In the

Supreme Court of the United States

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MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, AND DOROTHY SPOMER, AS ASSOCIATE CIRCUIT JUDGE FOR ALEXANDER COUNTY, ILLINOIS,	)	
Petitioners,	)	
v.	)	No. 72-953
EZELL LITTLETON, et al.,	)	
Respondents.	)	

Washington, D.C.
October 17, 1973

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MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, AND DOROTHY SPOMER, AS ASSOCIATE CIRCUIT JUDGE FOR ALEXANDER COUNTY, ILLINOIS, Petitioners v. EZELL LITTLETON, ET AL., Respondents	No. 72-953

Washington, D. C.

Wednesday, October 17, 1973

The above-entitled matter came on for argument at 10:51 a.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:

ROBERT J. O'ROURKE, ESQ., Deputy Assistant Attorney General of Illinois, Chicago, Illinois, for the Petitioners.

ALAN H. WISEMAN, ESQ., Schiff, Hardin & White, 231 South LaSalle Street, Chicago, Illinois 60604, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 72-953, Michael O'Shea against Ezell Littleton.

Mr. O'Rourke, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT J. O'ROURKE

ON BEHALF OF THE PETITIONERS

MR. O'ROURKE: Thank you, your Honor, and may it please the Court, this is a civil rights suit brought by plaintiffs on behalf of an undefined class of which they were not members charging that Michael O'Shea as the magistrate of the Circuit Court for Alexander County, Illinois, and Dorothy Spomer, as an associate judge for Alexander County, Illinois, systematically discriminate against members of their class on the basis of race.

This action was brought under the Civil Rights Act, title 42, sections 1981, 1982, 1983, and 1985, and it alleged interference with the plaintiffs' First, Sixth, Eighth, Thirteenth and Fourteenth Amendment rights. The plaintiffs sought mandatory injunctive relief against O'Shea and Spomer in their official capacity as members of the Illinois judiciary. The amended complaint in the first, second, third, and fourth claims for relief set out eleven specific acts of alleged discriminatory conduct on the part of defendant States Attorney Berbling and investigator Shepherd.

One claim for relief, which is the sixth claim,

which pertains to the judges comprises generally and conclusory allegations of patterns and practices of discriminatory conduct on the part of these defendant judges.

QUESTION: Mr. O'Rourke, just to help me at least keep this cast of characters, which is rather extensive, clearly in mind, the present prosecutor against whom part of this injunctive relief is directed was not in office at the time --

MR. O'ROURKE: No, sir, he was not.

QUESTION: -- this began. And Berbling and the man who alleged committed all these acts is out of office, is that correct?

MR. O'ROURKE: That is correct, your Honor. States Attorney Spomer is not to be confused with the judge, also by the name of Spomer. He was just elected States Attorney of Alexander County and was substituted in this cause because of --

QUESTION: Are they related, brothers, or father-son, or --

MR. O'ROURKE: I believe that they are husband and wife, your Honor.

The alleged conduct against the judges includes the following averments: (a)

QUESTION: Let me interrupt you once more.

MR. O'ROURKE: Certainly.

QUESTION: Is it clear from your point of view at least none of the allegations against Spomer, the present

District Attorney, that there are no allegations of misconduct against him?

MR. O'ROURKE: No, sir. It's the contention --

QUESTION: It's a predecessor and no one else.

MR. O'ROURKE: That's correct. And the contention is that the office will in the future in some way discriminate.

QUESTION: So that this is injunctive relief running against an office rather than a person, is it?

MR. O'ROURKE: That's correct, your Honor.

QUESTION: Well, in the judge's case, Mrs. Spomer, Judge Spomer, the allegations ran against her, did they not?

MR. O'ROURKE: Yes, they did.

QUESTION: And also as to Magistrate O'Shea?

MR. O'ROURKE: Yes, sir.

QUESTION: So in that case, at least, the injunction runs against people based on their alleged misconduct.

MR. O'ROURKE: Well, that's a contention that we don't agree with, your Honor. That is their contention, however, we do not agree with it.

QUESTION: Right.

QUESTION: The Chief Justice's inquiry relates to the next case rather than to this one.

MR. O'ROURKE: That's right.

The alleged conduct against the judges includes the following allegations:

(a) The judges involved set bond in criminal cases by following an unofficial bond schedule without regard to the facts of the case or the circumstances of the individual defendant.

(b) That they sentence black persons to longer criminal terms and imposed harsher conditions than they do with respect to white persons who are charged with the same or equivalent criminal conduct.

(c) That they require plaintiffs and members of the class to pay for a trial by jury when charged with violations of city ordinances which carry fines and possible jail penalty if the fine cannot be paid.

Though the amended complaint alleges in paragraph 36(b) that O'Shea and Spomer sentenced black persons to longer terms and imposed harsher conditions than for white persons similarly charged, the complaint does not mention a single instance of such conduct in the past nor does it charge that any sentence was not within the judge's lawful discretion. Indeed, no plaintiff is alleged to have been among those charged, bailed, or sentenced.

Furthermore, no plaintiff is alleged to be threatened with the possibility of requiring bail or being sentenced. The plaintiffs do not set forth any fact or allege a single instance of improper bail procedure or excessive sentence in the amended complaint.

Moreover, no other allegation of plaintiffs' complaint evidences or supports the conclusory allegations in the Sixth Claim for Relief against the defendant judges.

The plaintiffs additionally do not indicate any request for relief either by habeas corpus or by appellate review which has been made by any member of their class or by anyone else for past judicial discrimination by either of the defendant judges.

The allegations regarding the setting of bonds and the payment for jury trials do not state that respondents are treated differently than any other persons. It is merely averred in general terms that the petitioners follow an unofficial bond schedule in criminal cases; no charge is made, as has been done with respect to sentencing practices, that there exists discrimination in the treatment of white and black persons. The sole issue as drawn by the pleadings relates only to the allegation of the judge's discretionary role in imposing sentence on a lawfully convicted defendant. The complaint is completely barren of any factual averment involving the defendant judges and contains only one allegation of discrimination by the judges, and that is relative to the sentencing practice, and this allegation is alleged only on information and belief.

The District Court dismissed the Complaint on grounds (1) that it lacked jurisdiction to entertain a cause seeking

to have a federal court substitute its judgment for the judgment of the State judiciary, and (2) that in the regular performance of judicial officers' duties, judicial immunity barred relief in an action under the Civil Rights Act.

The Court of Appeals of the Seventh Circuit in a two-to-one decision reversed the judgment of the District Court and ruled that a Federal court may entertain actions requiring Federal supervision and regulation by mandatory injunction over the discretion which State court judges may lawfully exercise within the limits of the authority granted to them by law.

The Court of Appeals held: (1) that the Complaint stated a cause of action against these petitioners under the Civil Rights Act, sections 1981, 1983, and perhaps under 1982; and (2) the doctrine of judicial immunity did not extend to defendant judges in the light of the legislative history of the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871 where injunctive relief is sought.

The Seventh Circuit recognizing that its holding created a case of first impression, volunteered guidelines which the Federal District Court might follow in imposing upon the State judges a system of reporting their conduct and the disposition of their cases to the District Court.

We submit that the decision of the Seventh Circuit Court of Appeals would permit the intimidation of State court judges and would deprive the State of independent and

intellectually free judicial system. It is our contention that the common law doctrine of providing civil judicial immunity for judicial acts was not abolished by the Congressional Civil Rights Amendment regardless of whether the damages are mandatory or monetary damages are sought.

This Court established, in the classic case of Bradley v. Fisher, which we cite very extensively in our brief, that the purpose of judicial immunity is to assure the independence of the judicial judgment by precluding personal jeopardy of judges who might err.

We submit that the sanctions of contempt are as dangerous to judicial independence as the risk of a suit for money damages. One cannot visualize a more dramatic example of judicial subordination than the spectacle of having a State judge brought before a Federal district court on the claim of injunction and put through the ignominity of having to sit on the witness stand defending the integrity of his character and his actions and be subjected on cross-examination to the verbal onslaught of a class of people as in this particular instance who had never been before that particular judge at any time.

QUESTION: Mr. O'Rourke, --

MR. O'ROURKE: Yes, Mr. Justice.

QUESTION: As I understand the argument you are making, now, you go beyond really a position Judge Dillon took

in dissent. As I understood his dissent, he would not say categorically that you could never have an injunction under 1983 against a judicial officer, but that in this particular type of situation, you couldn't have it. But you say you can never have it?

MR. O'ROURKE: No, I don't say that, if the Court please. I don't mean to leave that impression. Judge Dillon did review the cases where injunctions had been granted and pointed out that injunctions had been granted for the -- a prohibitory type of injunction rather than a mandatory injunction which prohibits the court from, and in these particular instances that they cite which were ministerial acts rather than judicial acts raquiring judicial discretion.

QUESTION: So that there you wouldn't have the over-hanging threat of a contempt citation in your --

MR. O'ROURKE: No, sir, you would not. It would be a prohibitive act and not the constant supervision where the judge could be called in and be subjected to cross-examination. While on that Federal stand, the State judge could be compelled to recall his past decisions and the reasoning behind those decisions. In an instance like the present case, the judge may not only be on trial with respect to an individual case, but for patterns and practices which comprise within their purview many decisions extending through a number of years. The effect of the decision of the Seventh Circuit would be to

"chill"judicial discretion in the dispensation of justice in the State of Illinois. In effect, then, a State judge will have to look over his shoulder each time he exercises his judicial discretion for fear that by some nebulous standard of statistical analysis he has not meted out justice in accordance with a Federal district judge's personal formula. In addition, a State judge would be more likely to qualify or balance sentances or amounts of bail, not in accordance with what the circumstances are before him, or what the circumstances would warrant, but out of the nagging fear that leniency or strictness, irrespective of whether deserved, over a period of time would be interpreted as deliberate discriminatory conduct.

Subjecting a State judge to Federal review each time a dissatisfied but lawfully convicted defendant alleges class discrimination would require Federal judges to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. A judge operating under an order not to discriminate in fixing bonds and sentencing would find himself confronted with the possibility of a Federal contempt citation and the necessity to defend his motivation in each case.

The admonishment of this court in the City of Greenwood v. Peacock would apply to this case equally as well. But the burden of the Federal system would be, in the least, cumbersome and severe. The effect on the State system would be to create

an oppressive atmosphere of Federal supervision and perhaps render it impotent.

The action countenanced by the court below will result in the Federal courts sitting not only in review of State discretionary decisions, but also as an appellate tribunal passing ultimate judgment on State criminal proceedings. Though the action sanctioned here is civil, it requires the review of past criminal decisions. In addition, the likelihood is great that similar class actions would be taken to the district courts from State criminal actions on the grounds that the judge will or has a propensity to discriminate against a particular group. The result would be to exchange State remedies in favor of district court review.

Extending the possibilities sanctioned by the court below to its most absurd result, a State court judge could literally spend so much time defending his actions in frivolous suits at the Federal bar that he could notperform his State judicial duties. Again, an admonishment from the City of Greenwood v. Peacock case.

It must be noted that the decision of the Court of Appeals for the Seventh Circuit does not limit its holding to lower State court judges. Indeed, the application of the Seventh Circuit's decision renders all State judges subject to injunctive relief should some class allege that they have engaged in patterns and practices which they feel violate their

civil rights. Therefore, this decision, if it is allowed to remain in effect, could easily propel a rash of Federal injunctive proceedings agasint a State appellate court based upon the naked allegation that the appellate justices, or any combination of them, engage in patterns and practices of conduct inimical to the civil rights of the complaining class.

The unfitting burial given to the judicial immunity doctrine by the Seventh Circuit irrevocably alters the historic relationship that has existed between the courts of equity and law, between Federal and State courts, and between the judge and those persons appearing before him. The effect of permitting actions against the State judiciary, growing out of the exercise of lawful judicial discretion, would be to irreparably harm the administration of criminal justice at the State level.

We submit that no intellectually independent State judiciary could survive in an atmosphere of hostile litigants and the constant Federal supervision.

We believe that the question of judicial immunity had been -- the question of whether judicial immunity had been absolished by the Civil Rights Act was answered by this Court in Pierson v. Ray which we cite in our brief, that this Court held that the common law immunity of judges from civil actions for acts committed within their judicial jurisdiction was so settled a principle as to be excepted from the provisions of

section 1983. Furthermore, this Court in Pierson considered the same legislative history which the court below held to be so incisive, and found that history wanting, so much so that Court states it gives no clear indication that Congress meant to abolish wholesale all common law immunities. Mr. Chief Justice Warren expressed the feelings of eight members of the Court when he wrote:

"We presume that Congress would have specifically so provided had it wished to abolish the doctrine."

Nothing in the explicit language of Pierson affords a basis to limit that holding to money damages, especially in light of the Chief Justice's compelling language which draws no distinction between monetary and equitable relief. He said, at page 554: "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

The Court of Appeals for the Seventh Circuit draws the narrow distinction that while judges are immune from damages suits, they may be subjected to a mandatory injunction if ever anyone should charge them in the Federal courts with

class discrimination. The defendant judges submit that no distinction can logically be made as to judicial immunity between damages and an injunctive order for a judge's lawful exercise of his discretion.

The decision of the two-man majority in the court below is well written, but we submit that a careful reading of the decisions cited by the Seventh Circuit where injunctive relief has been granted will reveal that these cases either deal with ministerial duties, exercised by judicial office or the cases do not discuss the doctrine of judicial immunity or are ex parte proceedings in which the accused judge did not participate or are based upon the misapprehension of other decisions utilized as precedents.

QUESTION: What about a Federal court enjoining a State criminal proceeding in a 1983 action in the Federal court alleging that the State criminal proceeding deprived the defendant of some constitutional right, alleging harassment or a false charge, or something like that, a Dumbrosky type of situation, and the Federal court wholly consistently with Younger enjoins the State criminal prosecution? Would you say that the prosecution could be enjoined but not the judge?

MR. O'ROURKE: Yes. There is a difference there, if the Court please.

QUESTION: He can just work on the parties?

MR. O'ROURKE: There there is the prohibitory injunction

again, and here the injunction as has come down from the Seventh Circuit is the mandatory type of thing.

QUESTION: Well, is there something in -- there is nothing in Pierson that says that a prohibitory injunction can be entered either.

MR. O'ROURKE: No, sir, not in Pierson.

QUESTION: Well, how do you distinguish that?

MR. O'ROURKE: It has been distinguished in the various courts. We indicate that the essence of the rule of judicial immunity is the freedom of the judge from the threat of individual punishment in the event that a different court should decide that his judgment wasn't correct in the first place. And we maintain that it's unrelated to the nature of the suit, whether it's a civil rights action or whether it's an individual action, or whether it's an action brought by an individual or by a class.

QUESTION: I suppose that State court judges enjoined -- along the line of Justice White's question -- from carrying out a certain prosecution even though he may be enjoined by name, there is no doubt as to what his duty is under the terms of that injunction. He must simply desist unless it's reversed by a higher court.

What you are complaining about here, I take it, is the constant oversight of the discretion in cases unnamed.

MR. O'ROURKE: Yes, that's correct, your Honor.

QUESTION: It doesn't sound much like an immunity argument. It sounds like a scope of the remedy argument.

MR. O'ROURKE: Well, we maintain there is a scope of the remedy argument here, too --

QUESTION: Which is what you are now making, it sounds to me like.

MR. O'ROURKE: Both of them, if the Court please. We are arguing judicial immunity; we are also arguing the scope of the remedy. We also make the additional argument that the Constitution of the United States --

QUESTION: Do you concede that the judge is not immune from a --

MR. O'ROURKE: Prohibitory injunction?

QUESTION: Yes.

MR. O'ROURKE: Prohibited from doing certain acts, that's right.

QUESTION: You concede that.

MR. O'ROURKE: I concede that, yes, sir, to not handle a certain case or not perform ministerial duties.

QUESTION: You concede there is a constitutional case of controversy alleged in these actions?

MR. O'ROURKE: Yes, sir. I would say in the scope of the order of the Seventh Circuit which requires a constant supervision of the --

QUESTION: But how about the plaintiffs in the case?

Did they allege some concrete case of controversy that a Federal court should have entertained?

MR. O'ROURKE: Not as far as the defendant judges are concerned.

QUESTION: Well, then, why did you --

QUESTION: Even if all the facts were true?

MR. O'ROURKE: Even if all the facts were true, yes, sir.

QUESTION: Then what remedy would they have?

MR. O'ROURKE: The remedies here, if the Court please, there is no specific --

QUESTION: I should say what,if any.

MR. O'ROURKE: There is no specific allegation against either one of these judges as to a discriminatory act by them.

QUESTION: Suppose it was.

MR. O'ROURKE: It's merely conclusory.

QUESTION: Would your argument be the same?

MR. O'ROURKE: No. There are a number of remedies.

QUESTION: Suppose the allegations were that he sentenced eight people all involved for crap shooting in the same game and gave the four whites a suspended sentence, he gave the four Negroes five years. Would you make the same argument?

MR. O'ROURKE: Yes, sir, because --

QUESTION: And that he did that every day of the week.

Would you make the same argument?

MR. O'ROURKE: Yes, sir. There would be --

QUESTION: But you would at least insist that one of the Negroes who suffered from the discriminatory sentence be a plaintiff. It wouldn't be any use to have any member of the public bringing the action.

MR. O'ROURKE: That's correct.

QUESTION: And then here, it's just any member of the public, isn't it, in a sense that none of these particular plaintiffs has ever suffered any kind of a sentence or wrong from these judges.

MR. O'ROURKE: That's correct, your Honor.

QUESTION: Well, why isn't that your special argument in these cases?

MR. O'ROURKE: It would be except that we wanted to get into the question of judicial immunity because we feel --

QUESTION: I know you wanted to, but we have a jurisdictional problem at the outset.

MR. O'ROURKE: Yes.

If I could just get back to Justice Marshall's --

QUESTION: I don't want to get back to that yet. I just wondered, do you concede there is a case of controversy or not? Or do you say there is not?

MR. O'ROURKE: I say there is not, your Honor.

QUESTION: But if we disagree with you, then, you make

your argument about --

MR. O'ROURKE: Right.

There is also the -- to get back to Justice Marshall's question -- there is ample provision for review in our Appellate Courts if the judge were to be, is discriminatory, as you point out, there is also the question of the Illinois --

QUESTION: Could you give me a citation of such a case?

MR. O'ROURKE: No, sir, I don't.

QUESTION: I have been looking for one for a long time.

MR. O'ROURKE: I don't have one.

QUESTION: All right.

MR. O'ROURKE: Also, to get to the question of the -- the Constitution of the United States provides in Article IV, section 4, that the United States shall guarantee every State a republican form of government. Essential to the concept of republican form of government is the State judiciary remains free to pass upon its own laws without fear of district court surveillance. Where a pattern emerges or is allowed to emerge State judicial officers can be summoned before a Federal district court on the mere allegation that they engage in the patterns or practices of conduct somehow inimical to the class, then the obvious result will be the destruction of the State judiciary and thereby the republican form of government.

If the Court please, I would like to reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. O'Rourke.

Mr. Wiseman.

ORAL ARGUMENT OF ALAN M. WISEMAN ON

BEHALF OF THE RESPONDENTS

MR. WISEMAN: Mr. Chief Justice, and may it please the Court, we do not bring this lawsuit frivolously. We have made serious and grave charges here. We are making those charges consistent with our responsibility under rule 11 of the Federal Rules of Civil Procedure. That rule requires that before an attorney signs a pleading, he must have good grounds for it. We have such grounds here. There has been a fundamental breakdown in the administration of criminal justice in Cairo, Illinois.

What we are charging here is that these defendants engage in a pattern and practice of discrimination on the basis of race against these plaintiffs and blacks similarly situated in Cairo. The plaintiffs in this lawsuit were the black citizens of Cairo. We seek equitable relief only against these judges. We do not seek damages. We seek --

QUESTION: Of the named plaintiffs, which one suffered from these alleged practices?

MR. WISEMAN: Several of them have, your Honor. We did not specifically allege which ones. What we alleged was

that we are seeking to enjoin the deprivation of plaintiffs of their class rights. That was in paragraph 1 and in a number of the paragraphs in our complaint. We have indicated that plaintiffs and others have been deprived of their rights. We do not specifically list the individuals, but if we had to, we could.

QUESTION: How were they deprived?

MR. WISEMAN: They were deprived in that (1) an unofficial bond schedule was used when the defendant is black.

QUESTION: Have any of the plaintiffsbeen a defendant?

MR. WISEMAN: Yes, your Honor, but we have not specifically named them in the complaint.

QUESTION: Well, how can you rely on it?

MR. WISEMAN: Because we have named in general in the allegation that the plaintiffs have individually been deprived of the rights that we --

QUESTION: What does your class include?

MR. WISEMAN: It includes the named plaintiffs and the class are the black persons in Cairo who were similarly situated and who have been similarly deprived of the kinds of rights that we are alleging here.

QUESTION: What class is that? All of the Negroes?

MR. WISEMAN: It would be basically the black persons of Cairo?

QUESTION: All of them?

MR. WISEMAN: Yes. Well, the class that is specified in our complaint is those who are similarly situated, only those who were similarly deprived of rights as the named plaintiffs.

QUESTION: Where is the provision that the named plaintiffs were denied their rights?

MR. WISEMAN: In paragraph 1, we state that this is a civil action, insofar as the judges are concerned, for equitable relief. Page 15, your Honor. To enjoin the deprivation --

QUESTION: Fifteen of what?

MR. WISEMAN: Paragraph 1 of the appendix.

QUESTION: There are two appendices. We are now on the judges' case and that appendix -- well, I guess there are two appendicas.

QUESTION: The class includes all those? Is that the one, (c)?

MR. WISEMAN: Well, your Honor, in paragraph 1 of the complaint, which is on page 15, we indicate, we allege that the plaintiffs and members of their class have been deprived of certain rights.

In paragraph 3 we state under paragraph 3(a) "Plaintiffs are black citizens of the City of Cairo," with two exceptions and we name the two exceptions.

In paragraph (b) we say they bring this action as a

class action, individually and on behalf of others similarly situated.

QUESTION: There are 19 named plaintiffs. Are you suggesting that that is an allegation that each of the 19 was involved either in bonding business or sentencing or something?

MR. WISEMAN: Your Honor, the lawsuit was originally filed against six defendants.

QUESTION: I know. The named plaintiffs are 19 in number.

MR. WISEMAN: Yes, I understand. I'm getting to that point. When we filed against six defendants and we named the number of plaintiffs that we have, some of the charges go to the States Attorney so that some of the plaintiffs named were only affected by the States Attorney's conduct. Other of the plaintiffs were only affected by the conduct of the judges.

QUESTION: Each of the 19 was affected by the conduct of one or the other?

MR. WISEMAN: Yes, your Honor.

QUESTION: Because involved in some criminal charge?

MR. WISEMAN: Yes.

QUESTION: Each of the 19.

MR. WISEMAN: Either a criminal charge or in the case of the States Attorney, they sought to have relief in the criminal courts which was denied.

QUESTION: Where is that in this complaint? Where is

what you just said in the complaint?

MR. WISEMAN: Your Honor, I would submit that we are intending by our allegation on page 15, paragraph 1 --

QUESTION: What in there says these people have been bailed, or delawed? and arrested or anything?

MR. WISEMAN: In paragraph 3(c) which would encompass in the language of that paragraph the named plaintiffs as well, we are saying who, on account of their race and because of their exercise of First Amendment rights, have in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice.

Later on in our complaint we specify the kind of conduct we are referring to that the judges engage in, that they on account of race deprive the plaintiffs --

QUESTION: Where is it in this complaint that it says that any one of these plaintiffs has ever been subjected to denial of bail?

MR. WISEMAN: Paragraph 35, your Honor, of the complaint, page 29, I believe, of the appendix, we state with respect to the judges that they have deprived and continue to deprive plaintiffs and members of their class of their rights to due process under the Fourteenth Amendment, and then --

QUESTION: Denial of due process includes how many different things? Mine was the denial of bail.

MR. WISEMAN: Pardon me, your Honor?

QUESTION: Mine was where do you say that any one of the named plaintiffs were denied bail because of his race?

MR. WISEMAN: Paragraph 36 -- we are not referring to denied bail, your Honor.

QUESTION: Well, you said so.

MR. WISEMAN: What I mean --

QUESTION: You said that each one of these people had been denied bail or something else.

MR. WISEMAN: No, they are discriminated in the setting of bail in that these judges were following --

QUESTION: Where do you say that any one of these plaintiffs were discriminated against in the setting of bail?

MR. WISEMAN: Paragraph 36, your Honor, (a), we say in the preface to (a) that the judges have denied and continue to deny to plaintiffs and members of their class their constitutional rights in the following ways: And then (a) is our bail situation where the judges are following the unofficial bond schedule that has been established to apply to blacks.

QUESTION: Can you get it under (b), on information and belief they were denied bail?

MR. WISEMAN: Under (b), your Honor, refers to Sentences.

QUESTION: Well, do you think that you can allege

that on information and belief you were sentenced unconstitutionally? Do you allege that on information and belief?

MR. WISEMAN: The problem --

QUESTION: You allege that you knew it or you didn't know it.

MR. WISEMAN: No. Your Honor, the reason we alleged the way we did is that the plaintiffs and members of their class have been sentenced, and they believe and we believe, to a longer term than whites.

QUESTION: Which one of the plaintiffs?

MR. WISEMAN: Your Honor, I submit that we have in general covered that by saying the plaintiffs. When we were filing a lawsuit against six defendants, we did not break it down as to which plaintiffs were affected by the conduct of which defendant except with respect to the States Attorney and Mr. Shepherd. I would submit that in a liberal reading of the rules for pleading, that we have covered it, but if not, then we should have a right to amend our complaint because we can specify the individuals who have been directly affected by name if we had to.

QUESTION: Now, you do specify some individuals, at least with respect to the prosecutor defendants.

MR. WISEMAN: Yes, your Honor.

QUESTION: Some episodes and examples are spelled out in some little detail in the complaint. But none of those

people were the named plaintiffs, were they?

MR. WISEMAN: Yes, they are.

QUESTION: They are.

MR. WISEMAN: Yes. Mankar Harris, for example, is a named plaintiff. Every single one of them is a named plaintiff.

QUESTION: Hazel James, for example?

MR. WISEMAN: Yes. James Martin is a plaintiff. James Wilson is a plaintiff.

QUESTION: That's in the Berbling complaint?

MR. WISEMAN: Yes. But, your Honor, we have simply one complaint which covers all of the defendants. I submit, your Honor, that we have pleaded the essential allegations for an action under these statutes. We have stated that these plaintiffs have been discriminated against; we have stated that the defendants have acted under cover of State law customer usage; we have stated that the plaintiffs have been deprived of certain enumarated rights; and we have stated specifically the kinds of rights we are talking about with respect to the judges: the setting of bond in which they use an unofficial bond schedule; the setting of sentences in which they sentence blacks for longer terms than whites; and the imposition of a jury fee in certain kinds of cases which are not imposed upon against whites.

QUESTION: You can see, though, our problem, can't you, Mr. Wiseman? Here the Seventh Circuit has decided some

very complex legal questions, and your complaint is at best, it seems to me, ambiguous as to whether any of your particular plaintiffs in the judges' case have actually suffered these deprivations themselves.

MR. WISEMAN: I think, your Honor, one way the Seventh Circuit handled that with respect to some of our allegations going to Mr. Berbling, whose petition is pending before this Court, is that we could have the right to amend our complaint if necessary if the District Court thought it was necessary in that context. I think it's important the Seventh Circuit is extremely cognizant of what's going on in Cairo. Cairo is located --

QUESTION: Counsel, you don't want us to decide the case on the basis of the judicial notice that judges in Chicago take of some things that are going on in Illinois, do you?

MR. WISEMAN: I don't think it's necessary, your Honor, because I think in our complaint we have alleged in part what is happening in Cairo, that there is a considerable amount of tension between whites and blacks. Because of its location it has had a history of civil strife that since the 1950's these plaintiffs have been striving to obtain equal opportunity in employment and housing and participation in governmental affairs. This has created strife in the community. And the local officials who, if they applied the law even-handedly, could help the problem instead of exacerbating it in that they engage in this pattern and practice of discrimination.

QUESTION: Well, that's all set out in your complaint. So with or without judicial notice, the Court of Appeals assumed that all those well-pleaded allegations were true, and so do we. So we assume what you say, that there is a very bad situation in Cairo as set out and fully described in your complaint. And that takes us -- so we accept and assume that, but that still doesn't solve some of the problems in this case.

QUESTION: Given what you have just suggested about the flexibility, liberality of pleading under the Federal rules, I am surprised you don't argue that your complaint says, when you refer to plaintiffs, that it should be read as meaning plaintiffs and each of the plaintiffs, or that there is an implied adjective "each plaintiff." And then at least we get on to the heart of some of the other problems in this case. I'm not sure that solves your problem, but you have got a lot of important points here besides the important one we have been discussing.

MR. WISEMAN: I believe I would adopt the language you are suggesting, your Honor. I believe we have stated a claim under the statutes, in that section 1981 provides that all persons shall be subject to like punishments, penalties, and exactions as white persons. The Congress at the time they passed the statute must have been considering judges who would be the ones who would be subjecting persons to punishments, penalties and exactions. I don't believe that the judicial

immunity applies to judges when we are talking about suits in equity. The case of Bradley v. Fisher that is so heavily relied upon by the petitioners is not applicable to this case. First, it was not decided under the Civil Rights statutes; second, it was an action in damages; third, it was an isolated case involving a lawyer who had been taken off the rolls of attorneys. And, indeed, the Court in giving the broad language that it did as to the independence of the judiciary in that decision could not have meant that it applied to judges when we are talking about suits in equity because at the same time it decided that case, it decided the case of Ex Parte Bradley which is at 7 Wall. 364. And in that case, the United States Supreme Court issued a writ of mandamus to the then Supreme Court of the District of Columbia compelling that court to restore Mr. Bradley to the rolls of attorneys. This Court's decision most recently last term in Mitchum v. Foster decided the question as to whether a federal court could issue an injunction against a judge. One of the defendants in that case was a judge. The Court granted in remanding that case to the lower court, suggested that it should consider the questions of comity in our federalism and equity, but in terms of the doctrine of judicial immunity, it is clear that an injunction can extend to the judge.

We are not asking a court to infringe upon the lawful discretionary action of a judge. What we are asking a court to

do is to prohibit a judge from doing that which he has no right to do. We have simply asked that a judge, that these judges be enjoined from using race as a criterion in the exercise of their office. We have not asked the Court to tell the judge what sentence he must impose; we have not asked the Court to tell the judge which bond he must impose; we have simply said that we cannot use race as a factor.

QUESTION: Intentionally.

MR. WISEMAN: Intentionally.

QUESTION: And knowingly.

MR. WISEMAN: Yes, and in a pattern and practice case. Some of the charges that we have do not involve the exercise of discretion at all. With respect to the use of an unofficial bond schedule, there is no discretion involved. What we are talking about here is that when a black appears before the judge, he says, if the defendant is a black, the bond for him will be this, because he has a set bond schedule for blacks. We are not talking about the judge using -- weighing the various factors to determine --

QUESTION: Would you want the judge to be enjoined from performing a crime under Federal law? The use of race to impose a higher penalty is a crime, isn't it?

MR. WISEMAN: I believe it would be, but I am not sure of that, your Honor. I had not considered that through in this case. We do not have alternative remedies against the

judge because (1) there is no right of damages against the judge, (2) there is no way of solving the problem in the Appellate Court of Illinois. What we are talking about here is a pattern and practice. We are not seeking to enjoin a pending State proceeding. We are seeking to terminate this pattern and practice of these judges.

QUESTION: Has there ever been a direct appeal or State habeas on this question involving a particular defendant?

MR. WISEMAN: I don't know, your Honor. It would not be reflected in the record. I think the problem for it on a case-by-case basis are several: (1) that in order to prove the charge of sentencing on a pattern and practice basis, considerable discovery is necessary. It involves a considerable amount of resources to inspect court documents and police documents and then computerize them to come out with your prime facie case --

QUESTION: Will that be less so if you get to trial on this case?

MR. WISEMAN: It will not be less so on this case, but if we prevail in this case and prove our facts, that should end the problem. If you had it on a case-by-case basis, then the next defendant would have to do the same thing and you would continue on infinitum. Moreover, it would not prevent the ongoing discrimination that is occurring. Part of the discrimination that we allege has an effect on the participation

of these plaintiffs in peaceful parades against the racially discriminatory practices of merchants and public officials.

QUESTION: You really want an injunction against future prosecution? Do you want that?

MR. WISEMAN: No, your Honor, we are not --

QUESTION: Do you want a Federal court injunction against future State prosecution?

MR. WISEMAN: No. What we are seeking is very simple, that the judge not be permitted to use race as a criterion in administering the law with respect to bail and sentencing and the imposition of jury fees.

QUESTION: He takes an oath not to do that.

MR. WISEMAN: Your Honor, that's right. And we are charging that these judges have violated that oath.

QUESTION: You want them under the threat of contempt to try out on a contempt action whenever you might want to claim that he has used race in the imposition of a sentence?

MR. WISEMAN: Well, your Honor --

QUESTION: Intentionally and knowingly.

MR. WISEMAN: I would suggest (1) that if a judge does violate a Federal court order of that nature intentionally and wilfully and not inadvertently, then he should be subject to the contempt powers of the court.

Second, I would suggest we could not go into the Federal court on a show-cause order simply on an isolated

instance. Since we are pleading a pattern and practice case in order for us to show a violation of the court's order, we would again have to show a pattern and practice case. So we are not talking about five instances where a black may have gotten a different sentence than a white. We are going to have to show more. And I would submit to the Court that the Federal court after hearing the parties, after weighing the credibility of the witnesses and evaluating the evidence would then be able to be in a better position to fashion appropriate relief. And he could put certain limitations on our coming in to find a judge in contempt. Obviously, that's a serious thing, but we are making serious charges here. And the judge certainly would have the power to require us to come in to show again a pattern and practice.

QUESTION: May I ask you at this point who would be entitled under your definition of the class or classes here to come in and request a contempt citation for the judge? Your class is defined as all financially poor persons and all black citizens. It's a rather extensive and amorphous class, as I am sure you would agree. Does that mean any black citizen in Cairo or anybody who could prove he was relatively poor could request a contempt citation?

MR. WISEMAN: No, your Honor. We would, (1) there has been no finding as to what class consists of by the District Court. That finding would have to be made first. Then

presumably we would have to show -- assuming the District Court fashioned a relief with strict limitations -- we would have to show a series of persons who come within the class who have been deprived of those rights. It would not be an individual person who could do it. In the individual case, that could be handled in other means. But what we are trying to do is to prevent the pattern and practice situation, and the injunctive relief is, we believe, the most appropriate remedy.

QUESTION: Yes, but who would enforce that? Who would act to request a contempt citation for a judge?

MR. WISEMAN: The named plaintiffs and members of the class as ultimately determined by the District Court could come in again and request that the court issue a show cause order. It would be necessary, I believe, in the allegations for a finding of contempt that he allege that a series of people have been deprived again in violation of the court's order.

QUESTION: What's the population of Cairo?

MR. WISEMAN: It is a population of 6,000 people, approximately, 35 to 40 percent of whom are black.

QUESTION: What percentage roughly would you estimate would be categorized as financially poor?

MR. WISEMAN: Of that I am not certain, your Honor. I would say the black unemployment is 19 percent in Cairo, whereas the white unemployment is 6 percent. There are poor

whites in Cairo, but not to the same extent as blacks.

QUESTION: Well, obviously, you would have a serious problem there, certainly no one would minimize that. But the legal problem is who would enforce such a decree. Would it be two or three thousand people?

MR. WISEMAN: I believe, your Honor, that would be something that should be best reserved to the District Court after letting us have our day in court which we have not yet had. And then the District Court would be in a position to fashion the relief which would determine who could bring an action for a show cause order. I don't think that we can determine that here in the abstract.

I would suggest that the relief, your Honors, that we are seeking is of a prohibitory nature. We are seeking to termiante this pattern and practice of racial discrimination. The discriminatory practices are deeply engrained in Cairo, and what the Seventh Circuit suggested, and it was only by way of suggestion, was that a reporting system be devised whereby the State courts would report the disposition of cases before them. That would provide the information to the District Court that would be necessary to assure that the order is being enforced.

QUESTION: You haven't suggested as yet, at least I don't think I heard you suggest as yet, why the Appellate Courts of the State of Illinois can't deal with this problem.

MR. WISEMAN: There were several problems, your Honor. One, the appellate process on a case-by-case basis would not eliminate the ongoing discrimination. That ongoing discrimination goes in two ways --

QUESTION: Does the Supreme Court of Illinois have supervisory power under the Illinois Constitution and practice?

MR. WISEMAN: It's not clear, your Honor, whether the Supreme Court of Illinois could mandamus these judges in this kind of way.

QUESTION: Haven't they exercised supervisory power in past cases?

MR.WISEMAN: Yes, your Honor, but it has involved a different kind of issue. It has generally involved the personal misbehavior of a judge in cases such as bribery or criminal conduct of this kind.

QUESTION: Don't you characterize this as misbehavior of the judge?

MR. WISEMAN: Yes, I do, your Honor, but I don't believe it's clear under Illinois law that the Illinois Supreme Court could intervene. Moreover, your Honor, --

QUESTION: Don't you think there is some, under concepts of federalism, that there is some obligation to find that out first?

MR. WISEMAN: Your Honor, if I -- it would be necessary for me to go outside the record to explain the efforts

that have been made in the State system. The Federal remedy is a supplementary remedy. It is a remedy specifically provided by statute of the Congress. To read that statute plainly, it gives us a cause of action in Federal court to intervene. Granted, the concept of comity should temper the exercise of federal injunctive powers. But in this kind of case, where you have a pattern and practice, where the State is engaged in something that it has no right to do, where it is engaged in a conduct that is not insulated from judicial review, the Federal courts have an obligation to intervene.

QUESTION: Mr. Wiseman, what happened to your damage claim?

MR. WISEMAN: Your Honor, our damage claim was against the States Attorney, Mr. Berbling. He filed a petition 72-1107 which is pending before the Court. Also, our claim against Mr. Spomer, which is the case we are arguing now, in that case Mr. Spomer substituted himself when he became States Attorney on December 4, 1972, which was after the Seventh Circuit decision.

In summary, your Honors, judges do not have the right to engage in racial discrimination. If they did, they would then have the power to annul the Constitution of the United States. There is no State relief here, we contend, that is adequate to solve a pattern and practice situation. Federal courts have always been the basic responsibility of guaranteeing

Federal rights to its citizens when the States have deprived them of them.

All we are asking here is that we have our day in court to prove our charges. This case was dismissed on motion by the defendants.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wiseman, am I right in thinking that you don't within the limits of your complaint allege any efforts to pursue State court remedies, such as appeal?

MR. WISEMAN: That is correct, your Honor. We did not feel that was necessary because of the Court's decision such as in McNeese v. Board of Education, where the Court has indicated the remedy under the Civil Rights statute is a supplementary remedy to that and may or may not exist in the State courts.

QUESTION: Let's assume, though, that a State criminal prosecution was pending against one or more of the named plaintiffs at the time you filed this action, and you could have raised these claims in that State prosecution.

MR. WISEMAN: First, your Honor, we did not do that, but if we had, I would suggest that it would have --

QUESTION: I take it you say that all of these plaintiffs, except I don't know if you claim this about the white plaintiffs, but let's assume that all these plaintiffs

you allege were involved in a criminal prosecution. Insofar as the allegations against the judge is concerned, they must have been. And it must have been you claim they were discriminated against in their criminal prosecution. And you could have raised these very claims in those State criminal prosecutions.

MR. WISEMAN: The problem with that, your Honor, is twofold: (1) in order to prove the charge on sentencing, a considerable amount of discovery is needed. And the discovery -- a State judge whom we are challenging for racial bias in his decision is unlikely as a practical matter to grant us the discovery needed to prove that he did in fact engage in racial bias.

Second of all, that individual case would not have solved the ongoing problem. That would have solved simply that single case. What we are talking about is there is a continuous pattern and practice by these judges over the years to have engaged in this kind of conduct. What we are seeking is a prohibitory injunction to prevent them from doing that which they have no right to do.

QUESTION: So you think a class action like this where you are looking to the future is another exception to the Younger v. Harris?

MR. WISEMAN: In the circumstances of this case, yes, your Honor.

QUESTION: You mean in a pattern.

MR. WISEMAN: Yes, in a pattern and practice case.

QUESTION: Don't you think at least there is a possibility that if the Supreme Court of Illinois repeatedly reversed these judges, saying that they were in fact guilty of what you charge them with, they would stop doing that?

MR. WISEMAN: No, your Honor. I think considering the history of Cairo, it is not reasonable to expect that they would do that. I think moreover that handling it on a case-by-case basis wouldn't solve the overall problem.

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

Mr. O'Rourke, you have five minutes left.

REBUTTAL ORGAL ARGUMENT OF ROBERT J. O'ROURKE

ON BEHALF OF THE PETITIONERS

MR. O'ROURKE: Thank you, your Honor.

If the Court please, again we would like to point out that nowhere in the complaint as the Court has indicated in asking the questions do we find that any plaintiff that has been named has been brought before this Court has been charged, bailed or sentenced. Furthermore, there is not one single instance pleaded within the complaint of discriminatory practice. Counsel has indicated that there has been a pattern and practice over the years of discriminatory conduct. It could be very easily shown that if there is such a pattern or practice, that there are individual instances that there are differences between the pattern of sentencing between white and

black.

We submit that we read the complaint as far as the sentencing charge not that there is a discrimination between white and black persons as far as bail is concerned, but that only that they use an unofficial bond schedule in criminal cases. And that's solely it. We also submit that the allegations as have been charged here in a civil rights case, that the holdings of the courts have been that in civil rights action the pleadings must be specific. In the case People ex rel. Hoge v. Bolsinger is such a case that hold these pleadings be specific.

We maintain that nowhere in any of the pleadings and nowhere in the argument has there been any allegation made that these particular judges, O'Shea and Spomer, have been guilty of a discriminatory act relative to white and black persons.

QUESTION: If this pleading is not specific enough, what about its amendment?

MR. O'ROURKE: They have already amended once, if the Court please, and we submit --

QUESTION: How about amending a second time?

MR. O'ROURKE: Well, that might be possible, I don't know. We think that if they got specific as far as the States Attorney Berbling is concerned, point out specific acts of discrimination --

QUESTION: Well, against the judges, as I understand Mr. Wiseman's argument, they have the information which would identify which named plaintiffs were affected by which of the defendant judges. So he told us.

MR. O'ROURKE: I would say that in those specific instances, if there were such specific instances, that the remedies we have within our State court system would be able to take care of that.

We also point out that --

QUESTION: That's another argument. But as to the sufficiency of the pleadings, what he has in effect told us, I gather, is that he could amend this to specify everything.

MR. O'ROURKE: That's possible, yes, sir.

QUESTION: What do you have to say about the suggestion I made to counsel that reading of the pleadings the way we tend to read them is that under the Federal rules, plaintiffs means each plaintiff?

MR. O'ROURKE: This goes with the argument I started to make, if the Court please, that if they got specific in eleven specific instances, as far as the States Attorney is concerned, they could very easily have gotten specific as far as the judges are concerned. As a matter of fact, those eleven specific instances, there is not one instance there where any of the parties --

QUESTION: Well, of course, that's all speculation

about whether they can. But if we were to agree this complaint as meaning each plaintiff, do you regard this as the large issue in this case, the pleading issue, or is the underlying issue more important?

MR. O'ROURKE: Well, it's one of the issues, if the Court please. The most important issue, we contend, is the underlying issue of the State supervision by the Federal District Court on a continuing basis.

QUESTION: Well, part of that, of course, is your claim that these defendants are simply immune.

MR. O'ROURKE: Yes, sir, that's correct. Both from money damages and from injunctive relief --

QUESTION: Right. And that would end it.

MR. O'ROURKE: -- as far as a mandatory type of action.

QUESTION: And if you are correct in that opposition, then, of course, that ends it and we don't need to consider the propriety or the extent of the relief indicated by the Court of Appeals, if they are immune from any liability in equity or law.

MR. O'ROURKE: I would say so.

If there are no further questions, we would ask, based upon these reasons, that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed as to the defendant judges and that this Honorable Court hold that the doctrine of judicial immunity would apply in the mandatory injunction.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. O'Rourke.

The case is submitted.

(Whereupon, at 11:52 a.m., the case was submitted.)