

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Stephen May v. David Shinn

No. 17-15603, 17-15704, United States Court of Appeals for the Ninth Circuit (March 27, 2020)

SUMMARY

****Key Legal Topics:**** Ineffective assistance of counsel (Sixth Amendment); mistrial and resumption of jury deliberations after deadlock; Strickland performance prong; AEDPA deference. ****Holdings:**** The Ninth Circuit held that defense counsel’s failure to object to the jury resuming deliberations after a declared mistrial was not deficient performance under Strickland. Counsel reasonably concluded that continuing with the existing jury and favorable instruction (barring propensity evidence under Ariz. R. Evid. 404(c)) offered a better chance of acquittal than a retrial, where the prosecution could strengthen its case. The court rejected May’s habeas claim, and the district court’s grant of relief was reversed. ****Key Concepts:**** Strategic decision to forgo mistrial may be reasonable when the evidence is weak, the jury is deadlocked, and a retrial risks a more damaging prosecution case. Counsel’s decision is evaluated from counsel’s perspective at the time, with no duty to investigate further when the choice is objectively reasonable.

CASE DETAILS

COURT	United States Court of Appeals for the Ninth Circuit
WRITING FOR THE COURT	Michelle T. Friedland; Sandra S. Ikuta; Frederic Block
JURISDICTION	Federal
DECIDED	March 27, 2020
DOCKET	17-15603, 17-15704
DISPOSITION	reversed
PROCEDURAL POSTURE	Appeal and cross-appeal from district court's decision on habeas petition
STANDARD OF REVIEW	De novo for Strickland performance prong (state court did not decide); AEDPA deference for prejudice prong
PRECEDENTIAL VALUE	Published
PARTIES	David Shinn and Mark Brnovich v. Stephen Edward May

TOPICS

habeas corpus

sixth amendment

right to counsel

criminal procedure

standard of review

appellate procedure

PRACTICE AREAS

Criminal Law

Habeas Corpus

Ineffective Assistance of Counsel

QUESTIONS PRESENTED

1. Whether defense counsel's failure to object to the resumption of jury deliberations after a mistrial constituted ineffective assistance of counsel under Strickland.

HOLDINGS

1. Counsel's performance was not deficient because it was a reasonable strategic choice to continue with the existing jury rather than risk a retrial, given the weaknesses in the State's case and the favorable jury instruction.

KEY QUOTATIONS

"We hold that May's counsel was not ineffective because, on the facts of this case, it was a reasonable prediction that May had a better chance of a more favorable verdict from the existing jury on the existing trial record than he would from a retrial." (at 4)

"We are a hung jury because the not guilty side doesn't believe there is enough evidence and the guilty side believes there is." (at 13)

"Evidence of other acts has been presented. You may consider this evidence only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider this evidence to establish the defendant's motive, opportunity, intent, plan, absence of mistake or accident. You must not consider this evidence to determine the defendant's character or character trait, or to determine that the defendant acted in conformity with the defendant's character or character trait and therefore committed the charged offense." (at 13-14)

"The proper measure of attorney performance when evaluating a claim that the Sixth Amendment right to effective assistance of counsel was violated is reasonableness under prevailing professional norms." (at 18-19)

"Judicial scrutiny of counsel's performance must be highly deferential." (at 19)

FACTUAL BACKGROUND

Stephen May was convicted of five counts of child molestation based on testimony from four children. After the close of evidence, the jury reported deadlock, and the judge declared a mistrial. Minutes later, the jury asked to resume deliberations. May's defense counsel did not object, and the jury convicted on most counts. The evidence included inconsistencies and lack of corroboration, and the jury acquitted on two counts related to one child.

PROCEDURAL HISTORY

May was convicted in Arizona state court on five counts of child molestation. After state post-conviction relief was denied, he filed a federal habeas petition. The district court granted relief on the ground that the Arizona child molestation statute was unconstitutional, but denied relief on the ineffective assistance claim. Both sides appealed.

DISPOSITION

reversed

CASES CITED

- Strickland v. Washington, 466 U.S. 668 (1984)
- Porter v. McCollum, 558 U.S. 30 (2009)
- Hinton v. Alabama, 571 U.S. 263 (2014)
- Buck v. Davis, 137 S. Ct. 759 (2017)
- Berghuis v. Thompson, 560 U.S. 370 (2010)
- Brewster v. Hetzel, 913 F.3d 1042 (11th Cir. 2019)
- Lane v. Lord, 815 F.2d 876 (2d Cir. 1987)
- United States v. Beckerman, 516 F.2d 905 (2d Cir. 1975)
- Morris v. California, 966 F.2d 448 (9th Cir. 1991)
- Dietz v. Bouldin, 136 S. Ct. 1885 (2016)
- United States v. DiFrancesco, 449 U.S. 117 (1980)
- United States v. McGowan, 668 F.3d 601 (9th Cir. 2012)
- Padilla v. Kentucky, 559 U.S. 356 (2010)
- Harrington v. Richter, 562 U.S. 86 (2011)
- Williams v. Taylor, 529 U.S. 362 (2000)
- Coleman v. Thompson, 501 U.S. 722 (1991)

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