

# The Burger Court Opinion Writing Database

*Kelly v. Ohio*

416 U.S. 923 (1974)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF  
JUSTICE WILLIAM O. DOUGLAS

November 26, 1973

Dear Bill:

It's o.k. with me to hold  
72-1379, Kelly v. Ohio for Lewis v. New  
Orelans, 72-6156.

WWD  
William O. Douglas

Mr. Justice Brennan

cc: The Conference

To: The Clerk of the Supreme Court of Ohio  
1. Mr. Justice Douglas  
2. Mr. Justice Stewart  
3. Mr. Justice Harlan  
4. Mr. Justice Black  
5. Mr. Justice White  
6. Mr. Justice Marshall  
7. Mr. Justice Blackmun  
8. Mr. Justice Rehnquist  
9. Mr. Justice Powell  
10. Mr. Justice Burger

1st DRAFT

## SUPREME COURT OF THE UNITED STATES

ROBERT E. KELLY, JR. v. STATE OF OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF OHIO FOR PORTAGE COUNTY

No. 72-1379. Decided March —, 1974

PER CURIAM.

Petitioner was convicted in the Portage County, Ohio, Municipal Court, Kent Branch, on a charge, *inter alia*, of shouting vulgar words at police officers in violation of § 509.02 (A) of the Codified Ordinances of the City of Kent, which provides that

"[N]o person shall willfully conduct himself in a noisy, boisterous or other disorderly manner by either words or acts which disturb the good order and quiet of the Municipality."

The Court of Appeals of Ohio, Eleventh District, County of Portage, affirmed the conviction, stating:

"From a review of the record we find that the language used by the defendant in conjunction with the circumstances prevalent at the time is such as to be within the 'fighting words' doctrine of *Chaplinsky v. New Hampshire*, 315 U. S. 568 . . . .

"Defendant, maintaining freedom of speech is constitutionally protected, declares the ordinance is unconstitutional because it punishes both protected and unprotected conduct (i. e., by words or acts). We do not find the ordinance overbroad as to the words used herein, nor constitutionally protected premised on the evidence before the Court, hence neither the words nor acts herein are constitutionally protected."

The Supreme Court of Ohio denied review.

*Hess Jr. No. 72-6156.*

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

November 26, 1973

MEMORANDUM TO THE CONFERENCE

RE: No. 72-1379 Kelly v. Ohio

I have attempted a Per Curiam opinion in the above, but have concluded that the case cannot be decided, as we thought it could, on the basis of Hess v. Indiana, No. 73-5290, decided November 19, 1973. Unlike Hess, where the Court relied primarily on the fact that defendant's words were undirected, Kelly's words were directly addressed to the police officer hammering at the door and, on appeal, were characterized as "fighting words."

I therefore suggest we hold Kelly for Lewis v. City of New Orleans, No. 72-6156. In Kelly, the addressee of the allegedly "fighting words" was a police officer and even if the Ohio Court of Appeals can be read as having narrowed the ordinance to apply only to unprotected speech, (which I doubt) the ordinance was, in my view, overbroad at the time of trial. Lewis presents similar problems and its disposition may well dispose of this case.

W.J.B. Jr.

*Circulated*

3-12-74

1st DRAFT

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"Defendant, maintaining freedom of speech is constitutionally protected, declares the ordinance is unconstitutional because it punishes both protected and unprotected conduct (i. e., by words or acts). We do not find the ordinance overbroad as to the words used herein, nor constitutionally protected premised on the evidence before the Court, hence neither the words nor acts herein are constitutionally protected."

The Supreme Court of Ohio denied review.

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

**ROBERT E. KELLY, JR. v. STATE OF OHIO**

**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
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No. 72-1379. Decided March —, 1974

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The Supreme Court of Ohio denied review.

MEMORANDUM TO THE CONFERENCE

To: \_\_\_\_\_  
Cc: \_\_\_\_\_  
Re: \_\_\_\_\_

Date: \_\_\_\_\_

Recipient(s): \_\_\_\_\_

RE: No. 72-1379 Kelly v. Ohio  
No. 72-1738 Rosen v. California  
No. 73-537 Karlan v. Cincinnati  
No. 73-544 Lucas v. Arkansas

These four cases were held pending the decision in Mallie Lewis v. New Orleans, No. 72-6156, which was decided February 20, 1974. Lewis, although it involved words directed at a police officer, was decided solely on the basis of Gooding v. Wilson, 405 U.S. 518 (1972). Policemen were also involved in each of these held cases, but, as set out below, it now appears to me that it is unnecessary to reach the question. I would summarily reverse all but Kelly, No. 72-1379, and would reverse and remand that case for further proceedings. This is because No. 72-1738, 73-537 and 73-544 were decided in light of Gooding but Kelly was not.

1. Kelly v. Ohio, No. 73-1379

Petitioner was charged with violating two local ordinances, Secs. 501.05A and 509.02A, of the Codified Ordinances of the City of Kent, Ohio. The trial court, sitting without a jury, convicted petitioner on both charges. Its findings of fact indicate that petitioner was in the vicinity of a crowd of about 250 people on the streets of Kent which the local police were trying to disperse; that he shouted diagonally across an inter-

*23 Feb 1974*  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

March 14, 1974

72-1379 - Kelly v. Ohio

Dear Bill,

I think this is a marginal case and would probably vote to deny certiorari. If, however, certiorari is granted, I would join your proposed Per Curiam.

Sincerely yours,

*P.S.*  
*1*

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

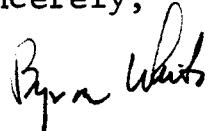
March 12, 1974

Re: No. 72-1379 - Kelly v. Ohio

Dear Bill:

Join me, please.

Sincerely,



Mr. Justice Brennan

Copies to Conference

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

March 14, 1974

Re: No. 72-1379 -- Kelly v. Ohio

Dear Bill:

I agree with your Per Curiam.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

March 12, 1974

Dear Bill:

Re: No. 72-1379 Kelly v. Ohio  
No. 72-1738 Rosen v. California  
No. 73-537 Karlan v. Cincinnati  
No. 73-5444 Lucas v. Arkansas

I shall prepare short dissents for each of these. I hope to get them out before Friday, but if I am unable to do so, I shall have to ask that the cases go over for another week.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

Justice  
Douglas  
Brennan  
Stewart  
White  
Associate Justice Marshall  
Associate Justice Powell  
Associate Justice Fehnquist

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

ROBERT E. KELLY, JR. v. STATE OF OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF OHIO FOR PORTAGE COUNTY

No. 72-1379. Decided March —, 1974

MR. JUSTICE BLACKMUN, dissenting.

Just after midnight on May 22, 1971, a crowd of about two hundred fifty people gathered in a one block area on North Walter Street, just north of Main Street, in Kent, Ohio. Traffic was stopped and windows were broken in nearby buildings. Police officers attempted in force to disperse the crowd. Petitioner Kelly was standing on a corner near a building police were attempting to enter. Upon seeing the police rapping on the door of the building, Kelly shouted to them to "stay away from the fucking door," "get the fuck out of there," and "what do you think you are doing?" Petitioner moved into the street and was placed under arrest. A scuffle ensued. The trial court found from the testimony and evidence that a riotous situation existed at the time in question and that the officers were in the proper performance of their duties. Specifically, the court ruled that petitioner "willfully joined in a riotous situation and became an aider and abettor and did disturb the good order and quiet of the municipality." Kelly was found guilty of resisting or abusing a public officer and of disorderly conduct. The Ohio Court of Appeals declared that "neither [petitioner's] words nor acts herein are found to be constitutionally protected," and affirmed the convictions.

I believe the Court distorts the record in this case and is using the pliable doctrine pronounced in *Street v. New York*, 394 U. S. 576, 585-588 (1969), as an excuse to

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

March 14, 1974

Re: No. 72-1379 - Kelly v. Ohio

Dear Harry:

Please join me in your dissenting opinion.

Sincerely,

W.W.

Mr. Justice Blackmun

Copies to the Conference