Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. 60

LEANDER H. PEREZ, JR., et al.

Appellants,

vs.

AUGUST M. LEDESMA, JR. et al.

Appellees

Place Washington, D. C.

Date November 17, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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LEANDER H. PEREZ, JR., et al., Appellants,	)	
vs	)	No. 60
AUGUST M. LEDESMA, JR., et al., Appellees.	)	

The above-entitled matter came on for argument at 11:36 o'clock a.m., on Tuesday, November 17, 1970.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in Perez against Ledesma, Number 60.

ORAL ARGUMENT BY CHARLES H. LIVAUDAIS, ESQ.

ON BEHALF OF THE APPELLANTS

MR. LIVAUDAIS: Honorable Chief Justice and may it please the Court.

MR. CHIEF JUSTICE BURGER: Mr. Livaudais.

MR. LIVAUDAIS: This is a case also involving obscenity; is involving the criminal prosecution by Appellee Ledesma in this case both for the sale of obscene publications and the possession of obscene publications with the intent to sell.

The primary issue in this appeal, raised on appeal, is a procedural question in enforcing the state statute. And the question as posed to the Court is whether or not in a state criminal prosecution under a valid and constitutional state statute which has been found constitutional by the three-judge court, relative to sale and possession with intent to sell obscene material and publications, it is necessary that there be a judicial adversary hearing prior to the arrest and prosecution of the defendant to determine in advance of his arrest or prosecution whether or not the materials and publications involved are obscene under the terms of the state statute.

We will have other related issues which I will

cover in connection with this in reference to the jurisdiction of this Court on appeal in light of 28 U.S.C. 1253 in the Dunn case which has been discussed. We also have had files connected involving injunctions and declaratory judgments under 2283, which has also been discussed and intervention by Federal Courts in a state proceedings and abuse of discretion by the District Court in this case.

This case originated on January 27, 1969 when two deputies of the St. Bernard Parish Sheriff's office in the State of Louisiana, purchased four obscene publications from Ledesma at his store in the St. Bernard Parish in Arabi, Louisiana. These publications and the other publications I will refer to are all here with the record which I brought in filing with this Court.

Ledesma was arrested and at the timeof his arrest these deputies selected certain publications -- the three-judge court found it be the number 45, from his shelf, as evidence.

Four bills of information were filed against him by me in the state court; two of them under the state statute relative to sale and possession with intent to sell obscene publications and two almost identical bills of information under the Parish ordinance. These two charges under the Parish ordinance which were almost identical to the state ordinance was subsequently nolle prossed or dropped by me.

In his prosecution in the state court, Ledesma

was afforded an adversary judicial hearing, focusing on the obscenity of these publications, and informed of a motion to suppress the evidence and a motion to quash the indictment which he filed in the state prosecutions.

Basis: one allegation that our statute was vague and overbroad and the other was that the materials were not obscene. This was decided -- within two weeks after his arrest he had his hearing in state court and we tried this issue and the state was denied the motion of Ledesma.

Wanting another bite of the apple, he then went to Federal Court to ask the Federal Court for relief under the civil rights statute, asking to declare both our state statute and our parish ordinance unconstitutional for vagueness and overbreadth, and also asking for injunctions against pending and future state prosecutions and also asking that we be enjoined from retaining the publications in our possession and using them in the prosecution.

Also he askedfor damages in the sum of $30,000 each for his clients.

After a long and prolonged hearing in court -- not in court, but a proceeding in the District Court after the three-judge court was convened, on July 14 of 1969, some five tosix months after the arrest, the three-judge court, in a two-to-one decision, with Judge Rubin dissenting, held, first of all, that our state statute, the two provisions: subsections

2 and 3 involved here and weren't held to be constitutional. Judge Rubin concurred in that.

The Court in its order, stated, and I say they allege, that they denied to grant the injunctive relief. As a matter of fact, they say, "We specifically deny injunctive relief."

Q They didn't deny that they granted injunctive relief in this case?

A Your Honor, I'll get to that, but my opinion, and I think this Court will see that we were enjoined, both pending and future prosecutions were enjoined in this case, that the Court, worded its judgment in this way so as to get around the provisions of Article 2283 and this Court in other cases which I will give to the Court shortly, look through this particular type of action by a court where trying to evade 2283 and actually had an order which had practical effect, the operating effect of an injunction on --

Q There was a suggestion that you can't appeal here; can you?

A That's correct, Your Honor. That unless jurisdiction in this matter was deferred to hearing on the merits today.

Q You have to construe what the judge said and perhaps --

A Yes, Your Honor.

Q the result as meaning: you must stop doing this; if you don't, something will happen to you. Isn't that right?

A That's right; that is the way I construe the judgment of the Court. In the record --

Q Is that not -- I don't know about Louisiana -- but is that not a fairly familiar technique of District Courts to say, in effect, that they will not enter a formal order or injunction on the assumption that the parties will abide or suggestion that they are not going to proceed with the prohibited acts?

A That is a common practice, Your Honor, and one that I do not think is advisable for a District Court to take. I think that Article 65, Subsection C of the Federal Rules of Civil Procedure is a mandate to the Federal District Courts, especially the three-judge courts that when they are dealing in the area of injunctions, as was stated in the footnotes in one case by this Court, that they should be specific; that it is, in effect, unfair for them to deal with areas such as this and not deal with them in a clear manner so that their intention is obvious to the parties. That was the problem in the Dunn case.

Q Did you trust the court to conform the record to the reality, the reality that you say is --

A Yes, Your Honor. First of all, I would like to

point out that in this case, as opposed to other cases I have been arguing, we did not agree to stop our prosecution. The records show that, first of all, our case was set for trial in February of 1969. The record does not show that, but a note of evidence with regard to the conference with Judge Boyle in this case, shows that our case was first -- again set for trial on April 21st of 1969. That is in the record at page 97, I think -- co-counsel will find that.

Also, that was continued to that day to give this three-judge court the time to issue its decision which it had not done as of that time. It was continued to April 28th of 1969. It was again continued by me after a phone call from the District Judge, saying that the decision by the three-judge court would be rendered in the near future and that we would be able to take whatever action we had to after that.

So, we did not abide by any requests. We do not concede to this Court that they, that we would have to halt our prosecution prior to their decision.

Now, in their decision --

Q Wasn't there a court order, though, under the declaratory judgment? I mean, the order said, "return all of the materials" --

A Yes, Yes.

Q They ordered you to return all of the materials and not to use them at any future prosecution?

A That's right. They ordered us to return all of the materials instanta, instantly.

Q Is that an injunction or an injunctive order for purposes of Appellant jurisdiction?

A I would say it is, Your Honor, in connection with the wording in the judgment itself which said, and I quote: "The pending prosecution should be effectively terminated." That was the wording of the judgment at page 97 in the appendix to this record.

"The pending prosecution should be effectively terminated." Now, whether they say "should be enjoined," or effectively terminated, it has the same meaning. It is our contention that we were enjoined and that this order ordering us to give up our evidence, to return it instanta and also to suppress it in any prosecutions, both pending and future is, has all the practical and full force operative effect of an injunction upon us. What better way to stop our prosecution than to take our evidence away from us and to tell us that we will not, in good faith, continue the prosecutions or to say that the prosecutions should be effectively terminated.

Now, Your Honor, there is a case and it's not in my brief, I wish to cite to the Court at this time, in connection with the Gun case, which came out after my brief was at the printer's: International Longshoremen's Association versus The Philadelphia Marine Trade Association, found at 389 US 64.

In that case there was an order, an arbitration award in a labor dispute and it was not before a court but then, after a dispute arose over the arbitration order the union went into court and they asked the court to give an order and the court gave this order: "That the arbitration award be specifically enforced;" and then he went on: "all the union to comply with and abide with the award."

And on the appeal to this Court, even though the word "injunction," was not used; Your Honors held, and I quote:"Whether or not the District Court's order was an injunction, it was an equitable decree compelling obedience under the threat of contempt and was therefore an order granting an injunction --

Q Well, you don't have to, to have jurisdiction here, you don't have to have an order enjoining a criminal prosecution; all you would have to have is an injunction. And if the Federal Court issues an order requiring you not to use certain evidence in a pending Federal prosecution, isn't that an injunction?

A Yes, sir. As a matter of fact, to look at Ledesma's petition, both his original petition and his amended petition, his prayer asks for injunctive relief to keep us from retaining the books in our possession. That was his request and that is what he got, the injunction that he asked for.

Q Did they mean to physically return all of this

seized property; did they?

A Yes, Your Honor, they did; it was instanta. The only way I could stop thatorder was to get a stay order pending the appeal to this Court and that is one of the reasons why the books are here before this Court at this time. I transmitted the books here. They had been introduced into evidence in this prior hearing before the three-judge court.

Now, Your Honor, in light of the Dunn case in which actually the word "injunction" was used and this Court held that it was not an injunction; and this other one in a Longshoreman's case, where the word "injunction" was not used but this Court looked through the attempts of the Court to evade the issue of 2283 and actually issue an injunction even though 2283 says it cannot --

Q Well, in that case I think the Court held that it was an order granting an injunction?

A Yes; and that's what we had the right of appeal for --

Q And it further went on to hold that it did not comply with the Federal Rules; that it was so ambiguous and unclear an order that they couldn't expect anybody to obey it; wasn't that the holding in that case?

A That's right; the holding in that case, but --

Q What is --

A Just the converse is true in our case. It is

crystal clear from the decision who is enjoined; Perez, Wendling, Bethea and Reichart are enjoined. What is enjoined? The prosecution pending and future under Title XIV, 106, Sections 2 and 3. This is all right in the opinion, page 97 and the prior pages in the opinion of the court. What was enjoined, these pending and future prosecutions and arrest.

So, I think that this complies with Rule 65C and the only abuse or discretion outlined here by the three-judge court was deliberately making it look like they were not enjoining us.

Q You agree that what you had to look at ultimately is not their opinion, but the order?

A Yes, Your Honor.

Q Which is under Section 107.

A Yes. And the operative effect of the order read in light with their opinion.

Q Right.

A And also in the -- another case in which this was the same type of action: Atlantic Coastline case, which also was decided in June of this year, Your Honors also looked at the order in that case. The order ordered the railroad not to take advantage of the State Court prosecution and Your Honors in that, used the word "evade." They said that "The District Three-Judge Court cannot evade the mandate of 283 by enjoining the railroads. We'll look right through that and see

that actually you are enjoining a pending state prosecution."

Q You are just arguing jurisdiction?

A Because jurisdiction was deferred by Your Honors to argument today.

Q You don't need to prove that the prosecution was enjoined?

A Your Honor, I was just arguing the case completely. I think I have shown not just the prosecution but the obtaining of the evidence and the orders of the Court.

Now, the sole reason, again looking at the decision of the court, the sole reason for the entire decision of this Court can be seen both in the judgment and the footnotes, Appendix 96 and 97, was that this Court held that there must be a prior judicial adversary hearing in this case. That is the sole reason for doing what they did and they so stated. This is a concept that they derived from the Marcus case and the Quantity of Books cases which are referred to in my brief.

I wish to point out again to the Court: this time that we did have in this case an adversary judicial determination of obscenity. There was hearing in court on Ledesma's motion to quash and motion to sppress wherein the District Court did view the books and made its determination. He did have an adversary judicial dissent motion.

The only thing new being requested is that this be a prior hearing; that this adversary hearing be held before any

arrest or any prosecution of the defendant. And I submit, Your Honor, that this Court has never held that in a criminal prosecution that this is necessary. As a matter of fact, you have indicated your preference for the conventional course of criminal procedure, again enforcing these cases. Not to say that other methods cannot be used, but I think that in these decisions -- for instance in the Kingsley Books case there in New York, attempted to supplement the conventional course of criminal procedure in dealing with these cases.

The problem with the Court at that time was that you were hesitant to allow them to supplement their procedures. And throughout the cases: Roth, the Alberts case, which I quoted in my brief there, Your HOnors indicated that such a hearing was not necessary, by its light.

In the New York Feed case and the Milky Way cases which were decided in February of 1970 by Your Honors, you summarily affirmed the decision of the three-judge court which held affirmatively that this adversay judicial determination of obscenity was indeed, a novelty, was unnecessary and afforded no special protection to the books, taking cognizance of the concurring opinion of Chief Justice Warren in the Roth case, that in these cases involving criminal prosecution it is the person who is on trial; not the books.

That decision was summarily affirmed by this Court and as seen in the record, page 121 in the appendix, after

Your Honors came out with your summary affirmation of the New York Feed and Milky Way cases, I went back to our three-judge panel and I told them, in my motion, which is in the record here, that the Supreme Court has finally decided this issue as to whether or not there must be a prior adversary hearing in criminal prosecutions. And I filed the motion; we argued the case; submitted memorandums and a motion was denied.

And I submit that this, number one, is proof of the injunctive intent of the lower court and also, Your Honor, I feel that in this case they are asking you to take jurisdiction and to decide these issues, because obviously, from the action of the three-judge court in our case the summary affirmation by Your Honors is not enough to straighten out the morass that has resulted in the Three-Judge District Court in this area.

And we must have a pronouncement from this Court as to whether or not this type of hearing is necessary and that is what we are asking you to do at this time.

We also feel, Your Honor, that we do have a question in arguing the other cases before us of 2283, the Abstention Doctrine, in view of Dombrowski, Cameron and the Atlantic Coast cases. And we just wish to point out strongly in line with that that there is no finding of bad faith on our part in this case. There was a specific finding of good faith on our part and the Cameron case, read together with Dombrowski and Atlantic Coast cases are specific that before these three-judge

courts can interpose themselves in the place of the United States Supreme Court in state prosecutions that there must be bad faith prosecution -- there must be a statute which is found unconstitutional.

In our case the Court specifically found that the sections of our statute that we're dealing with were constitutional.

Now, the Court also abused its discretion in ordering us to return the books and in not invoking the Doctrine of Abstention and I argue this in connection with the Court's action in our parish ordinance unconstitutional.

With reference to our parish ordinance, Your Honor, there is no case, there is no controversy of sufficient immediacy and reality to warrant the action taken by the court. In Golden v. Zwickler, which is a clarification of Zwickler v. Kutta, this Court held that although the Court might have jurisdiction to hear declaratory judgments what is allegations of the controversy in the absence in an actual controversy of sufficient immediacy and reality, the Court should not make declaratory judgments in an advisory capacity only. The purpose of this being, obviously, to keep the three-judge courts from taking the prerogative of the United States Supreme Court to issue these doctrines, especially in these cases of obscenity, which is so critical to our whole procedure in prosecuting these cases in court.

One obvious result that we can see from the three-judge court stepping into these cases is the facts as stated in the previous case, "I Am Curious Yellow," involving that, that there are five other cases pending in Federal District Three-Judge Courts involving these same issues. And it is my contention that if these cases were allowed to go through the normal course of the procedure as stated in the Atlantic Coast case, that we would not have the confusion that we have today in this field of obscenity.

(Whereupon, at 12:00 o'clock p.m. the argument in the above-entitled matter was recessed, to resume at 1:00 o'clock p.m. this day)

1:00 o'clock p.m.

MR. LIVAUDAIS: Mr. Chief Justice, and may it please the Court: Before the noon recess I had, for all practical purposes, concluded the bulk of my argument.

At this time I would like to sum up what I consider the major points of my argument; one is: the jurisdictional question, which I think that we have answered clearly as far as the injunctive intent of the Three-Judge District Court in this case. Also the fact that in cases involving criminal prosecutions, there are adversary judicial hearings, and that in light of this Court's summary affirmation of the Milky Way and New York Feed cases, that there is no need to have this hearing prior to arrest of the defendant in the case. This, in effect, would give no more protection to the publications than having a hearing after the arrest. That this extraordinary protection which is not allowed in Federal law, would serve to help the lawbreaker; it would not have any further effect in securing the First Amendment rights.

We do feel that there has been a definite abuse of the Court's discretion under the provision and the mandates of Article 2283 and of the dictates of this Court in the Dombrowski case, the Cameron case and the Atlantic Coast case. In our case there has been no finding of bad faith of any kind by the lower court.

Our state statute, subsections 2 and 3 which are the

only ones before this Court today, have been held constitutional and there has been no appeal taken from this decision of the Court by Appellees in this case.

We feel that there has been an abuse under the Declaratory Judgment Act and that the Doctrine of Abstention should have been invoked in this case in reference to the Three-Judge Court's declaring our St. Bernard Parish Police Jury Ordinance unconstitutional. I base that on the finding, not,in Zwicker v. Koota, which has been submitted to this Court in previous argument, erroneously, I think, but in the case of Golden v. Zwicker, which enlarged this Court's viewpoints in Zwicker v. Koota in which this Court specifically has referred to Zwicker v. Koota from which it originated, that there must be a controversy of sufficient immediacy and reality. There was no such issue before the Three-Judge Court in our case and that there are no pending prosecutions under that ordinance and there were no, in view of the fact that the prosecutions had been terminated, there were no threats of any future prosecutions under that ordinance.

So, here we have a case of clear abuse by a Three-Judge Court under the provisions of 2283 by interfering with state court prosecutions and going even further than that in legialating criminal procedure for state courts and I think that in doing this that these Federal Three-Judge, that this court has abused its powers and usurped the powers of this Court in

deciding Louisiana Law.

I will save the remainder of my time for rebuttal. Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Peebles.

ORAL ARGUMENT BY JACK PEEBLES, ESQ.

ON BEHALF OF APPELLEES

MR. PEEBLES: Mr. Chief Justice and may it please the Court: I think there are basically three issues which this case presents to this Court at this time. First, there is the threshold question of whether or not this Court has jurisdiction of this appeal in view of the provisions of Section 1253.

Once that hurdle is passed, I submit that the issues then are: first, did the court below use its discretion in granting the relief it granted or does Section 2283, the Federal Anti-injunction Statute, prevent the court below from taking the action that it took?

And then the fourth question: if this Court has jurisdiction and the court below properly considered the issues on the merits below, then did it properly decide the merits in this case?

But, before getting into those questions, I would like to emphasize certain facts in this case which I think are relevant and should be called to the Court's attention.

When August Ledesma, the news stand operator in this

case, decided to mark off a section of his news store in Chalmette, Louisiana and sell within that section to adults only, erotic literature, he did so with the full knowledge that the Sheriff's Department was aware of what he was doing and would be watching what he was doing. He was not secreting his publications; he was not selling them even under the counter.

So that the Sheriff's Department had adequate time to take any procedural measures that are constitutionally required. They cannot argue that there was any impediment of time facts which would have prevented them from giving Ledesma the full measure of his procedural constitutional protection, to which he would be entitled.

But, in view of this fact, on January 27, 1969, after watching his store for some time, they went in, purchased a couple of magazines, briefly looked at them and then arrested and seized 45 other of his publications on hand. They did not seek to obtain, nor did they obtain an arrest warrant; they did not seek to obtain, nor did they obtain a search warrant; they did not seek to have, nor was held, any kind of adversary hearing before a judge or magistrate which could have given them any kind of judicial opinion as to whether or not these publications were obscene. Rather, this raid occurred, simply because two members of the Sheriff's Department in this parish in Louisiana, decided that in their opinion the publications

were obscene.

Now, there was only one prosecution in this case; that's true, but I think it should be pointed out further that the deputy sheriffs made it clear that the rest of these magazines that were in that store had to be taken off the stand.

The affidavit filed by Ledesma and by his attorney below, indicated that one of the deputies toldhim on three separate occasions: "You had better get rid of the rest of these magazines," and of course, there was no doubt of what he was talking about. There would have been further prosecutions if he had not done so.

Now, in view of this fact, the three-judge court below, rendered certain relief. First, it declared that part of the state statute and the parish ordinance were unconstitutional. This case below is combined with another case called Delta Book Distributors versus Cronvich. And in the other case with which this case was combined below, the criminal defendants had been charged under Section 7 of the State Obscenity Act. So that in its decision in this case the court below held that Section 7 of the State Obscenity Act was unconstitutional on its face for overbreadth.

And in view of the statements by this Court in Zwickler versus Koota, we feel that this should be kept in mind.

Further, the court below declared that the procedure

of arresting and seizing these publications without adversary hearing, was unconstitutional and then the court ordered a return of the seized magazines and their suppression--and evidence in the state criminal prosecution. And the court below did not enjoin the state criminal prosecution and specifically declined to do so. It did not enjoin further arrests in the future; it did not enjoin the state prosecution facing Ledesma and resulting from these seizures. It simply exercised its authority as a court protecting Federal rights by determining what would happen to these magazines, and specifically it said, "Give the magazines back because you seized them in violation of constitutional rights."

Q You said what the court in this submission did not enjoin; do you think there was any injunction here? Was that an order granting injunction?

A That depends, Your Honor, upon what we mean by an injunction, and of course, takes us right into the threshold question of whether or not this Court probably has jurisdiction. Yes, Your Honor.

The court specifically said that it did not enjoin the defendants --

Q Well, it did not say that; it said that the preliminary and permanent injunctions prayed for be denied. It didn't say it wasn't issuing any injunctions.

Q Enjoined the use of the evidence --

A It certainly did, Your Honor; it not only enjoined the use of that evidence, but required that that evidence be returned to the petitioners below.

Now, in view of that decision by the court, we now call the Court's attention to the decision of Dial versus Fontaine, decided by this Court June 29, 1970, with Mr. Justice Douglas dissenting. In that case the facts are substantially similar to the facts in this case. And in Dial against Fontaine this Court held that it did not have jurisdiction in the appeal.

I'd like to mention briefly the facts in the Dial case. In Dial, arising from the Western District of Texas, the police authorities had seized a movie and the only question before the Three-Judge Federal Court in that case was: was the seizure proper?

That court held in Dial versus Fontaine below, that the procedure for seizure was unconstitutional and was declared to be unconstitutional. Second, in Dial the Three-Judge Court below as in our case, ordered the materials which had been seized, to be returned.

And third: in Dial the Court below prohibited the defendants from utilizing the statute in the future without a prior adversary hearing having been held.

But, just as in our case, in the Dial case the court below refused to interfere in any manner with the criminal

prosecution based upon the showing of the film.

Q What do you suppose the effect of paragraph 2 of the order in this case would have on any future criminal prosecutions?

Q What page is it on?

Q It's on page 107.

A I think it would have the effect, Your Honor, of making it impossible for the prosecution to proceed. And, likewise, I think in Dial the requirement that the material be returned likely would have the same effect. Yes, Your Honor.

And I can only say that in Dial this Court felt that it did not have jurisdiction and I don't see a distinguishing factor in that case between that case and this case, on that threshold question.

Q When was that case decided?

A Dial, Your Honor? Dial was decided June 29th by this Court and the citation below was 303 Fd. Supp.436.

Q And we dismissed?

A You dismissed for lack of jurisdiction, citing --

Q D-i-a-l?

A D-i-a-l, Yes, Your Honor. And in that case you cited Dunn versus University Committee as the basis for your decision.

But, as this Court does feel that an injunction was

issued here, and thus that it has jurisdiction to entertain this appeal, then we raise the further question of whether or not the court below properly exercised its discretion and whether it, in fact, was forbidden by 2283 from doing what he did.

Q I'm having a little trouble squaring that with what you responded to before when I asked you if it was not a fact that the court had enjoined the use of all this evidence; and I thought you said it did enjoin the use, and --

A It did.

Q -- and returned the exhibits to your client.

A It did, Your Honor.

Q Well, then there is an injunction; isn't there?

A It would seem so to me, Your Honor, but in view of the fact that this Court held no jurisdiction in Dial, in which case the Court were also required a return of the seized materials, then there may be some question about it.

Q Well, if they -- assume a state statute, for example, authorizes wire tapping on the use of evidence in criminal cases under controlled situations and a man is indicted and is about to go to trial and he sues the Federal Court to enjoin, to have declared unconstitutional the state wiretapping statute and to enjoin the use of any wiretap testimony in his criminal trial. And the Federal Court declares the statute unconstitutional and does enjoin the use of any of that evidence.

That's roughly this situation; isn't it?

A Yes, Your Honor.

Q And you think that the Dial case means that there is no jurisdiction here?

A The Dial case held that there was no jurisdiction and I cannot find a distinguishing factor from that case to this case.

Q Thank you.

A Yes.

But, assuming this Court does have jurisdiction, then does 2283, the Federal anti-injunction statute --

Q Is Dial an argued case here?

A I don't know, Your Honor, whether it was argued or not. I do not know.

Q You do not know the number of the volume?

A Below, Your Honor, or here?

Q Here.

A I have it, Your Honor.

Q You said it's in Law Week, I thought.

A It's in Law Week; yes, Your Honor. That's Number 1032 of the October Term, cited at 90 Supreme Court, 2235.

Q 399 U.S.521. 399 U.S.521.

Q How does the form of the order read; have you got it?

A Yes, Your Honor. In the Dial case decided by this Court, Your Honor?

Q Yes.

A First it says: "Facts and Opinion, giving the lower court citation: June 29, 1970 pro curiam. The appeal is dismissed for want of jurisdiction. Dunn versus University Committee. Mr. Justice Douglas dissents from the dismissal of the appeal."

If the Court please, yesterday our argument, other counsel fairly adequately covered, I think, the question of the effect that 2283 may have on the Civil Rights Statute. Suffice it to say that we simply take the position that the Civil Rights Act is aneact which expressly provides for an injunction and it is an exception, and one of the exceptions spelled out in the language of the Federal Anti-injunction Act.

We feel that the Reconstruction Congress of 1871 clearly intended that in an approprate case the Federal Court should intervene in a state proceeding. However, we would point out that in the facts of this case, 2283 should not be considered a bar because the court below did not grant "an injunction to state proceedings in a state court" which is the language of 2283.

Now, it did suppress the evidence and it did exercise jurisdiction over those magazines by requiring them to be returned, but it specifically did not stay the proceedings in

the state court. It did not say they could not go forward with the criminal prosecution.

Q How could the state prosecute without the books?

A It could not, effectively, Your Honor.

Q What's the difference, then? What's the effective difference?

A No effective difference, Your Honor. I think it's a question of whether they specifically stayed the injunction or simply had the effect of staying the injunction. We submit that if it's never had the effect of staying the proceedings below, then it would not be forbidden by the --

Q What worries me about it is in one paragraph they say they are not doing it; they say, "We will not grant a temporary or permanent injunction, but we will retain jurisdiction."

A They did that, Your Honor.

Q How do you interpret that?

A I interpret,that, Your Honor, to mean that if the state should resume prosecution they would then exercise the authority to effectuate their declaratory judgment by enjoining the state prosecution. That's my interpretation.

Q The only difference is that at that stage they can't be held in contempt and the only difference between their being held in contempt and not being held in contempt is a

little piece of paper which says "permanent injunction." That's the only difference?

A I think so, Your Honor.

Q If you had refused to return the exhibits, as ordered, and on the contrary, had gone to trial the next day or very soon; offered them in evidence; do you think your friend, do you think he might have been in contempt?

A I think he would have been, Your Honor; I do.

Q Very seriously; wouldn't he?

A I think so.

Q So, whatever name we give this exercise, he was prohibited from doing something?

A Yes, Your Honor. There is no question about that.

Now, with regard to 2283, yesterday Mr. Justice Stewart, inquired of one of the attorneys as to whether any studies had been made of the increased number of requests for Three-Judge Courts, and their effect upon the judicial system. Yesterday afternoon I located a comment in the April 1970 edition of the Harvard Law Review, which may be appropriate there.

In an article entitled: "Section 1983 Jurisdiction" the commentator pointed out that an examination of 100 private civil rights cases reported in the Federal Supplement in December, 1966; March, 1968, it shows that 67 were dismissed

without a trial or hearing, the vast majority in the face of the complaint.

"This statistic suggests,"said the writer, that no Section 1983 cases even now are quickly disposed of and pose lower time problems for Federal Courts. In the remaining 35 cases plaintiffs obtained preliminary relief in 12 without an evidentiary hearing. Only seven cases appear to have been tried and five of those resulted in a judgment for the plaintiff."

Q What that also suggests is that it requires a good deal of wasted time of members of FederalCourts; it's a problem that perhaps is easy in a circuit like the Second Circuit or the First Circuit, but in the larger geographical circuits the very assembling of one circuit judge, which is requiredby the statute, in two districts, that is, and they are traveling to whatever place it is going to be held, can add up to a great deal of expenditure and judicial time. And if, as it turns out, most of the cases end up by getting dismissed, I suggest it's a good deal of wasted time; isn't it?

A Yes, Your Honor. Certainly this process can be abused. However, if a complaint is considered frivolous the District Court is under no obligation to request a Three-Judge Court.

Q That's right.

A And I submit that this situation is roughly

analogous to the removal situation. Now, there for a while we had a flurry of removal cases, but once it's seen that the Federal Courts simply are not going to inappropriately intervene, unless there is really a chilling effect by the prosecution in a state criminal case, then counsel will surely learn not to waste their time.

But, we submit that the decision initially as to whether or not to implement the provisions of the injunctive authority should rest with the District Court. Federal-State relations are not cemented for the future and we don't know but that there may be some time in the future in which Federal Courts will find it very necessary to intervene in these situations.

We submit that the discretion of the lower court should be respected and perhaps, to coin a phrase, this Court should exercise "Appellate Judicial Restraint" in that regard and permit the District Courts to make their initial determination.

Incidentally, the Sixth Circuit, on September 9th, in the case of Honey versus Goodman, held that the anti-injunction statute did not bar 1983 proceedings even after the proceedings were instituted in state court. So that, at least in the view of that court the Atlantic Coastline decision from this Court, does not mean that you can't proceed with the 1983 action.

Now, to move on to the third question, then --

Q The dates of the -- the anti-injunction statute 2283, and 1983 --

A 1983 was passed as a part of the original Civil Rights Act in 1871, Your Honor.

Q And what was the other?

A I believe 1793 was the original Anti-injunction Statute. The original Anti-injunction statute I believe was 1793, Your Honor. It was a very early statute.

Q Thank you.

A So that the Reconstruction Congress had that in mind and it nonetheless, passed 1983 which provided for suits in equity.

And we come to the merits of the case. Counsel for the Appellant has argued specifically on the question of whether an adversary hearing is required before an arrest can be made. We call the Court's attention to the fact that in this case there was no judicial supervision whatsoever; no application for an arrest warrant or search warrant, either and none was obtained, in spite of the fact that they had all the time they needed in order to attempt to obtain such.

I really go further than that and argue that the court below was correct in its determination that there should be, if time and circumstances permit, in the specific fact situation involved, then there should be a prior adversary

judicial hearing on the question of the obscenity of the publications before the publications can be disturbed by the prosecuting officials.

Now, we say that because that is the method by which the publications should be given the maximum procedural protection to which we feel the presumptively protected First Amendment materials are entitled.

Some opinions from this Court have indicated that there may be materials that are hard core, and that these can be recognized easily. But, speaking from the standpoint of someone like Ledesma, I can assure the Court that it is extremely difficult to distinguish between those publications which will get you in danger of prosecution or conviction in those publications which are safe. It is impossible to do so.

In our neighboring State of Mississippi we recently had one Federal District Court to hold that the movie, "The Fox," was not obscene as a matter of law, and a neighboring District Judge in Mississippi held that it was hard-core pornography; the very same film.

Now, there are simply differences in this area of obscenity because of the subjective values involved and the opinions of the Deputy Sheriff of St. Bernard Parish can be so different from those of a news stand operator or an attorney or judge that we feel the only serious approach to take, as long as the Court does feel that there is not an absolute right to

possess and disseminate erotic materials under controlled circumstances. As long as this Court takes the position that the state can suppress the very controlled dissemination of these materials, then surely there must be a procedure by which the newsstand operator can know what is safe for him to sell and what is not safe for him to sell.

We submit that experience has shown that in the circumstances of obscenity the only fair way in a situation in which an adversary hearing can be held, is to grant a news stand operator an adversary hearing.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Livaudais you have a few minutes left.

REBUTTAL ARGUMENT BY CHARLES H. LIVAUDAIS, ESQ.

ON BEHALF OF APPELLANTS

MR. LIVAUDAIS: Mr. Chief Justice, and may it please the Court: I would first like to comment on the Dial case which has been mentioned with reference to the jurisdictional question.

That case was decided by this Court that jurisdiction was declined on the same day that Your Honors referred our case to an argument on the merits and I am sure you saw the distinction, in that case, as I see, between that case and our case. That is that in the Dial case the Court recognized that this case involves only one contested issue of law; that is,

whether or not the constitution of the United States requires an adversary hearing to determine the question of obscenity, must be held prior to the arrest.

Now, that was submitted, by stipulation of the parties to the Court strictly for the Court to decide that issue. There was no pending prosecution; there was not even a threat of future prosecution. What this Dial case amounts to is a submission by both sides for declaratory judgment in that case and I feel that that must be what this Court recognized when it declined jurisdiction in that case. There was no pending prosecution and no threats; no issue other than the one issue as to whether or not a prior adversary hearing is necessary. That is the sole issue in the Dial case and I just what I just quoted to you is from the report in 303 Fd. Supp. 436 at page 438.

So there is an easy distinction between the Dial case and our case and ours is a contested case, where there are questions of constitutionality about statutes; questions of bad faith in enforcement of the statute. And there is an easy distinction to make.

There have been some comments made by counsel concerning, not to even use the word "threats," I don't think, but something akin to that, by the police officers in this case. I would like to point out to this Court that in the findings of the District Court after a hearing on this case -- they wanted

to hear on affidavits, so we heard it on affidavits, but we did submit affidavits. They found no bad faith; they found no threats; they found no bad faith at all on our part. Their decision was made strictly on this question of the adversary hearing which is an erroneous decision.

This issue has been settled by this Court in the New York Feed and Milky Way cases, which asks the specific question and this Court affirmed that decision. This time we are asking the Court to reaffirm that decision, your decision in the Milky Way and New York Feed cases, using your own words, that once and for all these Three-Judge Courts will understand what Your Honors are telling them. This is a problem that happens when we have so many Federal Three-Judge Courts interfering with state prosecutions, each one of them giving their own pronouncement and they are so different, as to cause great confusion in the law.

And our confusion in this field of obscenity has been caused not by Your Honors in the United States Supreme Court, but by the Three-Judge Courts that have so many varying opinions as to what should be the law of the land in this area.

Q You are now addressing yourself now to the propriety of any action of the Three-Judge Court in cases generally, but you are talking about the necessary antecedent conditions to an obscenity prosecution; is that correct?

A Yes, Your Honor; both, I would say. But in this

particular instance concerning prior -- Your Honors have spoken out on this, in the New York Feed and Milky Way cases.

What I say is that this is evidence of the entire overall problem of the Three-Judge Courts making pronouncements that really should be made by this Court.

Q And you say have beenmade in the Milky Way case?

A Yes; that have been made, but unfortunately that case was a summary affirmation. I think that's the reason why I couldn't set our court on it. They want to hear it from your own words; they don't just want a summary affirmation as to a lower Three-Judge Court's decision.

I think that if the lower courts would follow more of the mandates of 2283 and let the conventional course of procedure go through you wouldn't have a lot of the problems you had in our case and in the other cases I have heard today. One problem you have had in all of these cases has been a lack of a record; a lack of evidence. You can't really tell what a case is about unless you have had a file on it. In our case we dohave a number of affidavits; for instance, we have affidavits in the record of our sheriff, stating that he received complaints from clergy and people in the neighborhood and schools and churches. We have affidavits in our record that show that we have had minors in this very store, we have affidavits of minors in this record stating that they went into the store and

got publications. This is evidence of the fact that these books do get to the children no matter what type of safeguards are attempted.

In view of this, Your Honor, we ask that you accept the jurisdiction and that you issue your own pronouncement as to this prior adversary hearing and reaffirm the decision in the New York Feed and the Milky Way decisions and reaffirm the pronouncement of the Atlantic Coast case in reference to 2283 to stop this constant interference by a Federal District Court in state court actions.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Livaudais; thank you, Mr. Peebles. The case is submitted.

(Whereupon, at 1:30 o'clock p.m. the argument in the above-entitled matter was concluded)