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Challenging an IRS 'Weapon'

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What does freight service owner Carlo Marinello have in common with former Virginia governor Bob McDonnell, ex-Enron CEO Jeffrey Skilling, vengeful Carol Anne Bond, fisherman John Yates, and former New York Assembly speaker Sheldon Silver?

On the surface, not much. But Marinello, represented by a Jenner & Block legal team, does hope the Supreme Court will do for him what the justices did for the others—rein in federal prosecutors' use of a broadly worded clause—this time in the federal tax code—to charge criminal conduct.

Marinello, represented by Jenner's Matthew Hellman, was convicted of willfully failing to file corporate and personal income tax returns— serious misdemeanors. But what pushed his sentence into felony stratosphere was one count of "corruptly endeavoring to obstruct or impede the due administration of the tax laws."

Here's the question before the justices in Marinello v. U.S: Does §7212(a) of the Internal Revenue Code require proof that a defendant acted with knowledge of a pending IRS action or proceeding, such as an investigation or audit, when he engaged in the allegedly obstructive conduct?

In Marinello's favor: Prosecutors recently have not been very successful in persuading the justices to endorse their broad interpretations of certain obstruction statutes.

"The reality is that Congress did not intend tax obstruction to be the code's uber-crime," writes Hellman, a former clerk to Justice David Souter and co-chair of Jenner's Supreme Court and appellate practice.

His client, Hellman tells the justices, "was not charged with or convicted of felony tax evasion, and he does not challenge his misdemeanor convictions … . But he does challenge his felony obstruction conviction under §7212(a), which was premised on his failure to maintain records and other acts and omissions not taken in the context of any IRS proceeding or investigation."

Assistant to the Solicitor General Robert Parker, who will argue for the government, tells the justices “a particular IRS action need not be pending, nor must the defendant know of a pending action, in order to anticipate one and seek to obstruct it."

The U.S. Court of Appeals for the Second Circuit agreed.

Impact of a government win? The U.S. Chamber of Commerce, represented by Lewis Liman of Cleary, Gottlieb, Steen & Hamilton, says the government's reading of the obstruction clause amounts to criminalizing a "vast array" of otherwise lawful conduct; chilling economic activity and tax law development, and providing the IRS with "a weapon with which to target particular small businesses, not because of their conduct, but because of their identity."

Who Pays Prisoners' Lawyers?

The tax code argument follows arguments in Murphy v. Smith, an important attorney fee case in the context of Section 1983 civil rights violations. As we wrote in August, the court surprisingly added the Murphy case to its docket during its summer recess, possibly to fill gaps in the December cycle.

At issue in the Illinois prisoner abuse case is what percentage of the attorney fee award should come from the inmates’ damage award, and how much should come from the corrections officers who committed the civil rights violations. The question crops up in almost every prison case under Section 1983, and lower courts are divided.

UCLA School of Law professor Stuart Banner will argue on behalf of the prisoners. He told us in August that when he saw the Seventh Circuit decision in favor of the corrections officers, it “seemed so wrong to me.” So he called Murphy’s original lawyer, Chicago solo practitioner Fabian Rosati, to suggest appealing to the Supreme Court. Rosati approved, the court granted the case, and Banner went to work with the UCLA Supreme Court clinic he leads.

It will be the second argument for Banner, a former clerk to Justice Sandra Day O’Connor, and the clinic’s seventh granted case in the last three terms.

His adversary will be Brett Legner, deputy Illinois solicitor general. Legner has more than 75 appellate arguments under his belt, but this will be his first appearance before the Supreme Court.

Masterpiece Cakeshop Takeaways and Tweets: All Eyes on Kennedy

Whew! If marble walls could sigh with relief, the Supreme Court's walls did just that on Tuesday after a full house—public, reporters and bar members—filtered out onto the plaza following arguments in the case of a Colorado baker who refused on religious grounds to make a wedding cake for a gay couple.

The baker, Jack Phillips, sat in the center, third row of the public section as the justices' questions and hypotheticals, in particular, challenged the four lawyers making their arguments.

There was obvious concern across the bench, as Justice Stephen Breyer said, about where to draw a line that accommodates free speech without undermining anti-discrimination laws.

In the end, the justices seemed closely divided on the baker's claims and no closer to consensus on how to draw that crucial line. Justice Anthony Kennedy, so often the key to a divided high court, gave hope and anxiety to both sides and likely will be key again to the outcome.

After the arguments …

We took the pulse on Twitter and surveyed lawyers for their snap predictions. Here's some of what they had to say:

● Carrie Severino, chief counsel and policy director, Judicial Crisis Network.

“Supporters of religious freedom should be encouraged after today's arguments. As Justice Kennedy himself pointed out, tolerance is essential in a civil society, but that tolerance must be mutual. His passion was evident when be pointed out how intolerant the state of Colorado had been of baker Jack Phillips' beliefs.”

● Ian Millhiser, Justice Editor for Think Progress:

“There’s no way to sugarcoat the oral arguments … Justice Anthony Kennedy, the key swing vote and the only conservative on the court who has shown much sympathy for LGBTQ rights, appears almost certain to side with Jack Phillips, the baker in this case. Though there is a chance that Kennedy could side with Phillips on narrow grounds, Masterpiece Cakeshop could potentially give religious conservatives sweeping power to engage in discrimination.”

● From Notre Dame law professor Rick Garnett:

● Our former NLJ colleague Mike Sacks, now of Scripps News, predicts a 5-4 ruling authored by Chief Justice John Roberts that sides with Masterpiece Cakeshop.

● ACLU attorney Joshua Block took hope from Kennedy's discomfort with a rule that would allow all vendors—florists, makeup artists, stationers—to "boycott" same-sex weddings.

● Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, told us, "the only thing that is safe to predict about this case is that it’ll end up 5-4."

Have a different take? Share your Masterpiece predictions with us at tmauro@alm.com or mcoyle@alm.com.

SCB Reading List

Yale Law Prof. James Forman, a 1993-94 O'Connor clerk made the gold standard of "best book" lists last week when The New York Times picked his book, "Locking Up Our Own: Crime and Punishment in Black America," as one of the 10 best books of 2017.

The NYT described the former D.C. public defender's work as a "masterly account of how a generation of black officials, beginning in the 1970s, wrestled with recurring crises of violence and drug use in the nation's capital" and ultimately embraced tough-on-crime policies "with devastating consequences for the very communities those officials had promised to represent."

In a brief interview with Forman, we asked if and how his Supreme Court clerkship may have led to his book. He said: "Clerking exposed me to the dreary state of criminal defense representation in trial courts around the country, and to the federal courts' lack of interest in doing anything about that. Clerking showed me that to make a difference, I would need to work at the trial level, because on appeal was too late."

Why this particular book? He explained: "I decided to become a public defender in Washington, D.C. in 1994 because I viewed over-incarceration as the civil rights issue of my generation. When I got to D.C. courtrooms I encountered lots of African-American police officers, judges, prosecutors, and court employees, many (though not all) of who seemed quite comfortable with locking up my clients, who were overwhelming African-American. I thought there was a story to be told. A story that examines the last 50 years in criminal justice policy through the lens of African-American police, prosecutors, judges, mayors, legislators, and ordinary citizens. Many of these officials had the best of intentions and yet they ended up embracing policies that had devastating consequences for the black community. My book tries to figure out why."

Museum Controversy Redux: Justice Clarence Thomas seems to have gotten past the controversy over the new National Museum of African American History and Culture's seeming omission of any positive recognition until recently. "People who care about me" were unhappy, he told Laura Ingraham, his former law clerk, on Fox News last month. But he shrugged it off.

It still seems to be a sore point for the museum and its director Lonnie Bunch III. During a radio interview December 4, Bunch said, "It wasn't an omission," adding that the museum is "not a hall of fame. There are stories that are not going to be told."

The museum added an exhibit in September that included Thomas as well as Thurgood Marshall, but Bunch said Monday, "There was never a decision to include [Thomas] just because somebody criticized the Smithsonian."

Rather, the addition came about when Bunch re-read Chief Justice John Roberts Jr.'s remarks on the museum's opening day in September 2016. Bunch said Roberts, who also wears the hat of chancellor of the Smithsonian, "talked powerfully about the role the Supreme Court has played"— good and bad—in the lives of African-Americans.

"So what we did was, 'let's add a piece on the Supreme Court,'" Bunch said. In that context, depicting Thomas and Marshall was "part of the story,' Bunch said.