

# The Burger Court Opinion Writing Database

## *United States v. Lane*

474 U.S. 438 (1986)

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



Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 84-744 AND 84-963

84-744 UNITED STATES, PETITIONER  
v.  
JAMES C. LANE AND DENNIS R. LANE

84-963 JAMES C. LANE AND DENNIS R. LANE, PETITIONER  
v.  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[November —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is subject to the harmless-error rule,<sup>1</sup> and to determine whether there is sufficient evidence

<sup>1</sup>Six Circuits have adopted a *per se* approach holding that misjoinder is always reversible error. See *United States v. Turkette*, 632 F. 2d 896, 906 & n. 35 (CA1 1980), rev'd on other grounds, 452 U. S. 576 (1981); *United States v. Graci*, 504 F. 2d 411, 414 (CA3 1974); *United States v. Bova*, 493 F. 2d 33 (CA5 1974); *United States v. Bledsoe*, 674 F. 2d 647, 654, 657-658 (CA8), cert. denied, 459 U. S. 1040 (1982); *United States v. Eagleston*, 417 F. 2d 11, 14 (CA10 1969); *United States v. Ellis*, 709 F. 2d 688, 690 (CA11 1983).

Six have subjected misjoinder claims to harmless-error analysis. See *United States v. Ajlouny*, 629 F. 2d 830, 843 (CA2 1980), cert. denied, 449 U. S. 1111 (1981); *United States v. Seidel*, 620 F. 2d 1006 (CA4 1980); *United States v. Hatcher*, 680 F. 2d 438, 442 (CA6 1982); *United States v. Varelli*, 407 F. 2d 735, 747-748 (CA7 1969); *United States v. Martin*, 567 F. 2d 849, 854 (CA9 1977); *Baker v. United States*, 401 F. 2d 958, 972-974

11/21  
WANT

Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

**CHANGES AS MARKED:**

6, 7, 8-10, 11-13

From: **The Chief Justice**

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 84-744 AND 84-963

84-744 UNITED STATES, PETITIONER  
 v.  
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JAMES C. LANE AND DENNIS R. LANE, PETITIONER  
 84-963 v.  
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[December —, 1985]

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Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **The Chief Justice**

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Recirculated: **JAN 24 1986**

STYLISTIC CHANGES THROUGHOUT

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 84-744 AND 84-963

UNITED STATES, PETITIONER

84-744

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER

84-963

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE FIFTH CIRCUIT

[January —, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the  
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We granted certiorari to resolve a conflict among the Cir-  
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*Bova*, 493 F. 2d 33 (CA5 1974); *United States v. Bledsoe*, 674 F. 2d 647,  
 654, 657-658 (CA8), cert. denied *sub nom. Phillips v. United States*, 459  
 U. S. 1040 (1982); *United States v. Eagleston*, 417 F. 2d 11, 14 (CA10  
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*Varelli*, 407 F. 2d 735, 747-748 (CA7 1969); *United States v. Martin*, 567  
 F. 2d 849, 854 (CA9 1977); *Baker v. United States*, 131 U. S. App. D.C. 7,

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

February 18, 1986

CHAMBERS OF  
THE CHIEF JUSTICE

RE: (No. 84-1692 - Bibby v. United States  
(No. 84-1851 - Gillock v. United States  
No. 85-5790 - Velasquez v. United States

MEMORANDUM TO THE CONFERENCE:

These petitions were held for United States v. Lane, No. 84-744.

No. 84-1692; No. 84-1851:

Bibby was an officer of Honeywell Information Systems and Gillock was a state senator in Tennessee. They were indicted for three kickback schemes in which Bibby and Gillock participated to varying degrees. First, two Honeywell employees sought Gillock's aid in selling a computer to the State of Tennessee; he received compensation for his efforts with Bibby's knowledge. Second, Bibby and another defendant shared in the profits realized by a computer financing company that benefitted from Honeywell's business sent to them by the two; Gillock was not involved in this scheme. Finally, Gillock was paid to help influence the sale of computers to Shelby County; Gillock did not report this payment on his 1978 tax return.

Bibby and Gillock were indicted on one count of conspiracy, six counts of mail fraud and two counts of wire fraud. Gillock was also charged with seven counts of extortion under the Hobbs Act and four counts of tax fraud. One tax count related to the Shelby County payments, and the others were based on unrelated deductions claimed in the wrong tax year. They were tried jointly on all charges. At trial, out-of-court statements made by Honeywell employees who participated in the schemes were admitted as co-conspirator statements.

The jury convicted both defendants on all the conspiracy, mail and wire fraud counts. Gillock was also convicted on one Hobbs Act count and the one tax fraud count related to the Shelby County payment. The jury acquitted Gillock on the three unrelated tax fraud counts, and was unable to reach a verdict on the remaining Hobbs Act counts.

The CA6 initially remanded to determine whether there was sufficient evidence of conspiracy to admit the co-conspirator statements under Fed. Rule Evid. 801(d)(2)(E). The DC found there was sufficient independent evidence of conspiracy to admit. The CA6 then reversed one of the wire fraud counts for lack of evidence and reversed Gillock's conspiracy count. The remaining

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**

Nos. 84-744 AND 84-963

UNITED STATES, PETITIONER

84-744

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER

84-963

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1986]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial *per se*. I write separately, however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with JUSTICE STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

I

The Act of February 26, 1919 ("1919 Act"), 40 Stat. 1181, added § 269 to the Judicial Code. This provided:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

STYLIC CHANGES THROUGHOUT  
SEE PAGES 1

From: Justice Brennan

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Recirculated: JAN 22 1986 \_\_\_\_\_

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 84-744 AND 84-963

84-744 UNITED STATES, PETITIONER  
v.  
JAMES C. LANE AND DENNIS R. LANE

84-963 JAMES C. LANE AND DENNIS R. LANE, PETITIONER  
v.  
UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January —, 1986]

JUSTICE BRENNAN, joined by JUSTICE BLACKMUN, concurring in part and dissenting in part.

I agree that the evidence was sufficient to sustain the mail fraud convictions and therefore join Part III of the Court's opinion. I also agree that the Court of Appeals erred in holding that misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is prejudicial *per se*. I write separately, however, because my reasons for reaching this conclusion differ from the Court's, and because I agree with JUSTICE STEVENS that the harmless-error inquiry should be made in the first instance by the Court of Appeals.

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CHAMBERS OF  
JUSTICE BYRON R. WHITE

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

November 22, 1985

84-744 and 84-963 -  
United States v. Lane  
Lane v. United States

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 10, 1985

Re: Nos. 84-744 and 963-United States v. Lane and  
Lane, and Lane and Lane v. United States

Dear John:

Please join me in your dissent.

Sincerely,

*JM*  
T.M.

Justice Stevens

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

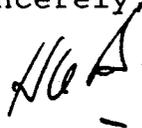
November 27, 1985

Re: No. 84-744) United States v. Lane  
No. 84-963, Lane v. United States

Dear Chief:

I have decided to wait to see what John has to say  
about these cases.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 16, 1985

Re: No. 84-744) United States v. Lane  
No. 84-963) Lane v. United States

Dear Chief:

At the end of your opinion, will you please add the following:

"JUSTICE BLACKMUN concurs in the result."

This means, of course, that my vote is to reverse in No. 84-744 and to affirm in No. 84-963.

Sincerely,



The Chief Justice

cc: The Conference

82 DEC 16 10:23

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 20, 1986

Re: No. 84-744) United States v. Lane  
No. 84-963) Lane v. United States

Dear Bill:

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

Sincerely,



Justice Brennan

cc: The Conference

82 JAN 21 10:43

U.S. SUPREME COURT  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

January 20, 1986

Re: No. 84-744) United States v. Lane  
No. 84-963) Lane v. United States

Dear Chief:

Bill Brennan's separate opinion persuades me, and I am joining it. You therefore should ignore my note to you of December 16. The effect of this is that I do join part III of your opinion.

Sincerely,



The Chief Justice

cc: The Conference

82 JAN 21 10:43

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*ly*

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

November 22, 1985

84-744 United States v. Lane  
84-963 Lane v. United States

Dear Chief:

Please join me.

Sincerely,

*Lewis*

The Chief Justice

lfp/ss

cc: The Conference

(4)

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

November 25, 1985

Re: No. 84-744) United States v. Lane  
84-963) Lane v. United States

Dear Chief,

Please join me.

Sincerely,

*WR*

The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

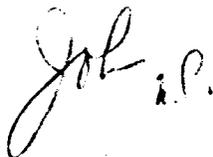
November 22, 1985

Re: 84-744 - United States v. Lane  
84-963 - Lane v. United States

Dear Chief:

In line with my vote at Conference, I shall be writing separately in this case.

Respectfully,

A handwritten signature in cursive script, appearing to read "John P. Stevens".

The Chief Justice

Copies to the Conference

Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice O'Connor

From: **Justice Stevens**

Circulated: DEC 16 1985

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

*Handwritten notes and scribbles on the left side of the page, including a large diagonal line and some illegible text.*

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

Nos. 84-744 AND 84-963

UNITED STATES, PETITIONER

84-744

v.

JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER

84-963

v.

UNITED STATES

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[December —, 1985]

JUSTICE STEVENS, dissenting in No. 84-744 and concurring in No. 84-963.

Rule 52(a) of the Federal Rules of Criminal Procedure provides:

“Harmless Error. Any error, defect, irregularity or variance which *does not affect substantial rights* shall be disregarded.” (Emphasis added).

The question presented in No. 84-744 is whether a misjoinder of defendants prohibited by Rule 8(b) is an error which affects substantial rights.<sup>1</sup> In my opinion, the Court has answered that question incorrectly; moreover, its opinion unfortunately confuses rather than clarifies the law of “harmless error.”

<sup>1</sup> Rule 8(b) provides, “Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”

*Handwritten mark resembling a large 'X' or a signature.*

STYLISTIC CHANGES THROUGHOUT.

SEE PAGES: 1, 11-12, 13

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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Recirculated: **DEC 30 1985**

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

Nos. 84-744 AND 84-963

UNITED STATES, PETITIONER

84-744

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JAMES C. LANE AND DENNIS R. LANE

JAMES C. LANE AND DENNIS R. LANE, PETITIONER

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UNITED STATES

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[January —, 1986]

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①

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

November 21, 1985

No. 84-744 United States v. Lane  
No. 84-963 Lane v. United States

Dear Chief,

Please join me.

Sincerely,

*Sandra*  
O'CONNOR

The Chief Justice

Copies to the Conference