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Supreme Court Watch: Recent Decisions of Selected Criminal Cases

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Supreme Court Watch

Recent Decisions of Selected Criminal Cases

BY DIANA TAFUR

Beard v. Kindler

08-992

Decided: December 2009

Question Presented:

For the purposes of federal habeas relief, can the adequacy of a state procedural rule hinge upon whether the rule is discretionary rather than mandatory?

Facts:

Joseph Kindler was convicted of first degree murder in a Pennsylvania state court and sentenced to death. Kindler appealed his sentence, but then escaped from prison before the judge could rule on the appeal. Kindler was captured in Quebec, but shortly thereafter, he escaped a second time and was recaptured. Five years later, Kindler sought reinstatement of his post-verdict appeal, but the court denied the appeal, holding that Kindler had waived his right to appeal his conviction because he fled prison. The Pennsylvania Supreme Court affirmed the ruling. In 1999, Kindler filed and was denied a habeas petition in federal district court. On appeal, the Third Circuit found that Pennsylvania's fugitive-forfeiture rule, which allowed for judicial discretion, was inadequate to bar federal review. Pennsylvania appealed to the Supreme Court.

Decision:

In a unanimous decision, the Supreme Court held that "a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. Nothing inherent in such a rule renders it inadequate for purposes of the adequate state ground doctrine." The Court noted that this decision should not provide broad guidance on the "adequate state ground doctrine," not

ing that "[i]f our holding in this case is narrow, it is because the question we granted certiorari to decide is narrow."



Bobby v. Van Hook

558 U.S. ____ (2009)

Decided: November 2009

Question Presented:

For purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), should defense counsel's performance be reviewed under professional standards that existed at the time of trial, as the majority of circuits require, or the under the current professional standards?

Facts:

Robert Van Hook was convicted of aggravated murder with one capital specification and aggravated robbery. Van Hook picked up David Self at a bar and the two went to Self's apartment where Van Hook lured Self into a vulnerable position, strangled him until he was unconscious, and then killed him with a kitchen knife.

At the sentencing hearing, the defense called eight mitigation witnesses, and Van Hook himself gave an unsworn statement. Defense counsel prepared the witnesses before the indictment, trial, and sentencing. The U.S. Court of Appeals for the Sixth Circuit granted Van Hook relief, holding that Van Hook's attorneys performed deficiently in investigating and presenting mitigating evidence at his sentencing.

Decision:

The Supreme Court held that the defense attorney acted reasonably. Citing the holding from *Strickland*, that representation must not fall below an objective standard of reasonableness in light of prevail-

ing professional norms, the Court concluded that the Sixth Circuit erred in relying on ABA guidelines established 18 years after Van Hook's trial. The Court stated that the Constitution has never required that defense counsel fully comply with statutory mandates. Although states are free to impose rules to ensure appropriate representation, the Court held that such rules should be regarded as evidence of what a reasonable diligent lawyer should do, rather than what a reasonable lawyer is required to do. Accordingly, the Court concluded that the attorney's investigation was reasonable and Van Hook was not deprived of effective assistance of counsel.

Corley v. United States

556 U.S. ____ (2009)

Decided: April 2009

Question Presented:

Does federal law permit the suppression of a voluntary confession made more than six hours after arrest but before presentment to a magistrate, as a consequence of unreasonable delay in presentment?

Facts:

Johnnie Corley was suspected of robbing a bank in Norristown, Pennsylvania. Federal agents went to arrest Corley and found him attempting to escape in his car. Corley nearly ran-over one officer and pushed down another. At 8:00 a.m., the agents arrested Corley for assaulting federal officers.

Federal agents kept Corley at a local police station while they questioned witnesses. At 11:45 a.m., the agents took Corley to the hospital to treat minor cuts he sustained during the arrest. Agents then took Corley to the Philadelphia FBI office at 3:30 p.m. and held him there until 6:30 p.m. The federal agents then asked Corley to put an alleged oral confession in writing. However, Corley told the agents he felt tired, so the agents held him overnight. The interrogation resumed at 10:30 a.m. the next morning, concluding with Corley signing a written confession. At 1:30 p.m., 29.5 hours after his arrest, police presented Corley to a magistrate who charged him with armed robbery and several other related charges. Corley moved to suppress the confession.

The District Court denied his motion to suppress under Rule 5(a), finding no unreasonable delay since Corley asked for a break and had to be taken to the hospital. The Third Circuit affirmed the ruling, holding that

18 U.S.C. § 3501 abrogated the *McNabb-Mallory* doctrine, which makes confessions inadmissible if they are obtained during an unreasonably long period of detention between the arrest and preliminary hearing. The Third Circuit ruled that under § 3501, confessions are admissible and voluntary after considering the points listed in § 3501(b), even if the presentment delay was unreasonable.

Decision:

In a 5-4 decision, the Supreme Court reversed and remanded the Third Circuit's decision and held that § 3501 only limits *McNabb-Mallory* rather than total abrogation. The Court ruled that the *McNabb-Mallory* doctrine still makes voluntary confessions inadmissible when they are given after an unreasonable delay. The Court clarified that § 3501(a) can only be interpreted to mean that all voluntary confessions are admissible as evidence, except when the confession is made after an unreasonable delay in presenting the defendant to the magistrate. In so ruling, the Court relied upon § 3501(c), which prevents a confession from being "inadmissible solely because of delay" when the confession is (1) voluntary and (2) made within six hours of arrest. The Court stated that holding otherwise would make subsection (c) superfluous.

Justice Alito, joined by Chief Justice Roberts, Jr., Justices Scalia, and Thomas dissented, arguing that the language found in § 3501(a) unambiguously makes confessions admissible if they are voluntarily given.

District Attorney's Office for the Third District v. Osborne

557 U.S. ____ (2009)

Decided: June 2009

Question Presented:

Under 42 U.S.C. § 1983 or under the Fourteenth Amendment's Due Process Clause, is a defendant entitled access to a state's biological evidence following conviction?

Facts:

In March 1994, William Osborne was convicted of kidnapping, assault, and sexual assault for forcing the victim to perform several sex acts, choking her, beat-

ing her with his gun and handle of a wooden axe, and shooting her in the head. After his conviction, Osborne requested the DNA evidence the state used against him. Osborne wanted to use new DNA testing technology to show that he was not the source. The state denied Osborne's request, and upon denial, Osborne filed suit pursuant to § 1983 claiming the District Attorney's Office violated his Fourteenth Amendment right to due process by refusing to provide potentially exculpatory evidence.

The Ninth Circuit reversed and remanded the district court's denial of Osborne's motion.

Decision:

In a 5-4 decision, the Supreme Court held that access to such DNA evidence, after Osborne was convicted in a fair trial, is not a constitutional right, but rather an issue for the states and the federal government to legislate. The Court pronounced that the appropriate test is the *Brady v. Maryland*, 373 U.S. 83 (1963) test, which asks whether the state's post-conviction procedures for relief offend a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental, or transgresses any recognized principle of fundamental fairness in operation.

Applying *Brady*, the Court found the state's post-conviction relief procedures to be adequate. The state allows individuals the right to be released when the evidence is sufficiently compelling in establishing innocence and allows for discovery in post-conviction proceedings, including access to DNA. There was ample evidence, aside from the DNA evidence, that Osborne committed the crime.

Justice Stevens filed a dissenting opinion joined by Justice Ginsburg, Justice Breyer, and Justice Souter joined in part, arguing that the Court's prior decisions and implementation of DNA access laws across the country make judicial intervention more, not less, appropriate.

Flores-Figueroa v. United States

556 U.S. ____ (2009)

Decided: May 2009

Question Presented:

Can an individual, who used false identification in the commission of a crime but was unaware that it belonged to another person, be convicted of "aggravated

identity theft" under 18 U.S.C. § 1028A(a)(1)?

Facts:

In 2000, Ignacio Flores-Figueroa secured employment using a false name, birth date, Social Security number, and a counterfeit alien registration card. Flores-Figueroa is a citizen of Mexico. In 2006, Flores-Figueroa provided his employer with more counterfeit documents that used his real name, but he was unaware that the documentation was legally registered to other people. The government charged Flores with entering the United States without inspection, misusing immigration documents, and aggravated identity theft. Flores-Figueroa was convicted on two counts of aggravated identity theft in a federal district court and sentenced to 75 months imprisonment.

Flores-Figueroa appealed the conviction, contending that the aggravated identity theft offense required he have knowledge that the identification belonged to another individual. The Eighth Circuit rejected the argument and affirmed the trial court's decision.

Decision:

The Supreme Court concluded that § 1028A(a)(1) requires the government to prove that the defendant knew that the means of identification he unlawfully transferred, possessed, or used, belonged to a real person. Applying the rules of statutory construction, the Court explained that phrases in a criminal statute that introduce the elements of a crime with the word "knowingly," must be read as applying "knowingly" to each element. In this case, because Flores-Figueroa did not know the information belonged to another, the government did not meet its burden of showing that Flores-Figueroa knowingly violated the statute. The Court reversed and remanded.

Justice Scalia, joined by Justice Thomas, wrote a separate concurring opinion, expressing that a *mens rea* or "knowingly" requirement should not ordinarily be read into criminal statutes, especially when the statute is carefully constructed to limit or eliminate a *mens rea* requirement.

Justice Alito also wrote a separate concurrence, noting that he was concerned that the Court's ruling would be read as applying an overly-rigid rule of statutory construction.

Knowles v. Mirzayance

556 U.S. ____ (2009)

Decided: March 2009

Question Presented:

Does a defense counsel's recommendation to abandon an insanity defense constitute ineffective assistance of counsel for the purpose of federal habeas law?

Facts:

Alex Mirzayance confessed to murdering his 19-year-old cousin by stabbing her nine times with a hunting knife and then shooting her four times. At trial, he entered two pleas, one of not guilty and another of not guilty by reason of insanity (NGI). Under California law, when these two pleas are entered, the court must hold a bifurcated trial, guilt determined during the first phase and the viability of the defendant's NGI plea during the second. Mirzayance sought to avoid a first-degree murder conviction during the guilt phase of Mirzayance's trial and presented medical testimony that he was insane at the time of the crime. The jury still convicted Mirzayance of first-degree murder. On the advice of his counsel, Mirzayance abandoned his NGI plea because he would have borne the burden of proving his insanity to the same jury that had just convicted him of first-degree murder. After the court sentenced Mirzayance, he challenged the conviction, claiming ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).

The California trial court denied the petition and the California Court of Appeal affirmed. The United States Court of Appeals for the Ninth Circuit found that the state court had unreasonably applied clearly established case law that defense counsel's failure to pursue the insanity defense constituted deficient performance.

Decision:

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit judgment and remanded the case with instructions to deny the petition, ruling that the California's decision to deny Mirzayance's claim did not violate clearly established federal law.

Under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1), a federal court may not grant a state prisoner's habeas application unless the relevant state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." In its ruling, the Court rejected

the Ninth Circuit analysis that Mirzayance had "nothing to lose" in pursuing his NGI defense and concluded that federal law never established such a standard. Instead, the Court ruled that habeas relief may only be granted if the state court decision unreasonably applied the ineffective-assistance-of-counsel standard established by *Strickland*, which holds that a defendant must show deficient performance and prejudice.

The Court found that Mirzayance's ineffective-assistance claim failed because it was reasonable for the state court to conclude Mirzayance's defense counsel's performance was not deficient. When Mirzayance's attorney advised him to abandon the NGI claim, the attorney did so because he believed his client stood almost no chance of success. The Court noted that it has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success. Accordingly, the Court found Mirzayance's attorney did not violate the *Strickland* standard.

Montejo v. Louisiana

556 U.S. ____ (2009)

Decided: May 2009

Question Presented:

Must an indigent defendant affirmatively accept the appointment of counsel in order to preclude future police interrogation without an attorney present?

Facts:

Jesse Montejo was charged with first-degree murder and the court ordered that an attorney be appointed for Montejo. Later that day, the police advised Montejo of his *Miranda* rights and asked Montejo to accompany them in locating the murder weapon. Montejo agreed. Neither Montejo, nor the police officers, were aware that Montejo had been appointed an attorney. During the search for the weapon, at the suggestion of one of the detectives, Montejo wrote an inculpatory letter of apology to the victim's widow. Upon returning to the police station, Montejo finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death.

The Louisiana Supreme Court concluded that, although Montejo had been appointed counsel at the

preliminary hearing, Montejo had not affirmatively requested counsel or invoked any of his *Miranda* rights, and, therefore, the letter was admissible.

Decision:

In a 5-4 opinion, the Supreme Court overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), a case holding that law enforcement must refrain from interrogating suspects once they have invoked their right to counsel at a preliminary hearing. The Court found *Jackson* unworkable because, in some jurisdictions, counsel is automatically appointed to indigent suspects, while other jurisdictions require suspects to formally request counsel before they are appointed an attorney. The Court explained that suspects are afforded sufficient Fifth and Sixth Amendment protections. Accordingly, the appropriate analysis is not whether or not the suspect was appointed counsel, but whether or not officers provided the suspect with his *Miranda* warnings and whether the suspect invoked those rights.

Although the Court found that the Louisiana Supreme Court correctly rejected Montejo's claim under *Jackson*, the Court remanded the lower court's decision in order to provide Montejo an opportunity to contend that his letter of apology should still have been suppressed on other grounds.

Justices Alito, joined by Justice Kennedy, filed a concurring opinion, noting that the Court was entitled to reject the doctrine of *stare decisis* and overturn *Jackson* because *Jackson* was poorly reasoned.

Justice Stevens, joined by Justice Souter, Justice Ginsburg, and Justice Breyer dissented, arguing that *Jackson* was not poorly reasoned and did not need to be overturned.

Justice Breyer filed a separate dissenting opinion, taking exception to the dissent's concession that *New York v. Belton*, 453 U.S. 454 (1981) should have been overturned.

Pearson v. Callahan

555 U.S. ____ (2009)

Decided: January 2009

Questions Presented:

For qualified immunity purposes, may police officers enter a home without a warrant on the theory that

the owner consented to entry by previously permitting an undercover informant into the home?

Should the Court should overrule *Saucier v. Katz*, 533 U.S. 194 (2001), a case holding that a qualified immunity challenge must pass a two-pronged test: first, the facts alleged must show that the government official(s) violated a constitutional right, and second that constitutional right was clearly established?

Facts:

An informant for the Central Utah Narcotics Task Force arranged to buy methamphetamine from Afton Callahan. The informant arrived at respondent's residence, confirmed Callahan had methamphetamine, and then left Callahan's home to obtain money. Police officers gave the informant a marked \$100 bill and a concealed electronic transmitter on the informant's person. Callahan's daughter let the informant into the home while Callahan retrieved a large bag containing methamphetamine from his freezer and sold the informant a gram of methamphetamine. Then the informant gave an "arrest" signal, and law enforcement entered the home through a porch door. The officers conducted a protective sweep of the premises, recovering the large bag of methamphetamine, the marked bill, the small bag containing methamphetamine from the informant, and drug syringes. Callahan was charged with the unlawful possession and distribution of methamphetamine.

Under 42 U.S.C. § 1983, Callahan sued the police officers for conducting a warrantless search. The United States Court of Appeals for the Tenth Circuit held the officers were not entitled to qualified immunity, finding that a reasonable police officer would have known not to proceed into the home without a search warrant.

Decision:

Justice Alito delivered the Court's unanimous opinion holding the *Saucier* protocol should not be regarded as mandatory in all cases and concluded the officers were entitled to qualified immunity. The Court revisited the doctrine of qualified immunity protecting government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known," as declared in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Saucier*, 533 U.S. 194. Under *Saucier* the Supreme Court mandated a two-step procedure for resolving

whether government officials' qualify for immunity. The procedure requires courts to first decide whether the plaintiff has alleged facts that constitute a violation of a constitutional right. If the first step is satisfied, then the court must decide whether the right at issue was "clearly established" at the time of government official's alleged misconduct.

Reviewing the consequences of *Saucier*, the Court determined that the imposition of the *Saucier* rule requires courts to depart from the general rule of constitutional avoidance, creates unnecessary litigation of constitutional issues, wastes the parties' and judicial resources when such litigation has no effect on the outcome of the case, and fails to contribute to the development of constitutional law because of the fact-intensive nature of the cases. Upon this reflection the Court held that, although the *Saucier* procedure is often appropriate, it should no longer be regarded as mandatory. The Court concluded that district court and appellate court judges should be permitted to exercise discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first. Applying this rational, the Court concluded that because these officers relied on the "consent-once-removed" doctrine, which had gained acceptance in the lower courts, the officers did not violate clearly established law and are entitled to qualified immunity.

Rivera v. Illinois

556 U.S. ____ (2009)

Decided: March 2009

Question Presented:

Does an erroneous denial of a criminal defendant's peremptory challenge, resulting in the challenged juror being seated, require automatic reversal of a conviction?

Facts:

During jury selection in Michael Rivera's first-degree murder trial, his counsel sought to use a peremptory challenge to strike a female venire member. However, Rivera had already exercised two peremptory challenges against women, one of whom was African-American. Believing Rivera was discriminating against women, the trial court rejected the third peremptory challenge. Under *Batson v. Kentucky*, 476 U.S. 79

(1986), parties are constitutionally prohibited from exercising peremptory challenges to exclude jurors based on race, ethnicity, or sex. At trial, the challenged juror was appointed the jury foreperson and the jury found Rivera guilty of first-degree murder.

On appeal, Rivera challenged the trial court's rejection of his peremptory challenge. The Supreme Court of Illinois held that the peremptory challenge should have been allowed, but that the error was harmless.

Decision:

The Supreme Court unanimously affirmed the lower decision, holding that the Due Process Clause of the Fourteenth Amendment does not require reversal whenever a criminal defendant's peremptory challenge is erroneously denied. The Court emphasized that it has never held a freestanding constitutional right to peremptory challenges, referring to it as a "creature of statute." Rejecting Rivera's argument, the Court held that if a defendant is tried before a qualified jury composed of individuals not challengeable for cause, then the loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern. The Court concluded the trial judge's refusal to excuse the challenged juror did not deprive Rivera of his constitutional right to a fair trial. The record did not show that the trial judge repeatedly or deliberately misapplied the law or acted in an arbitrary or irrational manner. Instead, the record demonstrated the trial judge's effort to enforce the anti-discrimination requirements of *Batson*.

Vermont v. Brillon

556 U.S. ____ (2009)

Decided: March 2009

Question Presented:

Do delays caused by public defenders, or resulting from a state's system of public defense, deprive a criminal defendant of his right to a speedy trial?

Facts:

On July 27, 2001, police arrested Michael Brillon for assaulting his girlfriend. Three days later he was arraigned in a Vermont state court and charged with felony domestic assault. The day of the arraignment, the county public defender's office appointed a public

defender as Brillon's first attorney. In October, the public defender filed a motion to recuse the trial judge. After a month, the motion was denied. In mid-January, the public defender moved for a continuance and the trial court denied the motion. On February 22, four days before the jury draw, the public defender again moved for a continuance. When the trial court denied the motion, Brillon asked the public defender be dismissed as his counsel and the court granted the motion. That same day, the trial court appointed a second attorney, but the second attorney immediately withdrew based on a conflict. On March 1, 2002, the court assigned Brillon a third attorney. On May 20, Brillon filed a motion to dismiss the third attorney for failure to file motions and lack of communication. On June 11, the third attorney moved to withdraw himself on the ground that Brillon had threatened his life. That same day, the trial court appointed a fourth attorney. Two months later, Brillon filed a motion to dismiss the fourth attorney. At a November 26 hearing, the fourth attorney reported that his contract with the Defender General's office had expired several months prior and that he was attempting to have Brillon's case reassigned. On January 15, 2003 the defender's office appointed Brillon's fifth attorney. The fifth attorney sought an extension for discovery deadlines on February 25. However, on April 10, the fifth attorney withdrew from the case based on contract modifications with the Defender General. On August 1, 2003, the Defender's Office appointed a sixth attorney for Brillon. On February 23, 2004, Brillon filed a motion to dismiss for lack of a speedy trial, but the trial court denied the motion.

The case finally went to trial on June 14, 2004. The jury found Brillon guilty and he was sentenced to 12 to 20 years in prison. The Vermont Supreme Court vacated defendant's conviction and held that he had been denied his Sixth Amendment right to a speedy trial.

Decision:

In a 7-2 decision, the Supreme Court reversed and remanded the Vermont Supreme Court's decision, holding that the Vermont Supreme Court erred in considering Brillon's assigned counsel as state actors because assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent. Noting that the Sixth Amendment guarantee of a speedy trial is dependent upon circumstances, the Court attributed most of the delays to the defendant's dismissal of counsel. Referring to *Barker v. Wingo*, 407 U.S. 514

(1972), which established a balancing test in which the conduct of both the prosecution and the defendant are weighed, the Court highlighted several factors in determining whether a delay constitutes a deprivation of a speedy trial: length of delay, reason for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. The Court found that most of the delays in Brillon's trial were attributable to him. Accordingly, the Court concluded, absent defendant's deliberate efforts to force the withdrawal of his prior counsel, no speedy-trial issue would have arisen.

Justice Breyer, joined by Justice Stevens dissented, arguing that there was no convincing reason to find error in the Vermont Supreme Court decision. In overturning Brillon's conviction, the Vermont Supreme Court, the dissent argued, properly attributed time against the state.

Wong v. Belmontes

558 U.S. ____ (2009)

Decided: November 2009

Question Presented:

Is an individual deprived of effective assistance of counsel where counsel failed to present mitigating evidence regarding that individual's background, character, mental state, and positive prison adjustment?

Facts:

While committing a burglary, Fernando Belmontes clubbed Steacy McConnell to death with a steel dumbbell bar. Belmontes struck her 15-20 times in the head until she died and then he stole her stereo. A jury convicted Belmontes of murder and he was sentenced to death.

At the sentencing hearing, Belmontes's defense attorney elicited testimony from nine witnesses about Belmontes's difficult childhood and religious conversion. As a strategy decision, Belmontes's attorney refused to elicit any other character evidence because the attorney did not want to open the door for the prosecution to discuss a prior murder in which Belmontes was found, after the fact, to be an accessory.

Belmontes argued that, because his counsel did not investigate and present sufficient mitigating evidence, he was deprived of effective assistance of counsel. The court of appeals agreed and granted Belmontes

federal habeas relief.

Decision:

The Supreme Court held that Belmontes was not deprived of effective assistance of counsel. Upholding *Strickland v. Washington*, 466 U.S. 668 (1984), the Court concluded that, to show ineffective assistance of counsel, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness and prejudice. The Court found that Belmontes's attorney understood the gravity of Belmontes's conduct in the prior murder and formed his strategy to prevent "opening of the door." The Court weighed how a jury would react to all the mitigating evidence in light of the aggravating evidence. The Court concluded that Belmontes's attorney submitted sufficient mitigating character evidence.

Yeager v. United States

557 U.S. ____ (2009)

Decision: June 2009

Question Presented:

Under the Double Jeopardy Clause, may the government retry acquitted defendants on factually related counts when the jury failed to reach a verdict?

Facts:

Scott Yeager, a former Enron executive, was charged with wire fraud, securities fraud, insider trading, money laundering, and conspiracy to engage in securities fraud and wire fraud. At trial the government tried to show that Yeager defrauded Enron investors and shareholders by purposely making misrepresentations and material omissions about revenues, business performance, and technological capabilities. The jury acquitted Yeager on several securities and wire fraud counts, but deadlocked on the remaining counts. The government subsequently recharged Yeager for insider trading and money laundering offenses.

Yeager moved to dismiss on double jeopardy grounds. This district court denied the motion and the Fifth Circuit Court of Appeals affirmed.

Decision:

In a 6-3 decision, the Court held that an apparent inconsistency between acquittals on some counts and a

jury's failure to return a verdict on other factually related counts does not diminish the acquittals' potential issue-preclusive force under the Double Jeopardy Clause. Relying on *Ashe v. Swenson* 397 U.S. 436 (1970), which precludes the government from retrying any crimes that have as a necessary element any issue that was already decided in a prior acquittal, the Court explained that, in identifying which issues a jury had previously conclusively determined, courts should look only to the jury's decisions rather than its failures to decide. In other words, "a jury speaks only through its verdict" because hung counts are unavoidably inscrutable. The Court concluded the jury's inability to reach a verdict on the insider trading counts were a "nonevent," entitled to no weight. The Court concluded that if the acquittal of insider trading was a critical issue of ultimate fact of all the other charges, then the prosecution would be barred from recharging on the other counts.

Justice Kennedy filed a separate concurring opinion, expressing that the Court should have required the lower court to revisit the factual analysis, rather than making it optional.

Justice Scalia, joined by Justices Thomas and Justice Alito dissented, arguing that the Double Jeopardy clause can have no preclusive effect within the same proceeding. There must be a separate prosecution altogether.

Justice Alito authored another separate dissent, to which Justices Thomas and Scalia joined, arguing that an acquittal should only have preclusive effect when it would have been irrational for the jury to acquit without a finding of fact.

GRANTED CERTIORARI

Florida v. Powell

08-1175

Argued: December 2009

Question Presented:

Does the lack of any explicit advice stating that a suspect has the right to counsel during questioning violate *Miranda v. Arizona*, 384 U.S. 436 (1966)?

Facts:

Kevin Powell was convicted of felony in possession of a firearm. When Powell was arrested and taken to the police department for questioning, the police recited to Powell, “You have the right to remain silent. If you give up this right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.” Powell subsequently waived his rights. Powell appealed his conviction arguing that he was not explicitly notified that he had a right to an attorney “during” his questioning, and therefore the questioning violated *Miranda*. The Florida Supreme Court ultimately reversed the conviction, holding that being told that an individual has the right to talk to an attorney before questioning is insufficient.

Graham v. Florida & Sullivan v. Florida

08-7412 & 08-7621

Argued: November 2009

Question Presented:

Does the Eighth Amendment’s ban on cruel and unusual punishment prohibit the sentence of life without the possibility of parole imposed on a juvenile convicted of a non-homicide offense?

Facts:

Terrance Graham was convicted of armed burglary and attempted armed robbery at the age of 16. After serving a 12-month sentence, Graham was accused of a probation violation for his involvement in an armed burglary. At the probation violation hearing, the judge considered Graham’s violent history and sentenced him to life in prison without parole.

At the age of thirteen, Joseph Sullivan was convicted of burglary and raping an elderly woman. At sentencing, the state presented evidence that Sullivan had participated in at least seventeen crimes before the rape and burglary. The judge determined that, given Sullivan’s violent past, he should be treated as an adult offender and sentenced Sullivan to life in prison without the chance of parole.

Johnson v. United States

08-6925

Argued: October 2009

Question Presented:

Is a prior state conviction for “battery,” in all cases, considered a “violent felony,” even where the state does not include as an element of the offense the use or threatened use of physical force?

Facts:

Curtis Johnson pleaded guilty to a single federal charge of possession of ammunition as a convicted felon. Johnson had several previous felony state convictions for aggravated battery, burglary, and battery. The Armed Career Criminal Act (ACCA) imposes a 15-year mandatory minimum sentence for an individual convicted under the act who also has three prior convictions for “violent felonies.” Under ACCA, Johnson was subject to a 15-year mandatory minimum sentence. The district court sentenced him to 185 months of imprisonment. On appeal the Florida Supreme Court overturned the sentence, ruling that battery did not constitute a violent felony because the use of force was not an element of the crime. The Eleventh Circuit reversed, upholding the trial court sentence.

Maryland v. Shatzer

08-680

Argued: October 2009

Question Presented:

Is *Edwards v. Arizona*, 451 U.S. 477 (1981), which prohibits interrogation of a suspect who has invoked the Fifth Amendment right to counsel, still applicable when the interrogation continues after a substantial delay from when the suspect requested counsel?

Facts:

In 2006, Michael Shatzer, Sr., was charged with a sexual offense in the second degree, sexual child abuse by a parent, second degree assault, and contributing to

Pottawattamie County v. McGhee

08-1065

Argued: November 2009

Question Presented:

Can a prosecutor, who procured false testimony during an investigation and then introduced the testimony against a defendant at trial, be subjected to a civil trial and potential damages for a wrongful conviction and incarceration?

Facts:

In 1978, Curtis McGhee Jr. was tried and convicted for the murder of an Iowa police officer. The Iowa Supreme Court vacated Harrington's conviction in 2003, after becoming aware that the prosecutors failed to disclose exculpatory evidence of an alternative suspect. In 2005, McGhee sued the prosecutors under 42 U.S.C. § 1983, alleging the prosecutors had coerced false testimony from witnesses and intentionally withheld exculpatory evidence of an alternative suspect.

The trial court granted Pottawattamie County's motion for summary judgment based on absolute and qualified immunity. The Seventh Circuit held that a prosecutor's procurement of false testimony, without more, does not violate any of a criminal defendant's constitutional rights. McGhee appealed to the Eighth Circuit under the collateral order doctrine. The Eighth Circuit reversed, holding that a prosecutor has *no* immunity "where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial," resulting in a post-trial "deprivation of liberty."

Smith v. Spisak

08-724

Argued: October 2009

Question Presented:

Did the Sixth Circuit contravene the Antiterrorism and Effective Death Penalty Act by improperly extending *Mills v. Maryland*, 486 U.S. 367 (1988), which held that, in capital cases, jurors may not be precluded from considering any mitigating circumstances proffered by the defendant?

conditions rendering a child in need of assistance. In August 2003, a police officer received a referral from a social worker about a child sexual abuse case. After interviewing the child, the police officer contacted Shatzer in jail where he was being held on a sex-offense charge involving a different victim. At the outset of the interrogation, the police officer notified Shatzer he was an officer and read him his *Miranda* rights. Shatzer invoked his right to counsel and the interview ceased. In March of 2006, a different police officer, investigating the same case, visited Shatzer in jail and read Shatzer his *Miranda* rights. Shatzer signed the form and agreed to talk with the officer. During this interrogation, Schatzer never invoked his right to an attorney. At trial, Schatzer moved to suppress the confession, arguing that he had invoked his right to counsel three years prior to the 2006 interrogation. The trial court denied the motion. On appeal, the Maryland Court of Appeals reversed, holding that *Edwards* applies when a suspect has been continually incarcerated and previously invoked his right to counsel.

Padilla v. Kentucky

08-651

Question Presented:

Does the Sixth Amendment's guarantee of effective assistance of counsel require an attorney to advise a non-citizen client that a guilty plea will trigger mandatory deportation, and if so, does it warrant setting aside the guilty plea?

Facts:

Jose Padilla, a non-citizen, was charged with trafficking and possessing marijuana, possession of drug paraphernalia, and operating a tractor without a weight and distance tax number. Relying on advice from his attorney, Padilla pleaded guilty to the drug charges. Padilla's guilty plea and subsequent conviction triggered deportation proceedings. Padilla filed for post-conviction relief, claiming ineffective assistance of counsel. The Kentucky Court of Appeals reversed and remanded the conviction. The Kentucky Supreme Court reversed, holding that collateral consequences of attorneys' advice are outside the scope of the Sixth Amendment.

Facts:

Frank Spisak was convicted of three murders in 1983. At the sentencing hearing, the trial court instructed the jury that if they all found proof beyond a reasonable doubt that the aggravating circumstances in each separate count outweighed the mitigating factors, then they must return that finding to the court. Spisak was subsequently sentenced to death.

However, the Sixth Circuit reversed and remanded the conviction, finding ineffective assistance of counsel and a *Mills* violation because the jury instructions required unanimity in the finding that the aggravating circumstances outweighed the mitigating factors. On appeal to the Supreme Court, the Court vacated the judgment and remanded the case in light of *Carey v. Musladin*, 549 U.S. 70 (2006) and *Schiro v. Landrigan*, 550 U.S. 465 (2007), two cases which addressed Spisak's ineffective assistance of counsel claim. On remand, the Sixth Circuit reinstated its decision.

United States v. Stevens

08-769

Argued: October 2009

Question Presented:

Is 18 U.S.C. § 48, criminalizing, *inter alia*, “knowingly selling depictions of animal cruelty with the intention of placing those depictions in interstate commerce for commercial gain” facially invalid under the Free Speech Clause of the First Amendment?

Facts:

Robert Stevens was convicted of selling videos of pit bulls participating in dog fights and attacking other animals through his business, “Dogs of Velvet and Steel” and a website called Pitbulllife.com. Stevens moved to dismiss the indictment on the grounds that the federal statute violates the Free Speech Clause, but the district court denied the motion. On appeal, the Third Circuit Court of Appeals reversed the conviction, finding that the statute was facially unconstitutional as a content-based prohibition of speech.

Wood v. Allen

08-9156

Argued: November 2009

Question Presented:

Did the state court err in its application of the Antiterrorism and Effective Death Penalty Act when the state court determined that it was not ineffective assistance of counsel for a defendant's novice attorney failure to present available evidence of the defendant's severely impaired mental functioning?

Facts:

In 1994, Mr. Holly Wood was convicted capital murder for killing his former girlfriend in her home. Evidence showed that Wood had an IQ within the range of mental retardation. At sentencing, Wood's attorney, who had just recently been admitted to the bar, only attempted to mitigate by eliciting pleas of mercy from Wood's family members, testimony about his upbringing, a police report that indicated he had been drinking at the time of his arrest, and a parole board report remarking that Wood needed anger-management therapy. The novice attorney made no attempt to introduce evidence of mental retardation, and had not attempted to investigate Wood's mental handicaps. The jury sentenced Wood death.

Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed the conviction and sentence, finding that the attorney's decision not to introduce evidence of mental retardation was a strategic decision. Wood subsequently filed for relief in federal courts. The federal district court granted relief, concluding that it was an unreasonable determination that the attorney's failure to introduce evidence was a strategic decision. The Eleventh Circuit reversed, concluding that there was ample evidence for the state courts to determine that the decision was a strategic move.

ABOUT THE AUTHOR

Diana Tafur received her B.A. from Florida State University, and is currently a 2L at the American University Washington College of Law.