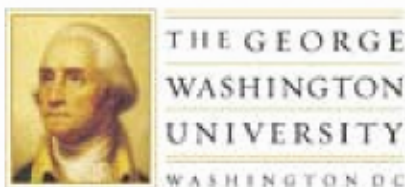


The Burger Court Opinion Writing Database

Cupp v. Murphy

412 U.S. 291 (1973)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University



CHAMBERS OF
THE CHIEF JUSTICE

Supreme Court of the United States
Washington, D. C. 20543

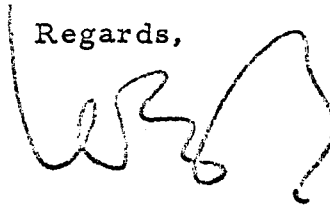
May 8, 1973

Re: No. 72-212 - Cupp v. Murphy

Dear Potter:

Please join me.

Regards,



Mr. Justice Stewart

Copies to the Conference

7
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 25, 1973

Re: No. 72-212 - Cupp, et al v. Murphy

Dear Lewis:

Please join me in your concurrence.

Regards,

WESB

Mr. Justice Powell

Copies to the Conference

6-011

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 25, 1973

Re: No. 72-212 - Cupp, et al v. Murphy

Dear Harry:

Please join me in your concurrence.

Regards,

WB B

Mr. Justice Blackmun

~~Copies to the Conference.~~

files
rev.
4-19-73

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-212

Hoyt C. Cupp, Superintendent, Oregon State Penitentiary, Petitioner, v. Daniel P. Murphy.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
---	---	---

[April —, 1973]

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by *Chimel v. California*, 395 U. S. 752, on which the Court relies, for in *Chimel* an arrest had been made.

The reasons why no arrest of Murphy was made on the day his fingernails were scraped creates a nagging doubt that they did not then have probable cause to make an arrest and did not reach that conclusion until a month later. Why was Murphy allowed to roam at will, a free man, for the next month? The evolving pattern of a conspiracy offense might induce the police to

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

59

1, 2

J.C.
reciv.
4-23-73

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No 72-212

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner.
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by *Chimel v. California*, 395 U. S. 752, on which the Court relies, for in *Chimel* an arrest had been made.

As the Court states, Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210. No such arrest was made until a month after Murphy's fingernails were scraped. As we stated in *Johnson v. United States*, 333 U. S. 10, 15 n. 5, "State law determines the validity of arrests without warrant." The case is therefore on

2, 3, 4

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-212

Circulated:

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary.
Petitioner.

?

Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

Recirculated:

4-30

[April —, 1973]

MR. JUSTICE DOUGLAS, dissenting in part.

I agree with the Court that exigent circumstances existed making it likely that the fingernail scrapings of suspect Murphy might vanish if he were free to move about. The police would therefore have been justified in detaining him while a search warrant was sought from a magistrate. None was sought and the Court now holds there was probable cause to search or arrest, making a warrant unnecessary.

Whether there was or was not probable cause is difficult to determine on this record. It is a question that the Court of Appeals never reached. We should therefore remand to it for a determination of that question.

The question is clouded in my mind because the police did not arrest Murphy until a month later. It is a case not covered by *Chimel v. California*, 395 U. S. 752, on which the Court relies, for in *Chimel* an arrest had been made.

As the Court states, Oregon defines arrest as "the taking of a person into custody so that he may be held to answer for a crime." Ore. Rev. Stat. § 133.210. No such arrest was made until a month after Murphy's fingernails were scraped. As we stated in *Johnson v. United States*, 333 U. S. 10, 15 n. 5, "State law determines the validity of arrests without warrant." The case is therefore on

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-212

From: Brennan, J.

Circulated: 5/2/73

Recirculated: _____

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

} On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE BRENNAN, dissenting in part.

Without effecting an arrest, and without first seeking to obtain a search warrant from a magistrate, the police decided to scrape respondent's fingernails for potentially destructible evidence. In upholding this search, the Court engrafts another, albeit limited, exception on the warrant requirement. Before we take the serious step of legitimating even limited searches merely upon probable cause—without a warrant or as incident to an arrest—we ought first be certain that such probable cause in fact existed. Here, as my Brother DOUGLAS convincingly demonstrates "[w]hether there was or was not probable cause is difficult to determine on this record." *Ante*, at —. And, since the Court of Appeals did not consider that question, the proper course would be to remand to that court so that it might decide in the first instance whether there was probable cause to arrest or search. There is simply no need for this Court to decide, upon a disputed record and at this stage of the litigation, whether the instant search would be permissible if probable cause existed.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES ^{From Stewart, J.}

No. 72-212

Circulated: **APR 16 1973**

Recirculated: _____

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary.
Petitioner.

v.

Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a red spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He ~~refused~~. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

B — 1, 2, 3, 5

To: The Chief Justice
✓ Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: _____

No. 72-212

Recirculated: APR 21 1973

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

9
2-3

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 72-212

Recirculated: APR 30 1973

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

— p.6
B.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
✓ Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72-212

Recirculated: MAY 10

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[April —, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Daniel Murphy, was convicted by a jury in an Oregon court of the second-degree murder of his wife. The victim died by strangulation in her home in the city of Portland, and abrasions and lacerations were found on her throat. There was no sign of a break-in or robbery. Word of the murder was sent to the respondent, who was not then living with his wife. Upon receiving the message, Murphy promptly telephoned the Portland police and voluntarily came into Portland for questioning. Shortly after the respondent's arrival at the station house, where he was met by retained counsel, the police noticed a dark spot on the respondent's finger. Suspecting that the spot might be dried blood and knowing that evidence of strangulation is often found under the assailant's fingernails, the police asked Murphy if they could take a sample of scrapings from his fingernails. He refused. Under protest and without a warrant, the police proceeded to take the samples, which turned out to contain traces of skin and blood cells, and fabric from the victim's nightgown. This incriminating evidence was admitted at the trial.

file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 1, 1973

Re: No. 72-212 - Cupp v. Murphy

Dear Potter:

Please note at the foot of your opinion in this case that Mr. Justice White joins the opinion of the Court but does not consider the issue of probable cause to have been decided here or to be foreclosed on remand to the Court of Appeals where it has never been considered.

Sincerely,



Mr. Justice Stewart

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES Marshall, J.

No. 72-212

Circulated: APR 27 1973

Recirculated: _____

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE MARSHALL, concurring.

I join the opinion of my BROTHER STEWART.

Murphy's freedom of movement was unquestionably limited when the police did not acquiesce in his refusal to permit them to take scrapings from his fingernails. But that detention, although a seizure of the person protected by the Fourth Amendment, did not amount to an arrest under Oregon law. See Ore. Rev. Stat. § 133.210. The police, understanding this, did not, for example, take Murphy promptly before a magistrate after this detention, as state law requires after an arrest. Ore. Rev. Stat. § 133.550.* As we have said before, however, "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U. S. 1, 16 (1968). See also *id.*, at 19 n. 16, 26; *Sibron v. New York*, 392 U. S. 40, 67 (1968).

*Thus this case does not require us to determine whether the police were required to obtain a warrant for Murphy's arrest at the relevant time. Cf. *Jones v. United States*, 357 U. S. 493, 499-500 (1958); *Coolidge v. New Hampshire*, 403 U. S. 443, 477-481 (1971).

WP
WD

23
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackman
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Marshall, J.

No. 72-212

Circulated: _____

Recirculated: MAY 3 '73

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy. } On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE MARSHALL, concurring.

I join the opinion of my BROTHER STEWART.

Murphy's freedom of movement was unquestionably limited when the police did not acquiesce in his refusal to permit them to take scrapings from his fingernails. But that detention, although a seizure of the person protected by the Fourth Amendment, did not amount to an arrest under Oregon law. See Ore. Rev. Stat. § 133.210. The police, understanding this, did not, for example, take Murphy promptly before a magistrate after this detention, as state law requires after an arrest. Ore. Rev. Stat. § 133.550.¹ As we have said before, however, "It is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the stationhouse and prosecution for crime—'arrests' in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U. S. 1, 16 (1968). See also *id.*, at 19 n. 16, 26; *Sibron v. New York*, 392 U. S. 40, 67 (1968).

¹ Thus this case does not require us to determine whether the police were required to obtain a warrant for Murphy's arrest at the relevant time. Cf. *Jones v. United States*, 357 U. S. 493, 499-500 (1958); *Coolidge v. New Hampshire*, 403 U. S. 443, 477-481 (1971).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 27, 1973

MEMORANDUM TO THE CONFERENCE

Re: No. 72-212 - Cupp v. Murphy

At our conference last Friday my vote was to remand to the Ninth Circuit for them to consider the issue of probable cause. The remand would rest on the conclusion that that court was in error in determining that the circumstances were not exigent. On further consideration, I have reached the conclusion that we should reverse and not remand. I am prompted to this conclusion, among other things, by the fact that this is a state case and comes to us on federal habeas.

H.A.B.
—

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

wB

wD

3
CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

Supreme Court of the United States
Washington, D. C. 20543

May 3, 1973

Re: No. 72-212 - Cupp v. Murphy

Dear Potter:

I am generally with you. I have been somewhat hung up because I would not want any observations in this opinion to be regarded, directly or by inference, as narrowing or foreclosing in any respect the issue to be considered in the search-upon-arrest cases, No. 72-936, U.S. v. Robinson, and No. 71-1669, Gustafson v. Florida, where certiorari has been granted. I would feel more comfortable if the opinion could be clarified with a sentence or two to this effect.

In any event, I am interested in what Lewis will have to say in the concurrence he is contemplating.

Sincerely,

Harry

Mr. Justice Stewart

Copies to the Conference

1476
1623

May 9, 1973

Re: No. 72-212 - Cupp v. Murphy

Dear Potter:

After our telephone conversation of yesterday afternoon I have reviewed this case. I am sending to the Printer a very short separate concurrence. Herewith is a typed copy of that concurrence so that you will not be delayed in your preparation for Monday.

Sincerely,

HAB

Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Blackmun, J.

No. 72-212

Circulated: 5/16/73

Recirculated:

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,

v.

Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE BLACKMUN, concurring.

The Court today permits a search for evidence without an arrest but under circumstances where probable cause for an arrest existed, where the officers had reasonable cause to believe that the evidence was on respondent's person, and where that evidence was highly destructible. The Court, however, restricts the permissible quest to "the very limited search necessary to preserve the highly evanescent evidence they found under [respondent's] fingernails."

While I join the Court's opinion, I do so with the understanding that what the Court says here applies only where no arrest has been made. Far different factors, in my view, govern the permissible scope of a search incident to a lawful arrest.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 2, 1973

No. 72-212 CUPP v. MURPHY

Dear Potter:

Please join me in your opinion for the Court.

It is possible, as I indicated to you in our talk today, that I may file a concurring opinion. In view of this possibility, I understand that it is agreeable to you for me to have additional time to consider this.

Sincerely,

L. F. Powell

Mr. Justice Stewart

cc: Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
• Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Circulated: MAY 23 1973

No. 72-212

Recirculated: _____

Hoyt C. Cupp, Superintendent,
Oregon State Penitentiary,
Petitioner,
v.
Daniel P. Murphy.

On Writ of Certiorari
to the United States
Court of Appeals for
the Ninth Circuit.

[May —, 1973]

MR. JUSTICE POWELL, concurring.

In this case the District Court and the Court of Appeals entertained a habeas corpus attack upon a state court conviction on the ground that the evidence seized in violation of the Fourth Amendment had been wrongly admitted at the state trial. For the reasons set forth in my concurring opinion in *Schneckloth v. Bustamonte*, p. —, ante, I think a claim such as this is properly available in federal habeas corpus only to the extent of ascertaining whether the petitioner was afforded a fair opportunity to raise and have adjudicated the question in state courts. The Court today, however, reaches the merits of the respondent's Fourth Amendment claim, and on the merits I join the Court's opinion.

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

file

May 2, 1973

Re: No. 72-212 - Cupp v. Murphy

Dear Potter:

Please join me.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference