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# A Quiet But Telling Year For Criminal Law In Supreme Court

By **Michael Kelly**

Law360, New York (June 27, 2017, 12:13 PM EDT) -- When it comes to criminal law, it was a relatively quiet year for the U.S. Supreme Court. The court decided 22 cases with criminal law issues in the October 2016 term, and none of them will be remembered as landmark decisions.

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Yet, because they covered a wide range of issues, the court's 22 decisions painted a detailed picture of its general sensibilities about criminal law. Even as the court welcomes Justice Neil Gorsuch and contemplates the possibility of more changes, many of these same sensibilities are likely to influence the court's deliberations in the years to come.

## Will the Court Continue to Reject Broad Interpretations of Federal Criminal Statutes?

Before the term began, many observers wondered whether the court would continue to reject broad interpretations of criminal statutes, as it has recently done. In the last several years, the court has rejected broad interpretations offered by the U.S. Department of Justice of statutes addressing honest services fraud,[1] possession and use of chemical weapons,[2] obstruction of justice,[3] interstate threats,[4] and federal bribery.[5]

This year, however, the court embraced broader interpretations of two federal criminal offenses: insider trading and bank fraud. In Salman v. United States, the court upheld an insider trading conviction and rejected the argument that a conviction can occur only if a tipper of inside information received money or tangible property in exchange for the tip.[6] In Shaw v. United States, the court upheld a bank fraud conviction where the defendant argued that he did not intend to defraud the bank but rather the customer holding the account at the bank.[7]

Neither of these cases were controversial to the justices (both were decided unanimously), and both decisions reflected a common-sense belief by the court that Congress did not intend for the existence of these offenses to turn on the kinds of arguments made by defense counsel. Because the court found Salman and Shaw to fit comfortably with Congress' intent for these offenses, the court did not have to address the difficult questions about broad federal criminal statutes in these cases.

But the same concerns about overcriminalization still remain. In Maslenjak v. United States, the court adopted a narrower interpretation of another criminal statute — this one governing unlawful procurement of citizenship or naturalization.[8] In the oral argument of that case, Chief Justice John Roberts memorably exclaimed, "Oh, come on," when a Justice Department lawyer argued that an incorrect answer to a broadly written question on a government form could lead to criminal penalties and the loss of citizenship.[9] Overcriminalization is an issue that still troubles nearly all of the justices.

Despite these concerns, the court has not settled yet on a consistent approach to use when interpreting broadly written criminal statutes.

- Will the court eventually conclude that Congress "means what it says" in broad criminal statutes and apply the "plain language" of the statute even if the broad interpretation results in an unreasonable outcome? That was the reasoning often favored by the court in criminal cases when William Rehnquist was the chief justice.[10]

- Or will the court conclude that Congress intended for a narrower statutory interpretation if the broad interpretation would lead to an unreasonable outcome that Congress could not have reasonably intended? That is the line of reasoning that has often prevailed now that John Roberts is the chief justice.[11]

We will have to wait for a definitive answer, because none of this year's cases provided it.

## How Did Constitutional Challenges Fare This Year?

This year, constitutional challenges in criminal cases were generally successful in the Supreme Court. The court relied on the First Amendment to strike down a North Carolina criminal statute. In that case, the court invalidated a statute imposing criminal penalties on any registered sex offender who participated in the use of social media — such as Facebook or Twitter — where the offender knows children might have accounts.[12]

Meanwhile, the court opened a path for criminal defendants to challenge jury verdicts animated by improper motivations. In particular, the court confirmed that defendants could use the Sixth Amendment to challenge (or impeach) jury verdicts that are motivated by racial bias.[13] The standard is not easy: There must be evidence of a clear statement by the juror that indicates he or she relied on racial stereotypes or animus to convict. But it was notable that the court would recognize any kind of exception to the no-impeachment rule usually enforced by federal courts.

The court also decided a large number of cases with ineffective assistance of counsel claims. In Lee v. United States, the court held that a naturalized citizen established a Sixth Amendment violation after his lawyer mistakenly told him that he would not be deported following his guilty plea to a drug offense.[14] In Buck v. Davis, the court found a Sixth Amendment violation in a death penalty case when a defense attorney elicited testimony from his own expert that his client was more likely to commit a crime again because of his race.[15] In Weaver v. Massachusetts, the court suggested that the failure to object to the exclusion of the public from jury selection process might constitute ineffective assistance of counsel in an appropriate case (though not in the one before the court).[16] However, the court also rejected an argument that ineffective assistance of appellate counsel is a reason to allow a defendant to bring a federal habeas case when he failed to bring the same claim in a previous state habeas case (and thereby defaulted on the claim under the state's procedural rules).[17]

In a few cases, the court reminded lower courts about the need to comply with its past decisions. For instance, in a Fourteenth Amendment due process case, the court reiterated that states must provide an indigent defendant in certain circumstances with access to a competent psychiatrist who will conduct an appropriate examination of the defendant and assist in the evaluation, preparation, and presentation of the defense.[18] In another case, the court reversed a Nevada Supreme Court decision that failed to apply the right standard in determining whether a judge must be disqualified for bias under the Due Process Clause of the Fourteenth Amendment.[19]

Not every constitutional challenge was successful. Because the Supreme Court agreed to hear a case involving the application of Brady v. Maryland, many in the defense bar hoped that the court would strengthen the defendants' right to obtain exculpatory evidence. However, in Turner v. United States, the court dashed those hopes when it held that the suppressed evidence in that case had no reasonable probability of changing the outcome of the verdict.[20] This decision will be cited by prosecutors to buttress arguments in future cases that there was no harm in the withholding of exculpatory evidence.

## Did the Court Issue Any Noteworthy Sentencing Decisions?

This year, sentencing issues did not play a major role in the court's docket. In the most notable case, the Supreme Court held that the advisory sentencing guidelines were not subject to void-for-vagueness challenges under the Due Process Clause of the Fifth Amendment.[21] The court's decision suggested that future constitutional challenges to the advisory sentencing guidelines will not be easy to win.

The court also emphasized the broad discretion of sentencing judges in a case involving a firearm offense with a mandatory minimum sentence and a separate offense of a violent or drug trafficking crime.[22] When a judge has to sentence a defendant for the trafficking crime, the judge has the discretion to consider the mandatory minimum for the firearm offense and to reduce the sentence for the trafficking offense.

In a drug case, the court held that a criminal forfeiture statute, 21 U.S.C. § 853, did not create joint and several liability for proceeds generated by a conspiracy when the defendant himself never acquired those proceeds.[23]

In a death penalty case, the court reaffirmed that the Eighth Amendment prohibited a sentencing jury from considering the opinions of the victim's family about the crime, the defendant, and the appropriate sentence.[24]

Finally, the court overturned a decision by Texas' highest criminal court in a habeas challenge to another death penalty case, finding that the Texas court had failed to apply the medical community's prevailing standards in determining whether the defendant was intellectually disabled and therefore whether the execution of the defendant would constitute cruel and unusual punishment under the Eighth Amendment.[25]

## Were There Any Other Criminal Cases of Note?

The court generally showed concern about the variety of ways in which the criminal justice system can harm individuals. For instance, the court held that the Fourth Amendment can be used by an individual to challenge an unlawful pretrial detention — even after a judge found probable cause for the arrest.[26] In that case, the judge had found probable cause based on a report fabricated by the police.

The court also concluded that states were required to refund fees, court costs, and restitution to defendants who were acquitted of criminal charges.[27] Colorado had required defendants to prove their innocence in a civil proceeding by "clear and convincing" evidence in order to obtain refunds, but the court found Colorado's requirement violated the Due Process Clause of the Fourteenth Amendment.

The court's remaining cases dealt with technical issues not likely to be of broad interest. These cases addressed the ability to assert issue preclusion in cases involving inconsistent verdicts when one of the inconsistent guilty verdicts is overturned on appeal because of trial error,[28] and the need to file a separate notice of appeal to challenge restitution when the issue of restitution has been deferred.[29] The court also decided that Virginia's geriatric release program — in which Virginia released older inmates on parole in some circumstances — could not be challenged as a violation of the Eighth Amendment on a habeas review.[30]

## What Does This Term Tell Us About the Court's Views of Criminal Law?

In this term, the court was skeptical of the government's position in many cases, and it ruled against the government on a variety of issues. Compared to the Rehnquist court, this court has been more receptive to arguments by defense counsel about governmental overreach. The court has reacted when it has perceived that criminal laws are being stretched beyond what Congress could have reasonably intended.

However, the court is generally unwilling to issue sweeping rulings in deciding these cases. In nearly every case, the court has been careful to limit its analysis to the facts and the specific statutes at issue, leaving observers to wonder how slight variations in the facts or in the wording of the statutes might change the court's analysis. Given the sensibilities of the current members of the court, this

careful, incremental approach in deciding criminal law issues seems likely to continue into the future.

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[1] Skilling v. United States, 561 U.S. 358 (2010).

[2] Bond v. United States, 134 S.Ct. 2077 (2014).

[3] Yates v. United States, 135 S.Ct. 1074 (2015).

[4] Elonis v. United States, 135 S.Ct. 2001 (2015).

[5] McDonnell v. United States, 136 S.Ct. 2355 (2016).

[6] Salman v. United States, 137 S.Ct. 420 (2016).

[7] Shaw v. United States, 137 S.Ct. 462 (2016).

[8] Maslenjak v. United States, No. 16-309, 2017 WL 2674154 (June 22, 2017).

[9] Transcript of Oral Argument at 28, Maslenjak v. United States, No. 16–309, 2017 WL 2674154 (June 22, 2017).

[10] See Michael P. Kelly & Ruth E. Mandelbaum, Are the Yates Memorandum and the Federal Judiciary's Concerns About Over-Criminalization Destined to Collide?, 53 Am. Crim. L. Rev. 899, 920-22 (2016) (collecting cases).

[11] Id. at 920-21, 922-25.

[12] Packingham v. North Carolina, No. 15-1194, 2017 WL 2621313 (June 19, 2017).

[13] Peña-Rodriguez v. Colorado, 137 S.Ct. 855 (2017).

[14] Lee v. United States, No. 16-327, 2017 WL 2694701 (June 23, 2017).

[15] Buck v. Davis, 137 S.Ct. 759 (2017).

[16] Weaver v. Massachusetts, No. 16-240, 2017 WL 2674153 (June 22, 2017).

[17] Davila v. Davis, No. 16-6219, 2017 WL 2722418 (June 26, 2017).

[18] McWilliams v. Dunn, No. 16-5294, 2017 WL 2621324 (June 19, 2017).

[19] Rippo v. Baker, 137 S.Ct. 905 (2017).

[20] Turner v. United States, Nos. 15-1503, 15-504, 2017 WL 2674152 (June 22, 2017).

[21] Beckles v. United States, 137 S.Ct. 886 (2017).

[22] Dean v. United States, 137 S.Ct. 1170 (2017).

[23] Honeycutt v. United States, No. 16-142, 2017 WL 2407468 (June 5, 2017).

[24] Bosse v. Oklahoma, 137 S.Ct. 1 (2016).

[25] Moore v. Texas, 137 S.Ct. 1039 (2017).

[26] Manuel v. City of Joliet, Illinois. 137 S.Ct. 911 (2017).

[27] Nelson v. Colorado, 137 S.Ct. 1249 (2017).

[28] Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016).

[29] Manrique v. United States, 137 S.Ct. 1266 (2017).

[30] Virginia v. LeBlanc, No. 16-1177, 2017 WL 2507375 (June 12, 2017).

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