

The Burger Court Opinion Writing Database

Burch v. Louisiana

441 U.S. 130 (1979)

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

April 9, 1979

Dear Bill:

Re: 78-90 Burch v. Louisiana

I join.

Regards,

WRB

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 29, 1979

RE: No. 78-90 Burch v. Louisiana

Dear Potter and Thurgood:

I propose the attached opinion in Bill Rehnquist's
Burch. What do you think?

Sincerely,

Bice

Mr. Justice Stewart

Mr. Justice Marshall

*Opinion attached
to WJB memo
of 3/29/79 to PS&TM*

1st Draft

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners,) On Writ of Certiorari to
v.) the Supreme Court of
State of Louisiana.) Louisiana.

[April --, 1979]

Mr. Justice Brennan, concurring in part and dissenting in part

For the reasons set forth in Johnson v. Louisiana, 406 U.S. 356, 380 (Douglas, J., dissenting), 395 (Brennan, J., dissenting), 397 (Stewart, J., dissenting), 399 (Marshall, J., dissenting) (1972) and Apodaca v. Oregon, 406 U.S. 404, 414 (Stewart, J., dissenting) (1972), I agree that petitioner Burch's criminal conviction by a non-unanimous jury verdict must be reversed as a violation of his right to jury trial guaranteed by the Sixth and Fourteenth Amendments. However, I dissent from the Court's disposition insofar as it authorizes retrial of petitioner Burch and affirms the conviction of petitioner Wrestle, Inc. Petitioners were convicted on charge of exhibiting allegedly obscene motion pictures in violation La. Rev. Stat. Ann. § 4:106(A)(3) (West 1974). That statute, in my view is overbroad and therefore facially unconstitutional. See Paris Adult Theater I v. Slaton, 413 U.S. 49, 79 (1973)

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

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners, | On Writ of Certiorari to
v. | the Supreme Court of
State of Louisiana. | Louisiana.

[April —, 1979]

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

For the reasons set forth in *Johnson v. Louisiana*, 406 U. S. 356, 380 (Douglas, J., dissenting), 395 (BRENNAN, J., dissenting), 397 (STEWART, J., dissenting), 399 (MARSHALL, J., dissenting) (1972), and *Apodaca v. Oregon*, 406 U. S. 404, 414 (STEWART, J., dissenting) (1972). I agree that petitioner Burch's criminal conviction by a nonunanimous jury verdict must be reversed as a violation of his right to jury trial guaranteed by the Sixth and Fourteenth Amendments. However, I dissent from the Court's disposition insofar as it authorizes a retrial of petitioner Burch and affirms the conviction of petitioner *Wrestle, Inc.* Petitioners were convicted on charges of exhibiting allegedly obscene motion pictures in violation of La. Rev. Stat. Ann. § 4:106 (A)(3) (West 1974). That statute in my view is overbroad and therefore facially unconstitutional. See *Paris Adult Theatre I v. Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). Accordingly, I would reverse the convictions of both petitioners and declare that the unconstitutionality of the statute precludes a constitutional conviction of either for its alleged violation. See *Ballew v. Georgia*, 435 U. S. 223, 246 (1978) (opinion of BRENNAN, J.).

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

CHAMBERS OF
JUSTICE POTTER STEWART

March 30, 1979

Re: No. 78-90 - Burch v. Louisiana

Dear Bill:

Your proposed separate opinion is fine with
me, and I shall join it.

Sincerely yours,

P.S.
✓

Mr. Justice Brennan

cc - Mr. Justice Marshall

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

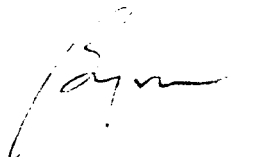
March 30, 1979

Re: 78-90 - Daniel Burch v. Louisiana

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 29, 1979

Re: No. 78-90 - Burch v. Louisiana

Dear Bill:

Your proposed opinion is O.K. with me.

Sincerely,

T.M.
T.M.

Mr. Justice Brennan
cc: Mr. Justice Stewart

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 29, 1979

Re: No. 78-90 - Burch v. Louisiana

Dear Bill:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", followed by a horizontal line.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 29, 1979

No. 78-90 Burch v. Louisiana

Dear Bill:

Please join me.

Sincerely,

Lewis

Mr. Justice Rehnquist

Copies to the Conference

LFP/lab

✓
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
27 MAR 1979

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners, } On Writ of Certiorari to
v. } the Supreme Court of
State of Louisiana. } Louisiana.

[April —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Louisiana Constitution and Code of Criminal Procedure provide that criminal cases in which the punishment imposed may be confinement for a period in excess of six months "shall be tried before a jury of six persons, five of whom must concur to render a verdict."¹ We granted certiorari to decide whether conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense as contemplated by these provisions of Louisiana law violates the

¹ Article I, § 17 of the Louisiana Constitution, provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Article 779 (a) of the Louisiana Code of Criminal procedure states:

"A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six persons, five of whom must concur to render a verdict."

PS

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

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners, } On Writ of Certiorari to
v. } the Supreme Court of
State of Louisiana. } Louisiana.

[April —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Louisiana Constitution and Code of Criminal Procedure provide that criminal cases in which the punishment imposed may be confinement for a period in excess of six months "shall be tried before a jury of six persons, five of whom must concur to render a verdict."¹ We granted certiorari to decide whether conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense as contemplated by these provisions of Louisiana law violates the

¹ Article I, § 17 of the Louisiana Constitution, provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Article 779 (a) of the Louisiana Code of Criminal procedure states:

"A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six persons, five of whom must concur to render a verdict."

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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

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners, } On Writ of Certiorari to
v. } the Supreme Court of
State of Louisiana. } Louisiana.

[April —, 1979]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Louisiana Constitution and Code of Criminal Procedure provide that criminal cases in which the punishment imposed may be confinement for a period in excess of six months "shall be tried before a jury of six persons, five of whom must concur to render a verdict."¹ We granted certiorari to decide whether conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense as contemplated by these provisions of Louisiana law violates the

¹ Article I, § 17 of the Louisiana Constitution, provides:

"A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, five of whom must concur to render a verdict. The accused shall have the right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury."

Article 779 (a) of the Louisiana Code of Criminal procedure states:

"A defendant charged with a misdemeanor in which the punishment may be a fine in excess of five hundred dollars or imprisonment for more than six months shall be tried by a jury of six persons, five of whom must concur to render a verdict."

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 16, 1979

MEMORANDUM TO THE CONFERENCE

Cases held for No. 78-90 Burch v. Louisiana

There are two cases held for Burch: Atkins v. Louisiana, No. 78-707 and Gambino v. Louisiana, No. 78-961. The petitioners in both Atkins and Gambino were convicted by nonunanimous six-person juries. In both cases, which were tried before this Court's decision in Ballew v. Georgia, 435 U.S. 223 (1978), the petitioners did not raise their jury trial claims in the trial court or in their appeals to the Louisiana Supreme Court. However, Atkins did raise the claim in his petition for rehearing in the Louisiana Supreme Court, which denied the petition. The State of Louisiana argues that this Court should deny these petitions because of petitioners' failure to raise the claim in a timely fashion below.

In Burch the Louisiana Supreme Court considered Burch's jury trial claim even though he had not raised it in the trial court because the error was "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." 360 So.2d 831, 837; see La. Code Crim. Proc. art. 920(2). But Burch, unlike Atkins and Gambino, did raise his federal

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 28, 1979

Re: 78-90 - Burch v. State of Louisiana

Dear Bill:

Please join me.

Respectfully,



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

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-90

Daniel Burch et al., Petitioners, | On Writ of Certiorari to
v. | the Supreme Court of
State of Louisiana. | Louisiana.

[April —, 1979]

MR. JUSTICE STEVENS, concurring.

Even though I have not changed the views I expressed in *Marks v. United States*, 430 U. S. 188, 198; *Smith v. United States*, 431 U. S. 291, 311-321; and *Splawn v. California*, 431 U. S. 595, 602-605, I do not believe that I have the authority to vote to modify the judgment below on a ground not fairly subsumed within the question presented by the petition for certiorari.* That question is whether conviction by a non-unanimous six-person jury of a nonpetty offense violates the Sixth and Fourteenth Amendments. Because this is the only question addressed by the Court and because I agree with the Court's resolution of this question, I join its opinion.

*See Rule 23 (1)(c) of the Rules of the Supreme Court ("Only the questions set forth in the petition or fairly comprised therein will be considered by the court."); *Mazer v. Stein*, 347 U. S. 201, 208, and n. 6; *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, 177-179.