In the

Supreme Court of the United States

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

DANIEL P. MURPHY,

Respondent.

No. 72-212

Washington, D. C.
March 20, 1973

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HOYT C. CUPP, Superintendent, Oregon State Penitentiary, Petitioner, v. DANIEL P. MURPHY, Respondent.	No. 72-212

Washington, D. C.,

Tuesday, March 20, 1973.

The above-entitled matter came on for argument at 10:58 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

THOMAS H. DENNEY, ESQ., Assistant Attorney General of Oregon, Salem, Oregon 97310; for the Petitioner.

HOWARD R. LONERGAN, ESQ., 812 Executive Building, Portland, Oregon 97204; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-212, Cupp against Murphy.

Mr. Denney, you may proceed.

ORAL ARGUMENT OF THOMAS H. DENNEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DENNEY: Mr. Chief Justice, and may it please the Court:

This is a federal habeas corpus case, here on writ of certiorari to review a judgment of the United STates Court of Appeals for the Ninth Circuit. The petitioner is the Superintendent of the Oregon State Penitentiary, and he has the respondent, Daniel P. Murphy, in his custody.

An Oregon State trial court convicted Murphy of second-degree murder, the second-degree murder of his wife; his conviction was affirmed by the Oregon Court of Appeals. The Oregon Supreme Court denied a petition for discretionary review of that decision. This Court denies Murphy's petition for certiorari.

Murphy then commenced this present Federal habeas corpus action. The United States District Court for the District of Oregon, relying very much on the opinion of the Oregon Court of Appeals, and agreeing with it in full, denied habeas corpus relief; and on Murphy's appeal to the Ninth Circuit, the Ninth Circuit reversed and remanded, ordering

Petitioner Cupp to release Murphy within sixty days unless the State of Oregon retries him within that time.

There's been only one question raised and preserved throughout these proceedings, and that is the legality of the seizure of certain evidence which was used in Murphy's trial. In the State court trial, as part of the showing that Murphy strangled his wife while she was asleep in bed and while wearing a rayon acetate nightgown, the State introduced some scrapings that were taken from underneath Murphy's fingernails while he was at the police station, and those scrapings revealed the presence of blood, skin cells, cotton fibers, and rayon acetate fibers.

The case -- well, the Oregon Court of Appeals and the U. S. District Court, and our position here can be reduced into three simple propositions, basically, the first being that as the courts of Oregon held, the police had probable cause to either arrest or to search Murphy at the time they conducted the search, that there were exigent circumstances justifying an immediate taking of the evidence from Murphy, even though the police did not formally place Murphy under arrest, nor did they seek to obtain a search warrant to seize this evidence from underneath Murphy's fingernails, and finally that the momentary detention while this evidence was taken was more reasonable, or at least no less reasonable than the full-scale formal arrest would have

been, or than detaining Murphy indefinitely, restraining him physically to the degree that would have been necessary to prevent possible loss or destruction of this evidence for the longer time that would have been necessary to obtain a search warrant after Murphy arrived at the police station.

On the issue of whether or not there was probable cause to conduct the search, every court below has held that there was probable cause for the police to act, but of course the question is briefed and argued here. I think that in their brief counsel for Murphy and counsel for the American Civil Liberties Union, who are appearing here amicus curiae on Murphy's behalf, understate the evidence.

The facts of the case in this particular situation were that the police had the -- were investigating a strangulation murder. The deceased was found in her bed in a perfectly made-up room, there were no signs of disturbance, no signs of forced entry of the house, no signs of robbery. All of this, we think, tends to show that the killer was probably known to the deceased.

The Murphys had been separated for some time, and Murphy was not living in the Murphy house at the time of the homicide; but he had been, the police learned, expected home that night.

The deceased was manually strangled, to the observation of the homicide detectives. There was not a formal

medical report on this point for some time, but the officers made their own opinion, which I think is enough to constitute probable cause, even though we of course don't have at this point legally admissible opinion as to the cause of death.

There were scratches on the neck of the deceased, which appeared to the officers to be scratches made from fingernails of the strangler. This was later confirmed, at least to be a fingernail scraping by the pathologist who examined the body.

And the son, the 18-year-old son of the Murphys, who was the only other person in the house, or known to be in the house on the night of the murder, was apparently a chronic nail-biter. Now, the record is not perhaps as clear on this point as it might be desired, but it does -- but the police do say that he bit his fingernails well back into the quick, he had no fingernails; it was absolutely impossible to scrape them. I believe that's all the record specifically says.

I conjecture from this, perhaps unjustifiably, I don't know, that he is a chronic nail-biter who has bit his nails for a long time. There's a suggestion, in trying to negate the existence of probable cause, in respondent's brief that there's no evidence in the record as to when this nail-biting occurred. My inference from my reading of the record simply is that this was a chronically recurring

condition.

At any rate, they also learned -- the police also learned from the son, Patrick Murphy, that Murphy was expected home that evening. The police called Camp Sherman, Oregon, which is in eastern Oregon, incidentally, rather than in southern Oregon as the record several times says; it's in central Oregon, about a hundred miles east of Salem, and left word of Mrs. Murphy's death. Murphy was not at Camp Sherman at the time. They learned from the person that they talked to over the telephone that he had ostensibly been going into Portland the preceding night, and he was expected back.

The police left word for Murphy to call. And he did, about 4 p.m.

Without, apparently -- according to the record -- without inquiring into the circumstances of his wife's death, other than to confirm the fact that his wife was indeed dead, Murphy immediately went into a long account of where he had been the night before, without any questioning on the officer's part.

He then agreed to come to Portland to discuss the case further with the police.

When he arrived at the station, he was fully advised of his constitutional rights, and he had two lawyers called, who came to the station to represent him. Murphy again seemed curiously disinterested in the circumstances of his wife's

death, and his behavior struck the detectives as unusual in that respect.

While they were talking to him, one of the detectives saw a dark spot underneath Murphy's right thumbnail, which prompted him to think about taking fingernail scrapings.

They asked Murphy for permission to scrape his fingernails, and, on the advice of counsel, he refused. Whereupon the police scraped the fingernails anyway.

There is also testimony in the record that when the request for fingernail scrapings was made, Murphy suddenly and immediately put his hands behind his back and started moving his hands, and that he then inserted them into his pockets, moving them around very vigorously so that change or something metallic in the pockets was heard rattling.

We think that all of this, all of these circumstances clearly gave the police probable cause to act to secure the fingernail scrapings.

QUESTION: But he was detained against his will for the limited time necessary to take the scrapings which were also taken against his will, is that right?

MR. DENNEY: That is correct.

QUESTION: So why wasn't that, from a constitutional point of view, an arrest?

MR. DENNEY: I thought --

QUESTION: Even though it might not have been from the

point of view of Oregon law; why wasn't it from the constitutional point of view an arrest, just as in Davis v. Mississippi? We said, although Mississippi says this was not an arrest, this was only a dragnet taking people in to the jailhouse to take their fingerprints, we said from the constitutional point of view, yes, it was a seizure. So why wasn't this?

MR. DENNEY: I --

QUESTION: In Mississippi we said it was an unreasonable seizure --

MR. DENNEY: I realize that, but --

QUESTION: -- and an unreasonable search. But why would not this have been a seizure under the Fourth and Fourteenth Amendments, that was a reasonable one?

MR. DENNEY: I would have no difficulty if the Court --

QUESTION: But you keep avoiding that in your brief. You said that he wasn't arrested, he wasn't arrested, he wasn't arrested.

MR. DENNEY: He only --

QUESTION: Why wasn't this from a constitutional point of view an arrest, just as it was in Davis?

MR. DENNEY: Perhaps it is. The definition that the Oregon --

QUESTION: Or a seizure, to use the constitutional

phrase, -- word.

MR. DENNEY: Right. I suppose the only answer I can give there, Mr. Justice Stewart, because it does occur to me that this could be perfectly well denominated an arrest, and that would be --

QUESTION: A seizure within the Fourth and Fourteenth Amendments --

MR. DENNEY: And a seizure incident to the arrest.

QUESTION: -- and a seizure upon probable cause, and a search incident to that reasonable seizure within the bounds of Chimel v. California.

MR. DENNEY: Yes, sir.

QUESTION: Why isn't that your case?

MR. DENNEY: The reason, I think, is because the Oregon Court of Appeals held, rightly or wrongly, and we have followed this all the way along, and I believe that they cited one of the decisions of this Court in so saying, that the arrest is the taking of the person into custody to make him answer for the charge.

QUESTION: Well, that may well be true, as a matter of Oregon law, just as in Louisiana they said, as a matter of Louisiana law, taking that young man Davis down to the station house was not an arrest. I'm sorry, the Mississippi law.

MR. DENNEY: I see. Well --

QUESTION: But we said -- we said in Davis v. Mississippi that as a matter of the Fourth and Fourteenth Amendments it was a seizure.

MR. DENNEY: Well, I am simply adhering to what the Oregon court said --

QUESTION: Not very understandably --

MR. DENNEY: -- at page 79 of the printed Appendix, they cite Terry vs. Ohio for the definition that they used, and went from there to say, well, even if it isn't an arrest, or assuming that it isn't an arrest --

QUESTION: But you're not confined to the Oregon State Supreme Court's basis to defend this judgment here, are you?

MR. DENNEY: Oh, I appreciate that, Mr. Chief Justice. But I did not have the confidence in the position that the Oregon Court of Appeals did not adopt that I have here. It's that simple.

Of course, if --

QUESTION: Well, all I meant --

MR. DENNEY: I'm rather grateful to Your Honor.

QUESTION: It may have sounded like a statement, but what I was asking you was a question, otherwise.

MR. DENNEY: Yes.

If this Court of course holds that is an arrest within the meaning of the search and seizure incident to a

lawful arrest problem, that's the end of the case, of course; and --

QUESTION: If there was probable cause.

MR. DENNEY: Yes.

QUESTION: Well, the Ninth -- you haven't gotten to what the Court of Appeals did, have you?

MR. DENNEY: I beg your pardon, Your Honor?

QUESTION: You still have some -- some -- What did the Court of Appeals do?

MR. DENNEY: The Court of Appeals held that there were no exigent circumstances --

QUESTION: Yes, but they set it aside, even assuming there was probable cause. Isn't that right?

MR. DENNEY: Yes, Your Honor.

QUESTION: So we can proceed on the basis that there was probable cause, in which event you say it doesn't make any difference whether it was an arrest or not.

MR. DENNEY: That is true. That is essentially the position that the Oregon Court of Appeals took, and perhaps they misunderstood the decisions of this Court as to whether this was an arrest or not.

QUESTION: Well, let's go on.

MR. DENNEY: As for the exigent circumstances which justified the immediate seizure from Murphy's person, whether or not he was under arrest, we think it's quite clear

that this evidence at least was potentially, readily destructible and perhaps, if the testimony of the Deputy District Attorney, who was present at the time the request was made,and one of the detectives, if that testimony is to be believed, it was in fact in the actual process of destruction at the time the police took the fingernail scrapings.

QUESTION: So you don't contend that just because there was probable cause, or that just because there was a seizure protected by the Fourth Amendment, you don't say that automatically the police had the right to take the fingernail scrapings, do you?

MR. DENNEY: No, in the abssence of the exigent circumstances, which are present here -- I'm not arguing for a blanket rule that probable cause justifies seizure, warrants a seizure of a person.

QUESTION: Well, you're saying that Schmerber type considerations apply, are applied?

MR. DENNEY: Very much so, and if anything the situation here is even more critical because the alcohol in Schmerber's bloodstream was so -- would only dissipate itself over a relatively lengthy period of time, whereas Murphy could have destroyed the fingernail scrapings, if given the opportunity, in a matter of seconds.

Again, assuming that this was not an arrest within the meaning of the Fourth Amendment, and that the search in

this case has to be justified without the arrest factor involved in it, it is our position, as developed in the brief, that this is in fact a less serious invasion of Murphy's privacy than would have been the case, either had the police made a full-scale arrest and kept him indefinitely while the fingernail scrapings were analyzed, instead of releasing him after the scrapings were taken, or holding him at the station and forcibly restraining him from making any attempt to destroy the evidence which was literally at his finger-tips.

As the Oregon Court of Appeals observed, we just don't think proper application of the Fourth Amendment requires any such extreme measure.

MR. CHIEF JUSTICE BURGER: Mr. Lonergan.

ORAL ARGUMENT OF HOWARD R. LONERGAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LONERGAN: Mr. Chief Justice, Mr. Justices:

I think the first consideration is rather like this ic/ case held in Coolidge, it's implicit in Coolidge. That essentially every extension into the protections of the Bill of Rights is really not an end in itself, but is merely the springboard for the next extension.

For example, --

QUESTION: Sometimes the reverse of that proposition is true, too, isn't it?

MR. LONERGAN: I don't know of any.

QUESTION: Well, go on, then.

MR. LONERGAN: You take, now, for example, Mr. Justice Stewart has mentioned, was this not an arrest? Well, of course, that would be contrary to this case, this Court's decision in Terry, because it held there that the detention was not an arrest because it was not the first step in a criminal proceeding.

Now, of course, the word "arrest", if we give it its English or French meaning literally, it is any stopping. And yet Terry was to the contrary.

So I don't think we can say it was an arrest.

Furthermore, we have the situation of when you say it was on probable cause, it is about the thinnest case of probable cause that I can see from the actual facts, because I think Mr. Denney beefed up the facts to a certain extent.

QUESTION: Well, don't we -- aren't we reviewing a judgment of the Court of Appeals that rested on an assumption there was probable cause?

MR. LONERGAN: I don't think it did rest on that assumption, but even if there were --

QUESTION: All right, then you have to consider, then, that the State is justified in having us look at the case on the assumption there was probable cause.

MR. LONERGAN: I would think that you have to

determine whether there's probable cause, if you reach -- if you reach that --

QUESTION: We normally don't. We normally don't reach those questions in the first instance. We normally ask the lower courts to decide those questions first.

MR. LONERGAN: That I recognize.

But, be that as it may, if I might say it, that ordinarily, for example -- if there was -- the question is whether there was probable cause to arrest; that answer is generally they did not arrest, in the traditional sense of the word. Ordinarily, for example, if an officer makes an arrest, as I understand the underlying English decisions, he has to justify on the position he's taken.

Here they did not justify themselves, in their own minds at least, that they were arresting him for the crime of murder. Instead, on the instructions of the District Attorney, they were scraping his fingernails for evidence. And I think the probable cause there comes down to this point:

Ordinarily, on a search for evidence or to get probable cause for a warrant, let's say, you must have probable cause that the material is there. Here, as the officer testified, that he had no idea what would turn up until they got a lab examination. And that he would have done this to any suspect, no matter -- no matter, the dark spot or anything.

So I don't think, really, it presents the correct probable cause question. The probable cause, if we are going to make this springboard, is whether the material was present.

QUESTION: You don't attach much weight to the evidence, the testimony that there was an effort to dispose, an apparent effort to dispose of the evidence, do you?

MR. LONERGAN: He's in the presence of the police. They can restrain anything like that. Rather than call the --

QUESTION: Well, if they restrain him, then, is he arrested?

MR. LONERGAN: I would say not according to the definitions that this Court gave in Terry.

QUESTION: What about Davis?

MR. LONERGAN: Well, Davis, I don't consider that an arrest case. I consider it a seizure all right. This is a seizure case. The Fourth Amendment applies. The Fourth Amendment applies in Terry. They seized -- this, I think, is the closest, Davis is the closest one to this case. They seized him because he was a suspect. They fingerprinted him without warrant. And therefore this Court held that that was illegal, and the evidence should be suppressed.

I think that applies here. He is a suspect, he is seized, he is -- his fingernails are scraped without a warrant, and therefore it violated the Fourth Amendment.

But it's not, to my mind, an arrest, because they

certainly didn't consider it an arrest.

QUESTION: Well, you say that for constitutional purposes you can have a seizure under the Fourth Amendment that doesn't qualify as an arrest, which would support a search incident to a seizure to arrest -- as a search incident to arrest?

MR. LONERGAN: Yes, Terry was just that sort of a case. This Court held in Terry that it wasn't an arrest. But it was -- but it had to comply with the Fourth Amendment. There had to be sufficient for that detention.

I think there's no question that that's Terry all the way through. Terry was not an arrest. Terry was not arrested. He was, however, detained, and this Court said the Fourth Amendment applied.

QUESTION: But Terry was arrested after they found the gun.

MR. LONERGAN: Later. But not at the stopping --

QUESTION: It was about a minute later.

And you say there was no grounds for probable cause to arrest here at all?

MR. LONERGAN: I don't see it. They had a stormy marriage, that's hardly grounds for -- he was somewhere present, by his own statement; he was somewhere present.

But this other business, like this cut with the fingernails, that isn't what the evidence is, it was something

sharp. That the fingernails of the son were bitten, but when were they bitten?

That the bed was made up; when was it made up? After she was killed?

The doors were locked; when were they locked? After she was killed?

In other words, the evidence, to me, is highly -- highly flimsy. It's -- it certainly doesn't warrant a man of reasonable probability to reach that conclusion; and the answer is the police did not do it. They did not reach the conclusion that they had probable cause to arrest this man, they didn't arrest him. He wasn't arrested until a month later, after an indictment was obtained.

They discussed it with the District Attorney. If he had instructed them to place him under arrest, if they had sufficient, they would have placed him under arrest.

The case has shifted its ground. It was an exigent circumstance case. Now the State has later on made an attempt to make it a probable cause case. But as probable cause to search, if we make this springboard that now you have probable cause to search persons and houses, just like automobiles, you've discarded the Fourth Amendment.

If you make exigent circumstances the ground, you again have discarded the Fourth Amendment. Because all evidence is subject to destruction. All evidence is subject

to destruction.

If all the policeman has to say is that "I feared it would be destroyed, and therefore I searched," you've discarded the magistrate, you've discarded the warrants, you've discarded the affidavit of probable cause.

They had time enough to call a Deputy District Attorney, they had time enough to call a magistrate. He was in the presence of the police. If he were trying to spoil evidence, they could have restrained him from doing it.

This Court allowed the detention for the purpose of getting a search warrant in that mail case, what is it, Van Leeuwen. The same thing applies here, I'd say.

QUESTION: Now you've just said that if he was trying to destroy evidence, the police could restrain him. Didn't they?

MR. LONERGAN: Restrain him from destroying the evidence?

QUESTION: Yes.

MR. LONERGAN: Apparently not.

QUESTION: Well, I thought immediately --

MR. LONERGAN: They just scraped them.

QUESTION: -- I thought immediately when this activity was noticed, they then proceeded to take the fingernail scrapings.

MR. LONERGAN: They called the Deputy District

Attorney and asked him what to do.

QUESTION: Well, but they held him right there all the time.

MR. LONERGAN: Well, he was there.

QUESTION: Yes.

MR. LONERGAN: So apparently he didn't make any serious attempt to destroy the evidence, otherwise he probably would have done it.

QUESTION: Well, he didn't make a successful attempt, that's all we know now, isn't it?

MR. LONERGAN: Well, we know he didn't make a successful attempt; but it probably couldn't have been serious, or he would have succeeded.

QUESTION: Well, hasn't the court said often that in evaluating these things they must be evaluated as a trained, experienced police officer sees them through his eyes, in light of all the surrounding circumstances?

MR. LONERGAN: I don't --

QUESTION: So that putting his hands in his pockets and putting his hands behind him after the subject of fingernail scrapings comes up might mean nothing to a tourist who was going by, but might mean a great deal to an experienced police officer.

MR. LONERGAN: Well, they said that what motivated them, they said that he was a suspect and they would have done

it to any suspect. And they had, as I say, they had time enough to call a Deputy District Attorney and get his opinion on the subject and follow that, they had time enough to call a magistrate and get his authorization; and that would have complied.

I see it really no different from Davis; that instead of getting a warrant in Davis, they rounded him up and got it.

If you're going to say exigent circumstances, you've discarded the Fourth Amendment. All evidence can be destroyed.

As to the probable cause, what can I say -- if we are going to jump, the automobile poised for flight, now to allow searches of persons, and I assume houses, on probable cause -- even that is not available,because they had no idea what they would find, as they testified, until the lab examination.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Denney, do you have anything further?

REBUTTAL ARGUMENT OF THOMAS H. DENNEY, ESQ.,

ON BEHALF OF THE PETITIONER

MR. DENNEY: Just briefly, two points, Your Honor.

I think that the fact that the police did not in fact arrest Murphy at that time, or did not formally place him under arrest and hold him indefinitely, no more negates

the existence of probable cause than the fact that a person is arrested establishes that there is. This is a matter for the courts to review, in the light of what the facts and circumstances known to the police officer area; and our position is that there was ample cause here, and I think we've been supported in that determination by every court below.

The second thing is, I do not see this case as controlled by Davis in the respect advocated by counsel here, because, as I've developed in our petitioner's brief, the Davis, there was no probable cause; this was a summary roundup of every Negro in the community when all the assailant in a rape case knew was that her assailant was a Negro, and a fingerprinting of them all.

Our contention here is that the finger of probable cause had pretty well focused on Murphy at the time the police acted.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:24 o'clock, a.m., the case was submitted.]