LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Jones Day Attys On Percoco, And How We Got Here

By **Stewart Bishop**

Law360 (May 22, 2023, 9:13 PM EDT) -- The U.S. Supreme Court's recent Percoco and Ciminelli opinions underscore the justices' continued skepticism toward prosecutors' sometimes expansive views of federal fraud laws and what constitutes political corruption, and attorneys in the trenches of this line of casework say the court is reiterating that it's serious.

In two opinions issued earlier this month, the justices overturned the convictions of former New York political operative Joseph Percoco and developer Louis Ciminelli.

In doing so, the high court scrapped the Second Circuit's "right to control" theory of fraud and found the circuit court's standard — based on the dated case of U.S. v. Margiotta — for determining when a private citizen owes a duty of honest services to the public was too vague.

The unanimous decisions follow a now-familiar path blazed by the court's findings in cases such as that of former Virginia Gov. Bob McDonnell, as well as in U.S. v. Kelly, where the justices warned against over-criminalization of what it viewed as everyday politicking and clarified its thoughts on what qualifies as property for the purposes of federal fraud statutes.

Seated at the defense table in these cases were appellate attorneys from Jones Day, including Washington, D.C., partners Yaakov Roth — who represented Percoco, Kelly and McDonnell — and former solicitor general Noel Francisco, who also represented the former Virginia governor.

Roth and Francisco spoke to Law360 about their experiences handling the landmark cases and their impact.

This interview has been edited for length and clarity.

What's your sense of the landscape going forward with respect to how courts are considering the wire fraud statute and public corruption cases in general?

Francisco: I think probably for the last 15 years or so, you've had the Supreme Court sending a consistent message to federal prosecutors and lower courts that they ought not be trying to adopt aggressive interpretations of vague federal criminal statutes like wire fraud, honest services fraud and the like.

For many years, the Supreme Court has been sending this message, but for many years, federal

prosecutors, and to a certain extent the courts of appeals, were not getting the message.

So federal prosecutors would continue to make very aggressive charges, and the courts of appeals would then go on and affirm those convictions. And the view that got up to the Supreme Court would almost invariably get reversed in lopsided 8-1, 9-0 opinions.

I'm kind of hopeful the trend has now been sufficiently long-standing and sufficiently powerful at the Supreme Court level, that the lower courts are starting to get the message.

What about the Justice Department?

Francisco: There are different levels of the Justice Department. If you talk to a lot of the lawyers in the solicitor general's office, who are the ones that have to defend these cases when they get to the Supreme Court — they get it. And they wish that the federal prosecutors at the line level would stop making these aggressive cases.

So you kind of have a disconnect between the appellate lawyers at Main Justice and the day-to-day trial lawyers of the 93 U.S. attorney's offices across the country.

Yaakov, what was your mindset going into the Percoco case?

Roth: I came into it for the cert petition. With most of these cases, [that's] the hardest part. If you get the case up, some of these theories are so outlandish that you don't have to be too worried about winning once you get it in front of the court — you just need to get it in front of the court.

Our strategy in the cert petition was to make that earlier precedent — Margiotta — the target; it had been widely criticized by professors and by other courts, and the implications were so worrisome.

The Supreme Court is much more attuned to those types of concerns than lower courts are. 'What are the broader implications of this? How could it be abused in the future?' Those were the themes that we were playing, but I was pretty optimistic in the beginning.

Francisco: The Supreme Court actually likes these cases, because they've got so many cases that are divisive and divide them. Whereas this is a set of cases, these criminal law cases, where it does really unify the court across the spectrum.

In both Percoco and McDonnell, the Supreme Court expressed apprehension about criminalizing certain aspects of what it views as everyday politics. What do you both think about the court's concerns here?

Francisco: My own take is that the Supreme Court justices have a much more clear-eyed and realistic view of how the political process works, and they're not as skeptical of it as federal prosecutors.

Whereas a lot of federal prosecutors, they kind of have this pristine view of the world. And if anything, you know, sometimes politics can look a little bit ugly, and if it looks a little bit ugly to them, they instinctively try to figure out if they can somehow charge it with crime.

Roth: I think it's one area where the Supreme Court is more careful about thinking those issues through. Sometimes, lower courts are more focused on the particular case in front of them and the particular

facts: 'Did this person do something wrong or not?' But the Supreme Court tends to look more broadly at: 'How is this theory going to work, and what does this theory mean for other cases?'

We live in a very politically polarized time and climate, and prosecutors have a lot of power. And these theories are what gives them their power. I think it's really critical to be taking stock in how these theories can be abused in real life — when you're deciding what the scope of these statutes should be, what Congress intended the scope to be, [it's important] to think about that practical aspect.

Noel, what was it like going into McDonnell? How did you approach it?

Francisco: From day one, we were articulating the theory that we ultimately won on in the U.S. Supreme Court through a series of motions, starting with motions to dismiss the indictment at the outset. Our basic argument was, if simply taking money in exchange for arranging meetings — in other words, an exchange for access — is a federal crime, then virtually every elected politician in the country is open to prosecution.

Everyone agrees that a campaign donation can be the quid in a quid pro quo transaction, and if the quo can simply be setting up a meeting, simply providing access without trying to influence the outcome of the decision, then every time an elected official gives preferred access to his big donors, he's committing a federal crime. So we launched that theory from day one in the trial court.

We got a very early victory at the Supreme Court — after the Fourth Circuit affirmed the conviction. We filed a motion ... to keep Gov. McDonnell out of jail while the Supreme Court review was pending. As far as we can tell, the Supreme Court hadn't granted that kind of motion in maybe 50 years, and maybe never, but they granted it — and they allowed him to stay out of jail while the cert process was taking place.

That was a pretty strong indication that they were leaning our way.

I know it wasn't your case, but I want to talk a little about Ciminelli. What do you think it says about the justices' mindset with respect to property fraud?

Roth: I think Ciminelli is a really important decision because property fraud is a more commonly charged offense than honest services fraud these days, and there's been a lot of manipulation of the property elements in the lower courts.

The Supreme Court didn't resolve every issue surrounding that element or what satisfies and what doesn't, but they did reinforce, very clearly, that it really needs to be property. And not the sort of made-up conceptions that are not property, which prosecutors have been using to make it easier to convict on property fraud theories.

It doesn't close the door on a lot of these cases, because a lot of them can be reframed. But it does, I think, reinforce that they need to proceed through the ordinary traditional, historical understanding of property and showing that the scheme really was intended to deprive somebody of property or obtain property, and not using these semantic workarounds to make it easier to convict.

I think it's going to be a really significant precedent going forward, especially in the Second Circuit where these alternative framings become almost the norm.

Do you have any thoughts about where we are going with respect to these types of cases, in the wake of the two most recent opinions?

Roth: I think the [justices] are hoping the message is going to get through, and that's what I kind of took away from it. These are short opinions, they're very to the point. They don't beat around the bush, and they're unanimous. I get the feeling they're saying, 'We really mean it, please stop,' and hoping that resonates.

I don't know that it tells us what they're going to do in any other case. I think it tells us that they're serious and these aren't like one-off, episodic issues. This is more of a theme.

Francisco: It's hard to make predictions as to where they're going, because these cases tend to be reactive, and I think they depend on what federal prosecutors charge. If the federal prosecutors continue with this aggressive charging pattern, and it's not fixed by the lower courts, that's when the Supreme Court steps in.

Look, I have no doubt that when defendants win these cases in the lower courts, the United States is very unlikely to ask the Supreme Court to review the cases.

--Editing by Philip Shea.
