The Burger Court Opinion Writing Database

United States v. Apfelbaum

445 U.S. 115 (1980)

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

February 1, 1980

RE: No. 78-972 - U.S. v. Apfelbaum

Dear Bill:

I join.

Regards,

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 7, 1980

RE: No. 78-972 - United States v. Apfelbaum

Dear Bill:

My notes from the conference in the above reflect a consensus that the opinion should go off on narrow grounds. More particularly, we were of the view that there was no reason to reach the Government's broad contention that immunized testimony may be used in any trial for conduct occuring after the grant of immunity. The logic of the perjury exception, we felt, was sufficient to decide the present case.

As I read your opinion, it decides the question I had thought reserved. Indeed, in some ways it goes even further. It suggests that the Fifth Amendment has no role at all in determining what immunized testimony may be used in a prosecution for after-occuring conduct. Not only am I not persuaded that all after-occuring conduct should be treated like perjury, but I suspect that the Fifth Amendment might operate as a substantive limit on the uses to which immunized testimony may be put even in a perjury trial. Specifically, I wonder if the wholesale introduction of immunized statements detailing the defendant's participation in other crimes might not raise problems of a constitutional dimension even if such introduction might be permissible under traditional rules of relevance.

Since I do not think it necessary to reach the broad questions you have reached, I cannot join your opinion as written. I do continue to concur in the result and wonder if you would consider retreating to the conference position.

Sincerely,

Bill

Mr. Justice Rehnquist
cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-972

United States, Petitioner, *v.* Stanley Apfelbaum.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[March —, 1980]

MR. JUSTICE BRENNAN, concurring in the judgment.

The Fifth Amendment guarantees the right to be free from compulsory self-incrimination. It permits an individual to refuse to answer questions; but it does not give him the right to answer falsely. *United States* v. *Mandujano*, 425 U. S. 584–585 (BRENNAN, J., concurring in judgment) (1976); *United States* v. *Wong*, 431 U. S. 174 (1977). When the government compels testimony via a grant of immunity it is constitutionally required to place the victim in a position similar to the one he would have occupied had he exercised his Fifth Amendment privilege. The scope of immunity, in other words, must be "coextensive with the scope of the privilege." *Kastigar* v. *United States*, 406 U. S. 441, 449 (1972). This does not, however, bar a prosecution for perjury committed in the course of immunized testimony, even though such a prosecution will obviously place the witness in a worse position than he would have been in had he invoked the privilege. The perjury exception seems to have two sources. First, it stems from the aforementioned fact that prior to the immunity grant the witness had no Fifth Amendment right to answer falsely, and, second, it flows from the simple reality that affording the witness a right to lie with impunity would render the entire immunity transaction futile.

Because I think it follows from the logic and exigencies of the perjury exception that the government should be permitted to introduce other portions of the immunized testimony to prove elements of the offense of perjury, I concur in the

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 29, 1980

Re: No. 78-972, United States v. Apfelbaum

Dear Bill,

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 7, 1980

Re: 78-972 - United States v. Apfelbaum

Dear Bill,

Please join me, but I may write separately in concurrence.

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1980

Re: No. 78-972 - United States v. Apfelbaum

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 13, 1980

Re: No. 78-972 - United States v. Apfelbaum

Dear Bill:

I am having some difficulty with your opinion as my comments at conference would indicate. I am trying my hand at a short opinion merely concurring in the judgment. I expect to have it around in xerox form tomorrow.

Sincerely,

Harry

Mr. Justice Rehnquist
cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 13, 1980

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Sincerely,

Harry

Mr. Justice Rehnquist
cc: The Conference

P.S. [to Justice Rehnquist only]

Since I am not joining your opinion, I have no business in saying so, but I am a little curious as to why you do not use the official citations for New Jersey v. Portash (440 U.S. 450) and for the Third Circuit's opinion below (584 F.2d 1264). The Portash citation was out as long ago as last October.

H.

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

From: Mr. Justice Blackmun

Circulated: FEB 14 1980

Recirculated: _____

No. 78-972 - United States v. Apfelbaum

MR. JUSTICE BLACKMUN, concurring in the judgment.

I do not join the Court's opinion. I agree, however, that the Court of Appeals too narrowly confined the use of immunized testimony in the prosecution of respondent for giving false testimony. I do not fully subscribe to the Court's holding that "neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements." Ante, at 1. And I do not fully agree with the Court's conclusion that the practical effect of asserting the privilege against self-incrimination is an unimportant factor in determining whether a grant of immunity is

To: The Chief Justice
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Mr. Justice Stewart
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Recirculated: FEB 15 1980

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–972

United States, Petitioner, v. Stanley Apfelbaum. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE BLACKMUN, concurring in the judgment.

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The Court's statement of its holding troubles me primarily for two reasons. First, it apparently makes no distinction between a prosecution for false testimony given under a grant of immunity and a prosecution for false testimony in other contexts. This case concerns the use of immunized testimony to prove that respondent made contemporaneous false statements. There is no occasion to determine whether the immunized testimony could have been used to prove perjury or false statements occurring at some other time. The Court thus states its holding in language that is broader than necessary. At the moment, I am not prepared to go so far.

Second, I am not sure I agree that the use of immunized testimony in perjury prosecutions requires no special analysis

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1980

78-972 United States v. Apfelbaum

Dear Bill:

Please join me.

Sincerely,

L. Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 29 JAN 1980

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-972

United States, Petitioner, *v.* Stanley Apfelbaum.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Apfelbaum invoked his privilege against compulsory self-incrimination while being questioned before a grand jury in the Eastern District of Pennsylvania. The government then granted him immunity in accordance with 18 U. S. C. § 6002, and he answered the questions propounded to him. He was then charged with and convicted of making false statements in the course of those answers.[1] The Court of Appeals reversed the conviction, however, because the District Court had admitted into evidence relevant portions of respondent's grand jury testimony that had not been alleged in the indictment to constitute the *"corpus delicti"* or "core" of the false statement's offense. Because proper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely, we hold that neither the statute nor the Fifth Amendment requires that the admissibility of immunized testimony be governed by any different rules than other testimony at a trial for making false statements in violation of 18 U. S. C. § 1623 (a). We therefore reverse the judgment of the Court of Appeals.

[1] Title 18 U. S. C. § 1623 (a) provides in pertinent part:

"Whoever under oath in any proceeding before . . . [a] grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

4, 8, 11, 15

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 1 [redacted] 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-972

United States, Petitioner, v. Stanley Apfelbaum. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 8, 1980

Re: No. 78-972 - United States v. Apfelbaum

Dear Bill:

After receiving your letter of February 7th, I reviewed my Conference notes on this case and found that while the votes for reversal were unanimous, the views expressed were not entirely in accord with one another. As is customary in a situation like that, I simply tried to write an opinion which supported the Conference vote, and was internally consistent and logical. My Conference notes do not indicate that there was a majority for the position you set forth in your letter, though I do show you as adhering to that position. Since my present circulating draft has been joined by four other members of the Court, I am not inclined to retreat to the position which you describe in your letter of February 7th as "the Conference position", but which my notes show to be simply one of several views espoused in support of a unanimous vote for reversal.

Sincerely,

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 11, 1980

MEMORANDUM TO THE CONFERENCE

Re: Cases held for No. 78-972 United States v. Apfelbaum

No. 78-1849, Attorney General, State of New York v. Shargel, etc.

In this case petitioner seeks review of CA 2's ruling that it was improper to admit virtually all of respondent Aloi's immunized grand jury testimony in an action against Aloi for perjury before the grand jury. The grand jury was investigating the death of Joseph Gallo. After the grand jury heard evidence that a certain apartment had been used by Aloi and others as a meeting place to plan the Gallo murder and the concealment of that crime, Aloi testified that he had never been to the apartment in question. Aloi was subsequently indicted for perjury for making that statement. Aloi also had answered many questions relating to the nature of his employment and to his acquaintances that were aimed at charactering him as an organized crime figure.

Under New York law, a grand jury witness automatically receives immunity from prosecution for "any transaction, matte or thing concerning which he gave evidence." N. Y. Crim. Proc Law § § 50.10(1), 190.40. This immunity does not extend to a prosecution for perjury or contempt involving testimony given in the same legal proceeding. Id. at § 50.10(1). At trial, over defense objections, the prosecution was allowed to introduce most of Aloi's testimony before the grand jury. The testimony was admitted so the jury could determine whether perjury had been committed in the total context of Aloi's appearance before the grand jury. The jury returned a verdict of guilty. Aloi's conviction was affirmed by the Appellate Division, and leave to appeal to the Court of Appeals was denied.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 5, 1980

Re: 78-972 - United States v. Apfelbaum

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Rehnquist

Copies to the Conference