

In the

Supreme Court of the United States

Raymond Belcher,

Petitioner,

v.

Casey D. Stengel, Et Al.,

Respondents.

No. 75-823

1976 OCT 9 AM 9 14

Washington, D. C.
November 2, 1976

Pages 1 thru 45

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RAYMOND BELCHER, :

Petitioner, :

v. :

No. 75-823

CASEY D. STENGEL, ET AL., :

Respondents. :

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Washington, D. C.,

Tuesday, November 2, 1976.

The above-entitled matter came on for argument at
10:37 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT A. BELL, ESQ., First Assistant City Attorney,
Columbus, Ohio; on behalf of the Petitioner.

JOHN H. LEWIS, ESQ., 3316 North High Street,
Columbus, Ohio; on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-823, Belcher v. Stengel, Et Al.

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

ORAL ARGUMENT OF ROBERT A. BELL, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari from the United States Court of Appeals, Sixth Circuit. Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an action "under color of law" within the meaning of 42 U.S.C., section 1983?

QUESTION: Sometime at your own convenience -- fit it in wherever you wish -- I would like to have you explain to me why the conduct reflected by this record of this officer is any different from what it would have been had he been specifically detailed to work overtime, that is work beyond his ordinary work-day or work-week -- if you would deal with that problem at some point.

MR. BELL: I can deal with it at this moment, Mr. Chief Justice. The officer testified that he was a uniformed

officer on foot patrol in an area in Columbus, Ohio that is known as one of the most difficult areas to patrol. And the facts of this case will bear out that he was off-duty, out of uniform and was a Columbus police officer. So had he been on overtime, I would respectfully suggest he would have been in uniform.

QUESTION: Well, a uniformed officer might be detailed to overtime work in plain clothes. That is not an uncommon thing, is it?

MR. BELL: No, Your Honor, it is not an uncommon thing but, again, it would depend, I think, depending upon other factors, and that this officer was a foot officer on patrol. Normally they would not be assigned to plain clothes duty on overtime. I do not mean to say that that is true in every case.

On March 1, 1971, the petitioner, off-duty, out of uniform, and was a member of the Columbus Police Department, a Columbus police officer, at approximately 1:15 a.m. in the morning, was in a public bar known as Jimmie's Cafe, in Columbus, Ohio, on a private social activity. An altercation developed in this bar between respondents and other persons in the bar, not including the petitioner at this time.

The petitioner then became involved in this altercation and, as a result of his becoming involved in this altercation, he resorted to the use of a .32 caliber automatic weapon,

firing it into the air, the use of this weapon resulted in the deaths of respondents, decedents Noe and Ruff, and injuries to the respondent Stengel.

The respondents then filed two complaints on the stated set of facts, briefly stated. They filed a complaint in the Court of Common Pleas, Franklin County, Ohio, a state court, and a complaint in the United States District Court, alleging violation of 42 U.S.C. 1983.

QUESTION: Does Ohio have a tort claims act that permits suit against municipal corporations or the state?

MR. BELL: No, sir, to answer your question. The complaint --

QUESTION: In fact, there is still sovereign immunity in most areas in Ohio, is there not?

MR. BELL: That is correct, Mr. Justice.

The respondents dismissed their complaint --

QUESTION: Well, specifically, is Columbus an area where the doctrine of sovereign immunity applies?

MR. BELL: Yes.

QUESTION: Either against the municipality or the -- well, it would be the municipality?

MR. BELL: Against the municipality, not against the officers, but against the municipality.

QUESTION: Against the municipality. Municipality would be exempt from liability --

MR. BELL: That is correct.

QUESTION: -- shielded from liability by the doctrine of sovereign immunity under Ohio law, is that correct?

MR. BELL: Correct.

QUESTION: All right.

MR. BELL: And the federal system, under *Monroe v. Pape*, the City of Columbus is not a person under 1983. Now, the complaint was dismissed in the state court by respondents, and it proceeded to try the case in the United States District Court upon the complaint they filed, stating and joining twelve officers along with the respondent Belcher.

At the close of the plaintiff's case, the twelve officers were dismissed and the respondent remained in the case.

QUESTION: What was the theory on which the other twelve officers were originally joined?

MR. BELL: Under 1985, title 42, conspiracy to, one, cover up the acts of the respondent Belcher; and, two, to deprive the respondents of their constitutional rights under 42 U.S.C. 1985.

QUESTION: Were they in effect Belcher's superiors?

MR. BELL: That is correct, and they were in the chain of command. Now --

QUESTION: Mr. Bell, there was also, was there not, an inquiry by the Police Board of Inquiry?

MR. BELL: Yes, Your Honor.

QUESTION: And was that initiated by the respondent or how did that come about? Does the record tell?

MR. BELL: No. In the Board of Inquiry, which was the Firearms Board, which meets every time an officer uses his firearm, was initiated automatically under the regulations of the Columbus Police Department. It was not initiated by the respondents. The complaint alleged facts in general in paragraphs four and five, making general allegations and, as we say, conclusions of law that at all times defendants acted under color of law and in line of duty. But in alleging the facts as to the petitioner's conduct in paragraph eight of the complaint, the allegations are accepted as true and taken in their best light for the plaintiff, can only lead to the conclusion that the petitioner did not act under color of law.

The facts alleged in paragraph eight of the complaint, if I may briefly refer to them --

QUESTION: I didn't see the complaint in the appendix? Is it?

MR. BELL: Yes, Your Honor. It begins at page 8, Volume 1, and I am referring to page 10 of the --

QUESTION: I don't -- I see, there are two volumes. I see.

MR. BELL: Correct -- Volume 1, page 10 --

QUESTION: I see.

MR. BELL: -- and I am reading at the bottom of -- you will notice it says "paragraph 8" and I am reading at the bottom, where it begins, "Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman and in no way involved in the minor dispute heretofore described, intervened by attacking one of the plaintiffs, decedent, from the rear by grabbing him around the neck from the rear, said intervention by Raymond L. Belcher being without any notification or attempt to notify anybody in the cafe that he was an off-duty Columbus policeman, and without any attempt by said Raymond L. Belcher to make a police arrest or citizen's arrest of any kind at this time."

The facts go on to state: "Casey D. Stengel, one of the respondents before the Court, attempted to kick the chemical mace equipment which Raymond L. Belcher pulled from his clothing and which was blinding and choking the people involved from the hand of said Raymond L. Belcher; whereupon, still without any warning, identification or attempt to make an arrest, said Raymond L. Belcher pulled a gun from his clothing, and which gun he was ordered and directed to carry as an off-duty Columbus policeman, and at that time he shot into the air resulting in the deaths of respondent Noe and respondent Ruff, and injury to respondent Stengel."

QUESTION: What do you mean by "shot into the air"?

MR. BELL: That was the testimony of Raymond Belcher.

He testified that he was on the floor, on his back, being stomped, and at that time he pulled the gun out from under his back and shot into the air to get these men off of him. The shots struck and caused the damages --

QUESTION: But they were on top of him, weren't they?

MR. BELL: Sir?

QUESTION: The men were on top of him?

MR. BELL: Yes, Mr. Justice.

QUESTION: Has there been some change in position by both you and your adversary in this case, Mr. Bell? I gather from the allegations you read in the complaint that the suggestion that the police officer did not ever assert who he was and that he never made any attempt to make an arrest, was thought to further the plaintiffs' cause and, on the other hand, I gather from other material in the record that whoever defended the case for Mr. Belcher, defended it on the basis that he was more or less acting in the line of duty.

MR. BELL: That is correct. That was a statement made at the close by the defense counsel, the then city attorney, who prior to that and at the time of this act was the safety director who issued an order in a letter to Mr. Belcher.

The statement was made at the conclusion of the plaintiffs' case in argument for a directed verdict of

acquittal. The court did not accept that statement, as I understand it, as a stipulation because he went on further to charge the jury as to the facts. I submit --

QUESTION: He used it in his closing argument, too.

MR. BELL: Yes, he did, and I respectfully submit --

QUESTION: And he really emphasized it.

MR. BELL: -- Mr. Justice, that the statement at the closing argument was not evidence, and I respectfully submit that the statement at the conclusion of the plaintiffs' case was not evidence.

QUESTION: Mr. Bell, there was evidence, that the Police Inquiry Board found precisely the same thing, and that was evidence, was it not?

MR. BELL: The Police Inquiry Board did find that the officer was justified in use of his weapon.

QUESTION: And was acting in the line of duty?

MR. BELL: In the line of duty.

QUESTION: Was that evidence put into the record by the plaintiff or the defendant?

MR. BELL: Well, I was not at the trial and I don't recall. I am sure it was put in by the plaintiff and would have --

QUESTION: Well, it would have supported the argument defense counsel made at the close of the plaintiffs' case and at the close of the entire case, wouldn't it? Wouldn't he have

put that evidence in?

MR. BELL: Yes, but --

QUESTION: It certainly would have been consistent with his theory of defense anyway.

MR. BELL: It would have been consistent with his theory of defense but I can't answer you as to the defense counsel, but I am sure the plaintiff would put that in, too.

QUESTION: You say there is no evidence but the statement in the closing by the city attorney is, "Bonnie Lohman related for you a conversation that she heard at the bar between these three people in which one of them said, 'He is a cop.'" Is that an accurate statement?

MR. BELL: The statement from Bonnie Lohman was the only statement that we could find that indicated --

QUESTION: I thought you said a minute ago that there was no evidence?

MR. BELL: This --

QUESTION: You mean there wasn't much?

MR. BELL: Well, Mr. Justice Marshall, the statement by Bonnie Lohman was, as far as we were concerned, what she heard, number one; and we know from the testimony of the petitioner that he did not identify himself or attempt to act under color of law, even though the respondents may have thought he was or even questioned it, they did not perceive his actions, as I read paragraph 8 of the complaint, where I

am arguing at this point, to have been acting under color of law. Now --

QUESTION: In your view of the federal statute and this complaint, if Belcher had been in uniform and on duty at that time and place, what would be the situation under the federal statute?

MR. BELL: If he had been in uniform and --

QUESTION: Yes.

MR. BELL: -- on duty?

QUESTION: On duty.

MR. BELL: He would have been acting under color of law.

QUESTION: But would that --

MR. BELL: Because he would have had the badge of authority.

QUESTION: Let's assume all of that --

MR. BELL: He would have the appearance, the symbol of it.

QUESTION: Let's assume all of that, would the plaintiff -- would you concede that the plaintiff would then have had a valid action under the civil rights statute?

QUESTION: Or would he only have a valid action if he could show excessive force beyond anything necessary?

MR. BELL: That is what I was going to lead up to.

QUESTION: Well, then, why would he then?

MR. BELL: Well, because if excessive force is used under color of law, that is the very thing that 1983 seeks to protect.

QUESTION: Why? Doesn't 1983 talk about a deprivation of rights secured by the federal Constitution or law?

MR. BELL: And through the Fourteenth Amendment, yes, sir.

QUESTION: Well, why is that a violation of the Fourteenth Amendment?

MR. BELL: The taking of life?

QUESTION: No.

MR. BELL: You mean excessive use --

QUESTION: The Fourteenth Amendment does not forbid the taking of life.

MR. BELL: Well, perhaps, Mr. Justice, I don't understand your question.

QUESTION: Well, my question is a pretty basic one in this case. It is one that wasn't even discussed. It was hardly discussed by either the District Court or the Court of Appeals. But why, even assuming this was a -- let's assume that this policeman, Mr. Belcher, was in uniform and on duty, and let's further assume that everything happened the way it did happen. Why would the victims of his shooting or their estates -- one person was injured seriously and two were killed, as I understand it -- why would they have an action under 1983?

MR. BELL: Because under 1983 if there is an abuse of authority or a misuse of authority, as stated in the judicial cases that have been before this Court before, that is a violation of the constitutional rights --

QUESTION: Of what constitutional right?

MR. BELL: The right to not be punished without due process of law.

QUESTION: Well, that involves the judicial system, at least it has always been thought to. We have a case that is going to be argued I guess later to day, so I had better not -- but generally, traditionally that has involved the judicial system and the penal system, hasn't it?

MR. BELL: Yes. But in the traditional cases -- in the cases before this Court, the law has been set forth that the misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of law, state law.

QUESTION: All right. Then let's assume this is all taken under color of law. I have assumed that.

MR. BELL: All right. Therefore, if he takes action under color of law and misuses that authority to, let's say, and --

QUESTION: Remember, you are representing Mr. Belcher. You are not on the other side in this case.

MR. BELL: I realize that. I realize that, but I am trying to be professionally honest with the Court as I can.

QUESTION: Well, I understand that, but I really don't -- let's assume that a policeman in uniform, on duty but not in an emergency, he is just driving from one station-house to another, drives with gross and wanton negligence and strikes and kills somebody. Does he deprive that victim, with his gross and improper behavior, of any constitutional right?

MR. BELL: It is our position that he would not in that case, Your Honor.

QUESTION: Then what is the difference between that case and this case?

MR. BELL: There is no difference in that sense in our position of that case and this case, as you state it, and that is what I am arguing.

QUESTION: No, no, no, because in each case he is acting under color of law. Now, your present case, I know that you argue that he isn't --

MR. BELL: Correct.

QUESTION: -- or wasn't.

MR. BELL: That's correct.

QUESTION: But I am assuming that he is in both cases, both in the bar in Columbus, Ohio and hypothetically in uniform and on duty and also on the street in Columbus, Ohio, where he just weaves and speeds and there is no emergency and

he kills somebody. Now, why in either case is the victim deprived of any right guaranteed by the Constitution, the federal Constitution or federal law?

MR. BELL: All right. In the latter case, Mr. Justice Stewart, I agree that the victim of the automobile would not be deprived of a constitutional right and it would not be an action under 1983. In the case --

QUESTION: What about an officer in uniform approaches a bank and a bank robbery is going on and engaged in a gunfight with the bank robbers but inadvertently shoots and kills one of the customers or one of the employees of the bank. Do you think that is covered by 1983?

MR. BELL: No, Your Honor, we do not, and that is one of the reasons of our argument, that is one of the purposes of our argument, that we do not feel that 1983 should -- that the doctrine "under color of law" should be extended to include these private acts.

QUESTION: Well, then the theory of your case might more appropriately be that this man was in fact on duty and engaged in the normal functioning of the police under the special instructions to carry guns at all times.

MR. BELL: It is our contention that the District Court hit on that theory, that he was carrying the gun on him, in its charge, and we feel that although that charge is not objected to -- which I will get to later in my argument -- we

feel that it was fundamental error.

QUESTION: Mr. Bell, let me get back to your answer to Mr. Justice Stewart's question. You said that in the squad car incident, which Justice Stewart hypothesized, you felt it was not a violation of any constitutional right. The intimation was that you felt in the bar case it is a violation of a constitutional right?

MR. BELL: It could be.

QUESTION: Well, what would it turn on?

MR. BELL: It would turn on, in my judgment, it would turn on if the officer arrested the person, took them into custody and then proceeded to beat a confession out of him or to in some way --

QUESTION: That would be like Screws?

MR. BELL: Screws, yes, Your Honor, or the --

QUESTION: Or Monroe v. Pape?

QUESTION: But Screws said he had to do it with an intent, an expressed intent to deny him a right guaranteed by the Constitution.

MR. BELL: That is correct, and this Court reversed the Screws case upon the charge of the Court calling it fundamental error because the Court did not charge on that very point, Justice Marshall.

QUESTION: Of course, that was a criminal case.

MR. BELL: And that was a criminal case, under 18

U.S.C., section 242. The cases that I would --

QUESTION: But the constitutional right at stake was precisely the same there, wasn't it, the right of --

MR. BELL: Excuse me, sir?

QUESTION: The constitutional right at stake in Screws is precisely the same, the right not to be deprived of right without due process of law?

MR. BELL: That is correct.

QUESTION: Yes.

MR. BELL: Now, to further answer Justice Rehnquist's question: The case most in point is the matter of Williams v. United States, where a private detective in the State of Florida was engaged by a lumberyard to catch petty thieves, and he had an authorization issued from the state. He also had with him an on-duty police officer, in uniform. He would catch these people, take them to a paint shed and beat confessions out of them, literally beat confessions out of them, and at the time that he was doing it, which is very significant, I suggest, he was flashing his badge, his color of authority. This was not done in this case that is at bar.

Now, we respectfully submit that the facts in this complaint indicate private conduct, and that it lacks a jurisdictional -- it created a jurisdictional facult in the District Court as attempting to include within 1983 those matters that are private acts that we have just discussed.

QUESTION: You started, I think, at the outset of the case, Mr. Bell, by telling us that a companion suit had been filed in the Franklin County Court of Common Pleas?

MR. BELL: That is correct.

QUESTION: And what happened to that litigation?

MR. BELL: That was dismissed by respondents and they elected to proceed --

QUESTION: Dismissed by the plaintiffs?

MR. BELL: Yes. Therefore, the only fact in the complaint from which we can derive official conduct, if the Court please, is the use of the weapon, which complaint alleges petition carried pursuant to a department regulation requiring off-duty officers to carry a weapon at all reasonable times under a theory that officers are on duty 24 hours per day.

To focus upon the use of that weapon alone, coupled with the facts stated leading to the conclusion that it was used in only a totally private manner, we feel, does not state the facts upon relief can be granted. And that if the weapon used is by and of itself determined to satisfy the "under color of law" requirement, then once again the traditionally excluded private uses that we have already discussed with the Court will be swept within the ambit of 42 U.S.C. 1983.

QUESTION: But, Mr. Bell, you say just the use of the private weapon, but does the record tell us why the defendant became involved in the incident, his motivation? Was

it a private motivation or in an effort to maintain the peace?

MR. BELL: There was a conflict of testimony on this point.

QUESTION: But if we take the evidence most favorably to the verdict, do we not have to assume that he sought to bring about peace and therefore perform his duty as an officer?

MR. BELL: It is our position that, whether he sought either that interpretation or if he became an aggressor or as a matter of self-defense, it doesn't matter because he did not attempt to act under color of law, as it has been defined by the cases in this Court, and that is --

QUESTION: Well, what is your theory of what he was trying to do when he got involved?

MR. BELL: He was sitting in -- the evidence was that he was sitting in the booth with a lady friend and two other people. The altercation was at the far end of the bar among respondents and other people.

QUESTION: Between the plaintiffs and third parties?

MR. BELL: Third parties.

QUESTION: And why did he get involved?

MR. BELL: All right. First, the testimony was that he said, well, I am going to arrest three -- no, I am going to arrest two of the officers, was part of the evidence, and then he said I am going to go to the phone and call on-duty

officers, and he never got --

QUESTION: Well, now, both of those statements --

MR. BELL: Excuse me, sir.

QUESTION: Is it not true that both of those statements are inconsistent with a purely private motivation? And do they not add to the evidence of the guns, or can you properly say there is nothing but the gun involved in the case?

MR. BELL: Yes, Your Honor, it is our position that the mere fact that he sought to get out of the bar to get to a phone was not an act under color of law that would bring the respondents, that they would perceive that they were acting under a color of law and that they were going to be arrested or that the petitioner was an officer. That act alone of trying to get out of the bar to get to a phone does not make him a police officer.

QUESTION: Wouldn't that act alone have been the most sensible thing to do if he had been in uniform, on duty, to call for some back-up help?

MR. BELL: I think he would have, yes, sir, I agree with that.

QUESTION: Well, that is consistent with what your response was to Justice Stevens --

MR. BELL: Yes, sir.

QUESTION: -- which adds up to me that he was engaged in police activity.

MR. BELL: Also it could be private activity if you are going to call the police when you see trouble.

QUESTION: What is it, arrest -- you think he was going to make a private arrest?

MR. BELL: No, Your Honor, he was not going to make any arrest.

QUESTION: You said --

MR. BELL: He was going to get help.

QUESTION: I thought you first said he was going to arrest one or two of them.

MR. BELL: No. He stated "I was going to arrest them but by calling on-duty police officers," not himself.

QUESTION: I mean to arrest is not private -- that word is not a very private word.

MR. BELL: No.

QUESTION: Arrest is not a very private word?

MR. BELL: I agree with that. But his acts were not acts --

QUESTION: So he was acting as a policeman? Well, let's put it this way: He was acting as a policeman in plain clothes.

MR. BELL: He was acting I think, Your Honor, more like a --

QUESTION: Right.

MR. BELL: -- a policeman off-duty who was required,

as testified by the chief of police, to take action.

QUESTION: Right. Now, how --

MR. BELL: Part of that action was to go and call other policemen.

QUESTION: How could he be off-duty? I thought you said he was on duty 24 hours a day.

MR. BELL: No, that -- no. They are on duty --

QUESTION: Didn't you say the --

MR. BELL: They are on duty eight hours a day, on call 16 hours a day --

QUESTION: I thought you said the reason he carried a gun was because they were considered to be on duty 24 hours a day. I heard you wrong?

MR. BELL: No, no. You heard me correctly. That was the theory of the purpose of carrying the weapon, that they were expected to be on duty but in fact they were really on duty eight hours a day, on call 16 hours a day.

QUESTION: So they were expected to be on duty, and so he was acting as a police officer out of uniform, off of official duty, but assumed to be on duty?

MR. BELL: That is correct, from his superiors.

QUESTION: And that isn't under color of statute of law?

MR. BELL: In our judgment --

QUESTION: That is not under color --

MR. BELL: -- the acts of the defendant or the petitioner were not acts under -- were private acts and not acts under color of law. He did not attempt to exercise his authority under the state, except to go and try and get to the phone, and he never got there.

QUESTION: If he had sat there and let the King's peace be disturbed and do nothing about it, would he be violating his oath of office as a policeman?

MR. BELL: Yes, sir, he could very well have been violating his oath as an officer.

QUESTION: So he was acting under color of state law, wasn't he?

MR. BELL: Only in going to get other policemen, not as to the respondents.

QUESTION: Well, when did all the trouble come, when he was on his way to get the policemen?

MR. BELL: Yes, which was --

QUESTION: Which was a policeman's act?

MR. BELL: Yes. Yes, sir. However, it was not an act as to the respondents. He did not attempt to take them into custody or arrest them as in traditional cases that have been before the Court.

May I reserve, Mr. Chief Justice, the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Lewis.

ORAL ARGUMENT OF JOHN H. LEWIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The question that Mr. Bell says is before the Court is not before the Court in any reasonable interpretation, reasonable and accurate interpretation of this record. Perhaps some of the argument that I advance here should have been advanced in more detail imposing the petition for writ of certiorari.

I think there is now enough before the Court in this record to establish conclusively that the question that petitioner says is present is not here, by any reasonable interpretation or accurate interpretation of the record.

QUESTION: Well, Mr. Lewis, if this man, the petitioner here, Belcher -- to repeat the same question I put to your friend -- had been on duty in his uniform and everything else had occurred just as this record shows it, would you have an action under 1983?

MR. LEWIS: Certainly. Certainly. Certainly. To come back under the theory of Screws and the Mape case --

QUESTION: What case?

MR. LEWIS: Pope v. Mape -- Mape v. Pope --

QUESTION: No, no. Monroe v. Pape --

MR. LEWIS: Monroe v. Pape.

QUESTION: Well, that involved the Fourth and Fourteenth Amendments, unreasonable search and seizure, against which everybody is clearly protected by the Fourth and Fourteenth Amendments. But what constitutional provisions are involved here?

MR. LEWIS: Well, we have a --

QUESTION: What constitutional protections?

MR. LEWIS: -- a deprivation of life without due process of law, it seems to me, that we have the --

QUESTION: Well, wouldn't that be true then in the hypothetical case of the grossly negligent policeman driving, on duty, not in an emergency, who strikes somebody and kills him?

MR. LEWIS: I think that would get into the area of purely a tort --

QUESTION: Well, this is a tort also. They are both torts.

MR. LEWIS: Yes.

QUESTION: I mean that doesn't answer the question, does it?

MR. LEWIS: Well, in the situation of driving an automobile, the officer wouldn't be doing anything enforcing the law or --

QUESTION: Well, he would be on duty, an on-duty officer, going from one stationhouse to another, and let's

assume he is careening down the street at 90 miles an hour and he strikes and kills somebody. That person clearly has a tort action, but has he been deprived -- has the victim been deprived of any rights secured to him by the federal Constitution or federal law; and, if so, what right?

MR. LEWIS: Well, in the tort situation, there is no effort to enforce the law in the -- you see, that was not the situation, enforcing the law. Here we have a situation where the officer was in the process of enforcing the law, one of his duties, performing one of his duties.

QUESTION: Well, let's assume it was the duty of my hypothetical policeman to go from one stationhouse to another, he was acting within the scope of his duty, in uniform, in a police car, on duty. What is the difference between the two cases?

MR. LEWIS: Well, I think in our case we have an intentional act, we have under the civil part, the civil section of the civil rights act, the person is presumed to do what would be the reasonable results of his act. Here we have a man shooting a gun at close range to the vital parts of the body of two people that were killed and one fellow that was shot in the back.

QUESTION: The Constitution doesn't say anything that differentiates an injury caused by somebody at close range with a pistol as contrasted with one caused by a

careening automobile. There is nothing in the Constitution making that sort of differentiation, is there?

MR. LEWIS: No, I think that is true. But I think the color of law --

QUESTION: Let's concede that you are correct about color of law, about that he is acting under color of law. Now, my question goes beyond that, which is simply what rights or liberty is protected by federal law or the federal Constitution were denied the victim?

MR. LEWIS: Well, I think it is the life, liberty and property under due process of law.

QUESTION: Well, wouldn't it equally be true in the case of the grossly negligent driver, if you are correct?

MR. LEWIS: Well, I have some trouble with that situation -- meets the color of law.

QUESTION: Well, I am assuming the policeman is acting under color of law in both cases in my question.

MR. LEWIS: Well, if you assume he is acting under color of law in those facts --

QUESTION: Well, a policeman in uniform, on duty, going from one stationhouse to another, is acting under color of law, isn't he? We could agree about that, couldn't we?

MR. LEWIS: Well, I don't believe -- I don't know that the cases have necessarily gone that far in the definition of color of law.

QUESTION: What if a policeman observed a bank robbery and sees someone fleeing who he has reasonable cause to think robbed the bank, shoots at the person and kills him. And say it take place in Ohio and Ohio says it is justifiable for an officer in that position to shoot a fleeing fleon. If it turns out that he was mistaken as to that person, does the person have a cause of action under 1983?

MR. LEWIS: I don't think so. I don't think so.

QUESTION: Well, why is that different from your case?

MR. LEWIS: Here we have an officer, the evidence taken in the most favorable light to the complainant, was in the process of quelling a disturbance. He entered into, as part of his police duties.

QUESTION: Well, so in my case. Certainly no one could be more in the performance of his police duties than in uniform, having just witnessed a bank robbery, and trying to prevent an escaping felon, someone whom he thought was an escaping felon.

MR. LEWIS: Well, I think the distinction is something that is the question of a purely accidental occurrence, happened in good faith in the performance of duty, and the situation we have here, shooting two people -- three people, at close range, and it has all been submitted to the jury and there was no justification for the potential excessive force.

QUESTION: In my hypothetical, the man is much more arguably in the course of duty than in your case, is it not?

MR. LEWIS: Right.

QUESTION: So what is it that would lead you to say in my case you don't have a claim under 1983 but in yours you do?

MR. LEWIS: Well, I think in both instances if we assume they are under color of law, it is a question of the excessive force used under the circumstances.

QUESTION: Where does the Constitution distinguish on the basis of excessive force?

MR. LEWIS: Well, I think that is the thrust of *Monroe v. Pape* and the *Screws* case, as I understand them, that there was excessive force used.

QUESTION: *Screws* was someone in custody, in a jail, and beaten to death, was he not? And *Monroe* was a Fourth Amendment violation, so you never had to go -- just the procedural guarantees of the Fourteenth Amendment.

QUESTION: Mr. Lewis, let me ask you two questions that I think may be relevant to Mr. Justice Rehnquist's inquiry. Supposing the facts had shown that the officer said to the decedent before he shot him, "I don't think you need a trial, I will take care of things without all this judicial process, and we will get things done in a hurry." I suppose that would support a claim that the man had been denied due

process of law?

MR. LEWIS: Yes.

QUESTION: And you would agree with that, would you not?

MR. LEWIS: Yes.

QUESTION: Now the second question I would like to ask is does the question presented in the petition for writ of certiorari raise any issue whatsoever with respect to whether it has to be negligence, deliberate intent, such as I raised, or any of these different hypothetical cases, is that before us today?

MR. LEWIS: I don't believe so. I don't believe so. I think the sole question that is presented here is was Belcher acting under color of law or was this private conduct, and all this has been submitted by the facts, the detailed facts of this case have been submitted to a jury, the trial court carefully instructed the jury to decide this case, is this color of law. The defense counsel used that theory throughout the case, including the final argument.

QUESTION: And there is no question as to the propriety of the jury instructions before us? We have to assume that the jury was properly instructed on what the nature of the violation was?

MR. LEWIS: Well, it would be my view, in view of the fact that they didn't except to the jury charges, although

they seem to be coming in the backdoor now and saying that there is something the matter with the jury charge after all the volume of evidence about color of law, and it is confined to other things that have not even been mentioned yet. There is an overwhelming amount of evidence in the record that supports the color of law theory. It isn't solely the gun regulation. The Court of Appeals stated that.

If I could come back to the initial place where Mr. Bell started his argument, he is again, like he has done throughout some of the briefs, and like has happened in the other courts, have taken part of the facts here and isolated them and not look at the complete and accurate facts, including the further allegations in this first complaint, the first claim related to color of law, that he didn't read to you. We stated that generally. There are other paragraphs here that were not even mentioned.

Now, the posture of this case on the motion to dismiss the complaint comes back to this: There was a motion to dismiss and there were depositions taken before the court ruled on the motion to dismiss, depositions taken of Belcher. Of course, at the time the suit was filed, we had no way of getting these depositions. At that time, Mr. Belcher admitted and used in the deposition, which is before the Court and was before the District Court, that he shot the two men and that he chased the third man out the door of the cafe to apprehend

him. He used words that indicated more than we knew because we only had one survivor, of what his intention was.

In addition to that, Belcher admitted at that time that he had applied for and had received industrial compensation for some minor injuries in occurrence of that. At that posture in the case, and before the court had ruled on the motion to the pleadings, I filed a motion for partial summary judgment on the issue of color of law, saying that that settled the issue of color of law. The court -- there was a dispute of facts and the court, I think properly, overruled that motion at that stage, and let the facts develop; likewise, overruled the motion to dismiss the complaint, the insufficiency of the complaint, and I think this was a proper ruling throughout the entire trial, the District Court allowed the jury to settle the disputed facts of what happened.

And as Mr. Justice Stevens says, at this point, the evidence has to be considered in its most favorable light to the plaintiff.

QUESTION: Mr. Lewis, at which point do you say point to under color of --

MR. LEWIS: Well --

QUESTION: -- that are in the record, of course?

MR. LEWIS: Well, that are in the record. There is a conflict of what the officer set out to do when this relatively minor altercation occurred, but there is evidence

in the record that he got up from his booth, he withdrew a mace -- there was, again, chemical mace, it was again issued by the City of Columbus, and that he started toward and did spray these people that had the altercation, twenty feet away. There was evidence to that effect. That was something that was issued to him by the City of Columbus, and he did intervene.

QUESTION: You are saying that is just what a policeman would do if he were on duty, in uniform?

MR. LEWIS: Not necessarily what he would do. He could have used better judgment in notifying them who he was, but he was --

QUESTION: Well, if he had a uniform, would that be necessary?

MR. LEWIS: Well, probably not.

QUESTION: And wouldn't it be sensible to use the mace first instead of the automatic?

MR. LEWIS: Yes.

QUESTION: So up to this point, except for the uniform, he is acting just like a policeman, was he not?

MR. LEWIS: Right. Right. Absolutely. He was acting and he continued to act like a policeman.

QUESTION: Would you say the pursuit of the third man was also acting like a policeman?

MR. LEWIS: Very definitely. He used the phrase in

there, he "didn't want him to get away." Here in one moment he comes with -- and his story is varied as the case goes on, it is changed around and he tried to fit himself within some defense, but he says here, "I am defending myself on the floor, in fear for my life," yet seconds later, in a very small cafe, he jumps up, he chases a man outside the bar who was trying to get away, he slugs him with the gun outside, now that certainly wasn't a defense but was the act of a policeman to get the other man, the third man from getting away.

Now, these are things that are in the record before the occurrence. Then we come in with what we put in the record afterwards. The application for compensation, industrial compensation, as he claims he was in line of duty, and we have the finding of the Firearms Review Board, the statement of review after they viewed all the investigative facts, that this was in line of duty. We have the admissions by counsel. Counsel tried the case on the theory and tried to use this as a defense, that he was clothing his defense with the good works of the police officer who was trying to quell a disturbance.

We have his argument to the jury at the end that says this is what the officer had to do. Now, after all that evidence, it is weighed by the jury, weighed by the Court of Appeals, and found to be overwhelming evidence, they are back

here saying, well, we want another shot, we want to withdraw the whole theory of the case and have a special shot that we are not under color of law, we want to come clear back here.

We think they have waived, procedurally waived everything. By inference, they are saying there is something the matter with the charge, that the Court was not quite complete enough or something of this kind, but yet they didn't object to it. There was no objection to the charge throughout. I think they have procedurally waived everything that they are now trying to bring before this Court for the third time.

They have been cutting the facts here, leaving out the complete facts, presenting a case to this Court that isn't the full and complete record. And that is the reason that I don't believe the question that they are trying to present is before this Court. I think we are still talking about basically what perhaps I failed to adequately cover in opposing the petition for certiorari, that the question is not here.

They say that now we weren't acting under color of law. That is all that is before the Court.

QUESTION: May I ask you this, Mr. Lewis: Why did you dismiss the law suit that you filed in the Franklin County Court of Common Pleas?

MR. LEWIS: That law suit, as I recollect it -- and I

don't remember, I think it was filed separately --

QUESTION: It was filed what?

MR. LEWIS: It was filed after this suit was filed here and was filed against the City of Columbus, as I recollect that suit. It is not in the record of this case. But there was a period of time involving I believe the Kent State cases, where the question of sovereign immunity was up in the air in Ohio. There was a Court of Appeals decision in Ohio that forcefully and very dramatically argued against the doctrine of sovereign immunity.

QUESTION: Right.

MR. LEWIS: And it was at that part of the case to keep open a direct claim against the city that there was a suit pending. It had nothing -- it was not coextensive with this, it was not an election.

QUESTION: Mr. Stengel wasn't a defendant in that suit, as you remember?

MR. LEWIS: Well, he was a plaintiff.

QUESTION: I mean Mr. Belcher wasn't a defendant.

Excuse me.

MR. LEWIS: As I remember the case -- and it was a long time ago -- it is not in this record -- but as I remember, it was directed to the city of Columbus for the purpose of taking advantage of the possible relaxation of the doctrine of sovereign immunity, which was up in the air by decision of the

Northern Court of Appeals in the State of Ohio. The judge wrote a very -- an opinion that has not been accepted by the Ohio Supreme Court.

QUESTION: Right.

MR. LEWIS: That was what that case was about.

QUESTION: I take it you filed that case, you were the attorney?

MR. LEWIS: Yes. Yes. Yes. And it was dismissed as the law became clear from the ruling of the other case. It is not a part of the record in this case and --

QUESTION: Well, it would be a matter of public record.

MR. LEWIS: Yes. And if I had known, I could have been better prepared.

QUESTION: Mr. Lewis, assuming for the moment that the case is here, as presented by the petition, does your position depend on the intent of the officer at the time he participated in this foray? I put another question to you that may sharpen it a bit: Suppose instead of his having said, according to some of the testimony, that he was going to arrest these people, he turns to his girlfriend and said this looks like a good fight, I think I will get into it, and it moved on from there into what happened. Would you have a case?

MR. LEWIS: Well, I think the Court's question comes

to a situation where you might have purely private conduct, but all the evidence, the weight of the evidence looks the other way.

QUESTION: I am putting a hypothetical case to you.

MR. LEWIS: Yes.

QUESTION: There is no evidence as to his intention beyond the statement he made to his girlfriend, "It looks like a great fight, I think I will get into it," and he did and ended up shooting two people with his service revolver and using his mace.

MR. LEWIS: I am afraid in that situation we could have filed suit. We could argue purely private conduct and there would be the question that they say is before the Court, but there is a handful of facts that --

QUESTION: If the facts had been as I have stated them, you think there would be no color of law?

MR. LEWIS: I can see situations, and I suspect that is one of them, where there wouldn't be color of law.

QUESTION: Let's assume, taking Justice Powell's hypothetical, but assuming that the policeman is in uniform and on duty and stopped by a bar to see how one of his constituents was getting along and everything else happened as did happen here. But he was in uniform and on duty, but he said to his girlfriend or the bartender, "This looks like a good fight, I think I will get into it," and then with the

results described by Mr. Justice Powell, which are the same results here, two people killed and one injured. Would those people have been denied any constitutional rights?

MR. LEWIS: Well, I think in that situation you probably don't have the color of law --

QUESTION: Well, I am assuming there is color of law. I am assuming he is in uniform and on duty.

MR. LEWIS: Yes, I think there would be.

QUESTION: What rights guaranteed by the Constitution?

MR. LEWIS: Life, liberty and the pursuit of happiness.

QUESTION: Well, the Constitution doesn't guarantee the pursuit of happiness. That is in the Declaration of Independence.

MR. LEWIS: All right.

QUESTION: And so far as life and liberty goes, it doesn't guarantee those either, it just guarantees that nobody should be deprived of them without due process of law by a state.

MR. LEWIS: Yes. Well, I don't see how he can be under color of law in the situations. There are District Court cases that say -- the uniform wouldn't have anything to do with it. I don't think he is under color of law in that situation. And it is in that area that the color of law is

the controlling thing before this Court now. That is all that is before this Court, as I understand the motion. There is sufficient evidence in this record that he was acting under color of law.

QUESTION: You can't assume it under this question. You can't assume that he is acting under color of law, because the question is was he acting under color of law or not. That is the question.

MR. LEWIS: And I think the record is completely clear, any further interpretation that he was --

QUESTION: That is the only point before us.

MR. LEWIS: That is my understanding, and I have --

QUESTION: Is there any discussion in Judge White's opinion and the Court of Appeals as to what federally protected right was invaded here? I know he mentions the due process clause of the Fourteenth Amendment and the equal protection clause, but they are just mentioned. Is there any discussion?

MR. LEWIS: I don't believe there is any in detail. I don't --

QUESTION: Was that briefed or argued before the Court of Appeals?

MR. LEWIS: I don't believe so. I don't believe so.

QUESTION: What is the basis for your claim in -- what was the jurisdictional statute that you relied on in filing your claim in the Federal District Court?

MR. LEWIS: Well, it was the 1983 claim and --

QUESTION: Well, 1983 doesn't by its terms -- was it 1343, the section that says if you state a claim under 1983 that the Federal Court shall have jurisdiction?

MR. LEWIS: I believe so.

QUESTION: And your complaint jurisdictionally relied on both section 1343 and section 1331?

MR. LEWIS: Yes.

QUESTION: I think I just saw that.

QUESTION: Now, let me ask you this, Mr. Lewis: If you go into District Court and say my claim arises under the Constitution of the United States, because it is under 1331, and your case is tried with a jury and so forth, is the existence of a constitutional question, is that a jurisdictional question so far as the District Court is concerned? Is that the kind of thing that can be raised at any time, or is that the sort of thing that has to be preserved by the parties?

MR. LEWIS: I think it has to be preserved by the parties.

QUESTION: Of course, federal courts are not courts of general jurisdiction, they are courts of limited jurisdiction, and a court is always free to examine its own jurisdiction. You would agree with those propositions, wouldn't you?

MR. LEWIS: Right.

QUESTION: Mr. Lewis, you are making a fairly

persuasive argument that the petition states a question that is quite different from theory on which the case was presented below. Did you file more than one brief in opposition to the petition for writ of certiorari?

MR. LEWIS: No, I did not, and I have --

QUESTION: That is the brief that --

MR. LEWIS: -- I have indicated that, as I see the case now, was probably an inadequate presentation and I think that the things that probably should have been presented in the thirty days that I had are now before the Court. I think there is -- though I am not in the position to press that forcefully, because of maybe the incompleteness of my brief, there is an amicus brief here that suggests that one disposition is the whole thing was improvidently granted, and I do suggest --

QUESTION: The amicus brief was not filed until August, after we had granted the petition.

MR. LEWIS: Yes.

QUESTION: We didn't have very much enlightenment at the time.

MR. LEWIS: That is true, and it is a rare case -- I understand there are a case or two where on further -- as the Court develops further information about the facts, that there is a determination that the thing was improvidently granted, as things became apparent to the Court, but that

weren't apparent to the Court when the writ was granted, and it is that disposition that I have suggested -- that I haven't suggested it as forcefully in my brief as perhaps the Solicitor General did because I felt maybe I wasn't entitled to. I should have presented it more forcefully in my opposition to the motion for petition for writ of certiorari, but I do think that that is appropriate solution or, in the event that an affirmance I think may be appropriate.

When the whole accurate is accurately considered, I think we have a manufactured record, manufactured argument that has been presented that the color of law issue has been out of this case, procedurally out of this case. And the question that they say is before this Court is not before the Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further? You have about two minutes.

ORAL ARGUMENT OF ROBERT A. BELL, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

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

Our position is that the question has been preserved upon the motion filed in District Court under Rule 12(b), Federal Rules of Civil Procedure; it was preserved throughout the trial, preserved in the Circuit Court of Appeals, and we

feel that it is still alive here today, as to whether or not the court had jurisdiction under 1343.

The other remark that I would like to make is that in question to Justice Marshall as to the petitioner going to the phone, it is our position that that act of going to the phone could have been an act of an individual or an officer or person with any sort of duty, or as a private individual could have gone to the phone to call the police. And we feel that there is something more that must take place to bring this case within the ambit and the actions of the petitioner within the ambit of 1983.

QUESTION: Like what?

MR. BELL: Showing his badge, telling them they are under arrest, advising that he was a police officer, cease and desist the actions that they were taking.

QUESTION: Did he have his badge with him?

MR. BELL: As far as I know, he did, but I --

QUESTION: You don't know? I can't assume he had it. I have great difficulty going outside the record.

MR. BELL: I understand, Your Honor.

I have nothing further.

MR. CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

[Whereupon, at 11:33 o'clock p.m., the case in the above-entitled matter was submitted.]