

The Burger Court Opinion Writing Database

United States v. Wilson

421 U.S. 309 (1975)

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

December 23, 1974

Re: No. 73-1162 - United States v. Wilson and Bryan

MEMORANDUM TO THE CONFERENCE:

I will prepare a dissent in this case.

Regards,

W. B.

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

CHAMBERS OF
THE CHIEF JUSTICE

December 23, 1974

Re: No. 73-1162 - United States v. Wilson and Bryan

MEMORANDUM TO THE CONFERENCE:

I will prepare a dissent in this case.

Regards,

WB

PERSONAL

P.S. To Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Ever optimistic, I hope my dissent will be found irresistible —
even by those who do not think Harris is
distinguishable. Maybe it's
too a "distinguish or
destroy" mission!

HOOVER INSTITUTION
ON WAR, REVOLUTION AND PEACE
Sanford, California 94505-6000



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Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
THE CHIEF JUSTICETo: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

January 2, 1975 From: The Chief Justice

Circulated: JAN 2 1975

Recirculated:

Re: No. 73-1162 - United States v. Wilson and Bryan

MEMORANDUM TO THE CONFERENCE:

This case concerns summary contempt citations of respondents Thomas Wilson and Bobby Bryan for refusing to answer questions in a criminal trial after they had been granted immunity from prosecution. The District Judge acted under Rule 42(a) of the Federal Rules of Criminal Procedure.

(1) Robert Anderson was on trial for armed robberies of two banks, one in Tuxedo, New York, and one in Mount Ivy, New York. Respondent Wilson had been charged with Anderson for armed robbery of the bank in Tuxedo, New York; respondent Bryan had been charged with Anderson for armed robbery of the Mount Ivy bank. Prior to Anderson's trial both Wilson and Bryan pleaded guilty to some of the charges against them. Bryan was given a provisional twenty-five year sentence and Wilson was not immediately sentenced. The government

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

CHAMBERS OF
THE CHIEF JUSTICE

March 3, 1975

Re: 73-1162 - U. S. v. Wilson & Bryan

MEMORANDUM TO:

Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Bill Brennan has asked me to reassign the opinion in the above since he has received only two concurrences to his draft opinion of January 6, 1975.

Lewis wrote on January 7 expressing views consistent with my earlier memo of January 2. Views have varied as to distinguishing Harris. Some would overrule it. The case can be reversed either way, but before I reassign I need to know how many will reverse only by overruling Harris.

Regards,

WFB

by vote to + only an auth + H.
~~if 5 + 6~~
if 5 + 6 + 7 want to + 6 + 7
may be 8
if 5 + 6 + 7 want to + 6 + 7
along with by 8
but by 5
the p. + letter

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

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1975

Re: 73-1162 - U. S. v. Wilson & Bryan

MEMORANDUM TO THE CONFERENCE:

Bill Brennan asked me to reassign the above case
a week ago. I have decided to assign it to myself.

Regards,

WSB

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 Chief Justice

Circulated: MAY 1 1975

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson
and Bobby Antonio
Bryan. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[May —, 1975]

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

We granted certiorari to decide whether a district court may impose summary contempt punishment under Rule 42 (a)¹ of the Federal Rules of Criminal Procedure when a witness who has been granted immunity, refuses on Fifth Amendment grounds to testify. The Court of Appeals held that in such circumstances a judge cannot dispose of the contempt summarily, but must proceed under Rule 42 (b)² which calls for disposition only after

¹ Rule 42 (a) provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

² Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be

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

CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1975

Re: 73-1162 - U. S. v. Wilson & Bryan

Dear Harry:

Re your memo of May 5, footnote 12 can be omitted without trouble.

A separate note today has a slight change in footnote 9, p. 8.

Regards,



Mr. Justice Blackmun

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

CHAMBERS OF
THE CHIEF JUSTICE

May 6, 1975

Re: 73-1162 - U. S. v. Wilson and Bryan

MEMORANDUM TO THE CONFERENCE:

I have deleted footnote 12, pp. 9-10, and
made two slight changes in footnote 9, as reflected
in the attached pages.

Regards,

WEB

Attachment

73-1162—OPINION

UNITED STATES *v.* WILSON

7

spondents' contumacious silence, after a valid grant of immunity followed by an explicit, unambiguous order to testify, impeded the due course of Anderson's trial perhaps more so than violent conduct in the courtroom. Violent disruptions can be cured swiftly by bodily removing the offender from the courtroom, or by physical restraints, *Illinois v. Allen*, *supra*; see *Ex parte Terry*, 128 U. S. 289 (1888), and the trial may proceed. But as this case demonstrates, a contumacious refusal to answer not only frustrates the inquiry but can destroy a prosecution, or perhaps a defense.

The face-to-face refusal to comply with the court's order itself constituted an affront to the court,⁸ and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify. *In re Chiles*, 22 Wall. 157, 168 (1875). Whether such incentive is necessary in a particular case is a matter the Rule wisely leaves to the discretion of the trial court.⁹

⁸ In order to constitute an affront to the dignity of the court the judge himself need not be personally insulted.—Here the judge indicated he was not personally affronted by respondents' actions. He said, "I am not angry at Mr. Wilson because he refuses to testify. That is up to him." App. 14. He also said, "I don't consider [Bryan] to have a chip on his shoulder towards the court or towards me." App. 33.

⁹ In *Shillitani v. United States*, 384 U. S. 364, 371 (1966), we said: "the trial judge [should] first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."

Here, of course, that admonition carries little weight because at the time they acted contumuously both respondents were incarcerated due to their own guilty pleas. The threat of immediate confinement for civil contempt would have provided little incentive for them to

Under the
circumstances
here

Our conclusion that summary contempt is available under the circumstances here is supported by the fact that Rule 42 has consistently been recognized to be no more than a restatement of the law existing when the Rule was adopted, *Cooke v. United States*, 267 U. S. 517; *Bloom v. Illinois*, 391 U. S. 194, 209 (1968); Notes of the Advisory Committee on Rule 42 (a),¹⁰ and the law at that time allowed summary punishment for refusals to testify. *Hale v. Henkel*, 201 U. S. 43 (1906); *Nelson v. United States*, 201 U. S. 92 (1906); *Blair v. United States*, 250 U. S. 273 (1919). See *Ex parte Hudgings*, 249 U. S. 378, 382 (1919); *Brown v. Walker*, 161 U. S. 591 (1896), and cases cited therein, cf. *Ex parte Kearney*, 7 Wheat. 38 (1822); *In re Savin*, 131 U. S. 267 (1889).

III

The Court of Appeals considered itself bound by language in *Harris v. United States*, *supra*, to hold Rule 42 (a) inapplicable to the facts here. The crucial difference between the cases, however, is that *Harris* did not deal with a refusal to testify which obstructed an ongoing trial. In *Harris* a witness before a Grand Jury had been granted immunity, 18 U. S. C. § 6002, and nevertheless refused to answer certain questions. The witness was

contrast, *Anglin v. Johnston*, 504 F.2d 1165 (CA7 1974), cert denied U.S. ____.

testify. Nevertheless, the careful trial judge made it clear to respondents that if they relented and obeyed his order he would consider reducing their sentences; and he also explained that he would consider other factors in deciding whether to reduce the sentences. *Supra*, at 3.

¹⁰ Sources contemporaneous with the adoption of this rule uniformly indicate that subsection (a) is substantially a restatement of existing law, Federal Rules of Criminal Procedure with Notes and Institute Proceedings, 73 (1946); Dession, The New Rules of Criminal Procedure II, 56 Yale L. J. 197, 224 n. 268 (1947); Orfield, Federal Rules of Criminal Procedure, 21 Neb. L. Rev. 167, 210, n. 183 (1946), and was not intended to alter the circumstances in which notice and a hearing are required.

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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 other Justice

Circulated: _____

Recirculated: MAY 12 1975

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson } On Writ of Certiorari to the
and Bobby Antonio } United States Court of Ap-
Bryan. } peals for the Second Circuit.

[May —, 1975]

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

We granted certiorari to decide whether a district court may impose summary contempt punishment under Rule 42 (a)¹ of the Federal Rules of Criminal Procedure when a witness who has been granted immunity, refuses on Fifth Amendment grounds to testify. The Court of Appeals held that in such circumstances a judge cannot dispose of the contempt summarily, but must proceed under Rule 42 (b)² which calls for disposition only after

¹ Rule 42 (a) provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

² Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be

57

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 Chief Justice

Circulated:

Recirculated: MAY 12 1975

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson
and Bobby Antonio
Bryan. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[May —, 1975]

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

We granted certiorari to decide whether a district court may impose summary contempt punishment under Rule 42 (a)¹ of the Federal Rules of Criminal Procedure when a witness who has been granted immunity, refuses on Fifth Amendment grounds to testify. The Court of Appeals held that in such circumstances a judge cannot dispose of the contempt summarily, but must proceed under Rule 42 (b)² which calls for disposition only after

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² Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 20, 1974

Dear Chief:

I will assign the opinion in
73-1162, U.S. v. WILSON to Justice Brennan.

WOD
William O. Douglas

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 30, 1975

Dear Bill:

Please join me in your opinion in
73-1162, UNITED STATES v. WILSON and
BRYAN.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 15, 1975

Dear Bill:

Please join me in 73-1162,

UNITED STATES v. WILSON & BRYAN.

WOD/ep

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

*b-1 44-12
ends*

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. December 27, 1974

Dear Bill:

Thanks for your note of December 24 on the dissents. There are two cases named Wilson on the list. The one you assigned to me is No. 73-1162 United States v. Wilson. The other has the same title but is No. 73-1395 in which Potter, you and I are in dissent.

Sincerely,

Bill

Mr. Justice Douglas

*Wm. Douglas
12/27/74*

J. W. Wilson, Jr.

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

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1162

Circulated: 1/6/75

Recirculated: _____

United States, Petitioner,

v. Thomas Joseph Wilson and Bobby Antonio Bryan.

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

[January —, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision in this case is one of procedure: is the criminal contempt of nonviolently and respectfully refusing to testify at a criminal trial punishable summarily by the trial judge pursuant to Rule 42 (a) of the Federal Rules of Criminal Procedure, or must the trial judge prosecute the contempt on notice pursuant to Rule 42(b), allowing a reasonable time for the preparation of the defense?¹ A trial judge in the District

¹ Rule 42 (a) provides:

"(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

Rule 42 (b) provides:

"(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of

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

From: Brennan, J.

Circulated: 5/7/75

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson and Bobby Antonio Bryan. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[January —, 1975]

MR. JUSTICE BRENNAN, dissenting.

The question for decision in this case is one of procedure: is the criminal contempt of nonviolently and respectfully refusing to testify at a criminal trial punishable summarily by the trial judge pursuant to Rule 42 (a) of the Federal Rules of Criminal Procedure, or must the trial judge prosecute the contempt on notice pursuant to Rule 42(b), allowing a reasonable time for the preparation of the defense?¹ A trial judge in the District

¹ Rule 42 (a) provides:

“(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.”

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“(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 4, 1975

Re: 73-1162 - U. S. v. Wilson & Bryan

Dear Chief,

I see no need to overrule Harris. Rather, I would distinguish it primarily on the ground that it involved a refusal to testify before a grand jury, not a refusal to testify in an ongoing trial in the immediate presence of the trial judge.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 5, 1975

No. 73-1162 - U. S. v. Wilson

Dear Chief,

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

Sincerely yours,

PS
i

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 4, 1975

Re: No. 73-1162 - U. S. v. Wilson & Bryan

MEMORANDUM TO: The Chief Justice
Mr. Justice Stewart
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

I would prefer to distinguish Harris
rather than overrule it.

Sincerely,



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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 2, 1975

Re: No. 73-1162 - United States v. Wilson

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 6, 1975

Re: No. 73-1162 -- United States v. Thomas Joseph Wilson
and Bobby Antonio Bryan

Dear Bill:

Please join me.

Sincerely,

J. M.

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1975

Re: No. 73-1162 -- United States v. Thomas Joseph
Wilson and Bobby Antonio Bryan

Dear Bill:

Please join me.

Sincerely,

T.M.

T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 4, 1975

Re: No. 73-1162 - U. S. v. Wilson and Bryan

Dear Chief:

Had I been on the Court at the time, I would have been with the majority in Brown and would have dissented in Harris. My vote at conference on the present case, accordingly, was a bow in Potter's direction. With his and Byron's reevaluation, I am willing to conform.

I could go along either by overruling Harris or by distinguishing it. I think the former is the better route, for I doubt that the two situations are really distinguishable when we look at bedrock. On the other hand, we often distinguish to avoid overruling. Most on the side now voting to reverse prefer to distinguish here. As of the moment, I probably would join that disposition, provided that I am satisfied that my doing so is not inconsistent with my current circulation in concurrence in No. 73-1595, Colonial Pipeline Co. v. Traigle.

Sincerely,

Harry

The Chief Justice

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Powell
Mr. Justice Rehnquist

May 5, 1975

Re: No. 73-1162 - United States v. Wilson & Bryan

Dear Chief:

I offer the following for your consideration:

1. Would it be better to omit footnote 12? I personally would prefer to have it omitted or, if not, to insert the word "possible" before the word "distinction" in the note's first line. I suggest the omission, I suppose, because I am not certain in my own mind that the difference between this case and Harris is a significant one.
2. I think the citation which appears in the first line of the footnote on page 10 should be to 382 U.S. rather than to 359.

Sincerely,

HAB

The Chief Justice

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 5, 1975

Re: No. 73-1162 - United States v. Wilson & Bryan

Dear Chief:

Please join me. I have prepared a short concurrence
which should be circulated within a day or so.

Sincerely,



The Chief Justice

cc: The Conference

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

From: Blackmun, J.

Circulated: 5/9/75

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson } On Writ of Certiorari to the
and Bobby Antonio } United States Court of Ap-
Bryan. } peals for the Second Circuit.

[May —, 1975]

MR. JUSTICE BLACKMUN, concurring in the opinion and judgment of the Court.

In *Brown v. United States*, 359 U. S. 41 (1959), the petitioner had refused, on Fifth Amendment grounds, to answer questions put to him by a federal grand jury. He thereafter was immunized by the District Judge but, on returning to the grand jury room, persisted in his refusal to answer questions. He again was taken before the District Judge, who repeated the grand jury's questions and ordered the petitioner to answer. He again refused. The court then, pursuant to Fed. Rule Crim. Proc. Rule 42 (a), adjudged him guilty of criminal contempt. This Court, by a 5-4 vote, sustained the judgment, and expressly approved the use of summary proceedings; it did so on the ground that the refusal to answer before the district judge was a contempt "committed in the actual presence of the court," within the meaning of Rule 42 (a). 359 U. S., at 47-52.

Less than seven years later, in *Harris v. United States*, 382 U. S. 162 (1965), the Court, with two new Justices, was confronted with a factual situation identical in all relevant respects to that in *Brown*. In *Harris*, however, the Court, again by a 5-4 vote, concluded that the witness' refusal to answer the questions before the District

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

1,2
pp. 1,2
From: Blackmun, J.

Circulated: _____

2nd DRAFT

Recirculated: 5/12/75

SUPREME COURT OF THE UNITED STATES

No. 73-1162

United States, Petitioner,
v.
Thomas Joseph Wilson and Bobby Antonio Bryan. } On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit.

[May —, 1975]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, concurring in the opinion and judgment of the Court.

In *Brown v. United States*, 359 U. S. 41 (1959), the petitioner had refused, on Fifth Amendment grounds, to answer questions put to him by a federal grand jury. He thereafter was immunized by the District Judge but, on returning to the grand jury room, persisted in his refusal to answer questions. He again was taken before the District Judge, who repeated the grand jury's questions and ordered the petitioner to answer. He again refused. The court then, pursuant to Fed. Rule Crim.

Proc. 42 (a), adjudged him guilty of criminal contempt. This Court, by a 5-4 vote, sustained the judgment, and expressly approved the use of summary proceedings; it did so on the ground that the refusal to answer before the District Judge was a contempt "committed in the actual presence of the court," within the meaning of Rule 42 (a). 359 U. S., at 47-52.

Less than seven years later, in *Harris v. United States*, 382 U. S. 162 (1965), the Court, with two new Justices, was confronted with a factual situation identical in all relevant respects to that in *Brown*. In *Harris*, however, the Court, again by a 5-4 vote, concluded that the witness' refusal to answer the questions before the District

Supreme Court of the United States
Washington, D. C. 20543CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 7, 1975

No. 73-1162 U.S. v. Wilson and Bryan

Dear Chief:

This refers to your memorandum of January 2nd.

In accord with my vote at the Conference, I agree with you that the judgment in this case should be reversed. The respondents persisted in refusal to testify during the course of the trial, even after being granted immunity. When respondents continued to refuse to answer questions, the trial judge summarily held them in contempt under Rule 42(a). Bryan's testimony was essential to the government's case against Anderson, who was acquitted.

The Court of Appeals reversed, relying on Harris v. United States, 382 U.S. 162 (1965), which had overruled Brown v. United States, 359 U.S. 41 (1959) decided six years prior thereto. I think the Court of Appeals erred in its interpretation of Harris. As this Court noted in that case, "the real contempt . . . was committed before the grand jury", id. at 164. Moreover, the Court in Harris also recognized that the case might be different if the refusal to testify was "an open, serious threat to orderly procedure". In addition, it was noted that "no disturbance had to be quelled" in the courtroom. Id. at 165.

The interruption of a criminal trial by contumacious conduct is far more serious than interruption of a grand jury proceeding. This may well be sufficient

2.

alone to distinguish Harris. Moreover, in Harris the original contempt was not committed in the presence of the court. But apart from these distinctions, as I read that case, it recognizes that Rule 42(a) may be applied when the interruption of orderly procedure is sufficiently serious. This accords with views repeatedly expressed. In Ex Parte Hudgins, 249 U.S. 378, 382 (1919) the Court recognized that "contumacious refusal of a witness to testify may so directly obstruct a court in the performance of its duty as to justify punishment for contempt." In discussing summary contempt, Mr. Justice Black spoke of conduct in the presence of the Court "which disturbs the Court's business". In re Oliver, 333 U.S. at 275.

I can think of no more serious interference with the "court's business" than the refusal of a key witness to testify after being granted immunity. In the usual situation, the jury will have been sworn, witnesses will have been summonsed, and the court calendar arranged on the assumption that the trial will proceed as scheduled. I see no valid distinction between an interference resulting from disobedience of an order to testify and disobedience of an order not to be insolent or disruptive. In either case, the result is precisely the same: justice is obstructed and the orderly procedure of a trial is frustrated by contumacious conduct.

This is not an area for arbitrary rules. Whether justice is obstructed is usually a question of fact to be resolved in the sound discretion of the trial judge. Of course every refusal of a witness to testify would not justify summary contempt: e.g., where the testimony of the witness was merely cumulative.

If Harris must be construed in a way which effectively deprives trial judges of the power to assure that cases proceed without being aborted or

3.

unduly delayed by recalcitrant key witnesses, I would vote to overrule Harris. But I do not read Harris as requiring a result so drastic. In short, I think Harris is clearly distinguishable.

Sincerely,

The Chief Justice

CC: The Conference

March 4, 1975

No. 73-1162 U.S. v. Wilson and Bryan

Dear Chief:

Responding to your memorandum of March 3, I reaffirm the views expressed in my memorandum of January 7.

For the reasons stated therein, I think Harris is clearly distinguishable. My strong preference is to distinguish rather than overrule it.

Sincerely,

The Chief Justice

lfp/ss

cc: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Rehnquist

P.S. I enclose, for your convenience, a copy of my January 7 memorandum.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 2, 1975

No. 73-1162 U.S. v. Wilson and Bryan

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

1fp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 5, 1975

Re: No. 73-1162 - United States v. Wilson & Bryan

Dear Chief:

Your memo of March 3rd asked of those of us who voted to reverse in this case whether we would prefer to distinguish Harris or overrule it. I am quite willing to distinguish it, but if this is done would prefer to see the proposed opinion written so as not to reaffirm the holding of Harris, but merely to state it as the holding of that case.

Sincerely,

The Chief Justice

Copies to: Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1975

Re: No. 73-1162 - United States v. Wilson and Bryan

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 9, 1975

Re: No. 73-1162 - United States v. Wilson and Bryan

Dear Harry:

Please join me in your concurring opinion in this case.

Sincerely,

W

Mr. Justice Blackmun

Copies to the Conference