High Court Case Could Have Systemwide Impact On Venue

By **Kenneth Notter**
(January 17, 2023, 2:30 PM EST)


Kenneth Notter

For the first time in decades, the U.S. Supreme Court will address criminal defendants' constitutional right to be tried in the venue where the alleged crime was committed.

The case, Smith v. U.S., may prove worth the wait, as it raises a foundational question: whether the government, after failing to prove venue at trial, may retry the same defendant for the same offense in a different venue.

How the court answers that question will likely have systemwide implications. A ruling for Smith may change how prosecutors charge cases, or if they charge a given individual at all. A ruling for the government, by contrast, risks watering down a deep-rooted constitutional right and exacerbating the power imbalance between prosecutors and criminal defendants.

The Venue Right

The U.S. Constitution twice protects the right to be tried in a proper venue. Article III requires criminal trials to "be held in the State where the said Crimes shall have been committed." And the Sixth Amendment separately guarantees a trial "by an impartial jury of the State and district wherein the crime shall have been committed."

Those overlapping protections reflect the venue right's historical importance. The right dates back at least to the Magna Carta and, as the 19th-century U.S. Supreme Court Justice Joseph Story wrote, has been "vital to the security of the citizen" ever since by limiting government forum shopping and mitigating the burden, expense and prejudice of standing trial in a remote place.[1]

Despite its importance, venue occupies an unusual position in criminal and constitutional law. Unlike nearly every provision in the Bill of Rights, for example, the Constitution's venue provisions do not apply in state criminal prosecutions.

And though venue is part of the government's burden of proof at trial, the government must prove venue only by a preponderance of the evidence, not beyond a reasonable doubt as it must for the substantive elements of the crime.

Smith v. U.S.

Smith is a product of the venue right's unusual position as a constitutionally required element of the prosecution's case but distinct from the substantive elements of the crime itself.

The case began when Timothy Smith hacked the website of a business called StrikeLines, which sells geographic coordinates of fishing reefs. Smith allegedly stole coordinates to certain reefs, posted the coordinates on Facebook, and then offered to remove the posts if StrikeLines gave him coordinates to other reefs for his own use.

The government charged Smith in the U.S. District Court for the Northern District of Florida with unauthorized computer access, theft of trade secrets and extortion. Though StrikeLines was based within the Northern District of Florida, its servers were in Florida's Middle District, and Smith himself lived in Alabama.

At trial, Smith moved for a judgment of acquittal on the unauthorized-access and trade-secrets-theft counts for lack of venue. The district court denied the motions without prejudice but instructed the jury to find Smith not guilty of any count for which the government failed to prove venue.

The jury found Smith not guilty of the unauthorized-access count and guilty of the other two counts. After the verdict, the court denied Smith's renewed motion for judgment of acquittal.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit in January 2022 agreed with Smith that venue was not proper in the Northern District of Florida for the trade-secrets-theft count. But the court held that the "remedy for improper venue is vacatur, not acquittal or dismissal with prejudice."[2] As a result, the government may retry Smith for trade secrets theft in a proper venue.

The Supreme Court granted Smith's petition for a writ of certiorari to resolve a split among the courts of appeals regarding the proper remedy for a failure to prove venue at trial.

Some circuits hold that the proper remedy is a judgment of acquittal, which bars retrial. But others, like the Eleventh Circuit, hold that venue is neither an element of the crime nor relevant to guilt, and thus treat a failure to prove venue as a dismissal, not an acquittal barring retrial.

The Stakes

Which side of the split the Supreme Court endorses could have far-reaching consequences.

Siding with the circuits that treat the government's failure to prove venue as an acquittal barring retrial may influence government charging practices. Because the government must prove venue for each count and each defendant, prosecutors may think twice before charging multiple counts or defendants in the same indictment if losing on venue would bar future prosecution.

And because the U.S. attorney's office where venue would be proper may be uninterested in pursuing the case, certain counts or defendants may escape prosecution entirely.

Siding with the Eleventh Circuit, by contrast, may dilute the constitutional right to trial in a proper venue. That right's value is largely preventative; it stops the government from inflicting the expense and burden of a faraway trial on defendants in the first place. Once that trial occurs, the injury is complete, and a second trial, even in a proper venue, only adds to the injury.

Indeed, a retrial leaves most defendants worse off than before. The odds are already stacked against defendants. Few criminal cases go to trial, and few trials — less than 20%, according to a Pew Research Center analysis — end in not guilty verdicts.[3]

Surprise at trial is one of defendants' only advantages. But that advantage disappears the second time around when the government knows the defense strategy.

Even winning at a retrial may be bittersweet. Most defendants are incarcerated as they await trial.[4] So prevailing on a venue argument and then prevailing at a second or third trial may add months or years to a defendant's pretrial detention, which may exceed the recommended sentence attached to a guilty plea.

The minority of defendants not detained also must endure years of restrictive pretrial conditions before ultimately clearing their name.

Such a meager remedy would render the constitutional right to trial in a proper venue a shadow of the vital protection the framers envisioned.

A watered-down venue right may also exacerbate the power imbalance between prosecutors and defendants. The reality, as former Supreme Court Justice Robert Jackson said in 1940, is that "a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone."[5]

With pretrial detention and increased sentences for going to trial as leverage, prosecutors can also extract guilty pleas from almost anyone.[6]

The pressure to plead guilty may become overwhelming if prosecutors could also threaten trial in a remote, government-friendly venue with a do-over as the only consequence.

Apart from potential abuse, giving the government a second chance to prove venue may erode public confidence in the criminal justice system by giving the appearance of abuse.

Failing to prove venue is not a procedural defect independent of the case submitted to the jury; it is a defect in the government's proof. There is no trial error to correct: The government had a clean opportunity to submit its proof to the jury, and the government failed.

Letting the government try again and again until it gets the outcome it wants may undermine the perception that the justice system is a level playing field.

Kenneth E. Notter III is an attorney at MoloLamken LLP.

[1] Joseph Story, Commentaries on the Constitution 3:§§ 1773-75 (1833), https://press-pubs.uchicago.edu/founders/documents/a3_2_3s19.html.

[2] United States v. Smith, 22 F.4th 1236, 1244 (11th Cir. 2022).

[3] See John Gramlich, Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty, Pew Research Center (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/.

[4] Matthew G. Rowland, The Rising Federal Pretrial Detention Rate, in Context, Fed. Probation, September 2018, at 13 (nearly 75% of federal criminal defendants detained before trial).

[5] Robert H. Jackson, The Federal Prosecutor, 31 Am. Inst. Crim. L. & Criminology 3 (1940).

[6] See, e.g., Rachel E. Barkow, The Court of Mass Incarceration, 2021-2022 Cato Sup. Ct. Rev. 11, 17-26 (2022) (discussing coercive pressure in plea bargaining).