

The Burger Court Opinion Writing Database

Holloway v. Arkansas

435 U.S. 475 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Mr. Justice _____
Mr. Justice _____
Mr. Justice _____
Mr. Justice BURGER, CHIEF
Mr. Justice BREWSTER
Mr. Justice COHEN
Mr. Justice HARLAN
Mr. Justice MARSHALL
Mr. Justice POWELL
Mr. Justice REHNQUIST

From: The Chief Justice

Circulated: MAR 1 1978

1st DRAFT

Recirculated: MAR 1 1978

SUPREME COURT OF THE UNITED STATES

No. 76-5856

Winston M. Holloway et al.,
Petitioners, } On Writ of Certiorari to the
v.
State of Arkansas. } Supreme Court of Arkansas.

[February —, 1978]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners, codefendants at trial, made timely motions for appointment of separate counsel, based on the representations of their appointed counsel that, because of confidential information received from the codefendants, he was confronted with the risk of representing conflicting interests and could not, therefore, provide effective assistance for each client. We granted certiorari to decide whether petitioners were deprived of the effective assistance of counsel by the denial of those motions. 430 U. S. 965 (1977).

I

Early in the morning of June 1, 1975, three men entered a Little Rock, Ark., restaurant and robbed and terrorized the five employees of the restaurant. During the course of the robbery, one of the two female employees was raped once; the other, twice. The ensuing police investigation led to the arrests of the petitioners.

On July 29, 1975, the three defendants were each charged with one count of robbery and two counts of rape. On August 5, the trial court appointed Harold Hall, a public defender, to represent all three defendants. Petitioners were then arraigned and pleaded not guilty. Two days later, their

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

CHAMBERS OF
THE CHIEF JUSTICE

March 15, 1978

Dear Lewis:

Re: 76-5856 Holloway v. Arkansas

Before you embark on a dissent, may I suggest you await some slight narrowing changes in my opinion. They may not divert you, but may well affect your response.

Regards,



Mr. Justice Powell

cc: The Conference

STYLISTIC CHANGES: 2, 8, 9, 11

new fns 3, 7

Mr. Justice Brennan
Mr. Justice Black
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice Clark

From: The Chief Justice

Circulated:

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-5856

Winston M. Holloway et al., Petitioners,
v.
State of Arkansas. } On Writ of Certiorari to the
Supreme Court of Arkansas.

[March —, 1978]

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Early in the morning of June 1, 1975, three men entered a Little Rock, Ark., restaurant and robbed and terrorized the five employees of the restaurant. During the course of the robbery, one of the two female employees was raped once; the other, twice. The ensuing police investigation led to the arrests of the petitioners.

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

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1978

Re: Cases Held for 76-5856 - Holloway v. Arkansas

MEMORANDUM TO THE CONFERENCE:

(1) 77-5157 - Hurst v. United States (I will vote to
DENY)

Petitioner and his co-defendant were tried and convicted of armed bank robbery. A single federal defender was appointed to represent both defendants at trial. The District Court before trial did not conduct an inquiry as to the possible prejudice from joint representation or warn petitioner of the danger. However, neither the defendants nor counsel objected prior to or during the trial.

Treating petitioner's § 2255 motion as a direct appeal, CA 6 affirmed. It noted that the District Court had no notice before trial of any inconsistent defenses, that there was no suggestion that petitioner had any defenses that were not raised at trial, and that there was no evidence exonerating petitioner that was not submitted to the jury.

In his response, the Solicitor General acknowledges that there is a split among the circuits with respect to the required showing on appeal of the presence of a conflict of interests in joint representation. He contends, however, that even under the most lenient standard (that of CA 3) petitioner has failed to demonstrate an actual conflict. The Solicitor General also acknowledges a circuit split with respect to the District Court's affirmative duty to inquire before trial into the possibility of conflicts arising later and tainting the joint representation. But, because a decision here imposing such a duty, even if made retroactive, would not benefit one such as petitioner who has failed to show the existence of a conflict, the Solicitor General urges that the petition be denied.

In urging this disposition, however, the Solicitor General concedes that "there are vexing and important problems arising from joint representation of criminal defendants that will one day require the attention of this Court." Response, at 9.

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

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

March 15, 1978

RE: No. 76-5856 Holloway v. Arkansas

Dear Chief:

I agree.

Sincerely,

Brennan

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 14, 1978

76-5856, Holloway v. Arkansas

Dear Chief,

I am glad to join your opinion for the
Court in this case.

Sincerely yours,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 15, 1978

Re: 76-5856 - Holloway v.
Arkansas

Dear Chief:

Please join me.

Sincerely yours,



The Chief Justice
Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 20, 1978

Re: No. 76-5856 - Holloway v. Arkansas

Dear Chief:

Please join me.

Sincerely,



T. M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

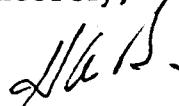
March 21, 1978

Re: No. 76-5856 - Holloway v. Arkansas

Dear Chief:

I shall await Lewis' writing in this case.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 30, 1978

Re: No. 76-5856 - Holloway v. Arkansas

Dear Lewis:

Please join me in your dissenting opinion.

Sincerely,

Hab.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 21, 1978

No. 76-5856 Holloway v. Arkansas

Dear Chief:

I hope to circulate in a few days an opinion concurring in the judgment.

As you know from our discussion at Conference, I am not in accord with a view that will result in separate counsel virtually upon demand. Thus, my view as to the framing of a constitutional rule differs from what will be the Court's view.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

March 28, 1978

No. 76-5856 Holloway v. Arkansas

Dear Harry and Bill:

As I believe the three of us are the only dissenting voices in this case, I send you herewith the first printed draft of my proposed opinion - prior to general circulation.

I had thought that possibly I could concur in the judgment. But closer examination persuaded me that the Supreme Court of Arkansas correctly decided this case under its facts and circumstances.

I would welcome suggestions before I circulate my opinion.

Sincerely,

Mr. Justice Blackmun
Mr. Justice Rehnquist

lfp/ss

To: The Chief Justice

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

1st DRAFT

Circulated: 10 MAR 1978

SUPREME COURT OF THE UNITED STATES

No. 76-5856

Winston M. Holloway et al.,
Petitioners,
v.
State of Arkansas. } On Writ of Certiorari to the
Supreme Court of Arkansas.

[April —, 1978]

MR. JUSTICE POWELL, dissenting.

While disavowing a *per se* rule of separate representation, the Court holds today that the trial judge's failure in this case "either to appoint separate counsel or take adequate steps to ascertain whether the risk was too remote to warrant separate counsel" worked a violation of the guarantee of "assistance of counsel" embodied in the Sixth and Fourteenth Amendments. The Court accepts defense counsel's representations of a possible conflict of interest among his clients and of his inability to conduct effective cross-examination as being adequate to trigger the trial court's duty of inquiry. The trial court should have held an appropriate hearing on defense counsel's motions for separate representation, but our task is to decide whether this omission assumes the proportion of a constitutional violation. Because I cannot agree that, in the particular circumstances of this case, the court's failure to inquire requires reversal of petitioners' convictions, and because the Court's opinion contains seeds of a *per se* rule of separate representation merely upon the demand of defense counsel, I respectfully dissent.

I

It is useful to contrast today's decision with the Court's most relevant previous ruling, *Glasser v. United States*, 315 U.S. 60 (1942). In that case, the trial court ordered Glasser's

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 21, 1978

Re: No. 76-5856 - Holloway v. Arkansas

Dear Chief:

I shall await Lewis' opinion concurring in the judgment in this case which he refers to in his letter to you of March 21st.

Sincerely,

WR

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 29, 1978

Re: No. 76-5865 - Holloway v. Arkansas

Dear Lewis:

I could join your dissent as is, and will do so if the following comment does not commend itself to you. I find myself slightly confused by one particular statement in footnote 3 which begins on page 4. My confusion, I realize, may result from insufficient acquaintance with the nuances of the issue. The Court of Appeals, when explaining its holding in United States v. DeBerry, states that it "reversed the conviction of both defendants represented by the same retained counsel, finding the inquiry of the District Court judge insufficient to establish lack of prejudice." While perhaps that observation makes sense in the context of that case, it seems to run counter to your suggestion on page 5 that "[a]t that hearing, the burden is on defense counsel, because his clients are in possession of the relevant facts, to make a showing of a reasonable likelihood of conflict or prejudice." Since the last sentence on page 4 indicates your approval presumably of at least those parts of the Court of Appeals opinion which are quoted in the footnote there could be some conflict between it and the previously noted language on page 5. If I am right would it not be best either to drop that paragraph in footnote 3 (i.e., the paragraph which begins, "In United States v. DeBerry, supra, 487 F. 2d, at

*See - either
there is no
necessity
represented
I see no objection
to
dropping it*

453-54 we reversed") or expand the explanation in the footnote to make it clear exactly how that statement squares with the statement on page 5 regarding the burden of proof at the hearing. If I am wrong, just say so and I will join as is.

Sincerely,



Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 30, 1978

Re: No. 76-5856 - Holloway v. Arkansas

Dear Lewis:

Please join me in your dissent in this case.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 20, 1978

Re: 76-5856 - Holloway v. Arkansas

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference