The Burger Court Opinion Writing Database

Reed v. Ross

468 U.S. 1 (1984)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

November 28, 1983

Re: No. 83-218 Reed v. Ross

Dear Bill:

I join your dissent from denial.

Regards,

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 31, 1984

Re: No. 83-218 - Reed v. Ross

Dear Bill:

Will you take a dissent, since you have a "headstart" with the subject?

Regards,

WEB

Justice Rehnquist

Copies to: Justice Blackmun
Justice O'Connor

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

CHAMBERS OF
THE CHIEF JUSTICE

(CORRECTED COPY)

RE: 83-218 - Amos Reed, Etc. & The Attorney General of N.C. v. Daniel Ross

Dear Bill:

Please join me in your dissent.

Regards,

WEB

Justice Rehnquist

copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 8 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving the element of malice. *Id.*, at 704. Two years later, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury instruction on the burden of proof.

I

A

In 1970, this Court decided *In re Winship*, 397 U. S. 358 (1970), the first case in which we directly addressed the constitutional foundation of the requirement that criminal guilt

STYLISTIC CHANGES THROUGHOUT.

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

'84 JUN 11 A10:01

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 11 1984

WJB
Please join me
M

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving the element of malice. *Id.*, at 704. Two years later, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury instruction on the burden of proof.

I

A

In 1970, this Court decided *In re Winship*, 397 U. S. 358 (1970), the first case in which we directly addressed the constitutional foundation of the requirement that criminal guilt

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 13, 1984

No. 83-218

Reed v. Ross

Dear Lewis:

You raise a very difficult question concerning the circumstances under which a defense attorney's procedural failure should bar the exercise of the habeas court's power. As my proposed opinion demonstrates, there are good reasons to erect a bar when a procedural default is attributable to a tactical decision. Under those circumstances, a bar is necessary to ensure that state proceedings are taken seriously and that every effort is made to finalize prosecutions without resort to the habeas court. In addition, when the lawyer for a defendant makes a tactical decision to forego the opportunity to raise an issue in state court, we have to assume that the defendant was better off, from an ex ante perspective, foregoing the opportunity than he would have been had he taken it. Thus he reaped a benefit of a greater potential value than his expected value of the constitutional right he might have raised.

When it is defense counsel's error -- reasonable or unreasonable -- I wonder whether there is a similar rationale for penalizing the defendant by depriving him of the forum authorized by §2254. What rationale do you have in mind? As I read Wainwright v. Sykes and Engle v. Isaac, the definition of "cause" has yet to be developed. In fact, those cases quite arguably involved procedural defaults that had been tactical maneuvers. Shouldn't we make an effort toward defining "cause" in this case?

In addition, it seems to me that this case involves what might be viewed as a reasonable error by counsel, as opposed to an unreasonable error, which would constitute ineffective assistance. Indeed, it is the reasonability of Ross' lawyer's procedural default that leads both of us to conclude that Ross should be able to present his constitutional claim to the habeas

court. Thus I am not sure how we can define "cause" in this case to exclude reasonable attorney behavior.

Of course, I will do whatever I can to accommodate your concerns if you see this case differently from the way I see it.

Sincerely,

WJB. Jr.
by HE

Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 18, 1984

No. 83-218

Reed, etc. v. Ross

Dear Lewis,

Your suggestion is fine. I will adopt the language you suggest verbatim, if you wish. Otherwise, I believe the changes I have indicated on the attached draft accommodate your concern.

Thank you very much for your help.

Sincerely,

Bill

Justice Powell

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 6/19/84

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE BRENNAN delivered the opinion of the Court.

In March 1969, respondent Daniel Ross was convicted of first-degree murder in North Carolina and sentenced to life imprisonment. At trial, Ross had claimed lack of malice and self-defense. In accordance with well-settled North Carolina law, the trial judge instructed the jury that Ross, the defendant, had the burden of proving each of these defenses. Six years later, this Court decided *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), which struck down, as violative of due process, the requirement that the defendant bear the burden of proving the element of malice. *Id.*, at 704. Two years later, *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977), held that *Mullaney* was to have retroactive application. The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise on appeal the unconstitutionality of the jury instruction on the burden of proof.

I

A

In 1970, this Court decided *In re Winship*, 397 U. S. 358 (1970), the first case in which we directly addressed the con-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 19, 1984

MEMORANDUM TO THE CONFERENCE

No. 83-218

Reed v. Ross

The third draft of the above has changes, as indicated, on pp. 12-13. I am sorry I neglected to note these changes on the first page.

Sincerely,

WJB. Jr.
by DLE

(3)

CHAMBERS OF
JUSTICE BYRON R. WHITE

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

June 13, 1984

Re: 83-218 - Reed v. Ross

Dear Bill,

Please join me.

Sincerely yours,

Byron

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1984

Re: No. 83-218-Reed v. Ross

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

'84 JUN 19 A9:52

June 19, 1984

Re: No. 83-218, Reed v. Ross

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

HAB

Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1984

83-218 Reed v. Ross

Dear Bill:

Subject to the point mentioned below, I think your opinion is excellent.

I do have trouble, however, with the paragraph that begins at the bottom of page 12. Apart from that paragraph, I read your opinion as saying: (i) Novelty may constitute "cause"; (ii) novelty is defined as whenever a Constitutional claim is "so novel that its legal basis is not reasonably available to counsel" (p. 14); and in this case it is clear that Ross' claim was novel under this standard in 1969. I agree with all of the foregoing.

In addition, the opinion properly makes clear that a tactical decision by counsel not to raise an issue never constitutes "cause". But the first sentence in the paragraph on page 12 (2nd draft) states that "the cause requirement is satisfied when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest." This, it seems to me, would excuse a counsel who was unfamiliar with a relevant principle, or simply overlooked a claim or issue that should have been reasonably known to him. This would be a procedural default under Wainwright and Engle.

As we all know, even competent counsel make errors of this kind and - under our system - the client necessarily suffers unless the error rises to the level of ineffective assistance.

If you could clarify this aspect of your opinion, I will be happy to join you.

Sincerely,

Lewis

Justice Brennan

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 14, 1984

83-218, REED v. ROSS

Dear Bill:

I agree with you that defining "cause" with respect to all the circumstances under which a defense attorney might fail to raise a meritorious claim would be a difficult task. My point is that we need not, and indeed should not, attempt that task in this case.

I am not suggesting that you define "cause" to exclude all errors of defense counsel that do not rise to the level of ineffective assistance. I ask only that you leave the question open by refraining from deciding, as you do in the first sentence of the last paragraph on page 12 of your opinion, that everything but tactical decisions constitutes cause. This could be done very simply by revising the paragraph on pages 12-13 as follows:

> "On the other hand, the cause requirement may be satisfied in certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest. We need not define these circumstances in this case. It is clear, however, that the failure of counsel to raise a constitutional issue reasonably unknown to him is one of those circumstances. Therefore, we hold that novelty is cause for the failure to raise a constitutional question in accordance with applicable state procedures."

Again, if you could agree to this or a similar change, I will be happy to join you.

Sincerely,

Lewis

Justice Brennan

lfp/ss

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

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

June 18, 1984

83-218 Reed v. Ross

Dear Bill:

Please join me.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

6/18/1984
Attached to letter

No. 82-218, REED v. ROSS

JUSTICE POWELL, Concurring.

I join the opinion and judgment of the Court. I write separately only to make clear that I continue to adhere to the views expressed in my concurring opinion in Hankerson v. North Carolina, 432 U.S. 233, 246-248 (1977) (POWELL, J., concurring).

In Hankerson, I agreed with the Court that the new constitutional rule announced in Mullaney v. Wilbur, 421 U.S. 624 (1975), should apply retroactively to cases on direct review. In this case, the rule of Mullaney has been applied retroactively on collateral review. For the reasons stated by Justice Harlan in Mackey v. United States, 401 U.S. 667, 675-702 (1971) (separate opinion), I

06/20

Previously Typewritten

Circulated in Form

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 21 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS, *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE POWELL, concurring.

I join the opinion and judgment of the Court. I write separately only to make clear that I continue to adhere to the views expressed in my concurring opinion in *Hankerson* v. *North Carolina*, 432 U. S. 233, 246–248 (1977) (POWELL, J., concurring).

In *Hankerson*, I agreed with the Court that the new constitutional rule announced in *Mullaney* v. *Wilbur*, 421 U. S. 624 (1975), should apply retroactively to cases on direct review. In this case, the rule of *Mullaney* has been applied retroactively on collateral review. For the reasons stated by Justice Harlan in *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (separate opinion), I would apply new constitutional rules retroactively on collateral review only in exceptional cases. See *Hankerson*, *supra*, at 247–248 (POWELL J., concurring). The State, however, has not challenged the retroactive application of *Mullaney* in this case. Thus, the issue whether that retroactive application is proper has not been presented to this Court.

Assuming, as we must, that *Mullaney* may be applied retroactively in this case, and for the reasons set forth in the Court's opinion today, I agree that Ross has shown "cause" for failing to raise his constitutional claim in a timely fashion.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: DEC 1 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA *v.* DANIEL ROSS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-218. Decided December ——, 1983

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting from denial of certiorari.

Respondent Ross killed his wife in November, 1968, and was found guilty by a North Carolina jury of first degree murder in March, 1969. The Supreme Court of North Carolina affirmed his conviction in October, 1969. *State* v. *Ross*, 275 N. C. 550, 169 S. E. 2d 875. Fourteen years later, in March, 1983, the Court of Appeals for the Fourth Circuit decided that Ross was entitled to be released on habeas corpus because of constitutional infirmities in his conviction. Respondent's complaint on federal habeas was that jury instructions respecting the burden of proof as to lack of malice and self-defense violated a series of decisions of this Court beginning with *In re Winship*, 397 U. S. 358 (1970), including *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and culminating in *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977).

I

Respondent never made any constitutional objection to the instruction regarding lack of malice at the time it was given, nor did he assert any such claim on his direct appeal to the Supreme Court of North Carolina. Petitioner, on behalf of the state, contends therefore that under our decisions in *Wainwright* v. *Sykes*, 434 U. S. 72, (1977), and *Engle* v. *Isaac*, 456 U. S. 107 (1982), respondent should not have been allowed to raise this claim in the federal habeas proceeding. The Court of Appeals held that there was "cause" under *Wainwright* for not having raised the constitutional burden of

Justice Rehnquist's dissent is no more convincing than the petition. I recommend ~~denial~~ that you not join.

Rob

10:20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: 11/28/83

Recirculated: ~~———~~

1st DRAFT ~~See 2nd Draft~~

SUPREME COURT OF THE UNITED STATES

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA *v.* DANIEL ROSS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-218. Decided November ——, 1983

JUSTICE REHNQUIST, dissenting from denial of certiorari.

Respondent Ross killed his wife in November, 1968, and was found guilty by a North Carolina jury of first degree murder in March, 1969. The Supreme Court of North Carolina affirmed his conviction in October, 1969. *State* v. *Ross*, 275 N. C. 550, 169 S. E. 2d 875. Fourteen years later, in March, 1983, the Court of Appeals for the Fourth Circuit decided that Ross was entitled to be released on habeas corpus because of constitutional infirmities in his conviction. Respondent's complaint on federal habeas was that jury instructions respecting the burden of proof as to lack of malice and self-defense violated a series of decisions of this Court beginning with *In re Winship*, 397 U. S. 358 (1970), including *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and culminating in *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977).

14 years later

I

Respondent never made any constitutional objection to the instruction regarding lack of malice at the time it was given, nor did he assert any such claim on his direct appeal to the Supreme Court of North Carolina. Petitioner, on behalf of the state, contends therefore that under our decisions in *Wainwright* v. *Sykes*, 434 U. S. 72 (1977) and *Engle* v. *Isaac*, 456 U. S. 107 (1982), respondent should not have been allowed to raise this claim in the federal habeas proceeding. The Court of Appeals held that there was "cause" under *Wainwright* for not having raised the constitutional burden of proof claim because respondent was tried and his conviction

CA4 found "cause"

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

3:55

From: **Justice Rehnquist**

Circulated: _____

Recirculated: DEC 1 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA *v.* DANIEL ROSS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-218. Decided December ——, 1983

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting from denial of certiorari.

Respondent Ross killed his wife in November, 1968, and was found guilty by a North Carolina jury of first degree murder in March, 1969. The Supreme Court of North Carolina affirmed his conviction in October, 1969. *State* v. *Ross*, 275 N. C. 550, 169 S. E. 2d 875. Fourteen years later, in March, 1983, the Court of Appeals for the Fourth Circuit decided that Ross was entitled to be released on habeas corpus because of constitutional infirmities in his conviction. Respondent's complaint on federal habeas was that jury instructions respecting the burden of proof as to lack of malice and self-defense violated a series of decisions of this Court beginning with *In re Winship*, 397 U. S. 358 (1970), including *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), and culminating in *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977).

H/C 14 yrs later

I

Respondent ~~never~~ made ~~any~~ no constitutional objection to the instruction regarding lack of malice at the time it was given, nor did he assert any such claim on his direct appeal to the Supreme Court of North Carolina. Petitioner, on behalf of the state, contends therefore that under our decisions in *Wainwright* v. *Sykes*, 434 U. S. 72, (1977), and *Engle* v. *Isaac*, 456 U. S. 107 (1982), respondent should not have been allowed to raise this claim in the federal habeas proceeding. The Court of Appeals held that there was "cause" under *Wainwright* for not having raised the constitutional burden of

no objection from

CA 4 found "cause" for not objecting

HAB

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 2, 1984

Re: No. 83-218 Reed v. Ross

Dear Chief:

I will be happy to take on the dissent in this case.

Sincerely,

WHR

The Chief Justice

cc: Justice Blackmun
Justice O'Connor

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 12, 1984

Re: 83-218 Reed v. Ross

Dear Bill,

In due course I will circulate a dissent in this case.

Sincerely,

Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JUN 16 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June ——, 1984]

JUSTICE REHNQUIST, dissenting.

Today's decision will make less sense to laymen than it does to lawyers. Respondent Ross was convicted of first degree murder in a North Carolina trial court in 1969. In 1977, eight years later, he instituted the present federal habeas action seeking to have his conviction set aside on the ground that an instruction given by the trial judge improperly placed upon him, rather than on the State, the burden of proving the defenses of "lack of malice" and "self defense." Today, fifteen years after the trial, the Court holds that Ross's conviction must be nullified on federal constitutional grounds. Responding to the State's contention that Ross never raised any objection to the instruction given by the trial judge, and that North Carolina law requires such an objection, the Court blandly states that no competent lawyer in 1969 could have been expected that such an objection would have been sustained, because the law was to the contrary. Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.

Along its way to this troubling result, the Court reaffirms the importance of the principles of comity and orderly administration of justice that underlie our decisions in such cases as

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnqui

Circulated: JUN 22 1984

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–218

AMOS REED, ETC., AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS *v.* DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 27, 1984]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN and JUSTICE O'CONNOR join, dissenting.

Today's decision will make less sense to laymen than it does to lawyers. Respondent Ross was convicted of first degree murder in a North Carolina trial court in 1969. In 1977, eight years later, he instituted the present federal habeas action seeking to have his conviction set aside on the ground that an instruction given by the trial judge improperly placed upon him, rather than on the State, the burden of proving the defenses of "lack of malice" and "self defense." Today, fifteen years after the trial, the Court holds that Ross's conviction must be nullified on federal constitutional grounds. Responding to the State's contention that Ross never raised any objection to the instruction given by the trial judge, and that North Carolina law requires such an objection, the Court blandly states that no competent lawyer in 1969 could have been expected that such an objection would have been sustained, because the law was to the contrary. Consequently, we have the anomalous situation of a jury verdict in a case tried properly by then-prevailing constitutional standards being set aside because of legal developments that occurred long after the North Carolina conviction became final.

Along its way to this troubling result, the Court reaffirms the importance of the principles of comity and orderly admin-

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

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

June 11, 1984

Re: 83-218 - Reed v. Ross

Dear Bill:

Please join me.

Respectfully,

John

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 28, 1983

No. 83-218 Reed v. Ross

Dear Bill,

Please join me in your dissent from denial of certiorari.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 12, 1984

No. 83-218 Reed v. Ross

Dear Bill,

I will await further writing in this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 18, 1984

No. 83-218 Reed v. Ross

Dear Bill,

Please join me in your dissenting opinion.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference