

The Burger Court Opinion Writing Database

Lo-Ji Sales, Inc. v. New York

442 U.S. 319 (1979)

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



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

From: The Chief Justice

Circulated: MAY 24 1979

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-511

Lo-Ji Sales, Inc., Petitioner, | On Writ of Certiorari to the Appellate Term, Supreme Court
v. | of New York, Ninth and
State of New York. | Tenth Judicial Districts.

[May —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari on claims that the seizure of magazines, films and other objects from petitioner's bookstore violated guarantees of the First, Fourth, and Fourteenth Amendments. —U. S. — (1978).

I

On June 20, 1976, an investigator for the New York State Police purchased two reels of film from petitioner's so-called "adult" bookstore. Upon viewing them he concluded the films violated New York's obscenity laws. On June 25th he took them to a Town Justice for a determination whether there was reasonable cause to believe the films violated the state obscenity laws so as to justify a warrant to search the seller's store. The Town Justice viewed both films in their entirety and he apparently concluded they were obscene. Based upon an affidavit of the investigator subscribed before the Town Justice after this viewing, a warrant issued authorizing the search of petitioner's store and the seizure of other copies of the two films exhibited to the Town Justice.

The investigator's affidavit also contained an assertion that "similar" films and printed matter portraying similar activities could be found on the premises, and a statement of the affiant's belief that the items were possessed in violation of

CHANGES AS MARKED: 6, 7, 8

To: Mr. Justice Brennan
Mr. Justice Stewart
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Circulated: _____

2nd DRAFT

Recirculated: MAY 30 1979

SUPREME COURT OF THE UNITED STATES

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

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1979

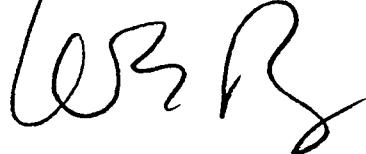
Re: 78-511 - Lo-Ji Sales, Inc. v. New York

Dear Lewis:

In response to your memorandum of June 4, I have no disagreement. I assume the following footnote for insertion at page 6 after the first Coolidge cite will meet your problem:

"5/ Of course, contraband may be seized without a warrant under the plain view doctrine. See e.g., Ker v. California, 374 U.S. 23, 42-43 (1963). But we have recognized special constraints upon searches and seizures of material arguably protected by the First Amendment, e.g., Heller v. New York, 413 U.S. 483 (1973); Marcus v. Search Warrant, 367 U.S. 717, 731-32 (1961); and materials normally may not be seized on the basis of alleged obscenity without a warrant."

Regards,



Mr. Justice Powell

Copies to the Conference

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

CHANGES AS MARKED: 6

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JUN 6 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-511

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Supreme Court of the United States
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CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1979

RE: No. 78-511 Lo-Ji Sales, Inc. v. New York

Dear Chief:

Please join me.

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1979

Re: No. 78-511, Lo-Ji Sales v. New York

Dear Chief,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
/ /

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 29, 1979

Re: No. 78-511 - Lo-Ji Sales, Inc. v. N.Y.

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

cmc

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1979

Re: No. 78-511 - Lo-Ji Sales, Inc. v. N.Y.

Dear Chief:

Please join me.

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

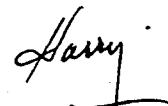
May 29, 1979

Re: No. 78-511 - Lo-Ji Sales, Inc. v. New York

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 4, 1979

78-511 Lo-Ji Sales, Inc. v. New York

Dear Chief:

I join your opinion, but do make the following suggestion.

On page 6 the opinion states: "[The search] was not limited at the outset as a search for the other copies of the two 'sample' films; it expanded into a more extensive search because other items were found the local justice deemed illegal. Therefore, we have no occasion to decide whether in this context the 'plain view' doctrine might be applicable. See Coolidge v. New Hampshire."

I am afraid the foregoing can be read as suggesting that the plain view doctrine never applies when officers are purposefully looking for contraband for which they have no warrant. This would be an implausible limitation upon the plain view doctrine that I'm sure you do not intend. If the search here did not implicate First Amendment rights, I would think the plain view doctrine would be applicable.

Perhaps a footnote could make clear that contraband normally may be seized without a warrant under that doctrine. See Ker v. California, 374 U.S. 23, 42-43; United States v. Lee, 274 U.S. 559; Hester v. United States, 265 U.S. 57. But we have recognized special constraints upon searches and seizures of material arguably protected by the First Amendment (see, e.g. Heller v. New York, 413 U.S. 483; Marcus v. Search Warrant, 367 U.S. 717, 731-732). Therefore - unlike other forms of contraband - allegedly obscene material normally may not be seized by police without a warrant.

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 5, 1979

78-511 Lo-Jo Sales, Inc. v. New York

Dear Chief:

Your proposed note 5 entirely meets my point.

I renew my "Join".

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1979

Re: No. 78-511 - Lo-Ji Sales v. New York

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

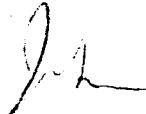
May 25, 1979

Re: 78-511 - Lo-Ji Sales, Inc. v. New York

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference