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Scholars, Prosecutors, and Defense Counsel Discuss Most Important Rulings of Last Term

Leading law professors and attorneys recently identified the most significant cases of the U.S. Supreme Court's last term in a series of interviews with BNA. The term's need-to-know rulings included decisions on double jeopardy, the admissibility of forensic laboratory reports, vehicle searches, prosecutorial immunity, and the scope of the federal Racketeer Influenced and Corrupt Organizations Act.

A table that summarizes the holdings of all the term's criminal law opinions and provides cites to stories and text in the *Criminal Law Reporter* begins on page XXX.

White Collar Crime. In *Boyle v. United States,* the justices approved a broad interpretation of the reach of the RICO statute.

The law's description of the criminal ''enterprises'' within its scope includes ''any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'' The lower courts, however, were divided as to what prosecutors and civil plaintiffs have to prove about an informal ''association-in-fact enterprise'' in order to bring it within the scope of RICO. For example, some circuits had held that a group of individuals who engaged in a pattern of criminal activity could not be prosecuted as an association-in-fact without some proof that their association extended beyond what was necessary to engage in the criminal activity itself.

In a 7-2 decision, the Supreme Court rejected this approach and held that the text of the statute does not require an association-in-fact enterprise to have any structure separate from that inherent in the pattern of racketeering activity in which it engaged. RICO is not ''limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach,'' the court said.

Professor Ellen Podgor teaches courses on white collar crime and international criminal law at Stetson University Law School, Gulfport, Fla. She said *Boyle* is a ''clear win'' for the government in that it approves RICO prosecutions based on a ''minimal amount of evidence'' as to the enterprise element. However, the decision's greatest impact will be its clarification of this murky aspect of RICO law, which will be helpful for counsel on both sides, Podgor said.

A number of the attorneys interviewed by BNA expressed the view that the decision in *Boyle* will be even more important in civil RICO litigation. For example, San Francisco lawyer Martha Boersch, of Jones Day, pointed out that RICO charging decisions in criminal cases are already restricted to officials at DOJ headquarters in Washington, D.C., and that the government can always resort to prosecutions for ''ordinary'' conspiracies in those cases in which RICO prosecutions are not approved. Civil plaintiffs, in contrast, are largely out of luck unless they can make a set of facts into a RICO conspiracy and—when they are able to do this—they can obtain attorneys' fees and treble damages, Boersch stressed. She acknowledged that there are some other civil conspiracy causes of action that plaintiffs could rely upon, but they are not as powerful as the RICO statute.

A second case related to white collar crime arose out of a prosecution of executives at Enron. In *Yeager v. United States*, the court addressed the collateral estoppel component of the Fifth Amendment's double jeopardy protection and how it applies when a jury is unable to reach a verdict on some counts but outright acquits on other counts that are factually related to the hung counts. The court held that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial.

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The holding obviously applies in prosecutions for all manner of offenses, but the scholars and defense attorneys interviewed by BNA observed that the decision has special significance in prosecutions for white collar crime. Mark Schonfeld is the former director the Securities and Exchange Commission's New York Regional Office, and he thought the decision was ''particularly interesting'' in light of the tendency of the government to bring ''increasingly complex'' prosecutions for financial crimes with multiple counts and multiple theories. Schonfeld is now with Gibson, Dunn & Crutcher LLP, New York. The decision in *Yeager* ''shifts the burden more against the government in having to establish an entitlement to a retrial when there are seemingly conflicting outcomes from the first trial,'' Schonfeld said.

Podgor, too, noticed a tendency toward overcharging in white collar cases and observed that any advantage that the government may have had in bringing multiple charges based on the same conduct now comes with a price. When there are multiple counts based on the same conduct, there is an increased likelihood that an acquittal will preclude retrial on another count on which a jury hung, Podgor explained.

Paul Rashkind told BNA that he sees *Yeager* as part of a more general trend in the court's decisions toward making the trial stage of the criminal process more important. Rashkind is the chief of appeals for the Federal Public Defender's Office in the Southern District of Florida, Miami. Rashkind is also a co-chair of the Defender's Supreme Court Resource & Assistance Panel.

What *Yeager* does, Rashkind said, is allow defense counsel ''to focus on the least provable counts'' and then use acquittals on those counts to collaterally estop other counts.

Rashkind's list of other decisions this term that ''empower'' choices made at the trial stage of the process included *Montejo v. Louisiana*. There, the court overturned the rule that excluded confessions elicited during counselless interviews of defendants who had invoked their right to an attorney at arraignment. Defendants can now choose for themselves whether they want counsel's advice concerning whether to answer interrogators' questions, Rashkind observed. Similarly, the court's decision in *Melendez-Diaz v. Massachusetts* gives defense counsel the option of requiring the appearance at trial of lab technicians who conduct forensic testing. (*Melendez-Diaz* is discussed in greater depth below.)

Podgor also found significance in Justice Antonin Scalia's opinion dissenting from the court's denial of certiorari in *Sorich v. United States,* 84 CrL 585 (U.S. 2009) (No. 08-410). The courts of appeals are deeply divided on the scope of the federal statute that authorizes federal fraud prosecutions based on the deprivation of ''honest services'' from a government or a company, 18 U.S.C. § 1346. Like its sister courts, the U.S. Court of Appeals for the Seventh Circuit has struggled to find some principle to restrict the seemingly limitless literal scope of the state. A principle that the Seventh Circuit has come up with is one that requires prosecutors to prove that the misconduct of public officials involved a plan by which they were to reap some ''private gain'' for themselves.

The circuit court applied this principle in *United States v. Sorich,* 523 F.3d 702, 83 CrL 146 (7th Cir. 2008), and the Supreme Court declined to review the judgment. Scalia complained in his dissenting opinion that the court was missing an opportunity to clear up the confusion surrounding the meaning of Section 1346 and whether the statute is unconstitutionally vague. Podgor wondered whether Scalia's observations in this dissenting opinion will come up again next term when the court addresses Section 1346 in *United States v. Black,* 530 F.3d 596 (7th Cir. 2008) (applying ''private gain'' requirement), cert. granted 85 CrL 257 (May 18, 2009) (No. 08-876), and in *United States v. Weyhrauch*, 548 F.3d 1237, 84 CrL 284 (9th Cir. 2008) (public official's misconduct does not have to offend state law to serve as basis for conviction of honest-service fraud), cert. granted 85 CrL 503 (June 29, 2009) (No. 08-1196).

Cross-Examination of Forensic Analysts. In *Crawford v. Washington,* 541 U.S. 36, 74 CrL 401 (2004), the Supreme Court made it tougher for prosecutors to present hearsay evidence when that evidence is ''testimonial'' in nature. Under *Crawford*, the Confrontation Clause gives an accused the right to insist either that the declarant testify or that the prosecution show that the declarant is unavailable and that the defense had a prior opportunity for cross-examination. Until this term, state and federal courts across the country were divided as to how this new regime impacts the widespread practice of allowing prosecutors to present documents certifying the results of drugs analyses or other lab work without the supporting testimony of the analyst. In *Melendez-Diaz,* the Supreme Court made clear that lab reports of analysis of controlled substances are ''testimonial'' and are subject to *Crawford*'s admissibility requirements.

Professor Nancy J. King, of Vanderbilt Law School, Nashville, Tenn., observed that the ''biggest impact of the decision . . . may not be in drug cases alone, but in other criminal cases where government certificates and reports have until now been admitted without a live witness.'' Just days after the Supreme Court handed down the decision in *Melendez-Diaz,* it granted certiorari in another case to examine the constitutionality of statutory schemes that require defendants to do more than make an affirmative demand for the live testimony of an analyst. See *Commonwealth v. Magruder,* 657 S.E.2d 113, 82 CrL 627 (Va. 2008), cert. granted sub nom. *Briscoe v. Virginia*, 85 CrL 503 (U.S. June 29, 2009) (No. 07-1191). King pointed out that the Virginia legislature is not waiting for the outcome of the decision and scheduled a special session to address *Melendez-Diaz* issues.

In his opinion for the five-justice majority, Scalia brushed aside arguments that the court's ruling will overburden the criminal justice system. Prosecutors interviewed by BNA, however, emphasized that applying *Crawford* to lab reports is having a big impact. Deputy County Attorney Pat Diamond, of the Hennepin County Attorney's Office, Minneapolis, has been prosecuting defendants under the new regime since the Minnesota Supreme Court's application of *Crawford* to lab reports in *State v. Caulfield,* 722 N.W.2d 304, 80 CrL 95 (Minn. 2006). He told BNA that the logistical difficulties created by the *Caulfield* rule are among the reasons why the state has been forced to hire additional analysts.

Oklahoma prosecutor Scott Rowland agreed that the decision in *Melendez-Diaz* is, ''hands down,'' the one this term that will have the greatest impact on the ''day to day'' business of prosecuting cases. Just how big that impact will be is still too early to determine, Rowland said. He is the first assistant district attorney for the

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Oklahoma County District Attorney's Office, and he conducts training for the National District Attorneys Association.

Rowland reported that he has not yet heard of any dockets ''grinding to a halt'' as a result of *Melendez-Diaz*, but he added that there have been a lot of delays and continuances. Only time will tell whether these delays are going to be long term, Rowland said.

Scalia had the following to say about why the court's ruling in *Melendez-Diaz* will not overburden prosecutors:

> Defense attorneys and their clients will often stipulate to the nature of the substance in the ordinary drug case. It is unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis. Nor will defense attorneys want to antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion.

Scalia noted that an amicus brief filed by district attorneys in the Massachusetts court stated, ''Generally, defendants do not object to the admission of drug certificates most likely because there is no benefit to a defendant from such testimony.''

Rowland agreed with this assessment. Even before *Crawford*, Oklahoma law gave defendants a right to insist on testimony of the chemist in a drug case, but Rowland said the cases in which defense counsel will not agree to a stipulation that would allow the prosecution to forgo calling the chemist are ''rare.''

Looking at the decision from the other side of the courtroom, Rashkind emphasized that the decision gives defense counsel the authority to decide for themselves how the testimony of an analyst fits into their trial strategy. He did not see an advantage in ''automatically stipulating away an opportunity for cross-examination,'' and said ''good defense attorneys will be able to find value in cross-examination of nearly any prosecution witness.''

Professor Jeffrey Fisher, of Stanford University Law School, Stanford, Calif., calculated that *Melendez-Diaz* is going to require expenditure of additional resources and cause some ''transitional headaches'' in about two-thirds of the states. However, he considered the more dire characterizations of the impact of the decision to be ''overblown.'' Fisher is a co-chair of the school's Supreme Court Litigation Clinic, and he argued both *Crawford* and *Melendez-Diaz* before the Supreme Court.

Fisher said one of the primary significances of the decision in *Melendez-Diaz* is that it keeps the *Crawford* doctrine coherent. If the justices had approved the dissenters' ''conventional witness'' approach, or had come out any other way than they did, ''it would have been very hard to make any theoretical sense of the *Crawford* principles''—especially the principle that statements made with an eye toward prosecution are covered by the Sixth Amendment, Fisher said. On the other hand, he said there remain other issues with respect to which ''there are legitimate arguments on both sides, and the court will have the option of applying *Crawford* or not—but the doctrine will remain coherent.''

Among the issues dividing courts that Fisher sees as being ''on the horizon'' for the next few years are:

- whether the Confrontation Clause applies to calibration reports on forensic testing machinery;
- whether the Confrontation Clause covers testimonial statements that are offered for reasons other than the ''truth of the matter asserted,'' such as nontestifying informers' accusations offered to show the context for police investigative activity, or nontestifying experts' statements offered to provide the basis for another expert's testimony; and
- whether the rule from *Davis v. Washington*, 547 U.S. 813, 79 CrL 333 (2006), regarding statements made to address emergencies or for other noninvestigative purposes, covers victims' statements whenever the perpetrator is on the loose, or covers child abuse victims' identifications of their abusers to medical personnel.

Exclusionary Rule. Another clear trend in the court's decisions this term was several refusals to apply exclusionary rules. Fisher said that a ''major takeaway'' of this term is ''the court's real—depending on the justice—skepticism or disdain for exclusionary rules.''

Fisher was referring to the implications of a trio of exclusionary-rule cases decided this term. In *Herring v. United States*, the court extended the good-faith exception to the Fourth Amendment's exclusionary rule to cover officer's reliance on negligent recordkeeping by other officers. In *Kansas v. Ventris*, the court recognized an impeachment exception to the Sixth Amendment's exclusionary rule for statements elicited from prisoners behind defense counsel's back. And in *Montejo v. Louisiana*, the court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), which had required the exclusion of statements made by an accused during a counselless interview initiated by police after the suspect invoked his Sixth Amendment right to counsel at an arraignment or similar proceeding.

In *Herring*, the court reasoned in part that, as a matter of logic, the exclusion of evidence cannot logically deter unintentional, negligent acts. ''It remains to be seen how far the court will take what it said in *Herring*,'' Fisher said. Fisher's clinic also represented Herring.

''A robust reading of *Herring* . . . would be a pretty aggressive move'' by the court, Fisher said. ''If the opinion applies across the board to every instance of police negligence, then it is a very significant case. But there are several places in the opinion where the court talks about the 'attenuated nature' of the negligence—that it wasn't even the arresting officer, etc. If the opinion is read that way, then you've got a limited set of circumstances that isn't going to come up nearly as often,'' Fisher explained.

Fisher said that the trend away from vigorous exclusionary rules stretches back to ''the Rehnquist court's chipping away at the exclusionary rules developed in the Warren court era,'' but he observed that ''any time you overrule a prior decision you are doing more than chipping away.''

Rowland, too, saw the primary importance of *Herring* being what the decision says about the trend in the high court. He was surprised by what the opinion suggests about how far the court is willing to go. He pointed out that the court merely accepted the parties' position that the arrest based on the bad police information constituted a Fourth Amendment violation, and that the opinion indicates that the court might have been willing to hold that there was no Fourth Amendment violation at all. And after accepting the concession of a constitutional violation, ''the court had no trouble at all finding

that the exclusionary rule was inappropriate here, where there was no police misconduct to deter,'' Rowland said.

''I hope that *Herring* is one more [paving] stone in the road toward getting the exclusionary rule back to its proper role, which is to deter police misconduct. . . . The rule shouldn't operate as a 'gotcha' when police are trying to do the right thing,'' Rowland said. He noted that the decision is going to affect prosecutors in his office on a ''day to day'' basis by prompting them ''to make clear to judges that the trend in the Supreme Court is not to exclude evidence as a knee-jerk reaction to every arguable violation.''

Vehicle Searches. Rowland was much less sanguine about the court's decision this term in *Arizona v. Gant.* In *Gant,* the court disapproved decades of expansive interpretations of the rule that allows suspicionless searches of vehicles incident to an arrest. The Fourth Amendment's search-incident-to-arrest doctrine accommodates concerns about officer safety and evidence preservation by allowing a warrantless search within the reaching distance of an arrestee. With relatively few exceptions, state and federal courts had interpreted *New York v. Belton,* 453 U.S. 454 (1981), as establishing a bright-line rule that police may, incident to an arrest of a recent occupant of a vehicle, search the car so long as the search is roughly contemporaneous with the arrest—even if the motorist had been secured in a police vehicle and there was no reasonable basis to believe that someone could gain access to evidence or a weapon in the vehicle. In *Gant*, the court held that the search-incident exception still requires a showing that the circumstances make it reasonable to be concerned about someone gaining access to weapons or evidence in the car.

Rowland reported that, where he practices, the court's ruling prompted ''high level meetings'' among the major police departments and district attorneys' offices and caused some ''wringing of the hands'' by law enforcement officers and prosecutors ''who were worried about whether the decision was going to severely limit our ability to do our job.''

''The decision is certainly going to change a lot in prosecutions because . . . [the search-incident doctrine] was widely relied upon,'' Rowland said. Looking at the bottom line, he concluded that *Gant* is not going to result in that many fewer vehicle searches being conducted. In many cases, the search-incident justification represented ''low hanging fruit,'' but there were other justifications for the search as well, such as probable cause or consent, Rowland said. ''We will have to do some retraining of officers, . . . but in terms of actual numbers of cases, I don't think [the decision] is going to impact it that much.''

Rashkind saw things a little differently. He emphasized that it is harder for police and prosecutors to establish the bases for other justifications for vehicle searches. Now that police officers are more often going to have to justify searches with probable cause, defense attorneys are more often going to be able to demonstrate factual problems with their testimony, Rashkind predicted. However, he also noted that two circumstances in *Gant* significantly limit the reach of the court's decision: (1) the car had only one occupant, so there was no one else who might have posed a threat; and (2) the driver was arrested for a traffic offense for which there could not have been any evidence in the car.

Consecutive Sentences. Those interviewed also frequently cited the court's decision in *Oregon v. Ice* as among the most significant rulings of the term. In *Ice*, the court held that the jury-trial rule from *Apprendi v. New Jersey*, 530 U.S. 466, 67 CrL 459 (2000), does not apply to facts that authorize courts to order sentences for multiple offenses to run consecutively rather than concurrently.

''The reasoning of the opinion suggests that a majority of justices are ready to cabin *Apprendi*'s reach, and may resist future efforts to apply *Apprendi* to a range of factual findings related to sentencing, including facts required for restitution, forfeiture, or recidivist penalties,'' King said.

Fisher agreed that, with the *Ice* decision, the court is telling everyone that it is not going to take *Apprendi* any further than it has. He pointed out, however, there remain questions about the scope of the prior-conviction exception that the court may choose to address. For example, he noted that courts remain divided as to whether the exception allows sentence enhancements based on prior juvenile adjudications.

Civil Rights Actions. In *Van De Kamp v. Goldstein,* the court held that supervisory prosecutors are protected by absolute immunity from civil rights claims based on allegations that they failed to adequately train subordinates regarding their discovery obligations under *Brady v. Maryland,* 373 U.S. 83 (1963). The court has previously drawn a line—for purposes of prosecutorial immunity—between alleged misconduct that is ''intimately associated with the judicial phase of the criminal process'' and alleged misconduct that is related to ''administrative duties'' or ''investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings.''

The plaintiff in *Van De Kamp* argued that supervisory prosecutors' failure to train regarding *Brady* obligations and/or their failure to create an information-sharing system to keep line prosecutors apprised of exculpatory information (such as promises to prosecution witnesses) qualified as being administrative in nature. The Supreme Court decided, however, that even if the supervisory prosecutors' alleged lapses were administrative in nature, they are entitled to absolute immunity. The court explained:

> [The plaintiffs'] claims focus upon a certain kind of administrative obligation—a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in the plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like. Moreover, the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.,* in determining what information should be included in the training or the supervision or the information-system management. And in that sense also Goldstein's claims are unlike claims of, say, unlawful discrimination in hiring employees.

Both defense attorney Rashkind and prosecutor Rowland were impressed by how strongly the court came out in favor of this broad protection for prosecutors, even in administrative matters.

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A second civil rights decision, *Ashcroft v. Iqbal*, also caught the attention of scholars and attorneys who spoke to BNA about the term. The lawsuit was filed by a Pakistani immigrant who alleged that, in the wake of the Sept. 11, 2001, terrorist attacks, former U.S. Attorney General John D. Ashcroft and current FBI Director Robert Mueller unconstitutionally singled out Arab Muslim prisoners for harsh confinement on the basis of their religion and ethnicity. The Supreme Court held that the allegations in the complaint were either conclusory or implausible and, thus, the complaint should have been dismissed for lack of compliance with the requirement of Fed. R. Civ. P. 8(a)(2) that the complaint set forth a ''short and plain statement of the claim showing that the pleader is entitled to relief.'' The court ended up remanding the case for possible amendment of the deficient claims.

Tom Goldstein, who heads the Supreme Court practice at Akin Gump Strauss Hauer & Feld, Washington, D.C., told BNA that *Iqbal* will be cited ''probably more than any other decision in a decade.'' Characterizing the opinion as ''truly pathbreaking,'' he said it will likely be ''the basis for an attempt to dismiss more than 50 percent of all the complaints filed in federal court.''

Professor Scott Dodson, of William & Mary Law School, Williamsburg, Va., predicted that motions to dismiss will now be more about district judges' discretion regarding whether plaintiffs have pleaded sufficient nonconclusory facts. Although the U.S. Judicial Conference has authority to draft an amendment to Rule 8 that would trump the *Iqbal* reading, changes to the federal rules require Supreme Court approval, and the court could decline to go along with any change from its new pronouncement, Dodson observed.

Professor Stephen C. Yeazell, of the UCLA School of Law, Los Angeles, told BNA that, in his view, ''it would probably constitute malpractice not to file an *Iqbal* motion'' in the appropriate case, before filing an answer. The Supreme Court in this case offered an avenue for the ''cheapest possible type of victory before the most expensive stage of modern litigation,'' Yeazell said.