

## High Court To Go Fishing For Answers In Anti-Shredding Case

*Law360, New York (October 01, 2014, 10:05 AM ET) --*

When the U.S. Supreme Court reconvenes this fall, it will hear oral arguments in *Yates v. United States*, the latest case to test the limits of 18 U.S.C. § 1519, the Sarbanes-Oxley provision that imposes criminal liability on anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with the intent to impede or obstruct an investigation.

Often referred to as the “anti-shredding” provision, § 1519 was originally passed in response to the infamous Enron scandal of 2002, in which there was widespread destruction of potentially incriminating documents. Since its enactment, however, the government has used this anti-shredding statute to prosecute the destruction of a wide range of physical evidence, not just documents. In *Yates*, that evidence was fish.



Diana Lloyd

In August 2007, commercial fisherman John Yates and his crew entered federal waters in the Gulf of Mexico on a fishing trip. During this trip, a field officer, deputized by the National Marine Fisheries Service (Fisheries Service) to enforce federal fisheries laws, approached Yates and his crew to inspect their gear and safety compliance. After noticing a number of red grouper that appeared to be less than 20 inches — the minimum length required by federal fishing regulations — the officer proceeded to spend nearly four hours inspecting and measuring some 3,000 fish caught by Yates and his crew. The officer ultimately found 72 grouper that did not meet the minimum length. These fish were placed in a crate, and the officer informed Yates that these fish would be seized by the Fisheries Service upon Yates’ return to port.

When Yates and his crew returned to port, they were met by federal Fisheries Services agents who inspected the fish, but who found only 69 fish measuring less than 20 inches, not 72. Prosecutors alleged that Yates had instructed his crew to dispose of the undersized grouper and to replace them with larger fish. In 2010, a grand jury charged Yates with a number of criminal offenses, including violation of the Sarbanes-Oxley’s anti-shredding restriction. In August 2011, a jury found Yates guilty of violating § 1519, and the court sentenced him to 30 days’ imprisonment.

The Eleventh Circuit Court of Appeals affirmed Yates’s conviction.

## **The Government's Case**

With regard to § 1519, the government's argument is simple: The plain meaning of the statute's reference to any "tangible object" unambiguously covers all types of physical evidence; Yates destroyed the physical evidence of the red grouper in order to conceal his violations of federal law from the Fisheries Service, and therefore violated the statute.

The government does not dispute that the Sarbanes-Oxley anti-shredding provision was sparked by Enron's collapse and the corporate document shredding that was later revealed. However, the government contends that this does not mean it is the only type of misconduct prohibited by the law. Rather, the government contends that statutory prohibitions often go beyond the principal evil identified by Congress to cover reasonably comparable evils. Here, § 1519 goes beyond the mere Enron-style shredding of documents; it prohibits any destruction of evidence in order to impede or obstruct a federal investigation.

The government also argues that the legislative history of the Sarbanes-Oxley Act confirms that § 1519 covers all physical evidence. In support of its position, the government cites to a Senate report that indicates that § 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence, so long as they are done with the intent to obstruct or impede an investigation, and that the provision could be effectively used in a wide array of cases.

The government also cites to a number of cases in which § 1519 has been used to prosecute the destruction of a wide range of physical evidence, including a human corpse, drugs and various machinery.

## **John Yates' Case**

Yates argues that in order to determine the scope of the phrase "tangible object," one cannot simply apply the plain meaning test and summarily give the term its broadest definition. Rather, it must be read in the context of its surrounding terms, "record" and "document." Using various contextual canons of interpretation, Yates argues that "tangible object" is thus naturally read as meaning a thing used to preserve information, such as a computer, server, or electronic storage device.

Yates further argues that within the larger context of the Sarbanes-Oxley Act, a law that was enacted in order to safeguard investors and to prevent and punish corporate fraud, it is clear that § 1519 was never intended to be applied in cases such as this. For Yates, it is obvious that the anti-shredding provision was only intended to preserve corporate records, documents, computer drives, email servers and the like. As further support for his interpretation of the statute, Yates cites to the U.S. Sentencing Guidelines Manual, which contains the following commentary:

Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

Yates also argues that it is unreasonable to prosecute him under an anti-shredding provision when there are certainly other statutes that more appropriately cover his alleged acts. Indeed, he was also charged with and convicted of violating 18 U.S.C. § 2232(a), which prohibits the "destruction or removal of property to prevent seizure."

Finally, because his liberty was at stake, Yates contends that this criminal statute should have been strictly construed. If there was any doubt as to the meaning of “tangible object,” the rule of lenity required that the doubt be resolved in his favor.

### **Overcriminalization**

Statutory interpretation and legislative history aside, the question must be asked: Is it reasonable for Sarbanes-Oxley to apply to a fisherman who throws red grouper into the sea? As the amicus brief filed by 18 law professors in support of Yates points out, if “tangible object” encompasses fish, then the statute captures essentially every physical item within the jurisdictional reach of the United States.

This case illustrates the more overarching issue of the government applying certain statutes to criminalize behavior beyond what one would reasonably understand to be prohibited. This “overcriminalization,” a term used by a number of parties who filed amicus briefs in this matter, prevents fair notice to potential offenders, and is a result of redundancy and vagueness in this country’s ever-growing criminal code. In this case, Yates has the better of the argument.

If the Supreme Court finds in favor of Yates and reverses the Eleventh Circuit decision, it will be a victory for those who recognize this was a case of government overreach and abuse of prosecutorial discretion. If, however, the court affirms, there is a serious risk that the government will interpret the ruling as a mandate to continue the dangerous trend of overcriminalization.

Oral arguments have been scheduled for Nov. 5, 2014.

—By Diana K. Lloyd and Kevin J. Ma, Choate Hall & Stewart LLP

*Diana Lloyd co-chairs Choate's government enforcement and compliance practice group in Boston. Kevin Ma is an associate in the firm's Boston office.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*