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BLOG POST

What A Fishy Case Tells Us About How The Supreme Court Views Criminal Law

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The Supreme Court's recent decision on the scope of a criminal anti-shredding law in *Yates v. United States*, 135 S. Ct. 1074 (2014), caught headlines in legal and mainstream publications for its unusual fact pattern. In short, a fisherman was accused of destroying fish that he had caught and stored that fell below the minimum length allowed. The odd twist in this story is that he was convicted under a law that was enacted in the face of widespread financial misconduct and often only applies to the destruction of information recording instances of corporate crime. The Justices ultimately gave the financial fraud law a narrow reading, but only in a split decision where no opinion garnered more than four votes.

If you look beyond the headlines and the immediate ruling, the Court's forty-three page decision, split across plurality, concurring, and dissenting opinions, provides important guideposts about where the Justices see the current state of criminal law.

The Facts: Fishes And SOX

The dispute in *Yates* originated in 2007 when Officer John Jones of the Florida Fish and Wildlife Conservation Commission boarded a commercial fishing boat captained by John Yates operating in the Gulf of Mexico. Officer Jones noticed that some caught Red Grouper aboard the vessel appeared shorter than the twenty-inch minimum length permitted by federal regulations. As every lawyer knows, in 2007, commercial fishing vessels such as Mr. Yates' were required to release "immediately with a minimum of harm" all Red Grouper shorter than the twenty-inch minimum proscribed in 50 C.F.R. § 622.37(d)(2)(ii) (2007). Officer Jones identified seventy-two fish that fell below the length proscribed in the Code of Federal Regulations but, notably, all seventy-two were within two inches of the minimum length. The officer issued a citation for the offense and instructed Yates and his crew members to leave the offending fish segregated until their ship returned to port.

When the ship returned to port several days later, several of the cold fish had mysteriously grown in length, leading Officer Jones to question the crew members about why the clearly deceased fish had grown. One of them eventually spilled the beans: Yates had instructed his crew to toss the fish that were initially measured by Officer Jones and replace them with new, longer fish.

Almost three years later, Yates was indicted and eventually convicted for violating 18 U.S.C. § 2232(a) and 18 U.S.C. § 1519. The parties agreed that the former statute – a nearly seventy-year-old provision that bars the knowing destruction of property to prevent seizure by government – applied to Yates. Section 1519 was more controversial and its application to

Yates became the basis for the case that reached the Supreme Court.

Section 1519 of Title 18 the U.S. Code was enacted as part of the Sarbanes-Oxley Act of 2002, 116 Stat. 745, in light of revelations that Enron's auditors, Arthur Andersen, had regularly destroyed incriminating evidence that could have implicate both its client and the audit company itself. Section 1519 proscribes that:

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

In short, the statute makes it a felony to modify or altogether destroy "any record, document, or tangible object" with the intent to obstruct an investigation or the administration of any matter within the jurisdiction of a federal agency.

Yates was eventually convicted of violating both § 2232(a) and § 1519 and sentenced to thirty days in prison followed by three year of supervised release.

The Supreme Court Weighs In

On appeal to the Supreme Court, the lone remaining question was whether § 1519 applied to the Red Grouper that Yates had allegedly destroyed or to a more narrow class of "tangible object." By a 4-1-4 vote, the Justices sided with Yates, concluding that the term "tangible object" as used in § 1519 did not include fish thrown back to the sea. The colorful opinions, which cite everything from *Black's Law Dictionary* (five times) to Dr. Seuss' *One Fish Two Fish Red Fish Blue Fish*, parse the text of the statute, including separately analyzing its verbs, nouns, title, and proximity to both narrow and broad anti-tampering provisions. The dueling opinions make for an interesting take on an age-old problem of statutory interpretation where a term may mean one thing on its own but another thing when placed in the context of a larger statutory scheme.

The opinions left the exact definition of "tangible object" somewhat unclear. Justice Ginsburg, in a plurality opinion joined by Chief Justice Roberts and Justices Breyer and Sotomayor, defined "tangible object" as one that is "used to record or preserve information." 135 S. Ct. at 1079. Justice Alito, concurring in the judgment only, defined the term to include "something similar to records or documents." *Id.* at 1089. Justice Kagan authored a dissenting opinion, joined by Justices Scalia, Kennedy, and Thomas, which argued for "tangible object" to encompass the dictionary-definition that all Justices agreed would normally apply: "any object capable of being touched." *Id.* at 1091.

Takeaways For Criminal Lawyers

In addition to providing well-reasoned commentary on statutory interpretation, the Justices were not shy about sharing their opinion on the current state of criminal laws in the United States.

Prosecutorial Discretion. First, this case drew out the Justices' focus on prosecutorial discretion. At oral argument in this case, Justice Scalia jokingly asked if the prosecutor bringing SOX § 1519 anti-tampering charges against a fisherman in this case was the same prosecutor who brought charges under the U.N. Chemical Weapons Convention against a jilted lover who rubbed skin-irritating chemicals on the car door of her husband's mistress. Oral Arg. Trans. at 27 (referring to *Bond v. United States*, 134 S. Ct. 2077 (2014)).

Justice Scalia was also critical of § 1519's steep twenty-year maximum penalty, which is far greater than the five-year maximum penalty for the other anti-tampering statute Yates was initially convicted for violating. After the attorney for the United States reported to the Justices that the U.S. Attorney's Manual generally advises prosecutors to charge the applicable offense that is most severe, Justice Scalia suggested that the Department of Justice's position may cause him to read expansive criminal statutes more narrowly in the future:

Well, if that's going to be the Justice Department's position, then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most severe, I'm going to be very careful about how severe I make statutes. . . . [O]r how much coverage I give to severe statutes.

Oral Arg. Trans. at 29. Justice Scalia pushed on, asking "What kind of a mad prosecutor would try to send this guy up for 20 years or risk sending him up for 20 years?" *Id.* at 28. At oral argument, the Chief Justice also picked up on the extraordinary leverage that a twenty-year penalty can afford prosecutors during the plea bargaining process. When the attorney for the United States noted that the Department of Justice does not prosecute "every fish disposal case," the Chief Justice shot back that statute's breadth still gives the Department leverage to force its will on defendants:

But the point is that you could [prosecute], and the point is that once you can, every time you get somebody who is throwing fish overboard, you can go to him and say: Look, if we prosecute you you're facing 20 years, so why don't you plead to a year, or something like that. It's an extraordinary leverage that the broadest interpretation of this statute would give Federal prosecutors.

Oral Arg. Trans. at 31. Almost as an aside, the plurality also criticized prosecutors for their thirty-two month delay in prosecuting the case. 135 S. Ct. at 1080.

Overcriminalization. Second, the Justices raised the broad issue of overcriminalization in America and cited § 1519 as an example of "excessive punishment in the U.S. Code." 135 S. Ct. at 1100 (Kagan, J., dissenting). In her plurality opinion, Justice Ginsburg deliberately mentioned that Yates would forever "bear the stigma of having a federal felony conviction" following his § 2232(a) and § 1519 convictions at trial. Justice Kagan had even deeper criticisms of the law, identifying § 1519's broad sweep as part of a larger problem in federal criminal law:

I tend to think, for the reasons the plurality gives, that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.

135 S. Ct. at 1101.

At base, *Yates* is an interesting look at statutory construction. Scholars and journalists are correct to pick up on the case for its possible effect on one of this Term's major cases, *King v. Burwell*, which raises a vaguely similar question of statutory construction that could potentially cripple the Affordable Care Act. But *Yates* presents an interesting question of criminal law on its own and the Justices' reactions to the underlying prosecution of John Yates are also important guideposts about where the Supreme Court currently sits on important criminal law questions of our day.