The Burger Court Opinion Writing Database

Marks v. United States

430 U.S. 188 (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

December 27, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I am prepared to join your proposed per curiam but I suggest that for explicit clarification:

(1) The final sentence on page 8 read: "Specifically, since the petitioners are charged with conduct occurring prior to our decision in Miller v. California, they are entitled, etc., etc."

(2) Following the final sentence on page 9, add: "Accordingly, the case is remanded for further proceedings consistent with this opinion."

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

December 29, 1976

Re: 75-708 - Marks v. United States

Dear Lewis:

I joined your proposed per curiam but it seems to me this is an important case and deserves a signed opinion.

To show my bona fides, I would volunteer to sign it if you decline to do so!

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

1/27/77

No. 75–708

Stanley Marks et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

MR. JUSTICE BRENNAN, concurring in part and dissenting in part.

I agree with the Court that the retroactive application of the definition of obscenity announced in *Miller* v. *California,* 413 U. S. 15 (1973), to the potential detriment of a criminal defendant, violates the Due Process Clause of the Fifth Amendment. See *Bouie* v. *City of Columbia,* 378 U. S. 347 (1964).

I cannot join, however, in remanding the case for a new trial. Petitioners were convicted of transporting obscene materials in interstate commerce in violation of 18 U. S. C. § 1465. I adhere to the view that this statute is "clearly overbroad and unconstitutional on its face." See, *e. g., Cangiano* v. *United States,* 418 U. S. 934, 935 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito,* 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would simply reverse.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-708

2/23/77

Stanley Marks et al., Petitioners, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1977]

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

I join the opinion of the Court insofar as it holds that the retroactive application of the definition of obscenity announced in *Miller* v. *California*, 413 U. S. 15 (1973), to the potential detriment of a criminal defendant, violates the Due Process Clause of the Fifth Amendment. See *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964).

I cannot join, however, in the judgment remanding the case for a new trial. Petitioners were convicted of transporting obscene materials in interstate commerce in violation of 18 U. S. C. § 1465. I adhere to the view that this statute is "clearly overbroad and unconstitutional on its face." See, *e. g.*, *Cangiano* v. *United States*, 418 U. S. 934, 935 (1974) (BRENNAN, J., dissenting), quoting *United States* v. *Orito*, 413 U. S. 139, 148 (1973) (BRENNAN, J., dissenting). I therefore would simply reverse,

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 29, 1976

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 26, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Your suggested additional footnote in the above case is all right with me.

Sincerely,

Mr. Justice Powell

Copies to: The Chief Justice
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 27, 1977

Re: No. 75-708, Marks v. U.S.

Dear Bill:

I agree.

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

January 4, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

I do not know what other writings will be forthcoming on this one but, for the moment at least, please join me. I, too, think that this should be a signed opinion.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 27, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

The addition of the footnote has my approval.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice White
Mr. Justice Rehnquist

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: DEC 21 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

[1] Two Courts of Appeals have found instructions derived from *Miller* appropriate in prosecutions based on conduct occurring before the *Miller* decision came down: *United States* v. *Marks*, 520 F. 2d 913 (CA6 1975) (the instant case); and *United States* v. *Friedman*, 528 F. 2d 784 (CA10 1976), petition for cert. pending, No. 75–1663. Three Courts of Appeals have reversed convictions where *Miller* instructions were given by the District Court: *United States* v. *Wasserman*, 504 F. 2d 1012 (CA5 1974); *United States* v. *Jacobs*, 513 F. 2d 564 (CA9 1974); *United States* v. *Sherpix, Inc.*, 168 U. S. App. D. C. 121, 512 F. 2d 1361 (1975).

In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States, supra*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review, appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 27, 1976

No. 75-708 Marks v. United States

Dear Chief:

I will be happy to make the changes suggested in your letter of December 27.

Sincerely,

L Lewis

The Chief Justice

lfp/ss

cc: The Conference

pp. 8, 9

1 /

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

2nd DRAFT

Circulated: _____

Recirculated: JAN 12 1977

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 26, 1977

No. 75-708 Marks v. United States

Dear Bill:

Thank you for yours of January 14, which I have neglected.

Although I perceive no incompatibility or tension between Rose v. Locke, 423 U.S. 48 and what I have written in this case, I am willing - if my "joiners" concur - to add a footnote as indicated on the enclosed xerox of page 7 of my opinion.

If this is agreeable, and unless I hear objection from others who have joined the opinion, I will add this footnote and recirculate later this week.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

cc: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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: _____

Recirculated: FEB 2 1977

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75–708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January —, 1977]

PER CURIAM.

This case presents the question, not fully answered in *Hamling* v. *United States*, 418 U. S. 87 (1974), whether the standards announced in *Miller* v. *California*, 413 U. S. 15 (1973), are to be applied retroactively to the potential detriment of a defendant in a criminal case. We granted certiorari, 424 U. S. 942 (1976), to resolve a conflict in the circuits.[1]

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In two earlier cases both conduct and trial occurred prior to *Miller*, and the jury instructions were derived from *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966) (plurality opinion). *United States* v. *Thevis* (*Thevis I*), 484 F. 2d 1149 (CA5 1973), cert denied, 418 U. S. 932 (1974); *United States* v. *Palladino*, 490 F. 2d 499 (CA1 1974). The Courts of Appeals there, foreshadowing to some extent our later decision in *Hamling* v. *United States*, *supra*, held that *Miller* did not void all *Memoirs*-based convictions, but that on review appellants were entitled to all the benefits of both the *Miller* and *Memoirs* standards. See

March 15, 1977

Cases held for No. 75-708, Marks v. United States

MEMORANDUM TO THE CONFERENCE:

No. 75-1663, Friedman v. United States. Petr was convicted of transporting an obscene book in interstate commerce, 18 U.S.C. § 1465. He initially was brought to trial before Miller v. California was decided. The jury was instructed under Memoirs v. Massachusetts, and it found him guilty. Before CA10 decided his appeal, the Miller decision was announced. CA10 vacated the first conviction, remanding to the District Court for reconsideration in light of Miller. It did not review the conviction; it simply vacated. 488 F.2d 1141. Petr was retried and this time, over objection, the District Court gave instructions based solely on Miller. Petr appealed his conviction and CA10 affirmed, noting that petr had been found guilty under both sets of standards and stating that it thought the book was "filth" under any standard.

The instructions at the second trial were erroneous under Marks. The first conviction cannot be used in support of the judgment since the vacation and remand for a new trial rendered the first conviction void. And the appellate court's determination that the book was obscene is not sufficient in these circumstances to sustain the conviction. Marks, slip op. at 9, n. 11. I will vote to GRANT, VACATE and REMAND for reconsideration in light of Marks.

* * * *

No. 75-985, American Theatre Corp. v. United States. Petrs were convicted of transporting obscene materials by common carrier in interstate commerce, 18 U.S.C. § 1462.

Apparently their conduct occurred after Miller, and there is no complaint about the Miller-based jury instructions. Petrs complain instead about CA8's failure to view the materials - two films - and make its own judgment whether or not they were obscene. CA8 decided that the materials were obscene based only on a stipulation of counsel listing the sexual activities portrayed in the films. Citing CA6's practice in Marks, CA8 stated expressly that it had not viewed the films. Petn App. at A3, n. 2.

In Marks we did not reach the question as to an appellate court's duty to view allegedly obscene materials, although the opinion may be viewed as impliedly critical of CA6 on this score. Slip op. at 9, n. 11. Miller emphasized "the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S., at 25. Jenkins v. Georgia, 418 U.S. 153, 160, reaffirmed that position. But our cases do not establish guidelines for determining when appellate viewing is "necessary." If the Court wishes to address this issue, this case may present a reasonably good opportunity. But there is the possibility that the SG will argue that a defendant who relied on a stipulation in the trial court cannot demand that an appellate court view the materials. See the SG's brief in Marks, at 39, n. 21.

On balance, I am inclined to Deny on this issue.

The other questions presented challenge the sufficiency of the evidence and the constitutionality of the statute that permits the court to tax costs to the defendant. 28 U.S.C. § 1918(b). These are not certworthy. DENY.

L.F.P., Jr.

ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Reversed
Rec'd 1/15

January 14, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

I voted to affirm the judgment of the Court of Appeals at Conference, but think you have written up more persuasively than I thought could be done the arguments for reversal. I can subscribe to what I understand are the two basic premises of your opinion: (1) the Due Process Clause of the Fifth Amendment prohibits the conviction of a defendant through an unforeseeable judicial expansion of a statute defining criminal liability; (2) notwithstanding the fact that 18 U.S.C. § 1465 prohibiting the transportation of obscene materials has not been amended, its broad language was necessarily confined by the decisions of this Court determining what is, and what is not, obscenity. Although the formulation of that test in Memoirs never attracted a majority of the Court, a process of vote counting makes clear that after that decision and before Miller this Court would not affirm a conviction which did not satisfy the test stated by the Memoirs plurality.

My only difficulty with your opinion is the related problem which we wrestled with last Term in the per curiam which I wrote in Rose v. Locke, 423 U.S. 48. Frequently a criminal statute will be sufficiently general in its

language so as to support any one of several reasonable constructions. When the court of last resort of a particular state comes to construe a particular section or clause of a statute for the first time, it should not be unconstitutional for it to prefer the broadest, rather than the narrowest, of the reasonable constructions.

Nothing you say in your opinion expressly militates against this proposition, but I would like to have it pointed out in some way that the opinion casts no doubt upon it. If you are amenable to such a comment, you are doubtless in a better position than I am to decide what it should be and where it should go. I will then be happy to join you. If you decide not to, I will presumably be relegated to the role of a voice crying in the wilderness.

Since the Chief, Byron, and Harry have already joined you, I am sending copies of this letter to them.

Sincerely,

WJBrennan

Mr. Justice Powell

Copies to The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

DM

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Thank you for your letter of January 26th, responding to my earlier letter suggesting the addition of a footnote. I quite agree that there is no incompatibility or tension between Rose v. Locke and your present circulating draft; my reason for wanting some mention of the former case is that Bill Brennan's dissent there which took a very expansive view of the opinion he had written for the Court in Bouie, claimed that we were doing an injustice to the latter opinion. Since your present draft relies very much on Bouie, and rightly so, I thought it desirable to include a reference to Rose v. Locke as indicating that there are some outer limits to the Bouie doctrine.

The proposed footnote on page 7 of the circulating draft which you attached to your letter of January 26th is agreeable to me. I think it would seem less "out of the blue" if a phrase could be added summarizing the holding of Rose v. Locke, but if you prefer to leave the footnote just the way you have drafted it, I will join in any event. My preference would be to add the following language so the footnote you have drafted would read this way:

change made for 3d draft and sent to printer 1/31/77 -DM

"For this reason, the instant case is different from Rose v. Locke, 423 U.S. 48 (1976), where the broad reading of the statute at issue did not upset a previously established narrower construction."

Sincerely,

Mr. Justice Powell

Copies to: The Chief Justice
Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1977

Re: No. 75-708 - Marks v. United States

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

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: FEB 4 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-708

Stanley Marks et al., Petitioners
v.
United States.

On Writ of Centiorari to the United States Court of Appeals for the Sixth Circuit.

[February —, 1977]

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

There are three reasons which, in combination, persuade me that this criminal prosecution is constitutionally impermissible. First, as the Court's opinion recognizes, this "statute regulates expression and implicates First Amendment values." *Ante*, at 8. However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace. Second, the statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess. See *Stanley* v. *Georgia,* 394 U. S. 557. Third, the present constitutional standards, both substantive and procedural,* which apply to these prosecutions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility. Indeed, my brief experience on the Court has persuaded me that grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law. Accordingly, while I join the Court's opinion, I am unable to join its judgment.

*How, for example, can an appellate court intelligently determine whether a jury has properly identified the relevant community standards?