10-1971

Kois v. Wisconsin

Lewis F. Powell Jr.

Conf. 3/17/72

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 71-5625

Submitted ....., *19*... *Announced* ....., *19*...

KOIS

Relist

vs.

WISCONSIN

After several votes we relisted - with Rehnquist to ~~Grant~~ P/C

2nd Vote (incomplete) 1st Vote

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.														
Powell, J.						Hold								
Blackmun, J.						Hold								
Marshall, J.	Hold					Grant +		Reverse					Redrupt	
White, J.		✓	✓			Grant +		Reverse					"	
Stewart, J.		✓				Grant +		Reverse					"	
Brennan, J.	Hold					Hold								
Douglas, J.		✓				Grant +		Reverse						
Burger, Ch. J.						Hold								

Conf. 3/24/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-5625

KOIS

vs.

WISCONSIN

RELIST
for week
~~Hold for Miller~~

Bill Rehnquist is
writing P/Cert.

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conf. 3/31/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-5625

KOIS

vs.

WASHINGTON

RELIST

Relist for
Rehnquist's Opinion

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Conf. 4/14/72

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 71-5625

Submitted ....., 19... *Announced* ....., 19...

KOIS

RELIST

vs.

WISCONSON

Relist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
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Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Sally — Have I joined this

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 14, 1972

Re: No. 71-5625 - Kois v. Wisconsin

Dear Bill:

Please join me.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

June 19, 1972

Re: No. 71-5625 Kois v. Wisconsin

Dear Bill:

One of the unfinished items on my agenda is voting in the above case.

Unless a decision is made to hold it, you may note me as joining you.

Sincerely,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 19, 1972

Re: No. 71-5625 Kois v. Wisconsin

Dear Bill:

One of the unfinished items on my agenda is voting in the above case.

Unless a decision is made to hold it, you may note me as joining you.

Sincerely,

Lewis

Mr. Justice Rehnquist

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

From: Rehnquist, J.

Circulated: 3/31/72

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

JOHN R. KOIS *v.* STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 71-5625. Decided April —, 1972

PER CURIAM.

Petitioner was convicted in the state trial court of violating a Wisconsin statute prohibiting the dissemination of "lewd, obscene or indecent written matter, picture, sound recording, or film." He was sentenced to consecutive one-year terms in the Green Bay Reformatory and fined $1,000 on each of two counts. The Supreme Court of Wisconsin upheld his conviction against his contention that he had been deprived of freedom of the press in violation of the Fourteenth Amendment.

Petitioner was the publisher of an underground newspaper called "Kaleidoscope." In an issue published in May, 1968, that newspaper carried a story entitled "The One Hundred Thousand Dollar Photos" on an interior page. The story itself was an account of the arrest of one of Kaleidoscope's photographers on a charge of possession of obscene material. Two relatively small pictures, showing a nude man and nude woman embracing in a sitting position, accompanied the article and were described in the article as "similar" to those seized from the photographer. The article said that the photographer, while waiting in the district attorney's office, had heard that bail might be set at $100,000. The article went on to say that bail had in fact been set originally at $100, then raised to $250, and that later the photographer had been released on his own recognizance. The article purported to detail police tactics which were described as an effort to "harass" Kaleidoscope and its staff.

Roth v. *United States,* 354 U. S. 476 (1957), held that obscenity was not protected under the First or Fourteenth Amendments. Obscenity was there defined as material which "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest." 354 U. S., at 489. In enunciating this test, the Court in *Roth* quoted from *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times* . . . ."

We do not think it can fairly be said, either considering the article as it appears or the record before the state court, that the article was a mere vehicle for the publication of the picture. A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication, but if these pictures were indeed similar to the one seized—and we do not understand the State to contend differently—they are relevant to the theme of the article. We find it unnecssary to consider whether the State could constitutionally prohibit the dissemination of the pictures by themselves, because in the context in which they appeared in the newspaper they were rationally related to an article which itself was clearly entitled to the protection of the Fourteenth Amendment. *Thornhill* v. *Alabama, supra.* The conviction on count one must therefore be reversed.

In its August 1968 issue, Kaleidoscope published a two-page spread consisting of 11 poems, one of which was entitled "Sex Poem." The second count of petitioner's conviction was for the dissemination of the newspaper containing this poem. The poem is an undisguisedly frank, play-by-play account of the author's recollection of sexual intercourse. But as the *Roth* Court emphasized, "sex and obscenity are not synonymous. . . . The portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny materal the constitutional protection of freedom of speech and press." 354 U. S., at 487. A reviewing court must, of necessity, look at the context of the material, as well as its content.

In this case, considering the poem's content and its placement amid a selection of poems in the interior of a newspaper, we believe that it bears some of the earmarks of an attempt at serious art. While such earmarks are not inevitably a guarantee against a finding of obscenity, and while in this case many would conclude that the author's reach exceeded his grasp, this element must be considered in assessing whether or not the "dominant" theme of the material is to prurient interest. While "contemparary community standards," *Roth* v. *United States,* 354 U. S., at 489, must leave room for some latitude of judgment on the part of state courts, and while there is an undeniably subjective element in the test as a whole, the "dominance" of the theme is a question of constitutional fact. Giving due weight and respect to the conclusions of the trial court and to the Supreme Court of Wisconsin, we do not believe that it can be said that the dominant theme of this poem appeals to prurient interest. The judgment on the second count, therefore, must also be reversed.

Reversed.

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

1st DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 3-2

PAUL CHAPMAN *v.* STATE OF CALIFORNIA

Recirculated: _____

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

No. 71-615. Decided April —, 1971

MR. JUSTICE DOUGLAS, dissenting.

Petitioner operates a bookstore in Fremont, California. On two occasions, a police officer visited the store and purchased four magazines and one paperback novel. While in the store the second time, the officer also "looked at parts" of 12 additional magazines and 14 other paperback books which were on petitioner's shelves. Based upon a reading of the four magazines, portions of the book, and the officer's conclusory affidavit, a magistrate issued an *ex parte* search warrant authorizing the seizure of the publications the officer had earlier purchased or perused. The warrant was executed and 78 copies of 35 different titles were seized. Among the items seized were 19 copies of nine magazines not specified in the warrant and apparently not previously evaluated by a magistrate.

Petitioner was charged with the sale or distribution of obscene matter in violation of Cal. Penal Code § 311.2. Petitioner made a motion under §§ 1538.5, 1539, 1540 of the Cal. Penal Code to suppress the evidence and to return the property seized. The municipal court ordered the return of the books which had not been specified in the warrant and of one book which it found not to be obscene.[1] It denied petitioner's motion in all other re-

[1] It does not appear that the respondent appealed from that portion of the municipal court's order suppressing the books which had not been specified in the warrant or which had been found not to be obscene. The Court of Appeal nonetheless upheld the admissibility of those books which had not been specified in the warrant and vacated the municipal court's order to the contrary.

spects. On appeal, the Appellate Department of the Superior Court ordered the suppression of those items which had been seized without a prior adversary hearing on their obscenity *vel non* but affirmed the municipal court with regard to the materials which had been purchased. The State then appealed and the Court of Appeal reversed in part the judgment of the Appellate Department and vacated in part the judgment of the municipal court, thereby allowing the admission into evidence of all the items except the one which had been determined not to be obscene. 17 Cal. App. 3d 865, 95 Cal. Rptr. 242. The Supreme Court of California denied a hearing and petitioner now seeks a writ of certiorari.

Our jurisdiction to review decisions of state courts is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ." 28 U. S. C. § 1257. The finality requirement, which has been with us since the Judiciary Act of 1789, § 25, 1 Stat. 73, 85, is "[d]esigned to avoid the evils of piecemeal review," *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62, 67, and is founded upon "considerations generally applicable to good judicial administration." *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 124. Our decisions make clear, however, that "this provision of the statute [has long been given a] practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 546. Thus, where denial of review would effectively foreclose our later consideration of a federal claim, *California* v. *Stewart,* 383 U. S. 903, 386 U. S. 436, 498 n. 71; *Hill* v. *Chicago & Evanston R. Co.,* 140 U. S. 52, 54; where postponement of review would seriously erode a federal policy, *Local No. 438* v. *Curry,* 371 U. S. 542, 550; *Rosenblatt* v. *American Cyanamid Co.,* 86 S. Ct. 1, 3; or where determination of preliminary questions might avoid subsequent litigation, *Mercantile National Bank* v. *Langdeau,* 371 U. S. 555, 558, we have determined that the requirement of finality had been satisfied.

Similarly, where the subsequent proceedings in state court would deny the federal right for the vindication of which review was sought, we have concluded that the case was final. See, *e. g., Klopfer* v. *North Carolina,* 386 U. S. 213 (speedy trial); *Harris* v. *Washington,* 404 U. S. 55 (double jeopardy); *Colombo* v. *New York,* 405 U. S. — (double jeopardy). And, as MR. JUSTICE WHITE indicated for the Court in *Mercantile National Bank* v. *Langdeau, supra,* at 558, we have found the policies underlying § 1257 satisfied where the matter to be reviewed was entirely "separate and independent" from those to be raised in the subsequent state proceedings.[2]

In *Mills* v. *Alabama,* 384 U. S. 214, a case strikingly similar to the present one, we determined that the finality requirement had been met. There, the trial court had sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed and remanded for trial. Mr. Justice Black, speaking for eight members of the Court, concluded that we had jurisdiction under § 1257:

> "The State has moved to dismiss the appeal on the ground that the Alabama Supreme Court's judgment is not a 'final judgment' and therefore not appealable under § 1257. The State argues that since the Alabama Supreme Court remanded the case to the trial court for further proceedings not inconsistent with its opinion (which would include a trial), the Supreme Court's judgment cannot be considered 'final.' This argument has a surface

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[2] "This is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. Moreover, we believe that it serves the policy underlying the requirement of finality in 28 U. S. C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings." 371 U. S., at 558.

plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of § 1257 as we construed it in *Pope* v. *Atlantic Coast Line R. Co.*, 345 U. S. 379, 381–383, does not require a result leading to such consequences. See also *Construction Laborers* v. *Curry*, 371 U. S. 542, 548–551; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 72–74. Following those cases we hold that we have jurisdiction." 384 U. S., at 217–218. (Footnotes omitted.)

In a concurring opinion joined by MR. JUSTICE BRENNAN, I said:

"We deal here with the rights of free speech and press in a basic form: the right to express views on matters before the electorate. In light of appellant's concession that he has no other defense to offer should the case go to trial, and considering

> the importance of the First Amendment rights at stake in this litigation, it would require regard for some remote, theoretical interests of federalism to conclude that this Court lacks jurisdiction because of the unlikely possibility that a jury *might* disregard a trial judge's instructions and acquit.
>
> "Indeed, even had appellant been unwilling to concede that he has no defense—apart from the constitutional question—to the charges against him, we would be warranted in reviewing this case. That result follows *a fortiori* from our holdings that where First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution." 384 U. S., at 221. (Citations omitted.)

The issues petitioner tenders are important ones. They go to the constitutionality of mass seizures of materials presumptively protected by the First Amendment, *Quantity of Books* v. *Kansas,* 378 U. S. 205; *Marcus* v. *Search Warrants,* 367 U. S. 717; the need for a prior adversary hearing before protected materials are condemned as obscene, *Lee Art Theatres, Inc.* v. *Virginia,* 392 U. S. 636; *Quantity of Books* v. *Kansas, supra;* the procedural burdens which must be overcome to secure the return of protected materials, *United States* v. *Thirty-seven Photographs,* 402 U. S. 363; cf. *Freedman* v. *Maryland,* 380 U. S. 51; The sufficiency of the officer's affidavit, the seizure of materials not specified in the warrant, *Stanley* v. *Georgia,* 394 U. S. 557, 569 (STEWART, J., concurring); *Marron* v. *United States,* 275 U. S. 192; and, of course, the obscenity *vel non* of the publications.

No significant question of fact or law remains for trial. It seems beyond argument that petitioner possessed the publications in question "for sale or distribu-

tion." Cal. Penal Code § 311.2. Petitioner's only viable defenses appear to be whether the publications were constitutionally protected and whether their seizure in some way was procedurally defective. These issues were passed upon by the courts below and are now before us for decision.

The purpose of furthering economy in judicial administration would be plainly be served by deciding these questions now rather than by sending petitioner through the formalities of a trial and months—if not years—of repetitious appellate review before allowing him to present to this Court again the very issues that are here now.[3] California has sought to conserve its judicial resources by providing pretrial appellate review of suppression hearings. Where the admissibility of evidence is the only real issue, this policy generally results either in the prompt dismissal of the charges without trial or in a plea bargain and guilty plea. The interests in the smooth working of our federal system and our accommodation of California's interests in pretrial adjudication of dispositive questions of law dictate that we not postpone our consideration of the federal questions now presented.

This is not a case involving only a pretrial motion to suppress. Rather, the motion now before us embraces all of the evidence the prosecution will introduce at trial and common to all of these items is the issue of their obscenity *vel non*. *Mills* v. *Alabama*, *supra*, teaches that where First Amendment rights are involved, compliance with procedural formalities before allowing their vindication in this Court is not necessary unless those procedures are meaningful.

I would follow *Mills* and grant the petition for a writ of certiorari and put the case down for argument.

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[3] Even if the California courts refuse to reconsider their earlier rulings, petitioner will be free to present the same claims now raised in the present petition for a writ of certiorari. R. Stern & E. Gressman, Supreme Court Practice 102 (4th ed. 1969).

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

2nd DRAFT

From: Douglas, J.

Circulated: _____

Recirculated: 5-22

SUPREME COURT OF THE UNITED STATES

JOHN R. KOIS *v.* STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

No. 71–5625. Decided April —, 1972

MR. JUSTICE DOUGLAS, concurring.

I concur in the judgment because neither logic, history, nor the plain meaning of the English language will support the obscenity exception this Court has engrafted onto the First Amendment. *United States* v. *12 200-Ft. Reels of Film, ante,* at —— (DOUGLAS, J., concurring).

This case, moreover, is further testimony to the morass in which this Court has placed itself in the area of obscenity. *Miller* v. *California, ante,* at —— (DOUGLAS, J., dissenting). Men are sent to prison under definitions which they cannot understand and on which lower courts and members of this Court cannot agree. Here, the Court is forced to examine the thematic content of the two newspapers for the publication of which petitioner was prosecuted in order to hold that they are constitutionally protected. Highly subjective inquiries such as this do not lend themselves to a workable or predictable rule of law, nor should they be the basis of fines or imprisonment.

In this case, the vague umbrella of obscenity laws was used in an attempt to run a radical newspaper out of business and to impose a two-year sentence and a $2,000 fine upon its publisher. If obscenity laws continue in this uneven and uncertain enforcement, then the vehicle has been found for the suppression of any unpopular tract. The guarantee of free expression will thus be diluted and in its stead public discourse will only embrace that which has the approval of five members of this Court.

The prospect is not imaginary now that the Bill of Rights, applicable to the States by reason of the Fourteenth Amendment is coming to be a "watered down" version, meaning not what it does when applied to the Federal Government but only what a majority of this Court thinks fit and proper.