering only the jury's acquittal in Yeager's trial, the Court reasoned that if the possession of insider information was a critical issue of ultimate fact in all of the charges against Yeager, a verdict that necessarily decides that issue in his favor protects him from prosecution for any charge for which that is an essential element. Accordingly, the Court reversed the judgment and remanded the case.

Justice Scalia authored a dissenting opinion which was joined by Justices Clarence Thomas and Samuel Alito. The dissent argued that the acquittals in Yeager's case did not unquestionably terminate Yeager's jeopardy with respect to the issues finally decided in those counts. Because the original jeopardy does not attach after a mistrial, the dissent asserted that no basis existed for invoking *Ashe* to prevent retrial in the present case.[21]

Immigration Law

In a unanimous decision in *Nijhawan v. Holder,*[22] the Court reviewed the federal immigration law statute that allows for the deportation of any alien who is convicted of an "aggravated felony." The statute's definition of "aggravated felony," set forth in subparagraph (M)(i) of §1101 of Title 8, includes an offense that involves "fraud or deceit *in which the loss to the victim or victims exceeds $10,000.*"[23] The Court considered whether the italicized language referred to an element of the fraud or deceit crime (the "categorical" approach) or referred to the particular circumstances by which an offender committed a fraud or deceit crime (the "circumstance specific" approach).

The Court noted that the circuits have come to different conclusions as to whether the $10,000 threshold refers to an element of the crime charged or the factual circumstances surrounding the crime. Concurring with the First and Fifth circuit, the Court held that courts were required to look to the facts and circumstances underlying the offender's conviction to determine if the $10,000 threshold had been met, therefore rendering the offender subject to deportation.

Rejecting the petitioner's arguments to the contrary, the Court noted that other provisions of the immigration statute contained qualifying language similar to subparagraph (M)(i) and that those other provisions also called for circumstance-specific analysis. "Moreover, to apply a categorical approach here would leave subparagraph (M)(i) with little, if any, meaningful application. We have found no widely applicable federal fraud statute that contains a relevant monetary loss threshold." The same was true of the majority of state statutes examined by the Court.[24]

In concluding that Congress did not intend the definition of aggravated felony to include only those fraud and deceit crimes generically defined to include the $10,000 loss threshold, the Court noted that an alien subject to deportation under this statute likely would have two opportunities to contest the amount of the loss—at sentencing and then again at the deportation hearing. Accordingly, the Court found no unfairness in its application of the statute in this manner.

1. 129 S.Ct. 2527 (2009).
2. 541 U.S. 36 (2004).
3. Id. at 51-52.
4. 129 S.Ct. at 2532.
5. 448 U.S. 56 (1980).
6. 129 S.Ct. at 2533.
7. Id.
8. Id. at 2538.
9. *United States v. Feliz*, 467 F.3d 227, 23334 (2d Cir. 2006).
10. 129 S.Ct. at 2539-40.
11. Id. at 2541.
12. The Court noted, however, that not "anyone whose testimony may be relevant in establishing chain of custody, authenticity of a sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." Rather, only those pieces determined by the government to be crucial in satisfying these evidentiary burdens must be presented live. Id. at 2532 fn. 1.
13. 129 S.Ct. 2360 (2009).
14. Robert G. Morvillo and Robert J. Anello, "When Is Once Enough? Collateral Estoppel in Criminal Cases," NYLJ (Dec. 8, 2008).
15. Id.
16. 397 U.S. 436 (1970).
17. 446 F. Supp.2d 719, 735 (SD Tex. 2006).
18. 521 F.3d 367, 378-79 (5th Cir. 2008).
19. 129 S.Ct. at 2367 (citing *Ashe*, 397 U.S. at 444).
20. Id. at 2368.
21. Id. at 2372-73 (dissent, Scalia, J.).
22. 129 S.Ct. 2294 (2009).
23. 8 U.S.C. §1227(a)(2)(A)(iii); §1101(a)(43)(M)(i) (emphasis added).
24. 129 S.Ct. at 2301-02.