The Burger Court Opinion Writing Database

New York v. Uplinger

467 U.S. 246 (1984)

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 15, 1984

Re: 82-1724 - New York v. Uplinger

Dear Byron:

Please show me as joining your dissent.

Regards,

WEB

Justice White

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 3/1/84

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

PER CURIAM.

We granted certiorari to review a decision of the New York Court of Appeals concerning New York State Penal Law § 240.35–3, which prohibits loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Respondents, charged with violating the statute, challenged its constitutionality and the Court of Appeals sustained their claim. The court concluded that § 240.35–3 is "a companion statute to the consensual sodomy statute . . . which criminalized acts of deviate sexual intercourse between consenting adults" and noted that it had previously held the latter statute unconstitutional in *People* v. *Onofre*, 511 N. Y.2d 476 (1980), which we declined to review, see 451 U. S. 987 (1981). Pet. App. 2b. Construing the loitering statute as intended "to punish conduct anticipatory to the act of consensual sodomy," the Court of Appeals reasoned that "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *Ibid.*

Petitioner challenges the decision of the Court of Appeals on the ground that the loitering statute is a valid exercise of

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

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pp. 2-3

'84 MAR -6 A9:38

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

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P.3

'84 MAR 14 A9:46

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

PER CURIAM.

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Petitioner challenges the decision of the Court of Appeals on the ground that the loitering statute is a valid exercise of

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

p.3

From: **Justice Brennan**

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

PER CURIAM.

We granted certiorari to review a decision of the New York Court of Appeals concerning New York State Penal Law §240.35–3, which prohibits loitering "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." Respondents, charged with violating the statute, challenged its constitutionality and the Court of Appeals sustained their claim. The court concluded that §240.35–3 is "a companion statute to the consensual sodomy statute . . . which criminalized acts of deviate sexual intercourse between consenting adults" and noted that it had previously held the latter statute unconstitutional in *People* v. *Onofre*, 511 N. Y. 2d 476 (1980), which we declined to review, see 451 U. S. 987 (1981). Pet. App. 2b. Construing the loitering statute as intended "to punish conduct anticipatory to the act of consensual sodomy," the Court of Appeals reasoned that "[i]nasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *Ibid.*

Petitioner challenges the decision of the Court of Appeals on the ground that the loitering statute is a valid exercise of

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 16, 1984

Re: New York v. Uplinger, No. 82-1724

Dear John:

I have not responded before now to your letter of March 1 because, like you, I was waiting for the Conference to address the general question of the type of disposition I have proposed in this case. It seems rather clear now, however, that the Conference is not disposed to take the matter up any time soon. I thought, therefore, that I might give you my thoughts on the subject.

I am very sensitive to the concern expressed in your letter. I doubt any present member of the Court feels more strongly about the Rule of Four than I, and I have often expressed my strong belief that the Rule must guide decisions to dismiss writs of certiorari as improvidently granted, most recently in my draft dissent in Welsh v. Wisconsin. I am sure our experience with that case, particularly in conjunction with the present one, has prompted us all to think through our views on this subject. For that reason, I have never intended to permit a DIG in Uplinger to come down over the dissents of four Justices voting to grant without explaining why, in my view, that disposition is consistent with the accepted practice under the Rule of Four.

As an initial matter, there seems to be only two reasonable answers to the question of whether five Justices can DIG a case over the dissent of four who voted to grant: Either they can never do so or they can sometimes do so. Bill Douglas advocated the former position and others, including myself, have sometimes joined broad statements of his to that effect. See, e.g., Triangle Improvement Council v. Ritchie, 402 U.S. 497, 508 (Douglas, J., dissenting, joined by Black, BRENNAN, and MARSHALL, JJ.). See also Donnelly v. DeChristoforo, 416 U.S. 637, 648 (1974) (Stewart, J., concurring, joined by WHITE, J.). At least as long as I have been here, however, a majority of the Court has never adopted an absolute bar of the kind Bill urged. Instead, there have been a number of cases, cited both in Bill Rehnquist's proposed per curiam and my draft dissent in Welsh, in which five have DIG'd over the objections of four; as you know, I was the author of one of those, The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959), which, despite his absolutist views, Bill Douglas joined. See also Triangle Improvement Council v. Ritchie, supra; Hanner v. DeMarcus, 390 U.S. 736 (1968); NAACP v. Overstreet, 384 U.S. 118 (1966); Hammerstein v. Superior Court, 341 U.S. 491 (1951).

Perhaps more importantly, the votes joining the per curiam opinions in Welsh and in this case--both of which cited The

Monrosa as authority for dismissing notwithstanding the Rule of Four--indicate that eight of us agree that five Justices may DIG a case over the dissent of four in certain limited circumstances. Bill Rehnquist's withdrawn draft dissent in the present case also took that view and Byron's present dissent, joined by Bill, Sandra, and the Chief, does not object to the per curiam on Rule of Four grounds.

This rejection of an absolute ban seems to me to make good sense. Given the limited time and attention we necessarily devote to petitions for certiorari, one may vote to deny for a variety of unarticulated reasons; under those circumstances, there is relatively little to be lost, and a great deal to be gained, by permitting four who feel strongly that a case should be heard to have it placed on the calendar for argument. And normally, once a case has been briefed, argued, and studied in Chambers, comity to the four who wish it to be decided as well as conservation of resources easily outweigh most reasons advanced for dismissing the case. A decision on the merits does have far more serious consequences than argument and briefing, however, and on the rare occasions in which a majority is firmly convinced after studying the case that its posture, facts, or presentation of issues make it an extremely unwise vehicle for deciding the questions presented, it does not seem to me that the Rule of Four should reach so far as to compel the majority to decide the case.

Defining the circumstances under which five may DIG over the dissents of four is, of course, a difficult task; as you know, a variety of verbal formulations for the appropriate standard have been employed, including the admittedly elastic notion of circumstances "not manifest or fully apprehended at the time certiorari was granted." Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 559 (1957) (Harlan, J., concurring and dissenting). (Along the same lines, Bill Rehnquist's draft dissent in the present case stated that "after full briefing and argument, nuances may emerge that were not apparent or fully appreciated when certiorari was granted and which justify dismissing the petition." Harry, who voted to grant and has now joined my proposed per curiam, apparently finds a standard of that kind applicable here.) Such formulations are necessarily vague and therefore undoubtedly subject to abuse. Nor do they provide a particularly powerful means of accomodating an absolutist view of the Rule of Four: if, for example, a supposed change in circumstances would have been immaterial to those who voted to grant, it should not affect their power to demand a decision on the merits. But if a DIG by five over the dissent of four can ever be proper, and eight of us appear to agree that it can, it seems to me that we have little choice, in this as in other areas where a majority can rule, but to rely on each other's good faith.

Ultimately, therefore, I think a Justice voting to DIG in a case like this must weigh for himself the reasons advanced for dismissing the case--which I think must be set out in a published

opinion--against a heavy presumption that, if four remain unpersuaded by those reasons, comity requires that the case be decided. From his circulations in Welsh, I take that to be Lewis's approach; when those voting to DIG in that case were compelled to set out their reasons, he apparently found those reasons insufficient to overcome his deference to the four seeking a decision on the merits. That sequence of events vindicates, in my view, the wisdom of requiring the five to explain their reasons for DIGging. Presumably operating under the same guidelines, Lewis has apparently concluded that the balance tips the other way in Uplinger. As my proposed per curiam indicates, I agree; briefing and oral argument have made plain the difficulty of deciding this case without considering the validity of Onofre--a decision for which petitioner no longer seeks review. Compare Pet. for Cert. 6 n.1 with Brief for Petitioner 2.

In short, I do not believe the Rule of Four precludes the disposition I have proposed in this case nor do I think that that disposition is inconsistent with the position I advanced in Welsh. Even if I did not agree with it, however, I think the approach I have described accurately reflects current practice as understood by our colleagues; unless and until the Conference substitutes for the status quo an absolute bar of the kind proposed by Bill Douglas, it seems to me somewhat beyond the requirements of comity automatically to provide the four who voted to grant a fifth vote out of courtesy when they would not do the same were the roles reversed.

In any event, if you cannot join my proposed per curiam--either because you do not believe the reasons for dismissing the case outweigh the comity owed our colleagues who wish it decided or because you prefer to adopt Bill Douglas' approach as a matter of personal practice--I will certainly understand.

Sincerely,

W.J.B.,Jr.

Justice Stevens

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

JUSTICE WHITE, dissenting. As I see it, the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed. Dismissing this case as improvidently granted is not the proper course.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAR 17 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[March ——, 1984]

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting. As I see it, the New York statute was invalidated on federal constitutional grounds, and the merits of that decision are properly before us and should be addressed. Dismissing this case as improvidently granted is not the proper course.

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 7, 1984

Re: No. 82-1724-New York v. Uplinger and Butler

Dear Bill:

I agree with your Per Curiam.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 1, 1984

Re: No. 82-1724 - New York v. Uplinger

Dear Bill:

Please join me in your Per Curiam.

Sincerely,

Harry

Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 6, 1984

82-1724 New York v. Uplinger

Dear Bill:

I agree with your Per Curiam.

Sincerely,

L. Lewis

Justice Brennan

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 1, 1984

Re: No. 82-1724 New York v. Uplinger

Dear Bill:

The Chief has asked me to undertake a dissent in this case.

Sincerely,

Justice Brennan

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: MAR 8 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF NEW YORK

[March ——, 1984]

JUSTICE REHNQUIST, dissenting.

Today the Court dismisses the writ of certiorari in this case as improvidently granted. It confesses to an uncertainty as to the federal constitutional issue decided below and declares that this case is an inappropriate vehicle for resolving the issues raised by the parties, since "meaningful evaluation" of the decision below entails reviewing the issues presented in *People* v. *Onofre*, 51 N. Y.2d 476 (1980), *cert. denied*, 451 U. S. 987 (1981). In so doing, the Court leaves untouched a decision invalidating *in toto* a statute designed to protect individual citizens and residential neighborhoods from lewd conduct that affronts peoples' sensibilities in the most intimate of matters and that made people apprehensive about walking neighborhood streets. See Pet. for Cert. 6d (opinion of City Court of Buffalo following Respondent Uplinger's trial). Four members voted to grant certiorari in this case, yet the majority advances no convincing reason for sidestepping the "Rule of Four" and dismissing the case now. Whatever the merits of the decision in *Onofre*, the New York Court of Appeals' decision in this case should be reviewed to determine whether the court below correctly applied our prior decisions addressing the right of privacy found in the First Amendment.

Previous cases have established the rule that four members of the Court may vote to grant a petition of certiorari,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1984

Re: No. 82-1724 New York v. Uplinger

Dear Byron:

Pursuant to our conversation this morning, I withdraw my dissenting opinion and join yours in this case.

Sincerely,

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 1, 1984

Re: 82-1724 - New York v. Uplinger

Dear Bill:

If you can get five votes on your per curiam, I will happily make a sixth; alternatively, I can make a fifth if one of the original four votes to grant will join you. I am most reluctant, however, to join this kind of disposition over the dissent of the four Members of the Court who voted to grant the case, even though, as you know, I think this was a particularly unwise grant.

Respectfully,

John

Justice Brennan

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 21, 1984

Re: 82-1724 - New York v. Uplinger

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: MAY 21 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1724

NEW YORK, PETITIONER *v.* ROBERT UPLINGER AND SUSAN BUTLER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[May ——, 1984]

JUSTICE STEVENS, concurring.

Although the origins of the Rule of Four are somewhat obscure,[1] its administration during the past 60 years has undergone a number of changes.[2] Even though our decision today makes no change in the Rule, I regard it as sufficiently significant to warrant these additional comments.

I first note that I agree with the reasons set forth in the Per Curiam opinion for not deciding this case. I would add (1) that the major reasons were apparent when the certiorari petition was filed, and (2) that our jurisdiction over this case is problematic at best because the most straightforward interpretation of the New York Court of Appeals' opinion is that the statutory provision at issue in this case is not severable, as a matter of state law, from the provision invalidated in *People* v. *Onofre*, 51 N. Y. 2d 476 (1980), cert. denied, 451 U. S. 987 (1981). The Court, quite correctly in my opinion, therefore declines to address the merits.

Four Members of the Court believe, however, that the merits "should be addressed." *Post*, at 1. They do not, however, address the merits themselves. Compare *Colorado* v. *Nunez*, —— U. S. —— (1984) (concurring opinion).

[1] See Leiman, The Rule of Four, 57 Colum. L. Rev. 975, 981–982 (1957).

[2] See Stevens, The Life Span of a Judge-Made Rule, 58 N. Y. U. L. Rev. 1, 11–14 (1983).

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 1, 1984

No. 82-1724 New York v. Uplinger and Butler

Dear Bill,

For now, I will wait until the dissent is circulated.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 13, 1984

SUPR... JUSTI...

'84 MAR 14 A11:47

Re: No. 82-1724 New York v. Uplinger and Butler

Dear Byron,

Please join me in your dissent.

Sincerely,

Sandra

Justice White

Copies to the Conference