



Fox Rothschild Podcast

The Presumption of Innocence

Episode 43: New Horizons: Impact of Recent Appellate Circuit Rulings on White-Collar Criminal Defense Law

Featuring Matt Adams and Morgan McCall Reece of Fox Rothschild

Adams: Hi, everyone and welcome to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense & Regulatory Compliance practice at Fox Rothschild. I'm your host, Matt Adams. And today my guest is Morgan McCall Reece. She is my colleague here at the firm and comes to us recently as a seasoned state and federal prosecutor in North Carolina.

She joins the Fox Rothschild Greensboro and Raleigh, North Carolina offices with extensive background in defending businesses and individuals in white-collar criminal cases and regulatory proceedings.

Morgan, I'm ecstatic to have you part of the practice group and at the firm. And today we really want to touch on your appellate background. Because when I say that the Supreme Court and some of our circuit courts out there have really turned some tried-and-true tested principles of law on their head in recent months and weeks, that's really an understatement. Isn't it?

Morgan McCall Reece: It really is. You know, over a couple of years, and especially in the past couple months, and, you know, for our purposes of thinking with federal criminal prosecutions and criminal cases and defending those, our question of how is this affecting the constitutionality of the charges, the cases against our clients? And then how's it affecting sentencing?

Matt Adams: Yeah, and the place I think I want to start is right there, at sentencing. Because, you know, the guidelines and commentary issues in particular have been a topic du jour in light of the 3rd Circuit's *Banks* decision a couple of years ago. And that really hit squarely on its head this concept of intended loss under section 2B1.1 of the sentencing guidelines. Which I would say, nine out of every 10 white-collar cases that I handle, section 2B1.1 of the guidelines is front and center as the primary driver of the ultimate sentence. And the 3rd Circuit *Banks* decision, like I said, turned it on its head. Or did it? Because we're seeing a couple of years under *Banks* and now sort of a retreat from *Banks* as the Sentencing Commission has acted in early 2024, set to take place here in just a couple of months in November.

So why don't you explain for our audience a little bit about what *Banks* said and did. And then we can get into how there's now been the retreat from *Banks* by the commission, and what the future might hold for this concept of intended versus actual loss when it comes to the federal sentencing guidelines.

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Which, as we know, for our audience, and we've talked about this in the past, when you are a white-collar defendant, you are in the guidelines. That is the way that you are able to predict, and in many instances, negotiate a better disposition for yourself.

Morgan McCall Reece: Absolutely. So, just stepping back. So *Banks* deals with what you've already talked about, Matt, which is this calculation of loss. And so when we get someone who is being sentenced under the guidelines, and we have to make this determination of what loss their actions the government is alleging to have caused, we have to look at the guidelines. And so you look at the guidelines themselves, the policy statements, and there's another part called the commentary and then even background commentary.

So, the guideline that we're talking about here defines loss in one way. But the problem is, the commentary -- until it changes, right, and a couple months -- expanded that definition. And with this understanding of intended loss.

So, *Banks* back in 2022, the 3rd Circuit really dealt with this issue that has been percolating, which is how do we read the guideline with commentary when the commentary expands the definition of what is in the guidelines. So, for the loss calculation purposes, if you have someone who is, you know, being held accountable for a \$1 million, let's just say, in loss, but then the government says, well, no, no, no, their scheme actually intended for, you know, \$3 million in loss. That affects how the person is going to be calculated their base offense level, and then the sentencing guideline range that would be recommended for them. Which is an uphill battle, as we know. The higher the guideline range that's recommended that means you have to ask for a downward variance or a downward departure. Or something to get them out of the higher range.

So, as you mentioned, we now find ourselves in this question of how do we read these two together? And this is a reflection on this case called *Kaiser* that came out a couple years ago, which has now raised into question the deference that we give. And so I'm sure you've seen this playing out in your practice, Matt.

Matt Adams: Yeah, every day.

Morgan McCall Reece: Right. And so, to your point, what has happened is the Sentencing Commission has now stepped in.

Matt Adams: These guys get to say, guess what? A court tried to tell us what we intended. We're going to make our pronouncement of sentencing policy in the United States crystal clear, so courts don't have to interpret any more ambiguity, right? So --

Morgan McCall Reece: That's exactly right.

Matt Adams: Are they effectively reversing *Banks* now? So we're living in this. I'm practicing in the 3rd Circuit and this has definitely come up. It has been black letter law that, at least since November of 2022, when *Banks* was decided, we are no longer in this intended loss environment. Which has been a cottage industry for forensic accountants and others that are in that business of trying to



narrow that aperture with which the concept of loss is seen through. But now the Sentencing Commission has basically said, yeah, we get it. Our guidelines were maybe unclear. The 3rd Circuit said what it said. But here's what we really mean and intended loss is back on the table.

So talk to us about the rulemaking process now, sort of jumping ahead of the *Banks* decision to sort of clarify the ambiguities that the 3rd Circuit discussed.

Morgan McCall Reece: So, let's go back to basics here, right? So the Sentencing Commission is a judicial agency that's been created by Congress, right. And it's been given certain authorities, the ability to create the guidelines. This all happened back in the 1980s. The guidelines were designed initially, right, as mandatory, binding. Of course, that has changed so that they're not in that way anymore. They're just recommendations.

They were designed to create this consistency in sentencing. And so that's what the Sentencing Commissions mandate is: to create these guidelines for judges to look at them so that Judge A and Judge B get cases, and they sentence defendants similarly.

Matt Adams: And in practice, right, in this post-*Booker* world where the guidelines are no longer mandatory -- and we've been in a post-*Booker* world for more than two decades -- but the guidelines are no longer mandatory. Discretion now holds back in the hands of the sentencing courts to determine the sentence. So, really all we are is with this aspirational set of guidelines.

In practice, I would say 90% of the time, you can take to the bank that you're going to get a guideline sentence. But there are circumstances where judges gladly deviate from that, on the upside or the downside.

Morgan McCall Reece: That's right. That's right.

Matt Adams: But now we have this comprehensive body of law that's given us cases like *Banks*. And these guidelines are supposed to bring uniformity and predictability to a sentence. But, you know, the judge still has discretion to throw caution to the wind and throw that out the window entirely.

But we're really fighting over what pieces of these guidelines are authoritative and what are not.

Morgan McCall Reece: That's exactly right.

Matt Adams: And so, at the end of the day, isn't this just semantics and linguistic games with what is and what is not part of the rule versus an explanatory note?

Morgan McCall Reece: Ah, well what appellate decision isn't just about the words? And everyone's different interpretation of, you know, the word "and" or whatever it may be? How can we spend five pages on something as simple as that? But, as we know, we can.

Because all of this, as you have pointed out, goes back to this concept of the interpretation. You have the text of the guideline that says one thing. But then you look to the commentary, or even a



background commentary, and somehow it expands the conduct so that your client gets punished at a higher level for something that they have done because the definition of whatever word gets built out.

And so this all comes out of this disagreement in court cases. So we have the *Stinson* case, which all practitioners are familiar with, which told us that commentary in the guideline manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, is inconsistent with, or plainly erroneous reading of, the guideline.

So you have that one interpretation of the authority of the guideline commentary. But then fast forward to within the past five years, we have another decision called *Kaiser*. *Kaiser* was not about the guidelines like *Stinson* was. But *Kaiser* told us that just generally when we're talking about agencies, courts do not defer and may not defer to agencies outside of their own regulation, if the court determines that the regulation itself is not ambiguous. So, to determine ambiguity, courts have to exhaust the quote traditional tools of construction. Which to your point, Matt, that goes into the, we're reading a plain language here how do we interpret the words that are written?

Matt Adams: Is this, like, relying on statutory -- when interpreting statutes -- relying on legislative history for statutory interpretation?

Morgan McCall Reece: Yeah, I mean, I think there are a lot of different tools that the court uses and that we can use as practitioners to determine whether ambiguity exists in plain meaning. A lot of times you'll see a return to the traditional Latin terminologies. And you have to find tools that are going to help you interpret what the words mean.

So, sometimes, for instance, like you said, legislative history, statutory history, in a statutory context will help aid us in the interpretation of something. But here, what we're seeing is this question now that has arisen across the country -- and different circuits are taking different approaches -- about what deference we give to the guidelines commentary in these situations where the guideline commentary expands the language of the guideline itself.

And so, I'll even highlight here in the 4th Circuit where I primarily have been practicing, is that we even have a couple of panels who have addressed this question in slightly different ways. You know, whether you look at the 3rd Circuit, the 9th Circuit, across the country, courts are issuing rulings about what deference they're giving to the commentary. And what analysis, whether they're falling under the *Stinson* analysis, you know, which relies on *Seminole Rock* and our deference, or whether they're kind of now starting to adopt *Kaiser*. And it just depends on how you read the interaction between these cases.

Matt Adams: So, *Banks* says application note 3a of the commentary is basically effectively not part of the rule, so we're not going to consider it. Actual loss, is the rule in the 3rd Circuit for two years. November of 2024, as we fully expect the Sentencing Commission, new rules will take effect. The application note that talked of intended loss is now part of the rule and this whole ordeal is over.



But what other sentencing issues do you see on the horizon, if any, that might encounter this same judicial scrutiny that may ultimately result in either the Sentencing Commission going back and taking a look and putting something that was previously part of the commentary into the rule?

We're not, I mean, are there any other sentencing issues that you see out there on the horizon that are ripe for that type of appellate development?

Morgan McCall Reece: Well, you've seen this happen already, um, especially in the context of career offender and controlled substance offenses. That's where that litigation has happened a lot already.

There may be some instances in the tax guidelines where there may be some expansion of that language. But I really think that for practitioners the takeaway point is, when your client is being sentenced you calculate the base offense level under the guideline language. If you have to look to the commentary and the commentary exposes your client to a greater sentencing level, a greater offense level, or it expands the conduct, then I think you need to look to your Circuit's interpretation of *Kaiser* and *Stinson* and the deference we give to the commentary, and see if you have the window to make a case.

Matt Adams: And I will tell you, this whole issue is fascinating. Last year at the Fox Rothschild White-Collar Symposium, we had members of the Sentencing Commission on one of our panels who actually came out and said, we believe *Banks* will be revisited. We believe that we are going to do exactly what they have ultimately done. And I find this pretty fascinating, in articulating in early 2024, the intention to modify this intended loss issue of 2B1.1 in response to *Banks*, the Sentencing Commission wrote, "The commission estimates that approximately 1/5 of individual sentence under section 2B1.1 in fiscal year 2022 were sentenced using intended loss. This estimate is based on the commission's review of a 30% representative sample of 3811 individuals sentenced under 2B1.1 in fiscal year 2022 with a no non-zero loss amount. Intended loss was used for sentencing in 19.8% of cases in the sample. Using these findings to extrapolate all section 2B1.1 cases with a loss amount, the commission estimates that approximately 750 individuals were sentenced using intended loss in fiscal year 2022. Of those 750 individuals approximately 50 were sentenced in the 3rd Circuit prior to the *Banks* decision."

Now, to me, that's really remarkable. Because I know that there was an active flurry of defendants who were seeking to be resentenced in the 3rd Circuit in light of that. So these decisions really do have a far-reaching effect, don't they?

Morgan McCall Reece: Oh, absolutely. I mean, when you think about this, if you're a defendant who was sentenced before *Banks*, and your guideline range was bumped up because of the concept of intended loss. And then *Banks* comes out, and your total offense level would have been lower without the intended loss, just based on actual loss. Then yes, you have to go back in there and argue it.

What you just read makes me reflect on the overarching problem that we're having here. Which is, courts across the country are interpreting a regulation that has been passed by the Sentencing



Commission and they're applying it to defendants' cases. They have now been applying it in such a way that is inconsistent across the country. Because we have the *Banks* decision. Then we have other courts that haven't even decided this decision yet, right? Like, the 4th Circuit still has the loss decision outstanding.

Of course, is it obsolete now in light of the guidelines changing? I'm not sure. It depends on if they take on the *Kaiser* and *Stinson* arguments. But the problem is, if the Sentencing Commission was created to avoid unwanted disparities in sentencing, this is exactly now what has happened based upon this problem.

Matt Adams: Yeah. So much for consistency.

Morgan McCall Reece: It's thrown out the window, even within the 3rd Circuit, to your point of cases that happened before *Banks* and then now cases that have happened after *Banks*. And that now cases after November.

Matt Adams: And it's just a microcosm for just how impactful these appellate decisions really are. And when appellate advocates like yourself are parsing through these constitutional and statutory and regulatory frameworks that form the criminal law, I think, unlike any other area of law, we're really a patchwork. Because we have these various sources of law to draw from.

Let's shift away for a moment on guidelines issues. Because I think we can at least agree that *Banks* may very well have been put to bed by the Sentencing Commission, but that there are some other areas where *Banks-style* arguments could be made where commentaries will be decided as either part of the rule or not. And then the Commission will either act or not. But, this is going to be a give and take, I think, for some time, in light of these developing lines of attack on deference versus not.

But let's move into some of the other issues de jour that are out there in our appellate world that impact the white-collar criminal defense and regulatory compliance practice, Morgan, especially as it relates in technology. And this concept of geofencing is something that really, really fascinates me. We've been exploring some of these hot-button issues on "The Presumption of Innocence" in recent episodes, especially as it pertains to artificial intelligence.

But what's your understanding of a geofence and how are the appellate courts tackling this particular issue?

Morgan McCall Reece: So, to your point, Matt, this is an interesting issue, right? Because over time, we have seen technology, of course, come into play with this concept of privacy. So, geofences seem to be a very new source that law enforcement and prosecutors are using to investigate crimes.

Let's just start with the basics. What's a geofence, first of all? So a geofence, basically, is based on someone's location history that they activate within their Google account. And if you have an Android phone, it applies in a certain way, obviously, like, logging into your Gmail or your Google accounts.



So, geofence warrants, they look for location history. And they have the ability to effectively map on to an area, the people who were there at the time. So, think about this in practical effects. And *Chatrie* is the case out of the 4th Circuit that was just recently decided that dealt with the 4th Circuit.

Matt Adams: I mean, it's Big Brother on steroids. It's putting

Morgan McCall Reece: It is!

Matt Adams: People at the scene of a crime, potentially, based

Morgan McCall Reece: That's right.

Matt Adams: On their digital fingerprint at that given moment. Whether it be from an IP address, whether it's a cell tower, whether it's, you know, all of this remote wireless connectivity that we enjoy in our everyday lives makes our lives easier and better supposedly.

Morgan McCall Reece: Right.

Matt Adams: I have some arguments on that one, but we'll put those aside for the moment. It's taking all of that information, assembling it and putting somebody in a particular place.

Morgan McCall Reece: That's exactly right. So this *U.S. v. Chatrie* case is the example of it. And because this is the only opinion from a federal court of appeals on this issue. There's another one pending in Minnesota right now. But, so *Chatrie* involved a bank robbery.

And this happened in Virginia. It happened in the late afternoon. And so what the local law enforcement did was they did this geofence search warrant, which effectively allows them to ask Google for the data for anyone who was within this area at this time, and, you know, they draw like a box, or however you want to say it, but they draw it around the bank so, that they can find the people who have opted into the location history, and then are in the area.

Now, there are three steps that Google has created to do a geofence. And that's kind of their own self-created procedure, it's not based necessarily in the law. And so law enforcement drawing the area, submitting it to Google through a search warrant. Google providing some anonymized data. Law enforcement going through, identifying who they want from the anonymized data, sending it back to Google. And then Google eventually sending it back. And then the anonymized data becomes non-anonymized at that point.

So, what that does is, if you and I are at that bank when it's being robbed, and we both have location history on our data is now part of the government search warrant. The government sees, oh, Morgan Reece was sitting right there by the bank and there's Matt too.

Matt Adams: And the implication is that, maybe combined with other evidence, you were responsible for that bank robbery.



Morgan McCall Reece: That's right. So, you know, then they see Mr. Chatrue there and, you know, for whatever reason, he becomes appealing to them, or they know him to be a suspect in other robberies. And one thing leads to another. It's, the law enforcement describes it as an investigative tool. But really, you know, it is being able to use Big Brother to the benefit of criminal investigations.

Matt Adams: I was involved heavily in the post-*Carpenter* sort of cell phone triangulation. This makes it look like a horse-and-buggy stuff compared to that. I mean, because that was like, guess and check, maybe you're there, maybe you're not. But this is some pinpoint stuff.

Morgan McCall Reece: This is some pinpoint stuff. And here's the problem with where now we are. So the 4th Circuit took this case. It came out of the Eastern District of Virginia. The 4th Circuit came out with a decision in July of this year. Just basically a month ago. It is a long opinion because it was not a unanimous decision, 2:1. The dissent wrote a very long dissent, talking about all the things that we're talking about, which is that this is an invasion of privacy.

But here's the whole thing that the 4th Circuit said. They said this was not a search that implicated the Fourth Amendment. And it rested in large part on the user's ability to opt out of location history. Which, we don't have to get so far into the technology and the ability. Suffice it to say, based on this opinion, the way the 4th Circuit saw it, because you have the ability to turn off or say no to location history in your Google account and your Android devices, that really weighed heavily into the court's analysis.

They compared it with *Carpenter*, where you don't have the ability to opt out of that data, right? Because you're carrying your cell phone around and it automatically has to connect to the cell towers. So, the court in the 4th Circuit said, you know, that was a really important distinguishing factor and they, interestingly enough, the Eastern District of Virginia did not even make this ruling. This was not the ruling that was on appeal. They affirmed for another reason based in the record. Which is, you know, it's just interesting.

When I saw this case, I thought that they might go to the good faith exemption and kind of avoid this issue altogether. But they didn't, and they took it head on. And now we have this rule that geofence is not a search that implicates the Fourth Amendment.

So, you know, I'm wondering, in the 4th Circuit now, what's law enforcement doing? They don't have to go get search warrants?

Matt Adams: All because I have the ability to go on to the settings of my phone and say, I want to turn my location off.

Morgan McCall Reece: Yep. The way the 4th Circuit describes the process in here is very in-depth, right? Because it's a very fact-intensive analysis. But you have the ability right up front to say, yes or no. And there's some data that the 4th Circuit cites about the number of people who opt into the service versus opt out and, it's just,



Matt Adams: It's remarkable. Because I'm thinking through my own cell phone, right? How many times a day do you get your apps asking you if you're sure you want to activate the location service, or you're sure you want to turn it off? You know, while you might be able to turn it off, living in the modern environment, the modern technology-driven landscape, there are all kinds of opportunities to have that inadvertently turned back on, even if you elect to turn it off, based on the types of technologies that are being utilized in just our everyday lives. And for the court to ignore that is kind of remarkable. And I think something that ultimately might need to go up to the Supreme Court one of these days.

Morgan McCall Reece: Yeah. I think that's true. I mean, so, this case is being handled by the Fourth Amendment Center through the NACDL. And they have a wonderful page on their website about *Chatrie* and about geofence search warrants. So just, if anyone's interested, please go check that out. They have all the filings on there. And they also have a lot of the testimony from the district court cases, the district court case that was involved in *Chatrie*.

But I'll tell you this. The window for *Chatrie* to petition for an en banc hearing in the 4th Circuit, they asked for an extension. So there's still a possibility that they'll ask for that rehearing en banc. Whether or not the 4th Circuit grants it, I don't know. But there is litigation to come out of *Chatrie*. And as I mentioned before, there's also a Minnesota state case that is dealing with this very issue right now.

So, you know, the 4th Circuit doesn't decide it for the country. The 4th Circuit has made this ruling now for the 4th Circuit, which may be challenged in on banc hearing and, you know, frankly, maybe challenge to your point, Matt, in a couple of years when there's more possibly a circuit split discussion, this issue.

Matt Adams: And big shout outs to the NACDL and the Fourth Amendment Center there. They are really out there on the cutting edge of all of these technology issues and all the various sundry of new surveillance tools that the government is bringing to bear, and out there defending individual rights. I am indebted to them. I've worked with them before on other cases. They really are at the cutting edge on these issues.

So let's take another pivot. away from the circuits, if we will, Morgan. And let's talk about a very active year at the United States Supreme Court. Chock full of headline-grabbing, notable cases, reversals and all kinds of stuff. We'll keep the politics out of it and keep it straight to the nuts and bolts. But suffice it to say, it was a busy year.

Talk to us a little bit about *Erlinger*, because that was one of the really disruptors that have -- one of many disruptors, I guess -- that have come out of the Supreme Court in our, our little area of the practice in the last year.

Morgan McCall Reece: Yeah, I think that's absolutely true. So *Erlinger* is an interesting one, right? So if you are in federal sentencing and you are convicted of certain crime, and you have the three predicate offenses that qualify, then all of a sudden, your sentencing scheme changes. It goes from a



statutory maximum to a statutory minimum of 15 years. And you're facing a much higher punishment, right? Because that's what the whole concept behind the Armed Career Criminal Act is to punish those who the government deems to be an armed career criminal.

So here's the thing: over the entire course of the Armed Career Criminal Act and sentencing with it, proving that someone has those three prior predicate offenses has always been a question that's been left to the court. This has now changed our practice. We now have to have a jury decide whether the three predicate convictions were committed on locations different from one another in order to be sentenced as an armed career criminal.

That may not seem like a big deal, but the practical implications of this are now that juries are going to be deciding a lot more than simply guilt or innocence. So, if you think about this practically from a practitioner standpoint, who's a criminal defense attorney in a federal district, and you have someone who is an armed career criminal, then yes, of course, you're going to want a jury to decide this issue. You don't want to just concede it. And it's going to draw out a lot of options for people to be able to challenge that, hopefully in a really good way, I think.

Matt Adams: Is it going to be more bifurcated trials do you think?

Morgan McCall Reece: Oh, yes, for sure. Right? Because if you're a defense attorney, I mean, if your client pleads guilty to let's just say the gun charge, the 922(g) charge, but you still want to have a jury trial on this question of whether or not they're an armed career criminal. Then yeah, you're going to take that to a jury and you're going to hold the government to its burden there.

Which I mean, make sense, right? I mean, and that's the whole point of the court at *Erlinger* was that, you know, it increases the defendant's punishment in such a way that it has to be found by a jury beyond a reasonable doubt. So, I think that the questions that I have coming out of *Erlinger*, is something that Kavanaugh says, right?

So, he says, in his opinion, he has a footnote, which says, "This is not going to be retroactive." There's a line of cases coming out of this. *Teague* is the old one, and then in 2021 they interpreted another one. The name is escaping me. But he basically suggested that this is not gonna implicate any sort of, it's *Edwards v. Vannoy*. They're gonna say that it's not retroactive, so that people who were sentenced, let's just say in 2020 to an armed career criminal sentence, he can't challenge it now.

Whether that's gonna play out in that way, I think that people should probably ask that. Not should, they absolutely should be asking that question for their clients. And they should be thinking about it in the context of post-conviction litigation. Whether it's the 2255 context in the habeas petitions. They really need to ask that question and they need to make those arguments. And maybe Kavanaugh's footnote in his opinion doesn't bear out.

Matt Adams: Fascinating. What else have we seen coming out of the, most recent term of the United States Supreme Court? Talk to us a little bit about *Loper Bright*.



Morgan McCall Reece: Yeah, *Loper Bright*, on its face doesn't seem like it's going to affect criminal law, right? Because it's about regulatory law. It's about the deference that we're supposed to be giving agency interpretations of their own regulations.

But, like, we were just talking about at the very beginning, Matt, the guidelines are based on a regulatory framework, essentially, right? Because the Sentencing Commission is a judicial agency. It's not your traditional executive agency, it's a little different. But *Loper Bright* to me raises this overall question of deference that we're giving to agencies. And it's really an overall question of administrative law and how that is going to graft on to our criminal sentencing.

And this is kind of harkening back to this discussion that we were having about *Kaiser* and *Stinson* and where this is all going to play out. But this is going to come to a head in a couple of years because we are all left wondering not only what deference are we going to be supposed to be giving to the commentary, which is the *Kaiser* discussion and a *Stinson* discussion. But I'm left wondering what deference are we giving to the guidelines? And there's a difference of opinion out there about whether or not this even plays out in any way. But, is there an argument to be made that perhaps the Sentencing Commission through *Loper Bright* is exceeding its authority in some capacity, right? And we shouldn't be giving deference.

Now, I'm kind of mixing metaphors with the, exceeding its authority. But I do think that this is reflective of an overall attack on agency law and administrative law that we need to be cognizant of in the criminal context.

Matt Adams: And just to set the frame of reference for our audience: prior to *Loper*, *Chevron*, the so-called *Chevron* doctrine, which had been the law of the land for decades, essentially afforded deference to administrative agencies, right?

Morgan McCall Reece: It afforded deference to administrative interpretations of their own regulation, right? And so, that is really the question, right? So *Chevron*'s out the window. Well, when viewing agency interpretation of a statute courts now have to exercise their independent judgment as to whether an agency acted within its statutory authority.

And that's really the question that we're going to have to ask with the Sentencing Commission.

Matt Adams: Well, in no other world than in the SEC context that impacts white-collar defendants is it more prevalent, that deference. And the SEC got its wings clipped this term by the Supreme Court in a real way. Talk to us a little bit about some of those SEC cases, because what we've seen come out of the Supreme Court with cases like *Jarkesy* were really a, I dare say, making the authority of the SEC weaker.

Morgan McCall Reece: Absolutely. I mean, so, *Jarkesy* was an interesting one, which. That's a fascinating scheme, right? When you think about it, what the SEC had done, which was essentially take their own cases and allow them to be heard in this separate hearing where their conviction rates were through the roof. And so *Jarkesy* talks about, civil penalties in the form of monetary damages



are the prototypical common law remedy. And so, because of that they can only be enforced in courts of law, which implicates people's Seventh Amendment rights.

Matt Adams: Sounds right to me.

Morgan McCall Reece: Right? I mean, this just seems like such common sense, when you think about it. The fact that this agency was able to do this and take the jury trial right away from someone seems such like such common sense.

Matt Adams: I've got some recent experiences with the SEC enforcement apparatus. And I would say the impression I get right now is that they are "shoot first, ask questions later." You know, tried-and-true concepts like the Wells Notice process and the interaction that you're supposed to have with the SEC during that process is really out the window these days.

And they're just coming at people, guns blazing. And almost, to the facts be damned. They're just really interested in talking facts. So,

Morgan McCall Reece: Yeah.

Matt Adams: I view cases like *Jarkesy* as a welcome relief from some overbearing administrative activity at the SEC, enforcement activity at the SEC. But it's clear that we really are having the battle lines redrawn when it comes to the administrative enforcement apparatus of any host of these federal agencies. Do you agree?

Morgan McCall Reece: Yes, that's absolutely right. I mean, I think that between *Loper Bright* and *Jarkesy*, we are seeing a trend, right, in talking about administrative law and agency authority and what deference we're going to be giving and what power we're going to be giving to agencies to not only decide but also interpret the law themselves. When really, this all needs to rest in the hands of a court of law, an Article Three judge, a jury.

So, I think for criminal practitioners on a larger sense, to go back to what we're talking about, the agency that we deal the most with is the Sentencing Commission. So I think we all need to reflect on how these cases shape our understanding of the Sentencing Commission's authority, and whether there is any room for us to challenge that authority and their interpretations in such a way to the benefit of our clients in the criminal sentencing context.

Matt Adams: Yeah, I, think that's a fascinating observation, Morgan.

I want you to take out your crystal ball now. Let's talk a little bit about what you see coming down the pike in the future from ... I think it would be impossible to survey the circuits, but let's focus on the Supreme Court of the United States. Obviously, making substantial groundbreaking pronouncements of new law in the most recent term. What do you see coming up in the next term?

Morgan McCall Reece: So, particularly for white-collar practice, as we all know, we're all familiar with the case law surrounding federal mail or wire fraud, right? We're familiar with the line of cases



talking about it. And the government likes to get creative when they bring some of these charges. And they bring some interesting interpretations of what constitutes criminal conduct under the law.

So one case that I'm particularly interested in watching is the *Kousisis* case. And it comes out of the 3rd Circuit. And so it deals with whether deception to induce a commercial exchange can constitute wire fraud. Even if the defendant does not intend to cause economic harm and the alleged victim in that case still received the good or services that it paid for.

So, in looking at the filings right now in the Supreme Court, the questions presented -- and this was taken from the defendant's petition for a writ of cert -- they've identified three issues in that case. And this is kind of based on a circuit split that's developed across the country. So, the three issues are first, like I said, whether deception to induce a commercial exchange can constitute wire or mail fraud, even if inflicting economic harm is not the object.

Second, whether a sovereign statutory, regulatory or policy interest is a property interest when compliance is a material term of payment for goods or services. And then finally, whether contract rights are indeed property.

So, *Kousisis* came out of a case involving improper representations from a company for a government contract and whether or not they were using a disadvantaged business enterprise.

So they said that they were, and they essentially lied and said that they were, but they still produced and followed through on their end of the contract. So, in the government's theory, the government in that case was deprived of what they asked for on their full side of the bargain, so to speak. Because they wanted supplies from a DBE, this disadvantaged business enterprise. But they didn't get it. Even though they still got the outcome.

So that's the question, right? Is that wire fraud? Is that federal wire fraud? And, you know, the court is going to do what we've been talking about. Which is, they're going to probably go back to basics here. Now, this is just my guess, of course, they're going to go back to the basics. It's a statutory interpretation. They're going to rely on the case law. And they're going to see under these principles of statutory interpretation. They may go to some other principles, like the rule of lenity. They may look at some federalism principles like they have. They may look at due process to assess this statute and whether the government's interpretation is constitutional and appropriate here.

Matt Adams: And this is really part, as you mentioned of a broader narrowing of some of these federal criminal law concepts. I mean, I think we saw this initially with *U.S. v. Kelly*, when, the convictions of the defendants convicted in New Jersey in the Bridgegate case were thrown out because the Supreme Court ruled that the conduct that was alleged didn't violate the wire fraud statute and impermissibly extended the wire fraud statute in a manner that, frankly, the government had been doing for years. They have been using these tried-and-true broad statutes, like wire fraud to convict a whole sundry of folks.



And in *U.S. v. Kelly*, the Supreme Court said this has to come to an end. Congress is going to have to specify these laws if they want them to constitute crimes, and you're not going to be able to turn the statutory language on its head to convict people and take away their liberty.

I think now's a good a time as ever to preview that on September 18, coming up, you're going to lead an appellate panel of a discussion on all these types of topics at the Fox Rothschild third annual White-Collar Symposium in Philadelphia, and present in the room as one of our keynote speakers is going to be Bill Baroni, who actually had his conviction overturned in *U.S. v. Kelly*. I think it's going to be a fascinating day, to put it mildly. We're going to really dissect the legal analysis with the real life story of the man whose life was upended.

Morgan McCall Reece: That's exactly right.

Matt Adams: Yeah. And so, these have far-reaching consequences. Do you think that's a broader trend? I would dare say there's quite a bit I disagree with coming out of this Supreme Court. But I don't disagree with this. I think that the government really has gotten a little over its skis with using some of these broad, platitudinal type of prosecutorial theories built off of statutes that were fully intended to prescribe some different behavior.

Morgan McCall Reece: I do. That is absolutely right. And I'll tell you that for a couple of reasons. One, I think laws have to be written in such a way so that people know what's criminal, right? So we all can live our lives within the lines that Congress tells us.

The problem is when those laws can be interpreted by the federal government in such a way that they can get creative to say, this statute is, you know, oh, we can manipulate it to say it would fit this conduct. That's just not an appropriate use of these statutes, whether it's the mail or wire fraud statute or another statute.

And that's what the Supreme Court really has been ... And they've done this, this is something that we've seen a lot, but this is not a new technique, right? The Supreme Court has particularly reminded us that we cannot trust federal prosecutors to say, oh, I promise I'll enforce the statute as it's written. The Supreme Court has to come in and say, no, this is not right. And then Congress really has to make a law that is clear and that delineates what the appropriate conduct is and what the inappropriate conduct is not.

Matt Adams: Amen. From a former federal prosecutor! And so, I want to, as we, wind down our time together today, Morgan, I want to just really talk a little bit about how the employing, at the early stages of a criminal regulatory white-collar matter, a lawyer like yourself to observe, preserve and develop theories of appeal is so critically important. I recently had a success at the 11th Circuit Court of Appeals that was largely driven by proactive thinking about a potential appellate issues that could arise, and how to properly frame them.

So talk to us a little bit about your role with trial teams. Because nobody wants to think about the idea that, well, I'm going to lose, so I need an appellate lawyer, but talk about the proactive appellate



lawyer's role as part of the trial team. Because that is a tremendous benefit since you've joined the firm that we can now offer our clients.

Morgan McCall Reece: Absolutely. So, I think a lot of people view appellate lawyers, right, as coming in on the backside after something has happened. Either we have to try to fix it or we have to try to protect it. But that sort of responsive appellate lawyer, although is important, I think that there's a use for an appellate lawyer as part of a trial team. And what we've talked about today is a really wonderful example of that.

When you get an appellate lawyer who's a part of the trial team, they can take these big picture issues and map them onto your case. So, when you are getting ready to decide if you're going to take a plea or go to trial, or have a suppression motion, or even if you're at the back end, and you have sentencing, you can raise these arguments. Whether it's an initial argument that the conduct doesn't even fall within the statutory interpretation. Whether it's a constitutional argument, like we saw in *Chatrie* with the geofence warrant.

Whether it's a sentencing argument, as we have now seen in *Erlinger* with a bifurcated trial for jury finding these predicate offenses. Having an appellate lawyer at the very beginning can guide big picture issues that you can be sure to raise.

And frankly, if you have success with the big picture issues at the outset, that will shape the rest of the case in a very positive way to put you in a better footing for the inevitable appeal. That will follow.

Matt Adams: We're speaking here today with Morgan McCall Reece, a new member of our white-collar team at Fox Rothschild. And in the waning moments here, why don't you just give us a little bit on your background?

I touched on it earlier, but just for our audiences' sake, tell us a little bit about the experience and the practice that you now bring to the table here at the firm, joining us from the government after quite a career.

Morgan McCall Reece: Yes, I spent almost a decade as a prosecutor, both here in state court in North Carolina in two different counties. Charlotte was one of them and then another smaller county. And then after that, I transitioned over to the U.S. Attorney's Office, where I was just a line prosecutor. I was a special AUSA for a little bit and a line prosecutor prosecuting a variety of crimes, focusing on drugs and guns. And then I focused at the end of my time with the U.S. Attorney's Office solely on criminal appeals. So I've had the opportunity to do a number of briefs, several oral arguments. And I'm taking that time to now flip it on its head and use my knowledge for the greater good.

Matt Adams: I like it. I like it, Morgan. And, as we expand across the country with this practice, it's terrific to have you as a tremendous resource for our group.



And I know we're going to have many matters together in the years ahead. So, that's all the time we have here today on "The Presumption of Innocence," but until next time, I'm your host, Matt Adams. We'll see you take care. Bye-bye.

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