The Burger Court Opinion Writing Database

Murray v. Carrier

477 U.S. 478 (1986)

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

April 24, 1986

84-1554 - Murray v. Carrier

Dear Sandra:

I join.

Regards,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 27, 1986

No. 84-1554

Murray v. Carrier

Dear Thurgood and John,

We three are in dissent in the above. Would you, John, be willing to take it on?

Sincerely,

Bill

Justice Marshall

Justice Stevens

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 28, 1986

Murray v. Carrier

No. 84-1554

Dear Sandra,

I will be writing a separate dissent in this case. I shall try my best not to hold you up too long.

Sincerely,

Bill

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 28, 1986

Murray v. Carrier

No. 84-1554

Dear John,

Although you have written an exceptionally fine dissent, your view that issuance of the writ depends in every case upon a balancing which asks whether justice is served is inconsistent with my own understanding of habeas. Accordingly, I shall write separately.

Sincerely,

Bill

Justice Stevens

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

From: **Justice Brennan**

Circulated: JUN 18 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–1554 AND 85–5487

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER

84–1554 *v.*

CLIFFORD W. CARRIER

MICHAEL MARNELL SMITH, PETITIONER

85–5487 *v.*

EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

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

[June ——, 1986]

JUSTICE BRENNAN, dissenting.

I

A

Like the Great Writ from which it draws its essence, see *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982), the root principle underlying § 2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under § 2254 differs in many respects from its common-law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, *e. g.*, *Moore* v. *Dempsey*, 261 U. S. 86 (1923); *Johnson* v. *Zerbst*, 304 U. S. 458

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 3, 10

From: **Justice Brennan**

Circulated: _____

Recirculated: JUN 20 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84–1554 AND 85–5487

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER
84–1554 *v.*
CLIFFORD W. CARRIER

MICHAEL MARNELL SMITH, PETITIONER
85–5487 *v.*
EDWARD W. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

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

[June 24, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

I

A

Like the Great Writ from which it draws its essence, see *Engle* v. *Isaac*, 456 U. S. 107, 126 (1982), the root principle underlying § 2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release. Of course, the habeas corpus relief available under § 2254 differs in many respects from its common-law counterpart. Most significantly, the scope of the writ has been adjusted to meet changed conceptions of the kind of criminal proceedings so fundamentally defective as to make imprisonment under them unacceptable. See, *e. g.*, *Moore* v. *Demp-*

(5)

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 20, 1986

84-1554 - Murray v. Carrier

Dear Sandra,

Please join me.

Sincerely yours,

Byron

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 7, 1986

84-1554 - Murray v. Carrier

Dear Sandra,

I am still with you.

Sincerely yours,

Justice O'Connor

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 27, 1986

Re: No. 84-1554-Murray v. Carrier

Dear Sandra:

I await the dissent.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1986

Re: No. 84-1554-Murray v. Carrier

Dear John:

Please join me in your dissent.

Sincerely,

T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1986

Re: Nos. 84-1554-Murray v. Carrier and
85-5487-Smith v. Murray

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 9, 1986

Re: No. 84-1554, Murray v. Carrier

Dear Sandra:

For now, I shall await the further writing in this case.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1986

Re: No. 84-1554, Murray v. Carrier

Dear John:

Please join me in your opinion concurring in the judgment.

Sincerely,

Harry

Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 25, 1986

84-1554 Murray v. Carrier

Dear Sandra:

Please join me.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

March 27, 1986

84-1554 Murray v. Carrier

Dear Sandra:

I think your additions are helpful and appropriate.

They are consistent with what I am saying in my opinion for the Court in Kuhlmann v. Wilson, No. 84-1479. The historic purpose of habeas corpus is to afford relief from an unconstitutional conviction of an innocent person - a purpose often overlooked.

Sincerely,

Justice O'Connor

lfp/ss

cc: Justice White
Justice Rehnquist

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 19, 1986

84-1554 - Murray v. Carrier

Dear Sandra:

Please join me.

Sincerely,

Justice O'Connor

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 27, 1986

Re: 84-1554 - Murray v. Carrier

Dear Bill:

I shall be happy to undertake the dissent in this case.

Respectfully,

John

Justice Brennan

cc: Justice Marshall

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1986

Re: 84-1554 - Murray v. Carrier

Dear Sandra:

I shall be writing in dissent in this case.

Respectfully,

Justice O'Connor

Copies to the Conference

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

From: **Justice Stevens**

Circulated: MAR 20 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[March ——, 1986]

JUSTICE STEVENS, dissenting.

Without any statutory authorization, the Court has created a rigid procedural obstacle to the consideration of meritorious habeas corpus petitions that is wholly foreign to the office of the Great Writ. The so-called "cause" and "prejudice" doctrine that the Court applies today had its source in cases construing Rule 12(b)(2) of the Federal Rules of Criminal Procedure, but today's decision derives no support whatever from that rule or from any other federal rule or statute. I fear that the Court has lost its way in a procedural maze of its own creation.

Respondent advanced a constitutional claim that was considered and rejected by a state trial court but not reviewed by a state appellate court because his lawyer failed to comply with an appellate procedural requirement. Notwithstanding its assumptions (1) that the negligence or inadvertence of respondent's counsel was the sole cause of the procedural default; (2) that the constitutional claim is meritorious; and (3) that respondent has suffered actual prejudice as a result of that negligence, the Court concludes that the Federal District Court may not entertain respondent's application for a writ of habeas corpus pursuant to 28 U. S. C. § 2254.

The reasoning which leads the Court to this conclusion is flawed in several respects. It omits any consideration of the

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 2, 3, 5, 9, 11, 19, 20

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

From: **Justice Stevens**

Circulated: _____

Recirculated: APR 4 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[April ——, 1986]

JUSTICE STEVENS, concurring in the judgment.

The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity.

The nature of the prisoner's claim, and its importance, would be especially easy to overlook in this case because the case involves at least four possible procedural errors. A Virginia trial judge may have erroneously denied respondent's counsel access to statements that the victim had made to the police. The Virginia Supreme Court did not address this issue because, although respondent's counsel included it in the assignment of errors in his "notice of appeal," he omitted it from his "petition for appeal." In a subsequent federal habeas corpus proceeding, the District Court held that the procedural default in the state appellate court effected a waiver of any right to federal relief and therefore dismissed the petition without examining the victim's statements. The Court of Appeals, however, concluded that there was no waiver if counsel's omission was the consequence of inadvertence and ordered a remand for a hearing to determine whether the lawyer had made a deliberate decision to omit the error from the petition for appeal. We granted certiorari to review that decision.

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

From: **Justice Stevens**

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Recirculated: JUN [illegible]86

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[June ——, 1986]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

The heart of this case is a prisoner's claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity.

The nature of the prisoner's claim, and its importance, would be especially easy to overlook in this case because the case involves at least four possible procedural errors. A Virginia trial judge may have erroneously denied respondent's counsel access to statements that the victim had made to the police. The Virginia Supreme Court did not address this issue because, although respondent's counsel included it in the assignment of errors in his "notice of appeal," he omitted it from his "petition for appeal." In a subsequent federal habeas corpus proceeding, the District Court held that the procedural default in the state appellate court effected a waiver of any right to federal relief and therefore dismissed the petition without examining the victim's statements. The Court of Appeals, however, concluded that there was no waiver if counsel's omission was the consequence of inadvertence and ordered a remand for a hearing to determine whether the lawyer had made a deliberate decision to omit

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: FEB 18 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[February ——, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." Record II, at 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. Record II, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151-152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 21, 1986

Re: 84-1554 Murray v. Carrier

Dear John,

I plan to make some responses to your dissent in this case but it will take me a few days.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 25, 1986

No. 84-1554 Murray v. Carrier

Dear Byron, Lewis and Bill,

John's dissent in this case is quite powerful and deserves an adequate response. I hope I have accomplished that in the attached 2nd Draft opinion for the Court. It now expressly concedes, as we did in Engle, that in an extraordinary case, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." (p.15) I think this much of a concession is appropriate and consistent with our precedents. agree

Please let me know if the additions cause any of you undue concern.

Sincerely,

Sandra

Justice White
Justice Powell
Justice Rehnquist

Dear Sandra,
I think your additions are helpful and appropriate.
They are consistent with what I am saying in my opinion for the Court in Kuhlmann v. Wilson No 84 —

The historic purpose of habeas corpus is to afford relief for an unconstitutional conviction of an innocent person & purpose not overlooked.

Stylistic Changes Throughout
pp. 12-17

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAR 27 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[March ——, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

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After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

pp. 12-16

Stylistic Changes Throughout

Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: APR 7 1986

3rd
~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[April ——, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." 2 Record 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. 2 *id.*, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151–152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 19, 1986

No. 84-1554 Murray v. Carrier
No. 84-5487 Smith v. Murray

Dear Chief,

There is a cross citation to Ford v. Wainwright in Bill Brennan's opinion in these two cases which he prefers to retain. Accordingly, the announcement of these cases should await the announcement of Ford.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Stylistic Changes Throughout

p.4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 23 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1554

EDWARD W. MURRAY, ACTING DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER *v.* CLIFFORD W. CARRIER

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

[June ——, 1986]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certoriari in this case to consider whether a federal habeas petitioner can show cause for a procedural default by establishing that competent defense counsel inadvertently failed to raise the substantive claim of error rather than deliberately withholding it for tactical reasons.

I

Respondent Clifford Carrier was convicted of rape and abduction by a Virginia jury in 1977. Before trial, respondent's court-appointed counsel moved for discovery of the victim's statements to police describing "her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place." 2 Record 11. The presiding judge denied the motion by letter to counsel after examining the statements *in camera* and determining that they contained no exculpatory evidence. 2 *id.*, at 31. Respondent's counsel made a second motion to discover the victim's statements immediately prior to trial, which the trial judge denied for the same reason after conducting his own *in camera* examination. Tr. 151–152.

After respondent was convicted, his counsel filed a notice of appeal to the Virginia Supreme Court assigning seven errors, of which the fifth was:

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Slinker v. Keplinger, No. 85-6283
(Case Held for Murray v. Carrier, No. 84-1554)

Petitioner and a codefendant were convicted of burglary by a Kentucky jury. Petitioner and the codefendant had separate counsel although they were tried jointly. During closing argument, the prosecutor said to the jury:

> "Tell me one thing. If you found some items and went and sold them and the law came to you and said, 'Wait a minute here. Those items were stolen out of somebody's house.' Tell me in your verdict whether or not you would have told the law you found them. Well, of course you'd have told the law you found them. If you find them not guilty then you're telling me, 'I'd cross my arms and say 'I've got nothing to say.'" Pet. for Cert. 2 (quoting Tr. 129-130).

The codefendant's counsel objected to this statement on behalf of the codefendant by name. Petitioner's counsel did not object, later stating in an affidavit that he did not do so in the belief that the objection that had been made would be sufficient to preserve the challenge for petitioner as well. The trial judge overruled the objection.

Both defendants were convicted, and the trial judge denied their motions for a new trial, finding that neither defendant had complied with Kentucky's contemporaneous objection rule, "since the Court was not given an opportunity to consider whether the error could have been corrected by an admonition and there is no indication that the prejudice was so apparent and so great as to result in manifest injustice." App. to Pet. for Cert. A-4. The Kentucky Court of Appeals agreed, ruling that the objection was not timely because "no objection was made to the remarks until the jury was leaving the courtroom." Id., at B-7.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Middleton v. Cupp, No. 85-6064
(Case Held for Murray v. Carrier, No. 84-1554)

death case?

Petitioner was charged with felony murder after he killed a store clerk during a robbery following a drinking spree. At trial, petitioner conceded that he had killed the clerk, but argued that he was so drunk that he could not have formed the requisite intent to commit the predicate felony, namely robbery. Petitioner and the state each offered expert testimony, which conflicted, and it appears that petitioner's expert made a factual mistake whose dimensions are not explained in the CA9's decision. The state TC instructed the jury that if it found that "any of the facts relied upon or assumed by the witness in forming his opinion were not established by the evidence or were untrue, then you should disregard the opinion." Pet. for Cert. 8. Petitioner objected to the instruction and proposed an alternative one, but did not argue that the instruction was defective because it failed to limit the jury's disregard to unproven material facts rather than "any" facts. The Oregon Supreme Court held that the objection to the instruction was inadequate to preserve the claim petitioner sought to raise on appeal, to wit, that the instruction deprived him of a key element of his defense and hence was a denial of due process.

Petitioner then sought federal habeas, renewing his due process claim. The DC dismissed the petition as moot. The CA9 affirmed on the grounds that the due process claim was procedurally defaulted and that petitioner had not shown cause for the default. The CA9 declined to decide whether there is cause for counsel's inadvertent procedural default where the procedural rule itself is not reasonably discernible by competent counsel, because it concluded that the Oregon rule requiring that objections to instructions be specific was reasonably discernible. Any reasonable counsel would have known that the objection needed to be a specific one.

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Lockett v. Arn, No. 84-5878
(Case Held for Murray v. Carrier, No. 84-1554)

Petitioner and three others conspired to rob a pawnshop at gunpoint, with petitioner assigned to drive the getaway car while the others entered the shop. The owner was shot and killed during the robbery. Petitioner was tried separately for aggravated murder and robbery, and the TC gave an instruction stating that "[a] person engaged in a common design with others to rob by force and violence ... is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise ...." App. to Pet. for Cert. 61. No objection was made to these instructions. Petitioner was convicted and sentenced to death, and her conviction and sentence were affirmed on appeal by the Ohio Supreme Court. State v. Lockett, 358 N.E.2d 1062 (1976). This Court invalidated her death sentence but rejected her challenges to the convictions. Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner then sought federal habeas, claiming that her trial counsel rendered ineffective assistance and that the presumed acquiescence instruction was unconstitutional under Sandstrom v. Montana, 442 U.S. 512 (1979). The DC held that counsel had not been ineffective and that the Sandstrom claim was procedurally defaulted. The CA6 initially reversed, reading the Ohio Supreme Court's decision as having reached the merits of the Sandstrom claim. Thus, there was no occasion for applying the cause and prejudice test, since the state courts had reached the merits. See Ulster County Court v. Allen, 442 U.S. 140 (1979). On rehearing, however, the panel reversed itself, vacated its earlier decision, and affirmed the DC. It ruled that the claim petitioner had raised before the state court was a state-law claim that the Ohio murder statute required proof that the gunman had a purpose to kill and that she shared that purpose; petitioner had not raised a federal claim that the jury

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Greer v. Gray, No. 85-1639
(Case Held for Murray v. Carrier, No. 84-1554)

Respondent was convicted of rape, attempted murder, and armed robbery. His conviction was upheld by the Illinois courts on appeal, and he filed a federal habeas petition raising several claims including the contention that blacks were improperly excluded from his jury, a claim he had not raised on appeal. This petition was dismissed for failure to exhaust state remedies, and the state habeas court subsequently held that the jury selection claim was procedurally defaulted because not raised on appeal. Respondent then filed a second federal habeas petition, alleging ineffective assistance of appellate counsel and renewing his jury selection claim. A magistrate, sitting by consent of the parties, dismissed the petition after finding that respondent had not exhausted state remedies with respect to the ineffective assistance claim.

The CA7 reversed and remanded on the grounds that the Illinois courts would not entertain the ineffective assistance claim since respondent failed to raise it in his first state habeas petition. On remand, the magistrate, reviewing the appellate brief but not the trial transcript, found that appellate counsel was not ineffective, and held that absent a showing of ineffectiveness respondent could not show cause for his procedural default with respect to the jury selection claim.

Again, the CA7 reversed and remanded. The CA7 ruled that the magistrate should review the trial record to determine whether the omission of issues on appeal was strategic. The CA7 left it to the magistrate to determine in the first instance on remand whether respondent could show cause and prejudice as to his ineffective assistance claim--which the CA7 agreed was itself procedurally defaulted. App. to Pet. for Cert. 5. Finally, the CA7 held that the magistrate had erred in indicating that

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Re: Aillon v. Connecticut, No. 85-5474
(Case Held for Murray v. Carrier, No. 84-1554)

Petitioner was convicted of a triple murder in 1973, but was granted a new trial because the TJ had engaged in an ex parte communication with a juror. The second trial ended with a hung jury and a mistrial was declared. Petitioner then moved for a judgment of acquittal, claiming that the first trial was also a mistrial because the TJ had coerced the jury, and that retrial following two mistrials would result in double jeopardy. The Connecticut Supreme Court, assuming arguendo that the first trial was a mistrial, ruled that the third trial would not constitute double jeopardy because as to both mistrials petitioner had exercised his right to control the course of the proceedings. State v. Aillon, 438 A.2d 30 (1980).

Petitioner then sought dismissal of the charges against him, raising a slightly different double jeopardy claim, namely, that the TJ at the first trial had foreclosed his right to have his guilt determined by that jury by engaging in ex parte contact with a juror in bad faith. The trial court held that this claim was untimely and thus waived, but the Connecticut Supreme Court affirmed on other grounds. The court held that petitioner's second double jeopardy claim was barred by res judicata, because the first claim had been finally decided, and the present claim relied on the same facts to advance a similar legal argument. State v. Aillon, 456 A.2d 279 (1983).

Before the commencement of his third trial petitioner sought federal habeas, raising his double jeopardy claim and also alleging ineffective assistance of counsel in connection with counsel's failure to raise this claim at the end of the first trial. While the third trial was in progress, the DC held a hearing on the petition and eventually dismissed it. The DC found that petitioner's counsel had rendered exceptional overall