

# The Burger Court Opinion Writing Database

## *Luce v. United States*

469 U.S. 38 (1984)

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 14 1984

Recirculated: \_\_\_\_\_

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 83-912

EDWARD LUCE, PETITIONER *v.* UNITED STATES

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

[November —, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the  
Court.

We granted certiorari to resolve a conflict among the Cir-  
cuits as to whether the defendant, who did not testify at trial,  
is entitled to review of the District Court's ruling denying his  
motion to forbid the use of a prior conviction to impeach his  
credibility.

### I

Petitioner was indicted on charges of conspiracy, and pos-  
session of cocaine with intent to distribute, in violation of 21  
U. S. C. §§ 846 and 841(a)(1). During his trial in the United  
States District Court for the Western District of Tennessee,  
petitioner moved for a ruling to preclude the Government  
from using a 1974 state conviction to impeach him if he testi-  
fied. There was no commitment by petitioner that he would  
testify if the motion were granted, nor did he make a proffer  
to the court as to what his testimony would be. In opposing  
the motion, the Government represented that the conviction  
was for a serious crime—possession of a controlled substance.

The District Court ruled that the prior conviction fell  
within the category of permissible impeachment evidence  
under Federal Rule of Evidence 609(a).<sup>1</sup> The District Court

<sup>1</sup> Rule 609(a) provides:

“General Rule. For purpose of attacking the credibility of a witness,  
evidence that he has been convicted of a crime shall be admitted if elicited

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 29, 1984

Re: 83-912 - Luce v. United States

Dear Harry:

I have no problem with incorporating the essence of your thoughts in your memo of November 21, albeit in slightly different language, as to your paragraph 3.

Regards,



Justice Blackmun

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

CHAMBERS OF  
THE CHIEF JUSTICE

November 30, 1984

RE: 83-912 - Luce v. United States

Dear Bill:

Your memorandum of 11/21 expresses two concerns.

(1) You believe that the holding is unclear, and that it should be made clear that it extends only to the question before the Court -- i.e., whether in limine rulings concerning impeachment by a prior conviction are reviewable. I have now re-read the draft carefully and it strikes me that is exactly what the opinion, as it stands, holds. The first sentence of the final paragraph states:

"We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."

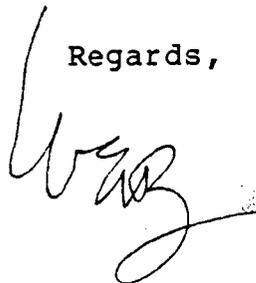
If you can suggest how this can be made more clear I will, of course, be glad to sharpen it.

(2) You believe we should hold now that our ruling should not apply retroactively. Whatever the merit to this position, the question of retroactivity need not be addressed. The question was not briefed, and I thought your view in Armco expressed Court "policy":

"...traditional practice has been not to address questions of possible retroactive application when we resolve the underlying merits of a dispute, but to leave those questions for future litigation."  
(Memorandum of September 14, 1984, in Armco, Inc. v. Hardesty, No. 83-297.)

Have I missed something?

Regards,



Justice Brennan

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

CHANGES AS MARKED: pp. 3, 4

From: **The Chief Justice**

Circulated: \_\_\_\_\_

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-912

EDWARD LUCE, PETITIONER *v.* UNITED STATES

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

[December —, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether the defendant, who did not testify at trial, is entitled to review of the District Court's ruling denying his motion to forbid the use of a prior conviction to impeach his credibility.

I

Petitioner was indicted on charges of conspiracy, and possession of cocaine with intent to distribute, in violation of 21 U. S. C. §§ 846 and 841(a)(1). During his trial in the United States District Court for the Western District of Tennessee, petitioner moved for a ruling to preclude the Government from using a 1974 state conviction to impeach him if he testified. There was no commitment by petitioner that he would testify if the motion were granted, nor did he make a proffer to the court as to what his testimony would be. In opposing the motion, the Government represented that the conviction was for a serious crime—possession of a controlled substance.

The District Court ruled that the prior conviction fell within the category of permissible impeachment evidence under Federal Rule of Evidence 609(a).<sup>1</sup> The District Court

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

CHAMBERS OF  
THE CHIEF JUSTICE

December 28, 1984

MEMORANDUM TO THE CONFERENCE:

RE: 83-1554 United States v. DiMatteo, et al.  
84-5333 Spicer v. United States

These cases were held for Luce v. United States (No. 83-912), which was decided December 10, 1984. The petitions will be discussed at the January 4 Conference.

No. 83-1554 UNITED STATES v. DIMATTEO, et al.

In early 1980 resp Kessler contacted a government informant about a possible drug smuggling scheme. The informant agreed to meet with Kessler on April 3, 1980, at the Fontainbleau Hotel in Miami Beach. Drug Enforcement Agency Special Agent Charles Martinez accompanied the informant to that meeting and posed as a pilot with experience in flying drugs into the United States. Kessler told Martinez that he and his partner, resp DiMatteo, needed a pilot to fly marijuana out of Haiti and Columbia. Martinez agreed to fly the drugs out of Haiti but not Columbia. The next day, April 4 1980, Martinez met with DiMatteo and Kessler in DiMatteo's hotel room at the Cricket Club, a private facility in Miami Beach. DiMatteo's sponsor at the club, Bobby Caldevilla, was present at that meeting. The co-conspirators discussed details of the planned marijuana importation, including the procedures to be followed and Martinez' payment.

On April 9, Martinez met resp Suggs who was in charge of the off-loading operation. The two men traveled to central Florida to find a landing site. After several more meetings with other co-conspirators, Martinez flew to Haiti, loaded the marijuana onto a DC-6, and returned to the landing site in Florida selected by Suggs. Law enforcement agents, who were waiting at the landing site, seized the marijuana and subsequently arrested Kessler, DiMatteo and Suggs on conspiracy and possession charges.

During the Government's direct case, DiMatteo announced his intention to call Caldevilla as a defense witness. The District Court allowed the defense to present a dry run of Caldevilla's testimony out of the presence of the jury. Caldevilla testified

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

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

November 21, 1984

No. 83-912

Luce v. United States

Dear Chief,

I am in accord with the result in your proposed opinion in the above case, and with much of the reasoning. I have two concerns, however. First, it is unclear to me exactly what the scope of our holding is. In cases where the defendant does not take the stand, the opinion could be read as holding that all in limine rulings are unreviewable, that all nonconstitutional in limine rulings are unreviewable, that all in limine rulings not involving the Fifth Amendment are unreviewable, or that all FRE 609(a) rulings are unreviewable. I think we should make clear that our holding extends only to the question before us--ie., whether FRE 609(a) in limine rulings are appealable--and to cases in which the same operative principle is at work. In other words, if the admissibility ruling hinges, as a FRE 609(a) ruling does, on questions that can only be adequately answered by evaluating a defendant's actual testimony in light of all other evidence introduced at trial, then the defendant should be required to take the stand as a prerequisite to challenging a decision to admit certain evidence. I do not think we should preclude at this juncture the possibility that other types of in limine rulings would be reviewable on appeal even if the defendant did not take the stand at trial. Second, I think we should hold that this ruling is prospective only in the sense that it applies only to trials held after this decision comes down. As you note in footnote 3, most circuits currently permit appellate challenges to in limine rulings when the defendant does not take the stand at trial. Defendants who have already gone to trial in cases in those circuits may, after adverse in limine rulings, have decided not to take the stand in reliance on their right to appeal the adverse ruling. Such defendants would be

prejudiced by retroactive application of our holding in the present case. If you can accommodate these concerns, I am confident I will be able to join your opinion.

Sincerely,

*Bill*

The Chief Justice

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

From: **Justice Brennan**

Circulated: DEC 6 1984

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-912

EDWARD LUCE, PETITIONER *v.* UNITED STATES

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

[December —, 1984]

JUSTICE BRENNAN, concurring.

I join the opinion of the Court because I understand it to hold only that a defendant who does not testify at trial may not challenge on appeal an *in limine* ruling respecting admission of a prior conviction for purposes of impeachment under Rule 609(a) of the Federal Rules of Evidence. The Court correctly identifies two reasons for precluding appellate review unless the defendant testifies at trial. The careful weighing of probative value and prejudicial effect that FRE 609(a) requires of a district court can only be evaluated adequately on appeal in the specific factual context of a trial as it has unfolded. And if the defendant declines to testify, the reviewing court is handicapped in making the required harmless error determination should the district court's *in limine* ruling prove to have been incorrect.

I do not understand the Court to be deciding broader questions of appealability *vel non* of *in limine* rulings that do not involve FRE 609(a). In particular, I do not read the Court's quotation of JUSTICE POWELL's concurring opinion in *New Jersey v. Portash*, 440 U. S. 450, 462 (1979), see *ante*, at 5, as intimating a determination with respect to a federal court's *in limine* ruling concerning the constitutionality of admitting immunized testimony for impeachment purposes. In that case, and others in which the determinative question turns on legal and not factual considerations, a requirement that the defendant actually testify at trial to preserve the admissi-



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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

November 15, 1984

83-912 - Luce v. United States

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Dear Chief,

I agree.

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 6, 1984

Re: No. 83-912-Luce v. United States

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

*Jm.*

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

November 21, 1984

Re: No. 83-912, Luce v. United States

Dear Chief:

I share some of Bill Brennan's concerns expressed in his letter of today. Would you also consider the following:

1. The elimination of the words "Like the District Court" in the second paragraph on page 3 of your opinion? The inclusion of that phrase seems to imply that even the District Courts should not be ruling in limine. That issue is not before the Court.

2. Should footnote 4 have some reference to Fed. R. Crim. Rule 12(e)? It seems to me that this rule has some bearing here and that we should not imply that the only support for the practice of ruling on in limine motions is the District Court's inherent authority to manage the course of trials.

3. In the third paragraph on page 4 is a sentence beginning with the word "Requiring." I think that sentence indicates a misunderstanding of the petitioner's argument. I would feel happier if the sentence could read:

"Requiring that a defendant testify in order to preserve Rule 609(a) claims will enable the reviewing court to determine the effect the erroneous impeachment had in light of all the evidence, and will discourage making such motions solely to 'plant' reversible error in the event of conviction."

Sincerely,

HAB.

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

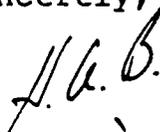
December 3, 1984

Re: No. 83-912, Luce v. United States

Dear Chief:

Please join me in your second draft circulated  
November 30.

Sincerely,

Handwritten signature of H.A.B. in cursive script.

The Chief Justice  
cc: The Conference



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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 15, 1984

83-912 Luce v. United States

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

ST. LOUIS, MO.



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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 15, 1984

Re: 83-912 Luce v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

November 19, 1984

Re: 83-912 - Luce v. United States

Dear Chief:

Kindly note at the end of your opinion that I  
took no part in the consideration or decision of this  
case.

Respectfully,



The Chief Justice

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CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

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

November 15, 1984

Re: 83-912 Edward Luce v. United States

Dear Chief,

Please join me.

Sincerely,

The Chief Justice

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