

Post-Enron Law Snags Fisherman

Supreme Court to consider whether case represents 'overcriminalization.'

By Marcia Coyle
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A Gulf Coast fisherman, caught in the wide net cast by a post-Enron financial fraud law, will ask the U.S. Supreme Court on Nov. 5 to reverse his conviction for destroying undersized red grouper.

The facts of John Yates' case read like either a tale of the one that got away or of prosecutors run amok. But underlying *Yates v. United States* is a purported "overcriminalization epidemic" that has united the nation's business community with the criminal defense bar against the federal government and a tool designed to prevent the destruction of evidence.

"It's an issue that brings people together from all walks of the political spectrum," said William Shepherd of Holland & Knight, who filed an amicus brief for the criminal defenders. "John Yates got caught up in it, but it could just as easily have been your cousin or your mom."

Overcriminalization at the federal level is "definitely a problem," said Kevin Walsh of the University of Richmond School of Law. "But it's also a problem to have the judiciary giving artificially narrow constructions to deliberately broad provisions, especially when they relate to evidence destruction."

The story began on a summer day on the Gulf of Mexico, with Yates' boat, the Miss Katie, six days into the commercial harvest of red grouper. A federally deputized state fish and wildlife conservation officer boarded for a routine inspection. Federal law requires harvested red grouper to be at least 20 inches in length. The officer found 72 grouper measuring between 18 3/4 and 19 3/4 inches. He issued a civil citation for harvesting undersized fish and ordered that they be separated so that they could be destroyed when the boat returned to dock.

Two days later, the boat docked and an inspector remeasured the fish. After finding discrepancies in the count and the measurements, he suspected they were not the same fish he had set aside at sea. A crew member later told federal agents the captain had directed the crew to throw the original undersized fish overboard and to catch others — apparently also undersized — to replace them.

In 2010, a grand jury indicted Yates on three counts: destroying property to prevent a federal seizure; destroying, concealing and covering up undersized fish to impede a federal investigation, and making a false statement to federal law enforcement officers. In 2011, a jury found Yates guilty of the first two crimes and not guilty of making a false statement. He was

sentenced to 30 days in prison, followed by 36 months of supervised release. The U.S. Court of Appeals for the Eleventh Circuit affirmed.

ANTI-SHREDDING SANCTIONS

In his high court appeal, Yates, represented by Federal Defender John Badalamenti, challenges the application of what is known as the "anti-shredding" provision of the Sarbanes-Oxley Act of 2002. That provision — Section 1519 — imposes criminal liability on "whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document or tangible object" with the intent to obstruct or influence a federal investigation.

Yates argues that Congress never intended to include fish as tangible objects in a law designed to prevent financial fraud, but instead limited the provision to things used to preserve or store information. The government counters that Congress, in enacting Sarbanes-Oxley, imposed a broad prohibition on evidence destruction that had been missing in federal law and that legal reformers had urged for decades. The government notes in its brief that a jury recently convicted a man under §1519 for helping accused Boston Marathon bomber Dzhokhar Tsarnaev conceal physical evidence — in the form of a backpack containing fireworks, a jar of Vaseline and a thumb drive — with intent to obstruct the investigation of the attacks.

To bolster their conflicting arguments, each side engages in a classic battle of statutory interpretation. They turn to the dictionary for the ordinary meaning of "tangible object." They fight over such canons of interpretation as "noscitur a sociis" and "ejusdem generis" with citations to a book by Justice Antonin Scalia and Bryan Garner. They look to the legislative history of Sarbanes-Oxley and they argue over Congress' intent.

Yates finds support in briefs from the U.S. Chamber of Commerce, the National Association of Criminal Defense Lawyers, the Cato Institute, Pacific Legal Foundation, Cause of Action, former U.S. Rep. Michael Oxley of Ohio and 18 criminal law professors. They stress the overcriminalization issue, the lack of fair warning to Yates and others that their actions could bring criminal liability, and the canons of statutory interpretation.

Richmond Law's Walsh agreed with Holland & Knight's Shepherd that several justices have shown concern about the scope of federal criminal law — for example, in Enron CEO Jeffrey Skilling's successful challenge to his conviction for honest-services fraud.

"At first glance, this case had that kind of feel — a grant of review to come up with some limiting principle," Walsh said. "But once you realize this only takes in destruction with intent to impede an investigation, and a lot of times physical evidence is the best evidence, it's hard to know why Congress would have wanted to exclude fish." Perhaps harder still is teaching prosecutorial discretion, Shepherd said. "This could easily have been dealt with by a civil citation and a fine," he said. "But now the Supreme Court is going to have a say on Sarbanes-Oxley."

Yates' case has parallels to last term's *Bond v. United States*, said Erin Murphy of Bancroft. In *Bond*, the government had prosecuted a woman for violating a law implementing the treaty

banning the use of chemical weapons because she used caustic chemicals in an attempt to harm her best friend who'd had an affair with her husband.

The government lost in an unanimous decision, said Murphy, whose partner Paul Clement won the case.

"*Yates* suggested another one of those prosecutorial overreach cases," Murphy said, but there are "big differences."

A decision ultimately will come down to which narrative is more persuasive, said Murphy. "Either: 'C'mon, nobody intended to cover throwing fish overboard.' Or, the government: 'This is exactly what Congress intended to do and don't be distracted by it being fish.' Even if the government wins, you could see someone writing an opinion saying, 'Boy, this was a waste of government resources.' "