In the

Supreme Court of the United States

Edgar Paul, Chief of Police, Louisville Division of Police, and Russell McDaniel, Chief of Police, Jefferson County Division of Police,

Petitioners,

v.

Edward Charles Davis, III,

Respondent.

No. 74-891

Washington, D. C.
November 4, 1975

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Petitioners, : No. 74-891

v.

EDWARD CHARLES DAVIS, III,

Respondent.

Washington, D. C.

Tuesday, November 4, 1975

The above-entitled matter came on for argument at 1:59 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CARSON P. PORTER, ESQ., Law Department, City of Louisville, 200 City Hall, Louisville, Kentucky 40202, for the Petitioners.

DANIEL T. TAYLOR, III, ESQ., Post office Box 1282, Louisville, Kentucky 40201, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Paul against Davis, 74-891.

Mr. Porter, you may proceed whenever you are ready.

ORAL ARGUMENT OF CARSON P. PORTER ON BEHALF OF PETITIONERS

MR. PORTER: Mr. Chief Justice, and may it please the Court: I am here today on behalf of the petitioners, the Chiefs of Police of Louisville, Kentucky, and Jefferson County, Kentucky.

This case arises out of a factual situation which began when the respondent was arrested for shoplifting in a Louisville retail store back in the summer of 1971. Subsequently, in September of 1971 this individual had his case by his motion "filed away with leave" which under Kentucky law constitutes a general continuance of the charges of shoplifting. Subsequently, in December of 1972, the petitioners sent a flier to a number of merchants in our community indicating that the persons named in that flier had been arrested for shoplifting in the past two years and were "active shoplifters."

QUESTION: There is quite a difference between the two, isn't there?

MR. PORTER: I don't think there is any question about that, Mr. Chief Justice. And that's the real heart of the case.

Subsequently, the respondent, after finding out about the circulation of this flier, had the status of his case changed on his motion from filed away, from the general continuance status, and the criminal charge was changed to "dismissed."

He then brought an action or attempted to do so in the United States District Court for the Western District of Kentucky, under 42 U.S.C. 1983, and right there, I think, is the nut of this case, the question being, in short, Did the respondent bring his action in the right court?

We submitted to the district court that the respondent had failed to state a claim under section 1983 for, in fact, the allegations which he set forth by the factual circumstances I just recited the statement of active shoplifters, no question, that's different from his status as an arrested person. But that constitutes in our estimation and in the estimation of the district court in Kentucky at best an allegation of defamation which is cognizable in the circuit courts of the Commonwealth of Kentucky and not under 1983. They contended in their complaint that the right, privilege, or immunity which had been denied to the respondent was one of two things: Either (a) a deprivation of his constitutional right of privacy, or (b) a denial of due process.

I would like to focus the Court's attention, if you

will, firstly on their allegation that this gentleman had been denied his alleged constitutional right of privacy. We basically submitted to the district court, and the district court held in his failure to state a claim decision, that the facts of this case did not give rise to a constitutional protected right of privacy. And I think the teachings of the Sixth Circuit says this Court -- nobody in this case has been able to cite a decision rendered by this Court dispositive of this issue or where this Court has recognized a constitutional right of privacy in the defamation area. We have, of course, learned about Griswold for married folks in contraceptives and Eisenstadt for unmarried people, and the abortion case in Roe v. Wade, but not what we consider to be primarily, if not totally, a defamation case.

But the Ninth Circuit had a similar case. Back in 1963 they decided in a split decision York v. Story. In that case the majority held that the factual circumstances there did in fact arise to a constitutional invasion. And I would submit to the Court that that decision was correct, and I would embrace it, because the facts in that case are entirely different from the facts in the case at bar.

For example, in York a young lady had gone to the local police department to complain about being raped. When she got there a police officer, acting as a police officer, took her into a room, asked her to strip nude, posed her in,

as the court said, lewd and lascivious poses and took photographs of her and then circulated the photographs to all of his friends on the police department.

Now, I would suggest that that, as the court held, shocked the conscience of that court, shocked my conscience, and I think it would shock the conscience of this Court.

QUESTION: Well, maybe so, but you don't need to concede the correctness of that decision. It may shock all our consciences, but it may not have been a violation of any constitutional right. In other words, we don't have that case before us.

MR. PORTER: You are exactly right, your Honor. I was drawing that case to show what they did in the same circuit six years later in a case very similar to the one at bar, Baker v. Howard. In that case the Ninth Circuit held unanimously that the fact situation did not arise to a constitutional deprivation. Therein, in fact, there was proof that Baker had had a statement alleging that he had committed a crime broadcast to the general public pursuant to the direction of the police department over the radio station, and he had in fact lost his job because of this. I would submit that to be a potential denial of a property right. The Ninth Circuit in that case held this did not constitute a deprivation, that this was not the kind of case that was cognizable under section 1983.

Now, in the transcript before you in this case, at the evidentiary hearing held on the motion for preliminary injunction, which the district court denied,respondent called two witnesses. They called the employer of the respondent for the purpose of attempting to show to the court the loss which respondent had suffered because of this dissemination. But the best testimony that was advanced there was that the employer knew about it, had thought about restricting his employee's activities as a photographer for the local newspaper, but in fact when asked by the judge, "What have you done," he said, "Nothing, your Honor. I've taken no action against this gentleman whatsoever." Some interesting distinctions between our fact situation and Baker v. Howard.

I respectfully submit to the Court that if the teaching of Baker v. Howard is correct where the gentleman lost his job because of the dissemination and where in this case there has been no proof advanced whatsoever of any type of grievious injury, I respectfully submit that this case doesn't even rise on the hierarchical ladder to Baker v. Howard, much less approach the grievious loss in York v. Story.

QUESTION: Well, supposing that there had been an adequate showing in your view of significant loss, as I read your brief your contention is that nonetheless if the loss itself isn't imposed by the sovereign powers of government, then it's not cognizable under 1983.

MR. PORTER: Yes, your Honor. What we are saying is while we are admitting for the purposes of argument that these actions were taken under color of law, which put us under the first aspect of 1983, we are submitting that we do not and we have not deprived the respondent of any right, privilege, or immunity guaranteed by the Constitution or the Federal laws. Therefore, since he can't make out a case, he failed to state a claim advancing both propositions which are required, we contend that what he has basically is a defamation case, and that he should be suing us, if he wishes to do so, in the circuit courts of the Commonwealth of Kentucky. That is the heart of this lawsuit.

QUESTION: .. of citizenship, I suppose he could sue you in the Federal courts.

MR. PORTER: No question about that, your Honor.

QUESTION: Were there about 115 of these people pictured as shoplifters?

MR. PORTER: There were 121 persons.

QUESTION: I was just looking at what is reproduced here in the appendix. About half or more of them are women. Along with this Annex A that appears in the appendix on page 8, was that distributed to the businessmen, too?

MR. PORTER: That's the cover letter, I believe, your Honor. Yes, sir.

QUESTION: And how about the material on page 9, was

that distributed also to the Louisville businessmen?

MR. PORTER: Yes, sir. Page 9 is a continuation of Annex A. That constituted the cover letter.

QUESTION: I see.

MR. PORTER: And as you will note, in the cover letter they made the statement, "These persons have been arrested during 1971 and 1972," which is a factual statement, "or have been active in various criminal fields in high density shopping areas."

QUESTION: Right.

MR. PORTER: The thrust of our position being that basically at best those statements and the "Active Shoplifter" label constitute nothing more than a defamation claim.

QUESTION: And the testimony was that this had been done repeatedly at the Christmas season?

MR. PORTER: Yes, your Honor. For 15 years. It has not been done since.

QUESTION: It has not been done since.

MR. PORTER: No, sir.

QUESTION: And that businessmen when they didn't get their copy of this would call the police headquarters and say, "Aren't you going to do it again this year," or something like that?

MR. PORTER: Yes, your Honor. The businessmen enjoyed receiving this information. I don't think there is

any question about that. Part of the thrust of our argument, your Honor, is that the dissemination itself constituted a legitimate law-enforcement dissemination that these persons are charged under Kentucky statute, the store detective, the owner of the store, and any merchant's employee has the right, if not the obligation, to apprehend persons they have reasonable grounds to believe are shoplifting on the premises of their store.

Because of that statutory cloak of authority, we contend that the dissemination from the police department to these merchants was a protected dissemination within law-enforcement or quasi-law-enforcement groups. It served a proper law-enforcement function.

The only point which the respondent might raise which would be a legitimate concern with regard to this dissemination is the attachment of the word "Active Shoplifter" which I contend is a gratuitous editorial comment made by the petitioners in addition to the circulation and the dissemination. But at best, the labeling there constitutes nothing more than a defamation claim.

QUESTION: That's a question of privilege that you wouldn't be able to raise on a motion to dismiss, isn't it? If your only ground were to say that even though this states a claim under 1983, we nonetheless were privileged because we were engaged in a legitimate law-enforcement activity.

You wouldn't be able ordinarily to get the complaint dismissed where you are asserting a qualified privilege that may depend on subjective good faith.

MR. PORTER: No, your Honor, we are not asserting -- we did not assert in this case the qualified privilege as an affirmative defense. I would concur with your analysis there.

What I am saying, your Honor, is that the factual allegation did not set forth a claim cognizable under 1983 because no privilege, right, or immunity enjoyed by the respondent vis-a-vis the Constitution or the Federal laws has been deprived.

QUESTION: But that's quite independent from your position that it's legitimate law-enforcement activities that your clients were engaged in.

QUESTION: It would be an affirmative defense.

MR. PORTER: Yes, sir, I concur with that.

QUESTION: Even to a defamation action that would be an affirmative defense.

MR. PORTER: Yes, sir. No question. I concur.

QUESTION: On what ground did the court below proceed? Was it on due process grounds?

MR. PORTER: Yes, your Honor.

QUESTION: A lot of it was procedural due process, wasn't it?

MR. PORTER: Your Honor, the Sixth Circuit reversed

and the thrust of their opinion was on the due process grounds --

QUESTION: You haven't addressed that yet, have you?

MR. PORTER: I would be delighted to do so at this point now.

QUESTION: I mean, before you can say it wasn't a 1983 action, you have to say that there wasn't properly alleged a deprivation of procedural due process.

MR. PORTER: I concur with that, your Honor, and I was attacking --

QUESTION: Did the court below suggest that even with proper procedures the officials couldn't have done this?

MR. PORTER: The court below rested its opinion largely on the Wisconsin v. Constantineau situation wherein they were making the thrust of their position that because of the labeling which took place in the case at bar as similar to the posting and labeling in the Constantineau circumstances that as they interpreted the Constantineau decision whenever that is undertaken due process must be entered into prior to the posting and labeling.

Now, we would submit for the Court's attention that there are some serious distinctions --

QUESTION:: May I interrupt at this point?

MR. PORTER: Yes, your Honor.

QUESTION: Actually, after going all through label carries with it a badge of disgrace, and all the rest of it,

all of this was done without the slightest regard for due process. There was no notice or opportunity to be heard prior to the distribution of the flier and the appellant and others have never been afforded the opportunity to refute the charges in a criminal proceeding.

Now, do I correctly read that as saying that in what was done here there was denial of Federal procedural due process?

MR. PORTER: I think that is their point, yes, your Honor.

QUESTION: Now, if that's so, does not that allege a violation of 1983?

MR. PORTER: I think if that's so, there is no question but that it does allege a violation of 1983. And my answer is that we, with all due respect to the Sixth Circuit Court of Appeals, respectfully dissent from their opinion in that we would draw the following distinctions between the Constantineau application and its application to the case at bar: In the first place --

QUESTION: That doesn't mean you say it isn't cognizable in 1983. It just means that you would dismiss it for failure of proof.

MR. PORTER: No, your Honor, I would dismiss it for failure to state a claim and not be cognizable under 1983 because I don't think this is a Constantineau case.

QUESTION: You don't agree with the Sixth Circuit that Constantineau governs this case.

MR. PORTER: That's exactly our position, for the following reasons:

In the first place, Wisconsin v. Constantineau struck down a facially unconstitutional statute passed by the Wisconsin legislature which said as follows, that a wife or various members, sheriff, board of aldermen, mayor, and so forth of a particular community could by swearing out an affidavit supplying a picture of the appropriate person have that person, without any other notice or hearing or whatever, the sheriff was mandated to take that to every bar and every liquor store in that community, post it there for the general public to see, saying that the person whose picture is on this poster cannot be served alcoholic beverages for a period of 1 year.

Now, in the case at bar, we have no statutory mandate, we have two chiefs of police taking on their own, making a gratuitous editorial comment, not pursuant to any kind of direction or authority --

QUESTION: I thought you admitted that this was State action on their part.

MR. PORTER: I did admit, your Honor, that it was State action --

QUESTION: You can't say they did it on their own, they took it on the part of the State.

MR. PORTER: I'm just trying to draw the distinction, your Honor, that but for the fact that these two gentlemen were chiefs of police, I don't think there would be any question but this is nothing but a defamation case and that there is a factual distinction in the first point between the statutory problem in Wisconsin v. Constantineau and the actions taken here.

Secondly, though --

QUESTION: In Constantineau what was done was done under the authority of a statute of the legislature. Here you have a couple of police officials just doing this out of thin air with no --

MR. PORTER: I would say that the Constantineau situation was worse, your Honor, because the officials in the Constantineau case had no choice. When that affidavit was signed, they had to act pursuant to their statute.

QUESTION: They followed the Wisconsin statute.

MR. PORTER: Yes, sir.

QUESTION: And you say the chiefs of police here were not purporting to follow any statute.

MR. PORTER: No, your Honor.

QUESTION: Did the State of Kentucky attach any disabilities to these people the way the State of Wisconsin did to the person who was posted, simply as a result of the circulation of this flier?

MR. PORTER: I think there were two important points about the posting. The first was that the Wisconsin posting was to the general public at large. The dissemination here was to this group of merchants.

Secondly --

QUESTION: As I recall, under that, all that happened was when it was posted the liquor dealer couldn't sell the lady any drinks, wasn't that it?

MR. PORTER: Yes, your Honor. She was deprived of the opportunity to purchase liquor for a year.

QUESTION: These fellows have to go through the rest of their lives with accusations, apparently untrue, that they were active shoplifters.

QUESTION: Would you finish answering my question when you get a chance?

MR. PORTER: Yes, your Honor.

In focusing on the attachment of the label, which I believe was your question, Mr. Justice Rehnquist, with regard to this situation as distinguished from the Constantineau situation, we contend to this Court that the respondent in this particular case did not receive from this type of publication the attachment that was passed on in Wisconsin v. Constantineau, for one reason because of its limited circulation.

Secondly, and I think in analyzing these 1983 cases and making a determination as to whether there has been a claim

asserted and when the Court takes evidentiary proof on that matter, as they did in this instance, respondent advanced his evidentiary proof as distinguished from Constantineau. There is not one incident in the transcript of any time when the person has been denied employment, when he has ever been stopped in a store, when he has ever been asked about this, other than --

QUESTION: Now you are going to injury. Doesn't that go to the injury?

MR. PORTER: In my estimation, your Honor, and I respectfully submit,it goes both to the injury and potential damages to this individual and whether or not he has been deprived a constitutional right. That is the reading of the right of privacy cases from the Ninth Circuit, the Fifth, and the Third Circuit -- or Second Circuit, excuse me -- in Rosenberg v. Martin.

QUESTION: More accurately, don't you mean whether or not he has been deprived of liberty or property?

MR. PORTER: I think that's right, your Honor, as to whether he is entitled to due process.

QUESTION: You refer to the 14th Amendment.

MR. PORTER: If we get in the due process area, I think --

QUESTION: That's where we are, isn't it? That was the theory of this complaint, was it not?

MR. PORTER: That was one-half of the theory, yes, your Honor.

QUESTION: And that was the basis upon which the court of appeals for the Sixth Circuit decided the case.

MR. PORTER: Yes, your Honor.

QUESTION: So the question is even though if he had been deprived of liberty or property, what happened here might have been a violation of due process, procedural due process rights. The first inquiry is whether he has been deprived of liberty or property because unless he has been, then he hasn't been deprived of what's guaranteed to him by the 14th Amendment.

MR. PORTER: That's the reaching of the Roth case, as I understand it, your Honor, that unless he can allege and assert deprivation of liberty or property --

QUESTION: Deprived by the State of liberty or property

MR. PORTER: That's right, your Honor.

All right, now -- yes, sir.

QUESTION: On that point, we're not giving you much of a chance to argue your case, but maybe I can help you.

In Constantineau the party was deprived of a very fundamental right of liberty. He was not allowed to buy whisky for a year.

MR. PORTER: Yes, your Honor. I would consider that to be fundamental, and grievous.

QUESTION: All right. Now, in this case there was

no deprivation of anything shown by the record.

MR. PORTER: That's right, your Honor, that's our contention.

QUESTION: Does evidence totally back that up?

MR. PORTER: I assert that it does, your Honor.

QUESTION: Is there any evidence to the contrary?

MR. PORTER: No, your Honor.

Our position with regard to the due process question is basically: Is the man entitled to the full-blown due process hearing prior to the time when a public official, in this case two chiefs of police, make what amounts to a defamatory statement about the gentleman? Or is due process served by an after-the-fact proceeding, which we contend in a defamation case is cognizable in the State court?

This Court recently in Arnett v. Kennedy in reviewing the language of the Roth case where there was an obvious deprivation of a property interest in that that was a civil service employee who had lost his job, pointed out that the after-the-fact due process remedy was appropriate, that in that procedure -- and I argue this case only by analogy, not as dispositive of our case -- but that in that proceeding due process, not as respondent would urge in the district court and in the Sixth Circuit and in their briefs, but that due process can be provided adequately to this gentleman after the fact, not prior to the time that this type of defamation, if we

can categorize it as that, is made by these individuals.

I think it's important --

QUESTION: This is after 15 years, right?

MR. PORTER: No, your Honor --

QUESTION: After the fact means 15 years.

MR. PORTER: No, your Honor, the 15 years refers to the 15th consecutive year when they had sent this circular. The evidence is this is the first time this gentleman had been on the circular.

QUESTION: But others have been on there.

MR. PORTER: There is no class action before us in this case, your Honor.

My suggestion to the Court is, very simply, that this case should be decided on the basis of the factual allegations set forth in the complaint and the proof presented at the evidentiary hearing in this transcript, that it should not be given a broad interpretation, it should not open the doors to the Federal courthouses throughout this country by attaching the Constantineau broad interpretation so that every potentially defamatory statement uttered by a public official would be redressable under 1983. We submit to the Court that the appropriate remedy is under the common law defamation remedy.

Basically, in reviewing the context of this case, I think it appropriate to assert to the Court that the right of

privacy having not been recognized by this Court, not elevating in our estimation under these factual circumstances to a constitutional level, and in our estimation inappropriate application of Constantineau to the facts at bar, wherein the liberty and property procedures and application of due process have not been attached to this gentleman, that under these circumstances, we respectfully submit that the decision of the Sixth Circuit below should be reversed.

QUESTION: May I just ask one question.

MR. PORTER: Yes, your Honor.

QUESTION: Under Kentucky law in a State defamation suit against these police officers, would they have a defense of privilege?

MR. PORTER: They may have a defense of qualified privilege, your Honor. That point, of course, has not been briefed or addressed anywhere in this lawsuit to date. But that defense would probably be raised. I think that the case law in the Commonwealth of Kentucky in that area is not what I could say to the Court is absolutely clear, and if we would raise that defense --

QUESTION: I take it in Kentucky, at least historically, it has been a defamation to accuse some person falsely of being a criminal.

MR. PORTER: No question about that, your Honor.

QUESTION: And the reason it is is that it injures

his reputation, presumably.

MR. PORTER: No question about that. The issue in this case, though, is whether that injury to his reputation arises to a constitutional deprivation.

QUESTION: Whether that's a deprivation of liberty or property.

MR. PORTER: Yes, your Honor. And we contend and respectfully submit that it is not and that the decision of this Court should take the opportunity to carve out this set of factual circumstances from the broad scope of the Constantineau and Roth language and leave the appropriate remedy in the State courts for persons who find themselves in these circumstances.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Taylor.

ORAL ARGUMENT OF DANIEL T. TAYLOR III

ON BEHALF OF RESPONDENT

MR. TAYLOR: Mr. Chief Justice, and may it please the Court: We would begin to set the record, I believe, a little bit more correctly before the Court because some of the Justices indicated that it was perhaps -- or at least the inquiry ran as to, well, had there been any damage to Davis per se.

QUESTION: Not whether there was any damage; has there been a deprivation of liberty or property.

MR. TAYLOR: May I please refer this Court, in the appendix, to the response that the employer of Davis gave. It's the very last page of the appendix, and if I may, it's very brief, just read it directly.

The question: As a result of the flier, did you feel that you might have to possibly limit the places that he would possibly in the future go in as a member -- By that they meant, of course, of the news staff.

QUESTION: Are you on page 30?

MR. TAYLOR: I am on what would be page 35, Mr. Chief Justice, in the appendix. The numeration right at the very end.

Mr. Justice Stewart, it is 35.

QUESTION: Thank you.

MR. TAYLOR: The answer: Very definitely, I would.

Question: And why did you feel that way?

And I read directly now from the proof adduced before the trial court at the seeking of the preliminary injunction, which was denied, and he goes on to say:

"Our photographers must be accepted as a reasonably honorable and truthful man wherever they go. I felt that in view of this flier's circulation to merchants of the community I could not, for example, assign Mr. Davis to photographing anything in a merchantile establishment and so that should such an assignment come up I would have been forced to have someone

else cover that assignment rather than Mr. Davis."

Now, if I might --

QUESTION: Will you read on, Mr. Taylor?

MR. TAYLOR: Yes, of course.

Question: That's all.

By the Court: Did you restrict him?

The question was from the bench.

The Witness: No, I did not.

By the Court: You have not restricted him at all?

The Witness: I have not restricted him, no, sir.

QUESTION: So there has been no restriction.

MR. TAYLOR: If it please, Mr. Justice, the situation had not come up as yet. Here is the young man's employer saying that he can't send this youngster -- he's a college student, young black photographer is what he was -- into a merchantile establishment because he doesn't have the proper bona fide due to this spot on his scutcheon.

QUESTION: How long after the flier was circulated was this evidence taken?

MR. TAYLOR: This was taken in January, the flier was circulated in December.

QUESTION: There had been no restriction in the intervening time.

MR. TAYLOR: There had been possibly -- I appreciate that question. I started to say it had not come up, but indeed

it had come up, and if I might, please, suggest most respectfully, that very question that your Honor has asked points out that the wide dissemination of this flier, as Mr. Justice Marshall asked in his question, how many of them were there -- Let me say to this Court there were 800 of them. Let me say to this Court they not only went in Louisville, they went across the river into what we can our tri-cities, into Indiana. Let me say that the qualification for getting hold of one of these -- and it's in the record -- from the chief of police was to go to the police department and knock on the door and get your yearly flier, and so forth.

Another thing, this flier itself on that cover sheet, Annex A, says a great deal more than my learned colleague averred. It says, and I am quoting directly: "We have approved the attached alphabetically" -- this is, of course, in your appendix -- "arranged flier of subject known" -- of subjects known -- "to be active in this criminal field" -- of subjects known to be active in this criminal field.

The papers themselves, the pictures at the top don't say anything about this man has been arrested, they say "Active Shoplifters." It is a fait accompli. There is no future determination, there is no notice, there is no confrontation. The trap has sprung and with it the imputation that the man -- not the imputation that the man is a criminal, but the conclusion, the statement by official State action, to wit, the

police department.

My opponent says arguendo it was State action. Possibly arguendo, de facto, and realistically and actually in any way you want to slice it, it was State action. And our police department not knowing they are wrong takes credit at the bottom of this paragraph for the offense against this young man. "This flier's preparation is accredited to officers. A small thing to take credit for.

I would suggest that this Court would perhaps want to hear more about the constitutional aspect of this case and I am prepared to proceed further if I might in that regard.

QUESTION: Mr. Taylor --

QUESTION: As you get into the constitutional issue which certainly does interest me, I note that as near as I can tell in your brief you do not use the word "Libel" at all. You don't mention it.

MR. TAYLOR: Mr. Justice Powell, no, sir.

QUESTION: May I finish my question?

MR. TAYLOR: Yes, sir.

QUESTION: You use different terminology, quite different for the ACLU, "Punishment without a prior due process hearing." Is it your basic position that whenever an employee of a State or city utters any words that may possibly be defamatory that under a new doctrine of prior restraint, there must be a due process hearing.

What is your position on prior restraint?

MR. TAYLOR: I understand the question you have --

QUESTION: The substance of your position, as I understand it, before any State or county or city employee says anything libelous about anybody else in the course of his duties.

MR. TAYLOR: The reason I was posing it was to try to give you a reasoned answer of --

QUESTION: If you would address that, I would appreciate it.

MR. TAYLOR: Thank you.

I believe, Mr. Justice Powell, that when criminality is imputed, I believe that when by State action -- a State action now -- absent a consideration of private acts and so forth, but by State action, that when one is indiscriminately lumped into a criminal class and taken as having been convicted, when the mere fact of arrest is all that's involved, that Constantineau mandates a reasonable notice that this isn't contemplated to .. and an opportunity to be heard. I believe that the 14th Amendment upon which Constantineau is grounded directs that this must be the case. Therefore, it's kind of a lengthy answer, but my answer, most respectfully, would have to be yes to the Justice.

QUESTION: You don't, then, Mr. Taylor, base your

claim on a protection of refutation based on Kentucky law. Take an example, my home State of Arizona puts out an Arizona Highways Magazine, and if they defame somebody in that magazine, would that give that person who was defamed a 1983 cause of action against the editor of the magazine?

MR. TAYLOR: I would suggest, Mr. Justice Rehnquist, that as a matter of fact Baker is helpful in this and so is York where they talk about an abuse can be so gross, and I might add that in the brief for petitioner it was stated somewhere along the line that Katz v. United States says there is no general constitutional right to privacy, is what they wrote. But it also did say, as has Baker and the other cases, that it is a question of perhaps the heinousness of the offense.

Now, therefore, I respond that we're talking, I believe, about a matter of degree. I don't believe that every time someone bad mouths someone that they are automatically into a situation of constitutional proportions. I think what I would emphasize in the case at bar is that here you had the Christmas season, you had 800, the wide dissemination, and I've mentioned that already, the broadcast aspect and what was called -- I couldn't help but reflect a minute ago when the distinction was being made about Constantineau that if one had a choice, I would rather be labeled as a drunk than a thief. I'm not trying to be humorous or facetious in any way when I

say that.

QUESTION: Was the Constantineau case a 1983 action?

MR. TAYLOR: No, Mr. Chief Justice. It was directly appealed from a three-judge panel which upheld the statute. It was a Wisconsin State statute, so it must have been a three-judge panel originally, your Honor.

QUESTION: That it was, but it was not a 19 -- the thing I want to emphasize is that it was not a 1983, a civil rights action.

MR. TAYLOR: May I respond that is --

QUESTION: I think it had to be, didn't it, to get into Federal court?

MR. TAYLOR: I believe --

QUESTION: It was more than $10,000 --

MR. TAYLOR: Mr. Justice Rehnquist is shaking his head. Yes, a 1983 action. But I know that it was a statute held unconstitutional, I believe, by direct appeal to this Court, if that's how it works.

QUESTION: Mr. Taylor.

MR. TAYLOR: Yes, Mr. Justice Powell.

QUESTION: Would you answer the question indicating that whether or not 1983 would apply to confer Federal jurisdiction would depend on the degree of the defamation.

Let me put a couple of hypotheticals to you. Suppose that the house organ of the police department in Louisville --

I don't know whether they have one or not, but let's assume that they do have a little magazine that comes out once a month, and let's assume it had a story about defense counsel and it named a well-known defense counsel and said he had a habit of using perjured testimony. Would that support a 1983 case, we require a prior due process hearing before the story was published?

MR. TAYLOR: I would not see that fact situation as similar to this.

QUESTION: Not similar.

MR. TAYLOR: May I distinguish why, with your permission?

Or as a matter of fact, it is interesting that Baker had the First Amendment aspect, if you recall, where the distinction in Baker was made. I mean, they do, police officers have a right to communicate and I suppose to have opinions.

It's a different case. What is so significant here are the facts in this case. They are raw. Here is a man never convicted of anything. His only prior arrest had been speeding. And right away thousands of copies -- and a young man just starting his life -- distributed in his area, not any inference or inuendo, but the plain, active branding of criminality by State action.

QUESTION: Mr. Taylor, if you were the lawyer

accused of using falsified testimony, wouldn't you consider that rather raw also?

MR. TAYLOR: Would I consider it raw?

QUESTION: You said this was a raw case and you use that to distinguish the case that I put to you.

MR. TAYLOR: I believe I would, Mr. Justice Powell, but I think considering my remedies, I wouldn't feel that it had a constitutional stature in this situation.

QUESTION: May I put another one to you? This may be easier for you. In any State supported television, educational programs, suppose that a professor on a State TV program was discussing the history book written by another professor and was critical of it and in the course of that discussion on educational television he said this professor was really a fraud and was widely known to use erroneous, false information in his textbooks. 1983 jurisdiction?

MR. TAYLOR: No, I don't think so.

QUESTION: No prior restraint in that situation?

MR. TAYLOR: Your Honor, I think you have some other aspects involved there. I don't believe that there you had State action that you have under color of State law and the abridgement of the --

QUESTION: No State action in teaching classes? What about ghosts?

MR. TAYLOR: I was going to add a little more to that

sentence. I was saying I understand it's basic black letter law. For a 1983 action you need under color of State law and the abridgement of a right guaranteed by the Constitution. That, we respectfully submit, is where the 14th Amendment becomes so important in this type of proceedings.

Now, people have opinions -- perhaps I can short cut and save some time for all of us by saying it is one thing for Professor A to say Professor B is a fraud.

MR. CHIEF JUSTICE BURGER: Excuse me, Counselor, you will get along better with that microphone if you stay about 6 or 8 inches away from it.

MR. TAYLOR: Thank you.

I was suggesting that one college professor imputing to another as being a fraud is a vastly different case from the combined police departments in the Christmas season for 15 years to run indiscriminately through their arrest records -- and I say indiscriminately because I'm in those cities and counties in practice and can assure this Court that there are more arrests for this offense than the 112 appearing here. They just sort of give to the community -- at least that's how they saw it, you see. And I think that's a tragic and a sad thing really, like where they took credit here. Credit for what? For calling an innocent man all this number of times a criminal.

The constitutional argument, I think, also should give a good deal of thought to just the most basic premise in

American criminal jurisprudence, the absolute bedrock, the one axiom, the one rule that every school child learns and that, of course, I am referring to the presumption of innocence.

QUESTION: No one found this man guilty in any official proceeding.

MR. TAYLOR: With all respect, Mr. Justice Rehnquist, the police department tried him and they have characterized him as active in this field. They have printed -- how else do you communicate in a brochure the picture and the language describes and relates, they say thief.

QUESTION: I thought that presumption of innocence that you just mentioned was directed to criminal proceedings directed at ultimate incarceration of the person.

MR. TAYLOR: I think a presumption of innocence is shared and possessed by all of us at all stages in our life and in the proceeding of a criminal case. It's a basic thing.

We were trying to reach the constitutional aspect of our fact situation here. In other words, did Davis have standing.

Well, we submit in behalf of respondent Davis that he had standing, constitutional standing, because of his constitutional presumption of innocence. Now, I freely concede that the magic language, your presumption of innocence, is not in an adjective way spelled out in the Constitution, but

I further say to your Honors that substantively and from the beginning of this Court, that right has assumed and has always enjoyed, and should most certainly enjoy, constitutional stature.

QUESTION: Why in answer to Justice Powell's question, then, when one professor calls another man a fraud and perhaps accuses him of plagiarism, why can't the same principle be invoked if they are a State employee?

MR. TAYLOR: I think one might want to consider a bit almost the area of bad faith, you know.

May I point this out to the Justice. This police department had within its own building the records that it could have determined by going right downstairs what disposition had been made.

May I further say, just to correct another thing here, in my State a finding of "filed away with leave" is not of indefinite continuance or anything. I really don't think that we have to reach that. I think that the appendix will show the order of the court. I think it's an anomaly that should be done away with, but nonetheless we have to deal with it. In Kentucky you are entitled to insist on a final determination of your case, which I did, or Davis. I did it myself personally, I might add. The reason I did it was after I saw that he was being characterized as a thief, then he had to get the matter resolved. He had to enforce his right and demand

that the case be dismissed. I thought there might have been some misapprehension on that point. I don't believe that this is the practice that is followed in too many States, this middle ground, this limbo between conviction. But there is no way that the petitioners in this case can claim that Davis' case had ever been brought to conviction at the time they ran this about him.

I have just two or three more minutes, if there be any questions.

MR. CHIEF JUSTICE BURGER: I think not.

QUESTION: May I just ask one final question.

Do you perceive any impairment of First Amendment rights of employees of State and local governments by this due process theory of yours requiring as a prior restraint a prior due process hearing before they indulge in common law definitions?

MR. TAYLOR: Did I understand what you asked me --

QUESTION: My concern is whether or not your position doesn't run head on into the First Amendment. I'm not talking about ultimate right to recover damages. I'd be with you all the way on that in this case, of course. But you are arguing for a position of prior restraint, a First Amendment issue. This is an egregious case, but there are lots of cases that aren't.

MR. TAYLOR: Of course, this is a case where -- I

think I must come back to your analogy, or your question of a couple of minutes ago about the professors.

Two professors warring within the groves of academia is one thing.

QUESTION: Warring publicly on educational television.

MR. TAYLOR: Right. As a matter of fact it might almost be expected. But to take a man's good name, his future -- what does the 14th Amendment say -- life, liberty, property. I suggest that he has a liberty interest in the jobs he might want to take. His property. There's another great quote in that appendix that says -- oh, it's in the appendix. He, Davis, had better watch his step. Next time he's going -- it's in the appendix, the page right where you are reading.

QUESTION: You might be able to sustain the notion that there was a liberty involved here and there was a hearing due the person. But you still have to get across the notion that he has to have a hearing before rather than after. Certainly the State gives him all the hearing he needs after the circulation. You can sue in court and you can get as much of a hearing as you want.

Do you think Constantineau requires that the hearing the State extends be before?

MR. TAYLOR: As I read Constantineau --

QUESTION: They didn't give him any hearing any time, did they?

MR. TAYLOR: Of course, the statute was abrogated. There is a parallel between Constantineau and our case because the damage was done by the time they got to court. What happened, that statute has been, of course --

QUESTION: I know, but you also have to argue, then, that it isn't enough to repair the damage afterwards.

MR. TAYLOR: You take what you can get, Mr. Justice White. I would respectfully respond to you that Constantineau mandates notice and an opportunity to be heard before the State maligns the character and good name of a citizen. That's what I believe.

QUESTION: How do you distinguish Mr. Justice Powell's inquiry about the two professors? We are assuming there is State maligning and there is just as much of a good name at issue there as here.

MR. TAYLOR: That's true. I'm reminded for some strange reason of the famous Oscar Wilde case. I think possibly that I'm too hard on the professors. Maybe if I represented the professors, that they have as much a right to their expertise and their reputation and character.

But if Mr. Justice Powell had said what if one professor had called the other a criminal -- here is another thing. We have all seen in the media where an opportunity is given for a person to express his views, and this Court has pronounced the law in that area within the last couple of years

and so forth. I don't believe that the public radio and the medium is any proof at all or guarantee for what they produce.

Here we have State action in Davis' case purposely done, more than carelessly done, done I think in bad faith. And I think under Constantineau, as the question was, that they just simply can't do it. It's just basically the 14th Amendment says -- it's just I think a very traditional and uncomplicated case -- no person shall be deprived by State action of life, liberty, or property without due process of law.

Now, we have not had a trial, a case, or anything in the case instant at bar as yet. The case was reversed at the Sixth Circuit. It happened I argued it. The case is now before your Honors. As this Court rules will determine the final chapter there.

May I thank you again.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Porter, you have a little time left. Do you have anything further?

REBUTTAL ARGUMENT OF CARSON P. PORTER

ON BEHALF OF PETITIONERS

MR. PORTER: Yes, your Honor.

MR. CHIEF JUSTICE BURGER: You have about 5 minutes remaining.

MR. PORTER: Thank you, your Honor.

Mr. Chief Justice, and may it please the Court: There are a couple of points which I should like to address to the Court's attention. One, I think, falls in the area of what I would like to characterize as a factual misstatement by my learned colleague, Mr. Taylor, analyzing the status of "filed away" in the Commonwealth of Kentucky and putting it in the proper context of this particular litigation.

One of the interesting points is that this gentleman at the time the dissemination was made was in a status where his case was subject to being reopened. It was not until after the dissemination was made that Mr. Taylor came to the local police court and petitioned for dismissal of the charge.

The second and most important thing I would like to follow up on is Mr. Justice Powell's comments regarding prior restraint on a significant First Amendment freedom of these two particular chiefs of police, the question really being in the end result is this Court going to say to the factual circumstances presented here today that before these petitioners made these editorial and potentially defamatory remarks about this respondent, they had to hold a full evidentiary due process hearing, or, as we respectfully submit and petition the Court to adopt the proposition, that the proper remedy lies in the circuit courts of the Commonwealth of Kentucky for defamation.

Thank you, your Honor.

QUESTION: May I ask you a question.

Suppose an action was brought against the officials in the Kentucky courts and an injunction was sought. On the right facts I suppose you would, as well as damages, I suppose a plaintiff could get an injunction against the police continuing to -- if he could prove that the allegation was false.

MR. PORTER: Yes, your Honor, injunctive relief would lie --

QUESTION: On the grounds that there was irreparable injury involved?

MR. PORTER: Yes, sir, on the -- we have adopted the civil rules in the Commonwealth of Kentucky that the temporary restraining order could be issued to prevent the further dissemination of these particular articles or at least with the words "Active Shoplifters" attached to this dissemination. That kind of injunctive relief could lie.

QUESTION: Was this procedural delay that you had referred to part of some program in Kentucky that's generally called early diversion of cases, that is, deferral of any prosecution in certain types of cases, first offenders, and so forth? Or was it just administrative inadvertence that no prosecution proceeded?

MR. PORTER: No, your Honor, it's a specific provision in the Kentucky law where the respondent in this case --

QUESTION: On the application of it, though.

MR. PORTER: Well, according to the transcript that was presented at the evidentiary hearing, there were no prosecuting witnesses present at the time the respondent made the motion that his case be "filed away," instead of making the motion that it be in fact dismissed. There is no question he is entitled to a presumption of innocence, but in Kentucky we make a distinction between dismissal, filed away, and convicted, and there is a procedure whereby a criminal defendant can instead of asserting I want to have my day in court, I want to have a trial, I want to be dismissed, and say to the court, and it would be granted by the court as it was in this instance, that I would like to have my case filed away with general leave to be reopened. Obviously, when your case is in that category, the police have to retain the arrest records in their file or there wouldn't be a file on which the case could subsequently be reopened. And that was the status of the respondent's position on the date of this dissemination.

QUESTION: It was standard how it is determined what cases may be filed away?

MR. PORTER: No, sir, your Honor, there is no particular standard, it's basically a presentation of the circumstances to the court. And first off, in the case cited in the brief, VanArsdale v. Caswell, it cannot be done unless the defendant concurs.

QUESTION: Suppose his case was over and he had been found guilty and fined $100 and he had paid the fine and then the publication was made, the circulation was made with "Active Shoplifter" on it, and he sued and asked for an injunction.

MR. PORTER: I think, your Honor, that he would be entitled to a defamation relief even under those circumstances

QUESTION: So it's really irrelevant in what condition his case was?

MR. PORTER: Basically I would concur, except I wanted to correct what I perceive to be a misstatement of the status of that provision of the law.

QUESTION: All right. Thank you.

MR. PORTER: Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Gentlemen, the case is submitted.

[Whereupon, at 2:55 p.m., the argument in the above-entitled matter was concluded.]