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Supreme Court's October Term 2018 Contains Hints Of Things to Come

Part Two of a Two-Part Article

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In Part One of this article last month (http://bit.ly/2CZxXdW), we discussed several of the key business crimes cases from the recently concluded October Term 2018. We resume this discussion in Part Two of our article and offer some concluding thoughts about where the Court may go next in the years to come.

United States v. Haymond: *Apprendi* Continues To Impact Sentencing

Some 20 years ago, the Supreme Court held in *Apprendi v. New Jersey*, 530 U.S. 466, 491-92 (2000) that any fact that increases the penalty for a crime beyond the otherwise-applicable statutory maximum (other than the existence of a prior conviction) must be proved to a jury beyond a reasonable doubt. As *United States v. Haymond*, 139 S. Ct. 2369 (2019), demonstrates, *Apprendi* continues to cast a long shadow over criminal proceedings.

Following his conviction for possession of child pornography, Haymond completed a prison sentence. He was serving a ten-year term of supervised release when government officials discovered what appeared to be images of child pornography on his cell phone. Following a hearing for the revocation of Haymond's supervised release, the judge found, by a preponderance of the evidence, that Haymond had knowingly possessed some of the images. Under 18 U.S.C. §3583(k), possession of child pornography during a period of supervised release carries a mandatory five-year term of imprisonment, and, so, Haymond received an additional five-year sentence. The Tenth Circuit held that the procedure contemplated in Section 3583(k) — that is, a mandatory five-year prison term for violation of supervised release, as determined by a judge under the "preponderance of the evidence" standard — violated the defendant's right to a trial by jury.

The Supreme Court affirmed and splintered along atypical lines. Justice Gorsuch wrote the plurality opinion for Justices Ginsburg, Sotomayor and Kagan. Justice Breyer provided a fifth vote but concurred separately, making his decision the binding precedent. Justice Alito wrote a dissent for himself, Chief Justice Roberts, and Justices Thomas and Kavanaugh. The plurality opinion concluded that the imposition of a mandatory minimum sentence triggered the *Apprendi* requirements of trial by jury and proof beyond a reasonable doubt. In particular, *Alleyne v. United States*, 570 U.S. 99, 111-12 (2013), held that facts setting a mandatory minimum sentence also must be proved beyond a reasonable doubt and to a jury.

The plurality opinion began by saying that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." The opinion rejected the notion that a supervised release proceeding was governed by different rules than apply in an ordinary criminal prosecution. It likewise rejected the idea that the additional punishment for a revocation of supervised release was actually punishment for the original crime of conviction.

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Although the plurality opinion never expressly stated that jury trials were required in all supervised release proceedings, that seemed implicit in the Court's analysis, as the dissent recognized. Justice Breyer — famously a dissenting voice in many decisions in the *Apprendi* line of cases — wrote separately and did not go quite as far as the plurality. He concluded that a supervised release revocation sentence is part of the punishment for the original crime, rendering *Apprendi* inapplicable. Nonetheless, he agreed that the particular mandatory minimum sentence imposed here was unconstitutional because it looked less like a standard revocation sentence and more like a sentence imposed for a new offense.

If Justice Gorsuch's opinion eventually becomes the law of the land, it will significantly change supervised release proceedings. The dissent pointed out that there are nearly 17,000 such proceedings every year. Although adding 17,000 jury proceedings would create a major practical problem for the federal system, the constitutional guarantee of due process imposes many unavoidable "inefficiencies." Defendants facing additional imprisonment for a supervised release violation should consider challenging the violation specification on *Haymond* grounds, in order to preserve the constitutional argument for appeal.

Lorenzo v. Securities and Exchange Commission: When Can False Statements Be Charged?

In *Lorenzo v. Securities and Exchange Commission*, 139 S. Ct. 1094 (2019) — which was an SEC enforcement action, not a criminal case — the Supreme Court undermined its decision in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011), and thereby expanded the scope and strength of Rule 10b-5's anti-securities fraud prescription. The SEC brought an action against Lorenzo, who, in his capacity as director of investment banking at a brokerage firm, had sent two emails containing false statements to prospective investors. The emails — which had been drafted by Lorenzo's supervisor — described an investment opportunity in a company that purportedly held $10 million in assets, but Lorenzo knew that this was a vast exaggeration and the company in fact had perhaps 5% of this amount in actual assets. The Supreme Court was asked to decide whether Lorenzo could be held liable for the dissemination of the emails even though he did not draft them.

The Court's decision was complicated by its recent decision in *Janus*, in which it held that an investment adviser who participated in the drafting of a false statement made by another person could not be liable under Rule 10b-5(b), which makes it unlawful "[t]o make any untrue statement of a material fact … in connection with the purchase or sale of any security." Only the "maker" of the statement can be charged under Rule 10b-5(b). On appeal, the Supreme Court assumed that under *Janus*, Lorenzo could not be held liable as a "maker" of the false statement under subsection (b).

Justice Breyer, writing for a 6-2 Court (Justice Kavanaugh abstained), held that as a matter of statutory interpretation, the Court's decision was easy. Notwithstanding *Janus*, the Supreme Court ruled that Lorenzo's "dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5[.]" These subsections prohibit securities fraud in other forms. Rule 10b-5(a) makes it unlawful "[t]o employ any device, scheme, or artifice to defraud … in connection with the purchase or sale of any security." Rule 10b-5(c) prohibits a person from "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit … in connection with the purchase or sale of any security."

To Justice Breyer, the fact that the defendant was not a "maker" of a false statement under subsection (b) did not affect the defendant's liability for securities fraud under one of the other broadly worded subsections of Rule 10b-5. The dissenters (Justices Thomas and Gorsuch) disagreed, contending that each of the three subsections of Rule 10b-5 is meant to address an entirely distinct category of fraudulent conduct, and the only prohibition on false statements is contained in subsection (b). A contrary ruling would render *Janus* a "dead letter." Justice Breyer rejected this argument on the ground that *Janus* simply did not address a case in which the defendant was charged as a disseminator, not a maker, of a false statement. Leaving aside the statutory basis for the Court's analysis, white-collar practitioners should take note that

Janus provides significantly less protection for potential Rule 10b-5 violators after *Lorenzo*.

Gundy v. United States: The Non-Delegation Doctrine Still Lives?

In *Gundy v. United States*, 139 S. Ct. 2116 (2019), the Supreme Court addressed whether the Sex Offender Registration and Notification Act (SORNA) violates the nondelegation doctrine, a rule of constitutional law that derives from the separation of powers, by giving the Attorney General the authority to specify the applicability of SORNA's registration requirements and to proscribe rules for their registration. Although the case involves criminal law issues, the question at issue has bigger implications for the modern administrative state than for most criminal defendants. As Justice Kagan wrote: "If SORNA's delegation is unconstitutional, then most of Government is unconstitutional."

On this contentious issue, a very divided Court ruled that the statute did not violate the doctrine. The splintered nature of the Court's decision makes it unlikely that the plurality opinion — written by Justice Kagan and joined by Justices Ginsburg, Breyer, and Sotomayor — will remain good law for very long. Justice Alito provided the fifth vote to uphold the statute, but he expressed willingness to "reconsider" the Court's precedents regarding the non-delegation doctrine. Justice Alito voted with the majority because a majority of justices were not prepared to revisit the entire nondelegation doctrine. (Justice Kavanaugh did not participate, having not been on the Court when the case was argued.) In a future case, Justice Alito may join Justices Gorsuch and Thomas, and Chief Justice Roberts, who dissented in an opinion written by Justice Gorsuch. Accordingly, there is reason to believe that Justice Gorsuch's opinion — which would dramatically expand the reach of the nondelegation doctrine — is poised to become the new rule as soon as a case in which Justice Kavanaugh is able to participate presents this question to the court.

This case does not address the usual criminal law issues that are presented to the Supreme Court, and in a sense is more concerned with administrative law issues. At the same time, as this case demonstrates, a more vigorous nondelegation doctrine could limit the extent to which administrative regulations can be used to prohibit conduct under the criminal law.

Concluding Thoughts

How will OT 2018 be recalled in the future by criminal law practitioners? It is hard to see it being remembered as having any immediately ground-breaking criminal law decisions, such as *Carpenter v. United States*, 138 S. Ct. 2206 (2018) in the prior term. Gamble is perhaps the biggest example of the deflated expectations for this term: The case was hyped as likely to change the Double Jeopardy doctrine dramatically, but — after 12 amicus briefs and oral argument — the Court left things exactly as they were before. Why did the Court even bother taking up this issue?

At the same time, the appearance of stasis could be misleading. Much like Ernest Hemingway's aphorism about bankruptcy, Supreme Court doctrine often changes "gradually, then suddenly." Several of the decisions — *Rehaif*, *Haymond*, and Justice Gorsuch's dissent in *Gundy* — have the potential to provide a basis for ground-breaking decisions in the future. Rehaif has within in it the seeds of a heightened *mens rea* requirements under federal criminal statutes, which may increase the burden on the government in white-collar litigation, in which knowledge defenses are often presented at trial. *Haymond* may provide a basis for finding a jury trial right in violation-of-supervised-release proceedings, which would require an overhaul of supervised release procedures and may reduce the likelihood that defendants return to prison for minor violations of supervision conditions. Justice Gorsuch's dissent in *Gundy* lays out a roadmap for reconceiving the modern administrative state, aspects of which are relevant to the criminal law. In short, the changes last term were gradual, but we may see that the decisions from this quiet term will lead to surprising — and significant — developments in the future.

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