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Hanging by a Thread: Unanimous Supreme Court Snips Back Two Wire Fraud Convictions

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May 17, 2023 - Despite the Supreme Court's sometimes testy ideological division, the Justices recently found common ground in two 9-0 decisions limiting the federal prosecution of wire fraud in public corruption cases. These cases, *Percoco v. United States*¹ and *Ciminelli v. United States*² both involved alleged schemes to obtain lucrative government contracts in the state of New York during then-Governor Andrew Cuomo's administration. In both cases, the Court unanimously found that jury instructions regarding the wire fraud counts were improper and remanded the cases for further proceedings. The cases come as a resounding blow to public corruption prosecutions at a time when the Court's own ethics are under public scrutiny.

Percoco Decision

Joseph Percoco was a longtime aide to former-Governor Cuomo and served in his administration from 2011 to 2016. From April 2014 to December 2014, however, Percoco stepped away from his official position to work on Cuomo's re-election campaign. During this hiatus, Percoco accepted payments totaling \$35,000 from a real-estate developer in exchange for lobbying the Cuomo administration to drop a labor-peace requirement that was preventing the developer from receiving state funds for a project. Days before returning to his official position in the administration, Percoco called a senior official to urge him to drop the labor-peace agreement precondition, which was done the next day.

As a result, the Department of Justice ("DOJ") charged Percoco in a multi-count indictment, which included a count for conspiring to commit "honest services" wire fraud, in violation of 18 U.S.C. §§ 1343 & 1346. Percoco's defense team sought to dismiss this count by arguing that because Percoco was a private citizen during his hiatus when he was managing Cuomo's re-election campaign, he could not have owed a duty to provide honest services to the public. Based on the Second Circuit's decision in *United States v. Margiotta*, 688 F.2d 108 (1982), the district court denied this motion and instructed the jury that Percoco owed the public a duty of honest services under the statute if they found "(1) he dominated and controlled any governmental business and (2) people working in the government actually relied on him because of a special relationship he had with the government."³ The jury found that Percoco met this test and convicted him, and the Second Circuit affirmed his conviction.

The Supreme Court unanimously reversed, finding that the *Margiotta* standard – as reflected in the jury instructions in this case – was overly vague. In the opinion for the Court, Justice Alito noted, “Without further constraint, *Margiotta* does not (and thus, the jury instructions did not) define ‘the intangible right of honest services’ ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited,’ or ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’”⁴ This decision hardly came as a surprise, because as Alito also noted, the DOJ did “not defend these jury instructions as an accurate statement of the law” in their briefing or at oral argument.⁵

Notably, Alito’s opinion rejected Percoco’s proposed bright-line rule that an individual could “never have the necessary fiduciary duty to the public” if they do not hold public office.⁶ Alito stated that this argument “sweep[s] too broadly,” noting that private individuals could become agents of the government, and therefore owe the public fiduciary duties by way of this agency relationship.⁷ However, Alito’s opinion offered little further guidance on when a private individual might owe the public such a fiduciary duty, and remanded the case to the lower court for further proceedings. Instead, he merely noted that the Solicitor General had advocated before the Court for a narrower standard than the jury instructions derived from *Margiotta*. The lower court will, therefore, be tasked with creating a new standard for when a private individual owes a duty to provide honest services, but it will not be able to use a bright-line test like the one for which Percoco advocated.

Ciminelli Decision

The *Ciminelli* case also involved a charge of wire fraud under § 1343 against Louis Ciminelli, a real estate developer who was allegedly part of a scheme to secure a \$750 million development project in upstate New York during the Cuomo administration. As part of this alleged scheme, Ciminelli and his co-defendants arranged for Ciminelli’s company to obtain a “preferred-developer status,” which gave the company an advantage in the bidding process. When the scheme came to light, Ciminelli was indicted on 18 counts, which included a wire fraud count under § 1343.

The DOJ prosecuted these wire fraud charges against Ciminelli under what is known as the “right to control” theory, under which a defendant can be found guilty of wire fraud if they are shown to have “schemed to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions.”⁸ The “right-to-control” theory is only recognized in the Second Circuit, and is premised on the idea that “a defining feature of most property is the right to control the asset in question, property interests protected by the wire fraud statute [§ 1343] include the interest of a victim in controlling his or her own assets.”⁹ At Ciminelli’s trial, the District Court’s jury instructions defined “property” for the purposes of § 1343 in a manner consistent with the right-to-control theory. Following these instructions, the jury found Ciminelli guilty of wire fraud. Ciminelli appealed, arguing that the right-to-control theory was an invalid interpretation of “property” under the wire fraud statute, but the Second Circuit affirmed his conviction.

In a unanimous opinion authored by Justice Thomas, the Supreme Court reversed and held that “[t]he so-called ‘right to control’ is not an interest that had ‘long been recognized as property when the wire fraud statute was enacted.’”¹⁰ Therefore, because “the federal fraud statutes criminalize only schemes to deprive people of traditional property interests,”¹¹ it follows that “the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.”¹² In reaching this conclusion, Justice Thomas noted concerns that because the right-to-control theory “treats mere information as the protected interest, almost any deceptive act could be criminal.”¹³

Just like the Court’s decision in *Percoco*, the *Ciminelli* decision hardly came as surprise, because the DOJ conceded in its briefing and oral argument that “the [right-to-control] theory as articulated below is erroneous.”¹⁴ Justice Thomas recognized that the DOJ made this concession “[d]espite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory[.]”¹⁵ However, just like in *Percoco*, the Court remanded the *Ciminelli* case for further proceedings, so the DOJ can still pursue the wire fraud charge against Ciminelli on remand, but it cannot rely on the right-to-control theory in doing so.

Takeaways

The *Percoco* and *Ciminelli* decisions show that the Supreme Court is united in curbing wire fraud prosecutions based on theories created by lower courts that go beyond the text and traditional understanding of the federal fraud statutes. The decisions also serve as warnings to over-zealous prosecutors looking for novel readings of criminal statutes.

References

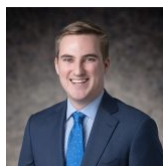
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- 1 No. 21-1158, 2023 WL 3356527 (U.S. May 11, 2023) [hereinafter *Percoco*]. A copy of the Court's slip opinion is available at https://www.supremecourt.gov/opinions/22pdf/21-1158_p8k0.pdf ^
- 2 No. 21-1170, 2023 WL 3356526 (U.S. May 11, 2023) [hereinafter *Ciminelli*]. A copy of the Court's slip opinion is available at https://www.supremecourt.gov/opinions/22pdf/21-1170_b97d.pdf.
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- 3 *Percoco*, at *7 (internal quotation marks omitted). ^
- 4 *Id.* at *7 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). In a concurrence, Justice Gorsuch (joined by Justice Thomas) noted they would go further and strike the entire honest services fraud statute on vagueness grounds. ^
- 5 *Id.* at *8. ^
- 6 *Id.* at *6 (emphasis in original).
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- 7 *Id.* ^
- 8 *Ciminelli*, at *3. ^
- 9 *Id.* at *4 (quoting *United States v. Lebedev*, 932 F.3d 40, 48 (2d Cir. 2019)). ^
- 10 *Id.* (quoting *Carpenter v. United States*, 484 U.S. 19, 26 (1987)). ^
- 11 *Id.* at *2 (citing *Cleveland v. United States*, 531 U.S. 12, 24 (2000)). ^
- 12 *Id.* at *5. ^
- 13 *Id.* ^
- 14 *Id.* ^
- 15 *Id.* ^

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