Trends Emerge In High Court's Criminal Law Decisions

By **Kenneth Notter** (August 8, 2023, 3:05 PM EDT)


Kenneth Notter

Every year, the U.S. Supreme Court issues dozens of decisions with far-reaching implications for years to come. That is particularly true for the court's criminal cases, where a single vote can determine the fate of hundreds or thousands of criminal defendants across the country.

The court's 2022-2023 term was no exception. The court issued nine merits decisions in criminal cases, not counting decisions in criminal-adjacent cases such as habeas petitions, immigration removal orders and civil enforcement actions.

Those nine decisions addressed issues ranging from foreign sovereign immunity from prosecution, to the use of a co-defendant's confession in a joint trial.

Each decision is independently important, but together, the decisions offer a window into how the court approaches criminal cases and what that means for criminal defendants and defense counsel going forward.

The Cases

Turkiye Halk Bankasi AS v. U.S.

The term's first criminal decision unanimously held in April that Halkbank, a Turkish state-owned bank, was not statutorily immune from federal prosecution as an instrumentality of a foreign sovereign.[1]

Ciminelli v. U.S.

In May, the court next unanimously held that deception that deprives another of the right to valuable information needed to make discretionary economic decisions could not support a prosecution under the federal fraud statutes, because such a right is not a traditional property interest.[2]

Percoco v. U.S.

The same day it decided Ciminelli, the court also rejected the position that a private citizen could be prosecuted for honest services fraud based on a "special relationship with the government" that allowed the private citizen to "'dominat[e] and control[]' government business."[3]

Dubin v. U.S.

In another unanimous decision, the court narrowly interpreted the aggravated identity theft statute, holding that "a defendant 'uses' another person's means of identification 'in relation to' a predicate offense" only where "the use is at the crux of what makes the conduct criminal," such as a pharmacist using pharmacy information to open a bank account in a patient's name.[4]

Smith v. U.S.

The court unanimously held that the U.S. Constitution permits the government to retry a defendant following a trial in an improper venue and decided by a jury drawn from the wrong district.[5]

Lora v. U.S.

Again unanimous, the court held that a provision banning consecutive sentences did not prohibit district courts from running a sentence for causing the death of a person through the use of a firearm concurrently with another sentence.[6]

U.S. v. Hansen

The term's first divided criminal law opinion — with a 7-2 split — held that a statute that criminalizes "encouraging or inducing" illegal immigration was not unconstitutionally overbroad because it could be read narrowly to prohibit "only the purposeful solicitation and facilitation of specific acts known to violate federal law."[7]

Samia v. U.S.

The term's only 6-3 decision — with Justices Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson in dissent — held that admitting a nontestifying co-defendant's confession did not violate the confrontation clause of the Constitution's Sixth Amendment under the particular circumstances of the case. The confession had been altered to avoid directly incriminating the defendant, and the trial court had instructed the jury to consider the confession only as to the co-defendant.[8]

Counterman v. Colorado

The final criminal decision of the term held that, to prosecute a defendant for a statement that is a "true threat" unprotected by the First Amendment, a state must prove that the defendant had a subjective — at least reckless — understanding of the statement's threatening nature.[9]

Trends

Several trends emerged from these nine decisions. Most remarkably, criminal defendants won five of the nine cases.

While the number of defendant wins may be unusual, it is unsurprising that four of those five wins — Ciminelli, Percoco, Dubin and Lora — came in cases where the government advocated broad interpretations of criminal statutes.

In nearly every term for the past decade, the court has at least once rejected an expansive interpretation of a criminal statute.[10] And this term further entrenched that practice.

By contrast, the government prevailed in two of the three constitutional cases this term. Both Smith and Samia, relying heavily on historical practice, refused to extend constitutional protections for criminal defendants.

Even Counterman, where the court vacated the defendant's judgment of conviction, turned not on a

right of criminal procedure, but on the court's robust First Amendment jurisprudence.

Beyond the continuing disparate outcomes in statutory and constitutional cases, the 2022-2023 term once again saw Justice Neil Gorsuch as one of the court's most frequent writers in criminal cases.

Though he did not write a majority opinion in any of the nine cases, he authored three separate opinions — in Halkbank, Percoco and Dubin.

In all three opinions, Justice Gorsuch emphasized the need for clarity and front-end predictability in criminal law. In Percoco and Dubin in particular, he wrote separately specifically to register his view that the honest services fraud and aggravated identity theft statutes were incurably vague, depriving ordinary people of the fair notice that due process requires.

In other trends, Chief Justice John Roberts and Justice Brett Kavanaugh each joined all nine majority opinions.

Six of the nine judgments were unanimous, and only one broke along ideological lines, with Justices Sotomayor, Kagan and Jackson in dissent.

Four of the unanimous opinions came in cases where the court narrowly interpreted the scope of a federal criminal statute. By contrast, two of the three divided cases involved constitutional rights.

Implications

White collar cases will feel the term's most profound implications. Both Ciminelli and Percoco cut back on aggressive prosecution theories of fraud. Ciminelli in particular may change how the government prosecutes property fraud.

Without the right-to-control theory to rely on, the government may find it difficult to prosecute "no harm" frauds where the purported victims were not deprived of property, but merely entered transactions that they would not have agreed to with full knowledge.

Yet it is unclear what, if any, effect the court's fraud rulings will have in practice. For decades, the court has repeatedly rejected expansive prosecution theories of fraud. But after each decision, the government has discovered a new theory to do the same work that the rejected theory once did.

And signs are already emerging that the government may do that here by reframing the right-to-control theory in language reminiscent of traditional property rights. In fact, the government's brief in Ciminelli itself offered several alternative framings to salvage the conviction.[11]

If lower courts accept the government's reformulated theories, the effect of Ciminelli and Percoco may be blunted.

Dubin's effects on the government's prosecution of aggravated identity theft may prove more lasting.

Before Dubin, the government routinely used the aggravated identity theft statute's two-year mandatory minimum sentence as a tool to leverage pleas in health care fraud cases. But after Dubin, the government can no longer use that tool whenever a defendant merely used another person's name or means of identification.

Rather, the two-year mandatory minimum sentence will come into play only in a more limited universe of cases, where the means of identification was crucial to the underlying offense.

Dubin thus limits the scope of a previously powerful prosecution tool to induce pleas through the threat of a mandatory prison sentence.

Smith's ruling permitting retrial following a trial in an improper venue may have the opposite effect. Particularly in complex white collar cases, Smith gives the government a low-risk option to charge a defendant in the government's ideal venue, even if that venue is susceptible to a venue challenge.

In doing so, the government can force the defendant either to spend the time and money to challenge venue before, during and after trial, with little upside, or to waive his constitutional venue right and endure trial in an inconvenient and potentially hostile venue.

As a result, some defendants may plead rather than contest venue or face trial in the government's hand-picked venue.

This term's overriding lesson, however, may lie in the disparate outcomes in statutory and constitutional cases. The court was again willing to invalidate prosecution theories that adopt broad interpretations of federal criminal statutes. Yet it seemed far less receptive to arguments that extend or provide robust remedies for criminal defendants' constitutional rights.

For defense counsel, it is therefore crucial to raise and preserve challenges to the government's legal theories. Because criminal statutes often use similar terms, counsel must carefully review the Supreme Court's decisions interpreting the same or similar language, even in a different statute.

Where possible, counsel should also consider using the court's emphasis on narrowly interpreting criminal statutes to advocate against indictment with prosecutors.

Conclusion

In the 2022-2023 term, the court once again reminded prosecutors and lower courts that it will not tolerate overbroad interpretations of criminal statutes.

Whether that message will land is unclear, but it gives defendants an opportunity to challenge expansive prosecution theories before and after trial.

Next term, which has four criminal cases set for argument so far, will provide a chance to see if current trends hold.[12]

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

Disclosure: Notter represented the National Association of Criminal Defense Lawyers as amicus curiae in support of petitioners in Ciminelli and Percoco.

general information purposes and is not intended to be and should not be taken as legal advice.

[1] Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940 (2023).

[2] Ciminelli v. United States, 143 S. Ct. 1121 (2023).

[3] Percoco v. United States, 143 S. Ct. 1130 (2023).

[4] Dubin v. United States, 143 S. Ct. 1557 (2023).

[5] Smith v. United States, 143 S. Ct. 1594 (2023).

[6] Lora v. United States, 143 S. Ct. 1713 (2023).

[7] United States v. Hansen, 143 S. Ct. 1932 (2023).

[8] Samia v. United States, 143 S. Ct. 2004 (2023).

[9] Counterman v. Colorado, 143 S. Ct. 2106 (2023).

[10] See, e.g., Wooden v. United States, 142 S. Ct. 1063, 1069-70 (2022); Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021); Kelly v. United States, 140 S. Ct. 1565, 1574 (2020); Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019); Marinello v. United States, 138 S. Ct. 1101, 1109 (2018); Yates v. United States, 574 U.S. 528, 536 (2015); Bond v. United States, 572 U.S. 844, 863 (2014).

[11] Brief for the United States at 31-40, Ciminelli v. United States, No. 21-1170 (U.S.) (arguing the scheme was one to obtain "contract funds" rather than to deprive the State of information needed to decide whether to award the contract).

[12] Pulsifer v. United States, No. 22-340 (U.S.); Brown v. United States, No. 22-6389 (U.S.); United States v. Rahimi, No. 22-915 (U.S.); McElrath v. Georgia, No. 22-721 (U.S.).