1994 WL 113097
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

UNITED STATES of America ex rel. Mervin GREEN, individually and on behalf of all others similarly situated, Petitioner,
v.
Howard PETERS, etc., et al., Respondents.

No. 93 C 7300.
|
March 30, 1994.

*MEMORANDUM OPINION AND ORDER*

SHADUR, Senior District Judge.

***1** On behalf of the Illinois Appellate Court for the First District, the Chairman of its Executive Committee Justice Robert Chapman Buckley has transmitted to defense counsel Attorney General Roland Burris, and Attorney General Burris' office has in turn filed with this District Court, a letter responding to the two questions that were respectfully posed to the Appellate Court at the conclusion of this Court's January 6, 1994 memorandum opinion and order (the "Opinion"). Justice Buckley stated that such a transmittal procedure was followed because of a possible concern "that our answers will be deemed *ex parte* communications or an impermissible advisory opinion...." This Court of course appreciates the sensitivity that is reflected by that concern, although it would not view the Appellate Court's requested response to the two specific questions in the Opinion as presenting any such risk in any event.[1]

In any case this Court will not prolong any discussion of collateral issues by responding to the "preliminary observations" of a majority of the Justices as reported in Justice Buckley's letter. In the Opinion at 7–9 this Court set out in some detail the nature of the earlier activity by the Assistant Attorneys General that have been assigned to this case (such as their presenting the bizarre argument that the case, which complains that plaintiffs' constitutional rights have been violated by the very existence of protracted delays in the disposition of their criminal appeals [the taking of such an appeal is of course a step essential to a prisoner's exhaustion of his or her state remedies], should somehow be dismissed because the prisoners had not previously exhausted their state remedies). No matter in how "temperate" and "civil" a manner such arguments are presented (and the Opinion did not even hint that defense counsel were anything less than temperate and civil in their filings), this Court continues to view such meritless arguments as justifying the characterizations contained in the Opinion. Suffice it to say on that score that the Appellate Court, though they are of course free to differ in their perceptions, do not sit in review of this Court.

Far more importantly, what *is* relevant for purposes of this case is that this Court much appreciates the Appellate Court's having provided the substantive information contained in Justice Buckley's letter. It may be that in light of that information either or both litigants may wish to accelerate the next scheduled status date in this action, which is currently set for June 2, 1994. Accordingly this Court establishes a telephonic status hearing to be held 1:15 p.m. March 31, 1994 both to inquire in that respect and, more generally, to discuss further proceedings in the case.[2]

APPENDIX

Justice Buckley's sensitivity to the problem of ex parte communications does not appear to have been shared by certain of Justice Buckley's colleagues, who saw fit to transmit to this Court a separate letter that clearly addressed the merits of the litigation. Any consideration of such a communication by this Court is prohibited by Canon 3A(4) of the Code of Conduct for United States Judges. Indeed, the Commentary to that provision states:

> ***2** The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other

> judges, or with court personnel whose function is to aid the judge in carrying out adjudicative responsibilities.

That Commentary's final sentence is ordinarily understood to extend only to a judge's election to consult with his or her own colleagues or with his or her own law clerks—but even if it were not so limited, there can be no question that this Court has not elected to consult with the writers of that separate letter. It is perhaps worth noting in that respect that Ill.S.Ct. Rule 63A(4) contains a prohibition (drawn from ABA Canon 3(A)(4)) that is applicable to Illinois judges and that is either identical to or broader than the one in the Code of Conduct that binds federal judges.

In any event, as soon as this Court ascertained that the separate letter did indeed deal with the merits of the litigation (something that became apparent from its first paragraph), this Court returned the letter to the senders without reading it. But it appears that they were not content with having made the original transmittal—an article has appeared in the March 25, 1994 edition of the *Chicago Daily Law Bulletin* that not only refers to the content of but actually quotes the letter, suggesting that the writers have also made it available to the press.[1] Despite that fact, this Court believes that judicial propriety calls for no comment on the reported aspects of the letter—except that it is constrained to say that it was this Court that first called to the attention of the litigants (and, as a matter of courtesy, to the Appellate Court's attention) the January 26, 1994 decision by the Court of Appeals for the Tenth Circuit in *Harris v. Champion,* 15 F.3d 1538, specifically referring both to *Harris'* substantive rulings and to its limitations and to the fact that although *Harris* was not of course binding on this Court, its rulings would be useful in considering the parallel issues posed in the case before this Court.

**All Citations**

Not Reported in F.Supp., 1994 WL 113097

Footnotes

1 See Appendix.

2 As it has done in the past, this Court is transmitting a copy of this memorandum order to Justice Buckley for purely informational purposes.

1 Even apart from the prohibitions on judicial activity, that might well raise an interesting (though presumably academic) question under Rule 3.6(a) of the Illinois Rules of Professional Conduct, which deals with lawyers' comments on pending litigation. Judges are of course lawyers too.

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