

The Burger Court Opinion Writing Database

Smith v. United States

431 U.S. 291 (1977)

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

March 26, 1977

Re: 75-1439 Smith v. United States

Dear Harry:

I join.

Regards,

WSB

Mr. Justice Blackmun

cc: The Conference

WB
1/2
5/10/77

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: 5/10/77

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Eighth Circuit.

[May —, 1977]

MR. JUSTICE BRENNAN, dissenting.

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of Iowa of mailing obscene material in violation of 18 U. S. C. § 1461. The Court of Appeals for the Eighth Circuit affirmed.

I would reverse. I have previously stated my view that this statute is "clearly overbroad and unconstitutional on its face," see, e. g., *Millican v. United States*, 418 U. S. 947, 948 (1974), quoting *United States v. Orito*, 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting).

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:

Recirculated: 5/19/77

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Eighth Circuit.

[May —, 1977]

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

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of Iowa of mailing obscene material in violation of 18 U. S. C. § 1461. The Court of Appeals for the Eighth Circuit affirmed.

I would reverse. I have previously stated my view that this statute is "clearly overbroad and unconstitutional on its face," see, e. g., *Millican v. United States*, 418 U. S. 947, 948 (1974), quoting *United States v. Orito*, 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting).

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 17, 1977

75-1439 - Smith v. United States

Dear Bill,

Please add my name to your dissent
in this case.

Sincerely yours,

BS
P

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 16, 1977

Re: No. 75-1439 - Smith v. United States

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

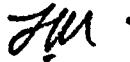
March 28, 1977

Re: No. 75-1439, Smith v. United States

Dear Harry:

I await Stevens' dissent.

Sincerely,



T. M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 17, 1977

Re: No. 75-1439, Smith v. United States

Dear Bill:

Please join me.

Sincerely,

JM ·

T. M.

Mr. Justice Brennan

cc: The Conference

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: 3/14/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States | peals for the Eighth Circuit.

[March —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In *Miller v. California*, 413 U. S. 15 (1973), this Court rejected a plea for a uniform national standard as to what appeals to the prurient interest and as to what is patently offensive; the Court held, instead, that these essentially were questions of fact to be measured by contemporary standards of the community. *Id.*, at 30-34. The ~~present~~ case presents the issue of the constitutional effect of state law, that leaves unregulated the distribution of obscene material to adults, on the determination of contemporary community standards in a prosecution under 18 U. S. C. § 1461 for a mailing that is wholly intrastate. The case also raises the question whether § 1461 is unconstitutionally vague as applied in these circumstances, and the question whether the trial court, during the *voir dire* of prospective jurors, correctly refused to ask preferred questions relating to community standards.

instant

I

Between February and October 1974 petitioner, Jerry Lee Smith, knowingly caused to be mailed various materials from Des Moines, Iowa, to post office box addresses in Mount Ayr and Guthrie Center, two communities in southern Iowa. This was done at the written request of postal inspectors using fictitious names. The materials so mailed were delivered

6, 7, 8, 9 and
STYLISTIC CHANGES

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

2nd DRAFT

From: Mr. Justice Blackmun

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 3/16/77

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Appeals
United States | for the Eighth Circuit.

[March —, 1977]

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pp. 10.12

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: 5/18/77

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States. | peals for the Eighth Circuit,

[March —, 1977]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 5, 1977

No. 75-1439 Smith v. United States

Dear Harry:

I am glad to join your opinion for the Court, and will circulate a join note.

It occurred to me that it might be useful if I wrote a brief concurring opinion summarizing, as I understand it, the situation with respect to the relationship of federal and state obscenity laws. Unless you prefer otherwise, I will circulate the enclosed concurrence.

Sincerely,

Lewis

Mr. Justice Blackmun

1fp/ss
Enc.

*Offered by telephone to
Mr. Justice Blackmun
4/5/77*

✓ ✓

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

From: Mr. Justice Powell

Circulated: APR 6 1977

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
v. | United States Court of Ap-
United States | peals for the Eighth Circuit.

[April —, 1977]

MR. JUSTICE POWELL, concurring.

I join the Court's opinion and write to express my understanding of the relative narrowness of the issues presented.

At the time petitioner engaged in the conduct at issue here, Iowa law placed no limits on the distribution of obscene materials to adults. If Iowa law governs in this federal prosecution, petitioner's conviction must be reversed. Our decision therefore turns on the answers to two questions, one requiring interpretation of a federal statute, the other calling for elucidation of the constitutional standards announced in *Miller v. California*, 413 U. S. 15 (1973).

The first question, easily answered, is whether Congress intended to incorporate state obscenity statutes into 18 U. S. C. § 1461. I agree with the Court's opinion, *ante*, at 12-13, and n. 10, that no such intent existed.

The federal statute goes to the constitutional limit, reaching all pornographic materials not protected under the First Amendment. See *Marks v. United States*, — U. S. — (1977) (Slip op., at 7). Under *Miller*, local community standards play an important role in defining that limit. The second question, therefore, is whether "community standards," as that concept is used in *Miller*, necessarily follow changes in a State's statutory law. Again, I agree with the Court's conclusion that they do not. A community may still judge that materials are patently offensive and that they appeal to the prurient interest even though its legislature has chosen,

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 6, 1977

No. 75-1439 Smith v. United States

Dear Harry:

Please join me.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1977

Re: No. 75-1439 - Smith v. United States

Dear Harry:

Please join me.

Sincerely,

WR

Mr. Justice Blackmun

Copies to the Conference.

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 15, 1977

Re: 75-1439 - Smith v. United States

Dear Harry:

In due course I expect to circulate a dissent.

Respectfully,



Mr. Justice Blackmun

Copies to 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 Rehnquist

From: Mr. Justice Stevens

Circulated: 5/12/77

2nd DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
 v, | United States Court of Appeals for the Eighth Circuit,
 United States. |

[May —, 1977]

MR. JUSTICE STEVENS, dissenting.

Petitioner has been sentenced to prison for violating a federal statute enacted in 1873.¹ In response to a request, he mailed certain pictures and writings from one place in Iowa to another. The transaction itself offended no one² and violated no Iowa law. Nevertheless, because the materials proved "offensive" to third parties who were not intended to see them, a federal crime was committed.

Although the Court's affirmation of this conviction represents a logical extension of recent developments in this area of the law, it sharply points up the need for a principled re-examination of the premises on which it rests. Because so much has already been written in this area, I shall merely endeavor to identify certain weaknesses in the Court's "offensiveness" touchstone³ and then to explain why I believe

¹ 17 Stat. 598, 18 U. S. C. § 1461. The statute ". . . was passed with less than an hour of Congressional debate, and there was no objection to its enactment in either the House or the Senate. Reflecting its origin, the law is still known as the Comstock Act." Schauer, *The Law of Obscenity* 13 (1976).

² It is, of course, possible that the postal inspectors, who had used fictitious names to request the materials, were offended by them. There was, however, no such testimony. Moreover, persons examining materials of this kind as a part of their routine duties must surely develop an insensitivity to them.

³ Although appeal to the "prurient" interest and "patently offensive" character are identified as separate parts of the legal standard for determining whether materials are obscene, the two concepts overlap to some

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 19, 1977

Re: 75-1439 - Smith v. United States

Dear Harry:

This morning I made some minor revisions in my Smith dissent which I have sent to the Printer. Although I am quite sure these changes will have no effect on your opinion, I thought you might want to have a copy before the draft is returned by the Printer.

Respectfully,



Mr. Justice Blackmun

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

From: Mr. Justice Stevens

3d

2nd DRAFT

Circulated: _____

Recirculated: 5/19/77

SUPREME COURT OF THE UNITED STATES

No. 75-1439

Jerry Lee Smith, Petitioner, | On Writ of Certiorari to the
 v, | United States Court of Ap-
 United States. | peals for the Eighth Circuit,

[May —, 1977]

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pp. 3-5, 7, 9

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

From: Mr. Justice Stevens

Circulated: _____

3rd DRAFT Recirculated: MAY 19 1977

SUPREME COURT OF THE UNITED STATES

No. 75-1439

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 v. | United States Court of Appeals for the Eighth Circuit,
 United States.

[May —, 1977]

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