Justices' Criminal Law Decisions: The Term In Review

By **Kenneth Notter** (July 19, 2024, 1:52 PM EDT)


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The U.S. Supreme Court's criminal law decisions ordinarily draw less public attention than its other cases.

The court's 2023-2024 term broke from that pattern, with high-profile criminal cases involving former President Donald Trump's claims of immunity from prosecution and the theory prosecutors used to convict hundreds of Jan. 6 rioters.

Along with those headline-grabbing decisions, the court's 11 total criminal decisions addressed issues ranging from the scope of a federal bribery statute to the constitutionality of a law barring anyone subject to a domestic violence restraining order from possessing a gun.[1]

Each decision is independently important and requires careful study. But together, the decisions reveal trends in how the court approaches criminal cases. Practitioners must therefore examine not only each case's holding, but also how the court's broader approach to the criminal law presents opportunities and pitfalls for clients.

The Cases

McElrath v. Georgia

In the term's first criminal decision, the court unanimously held on Feb. 21 that the double jeopardy clause of the U.S. Constitution's Fifth Amendment prohibits a state from retrying a defendant on a charge for which a jury found him not guilty by reason of insanity, even if that verdict was inconsistent with the jury's other findings.[2]

Pulsifer v. U.S.

On March 15, divided 6-3 court adopted a narrow reading of a federal law that allows certain nonviolent drug offenders to qualify for relief from federal mandatory minimum sentencing guidelines.[3]

McIntosh v. U.S.

On April 17, a unanimous court held that trial courts can issue forfeiture orders at sentencing in criminal cases even if prosecutors fail to submit a draft request before the court-ordered date.[4]

Brown v. U.S.

On May 23, a divided court held 6-3 that a prior conviction for a state drug crime counts as a "serious drug offense" for sentencing purposes if it involved a drug that was on the federal schedules of controlled substances at the time of the conviction, even if the drug was later removed from the schedules.[5]

Diaz v. U.S.

In another 6-3 decision, the court held on June 20 that expert testimony opining that "most people" in the defendant's position have a particular criminal intent does not violate the Federal Rule of Evidence prohibiting expert testimony about whether the defendant does or does not have a particular criminal intent.[6]

U.S. v. Rahimi

On June 21, in an 8-1 decision where seven different justices wrote opinions, the court held that an individual who has been found by a court to pose a credible threat to the physical safety of another may be temporarily prohibited from possessing firearms.[7]

Smith v. Arizona

In another June 21 decision, though all nine justices agreed to vacate the Arizona Court of Appeals' ruling, only seven justices joined the majority opinion that held in relevant part that, when an expert conveys an absent lab analyst's statements in support of the expert's opinion, the statements are subject to the U.S. Constitution's confrontation clause guaranteeing defendants' right to confront the witnesses against them.[8]

Erlinger v. U.S.

That same day, in another 6-3 decision, the court held that the U.S. Constitution requires a unanimous jury to decide whether a defendant's past offenses were committed on separate occasions to trigger a mandatory minimum sentence.[9]

Snyder v. U.S.

In yet another 6-3 decision, the court held on June 26 that federal law prohibits bribes to state and local officials, but does not make it a crime for those officials to accept gratuities for their past acts.[10]

Fischer v. U.S.

In this case involving hundreds of Jan. 6 defendants, the justices continued their 6-3 split on June 28. The court held that to prove a violation of a specific obstruction-of-justice provision, the government **must establish** that the defendant impaired the availability or integrity of documents or other things used in an official proceeding, or attempted to do so.[11]

Trump v. U.S.

The final criminal decision of the term was yet another 6-3 decision, and it held on July 1 that former U.S. presidents are: (1) absolutely immune from prosecution for acts within their "core constitutional powers," (2) presumptively immune for other official acts; and (3) not immune for unofficial acts.[12]

Trends and Observations

As they did last term, criminal defendants won a majority of the cases, prevailing in six of the 11 cases.

Two cases — Snyder and Fischer — continued a decadeslong pattern of the court rejecting prosecutors' overbroad interpretations of criminal statutes, particularly statutes frequently charged in white collar cases.

These cases show that the court remains steadfast in its refusal to "'rely upon prosecutorial discretion to narrow the' scope of an 'otherwise wide-ranging' criminal law," as Justice Neil Gorsuch wrote in his concurrence in Snyder.[13]

Again and again, the court has explained that criminal laws must give defendants fair notice of what the law does and does not punish, and that if there is doubt as to a criminal law's reach, courts must rule, Justice Gorsuch continued, "not for the prosecutor but for the presumptively free individual."[14]

Lower courts and prosecutors, however, have been slow to heed the Supreme Court's teachings, and continue to embrace overbroad readings of criminal laws, though there are signs that this is beginning to change.

Unlike last term, where six of nine criminal decisions were unanimous, the court split 6-3 in seven of 11 cases. Which three justices were in dissent varied substantially, however, with six different combinations of justices dissenting in the seven 6-3 cases.

Justice Gorsuch was once again one of the court's most frequent writers in criminal cases, authoring six opinions — one majority, three concurrences and two dissents. In all but one of those opinions (his concurrence in Rahimi), Justice Gorsuch sided with the defendant.

Two of Justice Gorsuch's opinions — his dissent in Puslifer and concurrence in Snyder — returned to a frequent subject in his opinions from prior terms — the importance of the rule of lenity. That rule holds, as Justice Gorsuch wrote in Pulsifer, that courts must interpret ambiguous criminal laws "in favor of liberty, not punishment."[15]

For several years, Justice Gorsuch's opinions have advocated for the court to rely on the rule of lenity more frequently.[16] And though the court remains reluctant to explicitly rely on the rule of lenity, as Justice Gorsuch noted in his Snyder opinion, the spirit of that rule appears to be at work in several of the court's decisions rejecting broad government interpretations of criminal laws.[17]

Only Justice Ketanji Brown Jackson authored more opinions than Justice Gorsuch, writing in all but three criminal cases this term. Interestingly, Justice Jackson — the only former public defender on the court — sided with the government in five of her eight opinions, including in three of her five dissents (Erlinger, Snyder and Trump).

Justice Jackson also surprised practitioners by writing in her Erlinger opinion that the court's 2000 decision in Apprendi v. New Jersey was wrongly decided.[18]

Apprendi has long been seen as promoting fairness for defendants by ensuring that most facts that increase "the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[19]

Yet Justice Jackson challenged that conventional wisdom by pointing to "Apprendi's negative downstream impact on sentencing fairness," such as exacerbating "racial disparities in sentencing."[20]

Implications

The term's most immediate consequences will be felt in the prosecutions surrounding the storming of the U.S. Capitol on Jan. 6, 2021, and the cases against Trump.

Fischer rejected the legal theory the government used to prosecute hundreds of Jan. 6 rioters for obstruction of justice. The government had charged most of the rioters with physically obstructing the joint session of Congress to certify the 2020 presidential election by storming the Capitol. But that theory, the court ruled, could not support an obstruction-of-justice charge because the rioters didn't impair the availability or integrity of documents or other things used in an official proceeding.[21]

What Fischer will mean in practice for the Jan. 6 defendants, however, is unclear. For the rioters convicted of other offenses in addition to obstruction of justice, the court's decision may make no difference to their sentences. And at least some defendants have already served the bulk of their prison sentences, leaving them with no meaningful relief.[22]

Trump also faces an obstruction-of-justice charge under the same provision the court interpreted in Fischer.[23] Fischer is unlikely to help Trump beat that charge because his alleged conduct — causing fake electors to submit fraudulent certificates to Congress — implicates the integrity of documents used in an official proceeding.

But another ruling — Trump v. U.S. — cast doubt on the obstruction-of-justice charge and every other charge against Trump by holding that former presidents enjoy presumptive immunity from prosecution for official acts.

With the Supreme Court's remand, the trial court — and other courts entertaining Trump prosecutions — must now sort Trump's conduct into "official" and "unofficial" buckets, and then determine whether prosecuting official acts poses any "dangers of intrusion on the authority and functions of the Executive Branch."[24] That process will take months.

And even if Trump's pending trials eventually go forward, the court's ruling may tie prosecutors' hands by preventing them from offering evidence about any conduct for which a president is immune.[25]

As Justice Amy Coney Barrett explained in her separate opinion, that blanket preclusion of evidence may "hamstring the prosecution" by effectively "blinding juries to the circumstances surrounding conduct for which Presidents can be held liable."[26]

Beyond the Jan. 6 rioters and Trump, white collar defendants will likely feel the effects of the court's decisions most acutely. With Fischer and Snyder, the court reaffirmed its commitment to invalidating prosecution theories that adopt overbroad interpretations of federal criminal statutes.

The statutes at issue in white collar cases — such as the fraud, bribery and obstruction statutes — are most susceptible to the aggressive interpretations that the court has proved eager to reject. And these statutes often use the same key terms, such as "property" or "corruptly." That gives white collar practitioners an opportunity to challenge the government's interpretation of statutory text by invoking the court's recent decisions.

Though Diaz and Smith involved drug crimes, each case may also prove important for white collar trials. The open-ended ruling in Diaz that experts may testify that most people in a group have a particular

mental state opens the door to powerful expert testimony in white collar cases, such as an FBI agent's opinion that most corporate executives do not unintentionally make false statements on company financial reports.

And because the basis for that testimony is bound to be the agent's generalized experience, prosecutors can, as the U.S. District Court for the District of New Mexico wrote in its 2018 decision in U.S. v. Baca, "pass off suspicion, speculation and intuition as real expertise."[27]

From now on, defense counsel must carefully consider alternative strategies to exclude such prejudicial testimony or devise lines of cross-examination to combat the testimony.

Smith, by contrast, may work to defense counsel's advantage at white collar trials. That case held that the U.S. Constitution's confrontation clause ordinarily bars an expert witness at trial from conveying an absent analyst's testimonial statements.

As others have noted, white collar trials often feature prosecution experts who rely on an entire team of nontestifying accountants, economists or other experts.[28] That may allow defense counsel to invoke Smith's holding to exclude any testimony that purports to relay testimonial statements by nontestifying experts.

This term's most important reminder, however, may be that defense arguments that failed to persuade trial and appellate courts may nevertheless prevail at the Supreme Court. It is thus critical for defense counsel to properly preserve legal arguments, including those that may seem unlikely to prevail in the short term, at trial and on appeal. Doing so may prove to be the difference between ultimate victory and defeat.

Conclusion

The 2023-2024 term was as high-profile as any in recent memory. But beyond the headlines, the court's decisions also revealed trends in how the court approaches criminal cases, and offered important lessons and reminders for practitioners.

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[1] For purposes of this article, I define "criminal cases" narrowly to include only those cases that arose directly from a criminal prosecution, which excludes criminal-adjacent cases such as habeas petitions (e.g., Thornell v. Jones), immigration proceedings (e.g., Wilkinson v. Garland, Campos-Chaves v. Garland), civil enforcement actions (e.g., Securities and Exchange Commission v. Jarkesy), and civil suits involving law enforcement misconduct (e.g., Chiaverini v. City of Napoleon).

[2] McElrath v. Georgia, 601 U.S. 87 (2024).

[3] Pulsifer v. United States, 601 U.S. 124 (2024).

[4] McIntosh v. United States, 601 U.S. 330 (2024).

[5] Brown v. United States, 144 S. Ct. 1195 (2024).

[6] Diaz v. United States, 144 S. Ct. 1727 (2024).

[7] United States v. Rahimi, 602 U.S. ____, 2024 WL 3074728 (2024).

[8] Smith v. Arizona, 602 U.S. ____, 2024 WL 3074423 (2024).

[9] Erlinger v. United States, ___ U.S. ____, 2024 WL 3074427 (2024).

[10] Snyder v. United States, ___ U.S. ____, 2024 WL 3165518 (2024).

[11] Fischer v. United States, 603 U.S. ____, 2024 WL 3208034 (2024).

[12] Trump v. United States, 603 U.S. ____, 2024 WL 3237603 (2024).

[13] Snyder, 2024 WL 3165518, at *11 (Gorsuch, J., concurring).

[14] Id.

[15] Pulsifer, 601 U.S. 124, 185 (2024) (Gorsuch, J., dissenting).

[16] See, e.g., Wooden v. United States, 595 U.S. 360, 389-97 (2022) (Gorsuch, J., concurring in the judgment).

[17] Snyder, 2024 WL 3165518, at *11-12 (Gorsuch, J., concurring).

[18] Erlinger, 2024 WL 3074427, at *27 (Jackson, J., dissenting).

[19] Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

[20] Erlinger, 2024 WL 3074427, at *35 (Jackson, J., dissenting).

[21] Fischer, 2024 WL 3208034, at *10.

[22] See, e.g., United States v. Calhoun, No. 21-cr-116 (D.D.C. July 1, 2024) (ordering release of January 6 rioter following Fischer who had already served all but a few weeks of an 18-month prison sentence).

[23] See Indictment, United States v. Trump, No. 1:23-cr-257, Dkt. 1 (D.D.C. Aug. 1, 2023).

[24] Trump, 2024 WL 3237603, at *16.

[25] Id. at *20.

[26] Id. at *31 (Barrett, J., concurring in part).

[27] United States v. Baca, No. 16-cr-1613, 2018 WL 6602216, at *19 (D.N.M. Sept. 17, 2018).