Justice David Souter's Criminal Justice Cases

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At the request of Thomas L. Jipping, Legal Affairs Analyst, Coalitions for America, I have reviewed 72 New Hampshire Supreme Court opinions written by Justice David H. Souter in the areas of substantive criminal law and criminal procedure. I also have examined a few cases not on the list provided me. I chose these additional cases either because the issue presented was related to criminal justice or because Justice Souter wrote a separate opinion. My analysis of this body of case law follows.

I. Overview

Justice Souter is a knowledgeable and conscientious judge who seeks to identify precisely the issues before the court and to treat these issues fairly in accordance with applicable precedent. When statutes are involved, he seeks to ascertain the intended meaning of the provision at issue rather than to achieve his own policy objectives. Indeed, because he refrains from reaching out to decide issues not presented by the parties and from offering gratuitous remarks, Justice Souter's opinions give little insight into his personal values or politics. Clear,

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always well-reasoned, and concise, his opinions contain little, if any, dicta.

In analyzing Justice Souter's opinions, one must keep in mind the nature of the cases that came before him. Because New Hampshire lacks an intermediate appellate court, its Supreme Court decides many appeals that the highest courts of other states would not bother to review. One would expect, therefore, a relatively high affirmance rate in criminal cases, similar to that usually found in the intermediate appellate courts of other states. By the same token, one would expect a lower reversal rate than usually found in state supreme courts that are free to choose, on the basis of difficulty or importance, the cases they will review. One also would expect to find less complexity in, and fewer dissents from, the opinions of such a court. Although I have not done a statistical analysis, my impression from reading the cases is that these expectations are accurate.

Justice Souter's decisions on federal issues in criminal cases were potentially reviewable by the United States Supreme Court on direct review and by the lower federal courts and again by the United States Supreme Court on habeas corpus review. Independent of any actual review, of course, Justice Souter was bound by oath to apply applicable federal case law, an obligation that he took seriously. I can cite no case from my list in which Justice Souter "cheated" in reading the precedent. This obligation, however, especially when combined with Justice Souter's honesty in applying precedent and his reluctance to offer ex-

traneous remarks, makes it difficult to predict with confidence how Justice Souter would decide cases were he free to define the applicable law. Nevertheless, some insights are possible.

Justice Souter is a "conservative" judge in the criminal justice area in the sense that he does not reverse criminal convictions lightly. While he treats precedent fairly, he does not indulge the facile presumption that controversial precedents, particularly those that departed from historical understandings in imposing limits on law enforcement, should be extended even further. Rather, he places the burden of persuasion where it belongs -- on those who seek such extensions. Moreover, Justice Souter seems to believe that cogent arguments must precede use of the state constitution to impose restrictions on the prosecution that are not required by federal law. That is, he does not regard the so-called "new federalism" as a justification, by itself, for making law enforcement more difficult. When he finds error, Justice Souter is not willing to reverse convictions to achieve a speculative deterrent effect or merely to make a point. Rather, if the error is truly "harmless," -- and again, he is honest in evaluating this -- he will affirm the conviction. One may surmise, therefore, even though his opinions do not contain philosophical excursions, that Justice Souter firmly believes that the interest in ascertaining truth in criminal cases should be sacrificed only for compelling reasons. In this regard, he is considerably different from the justice whom he has been nominated to replace.

From what already has been said, it should come as no surprise that Justice Souter's criminal justice opinions disclose no agenda, other than one to apply the governing law honestly and with common sense. For those who seek a bold judge willing to undo past "mistakes," there may be cause to anticipate some disappointment. One can foresee, for example, Justice Souter failing to supply the necessary vote to overrule a questionable precedent because the case at bar can be decided on a narrower ground.[1] To cite one instance that perhaps supports this assessment, Justice Souter was offered an opportunity to overrule a 1978 state court decision that requires the prosecution to prove the validity of Miranda waivers beyond a reasonable doubt -- a standard subsequently rejected as too high for federal constitutional purposes by the United States Supreme Court. Justice Souter declined the opportunity because the issue was not, in his view, properly before the court and because the state, in any event, satisfied the heavier burden.[2] While some may see in this cause for concern, such caution, restraint, and commitment to procedural propriety may be what the country most needs given the politicized atmosphere that recently has surrounded both the

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[1] One is reminded of Justice White objecting in Illinois v. Gates, 462 U.S. 213 (1983), to the overruling of Spinelli v. United States, 393 U.S. 410 (1969), because, in his view, the case could have been decided favorably to the state under Spinelli.

[2] State v. Derby, 561 A.2d 504 (1989). In State v. Rathbun, 561 A.2d 505 (1989), however, Justice Souter refused to extend the earlier case to other Miranda issues.

judicial confirmation process in the Senate and the public evaluation of Supreme Court opinions.

From the cases I reviewed, I can find no legitimate basis for either side of the political spectrum opposing this intelligent jurist. Of course, for those who want politics rather than law from the Supreme Court, Justice Souter is not the right person. For those who know better, it should be evident that President Bush has made an excellent selection.

II. Review of Particular Cases

I have not attempted to discuss all, or even most, of Justice Souter's criminal justice opinions. What follows is an analysis of some cases in areas that might provoke particular interest. The discussion, though limited, should prove adequate to reveal the kind of jurist that Justice Souter is.

A. Police Interrogation Issues

Justice Souter wrote two opinions reversing convictions on the basis of issues that pertain to the use of confessions. One involved a challenge to police interrogation. The other, although not turning upon an issue of police interrogation as such, is discussed here because the defendant's response to the police during interrogation gave rise to the issue before the court.

Justice Souter also wrote several opinions affirming convictions in cases that raised police interrogation issues.

In State v. Lamb,[3] Justice Souter concluded that the trial judge failed to find, as required by a 1978 state case, that the validity of the defendant's Miranda waiver had been proved beyond a reasonable doubt. Because Lamb was decided before the United States Supreme Court applied the lower preponderance of the evidence standard to Miranda waivers,[4] it provided no occasion to review the earlier state court holding. (As discussed above, Justice Souter for procedural reasons declined a subsequent opportunity to review the 1978 decision.) Justice Souter's analysis of the record and treatment of precedent was honest and appropriate. While the reversal arguably turned on a "technicality," the technicality was not one of Justice Souter's making.

In State v. Jones,[5] the second reversal, Justice Souter actually concluded that Miranda had not been violated. Correctly anticipating a later Supreme Court case,[6] he first ruled that Miranda does not require the police to tell the suspect the crime he is suspected of having committed. He next ruled, again correctly, that the defendant's refusal to sign the statement he gave the police did not invalidate his previous waiver. Never-

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[3] 484 A.2d 1074 (1984).

[4] Colorado v. Connelly, 479 U.S. 157 (1986).

[5] 484 A.2d 1070 (1984).

[6] Colorado v. Spring, 479 U.S. 564 (1987), a 7-2 decision in which only Justices Brennan and Marshall dissented.

theless, Justice Souter deemed it necessary to reverse the defendant's conviction for attempted murder because the trial judge had answered "no" to the jury's question of whether the defendant's refusal to sign the statement meant that he completely denied its truth. Noting that lawyers would assume that the judge's answer meant only that the refusal was subject to more than one interpretation, Justice Souter nevertheless concluded that a lay jury probably would have taken the judge's unequivocal answer as a resolution of the factual issue. Because the issue of fact was for the jury, a reversal was necessary. Demonstrating both fairness to defendants and judicial integrity, Justice Souter properly concluded that this kind of error could not be deemed "harmless."

In State v. Lewis,[7] on the other hand, the facts presented a close issue as to whether the police had misled the defendant when they responded to his question about the meaning of waiver. Observing that the court would have agreed with the defendant if it had limited its review to the portion of the record he isolated, Justice Souter concluded that the entire record supported the trial judge's findings that the police did not mislead the defendant and that the defendant had a correct understanding of what it meant to waive his rights. Justice Souter observed, as he did in numerous other cases, that the trial judge's findings should stand unless they are contrary to the manifest weight of

[7] 533 A.2d 358 (1987).

the evidence. After dismissing other Miranda arguments that posed less difficulty, Justice Souter also rejected the defendant's claim that it was fundamentally unfair for the police to wire his acquaintance and use him as an informant. Referring to the defendant's argument as "obscure," Justice Souter remarked that fundamental unfairness for due process purposes does not occur "simply because a defendant places himself at a disadvantage under circumstances in which there are no substantive constitutional violations."[8]

State v. Bruneau[9] perhaps is one of the better cases for revealing Justice Souter's reluctance to reverse criminal convictions on the basis of strained constitutional arguments. The defendant, who previously had confessed to his friend about murdering his wife, continued to contact his friend by phone after he had been formally charged with the murder. When the friend informed the police of this, they neither encouraged nor discouraged him to take the long distance calls. The friend took the calls and later informed the police of the defendant's incriminating remarks and threats to witnesses. The defendant argued that this violated his right to counsel under both the state and national constitutions. Rejecting both claims, Justice Souter held, first, that the friend was not acting as an agent of the state at the time of the calls, his private "hopes" of

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[8] Id. at 365.

[9] 552 A.2d 585 (1988).

benefit not being equivalent to police inducement, and the police "readiness to receive" information not being equivalent to "importunity to obtain" information. Second, Justice Souter held that the friend did not interrogate or deliberately elicit incriminating remarks from the defendant. With regard to another statement admittedly taken in violation of Miranda, Justice Souter held, in accordance with United States Supreme Court precedent, that the statement could have been used, as the trial judge had ruled, for impeachment purposes. Because the defendant failed to make the argument in the trial court, and because, in any event, the defendant had not opened himself to impeachment by actually taking the stand, Justice Souter declined to consider whether a different impeachment rule should govern statements obtained in violation of either the sixth amendment or the state constitution's right to counsel provision rather than in violation of Miranda.

Bruneau came on the heels of (1) a 1983 decision, in which Justice Souter did not participate, that suggested, without holding, that the state constitution's right to counsel provision might give broader protection to defendants than the sixth amendment[10] and (2) a 1984 opinion in which Justice Souter noted in passing that state precedent interpreting the state constitution required the prosecutor to prove an explicit waiver of the

[10] State v. Tapply, 470 A.2d 900 (1983) (reversing defendant's conviction; Justice Souter not sitting).

right to counsel.[11] The dictum in these cases notwithstanding, Justice Souter declined in Bruneau to use the defendant's invocation of the state constitution as an excuse to impose further and questionable restraints on the use of a defendant's reliable admissions at trial.

B. Fifth Amendment Issues Not Related to Police Interrogation

Contrary to popular belief, the fifth amendment prohibits not self-incrimination but only "compelled" self-incrimination,[12] and then only self-incrimination of a testimonial or communicative nature. A defendant has no constitutional protection from being compelled to produce physical evidence, such as a handwriting sample or fingerprints, no matter how incriminating such evidence may be.[13] With their roots in the same common law background, self-incrimination clauses in state constitutions presumably are no broader. At the very least, the burden should be on those who would contend otherwise.

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[11] State v. Elbert, 480 A.2d 854 (1984) (finding no violation of the fifth or sixth amendments because the defendant initiated conversations about the crime with the police even though he earlier had invoked the right to counsel).

[12] United States v. Washington, 431 U.S. 181, 187 (1977).

[13] Gilbert California, 388 U.S. 263, 265-67 (1967); Schmerber v. California, 384 U.S. 757, 760-65 (1966).

Justice Souter's opinions evidence a keen appreciation that the protection against compulsory self-incrimination was not intended to protect the defendant from doing anything that harms his chances of acquittal. State v. Cormier[14] perhaps is his best reasoned opinion in this area. In Cormier, Justice Souter's opinion followed South Dakota v. Neville,[15] which had interpreted the fifth amendment, and held that the state's use of the defendant's refusal to take a chemical test for blood alcohol content did not violate the self-incrimination clause in the state constitution. Justice Souter concluded both that the refusal to take the test was not evidence of a "testimonial" nature and that the state did not "compel" the refusal. He reasoned that under governing case law, the legislature simply could have compelled the chemical test, because such a test produces evidence that is physical in nature. What the legislature did here was to give motorists a choice to refuse to take the test -- a choice it did not have to give -- but to impose a cost on the exercise of this choice. Without this cost, the legislature would have emasculated its testing law. Surprisingly, two justices declined to follow Neville and Justice Souter's reasoning.[16]

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[14] 499 A.2d 986 (1985).

[15] 459 U.S. 552 (1983).

[16] See also State v. Frederick, 566 A.2d 180 (1989) (again following Neville). In State v. Denney, 536 A.2d 1242 (1987), Justice Souter dissented from a holding, based on the state constitution's due process clause, that the defendant's refusal to take the test cannot be used as evidence if the police fail to advise the defendant that his refusal can be used against him. Justice Souter argued, first, that Miranda warnings provided the

In other opinions, Justice Souter held that neither the national nor the state constitution protects against compulsory disclosures in civil commitment proceedings.[17] He also held that a prosecutor's comment at trial about the defendant's trying to pull the wool over the eyes of the police and the jury was not a comment on the defendant's failure to testify.[18] Two other cases raised comment on silence issues. Affirming an attempted murder conviction, Justice Souter concluded that the prosecutor could ask the victim at trial whether the defendant apologized after the shooting, which the defendant claimed was accidental; Justice Souter reasoned that because neither the national nor the state constitution gives self-incrimination protection against private parties, such as the victim, the defendant could not invoke the rule that bars evidentiary use of post-arrest silence following

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defendant all the advice that was necessary. More fundamentally, Justice Souter disagreed that any warning pertaining to the evidentiary consequences of refusing to take the test was required. He charged the majority with transforming "the familiar and specific requirement of [Miranda] into a general rule of evidence, unlimited by any reference to the constitutional privilege that Miranda was intended to serve." Id. at 1247 Souter, J. dissenting). He also faulted the majority for failing to distinguish fundamental unfairness "from what the defendant finds unfortunate." Id. at 1249. In terms of statutory and constitutional construction and the treatment of precedent, the dissent reveals Justice Souter at his analytic best.

[17] State v. Mercier, 509 A.2d 1246 (1986).

[18] State v. Merrill, 484 A.2d 1065 (1984). Griffin v. California, 380 U.S. 609 (1967), prohibits comment on the defendant's failure to testify.

Miranda warnings.[19] In a related ruling, Justice Souter concluded that the prosecutor's evidentiary use at trial of the defendant's boast to the police that he was too sophisticated to confess constituted proper use of a statement rather than impermissible use of the defendant's invocation of his right to silence.[20] None of these holdings should be deemed controversial.

C. Search and Seizure

Because of the exclusionary rule, perhaps no one area of criminal procedure produces more litigation, and more hair-splitting, than search and seizure. Though sensitive to constitutional protection, Justice Souter demonstrated a disinclination to engage in the kind of technical Monday morning quarterbacking that too often has brought the criminal justice system into disrepute.

Most searches and arrests require probable cause. Although the United States Supreme Court has cautioned that probable cause is a practical, nontechnical concept that requires an exercise of common sense,[21] some appellate judges approach the issue as legal

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[19] State v. Brown, 517 A.2d 831 (1986). The defendant had invoked the rule of Doyle v. Ohio, 426 U.S. 610 (1976).

[20] State v. Coppola, 526 A.2d 1236 (1987).

[21] Illinois v. Gates, 462 U.S. 213 (1983); Brinegar v. United States, 338 U.S. 160 (1949).

technicians, giving no deference either to the often hurried judgments the police must make or to the evaluations of magistrates who issue warrants. Not Justice Souter.

In State v. Davis,[22] for example, Justice Souter upheld a warrant issued on the basis of a tip from an informant who had agreed to provide information to the police in return for favorable treatment with regard to his own criminal charge. Following Illinois v. Gates,[23] Justice Souter applied a totality of circumstances test to the issue of probable cause. He concluded that "participation in plea bargaining imposes no automatic disqualification of an informer." Looking at the police corroboration of the tip, Justice Souter reasoned that no special insight was needed to understand that the defendant was planning to sell drugs.

In State v. Baldic,[24] Justice Souter upheld a finding of probable cause based upon a robbery victim's not too detailed description. "On otherwise deserted streets, and within minutes of a late evening robbery in a small town, the officer saw an individual who matched the victim's description of the perpetrator as a male with bushy hair, and who was wearing a jacket that appeared to be consistent with the victim's description."[25]

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[22] 575 A.2d 4 (1990).

[23] 462 U.S. 213 (1983).

[24] 551 A.2d. 977 (1988).

[25] Id. at 978.

Justice Souter also found significant the defendant's failure to respond to the officer's spotlight. While the defendant, of course, could have been innocent of the robbery, Justice Souter's opinion implicitly recognized both that police often must act on the basis of the evidence they have -- not on what we might wish that they had -- and that police failure to act promptly after a crime often will mean that the crime goes unsolved. Justice Souter's opinion evinces an understanding that probable cause requires the common sense judgments of reasonably cautious police officers.[26]

State v. Faragi[27] provided an interesting twist on the probable cause issue. The defendant appealed a first degree murder conviction alleging, among other things, that his counsel was ineffective for failing to attempt to suppress the murder weapon on grounds of an allegedly illegal search of his home. Justice Souter concluded that the defendant could not possibly have been prejudiced by the lawyer's decision because the warrant that authorized the search was valid. Relying on a lower federal court opinion,[28] the defendant argued that it was not reasonable to assume that he kept the murder weapon in his home. Justice Souter opted for a "different generalization": "where the object

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[26] For similar holdings by Justice Souter, see State v. Chaloux, 546 A.2d 1081 (1988); State v. Maya, 493 A.2d 1139 (1985) (finding reasonable suspicion for a Terry stop after a store burglary).

[27] 498 A.2d 723 (1985).

[28] United States v. Charest, 602 F.2d 1015 (1st Cir. 1979).

of the search is a weapon used in the crime . . . the inference that the item is at the offender's residence is especially compelling."[29] Once again evidencing his appreciation of probable cause as a practical concept, Justice Souter concluded that the warrant application unquestionably established probable cause.

State v. Valenzuela,[30] a 3-1 decision, must rank as one the better, and most important, search and seizure opinions written by Justice Souter. The defendants challenged the use of pen registers by the state police that had been installed pursuant to federal court order. (A pen register records the numbers dialed from a phone but does not intercept conversations.) Although the United States Supreme Court in Smith v. Maryland[31] had held that the use of pen registers was not a "search" for fourth amendment purposes, the defendants claimed that the use of these devices was a search under the state constitution, and an illegal search in this instance because probable cause was lacking. Justice Souter's opinion declined to interpret the state constitution more broadly than the United States Supreme Court had interpreted the fourth amendment.

Justice Souter began by observing that both parties ironically had assumed that the reasonable expectation of privacy test

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[29] 498 A.2d. at 727, quoting 1 W. LaFave, Search and Seizure 709 (1978).

[30] 536 A.2d 1252 (1987).

[31] 442 U.S. 735 (1979).

from Katz v. United States[32] defined the scope of the state constitution's search and seizure provision. He suggested at least the possibility that the state constitution was intended to have a narrower scope than that defined by Katz. Nevertheless, proceeding on the assumption that the Katz privacy test controlled for state constitutional purposes, Justice Souter agreed with the analysis in Smith that pen registers do not fall within the scope of this test. Justice Souter carefully reviewed, argument by argument, the criticisms leveled at the Smith opinion, and he found each criticism lacking in merit. Demonstrating his legal acumen, he refused to rely on the weaker segments of the Smith opinion -- those dealing with subjective privacy expectations and "assumption of the risk." Nevertheless, he reasoned that to reject the Smith analysis in toto would be to cast doubt on a substantial body of search and seizure jurisprudence. The following is just one segment of a lengthy and thorough analysis:

> The defendants' position would redefine Katz's privacy by converting it from a defendant's right to be secure against certain means of non-consensual access to his communications and possessions, into a defendant's right to control the use of evidence without regard to how the defendant may have disclosed that evidence to

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[32] 389 U.S. 347 (1967).

> another. It would empower the defendant to enforce a kind of evidentiary copyright, by precluding the government's use of information for a purpose that the defendant did not intend when he communicated with another. Suffice it to say that we could not accept the defendants' position without a wholesale overruling of the agent-informer cases . . . which stand together as an integral limit to Katz's concept of privacy.[33]

A few other search and seizure decisions warrant passing comment. In State v. Stiles,[34] Justice Souter rejected an argument that a search warrant was tainted by illegal tape recording under a state statute; Justice Souter correctly observed that the agent's own recollection, not the tape recording, was the source of information for the warrant. Those more eager to apply exclusionary rules may not have perceived this distinction. In State v. Cimino,[35] Justice Souter rejected a similar "fruit of the poisonous tree" argument, concluding that even if the seizure of pills from a car was illegal, the pills played no role in the

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[33] 536 A.2d at 1261. Justice Souter also disposed of several other search and seizure issues. Deserving special commendation is his analysis showing that the defendants had confused stale probable cause and stale information that is used to establish current probable cause: "If such past fact contributes to an inference that probable cause exists at the time of the application, its age is no taint."

[34] 512 A.2d 1084 (1986).

[35] 439 A.2d 1197 (1985).

probable cause that subsequently developed. In State v. Cote,[36] Justice Souter rejected a hair-splitting argument that a search warrant for the defendant's restaurant did not permit a search of the restaurant's basement. In State v. Cannata,[37] he upheld a conviction by applying harmless error analysis to the search and seizure claim. Finally, in State v. Koppel,[38] Justice Souter dissented from an opinion that invalidated sobriety checkpoint stops as unreasonable searches and seizures under the state constitution. Just this year, Justice Souter's position on this issue was adopted for fourth amendment purposes by the United States Supreme Court.[39]

D. Admissibility of Eyewitness Identification Testimony

For some kinds of crimes, such as robbery and rape, eyewitness identification testimony can be crucial. The admission of such testimony was viewed entirely as a matter of state evidentiary law until the late 1960's, when the Supreme Court created new exclusionary rules stemming from its application of the sixth amendment right to counsel and the due process clause to pretrial police identification procedures.

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[36] 493 A.2d 1170 (1985).

[37] 543 A.2d 543 (1988).

[38] 499 A.2d 977 (1985).

[39] Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990).

In State v. Humphrey,[40] Justice Souter rejected a due process challenge to a pretrial photo display. Carefully examining the record, he demonstrated that the display was not unnecessarily suggestive. In State v. Prisby,[41] Justice Souter refused to consider such a challenge because the defendant had failed to make a timely objection. Perhaps most significantly, however, Justice Souter in State v. Cross[42] rejected an argument that eyewitness identification evidence should be suppressed, even absent police misconduct, simply because of the danger of unreliability. The federal constitutional exclusionary rules are based on the view that the state has no legitimate interest in contributing to the risk of mistake, as it might do, for example, by conducting an unnecessarily suggestive lineup. While the risk of mistake is inherent in human perception and recall, the additional risk created by unnecessarily suggestive identification procedures is gratuitous. When the police have not engaged in such misconduct, however, the rule is, as it always has been, that the weight, if any, that should be given to a witness's identification is for the jury or trier of fact to decide. Justice Souter in Cross adhered to the common law rule by refusing to create yet another, and even more novel, exclusionary rule

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[40] 531 A.2d 329 (1987).

[41] 500 A.2d 89 (1988).

[42] 519 A.2d 272 (1986).

that would make judges, rather than juries, the ones to evaluate witness credibility.

E. Guilty Pleas and Trial by Jury

In Richard v. MacAskill,[43] Justice Souter reversed a lower court order dismissing the defendant's habeas corpus challenge to a nolo contendere plea to shoplifting. The defendant alleged that his plea taking procedure did not comply with the procedural requirements of Boykin v. Alabama.[44] Justice Souter concluded that although a technical Boykin violation requires reversal on direct appeal, the defendant cannot prevail on collateral attack (i.e., habeas corpus) unless his plea was unknowingly or involuntarily made. If the defendant has shown a Boykin violation, however, the state has the burden of demonstrating the plea's validity. On the facts presented, Justice Souter concluded both that Boykin had been violated, in that the record did not show the defendant was aware of the rights she was relinquishing, and that the state failed to carry its burden of showing that the defendant understood she had the right to go to trial. Justice Souter remanded the case to give the state an opportunity to carry its burden.

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[43] 529 A.2d 898 (1987).

[44] 395 U.S. 238 (1969).

Richard is not wholly satisfactory in that it is difficult to believe that the defendant was not aware of what rights she was relinquishing when she entered her plea. Moreover, much can be said for a rule that presumes defense counsel has communicated with the client. Nevertheless, the United States Supreme Court has mandated procedures that will make evident on the record that the defendant explicitly waived his rights and entered a knowing plea, and there is no disputing that such a record did not exist in this case. Indeed, Justice Souter criticized the trial court because this was the second case in recent years to reveal that the court had made "neither a taped nor a written record." The clear message is that whatever one may think of Boykin, these errors are easy to avoid.

In State v. Hewitt,[45] Justice Souter similarly applied a rigorous standard to the issue of waiver of trial by jury. During the defendant's trial for forgery, the trial judge decided both to dismiss one of the jurors who might have known the defendant and to continue the trial with eleven jurors, no alternative jurors having been selected. The judge announced his decision to counsel in chambers and again in open court. On the latter occasion, defense counsel, in front of the defendant, responded, "That's fine." With new counsel on appeal, the defendant claimed that the waiver was invalid because the trial judge did not

[45] 517 A.2d 820 (1986).

follow a "Boykin" procedure to determine that he, the defendant, personally wanted to waive this right.

Relying on the state constitution's jury trial provision, Justice Souter agreed and reversed the conviction. Starting from the premise that "the right to trial by jury is one of central and fundamental importance," Justice Souter concluded that acquiescence in the loss of fundamental rights will not be presumed. Recognizing that a number of federal decisions had permitted the waiver of constitutional rights to be implied, Justice Souter found those decisions inapposite: first, the right at issue here was fundamental; second, the court knew that the right in question was being waived; third, the trial judge could have engaged in a waiver inquiry without requiring the defense to reveal strategic or confidential information. Justice Souter found the right at issue no less important because only one juror was dismissed: "twelve means twelve, and concessions can develop momentum."[46]

Among Justice Souter's opinions, Hewitt stands virtually alone in revealing a willingness to reverse a conviction for an arguably technical reason when there was a choice. As Justice Souter conceded, some federal cases specifically have held that defense counsel's stipulation to a jury of less than twelve is enough to bind the client. Moreover, the likelihood in this case that the defendant would have disagreed seems insubstantial. In

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[46] Id. at 822.

addition, Justice Souter's "slippery slope" concern about allowing any concessions is not fully persuasive. On the other hand, the right to trial by jury is fundamental in an historical sense, waiver of this right not even being permitted at common law and in the early days of this republic. If there are any rights the defendant personally must waive, trial by jury seems an obvious candidate for inclusion. Finally, as in MacAskill, the trial judge easily can avoid posttrial disagreements over waiver simply by asking the defendant whether he knows what he is relinquishing and wants to proceed. The Hewitt holding, that is, imposes no real burden on the criminal justice system.[47]

State v. O'Leary,[48] which involved both guilty plea and trial by jury issues, demonstrates Justice Souter's unwillingness, even in these two areas, lightly to overturn reliable convictions. Writing for the Court, Justice Souter first held that due process under the state constitution does not prevent the prosecution from rescinding a plea agreement before the defendant has pleaded or otherwise relied upon the agreement.[49] Second, Justice Souter held that the trial judge did not violate the defendant's right to trial by jury when he told the jury that they need not be concerned with proof of penetration because the

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[47] See also State v. Bailey, 503 A.2d 762 (1985) (due process requires a record to be made of the judge's conferences with jurors; on these facts, failure to make a record was harmless error).

[48] 517 A.2d 1174 (1986).

[49] Accord, Mabry v. Johnson, 467 U.S. 504 (1984).

defendant had admitted this element of the crime in his testimony. Sounding a cautionary note, however, Justice Souter added that "[t]here is a quantum difference of constitutional significance between a fact admitted under the conditions present here and a fact merely uncontested." Justice Souter also warned that judges should not assume that the defendant has made an admission if there is any doubt about the matter. Though concurring on harmless error grounds, two justices disagreed with Justice Souter's view that the trial judge did not violate the defendant's right to trial by jury.[50]

F. Ineffective Assistance of Counsel

Ineffective assistance of trial counsel quite understandably is a favorite allegation for disappointed defendants seeking to overturn their convictions either on direct appeal or collateral attack. If not approached realistically, such allegations can play havoc with the strong interest in finality in criminal prosecutions. An appellate judge aware of his or her limited role in this area knows that Monday morning quarterbacking is to be avoided. Legal assistance is ineffective not when the judge disagrees with strategic defense choices but only when those choices, one, are outside the bounds of reasonable disagreement

[50] See also State v. Elliot, 574 A.2d 1378 (1990) (plea is not unknowing because defendant not told conviction would make him liable to be declared a motor vehicle habitual offender).

and, two, prejudice the defendant. Justice Souter's opinions in this area reflect a proper awareness of the appellate court's role.

Justice Souter's opinion in State v. Faragi already has been discussed.[51] Justice Souter used a similar analytic approach in State v. Allegra,[52] affirming the defendant's forgery conviction but remanding for reconsideration of the sentence. The defendant alleged ineffective assistance of counsel because of counsel's failure to file a motion to quash the indictment on the ground that it charged a misdemeanor, not a felony as it claimed. Agreeing that the indictment incorrectly described the defendant's offense as a felony, Justice Souter disagreed that counsel was ineffective for failing to file a motion to quash. He pointed out that the indictment validly charged the misdemeanor offense, and that felony courts could assume jurisdiction over misdemeanors and probably would have done so in this case. Hence counsel's decision was not the product of professional incompetence. Moreover, because the defendant's sentence did not exceed what a misdemeanor conviction would have authorized, Justice Souter also concluded that the prejudice prong of the ineffective assistance of counsel test was not satisfied.

That Justice Souter approached ineffective assistance of counsel claims with common sense does not mean that he was cava-

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[51] See notes 27-29, supra, and accompanying text.

[52] 533 A.2d 338 (1987).

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lier in rejecting such claims. In the same Allegra case, he agreed that reconsideration of the sentence was necessary because the sentence imposed, though within what the misdemeanor statute authorized, may have been influenced by the judge's belief, not corrected by counsel, that the crime was a felony. Although this conclusion did not justify reversal of the sentence under the prejudice prong of the test, Justice Souter, demonstrating his fairness, used the court's supervisory power over the trial courts to order a reconsideration of the sentence. Showing his disinclination for wasting scarce judicial resources, however, Justice Souter observed that the trial judge simply could let the original sentence stand if in fact he had been aware that the offense was only a misdemeanor.

Justice Souter also found in Allegra that counsel was incompetent for failing to object to certain jury instructions. He avoided reversing the conviction outright only by concluding that the prejudice prong of the ineffective assistance of counsel test was not satisfied: the defendant failed to demonstrate a probability that the verdict would have been different.[53] Indeed, he thought it highly unlikely that the outcome would have been different. Justice Souter reached this conclusion only after carefully reviewing and analyzing the record. Finally, finding, as in Faragi, that the search warrant at issue was valid, Justice

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[53] The prejudice prong was imposed in Strickland v. Washington, 466 U.S. 668 (1984).

Souter absolved defense counsel of an additional charge of incompetence for not filing a motion to suppress.

Allegra reveals a judge without a "knee-jerk" response to issues that come before him. Although the temptation is great to become cynical about ineffective assistance claims, Justice Souter proceeded to consider and to address seriously each of the defendant's arguments in Allegra with regard to this issue. He found some of the arguments wholly lacking in merit, some only partially lacking in merit, and one -- that regarding the sentencing -- deserving of some appellate relief. Demonstrating fairness and care, he also eschewed precipitous and reckless use of the "reversal" club that an appellate court carries. More could not be asked of an appellate judge.[54]

G. Rape Shield Law

Loose talk has suggested that the only conviction Justice Souter ever reversed involved the state's rape shield statute. Presumably such hyperbole is supposed to convey a sense of a pro-prosecution judge who is not sensitive to the interests of women. If this is the intended message, it is wrong on both counts. Justice Souter's willingness to reverse convictions when neces-

[54] See also Hopps v. State Bd. of Parole, 500 A.2d 355 (1985) (rejecting an ineffective assistance of counsel claim predicated on an alleged conflict of interest).

sary already has been demonstrated. Attention here will focus on his decisions applying the rape shield statute.

New Hampshire's rape shield statute bars evidence of "prior sexual activity between the victim and any person other than the defendant."[55] In State v. Colbath,[56] the defendant was charged with felonious sexual assault. Having met the complainant at a bar and associated with her there during the afternoon, the defendant took her to his trailer, where sexual intercourse occurred. According to the complainant, the intercourse was forcible; according to the defendant, it was consensual. The defendant claimed that the complainant directed sexually provocative attention not only to him but also to several other men in the bar on the afternoon in question, and there was substantial evidence of this. The trial judge first permitted the defense to produce testimony to this effect, then ruled that such evidence was inadmissible, and then acquiesced nevertheless in the introduction of such evidence. In his instructions, however, the judge explicitly told the jury that the complainant's activities with other men on the day in question was not to be considered on the issue of consent. He relied, at least in part, on the rape shield law.

Justice Souter observed that the instruction could be upheld only if the evidence was excludable. Despite the apparently

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[55] RSA 632-A:6.

[56] 540 A.2d 1212 (1988).

absolute terms of the statute, earlier cases had held that the statute had to be construed so as not to violate the defendant's constitutional right to confrontation. In particular, State v. Howard,[57] decided before Justice Souter joined the court, had held that a defendant must be given an opportunity to show that the probative value of such evidence "in the context of [the] particular case outweighs its prejudicial effect on the prosecutrix." Justice Souter concluded that this was such a case.

First, the evidence at issue referred to public acts at the bar, not to private acts of an intimate nature: "evidence of public displays of general interest in sexual activity can be taken to indicate a contemporaneous receptiveness to sexual advances that cannot be inferred from evidence of private behavior with chosen sex partners." Second, the evidence was particularly strong given that the acts in question occurred closely in time to the alleged assault. Third, in this case, a motive to lie was presented in that the defendant's living companion had caught the defendant and the complainant in his trailer and violently assaulted the latter. "With the sex act thus admitted, with the evidence of violence subject to exculpatory explanation, and with a motive for the complainant to make a false accusation, the outcome of the prosecution could well have turned on a very close judgment about the complainant's attitude of resistance or consent." Furthermore, because the

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[57] 426 A.2d 457 (1981).

privacy interest underlying the statute was virtually absent here, there was little to outweigh the defendant's need for the evidence.[58] Given that no one has a legitimate interest in mistaken convictions, it should come as no surprise on facts such as these that no justice dissented.

In State v. Baker,[59] decided before Colbath, Justice Souter showed that application of the principles employed in that case has nothing whatsoever to do with the gender of the complainant. The defendant was convicted of felonious sexual assault of a thirteen year old boy. Writing for a unanimous court, Justice Souter reversed the conviction because the trial court had failed to provide the defendant the hearing required by Howard on the possible admissibility of sexual conduct evidence.

In State v. Goulet,[60] a case involving a female complainant, the prosecutor commented on the defendant's failure to show that the victim was sexually promiscuous. The trial judge overruled defense counsel's objection on the ground that such evidence could have been admissible despite the rape shield statute. Justice Souter concluded that the term "promiscuity" was broad enough to cover conduct not admissible under the Howard rule. He added, moreover, that Howard did not provide an automatic rule of admissibility; rather, the complainant's claim of personal priv-

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[58] 540 A.2d at 1217.

[59] 508 A.2d 1059 (1986).

[60] 529 A.2d 879 (1987).

acy cannot be defeated unless the defendant offers facts demonstrating that probative value outweighs prejudice. Justice Souter construed the Howard rule fairly and narrowly, thus demonstrating his sensitivity to the privacy interests of female complainants. In addition, by concluding that the defense had invited the prosecutor's comment, he also affirmed the defendant's conviction for a brutal sexual assault.[61]

H. Miscellaneous

As previously indicated, Justice Souter wrote too many criminal justice opinions to review even most of them. This is somewhat unfortunate, because numerous cases outside the areas already discussed confirm both his intellectual honesty and his intelligence. A few worth reading are mentioned here.

In State v. Springer,[62] Justice Souter rejected a construction of the state's restitution statute that would have permitted restitution to be ordered to the victim's insurance carrier. Justice Souter carefully reviewed the text of the statute and its legislative history in reaching this conclusion. To the state's argument that such an interpretation would produce an absurd

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[61] See also State v. Johnson, 564 A.2d 444 (1989), not involving the rape shield statute, but holding that the judge erred in sequestering the fourteen year old male complainant and, therefore, did not err in permitting him to testify in rebuttal.

[62] 574 A.2d 1381 (1990).

result, Justice Souter responded that such an argument should be redirected to the legislature. "[W]hen the intent is consistent with the language employed, this court has no interpretive right to disregard it in disparagement of the legislative choice it reflects." Obviously, this is a judge inclined to interpret rather than legislate the law.

In State v. Dufield,[63] Justice Souter rejected an argument that voluntary intoxication could be a defense to second degree murder based upon reckless indifference to human life. His reasoned opinion demonstrates keen ability to grapple with some of the difficult jurisprudential issues on the substantive side of the criminal law. In State v. Allen,[64] Justice Souter similarly wrote an insightful opinion explaining why an indictment for attempted murder need not allege the degree of the murder attempted. Particularly revealing of his judicial outlook was this comment: "We are dealing, after all, with a code of basic human conduct, not with a system of esoteric rules designed to guide specialist professionals."[65] Were it only true that all judges shared this view.

Finally, numerous decisions show appropriate deference to the findings of the trial judge. Among these are State v. Hart-

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[63] 549 A.2d 1205 (1988).

[64] 514 A.2d 1263 (1986).

[65] Id. at 1267.

ford,[66] upholding a hung jury mistrial challenged on double jeopardy grounds; State v. Cochran,[67] upholding a judge's evidentiary decision that probative value outweighed possible prejudicial effect; and State v. Knowles,[68] deferring to the trial judge's decision to invoke the catch-all exception to the hearsay rule.

III. Conclusion

The above review of Justice Souter's opinions should confirm the assessment of him set forth in the overview section of this analysis, and little would be served by repeating that assessment here. Suffice it to say that in a day when legal issues tend to be examined from the perspective of competing "sides," Justice Souter's opinions reflect that he is neither a "pro-prosecution" nor a "pro-defense" judge. Rather he is a fair and intelligent jurist who, while not inclined to indulge frivolous arguments for reversal, treats serious issues with the seriousness they deserve. He is a judge who believes in "neutral principles, "meaning that his decisions are dependent upon the issues in the particular case rather than upon the identity of the parties before the court. Thus, in one case, an application of the rape

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[66] 567 A.2d 577 (1989).

[67] 569 A.2d 756 (1990).

[68] 562 A.2d 185 (1989).

shield statute may favor the defendant, in another it may favor the male or female complainant; in one case, an examination of guilty plea requirements may favor the prosecutor, in another it may favor the defendant. Always, however, Justice Souter is wary of reversing convictions for insubstantial reasons. That some may view such a "conservative" approach to reversing convictions as proof of a bias for the prosecution reflects more on the times we live in, and on those who would make such a charge, than it does on Justice Souter's impartiality and legal ability.

State v. Tucker, 575 A.2d 910 (N.H. 1990)
State v. Davis, 575 A.2d 4 (N.H. 1990)
State v. Cartier, 575 A.2d 347 (N.H. 1990)
State v. Springer, 574 A.2d 1381 (N.H. 1990) - reversing restitution order
State v. Monsalve, 574 A.2d 1384 (N.H. 1990)
State v. Elliott, 574 A.2d 1378 (N.H. 1990) - affirming order denying motion to withdraw guilty plea
State v. Cochran, 569 A.2d 756 (N.H. 1990)
State v. Stanley, 567 A.2d 575 (N.H. 1989)
State v. Hatford, 567 A.2d 577 (N.H. 1989) - affirming order declaring mistrial
State v. Hodgkiss, 565 A.2d 1059 (N.H. 1989)
State v. Frederick, 566 A.2d 180 (N.H. 1989)
State v. Johnson, 564 A.2d 444 (N.H. 1989)
State v. Grondin, 563 A.2d 435 (N.H. 1989)
State v. Knowles, 562 A.2d 185 (N.H. 1989)
State v. Rathbun, 561 A.2d 505 (N.H. 1989)
State v. Tucker, 561 A.2d 1075 (N.H. 1989)
State v. Derby, 561 A.2d 504 (N.H. 1989)
State v. Hood, 557 A.2d 995 (N.H. 1989)
State v. Baldic, 551 A.2d 977 (N.H. 1988)
State v. Breneau, 552 A.2d 585 (N.H. 1988)
State v. Dufield, 549 A.2d 1205 (N.H. 1988)
State v. Prisby, 550 A.2d 89 (N.H. 1988)
State v. Chaloux, 546 A.2d 1081 (N.H. 1988)
State v. Cannata, 543 A.2d 421 (N.H. 1988)
State v. Svoleantopoulos, 543 A.2d 410 (N.H. 1988)
In re $207,523.46 in U.S. Currency, 536 A.2d 1270 (N.H. 1987) - affirming decree ordering asset forfeiture
State v. Valenzuela, 536 A.2d 1252 (N.H. 1987)
State v. Coppola, 536 A.2d 1236 (N.H. 1987)
State v. Jordan, 534 A.2d 378 (N.H. 1987)
State v. Allegra, 533 A.2d 338 (N.H. 1987)
State v. Therrian, 533 A.2d 346 (N.H. 1987)
State v. Lewis, 533 A.2d 358 (N.H. 1987)
State v. Rollins, 533 A.2d 331 (N.H. 1987) - affirming order granting defendant motion to dismiss citizen's criminal action
State v. Humphrey, 531 A.2d 329 (N.H. 1987)
State v. Murray, 531 A.2d 323 (N.H. 1987)
State v. Pugliese, 529 A.2d 925 (N.H. 1987)
Richard v. MacAskill, 529 A.2d 898 (N.H. 1987) - vacating dismissal of petition to vacate conviction because plea not knowing or voluntary
State v. Goulet, 529 A.2d 879 (N.H. 1987)
State v. Heath, 523 A.2d 82 (N.H. 1986)
State v. Cross, 519 A.2d 272 (N.H. 1986)
State v. Beede, 519 A.2d 260 (N.H. 1986)

State v. Brown, 517 A.2d 831 (N.H. 1986)
State v. O'Leary, 517 A.2d 1174 (N.H. 1986)
State v. Hewitt, 517 A.2d 820 (N.H. 1986)
State v. Allen, 514 A.2d 1263 (N.H. 1986)
Baker v. Cunningham, 513 A.2d 956 (N.H. 1986) - affirming dismissal of petition for habeas corpus
State v. Deflorio, 512 A.2d 1133 (N.H. 1986)
State v. Dominguez, 512 A.2d 1112 (N.H. 1986)
State v. Mercier, 509 A.2d 1246 (N.H. 1986) - affirming order committing defendant found not guilty by reason of insanity to state hospital
State v. Stiles, 512 A.2d 1084 (N.H. 1986)
State v. Baker, 508 A.2d 1059 (N.H. 1986)
Hopps v. State Board of Parole, 500 A.2d 355 (N.H. 1985) - affirming denial of petition for writ of habeas corpus
State v. Dukette, 506 A.2d 699 (N.H. 1986)
State v. Bailey, 503 A.2d 762 (N.H. 1985)
State v. Cormier, 499 A.2d 986 (N.H. 1985)
State v. Campbell, 498 A.2d 330 N.H. 1985)
State v. Faragi, 498 A.2d 723 (N.H. 1985)
State v. Cavanaugh, 498 A.2d 735 (N.H. 1985)
State v. Batchelder, 496 A.2d 346 (N.H. 1985)
State v. Wright, 496 A.2d 702 (N.H. 1875)
State v. Cimino, 493 A.2d 1197 (N.H. 1985)
State v. Maya, 493 A.2d 1139 (N.H. 1985)
State v. Cote, 493 A.2d 1170 (N.H. 1985)
State v. Allison, 489 A.2d 620 (N.H. 1985)
State v. Sefton, 485 A.2d 284 (N.H. 1984)
State v. Alcorn, 484 A.2d 1176 (N.H. 1984)
State v. Crosman, 484 A.2d 1095 (N.H. 1984)
State v. Merrill, 484 A.2d 1065 (N.H. 1984)
State v. Jones, 484 A.2d 1070 (N.H. 1984)
State v. Lamb, 484 A.2d 1074 (N.H. 1984)
State v. Cook, 481 A.2d 823 (N.H. 1984)
State v. Elbert, 480 A.2d 854 (N.H. 1984)