

Overview

- CURRENT TERM
 - Con Law (4)
 - Statutory (4)
 - Habeas (1)



- Briefly look ahead to next Term

Counterman v. Colorado (argued April 19)

- Conviction under Colorado stalking statute for numerous FaceBook messages at a local musician.
- “True threats” are not protected by the 1st Amendment. What is the required mens rea?
- Follow up to VA v. Black and Elonis v. United States
- Subjective: must the speaker subjectively intend or know the threatening nature of the statement? OR
- Objective: must the statement be one that a “reasonable person” would interpret as a threat?
- Strict mens rea/broad 1A v. protect society from fear and harassment on the internet?

U.S. v. Hansen (argued March 27)

- Respondent ran an adult adoption scheme, promising non-citizens a false pathway to citizenship.
- 8 U.S.C. 1324(a)(1)(A)(iv) makes it a federal crime to “encourage” or “induce” someone to unlawfully come to, enter, or reside in the United States.
- For purpose of financial gain — 5 → 10 year stat max
- CA9 and CA10 have both struck statute down as facially overbroad, in violation of First Amendment.
- Accomplice prohibition on solicitation/facilitation of illegality, or sweep in all types of protected speech?
- Same QP addressed but reserved in Sineneng-Smith.

Samia v. United States (argued Mar 29)

- Bruton (1968): admitting co-D confession implicating D violates Confrontation Clause, even if a limiting instruction.
- Two post-Bruton redaction cases:
- (1) Richardson: redacting confession to remove any reference to another does not violate CC; BUT
- (2) Gray: redacting confession in a manner that reveals that there has been in fact been a redaction does violate the CC.
- QP: do courts look at the redaction in isolation or in context?
- Here, redacted confession by inserting neutral descriptor of “another person” and removing any indication of a redaction, but jury could infer from context that D was the other person.

Smith v. United States (argued Mar. 28)

- Venue in both Article III and Sixth Amendment
- QP: What's the remedy for improper venue: an acquittal or a re-trial in the proper venue?
- Heavy reliance on history and tradition.
- Prevent forum shopping and serial re-trials
- But venue is diff than an offense element that goes to guilt/innocence.
- Is this really a Double Jeopardy case?

Dubin v. United States (argued Mar 27)

- “Whoever, during and in relation to any felony violation enumerated [elsewhere], **uses, without lawful authority**, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.” 18 U.S.C. 1028A
- Does someone commit “agg ID theft” by incidentally mentioning another person’s name while committing a fraud, even if he does not steal their ID or impersonate them?
- The latest case on federal over-criminalization.
- NAFD amicus on how prosecutors use 1028A to coerce pleas.

Lora v. United States (argued Mar. 28)

- 924(c): crime to carry gun during and in relation to predicate drug crime.
- 924(c)(1)(D)(ii): “no term of imprisonment imposed on a person under this subsection shall run concurrently” with sentence for predicate drug crime.
- 924(j): “A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall” be punished for up to life or for death if it was a murder.
- QP: Does 924(j) incorporate 924(c)’s mandatory consecutive sent. regime?
- Plain text v. statutory purpose.

Ciminelli v. United States (argued Nov. 28, 2022)

- Bid-rigging case; defendant had secret involvement with state insiders about the bid; bid rigging led to \$750m state contract.
- Prosecuted under CA2's "right to control" theory of wire fraud—*i.e.*, that the deprivation of valuable information about how to control \$ is itself a "property" interest for purposes of the wire fraud statute.
- SG concedes "right to control" theory is too broad; it tries to re-characterize the theory as the fraudulent inducement of \$.
- D will win, but what is the remedy on sufficiency review: acquittal b/c jury was instructed on invalid theory OR vacate?

Percoco v. United States (argued Nov. 28, 2022)

- Influential political operative, former government employee, used influence to secure real estate deal.
- D was convicted of “honest services” fraud/bribery.
- But he himself was not a public official exercising gov’t power at the time; he was part of Cuomo re-election campaign; he later re-joined Gov. office.
- D says influence not enough, or else lobbying=crime; must be some nexus to official power; if not a public official, then must be an “agent” for one.
- Gov’t says enough if person “functions” as a public official, but what’s the test? Cover lobbyists too?

Jones v. Hendrix (argued Nov. 1, 2022)

- Scotus announces new decision narrowing a fed. criminal statute. Can fed prisoners in successive posture seek relief via 2255(e) saving clause/2241 habeas petition?
- Petitioner/United States: yes, there must be at least one meaningful opportunity to argue that they are in prison for conduct that's not a crime.
- Court-appointed amicus: No, allowing such statutory claims would circumvent 2255(h) second/successive bar; a formal opportunity to raise claim in first 2255 is enough, even if circuit precedent then foreclosed claim.
- Prediction: 6-3 loss for Petitioner.

Pulsifer (Next fall)

- Safety valve allows relief from man min in drug cases.
- 18 U.S.C. 3553(f): Eligible for SV “if the court finds at sentencing . . . (1) that the D does not have—
 - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
 - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
 - (C) a prior 2-point violent offense, as determined under the sentencing guidelines.
- QP: IS D ineligible for safety valve if he has any of the (A), (B), or (C); or ineligible only if he has all of them?
- Battle of canons: Plain meaning v. surplusage v. lenity

Fin

That's all Folks!



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