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Prosecutorial Over-criminalization: Fishing For Guilty Pleas

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On November 5, 2014, the Supreme Court heard oral argument in a case involving a fisherman, Mr. Yates, who was convicted of violating the so-called "anti-shredding" provision of the Sarbanes-Oxley Act, which was passed in 2002 in the wake of the Enron scandal. The case arose from a 2007 search of the *Miss Katie*, Mr. Yates' fishing vessel. A Florida state officer boarded the ship at sea and noticed fish that appeared less than 20 inches long, which was under the minimum legal size of grouper. The officer placed the smaller fish into a crate, issued Yates a citation, and ordered Yates to take the crate to port for seizure. Instead, Yates ordered his crew to throw some of the smaller fish overboard. Officials at the port realized some fish were missing, and Yates was eventually charged under the Sarbanes-Oxley Act for destruction of evidence with intent to obstruct a federal investigation, which carries a maximum 20 year sentence. A federal jury found Yates guilty and sentenced him to 30 days' imprisonment. The Eleventh Circuit upheld the ruling, finding that the phrase "tangible object" applies to fish. Despite a lack of circuit split, the Supreme Court agreed to hear the case. At oral argument in early November 2014, most of the justices sounded skeptical of the government's statement that federal prosecutors would not prosecute every fish destruction case. Chief Justice Roberts remarked, "but the point is that you could, and the point is that once you can, every time you get somebody who is throwing fish overboard, you can go to him and say: Look, if we prosecute you, you're facing 20 years, so why don't you plead to a year, or something like that." The Chief Justice continued, "it's an extraordinary leverage that the broadest interpretation of this statute would give federal prosecutors." Justice Scalia echoed that sentiment, stating, "[h]e could have gotten 20 years, what kind of sensible prosecution is that?" This use of prosecutorial discretion, or, perhaps more accurately, bullying tactic used to coerce guilty pleas, places a growing burden on the administration of justice, often resulting in federal convictions for conduct that traditionally falls outside constitutionally anticipated federal purview. Although Yates was convicted by a jury, it is likely many defense attorneys, including, perhaps, his own, would counsel Yates, facing a maximum 20 year prison term, to plead guilty to a lesser charge or in exchange for a reduced, agreed, sentence. As the United States Supreme Court has recognized, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). Guilty "pleas account for nearly 95% of all criminal convictions." *Id*. "The reality is that plea bargains have become so central to the administration of the criminal justice system that plea bargains are not an 'adjunct to the criminal justice system; it *is* the criminal justice system.'" *Id*. Although the number of innocent people who

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have pleaded guilty to crimes to avoid lengthy prison terms is unknown, studies in recent years have proven that the phenomenon occurs with greater frequency than once imagined. *See* ABA Resolution 107, Adopted By The House Of Delegates (2005). Currently, “the incentives for defendants to plead guilty are greater than at any previous point in the history of our criminal justice system[,]” and “[t]oday, the incentives to bargain are powerful enough to force even an innocent defendant to falsely confess guilt in hopes of leniency and in fear of reprisal.” *See* Lucian E. Dervan, Bargained Justice: Plea-Bargaining’s Innocence Problem and the Brady Safety-Valve, 2012 UTAH L. REV. 51, 64, 56 (2012). At oral argument, Justice Scalia asked Assistant Solicitor General Roman Martinez whether the Justice Department offers any guidance to prosecutors before they file charges, probing “what kind of a mad prosecutor would try to send him up for 20 years?” Mr. Martinez agreed 20 years “would be too much,” but maintained “the general guidance is that the prosecutor should charge the offense that is the most severe under law.” Perhaps, the Justice Department needs to readjust its guidance to prosecutors in the interests of due process and prosecutorial discretion. A decision in *Yates* is expected by next June.