The Burger Court Opinion Writing Database

Morris v. Mathews

474 U.S. 237 (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

January 6, 1986

RE: No. 84-1636 - Morris v. Mathews

Dear Byron,

I am with you on all parts of your opinion in this case with the exception of your conclusion that the case should be remanded to the Court of Appeals, because I do not believe that a remand is necessary or appropriate here.

The State tried this case on the theory that respondent murdered Daugherty to prevent him from contradicting respondent's initial story that respondent had been kidnapped by Daugherty and forced to participate in the bank robbery. This theory was developed on the basis of respondent's own admission (in one of his many confessions which he recanted at trial) that he murdered Daugherty in order to cover his own involvement in the robbery. Rule 404 of the Ohio Rules of Evidence provides that "[e]vidence of other crimes ... may be admissible [to show] motive ... [or] plan ..." Thus, evidence showing respondent's active involvement in the robbery would certainly have been admitted to establish respondent's motive either during the State's case-in-chief or in its rebuttal. I see no reason to remand this case back to the Court of Appeals to make a finding on such a straight-forward matter of evidence law.

Moreover, even if it were not entirely clear that evidence relating to the robbery alone would have been admissible, I would not see the need to remand this case in order to allow the Court of Appeals to determine whether respondent was prejudiced by its admission. This was clearly a case of overwhelming evidence. Respondent had confessed at least twice to the murder. He was, by all accounts, the only one in the house with Daugherty when the shooting took place. Medical expert testimony ruled out suicide since the first shot would have rendered Daugherty unconscious before the second and fatal shot was fired. In sum, the admission of evidence relating to the robbery could not reasonably be said to have determined the outcome of this case.

With respect to the suggestions made by Harry and Lewis that you shift the basis of the opinion from the "reasonable possibility of prejudice" approach to the "harmless error" rational of Chapman, I urge you to "stick to your guns." The suggestion that we apply the "harmless error" standard in this case where no error is found strikes me as being unwise at best. At worst, it might be viewed as boot strapping a constitutional violation.

Regards,

Justice White

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

January 24, 1986

RE: 84-1636 - Morris v. Mathews

Dear Byron:

I join.

Regards,

WEB

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 12, 1985

84-1636-Morris v. Mathews

Dear Thurgood,

So far, only you and I are in dissent in the above. Since Hetenyi so clearly proves it's wrong, will you take on the dissent?

Sincerely,

Bill

Justice Marshall

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

From: **Justice Brennan**

Circulated: JAN 2 2 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE BRENNAN, dissenting.

Both the charge for aggravated robbery, to which respondent pleaded guilty, and the subsequent charge for aggravated murder arose from the same criminal transaction or episode. In those circumstances, Ohio's prosecution for aggravated murder, and the Ohio Court of Appeals' subsequent reduction of that conviction to simple murder, in my view, violated the prohibition of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), that no person shall be subject for the same offense to be twice put in jeopardy. I adhere to my view that the Double Jeopardy Clause requires that except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *e. g.*, *Brooks* v. *Oklahoma*, 456 U. S. 999 (1982) (BRENNAN, J., dissenting); *Snell* v. *United States*, 450 U. S. 957 (1981) (BRENNAN, J., dissenting); *Werneth* v. *Idaho*, 449 U. S. 1129 (1981) (BRENNAN, J., dissenting); *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting). Accordingly, I would affirm the judgment below reversing the District Court, with directions to the Court of Appeals to re-

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

From: **Justice White**

Circulated: DEC 10 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER
v. JAMES MICHAEL MATHEWS

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

[December ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser-included offense that is not jeopardy-barred.

I

On February 17, 1978, respondent James Michael Mathews and Steven Daugherty robbed the Alexandria Bank in Alexandria, Ohio. After an automobile chase, the police finally surrounded the two men when they stopped at a farmhouse. Soon thereafter, the police heard shots fired inside the house, and respondent then emerged from the home and surrendered to police. When the officers entered the house, they found Daugherty dead, shot once in the head and once in the chest. The police also found the money stolen from the bank hidden in the pantry.

Once in custody, respondent gave a series of statements to law enforcement officials. In his first statement, given one hour after his surrender, respondent claimed that Daugherty and another man had forced him to aid in the bank robbery by threatening to kill both respondent and his girl friend. Respondent denied shooting Daugherty. In the second state-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1985

84-1636 - Morris v. Mathews

Dear Harry:

I appreciate your comments, but I would rather not rewrite the draft to accommodate your views. First, there was a double jeopardy error in this case, and the state attempted to cure it by setting aside the conviction on the jeopardy-barred charge. The question in my mind is whether this cured the error, or to put it another way, whether conviction on the lesser-included offense also violated the Double Jeopardy Clause. If it did not, there was no error, harmless or otherwise. And the draft concludes that Clause was not violated because there was no reasonable probability that Morris would not have been convicted in a separate trial for murder.

I also prefer the reasonable probability standard. It is consistent with the approach in other contexts and gives sufficient protection to state convictions, which I doubt your harmless error analysis would afford in other cases.

Sincerely,

Byron

Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 2, 1986

84-1636 - Morris v. Mathews

Dear Lewis,

Thanks for your note. I'll take another look at this case and will be back to you.

Sincerely yours,

Justice Powell

Cabell - Any thoughts? If there was no D/Jeopardy violation, I could join 4 to make a court. Some of our D/J cases have gone too far.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 2, 1986

84-1636 - Morris v. Mathews

Dear Lewis,

I respect your and Harry's view that this is a harmless error case.

But it is just as sensible it seems to me to ask whether after reducing the conviction to one for murder, there is a double jeopardy violation at all. If there is not, there is no occasion to inquire into error, harmless or otherwise. And if this is the case, then the reasonable probability standard of Strickland and other cases is the proper one, and it cannot be said that the draft treats double jeopardy violations different from other constitutional infractions. Furthermore, applying the harmless error, beyond-reasonable-doubt standard in a case like this, with the burden on the state, invites precisely the result that the Court of Appeals reached. That court said there "may" have been prejudice, obviously thought that this was equivalent to a reasonable possibility, and dealt with the evidentiary problem in the most cursory way. It would have given the issue a more reasoned treatment, it seems to me, had it been necessary to conclude that it was reasonably probable that had respondent been tried for simple murder, he would not have been convicted.

Being doubtful, however, of convincing you, I shall consult my colleagues as to whether to modify my circulating draft.

Sincerely yours,

Byron

Justice Powell

Copies to: The Chief Justice NO
Justice Rehnquist
Justice O'Connor Y, 12/10
Y, 12/12

Have these joined Byron?

Lewis, Re Harris -f. 1836

The indicated changes embrace the reasonable possibility standard. If they satisfy you, I shall ~~see~~ present them to Sandra and Bill. The Chief has not yet voted.

Byron

(Sally - Keep in file with three drafts - received 1/3/86)

printer: see pp. 1, 7, 9, 10, 11

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

L.F.P

From: Justice White

Circulated: Sent only to me 1/3/86

Recirculated: _____

2nd

~~1st~~ DRAFT

See changes on pp 7, 9-11 intended to satisfy me. See my letter to BRW.

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* JAMES MICHAEL MATHEWS

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

[December ——, 1985]

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser-included offense that is not jeopardy-barred.

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On February 17, 1978, respondent James Michael Mathews and Steven Daugherty robbed the Alexandria Bank in Alexandria, Ohio. After an automobile chase, the police finally surrounded the two men when they stopped at a farmhouse. Soon thereafter, the police heard shots fired inside the house, and respondent then emerged from the home and surrendered to police. When the officers entered the house, they found Daugherty dead, shot once in the head and once in the chest. The police also found the money stolen from the bank hidden in the pantry.

Once in custody, respondent gave a series of statements to law enforcement officials. In his first statement, given one hour after his surrender, respondent claimed that Daugherty and another man had forced him to aid in the bank robbery by threatening to kill both respondent and his girl friend. Respondent denied shooting Daugherty. In the second state-

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 15, 1986

Sally - Let me know when
CJ votes
1/22

84-1636 - Morris v. Mathews

Bill Brennan
vote for a court.

Dear Lewis,

It will not surprise you to learn that the suggested changes in my draft did not go over well with two of the Justices on my side of the case. Hence, I shall stick with my draft but subject to some changes that may satisfy John Stevens.

Sincerely yours,

Byron

Justice Powell

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

From: **Justice White**

Circulated: _____

Recirculated: JAN 15 1986

Pp. 7, 9-10 and stylistic

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser-included offense that is not jeopardy-barred.

I

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 24, 1986

84-1636 - Morris v. Matthews

Dear Chief,

I discover we do not have a headnote in this case, and I think it should go over. Also, I have not yet heard from Lewis.

Sincerely yours,

Byron

The Chief Justice

Copies to the Conference

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

From: **Justice White**

Circulated: _____

Recirculated: _____ 1986

[illegible] CHANGES THROUGHOUT.

3
~~2nd~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE WHITE delivered the opinion of the Court.

The question presented in this case is whether a state appellate court provided an adequate remedy for a violation of the Double Jeopardy Clause of the Fifth Amendment by modifying a jeopardy-barred conviction to that of a lesser-included offense that is not jeopardy-barred.

I

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 13, 1985

Re: No. 84-1636-Morris v. Mathews

Dear Byron:

In due course I shall circulate a dissent in this one.

Sincerely,

T.M.

Justice White

cc: The Conference

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

From: **Justice Marshall**

Circulated: JAN 8 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER *v.* JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE MARSHALL, dissenting.

For substantially the reasons stated in Parts I and II of JUSTICE BLACKMUN's thoughtful concurring opinion, I believe that the Court of Appeals was correct to conclude that respondent was entitled to a new trial if he could demonstrate a "'reasonable possibility that he was prejudiced'" by the double jeopardy violation, 754 F. 2d 158, 162 (CA6 1985) (quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979)). This standard is consistent with the approach this Court has uniformly taken when constitutional violations do not require automatic reversal, see *ante*, at ——, and is justified by the difficulties that a defendant wishing to show even the probability of actual prejudice must face.

> "There [can] never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 864 (CA2 1965), cert. denied, 383 U. S. 913 (1966).

STYLISTIC CHANGES THROUGHOUT

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

From: **Justice Marshall**

Circulated: _____

Recirculated: JAN 14 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER
v. JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE MARSHALL, dissenting.

For substantially the reasons stated in Parts I and II of JUSTICE BLACKMUN's thoughtful concurring opinion, I believe that the Court of Appeals was correct to conclude that respondent was entitled to a new trial if he could demonstrate a "'reasonable possibility that he was prejudiced'" by the double jeopardy violation, *Mathews* v. *Marshall*, 754 F. 2d 158, 162 (CA6 1985) (quoting *Graham* v. *Smith*, 602 F. 2d 1078, 1083 (CA2 1979)). This standard is consistent with the approach this Court has uniformly taken when constitutional violations do not require automatic reversal, see *ante*, at ——, and is justified by the difficulties that a defendant wishing to show even the probability of actual prejudice must face.

> "There [can] never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available." *United States ex rel. Hetenyi* v. *Wilkins*, 348 F. 2d 844, 864 (CA2 1965), cert. denied *sub nom. Mancusi* v. *Hetenyi*, 383 U. S. 913 (1966).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 16, 1985

Re: No. 84-1636, Morris v. Mathews

Dear Byron:

Like John, I agree with the result you reach in this case and with much of what you say in your proposed opinion. I share his feeling that the error made by the Court of Appeals rests in its conclusion that respondent showed a "reasonable possibility" of prejudice.

I feel, too, that this is a "harmless error" case, despite the disclaimer near the bottom of your page 7. For me, the issue is whether the double jeopardy violation may be deemed harmless with respect to the conviction on the lesser-included charge. Moreover, I am somewhat concerned about your enunciation of a standard. The opinion seems to embrace three formulations: "reliable inference of prejudice," "reasonable probability that he would not have been convicted of murder," and "the result of the proceeding probably would have been different." Pp. 9-10. Perhaps these are, or are meant to be, one and the same, and perhaps I am bothered only by semantics. Taken together, however, the three formulations seem incompatible with the "reasonable possibility" standard applied by the Court of Appeals. Of course, you seem to reject that standard on page 10 of the opinion.

I, however, see no good reason not to apply the "reasonable possibility" standard, which was first formulated by then-Judge Marshall in United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (CA2 1965), cert. denied, 385 U.S. 913 (1966), and was later endorsed by Judge Friendly in Graham v. Smith, 602 F.2d 1078 (CA2), cert. denied, 444 U.S. 995 (1979). I think the Hetenyi standard is the proper one, in part because it ultimately seems identical to the "beyond the reasonable doubt" standard of Chapman v. California, 386 U.S. 18 (1967), which has been applied consistently to other constitutional errors. See id., at 24. Double jeopardy violations, for me, are no less serious than other constitutional violations, and I hesitate to assess their harm under the more lenient standards that you propose.

In this case, however, the Chapman standard seems satisfied, because there was no possibility of a compromise verdict, and evidence regarding the robbery would have been admitted anyway to show motive and opportunity for the murder.

I offer these comments for your consideration. If they do not appeal to you, I shall probably write separately concurring in the result. For the moment, I shall wait to see how you and John work out your differences.

Sincerely,

Harry

Justice White

cc: The Conference

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

From: **Justice Blackmun**

Circulated: DEC 30 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER
v. JAMES MICHAEL MATHEWS

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

[December ——, 1985]

JUSTICE BLACKMUN, concurring in the judgment.

To remedy the jeopardy-barred prosecution and conviction of respondent James Michael Mathews for aggravated murder, the Ohio appellate court modified the conviction to one for the lesser included offense of murder, which was not jeopardy-barred. The United States Court of Appeals for the Sixth Circuit held this remedy constitutionally insufficient because there was a "reasonable possibility" that the presence of the aggravated-murder charge prejudiced respondent's defense against the charge of murder. I think the Court of Appeals applied the right standard but reached the wrong result. Accordingly, I concur in today's judgment but do not join the Court's opinion.

I

Respondent concedes that after he pleaded guilty to armed robbery Ohio could have tried him for murder without violating the Double Jeopardy Clause. Disagreeing with the Court of Appeals, however, he contends that the presence of the jeopardy-barred charge of aggravated murder in his subsequent trial *automatically* rendered unconstitutional any conviction resulting from that trial. The Court correctly points out that this position cannot be reconciled with the terms of the judgment in *Benton* v. *Maryland*, 395 U. S. 784

pp. 6, 7, 3

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

From: **Justice Blackmun**

Circulated: _____

Recirculated: JAN 16 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1636

T. L. MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, PETITIONER
v. JAMES MICHAEL MATHEWS

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

[January ——, 1986]

JUSTICE BLACKMUN, concurring in the judgment.

To remedy the jeopardy-barred prosecution and conviction of respondent James Michael Mathews for aggravated murder, the Ohio appellate court modified the conviction to one for the lesser included offense of murder, which was not jeopardy-barred. The United States Court of Appeals for the Sixth Circuit held this remedy constitutionally insufficient because there was a "reasonable possibility" that the presence of the aggravated-murder charge prejudiced respondent's defense against the charge of murder. I think the Court of Appeals applied the right standard but reached the wrong result. Accordingly, I concur in today's judgment but do not join the Court's opinion.

I

Respondent concedes that after he pleaded guilty to armed robbery Ohio could have tried him for murder without violating the Double Jeopardy Clause. Disagreeing with the Court of Appeals, however, he contends that the presence of the jeopardy-barred charge of aggravated murder in his subsequent trial *automatically* rendered unconstitutional any conviction resulting from that trial. The Court correctly points out that this position cannot be reconciled with the terms of the judgment in *Benton* v. *Maryland*, 395 U. S. 784

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 19, 1985

84-1636 Morris v. Mathews

Dear Byron:

Until the "dust settles" (no reflection on any of the views expressed!), I will await further writing in this case.

Although I have not reexamined this case with care, my impression is that you, Harry and John are not very far apart. I do think it reasonably clear that evidence concerning the robbery would have been admissible in a murder trial. The robbery and the murder, including motivation, were inextricably intertwined.

Sincerely,

Lewis

Justice White

Copies to the Conference

LFP/vde

January 2, 1986

84-1636 Morris v. Mathews

Dear Byron:

Harry has written a rather strong opinion concurring only in the judgment. He views this as a "harmless error" case, as I did at Conference. I also thought that since the respondent had failed to identify any evidence of prejudice, we could find the Double Jeopardy error harmless and enter final judgment.

Harry says that you have departed from a host of precedents by applying a "reasonable probability" rather than a "reasonable possibility" standard. In my view of the case (finding no evidence of prejudice in the record before us), the way the standard is articulated makes little difference except as a precedent in a future case.

I write this personal note as normally I like to join the opinion of the Justice assigned to write the Court opinion. I would be interested in your reaction to Harry's opinion, and whether you plan to respond. I suppose it would be helpful if five of us could agree on the applicable standard.

Sincerely,

Justice White

lfp/ss

January 9, 1986

84-1636 Morris v. Mathews

Dear Byron:

As the flu bug has had me at home for most of the past week, I have not commented on the changes suggested on the draft of your opinion sent to me on January 3. I think we will have no difficulty in getting together. Except as I indicate below, I approve of your changes.

On p. 9, in the second sentence of the second full paragraph, the phrase "reliable inference of prejudice" is used. In view of your other changes, I suggest that the phrase "reasonable possibility of prejudice" would be appropriate.

Although I can accept the "insert" you propose on page 10, I think the thought would be more clearly expressed if the insert read as follows:

> "The Court of Appeals, however, was too ready to conclude that the inclusion of the jeopardy-barred offense had created a reasonable possibility of prejudice with respect to the lesser included offense of simple murder."

Finally, I enclose a xerox of page 11 on which I have suggested in pen some language changes that I would appreciate your considering. I think it is particularly important to add the addition to what will be the last sentence in the first full paragraph on p. 11.

I could agree, as the Chief Justice suggests, that we simply reverse this case in the absence of any showing of prejudice.

Sincerely,

Justice White

lfp/ss

166, 169, 265 N. E. 2d 551, 553 (1970). We normally accept a Court of Appeals's view of state law, but if this case turns on the admissibility of the challenged evidence in a separate trial for murder, the issue deserves a more thorough consideration by the lower court.

Finally, the court's observation that the admission of ~~questionable~~ evidence "may have prejudiced the jury" falls far short of a considered conclusion that if the evidence at issue was not before the jury in a separate trial for murder, there is a reasonable ~~probability~~ that respondent would not have been convicted.

Because the Court of Appeals's legal and factual basis for ordering the writ of habeas corpus to issue was seriously flawed, its judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

---

to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

Similarly, Ohio R. Evid. 404(b) states:

(B) *Other crimes, wrongs or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

January 24, 1986

84-1636 Morris v. Mathews

Dear Byron:

This has been a close case for me, even after you found my suggested changes unacceptable.

As Harry's opinion is closer to the way I have thought about this case, now that you have a Court I will go ahead and join Harry.

Sincerely,

Justice White

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 24, 1986

84-1636 Morris v. Mathews

Dear Harry:

Although I have been in some doubt as to how I would vote in this case, I now request that you add my name to your dissenting opinion.

Sincerely,

L. Lewis

Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 12, 1985

Re: No. 84-1636 Morris v. Mathews

Dear Byron,

Please join me.

Sincerely,

WHR

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 13, 1985

Re: 84-1636 - Morris v. Mathews

Dear Byron:

Although I agree with your result and with the first nine pages of your opinion (except for the last two or three lines), my reasoning is just a little different. I don't think the principal error made by the Court of Appeals was in the statement of an incorrect standard, but rather in its conclusion that the respondent suffered prejudice. Since he was found guilty beyond a reasonable doubt of the greater offense, it seems to me to follow a fortiori that his guilt of the lesser offense was also adequately proved. In this circumstance, I agree with you that respondent had the burden of showing some prejudice and that he just hasn't carried that burden here.

Accordingly, I would prefer to dispose of the case by using the same formula that the Court used in Benton--that is, stating that "[i]t is not obvious on the face of the record," 395 U.S., at 798, that the murder conviction was affected in any way by the double jeopardy violation and that a federal court should not assume that it was without some specific demonstration of prejudice, which simply has not been made in this case. In short, I would hold that the correct remedy for this sort of double jeopardy violation is a setting aside of the barred conviction, and that if the defendant is to obtain any other relief, he has the burden of demonstrating his entitlement to it--a burden that he has not begun to discharge in this case. The source of the "reasonable probability" standard that you announce is somewhat elusive, and while the standard may be

appropriate in some cases, I am concerned that it may be inappropriate in others.

Respectfully,

JM

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 15, 1986

Re: 84-1636 - Morris v. Mathews

Dear Byron:

Please join me.

Respectfully,

Justice White

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CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

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

December 10, 1985

No. 84-1636 Morris v. Mathews

Dear Byron,

Please join me.

Sincerely,

Sandra

Justice White

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