Whither the Rule of Lenity

*by Dan Levin & Nathaniel Stewart**

The "rule of lenity" "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[1] Although long a favorite of defense attorneys, actual applications of the rule, at least at the Supreme Court level,[2] have been relatively rare. This is perhaps somewhat surprising as the rule's roots in due process principles, and potential application where a strict construction of a statute results in an ambiguity, could lead both traditionally liberal and traditionally conservative Justices to favor its use. In 2008, in *United States v. Santos,* the Supreme Court issued a plurality opinion holding that a key term in a federal money laundering statute was ambiguous and applied the rule of lenity to resolve the ambiguity in the defendants' favor. The plurality involved just such a coalition of conservative and liberal Justices (Justices Scalia, Thomas, Ginsburg, and Souter; with Justice Stevens writing separately and agreeing that the rule should apply), raising the question of whether the rule may be entering a period of somewhat greater application.

As noted, to date, the Supreme Court has applied the rule sparingly and "only when, after consulting the traditional canons of statutory construction, [the court is] left with an ambiguous statute."[3] As Justice Thomas noted in *Staples v. United States*, "[t]hat maxim of construction [the rule of lenity] is reserved for cases where, '[a]fter seiz[ing] every thing from which aid can be derived,' the Court is 'left with an ambiguous statute.'"[4] Similarly, the Court has described the rule as "appl[ying] only when the equipoise of competing reasons cannot otherwise be resolved...."[5]

Determining when the traditional canons have failed and an ambiguous statute remains, however, enjoys little consensus among members of today's Supreme Court. Because it is currently used only as an interpretative tool-of-last-resort, it is not surprising that the rule of lenity has not ultimately served to "break the tie" in many cases. After all, the Court may choose to interpret a criminal statute using any number or combination of the canons of construction in order to avoid declaring a statute hopelessly ambiguous.[6] Since the 2006-2007 term, for example, the rule of lenity has been mentioned or discussed in a majority, dissenting, or concurring opinion fewer than a dozen times,[7] and it has been applied and broken the tie in the defendant's favor only once—in the *Santos* case.[8]

Although it has rarely decided a case, the rule of lenity has been more frequently cited in dissenting opinions arguing that the statutory provision at issue is ambiguous enough to warrant the rule's application. Maybe this, too, should be expected in light of the rule's broad implications for and effect on criminal statutes.[9]

Because the rule of lenity can be applied in a manner that protects defendants' due process rights and also in a manner based on strict statutory construction, it is perhaps not surprising that at times it results in interesting coalitions that cross the Court's traditional conservative-liberal lines. As noted, Justice Scalia's plurality opinion in *Santos*[10] was joined by Justices Thomas, Ginsburg, and Souter; Justice Stevens concurred in the judgment and wrote separately, also endorsing application of the rule. Justice Alito filed a dissenting opinion joined by Chief Justice Roberts, Justices Kennedy and Breyer.

Other discussions of the rule of lenity in the most recent three terms have included the following: Justice Ginsburg acknowledging that the statutory definition in question was "not a model of the careful drafter's art" and yet declining to apply the rule,[11] while Chief Justice Roberts, joined by Justice Scalia, considered the case "a textbook case" for the rule of lenity;[12] Justice Souter and Justice Ginsburg joining with the traditionally more conservative members in declining to apply the rule of lenity,[13] while Justice Stevens[14] and Justice Breyer[15] each wrote dissenting opinions calling for its application; and Justice Scalia writing an opinion, joined by Justice Stevens and Justice Ginsburg, calling for application of the rule of lenity, in a case in which neither the majority opinion, authored by Justice Alito, nor Justice Thomas's separate dissent, even discussed the rule.[16]

A brief review of *Santos* and several of the recent cases discussing the rule highlights the confusing difficulty the Court faces in determining when to apply the rule of lenity. The Justices seem to agree on the rule's purpose and that the rule is one of "last resort," to be used when all other attempts to interpret the text have failed. But *when* those attempts have failed, and *when* the rule must be employed, remains murky and uncertain.

I. United States v. Santos

Santos and one of his collectors were convicted of money laundering charges related to their long-standing illegal lottery scheme.[17] Santos employed several operatives to manage an illegal lottery, including "runners" to collect bets at bars and restaurants and "collectors" who would deliver those bets to him.[18] Financial transactions between Santos and his employees and lottery winners formed the basis for money laundering charges and subsequent convictions under 18 U.S.C. § 1956(a)(1),[19] which criminalizes financial transactions involving "proceeds" of certain types of unlawful activities.[20]

The convictions were vacated by the lower court on grounds that "proceeds" means "profits" rather than "gross receipts," and the Government had failed to prove that the funds involved in the transactions represented "profits" from the lottery.[21] After the Seventh Circuit Court of Appeals affirmed the holding, the Supreme Court granted certiorari to determine the narrow question of whether "proceeds" means "profits" or "gross receipts," i.e. whether the government has to prove that the underlying criminal activity was profitable or

** Dan Levin and Nathaniel Stewart are white collar attorneys with White & Case LLP in Washington, DC.*

just that the money used in the transaction was a product of the criminal activity.[22]

The plurality held in favor of the two defendants by settling on the narrower of the two meanings. The money laundering statute did not define "proceeds," and, as Justice Scalia noted, "[w]hen a term is undefined, we give it its ordinary meaning."[23] But "proceeds" is equally capable of two "ordinary meanings"—either "receipts" or "profits."[24] In such a case, as Justice Scalia explained, the rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them," since no individual should be held criminally liable for statutory offenses not clearly prescribed.[25] Thus, according to the plurality, "[b]ecause the 'profits' definition of "proceeds" is always more defendant-friendly than the 'receipts' definition, the rule of lenity dictates that it should be adopted."[26] Justice Scalia went on to argue that "[w]hen interpreting a criminal statute, we do not play the part of mind reader," and, quoting Justice Frankfurter, stated: "'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.'"[27]

The Government had made two primary arguments in favor of the "gross receipts" interpretation. First, gross receipts would more "accurately reflect the scale of the criminal activity" and thus better serve the purpose of the money laundering statute.[28] The plurality rejected this argument out of concern that such a broad interpretation would effectively "merge" any illegal gambling offense into a much more severe money laundering offense, "because paying a winning bettor is a transaction involving receipts that the defendant intends to promote the carrying on of the lottery."[29] Second, the Government argued for the "receipts" interpretation "because—quite frankly—it is easier to prosecute."[30] Justice Scalia rejected this position because it "[e]ssentially... asks us to resolve the statutory ambiguity in light of Congress's presumptive intent to facilitate money-laundering prosecutions," a position which "turns the rule of lenity upside-down. We interpret ambiguous criminal statutes in favor of defendants, not prosecutors."[31]

Concurring in the judgment as the decisive fifth vote, Justice Stevens noted at the outset that "[w]hen Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute."[32] Justice Stevens argued that Congress has, in other contexts, and could have here "defined 'proceeds' differently when applied to different specified unlawful activities," and therefore judges may do the same "as long as they are conscientiously endeavoring to carry out the intent of Congress."[33] Thus, Justice Stevens would not pick a single definition of "proceeds," but would define the term differently depending on the type of unlawful activity that produces the funds in question.[34] Ultimately, Justice Stevens concluded that the rule of lenity required the narrower "profits" interpretation for money laundering charges based on illegal gambling transactions because the statutory text and its legislative history did not clearly indicate congressional intent regarding the defendants' gambling operation.[35]

Justice Alito's dissent, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer, argued that Congress intended the term "proceeds" to be defined as "gross receipts" for any unlawful activity under the statute.[36] The dissent focused on the legislative history of the statute and cited similar definitions in other statutes, including every state money laundering statute, as well as the prosecutorial burdens created by the plurality's definition, and concluded that the "meaning of 'proceeds' in the money laundering statute emerges with reasonable clarity when the term is viewed in context, making the rule of lenity inapplicable."[37]

II. Other Recent Rule of Lenity Cases

In two cases since *Santos*, application of the rule of lenity has been rejected, making clear that even if *Santos* may herald some greater receptivity to the rule, it is still likely to be sparingly applied.

A. United States v. Hayes

In *United States v. Hayes*, Justice Ginsburg, writing for the majority, reversed the Fourth Circuit's application of the rule of lenity, and held that the rule did not apply because the statute's "text, context, purpose, and what little drafting history there is all point in the same direction."[38] *Hayes* concerned the Gun Control Act of 1968,[39] which prohibits a person convicted of a "misdemeanor crime of domestic violence" from possessing a firearm. The defendant was charged with three counts of possessing firearms after being convicted of a crime of domestic violence, but he moved to dismiss the indictment on grounds that the state statute "under which he was convicted in 1994... was a generic battery proscription, not a law designating a domestic relationship between offender and victim as an element of the offense."[40] The district court denied defendant's motion to dismiss, and he pleaded guilty and appealed. The Fourth Circuit reversed the conviction, holding that the predicate offense for a conviction under § 922(g)(9) must "have as an element a domestic relationship between the offender and the victim."[41]

The Supreme Court's decision turned on whether "misdemeanor crime of domestic violence" in § 921(a)(33)(A) requires that "the predicate misdemeanor identify as an element of the crime a domestic relationship between the aggressor and victim."[42] Section 921(a)(33)(A) provides:

> The term "misdemeanor crime of domestic violence" means an offense that—
>
> (i) is a misdemeanor under Federal, State, or Tribal law; and
>
> (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

The majority first focused on the text of the statute and observed that

> as an initial matter... § 921(a)(33)(A) uses the word "element" in the singular, which suggests that Congress

> intended to describe only one required element.... Had Congress meant to make the latter as well as the former an element of the predicate offense, it likely would have used the plural "elements," as it has done in other offense-defining provisions.[43]

Justice Ginsburg then approached the text's syntax and found that

> [t]reating the relationship between aggressor and victim as an element of the predicate offense is also awkward as a matter of syntax. It requires the reader to regard "the use or attempted use of force, or the threatened use of a deadly weapon" as an expression modified by the relative clause "committed by." In ordinary usage, however, we would not say that a person "commit[s]" a "use." It is more natural to say that a person "commit[s]" an "offense."[44]

The majority went on to note that "[h]ad Congress placed the 'committed by' phrase in its own clause, set off from clause (ii) by a semi-colon or a line break, the lawmakers might have better conveyed that 'committed by' modifies only 'offense' and not 'use' or 'element.'"[45]

Furthermore, the Court rejected the Fourth Circuit's application of the "rule of the last antecedent," "under which 'a limiting clause or phrase... should ordinarily be read as modifying only the noun or phrase that it immediately follows.'"[46] According to the Court,

> [a]pplying the rule of the last antecedent here would require us to accept two unlikely premises: that Congress employed the singular "element" to encompass two distinct concepts, and that it adopted the awkward construction "commit" a "use." ... "Committed" retains its operative meaning only if it is read to modify "offense."[47]

Thus, the Court's textual analysis concluded that "[m]ost sensibly read, then, § 921(a)(33)(A) defines 'misdemeanor crime of domestic violence' as a misdemeanor offense that (1) 'has, as an element, the use [of force],' and (2) is committed by a person who has a specified domestic relationship with the victim."[48]

The majority then considered the statute's purpose and the "practical considerations" that "strongly support" its reading of the statute,[49] and found that "[b]y extending the federal firearm prohibition to persons convicted of 'misdemeanor crime[s] of domestic violence,'"[50] Congress sought to prevent domestic abusers who are not charged with or convicted of felonies from possessing firearms. The majority argued that "[c]onstruing § 922(g)(9) to exclude the domestic abuser convicted under a generic use-of-force statute (one that does not designate a domestic relationship as an element of the offense) would frustrate Congress' manifest purpose,"[51] which, the Court believed, was to "keep[] firearms out of the hands of domestic abusers" even if those abusers are not charged with or convicted of felonies.[52] The majority then noted that "[g]iven the paucity of state and federal statutes targeting *domestic* violence, we find it highly improbable that Congress meant to extend 922(g)(9)'s firearm possession ban only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense."[53]

The majority opinion concluded with a brief look at the scant legislative history of the statute, consisting of an earlier version of the law and a floor statement by the bill's sponsoring Senator, which included the statement that:

> Convictions for domestic violence-related crimes often are fore crimes, such as assault, that are not explicitly identified as related to domestic violence. Therefore, it will not always be possible for law enforcement authorities to determine from the face of someone's criminal record whether a particular misdemeanor conviction involves domestic violence, as defined in the new law.[54]

The Court acknowledged that "[t]he remarks of a single Senator are 'not controlling,' but, ... the legislative record is otherwise 'absolutely silent.'"[55]

Rejecting the defendant's contention that the statute's ambiguity called for application of the rule of lenity, the majority held that although the statute's definition of "misdemeanor crime of domestic violence" "is not a model of the careful drafter's art," the statute was not so ambiguous as to allow for the rule of lenity to apply.[56]

Whereas the *Hayes* majority did not think the statute ambiguous enough to apply the rule of lenity, the dissent, written by Chief Justice Roberts and joined by Justice Scalia, considered this "a textbook case for application of the rule of lenity."[57] The dissent rejected the majority's reading on textual, structural, and practical grounds, and concluded that the statute is so ambiguous that the rule of lenity should be applied.

Like the majority opinion, the dissent started with the statute's text and framed the question as "whether the definition of 'misdemeanor crime of domestic violence' in § 921(a)(33)(A) includes misdemeanor offenses with no domestic-relationship element."[58] The Chief Justice began by disagreeing with Justice Ginsburg's reading of the text, noting that "[t]he majority would read the 'committed by' phrase in clause (ii) to modify the word 'offense' in the opening clause of subparagraph (A), leapfrogging the word 'element' at the outset of clause (ii)."[59] Under the majority's reading, "[i]ndividuals convicted under generic use-of-force statutes containing no reference to domestic violence would therefore be subject to prosecution under § 922(g)(9)."[60] The dissent found this reading incongruous and preferred the Fourth Circuit's more "natural reading," which held that "'committed by' modifies the immediately preceding phrase: 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'"[61] "Read this way," wrote the Chief Justice, "a domestic relationship is an element of the prior offense."[62]

The dissent also analyzed the structure of the statute to decipher its meaning, and concluded that "[t]he most natural reading of the statute... is that the underlying misdemeanor must have as an element the use of force committed by a person in a domestic relationship with the victim."[63] Chief Justice Roberts argued that "[t]he fact that Congress included the domestic relationship language in the clause of the statute designating the element of the predicate offense strongly

suggests that it is in fact part of the required element."[64] He contended that the majority's reading "requires restructuring the statute and adding words. The majority first must place the 'committed by' phrase in its own clause—set off by a line break, a semicolon, or '(iii)'—to indicate that 'committed by' refers all the way back to 'offense.'"[65] The dissent noted several other textual revisions required by the majority's reading and argued that they "are not insignificant revisions; they alter the structure of the statute[,] ... [which] is often critical in resolving verbal ambiguity."[66]

Turning to the majority's arguments concerning the statute's sparse legislative history—a single floor statement by a single Senator—the dissent stated that "[s]uch tidbits do not amount to much," especially when, as here, "the statement was delivered the day the legislation was passed and *after* the House of Representatives had passed the pertinent provision."[67] Thus, the dissent dismissed the relevance and "value of such statements due to their inherent flaws as guides to legislative intent, flaws that persist... in the absence of other indicia."[68]

Chief Justice Roberts concluded by turning to the rule of lenity: "Taking a fair view, the text of 921(a)(33)(A) is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much," thereby making this "a textbook case" for applying the rule of lenity.[69] Moreover, he wrote, "[i]t cannot fairly be said here that the text 'clearly warrants' the counterintuitive conclusion that a 'crime of domestic violence' need not have domestic violence as an element."[70]

B. Dean v. United States

Whereas Chief Justice Roberts argued in favor of the rule of lenity in his *Hayes v. United States* dissent, he authored the opinion rejecting the rule's application in *Dean v. United States*.[71] In *Dean*, the Chief Justice was joined by the traditionally more conservative justices along with Justices Ginsburg and Souter, while Justices Stevens and Breyer (who had both joined Justice Ginsburg in rejecting the rule of lenity arguments in *Hayes*) each wrote separately in calling for the rule of lenity to be applied.

Dean concerned the meaning of 18 U.S.C. 924(c)(1)(A), which imposes extra punishment for discharging a firearm during a "crime of violence or drug trafficking crime." The question in *Dean* was whether the statute requires that the defendant intended to discharge the firearm during the commission of his crime. The Court held that it does not.[72]

During the course of an armed bank robbery, Dean's gun accidentally discharged as he was removing money from the teller's drawer. The defendant was convicted of discharging a firearm during an armed robbery, in violation of 924(c)(1)(A)(iii), and was sentenced to a mandatory minimum of 10 years in prison.[73] Dean appealed, arguing that the gun fired accidentally and that "the sentencing enhancement... requires proof that he intended to discharge the firearm."[74] The Eleventh Circuit affirmed Dean's conviction and sentence.

In affirming the court of appeals, the majority rejected Dean's argument that "any doubts about the proper interpretation of the statute should be resolved in his favor under the rule of lenity."[75] After analyzing the statute's text, structure, and practical application, the majority determined that the statute is not so "grievously ambiguous" as to warrant the rule of lenity.[76]

The majority began by observing that the statute's text on its face "does not require that the discharge be done knowingly or intentionally, or otherwise contain words of limitation," and the Court refrained from reading words or elements into the statute.[77] The Court then turned to the structure of the statute and found that it too did not support Dean's contention that the sentence enhancement included an intent requirement. The majority noted that whereas subsection (ii) of the statute "expressly included an intent requirement" for the 7-year mandatory minimum sentence if a criminal brandishes a firearm,[78] "Congress did not, however, separately define 'discharge' to include an intent requirement."[79] The Court rejected Dean's argument that "even if the statute is viewed as silent on the intent question, that silence compels a ruling in his favor."[80] Dean argued that there is a presumption in criminal cases that "the Government [must] prove the defendant intended the conduct made criminal."[81] Chief Justice Roberts acknowledged that "[i]t is unusual to impose criminal punishment for the consequences of purely accidental conduct," but explained that "it is not unusual to punish individuals for the unintended consequences of their *unlawful* acts," citing the felony-murder rule, whereby "[i]f a defendant commits an unintended homicide while committing another felony, the defendant can be convicted of murder," as an example.[82] The majority observed that Dean was already guilty of illegal conduct, and that conduct was not accidental:

> The fact that the actual discharge of a gun under 924(c)(1)(A)(iii) may be accidental does not mean that the defendant is blameless. The sentence enhancement in subsection (iii) accounted for the risk of harm resulting from the manner in which the crime is carried out, for which the defendant is responsible.[83]

Taken together, the majority was convinced that the law's text and structure were sufficiently clear and unambiguous to deny Dean's claim that the rule of lenity should apply.

Justice Stevens and Justice Breyer, however, were not so convinced. Justice Stevens argued that the structure and history of the statute indicate that "Congress intended § 924(c)(1)(A)(iii) to apply only to intentional discharges" because it may be inferred that "Congress intended to impose increasingly harsh punishment for increasingly culpable conduct."[84] Justice Stevens points to the escalating sentences in subsections (i) – (iii) and argues that by implication, the 5-year to 7-year to 10-year progression should correspond to escalating degrees of culpability. Because the accidental discharge caused no harm, and because the defendant did not act intentionally in firing his gun, he therefore lacked a more culpable mens rea and should not be punished more harshly. Rather than read subsection (iii) as a strict-liability offense, Justice Stevens contended that the Court should have applied the "common-law presumption that provisions imposing criminal penalties require proof of mens rea," which, he argued, was "bolstered by the fact that we have long applied

the rule of lenity—which is similar to the mens rea rule in both origin and purpose—to provisions that increase criminal penalties as well as those that criminalize conduct."[85] He stated that he would apply this presumption in order to "avoid the strange result of imposing a substantially harsher penalty for an act caused not by an 'evil-meaning mind' but by a clumsy hand."[86]

Justice Breyer largely adopted the points made by Justice Stevens without much additional explanation, and then focused more narrowly on the rule of lenity, which he argued "tips the balance against the majority's position."[87] Justice Breyer believed "the discharge provision here is sufficiently ambiguous to warrant the application of that rule [of lenity]," but he offered little analysis for that view.[88] Instead, Justice Breyer argued that the rule of lenity should be applied because "in the case of a mandatory minimum [sentence], an interpretation that errs on the side of *exclusion* (an interpretive error on the side of leniency) still *permits* the sentencing judge to impose a sentence similar to... the statutory sentence even if that sentence... is not legislatively *required*."[89] In contrast, "an interpretation that errs on the side of *inclusion* requires imposing 10 years of additional imprisonment on individuals whom Congress would not have intended to punish so harshly."[90] Such an "inclusive" error would remove discretion from the sentencing judge and perhaps "depart dramatically" from what Congress had intended.[91]

III. The Newest Justice's Views

Justice Sonia Sotomayor has joined the Supreme Court for the 2009-2010 Term, replacing Justice Souter, who joined in the *Santos* opinion applying the rule and also penned only one recent dissenting opinion favoring its use.[92] It is natural to ask whether this change in personnel may herald any greater—or lesser—receptivity to the use of the rule.

Of course practice on a lower court is not always a reliable predictor of practice on the Supreme Court. But it is worth noting that during her tenure on the lower courts, then-Judge Sotomayor authored seven opinions in which the rule was at issue—six during her time on the Second Circuit Court of Appeals,[93] and one as a district court judge in the Southern District of New York.[94]

In each of the six circuit court decisions in which she discussed the rule of lenity, Judge Sotomayor rejected the arguments in its favor, finding the statute in question was sufficiently clear using the traditional canons of interpretation. As discussed above, even in otherwise difficult cases the rule of lenity rarely proves dispositive, so it is not surprising that Judge Sotomayor did not find the challenged statutes so "grievously ambiguous" as to require the judicial rule's application. In four of those six cases, Judge Sotomayor declined the defendant's invitation to apply the rule in summary fashion, with relatively little discussion or explanation.[95] In two related circuit court opinions, however, she discussed the rule of lenity and its meaning at some length before concluding that it did not apply.

In *Sash v. Zenk* (*Zenk I)*,[96] and in the petition for rehearing that case (*Zenk II*),[97] Judge Sotomayor, writing for unanimous panels, held that the rule of lenity did not apply to the calculation of credits awarded to federal prisoners for good behavior, governed by 18 U.S.C. § 3624(b). In *Zenk I*, the court explained that "[t]he rule of lenity has two purposes: first, to ensure that the public receives fair notice of what behavior is criminal and what punishment applies to it; and second, to ensure that legislatures and not courts define criminal activity."[98] But because the statute at issue was not a criminal statute, the rule of lenity was irrelevant.[99]

On a petition for rehearing, *Zenk II* addressed the defendant's arguments that the court had erred in its earlier analysis because the Supreme Court had previously held that sentencing credit calculations were "criminal for purposes of an *ex post facto* analysis."[100] The court in *Zenk II* sought to clarify its earlier holding "to avoid any confusion,"[101] and drew the distinction between the rule of lenity and *ex post facto* doctrine. Acknowledging that the two rules are related and that "both are concerned with notice and fair warning,"[102] Judge Sotomayor distinguished between their purposes:

> The rule of lenity concerns situations in which a legislature fails to give notice of the scope of punishment by leaving "a grievous ambiguity or uncertainty in the language and structure of the [statute]....," while the *ex post facto* doctrine "concerns situations in which the legislature gives adequate notice, but then affirmatively changes its instructions in a way that disadvantages the defendant."[103]

Accordingly, the court observed, the rule of lenity is the narrower doctrine, and "should be more narrowly applied."[104] Judge Sotomayor went on to explain:

> The reason the *ex post facto* doctrine is broader than the rule of lenity in the area of sentencing administration is that there is a greater potential for unfairness when a legislature changes the law pertaining to a criminal offender's sentence than when the legislature merely leaves a question open for future regulation by an administrative agency....
>
> The rule of lenity, however, deals with different concerns and employs a different analysis, and so it is not remarkable that the scopes of these doctrines should also differ or that we should consider a particular statute to be "criminal" in a way that implicates one doctrine but not the other.[105]

In light of her view that the rule of lenity should be "narrowly applied," it is perhaps unsurprising that Judge Sotomayor declined to apply the rule in each of her opinions on the Court of Appeals.

In contrast, as a district judge in *United States v. Westcott*,[106] Judge Sotomayor found that the "defendant's reading of [the statute] is as reasonable as the government's, and that the rule of lenity therefor[e] requires that the provision be applied according to defendant's interpretation."[107] *Westcott* concerned a defendant who had been convicted of robbery and then deported from the United States to Jamaica. He illegally reentered the United States several years later and pleaded guilty to reentering "after being deported subsequent to the

commission of an aggravated felony, in violation of 8 U.S.C. § 1326(b)(2)."[108]

Section 501 of the Immigration Act of 1990 amended the definition of "aggravated felony" to include robbery, and the issue in *Westcott* was whether the "effective date" provision in § 501(b) expanded the definition of aggravated felony to reach the defendant's earlier robbery conviction and therefore made him an aggravated felon. Section 501(b) states:

> Effective date—The amendments made by subsection (a) shall apply to offenses committed on or after the date of enactment of this Act, except that the amendments made by paragraphs (2) and (5) of subsection (a) shall be effective as if included in the enactment of 7342 of the Anti-Drug Abuse Act of 1988.

The expanded definition of "aggravated felony" to include "any crime of violence" was made in paragraph 3 of 501(a), and was therefore not one of the enumerated paragraphs to be effective as if enacted in the Anti-Drug Abuse Act. But, as the Government argued, the "offense" at issue in the case was the "defendant's illegal reentry, which occurred 'after the date of the enactment of [the Immigration] Act.'"[109] Thus, according to the Government, the expanded definition of aggravated felony would apply and reach the defendant's robbery conviction. The defendant countered that the "offenses" referred to in § 501(b) "are limited to those offenses delineated as aggravated felonies in § 501(a) of the Act," which would therefore not reach back to his earlier robbery conviction.[110]

Judge Sotomayor recognized that several circuit courts were divided on this issue, with the Fourth and Fifth Circuits adopting the Government's view and the Ninth Circuit, in an en banc decision, unanimously taking the defendant's position.[111] In holding that the rule of lenity should apply in this case, Judge Sotomayor acknowledged that the positions taken by the Fourth and Fifth Circuits were "plausible interpretation[s] of the Immigration Act," but that the "structure and language of section 501 of the Immigration Act" support the Ninth Circuit's "natural and reasonable reading" of the statute.[112] Judge Sotomayor began by analyzing the text of the statute and found that "[i]n short, section 501(b) can reasonably and naturally be construed to provide that most of those crimes set forth in section 501(a)—including crimes of violence—are aggravated felonies only to the extent that they occurred after November 29, 1990."[113] Then, finding "no real guidance" in the statute's legislative history, the judge noted that although the Government had offered a plausible interpretation of § 501(b), it provided "no arguments which unambiguously preclude the Ninth Circuit's reading of that same provision."[114] This is perhaps a strange formulation of the Government's burden, requiring it to present arguments which "unambiguously preclude" another court's reading of a statute, but she went on to explain that for each of the Government's interpretations there was an equally plausible alternative way to read the text.[115] She concluded, therefore, that "the Ninth Circuit has identified an interpretation of section 501 which favors [the] defendant, which appears reasonable, and which cannot be rejected through the applicable tools of statutory construction."[116] Thus, in cases where the statute is ambiguous and capable of two reasonable, competing meanings, the rule of lenity "'requires the sentencing court to impose the lesser of two penalties'"[117] and "assures defendant the benefit of the doubt."[118] On appeal, the Second Circuit affirmed the defendant's sentence without reaching the rule of lenity question.[119]

As noted, divining how any Justice will act based on their prior record is, at best, a hazardous task. Justice Sotomayor's lower court decisions, however, suggest that she takes the rule seriously while applying it, in her own words, "narrowly." If so, her addition to the Court in place of Justice Souter is unlikely to mark any significant departure in the application of the rule.

IV. Conclusion

The rule of lenity will undoubtedly remain a favorite among defense counsel. Given its roots in due process notice principles, it is perhaps somewhat surprising that it has not received more traction in coalitions of traditionally conservative, strict constructionist Justices and more liberal Justices. It is possible that *Santos* may signal a greater willingness of such coalitions of Justices to apply the rule in the future, and the Supreme Court's 2009-2010 Term includes at least three cases in which the rule may be discussed or applied.[120] *Hayes* and *Dean* strongly suggest, however, that there has been no radical change yet and that, at least for the foreseeable future, the rule is still likely to be sparingly used.

Endnotes

1 United States v. Santos, 128 S.Ct. 2020, 2025 (2008).

2 This article is limited to the Supreme Court's recent application of the rule of lenity and does not examine how frequently the rule is used in the lower courts.

3 United States v. Shabani, 513 U.S. 10, 17 (1994); *see also* Callanan v. United States, 364 U.S. 587, 596 (1961) ("The rule comes into operation at the end of the process of construing what Congress has expressed.").

4 Staples v. United States, 511 U.S. 600 n.17 (1994) (denying the rule's application) (quoting Smith v. United States, 508 U.S. 223, 239 (1993)).

5 Johnson v. United States, 529 U.S. 694, 713 n.13 (2000).

6 The use of these other canons may help explain the relative rarity of the rule's use at the Supreme Court level. For example, in *McNally v. United States*, 483 U.S. 350 (1987), the Court limited the reach of the mail fraud statute using language sounding much like the rule of lenity but without actually invoking the rule:

> The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language. As the Court said in a mail fraud case years ago: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

Id. at 360 (internal citations omitted). Indeed, the dissent appears to have assumed that the majority was applying the rule (or doctrine) of lenity:

> To support its crabbed construction of the Act, the Court makes a straightforward but unpersuasive argument. Since there is no explicit,

> unambiguous evidence that Congress actually contemplated "intangible rights" when it enacted the mail fraud statute in 1872, the Court explains, any ambiguity in the meaning of the criminal statute should be resolved in favor of lenity. The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment. But the Court's reliance on that doctrine in this case is misplaced for several reasons.

Id. at 482-83.

7 *See, e.g.,* Boyle v. United States, 129 S.Ct. 2237 (2009) (majority refusing to apply the rule of lenity); Dean v. United States, 129 S.Ct. 1849 (2009) (Stevens, J., and Breyer, J., dissenting) (each calling for the rule of lenity).

8 United States v. Santos, 128 S.Ct. 2020 (2008). The Court has found it somewhat easier to conclude that the rule does not apply in a particular case, but even in those instances unanimity has been elusive. In *Boyle v. United States*, 129 S.Ct. 2237 (2009), for example, the Court refused to apply the rule of lenity, but the dissent did not comment on this point. As far as the authors are aware, Justice Ginsburg's opinion in *Burgess v. United States* is the only recent unanimous decision in which the Court held that the rule of lenity could not be invoked.

9 This raises the additional question as to whether the rule retains much force as a practical matter for deciding cases in the defendant's favor, or whether it is largely a tool used by the dissent to construe the statute in question as too ambiguous to be read as the majority has read it. This question lies beyond the scope of this article.

10 128 S.Ct. 2020 (2008).

11 United States v. Hayes, 129 S.Ct. 1079, 1089 (2009).

12 *Id*. at 1093 (Roberts, C.J., dissenting).

13 Dean v. United States, 129 S.Ct. 1849, 1856 (2009).

14 *Id*. at 1859 (Stevens, J., dissenting).

15 *Id*. at 1860 (Breyer, J., dissenting).

16 James v. United States, 127 S.Ct. 1586 (2007).

17 *Id.* at 2022.

18 *Id.* at 2023. The co-defendant in the case was one of Santos' collectors.

19 *Id*.

20 Money Laundering Control Act of 1986, 18 U.S.C. § 1956(a)(1) (2006).

21 *Santos*, 128 S.Ct. at 2023.

22 *Id.* at 2022.

23 *Id*. at 2024.

24 *Id*.

25 *Id*. at 2025.

26 *Id*.

27 *Id*. at 2026 (quoting Bell v. United States, 349 U.S. 81, 83 (1955)).

28 *Id*.

29 *Id.*

30 *Id*. at 2028.

31 *Id*. Within one year of the *Santos* decision, Congress responded with the Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617. Designed to bolster the government's anti-fraud capabilities, FERA, *inter alia*, amended the Money Laundering Control Act's definition of "proceeds" (§ 2(f)(1)(9)) to specifically include "gross receipts" of unlawful activity, as well as "any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity."

32 *Santos*, 128 S.Ct. at 2031 (Stevens, J., concurring).

33 *Id*. at 2032 (Stevens, J., concurring).

34 *Id*.

35 *Id.* Justice Stevens agreed with Justice Alito that "the legislative history of § 1956 makes it clear that Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id*. But he disagreed with the dissent because "that history sheds no light on how to identify the proceeds of many other types of specified unlawful activities." *Id*.

36 *Id.* at 2044.

37 *Id*. at 2054 (Alito, J., dissenting).

38 United States v. Hayes, 129 S.Ct. 1079, 1089 (2009).

39 18 U.S.C. § 921(g)(9).

40 *Hayes*, 129 S.Ct. at 1083.

41 United States v. Hayes, 482 F.3d 749, 751 (4th Cir. 2007).

42 *Hayes*, 129 S.Ct. at 1082.

43 *Id*. at 1084.

44 *Id*. at 1085.

45 *Id*.

46 *Id*. at 1086.

47 *Id.* at 1086-87.

48 *Id*. at 1087.

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*.

53 *Id.* at 1087-88.

54 *Id*. at 1088.

55 *Id*.

56 *Id*. at 1089.

57 *Id*. at 1093 (Roberts, C.J., dissenting).

58 *Id.* at 1089 (Roberts, C.J., dissenting).

59 *Id*.

60 *Id*.

61 *Id*.

62 *Id*.

63 *Id*. at 1091

64 *Id*.

65 *Id.*

66 *Id*.

67 *Id*. at 1092.

68 *Id*.

69 *Id*. at 1093.

70 *Id*.

71 129 S.Ct. 1849, 1856 (2009).

72 *Dean*, 129 S.Ct. at 1853.

73 *Id*.

74 *Id*.

75 *Id*. at 1856.

76 *Id*. The Court quotes *Muscarello v United States*, 524 U.S. 125, 138 (1998) ("The simple existence of some statutory ambiguity, however, is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.").

77 *Dean*, 129 S.Ct. at 1853.

78 *Id.* (observing that Congress defined "brandish" to mean "to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person." 924(c)(4) (emphasis

added)).

79 *Id*. at 1854.

80 *Id*. at 1855.

81 *Id*.

82 *Id*.

83 *Id*.

84 *Id*. at 1857 (Stevens, J., dissenting).

85 *Id*. at 1858-59.

86 *Id*. at 1859.

87 *Id*. at 1860 (Breyer, J., dissenting).

88 *Id*. at 1861.

89 *Id*. at 1860.

90 *Id*.

91 *Id*. at 1861.

92 *See* United States v. Rodriguez, 128 S.Ct. 1783, 1793 (2008) (Souter, J., dissenting).

93 *See* United States v. Giordano, 442 F.3d 30 (2d Cir. 2006); Sash v. Zenk, 439 F.3d 61 (2d Cir. 2006) (rehearing); Sash v. Zenk, 428 F.3d 132 (2d Cir. 2005); United States v. Maloney, 406 F.3d 149 (2d Cir. 2005); United States v. Reinoso, 350 F.3d 51 (2d Cir. 2003); United States v. Figueroa, 165 F.3d 111 (2d Cir. 1998).

94 United States v. Westcott, 966 F.Supp. 186 (S.D.N.Y. 1997).

95 *See* United States v. Giordano, 442 F.3d 30, 40 (2d Cir. 2006) ("Because we find that the statute unambiguously reaches intrastate use of a telephone, we decline Giordano's invitation to apply the rules of lenity and constitutional avoidance to guide our interpretation."); United States v. Maloney, 406 F.3d 149, 153 n.6 (2d Cir. 2005) (rejecting the rule of lenity argument in a footnote); United States v. Reinoso, 350 F.3d 51, 55-56 (2d Cir. 2003) (summarily rejecting the rule of lenity argument in a section-closing paragraph); United States v. Figueroa, 165 F.3d 111, 119 (2d Cir. 1998) (dismissing the rule of lenity argument in the opinion's final paragraph).

96 428 F.3d 132 (2d Cir. 2005).

97 Sash v. Zenk, 439 F.3d 61 (2d Cir. 2006) (rehearing).

98 *Zenk*, 428 F.3d at 134.

99 *Id*.

100 *Zenk*, 439 F.3d at 63.

101 *Id*.

102 *Id*. at 64.

103 *Id*.

104 *Id*. at 65.

105 *Id*. at 66.

106 966 F.Supp. 186 (S.D.N.Y. 1997).

107 *Westcott*, 966 F.Supp. at 188.

108 *Id*. at 187.

109 *Id*. at 188.

110 *Id*.

111 *Id*. at 189 (citing and discussing United States v. Garcia-Rico, 46 F.3d 8 (5th Cir. 1995) (applying amended definition of aggravated felony retroactively); United States v. Campbell, 94 F.3d 125 (4th Cir. 1996) (applying amended definition of aggravated felony retroactively); and United States v. Gomez-Rodriguez, 96 F.3d 1262 (9th Cir. 1996) (rejecting retroactive application of the 1990 amendments)).

112 *Westcott*, 966 F.Supp. at 189, 190.

113 *Id*. at 190.

114 *Id*. at 191.

115 *Id*.

116 *Id*.

117 *Id*. (quoting United States v. Canales, 91 F.3d 363, 367 (2d Cir. 1996)).

118 *Id*.

119 United States v. Westcott, 159 F.3d 107 (2d Cir. 1998).

120 *See* Skilling v. United States (08-1394) (discussing the scope of federal law punishing a corporate executive's failure to provide "honest services"); Weyhrauch v. United States (08-1196) (discussing the rule of lenity in the context of the "intangible right to honest services"); Black v. United States (08-876) (discussing the rule of lenity in the context of the "honest services" provisions of 18 U.S.C. § 1346).