

ARTICLE

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The Fish Tale and the Supreme Court: How Applying Sarbanes-Oxley to Missing Grouper Has Raised Questions of Overcriminalization

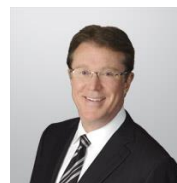
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The Issues

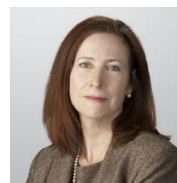
On November 5, 2014, the Supreme Court heard arguments in *Yates v. United States of America*. In layman's terms, the issue is whether an Enron-era anti-shredding provision of the Sarbanes-Oxley Act was wrongly used to convict a fisherman of a crime carrying a penalty of up to 20 years in prison based on evidence that he destroyed some undersized grouper after receiving a civil citation from a wildlife agency.

The opening argument of Assistant Federal Defender John L Badalamenti, Yates' counsel, centered on syntax and canons of construction like *Ejusdem Generis*, which requires that a word be construed according to the company it keeps. The pertinent provision, codified at 18 U.S.C. § 1519, subjects anyone to criminal punishment who, with the requisite intent, "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object." Badalamenti told the Justices that "[t]he natural, sensible and contextual reading of Section 1519 is that the phrase 'record document or tangible object' is confined to records, documents and devices designed to preserve information, the very matters involved in the Enron debacle." Representing the United States as Assistant to the Solicitor General, Roman Martinez argued in response that "this is a general statute that would cover destroying any record, document, or tangible object, which we think, as a manner of plain meaning and history covers all types of – physical evidence."

Justice Breyer, however, soon showed interest in a broader issue commonly called "overcriminalization." He expressed his concern early, stating that this statute "at first blush seems far broader than any witness-tampering statute, any obstruction of justice statute, any not lying to an FBI agent statute that [he's] ever seen." Other Justices quickly picked up on this theme, which seemed to dominate the questioning going forward. But another problem surfaced during the discussion – the overcriminalization issue was not presented in the courts below, though it was squarely raised in the Supreme Court by Holland & Knight Partner William N. Shepherd as counsel for *Amicus Curiae* The National Association of Criminal Defense Lawyers, and by other *Amici* as well. Thus the impending decision in this case promises to be instructive on both



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procedural and substantive issues. And, though it is impossible to predict with total accuracy the outcome of the case, the live arguments last week were revealing, and at times, quite humorous.

The Facts

On August 23, 2007, Gulf Coast fisherman John L. Yates was captaining the 47-foot boat, Miss Katie, when a state conservation officer with federal enforcement power boarded and measured approximately 3,000 pounds of fish. Following the officer's inspection, he issued a civil fishing citation to Yates for allegedly having caught 72 red grouper fish that were below the 20-inch minimum. The officer ordered Yates and his crew to return to shore with the red grouper fish that were allegedly too small to harvest, at which point the fish would be seized and destroyed. At this time, Yates only faced potential fines and a suspension of his fishing license.

Upon the return of the Miss Katie to shore, the officer again measured the red grouper fish that were allegedly too small. This time, however, the officer only found 69 undersized fish – three fewer than he documented on board – with many of them closer to the required 20 inches in length. Suspecting foul play by Yates, federal agents conducted an investigation of Yates and his crew. During the investigation, a crew member told the federal agents that on their way back to shore, Yates had instructed certain crew members to dispose of the offending fish and replace them with longer fish. Yates denied all allegations that he had attempted to conceal or dispose of the red grouper fish which fell below the 20-inch minimum.

Despite Yates' denials of wrongdoing, federal prosecutors formally indicted Yates in 2010 on three charges: destroying property to prevent a federal seizure; lying to federal agents; and destroying, concealing, and covering up the undersized fish to impede an investigation, in violation of Sarbanes-Oxley's anti-shredding provision. The Sarbanes-Oxley charge carried a possible 20-year sentence for Yates, even though the provision itself was intended to promote corporate responsibility and prohibit the destruction of documents and computer drives associated with corporate fraud.

Although Yates was acquitted in 2011 of lying to federal agents, he was convicted of violating the Sarbanes-Oxley anti-shredding provision and destroying property to prevent a federal seizure. The Court of Appeals for the Eleventh Circuit upheld the conviction. It concluded that the term "tangible object," as used in this Sarbanes-Oxley provision, "unambiguously applies to fish." As a result of the conviction, Yates was sentenced to 30 days in jail, which he served over the Christmas holidays. Yates also still lives under a three-year supervised release program.

The Oral Argument

Yates' textual argument met push-back from several of the Justices who challenged Yates' proposition that § 1519 would indeed allow a conviction based on the destruction of a physical recording of the destruction of fish (such as the destruction of a filmed recording of a fisherman dumping an illegal catch), but yet would not support a conviction based on testimony that the fisherman had destroyed a portion of his catch while an investigation was pending. For example, Justice Kennedy asked, "Would [the film's] destruction be a violation of this Act?" and Badalamenti responded, "Yes, it would be" – which prompted this quip from Justice Kennedy: "It seems very odd that you can throw away the fish without violating the Act, but you can't throw away the picture."

Yates' counsel also conceded that the conduct at issue might be covered by another section of the Act, § 1512, which includes the term "other" object instead of the words "tangible object." Martinez argued that anyone on the street, if asked, would insist that a fish is in fact a "tangible object." But Chief Justice Roberts returned to the context of the term at issue by asking, "Well, what if you stopped them on the street and said is a fish [a] record, document or tangible object?" – to which Justice Scalia retorted, "I don't think you would get a polite answer to either of those questions."

Most of the discussion, however, focused on the government's position that the Sarbanes-Oxley Act criminalizes minor infractions during a civil investigation – conduct that has nothing to do with the Enron-type of corporate misconduct – and exposes the defendant to a potential sentence of 20 years in prison.

Justice Breyer, in particular, expressed concern that the breadth of § 1519 created the potential for "arbitrary and discriminatory enforcement" of the Sarbanes-Oxley Act. To illustrate his concerns, Justice Breyer used the "ridiculous example" of a person who ripped up a piece of mail because he hated postmen, but could nonetheless be subject to criminal prosecution under the Sarbanes-Oxley Act.

Following up on Justice Breyer's line of questioning, Justice Alito made even more explicit the concerns about overcriminalization. While recognizing that Martinez had "arguments on all of these points," Justice Alito noted that the government was "really asking the Court to swallow something that is pretty hard to swallow." In a series of questions directed to Martinez, Justice Alito went straight to the heart of the issue: "Do you deny that this statute, as you read it, is capable of being applied to really trivial matters" that "carry a potential penalty of 20 years," yet it is still "the policy of the Justice Department that this has to be applied in every one of those crazy little cases." Providing explicit examples of such "really trivial matters," Justice Alito asked, "What if it was one fish? What if it was one undersized fish that was caught by a fisherman in a national – on Federal land? This would be – would it apply here?"

In the Court's final question posed to Martinez, Justice Kennedy injected one final bit of levity into the proceeding, while further highlighting the Court's skepticism about the prosecution of Yates. In response to Martinez's statement that the "case presents just a common sense, straightforward question of statutory interpretation," Justice Kennedy sarcastically offered: "Perhaps Congress should have called this the Sarbanes-Oxley Grouper Act." Martinez could do nothing but agree.

Conclusion

The oral argument regarding the prosecution of Yates reflects the Supreme Court's obvious concerns about overcriminalization as a result of the Sarbanes-Oxley Act, which offers the government unprecedented breadth and flexibility when prosecuting seemingly minor offenses. One potential issue, however, is that the overcriminalization argument was not raised in the lower courts, raising a possible preservation problem. The Court's focus on overcriminalization – despite these apparent preservation issues – should serve as an important check on prosecutorial overreach in future indictments under the Sarbanes-Oxley Act.