

**LAW OFFICE OF PETER GOLDBERGER**

50 Rittenhouse Place  
Ardmore, PA 19003-2276

*Of Counsel:*  
Anna M. Durbin

(610) 649-8200  
FAX (610) 649-8362  
E-mail: peter.goldberger@verizon.net

Peter Goldberger  
Pamela A. Wilk

ROLLING SUMMARY OF U.S. SUPREME COURT DOCKET ON CRIMINAL LAW  
2022 Term, as of 6/30/23 EOT, final

*A. DECIDED CASES, 2022-23*

In re Grand Jury, 598 U.S. -- (1/23/23) - Dismissed as improvidently granted. QP was: Is a "dual purpose communication" -- seeking and/or providing both legal and non-legal advice -- protected by the attorney-client privilege so long as legal advice is a significant purpose?

Cruz v. Arizona, 598 U.S. -- (2/22/23) - State supreme court's holding that Ariz.R.Cr.P. 32.1(g), governing successive post-conviction petitions, barred relief for Simmons v SC violation on the basis that Lynch v AZ was not a "significant change in the law" was too novel and unforeseeable to qualify as an "adequate and independent" state law basis that precludes federal habeas corpus review. 5-4 (perSAS;ACB/CT/SAA/NG diss)

Reed v. Goertz, 598 U.S. -- (4/19/23) - Statute of limitations for §1983 action by capital prisoner challenging state-provided remedy seeking DNA testing (under Skinner v. Switzer, 2011) as lacking procedural due process runs from completion of appeals from denial of petition, not from initial state court denial. 7-2 (perBK;SAA/NG diss)

Turkiye Halk Bankasi A.S. v. US, 598 U.S. -- (4/19/23) - Neither any implied exclusion from 18 USC §3231 nor Foreign Sovereign Immunities Act deprives a US Dist.Ct. of subject matter jurisdiction to entertain a criminal case against a commercial instrumentality of a foreign government. 7+2-0 (perBK;NG/SAA conc)

Ciminelli v. US, 598 U.S. -- (5/11/23) - The "right to control" doctrine -- which treats a denial of complete and accurate information bearing on economic decisions as a deprivation of "property" -- is not a valid predicate for a mail or wire fraud prosecution. Unan (per CT; SAAconc).

Percoco v US, 598 U.S. -- (5/11/23) - A person who holds no public office or official position owes no fiduciary duty to the public, even if they wield political or other informal influence over governmental decisionmaking, and so cannot be the subject of a prosecution for "honest services" mail or wire fraud as defined in 18 USC §1346. Unan (per SAA;NGconc)

Santos-Zacaria v. Garland, 598 U.S. -- (5/11/23) - The exhaustion requirement of 8 USC 1252(d)(1), which is not jurisdictional, does not bar the US Court of Appeals from reviewing a decision of the Board of Immigration Appeals, where the petitioner failed to seek reconsideration on the basis that the BIA engaged in impermissible factfinding. 7+2-0 (per KBJ; SAA/CT conc)

Tyler v. Hennepin County, MN, 598 U.S. -- (5/25/23) - Applying FRCP 12(b)(6) standard, complaint plausibly alleges that government's civil forfeiture of property that is worth more than is needed to cover the amount of the debt (including interest, penalties and costs) is a "taking" under Fifth Amendment; not reaching whether seizure is also a "fine" within the meaning of the Eighth Amend. Unan (per JGR; NG/KBJ conc)

U.S. ex rel. Proctor v. Safeway, 598 U.S. -- (6/1/23) - A dft "knowingly" violates civil False Claims Act if they subjectively understand and believe that submission is false as a matter of fact under the law as they understand it, even if law's requirements are unclear or ambiguous. Unan (per CT).

Dubin v. US, 599 U.S. -- (6/8/23) - Use of a victim's name (a "means of identification") in the course of criminal activity does not constitute aggravated identify theft (18 USC 1028A) unless it is "at the crux" of the fraud, avoiding "staggering breadth" of govt's proposed reading. Unan (per SAS; NG conc [contending statute is unconstitutionally vague])

Smith v. US, 599 U.S. -- (6/15/23) - Where conviction is overturned on appeal on basis that govt failed at trial to prove venue as charged, Double Jeopardy does not bar retrial in another federal district. Sixth Amend vicinage is aspect of right to a fair jury, "unrelated to factual guilt or innocence of the offence." Unan (per SAA)

Lora v. US, 599 U.S. -- (6/16/23) Homicide in aid of drug trafficking, 18 USC §924(j), is a stand-alone offense, not an aggravated sentencing provision for fatal §924(c) violations. Section 924(c)(1)(D) therefore does not require that a §924(j) sentence be imposed consecutively to any other sentence. Unan (per KBJ)

Jones v. Hendrix, 599 U.S. -- (6/22/23) - AEDPA savings clause, 28 USC 2255(e), does not authorize §2241 habeas relief to vacate the conviction of a prisoner who filed and lost prior §2255 motion, even though conduct did not violate the statute of conviction, as construed by the Supreme Court of the United States after §2255 statute of limitations expires. 6-3 (per CT; SAS/EK diss; KBJ diss)

Pugin v. Garland, 599 U.S. -- (6/22/23) - To qualify as an "offense related to obstruction of justice" -- an "aggravated felony" under 8 U.S.C. §11001(a)(43)(S) -- alien's prior offense need not have required nexus with a pending investigation or judicial proceeding. 6-3 (per BK;KBJ conc;SAS/EK/NG diss)

Samia v. US, 599 U.S. -- (6/23/23) - Limiting instruction is sufficient to protect dft's 6th Amend Confront Cl rights under Bruton when co-defendant's redacted confession is admitted at a joint trial. 6-3 (per CT; ACBconc; EK/SAS/KBJdiss; KBJdiss)

US v. Hansen, 599 U.S. -- (6/23/23) - Criminal prohibition under 8 USC §1324(a)(1) of encouraging illegal immigration is not facially overbroad in violation of the First Amendment. Properly construed it reaches only purposeful solicitation and facilitation of specific acts known to violate federal immig law. 6+1-2 (per ACB; CTconc; KBJ/SAS diss)

Counterman v. Colorado, 600 U.S. -- (6/27/23) - To establish that a statement is a "true threat" unprotected by the First Amendment, State need not show that speaker subjectively knew or intended the statement to be taken as a threat; recklessness that a "reasonable person" would regard the statement as threatening violence suffices. 7-2 (per EK; SAS conc-in-jmt; ACB/CT diss)

#### *B. CRIMINAL CASES GRANTED REVIEW for decision in 2023 Term*

Pulsifer v. US (granted 2/27/23) - Do criteria for "safety valve" exemption from controlled substances mandatory minimum sentencing, 18 USC §3553(f), as amended in 2018 by First Step Act, exclude those with any of five listed types of prior convictions or only those with all five?

Brown v. US (granted 5/15/23) - In applying categorical approach to determine whether felon-in-possession-of-firearm is subject to enhanced sentence as an "armed career criminal" (ACCA), as of what date(s) is the scope of the prior state "controlled substances" offense to be compared with a touchstone federal drug offense?

Culley v. Marshall (granted 5/17/23) - In determining whether and, if so, when Constitution requires a prompt post-seizure probable-cause hearing prior to full statutory judicial-forfeiture proceeding, should courts apply the Sixth Amend "speedy trial" test adopted for final forfeiture hearings in US v. \$8850 (1983), or a three-part due process analysis under Mathews v. Eldridge (1976)?

McElrath v. Georgia (granted 6/30/23) - Does the Double Jeopardy Clause, as applied through the 14th Amend, bar a state court from ordering retrial of a count on which a jury had rendered a verdict of not guilty by reason of insanity, where the jury at the same trial found the defendant guilty but mentally ill on another count, based on a judicial determination that the two verdicts are not merely "inconsistent" but legally and factually "repugnant" to one another?

US v. Rahimi (granted 6/30/23) - Is 18 USC §922(g)(8), which categorically prohibits the possession of firearms by persons subject to domestic-violence restraining orders, facially invalid under the Second Amendment?