The Burger Court Opinion Writing Database

Maness v. Meyers

419 U.S. 449 (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

November 29, 1974

Re: 73-689 - Maness v. Meyers

MEMORANDUM TO THE CONFERENCE:

Since the Print Shop is somewhat overloaded, I circulate the above in this form. I should add that this draft is not yet finally cite checked.

Regards,

WEB

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: NOV 29 1974

Recirculated: _____

We granted certiorari to decide whether a lawyer may be cited for contempt in a state civil proceeding for advising his client, in good faith and without contumacious conduct, that the client may refuse to produce subpoenaed material on Fifth Amendment grounds.

I.

Petition is a lawyer. In January 1973 his client was convicted before a Municipal Court in the city of Temple, Texas, of selling seven obscene magazines in violation of a Temple ordinance. Six days later the client, Michael McKelva, was served by a Bell County deputy sheriff with a subpoena duces tecum directing him to produce fifty-two magazines before the 169th Judicial District Court. The titles of the magazines were given, but no other description was contained in the warrant.

Under the Texas Penal Code [1] upon application by any city attorney the district courts may issue injunctions to prevent illegal distribution of

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[1] Article 527 of the Texas Penal Code regulates distribution of obscene matter. Generally, it provides criminal penalties for specific acts of distribution. In section 13, however, it provides for a civil injunctio to enforce its other provisions:

> Sec. 13. The district courts of this State and the judges thereof shall have full power, authority, and jurisdiction, upon application by any district, county, or city attorney within their respective jurisdictions, or the Attorney General to issue any and all proper restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of this article. Such restraining orders or injunctions may issue to prevent any person from violating any of the provisions of this article. However, no restraining order or injunction shall issue except upon notice to the person sought to be enjoined. Such person shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial. In the event that

(Continued on next page)

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

CHAMBERS OF
THE CHIEF JUSTICE

December 2, 1974

Re: 73-689 - Maness v. Meyers

Dear Bill:

Your suggestion is a good one. I have inserted "generally" before the word "risk".

Regards,

Mr. Justice Douglas

Copies to the Conference

Changes: 1, 3, 7, 9, 12, B, 14, 17-20

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

1st PRINTED DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-689

Recirculated: DEC 3 1974

Michael Anthony Maness, Petitioner, v. James R. Meyers, Presiding Judge. | On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

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

We granted certiorari to decide whether a lawyer may be cited for contempt in a state civil proceeding for advising his client, in good faith and without contumacious conduct, that the client may refuse to produce subpoenaed material on Fifth Amendment grounds.

I

Petitioner is a lawyer. In January 1973 his client was convicted before a Municipal Court in the city of Temple, Texas, of selling seven obscene magazines in violation of a Temple ordinance. Six days later the client, Michael McKelva, was served by a Bell County deputy sheriff with a subpoena duces tecum directing him to produce 52 magazines before the 169th Judicial District Court. The titles of the magazines were given, but no other description was contained in the warrant.

Under the Texas Penal Code[1] upon application by

[1] Article 527 of the Texas Penal Code regulates distribution of obscene articles. Generally, it provides criminal penalties for specific acts of distribution. In § 13, however, it provides for a civil injunction to enforce its other provisions:

"Sec. 13. The district courts of this State and the judges thereof

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

CHAMBERS OF
THE CHIEF JUSTICE

December 4, 1974

Re: 73-689 - Maness v. Meyers

MEMORANDUM TO THE CONFERENCE:

I propose to make three minor changes in the above opinion.

1. At page 12, footnote 6, delete the present footnote and substitute the following:

> This case deals only with the privilege against self-incrimination contained in the Fifth Amendment to the Constitution and made applicable to the states by the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1. The constitutional basis for this privilege distinguishes it from other privileges established by state statute or common law such as those arising from the relation of priest and penitent, lawyer and client, physician and patient, and husband and wife.

2. At page 17, line 2, insert footnote 12 after the word "present:"

> 12/ Under Texas procedure and the rulings of the trial court in this case the client was undoubtedly entitled to consult with counsel at the times and in the manner he did.

Subsequent footnotes will be re-numbered accordingly.

3. On page 20, in line 2 of the last footnote, now numbered 15, after "bad faith" add "or could be patently frivolous or for purposes of delay."

Regards,

WEB

P.S. Several minor verbal changes will also appear in the second printed draft and will be marked to facilitate your study.

Changes: 1, 3, 6, 12, 14, 16, 17, 18, 20.

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: [illegible]

Circ

Recirc DEC 5 1974

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No 73-689

Michael Anthony Maness, Petitioner
v.
James R Meyers, Presiding Judge.

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

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

We granted certiorari to decide whether a lawyer may be cited for contempt in a state civil proceeding for advising his client that the client may refuse on Fifth Amendment grounds to produce subpoenaed material.

I

Petitioner is a lawyer. In January 1973 his client was convicted before a Municipal Court in the city of Temple, Texas, of selling seven obscene magazines in violation of a Temple ordinance. Six days later the client, Michael McKelva, was served by a Bell County deputy sheriff with a subpoena *duces tecum* directing him to produce 52 magazines before the 169th Judicial District Court. The titles of the magazines were given, but no other description was contained in the warrant.

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"Sec. 13. The district courts of this State and the judges thereof

√ — changes 1, 5, 6, 10-14, 17-21

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

3rd DRAFT

From: The Chief Justice

Circulated:

Recirculated: JAN 7 1975

SUPREME COURT OF THE UNITED STATES

No. 73-689

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge. | On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[January —, 1975]

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

We granted certiorari to decide whether in a state civil proceeding a lawyer may be cited for contempt for advising his client, a party to the litigation, that the client may refuse on Fifth Amendment grounds to produce subpoenaed material.

I

Petitioner is a lawyer. In January 1973 his client was convicted before a Municipal Court in the city of Temple, Texas, of selling seven obscene magazines in violation of a Temple ordinance. Six days later the client, Michael McKelva, was served by a Bell County deputy sheriff with a subpoena *duces tecum* directing him to produce 52 magazines before the 169th Judicial District Court. The titles of the magazines were given, but no other description was contained in the warrant.

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"Sec. 13. The district courts of this State and the judges thereof

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 30, 1974

Dear Chief:

I agree with your opinion in 73-689, MANESS v. MEYERS.

On p. 10, l. 8 should not the sentence beginning "Persons who make private" have added before the word "risk" the word "usually" or "generally" or "normally", because the holding in this present case carves out a narrow exception?

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 3, 1974

RE: No. 73-689 Maness v. Meyers

Dear Chief:

I agree.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

1st DRAFT

Mr. Justice Stewart, J.

Circulated: DEC 12 1974

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 73-689

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge.

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

MR. JUSTICE STEWART, concurring in the result.

The Court today necessarily holds that the constitutional privilege against compulsory self-incrimination embraces the right of a party or witness to the unfettered advice of counsel in all civil proceedings. As the Court puts the matter, a "layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived or lost by not asserting it in a timely fashion. . . . [I]f his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege." *Ante,* at slip op. 17–18.

The premise underlying the conclusion that the constitutional privilege against compulsory self-incrimination includes the right to the *unfettered* advice of counsel in civil proceedings must be that there is a constitutional right, also derived from the privilege against compulsory self-incrimination, to *some* advice of counsel concerning the privilege in the first place. The Court's rationale thus inexorably implies that counsel must be appointed for any indigent witness, whether or not he is a party, in

73-689

Supreme Court of the United States

Memorandum

12-17, 1976

Harry,

Thanks for joining me in Wilkes. Since made a couple of modest, non-substantive changes and sent them to the printer, after seeing Rehnquist's, you have any questions or criticisms, please do not hesitate to let me know.

P.S.

pp 1, 2

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

No. 73-689

Circulated:

Recirculated: DEC 17 1974

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge.

On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

The Court today holds that the constitutional privilege against compulsory self-incrimination embraces the right of a testifying party to the unfettered advice of counsel in a civil proceeding. As the Court puts the matter, a "layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived or lost by not asserting it in a timely fashion. . . . [I]f his lawyer may be punished for advice so given there is a genuine risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege." *Ante*, at slip op. 17–18.

The premise underlying the conclusion that the constitutional privilege against compulsory self-incrimination includes the right to the *unfettered* advice of counsel in civil proceedings must be that there is a constitutional right, also derived from the privilege against compulsory self-incrimination, to *some* advice of counsel concerning the privilege in the first place. The Court's rationale thus inexorably implies that counsel must be appointed

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 5, 1974

Re: No. 73-689 - Maness v. Meyers

Dear Chief:

I am not at rest in this case and am considering a concurrence. I hope you will not mind putting it over.

Sincerely,

Byron

The Chief Justice

Copies to Conference

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

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 12-9-74

No. 73-689

Recirculated: _____

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge. } On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

MR. JUSTICE WHITE, concurring in the result.

The issue in this case is not simply whether a lawyer may be held in contempt for advising his client to plead the Fifth Amendment. Obviously, put that way, he may not. The issue is whether, after his client's self-incrimination objection to testifying or complying with a subpoena is overruled and his client is ordered to answer, the lawyer is in contempt of court when he advises the client not to obey the court's order. I agree with the Court's judgment that the contempt judgment against the lawyer cannot stand in the circumstances of this case.

Although the proceeding in which he is called is not criminal, it is established that a witness may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him. The object of the Amendment "was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892); *McCarthy* v. *Arndstein*, 266 U. S. 34, 40 (1924); *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973). In any of these noncriminal contexts, therefore,

pp 2, 4

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

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-689

Recirculated: 12-19-74

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge.	On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

MR. JUSTICE WHITE, concurring in the result.

The issue in this case is not simply whether a lawyer may be held in contempt for advising his client to plead the Fifth Amendment. Obviously, put that way, he may not. The issue is whether, after his client's self-incrimination objection to testifying or complying with a subpoena is overruled and his client is ordered to answer, the lawyer is in contempt of court when he advises the client not to obey the court's order. I agree with the Court's judgment that the contempt judgment against the lawyer cannot stand in the circumstances of this case.

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-689

Michael Anthony Maness, Petitioner, *v.* James R. Meyers, Presiding Judge. | On Writ of Certiorari to the 169th Judicial District Court of Bell County, Texas.

[December —, 1974]

MR. JUSTICE WHITE, concurring in the result.

The issue in this case is not simply whether a lawyer may be held in contempt for advising his client to plead the Fifth Amendment. Obviously, put that way, he may not. The issue is whether, after his client's self-incrimination objection to testifying or complying with a subpoena is overruled and his client is ordered to answer, the lawyer is in contempt of court when he advises the client not to obey the court's order. I agree with the Court's judgment that the contempt judgment against the lawyer cannot stand in the circumstances of this case.

Although the proceeding in which he is called is not criminal, it is established that a witness may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him. The object of the Amendment "was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime." *Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892); *McCarthy* v. *Arndstein,* 266 U. S. 34, 40 (1924); *Lefkowitz* v. *Turley,* 414 U. S. 70, 77

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 3, 1974

Re: No. 73-689 -- Maness v. Meyers

Dear Chief:

Please join me in your opinion in this case.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 16, 1974

Re: No. 73-689 - Maness v. Meyers

Dear Potter:

I would appreciate it if you would join me in your concurrence in this case.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

December 3, 1974

No. 73-689 Maness v. Meyers

Dear Chief:

I am, of course, with you in this case and will join your opinion.

In reading your first draft, however, some thoughts occurred to me which I now share with you. The basis for the Court's decision here is the Fifth Amendment. Although this is made clear toward the end of your draft, it is preceded by a certain amount of emphasis on the generalized right of a lawyer to advise his clients. I agree with this, but it occurred to me that much of the discussion would be equally relevant in cases involving claims of privilege unrelated to the Fifth Amendment. I would not want our opinion to be deemed authoritative with respect to nonconstitutional claims of privilege.

The draft emphasizes the lawyer's "good faith". While this is important, I would think that the asserted claim of Fifth Amendment privilege also must be at least arguably sound. A lawyer, unlearned or lazy, could in good faith advise a client to take the Fifth with respect to an issue that is wholly frivolous.

If the foregoing appeals to you, perhaps in

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 4, 1974

No. 73-689 Maness v. Meyers

Dear Chief:

Please join me.

Sincerely,

L. Lewis

The Chief Justice

CC: The Conference

LFP/gg

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 3, 1974

Re: No. 73-689 - Maness v. Meyers

Dear Chief:

I suspect this was a more difficult opinion to write than most of us thought it would be at Conference, and I think you have done a good job. Your draft has broader implications in places than I would like, but if you would be agreeable to changing one footnote and inserting another, I will be happy to join it.

Footnote 6 on page 12 really bothers me, because it seems to me to be virtually an invitation to argue in future cases that the reasoning of your opinion here would permit us to reverse a state court which had sentenced a lawyer for contempt when he persisted in advising his clients to refuse to answer a question after a claim of statutory or common law privilege was made and overruled. As I understand the thrust of your opinion, it is based on the privilege against self-incrimination which is found in the Fifth Amendment and made applicable to the states by the Fourteenth; I would hope that the opinion should offer no encouragement whatever to other claimants whose claim of privilege had no constitutional basis. I think you could avoid any such unintended and wholesale opening up of more federal review of state evidentiary rulings by changing footnote 6 to read this way:

"We deal here only with the privilege against self-incrimination, which is

> contained in the Fifth Amendment to the Constitution and made applicable to the states by the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1. The constitutional basis for this privilege thus distinguishes it from other privileges established by state statute or common law such as those arising from the relation of priest and penitent, lawyer and client, physician and patient, and husband and wife." [Delete remainder of present text.]

I also think there would be some danger, if it were not for the language in the first sentence on page 18 "being lawfully present", that this opinion could be used as a basis for arguing that a witness before a grand jury was entitled to have counsel present with him at all times in order to advise him as to his Fifth Amendment rights. Would you have any objection to nailing this point down by putting in a new footnote following the word "present" and reading something like the following:

> "Here there is no doubt that under Texas procedure and the rulings of the trial court in this case the client was entitled to consult with counsel at the times and in the manner he did."

Sincerely,

The Chief Justice

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 5, 1974

Re: No. 73-689 - Maness V. Meyers

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference