UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT
MICHIGAN-OHIO-KENTUCKY-TENNESSEE

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE
U.S. COURT HOUSE
DETROIT, MICHIGAN 48226

October 21, 1981

John P. Hehman, Clerk
United States Court of Appeals
for the Sixth Circuit
Cincinnati, OH 45202

Re: 81-3196, Carter v. Gray
10/12/81

Dear Mr. Hehman:

Please sign and enter the enclosed order in the above case.

Judges Merritt and Unthank have concurred.

Sincerely,

Cornelia G. Kennedy

Enc.

cc: Judge Merritt
Judge Unthank

4.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANEL REPORT

DATE: Monday, October 12, 1981, #1, 1:30 p.m.

PANEL: Merritt, Kennedy and Unthank

NO: 81-3196, Carter v. Gray, Superintendent
N.D. Ohio - Aldrich, J.

Attached for your review is an order in the above-entitled case, which is being circulated in lieu of a panel report. It is called to the particular attention of Judges Merritt and Unthank.

Cornelia G. Kennedy

Enc.

cc: All Judges

October 16, 1981

Dear Judge Kennedy:

I concur.

G. Wix Unthank

NO. 81-3196

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE H. CARTER,

Petitioner-Appellee,

v.

FRANK GRAY, SUPT.,

Respondent-Appellant.

_____/

O R D E R

Before: MERRITT and KENNEDY, Circuit Judges; and UNTHANK, District Judge.*

Respondent appeals from the grant of a petition for writ of habeas corpus granted by the District Court for the Northern District of Ohio. Petitioner pleaded guilty to second degree murder of his wife. He alleges that his plea was involuntary because no one ever advised him that intent to kill was an element of the crime of second degree murder. Petitioner had been charged with first degree murder. At some time during his trial on that charge he pleaded guilty to second degree murder. Petitioner claims his plea came after the state rested its case. The state claims, based upon the docket entries in the state trial court, that the plea occurred while the jury was deliberating.

Petitioner's claim here was the subject of a post-conviction proceeding in the Ohio courts. The state trial court, after an

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* The Honorable G. Wix Unthank, United States District Court, Eastern District of Kentucky, sitting by designation.

evidentiary hearing, at which petitioner was present but did not testify, found that neither of petitioner's attorneys could specifically recall advising petitioner of the essential elements of second degree murder. It concluded:

> The Court further fails to find from the evidentiary hearing that the Defendant was at any time specifically informed or aware that the essential elements of the crime to which he entered a plea of guilty involved the elements of an intentional killing or malice.

The Ohio Court of Appeals found the plea infirm and set it aside, based not only on the trial court's finding but its own review of the record. The Ohio Supreme Court reversed the court of appeals. It held that under the totality of the circumstances, there was sufficient evidence that petitioner received adequate notice of the elements of the second degree murder charge prior to pleading guilty. It noted:

> (1) defense counsel's opening statement at trial, at which Mr. Carter was present, specifically noted the maliciousness element of second degree murder;
>
> (2) at the change of plea defense counsel represented that Mr. Carter and counsel had discussed the possibilities of entering a plea on several occasions;
>
> (3) Mr. Carter told the court he had given the matter considerable thought; and
>
> (4) one of his attorneys testified that while he could not specifically recall informing Mr. Carter of the elements it was his practice to do so and he undoubtedly did so inform Mr. Carter.

The District Court, without indicating why the Ohio Supreme Court's determination of the facts was incorrect or why petitioner had not received a full and fair hearing in the state courts, conducted its own evidentiary hearing. There petitioner testified that he had not been advised that intent to kill was an element of the crime of second degree murder.

The state moved both before and at the conclusion of the evidentiary hearing for an adjournment on the grounds that it had not received notice of the hearing, scheduled for February 18, 1981, until February 10, 1981. It was not anticipating an evidentiary hearing since the magistrate had recommended denial of the writ. Respondent required time to prepare for a hearing since one of petitioner's two trial attorneys was in Florida. Further the state court docket indicates that the jury had been instructed. When petitioner testified it had not, there was no time to confirm or refute this. Petitioner also testified family members had been present when the plea was discussed, and the state had no opportunity to interview them.

We hold that the District Court abused its discretion in denying the motion for continuance. The grounds stated by respondent were meritorious. The District Court gave no reason for its denial.

We would remand the case in any event to require the District Court to make findings of fact and state its conclusions of law. Under 28 U.S.C. § 2254(d) the federal courts have only limited power to reject a state court's determination of a factual issue, made after a hearing on the merits. The findings of a state appellate court are entitled to the same respect as those of a state trial court. Sumner v. Mata, 449 U.S. 539, 546 (1981). Although a defect in the state fact finding procedure may render it inadequate to afford a full and fair hearing, a finding to that effect is required.

As stated by the Court in Sumner v. Mata, supra:

> Thus, Congress meant to insure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard in such a situation. In order to ensure that this mandate of Congress is enforced, we now hold that a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.' Such a statement tying the generalities of § 2254(d) to the particular facts of the case at hand will not, we think, unduly burden federal habeas courts even though it will prevent the use of the 'boilerplate' language to which we have previously adverted. Moreover, such a statement will have the obvious value of enabling courts of appeals and this Court to satisfy themselves that the congressional mandate has been complied with. No court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provision of § 2254(d).

449 U.S. at 551-552.

Reversed and remanded.

ENTERED BY ORDER OF THE COURT

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Clerk

4.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Cornelia G. Kennedy

Enc.

cc: All Judges

10-12-81
Dear Cornelia:
I concur. Thanks.
Gil Merritt
Pat Unthank