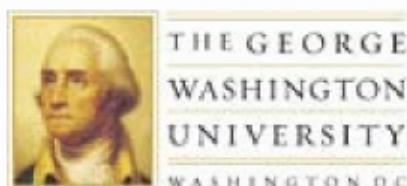


The Burger Court Opinion Writing Database

Cuyler v. Sullivan

446 U.S. 335 (1980)

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

May 6, 1980

RE: 78-1832 - Cuyler v. Sullivan

Dear Lewis:

I join.

Regards,

Mr. Justice Powell
Copies to the Conference

WRB

1st DRAFT

SUPREME COURT OF THE UNITED STATES

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

No. 78-1832

From: Mr. Justice Brennan

Circulated: ~~APR 16 1980~~

Julius T. Cuyler, Superintendent, etc., et al., Petitioners,

Recirculated: ~~APR 16 1980~~

v.

John Sullivan

On Writ of Certiorari to the United States Court of Appeals
for the Third Circuit

[April __, 1980]

MR. JUSTICE BRENNAN, concurring in part III of the opinion
of the Court and in the result.

I agree with the Court, part III, ante, that the alleged
failure of retained counsel to render effective assistance
involves state action and thus provides the basis for a writ of
habeas corpus. I cannot, however, join part IV of the
opinion.

Holloway v. Arkansas, 435 U.S. 475 (1978), settled that the
Sixth Amendment right to effective assistance of counsel
encompasses the right to representation by an attorney who does
not owe conflicting duties to other defendants. While Holloway
also established that defendants usually have the right to

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

From: Mr. Justice Brennan

Circulated: APR 17 1980

1st PRINTED DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
etc., et al., Petitioners, } On Writ of Certiorari to
v.
John Sullivan. } the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

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right to share a lawyer if they so choose, that choice must
always be knowing and intelligent. The trial judge, there-
fore, must play a positive role in ensuring that the choice was
made intelligently. The court cannot delay until a defendant
or an attorney raises a problem, for the Constitution also
protects defendants whose attorneys fail to consider, or choose
to ignore, potential conflict problems. "Upon the trial judge
rests the duty of seeing that the trial is conducted with solici-
tude for the essential rights of the accused. . . . The trial
court should protect the right of an accused to have the assist-
ance of counsel." *Glasser v. United States*, 315 U. S. 60, 71
(1942). "While an accused may waive the right to counsel,
whether there is a proper waiver should be clearly determined
by the trial court, and it would be fitting and appropriate for

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

314
From: Mr. Justice Brennan

2nd DRAFT

Circulated: _____

Recirculated: APR 24

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent, On Writ of Certiorari to
etc., et al., Petitioners, the United States Court
v. of Appeals for the Third
John Sullivan. Circuit.

[April —, 1980]

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whether there is a proper waiver should be clearly determined
by the trial court, and it would be fitting and appropriate for

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 14, 1980

Re: No. 78-1832, Cuyler v. Sullivan

Dear Lewis,

My longstanding doubts as to the Sixth and Fourteenth Amendments' applicability to cases involving retained counsel have been resolved by the reasoning reflected in Part III of your opinion for the Court in this case. I am glad to join your opinion.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1980

Re: No. 78-1832 - Cuyler v. Sullivan

Dear Lewis,

Your suggested change is quite satisfactory, and I hope that you will also eliminate the Shelley v. Kraemer cite on page 8. Thank you for accommodating me. I shall write you a joint note.

Sincerely yours,



Mr. Justice Powell

cmc

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1980

Re: No. 78-1832 - Cuyler v. Sullivan

Dear Lewis,

Please join me.

Sincerely yours,



Mr. Justice Powell

Copies to the Conference

cmc

2, 3, 4, 5

25

APR 1980

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent, | On Writ of Certiorari to
etc., et al., Petitioners, | the United States Court
v. | of Appeals for the Third
John Sullivan. | Circuit.

[April —, 1980]

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree that the Court of Appeals properly concluded that petitioner's lawyers had undertaken multiple representation, and that a conviction obtained when a defendant's retained counsel provided ineffective assistance involves state action that may provide the basis for a writ of habeas corpus. Accordingly, I join Parts I, II, and III of the Court's opinion.

I believe, however, that the potential for conflict of interest in representing multiple defendants is "so grave," see ABA Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Function, Standard 4-3.5 (b) (Approved Draft 1979), that whenever two or more defendants are represented by the same attorney the trial judge must make a preliminary determination that the joint representation is the product of the defendants' informed choice. I therefore agree with MR. JUSTICE BRENNAN that the trial court has a duty to inquire whether there is multiple representation, to warn defendants of the possible risks of such representation, and to ascertain that the representation is the result of the defendants' informed choice.¹

¹ The determination that the defendant has made an informed choice of counsel would not, of course, establish a waiver that would prevent him from subsequently raising any claim of ineffective assistance of counsel based on a conflict of interest. The dangers of infringing the defendants' privilege against self-incrimination and their right to maintain the con-

3,4,5

28 APR 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
etc., et al., Petitioners,
v.
John Sullivan. } On Writ of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

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STYLISTIC CHANGES THROUGHOUT

9 MAY 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
etc., et al., Petitioners,
v.
John Sullivan. | On Writ of Certiorari to
the United States Court
of Appeals for the Third
Circuit.

[April —, 1980]

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privilege against self-incrimination and their right to maintain the con-

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 28, 1980

Re: No. 78-1832 - Cuyler v. Sullivan

Dear Lewis:

Please join me.

Sincerely

Ha

Mr. Justice Powell

cc: The Conference

To: The Other Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

4-11-80

From: Mr. Justice Powell

Circulated: APR 11 1980

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
etc., et al., Petitioners, } On Writ of Certiorari to
v. } the United States Court
John Sullivan. } of Appeals for the Third
Circuit.

[April —, 1980]

Mr. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether a state prisoner may obtain a federal writ of habeas corpus by showing that his retained defense counsel represented potentially conflicting interests.

I

Respondent John Sullivan was indicted with Gregory Carchidi and Anthony DiPasquale for the first-degree murders of John Gorey and Rita Janda. The victims, a labor official and his companion, were shot to death in Gorey's second-story office at the Philadelphia headquarters of Teamsters' Local 107. Francis McGrath, a janitor, saw the three defendants in the building just before the shooting. They appeared to be awaiting someone, and they encouraged McGrath to do his work on another day. McGrath ignored their suggestions. Shortly afterward, Gorey arrived and went to his office. McGrath then heard what sounded like firecrackers exploding in rapid succession. Carchidi, who was in the room where McGrath was working, abruptly directed McGrath to leave the building and to say nothing. McGrath hastily complied. When he returned to the building about 15 minutes later, the defendants were gone. The victims' bodies were discovered the next morning.

April 14, 1980

78-1832 Cuyler v. Sullivan

Dear Byron:

I proposed to substitute the following for the first sentence of the second paragraph on page 7 of my opinion:

"This Court's decisions establish that a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. See Lisenba v. California, 314 U.S. 219, 236-237 (1941); Moore v. Dempsey, 261 U.S. 86, 90-91 (1923)."

I think your point is a good one, and appreciate your bringing it to my attention.

Is the above language satisfactory to you?

Sincerely,

Mr. Justice White

lfp/ss

678

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice O'Connor
Mr. Justice Stevens

4-16-80

From: Mr. Justice Powell

Circulated: _____

2nd DRAFT

Recirculated: APR 16 1980

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
etc., et al., Petitioners, } On Writ of Certiorari to
v. } the United States Court
John Sullivan. } of Appeals for the Third
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To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Ohrquist
 Mr. Justice Stevens

10,13,14

4-23-80

From: Mr. Justice Powell

Circulated: _____

APR 23 1980

3rd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent,
 etc., et al., Petitioners, } On Writ of Certiorari to
 v. } the United States Court
 John Sullivan. } of Appeals for the Third
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To: The Court Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

5/14

4-25-80

From: Mr. Justice Powell

Transcribed: APR 25 1980

4th DRAFT

Autographed: _____

SUPREME COURT OF THE UNITED STATES

No. 78-1832

Julius T. Cuyler, Superintendent, etc., et al., Petitioners, <i>v.</i> John Sullivan.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
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[April —, 1980]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 12, 1980

MEMORANDUM TO THE CONFERENCE

Cases Held for No. 78-1832, Cuyler v. Sullivan

No. 79-646: Partin v. United States (Cert to CA9)

The questions in this case are (1) whether petr waived his objection to conflicts of interest when he insisted on multiple representation at the outset of an earlier trial and (2) whether petr was denied effective assistance of counsel when the prosecutor called to the stand a former co-defendant for whom petr's trial lawyer was seeking a writ of cert.

Petr (the Partin of Hoffa v. United States, 385 U.S. 293) was convicted on three counts of conspiring to obstruct justice after his third trial on an indictment returned in 1973 against petr, Sykes, and 10 others. Before the first trial in 1974, the DC--on the Government's motion--thoroughly advised petr and the 7 other defendants represented by one McPherson of the risks inherent in multiple representation. No defendant availed himself of the court's offer to appoint separate counsel.

Petr's third trial began in 1977 after his case had been severed and transferred to California. Sykes, who had been

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1980

Re: No. 78-1832 - Cuyler v. Sullivan

Dear Lewis:

Would you consider replacing the last two sentences in the first paragraph on page 6 of your present draft with something along the following lines:

"But the determination that the lawyers who played those roles did not engage in multiple representation appears to be a so-called mixed question of fact and law, requiring application of legal principles to the historical facts of this case. Cf., Brewer v. Williams, 430 U.S. 387, 403-404 (1977); Neil v. Biggers, 409 U.S. 188, 193, n. 3 (1972). As such, it is open to review on collateral attack in a federal court."

Otherwise, I think treating the matter as a purely legal question, much less deference may be due to state findings.

Sincerely,



Mr. Justice Powell
Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1980

Re: No. 78-1832 - Cuyler v. Sullivan

Dear Lewis:

Please join me.

Sincerely,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 14, 1980

Re: 78-1832 - Cuyler v. Sullivan

Dear Lewis:

Please join me.

Respectfully,



Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 24, 1980

Re: 78-1832 - Cuyler v. Sullivan

Dear Lewis:

Your revision of the last sentence in the first full paragraph on page 14 concerns me somewhat. Perhaps it is because I do not fully understand the language "actually responded to conflicting interests," and perhaps because I am somewhat concerned that the quotation of that sentence by litigants out of the context of the entire paragraph may give rise to an incorrect meaning, I much prefer the final sentence that you had in the preceding draft which I joined. It seems to me that if a defendant can show that his counsel actively represented conflicting interests, he has at least established the constitutional predicate for a claim of ineffective assistance.

Respectfully,



Mr. Justice Powell