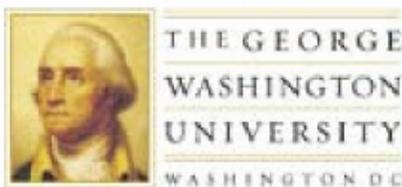


The Burger Court Opinion Writing Database

Arizona v. Manypenny

451 U.S. 232 (1981)

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

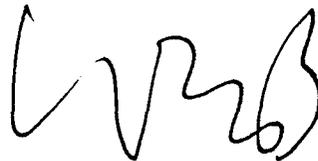
April 1, 1981

RE: 79-621 - Arizona v. Manypenny

Dear Harry:

I join.

Regards,



Justice Blackmun

Copies to the Conference

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OFFICE OF THE CLERK OF THE SUPREME COURT OF THE UNITED STATES

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 4, 1981

MEMORANDUM TO THE CONFERENCE

RE: No. 79-621 Arizona v. Manypenny

I shall await the dissent in the above.



W.J.B. Jr.

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U.S. SUPREME COURT ADVISORY COMMISSION

TO: THE CHIEF JUSTICE
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Arizona v. Manypenny, No. 79-621

From: Mr. Justice Brennan

JUSTICE BRENNAN, dissenting:

Circulated: MAR 30 1981

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United States v. Sanges, 144 U.S. 310 (1892), announced the general rule that governments may not appeal in criminal cases in the federal courts in the absence of express statutory authority. Finding, inter alia, that the predecessor to 28 U.S.C. §1291 was not sufficiently express,¹ Sanges refused to allow an appeal by the federal government. Today, however, the Court intertwines §1291 with an Arizona statute authorizing appeals by the State in criminal cases in the Arizona courts to make §1291 "sufficiently express" to authorize a State to appeal from a federal district court's judgment of acquittal. Because this result flouts Congress' authority to regulate the jurisdiction of the lower federal courts, I respectfully dissent.

I

The Court proposes the novel interpretation of Sanges and

¹ This statute, the Judiciary Act of 1891, provided that "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court...in any case that involves the construction or application of the Constitution of the United States," Act of March 3, 1891, c.517, §5, and to the Circuit Courts of Appeal from final decisions of the District Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided for by law," Id. §6.

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1, 4, 5, 7

10 copies prepared.
PAGES:

WJS
M. J. Brennan

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

From: Mr. Justice Brennan

1st PRINTED DRAFT

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SUPREME COURT OF THE UNITED STATES

dated: APR 6

No. 79-621

State of Arizona, Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
William Dale Manypenny. } peals for the Ninth Circuit.

[April —, 1981]

JUSTICE BRENNAN, dissenting.

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

2nd DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: APR 15 1981

No. 79-621

State of Arizona, Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
William Dale Manypenny. } peals for the Ninth Circuit.

[April —, 1981]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
dissenting.

United States v. Sanges, 144 U. S. 310 (1892), announced the general rule that governments may not appeal in criminal cases in the federal courts in the absence of express statutory authority. Finding, *inter alia*, that the predecessor to 28 U. S. C. § 1291 was not sufficiently express,¹ *Sanges* refused to allow an appeal by the Federal Government. Today, however, the Court intertwines § 1291 with an Arizona statute authorizing writs of certiorari on behalf of the State in criminal cases in the Arizona courts to make § 1291 “sufficiently express” to authorize a State to appeal from a federal district court’s judgment of acquittal. Because this result flouts Congress’ authority to regulate the jurisdiction of the lower federal courts, I respectfully dissent.

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 3, 1981

Re: No. 79-621, Arizona v. Manypenny

Dear Harry,

I am glad to join your opinion for the
Court.

Sincerely yours,

J.S.
/

Justice Blackmun

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OF THE MANUSCRIPT DIVISION

U.S. DEPARTMENT OF COMMERCE

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 6, 1981

Re: 79-621 - Arizona v. Manypenny

Dear Harry,

Please join me.

Sincerely yours,



Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 14, 1981

Re: No. 79-621 - Arizona v. Manypenny

Dear Bill:

Please join me in your dissent.

Sincerely,

JM

T.M.

Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTION

MANUSCRIPT DIVISION

OFFICE OF THE CLERK OF THE SUPREME COURT

February 5, 1981

Re: No. 79-621, Arizona v. Manypenny

Dear Bill:

I was glad to hear from you about this case, for I value your reactions as to Arizona law.

The point you make is a good one. I therefore shall add the following at the end of the second sentence of the paragraph beginning on page 16: "or when a legislative enactment has been authoritatively construed by the sovereign's highest court." I shall also strike the word "express" that now appears in what is the present last line of the text on page 16.

Sincerely,

HAB

Mr. Justice Rehnquist

pp. 16, 17

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

From: Mr. Justice Blackmun

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-621

State of Arizona, Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
William Dale Manypenny, } peals for the Ninth Circuit.

[February —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

Respondent, a federal officer, was charged in Arizona with the commission of a state crime. On the officer's motion, the case was removed from state court and tried in federal court. The issue presented is whether a federal appellate court has jurisdiction to entertain Arizona's appeal from the District Court's judgment of acquittal entered after a jury verdict of guilty.

I

A

Respondent William Dale Manypenny had been employed for six years as a Border Patrol Agent in the United States Immigration and Naturalization Service (INS). On the moonlit evening of March 15, 1976, he and fellow agent Gerald Wayne Hjelle were assigned to patrol the Sweetwater Pass, located on federal land in Pima County, Ariz., approximately 10 miles from the Mexican border.¹ INS officials knew that the Pass was frequently traveled by aliens illegally entering the United States. While patrolling the Pass, re-

¹ Sweetwater Pass is located about 29 miles southeast of Ajo, Ariz. The Pass is bounded on the west by the Organ Pipe Cactus National Monument, and on the east by the Papago Indian Reservation. It is undisputed that the events in question occurred on land owned by the Federal Government.

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pp. 7-8, 15-18

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

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-621

State of Arizona, Petitioner, } On Writ of Certiorari to the
v. } United States Court of Ap-
William Dale Manypenny. } peals for the Ninth Circuit.

[February —, 1981]

JUSTICE BLACKMUN delivered the opinion of the Court.

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¹ Sweetwater Pass is located about 29 miles southeast of Ajo, Ariz. The Pass is bounded on the west by the Organ Pipe Cactus National Monument, and on the east by the Papago Indian Reservation. It is undisputed that the events in question occurred on land owned by the Federal Government.

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U.S. DEPARTMENT OF JUSTICE

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 6, 1981

79-621 Arizona v. Manypenny

Dear Harry:

Please join me.

Sincerely,

A handwritten signature in cursive script that reads "Lewis".

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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THE MANUSCRIPT DIVISION

U.S. SUPREME COURT

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 4, 1981

Re: No. 79-621 Arizona v. Manypenny

Dear Harry:

I will probably join your opinion whether the following suggestion makes any sense to you or not. In the paragraph beginning on page 16, in the first sentence you speak of the "affirmatively sanctioning" by the sovereign that sponsors the prosecution of an appeal in "express" terms. When I left Arizona, and that is sufficiently long ago to have permitted intervening changes in legislation which have not come to my attention, no "appeal" as such was allowed in criminal cases; all appellate review was obtained by writ of certiorari under the line of authorities which you have set out on page 7 of your second draft. It seems to me that there is some inconsistency between the line of cases which you cite on page 7, and the statement made in the paragraph on page 16 that the "legislature responsible for that power has spoken in express terms". I would think that a construction of the extraordinary writs statutes available in most states to allow this type of review would be equally acceptable, and therefore the sentence contained in your page 16, "Instead, the provision permits a State to appeal if it is authorized to do so by state law" is a completely accurate description of the Arizona procedure, although it has been arrived at by judicial construction, rather than the "express terms" which you refer to in the preceding sentence on page 16.

It is not that I disagree with the result; it is just my recollection that Arizona has never had the Sanges problem because its courts have construed general provisions allowing for the writ of certiorari to include the sort of authority to review what you quite accurately described as the "presumed motion for acquittal" on page 4 of your second draft.

I am in complete accord with the result in this case, and thought at the time of argument and discussion that it presented one of the more tricky issues in our cases this year. I guess my principal concern is that the sentence to which I have previously adverted on page 16 would require an express authorization in haec verba by the legislature of a state's right to appeal in a situation such as this; that concern would be completely alleviated if you were to add after the words "express terms" in the sentence on page 16 something to the effect "or a legislative enactment has been similarly construed by the highest court of the state".

This may well be nit-picking, but I think something to this effect will prevent us from having the language thrown back at us to mean that only if the state legislature had enacted the equivalent of 18 U.S.C. § 3731, which Arizona has not done and which I sense neither you nor I would require it to do in order to appeal under 28 U.S.C. § 1291.

Sincerely,



Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

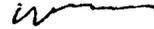
February 9, 1981

Re: No. 79-621 Arizona v. Manypenny

Dear Harry:

Please join me.

Sincerely,



Justice Blackmun

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Mr. Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: APR 1 '81

1st DRAFT

Supreme Court of the United States

No. 79-621

State of Arizona, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Appeals
William Dale Manypenny. | for the Ninth Circuit.

[April —, 1981]

JUSTICE STEVENS, concurring.

There is a distinction between a court's power to accept an appeal and an executive's power to prosecute an appeal. The question whether the United States Court of Appeals in this case had jurisdiction to entertain the appeal is a federal question. I agree with the Court's conclusion that such jurisdiction is conferred by 28 U. S. C. § 1291.*

The question whether the prosecutor had authority to prosecute an appeal is, I believe, a question controlled by the law of the sovereign that the prosecutor represents. I therefore agree with the Court's conclusion that the holding in *United States v. Sanges*, 144 U. S. 310, to the effect that a federal prosecutor had no such authority in 1892, is not controlling in this case. The controlling authority is conferred by Arizona, which does empower its prosecutors to appeal in the situation presented here.

Although this simple analysis persuades me to join the Court's opinion, I write separately to emphasize that it lends no support to an argument that 18 U. S. C. § 3731 or any other federal statute would authorize an appeal by a state prosecutor.

*28 U. S. C. § 1291 provides in part:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

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