The Burger Court Opinion Writing Database

Huffman v. Pursue, Ltd.

420 U.S. 592 (1975)

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

October 11, 1974

Re: 73-293 - Huffman v. Pursue

Dear Lewis:

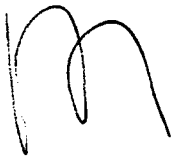
I concur.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference



CHAMBERS OF
THE CHIEF JUSTICE

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

October 4, 1974

Re: No. 73-296 - Huffman v. Pursue, Ltd.

MEMORANDUM TO THE CONFERENCE:

I recommend we reject the Jurisdictional Statement in this case for the reasons stated in Lewis Powell's memorandum of October 1.

Regards,

WEB

Wm Dogh
0c174

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

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1975

Re: No. 73-296 - Huffman v. Pursue, Ltd.

Dear Bill:

I join your proposed opinion dated February 19, 1975.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

October 11, 1974

Dear Lewis:

In 73-296, Huffman v. Pursue, Ltd., would you kindly note that I dissent from the order.

William O. Douglas

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 7, 1975

Dear Bill:

Please join me in your dissenting opinion in Huffman v. Pursue, No. 73-296. I would like to have the following notation added to your opinion:

"MR. JUSTICE DOUGLAS, while joining in the opinion of Mr. Justice Brennan, wishes to make clear that he adheres to the view he expressed in Younger v. Harris, 401 U.S. 37, 58-65 (1971) (dissenting opinion), that federal abstention from interference with state criminal prosecutions is inconsistent with the demands of our federalism where important and overriding civil rights (such as those involved in the First Amendment) are about to be sacrificed."

Thank you.

Sincerely,

WILLIAM O. DOUGLAS

Mr. Justice Brennan

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

October 11, 1974

RE: No. 73-293 Huffman v. Pursue, Ltd.

Dear Lewis:

I agree with your proposed form of Order in the above. As I remember it, the Chief Justice had in mind asking Law Week to make a news item of the Order. I think that would be particularly effective in alerting the Bar.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 20, 1975

MEMORANDUM TO THE CONFERENCE

RE: No. 73-296 - Huffman v. Pursue, Ltd.

In due course I shall circulate a dissent in the above.

W.J.B.Jr.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[March —, 1975]

MR. JUSTICE BRENNAN, dissenting.

I dissent. The treatment of the state *civil* proceeding as one "in aid of and closely related to criminal statutes" is obviously only the first step toward extending to state *civil* proceedings generally the holding of *Younger* v. *Harris*, 401 U. S. 37 (1971), that federal courts should not interfere with pending state *criminal* proceedings except under extraordinary circumstances.[1] Similarly, today's holding that the plaintiff in an action under 42 U. S. C. § 1983 may not maintain it without first exhausting state appellate procedures for review of an adverse state trial court decision is but an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies.

Younger v. *Harris* was basically an application, in the context of the relation of federal courts to pending state criminal prosecutions, of "the basic doctrine of equity jurisprudence that courts of equity . . . particularly should not act to restrain a criminal prosecution." 401

[1] The Court reaches the *Younger* issue although appellants did not plead *Younger* in the District Court. Yet the Court implies that *Younger* is not a jurisdictional matter, since we allowed the parties to waive it in *Sosna* v. *Iowa*, — U. S. — (1975). *Ante*, at —, n. 1. In that circumstance, I address the *Younger* issue solely to respond to the Court's treatment of it.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[March —, 1975]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

I dissent. The treatment of the state *civil* proceeding as one "in aid of and closely related to criminal statutes" is obviously only the first step toward extending to state *civil* proceedings generally the holding of *Younger* v. *Harris*, 401 U. S. 37 (1971), that federal courts should not interfere with pending state *criminal* proceedings except under extraordinary circumstances.[1] Similarly, today's holding that the plaintiff in an action under 42 U. S. C. § 1983 may not maintain it without first exhausting state appellate procedures for review of an adverse state trial court decision is but an obvious first step toward discard of heretofore settled law that such actions may be maintained without first exhausting state judicial remedies.

Younger v. *Harris* was basically an application, in the context of the relation of federal courts to pending state criminal prosecutions, of "the basic doctrine of equity jurisprudence that courts of equity . . . particularly should not act to restrain a criminal prosecution." 401

[1] The Court reaches the *Younger* issue although appellants did not plead *Younger* in the District Court. Yet the Court implies that *Younger* is not a jurisdictional matter, since we allowed the parties to waive it in *Sosna* v. *Iowa*, — U. S. — (1975). *Ante*, at —, n. 1. In that circumstance, I address the *Younger* issue solely to respond to the Court's treatment of it.

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

CHAMBERS OF
JUSTICE POTTER STEWART

October 11, 1974

Re: No. 73-293, Huffman v. Pursue, Ltd.

Dear Lewis,

Your proposed order in this case seems satisfactory to me.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 18, 1975

Re: No. 73-296, Huffman v. Pursue

Dear Bill,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 18, 1975

Re: No. 73-296 - Huffman v. Pursue, Ltd.

Dear Bill:

Please join me.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 4, 1975

Re: No. 73-296 -- Lawrence S. Huffman, etc., v. Pursue, Ltd.

Dear Bill:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Brennan

cc: The Conference

J 11

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 14, 1974

Re: No. 73-296 - Huffman v. Pursue, Ltd.

Dear Lewis:

Your proposed order has my approval.

Harry

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 20, 1975

Re: No. 73-296 - Huffman v. Pursue, Ltd.

Dear Bill:

Please join me.

Sincerely,

H. A. B.

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
LEWIS F. POWELL, JR.

October 11, 1974

No. 73-293 Huffman v. Pursue, Ltd.

Dear Chief:

In accordance with your suggestion at the Conference on yesterday, I have drafted the attached disposition of the nonconforming briefs in the above case for consideration by you and other members of the Court. I have reviewed this with Mike, and he thinks it should produce the desired result in this case.

It is essential, in my view, that we have something on the Order List. Unless we alert the Bar to our intention to enforce our Rules, little will be accomplished by rejecting briefs in a particular case - although I would consider this also to be desirable.

I recognize that the enclosed draft may lack some specificity. Yet, counsel will undoubtedly call Mike and he can indicate - with a memorandum which I will give him - the specific departures in the present briefs from our Rules.

As the Order List for this week is now being typed, if the enclosed order is approved it could be included in next week's Order List.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

No. 73-296 Huffman v. Pursue, Ltd.

The brief for appellants does not comply with Rules 39 and 40 of the Court with respect to conciseness, the statement of questions without unnecessary detail, and the printing of appendices thereto.

Appellee's brief does not comply with Rule 39 with respect to printing.

Accordingly, as provided in paragraph 5 of Rule 40, the briefs of appellants and appellee are hereby stricken. Counsel for appellants may file a brief complying with the Rules within 20 days of the date of this order. Counsel for appellees may file such a brief within 30 days of the date of this order. Oral argument will be allowed only by counsel who have filed briefs that conform to the Rules.

10/17/74

No. 73-296 Huffman v. Pursue, Ltd.

The brief for appellants does not comply with Rules 39 and 40 of the Court with respect to conciseness, the statement of questions without unnecessary detail, and the printing of appendices thereto.

Accordingly, as provided in paragraph 5 of Rule 40, the brief of appellants is hereby stricken. Counsel for appellants may file a brief complying with the Rules within 20 days of the date of this order. Oral argument will be allowed only by counsel who have filed briefs that conform to the Rules.

January 25, 1975

LP to WR

No. 73- 296, Huffman v. Pursue

Dear Bill:

Although I am certainly with you as to the result, I write to share some of my second thoughts about this case.

I am concerned about the Younger issue. In deciding the case on that ground, you were entirely faithful to the Conference vote. I am quite willing to apply Younger to civil cases, whether or not the civil suit may be said to implement criminal law. As I have studied this case more carefully, however, it seems to me that on principle res judicata - rather than Younger - should have precluded resort to the federal court.

As I understand the situation, the state trial court has issued a permanent injunction against Pursue. Pursue thereupon had a right to appeal but elected not to do so.* Thus, at the time Pursue sued in the federal court nothing was pending in state courts. To be sure an injunction was outstanding in final and binding form. But I have not thought of Younger as being the proper response to a federal suit to restrain enforcement of a final state court injunction. The answer for me seems to be res judicata.

Indeed, as I stated at the Conference on Ellis v. Dyson, (which Harry is writing), I think that a 1983 action is barred when it purports to relitigate an issue (whether civil or criminal) finally resolved in a state court. I expect

*I am not sure that the period within which an appeal could be taken had expired. This seems irrelevant, however, in view of appellee's election not to pursue state remedies.

Attached to 2-10-094
73-296

Bill - I had hoped to discuss this with you today, but my time has slipped by.
I'm not positive about my position & want your views. We'll talk when I return

February 10, 1975

LP to WR

No. 73-296 Huffman v. Pursue

Dear Bill:

Thank you for the opportunity of taking an advance look at your 5th Draft.

I continue to have difficulty with Part IV. As a general observation, the draft may overdignity - or overargue - an issue which seems to me to be subject to relatively peremptory treatment. As I understand it, the issue is whether the civil litigant in this case (which has quasi criminal overtones) should be permitted "simultaneous litigation in state and federal courts". The case is in the posture of simultaneous litigation because of your assumption that the state proceeding is still pending. I would dispose of the asserted right to simultaneous litigation without an elaborate distinction of habeas corpus, going back into Fay v. Noia, its misreading of history, and congressional intent.

If it is necessary to refer at all to the difference between a habeas and a civil defendant, I would rely briefly and simply on the most fundamental difference: the central reason for habeas corpus is to afford a means, through an extraordinary writ, of redressing an unjust incarceration. The absence of restraint on liberty in a civil case is a conclusive distinction. I would say no more.

I return herewith a copy of your 5th Draft, in which I have indicated - in broad strokes - one way of restructuring Part IV. I repeat, however, the concern I expressed in my previous letter as to whether your basic assumption is supportable, namely, that there is reason to believe a state proceeding is still pending in the sense that the decision

to file a separate opinion (dissenting or concurring) in Ellis on this ground.

It is true, as Potter noted at our Conference in this case, that the issue of res judicata was not raised by Ohio.* Nevertheless, if I were writing Huffman v. Pursue I presently think I would say that Younger is inapposite in the absence of a state proceeding actually pending,** that the only issue is the application of res judicata in 1983 cases, but that the state failed to present that issue. Accordingly, I would remand the case for reconsideration in light of the intervening decision of the Ohio Supreme Court.

* * * *

I hesitate to present a view as to the applicability of Younger that I did not voice at the Conference. It has been prompted in large part by my position in Ellis v. Dyson. It would be intolerable, at least for me, to allow parties to employ 1983 as a means of collateral attack on an otherwise valid state judgment, whether civil or criminal.

Sincerely,

L Lewis

Mr. Justice Rehnquist

lfp/ss

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*My Conference notes indicate that Potter further stated that "it probably could have been raised".

**I would, of course, leave open the question whether Younger applies in a civil context. If the move into the federal court had occurred during the pendency of the state case and before the issuance of a final judgment, Younger should bar federal intervention.

February 20, 1975

No. 73-296 Huffman v. Pursue

Dear Bill:

I think your major revision of this case is most constructive and certainly meets most of the concerns which I expressed to you. I am grateful for your reconsideration.

Although I will join your opinion (and circulate a formal join note) I am inclined to file a one-paragraph concurrence along the lines enclosed. I read the substance of your opinion to be in accord with my brief concurrence; yet, I have a slight preference - especially in view of what I have said in Councilman and will say in my forthcoming dissent in Dyson - to file the concurrence.

If, however, you have a preference to the contrary, I will gladly abide by your wishes.

With my thanks.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	An Appeal from the United States District Court for the Northern District of Ohio.

[February —, 1975]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court. I write only to emphasize my understanding that the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971), are applicable to this case because, at the time appellee filed his suit in Federal District Court, he had adequate remedies still available to him under state law. Had the state court judgment become final prior to appellee's filing in federal court, then this case would be governed by traditional principles of res judicata, see *Schlesinger* v. *Councilman*, — U. S. — (1975).

which he had failed to exhaust

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 27, 1975

No. 73-296 Huffman v. Pursue

Dear Bill:

Please join me.

Sincerely,

L.F.P.

Mr. Justice Rehnquist

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

October 11, 1974

Re: No. 73-293 - Huffman v. Pursue, Ltd.

Dear Lewis:

I agree with your proposed form of order in this case.

Sincerely,

WHR

Mr. Justice Powell
Copies to 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: 1/21/75

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[January —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires that we decide whether our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), bars a federal district court from intervening in a pending state civil proceeding which is based on a state statute believed by the District Court to be unconstitutional. This issue was raised in *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 411 U. S., at 577. Similarly, in *Speight* v. *Slaton*, 415 U. S. 333 (1974), we noted probable jurisdiction to consider this issue, but we remanded for reconsideration in light of a subsequent decision of the Georgia Supreme Court which struck down the challenged statute on similar facts. Today we do reach the issue, and conclude that in the circumstances presented here the principles of *Younger* are applicable even though the pending state proceeding is civil in nature.[1]

[1] Other recent cases in which this issue has been recognized include *Mitchum* v. *Foster*, 407 U. S. 225 (1972), and *Sosna* v. *Iowa*, —

Lee 6, 9, 13, 15, 16, 12

STYLISTIC CHANGES THROUGHOUT

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

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[January —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires that we decide whether our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), bars a federal district court from intervening in a pending state civil proceeding which is based on a state statute believed by the District Court to be unconstitutional. This issue was raised in *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." 411 U. S., at 577. Similarly, in *Speight* v. *Slaton*, 415 U. S. 333 (1974), we noted probable jurisdiction to consider this issue, but remanded for reconsideration in light of a subsequent decision of the Georgia Supreme Court which struck down the challenged statute on similar facts. Today we do reach the issue, and conclude that in the circumstances presented here the principles of *Younger* are applicable even though the pending state proceeding is civil in nature.[1]

[1] Other recent cases in which this issue has been recognized include *Mitchum* v. *Foster*, 407 U. S. 225 (1972), and *Sosna v. Iowa*, —

STYLISTIC CHANGES THROUGHOUT

See pp 1, 2, 6, 8, 10-18

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:

Recirculated: 2/14/75

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[January —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires that we decide whether our decision in *Younger* v. *Harris*, 401 U. S. 37 (1971), bars a federal district court from intervening in a state civil proceeding such as this, when the proceeding is based on a state statute believed by the District Court to be unconstitutional. A similar issue was raised in *Gibson* v. *Berryhill*, 411 U. S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.*, at 577. Similarly, in *Speight* v. *Slaton*, 415 U. S. 333 (1974), we noted probable jurisdiction to consider the applicability of *Younger* to noncriminal cases, but remanded for reconsideration in light of a subsequent decision of the Georgia Supreme Court which struck down the challenged statute on similar facts. Today we do reach the issue, and conclude that in the circumstances

p. 17

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:

Recirculated: 2-12-75

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-296

Lawrence S. Huffman, etc., et al., Appellants, *v.* Pursue, Ltd.	On Appeal from the United States District Court for the Northern District of Ohio.

[January —, 1975]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires that we decide whether our decision in *Younger* v. *Harris,* 401 U. S. 37 (1971), bars a federal district court from intervening in a state civil proceeding such as this, when the proceeding is based on a state statute believed by the District Court to be unconstitutional. A similar issue was raised in *Gibson* v. *Berryhill,* 411 U. S. 564 (1973), but we were not required to decide it because there the enjoined state proceedings were before a biased administrative body which could not provide a necessary predicate for a *Younger* dismissal, that is, "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved." *Id.,* at 577. Similarly, in *Speight* v. *Slaton,* 415 U. S. 333 (1974), we noted probable jurisdiction to consider the applicability of *Younger* to noncriminal cases, but remanded for reconsideration in light of a subsequent decision of the Georgia Supreme Court which struck down the challenged statute on similar facts. Today we do reach the issue, and conclude that in the circumstances

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 3, 1975

MEMORANDUM TO THE CONFERENCE:

Re: Holds for No. 73-296, Huffman v. Pursue, and No. 73-1119, MTM, Inc. v. Baxley.

No. 73-982, Adult Book Store v. Sensenbrenner, is a petition for certiorari seeking review of an Ohio Supreme Court judgment entered following a Miller remand. The case involves an injunction against the sale of 127 specific pornographic items, each of which was determined to be obscene under pre-Miller standards. On our remand, the Ohio Supreme Court relied on a case decided the same day, State ex rel. Keating v. A Motion Picture Entitled Vixen, 35 Ohio St. 2d 215, for the proposition that the state's statutory definition of obscenity met the Miller standards. It then concluded that a trial court considering the issue of obscenity under that definition (which was not the one under which the original determination of obscenity had been made) "could come to no other conclusion" than the one reached in the first instance." The court therefore affirmed the original decision without remand for further trial court proceedings. Petitioner seeks cert claiming that the new obscenity statutes are unconstitutional due to vagueness and overbreadth problems, and that the 127 items involved are not obscene under Miller standards.

The Huffman and MTM decisions have no bearing on this case, since the lower federal courts are in no way involved in the litigation. On the issues presented, I would deny.

Wm Doyle 0c/7

In 106 Forsyth Corp. v. Bishop, No. 73-1176, petitioner seeks review of CA 5's affirmance of a district court decision which permitted a City Council to revoke petitioner's license to operate a movie theater pursuant to ordinances which provided for such revocation when a theater intentionally exhibited obscene films, or when it carried on the business of an "Adult Movie House" within 200 yards of a church. The suit was filed after the City Council notified petitioner that a hearing on revocation would be held. Petitioner challenged the constitutionality of the ordinances and of the procedures which would be used, claiming that the ordinances constituted a prior restraint and that the hearings would not provide the procedural safeguards required by Freedman v. Maryland, 380 U.S. 51, and Blount v. Rizzi, 400 U.S. 410 (judicial review of the council's determinations is by certiorari to the state courts). The CA relied on Paris Adult Theatre, and on the particular procedures in this case, especially respondents' promise not to revoke the license until all judicial review procedures were exhausted.

The suit is an effort to interfere with an administrative proceeding, and there is not even an appeal of right to a state court capable of considering constitutional issues; thus Huffman's bar to federal judicial interference is not implicated. The prior restraint issue is identical to that in Huffman, but the question was not reached and the decision offers no guidance. I would deny, especially in light of the time-place-and-manner nature of the alternative ground for revocation, that of operation of an "Adult Movie House" within 200 yards of a church.

In Fair v. Smith, No. 73-2013, petitioners are Allen County, Ohio, officials engaged in yet another foray against Pursue, Ltd's Cinema I. Here, they filed a misdemeanor charge alleging exhibition of obscene materials, and promptly subpoenaed respondents to appear at an adversary hearing and to produce the allegedly obscene films. They appeared, but claimed Fifth Amendment immunity against production of the films, even though they did not own the films. After this claim was rejected, they contended the films were no longer in their control; the court thereupon held them in contempt and ordered a 10-day jail term unless the contempt was purged. Without exhausting state remedies, respondents filed a § 2254 petition in federal court. The district court (N. D. Ohio, Walinski) granted relief. It

thought exhaustion was not required because prevailing state law was plainly against respondents' position. On the merits, it thought the case not to be within the U.S. v. Dionisio, 410 U.S. 1 (1973) (voice exemplar) and Schmerber v. California, 384 U.S. 757 (1966) (blood exemplars) doctrine, on the grounds the evidence was not sought merely for identification purposes, and that surrender of the films required active participation on the part of respondents, not the mere passive participation required in Schmerber. CA 6 affirmed without opinion.

Petitioners contend the films are "real" evidence, not communication, and that disclosure may therefore be compelled under Dionisio and Schmerber. They also contend that the films were possessed in a representative rather than personal capacity, and thus under Bellis v. U.S., 417 U.S. 85 (1974), are not subject to claims of privilege. Finally, they raise the interesting contention which was not reached in Maness v. Meyers, U.S. (No. 73-689, Jan. 15, 1974), that public display of the films waived any Fifth Amendment privilege which might otherwise have been available.

The case is not affected by either Huffman or MTM. Aside from the exhaustion problems, I believe it is plainly erroneous under Bellis. I would summarily reverse or grant, vacate and remand for reconsideration under that case.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 3, 1975

MEMORANDUM TO THE CONFERENCE:

Re: Cases Heretofore Held for No. 73-296 -- Huffman v. Pursue, Ltd.

No. 73-1973, Art Theater Guild, Inc. v. State of Ohio ex rel., Ewing, is an appeal from the Supreme Court of Ohio challenging the nuisance statute which was at issue on the merits of Huffman. It is the case in which the Ohio Supreme Court interpreted the statute to permit reopening of a closed theater upon a showing, inter alia, that the nuisance would not recur, where the nuisance was understood to be the particular film. The court based this construction on its opinion that to require a showing that no obscene film would be displayed would violate the prior restraint principles of Freedman v. Maryland, 380 U.S. 51 (1965). Appellants raise a variety of constitutional challenges to the statute as so construed, and also contend that because the adjudication of obscenity in this case occurred prior to our Miller decision, a remand is necessary for reconsideration of obscenity vel non in light of Miller. Huffman has no bearing on these matters, and I would be content to DFWSFQ.

No. 74-691, Schmidt v. Lessard, is an appeal from a three-judge district court decision invalidating the Wisconsin statutory provisions for civil commitment of the mentally ill, and prescribing the procedures required to comport with due process. Appellee originally sought release from custody for herself and members of her class. However, the final version of the district court's judgment,

Wm Daylu 04 74

entered after remand by this Court for compliance with Rule 65(d), F.R.Civ.P., 414 U.S. 473, does not provide for her release from custody, although arguably it does so with regard to class members. According to appellee's response to our request that the Preiser issue be briefed, release from custody for Lessard herself is no longer in issue, by operation of a statute by which a commitment order expires after one year of conditional release -- having met the one-year requirement, Lessard is no longer subject to commitment under the order emanating from the 1972 commitment proceeding.

The district court's final decree contains a declaratory judgment that the Wisconsin statutes were unconstitutional for specified reasons; that Lessard's order of commitment was invalid; that class members were being unconstitutionally held; and that persons subject to commitment were entitled to specified procedural safeguards. The judgment also enjoined state officials to follow the specified procedures in subsequent commitment proceedings; to permit access to court and hospital records of involuntarily committed persons; and to note upon the records of involuntarily committed persons that they had either been released pursuant to Lessard or recommitted according to its procedural specifications.

The district court considered whether it was without jurisdiction under Younger. It concluded that it was not, because: (a) Younger is not applicable to civil proceedings; (b) the state proceeding was not pending because Lessard had not received written notice of it at the time she filed her federal complaint (she was plainly aware, however, that a proceeding was underway, by virtue of appointment of a guardian ad litem, examination by physicians, emergency confinement, and an interview with the judge); (c) that the state proceeding was not "the type of proceeding against which principles of federalism and comity had been directed"; (d) and that as of the date of its decision, there was no appeal available from the state proceeding, were such an appeal ever available.

On the basis of Huffman, I think that the district court's reliance on points (a), (b) and (d) was plainly misplaced. Its point (c) may be decisive, but the court

did not ask the critical question, that of whether the state proceeding was one in which the constitutionality of the state statutes could be challenged. I have been unable to find a clear answer to the question, and do not think we should attempt to fashion one. I would therefore remand for the reconsideration in light of Huffman, although this is not a happy resolution since the merits are important and we have already once remanded the case. I am buoyed in this approach, however, by the presence of other procedural problems which may absorb our attention and even prevent our reaching the merits. In particular, I refer to the Preiser issue raised by the district court's declaratory judgment that class members are being held unconstitutionally and by its injunction that their records be noted to show either release or recommitment under Lessard procedures. In addition, there is some difficulty with whether Lessard is a proper representative for a class which seeks not merely protection against future commitment proceedings, but which also seeks relief against custodial status imposed under prior proceedings.

In order to focus the district court's inquiry, and in hopes of clarifying the procedural problems should this case come back to us, I recommend the following order list disposition:

> The judgment of the district court is vacated and the cause is remanded for further consideration in light of this Court's decision in Huffman v. Pursue, Ltd., No. 73-196 (Mar. 18, 1975). The district court should consider whether the civil commitment proceeding which is the subject of appellee's complaint was one in which constitutional challenges to the validity of relevant statutes could be presented and adjudicated. If such challenges were within the scope of the pending state proceeding, the complaint should be dismissed. If such challenges were beyond its scope, the district court should then address itself to whether appellee, in light of her discharge by lapse of time, is a proper representative of the class for the purpose of litigating the constitutionality of the custodial

detention of class members. Should the district court conclude that the class is properly represented, it should consider whether its relief with regard to custodial detention is barred by Preiser v. Rodriguez, 411 U.S. 475 (1973).

It is so ordered.

No. 74-793, Marks v. Leis, is an appeal from consolidated three-judge district court cases challenging the nuisance statute involved in both Huffman and Ewing. The parties apparently never raised, and the court never considered, the jurisdictional problems that might be caused by the pendency of two state court nuisance proceedings against the appellants herein, one filed by a private citizen and the other by a county prosecutor. Appellants sought to enjoin the enforcement of the statute, and thus those proceedings. The district court granted summary judgment for appellees, and entered a declaratory judgment that the statutes were constitutional. In so doing, the court relied to some extent on the narrowing construction in Ewing, but also on the proposition that the padlock provision was a time-honored remedy running against a place, and was neither censorship nor prior restraint.

The Huffman issues are not presented in such a fashion that we can appropriately attempt to resolve them. The record is confused as to exactly what proceedings were under way at what points, and as to exactly what Huffman rights the parties may have waived, explicitly or otherwise. Moreover, the failure of the parties to raise the issues would seem, under Sosna, to preclude our basing a decision on them. While we could accord the appellees the opportunity to raise them by remanding for reconsideration in light of Huffman, I would prefer to affirm. Such a remand would itself seem inconsistent with the Sosna waiver principle, and I believe that the constitutional issues were correctly resolved, at least in light of the Ohio Supreme Court's narrowing construction in Ewing.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 3, 1975

MEMORANDUM TO THE CONFERENCE:

Re: Holds for No. 73-296, Huffman v. Pursue, and No. 73-762, Sosna v. Iowa.

No. 73-1643, Darden v. Witham, is a petition for certiorari to CA 4 to review its affirmance of a district court dismissal of petitioner's civil rights action challenging the South Carolina statute which permits attorneys fees in divorce actions to be awarded to wives but not to husbands, regardless of circumstances. At the time he filed suit, petitioner was litigating the attorneys fees issue in state court, and had raised the constitutional issue before the South Carolina Supreme Court. The district court (D.S.C. Hemphill) dismissed, principally on Younger grounds as a result of the comity which it felt obliged to accord the state courts. In extending Younger to a purely civil case, it relied on CA 4's Lynch v. Snepp, 472 F.2d 769 (1973). A three-judge court was not convened, despite petitioner's prayer for an injunction against both the state proceedings and enforcement of the challenged statute. CA 4 affirmed, on Younger comity grounds, and on the assumption that the issue would be resolved by the state court.

Petititioner contends that the district court should not have dismissed. Rather it should have retained jurisdiction pending decision in state court; he argues that this is the appropriate procedure in abstention cases. He also contends that under Steffel v. Thompson, 415 U.S. 452, n. 7 (1974), a three-judge court was required to dismiss on Younger grounds.

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Well after the petition was filed, on October 11, 1974, the South Carolina Supreme Court rendered a decision adverse to petitioner. The constitutional issue was not reached because it had not been raised in the state trial court. 209 S.E.2d 42, 45. Petitioner has not sought certiorari from this decision.

This case is not squarely controlled by either Huffman, since it is purely civil, or MTM, since that case left open the issue of whether convention of a three-judge court is required for a Younger dismissal. See MTM, n. 6. I would nonetheless deny. The fact that the state court proceedings have been completed raises problems of both mootness and res judicata which could readily derail any attempt to resolve the Huffman issue. As for the three-judge court issue, I do not think it worthy of a grant in this case, especially since the district court's opinion can be read to rest in part on the absence of a genuine prayer for injunction of the enforcement of a state statute by state officers -- the court viewed the state defendants (a state judge and two clerks of state courts) as "perfunctory" defendants named in "an effort to come within the periphery" of the three-judge court statute. App. at 5a.

Sincerely,

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 8, 1975

MEMORANDUM TO THE CONFERENCE:

Re: Cases held for No. 73-296, Huffman v. Pursue, Ltd.

No. 74-858, Carey v. Sugar, and 74-859, Curtis Circulation Co. v. Sugar, are appeals from a three-judge district court which held unconstitutional and enjoined the enforcement of New York statutes which permit prejudgment attachment upon ex parte allegations of fraud. The statutes at issue incorporate most of the protections which in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), were the basis of our distinction of Fuentes; the significant exception is that under the New York scheme the post-attachment hearing is at the instance of the debtor, who also bears the burden in that proceeding.

Huffman is implicated because of the pendency of the state fraud action which was the occasion for the prejudgment attachment; discovery was in progress when the federal complaint was filed. Appellees never raised in state court the issue of the constitutionality of the attachment statutes.

The district court did not enjoin or otherwise interfere with the underlying fraud action. But it did render nugatory a significant judicial proceeding which was ancillary to the main proceeding, and which presumably afforded an opportunity to test appellees' constitutional claims. Thus I would consider the case to be subject to Younger, were its considerations of comity and federalism applicable to purely civil proceedings. I do not, however,

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think that a Huffman remand is in order, because of the failure of the parties to raise the issue. See Sosna, n. 3. Moreover, because of the presence of state officials as appellants, there is no issue presented as to whether private parties may waive the state interests which undergird Younger and Huffman.

I would thus reach the merits, and would note probable jurisdiction for reasons which have nothing to do with Huffman. I do not think the Mitchell/Fuentes - Di-Chem distinction should turn on whether there is an automatic hearing at which the creditor has the burden of proof. Especially is this so when, as here, the attachment is based on alleged fraudulent dissipation of assets, since the relevant evidence would normally be readily available only to the debtor. Nor should this case turn on the district court's other, and I think weaker, distinctions of Fuentes.

Should appellants raise the Younger issue during briefing or argument, then this case might prove to be a vehicle for considering its application in the context of purely civil state proceedings.

Sincerely,

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