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Expert Analysis

Rowland Conviction Rests on Expansive Interpretation of Sarbanes-Oxley

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In *United States v. Rowland*, a case decided on June 17, 2016, the U.S. Court of Appeals for the Second Circuit rejected a challenge by former Connecticut Governor John Rowland to his conviction on seven counts of violating campaign finance laws and falsifying records. In so doing, the panel issued an important decision regarding the interpretation of 18 U.S.C. §1519, a provision of the Sarbanes-Oxley Act, which prohibits the falsification of documents for the purpose of misleading government investigators. *United States v. Rowland*, No. 15-985 (2d Cir. June 17, 2016)

The Rowland decision tacks in a different direction from the U.S. Supreme Court's recent decision in *Yates v. United States*, 135 S. Ct. 1074 (2015), in which the court narrowed the reach of this statute by adopting an interpretation rooted in the statute's purpose. *Rowland*, by contrast, seems to take a broader approach. Given the tension between *Rowland* and *Yates*, and the Supreme Court's longstanding interest in limiting the breadth of the statutes that prohibit obstruction of justice, *Rowland* may warrant further appellate review.

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Background

According to the panel's opinion, during the 2010 and 2012 election cycles, Rowland sought paid political consulting work on behalf of two Republican congressional candidates, Mark Greenberg and Lisa Wilson-Foley. Because Rowland previously served 10 months in jail on prior unrelated convictions arising out of a political corruption scandal that resulted in his 2004 resignation from office, neither Rowland nor the candidates wanted Rowland's involvement in their campaigns to be made public.

The Federal Election Commission (FEC) requires campaigns to disclose disbursements to individuals from official campaign funds, see 11 C.F.R. §104.3(b)(3)(i); it therefore became vital that Rowland not receive any payment for his political consulting work directly from either campaign.

To facilitate payment through other channels, Rowland prepared and submitted to Greenberg a draft contract, under which he offered to provide "consulting services" for Greenberg's businesses and his nonprofit organization. Greenberg ultimately declined to

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hire Rowland. Rowland's involvement with the Wilson-Foley campaign was more extensive. Rather than entering into a contract with Wilson-Foley herself, Rowland was instead hired as a consultant for a nursing home company, Apple Rehab, which was run by Wilson-Foley's husband.

Apple Rehab agreed to pay Rowland $5,000 per month for his services. Rowland did engage in work on behalf of Apple Rehab during the campaign season, but also worked for Wilson-Foley's campaign (over the relevant time period, Rowland participated in 787 email exchanges relating to the campaign and only 63 regarding Apple, suggesting that Rowland spent more time working on the campaign than for Apple Rehab).

Following a government investigation, Rowland was indicted and subsequently convicted at trial on seven counts, including two counts of falsification of records in violation of 18 U.S.C. §1519, with respect to both the Greenberg and Wilson-Foley contracts. The U.S. District Court for the District of Connecticut sentenced Rowland to 30 months' imprisonment.

Second Circuit on §1519

On appeal, Rowland argued that the evidence did not support his Section 1519 convictions because the contracts in question were not "falsified" within the meaning of the statute; that he was entitled to a new trial because the government improperly withheld material exculpatory evidence from the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963); and that the district court committed various other errors relating to evidentiary rulings, jury instructions, and U.S. Sentencing Guidelines' calculations. The Second Circuit rejected each of these challenges, but it is the panel's expansive interpretation of the Sarbanes-Oxley obstruction provision that renders the opinion most notable.

Title 18, U.S. Code, Section 1519 makes it illegal for an individual to "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] 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." Rowland contended that he could not have falsified the two contracts. According to Rowland, "falsification" refers only to tampering with a preexisting document, not creating a new, inaccurate document.

The panel disagreed. Analyzing the statute's plain meaning, the panel determined that "falsification" extends further and encompasses any false "represent[ation]," including a representation made in a newly drafted document. Choosing between its canons of construction, the panel turned aside Rowland's argument that "falsifies" should be read to carry a meaning similar to that of the neighboring words in the provision (i.e., "alters, destroys, mutilates, conceals, covers up"), each of which suggests tampering with an existing document. Instead, the panel reasoned that Rowland's proposed definition of the term would make "falsifies" synonymous with "alters"—another term in Section 1519. Because this reading would render "falsifies" superfluous, a broader reading was therefore appropriate. Finally, the panel noted that the legislative history of Section 1519 also supported an expansive interpretation: according to the Senate Report, "Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence[.]" S. Rep. No. 107-146, at 14 (2002).

After the panel determined that an individual may violate Section 1519 "by creating a document that is false," the panel considered whether the contracts at issue were in fact "falsified" by Rowland. In support of his argument, Rowland relied on *United States v. Blankenship*,

382 F.3d 1110 (11th Cir. 2004), an Eleventh Circuit case interpreting a different federal statute relating to "false writing[s] or document[s]," 18 U.S.C. §1001(a)(3). In *Blankenship*, the U.S. Court of Appeals for the Eleventh Circuit concluded that promises in a contract could not be "false," even where "neither party actually intended to carry through on their promises" because "[a] 'promise' contained in a contract is not a certification that the promisor will actually perform the specified acts, or presently intends to perform those acts." Id. at 1133. A contract is only "false" if it has been forged or altered, or if it contains factual misrepresentations. Id. at 1132.

The Second Circuit, however, departed from the Eleventh Circuit's reasoning, creating an apparent circuit split. The panel read Section 1519 broadly, to encompass "the creation of documents—like the contracts at issue here—that misrepresent the true nature of the parties' negotiations, when the documents are created in order to frustrate a possible future government investigation." The panel commented that "importing principles of contract law into the interpretation of this criminal statute muddies the issues," and held that "a written contract may be 'falsified' for purposes of §1519 if it misrepresents the true nature of the parties' agreement," or "the true relationships among the parties."

In Rowland's case, it was clear to the panel that the documents—purporting to hire him as a business consultant (in the case of Greenberg) and an employee of Apple Rehab (in the case of Wilson-Foley)—did not reflect the arrangement actually contemplated by the parties; therefore, it was unimportant that the fictitious arrangement was memorialized in a contract rather than, for example, in a memorandum to file, which more easily could have been deemed "false." Because there was no shortage of evidence that Rowland intentionally drafted contracts that misrepresented his relationship with two congressional candidates, the panel determined that Section 1519 reached his conduct.

The panel's ruling on this statutory interpretation question is important for several reasons. First, while the Eleventh Circuit was interpreting a different federal statutory provision (18 U.S.C. §1001) in *Blankenship*, the Second Circuit has effectively created a circuit split by reading the term "false" to apply to contractual agreements even where there is no showing of a factual misrepresentation in the contract. The panel cites *United States v. Jespersen*, 65 F.3d 993 (2d Cir. 1995), but *Jespersen* involved a conviction under 18 U.S.C. §1503 for obstructing a grand jury investigation, where the defendant created a false document in response to a grand jury subpoena. Here, there was no pending investigation at the time Rowland drafted the contracts at issue—one of which (the Greenberg contract) was never executed by the parties. Nor can it be said that the Wilson-Foley contract was entirely false, given that Rowland did perform legitimate work for Apple Rehab (even if he also worked for the Wilson-Foley campaign).

Second, the panel's opinion is all the more significant in light of the Supreme Court's 2015 plurality decision in *Yates v. United States*, 135 S. Ct. 1074, which interpreted another term in Section 1519. In *Yates*, the court focused on Section 1519's prohibition on the destruction of "any record, document, or tangible object." There, a fisherman had thrown undersized red grouper overboard in order to avoid prosecution for violating federal fishing regulations, which placed lower limits on the size of grouper that could be commercially fished. A divided court determined that a "fish" did not constitute a "tangible object," and limited the term to those objects

"used to record or preserve information." Id. at 1085.

The Second Circuit acknowledged *Yates* in its decision and explained that while *Yates* adopted a narrower reading of "tangible object," which diverged from the dictionary definition of the term, "the same interpretive clues that led the plurality in *Yates* to depart from the ordinary dictionary definition in that case counsel in favor of following the dictionary definition here."

While the Supreme Court's narrow construction certainly does not foreclose the Second Circuit's broad reading of a different term in the same statutory provision, the contrast is nonetheless worth noting. Interestingly, the Second Circuit acknowledged that Rowland's strongest interpretive argument was based on the doctrine of noscitur a sociis, or "a word is known by the company it keeps," *Yates*, 135 S. Ct. at 1085—a doctrine on which the Yates plurality heavily relied in reaching its holding. Here, Rowland pointed out that the terms immediately preceding "falsifies" in Section 1519 ("alters, destroys, mutilates, conceals, covers up") all imply the preexistence of a document and that, therefore, a reading of "falsifies" to encompass newly created documents would be in tension with the remainder of the provision. The Second Circuit accepted Rowland's point, but reasoned that "when the plain meaning of 'falsify' and other interpretive guidelines lead to the opposite conclusion, a lone canon of construction cannot cabin the meaning of 'falsify' as Rowland urges."

To be sure, the panel offered a logical competing explanation for the terms at issue in *Rowland* and identified varied support for its reading of Section 1519. It also may be the case that the notice concerns at issue in *Yates*, where the Supreme Court was asked to apply a law targeted at white-collar crime to fish as well as to documents, were not present in *Rowland*. Nevertheless, given that the Second Circuit's decision suggests a circuit split and addresses issues related to those previously raised by the Supreme Court in the Yates decision, it seems likely that other courts will weigh in on the interpretation of this statutory provision in the near future.

Benefit From Further Review

Rowland may also be a candidate for certiorari. The U.S. Supreme Court has long demonstrated an interest in policing the boundaries of overbroad statutes that punish obstruction of justice. See, e.g., *Yates*, supra; *Arthur Andersen v. United States*, 544 U.S. 696 (2005) (reversing conviction because the jury instructions did not properly convey the elements of a violation of Section 1512); *United States v. Aguilar*, 515 U.S. 593 (1995) (affirming appellate court's reversal of conviction under Section 1503 where the government did not prove that false statements made to FBI agents had the natural and probable effect of obstructing justice).

Legislative history cited in *Yates* supports the notion that Section 1519 was intended to be a "general anti shredding provision," and not a law that prohibits the creation of an inaccurate contract long before there is any prospective prosecution. See *Yates*, 135 S. Ct. at 1081 (quoting S. Rep. No. 107-146, at 14). In short, *Rowland* presents issues similar to those addressed in *Yates*, *Arthur Andersen*, and *Aguilar*, and the development of the law would benefit from further review to ensure that Section 1519 is not allowed to run rampant.