



10-1973

Holder v. Banks

Lewis F. Powell Jr.

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DISCUSS

Kunstler case

I'm out.

PRELIMINARY MEMORANDUM

Discretionary

Deny

See reverse side of last page

B

January 18 Conference

Cert to CA 7

List 1, Sheet 4

(Swygert, Kiley, Fairchild) PC. order

No. 73-841

Federal/civil

HOLDER, Judge

v.

BANKS

Timely

1. Summary: Petitioner, Judge Holder (S.D. Ind.), seeks review of the CA 7 decision granting respondent's application for a writ of mandamus directing petitioner to vacate certain orders (1) denying a

motion by Attorney William M. Kunstler for leave to represent respondent in a pending criminal prosecution; (2) denying a motion for petitioner to disqualify himself; and (3) appointing a new attorney for respondent.

Petitioner contends that his order denying Attorney Kunstler permission to represent respondent pro hac vice was proper because Attorney Kunstler (a) is not a member of the Indiana bar, and (b) made certain pre-trial statements that violated the rules of the court and the ethical standards of the legal profession.

2. Facts: On December 14, 1972, respondent, an inmate at the federal penitentiary in Terre Haute, Indiana, was indicted and charged with assault on a guard at the institution. At the arraignment, respondent appeared and indicated that Kunstler would be his counsel at trial. After several continuances a hearing was held on Kunstler's application for leave to appear as counsel. Evidence was introduced indicating that Kunstler engaged in a pattern of pre-trial publicity in Terre Haute, including public statements, interviews and press conferences, relating to respondent's prior criminal record, the identity and credibility of prospective witnesses, his opinion of respondent's innocence, and the political context of the trial. Kunstler also encouraged certain segments of the community to support respondent's case by, inter alia, filling the spectator section of the courtroom and adjacent hallways and organizing demonstrations. (For specific statements attributed to Kunstler, see pp. 6-7 of petitioner's brief.)

Petitioner Holder (S.D. Ind.) denied Kunstler's application for leave to appear pro hac vice as respondent's counsel. Petitioner found that

Kunstler's public statements reduced the prospect of obtaining a fair and impartial trial and would tend to intimidate and/or alienate any prospective jury. Petitioner also noted that Kunstler's professional work load and political activity would occasion further delay in scheduling the trial. Petitioner placed the most significance, however, on Kunstler's stated intention to continue his previous course of activity. This conduct, petitioner stated, would violate the court's local rules regarding ethical standards of conduct for members of the bar and the rules regarding the release of information by attorneys in criminal cases. Moreover, it would subject Kunstler to citations for contempt and impose a further impediment in providing a fair trial.

Petitioner concluded:

"When petitioning attorney's conduct . . . is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause. Neither Mr. Banks [respondent] nor the public can waive their right to a fair and impartial trial in the subject cause nor can the Court abrogate its obligation upon its Constitutional Oath to provide a fair and impartial trial to all parties in the subject cause. The Court has denied the petitioning attorney's application for the reasons that petitioning attorney's stated course of future conduct will be in violation of the Rules of the Court and that the opportunity to afford a fair, impartial and speedy trial to all parties in the subject cause is best served thereby."

On respondent's application for mandamus against petitioner Holder, the Court of Appeals granted the requested relief vacating the district court's

orders. The court noted that the district court was concerned primarily with "protecting the right of the respondent to obtain a fair and impartial jury," and that the local rules relied on were directed to that end. In the present case, however, the respondent continually insisted at the hearing that he was satisfied with Kunstler's representation and that he wanted him as his trial counsel. The Court of Appeals then found that Kunstler's ^{course} of conduct involving pre-trial publicity could not override respondent's Sixth Amendment right to counsel of his own choosing. The court distinguished Shepard v. Maxwell, 384 U.S. 333 (1966), as not involving the Sixth Amendment issue presented here. Furthermore, the court noted that "the answer does not assert any right of the prosecution to prevent matters possibly prejudicial to its case from reaching prospective jurors, nor does it assert any inherent right of the court, independent of the defendant's Sixth Amendment rights, to limit pretrial publicity in the interests of the orderly and fair administration of justice." The court concluded that it was not necessary to decide whether such rights exist and, if so, what weight they should be accorded. In sum, the court held that respondent-defendant had waived any right to object to Kunstler's course of pre-trial publicity as denying him his Sixth Amendment right to a fair and impartial jury. It then vacated the district court's orders but noted that since respondent will not preside at the trial, no ruling was required on respondent's motion for disqualification of ~~respondent~~ ^{petr.}.

On petition for rehearing, the Court of Appeals held that petitioner's

original answer to the mandamus application did not expressly raise the question whether prejudice to the government's case or impairment of the orderly and fair administration of justice (aside from any adverse effect on respondent) may have justified the order denying Kunstler's application. Rather, the petitioner's primary concern was possible prejudice to the respondent.

The Court of Appeals admitted, however, that a few of Kunstler's statements "were clearly improper when made publically by an attorney for a party."

In any event, the court thought that before respondent's choice of counsel could be disregarded, "there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances', citing Magee v. Superior Court of City & County of San Francisco, 506 P. 2d 1023 (1973). See Chase v. Robson, 435 F. 2d 1059 (CA 7 1970). The court further stated that a trial court must consider

"whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other

interests at stake." The court added that to the extentⁿ a defendant knowingly and intelligently endorses the conduct of his attorney . . . he has^{waived} his^{no} right" to object to the impairment of a fair and impartial trial. Finally,

the court held that petitioner's findings in this case did not meet the above standard relating to dismissal of an attorney, that the hearing did not encompass

that issue, and that the evidence would not justify denying Kunstler's pro hac vice application.

The motion for reconsideration en banc was denied (Cummings, Pell, and Stevens, J.J., voting to grant.) To prevent mootness, Mr. Justice Rehnquist stayed the CA 7 mandate pending disposition of petitioner's application for cert.

3. Contentions:

(a) Petitioner contends that the decision whether to grant an application pro hac vice is within the sound discretion of the trial court and that it was properly denied here because Kunstler (i) is not a member of the court's bar and not admitted to practice in Indiana; (ii) could not serve as counsel without unduly delaying the trial; and (iii) engaged in "unlawyerlike" and unethical conduct in violation of court rules and ethical standards of the legal profession. Petitioner argues that misconduct alone is sufficient to exclude an attorney from a case, citing state cases and dicta in federal cases. Petitioner also relies on Standard 3.5 of the ABA Project on Standards for Criminal Justice, permitting exclusion of counsel not admitted in the jurisdiction if they have engaged in various misconduct.

(b) Petitioner also relies on Sheppard v. Maxwell, 384 U.S. 333 (1966) in which the Court noted that a trial court has authority to prevent prejudice to a fair trial by proscribing extrajudicial statements by lawyers relating to the merits of the case, prospective witnesses, and any belief in guilt or

innocence. See also In re Sawyer, 360 U.S. 622 (1959).

(c) Petitioner argues that Kunstler's application was properly denied on the facts of this case.

(d). Petitioner devotes part of his brief to the contention that the court's local rules violate the First Amendment. It is uncertain whether this issue was raised below. In any event, no First Amendment contention is made in respondent's reply brief.

Respondent repeats the reasoning of CA 7. Respondent's main point is that the evidentiary hearing and petitioner's fact findings were directed to the issue of respondent's right to a fair trial. As the CA 7 found, respondent waived any right to object to such of Kunstler's conduct and reaffirmed his desire to have him as trial counsel.

Respondent further argues that his Sixth Amendment right to counsel of his choice is fundamental, and ^{that} the circumstances of this case do not justify any exception. Respondent also admits that the constitutional validity of the court's rules are not at issue.

4. Discussion:

It is certainly arguable that the district court relied on the prejudice to both (1) respondent's right to a fair trial and (2) the public's right to a fair trial. CA 7 evidently thought that the district court's primary concern was the prejudice to respondent and that respondent had waived any objection. In any event, CA 7 found that the evidence in this case would not justify

exclusion of Kunstler even on the broader rationale. Since the CA 7 expressly noted that the district court could issue injunctive orders to assure a fair trial, I do not think this case is certworthy.

There is a response.

January 9, 1974

Buckley

Ops in Pet br.

Had I been the dist ct judge, I would have denied the pro hae vice application, but I would have made certain that the evidence in the record and the ct's opinion clearly articulated the reasons therefore - the public's interest in a fair trial. Because of the confused posture of the present record, I would probably deny,

B

Court CA - 7 Voted on....., 19...
 Argued , 19... Assigned , 19... No. 73-841
 Submitted , 19... Announced , 19...

CALE J. HOLDER, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA, Petitioner

vs.

ARTHUR BANKS

OUT!
 17P

11/28/73 - Cert. filed.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....													
Rehnquist, J.		✓											
Powell, J.													
Blackmun, J.													
Marshall, J.			✓										
White, J.			✓										
Stewart, J.			✓										
Brennan, J.			✓										
Douglas, J.		✓											
Burger, Ch. J.		✓											

out joined ~~Three~~

For CA7 to Resolve + Reverse Summary

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

CHAMBERS OF
THE CHIEF JUSTICE

January 21, 1974

Re: 73-841 - Holder v. Banks

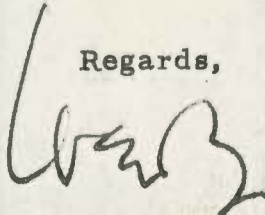
MEMORANDUM TO THE CONFERENCE:

When we granted cert on Friday I was not clear, nor was Bill Rehnquist, on the status of the stay he had entered pending action on cert.

With a rough weekend of cleaning up "loose ends" for a nine-ten day absence I failed to follow up. It appears that the stay is not explicitly "until further order of the Court"; hence, to give any meaning to the granting of cert, it seems to me we should continue the stay until the case is heard. This would, as I see it, allow the case to proceed with another lawyer or defer trial until we decide the case which, I hope, will be this Term. I will advise the Clerk to press the case with all speed for an April argument.

Please let me have your vote on continuing Bill Rehnquist's stay order which we can give out on a special list.

Regards,



out

DISCUSS!

A Kunstler case

I believe you have
recused yourself
from this case. Otherwise,

X-DENY

shiny

March 15, 1974 Conference
List 5, Sheet 2

No. 73-841

Motion of Resp to Supplement
the Record and to Defer Oral
Argument

HOLDER, USDC Judge

v.

BANKS

IMMEDIATE SITUATION: The Court granted cert to CA 7 in this case on January 21 to review the decision of the CA directing petr to vacate certain orders (1) denying a motion by Attorney William Kunstler for leave to represent resp in a pending criminal prosecution for assaulting a guard at the federal penitentiary in Terre Haute, (2) denying a motion for petr to disqualify himself and (3) appointing a new attorney to represent resp. Mr. Justice Rehnquist has stayed the CA 7 mandate pending disposition of petr's application for cert.

You're
out

Answers

Resp now moves that (1) he be permitted to supplement the record in this case by including a certified copy of the record of a habeas corpus action brought by resp and now pending in the USDC (Minn.), and (2) that oral argument in this case be deferred until the completion of the USDC (Minn.) action.

The case is tentatively scheduled for argument in April.

FACTS: In November, 1973, resp was removed from Indiana to the federal penitentiary in Sandstone, Minn. Represented by Mr. Kunstler, resp filed a habeas corpus petition in the USDC (Minn.) alleging, among several other grounds, that the indictment in Indiana was wholly unfounded and that steps were taken to prevent his having the services of Attorney Kunstler. The USDC (Minn.) held a limited hearing and released resp on bail pending a further and full evidentiary hearing.

CONTENTIONS OF RESP: Resp argues that the record of the proceedings in the USDC (Minn.) evidences his choice to have Attorney Kunstler represent him and, apparently, Mr. Kunstler's ability to do so successfully. Resp also contends that the complete record of the habeas corpus proceeding will establish facts showing the connection between the effort to deny resp the services of Mr. Kunstler and a long record of his being harassed and brutalized within the federal prison.

Resp also suggests that "it is even possible that at the conclusion of the Minnesota proceeding the issue which emerged in Indiana may be moot."

CONTENTIONS OF PETR: Petr contends that the proceeding now pending in Minnesota has very limited, if any, relevance to the Indiana case. Petr contends that the USDC (Minn.) does not have any jurisdiction to dispose of the indictment against resp in the USDC (S.D. Ind.) and that resp will have to face that charge no matter what the outcome of the Minnesota proceedings. Petr notes that Attorney Kunstler stated before the USDC (Minn.) that the Indiana case would not be mooted and that:

The only issue before you is that he doesn't get a speedy trial because of all the legal maneuvers. We are hoping that you would release [respondent] at least pending that Supreme Court decision until he goes back to Indiana and is tried. But I don't think anything here would have an effect on the Supreme Court ruling. That ruling is only going to be whether I can represent him [in Indiana] or whether they are going to reverse the order of the 7th Circuit."

DISCUSSION: There appears to be little, if any, relevance between the Minn. proceedings and the case now before the Court. One can only speculate as to the grounds the USDC (Minn.) found for releasing resp on bail or what the final outcome of the habeas corpus proceeding will be. However, it seems doubtful that the outcome of that case would effect the Indiana indictment.

Ginty

3/13/74

DK

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

CALE J. HOLDER, UNITED STATES DISTRICT
JUDGE FOR THE SOUTHERN DISTRICT
OF INDIANA *v.* ARTHUR BANKS

Circulated: 4-29

Re-circulated: _____

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

No. 73-841. Decided May —, 1974

PER CURIAM.

The petition for certiorari is dismissed as improvidently
granted.

MR. JUSTICE POWELL took no part in the consideration
or decision of the case.



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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 29, 1974



RE: No. 73-841 Holder v. Banks

Dear Bill:

I agree.

Sincerely,

Bill

Mr. Justice Douglas

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST



April 29, 1974

Re: No. 73-841 - Holder v. Banks

Dear Bill:

Please join me in the per curiam opinion you have prepared in this case.

Sincerely,

WHR

Mr. Justice Douglas

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 30, 1974

Re: No. 73-841 -- Holder v. Banks

Dear Bill:

I agree with your Per Curiam in this case.

Sincerely,

J.M.
T.M.

Mr. Justice Douglas

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R WHITE

May ²³~~17~~, 1974

Re: No. 73-841 - Holder v. Banks

Dear Bill:

I join the per curiam in this case.

Sincerely,

Byron

Mr. Justice Douglas

Copies to Conference

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



CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1974

Dear Bill:

Re: No. 73-841 - Holder v. Banks

Please join me in the per curiam you
have proposed.

Sincerely,

Harry

Mr. Justice Douglas

Copies to the Conference

