October Term 2023 Supreme Court Preview: White Collar Criminal Defense
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As fans of One First Street surely know, the Supreme Court's October 2023 term is well underway. Unlike previous years, the court's docket does not currently contain a case that presents a substantive question of white-collar criminal law, but white-collar lawyers should not despair. The docket is a work-in-progress and there are still plenty of cases that should be of interest to lawyers practicing in the white-collar space. Below, we recap *Culley v. Marshall*, a recently-heard forfeiture matter; preview *SEC v. Jarkesy* and *McElrath v. Georgia*, which should be of interest to criminal defense lawyers of all stripes; and detail two certiorari petitions that white-collar lawyers should keep an eye on to see if the court will continue its trend of hearing cases that enable it to pare back aggressive prosecutorial theories.

Recently Argued

'Culley v. Marshall'

The court heard oral arguments in *Culley v. Marshall* on Oct. 30, 2023. In Culley, the court will decide which legal test should be used to determine what process is due after property is seized by law enforcement in anticipation of civil forfeiture.

The petitioners in *Culley* are innocent owners of cars seized incident to arrest and then subjected to civil forfeiture proceedings. Petitioner Lena Sutton's car was seized in February 2019, when a friend borrowing the car was pulled over and arrested after police found methamphetamine in the car. Two weeks later, the state instituted forfeiture proceedings, but it was not until May 2020 that Sutton got her car back after the court ruled she was an innocent owner and directed the state to return her car.

Petitioner Halima Culley's car was also seized in February 2019, after her son, who was driving it, was pulled over and arrested on drug charges. The state filed a civil forfeiture action shortly thereafter, but Culley did not get her car back until October 2020, after the court entered summary judgment in her favor on her innocent-owner defense.

Culley and Sutton filed separate federal lawsuits alleging that the state violated their due process rights by retaining their cars without providing them with an interim "retention hearing." The district courts applied the Supreme Court's four-part test from *Barker v. Wingo* for determining whether a criminal defendant's speedy-trial right has been denied, which the Supreme Court had applied to determine the timeliness of a forfeiture proceeding in *United States v. $8,850*. The district courts ruled against the petitioners after finding that the state had timely initiated the forfeiture proceedings and that any delay was due to the petitioners' lack of diligence in pursuing their rights. The Eleventh Circuit affirmed, holding that no interim hearing was required because, under the Supreme Court's decision in *United States v. Von Neumann*, a timely hearing on the merits of the forfeiture action is all that due process requires.

The petitioners now argue to the Supreme Court that the appropriate legal test for deciding whether they should have gotten an interim hearing is not the *Barker* test but the familiar three-part *Mathews v. Eldridge* test used in civil proceedings to determine whether additional process is required.
The *Barker* test focuses on the timely application of existing procedures, petitioners argue, and is thus inapposite because it does not focus on whether additional procedures are needed. Respondents and the United States as amicus curiae argue, consistent with the Eleventh Circuit's opinion, that because a timely hearing on the merits of the forfeiture action is all that due process requires, the Barker test for timeliness is the appropriate test.

At oral argument, no obvious majority emerged, though several of the justices took clear sides on whether the court's prior decisions in *Von Neumann* and *$8,850* foreclosed petitioners' claim. Justice Amy Coney Barrett, for example, told petitioners' counsel that they had "a hard row to hoe" in light of the court's prior decisions. Justice Ketanji Brown Jackson, on the other hand, repeatedly returned in her questions to the idea that the question of timing is different from the question of what procedure is required.

Perhaps the most striking thing about the oral argument was the frank discussion about abuses of the civil forfeiture system. Justices Neil Gorsuch, Sonia Sotomayor, and Elena Kagan all aired concerns, in Kagan's words, about "how civil forfeiture is being used in some states, about the kinds of abuses that it's subject to, [and] about the kind of incentives operating on law enforcement officers that … that tend toward those abuses." The justices similarly expressed concern that any decision in *Culley* not foreclose due process challenges to other, more problematic, elements of civil forfeiture. As Gorsuch wondered, "Is this the case that presents the due process problem that we should be worried about?"

Upcoming Cases of Interest

'Securities and Exchange Commission v. Jarkesy' (oral argument set for Nov. 29, 2023)

Another notable white-collar-adjacent case currently on the court's docket is *SEC v. Jarkesy*—a matter raising three constitutional issues with significant implications for the government's ability to enforce federal statutes through the administrative state.

As many white-collar practitioners know, the Securities and Exchange Commission can enforce federal securities laws either by instituting administrative enforcement proceedings or bringing civil actions in federal district court. If the SEC brings an administrative enforcement proceeding, an administrative law judge (ALJ) receives evidence and makes an initial decision, either party can appeal to the SEC, and then, if the SEC's decision is adverse to the respondent, that party can file a petition for review in a court of appeals.

The Supreme Court will decide in *Jarkesy* if a divided panel of the U.S. Court of Appeals for the Fifth Circuit correctly held that:

- Congress infringed upon the Seventh Amendment right to a jury trial by empowering the SEC to bring such administrative proceedings.
- Congress improperly delegated legislative power to the SEC by giving it authority to choose to seek civil remedies in administrative proceedings.
- The statutory restrictions on the removal of the SEC's ALJs violate Article II because they provide two layers of for-cause protection from removal.

On the first issue, *Jarkesy* insists that under the Seventh Amendment's "public rights" doctrine Congress cannot properly assign to agency adjudication an SEC proceeding seeking civil penalties, because jury trials in securities suits would not dismantle the statutory enforcement scheme, securities fraud suits are not unknown to the common law, and securities fraud suits are not uniquely suited to agency adjudication. The SEC counters that, under longstanding precedent, administrative adjudications seeking civil penalties do in fact qualify as matters involving the enforcement of "public rights," and Congress' decision to allocate some securities enforcement proceedings to federal courts does not preclude it from allocating others to administrative agencies like the SEC.

On the second issue, *Jarkesy* contends Congress violated the non-delegation doctrine (i.e., lacked an "intelligible principle") when it gave the SEC the power to bring enforcement actions seeking monetary penalties within the agency, instead of in an Article III court, whenever the SEC in its discretion elects to do so. The SEC responds that the "intelligible-principle" standard applies only where (unlike here) Congress authorized executive agencies to adopt general rules governing private conduct, and in any event, that choices about whether and how to enforce the securities laws reflect an exercise of enforcement discretion—a classic executive, not legislative, power.

Finally, *Jarkesy* posits that, under *Free Enterprise Fund v. PCAOB*, the statutory restrictions on the removal of SEC ALJs violate Article II of the Constitution because they provide two layers of "for-cause protection"—ALJ's may be removed only for good cause as determined by the Merit Systems Protection Board, and board members may be removed only for inefficiency, neglect of duty, or malfeasance. The SEC counters that Free Enterprise Fund expressly declined to address the propriety of two-layer tenure protections as applied to ALJs, the constitutional power to remove adjudicators (like ALJs) is different (and more restrained) than it is in other contexts, and that the removal provisions at issue in *Jarkesy* are less stringent than the one the court invalidated in *Free Enterprise Fund*.

The court's decision to review these issues suggests that at least some of the justices are interested in reversal on one or more of the questions presented. Criminal defense lawyers should keep an eye on *Jarkesy*, as it could broadly impact the government's ability to conduct adjudications and impose monetary sanctions via administrative enforcement under a variety of federal statutes.

'McElrath v. Georgia' (oral argument set for Nov. 28, 2023)

In *McElrath v. Georgia*, the court will decide an interesting double jeopardy issue: whether the Double Jeopardy Clause of the Fifth Amendment bars prosecutors from retrying a defendant for an offense for which the jury returned a not-guilty verdict that was later vacated because it was irreconcilable with the jury's guilty verdict on other charges.

The petitioner in *McElrath* was charged in Georgia state court with malice murder, aggravated assault, and felony murder during the aggravated assault. Following a trial, the jury returned verdicts of guilty but mentally ill on the aggravated assault and felony murder charges, but a verdict of not guilty by reason of insanity on the malice murder charge, even though all three charges stemmed from the same conduct. Upon appeal, the Georgia Supreme Court distinguished between "inconsistent verdicts"—such as a finding that a defendant did not conspire to distribute drugs but used a telephone to facilitate the conspiracy—and "repugnant" verdicts, in which a jury "make[s] affirmative findings … that logically or legally cannot exist at the same time."

The Georgia Supreme Court concluded the verdicts were "repugnant" and thus threw them out, finding it was "not legally possible for an individual to simultaneously be insane and not insane during a single criminal episode." McElrath, the petitioner, argued on remand that the Double Jeopardy Clause barred prosecutors from retrying him on the malice murder charge of which the jury had found him not guilty by reason of insanity, but the Georgia Supreme Court ultimately disagreed, concluding the repugnant verdicts were "valueless" and failed to result in an event that terminated jeopardy.

In seeking reversal, McElrath now contends that the Double Jeopardy Clause is an "ironclad" prohibition on retrying a defendant for a crime after he has been acquitted of that crime and cites case law holding that the ban on retrial following an acquittal applies even when the acquittal is inconsistent with other verdicts returned by the jury. The state counters that the issue is not whether McElrath can be retried after an acquittal, but whether there was an acquittal in the first place. And, the state contends, the Double Jeopardy Clause is not implicated because, under Georgia law, the "repugnant" verdicts mean there was never an acquittal.

McElrath presents a narrow issue but white-collar lawyers should keep an eye on the case for any potential indications that the court is inclined to weaken the Fifth Amendment's double-jeopardy protections.

Pending Certiorari Petitions of Interest

There are at least two pending certiorari petitions of which white-collar practitioners should take note as the new term unfolds.

‘Snyder v. United States’

Snyder concerns the scope of the most prosecuted public-corruption statute, 18 U.S.C. § 666, which makes it a crime for state and local officials to “corruptly solicit[,] demand[,] … or accept[] … anything of value” in order to be “influenced or rewarded in connection with” government business worth $5,000 or more. The question presented in *Snyder* is whether Section 666 criminalizes gratuities, i.e., “payments in recognition of actions the official has already taken or committed to take where the official did not agree to take those actions in exchange for payment.”

In *Snyder*, the petitioner-defendant, James Snyder, was the mayor of Portage, Indiana. He was convicted under Section 666 for accepting $13,000 from a truck company after the company successfully won bids to sell garbage trucks to the city. The government disavowed any obligation at trial to prove a quid pro quo and argued instead that Snyder approached the company and received payment after the bidding was over, i.e., that the mayor received an impermissible gratuity. The Seventh Circuit affirmed Snyder’s conviction, reasoning that the statutory prohibition on being “‘influenced or rewarded’ reaches both bribes and gratuities.” But Snyder insists that, absent a quid pro quo requirement, Section 666’s reach is amorphous and would sweep in a wide array of First Amendment-protected interactions with government officials.

The Supreme Court has been keenly interested in federal fraud and public corruption statutes in recent years and has consistently pared back the reach of such laws. *Snyder* could very well become the next in this long line of cases.

‘Miller v. United States’

Miller is a case that arises out of the attack on the U.S. Capitol on Jan. 6, 2021, and has headline-grabbing potential because it could clarify the scope of an obstruction-of-justice statute that has implications for former President Donald Trump.

The government has charged more than 300 individuals since January 6 with violating 18 U.S.C. § 1512(c), which makes it a crime to “corruptly”: “alter[,] destroy[,] mutilate[,] or conceal a record, document, or other object, or attempt to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding”; or “otherwise obstruct[,] influence[,] or impede[,] any official proceeding, or attempt to do so[.]”

Defendant Garrett Miller was arrested in the aftermath of January 6 and charged with, among other things, violating the second clause of Section 1512(c) by obstructing an official proceeding; namely, Congress’s session to certify the results of the 2020 election (*United States v. Fischer*, 64 F.4th 329, 332–33 (D.C. Cir. 2023)). Miller successfully argued in the district court that Section 1512(c)’s two clauses work in tandem such that the second clause prohibits only corrupt conduct that “otherwise” obstructs a government proceeding through evidence tampering. But the U.S. Court of Appeals for the District of Columbia Circuit disagreed, holding that the law’s two clauses function independently, barring evidence tampering, on the one hand, and conduct that, even if not directed at a government record, “otherwise obstructs” a government proceeding, on the other.

Former President Trump’s indictment on federal charges in the District of Columbia included a charge that he violated Section 1512(c). The court could very well wade into this thicket and seek to clarify what it means under this statute to “otherwise obstruct” an official proceeding.

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