The Burger Court Opinion Writing Database

Splawn v. California

431 U.S. 595 (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

May 11, 1977

Re: 76-143 - Splawn v. State of California

Dear Bill:

I join.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

WJB

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: 5/26/77

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner, *v.* State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[June —, 1977]

MR. JUSTICE BRENNAN, dissenting.

The California courts, in response to our remand for reconsideration in light of *Miller* v. *California*, reaffirmed petitioner's 1971 conviction for selling obscene films in violation of California Penal Code § 311.2. I would reverse the conviction. I adhere to my view expressed in *Miller* that this statute is "unconstitutionally overbroad, and therefore invalid on its face." *Id.*, at 47 (BRENNAN, J., dissenting). See also *Pendleton* v. *California*, 423 U. S. 1068 (1976) (BRENNAN, J., dissenting); *Sandquist* v. *California*, 423 U. S. 900 (1975) (BRENNAN, J., dissenting); *Toblina* v. *California*, 419 U. S. 926 (1974) (BRENNAN, J., dissenting); *Kaplan* v. *California*, 419 U. S. 915 (1974) (BRENNAN, J., dissenting); *Blank* v. *California*, 419 U. S. 913 (1974) (BRENNAN, J., dissenting).

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

CHAMBERS OF
JUSTICE POTTER STEWART

November 29, 1976

Re: No. 76-143, Splawn v. California

Dear Bill,

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copy to Mr. Justice Marshall

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner,)
)
v.)
)
State of California.)

On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[May ___, 1977]

MR. JUSTICE STEWART, dissenting.

In my view the statute under which the petitioner was convicted is constitutionally invalid on its face. Accordingly, I have joined MR. JUSTICE BRENNAN's dissent.

But even if, as the Court believes, the statute itself is not invalid, MR. JUSTICE STEVENS has surely demonstrated that this petitioner was unconstitutionally convicted under it. On that basis, I also join the dissenting opinion of MR. JUSTICE STEVENS.

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 27, 1977

Re: No. 76-143, Splawn v. California

Dear Bill,

Please add my name to your dissent.

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

May 27, 1977

Re: No. 76-143, Splawn v. California

Dear John,

Please add my name to your dissenting opinion.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: MAY 3 0 1977

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner, v. State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[June —, 1977]

MR. JUSTICE STEWART, dissenting.

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But even if, as the Court believes, the statute itself is not invalid, MR. JUSTICE STEVENS has surely demonstrated that this petitioner was unconstitutionally convicted under it. On that basis, I also join the dissenting opinion of MR. JUSTICE STEVENS.

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

From: Mr. Justice Stewart

Circulated: _____

2nd DRAFT Recirculated: JUN 02 1977

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner, *v.* State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[June —, 1977]

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

In my view the statute under which the petitioner was convicted is constitutionally invalid on its face. Accordingly, I have joined MR. JUSTICE BRENNAN's dissent.

But even if, as the Court believes, the statute itself is not invalid, MR. JUSTICE STEVENS has surely demonstrated that this petitioner was unconstitutionally convicted under it. On that basis, I also join the dissenting opinion of MR. JUSTICE STEVENS.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 2, 1977

Re: No. 76-143 - Splawn v. California

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

(granted 12/3/76) HAB

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 22, 1976

Re: No. 76-143 -- Splawn v. State of California

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 THURGOOD MARSHALL

May 27, 1977

Re: No. 76-143, Splawn v. California

Dear John:

Please join me .

Sincerely,

TM

T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 27, 1977

Re: No. 76-143, Splawn v. California

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

May 3, 1977

Re: No. 76-143 - Splawn v. California

Dear Bill:

Please join me.

Sincerely,

HAB.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 30, 1977

No. 76-143 Splawn v. California

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

From: Mr. Justice

Circulated: MAY 9 1977

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner, v. State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[May —, 1977]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Splawn was convicted in 1971 of the sale of two reels of obscene film, a misdemeanor violation of California Penal Code § 311.2. After the conviction was affirmed on appeal by the California First District Court of Appeals and the State Supreme Court denied review, this Court granted certiorari, vacated the judgment, and remanded for consideration in light of our decision in *Miller* v. *California*, 413 U. S. 15 (1973), which had set forth the standards by which the constitutionality of § 311.2 was to be determined. After the State Supreme Court ruled that the statute satisfied the requirements articulated in *Miller*, see *Bloom* v. *Municipal Court*, 16 Cal. 3d 71 (1976), the Court of Appeals again affirmed the conviction and the Supreme Court denied petitioner's motion for a hearing.

We again granted certiorari, 45 U. S. L. W. 3416 (Dec. 6, 1976), to consider petitioner's assorted contentions that his conviction must be reversed because portions of the instructions given to the jury during his trial render his conviction violative of the First and Fourteenth Amendments. He claims that the instruction allowed the jury to convict him even though it might otherwise have found the material in question to have been protected under the *Miller* standards. He also contends that the same portions of the instructions render his conviction invalid by reason of the constitutional

J—

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart

Pp 1, 3, 5

2nd DRAFT

MAY 18 1977

SUPREME COURT OF THE UNITED STATES

No. 76–143

Roy Splawn, Petitioner, *v.* State of California.	On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[May —, 1977]

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NAD

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1977

MEMORANDUM TO THE CONFERENCE

Re: Case held for No. 76-143 - Splawn v. California

The petition in No. 76-970, Kuhns, et al., v. California, challenges a pandering instruction given pursuant to the same California statute involved in Splawn, similar in all essential respects to the one upheld there. The ex post facto issue concerning the statute is not involved here as it was in Splawn.

The petitioners also raise a question of the sufficiency of the evidence to support the pandering instruction, and an equal protection challenge to California obscenity law's inclusion of bookstore clerks while excluding film projectionists. The Court in Splawn decided not to take cert on this latter issue.

I will vote to deny.

Sincerely,

WHR

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 2, 1977

Re: 76-143 - Splawn v. California

Dear Bill:

As soon as I can get to it, I will circulate a short dissent.

Respectfully,

JPS

Mr. Justice Rehnquist

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: MAY 25 1977

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 76–143

Roy Splawn, Petitioner, v. State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[May —, 1977]

MR. JUSTICE STEVENS, dissenting.

Under the trial court's instructions, the jury may have determined that the films sold by the petitioner had some social significance and therefore were not in themselves obscene, but nevertheless found him guilty because they were advertised and sold as "sexually provocative." [1] A conviction pursuant to such an instruction should not be allowed to stand.

Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose. *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U. S. 748. Nothing said on petitioner's behalf in connection with the marketing of these films was false, misleading, or even arguably offensive either to the person who bought them or to an average member of the community. The statements did make it clear that the films ~~are~~ were "sexually provocative," but that is hardly a confession that they were obscene. And, if they were not otherwise obscene, I cannot understand how these films lost their protected status by being truthfully described.[2]

[1] The relevant instruction is quoted by the Court, *ante*, at 2. I would emphasize this sentence: "If you conclude that the purveyor's sole emphasis is in the sexually provocative aspect of the publication, that fact can justify the conclusion that the matter is utterly without redeeming social importance."

[2] *Ginzburg* v. *United States*, 383 U. S. 463, does not foreclose this analysis because it was decided before the Court extended First Amendment coverage to commercial speech. *Ginzburg* cannot survive *Virginia Phar-*

pp. 1-2

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: _____

Recirculated: JUN 1 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-143

Roy Splawn, Petitioner, v. State of California. | On Writ of Certiorari to the Court of Appeal of California, First Appellate District.

[June —, 1977]

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