Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

White Collar Cases And Trends To Watch At High Court

By **Brook Dooley and Cody Gray** (September 23, 2019, 5:30 PM EDT)

Brook Dooley

Cody Gray

Who doesn't love October? It summons the arrival of crisp, fall air; the return of pumpkin spice lattes; and, for attorneys, the beginning of the U.S. Supreme Court's annual term. This October, white collar lawyers should set their eyes on Kelly v. United States, the one white collar criminal matter the Supreme Court has currently agreed to hear.[1] The case stems from New Jersey's Bridgegate affair, has headline-grabbing potential, and affords another opportunity for the court to consider the scope of the federal fraud statutes, a la McNally and Skilling.

There are also a number of certiorari petitions the white collar bar should keep sight of, including Scoville v. SEC, which asks whether the Dodd-Frank Act expanded the extraterritorial reach of the federal securities laws after the court's 2010 landmark decision in Morrison v. National Australia Bank Ltd.

Here, we preview Kelly, discuss the pending certiorari petitions of interest, and flag a few issues and trends to watch as the court opens its doors for the October 2019 term.

On the Docket: Kelly v. United States

In Kelly, two New Jersey public officials were prosecuted for their roles in what came to be known as the Bridgegate affair. Defendant Bridget Kelly was the deputy chief of staff to then-Governor Chris Christie and was tasked with securing endorsements for Christie's 2013 gubernatorial reelection bid.[2]

One endorsement Kelly coveted was that of Mark Sokolich, the democratic mayor of Fort Lee.[3] Kelly's office wooed Sokolich, but Sokolich ultimately decided not to endorse Christie.

Disappointed, Kelly contacted a friend, David Wildstein, at the Port Authority of New York and New Jersey. He reminded her that the three right-most lanes of the George Washington Bridge — the busiest bridge in the world, and one connecting Fort Lee to New York City — were reserved for local traffic from Fort Lee. Wildstein offered "to close down those Fort Lee lanes to put some pressure on Mayor Sokolich." Kelly countered, "Time for some traffic problems in Fort Lee."[4]

To implement the plan, Wildstein and Kelly recruited defendant Bill Baroni, the Port Authority's deputy executive director, and concocted a cover story falsely asserting that the restrictions were necessary for a traffic study.[5] The plot was ultimately executed on the first day of school, gridlocking the entire town of Fort Lee.[6]

Kelly and Baroni were indicted for wire fraud and federal program fraud. The defendants argued that the government had turned the fraud statutes into all-purpose ethics codes. The concealment of a political motive — punishing Sokolich — for an otherwise legitimate official act — realigning lanes — cannot serve as the basis for a criminal fraud conviction, the defendants said. Otherwise, any public official could be indicted based on nothing more than the allegation that their public policy justification for a decision was not really and truly the subjective reason for making the decision.[7]

The defendants also insisted that the charges should be dismissed because the defendants did not deprive the Port Authority of any tangible property.[8]

The district court and, ultimately, the U.S. Court of Appeals for the Third Circuit saw it differently. The Third Circuit held the defendants' conduct could "hardly be characterized as 'official action' that was merely influenced by political considerations" because there was "no facially legitimate justification for Defendants' conduct."[9]

The court also concluded that the defendants deprived the Port Authority of:

- Property, including money it paid to relief toll workers that would not otherwise have been shelled out;
- "[Money] in the form of public employee labor," a form of intangible property that included the time and wages fourteen employees (including Kelly and Baroni) spent "doing work that was unnecessary and furthered no legitimate Port Authority aim"; and
- The Port Authority's "exclusive interest" in the bridge's operation, including "the allocation of traffic through its lanes."[10]

The Supreme Court is now tasked with deciding whether a public official defrauds the government of property by advancing a pretextual public policy reason for an official action that either conscripts public employees to expend time and resources that would otherwise have been spent on legitimate ends, or usurps the government's exclusive interest in the operation of an asset.

Kelly offers another opportunity for the court to cabin the criminal fraud statutes and, in particular, the creative prosecutorial theories that are brought to bear against actors in the political scene. This project kicked off with McNally v. United States, where the court concluded that the federal mail fraud statute was "limited in scope to the protection of property rights," and didn't embrace the public's intangible interest in honest services from government employees.[11]

Congress repudiated that decision, but the court took a scalpel to the resulting honest-services statute in Skilling v. United States.[12] There, it held that the honest-services statute applied only to "schemes to defraud involving bribes and kickbacks," not to the amorphous conflict-of-interest cases the government had previously sought to pursue.[13]

The trend continued with McDonnell v. United States, where the court held that "[setting] up a meeting, calling another public official, or organizing an event" does not, standing alone, qualify as an official act for purposes of convicting a public official under the federal bribery law.[14] In short, the court has been reluctant to construe criminal fraud statutes "in a manner that leaves [their] outer boundaries ambiguous," or "involves the Federal Government in setting standards of disclosure and good government for local and state officials."[15]

Time will tell if the narrowing of the corruption laws will continue with Kelly.

Pending Certiorari Petitions

Along with Kelly, there are three pending certiorari petitions that white collar practitioners should follow as the new term begins.

Scoville v. SEC

Scoville concerns the extraterritorial reach of the anti-fraud provisions of the Securities Act of 1933 and the Exchange Act of 1934. It asks, in particular, whether the Dodd-Frank Act legislatively overruled Morrison v. National Australia Bank Ltd.[16]

In Morrison, the court held that Section 10(b) of the Exchange Act does not apply extraterritorially, and it abrogated the so-called conduct-and-effects test that had long been applied by lower courts to determine whether foreign conduct fell within the scope of Section 10(b). In reaching its holding, the

court emphasized that the circuit court erred in approaching the question of Section 10(b)'s extraterritorial reach as a question of subject-matter jurisdiction:

> [To] ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunal's power to hear a case.[17]

Less than a month after the court decided Morrison, Dodd-Frank amended the jurisdictional sections of the 1933 and 1934 acts to grant federal courts jurisdiction in antifraud actions or proceedings involving either "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, … or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[18] Since Dodd-Frank's enactment, courts and practitioners have wrestled with whether Dodd-Frank's jurisdictional amendments restored the substantive reach of the 1933 and 1934 acts to pre-Morrison days.

In Scoville, the U.S. Court of Appeals for the Tenth Circuit cited "the context and historical background surrounding Congress's enactment of those amendments" to hold that "Congress undoubtedly intended that the substantive antifraud provisions should apply extraterritorially when the statutory conduct-and-effects test is satisfied."[19] The Tenth Circuit thus upheld the SEC's application of Section 10(b) and Section 17(a) to Scoville's sales of allegedly fraudulent securities to customers overseas.

In urging the court to take up his appeal, Scoville argues not only that the Tenth Circuit's decision is inconsistent with Morrison's carefully drawn distinction between jurisdictional and substantive questions, but also that the court of appeals' decision was wrong as a matter of statutory interpretation. Scoville's emphasis on interpreting the Dodd-Frank amendments based on their plain statutory language — over the legislative history and context relied upon by the Tenth Circuit — appears designed to draw in the conservative wing of the court.

Of course, Scoville is of interest for reasons beyond methodological questions related to statutory interpretation. With an increasing number of securities cases involving overseas elements, the substantive scope and extraterritorial reach of Section 10(b) and Section 17(a) are key issues for white collar lawyers, and Scoville would give the court the opportunity to provide clarity in this area.

Asaro v. United States

In Asaro, the petitioner argues that the Fifth Amendment's due process clause and the Sixth Amendment's jury trial right bar judges from considering at sentencing conduct underlying charges of which the defendant was acquitted, and asks the court to overturn — or at least limit — its 1997 per curiam decision in United States v. Watts.[20]

Asaro's petition stands out for the number of current and former justices whom the petitioner cites as having questioned Watts and the practice of relying on acquitted conduct at sentencing. In 2014, Justices Ruth Bader Ginsburg and Clarence Thomas joined Justice Antonin Scalia in a call to reconsider Watts and resolve whether the Fifth and Sixth Amendments permit sentencing courts to rely on acquitted conduct.[21]

Likewise, both Justices Neil Gorsuch and Brett Kavanaugh questioned the practice of using acquitted conduct at sentencing during their tenures on the court of appeals.[22] This record suggests there may well be an appetite among the current justices to take up this issue. Indeed, after the government waived its right to respond to Asaro's petition, the court requested a response, a signal that the court is looking hard at this case.

Peithman v. United States

Finally, Peithman v. United States involves the relationship between the various federal criminal forfeiture statutes and the scope of the court's 2017 decision in Honeycutt v. United States.[23] Honeycutt bars the government from forfeiting from one defendant property obtained by a co-conspirator, and limits the government, except in certain statutorily defined circumstances, to forfeiting tainted property obtained by the defendant.

In Honeycutt, the court was asked to interpret Title 21 of the U.S. Code, Section 853, the federal forfeiture statute that applies to drug transactions. The question in Peithman is whether Honeycutt's holding applies when the government seeks forfeiture under the more generally applicable forfeiture statute found in Title 18 of the U.S.Code, Section 981.

The government's response to Peithman's petition is notable. The government acknowledges that the U.S. Court of Appeals for the Eighth Circuit erred in holding that Honeycutt does not apply to Section 981, and acknowledges that a circuit split exists. Nonetheless, the government urges the court to deny certiorari on the basis that, having taken the position that Honeycutt applies to Section 981 forfeiture actions, "the question presented is of diminishing importance," and "it is far from clear that a substantial number of further cases implicating the issue is likely to arise."

Trends to Watch

Beyond the specific cases before the court, there are a few trends and developments that white collar practitioners should watch out for in the upcoming Supreme Court term.

First, the criminal defense bar should keep an eye on Justice Gorsuch to see if, in the mold of Justice Scalia, his originalist, libertarian instincts continue to lead him to defense-friendly votes in criminal cases. Justice Scalia famously ruled for criminal defendants in cases involving the confrontation clause,[24] the Fourth Amendment[25] and sentencing issues.[26] Likewise, Justice Gorsuch has joined the liberals in 5-4 decisions five times over the course of his short tenure — four of which were last term, and the majority of which resulted in defense-friendly outcomes in criminal cases.[27]

Justice Gorsuch has concluded, for instance, that the statute authorizing heightened penalties for using or carrying a firearm in furtherance of a crime of violence is unconstitutionally vague,[28] and that a statute requiring an additional term of imprisonment following judicial determination of a supervised release violation is unconstitutional because the requisite fact needs to be found by a jury upon proof beyond a reasonable doubt.[29]

Second, as Justice Kavanaugh settles in to his second term, practitioners should look to see whether he hews to the more moderate path he followed last term, or turns in a more conservative direction. Justice Kavanaugh was the justice with the highest frequency in the majority last term, but that may have been a product of the so-called freshmen effect, which contends that first-time justices are more prone to consensus during their initial term on the court.[30]

It will also bear watching how Justice Kavanaugh decides white collar criminal cases. Last term, he authored Flowers v. Mississippi,[31] which held that a Mississippi prosecutor's use of peremptory challenges was racially discriminatory and violated Batson v. Kentucky. The defense bar will be watching to see how he approaches Kelly and any other white collar cases the court picks up this term.

Finally, as the court continues reviewing certiorari petitions, the defense bar should keep an eye on any budding white collar and criminal procedure cases. The court grants review in criminal procedure cases more often than it does in any other area, and it has currently agreed to hear only about half of its usual amount.[32] Thus, there may be more cases to watch as the term unfolds.

Brook Dooley is a partner and Cody Gray is an associate at Keker Van Nest & Peters LLP.

[1] While the court has so far agreed to hear only one white-collar case, it has a healthy docket of criminal law cases. The court will consider whether a state may constitutionally eliminate the insanity defense, Kahler v. Kansas, No. 18-6135; whether the Sixth Amendment's "unanimous verdict" requirement for criminal jury trials necessarily applies to all states under the Fourteenth Amendment, Ramos v. Louisiana, No. 18-5924; and whether a formal objection after

pronouncement of a sentence is necessary to trigger appellate review, Holguin-Hernandez v. United States , No. 18-7739. The court will also hear cases confronting the "categorical approach" to evaluating whether a state offense can serve as a predicate for enhanced federal sentencing, Shular v. United States , No. 18-662; a Fourth Amendment case, Kansas v. Glover , No. 18-556; and a death-penalty case, McKinney v. Arizona , No. 18-1109.

[2] United States v. Baroni , 909 F.3d 550, 556 (3rd Cir. 2018).

[3] Id. at 556–57.

[4] Id. at 557.

[5] Id. at 557–58.

[6] Id. at 559.

[7] Id. at 567–71.

[8] Id. at 564.

[9] Id. at 568, 571.

[10] Id. at 562, 564–65, 567.

[11] See 483 U.S. 350, 360 (1987), superseded in part by statute, 18 U.S.C. § 1346.

[12] 561 U.S. 358 (2010).

[13] Id. at 368, 409.

[14] 136 S. Ct. 2355, 2372 (2016). In recent years, the court has seen fit to pare back the reach of federal criminal statutes in other contexts as well. See, e.g., Yates v. United States, 135 S. Ct. 1074 (2015) (reversing conviction because the criminal destruction of a "tangible object" within the meaning of the Sarbanes-Oxley Act didn't include disposal of an undersized fish); Bond v. United States, 572 U.S. 844 (2014) (reversing conviction where the defendant spread a chemical on a woman's car door and was prosecuted for violating the Chemical Weapons Convention Implementation Act of 1998).

[15] McNally, 483 U.S. at 360.

[16] 561 U.S. 247 (2010).

[17] Morrison, 561 U.S. at 254 (internal quotation marks omitted).

[18] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010).

[19] SEC v. Scoville, 913 F.3d 1204, 1218 (10th Cir. 2019).

[20] 519 U.S. 148 (1997) (per curiam).

[21] Jones v. United States, 135 S. Ct. 8 (2014) (Scalia, J., dissenting from denial of certiorari)

[22] United States v. Sabillon-Umana, 772 F.3d 1328 (10th Cir. 2014) (Gorsuch, J.); United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc).

[23] 137 S. Ct. 1626 (2017).

[24] See, e.g., Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009); Crawford v. Washington, 541 U.S. 36 (2004).

[25] See, e.g., United States v. Jones, 565 U.S. 400 (2012); Kyllo v. United States, 533 U.S. 27 (2001).

[26] See, e.g., Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 466 (2000).

[27] See United States v. Davis, 139 S. Ct. 2319 (2019); United States v. Haymond, 139 S. Ct. 2369 (2019); Sessions v. Dimaya, 138 S. Ct. 1204 (2018); but see Leah Litman, Neil Gorsuch is No Friend to Criminal Defendants, Slate (June 26, 2019, 2:20 p.m.), https://slate.com/news-and-politics/2019/06/neil-gorsuch-criminal-defendant-death-penalty-cases.html.

[28] United States v. Davis, 139 S. Ct. 2319 (2019).

[29] United States v. Haymond, 139 S. Ct. 2369 (2019).

[30] See, e.g., Timothy M. Hagle, "Freshman Effects" for Supreme Court Justices, 37 Am. Pol. Sci. Rev. 1142 (1993).

[31] 139 S. Ct. 2228 (2019).

[32] See Adam Feldman, Empirical SCOTUS: A new term with plenty of hype, SCOTUSblog (Sept. 11, 2019, 12:18 p.m.), https://www.scotusblog.com/2019/09/empirical-scotus-a-new-term-with-plenty-of-hype/.
