The Burger Court Opinion Writing Database

Brown v. United States

411 U.S. 223 (1973)

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

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To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: MAR 8 1973

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6193

Joseph Everette Brown and Thomas Dean Smith, Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen merchandise in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his warehouse under a faulty warrant, and his case was separately tried.

The evidence against petitioners is largely uncontroverted. Petitioner Brown was the manager of a warehouse in Cincinnati, Ohio, owned by a wholesale clothing and household goods company. He was entrusted with the warehouse keys. Petitioner Smith was a truck driver for the company. During 1968 and 1969, the company had experienced losses attributed to pilferage amounting to approximately $60,000 each year. One West, a buyer and supervisor for the company, recovered a slip of paper he had seen drop from Brown's pocket.

pg 4

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 71-6193

Recirculated: MAR 13 1973

Joseph Everette Brown and Thomas Dean Smith, Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1973]

Memorandum from MR. CHIEF JUSTICE BURGER.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen merchandise in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his warehouse under a faulty warrant, and his case was separately tried.

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

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1973

Re: No. 71-6193 - Brown & Smith v. United States

Dear Bill:

I do not think this case should be dismissed as improvidently granted. My reasons probably would not appeal to some but essentially they relate to the need to restore vitality to the "harmless error" doctrine and this is a good vehicle.

As to the "knocks" on Bruton, I do not feel adamant. Experience has, in my view, cast some doubt on aspects of Bruton but I cannot agree that automatic severance is the solution. I believe that deletion of names -- something commonly done in written confessions -- is appropriate but the basic fallacy of seeking "perfect" solutions emerges from the impossible burdens that the "severance remedy" in this matter would produce. Severing both as to counts and parties would make four trials out of one.

Perhaps I should await other reactions on this case.

Regards,

WEB

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

March 20, 1973

Re: No. 71-6193 - Brown v. U. S.

MEMORANDUM TO THE CONFERENCE:

To eliminate the prospects of partial concurrences taking exception to the very candid dictum relating to Bruton I will drop the material beginning with the first full paragraph on page 9 through page 11.

This will save print costs, book shelf space and give a renewed vitality to our commitment to eschew dictum!

Regards,

WEB

P. S. -- I am also moved to this step in the hope I can get my second opinion out this Term.

B —

4, 5, 9

1 copy only received

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

3rd DRAFT

Circulated: _____

Recirculated: MAR 23 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6193

Joseph Everette Brown and Thomas Dean Smith, Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen merchandise in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his warehouse under a faulty warrant, and his case was separately tried.

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(2)

pg 6

Dissenting MC JMH

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: The Chief Justice

Circulated: _____

Recirculated: MAR 26 197

SUPREME COURT OF THE UNITED STATES

No. 71-6193

Joseph Everette Brown and Thomas Dean Smith, Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen merchandise in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his warehouse under a faulty warrant, and his case was separately tried.

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

CHAMBERS OF
THE CHIEF JUSTICE

March 27, 1973

Re: No. 71-6193 - Brown and Smith v. U. S.

Dear Potter:

I have your memo of March 26.

Since I see no difference whatever between the recital "defendant's dilemma" and your preference for the "self incrimination dilemma" I am glad to make the change you suggest. The self incrimination dilemma is the only one presented, of course; there is no other in the context of a discussion of Jones.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

P. S. -- A new draft will follow shortly. --WEB

B JM

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5-7

Joined 3/27

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Chief Justice

Circulated:

Recirculated: MAR 30 1973

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-6193

Joseph Everette Brown and Thomas Dean Smith, Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1973]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners were convicted by a jury of transporting stolen goods and of conspiracy to transport stolen merchandise in interstate commerce, contrary to 18 U. S. C. § 2314 and 18 U. S. C. § 371. The central issue now is whether petitioners have standing to challenge the lawfulness of the seizure of merchandise stolen by them but stored in the premises of one Knuckles, a co-conspirator. At the time of the seizure from Knuckles, petitioners were in police custody in a different State. Knuckles successfully challenged the introduction of the stolen goods seized from his warehouse under a faulty warrant, and his case was separately tried.

The evidence against petitioners is largely uncontroverted. Petitioner Brown was the manager of a warehouse in Cincinnati, Ohio, owned by a wholesale clothing and household goods company. He was entrusted with the warehouse keys. Petitioner Smith was a truck driver for the company. During 1968 and 1969, the company had experienced losses attributed to pilferage amounting to approximately $60,000 each year. One West, a buyer and supervisor for the company, recovered a slip of paper he had seen drop from Brown's pocket. On the slip, in Brown's handwriting, was a list of ware-

(B)

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 15, 1973

Dear Chief Justice:

We took 71-6193, Brown v. U.S. to resolve the "standing" issue. Since that on analysis drops out of the case, I am inclined to dismiss as improvidently granted.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

March 23, 1973

DearChief:

I acquiesce in your opinion in No. 71-6193 - Brown v. U. S. on the assumption that there has been added to (a) on page 6 "and had no proprietary interest in the premises."

W. O. D.

The Chief Justice

WD

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 14, 1973

Re: No. 71-6193 Brown & Smith v. United States

Dear Chief:

I am still somewhat puzzled by the standing issue in this case, and I remain inclined to the view that the case should be dismissed as improvidently granted since the question reserved in Combs v. United States is apparently not presented. But I thought it best to advise you at this time that I have strong reservations about the treatment of the Bruton issue in your memorandum of March 8. Like Thurgood, I consider the Bruton error here so clearly harmless that there is no need to reach out and speculate on means, other than those specifically authorized in Bruton, by which the error might have been avoided. In any case, I have great doubt that the deletion of the co-defendants' names could have avoided the constitutional problem. Indeed, you make the point extremely well when you point out on page 10 of your memorandum that where the procedure would result in "the inevitable linking of co-defendants in the minds of the jurors, it [would become] a ludicrous ritual unrelated to fairness." There may be a case, of course, where the procedure would be something more than a ludicrous ritual. But since this is plainly not such a case, since the entire question is unnecessary to our decision, and since it could easily be viewed as an implicit overruling of our 1968 decision in Bruton, I would hope that the entire matter could be dropped.

Sincerely,

WJB

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 26, 1973

RE: No. 71-6193 Brown v. United States

Dear Chief:

Will you please add at the foot of your opinion

"Mr. Justice Brennan concurs in the result."

Thank you very much.

Sincerely,

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 26, 1973

71-6193, Brown v. United States

Dear Chief,

I do not agree with the first sentence of the first paragraph on page 5 of your proposed opinion: "This 'defendant's dilemma,' so central to the Jones decision, can no longer occur . . ."

While the dilemma will be presented less frequently, it has not been eliminated. Under Simmons a defendant's own testimony at a suppression hearing cannot be introduced against him at trial, but Simmons does not cover the testimony of other witnesses the defendant might call at the suppression hearing. A defendant still faces the dilemma whether to introduce such evidence to prove that he did in fact have possession and thus standing, when he knows that he thereby runs the risk that such evidence may eventually be used against him at trial.

My problem could be resolved with very minor word changes in this sentence -- e.g., substitution of the phrase "not so frequently" for "no longer," or substitution of the phrase "self-incrimination dilemma" for "defendant's dilemma." If the sentence in question is modified along these lines, I shall be glad to join your opinion for the Court in this case. But if you are not disposed to modify the sentence, I would appreciate your adding at the foot of the opinion: "MR. JUSTICE STEWART concurs in the result."

Sincerely yours,

P.S.
I.

The Chief Justice

Copies to the Conference

B

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 26, 1973

Re: No. 71-6193 - Brown v. United States

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 13, 1973

Re: No. 71-6193 - Brown v. United States

Dear Chief:

Although I voted to affirm at Conference, and am still so inclined, I cannot join your memorandum of March 8. I believe that the focus in Part (1) is slightly misplaced, and that the Bruton error here was so clearly harmless that the final two paragraphs are unnecessary.

On the latter point, I cannot accept the suggestion that the only way to avoid a Bruton problem is to "allow the testimony concerning the confessions, but with the co-conspirators' names carefully omitted." (p. 9) Although that is one possibility, in some circumstances it may result in testimony that is unfairly misleading with respect to the defendant against whom it is admitted, and in other circumstances, it may be a meaningless gesture, as you suggest, because the only inference to be drawn is that the other man is the co-defendant. I would think, however, that that establishes, not that Bruton was wrongly decided, but that another course, such as severance, is required to avoid the Bruton problem. Many of these problems arise because a prosecutor seeks to clinch what is already an open and shut case, as Judge McCree characterized this one, with evidence that he ought to know is both unnecessary and constitutionally suspect. It is not all that difficult to avoid Bruton problems, by a careful choice between deletion, severance, or, where the other evidence is very strong, foregoing reliance on the questionable testimony. I find it hard to believe, for example, that in this case the jury would have returned a different verdict had neither Brown nor Smith's confession been introduced at all, in light of the eyewitness testimony and the photographs of the crime in progress.

Second, I believe that the discussion of Jones is slightly out of focus. In the first place, the defendant in Jones was not charged with possession of narcotics. Rather, he was charged with having purchased, sold, dispensed and distributed narcotics not in or from the original stamped package and with having facilitated the concealment and sale of the same narcotics, knowing them to have been imported illegally into the United States. 362 U.S. 257, at 258. Thus, possession was not, strictly speaking, an element of the offenses charged. In Jones, the Court noted that "narcotics charges like those in the present indictment may be established through proof solely of possession of narcotics," id. at 261. It said that the facts establishing possession "would tend, if indeed [they would] not be sufficient, to convict him." Id. at 262.

I take it that this means, for example, that the jury could properly have been instructed in that case that it could infer the defendant's knowledge of illegal importation from his possession of the narcotics. It seems to me that this case should focus on that fact. I seriously doubt whether the jury here could have been instructed that it could infer petitioners' participation in the conspiracy charged or their guilt of the substantive offense of transporting stolen goods, knowing them to be stolen, from their possessory interest, if established, in Knuckles' warehouse after the end of the conspiracy. In any event, the jury was not so instructed.

However, I am not convinced that this alone sufficiently distinguishes this case from Jones. I believe that it is enough only when coupled with the rule in Simmons that a prosecutor may not use at trial any testimony given by the defendant at the suppression hearing. The rule in Simmons derives from the Self-Incrimination Clause of the Fifth Amendment, and we have not yet held that it bars the use of evidence produced by the defendant, other than his own testimony, in support of his standing. Such evidence is likely to be far less persuasive than the defendant's own words. Where the jury is not instructed as to the inferences it may draw from possession, the possibility of its finding the defendant guilty on the basis of the evidence produced to

establish standing--thus giving the Government the benefit of asserting inconsistent positions--seems to me so small as not to justify invocation of the Jones rule.

I find this analysis of the Jones issue more satisfying than that proposed in your memorandum, particularly because it does not sharply separate the issues of the nature of the offense charged and of the Simmons rule, as your memorandum does. (Finally, as I am sure you are aware, I would expressly disclaim agreement with your footnote 3, which states a view on an issue not presented by this case.)

Sincerely,

T.M.

The Chief Justice

cc: Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 27, 1973

Re: No. 71-6193 - Brown v. United States

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: Conference

B

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 16, 1973

Re: No. 71-6193 - Brown and Smith v. United States

Dear Chief:

This relates to your circulation of March 13 and to your note of March 14 inviting reactions. I am with you generally, and I would oppose dismissing this case as having been improvidently granted.

Sincerely,

H.A.B.

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 23, 1973

Re: No. 71-6193 - Brown v. United States

Dear Chief:

Please join me in your recirculation of March 23.

Sincerely,

H. A. B.

The Chief Justice

cc: The Conference

sent?

March 12, 1973

Re: No. 71-6193 Brown and Smith v. United States

Dear Chief:

Please join me.

Sincerely,

LFP

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 15, 1973

Re: No. 71-6193 Brown and Smith v. United States

Dear Chief:

This refers to the various exchanges on your first draft in the above case. Your note of March 14 invites further reactions.

I am certainly with you as to the result and, indeed, as to the opinion also. I nevertheless have considerable doubt as to whether we should address the meaning of the Bruton rule. This is not necessary to the decision.

I would oppose dismissing the case as improvidently granted.

Sincerely,

L.F.P.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 23, 1973

Re: No. 71-6193 Brown and Smith v. U. S.

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1973

Re: No. 71-6193 - Brown and Smith v. United States

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference