

# The Burger Court Opinion Writing Database

*Giglio v. United States*

405 U.S. 150 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



10  
Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
THE CHIEF JUSTICE

December 2, 1971

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Conrad

## MEMORANDUM TO THE CONFERENCE:

From: The Chief Justice

Circulated: DEC 2 1971

Re: No. 70-29 - John Giglio v. United States Recirculated:

After struggling with this case, including close scrutiny of the entire record, it seems to me that the remand I proposed is futile. There are three possible solutions:

1. Remand as originally proposed
2. Dismiss as improvidently granted
3. Affirm, along the following lines with a cross reference to Santobello.

\* \* \* \*

Petitioner was convicted of passing forged money orders and sentenced to five years imprisonment. While appeal was pending, new evidence was discovered raising questions about the credibility of the Government's key witness. The Court granted certiorari to determine whether the new evidence required a second trial in light of Napue v. Illinois, 360 U.S. 264 (1959), and Brady v. Maryland, 373 U.S. 83 (1963).

3  
My Action.

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

CHAMBERS OF  
THE CHIEF JUSTICE

DECEMBER 3, 1971

Re: No. 70-29 - Giglio v. U. S.

MEMORANDUM TO THE CONFERENCE:

To avoid unnecessary writing I hope all who agree  
with the analysis in the opinion but desire the remand result  
will so advise me. When four are of that view, I will alter  
the disposition paragraph at the end of the opinion.

Regards,

WES

CHAMBERS OF  
THE CHIEF JUSTICE

Supreme Court of the United States  
Washington, D. C. 20543  
December 9, 1971

13  
Hollings

## MEMORANDUM TO THE CONFERENCE:

Re: No. 70-29 -- John Giglio v. United States

Although we vote to remand this case for resolution of the conflicting factual situation on what promises were in fact made to Taliento, I think the real choice is between affirming on harmless error or ordering a new trial without a remand for a hearing. I cannot agree with Potter Stewart's memo that the factual situation is clear. Far from it. Di Paola's affidavit is flatly contradicted by Golden and it was on this basis we voted to remand to resolve that conflict. Meanwhile my review of the entire transcript convinced me the error was harmless.

However, if we are not to affirm, there are some practical considerations, including saving of judicial time, that militate against a remand for hearing.

The trial judge here was District Judge Manuel Real of Los Angeles and he would need to make a cross-continent trip to conduct what would likely be a one-day hearing. If he did not order a new trial,

the case could return again. What we hold and say is far more important than what happens to this particular case.

In these circumstances, our time being at least as valuable as the time of one District Judge to conduct a new trial, I suggest we abandon the originally contemplated remand and cut the Gordian knot by simply ordering a new trial. If that is an acceptable disposition a slight change in the opinion can accomplish this.

Regards,

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Loy. Justice Marshall  
Mr. Justice Blackmun

From: The Chief Justice

Circulated:

Recirculated: DEC 10 1971

No. 70-29 - John Giglio v. United States

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

Petitioner was convicted of passing forged money orders and sentenced to five years imprisonment. While appeal was pending, new evidence was discovered raising questions about the credibility of the Government's key witness. The Court granted certiorari to determine whether the new evidence required a second trial in light of Napue v. Illinois, 360 U.S. 264 (1959), and Brady v. Maryland 373 U.S. 83 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged co-conspirator in the offense and the only witness linking him with the crime. In June 1966 officials at the Manufacturer's Hanover Trust discovered that Taliento had used his position as teller at the bank to cash several forged money orders. Upon questioning by F.B.I. agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$2300 in money orders; Taliento then processed these money orders through

5  
Supreme Court of the United States  
Washington, D. C. 20543  
December 28, 1971

CHAMBERS OF  
THE CHIEF JUSTICE

Want for PS

No. 70-29 -- John Giglio v. United States

MEMORANDUM TO THE CONFERENCE:

I enclose a revised draft of the opinion in the above.

It had not occurred to me that the conflict in the affidavits of the two Assistant United States Attorneys was of any real consequence on the central issue of the case and my purpose in discussing it was to use the opinion to "instruct" prosecutors on the need for procedures to avoid just such problems as developed in this case and Santobello.

Since reference to that conflict seemed to cause an unanticipated problem for some of the Brethren, I have removed it from the opinion and now merely relate enough to show the "fumbles" of the prosecutor's office that brought on the problems.

I trust this will satisfy everyone.

Regards,

W. B.

To: Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall ✓  
Mr. Justice Blackmun

PRINTED  
1st DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES *Contra* *ad*: DEC 28 1971

No. 70-29

Recirculated:

John Giglio, Petitioner, | On Writ of Certiorari to the  
v. | United States Court of Appeals for the Second Circuit.  
United States.

[January —, 1972]

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

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending, new evidence was discovered raising questions about the credibility of the Government's key witness. The Court granted certiorari to determine whether the new evidence required a second trial in light of *Napue v. Illinois*, 360 U. S. 264 (1959), and *Brady v. Maryland*, 373 U. S. 83 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged co-conspirator in the offense and the only witness linking him with the crime, and the affidavits made after the trial, including one by an Assistant United States Attorney, indicating that he had made a promise to Taliento that he would not be prosecuted if he cooperated with the Government.

In June 1966 officials at the Manufacturer's Hanover Trust discovered that Taliento had used his position as teller at the bank to cash several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$2,300 in money orders; Taliento then processed these money orders through the

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*Please return me*

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

From: The Supreme Court

Circulated: \_\_\_\_\_

Recirculated: 2/23/1972

*Printed*

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

—  
No. 70-29  
—

John Giglio, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1972]

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

Petitioner was convicted of passing forged money orders and sentenced to five years' imprisonment. While appeal was pending in the Court of Appeals, defense counsel discovered new evidence indicating that the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government. We granted certiorari to determine whether the evidence not disclosed was such as to require a new trial under the due process criteria of *Napue v. Illinois*, 360 U. S. 264 (1959), and *Brady v. Maryland*, 373 U. S. 83 (1963).

The controversy in this case centers around the testimony of Robert Taliento, petitioner's alleged co-conspirator in the offense and the only witness linking petitioner with the crime. The Government's evidence at trial showed that in June 1966 officials at the Manufacturer's Hanover Trust discovered ~~that~~ Taliento, as teller at the bank, had cashed several forged money orders. Upon questioning by FBI agents, he confessed supplying petitioner with one of the bank's customer signature cards used by Giglio to forge \$2,300 in money orders; Taliento then processed these money orders through the regular channels of the bank. Taliento related this story to the grand jury and petitioner was indicted; thereafter,

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

December 14, 1971

Copy  
This is a concurrence  
Wishes also joined it

Dear Potter:

Please join me in your No. 70-29 -

Giglio v. U. S.

W. O. D.

3

Mr. Justice Stewart

B

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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

January 27, 1972

Dear Chief:

In No. 70-29 - Giglio v.  
United States, please join me in  
your opinion.

WOD

William O. Douglas

The Chief Justice

CC: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

December 14, 1971

RE: No. 70-29 - Giglio v. United States

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

January 31, 1972

RE: No. 70-29 - Giglio v. United States

Dear Chief:

I agree.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE POTTER STEWART

December 6, 1971

No. 70-29, Giglio v. United States

Dear Chief,

My difficulty with your memorandum in this case stems, I think, from the fact that I do not read the DiPaola and Golden affidavits as being actually in conflict. In short, it seems to me reasonably clear that a deal was made with Taliento, that Taliento did not tell the truth about this deal when he testified at the trial, and that the prosecution, far from disclosing the untruth, compounded the falsity in final argument to the jury. Accordingly, I think the case is squarely governed by Napue v. Illinois, 360 U.S. 264, and that the judgment should be set aside and the case remanded for a new trial.

The deal made with Taliento was as follows: If Taliento would sign a waiver of immunity and testify before the grand jury as a witness for the Government, he would not then be indicted. If Taliento would subsequently testify as a Government witness at Giglio's trial, he would not be prosecuted. If, on the other hand, Taliento would not testify at Giglio's trial, he would be indicted and prosecuted.

These are the precise terms of the agreement described in the affidavit of the Assistant U. S. Attorney (DiPaola) who negotiated it with Taliento and his lawyer (Darienzo) in the summer of 1966:

- 2 -

It was agreed that if ROBERT EDWARD TALIENTO would testify before the Grand Jury as a witness for the Government, that he would be named as a co-conspirator and would not be indicted. His attorney would not permit ROBERT EDWARD TALIENTO to testify before the Grand Jury if he was going to be indicted.

It was further agreed and understood that he, ROBERT EDWARD TALIENTO, would sign a Waiver of Immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted.

It was further understood and agreed that if in the event ROBERT EDWARD TALIENTO did not testify at the trial of the defendant, JOHN GIGLIO, he would be prosecuted. [App. 137a]

The affidavit of the Assistant U. S. Attorney who acted as prosecutor at Giglio's trial (Golden) strikes me as basically corroborative of this agreement:

Mr. DiPaola further advised that Mr. Taliento had not been granted immunity but that he had not indicted him because Robert Taliento was very young at the time of the alleged occurrence and obviously had been overreached by the defendant GIGLIO. Mr. DiPaola stated that he felt Mr. Taliento's testimony would be very vital to the Government's case and that he had exercised his discretion in not indicting the witness Taliento.

On August 6, 1968, I attempted to communicate with Robert Taliento for purposes of interviewing him prior to trial. I was unsuccessful in reaching Mr. Taliento and later in the afternoon of August 6, 1968, discussed the matter again with Mr. DiPaola. Mr. DiPaola maintained that he felt the witness would be cooperative and stated, to the best of my recollection, "And if he

isn't; he could still be indicted." \* \* \* After discussing the matter with the elder Taliento for about twenty minutes Mr. Hoey unequivocally stated that if Robert Taliento refused to testify he would have no alternative other than to indict the witness. \* \* \* I was present when Mr. Hoey told Mr. Darienzo, in the presence of his client, that Robert Taliento had not been granted immunity and that if he refused to testify in the pending criminal action against JOHN GIGLIO, he would be indicted. [App. 139a-140a]

The affidavit of the then U. S. Attorney (Hoey) is somewhat more euphemistic, but not, I think, basically at odds with the other two affidavits:

After reviewing the file and the indictment, Mr. Golden conferred with the undersigned. On August 7, 1968 in the A.M., he advised your deponent that Robert Taliento and his father had appeared at his office and that Robert Taliento refused to testify as a witness, stating that he feared for his safety. \* \* \* Your deponent then conferred with Robert and his father in the presence of Mr. Golden. \* \* \* They were informed that Robert Taliento could and should have been indicted as a co-defendant with GIGLIO. Your deponent then suggested that they confer with their attorney, Mr. Darienzo, and return in the afternoon to confer with your deponent.

In the meantime, Mr. Darienzo was contacted by your deponent who explained the situation to him. The Talientos left to confer with Mr. Darienzo.

Shortly after 3:00 p.m. the Talientos, accompanied by Mr. Darienzo, returned. A discussion was had concerning the reluctance of Robert Taliento to testify. Mr. Darienzo stated that he had advised his client that he could be indicted under the facts as developed in the case and that he would advise his client to testify. Mr. Darienzo did not claim that his client Robert Taliento received

immunity or was made any promises. No assurances were given to Mr. Darienzo or to the Talientos except that they would have to rely on the good judgment and conscience of the Government. [App. 143a-144a]

What led District Judge Real astray in this case, I think, was his misconception of the gist of Giglio's motion for a new trial. Judge Real speaks in his opinion (App. 149a-152a) of "immunity," and points out that only Mr. Hoey could have granted immunity. But there has never been a claim that Taliento was granted immunity. It is clear that he signed a waiver of immunity. The claim is only that a deal was made with Taliento containing the terms described above. As stated, I read the affidavits as clearly evidencing such a deal, the final condition of which was that if Taliento testified as a Government witness at Giglio's trial, he would not be prosecuted.

Yet, after he had testified for the Government at Giglio's trial, Taliento on cross-examination explicitly denied the existence of any such deal:

Q. Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted? A. Nobody told me I wouldn't be prosecuted.

\* \* \*

Q. They told you you might not be prosecuted?  
A. I believe I still could be prosecuted.

Q. Were you told that you would not be prosecuted if you testified against somebody else? A. Not that I wouldn't be prosecuted.

Q. What were you told? A. That there is still a chance I could be prosecuted. [App. 43a-44a]

- 5 -

Q. Were you told, if you did not testify, that you would be indicted? A. If I didn't testify?

Q. Yes. A. Chances are I still could be indicted.

Q. Were you told if you did testify you would not be indicted? A. I was told I still could be indicted. [App. 51a]

These denials on the part of Taliento were compounded when the prosecutor (Golden) stated in his final argument to the jury: "He [Taliento] received no promises that he would not be indicted." [App. 119a]

In the light of the above reading and analysis of the record in this case, my problems would not be solved by simply recasting the last paragraph of your memorandum to provide for a remand. At the very least, I would set out this analysis, and would remand, with directions to the District Court to grant a new trial, unless, after a hearing, he found that the deal as above described was in fact not made. Otherwise, I would, as stated at the beginning of this letter, set aside the judgment and remand the case for a new trial on my own reading of the affidavits now in the record.

I should say, finally, that I do not see any real connection between this case and Santobello. This case involves the knowing use of perjured testimony by a Government witness, and thus falls in the area of Napue v. Illinois, and like decisions. Santobello, on the other hand, involves the failure of a state prosecutor to live up to his part of a plea bargain made with a criminal defendant, and thus falls in a basically unrelated area.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

*Please review*

1st DRAFT

To: The Chief Justice  
Mr. Justice Black  
Mr. Justice Douglas  
Mr. Justice Harlan  
Mr. Justice Brennan  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun

**SUPREME COURT OF THE UNITED STATES**

From: Stewart, J.  
Circulated: DEC 14 1971

No. 70-29

John Giglio, Petitioner, v. United States. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1971]

MR. JUSTICE STEWART, concurring.

We would hardly have granted certiorari in this obscure criminal case if it presented no more than a question about the "credibility" of a Government witness. What is involved here is a basic element of due process of law. Almost 40 years ago the Court held that the Constitution cannot tolerate a conviction obtained by the knowing use of false evidence. *Mooney v. Holohan*, 294 U. S. 103. And in the years that have passed since the *Mooney* decision, there has been no retreat from the principle it established. *Pyle v. Kansas*, 317 U. S. 213; *Miller v. Pate*, 386 U. S. 1; cf. *Alcorta v. Texas*, 355 U. S. 28; *Brady v. Maryland*, 373 U. S. 83.

In *Napue v. Illinois*, 360 U. S. 264, we held that this principle required reversal of a conviction in a case where the prosecutor had allowed to go uncorrected an untrue statement by a key prosecution witness that he had received no promise in return for his testimony. Our decision in *Napue* squarely governs the case now before us. For the affidavits filed in this case make it clear that a promise was made to Taliento, the key Government witness, in return for his testimony, that Taliento did not tell the truth about the promise when cross-examined at the trial, and that the prosecutor, far from disclosing the untruth, compounded the falsity in his final argument to the jury.

The agreement made with Taliento was as follows:  
(1) Taliento would not be granted immunity from prose-

*BTM*

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

2nd DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 70-29

Recirculated: DEC 15 1971

John Giglio, Petitioner, v. United States. } On Writ of Certiorari to the  
United States Court of Appeals for the Second Circuit.

[December —, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, concurring.

We would hardly have granted certiorari in this obscure criminal case if it presented no more than a question about the "credibility" of a Government witness. What is involved here is a basic element of due process of law. Almost 40 years ago the Court held that the Constitution cannot tolerate a conviction obtained by the knowing use of false evidence. *Mooney v. Holohan*, 294 U. S. 103. And in the years that have passed since the *Mooney* decision, there has been no retreat from the principle it established. *Pyle v. Kansas*, 317 U. S. 213; *Miller v. Pate*, 386 U. S. 1; cf. *Alcorta v. Texas*, 355 U. S. 28; *Brady v. Maryland*, 373 U. S. 83.

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X  
M page 3

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

## 3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

Circulated: \_\_\_\_\_

No. 70-29

Recirculated: DEC 29 1971

John Giglio, Petitioner, } On Writ of Certiorari to the  
v. } United States Court of Ap-  
United States. } peals for the Second Circuit.

[January —, 1972]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, concurring.

We would hardly have granted certiorari in this obscure criminal case if it presented no more than a question about the "credibility" of a Government witness. What is involved here is a basic element of due process of law. Almost 40 years ago the Court held that the Constitution cannot tolerate a conviction obtained by the knowing use of false evidence. *Mooney v. Holohan*, 294 U. S. 103. And in the years that have passed since the *Mooney* decision, there has been no retreat from the principle it established. *Pyle v. Kansas*, 317 U. S. 213; *Miller v. Pate*, 386 U. S. 1; cf. *Alcorta v. Texas*, 355 U. S. 28; *Brady v. Maryland*, 373 U. S. 83.

In *Napue v. Illinois*, 360 U. S. 264, we held that this principle required reversal of a conviction in a case where the prosecutor had allowed to go uncorrected an untrue statement by a key prosecution witness that he had received no promise in return for his testimony. Our decision in *Napue* squarely governs the case now before us. For the affidavits filed in this case make it clear that a promise was made to Taliento, the key Government witness, in return for his testimony, that Taliento did not tell the truth about the promise when cross-examined at the trial, and that the prosecutor, far from disclosing the untruth, compounded the falsity in his final argument to the jury.

3  
Supreme Court of the United States  
Washington, D. C. 20543CHAMBERS OF  
JUSTICE POTTER STEWART3  
for concurrence  
sent P. S. & W.  
work you join Chief

January 27, 1972

No. 70-29 - Giglio v. U.S.

Dear Chief,

Your circulation of yesterday accommodates the basic problems I had with this case. I am, therefore, glad to join your proposed opinion, and will withdraw my separate concurrence, unless those who previously joined it have a strong contrary view.

Sincerely yours,

P.S.  
✓

The Chief Justice

Copies to the Conference

B2

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

December 9, 1971

Re: No. 70-29 - Giglio v. U. S.

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

December 14, 1971

Re: No. 70-29 - Giglio v. United States

Dear Potter:

Please join me in your concurrence.

Sincerely,



T.M.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

February 1, 1972

Re: No. 70-29 - Giglio v. United States

Dear Chief:

Please join me.

Sincerely,  
  
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20542

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 15, 1971

Re: No. 70-29 - Giglio v. United States

Dear Chief:

Please join me.

Sincerely,

*Harry A.*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 28, 1972

Re: No. 70-29 - Giglio v. United States

Dear Chief:

Please join me in your new circulation of  
January 26.

Sincerely,

*H. A. B.*

The Chief Justice

cc: The Conference