

## High Court SOX Fish Ruling Cuts Hole In Prosecutors' Net

By **Juan Carlos Rodriguez**

*Law360, New York (February 25, 2015, 8:30 PM ET)* -- With the dramatic reversal of a fisherman's felony conviction under a provision of the Sarbanes-Oxley Act, the U.S. Supreme Court on Wednesday sent a clear message to overzealous prosecutors that the law doesn't give them carte blanche to pursue defendants outside the act's corporate context.

The plurality decision authored by Justice Ruth Bader Ginsburg chided the government for its "unrestrained reading" of Section 1519 of the act, which prohibits the destruction or falsification of "any record, document or tangible object." While Florida prosecutors asserted that three fish allegedly thrown overboard by John Yates after he was busted for making undersized catches qualified as tangible objects, a majority of justices disagreed.

That narrow interpretation of the provision showed the justices' unwillingness to bless a "particularly overzealous" prosecution, Timothy S. Bishop, a partner at Mayer Brown LLP, said.

"The court recognizes that prosecutors have immense power and need to use that power very carefully. When they are overzealous the court will examine the underlying statute carefully and look for ways to contain prosecutorial discretion if the statutory language allows it," Bishop said.

He noted Justice Ginsburg's reliance on the rule of lenity, which holds that when a criminal statute is ambiguous, it will be read narrowly, because citizens are entitled to clear warning about what conduct is illegal. He said a vigorous application of the rule will help ensure that only the crimes Congress intended can be prosecuted.

"Yates serves as a good warning to the Department of Justice to apply common sense rather than prosecute every possible crime to the nth degree," Bishop said.

William N. Shepherd, a partner Holland & Knight LLP and a former statewide prosecutor for Florida, agreed. Shepherd represented the National Association of Criminal Defense Lawyers, which supported Yates, in amicus briefs at the Eleventh Circuit and the high court.

In her opinion, Ginsburg rejected the government's reading of Section 1519, which she said would expose people to 20-year prison sentences for tampering with any physical object that might have evidentiary value in any federal investigation into any offense, no matter whether the investigation was pending or merely contemplated, or whether the offense subject to investigation was criminal or civil.

And Shepherd pointed out that even in the dissent, Justice Elena Kagan wrote that Section 1519 is a bad law because it is too broad and undifferentiated, with too-high maximum penalties that give prosecutors too much leverage and sentencers too much discretion. She also said it is “unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.”

Shepherd said the ruling comes at a time when overcriminalization is being discussed around the topics of drug laws and prison populations. The U.S. House Judiciary Committee last year reauthorized the Over-Criminalization Task Force for six months.

“Now we have a Supreme Court that has said they are focused on this issue and aware of it,” Shepherd said. “I think that prosecutors at all levels — state, federal, local — will look at this as an opportunity to step back and talk amongst themselves about how they’re going to work on issues of discretion and training.”

Eugene I. Goldman, a partner at McDermott Will & Emery LLP and former senior counsel in the SEC’s Division of Enforcement, said the plurality made sure to highlight the purpose of the Sarbanes-Oxley statute, which Congress passed to address corporate abuses, including the destruction of records.

“Their message is before you imprison someone for 20 years by applying the statute against a destroyer of fish rather than corporate records, the language of the prohibition must be clear to cover that conduct,” Goldman said.

The Yates case isn’t the only one in which prosecutors have used the act for slightly unorthodox purposes. For example, in cases revolving around the friends of alleged Boston Marathon bomber Dzhokhar Tsarnaev, a federal judge recently stayed sentencing proceedings over their alleged obstruction of justice — also prosecuted under Sarbanes-Oxley — until the Yates decision was revealed.

“This decision will cause the Justice Department to rethink making charging decisions under Section 1519 in evidence destruction cases outside the corporate context,” Goldman said.

But Justin J. Roberts, a partner at Vorys Sater Seymour & Pease LLP and former assistant U.S. attorney in the major fraud and corruption unit of the U.S. Attorney’s Office for the Northern District of Ohio, said he doesn’t think the ruling should be interpreted so broadly.

“The plurality decision seems to suggest that [Yates] could have been charged and convicted under the witness tampering provision, which is Section 1512, and you see that discussed in the opinion,” Roberts said. “So the takeaway is that he still is subject to a severe federal felony charge, this was just not the right one.”

And given that the dissent held that the conviction should have been upheld, he said, it might be a stretch to say the court is sending a message about overcriminalization. He said the more interesting point is the decision’s focus on the issues around the rules of statutory construction, which could come up in the upcoming Affordable Care Act case.

“I don’t know that it’s going to change prosecutors’ behavior, and because these laws have been unclear for a while, it may cause the use of several in the same case to make sure the conduct was covered,” Roberts said.

But Bishop said the ruling prevented Sarbanes-Oxley from becoming an expansive tool to federally prosecute conduct involving the environment.

“By limiting Section 1519 to the filekeeping context in which Sarbanes-Oxley was adopted, the court has rejected a prosecutorial overreach that could have applied to any natural object at all and thus have created special risks in the environmental area,” Bishop said.

--Editing by Kat Laskowski and Chris Yates.

---

All Content © 2003-2015, Portfolio Media, Inc.