The Burger Court Opinion Writing Database

McKinney v. Alabama

424 U.S. 669 (1976)

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

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

CHAMBERS OF
THE CHIEF JUSTICE

February 19, 1976

Re: 74-532 - McKinney v. Alabama

Dear Bill:

Please join me in your circulation of February 12.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 18, 1976

RE: No. 74-532 McKinney v. Alabama

Dear Bill:

I shall shortly circulate an opinion in the above concurring insofar as the judgment of conviction is reversed.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 3/12/76

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-532

Chester McKinney, Petitioner, *v.* State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[February —, 1976]

MR. JUSTICE BRENNAN, ~~concurring.~~

I concur insofar as the judgment of conviction is reversed. I have frequently stated my 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." See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73, 113 (1973) (BRENNAN, J., dissenting). Upon that view the Alabama Law on Obscenity, which forbids such dissemination of explicit sexual material to consenting adults, is facially unconstitutional in both its civil and criminal aspects. Therefore, while I agree that petitioner could not constitutionally be convicted and sentenced in a criminal proceeding wherein the issue of obscenity *vel non* was held to be concluded against him by the decree in a civil proceeding to which he was not a party and of which he had no notice, rather than remand for further proceedings not inconsistent with the Court's opinion, I would declare the Alabama Law unconstitutional and hold that petitioner cannot be criminally prosecuted for its violation.

However, since presently prevailing constitutional jurisprudence accords States a broader power to regulate

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Ste

From: Mr. Justice B

Circulated: _____

Recirculated: 3/10

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-532

Chester McKinney, Petitioner, v. State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[February —, 1976]

MR. JUSTICE BRENNAN.

I concur insofar as the judgment of conviction is reversed. I have frequently stated my 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." See *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73, 113 (1973) (BRENNAN, J., dissenting). Upon that view the Alabama Law on Obscenity, which forbids such dissemination of explicit sexual material to consenting adults, is facially unconstitutional in both its civil and criminal aspects. Therefore, while I agree that petitioner could not constitutionally be convicted and sentenced in a criminal proceeding wherein the issue of obscenity *vel non* was held to be concluded against him by the decree in a civil proceeding to which he was not a party and of which he had no notice, rather than remand for further proceedings not inconsistent with the Court's opinion, I would declare the Alabama Law unconstitutional and hold that petitioner cannot be criminally prosecuted for its violation.

However, since presently prevailing constitutional jurisprudence accords States a broader power to regulate

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 15, 1976

No. 74-532, McKinney v. Ala.

Dear Bill,

I should appreciate your indicating on your separate opinion in this case that I join all but Part III thereof.

Sincerely yours,

Potter Stewart

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1976

Re: No. 74-532 - McKinney v. Alabama

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

March 15, 1976

Re: No. 74-532 -- McKinney v. Alabama

Dear Bill:

Please join me.

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

February 23, 1976

Re: No. 74-532 - McKinney v. Alabama

Dear Bill:

I have just sent a brief concurrence to the Printer.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

1st DRAFT

Circulated: 2/24/76

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74–532

Chester McKinney, Petitioner, *v.* State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[March —, 1976]

MR. JUSTICE BLACKMUN, concurring.

I concur in the judgment of the Court and I join its opinion on the assumption that the Court is not deciding either of the following propositions:

1. Whether a State may institute in some state court a civil proceeding to adjudicate obscenity and then, merely by notifying publishers and exhibitors of the pendency of such adjudication, thereby bind them everywhere throughout the jurisdiction. I take it, specifically, that the concluding sentence of the paragraph at the top of page 7 of the Court's opinion does not resolve that question. If it does, I refrain from joining that resolution.

2. Whether a system which has mere "provision for later challenges" to an *ex parte* determination of obscenity is constitutionally proper. I take it that the full paragraph on page 5 of the Court's opinion does not resolve that question. If it does, I refrain from joining it. I had believed, in this connection, that it is settled that the burden of proving that a particular expression is unprotected rests on the censor, *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 560 (1975), and is not to be shifted to the other side by a mere "provision for later challenges."

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 2/26/76

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–532

Chester McKinney, Petitioner, *v.* State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[March —, 1976]

MR. JUSTICE BLACKMUN, concurring.

I concur in the judgment of the Court and I join its opinion on the assumption that the Court is not deciding either of the following propositions:

1. Whether a State may institute in some state court a civil proceeding to adjudicate obscenity and then, merely by notifying publishers and exhibitors of the pendency of such adjudication, thereby bind them everywhere throughout the jurisdiction. I take it, specifically, that the concluding sentence of the paragraph at the top of page 7 of the Court's opinion does not resolve that question. If it does, I refrain from joining that resolution.

2. Whether a system which merely allows one to initiate a challenge to an *ex parte* determination of obscenity is constitutionally proper. I take it that the full paragraph on page 5 of the Court's opinion does not resolve that question. If it does, I refrain from joining it. I had believed, in this connection, that it is settled that the burden of proving that a particular expression is unprotected rests on the censor, *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 560 (1975), and is not to be shifted to the other side by a mere "avenue for initiating a challenge."

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 17, 1976

No. 74-532 McKinney v. Alabama

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

From: Mr. Justice Rehnquist

Circulated: FEB 11

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74–532

Chester McKinney, Petitioner, *v.* State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[February —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted of selling material which had been judicially declared obscene. At his trial he was not permitted to litigate the obscenity *vel non* of the publication which was the basis of his prosecution, even though he had not been a party to the earlier civil adjudication in which it was held obscene. We granted certiorari, 422 U. S. 1040 (1975), to consider whether this procedure comported with our decisions delineating the safeguards which must attend attempts by the States to prohibit dissemination of expression asserted to be protected by the First and Fourteenth Amendments against such interference. We reverse.

I

Pursuant to the authority conferred upon him by Ala. Code, Tit. 14, c. 64A (Supp. 1973),[1] the District Attorney

[1] Chapter 64A provides, in pertinent part:

"§ 374 (5). Equitable action to adjudicate obscenity of mailable matter imported, sold or possessed.—Whenever the solicitor for any judicial circuit or county solicitor has reasonable cause to believe that any person, with knowledge of its contents, is (1) engaged in sending or causing to be sent, bringing or causing to be brought, into

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 25, 1976

Re: No. 74-532 - McKinney v. Alabama

Dear Harry:

With respect to paragraph 2 of your concurring opinion, I will be happy to substitute for the present last sentence on page 5 of my circulating draft the following:

> "Such a procedure, without any provision for subsequent re-examination of the determination of the censor, would clearly be constitutionally infirm."

Sincerely,

WHR

Mr. Justice Blackmun

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-532

Chester McKinney, Petitioner, *v.* State of Alabama. } On Writ of Certiorari to the Supreme Court of Alabama.

[February —, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner was convicted of selling material which had been judicially declared obscene. At his trial he was not permitted to litigate the obscenity *vel non* of the publication which was the basis of his prosecution, even though he had not been a party to the earlier civil adjudication in which it was held obscene. We granted certiorari, 422 U. S. 1040 (1975), to consider whether this procedure comported with our decisions delineating the safeguards which must attend attempts by the States to prohibit dissemination of expression asserted to be protected by the First and Fourteenth Amendments against such interference. We reverse.

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