

The Burger Court Opinion Writing Database

United States v. Young

470 U.S. 1 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **NOV 16 1984**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[November —, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

We granted certiorari to review the reversal of respondent's conviction because of prosecutorial comments responding to defense counsel's closing argument impugning the prosecution's integrity and belief in the Government's case.

I

Respondent Billy G. Young, as vice president and general manager of the Compton Petroleum Corporation in Abilene, Texas, contracted in 1976 and 1977 to deliver monthly supplies of "sweet" crude oil to the Apco Oil Corporation refinery in Cyril, Oklahoma. Some 205,000 barrels of oil were delivered under the contract between January and September 1977, but more than half of the oil delivered to Apco, approximately 117,250 barrels, consisted of fuel oil, an already refined product less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all of the oil was crude. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, 10 CFR §§211.66, 211.67 and 212.131 (1976), the amount of crude oil it thought it was refining each month. The Federal Energy Administration in turn relied on Apco's reports to determine the national averages of tier categories of refined oil for purposes of

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

CHAMBERS OF
THE CHIEF JUSTICE

November 27, 1984

Re: No. 83-469 - United States v. Billy G. Young

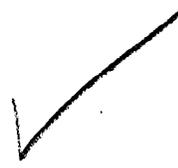
MEMORANDUM TO THE CONFERENCE:

In due course I will respond to the recent memos
of Bill and Lewis.

Regards,



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



CHAMBERS OF
THE CHIEF JUSTICE

December 11, 1984

PERSONAL

Re: 83-469 - United States v. Young

Dear Lewis:

Thank you for your memo, which I have now "absorbed" into the second draft. I believe it will meet your points.

Regards,

A handwritten signature in cursive script, appearing to be 'WRB', is written below the word 'Regards'.

Justice Powell

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: **DEC 13 1984**

CHANGES: 7-18

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[December —, 1984]

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STYLISTIC CHANGES THROUGHOUT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JAN 24 1985

CHANGES: 4-8, 10-13, 19

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[January —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the
Court.

We granted certiorari to review the reversal of respondent's conviction because of prosecutorial comments responding to defense counsel's closing argument impugning the prosecution's integrity and belief in the Government's case.

I

Respondent Billy G. Young, as vice president and general manager of the Compton Petroleum Corporation in Abilene, Texas, contracted in 1976 and 1977 to deliver monthly supplies of "sweet" crude oil to the Apco Oil Corporation refinery in Cyril, Oklahoma. Some 205,000 barrels of oil were delivered under the contract between January and September 1977, but more than half of the oil delivered to Apco, approximately 117,250 barrels, consisted of fuel oil, an already refined product less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all of the oil was crude. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, 10 CFR §§211.66, 211.67 and 212.131 (1976), the amount of crude oil it thought it was refining each month. The Federal Energy Administration in turn relied on Apco's reports to determine the national averages of tier categories of refined oil for purposes

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Young RG

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

February 22, 1985

CHAMBERS OF
THE CHIEF JUSTICE

Re: No. 83-613 - United States v. Robinson

MEMORANDUM TO THE CONFERENCE:

This case was held for United States v. Young (No. 83-469), which was decided February 20, 1985. The petition will be discussed at the March 1 Conference.

Respondent, Thomas Robinson, Jr., was charged with two counts of mail fraud, 18 U.S.C. §§1341 and 2, in connection with an arson scheme and insurance fraud. He was tried before a jury sitting in the District Court for the Middle District of Tennessee.

The evidence for the defense consisted of the testimony of two of respondent's children and a neighbor concerning the events surrounding the fires and the various items left in Tennessee or taken to California. In addition, one of respondent's business associates testified that respondent had been current in his business dealings and that respondent said he intended to return to Clarksville two weeks after going to California. Respondent chose not to take the stand.

In closing argument, the prosecutor summarized the compelling evidence against respondent. Defense counsel began his closing argument by contending that the Government had breached its duty to be fair to the accused and to "play[] straight" with the jury. Defense counsel returned to this theme, arguing that the Government had unfairly "filtered" the evidence and used one witness to "imply something sinister" about respondent's conduct. Finally, defense counsel repeatedly charged that the Government had unfairly denied respondent an opportunity to "explain" his actions. Near the conclusion of his argument, defense counsel stated:

"Now, would you like to get indicted for that, without the Government being fair, and being able to explain, have him explain before you, members of your own community rather than before the agents?"

After the defense summation the jury was excused from the courtroom. The prosecutor then objected to defense counsel's contention that the Government had not given respondent a chance to "explain"; the prosecutor requested leave to rebut that contention. The District Court granted the prosecutor's motion;

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

November 21, 1984

No. 83-469

United States v. Young

Dear Chief:

I voted at Conference to reverse and remand this case. Although I still believe that a reversal is necessary, I am unable to join in your proposed opinion for the following two reasons:

I

You carefully and convincingly review the applicable rhetorical standards, and you emphasize that "two improper arguments ... do not make for a right result." You also emphasize, properly, that a United States Attorney does not have the "right" to respond to improper defense arguments. In the last pages of your opinion, however, you then assert inter alia that (1) the prosecutor's remarks were "relatively restrained," (2) the rules against improper prosecutorial invective were not "seriously implicated" by the remarks at issue, and (3) the prosecutor was somehow understandably "goaded" by defense counsel's "inflammatory attack."

I am unable to join in an opinion that minimizes the gravity of the prosecutor's misconduct. While the proposed opinion properly emphasizes that both sides are subject to ethical rules of rhetorical conduct, it fails completely to acknowledge that we have long emphasized that a representative of the United States Government is held to a higher standard of behavior:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. ... Consequently, improper suggestions,

5/23/00

COPYIST NOTE - THE FOLLOWING FOUR PAGES WERE FILED OUT OF ORDER IN THE FILE - THIS PAGE WAS LOOSE - FOLLOWING FOUR STAPLED TOGETHER

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insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1935).

See also 1 ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §3-5.8 (2nd ed. 1980).

Moreover, although the opinion suggests that "[w]e see much to agree with" in the Tenth Circuit's rule, it then goes on to ignore the most obvious impropriety of the prosecutor's argument: The Tenth Circuit has for years instructed prosecutors in no uncertain terms that they may not under any circumstances respond to defense attacks, but must instead object to the trial judge. The prosecutor's remarks flew squarely in the face of this rule. Surely the lower courts have the power to define reasonable rules of courtroom conduct. We should not be in the business of apologizing for any Government attorney who flaunts such clear rules. In the absence of a Circuit rule, some of the prosecutor's comments might be excused as not "serious" under the circumstances. Given the Circuit rule, I believe the prosecutor's comments were very "serious" indeed.

In addition, I cannot join in an opinion that characterizes as "relatively restrained" conduct which clearly violated the Disciplinary Rules of our profession.

Finally, even if I were able to overlook the special rules governing federal prosecutors, the clear and reasonable Tenth Circuit rule, and the Disciplinary Rules, I could not agree that the prosecutor's invective here was a "relatively restrained" response to the clearly improper defense arguments. The prosecutor repeatedly emphasized what "I think" about Young's intent, given "my experience" in matters of that sort. The proposed opinion overlooks that "[i]mplicit in [a prosecutor's] assertion of personal belief that a defendant is guilty, is an implied statement that the prosecutor, by virtue of his experience, knowledge and intellect, has concluded that the jury must convict. The devastating impact of such 'testimony' should be apparent." United States v. Bess, 593 F.2d 749, 755 (CA6 1979). Moreover, the prosecutor inexcusably admonished the jurors that, if they acquitted, "I don't think you're doing your job as jurors." Historically, the vast majority of state and federal courts have characterized warnings about "not doing your job" as among the most egregious forms of prosecutorial misconduct. I am frankly at a loss at how the proposed opinion can characterize these remarks as "simply" a statement by the prosecutor that "he did not file criminal charges irresponsibly." And the opinion wholly omits to mention that, when Young suggested that Apco had not been injured by the deliveries, the prosecutor chimed in that, based on "my experience," the DOE would soon be seeking a refund from Apco.

In sum, this Court gives plenary consideration to cases involving standards of rhetorical conduct very infrequently. When we do, our decisions invariably send a powerful message to the lower courts about the standards we expect prosecutors to abide by, and these messages have a profound influence far beyond the outcome of the particular cases before us. I am extremely uncomfortable with the tone of the message that the proposed opinion would send. Indeed, given the narrow holding that is necessary to dispose of this case--that the Tenth Circuit did not conduct a proper plain-error analysis--I do not understand the point of the extended discussion of rhetorical standards and the ultimate apology for the prosecutor's gross refusal to obey the Tenth Circuit rules.

II

Because Young's counsel did not object to the prosecutor's argument, the Tenth Circuit was required to determine whether the argument constituted plain error under Fed. R. Crim. P. 52(b). As uniformly interpreted by the courts, Rule 52(b) requires that the error be viewed against the context of the entire trial to determine whether it had a prejudicial impact on the verdict. The Tenth Circuit did not conduct such a review; it reversed simply on finding that an error had been committed. I would therefore reverse the judgment and remand to the Tenth Circuit for a proper plain-error inquiry.

The proposed opinion, however, reaches out and decides the issue itself. This is inappropriate for at least two reasons. First, although courts uniformly have emphasized that plain-error inquiry requires a careful review of the entire record, I see no evidence of such record review here. The opinion omits to mention that mail fraud and making false statements are specific-intent crimes, and that good faith therefore stands as a complete defense. The question of Young's specific intent to defraud necessarily turned on witness credibility, and in this context the prosecutor's misconduct may well have had a prejudicial impact on the jurors' deliberations. Was the evidence of Young's specific intent to defraud overwhelming? The opinion does not tell us and, while I have not reviewed the trial record, my impression was that the testimony on this issue was sharply divided. Perhaps the evidence on this question of credibility was so one-sided that the closing argument could not have had a prejudicial impact, but the opinion has not endeavored to demonstrate that this is so.

Second, I continue strongly to believe that this Court is not institutionally capable of conducting the sort of detailed record analyses required in properly applying the harmless- and plain-error rules. When we detect legal error in a lower court's application of those rules, as we have done here, we should set forth the appropriate analysis and then remand for further proceedings. We have followed this procedure in countless cases and I cannot understand why should abandon it now. I cannot

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improve on John Stevens's discussion in United States v. Hasting,
461 U.S. 499, 516-517 (1983):

"This Court is far too busy to be spending countless hours reviewing trial transcripts in an effort to determine the likelihood that an error may have affected a jury's deliberations. ... As a practical matter, it is impossible for any Member of this Court to make the kind of conscientious and detailed examination of the record that should precede a determination that there can be no reasonable doubt that the jury's deliberations as to [the defendant] were not affected by the alleged error. And it is an insult to the Court of Appeals to imply, as the Court does today, that it cannot be trusted with a task that would normally be conducted on remand."

If the proposed opinion remains in substantially the same form as it is now, I therefore intend to write a separate opinion concurring in part and dissenting in part.

Sincerely,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 3, 1984

No. 83-469

United States v. Young

Dear Lewis,

Enclosed is a typed copy of my effort. I have sent it to the printer with a view of circulation tomorrow. If you have any comments, I would appreciate them before then.

Sincerely,



Justice Powell

Enclosure

WB 70 LR

12/3/84

United States v. Young

No. 83-469

JUSTICE BRENNAN, concurring in part and dissenting in part.

JUSTICE BRENNAN, concurring in part and dissenting in part. .

In his closing argument to the jury, the prosecutor from the Criminal Fraud Section of the United States Department of Justice in Washington, D.C. (1) repeatedly stated his personal opinion that the respondent Billy G. Young was guilty of fraud, (2) used his prosecutorial "experience in these matters" in discussing the consequences of Young's conduct, and (3) admonished the jurors that, if they voted to acquit, they would not be "doing your job as jurors." App. 8-11. The Government would justify the prosecutor's remarks as "invited" by the defense counsel's own improper arguments. In reversing Young's conviction, the Court of Appeals for the Tenth Circuit rejected this justification and emphasized, as it has repeatedly for over 10 years, that whatever the practice in other jurisdictions, "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." App. to Pet. for Cert. 11a. Thus in that Circuit, "'[w]e can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel.'" Ibid., quoting United States v. Ludwig, 508 F.2d 140, 143 (CA10 1974).

The Court of Appeals for the Tenth Circuit certainly has the

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[December —, 1984]

JUSTICE BRENNAN, concurring in part and dissenting in part.

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The Court of Appeals for the Tenth Circuit certainly has the authority to prescribe and enforce this rule whether or

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

RECEIVED
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JUSTICE MARSHALL

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

'84 JAN 16 P1:14

January 16, 1985

10/3
Handwritten scribbles and a diagonal line

No. 83-469

United States v. Young

Dear Thurgood,

The attached second draft makes substantial changes from the circulation you joined. I thought I should circulate it without your name and await word from you whether I should add it.

Sincerely,

Justice Marshall

Attachment

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1-15

From: Justice Brennan

Circulated: _____

Recirculated: JAN 16 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[January —, 1985]

JUSTICE BRENNAN, concurring in part and dissenting in part.

In his rebuttal argument to the jury, the prosecutor from the Criminal Fraud Section of the United States Department of Justice in Washington, D. C. (1) repeatedly stated his personal opinion that the respondent Billy G. Young was guilty of fraud, (2) used his prosecutorial "experience in these matters" in discussing the consequences of Young's conduct, and (3) admonished the jurors that, if they voted to acquit, they would not be "doing your job as jurors." App. 8-11. The Government would justify the prosecutor's remarks as "invited" by the defense counsel's own improper arguments. In reversing Young's conviction, the Court of Appeals for the Tenth Circuit rejected this justification and emphasized that "[w]e can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel." App. to Pet. for Cert. 11a, quoting *United States v. Ludwig*, 508 F. 2d 140, 143 (CA10 1974). Accordingly, the Court of Appeals held that "improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." *Ibid.*

This surely is a sensible conclusion and falls well within the authority of the courts of appeals to define reasonable rules of courtroom conduct. Because Young's counsel did not object to the prosecutor's misconduct, however, a reversal was

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES 1, 6, 8

From: Justice Brennan

Circulated: _____

Recirculated: JAN 21 1985

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[January —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins,
concurring in part and dissenting in part.

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This surely is a sensible conclusion and falls well within the authority of the courts of appeals to define reasonable rules of courtroom conduct. Because Young's counsel did not object to the prosecutor's misconduct, however, a reversal was

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

STATISTIC CHANGES THROUGHOUT
1, 5-7, 9

From: Justice Brennan

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[January —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and
JUSTICE BLACKMUN join, concurring in part and dissenting in
part.

In his rebuttal argument to the jury, the prosecutor from the Criminal Fraud Section of the United States Department of Justice in Washington, D. C., (1) repeatedly stated his personal opinion that the respondent Billy G. Young was guilty of fraud, (2) used his prosecutorial "experience in these matters" in discussing the consequences of Young's conduct, and (3) admonished the jurors that, if they voted to acquit, they would not be "doing your job as jurors." App. 8-11. The Government would justify the prosecutor's remarks as "invited" by the defense counsel's own improper arguments. In reversing Young's conviction, the Court of Appeals for the Tenth Circuit rejected this justification and emphasized that "[w]e can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel." 736 F. 2d 565, 570 (1983), quoting *United States v. Ludwig*, 508 F. 2d 140, 143 (CA10 1974). Accordingly, the Court of Appeals held that "improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response." 736 F. 2d, at 570.

This surely is a sensible conclusion and falls well within the authority of the courts of appeals to define reasonable rules

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 17, 1984

Re: 83-469 - United States v. Young

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 5, 1984

Re: No. 83-469-U.S. v. Young

Dear Bill:

Please join me in your opinion concurring in part
and dissenting in part.

Sincerely,

JM

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 18, 1985

Re: No. 83-469-United States v. Young

Dear Bill:

I am still with you.

Sincerely,



T.M.

Justice Brennan

cc: The Conference

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

MEMBERS OF
JUSTICE HARRY A. BLACKMUN

December 10, 1984

Re: No. 83-469, United States v. Young

Dear Chief:

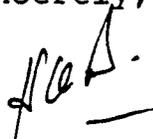
This note is merely to "report in" on this case and on the three opinions that have been circulated.

I find the case to be a close one. I am now persuaded that the prosecutor, by his argument, went beyond a "direct" and "relatively restrained" response to the defense counsel's argument, and that the prosecutor's comments constituted error. I am also persuaded that it makes sense to remand to the Court of Appeals for a review of the entire record.

Lewis has concluded that the prosecutor's argument constituted error and that the error was "plain," and he would remand for a determination whether the error was harmless. Bill Brennan has concluded that the prosecutor's argument constituted error because it violated the Tenth Circuit's supervisory rule. He would remand for a determination whether the error was plain; he does not explain whether, if the error is determined to be plain, the Court of Appeals also must determine whether it was harmless. Of these two approaches, I am presently inclined toward Lewis' and, at the moment, I could join his opinion.

You indicated in your note of November 27, however, that you will respond to Lewis and Bill Brennan. I therefore am on "hold" and shall await your response before I formally vote.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 22, 1985

Re: No. 83-469, United States v. Young

Dear Bill:

Please join me in your opinion concurring in part
and dissenting in part.

Sincerely,



Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 5, 1984

83-469 United States v. Young

Dear Chief:

My vote at Conference was to reverse.

I write to say that I was impressed by Sandra's point that prosecutors - and particularly U.S. Attorneys - should be held to a higher standard than lawyers who do not represent government. There is certainly a right to reply, but it seems to me the U.S. Attorney here abused the right. My vote to reverse is because of CA10's plain error view, and its failure to consider whether there was harmless error.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

11/25

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

NOV 26 1984

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[November —, 1984]

JUSTICE POWELL, concurring in part and dissenting in part.

The Court today adopts an appropriate test to determine whether improper statements by a prosecutor can be excused on the ground that they were "invited" by defense counsel. The test is stated as follows: "[I]f the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments [do] not warrant reversing a conviction unless they had an unfair impact on the jury." *Ante*, at 11. This strikes a fair balance between the interests of the defendant and the government. It preserves convictions where the prosecutor's statements did not endanger the integrity of trial. While I agree that this is the proper test to apply, I believe it requires a somewhat different result on the facts of this case. In my view, the prosecutor went well beyond "right[ing] the scale." I would find error and remand to allow the Court of Appeals to consider whether the error was harmless in the circumstances.

In his closing remarks, defense counsel made several statements criticizing the prosecution's handling of the case.¹

¹The defense remarks were as follows:

"I'm obligated as a lawyer to attack unfairness. And I submit to you that this case has been presented unfairly by the prosecution. . . . The attempt to make the case something that it isn't does no credit to the prosecution. . . ."

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December 10, 1984

83-469 United States v. Young

Dear Chief:

Thank you for giving me an opportunity to take a look at the revisions in your second draft of this case. I was not able to get to this until the weekend. I can join your second draft if you will tone down the following statement on page 16.

"Any notion that the prosecutor, whose every word and act is subject to review, should be held to a higher standard than defense counsel, whose successful misconduct is never reviewable, is a contradiction of 'equal justice'".

A somewhat similar statement is made on page 7.

A prosecutor does have a higher and broader responsibility than defense counsel, though not with respect to the precise issue of the right of counsel to express his personal views. I turn again to the Criminal Justice Standards that you and I both played major roles in developing. Volume I, Standard 3-1.1, summarizes the functions of the prosecutor. These include:

"The prosecutor is both an administrator of justice and an advocate. * * * The duty of the prosecutor is to seek justice, not merely to convict."

The first sentence in the commentary on Standard 3-1.1 includes the following:

"Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the right of the accused as well as to enforce the rights of the public. Thus, the

prosecutor has sometimes been described as a 'minister of justice' or as occupying a quasi-judicial position."

I recall a decision of this Court that emphasized substantially the foregoing view of a prosecutor's duty, but have not been able to locate it. In sum, my suggestion is that you describe the role of the prosecutor generally as the Standards do, and this role continues throughout the trial. But with respect to expressing a personal opinion as to the guilt or innocence, the duty of prosecutor and defense counsel is the same.

With changes along the foregoing lines I will be happy to join you and withdraw my concurring opinion.

Sincerely,

The Chief Justice

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 14, 1984

83-469 United States v. Young

Dear Chief:

Please join me.

I withdraw my opinion concurring in part and dis-
senting in part.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

12

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

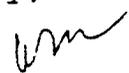
November 19, 1984

Re: No. 83-469 United States v. Young

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[January —, 1985]

JUSTICE STEVENS, dissenting.

In *Namet v. United States*, 373 U. S. 179 (1963), the Court recognized that even in the absence of an objection, trial error may require reversal of a criminal conviction on either of two theories: (1) that it reflected prosecutorial misconduct, or (2) that it was obviously prejudicial to the accused. *Id.*, at 186-187. In that case, after determining that the challenged error did not satisfy either standard, *id.*, at 188-189, the Court concluded that it saw "no reason to require such extravagant protection against errors which were not obviously prejudicial and which the petitioner himself appeared to disregard." *Id.*, at 190.¹ It therefore affirmed the judgment of the Court of Appeals in that case.

In this case the Court has unanimously concluded that the prosecutor's response to defense counsel's closing argument constituted error.² It has thus decided against the Government the principal question that its petition for a writ of cer-

¹The Court appended the following footnote:

"Finding, as we do, that this case involves neither misconduct by the prosecution nor inferences of material importance, we need not pass upon the holding in *United States v. Maloney*, *supra*, that a failure to give proper curative instructions when such elements are present constitutes plain error." *Namet v. United States*, 373 U. S., at 190, n. 10. See also *Henderson v. Kibbe*, 431 U. S. 145, 154, n. 12 (1977).

²*Ante*, at 12, 13, 15, 16, 17, 18; *id.*, at 6-10 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[February —, 1985]

JUSTICE STEVENS, dissenting.

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See also *Henderson v. Kibbe*, 431 U. S. 145, 154, n. 12 (1977).

² *Ante*, at 12, 13, 15, 16, 17, 19; *id.*, at 7-10 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[February —, 1985]

JUSTICE STEVENS, dissenting.

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²*Ante*, at 12, 13, 15, 16, 17, 19; *id.*, at 7-10 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

7.2

From: Justice Stevens

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-469

UNITED STATES, PETITIONER *v.* BILLY G. YOUNG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

[February —, 1985]

JUSTICE STEVENS, dissenting.

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²*Ante*, at 12, 13, 15, 16, 17, 19; *id.*, at 7-10 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and dissenting in part).

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✓

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 16, 1984

No. 83-469 United States v. Young

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

NOV 20 1984

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