

The Burger Court Opinion Writing Database

Henderson v. Kibbe

431 U.S. 145 (1977)

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



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

From: The Chief Justice

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No: 75-1906 - Henderson v. Kibbe

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment, but I find it unnecessary to resolve the question of New York criminal law considered by the Court at pp. 9-11, ante. In my view, the federal court was precluded from granting respondent's petition for collateral relief under 28 U.S.C. §2254 because he failed to object to the jury instructions at the time they were given. This was precisely why the New York Court of Appeals refused to consider respondent's belated claim. Cf. Henry v. Mississippi, 379 U.S. 443 (1965).

This Court has held that under certain circumstances a defendant's failure to comply with state procedural requirements will not be deemed a waiver of federal constitutional rights, unless it is shown that such bypass was the result of a deliberate tactical decision. See, Fay v. Noia, 372 U.S. 391 (1963); Humphrey v. Cady, 405 U.S. 504 (1972). These cases, however, involved post-trial omissions of a technical nature which would be unlikely to jeopardize substantial

From the Chief Justice

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1906

Robert J. Henderson, Superintendent,
Auburn Correctional Facility,
Petitioner,
v.
Barry Warren Kibbe. } On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit,

[May —, 1977]

MR. CHIEF JUSTICE BURGER, concurring in the judgment.

I concur in the judgment, but I find it unnecessary to resolve the question of New York criminal law considered by the Court, at 9-11, *ante*. In my view, the federal court was precluded from granting respondent's petition for collateral relief under 28 U. S. C. § 2254 because he failed to object to the jury instructions at the time they were given. By that failure he waived any claim of constitutional error. This was precisely why the New York Court of Appeals refused to consider respondent's belated claim. Cf. *Henry v. Mississippi*, 379 U. S. 443 (1965).

This Court has held that under certain circumstances a defendant's failure to comply with state procedural requirements will not be deemed a waiver of federal constitutional rights, unless it is shown that such bypass was the result of a deliberate tactical decision. See *Fay v. Noia*, 372 U. S. 391 (1963); *Humphrey v. Cady*, 405 U. S. 504 (1972). These cases, however, involved *post*-trial omissions of a technical nature which would be unlikely to jeopardize substantial state interests. *Mid*-trial omissions such as occurred in this case, on the other hand, are substantially different. "It is one thing to fail to utilize the [state] appeal process to cure a defect which already inheres in a judgment of conviction, but it is quite another to forego making an objection or exception which

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 26, 1977

RE: No. 75-1906 Henderson v. Kibbe

Dear John:

I agree.

Sincerely,

W. J. Brennan Jr.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 25, 1977

Re: No. 76-1906, Henderson v. Kibbe

Dear John,

I am glad to join your opinion for the Court
in this case.

Sincerely yours,

P.S.
P.

Mr. Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1977

Re: No. 76-1906 - Henderson v. Kibbe

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 26, 1977

Re: No. 75-1906, Henderson v. Kibbe

Dear John:

Please join me.

Sincerely,



T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 27, 1977

Re: No. 75-1906 - Henderson v. Kibbe

Dear John:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 27, 1977

No. 75-1906 Henderson v. Kibbe

Dear John:

Please join me.

Sincerely,



Mr. Justice Stevens

1fp/ss

cc: The Conference

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

From: Mr. Justice Stevens

APR 22 1977

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. ~~76~~ 1906

Robert J. Henderson, Superintendent,
Auburn Correctional Facility,
Petitioner,
v.
Barry Warren Kibbe.

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

[April —, 1977]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Respondent is in petitioner's custody pursuant to a conviction for second-degree murder. The question presented to us is whether the New York State trial judge's failure to instruct the jury on the issue of causation was constitutional error requiring a federal district court to grant habeas corpus relief. Disagreeing with a divided panel of the Court of Appeals for the Second Circuit, we hold that it was not.

On the evening of December 30, 1970, respondent and his codefendant encountered a thoroughly intoxicated man named Stafford in a bar in Rochester, N. Y.¹ After observing Stafford display at least two \$100 bills, they decided to rob him and agreed to drive him to a nearby town. While in the car, respondent slapped Stafford several times, took his money and, in a search for concealed funds, forced Stafford to lower his trousers and remove his boots. They then abandoned him on an unlighted, rural road, still in a state of partial undress, and without his coat or his glasses. The temperature was near zero, visibility was obscured by blowing snow, and snow

¹ A pathologist testified that the alcohol content in Stafford's blood was indicative of "a very heavy degree of intoxication."

STYLISTIC CHANGES THROUGHOUT

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

From: Mr. Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1906

Robert J. Henderson, Superintendent,
Auburn Correctional Facility,
Petitioner,
v.
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Court of Appeals for
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¹ A pathologist testified that the alcohol content in Stafford's blood was indicative of "a very heavy degree of intoxication." App., at 58.

2 Tr., 723.