The Burger Court Opinion Writing Database

Perez v. Ledesma

401 U.S. 82 (1971)

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

February 4, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

I write to say that I am glad to join your opinion for the Court, as I have already joined your opinions in the companion cases. Perhaps I should also add that I am also joining Brother Stewart's separate concurrence in the Younger case.

Sincerely,

J.M.H.

Mr. Justice Black

CC: The Conference

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[December —, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* Nos. 7 and 9, *Samuels* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., one of the owners, for displaying obscene materials for sale. On February 10, 1969, four informations were filed, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, LSA–RS. 14–106, and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21–60. On February 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a declaratory judgment under the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, declaring the state

December 1, 1970

RE: No. 60 - Perez v. Ledesma

Dear Chief:

I am just back from California where I am happy to say we found Nancy and Constance doing very well indeed.

I have your note regarding the assignment to me of No. 60 - Perez v. Ledesma. I am not sure that my views on part of that case would have the support of a majority. The only pending prosecution was for violation of a state statute. I think there would be a majority in agreement with me that in that circumstance it was improper for the three-judge court to pass on the Fourth Amendment claim and order the seized materials to be returned and those materials to be suppressed as evidence in any pending or future prosecutions. But the Order also declared a local ordinance unconstitutional and no prosecution was pending for violation of that ordinance. It is my view (and my notes indicate that only Bill Douglas, Byron White and Thurgood Marshall agreed) that the declaratory judgment was proper in that circumstance. Thus, if the tentative votes hold, I'd have a Court for only part of an opinion.

I am nevertheless quite willing to try my hand at an opinion if you think I should. Perhaps I might have the good fortune to persuade you!

Sincerely,

WB

The Chief Justice

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[December —, 1970]

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Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., an owner, for displaying obscene materials for sale. On February 10, 1969, four informations were filed in the State District Court, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, LSA–RS 14–106, and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21–60. The statute and ordinance appear as Appendix A. On February 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a judgment under the Federal Declaratory

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12-17-70

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[December —, 1970]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 23, 1970

RE: No. 60 - Perez v. Ledesma

Dear Bill:

This is addressed to the two points in your uncirculated opinion: (1) that the appeal from the holding that the ordinance is unconstitutional should go to the Court of Appeals and (2) that on the merits the ordinance cannot be struck down as unconstitutionally vague consistently with our holding in Roth and Alberts sustaining the federal and California statutes against that attack.

As to the first point, it is true that the day the three-judge court opinion was filed, July 14, 1969, the initiating judge filed an opinion over his signature alone stating "it is ordered that judgment be entered herein decreeing" the ordinance unconstitutional. So far as appears no separate judgment was entered in compliance with this direction. The only judgment that complies with it is the judgment filed a month later on August 13, 1969 as the judgment of the three-judge court. Paragraph 4 of that judgment declares the ordinance unconstitutional. Since it is common ground between us that appeals are taken only from judgments and not from opinions clearly the only possible appeal in this case is that before us from the judgment of August 13 of the three-judge court, and that appeal draws in question paragraph 4 with the other paragraphs of the judgment.

I cannot see therefore how we can avoid deciding whether the three-judge court properly exercised its discretion in passing on the constitutionality of the ordinance. There is a precedent which, in my view, sustains both the action of the three-judge court in passing on the ordinance and my proposal that we sustain what they did. That precedent is New York Feed Co. v. Leary, 397 U.S. 98 (1970) where we summarily affirmed a three-

judge court in the Southern District of New York in a case there entitled Milky Way Productions, Inc. v. Leary, 305 F. Supp. 288 (1969). That case did not present attacks on a statute and ordinance but rather attacks on two different New York statutes. The first attack was on Penal Law § 235, New York's General Obscenity statute. The second attack was on New York Code of Criminal Procedure §§ 148-150. The Court held that a three-judge court was required to deal with the attack on § 235 since the claim was that that section was facially unconstitutional. However, the attack on the provisions of Criminal Code §§ 148-150 was not that those sections were facially unconstitutional but only that those sections were unconstitutionally invoked before there had been an adversary judicial determination on the obscenity of the publications in question (i. e., as applied). The Court acknowledged that the attack on the Code provisions was thus probably not for determination by three judges, but "as a simple claim of official lawlessness, cognizable by one judge." Nevertheless, the Court invoking the principle that once three-judge court jurisdiction is established on one claim, the court may consider other issues that alone would not have called on three-judges, held that since there was three-judge jurisdiction of the claim of facial unconstitutionality of § 235, jurisdiction existed also to determine the merits of the claim that the criminal procedure provisions were unconstitutionally applied. 305 F. Supp., at 295-296.

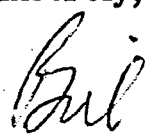
Appellants cited this decision as foreclosing any challenge on their part to the propriety of the three-judge court's consideration of the constitutionality of the ordinance. They also cited the several other cases listed in footnote 3 of my opinion, although in each of those cases the question was really whether the three-judge court might consider attacks on statutes on nonconstitutional grounds when it was properly convened to hear constitutional challenges.

Turning now to your point 2, I would agree that an attack on § 6 of the ordinance on vagueness grounds would ordinarily have to withstand the precedents of Roth and Alberts sustaining the statutes there involved against such an attack. But in my view that's not all there is to the attack on the ordinance in this case. I've reproduced the ordinance in the Appendix to my opinion. It's hard to know how it happened but the text of the ordinance throughout is absolutely unintelligible. That was the ground taken by the three-judge court. "The ordinance is poorly drafted and in some respects may be unintelligible and, therefore, is mortally infected with the vice of vagueness." 304 F. Supp., at 670.

A mere reading of the ordinance persuades me that this conclusion is compelled.

I therefore see no basis for reversal of the three-judge court's declaration of the unconstitutionality of the ordinance. In any event, am I not correct that even if there might be a reversal, you would find it necessary to dissent on your view that all obscenity statutes are unconstitutional?

Sincerely,



W.J.B. Jr.

Mr. Justice Douglas

pp. 6-9, 10, 12, 21, 23, 24-25, 30

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Brennan, J.

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Brennan delivered the opinion of the Court.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., an owner, for displaying obscene materials for sale. On February 10, 1969, four informations were filed in the State District Court, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, LSA–RS 14–106, and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21–60. The statute and ordinance appear as Appendix A. On February 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a judgment under the Federal Declaratory

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1-29-71

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in part and dissenting in part.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

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2-2-71

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in part and dissenting in part.

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/ p 7

Circulated
2-5-71

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 60.—OCTOBER TERM, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

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

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

Appellees operate a newsstand in the Parish of St. Bernard, Louisiana. On January 27, 1969, sheriff's officers of the parish, without warrants, raided the newsstand, seized allegedly obscene magazines, books, and playing cards from the shelves, and arrested appellee August M. Ledesma, Jr., an owner, for displaying obscene materials for sale. On February 10, 1969, four informations were filed in the state district court, two charging Ledesma with the crime of obscenity in violation of a Louisiana statute, LSA–RS 14–106, and two charging him with obscenity in violation of St. Bernard Parish Ordinance 21–60. The statute and ordinance appear as Appendix A. On February 17, 1969, appellees filed the instant action in the United States District Court for the Eastern District of Louisiana, New Orleans Division. Their complaint sought a judgment under the Federal Declaratory

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February 23, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in part and dissenting in part.

This case presents questions regarding federal court intervention affecting the administration of state criminal laws that were not presented in No. 2, *Younger* v. *Harris, ante;* No. 7, *Samuels* v. *Mackell, ante;* No. 9, *Fernandez* v. *Mackell, ante;* No. 4, *Boyle* v. *Landry, ante;* No. 83, *Byrne* v. *Karalexis, ante;* and No. 41, *Dyson* v. *Stein, ante,* all decided today.

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

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

The three-judge District Court's decree suppressing the use of the seized material as evidence and ordering its return to the appellees was an injunctive order, from which an appeal was properly taken directly to this Court. 28 U. S. C. § 1253. The decree was plainly wrong under *Stefanelli* v. *Minard*, 342 U. S. 117, and I agree that it must be reversed. In *Stefanelli* we affirmed the refusal of a federal district court to suppress the use in a pending state prosecution of evidence which the petitioners alleged had been obtained in an unlawful search. Our ruling there is clearly applicable to the facts before us:

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U. S., at 120. See also *Cleary* v. *Bolger*, 371 U. S. 392, 400.

But I would dismiss the appeal from the declaratory judgment holding the parish ordinance unconstitutional. This Court has no power to consider that appeal for two quite distinct reasons, each sufficient to defeat our jurisdiction. First, the ordinance is neither a state statute nor of statewide application. The case thus presents *a*

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan

2nd DRAFT

From: Stewart, J.

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SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Stewart, concurring.

In joining the opinion and judgment of the Court, I add these few concurring words.

The three-judge District Court's decree suppressing the use of the seized material as evidence and ordering its return to the appellees was an injunctive order, from which an appeal was properly taken directly to this Court. 28 U. S. C. § 1253. The decree was plainly wrong under *Stefanelli* v. *Minard,* 342 U. S. 117, and I agree that it must be reversed. In *Stefanelli* we affirmed the refusal of a federal district court to suppress the use in a pending state prosecution of evidence which the petitioners alleged had been obtained in an unlawful search. Our ruling there is clearly applicable to the facts before us:

> "We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure." 342 U. S., at 120.

See also *Cleary* v. *Bolger,* 371 U. S. 392, 400.

I also agree that the appeal from the declaratory judgment holding the parish ordinance unconstitutional is not properly before us. This Court has no power to consider the merits of that appeal for two quite distinct

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

...ewart, J.

No. 60.—October Term, 1970 Circulated: _____

Recirculated: FEB 4 1971

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al.	On Appeal from the United States District Court for the Eastern District of Louisiana.

[February —, 1971]

Mr. Justice Stewart, with whom Mr. Justice Blackmun joins, concurring.

In joining the opinion and judgment of the Court, I add these few concurring words.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 11, 1970

Re: No. 60 - Perez v. Ledesma

Dear Bill:

A spectacular job and I join even if you haven't time to listen to a suggestion or two.

Sincerely,

B.R.W.

Mr. Justice Brennan

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 28, 1970

Re: No. 60 - Perez v. Ledesma

Dear Bill:

Please join me in this one.

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

December 28, 1970

Re: No. 60 - Perez v. Ledesma

Dear Bill:

I am today asking Mr. Justice Black to join me in his proposed opinions in Nos. 2, 4, 7 and 9, 41, and 83. I have carefully reviewed your opinion proposed for No. 60. It strikes me that some of the implications flowing from the opinion are at odds with what Mr. Justice Black has said in his opinions for the other cases in the group. I, therefore, shall withhold my vote in No. 60 until I have an opportunity to see the forthcoming dissent. I assume that it will be generally in line with the other opinions Mr. Justice Black has written and, if so, I shall probably join him.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

January 6, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

I like your proposed dissent, and I would be pleased to have you join me in it.

I feel there is another factor in support of the dissenting position here. I have taken the liberty of setting it forth in a short addendum in dissent which will be circulated today. If it is not sound, perhaps you will talk me out of it.

Sincerely,

H. A. B.

Mr. Justice Black

cc: The Conference

SUPREME COURT OF THE UNITED STATES

No. 60.—October Term, 1970

Leander H. Perez, Jr., et al., Appellants, *v.* August M. Ledesma, Jr., et al. | On Appeal from the United States District Court for the Eastern District of Louisiana.

[January —, 1971]

Mr. Justice Blackmun, dissenting.

As is above indicated, I am in full agreement with what Mr. Justice Black says and I join him in his dissent. I feel, however, that there is still another reason to dissent. It strikes me as a most persuasive one. The majority appear to me to indicate, ante, pp. ———, that the propriety of granting federal declaratory relief is to depend solely upon their being no state prosecution in process at the time of the inception of the federal action, or at least at the time the federal hearing begins. If that is to be the determinative factor, then we are placing a premium on the winning of the race to the respective state and federal courthouses. I desire no part in the promotion of a contest of that kind. It does not make good sense. Neither does it promote the stability and certainty which we ought to have in our judicial procedures. Something far more significant than mere chronological priority should be the measure of the availability of relief in the federal forum.

there

February 1, 1971

Re: No. 60 - Perez v. Ledesma

Dear Potter:

I am joining Mr. Justice Black's opinion and, unless you regard it as inconsistent so to do, I would be pleased to have you note that I join in your opinion as well.

Sincerely,

H.A.B.

Mr. Justice Stewart

cc: The Conference

February 1, 1971

Re: No. 60 - Perez v. Ledesma

Dear Hugo:

On January 6 I joined your then proposed dissent in this case. Would you please join me in the opinion you now propose for the Court. I am also asking Mr. Justice Stewart to join me in his separate concurrence.

Sincerely,

H.A.B.

Mr. Justice Black

cc: The Conference