In the

Supreme Court of the United States

DAVID MOOR, et al.,

Petitioners,

v.

COUNTY OF ALAMEDA, et al.,

Respondents.

No. 72-10

Washington, D. C.
February 27, 1973

Pages 1 thru 53

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DAVID MOOR, et al., Petitioners,	:	
v.	:	No. 72-10
COUNTY OF ALAMEDA, et al., Respondents.	:	

Washington, D. C.,

Tuesday, February 27, 1973.

The above-entitled matter came on for argument at 1:31 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RONALD M. GREENBERG, ESQ., 615 South Flower Street, Los Angeles, Calif., 90017; for Petitioners.

PETER W. DAVIS, ESQ., 1939 Harrison Street, Oakland, Calif., 94612; for Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments now in No. 72-10, Moor against County of Alameda.

Mr. Greenberg.

ORAL ARGUMENT OF RONALD M. GREENBERG, ESQ.

ON BEHALF OF THE PETITIONERS

MR. GREENBERG: Mr. Chief Justice, and may it please the Court:

For purposes of this appeal, the facts are not really in dispute in this case.

What happened, essentially, is that on May 15, 1969, our clients, David Moor in one case and the plaintiff William Donovan Rundle, Jr., in the other case, were shot by an Alameda County deputy sheriff in connection with the Peoples Park disturbances in Berkely.

Subsequently, a suit was filed -- actually, two suits -- against the deputy that shot our client, his superior officers for their own acts, and the County of Alameda.

The concern here is only with that aspect of the case against the County of Alameda.

What's involved here are three separate and distinct concepts of Federal jurisdiction:

The first, the Civil Rights Acts jurisdiction, the second pendent jurisdiction, and the third diversity jurisdiction.

The diversity jurisdiction issue relates only to the Moor case. It has no application whatsoever to the Rundle case.

Of these three issues, we would submit that the clearest example of error by the court below is in connection with the ruling on the diversity issue.

For over 100 years, this Court, Courts of Appeals, District Courts and at least two District Courts within the Ninth Circuit, have consistently held that political subdivisions of a State, such as the County of Alameda, are considered citizens of the State for diversity jurisdiction purposes.

For some unexplained reason, we have the rather anomalous result that, with respect to California counties, they are presently not considered citizens of California for diversity jurisdiction purposes.

Q Is it your position that, regardless of the relationship of a county to a particular State, it should be one rule throughout the country?

MR. GREENBERG: Barring at least a circumstance which would show that the State is in essence the real party in interest in the case, correct.

And I can't think of a political subdivision, such as a county, in any State in the Union where that would be the case.

Consistently, in every case we have researched on the point, it has always been that the county is separate and distinct from the State.

Taking this case, for example, anyone who is familiar with California law and California politics, would have to concede that the State of California is not the real party in interest in this case.

No liability is being sought against it. If we procure a judgment, it won't be liable for it. Indeed, it is not even a party in interest, let alone a real party in interest.

So, for those reasons, I would urge on the Court that, even if we are successful with respect to the Civil Rights Acts jurisdiction contention or the pendent jurisdiction aspect, or both, that the Court also reverse the diversity aspect jurisdiction holding.

I know for a fact that it has had serious effect, for example, on out of State contractors who wish to sue counties with which they contract in the State.

As a result of the holding in this court, there is no diversity jurisdiction. The county is not a citizen, and there is just no explanation given for that rule.

Q It arose in kind of an offhand, casual, way, I gather, in the Ninth Circuit, originating with a brief opinion by the late District Judge Mathis. It was accepted by the Ninth

Circuit and then everything else was built on that.

MR. GREENBERG: There are really only two opinions by the Ninth Circuit that even enunciate that point. One is the Miller case which was a pro per case, and then our case, in which it was cited as authority.

I think one could search both of those opinions in vain to find any reasoned analysis as to why, in essence, the court feels that the State of California is somehow the real party in interest in our case. And that's really what you have to conclude to conclude it is a State agency.

Q In the other cases -- and you are quite correct, in my understanding, that there are many of them -- which do hold that a county is a citizen for diversity purposes, is there any analysis of the particular relationship between the county and the State in the --

MR. GREENBERG: Well, I would cite two clear examples of the two district courts within the Ninth Circuit who have refused to follow the Ninth Circuit holding, the Oregon case and the Arizona, in which at length analyzed the nature of the county and showed, quite conclusively, that it wasn't the State of Oregon or the State of Arizona.

There are other cases cited in our brief which also engage in this kind of analysis. Indeed, some of them say that's the kind of analysis you should make when a claim is made that the particular defendant is, in essence, a State

agency.

No such analysis was made here.

We have briefed at length, in our brief, all of the powers and functions of the County of Alameda that distinguish it from the State of California.

I think both the county and the State would be surprised if they found out they were considered one and the same.

Q Why is the State not a citizen of the State?

MR. GREENBERG: Starting with the Eleventh Amendment, you can't sue a State --

Q That's a different reason. I mean, in one case, you would be saying there is an affirmative defense based on the Eleventh Amendment. In the other case, you are saying there is not the basic prerequisite for jurisdiction.

MR. GREENBERG: I think that this Court has held, and many courts have held, that a State cannot be a citizen of itself. That's a firmly established rule that we don't even question in this case. We are not here contending that the State is even a party, let alone the real party in interest.

We will live with that holding.

Q Part of your assertion is that the county is not equivalent to the State, even though it is a subdivision of the State.

MR. GREENBERG: That's correct. The State is clearly

not the real party in interest in this case.

Turning next to --

Q What about corporations chartered by the State?

MR. GREENBERG: They have long been held to be citizens of the State for diversity jurisdiction purposes, and the most recent enunciation by the California Supreme Court has said that counties are quasi-corporations of that nature.

Turning next to the Civil Rights Acts jurisdiction aspect of our appeal, I think you have to take it step by step.

The first question is, does Section 1983 allow for the doctrine of respondiat superior? That's the first basic question.

If one was to look at Hesselgesser v. Reilly, McDaniel v. Carroll, Lewis v. Brautigam, clearly, it seems that conceptually there is such allowance.

An additional case, which I would add, which is not cited in our brief but which specifically discusses this point is a case called Hill v. Toll, 320 Fed. Sup. 185, at pages 188 and 189, which involved Pennsylvania law.

Briefly, the court there addressed itself specifically to the respondiat superior concept and said, in essence, as regards this case, we note that the well settled doctrine of respondiat superior is not expressly abolished by Section

1983, nor does the legislative history make it clear that Congress intended the doctrine not to apply to Section 1983.

Further, the salutory reason for the doctrine's application to common law torts, i.e., the furnishing of a deep pocket from which a claimant can collect, argues just as forcefully for its application to the cause of action created by Section 1983.

And, conversely, we find that it is nowise less appropriate to apply respondiat superior to Section 1983, than to common law torts.

Accordingly, we now decide, consistent with traditional injunction, that remedial statutes are to receive a liberal construction, that respondiat superior is impliably a part of the Civil Rights Act.

Now, once you accept that premise, you next look to the source of that vicarious liability.

We are not here arguing today that the source of that liability is Section 1983.

We are not here arguing that the source of that vicarious liability is any other Civil Rights Act Federal law.

Rather, we are saying the source of that vicarious liability is the California Tort Claims Act. State law.

Just as the source of the sheriff's vicarious liability in Hesselgesser, the sheriff and surety's vicarious liability in McDaniel, and the sheriff's vicarious liability in

Lewis, were State law. No difference.

Q Are there some California cases that hold also that the county may not be a plaintiff? There must be, for purposes of diversity jurisdiction.

MR. GREENBERG: To my knowledge, no case has been cited to us and -- as a result of the Tort Claims Act, the law says the county can sue and be sued. We presume that when it says a county can be sued, can sue, it means it can be a plaintiff.

Q Yes.

MR. GREENBERG: As well as defendant.

Specific authorization was given in 1963 by the California law for that.

Now, turning then to the source of liability, two rather anomalous results would occur if the defendant's position is adopted. They are as follows.

Up until 1963, California law was that the sheriff was vicariously liable for the torts committed by his deputy.

A case called Reynolds v. Lerman, 138, Cal.Ap.2d, 586, specifically held that.

When the Tort Claims Act was enacted in 1963, Section 820.8 was enacted,which specifically says that one public employee cannot be vicariously liable for the acts of another public employee, rather it is the employing public entity.

Now, the whole policy of the Tort Claims Act was

obviously to place ultimate financial responsibility where it could best be realized, and to allow the party injured by a public employee opportunity for meaningful redress.

Yet, if we adopt the defendant's position, while California sought to increase the likelihood that a plaintiff might recover for the wrongs of a public employee, we would have the opposite effect in this case, because we would say, in essence, that while we could have sued the sheriff vicariously, under cases such as we have discussed, somehow we can't sue the county.

Q Does the California Tort Claims Act have an exemption or exception with respect to governmental discretionary functions?

MR. GREENBERG: No, and in this case, there would be no such exception that would apply.

Q Well, do they have any in the Act itself?

MR. GREENBERG: If there --

Q Is there one comparable to the Federal Tort Claims Act, for example?

MR. GREENBERG: Not to my knowledge.

Second, the logical result of the defendant's position is simply not only that a Federal court cannot impose that State created liability, but because Congress did not intend public entities to bear this ultimate liability, that a State court can't even impose it and, indeed, a State can't

pass such a law.

And, yet, I cannot imagine that the defendants are here even taking the position that California, as a matter of its law, doesn't have the authority, power, or what have you, to pass a law saying that its public entities will be vicariously liable for the torts of their employees, including Civil Rights Act violations.

That's a State law determination. That's a policy determination.

And, the only next question then becomes, can a Federal court also impose that State created liability?

To that, we look to 1988 in Section 1343.

Now, 1988 is not a jurisdictional section. It doesn't create any cause of action. It doesn't confer any jurisdiction.

Title 28, 1343, confers jurisdiction on the Federal courts to enforce, and, in the words of it, I believe, "any act of Congress which is provided for the protection of civil rights."

Looking at Section 1988, if it is not an act of Congress, I don't know what it is.

And if it wasn't designed for the protection of civil rights, I don't know what it was passed for.

It clearly falls within that language.

And, thus, there is no violation to Monroe, to 1983,

or to any other civil rights act provision, by saying that the Federal court can utilize 1988 in the fashion it was intended and have jurisdiction to impose that State created liability.

This, then, brings me to the final jurisdictional contention we make, and, which is perhaps the most difficult.

That is, if we assume arguendo that, by some quirk, 1988 doesn't mean what it says, that the California Tort Claims Act can't impose this vicarious liability, but can, at the same time, impose vicarious liability for the State battery or State negligence wrongs committed by the public employee, can the county be joined as a pendent party on the pendent State claims that are otherwise before the Court?

Now, in a sense, we have something like an Astor-Honor type analysis, because you do have a Federal statute which can be construed along with pendent jurisdiction, really, to bring about the result of joining the county.

But, taking it just in the abstract, for the moment, we are concerned here with the concept of judicial power, not discretion.

There is no opinion from this Court that we are aware of that has precisely discussed the joinder of a pendent party.

The trend since Gibbs has been certainly that pendent jurisdiction can be utilized, that the considerations

and policy which led to its liberalization, they were further liberalized in Rosado, and if the criteria otherwise available for pendent jurisdiction, there is at least the power to join, perhaps, a pendent party.

Now, in the Courts of Appeals, the Second, Third, Fourth, Fifth and Eighth Circuit Courts of Appeals have expressly recognized this judicial power.

The Sixth Circuit, by implication, has recognized this power.

Yet, the Ninth Circuit stands alone. It is the only circuit, to our knowledge, to expressly hold that pendent jurisdiction does not allow for the joinder of parties, only claims.

Taking this case, for the moment. If we look to the traditional test, does the claim arise out of a common nucleus of operative fact? Clearly, there isn't even an additional fact involved with respect to the county's liability, because it is vicarious and dependent solely upon the liability of the individuals.

Q If you are right on the diversity jurisdiction point, you don't reach this, do you?

MR. GREENBERG: That's not correct.

Diversity is only in Moor.

One must get to Civil Rights Act jurisdiction and/or pendent jurisdiction --

Q Pendent jurisdiction. That's only in Moor, is it?

MR. GREENBERG: No, that's in both.

Pendent jurisdiction, if we are correct on diversity in Moor, then, in theory, the Civil Rights Acts jurisdiction contention and dependent party jurisdiction aspect may not have to be reached, although there would be an open question as to whether or not, as to the Federal causes of action.

If the county was joined on diversity, it could -- there would still be potential liability. However, --

Q What's the other case?

MR. GREENBERG: Rundle. They are companion cases. They were consolidated for appeal.

Q Say again, if you were right on your diversity point, then you don't have to reach any of these other questions in Moor, is that right?

MR. GREENBERG: With the possible exception of 1988, Civil Rights statutes.

Q Why?

MR. GREENBERG: Because the diversity jurisdiction question would leave open whether or not the county was vicariously liable for the Civil Rights Acts.

Q The whole question?

MR. GREENBERG: That's correct. And, in that sense, one would not have to reach it.

Q Oh.

Q Why would we have to reach in Rundle, assuming we agree with you on your diversity question.

MR. GREENBERG: Either or both. The Civil Rights Acts jurisdiction and --

Q Because finding diversity jurisdiction in Moor doesn't answer either question?

MR. GREENBERG: No. They are separate cases. The plaintiffs in Rundle are California citizens. The plaintiffs --

Q So there is no possibility of -- to find diversity in their case?

MR. GREENBERG: It was never even raised, never argued. Both of these people were shot at the same time, in the same place, and perhaps with the same shot.

That's why the two cases were brought together. They involve all of the same issues factually with respect to ultimate liability.

The only distinction that Moor has is he is an Illinois resident, and, as a result, we were able to raise the diversity jurisdiction issue.

But Rundle has to be resolved by either a resolution of Civil Rights Acts jurisdiction and/or pendent party jurisdiction.

Q Would deciding in your favor in one of those give you all the relief to which you think you are entitled?

Clearly, if we decide on the basis -- well, if you decide that there is Federal jurisdiction, under the Civil Rights Acts, then you really don't have pendent party joinder any more. You just have traditional pendent jurisdiction joinder, because now you are joining claims against whom you -- a party --

Q You already had a party in your 1983 action.

MR. GREENBERG: Right.

Q You must be suggesting you have to reach, in Rundle, pendent party, if you treat Moor as a proper diversity case.

MR. GREENBERG: Correct.

Q And then you have to get to the pendent party to bring Rundle in, if you lost out on the 1988 question.

MR. GREENBERG: Correct.

Q To bring the county in.

MR. GREENBERG: Pardon?

Q To bring the county in.

MR. GREENBERG: To bring the county, correct.

There are otherwise -- there are pendent State claims now pending against the deputy and the other individuals.

Q But just saying you can join a party through pendent jurisdiction doesn't tell us what kind of a claim that party might have?

MR. GREENBERG: No. One would think you would clearly have the State law claims.

Q Well, is that all you are saying? Are you saying that you can join the Federal claim?

MR. GREENBERG: I am saying, as follows, in this order.

The scope of the Civil Rights Act covers both the Federal and State claims.

There is no dispute that it covers the State claims, and, for some unexplained reason, the defendants have not briefed, in their brief to the Court, any argument that the California law does not also cover the Federal claims.

So, perhaps, they have abandoned that. I don't know.

However, true pendent party joinder, in one sense, would be only joining the county on the pendent State law claims, without regard to the Federal claims. Because, once you say that the county also has vicarious liability for the Federal claims, then, I think, you are clearly within -- you have to deal with 1988 -- then you get into an independent basis of Federal jurisdiction through 1343, because now you are talking about imposing the vicarious Federal liability.

Q Mr. Greenberg, if you prevail in Moor on diversity, and also prevail on the pendent party point, why haven't you got everything you want?

MR. GREENBERG: Oh, I'll have everything I want whether -- if I prevail on diversity and Civil Rights Acts

jurisdiction or pendent party.

Q No, pendent party only. I am asking you if you prevail on diversity and your pendent party point, what more do you want? Why do you have to have Civil Rights jurisdiction? You've got the State law, then, don't you? Vicarious liability.

MR. GREENBERG: It is all State law vicarious liability that's being imposed.

Q Well, don't you have enough?

MR. GREENBERG: Correct. If I could get the county into the case.

Q Mr. Greenberg, I suppose it is beside the point, but would it have been possible for you to get everything you want in a State court action?

MR. GREENBERG: Theoretically, yes, because there is concurrent jurisdiction of the Civil Rights Acts.

Q I had missed the last --

MR. GREENBERG: But, I think, we have tried to explain to the Court in our brief that, given the nature of this case, which involves Federal constitutional rights, if there is a type of case that really should be brought in a Federal court, I would think this is the type, and I don't think -- I think -- this Court has said before that merely because you can go to the State court isn't grounds for denying your choice of a Federal forum for adjudication of your Federal constitutional rights.

Q That's true, of course, in almost all these cases, but at least you wouldn't be up here battling jurisdiction.

MR. GREENBERG: No, but I might have been summarily thrown out in the State court altogether.

Q Mr. Greenberg, if you are right about State court's power under pendent jurisdiction, that's a matter of power, would you not still have the problem of whether or not the court in its discretion did not have wide discretion in refusing to exercise the power in a particular case?

MR. GREENBERG: No question about it, that if we concede that the power exists, the next question is discretion.

However, I think any fair reading of the District Court's opinion in this case will show that it never reached the discretionary aspect. It specifically said the issue is not one of discretion but rather lack of power.

The District Court further said he intimates no view on how he would decide the case, if he was possessed of the power, but because of Hymer v. Chai, the Ninth Circuit opinion, which specifically said there is no power for that joinder, the District Court never reached that.

There would not be discretion, however, with respect to Civil Rights Acts jurisdiction, if we are correct.

I reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Greenberg.

Mr. Davis.

ORAL ARGUMENT OF PETER W. DAVIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DAVIS: Mr. Chief Justice, and may it please the Court:

I think the analysis of this issue must first start with plaintiff's concessions, which are that he has not and cannot state a cause of action against the County of Alameda under any Federal law.

He is only asking this Court to have a Federal court hear State law, California causes of action against the County of Alameda.

And he is asking the Court for an expansion of Federal jurisdiction in three regards.

He is asking the Court to incorporate an entire body of California law through 1988, and then pretend that that's an act of Congress, within the meaning of Section 1343.

He is asking the Court to expand the concept of pendent jurisdiction to bring in a party defendant, not otherwise before the court, against whom no Federal cause of action has been stated, just because there is a related cause of action in the court against other parties.

And, third, in the Moor case only, he is stating that there is diversity jurisdiction because the County of Alameda is a "citizen" within the meaning of diversity jurisdiction, Section 1332.

Taking the 1988 argument first, which is the most difficult one, I think that there are at least three major objections to bringing in a State body of law under that section for the purpose of giving the Federal court jurisdiction of the State law cause of action.

First, from the language of the section itself, and from the reported decisions, it does not appear that Section 1988 was intended to create a cause of action -- in fact, plaintiff concedes this -- or intended to confer jurisdiction, or intended to do any more, really, than provide supplementary damage remedies to the District Court on a cause of action, a case over which it already has jurisdiction against the party over which it already has jurisdiction.

And the language of the section says, in itself, statutes of the State wherein the court "having jurisdiction of such civil or criminal causes held, shall be extended to engovern said courts in the trial and disposition of the cause."

We submit that Section 1988 should not be used to wholesale incorporate State law causes of action for torts of any kind or vicarious responsibility --

Q In 1983, in the light of Monroe and Pape, there could be no action against the county --

MR. DAVIS: That's correct.

Q -- and, therefore, since there is no jurisdictional proceeding against the county, you can't bring in 1988 to infuse

California law, is that it?

MR. DAVIS: Yes.

Q There is no Federal cause of action.

MR. DAVIS: There is no Federal cause of action.

He is talking about bringing in a State law cause of action.

Q That's what I said. There is no Federal cause of action under 1983 against the county.

MR. DAVIS: And they have admitted that.

Q Right. Under Monroe and Pape.

And your argument, now, is that, therefore, there is no jurisdiction in the sense required by 1988 before you can draw on State law.

MR. DAVIS: That's correct.

I am saying that 1343 requires an act of Congress and that's the jurisdictional statute.

And, using 1988 to incorporate an entire body of State law, is not an act of Congress. It is an act of the State legislature.

Q All right.

MR. DAVIS: And, in addition to that, the thing it has not met at all, the arguments that you cannot use 1983 simply by its own terms, where there is an adequate remedy, the Federal remedy is adequate, and you cannot use it to bring in any inconsistent State law. And, both of those considerations

are present here.

It has been pointed out in our brief and it is pointed out by petitioner in his brief, what California did in this case, instead of providing for the direct liability of public entities in this type of situation in 1983 suit, they said that, where the employee requested, the county must defend and indemnify the employee under Government Code Sections 825 and 895.

In other words, it is an indirect assumption to get at this principle of deep pocket, if you will, or provide a responsible defendant.

And that has been done in this case, as alleged.

The county is conducting the defense of all the employees.

Furthermore, it is also pointed out that the employees have their own insurance of $200,000, or more.

Now, the argument raised here has been that the employees are judgment-proof.

And I submit that petitioners have been less than candid with the court in making that kind of an assertion because it is quite obvious that they -- the defendants -- the individual defendants are not judgment-proof in any sense of the word.

And plaintiff's remedy is perfectly adequate, under Section 1983, 85, 86, against the five individual defendants.

And, that precludes application of State law under Section 1988.

Furthermore, it has been held in Monroe, the legislature, when it passed the 1871 Act, intended to exclude public entities.

Now, the argument is made here that, well, if the 1981 Congress were transported to the 21st Century or the 20th Century, and in light of the fact that some municipalities and States have conditionally waived sovereign immunity, they would have intended something different or passed a different act. But that's not the point.

As was held in Ries v. Lynskey, what we are looking at is what they intended at that time, and they intended at that time to exclude public entities.

Their motive in doing so is not relevant to statutory interpretation.

I think that point is very clearly established in Monroe and I think it is binding here.

To bring in, then, the public entity through 1988, is in derrogation of the intent of Congress. It is clearly against what Congress said they wanted to do at that time, that is, exclude public entities.

And, for that reason also, then, 1988 could not be used to incorporate this body of State law.

And, I would refer the Court also to the brief of the

District of Columbia in a related case of District of Columbia v. Carter, which was recently reversed by this Court. And, he discussed at some length the motives of Congress, and there are several references there.

I didn't brief this at length because it was in his brief and I didn't want to duplicate it.

Finally, I would point out that Monroe has been on the books for something like 12 years now, and in the interim Congress has enacted several major Civil Rights legislations, and has not changed the rule, and they have been asked to do so.

And, I think, that is indicative of the situation.

I don't think this Court should now try and change the rules of municipal liability and civil rights actions.

If Congress wants to do so, then, that is up to them.

All right, second, as to the issue -- I should point out one other thing, too.

There really isn't any reason to make this kind of a change.

Plaintiff not only has a remedy in State court, he has acted on it.

There is a case pending in the State court with the identical issues. In fact, the complaint is identical. It has been answered exit issue.

Q Who were the defendants in that?

MR. DAVIS: The same defendants, the five individuals in the County of Alameda.

It's pending in the State Court. It is not a theoretical remedy at all. It is a very practical remedy which he has taken advantage of.

Q Who is the plaintiff?

MR. DAVIS: Rundle.

Plaintiff Moor filed the claim, but maybe due to the small size of the case did not file a complaint.

Under California law, you have to file a claim first and then file a complaint after its denied, if it is, and that was done in both cases.

But a complaint was only filed on behalf of one of the two plaintiffs.

Q That is, under the Liability Act applicable to municipalities and counties, you have to file a claim first, before you sue?

MR. DAVIS: That is correct, under the Tort Claims Act.

Q You mentioned this liability insurance earlier. Enlarge a little on that, will you?

The county doesn't carry any --

MR. DAVIS: Outside of the record, all of the individual defendants are individually insured for, I believe it is, $200,000 for one injury or $500,000 or $800,000 for all injuries.

There is individual insurance applicable to all of them.

And, that is in addition to the county having to indemnify and defend the employees when they are requested to do so.

Now, this does not apply to punitive damages. This is to compensatory damages also.

And, as to the --

Q Compensatory damages only?

MR. DAVIS: Yes.

Typically, as a rule, it does not apply to punitive damages, and the California Tort Claims Act so states.

Q Is that a substitution for liability of the municipal corporation or is it in addition to that?

MR. DAVIS: In the case of a Federal Civil Rights Act, I would take a position that it is in substitution for.

In the case of an act under the California Tort Claims Act, it is in addition to.

Q That's why the county is joined in the State court action; I take it it's a proper party under California State law?

MR. DAVIS: That's correct.

He is sued in California under California Tort Claims Act, and joined to the county.

Now, there are some issues as to whether the county

is responsible directly, under the Civil Rights action and the State action, but since the county is a party anyway under the State action, it makes no practical difference, and that issue has not been asserted by the county so far because it is of practically -- of no significance at all.

The other thing I think it is appropriate to point out is that, as has been discussed before, the -- it makes more sense in a lot of ways to go at the indirect assumption of liability and require in Federal Civil Rights cases that the individual employees be located and served.

And, in my own experience, I found this to be true. And this was pointed out by the court in Ries v. Lynskey in the Seventh Circuit, that when you bring in an individual defendant, and you make him a defendant, and you take his deposition and you make him attend the trial, it has a very profound effect on him. It has a very sobering effect on him, win or lose.

Whereas, if you allow plaintiffs to sue an amorphous public entity the individual employees do not seem to feel so responsible for their own actions, that there is somebody out there that's going to take care of this, and they don't have to worry about it.

Q That leaves the alternative of suing them both, and achieving both --

MR. DAVIS: Well, that's also possible, but,

as a practical matter, if you allow suit against the public entity, you don't get suits against the individual as often.

Q Didn't you say the counties are joined with the policemen in the State action?

MR. DAVIS: In this particular case, they are, but in many, many cases they are not. They just sue the county.

Q Clear up one thing for me. You said the insurance does not cover punitive damages.

Does the obligation of the county to indemnify the employees cover punitive --

MR. DAVIS: No, it specifically excluded under Section 818 of the Government Code.

Q And the Tort Claims Act, I gather.

MR. DAVIS: That's part of the Tort Claims Act, yes.

Q In other words, if it is something that generates punitive damages, the policeman is on his own frolic. Or the employee is on his own?

MR. DAVIS: That's correct, the feeling being that punitive damages are not to compensate but to punish and that they won't punish unless the individual defendant, himself, feels them.

In other words, they would have to be awarded against him, individually.

To answer one of your earlier questions, Chief Justice Burger, there is a discretionary immunity section --

Q Could you raise your voice a little?

MR. DAVIS: I am sorry.

Q I think if you get more nearly the center of that microphone.

MR. DAVIS: I am sorry.

There is a discretionary immunity section in the Tort Claims Act, being Government Code Section 820.2, in response to your earlier question --

Q Is it essentially like that of the Federal Act?

MR. DAVIS: Yes, Your Honor, it is.

Q Well, are you suggesting that might reach all police action by the county?

MR. DAVIS: In this case? No.

But I do suggest it does reach a considerable amount of the claims against the superior officers.

One final issue on this point, and that is whether California does provide a direct right of action.

And, I think that it can most clearly be seen that it does not by reference to the California Law Revision Commission statement which was referred to by plaintiff in his brief.

Q What difference does that make right here?

If you are right so far, does it make any difference?

MR. DAVIS: Yes. No, it does not.

If I may, though, Mr. Justice White, read.

"The issue relevant to the present study, of course, is whether public entities, notwithstanding their immunity from direct liability, under the Civil Rights Act, should assume financial responsibility (whether through payment of insurance premiums to protect their personnel, or through assumption of payments of judgments against such personnel) for violations by their police officers of that Act.

"By analogy to suggestions offered earlier,it is believed that considerations should be given to adoption of statutory procedures under which entities in California would be required to assume ultimate financial responsibility for such torts of their police officers."

And, that's precisely what they did under Section 825 and 895.

Now, plaintiff says they did not specifically exclude 1983 actions. But you have to recall that this is in the wake of Monroe v. Pape, and, as they discussed there, the legislature knew they were already excluded. There wasn't any reason to make a supra or an extra exclusion for that point.

What they did do is provide, through 825 and 895, to defend and indemnify in such actions, instead of having the public entity a direct defendant in the Federal court.

There is also the point present here that putting the public entity directly into a Federal 1983 action would

seriously complicate the jury instructions. I believe, that would be present in the case.

As I pointed out in our brief, there are a large number of defenses and immunities that are applicable under the California action, which then would become present in the Federal case as to the entity.

Now, petitioner properly points out that under the pendent jurisdiction claims against the employees, some, but not all, of these defenses would be present anyway.

It seems to me that you are going to have a situation where you are going to tell a jury that as to the Federal causes of action you have these three defenses applicable, and as to the State law causes of action, you have these four or five others applicable, as to the employees.

But, as to the public entity, you have six others applicable whether it is a State law or Federal law cause of action, and then you are going to tell the jury that the public entity can only be held liable vicariously through the State.

And the jury is going to say, "What are you trying to say?"

It is a ridiculous situation. And it is an unnecessary situation to overly complicate the case.

I feel that a jury given that kind of instructions cannot possibly follow the law.

Q Now, let's see. This is an argument addressed to the second point of pendent parties?

MR. DAVIS: That would also be an argument addressed to the discretion issue on the pendent parties, but I think it is an argument that's present here, when plaintiff says he wants to bring in State law causes of action wholesale through 1988.

I think it is not only unnecessary, but it is unwise.

Q What about diversity? On Mr. Moor?

MR. DAVIS: Diversity is a problem.

I think, logically --

Q But you would agree it's not a question in Rundle's case?

MR. DAVIS: That's correct.

I think, logically, as pointed out by the Constitution statutes of the State and by the County of Marin case cited, that a county is simply a public --

Q Let me get it straight. If they say there is diversity here with respect to Moor, and assume that you won in Rundle, could Rundle's case be pendent to Moor's? Your argument would take care of that, too, I suppose.

MR. DAVIS: That's close to the situation in Hatridge.

You mean if the county is properly in the Moor case

under diversity, are they then pendent, because the cases are consolidated?

And, I agree, that makes a much tougher case.

Q If you are wrong on diversity, then, does -- do we have to face up to --

MR. DAVIS: Yes, I would take the position that it's -- even though it makes more sense in that situation than in the instant situation, I think that it still is an extension of pendent jurisdiction which is not authorized.

Q In the discretionary sense, ought we decide that here?

If you are wrong on diversity, should we decide the pendent question here?

MR. DAVIS: The pendent question, correct, yes.

Q I know, but should we decide it here or should we send it back? If you are wrong on diversity, should we send it back and let the court below decide it?

MR. DAVIS: You'd have to decide whether there is power, in any event.

As to whether there is discretion, I think that the Ninth Circuit has said that, as a matter of discretion, they would keep it out, clearly, and they also indicated they felt the District Court thought that it should be kept out, as a matter of discretion, and I agree with that.

Q It is my understanding that in order for there to be

diversity jurisdiction, all of the plaintiffs have to be of diverse citizenship from all of the defendants. And once you have plaintiff and defendant who do not have diverse citizenship, diversity is defeated.

Q They are separate suits, aren't they?

MR. DAVIS: They are separate suits but they have been consolidated.

Q Does that mean you destroy Federal jurisdiction?

I mean, you would throw the case out on diversity, entirely, then, if that were true.

MR. DAVIS: That point has not been argued, but it makes sense to me and I would agree with it, that if the cases are consolidated, then, there would not be complete diversity since --

Q You have a defendant and a plaintiff from the same State, citizens of the same State, then you don't have diversity jurisdiction?

MR. DAVIS: That is correct.

Q Neither party moved for consolidation, did they?

Didn't the court do it for convenience, or what?

MR. DAVIS: These were all assigned,under the related case rule, to the same judge.

Q Related. Does that mean every time there is a related case you destroy Federal jurisdiction?

MR. DAVIS: No, but I believe the cases were also

consolidated.

Q By whom?

MR. DAVIS: I believe -- I am sorry, Your Honor, I am a little shakey on the record, but I believe that it was a motion of plaintiff.

Q How can you consolidate a diversity case with another case and then thereby defeat the diversity case? How can you do that?

MR. DAVIS: Federal jurisdiction is limited and if the case falls within or without the purview of the jurisdictional statutes, the chips have to fall as they may.

Q But if cases are consolidated, don't they each stand on their individual merits?

MR. DAVIS: Conceptually, I don't know what the difference is between two individual actions with identical complaints, except for the diversity point in one, which are consolidated, and one complaint that has both in it. And, under the --

Q They were consolidated in one complaint?

MR. DAVIS: Consolidated in one action, with two separate complaints which say the same thing.

Q Well, that's a lot different.

MR. DAVIS: Is it really conceptually different, as a practical matter --

Q I am not talking about conception. I am talking about

actually.

Well, did they each have a separate docket number?

MR. DAVIS: Yes.

Q Well, aren't they then individual cases?

MR. DAVIS: Technically, I think that they are, except --

Q Wouldn't the fact that they are consolidated for the purpose of convenience defeat one on diversity?

MR. DAVIS: I think that it is possible.

Q Well, suppose we both sue General Motors for something and I -- mine is on diversity, yours is not. So they consolidate the two cases and throw me out of court?

Q Well, that may be so, but if I want to come in and say I am pendent and say I want to be part of this lawsuit, that's different, isn't it? Then you are in one lawsuit. It is not just a question of consolidation you are claiming, if you are claiming you are pendent. You can't have it both ways.

MR. DAVIS: I think in your case, Mr. Justice White, that's very true.

Q Did anybody argue the Strawbridge v. Curtis point in the lower courts, their complete diversity of plaintiffs --

MR. DAVIS: On a consolidated issue, no.

But, of course, jurisdiction can be raised at any point, and could be raised by this Court.

On the pendent jurisdiction point again, I think that, again, we have to start with the rather axiomatic propos --

Q You started to say something about in California a county is simply, and at that point something else intervened. Do you want to finish that?

MR. DAVIS: I think that in California, whatever the situation might be in other States, the California law makes it clear that a California county is simply a subdivision of the State, and has whatever powers the State delegates to it.

Now, as against the State, the county has no powers, whatsoever, as has been made clear in the cases cited.

In other words, if the State wants to take property away from the county, they just simply do it. No compensation, nothing.

As to third parties, the county stands in the shoes of the State, and that's also in the cases.

For example, in the one case mentioned, the county took some action which should properly have been taken by the State, and the court said no, the county is simply an agent of the State, stands in the State's shoes and is perfectly capable of taking this action.

Now, when you are talking about citizenship, which is what we are talking about under 1332, and I would oppose that to the concept of State, as in the Eleventh Amendment, I

think this is something different.

I fail to see how you can say that a county is a citizen of the State under those circumstances.

It seems to me you have to make some basic divisions between Government and citizens. And the kinds of things that are given to citizens, like the power to hold property, and like the power to vote, are not in the county, under any stretch of the imagination.

Q (inaudible) San Francisco --

MR. DAVIS: No, not as to the city.

Cities are different. Cities are entirely different in California than counties.

Q Are you saying that this is unique to California counties? And do you think that this is behind the Court of Appeals for the Ninth Circuit's decisions in this area, even though not articulated?

MR. DAVIS: I think it must be.

At least in this case, all of these arguments were presented to the court, and they refused to change their earlier ruling and insisted that California counties are different.

Q As I understand your argument, your major premise, that there is a relationship between the State of California and its counties, whatever it may be other ways, which makes the county simply an alter ego of the State --

MR. DAVIS: Makes it not a citizen of the State.

Q All right, not a citizen. Now, has that ever been said by the Ninth Circuit?

MR. DAVIS: They have said just what you said. They have not gone on at great length and explained why.

Q Ordinarily, of course, we accept here, as you know, what a Court of Appeals says as State law, but are we in that position with this one, on this issue?

MR. DAVIS: The plaintiff has pointed out authorities to the effect that whether it is a citizen or not is a matter of Federal law, and not State law, although, of course, you'd look very properly to the State law to determine that question.

Q So far, everything you've told us about California counties, I think, could have been said about the counties in any State that I know about. You haven't told us anything that's uniquely characteristic of California counties.

MR. DAVIS: I am not sure what the status of counties in other States is.

Q I am not sure, certainly, with respect to every State, but the States I am familiar with are just as you've told us California is, are creatures of the State.

MR. DAVIS: The decisions I've read haven't given any greater analysis to this, either, including Cowles. They've just said, they look at some language like corporate and that's as far as they go, and they say, okay, must be a citizen because a corporation is a citizen.

I find that, I think a little more analysis is in order. I think that the concept of a citizen could apply to a municipal corporation. And I really don't have much difficulty with that, because they are different, they are not a subdivision of the State. They are a corporation, which does govern, but they hold their own property. They have their own rights. A county doesn't have that in California. I think it is a different entity.

It seems to me, logically, difficult --

Q Who owns the county courthouse in California? What entity owns it?

MR. DAVIS: According to the County of Marin case, it is owned by the State.

If the State says, "That's our courthouse. We are going to sell it tomorrow," they can do it.

The judges are State, for example. They are not county -- it is Superior Court in and for the County of Alameda, and they are called Alameda Superior Court judges, but the analysis of the situation indicates that they are State judges. They are paid by the State and are responsible to the State.

Q Your cities are not creatures of the State?

MR. DAVIS: Cities are creatures of the State under different constitutional provisions and under different legislative provisions, and they have different powers and different

duties than the counties.

Q Did you say cities are incorporated?

MR. DAVIS: Yes.

Q And counties are not?

MR. DAVIS: I don't think -- not in the same sense of the word. No.

Q Doesn't the county put up part of the judges' salary, or does it come entirely from the State?

MR. DAVIS: I am not sure, Justice Rehnquist, but I believe that -- I was told that they were paid by the State. I haven't really researched the point. I am sorry.

Q Are your school districts citizens, for purposes of the diversity clause?

MR. DAVIS: School districts, assuming that they are all the same, and I don't know that, would be, again, a legislative creature only. Nothing, enacted under different laws --

Q So, your answer is yes?

MR. DAVIS: Probably would be yes.

Q San Francisco would be under Monroe and Pape.

MR. DAVIS: I am going to have to back up a minute on that. It just occurred to me there are two or three cities and counties and San Francisco is one of those. So, San Francisco happens to be an exception that comes under both.

In this case, it is not. The County of Alameda is

completely separate from any of the cities and municipalities within the county. I believe Los Angeles is the other.

As to the other rights that have been enumerated, for example, the right to sue or be sued, the State has the identical right.

I don't see how that can really be a distinction between whether you are a citizen or not.

In fact, all the rights that are talked about here are State rights that are delegated to the county. So, how does that make the county a citizen of the State?

I feel it does not.

On the pendent point then, I feel that there is a major difference between joining causes of action among a defendant already subject to Federal jurisdiction and between bringing in a defendant into the Federal court on a State law cause of action,when there is no Congressional or constitutional authority to bring that particular defendent in.

I can readily appreciate the reasoning in Gibbs, which is judicial economy and expediency, but I think that one of the very few checks on the Federal judiciary today is the power of Congress to define jurisdictional limits of the District Court.

And I would respectfully suggest that this Court should go slow in extending, on your own, the concept of

jurisdiction to include another party, not previously in front of the court.

I think that there is also merit to Mr. Shackman's argument, in 20 Stanford Law Review, that State questions should be left to the State courts in many cases. And I think in this particular case, Chief Justice Burger brought up the discretionary immunity point.

There is the point of Section 820.4 of the Government Code which says there is no liability to a public employee in exercising due care in the enforcement of law except for false arrest or false imprisonment.

I think that these are questions that are difficult questions that should be left to the State courts and not to the Federal courts.

As Mr. Shackman points out, if the State court makes an error, this Court can review it.

If the Federal court makes an error, the State has absolutely no opportunity to review that or to correct the error.

And I think there are some very good reasons why it should not be extended in that regard.

But, basically, I think we are talking about a separation of powers problem, and I think that you are going to have to draw the line some place on what kinds of claims can be brought into Federal court when there is no Congressional

authority for that.

And I would draw the line here, when you are talking about bringing in another party who is not already in front of the court, and that is the situation here.

I think the Ninth Circuit was correct in these points, and I would like to suggest that their action should be affirmed.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Davis.

Mr. Greenberg, you have a few minutes left.

REBUTTAL ARGUMENT OF RONALD M. GREENBERG, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GREENBERG: Let me correct a couple of points.

On consolidation, Appendix D to the petition will show how the cases became consolidated. They were consolidated by the Ninth Circuit for this appeal only. They have never been consolidated for trial. Indeed, at one point, we tried to have them consolidated. The county opposed the motion for consolidation.

Q Don't they claim that if Moor is a good diversity case, Rundle is pendent to that case? You couldn't make the argument --

MR. GREENBERG: No. Rundle must stand or fall on the Civil Rights Acts and pendent jurisdiction points.

Q As soon as it became pendent, there would no longer be jurisdiction of the Federal court, isn't that correct?

MR. GREENBERG: Oh, no. The whole concept of pendent jurisdiction implies that a court has jurisdiction --

Q Yes, but the whole concept of diversity jurisdiction is that all the plaintiffs are diverse in citizenship from all the defendants, and, if they are not, there is no jurisdiction of a Federal court.

MR. GREENBERG: Except some Courts of Appeals have sure gotten around that point, and pended some claims of citizens of same States once they had jurisdiction of the entire matter.

But, we aren't raising that at all. We are not saying that Rundle is a pendent case. Indeed, the injuries are different and the cases will be tried separately.

A second point that I think we should dispel is that if the Court will look at the opinion attached to our reply brief, which is the latest one by Judge Peckam in this case, you will see that discretionary acts is not even an issue. The court has completely rejected those for these individuals.

Number three, --

Q According to that, you said that Ninth Circuit is responsible for consolidating these cases for appeal only. When, as, and if you should get back, you mean you are going to undertake, if you can, to try these cases entirely separately?

MR. GREENBERG: At the moment, that is correct, and that's their posture. They are separate cases to be tried

separately. They have not been consolidated for trial or for any other purpose except this appeal by the Ninth Circuit in its order, at our request, to bring the cases on.

Q Of course, they will especially be tried separately if one is in the State court and one is in the Federal court.

MR. GREENBERG: No question about that.

Q And I gather the actions pending in the State courts will also be tried --

MR. GREENBERG: That's the --

No, the State court action, Your Honor, was filed for this reason. In 15 Am. Jur. Trial, Section 26, at pages 617 and 618, they talked about a Chicago practice. Because of Monroe, it is unclear -- and it was unclear that we would ultimately be successful in bringing the county into this case.

For that reason, we wanted to protect our client.

A former associate of ours did some research in the area and concluded that we had no problem as to diversity so we filed the Moor case only in the Federal court.

However, because of the unknown factors in Rundle we filed only in the State court.

For the past three years, we have never done anything --

Q Only in Rundle?

MR. GREENBERG: Only in Rundle.

Q Moor is -- I see.

MR. GREENBERG: We have never done anything with the State court action, include serving it, until about a month ago, when, under California law, if a case is not served within three years of filing, it is automatically dismissed.

In the Federal case, we have taken some 15 depositions, had an extensive discovery, extensive motions.

The Federal case has been the case. We have filed the State case.

Q There are two Federal cases, Rundle and Moor.

MR. GREENBERG: Right, but we are talking about Rundle because it's got the companion State case.

Q I see.

MR. GREENBERG: I would hate to think that our client in Rundle would be prejudiced by our seeking to protect him and to obviate, the very thing that we are trying to obviate, having to go to two courts with the same case.

Q I say you would have avoided all this had you gone full steam ahead on the State side.

MR. GREENBERG: Just as in any pendent jurisdiction case or diversity case, I suppose.

Sure. We had that option, but we chose the Federal forum because we felt we would get -- there are many factors which dictated our going into the Federal forum, and I would -- de jure -- there were balancing factors.

You could get to trial faster in Federal court,

generally, than a State court. There were many factors.

The Federal judiciary was much more familiar with the Civil Rights Acts, we thought. We know of no State court reported opinion construing the Civil Rights Acts.

Indeed, if one looked at the opinions of Judge Peckam, in this case, where he has agreed with us and disagreed with us, at least he has enunciated some pretty extensive opinions.

On the point about complicating the case by adding the county, it is just a falacy. The same defenses which are available to the county are available to the individual employee defendents.

We have to satisfy our right to sue the county in order to sue the individuals.

These same instructions are going to be a part of this case.

And, with respect to insurance, there is nothing in this record which shows that these employees have insurance of any sort.

I can tell you, as a fact, that the officer that shot my client is making approximately $8,000 a year and doesn't have any insurance, to our knowledge.

The county carries insurance. They are the only ones we know of that carry insurance, aside from Sheriff Mattigan who has a smaller bond of some $25,000.

But there is nothing in this record showing that these defendents are financially able to respond to the kind of judgment we are seeking in this case. None whatsoever.

Q Or the contrary.

MR. GREENBERG: But they are not. No, this really was never raised as a point. Indeed, I think, common sense would say that the deep pocket in this case is unquestionably the county.

Moreover, under California law, in order to sue other counties --

Q Isn't the Government basis, as far as the record is concerned, that the counties are usually richer than anybody, any individual?

MR. GREENBERG: I think that's a fair assumption.

Q That's your argument, and that's all you've got. You have no evidence on that.

MR. GREENBERG: True.

No, and perhaps the Court can take judicial notice of it, that the county has a deeper pocket than the deputy that shot my client.

However, with respect to another important reason for a judgment against the county, in California, if you want to sue other counties who participated in a particular act, you must get a judgment against one county.

In connection with the Peoples Park disturbances,

there were a number of counties involved in that situation.

Only if we procure a judgment against the County of Alameda, can we then sue these other counties, which we would intend to do.

And finally, on Congressional intent.

I have found nothing that even remotely indicates that Congress intended not only not to impose liability, as a result of the Sherman Amendment to Bates, not only did not intend, as a matter of Federal law, to impose liability, but went further and said, "We intend to preclude a State from imposing vicarious liability on its public entities."

I think that kind of Congressional intent is pure fabrication. It is not found in the debates and it's not found in Monroe.

Q It is found in the decision in Monroe v. Pape, isn't it?

MR. GREENBERG: No. Monroe says, and Monroe was concerned only with 1983 liability, Footnote 2 of that opinion makes clear that the only section that was before the court -- and the court held that on the basis of the Sherman Amendment debates, Congress did not intend to impose liability by virtue of 1983.

Q Didn't the court also say that a city was not a person, within the meaning of 1983?

MR. GREENBERG: That's correct, within the meaning

of 1983, for purposes of imposing Federal liability.

Q Right.

MR. GREENBERG: That's not our position here. We say there is nothing in Monroe and nothing in the Congressional debates, or any other place that we know of, which says that Congress also didn't -- intended to preclude a State, as a matter of its law, from imposing that liability.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Thank you, Mr. Davis.

The case is submitted.

(Whereupon, at 2:31 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)