In the

Supreme Court of the United States

W. C. SPOMER, STATE'S ATTORNEY OF ALEXANDER COUNTY, ILLINOIS, Petitioner,	)	
v.	)	No. 72-955
EZELL LITTLETON, et al.,	)	

Washington, D.C.
October 17, 1973

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Petitioner	:	No. 72-955
v.		
EZELL LITTLETON, ET AL.		

Washington, D. C.

Wednesday, October 17, 1973

The above-entitled matter came on for argument at 11:53 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:

JAMES B. ZAGEL, ESQ., National District Attorneys Association, 211 East Chicago Avenue, Chicago, Illinois 60611, for the Petitioner.

ALAN M. WISEMAN, ESQ., Schiff, Hardin & Waite, 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

CHIEF JUSTICE BURGER: We will hear arguments next in 72-955, Spomer against Littleton.

Mr. Zagel, you may proceed.

ORAL ARGUMENT OF JAMES B. ZAGEL ON

BEHALF OF THE PETITIONER

MR. ZAGEL: Mr. Chief Justice, and may it please the Court, this is, as was referred to in the previous argument, the next case involving the States Attorney.

If it would help the Court, I will give a brief outline of the standing of the various parts of the Seventh Circuit judgment and the appeals taken therefrom.

The Seventh Circuit indicated that there would be equitable relief available if the case were proven against the two State judges. That part of the Seventh Circuit appeal is the subject of the previous case.

The Seventh Circuit also indicated that there would be mandatory injunctive relief available against the States Attorney of Alexander County, and that part of the Seventh Circuit suggestion is the concern of this case.

There is a third petition for certiorari filed on behalf of Peyton Barbling, the immediate past States Attorney of Alexander County, and his investigator Earl Shepherd, and the police chief of Cairo, Illinois, Chief Meisenheimer. That petition concerns the portion of the judgment having to

do to the extent that it does with injunctions against --

QUESTION: Is that pending?

MR. ZAGEL: That is pending. That is pending. The petition has not been ruled on. That concerns whatever remains of the injunction with respect to Berbling and I suspect nothing remains, with whatever remains of the injunction with respect to Shepherd and Meisenheimer, but principally that third case is concerned with the damage holding of the Seventh Circuit.

The only two cases that are before this Court in terms of certiorari having been granted have to do with the injunctive relief.

Now, the question has been raised during the course of the previous oral argument with respect to the fact that States Attorney Spomer was not named as an original defendant in this case and that there are no specific factual allegations against him. The brief for the petitioner Spomer does not raise that argument, and it was a decision by Mr. Spomer consistent with my advice to him that whatever defense he would have and whatever claim he would have with respect to the correctness of the Seventh Circuit judgment on the basis of the carryover of the allegations of Berbling to allegations against Spomer, that he should not and he so decided that he should not raise that point. The waiver that we make with respect to any claim that the allegations with respect to Berbling do not carry over to Spomer may give this Court an

indication of how significant the basic underlying issue is, both to the States Attorney of Alexander County and to State prosecutors generally in this country.

QUESTION: Is this a jurisdictional problem?

MR. ZAGEL: I think it is not a jurisdictional problem.

QUESTION: If these people have never experienced anything at the hands of the latest prosecutor, is there any case of controversy between them and the prosecutor?

MR. ZAGEL: I think there is sufficient case of controversy.

QUESTION: A statutory claim under 1983 or 1981?

MR. ZAGEL: I think there is a sufficient statutory claim against the office of the States Attorney of Alexander County.

QUESTION: In essence, he wants to stand in Berbling's shoes in order to test out the underlying constitutional issue. The question really is whether that involves perhaps an advisory opinion.

MR. ZAGEL: I think not. I think not. I am, of course, aware of the fact that such a contention can be made, and it's certainly an arguable one.

QUESTION: You don't urge that your waiver is binding on us, do you?

MR. ZAGEL: Oh, no. No. I have done many things in the course of my practice before courts of the last resort,

but words of "binding," "cannot," and "have no power" are words I do not use. This Court can despite the waiver made by Spomer decide that there exists no case or controversy. I suggest that there are very sound reasons --

QUESTION: What is there in the complaint that goes against the office?

MR. ZAGEL: There is -- the complaint is specific with respect to those actions that took place while Berbling was the States Attorney. Not all of the specific allegations have to do with Berbling himself. Some of them have to do with the staff in his office. It is true that in each of the allegations Berbling's name is mentioned. There are two things that ought to be pointed out to the Court.

The first is that there has been no allegation or no claim, despite the fact that one could be made, that Spomer, the States Attorney, has changed any of the policies that Berbling exercised. And in fact there is the affirmative act of Spomer in substituting himself for Berbling in this Court.

QUESTION: It sounds like a case where somebody is charged with the crime of murder and his successor comes along and says, "I am also guilty."

MR. ZAGEL: Well, I don't think so. I don't think so. I think that one --

QUESTION: Is there anything in this record that shows that the successor in office intends to do what the other

man did?

MR. ZAGEL: No.

QUESTION: It's not in this record.

MR. ZAGEL: Well, yes, I concede that point, but --

QUESTION: Doesn't that cut you off?

MR. ZAGEL: No, I think not.

QUESTION: Recordwise.

MR. ZAGEL: No, I think not.

MR. CHIEF JUSTICE BURGER: We will resume there after lunch.

(Whereupon, at 12 noon, the oral argument was recessed until 1 p.m. the same day.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue.

MR. ZAGEL: Mr. Chief Justice --

MR. CHIEF JUSTICE BURGER: We will allow you a little extra time since you seem to have been interrupted, Mr. Zagel.

MR. ZAGEL: Thank you, Mr. Chief Justice, and may it please the Court, to return to the point that we had departed before, so far as I can tell in the brief period of time that I have had to review materials, and I find almost no decided cases on this point, the only indication I have with respect to substitution of parties is a line in Stearn and Gressman on Supreme Court practice which indicates, that the substitution is based on the assumption that the successor will continue the policy which was responsible for the litigation and that if that policy is not to be continued, it is the burden of the substituted official to make a motion to prove that the case is moot. And as I have indicated before, there is nothing in this record, nor will there be on the part of my client, to indicate that he would change the policies which are alleged to have been exercised by his predecessor.

QUESTION: You mean that your client says he would do all the things that were alleged in this complaint?

MR. ZAGEL: I think that my client's position is that his policy would not deviate from the policy of his

predecessor.

QUESTION: I asked a specific question that he intends to do the type of things that are alleged in this complaint.

MR. ZAGEL: I think he would concede that he would do the acts that it is alleged that his predecessor --

QUESTION: He admits that the allegations are true?

MR. ZAGEL: For purposes of this litigation --

QUESTION: I'm asking, does he admit them?

MR. ZAGEL: Yes.

QUESTION: Not for the purpose of this litigation. Does he admit them or not? Does he intend to do these things?

MR. ZAGEL: To answer that question I would have to go outside the record, which I am willing to do, but I would have to go --

QUESTION: I didn't ask you to go outside the record.

QUESTION: What if the allegations as alleged amount to a crime under 242?

MR. ZAGEL: Well, if the allegations --

QUESTION: That's what he says he's going to violate the Federal statutes?

MR. ZAGEL: Well, if they do constitute a crime under the Civil Rights Act, and one of the points that was made, one of the points suggested is if the allegations of the complaint are true, one of the appropriate remedies for the plaintiffs below was to seek Federal prosecution of the States Attorney.

That is one of the alternatives. And if the policies that are being followed by this States Attorney and by his successor constitute Federal crimes, then there should be Federal prosecution.

QUESTION: I suppose you are trying to say that your posture is necessary to try to preserve this litigation for the larger issue which you talked about before lunch.

MR. ZAGEL: Yes, it is necessary not only to preserve the litigation generally for the larger issue, I rather suspect that the policies followed by Berbling and stripping of the general conclusory allegations, the policies followed by Berbling would as a practical necessity be followed by Spomer.

QUESTION: Well, the thing that bothers me, Mr. Zagel, insofar as this is a 1983 suit, 1983 in terms creates an action only against -- I am reading it -- every person who under cover, and so forth, subjects or causes to be subjected any citizen to a deprivation of rights, et cetera. And I don't see how this, if treated as a 1983 action, the successor comes within it.

MR. ZAGEL: I think the successor comes within it so long as the successor -- well, my answer is --

QUESTION: He couldn't possibly have done any of the things alleged because he wasn't in office at the time those things were alleged to have been done.

MR. ZAGEL: My answer really is twofold. The first

part of the answer is it's our basic contention that these allegations if stated against Spomer directly instead of if Berbling continued in office would not state a cause of action under 1983 in any event. It's our secondary position that to the extent that they are found to state an action, that they would state an action against the successor in office, the substitute party so long as there is no declaration, and the burden is upon him to make the declaration, that he is going to deviate from those policies.

QUESTION: So if he has said he is going to continue the policies, if he hasn't done it, he's threatening to do it.

MR. ZAGEL: Well, yes, that would be his status, although I tend to think there has been no material change so far as I am aware in Alexander County since December when Spomer took over.

It might also be said of the Seventh Circuit that at the time the ruling was issued, it should have been apparent to the Seventh Circuit that Berbling would not be in office after December 5, because he did not run for reelection.

QUESTION: It appears the Seventh Circuit was as anxious to keep the litigation alive as you are today.

MR. ZAGEL: I think so. I think so.

QUESTION: Of course, the Seventh Circuit's opinion was handed down before December 5th, wasn't it? I mean it wasn't moot when they decided it.

MR. ZAGEL: Yes, although it could be determined at the time they issued that opinion that Berbling would not succeed himself in office. It was impossible for him to succeed himself in office simply because he had not filed for reelection, and the filing date was in the previous December.

With respect to the merits of the case, there has been some discussion as to whether the argument that is offered here and I suppose with respect to both petitioners, this one and the one in the previous cases, whether the argument is one of immunity or one of scope of remedy. For purposes of this petitioner I don't think it makes a great deal of difference how you view it simply because whether you view it as an immunity argument or as a scope of the remedy argument, the position the petitioner States Attorney is taking is that this kind of remedy, this mandatory injunction could under no circumstances in any case ever be appropriately issued. So whether the argument is phrased in terms of scope of the remedy or absolute immunity, its functional purpose from our view is precisely the same.

I might add also that although I think and agree with the position of the petitioners in the previous case with respect to the appropriateness of the remedy directed against the judges, I would submit that the argument of the States Attorney is still stronger than that of the judges. Essentially what the Seventh Circuit would force the United States district

judge to do is to exercise his supervisory jurisdiction over both the trial judge and the State prosecutor. I think it is improper that he does either, but I might say that at least when it comes to exercising supervisory jurisdiction over the State trial judge, the United States district judge is doing something that is not too far remote from what he is expected to do with his own docket, because a Federal trial judge, of course, makes decisions as to bail, and so on and so forth.

When it comes to exercising supervisory jurisdiction over the States Attorney, the court is crossing into the realm of prosecutor. And I think for reasons that we have stated innumerable times in our briefs, it is a function that cannot be effectively performed by most judges, and for those few judges who could effectively perform it, it would be highly inappropriate to do so.

I might add also that the reason that this ruling is so particularly crucial for prosecutors throughout the nation is that there is, aside from situations like those in Cairo, Illinois, there is in this country a large number of groups of people who have severe quarrels with the way criminal justice is run, whose quarrels generally fall on the side of their view of the insufficient prosecution. And we submit that there is a very realistic possibility that if the judgment of the Seventh Circuit, this remedy is allowed to stand, that we will open a real Pandora's box with respect to suits against

prosecutors.

Now, the Pandora's box argument is a common one. I think that at least half the litigants who argue cases involving basic principles of law will use a variation of the Pandora's box argument, saying if you do this, then the walls will all fall down. And perhaps there is a hyperbole in that argument in most cases. I think not in the case of the prosecutor. There is presently in the State of Illinois at least several groups who are complaining vigorously, and although they have not sued yet about what they consider to be insufficient efforts by the prosecutors to proceed on given cases, the most prominent of which in our State is the Citizens for Decent Literature who are complaining bitterly about the failure of various prosecutors to move against literature that they consider obscene. There is a group of people who claim to represent rape victims who are concerned about the policies of prosecution with respect to rape cases. There are groups that complain about the prosecutions with respect to environmental cases. And I suspect that if the ruling stands up, most prosecutors who have adopted a policy of declining anything, any violation of criminal statutes involving a dispute between a tenant and landlord, I suspect that both the tenants and the landlords will be in Federal court claiming improper prosecution.

And I might add further that purely apart from the

question of whether a Federal judge could administer this rather mammoth remedy that is called for, there is the basic question -- and I suppose this is an argument that speaks more to an immunity argument than to anything else -- there is the basic question of forcing the prosecutor to spend his time in court and defend his policies with respect to discretionary declination of prosecution. The plain fact of the matter is I don't think any prosecutor could long function if he had to depose on declinations of prosecution. I doubt that there is a prosecutor in this nation who prosecutes more than a fraction, less than one-half, certainly, more than a fraction of the cases that are brought to him. Would he have to come to Federal court and explain his declination in each and every one of those cases, even if the case is not made, even if the petitioner fails to make his case, or the plaintiffs fail to make their case? The enormous burden on the prosecutor, I think, would be sufficient to justify, as it does in other areas, the application of an absolute immunity doctrine. And it is clear, I might say, it is clear that the Seventh Circuit contemplated that the Federal District Court would address itself to individual decisions. There is a certain selective blindness exercised by the respondents in this case with respect to what exactly they won, if you want to use that word, in the Seventh Circuit. And I quote from the language of the Seventh Circuit's opinion that said, "An initial decree

might set out the general tone of rights to be protected and require only periodic reports and various types of aggregate data on actions on bail and sentencing and disposition of complaints." The court expressed, and I quote, "complete confidence in the district court's ability to set up further guides as required and, if necessary, to consider individual decisions," which appears at page 415 of 468 F. 2d.

So we are in effect talking about review of individual decisions to or not to prosecute.

There has been citation of authority in this Court in which Federal courts have exercised what might be called a pretrial supervision over State prosecutor by enjoining him from proceeding in a particular case. I state as we have stated in the brief that this is a far different thing from exercising a general power to force a prosecutor to prosecute a case in a certain way.

And I might add that the complaint was not limited simply to the initiation of criminal proceedings. There were elements in the complaint that said that the prosecutor didn't present the case competently. Perhaps the closing argument didn't appeal to the plaintiffs, or perhaps the way a witness was examined didn't appeal to the plaintiffs. You are talking about very detailed regulation of the way a prosecutor tries his case, and that is what the Seventh Circuit and certainly what the plaintiffs contemplate.

The fact of the matter is that those cases in which preliminary injunction have been granted prior to trial or at least it has been suggested that it might be done are really no different in effect than a form of accelerated appellate review. It's a court saying in advance that this particular prosecution is brought in such bad faith or for such obvious harrassment purposes that we are going to stop it now. And the basic premise is that if we did not stop it now, we would just have to reverse it later. But it is still the review of an individual case.

As I suggest in the brief, there are available and I think superior remedies, superior to that suggested by the Seventh Circuit. Indeed, I would say that each of the remedies considered by the Seventh Circuit,including the most Draconian one of all, which is to say reversal of convictions of people who were properly prosecuted because the prosecutor refuses to proceed against other people, I think that even that remedy is preferable to the remedy that is involved in this case. It seems to me what the Seventh Circuit did was take upon itself, or if not take upon itself, convey a power to the Federal district judges that no court should under any conditions ever exercise. And that is the power to prosecute. A Federal judge simply should not serve as a prosecutor, either in State or Federal court. And I think that that is what the Seventh Circuit opinion amounts to, a command to a Federal judge that if certain

cases are proven, you have to preempt the decision of the prosecutor in State court.

If there are no further questions, I would like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

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 named Peyton Berbling as the defendant in our complaint. He was the then States Attorney. His term of office ended December 4, 1972, which was after the Seventh Circuit decision.

Mr. Spomer on his own substituted himself as the defendant in this case insofar as the appeal is concerned.

QUESTION: Where is that in the record?

MR. WISEMAN: Well, it is in Mr. Spomer's brief, your Honor, where he specifically said that he substituted himself pursuant to the rules of this Court.

QUESTION: You mean it's not in the record?

MR. WISEMAN: Other than that, no, your Honor. There is nothing in the record to indicate when Mr. Berbling's term of office ended.

QUESTION: I suppose that could be judicially noticed by the Seventh Circuit, couldn't it?

MR. WISEMAN: Yes.

QUESTION: Can we judicially notice the fact that he substituted himself?

MR. WISEMAN: Well, I think Mr. Spomer is conceding that fact, and I think that the Court can take note of --

QUESTION: Could I put myself in there, too, while we are at it? Isn't there some procedure?

MR. WISEMAN: Well, your Honor, the normal procedure would be that we would have substituted the other side as a party. We did not do that. I would suggest that the case does not necessarily have to be deemed moot insofar as this States Attorney is concerned if the Court chooses to, for two possible reasons:

One, Mr. Spomer substituted himself and he is apparently conceding that he is continuing the practices of Mr. Berbling.

The second is that an investigator employed in the States Attorney's office, a man by the name of Mr. Shepherd, is still employed by the States Attorney's office. Mr. Shepherd's petition is pending before this Court in conjunction with the petition of the previous States Attorney. And it could be stated that Mr. Shepherd's conduct is continuing, and Mr. Spomer as his supervisor has ultimate responsibility for the conduct of his subordinates and is therefore a proper party at this time.

I would submit, however, that in order for us to proceed against Mr. Spomer, it would be necessary for us to investigate the facts to see that the concession apparently made by the States Attorney is true and amend our complaint.

QUESTION: Suppose the judge here dies tomorrow and another judge is appointed. Is it still a live case?

MR. WISEMAN: I do not believe so, your Honor.

QUESTION: The difference being what?

MR. WISEMAN: The only difference that I see is (1) that the States Attorney has made this concession, and (2) that a subordinate whom we are charging --

QUESTION: Where is that concession in the record?

MR. WISEMAN: It is only in the record of this argument by counsel for the States Attorney.

Aside from the issue of whether it is moot against the States Attorney, I would like to proceed to the merits of the case.

QUESTION: May I ask just before you do whether Shepherd has been employed by the present States Attorney?

MR. WISEMAN: Yes. And that is in the record in this way, that we alleged in our complaint that he is employed by the States Attorney, and there is nothing in the record to indicate that he has terminated his employment.

QUESTION: So he as an agent continues.

MR. WISEMAN: Yes, your Honor.

QUESTION: And insofar as your complaint was against his actions as an agent of the States Attorney, there is a continuity here.

MR. WISEMAN: Yes.

QUESTION: Isn't the issue of vicarious liability under 1983 somewhat unsettled? Isn't that kind of injecting a new element into the case if you have to rely on that?

MR. WISEMAN: To a certain degree it is, your Honor. But since we are seeking equitable relief, a superior is responsible for the conduct of his subordinates, and whether it's by acquiescence or active participation in the conduct of the subordinate, he would have a duty, I believe, to stop that conduct. And precedent for this that I am familiar with in a Seventh Circuit decision is Schnell v. City of Chicago in which the superintendent of police was named as a defendant in that case solely because he was responsible for the conduct of his subordinates.

QUESTION: Do you see any similarity between the kind of continuing monitoring that the Seventh Circuit has prescribed here and the continuing monitoring that the Sixth Circuit prescribed in Gilligan v. Morgan?

MR. WISEMAN: Your Honor, frankly--

QUESTION: That is the National Guard case where the Sixth Circuit sent the case back to the district court and prescribed proper weapons and methods and procedures for the

National Guard.

MR. WISEMAN: We are not seeking relief that extensive. What we are seeking is (1) that the States Attorney not turn a deaf ear to complaints of blacks simply because they are black. He refuses simply to take the evidence of a black complainant.

Second, he is refusing to prosecute whites when the victims are black simply because the victim is black. What we are seeking is a prohibitory injunction to keep him from using race as a criterion in the exercise of his office.

And as the Seventh Circuit has suggested so far, that a reporting system indicating the disposition of cases might be a start. It would be for the district court after hearing again the case in a trial and weighing the credibility of the witnesses and the parties, to then determine what would be appropriate relief at the first instance. We would assume that once a Federal court issued an order compelling the States Attorney not to use race as a factor in the exercise of his office, that the States Attorney will abide by that order. And it is only if he disobeys that order that further relief comes into being.

The situation in Cairo is that as a result of the efforts of blacks to free themselves of the shackles of the discriminatory conduct of the white merchants and public officials, that they have been the targets of white criminal

conduct; assaults and batteries occur frequently. In the course of their peaceful parading to demonstrate against this they are assaulted and battered by whites. And what happens? They then complain to the States Attorney, and what does he do? He refuses to take any evidence; he refuses to investigate.

We brought this action under 1981, and 1981 specifically says all persons shall have the same right to give evidence and to the full and equal benefit of all laws and proceedings for the security of persons as white persons. That is precisely what we are charging the States Attorney has violated, that he --

QUESTION: That he didn't give your clients the protection of the criminal law.

MR. WISEMAN: Yes. And that he refuses to do what the Federal statute requires, and that is to give all persons the same right to give evidence as white persons. He is refusing to allow them to give evidence, although he allows white persons to give evidence when they are the victims of black criminal conduct.

QUESTION: Will the Governor of Illinois have any supervisory power over local prosecutors as, for example, the State of New York provides?

MR. WISEMAN: To my knowledge, the States Attorney is an independent office, and to my knowledge he is not subjected to the control of the Governor.

QUESTION: Can't even be removed by him as they can in New York?

MR. WISEMAN: Not to my knowledge.

QUESTION: How about a case last term, the Linda R. or Linda S. case on standing, holding the lack of standing in a person to complain that the criminal law was not being enforced so as to protect her?

MR. WISEMAN: Well, I think that in this case, your Honor, the blacks who have sued are complaining not only that the law isn't being enforced, but that this States Attorney -- that is, really, the predecessor States Attorney -- would refuse to take evidence or investigate. In that sense the States Attorney's conduct --

QUESTION: That proposes the same question as was dealt with last term.

MR. WISEMAN: Well, I submit, your Honor, that because this is a pattern and practice case in which the conduct of the States Attorney in refusing to take evidence of white --

QUESTION: There isn't any more pattern than there was in this case last term.

QUESTION: It was Dallas, Texas, where the States Attorney just said no.

MR. WISEMAN: Well, I suggest, your Honor, at least in the circumstances of this case, that we have stated the

necessary allegations for a claim under sections 1981 and 1983. I think that the question may be then to the extent whether this Court or Federal district court should restrain itself from exercising the authority that is present under the Civil Rights statutes. And I think first we have to start with the proposition that this Court has in the past decided a number of cases in which it has enjoined pending State prosecution. I suggest that the standards that have been established in those cases in which the office of the State has been exercised in bad faith and in which there was immediate irreparable harm have been met in this case.

I think the doctrine of quasi-judicial immunity because of the prior cases in this Court has already been resolved. I don't believe the interference by a Federal court by issuing such an injunction will infringe upon the lawful exercise of the discretion of the States Attorney.

First of all, discretion is not unlimited. It is limited to abiding by the law and not to seek to annul the Constitution and the laws of the United States. This is not an isolated case in which we have a disgruntled litigant complaining that he did not have his attacker assailant prosecuted. Instead we are claiming that across the board black complainants do not get relief.

It does not involve discretion at all when the States Attorney says, "I am not going to take evidence from blacks

when they are victims of white criminal conduct." Moreover, when the States Attorney refuses to prosecute simply because the victim is black, does not involve discretion at all, either.

There is no relief in the State court in this situation. Where the States Attorney refuses to take evidence, you cannot appeal to a State court for relief. Where the States Attorney refuses to investigate or refuses to prosecute, you cannot go to a State court for relief.

One suggestion that Mr. Spomer has made in his brief is interestingly at odds in the petition of Mr. Berbling. Mr. Spomer suggested that a cause of action in damages is preferable to equitable relief. Mr. Berbling, of course, is taking the opposite position in his petition before the Court. I would suggest that damages would not solve the problem because it would not prevent the ongoing discrimination. What you could have in a situation where you had an action in damages, is that the white citizens who are against the black efforts to free themselves collecting a defense fund, and every time the States Attorney is found liable in damages, they pay it off, but in the same sense they manage to maintain their supremacy, they manage to avoid prosecution. I would suggest that that would not be a way to solve this problem.

The basic relief that we are seeking is of a prohibitory nature, that race not be used as a criterion in the exercise of office. I think again that it would be

premature to determine what precisely is the appropriate relief because I think the district court must hear our evidence first and then fashion what would be considered appropriate relief by it.

In summary, when citizens are deprived of access to the criminal justice system, the fabric of a civilized society disintegrates. I submit to you, your Honors, that is what is happening in Cairo.

Thank you.

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

You have about six minutes left, Mr. Zagel.

REBUTTAL ORAL ARGUMENT OF JAMES B. ZAGEL

ON BEHALF OF PETITIONER

QUESTION: Mr. Zagel, before you get startad, if by any chance you lose this case, are you going to pay the costs?

MR. ZAGEL: Is who going to pay the costs? Is my client going to pay the cost?

QUESTION: Yes.

MR. ZAGEL: That is the customary rule in this Court.

QUESTION: It is a customary rule for a party to. You admit that you are a party for the purpose of costs?

MR. ZAGEL: Mr. Spomer, yes, he is. Yes.

QUESTION: If the Court accepts the view that he is a party.

MR. ZAGEL: Yes. That would be the natural assumption

that if we were to lose the case, Mr. Spomer would get a little bill from the clerk of the court for the costs, and he would pay it.

With respect to the point on substitution, I just point out that Rule 483 of this Court provides for automatic substitution in these cases.

One point that was made by Mr. Wiseman is that -- generally has been, and I suppose is perfectly acceptable, a tactic for him in the course of argument is to minimize, although I don't think he can do so successfully, the nature and scope of the Seventh Circuit's remedy. One of the words he used is that somewhere we will have to start, and this is just a start, at determining what relief has to be granted.

It's really not the start that so much concerns us, it's where the finish is. And no one has denied yet, and no one has ever offered a credible argument that the limits of this doctrine are very broad indeed. And I might add that even the start has to be a substantial burden on any prosecutor, even the hearing has to be a burden on the prosecutor, and the discovery practice as well. That, too is a burden, and an unreasonable one.

QUESTION: If a prosecutor brings or refuses to bring -- well, say, brings a criminal prosecution in circumstances where he ordinarily wouldn't, brings it because of race, would you suppose he violates 1981?

MR. ZAGEL: He may violate 1981.

QUESTION: What if he does it knowingly, wilfully, does he violate 242?

MR. ZAGEL: Yes, he may.

QUESTION: So he always has the criminal sanction over him anyway if he intentionally and wilfully conducts himself?

MR. ZAGEL: Precisely.

QUESTION: That cuts both ways, I suppose, that it -- doesn't it put the injunction in a different light if what he is enjoined from doing is not acting intentionally and wilfully based on race?

MR. ZAGEL: Well, if you view it again solely as an immunity argument rather than as a remedy argument, yes, I suppose one could say that since --

QUESTION: I look at it both ways, both as a remedy and --

MR. ZAGEL: Well, I think that the two basic points are there: If what the States Attorney is doing constitutes a Federal crime, a violation of 243 --

QUESTION: After all, I gathered from what your opponent said that all they were claiming and all they wanted protection against was an intentional and wilful act based on race, not a mistake.

MR. ZAGEL: That is correct, that is their point.

QUESTION: And I take it that if you take that literally it means that 242 would be violated by these acts?

MR. ZAGEL: Yes, if you take it literally.

QUESTION: Well, doesn't that put the injunction issue in a different light, if you are enjoined only from acting intentionally?

MR. ZAGEL: No, I think it does.

QUESTION: Would you say the immunity reaches that?

MR. ZAGEL: Well, that's precisely my point, if you view it solely as an immunity matter, my answer to the question is no.

QUESTION: Immunity is not (inaudible) whether equity should enjoin it.

MR. ZAGEL: Yes.

QUESTION: And ordinarily you would say equity doesn't enjoin a crime, commission of a crime.

MR. ZAGEL: That's correct.

QUESTION: But here you have a high policy Federal statute, 1983 and 1981.

MR. ZAGEL: Yes. You also have, as I --

QUESTION: And 1983 having been held to be exempt from one of the restraints on a Federal court.

MR. ZAGEL: Yes. And in that respect, basically, I suppose, my argument then goes to scope of the remedy rather than immunity. I think that that is inherent in the fact that

I have made two concessions which, considering the fact that this brief was filed not only in behalf of Spomer, but in behalf of the National District Attorneys Association as well, I think are very substantial concessions: (1) that there would be, if the allegations were all true, a remedy in Federal criminal prosecution, which I think is perhaps the greatest single ... ; and (2) we would be willing to concede that if there has to be any remedy at all between private parties in a Federal court, that that remedy rather than be the injunction be damages. I tend to think that there is a strong immunity argument against damages as well. What I am trying to impress upon the Court is the degree of opposition and the degree perhaps of maybe outright terror would be the best word with which State prosecutors would view proceedings under the Seventh Circuit opinion.

QUESTION: The idea would be that it might not be so hard to defend himself -- might not be so hard to win, but it would be terribly burdensome defending himself against perhaps a series of unsubstantiated charges.

MR. ZAGEL: Yes. Yes.

There is one final question I would answer with respect to the Governor's power. The Governor has no power in Illinois at all over the prosecutor, nor does the Attorney General except to nolle pros a criminal charge.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:39 p.m., the case was submitted.)