The Burger Court Opinion Writing Database

Hamling v. United States
418 U.S. 87 (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
THE CHIEF JUSTICE

June 18, 1974

Re: 73-507 - Hamling v. U. S.

Dear Bill:

Please join me.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 18, 1974

PERSONAL

Re: 73-507 - Hamling v. U. S.

Dear Bill:

I am still with you on the June 18 additions.

I hope you thanked Brennan, J. for giving you this opening!

Regards,

Mr. Justice Rehnquist

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

CHAMBERS OF
THE CHIEF JUSTICE

July 3, 1974

Re: Hold Cases - 73-507 - Hamling v. U. S.
73-557 - Jenkins v. Georgia

Dear Bill:

Cases held for the above two cases will be put over until you are ready. Anyway we'll be here until August 8!

Regards,

WEB

Mr. Justice Brennan

Copies to the Conference

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshal
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqui

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Douglas; J.

No. 73-507

Circulate: 6-6

Recirculated:

William L. Hamling et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

In 1970 the President's Commission on Obscenity and Pornography issued its Report. Dean William D. Lockhart was Chairman. Eighteen others were members. It was a 646 page report. One member, Charles H. Keating, Jr., filed a dissenting report of some 60 pages with at least as many pages comprised of exhibits. The report contains many references to many facets of sex: *e. g.*, petting, coitus, oral sexuality, masturbation, and homosexual activities.

What petitioners did was to supply the Report with a glossary—not in dictionary terms but visually. Every item in the glossary depicted explicit sexual material within the meaning of that term as used in the Report. Perhaps we should have no Reports on Obscenity. But imbedded in the First Amendment is the philosophy that the people have the right to know. Sex is more important to some than to others but it is of some importance to all. If officials may constitutionally report on obscenity, I see nothing in the First Amendment that allow us to bar the use of a glossary factually to illustrate what the Report discusses.

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

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-507

Recirculated: 6-17

William L. Hamling et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

In 1970 the President's Commission on Obscenity and Pornography issued its Report. Dean William D. Lockhart was Chairman. Eighteen others were members. It was a 646 page report. One member, Charles H. Keating, Jr., filed a dissenting report of some 60 pages with at least as many pages comprised of exhibits. The report contains many references to many facets of sex: *e. g.*, petting, coitus, oral sexuality, masturbation, and homosexual activities.

What petitioners did was to supply the Report with a glossary—not in dictionary terms but visually. Every item in the glossary depicted explicit sexual material within the meaning of that term as used in the Report. Perhaps we should have no Reports on Obscenity. But imbedded in the First Amendment is the philosophy that the people have the right to know.* Sex is more impor-

*The Constitution of India (March 1, 1963) provides in Art. 19 (1) that "All citizens shall have the right—(a) to freedom of speech and opinion"; but Art. 19 (2) provides that nothing in that clause bars "reasonable restrictions in the exercise" of those rights "in the interests of . . . decency or morality." Our First Amendment contains no such qualification and certainly when Jefferson and Madison drafted it sex had as great a potential for vulgarity as for beauty. If they had wanted a federal censor to edit our publications, they certainly would have made it explicit.

SUPREME COURT OF THE UNITED STATES

No. 73-507

6-17-74

William L. Hamling, et al., Petitioners	)	
	)	
	)	
	)	On Writ of Certiorari to the
v.	)	United States Court of
	)	Appeals for the Ninth Circu
	)	
United States	)	

[June ___, 1974]

MR. JUSTICE BRENNAN, dissenting.

I.

Whatever the constitutional power of government to regulate the distribution of sexually oriented materials, the First and Fourteenth Amendments, in my view,deny the federal and state governments power wholly to suppress their distribution. For I remain of the view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973) (Brennan, J.,dissenting). Since amended 18 U.S.C. §1461, as construed by the Court, aims at total suppression of distribution by mail of sexually oriented materials, it is in my view unconstitutionally overbroad and therefore invalid on its face.On that ground alone I would reverse the judgment of the Court of Appeals and direct the dismissal of

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-507

William L. Hamling et al., Petitioners, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I

Whatever the constitutional power of government to *regulate* the distribution of sexually oriented materials, the First and Fourteenth Amendments, in my view, deny the Federal and State Governments power wholly to *suppress* their distribution. For I remain of the view that, "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). Since amended 18 U. S. C. § 1461, as construed by the Court, aims at total *suppression* of distribution by mail of sexually oriented materials, it is, in my view, unconstitutionally overbroad and therefore invalid on its face. On that ground alone, I would reverse the judgment of the Court of Appeals and direct the dismissal of the indictment. Several other reasons, however, also compel the conclusion that petitioners' convictions should be set aside.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 2, 1974

MEMORANDUM TO THE CONFERENCE

Re: Cases Held Pending Hamling v. United States, No. 73-507, and Jenkins v. Georgia, No. 73-557

In light of Byron's circulation in the "held" obscenity cases, I ask that all these cases be omitted from the July 8 order list. I will want to revise my dissents on my return and perhaps ask a conference discussion.

WJB Jr
by JL.

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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

July 11, 1974

MEMORANDUM TO THE CONFERENCE

RE: "Held" Cases for No. 73-507 Hamling v. United States
and No. 73-557 Jenkins v. Georgia

After further reflection, I have decided that it will be unnecessary for me to revise my dissents in these cases. In view of the additional portions of the record now available in J-R Distributors v. Washington, No. 73-937, and Sians v. United States. No. 73-584, I attach revised drafts in those two cases. I have also revised all dissents to reflect a determination not to invoke the "rule of four" in these cases.

W.J.B.Jr.

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 18, 1974

No. 73-507 - Hamling v. U. S.

Dear Bill,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

July 11, 1974

Re: Held Cases for No. 73-507, Hamling v. U. S., and No. 73-557, Jenkins v. Ga.

Dear Bill,

I continue to join you in your dissents in these cases, in accord with your memorandum and recirculations today.

Sincerely yours,

P. S.

Mr. Justice Brennan

Copies to the Conference

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 13, 1974

Re: No. 73-507 - Hamling v. United States

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1974

Re: No. 73-507 -- William L. Hamling v. United States

Dear Bill:

Please join me in your dissent.

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

June 18, 1974

Dear Bill:

Re: No. 73-507 - Hamling v. United States

Please join me.

Sincerely,

Harry

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1974

No. 73-507 Hamling v. U.S.

Dear Bill:

Please join me in your carefully written opinion.

As I have mentioned to you, I wonder whether it would be appropriate to add - as an appendix - a reproduction of the brochure, including the pictures. Although I have not seen it, there may be something to be said for letting the public see some hard core pornography. Based on comments made to me, many of the Court's critics think we are talking about Rubens' paintings.

Sincerely,

L.F.P.

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 10, 1974

No. 73-507 Hamling v. United States

Dear Bill:

In light of our talk, I retreat from the suggestion that we consider attaching the brochure as an Appendix to your opinion.

Apart from thinking that the public just wouldn't believe it, you do have a telling point in fearing that the panderers would commence selling copies of your opinion - at least the Appendix. The panderers are rich enough already!

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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

January 10, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-507 - Hamling v. United States

This case has been relisted for this Friday's Conference at my request. The Conference decided last Friday that Hamling should be disposed of as have been the petitions for certiorari in other obscenity cases decided by the court below prior to our decisions last June. After the Conference it came to my attention that the Ninth Circuit panel in Hamling reconsidered its denial of rehearing in light of our June decision (Petition, page 39). It would thus appear inappropriate for us to grant, vacate and remand for a second reconsideration in light of our June decisions.

Sincerely,

WHR

uncorrected

To: The Chief Justice
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. Justice [illegible]
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

Circulated: 6-5-74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-507

William L. Hamling et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1971, a grand jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on 21 counts of an indictment charging use of the mails to carry an obscene book, The Illustrated Presidential Report of The Commission on Obscenity and Pornography, and an obscene advertisement, which gave information as to where, how, and from whom and by what means the Illustrated Report might be obtained, and of conspiracy to commit the above offenses, in violation of 18 U. S. C. §§ 2, 1641 and 371.[1] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on ground that there had been an unconstitutional exclu-

[1] The indictment is reproduced in full in the Appendix at pp. 14-31.

pp. 16-17, 45

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

From: Rehnquist, J.

2nd DRAFT

Circulated: _____

Recirculated: 6-11-74

SUPREME COURT OF THE UNITED STATES

No. 73-507

William L. Hamling et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

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[1] The indictment is reproduced in full in the Appendix at pp. 14-31.

Mary
This is the
Justice's Copy

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-507 - Hamling v. United States

I am making two additions to the opinion in this case.

1. At the end of the paragraph ending at the top of page 16, add the following:

> Our Brother Brennan suggests in dissent that in holding that a federal obscenity case may be tried on local community standards, we do violence both to congressional prerogative and to the Constitution. Both of these arguments are foreclosed by our decision last Term in United States v. 12 200-Ft. Reels of Film, supra, that the Miller standards, including the "contemporary community standards" formulation, applied to federal legislation. The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the states for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions. In Miller v. California, 413

U.S., at 32, we cited with approval Mr. Chief Justice Warren's statement that:

> "[W]hen the Court said in Roth that obscenity is to be defined by reference to 'community standards,' it meant community standards--not a national standard, as it is sometimes argued. I believe that there is no provable 'national standard,' and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a 'community' approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals." Jacobellis v. Ohio, 378 U.S. 184, 200-201 (Warren, C.J., dissenting).

2. At the end of the paragraph ending at the top of page 17, add the following:

> Our Brother Brennan takes us to task for reaching this conclusion, insisting that the District Court's instructions and its exclusion of the testimony of a witness who had assertedly conducted a survey of standards in the San Diego area requires that petitioners be accorded a new trial. As we have noted infra, at ___, the District Court has wide discretion in its determination to admit and

exclude evidence, and this is particularly true in the case of expert testimony. Stillwell Manufacturing Co. v. Phelps, 130 U.S. 520, 527 (1889); Barnes v. Smith, 305 F. 2d 226, 232 (CA 10 1962); II J. Wigmore, Evidence § 561 (3d ed. 1940). */ But even assuming that the District Court may have erred in excluding the witness' testimony in light of the Miller cases, we think arguments made by petitioners' counsel and urging the admission of her survey reemphasize the confusing and often gossamer distinctions between "national" standards and other types of standards. Petitioners' counsel, in urging the District Court to admit her survey, stated:

> ". . . We have already had experts who have testified and expect to bring in others who have testified both for the prosecution and the defense that the material that they have found was similar in all cities. . ."
>
> "This witness can testify about experiences she had in one particular city. Whether this is or not a typical city is for the jury to decide." Tr. 3932.

---

*/ The stated basis for the District Court's exclusion of the testimony of Miss Carlson was that her survey was not framed in terms of "national" standards, but it is not at all clear that the District Court would have admitted her testimony had it been so framed. "[A] specific objection sustained. . . is sufficient, though naming an untenable ground, if some other tenable one existed." I J. Wigmore, Evidence § 18 (3d ed. 1940), citing Kansas City So. R. v. Jones, 241 U.S. 181 (1916). Miss Carlson was a student at San Diego State University who worked part time at F. W. Woolworth, doing composition layouts of newspaper advertising for the company's store in Fashion Valley. She had undertaken a "Special Studies" course with her Journalism professor, Mr. Haberstroh, who was also offered by petitioners as an expert witness at the trial. Miss Carlson had circulated through the San Diego area and asked various persons at random whether they thought "adults should be able to buy and view this book and material". R.T. 3926.

"Now this supports the national survey. It is not something that stands alone. The findings here are consistent with the national survey and is part of the overall picture, taking into account, of course, that this is something that has taken place after the national survey, which was about two years ago, that Dr. Abelson performed." R.T. 3934-3935.

The District Court permitted Dr. Wilson, one of the four expert witnesses who testified on behalf of petitioners, to testify as to materials he found available in San Diego, as a result of having spent several days there. R.T. 3575. He was then asked by petitioners' counsel whether this material was "similar to or different than" the material found in other cities where he had also visited adult bookstores. The witness responded that he thought "essentially the same kinds of material are found throughout the United States". R.T. 3577.

These statements of counsel, in colloquies between counsel and Dr. Wilson, only serve to confirm our conclusion that while there may have been an error in the District Court's references to the "community standards of the country as a whole" in its instructions, and in its stated reasons for excluding the testimony

of Miss Carlson, these errors do not require reversal under the standard previously enunciated. */

Sincerely,

---

*/ The sequence of events in this case is quite different from that in Saunders v. Shaw, 244 U.S. 13 (1917), upon which our Brother Brennan relies. There the Supreme Court of Louisiana directed the entry of judgment against an intervening defendant who had prevailed in the trial court, on the basis of testimony adduced merely as an offer of proof by the plaintiff, and to which the intervening defendant had therefore had no occasion to respond. Since the trial court had ruled that the issue to which plaintiff's proof was addressed was irrelevant, this Court reversed the Supreme Court of Louisiana in order that the intervening defendant might have an opportunity to controvert the plaintiff's proof. Here petitioners were given full latitude in rebutting every factual issue dealt with in the government's case, and no claim is made that the jury was permitted to rely on evidence introduced merely by way of offer of proof which was not subject to cross-examination or to contradiction by countervailing evidence offered by the petitioners. The present case seems to us much closer to Ginzburg v. United States, 383 U.S. 463 (1966), than to Saunders.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1974

MEMORANDUM TO THE CONFERENCE

Re: Cases Held for No. 73-507, Hamling v. United States and/or No. 73-557, Jenkins v. Georgia

As of the date of circulation of this memorandum, we have held twenty cases for the decisions of these obscenity cases. With some exceptions, most of these cases involve questions of the applicability of our decisions in the Miller cases last Term to convictions not yet final at the time of those decisions. With one or perhaps two exceptions, each of the courts being reviewed has relied on Miller in affirming a judgment of conviction. Hamling holds that defendants whose convictions have not yet become final are entitled to whatever benefit the Miller formulation of obscenity affords them.

Absent special considerations or other separate issues, I will vote to deny certiorari or dismiss in all of those cases which raise the applicability of Miller to convictions which antedated that decision as long as the appellate court has reasonably applied the Miller standards to test the defendant's conviction. Questions as to the degree of precision of the application of Miller -- for example, the manner in which the state has complied with Miller's requirement as to specificity -- strike me as generally not worthy of review here if the court has made a good faith effort to follow Miller.

Few of the cases raise the issue of obscenity vel non addressed in Jenkins, and, indeed, the records of only two of these cases (specifically mentioned hereafter) contain the allegedly obscene material at issue below. Unless it appears that the court being reviewed has sustained a finding of obscenity which the Miller cases and Jenkins

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1974

MEMORANDUM TO THE CONFERENCE

Re: Case held for Hamling, No. 73-507 -- this case will be listed on a supplemental conference list for June 21, 1974.

No. 73-5927, Millican v. United States (Cert. to CA 5)

Petr was convicted after a jury-waived trial in the N.D. Ga. of two counts of using the mails to distribute obscene materials in violation of 18 U.S.C. § 1461. The materials found obscene were "HIP" magazine and a film entitled "In Deep." Petr's pre-Miller conviction was affirmed by CA 5 after our decision in Miller. CA 5 held that the proper procedure in pre-Miller convictions was to test the obscenity vel non of the materials under both the Roth-Memoirs and Miller tests. The CA found the material obscene under both tests, and accordingly affirmed the convictions.

Petr contends that the application of Miller to his conviction deprives him of fair notice, and that 18 U.S.C. § 1461 is unconstitutionally vague and not precisely drawn under Miller. Since we rejected these arguments in Hamling and since the CA 5 here examined petr's conviction in light of both Roth-Memoirs and Miller, I will vote to deny certiorari.

Sincerely,

WHR

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-507

William L. Hamling et al., Petitioners, v. United States,	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June —, 1974]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

On March 5, 1971, a grand jury in the United States District Court for the Southern District of California indicted petitioners William L. Hamling, Earl Kemp, Shirley R. Wright, David L. Thomas, Reed Enterprises, Inc., and Library Service, Inc., on 21 counts of an indictment charging use of the mails to carry an obscene book, The Illustrated Presidential Report of The Commission on Obscenity and Pornography, and an obscene advertisement, which gave information as to where, how, and from whom and by what means the Illustrated Report might be obtained, and of conspiracy to commit the above offenses, in violation of 18 U. S. C. §§ 2, 1461 and 371.[1] Prior to trial, petitioners moved to dismiss the indictment on the grounds that it failed to inform them of the charges, and that the grand jury had insufficient evidence before it to return an indictment and was improperly instructed on the law. Petitioners also challenged the petit jury panel and moved to strike the venire on ground that there had been an unconstitutional exclu-

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