

**TalkLeft's Abridged Version** of the 70 page Roman Polanski decision, 12/21/09

<http://www.courtinfo.ca.gov/opinions/documents/B217290.PDF>

The result:

We conclude that the trial court did not abuse its discretion in applying the fugitive disentitlement doctrine and refusing to consider dismissing the action. In so doing, we do not disregard the extremely serious allegations of judicial and prosecutorial misconduct that have been brought forward, but urge the parties to take steps to investigate and to respond to the claims.

The Court acknowledges that the misconduct allegations have never been heard by a court, but says:

To the extent that these allegations are true — and from the documentary evidence filed with this court, it appears to this court that there is a substantial probability that a court conducting an evidentiary hearing would conclude that many, if not all, are true—they demonstrate malfeasance, improper contact with the media concerning a pending case, and unethical conduct.

On the fugitive entitlement doctrine question, the court rejects the prosecution argument that Polanski may not appeal, ruling that as an appeals court, it has the ability to apply the doctrine or not, as it sees fit.

As far as fugitive disentitlement, which shall be discussed in far greater depth below, the doctrine remains an equitable one, and we are aware of no authority compelling any court to disentitle a fugitive defendant by determining that he lacks standing for the purposes of seeking appellate review of a court's decision under section 1385.

...Fugitive disentitlement, however much it may advance legitimate policies... is not an automatic rule but a discretionary tool of the courts that may only be applied when the balance of all equitable concerns leads the court to conclude that it is a proper sanction for a party's flight....The doctrine is a blunt weapon, not appropriate in every matter in which a party has fled criminal prosecution.

It also rejects the prosecution argument that the appeal should be dismissed because it was filed one day late:

We decline to dismiss the petition on timeliness grounds because the People have not identified any prejudice from the filing of this writ petition on

July 7, 2009, rather than on July 6, 2009; because the delay in filing the petition was truly minimal; and because any court interest in holding fast to the timeliness principle against a nonprejudicial one-day incursion is far outweighed by the interest in considering the grave judicial and prosecutorial misconduct alleged here.

So why does the appeals court reject Polanski's bid? Because of deference to the trial court:

As the application of the disentanglement doctrine is abundantly within the court's discretion ... we review the trial court's refusal to consider exercising its discretionary authority to dismiss the action on the basis of this doctrine for an abuse of that discretion. "Under the abuse of discretion standard, „a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'

...The trial court's "decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."

A factor that weighed against Polanski was how long he waited to make his motion. Nonetheless, the appeals court castigates the original judge:

Finally, the court considered how long Polanski had waited before requesting the dismissal of the charges and the prejudice resulting from the delay. Polanski's delay appears to have been unjustifiable under the facts of the case. Polanski may not have known of the alleged contacts between Wells and Judge Rittenband until 2008, but he was well aware of the misconduct he alleges by Judge Rittenband in 1977 and 1978. Without minimizing the seriousness of the misconduct that Wells appears to have revealed in his 2008 interviews, the core of the alleged injustice in this matter is Judge Rittenband's conduct.

If Wells's account is true, Judge Rittenband was ushered along a path of iniquity by an officer of the court with a personal axe to grind and no hesitation to engage in unethical ex parte communications and devise illegal, nonappealable sentences to circumvent the defendant's due process and sentencing rights — but it remains Judge Rittenband who imposed an improper punishment, said he would renege on the punishment agreement, threatened to sentence Polanski to prison with unlawful conditions for his release, and engaged in improper conduct with the media and others not

involved in the matter.

In a footnote:

While we do not consider this in the balance of equities concerning disentitlement, another unfortunate consequence of the delay here in seeking an evidentiary hearing on these allegations is that the justice system's ability to police its own through disciplinary proceedings was frustrated, and a judge whose ethics and conduct are strongly questioned was left on the bench for more than a decade without closer oversight. Of course, Polanski and his counsel are not the only actors who could have prompted a timely investigation, as it is also alleged that much of this conduct took place in the presence of other lawyers.

As to Polanski's flight:

Even in light of our fundamental concern about the misconduct that has been alleged here with significant evidentiary support, flight was not Polanski's only option. It was not even his best option.

What should Polanski have done'

Aside from the judge's post-flight press conference, all the wrongful conduct alleged in the statement of disqualification for cause had already occurred before the February 1, 1978 sentencing hearing. Instead of fleeing and then urging disqualification, Polanski could have raised these issues of judicial misconduct by attending the sentencing hearing on February 1, 1978, and filing the statement of disqualification for cause at that time.

...If, however, the trial court had refused to suspend the proceedings and nonetheless proceeded to sentencing that day, there would have been two consequences. First, Polanski would have been able to seek habeas corpus relief on the basis of the court's failure to follow the disqualification process; and second, Polanski could have demanded a hearing to present his evidence of the court's sentencing commitment and its misconduct.

While the court acknowledges that if the judge refused to hear Polanski before sentencing, he would have no right to direct appeal because he would have been precluded from making a record of the misconduct, the court says he could have filed a habeas petition.

A petition for habeas corpus is the appropriate vehicle for obtaining review of issues requiring consideration of matters outside the record. ... Had the court sentenced Polanski to any further incarceration, Polanski could have

filed an immediate petition for habeas corpus with a request that the sentence be stayed pending the petition's resolution

Yet, the court acknowledges Polanski could not have known of the improper relationship between DA Wells and the judge:

These recent revelations add to, but do not fundamentally change, Polanski's evidence and argument that justice was miscarried here. With or without knowledge of Wells's alleged operations behind the scenes, at the time Polanski fled he already had reason to know, and evidence to demonstrate, that the process of negotiating his punishment for the offense to which he had pleaded guilty had veered constitutionally off course.

The court then engages in a series of "what if's," finding:

If a hearing had been requested on the record and granted, by Polanski's account at least three people could have testified at the sentencing hearing to the trial court's agreement that the diagnostic study would constitute Polanski's entire punishment: Dalton, Gunson, and probation officer Gold. These three witnesses as well as Geimer's attorney, Lawrence Silver, could have testified to the other misconduct occurring in their presence, if Polanski's allegations are true.

We cannot know what Judge Rittenband would have done in response to this testimony, but even if he had sentenced Polanski on February 1, 1978, to time in state prison or county jail, based on the evidence that Polanski could have developed at the sentencing hearing Polanski would have been able to seek an immediate stay of any commitment pending review of the sentence.

So Polanski should have to remain in jail while fighting this out? Apparently so:

We acknowledge that if a term of imprisonment had been imposed at the sentencing hearing on February 1, 1978, Polanski would have remained in custody for the time it would have taken to prepare, as appropriate, an appeal and/or a petition for writ of habeas corpus and to seek a stay of the sentence.

...Polanski simply was not without a remedy other than flouting the judicial system through flight

The court notes Polanski's lawyer had told him exactly that:

Indeed, Dalton revealed in an interview for the Polanski film that he

advised Polanski prior to his flight that Polanski would likely be able to secure relief from the sentence they feared the trial court would impose: "I contacted Roman and I said for them to come to my office and discuss what was going to happen the following morning. I told them it was my opinion that the sentence would be illegal, that we could probably obtain relief on appeal but that would involve[] a long procedure and Polanski would be incarcerated during that period of time."

But, the court says, Dalton should have recognized "Polanski would have been able to seek an immediate stay of the sentence pending appellate resolution of the issues." Another factor that sways the court: Polanski's refusal to return when a subsequent Judge offered to honor the plea agreement for time served and release Polanski on bail immediately if he returned. According to the lawyers, that Judge insisted on televising the hearing and Polanski was opposed to that. The appeals court says:

We recognize that there exists some controversy as to whether the trial court actually insisted that the proceedings upon Polanski's return would be televised, but the record contains no dispute that Polanski declined to return despite the pledge of no further time in prison because he was dissatisfied, not with the trial court's offer, but with the conditions surrounding the hearing that would be held.

...This is not the case of a man who for 31 years has been effectively unfairly exiled from the United States because he was left with no remedy but flight in the face of alleged misconduct by the trial court. Instead it appears to be a case in which the litigant wants not only to obtain relief for the events that occurred long ago but also to direct the conditions under which that relief is dispensed.

In the consideration of the equities of disentitlement here, the fact that Polanski has chosen to remain a fugitive tends to considerably diminish any injustice that would otherwise be wrought by the trial court's refusal at this time to permit him to solicit relief from the criminal proceeding while he remains aloof from the court.

The court discusses remedies still available to Polanski: First and foremost, he can request to be sentenced in absentia. For a felony, this requires court approval.

At the plea hearing in this case, Polanski specifically pleaded guilty to the offense as a felony, but on the record he acknowledged that the judge would decide whether he would receive a felony sentence or a misdemeanor sentence.

...At sentencing, Polanski's counsel could argue that the proper sentence is the time already served. ...Based on the oral arguments of counsel, this court would not expect any objection to be made if Polanski should request to be sentenced in absentia.

His other option: waive extradition and possibly prevail on a motion to dismiss the case.

Polanski could also cooperate with the extradition process and return to California. Once back in the jurisdiction, he could request that the trial court exercise its discretion to dismiss the prosecution in the interest of justice under section 1385.

Alternatively, as he had already fulfilled the terms of the agreed sentence he alleges, he could appear for the formal sentencing hearing from which he fled and ask the trial court to honor those sentencing provisions.

Potentially more expeditiously, upon his return he could immediately file a petition for writ of habeas corpus with a request for an immediate stay of all further sentencing proceedings. **While we neither claim an ability to predict the future nor purport to prejudge any matter for ourselves or for the trial court, the evidentiary showing that he has mustered in support of this petition would appear highly likely to merit both a stay and an immediate review of the propriety of any continued detention.** (my emphasis)

The court notes Polanski might be eligible for probation, under the original agreement:

Dalton alleged in 1978 that Judge Rittenband said "there would be no further incarceration" beyond the diagnostic stay at Chino. Clearly that would not rule out the imposition of probation at the sentencing hearing.

In 2008, Dalton declared that Judge Rittenband said that the study would be the "complete punishment" under the plea as long as the report from Chino was favorable. This phrasing leaves open the possibility that Judge Rittenband could sentence Polanski to incarceration if the report was not favorable (although the report was in fact favorable), but would tend to indicate by its reference to "complete punishment" that Judge Rittenband had pledged himself to employ no other non-incarceration sentencing options, such as probation.

Gunson's declaration sheds no light on whether Judge Rittenband made a commitment that ruled out probation, stating only that the diagnostic study would be Polanski's punishment.

The court, winding down, says:

As we have discussed, Polanski has failed to avail himself of the many other options he has had to vindicate his constitutional rights, and he retains the ability to seek that vindication today.

The bottom line:

Here, the seriousness of the misconduct that Polanski alleges played a role in his decision to flee clearly weighs against disentitlement, but the traditional justifications for the doctrine, Polanski's refusal to accept relief offered in the past, and the fact that he has always had legitimate alternatives to flight all weigh in favor of applying disentitlement here and support the trial court's ruling. Considering the totality of circumstances in reviewing the trial court's ruling on disentitlement, Polanski has not established that the trial court's decision fell outside the bounds of reason under the law and the facts here.

Whether or not we would have reached the same conclusion if we had been in the position of the trial court, we cannot say that the trial court's decision was so irrational or arbitrary that no reasonable person could agree with it, nor may we substitute our judgment for that of the trial court.

The court ends with why a complete dismissal is not otherwise appropriate at this juncture:

...the relief that [Polanski] requests goes far beyond asking the courts to honor Judge Rittenband's alleged 1977 commitment that the diagnostic study would constitute Polanski's full punishment for unlawful sexual assault, presumably by a formal sentence to time served. Instead, Polanski seeks a complete dismissal of the criminal prosecution against him under section 1385, and he asks us to compel that result by means of writ of mandate.

The effect of such a dismissal would be not only to bar any further prosecution or punishment for the crime, but also to entirely erase Polanski's plea to unlawful sexual conduct. He would "stand as if [he] had never been prosecuted" for the crime.

Nothing in the record suggests that this is an appropriate result. Polanski has not alleged any misconduct with respect to the plea itself or at any point in the proceedings prior to the consideration of sentencing, and therefore has not established any reason for this court to nullify the criminal proceeding altogether.

“While irresponsible or overzealous conduct by government agents is not to be condoned, in the case of challenged conduct which occurred only after a plea of guilty and neither coerced nor induced that plea, it is not immediately apparent how there could have been prejudice to a defendant which would justify withdrawal of the plea or dismissal.”

In going forward,

Without returning to the United States or dropping his battle against extradition, Polanski may, through counsel, request that the trial court conduct the never-yet-held sentencing hearing in absentia pursuant to section 1193. If the trial court approves this request, then Polanski, through his counsel, will be able to obtain the evidentiary hearing that is so urgently required to establish the facts of what occurred in 1977 and 1978. The trial judge now presiding over the matter, Judge Espinoza, has already indicated that at a sentencing hearing Polanski would be able to fully litigate the allegations of misconduct and a prior pledge by Judge Rittenband as to Polanski’s punishment.

The court quotes Judge Espinoza's earlier finding:

“[H]aving reviewed all of the evidence in this case, notwithstanding the People's assertion that the misconduct that occurred is still in dispute, there was substantial, it seems to me, misconduct that occurred during the pendency of the case which will be among the many factors that would be considered by me and any other court that would sentence Mr. Polanski. He had a plea agreement with Judge Rittenband. Unfortunately, Judge Rittenband is long since deceased, but the terms and conditions of that plea agreement are well known.”

While Judge Espinoza has expressed the view that Polanski is required by section 977 and the bench warrant to be present at any proceeding regarding his case, on this record it does not appear that he has ever been asked to release Polanski from that obligation, as he is authorized to do by section 1193. Because Polanski possesses a means to seek an evidentiary hearing on his allegations of prosecutorial and judicial misconduct, he has not demonstrated that he is without any remedy in the ordinary course of the law

The court concludes by saying Polanski could yet get a complete dismissal of the charges:

The trial court’s justified refusal to consider Polanski’s request that it consider dismissing the prosecution on the basis that Polanski was not entitled to seek relief while defying the court’s authority does not preclude



the court from considering whether to offer relief — at the trial court’s own instance in the furtherance of justice — based on the overarching systemic issues here of ensuring that the court system operates with integrity and responds appropriately to judicial and prosecutorial misconduct when it has occurred.

The trial court is fully empowered, upon examining the evidence in this matter, to order an evidentiary hearing on whether to dismiss the prosecution in furtherance of justice. **Such a hearing would permit the trial court to make factual findings as to the events in 1977 and 1978 and to dismiss the prosecution in its entirety if the facts so warrant.** (my emphasis)

In this scenario, the trial court could consider the larger question of whether the justice system was compromised by the actions of the judge and a prosecutor not assigned to the case; the balance of the equities, without the weight of the request of a fugitive, could very well be different.

If the judge doesn’t want to dismiss, time served is another option:

If, after taking evidence, the trial court finds that Polanski’s allegations are true and that the original trial judge agreed that the prison stay for the diagnostic study would constitute Polanski’s entire punishment, a condition Polanski fulfilled, the trial court could find that justice requires that the trial court’s commitment be honored and that Polanski should be sentenced to time served.

...we are confident that the trial court could fashion a legal sentence that results in no further incarceration for Polanski.

The court takes a final parting shot at the District Attorney’s office:

We are disturbed by the district attorney’s refusal in the briefing submitted to this court to address or consider what appears to be an admission by a former member of the district attorney’s office that he: engaged in highly improper ex parte communications with a judge about a pending matter; recommended the misuse of a sentencing tool as a punishment; deliberately provoked the judge against a defendant based on a newspaper photograph and no further information; and pursued a personal agenda against a defendant. Such profoundly unethical conduct, if proven to be true, strikes at the heart of the prosecutor’s role as a guardian of systemic integrity.

...Although the district attorney’s office dismisses the allegations concerning the conduct of former Deputy District Attorney Wells with the assertions that “[i]t is unknown at this time whether statements made during a heavily edited documentary reflect actual circumstances, opinions, or

exaggerated braggadocio” and that Polanski is not entitled to a hearing on the merits until he returns, the district attorney’s office has an interest in ascertaining whether, in fact, one of its former members committed unethical acts interfering with a criminal case. The prosecutor’s responsibility to ensure that justice is done ... is not extinguished by a litigant’s bad behavior.

...the need remains to investigate and take appropriate curative action in response to Wells’s admissions that he engaged in prosecutorial misconduct in the Polanski matter. Similarly, although Judge Rittenband’s alleged transgressions cannot be attributed to the district attorney’s office, former Deputy District Attorney Gunson has declared under penalty of perjury that the trial court engaged in misconduct. “

“Prosecutors play a dual role in the criminal justice system; they are advocates, but they are also administrators of justice. ...[I]t is their sworn duty to see that the defendant has a fair and impartial trial . . . .” ...This role as an administrator of justice should prompt the district attorney’s office to internally investigate whether the allegations of judicial misconduct are substantiated and whether Polanski was subjected to unethical and unjust proceedings.

That investigation, the court opines, could warrant dismissal of the case against Polanski:

...if the district attorney finds that the allegations of prosecutorial and/or judicial misconduct advanced by Polanski are substantiated, we expect the district attorney’s office both to consider whether to refer former Deputy District Attorney Wells to the State Bar of California for disciplinary proceedings and to seek condign remedies for the misconduct.

Should the misconduct be found by the district attorney’s office to have tainted the proceedings against Polanski to the point that justice would be furthered by a dismissal of the entire prosecution, the district attorney’s office is empowered to and should apply to the trial court for a dismissal of the action under section 1385.(my emphasis).

Alternatively, if the district attorney’s office finds that misconduct occurred after the taking of the plea and with regard to the sentence only, the district attorney’s office could request that the court set a sentencing hearing in absentia and that Polanski be sentenced only to time served.

The court says the investigation should commence immediately, even before further proceedings in Polanski’s case.

The Court ends with:

Fundamental fairness and justice in our criminal justice system are far more important than the conviction and sentence of any one individual. “[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.” (*Olmstead v. United States* (1928) 277 U.S. 438, 470 (dis. opn. of Holmes, J.)) Polanski’s allegations urgently require full exploration and then, if indicated, curative action for the abuses alleged here.

We exhort all participants in this extended drama to place the integrity of the criminal justice system above the desire to punish any one individual, whether for his offense or for his flight.

As Justice Murphy wrote in dissent in *Eisler*, *supra*, 338 U.S. at pages 194 and 195, “Our country takes pride in requiring of its institutions the examination and correction of alleged injustice whenever it occurs. We should not permit an affront of this sort to distract us from the performance of our constitutional duties.” We encourage all participating parties to do their utmost to ensure that this matter now draws to a close in a manner that fully addresses the issues of due process and fundamental fairness raised by the events of long ago.

One further note: In a footnote, the court makes clear:

For clarity, we emphasize that all references to alleged prosecutorial misconduct in this opinion concern only the alleged conduct of former Deputy District Attorney David Wells as described by Wells in the interview he gave for the film *Roman Polanski: Wanted and Desired*. No allegation of misconduct has been leveled at former Deputy District Attorney Roger Gunson, the prosecutor responsible for Polanski’s prosecution.