

In the
Supreme Court of the United States

RUBY JONES,

PETITIONER,

V.

DOUGLAS HILDEBRANT, ET AL.,

RESPONDENTS.

No. 76-5416

Washington, D. C.
April 26, 1977

Pages 1 thru 45

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DOUGLAS HILDEBRANT, et al., :

Respondents. :
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Washington, D. C.,

Tuesday, April 26, 1977.

The above-entitled matter came on for argument at
1:39 o'clock, p.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:

DAVID K. REES, ESQ., Suite 2317, 1700 Broadway,
Denver, Colorado 80290; on behalf of the
Petitioner.

WESLEY H. DOAN, ESQ., 5945 W. Mississippi Avenue,
Lakewood, Colorado 80226; 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 76-5416, Jones against Hildebrant.

Mr. Rees, you may proceed whenever you're ready.

ORAL ARGUMENT OF DAVID K. REES, ESQ.,

ON BEHALF OF THE PETITIONER

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

I am David Rees. I represent the petitioner in this case, Ruby Jones.

In 1973, Ruby Jones filed a complaint in the Denver District Court in which she alleged that Douglas Hildebrant, Brian Moran, and the City and County of Denver, as respondeat superior, had killed her son Larry by shooting him in the back of the head.

Brian Moran was subsequently dismissed from that suit, at the end of discovery. The action proceeded against just Officer Hildebrant and the City and County of Denver.

Her complaint stated three claims: first, battery; second, negligence -- both of these claims were properly brought under the Colorado Wrongful Death Act, and are controlled by Colorado law. The third claim was brought pursuant to 42 U.S.C. 1983, and is a federal claim.

At the close of the evidence -- well, first of all, in answer to this complaint, Hildebrant and the City said

-- they admitted that Hildebrant shot Larry Jones intentionally, and that he was acting under color of State law when he did so. They alleged, however, --

QUESTION: This was during the course of what kind of activity that he was shot?

MR. REES: The record is silent. But, in fact, the record below would show that Officer Hildebrant was responding to a call of a silent burglar alarm, and that he was pursuing Larry Jones, who was allegedly committing a burglary.

As a result, Hildebrant alleged that he was acting in self-defense, and he also alleged that Larry Jones was a fleeing felon, and that the shooting was justified on that ground.

But the jury rejected both of those defenses.

At the close of the evidence, the defendants moved to dismiss Mrs. Jones' claim under 1983 on the grounds that it was redundant with her State claim.

QUESTION: Of course, did the complaint mention 1983?

MR. REES: Yes, specifically.

QUESTION: And what was the claim, the constitutional claim?

MR. REES: The constitutional claim on Mrs. Jones' behalf, and it's her claim, is founded in -- you can look at it two different ways: first, this Court has held on several

occasions that a parent has a constitutional right to raise their child, and that that child cannot be taken from them without the due process of law. So in Armstrong vs. Manzo and in the Stanley case, this Court held that the State could not deprive a parent of their parental rights without meeting the guidelines of the Fourteenth Amendment.

And in the Meyer vs. Nebraska case --

QUESTION: Where could I find your complaint in the record, do you know?

MR. REES: It's in the --

QUESTION: In the Appendix. Is it right there at pages 1, 2, and 3 of the Appendix?

MR. REES: Yes, it is.

QUESTION: And your third claim is down in paragraph 10, is that it?

MR. REES: Yes. And particularly paragraph 12.

QUESTION: And where is the 1983 -- you say it's just under the Constitution?

I take it, you --

MR. REES: Yes, we allege the elements of 1983.

QUESTION: Yes. Yes. And I take it that it was understood to be a 1983 --

MR. REES: Oh, yes, it has been treated so at all times in the course of the proceeding by the district court and by the Colorado Supreme Court.

QUESTION: And I take it that -- you state it both ways here, either she is suing on behalf of her son or on her own behalf, either way.

MR. REES: Well, we drafted it that way.

QUESTION: Yes. So which one are you pushing now?

MR. REES: But what we -- it has now become clear, after four years, that it is her right, that it would be improper for her to sue on behalf of her son's right.

QUESTION: Well, then, if you're right there, we were wrong in turning down Gary Gilmore's mother's petition for a stay, weren't we?

MR. REES: No. And the reason for that is this: Gary Gilmore had rights of his own, as Judge Lewis in the Tenth Circuit stated the morning he was killed. Gary Gilmore was given every due process of law.

QUESTION: Well, he didn't -- his mother didn't think he was.

MR. REES: That's right.

But his mother had no rights that were deprived there.

QUESTION: Well, --

MR. REES: In other words, let me try and make the distinction. A mother does not have the right not to have her son killed; a mother does have the right not to have a State official wrongfully kill her son. And that's the distinction.

Every possible due process was afforded to Gary Gilmore, and he, an adult, chose not to file any further papers in this Court. And Judge Lewis said, this man has rights too; and here the mother, with no real standing, just tried to come in and save her son's life.

And I think that's a significant distinction.

QUESTION: Mr. Rees, let me follow through on Justice White's question. I think the printed Appendix is confusing, because you printed the Amended Complaint and the Answer to the Original Complaint, which is not printed. And the things don't fit together.

Did the original complaint cite -- mention 1983 in so many words?

MR. REES: The Original Complaint and the Amended Complaint are essentially the same, the difference being that a fourth claim for relief was --

QUESTION: Well, that isn't essentially the same, certainly. Of course it's a difference.

MR. REES: Yes.

QUESTION: That's why I'm confused when I read the Answer to the Original Complaint and then try to fit it into the Amended Complaint.

I'm asking: Is 1983 mentioned in the original complaint?

MR. REES: Yes.

QUESTION: And I take it, the answer is no.

MR. REES: No, it is. You mean specific statutory citation, Your Honor?

QUESTION: That's what I mean.

MR. REES: I think it was. I may be wrong about that.

QUESTION: Well, if it was, why isn't it mentioned in the Amended Complaint?

MR. REES: I think we just, under fact pleading, pled the elements. But there was no question at any point on any of the party's parts that this was a 1983 complaint.

QUESTION: Is that good pleading?

MR. REES: It's probably not as good as it might have been, but under fact pleading, I do think it is certainly sufficient; and there was no question about notice here. All the parties understood that this was a 1983 complaint.

QUESTION: And what was the -- a 1983 is a statute that allows civil recovery for the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States. And what was the theory here?

MR. REES: The theory here is that a mother -- and I can get this two different ways: first of all, that a mother has a right to not have her child taken, whether by court proceeding or by bullet, by a State official.

QUESTION: Why? What provision of the Constitution or

federal law?

MR. REES: It would be the due process clause. In Meyer vs. Nebraska, they talked about the term "liberty" and they construed liberty to include the liberty to raise children.

QUESTION: Well, now, you mean that this person who was killed should have been given a hearing before he was shot? Is that what you mean?

MR. REES: No, he shouldn't have been shot at all.

QUESTION: Well, no, he shouldn't as a matter of State tort and criminal law, but what in the United States Constitution protected either him or his mother from that?

MR. REES: The Fourteenth Amendment.

QUESTION: Well, what part of it?

MR. REES: The part that you shall not be deprived of life or liberty, --

QUESTION: Yes.

MR. REES: -- without the due process of law.

QUESTION: This was life, wasn't it?

MR. REES: Well, as to Larry, it was his life.

QUESTION: Yes.

MR. REES: As to Mrs. Jones, it was her liberty.

QUESTION: Yes. And what was the constitutional violation with respect to either one?

MR. REES: The constitutional violation was the

infringement of her rights as a parent.

QUESTION: To what?

MR. REES: To raise her child.

QUESTION: But where do you find that in the Constitution?

MR. REES: Well, for example, --

QUESTION: The due process clause -- I thought perhaps you were saying that there should have been a hearing accorded before he was shot.

MR. REES: Well, in answer to Justice Rehnquist's question, you know, had there been a hearing and the death penalty imposed after a criminal case had been filed against him, a hearing would have precluded a suit. But I'm not saying that they should have held a hearing before they wrongfully shot Larry in the back of the head.

QUESTION: Well, what constitutional deprivation was there?

MR. REES: The constitutional deprivation was the deprivation to raise --

QUESTION: Well, where do you --

MR. REES: Just as in my --

QUESTION: First of all, you're referring, I suppose, to the Fourteenth Amendment.

MR. REES: To the Fourteenth Amendment.

QUESTION: Begin with that. And now, what in the

Fourteenth Amendment? You're talking about equal protection of the laws here.

MR. REES: What?

QUESTION: Equal protection.

MR. REES: Yes.

QUESTION: Do you rely on that?

MR. REES: We are not, we're relying on the word "liberty" primarily.

QUESTION: Because your complaint talks about equal protection; you've abandoned that, have you?

MR. REES: Yes. When we drafted the complaint, and I can explain that -- Officer Hildebrant is white, Larry Jones was black, we thought there might be a problem there when we drafted the complaint. In the course of discovery we decided that the equal protection claim was not well founded, but that the deprivation of --

QUESTION: Because he had shot white people, too?

MR. REES: No. But we did not feel we had a case that we could show --

QUESTION: Well, what do you feel -- what is your case now, based upon the Federal Constitution or the federal law?

MR. REES: Our federal case is that you cannot take -- you cannot take a child's life. And there's a case directly on that point.

QUESTION: I understand, but that's protected by State law, criminal and negligence law.

MR. REES: No, it's also protected under the Fourteenth Amendment. And the Eighth Circuit has held specifically on that, with identical facts. Mattis vs. Schnarr.

In Mattis vs. Schnarr, Mattis was a doctor whose son was killed by a local police officer who was chasing young Mattis and fired a so-called warning shot that hit him in the head and killed him.

QUESTION: Unh-hunh.

MR. REES: And Mattis, the father, brought a suit under 1983, and the Missouri Court held that that was proper.

There are other cases with similar facts that are cited in the brief, Perkins vs. Salafia.

QUESTION: And what --

MR. REES: Perhaps I can -- excuse me, Your Honor.

QUESTION: Well, it's still not clear to me what provision of the United States Constitution you're relying on.

MR. REES: The Fourteenth Amendment, in precisely what protects -- the right to liberty would be the key word, it is the same part of the Constitution that protected the plaintiffs in Meyer vs. Nebraska, and that protected the plaintiffs in Stanley vs. Illinois.

QUESTION: Those are two different kinds of -- in Meyer vs. Nebraska, though, the State courts of Nebraska could

have held all the hearings they wanted to in the world, and they still wouldn't have been allowed to do what they tried to do in that case.

MR. REES: That's right.

QUESTION: So that's kind of a substantive type liberty as opposed to the kind of procedural type liberty that I thought you were talking about.

MR. REES: No, I'm talking about very substantive liberty: not being shot in the back of the head. Or having your son shot in the back.

QUESTION: But you've conceded -- I don't mean conceded, but don't you agree that, given a suitable statute on the books and a proper trial and hearing and so forth, that a State could put someone to death?

MR. REES: Oh, yes.

QUESTION: So it's not an absolute prohibition, the way it is in Meyer.

MR. REES: That's correct. But you must look, I think, to whether there is a right that it finds protection. Okay. And the answer to that is that you do have a right in your children. It is one of the very essentials of life. And that's what has been held in the whole series of cases that I argued -- perhaps if I can explain the background of --

QUESTION: Well, that's just turning 1983 into a general tort statute.

MR. REES: Oh, no, I would disagree with that. It's very narrowly restricted. It's narrow --

QUESTION: Well, whenever the defendant is a State agent.

MR. REES: And where there has been a constitutional right infringed upon.

QUESTION: Well, that's the question: what constitutional right?

MR. REES: The right to raise your child. There is a --

QUESTION: Well, suppose for a moment that we change the facts to see if we can at least get it in focus for me.

Suppose, instead of having been killed by reason of a bullet, that Jones had been fleeing in a car and the police car pursued him and at some point ran into him, ran into the Jones car and killed him; would you say he has the same rights that you have been trying to articulate to Mr. Justice Stewart?

MR. REES: Oh, no. No. You would have there simply a negligence action under State law.

QUESTION: Well, the same deprivation.

QUESTION: Sure, he's dead.

MR. REES: Well, injury is only one element, you've got to have the intentional deprivation of constitutional rights under 1983.

QUESTION: You don't allege that in your complaint.

MR. REES: And unless all of those elements are met, then the plaintiff can't recover.

Perhaps I can put this in historical perspective and make it clearer.

Courts have held traditionally that the Civil Rights Acts are deficient on the issue of standing to bring suits. And there are several court decisions, Brazier vs. Cherry is probably the leading one; and there is also a footnote in Moor vs. County of Alameda, that you can look at State law on the issue of standing. And that where the State has a wrongful death statute, which provides an independent right in the survivor, that that will give them standing under 1983. And that was one of the things pointed out in Mattis vs. Schnarr, and Colorado does have such a statute.

And so Mrs. Jones properly did bring the suit.

QUESTION: Well, now you're talking about the State law question. And the only --

MR. REES: Well, I had said initially that there were two ways in which you could view this as it being proper that Mrs. Jones --

QUESTION: Mr. Justice Stewart has already, several times, pointed out that no one is questioning, and none of our questions are addressed to the problem of the right to recover under Colorado State law for the wrongful

death, if it can be shown.

MR. REES: Yes.

QUESTION: The questions are addressed to the right to recover under the federal statute.

MR. REES: That's true.

QUESTION: But you now concede that the automobile killing would not be the same as the shooting.

MR. REES: Correct.

QUESTION: And is the only distinction the intent?

MR. REES: Yes. One would be -- and if they intentionally drove their automobile into the back of Larry's car and killed him, then a 1983 action would be proper.

QUESTION: Well, it would be just as easy to allege that with respect to an automobile as it would with respect to a gun, wouldn't it?

MR. REES: Certainly.

As an attorney I try to sign pleadings that reflect the facts as I see them.

In this case, Officer Hildebrant admitted that he shot him intentionally. Negligence was never an issue in this case. And if he had said, "I tripped while I was chasing him and the gun went off", that would have been a -- certainly a defense to a 1983 claim. But that just wasn't what happened here.

What happened here was that he shot the kid in the

kid in the back of the head.

QUESTION: Why did you say a little while ago that you thought that after -- that you realized, after two or three years, that the mother had to be suing in her own right?

MR. REES: Well, we thought --

QUESTION: Could she sue, or does Colorado law permit, or does 1983 permit a mother to sue to recover on behalf of her son, as sort of a survivor, on survivor's --

MR. REES: Under Scheuer vs. Rhodes, yes, survivorship action would be proper.

The problem we had --

QUESTION: Well, why do you say that -- why do you say here, then, that the mother couldn't proceed on that basis?

MR. REES: Well, in hindsight, she could have.

But that would have been, first of all, a different claim. That would have been a claim for Larry's rights and not for her rights.

QUESTION: Yes.

MR. REES: That's one. Two, --

QUESTION: And what's wrong with that?

MR. REES: Well, the problem with us was that at the time that there was a case, there was a case, Perkins vs. Salafia --

QUESTION: Oh, a Colorado case.

MR. REES: No, it is not, it's a federal district

court case and it comes from Connecticut.

And I think it has since been overruled, not directly but in light of other decisions. But it said specifically you couldn't do that.

QUESTION: Under 1983?

MR. REES: Under 1983. It said only where you've got -- only if there's a wrongful death action, so that the mother can bring the action in her own name, will we permit that suit.

And in view of the Perkins case, and in view of the cases that said it was proper to posture the case as we had postured it, we chose to posture it that way. We could have postured it either way, because Colorado had both statutes. And simply because of the Perkins case, we chose to plead it the way we did.

Four years ago I would posture it both ways to protect myself and to try to recover even additional damages on behalf of Larry; but that's hindsight.

QUESTION: Well, how does -- on what basis did the Colorado Supreme Court judge the case?

MR. REES: The Colorado Supreme Court said, one, Ruby Jones would have had no standing at all unless you look to the Colorado wrongful death statute. And if you're going to utilize the Colorado wrongful death statute on the issue of standing, you must incorporate its remedy as well. The

theory there is that where the federal law is silent on an issue, you look to State law to fill the gap.

And we would argue that even if you look to the Colorado statute to give Mrs. Jones standing to bring this suit, there is no gap with respect to the remedies.

So the Colorado court held that if we had filed a 1983 action in federal court, that the net pecuniary loss rule under Colorado law would have been engrafted onto -- and that's their language -- our claim in federal court.

And so they said that the Colorado rule of damages could govern a claim brought under the federal statute.

QUESTION: And so they said the 1983 action in the State court didn't survive at all.

MR. REES: It wasn't a matter of survival, but --

QUESTION: It was that they merged it.

MR. REES: They merged it. It was simply the same measure of damages as if --

QUESTION: So they just said it isn't really any different, it isn't a separate cause of action at all.

MR. REES: That because it has the same measure of damages, it would be duplicitous, and there's no need to instruct the jury on both of them.

And that was the whole basis of their ruling and the reason why we petitioned for certiorari.

Perhaps if I can answer your question, Justice

Blackmun, in another way: Given that decision as it stands now, if I were to file another suit in Colorado on behalf of -- you know, in a different case, on behalf of Larry, then the Colorado limitations on recovery for survivorship statutes -- I'm not sure exactly what they are -- would also apply and would govern the federal law.

And what they've done here is they've restricted a statute, where the very purpose of that statute was to provide a remedy supplemental to a State remedy.

QUESTION: Well, but if you're talking about any person injured, you have the choice of your theory as to Larry's mother, which you were urging earlier, as an independent constitutional violation.

MR. REES: Yes.

QUESTION: But if you're trying to recover damages for the injury or death of Larry, then you've got to get a survivorship statute somewhere I would think.

MR. REES: I agree. We have not alleged damages on Larry's behalf in this suit, nor do the damages that we seek --

QUESTION: In loss of income to his mother, basically. Or loss of support.

MR. REES: Well, loss of income is covered under the Colorado net pecuniary loss rule, and that would be covered in the \$1500 that was awarded by the jury. We don't seek double recovery for that.

The items of damage which we think are particularly appropriate in this case, and which are available under the federal common law that governs 1983 action, --

QUESTION: Now, what's your authority for saying that federal common law governs 1983 action?

MR. REES: Probably the leading case is Basista vs. Weir.

QUESTION: Is that a case in this Court?

MR. REES: No, that's a Third Circuit case.

QUESTION: Has this Court ever spoken on the subject?

MR. REES: This Court has not used the words "common law" to my knowledge. However, in Sullivan vs. Little Hunting Park, where the Court was dealing with a case that came under 1981 but, like 1983, is governed by 42 U.S.C. 1988 on the damage issue, the Court said that the measure of damages can be drawn from either federal or State sources, but that the remedy is a federal remedy and responsive to where a federal right has been infringed.

And this makes sense, the federal common law should govern this action, for two reasons:

First of all, federal common law traditionally applies to the enclaves of law that are of specific federal concern: labor law, maritime law. And, given the history of this statute, civil rights is certainly one of those enclaves.

Second, --

QUESTION: The difference between federal -- between common law and statutory law is what?

MR. REES: Well, the common law can -- the federal common law is judicial law construing --

QUESTION: Well, where do we find the federal common law?

MR. REES: The courts make the federal common law by construing the statute.

QUESTION: It's in the statutes, that's what you're saying.

Its MR. REES: It's construction of the statutes, of the 1988; that's right.

But, on occasion, the courts have gone quite beyond the statute. For example, in Shaw vs. Garrison, the Louisiana -- it was a federal court in Louisiana, as a matter of federal common law, said that the action could survive even though there was no federal survivorship statute, and even though, under Louisiana law, the action would have died.

QUESTION: I'm still trying to find the federal law that gives a survivorship right to the mother.

MR. REES: Excuse me?

QUESTION: The State -- the federal law that gives a survivorship right of action to the mother.

MR. REES: Well, the right of action is through 1983,

and the constitutional --

QUESTION: To the mother?

MR. REES: That's right. And the constitutional right is the Fourteenth Amendment.

QUESTION: The Fourteenth Amendment is her right to liberty to raise her child?

MR. REES: That's right. Specifically with -- the language of --

QUESTION: And anybody that interferes with her right to raise her child is subject to 1983 action, if it's --

MR. REES: Well, no, I would --

QUESTION: -- if it is a State officer.

MR. REES: If he intentionally --

QUESTION: He or she.

MR. REES: I wouldn't go so far as to say any kind of interference. I mean, if a policeman -- if a school teacher beats her son in school, I don't think that would give rise necessarily to a 1983 action.

QUESTION: Why not? Under your theory.

MR. REES: Well, I was alluding particularly to the Court's recent decision.

QUESTION: Well, doesn't a mother have a liberty for her child not to be spanked by anybody but her?

MR. REES: I guess not, Your Honor. No. She does not have that liberty.

QUESTION: Well, what --

MR. REES: But she does have the liberty not to have her child shot in the back of the head.

QUESTION: Well, I suppose -- oh, this is limited to the "shot in the back of the head" case.

MR. REES: Well, no. I don't know --

QUESTION: Well, how far does it go?

MR. REES: I don't know how far it goes, and, as in any case, you start in one place and then you find the parameters. But it would at least cover shooting in the back of the head. I'm not -- I don't know how you would draw those parameters exactly.

QUESTION: Suppose he shot him in the back of the head in self-defense?

MR. REES: Then there's no -- then the jury comes in on behalf of the defendant, and we lose everything, we lose the State claim too. But the jury here found that he didn't shoot him in self-defense, that he just shot him in the back of the head.

QUESTION: That he used excessive force in the circumstances.

MR. REES: That's right. And then he had no reason -- yes, under the circumstances that would --

QUESTION: Well, Jones wasn't just standing on the sidewalk or walking along the street, was he?

At the time he was shot.

MR. REES: He was running away from the police officer at the time he was shot. Whether or not he was in fact burglarizing that building is a subject of dispute. There's very strong evidence that he was, there is also some evidence that he wasn't. None of that evidence is in the record, and all of that evidence has been determined by the jury, and the jury has decided that the shooting was wrongful.

QUESTION: Then it's not before us in any sense.

MR. REES: It's not before you in any sense, and it isn't even in the record that was sent up.

QUESTION: No.

MR. REES: I would like to point out just one other point, because the defendants raise it in their brief, and that is: we chose to bring this action in State court. The defendants imply that perhaps we would have had a different remedy in federal court. I just wanted to point out that under the doctrine of concurrent jurisdiction, this was properly brought in the State court. And this gives the States the opportunity to relieve the burden on the federal courts, so that there is no problem with -- the law doesn't change because we brought it in State court, we have confidence in our State courts.

I would like to reserve the remainder of my time for rebuttal, if I may.

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

Mr. Doan.

ORAL ARGUMENT OF WESLEY H. DOAN, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. DOAN: Mr. Chief Justice and members of the Court:

If the Court please, I have had the same difficulty in trying to respond to this case from the very inception of the petition in this matter, and I think it's extremely important at this stage of the proceeding that the factual situation that existed in this case be corrected.

The plaintiff has alleged that this was an intentional shooting in the back of the head, and perhaps, if any error was made by the Colorado Supreme Court in this matter, it was in likewise making that statement that it was admitted that the plaintiff was intentionally shot in the back of the head.

What the court should have said was that it was admitted that the police officer intentionally shot at the plaintiff, the net result of which was that he was killed.

The fact is, as was found by Judge Goldberg at the trial court level, and as is indicated on page 30 of the Appendix in this matter, in part at least, and as is in our answer to your question, Mr. Chief Justice Marshall [sic], the facts were that, as Judge Goldberg indicated and the true facts before the jury decided were that the police officer is

driving down the street and sees the shadow of a figure in a lighted Day Care Center, which is a building provided in the area where it existed for mothers to bring their children during the daytime so they could work.

Upon seeing this, and a silent burglar alarm, the officer exited his vehicle, went to the side of the building and his partner drove the police car down the street, turned up another street and was going to proceed back down the alley in order to provide cover at the back of the building. The officer, in fact, then saw this party in the building jump out the building almost on top of him, in an area where it was lighted. This boy at that time was six foot tall and about 200 pounds. The officer observed him, after demanding that he halt, instructing him to halt, run from him.

As Judge Goldberg indicated, perhaps, in taking the case in the best light available to the plaintiff, he should have determined what was in his hand. And therefore a jury question was presented.

The fact was, to which Judge Goldberg refers, is that the officer testified that he saw, as this large figure is running from an area of lightness into darkness, into an area of a paved alley to an area of rubble, that there was a gleam of metal in the hand of the boy, that he thought, in his mind -- this was unrefuted -- that this person who was running from him has a gun in his hand and was going to shoot

him.

QUESTION: That's all very interesting, counsel, but this is the jury case that's already been decided, isn't it?

MR. DOAN: It certainly is, Your Honor. And it was decided upon the issues of whether or not, under those circumstances, the officer was negligent.

QUESTION: Well, and a decision was --

MR. DOAN: It goes along with your question earlier --

QUESTION: Yes, but the decision was adverse to you, was it not?

MR. DOAN: It was, Your Honor.

QUESTION: And you did not bring that question here, did you?

MR. DOAN: Well, I was satisfied with the judgment rendered by the court and the jury below.

Getting from that factual situation to what I truly believe is the issue before this Court is, and that is whether or not the damages in this case were inadequate. And the only way that you could get at that is the asking by the plaintiff or the petitioner here to rule that the wrongful death damage rule of Colorado was unconstitutional.

QUESTION: You say this was submitted as a negligence case to the jury?

MR. DOAN: It was, Your Honor. The instructions were submitted to the jury on negligence and also as to whether

or not, in effect, it was an excessive use of force under those circumstances.

The issue that's now before the Court, as I see it, is very simple. The petitioner is asking that there be two rules of damage that exist in Colorado: one, that although it is not specifically pled, 1983, that we pled the elements, and the court said --- and perhaps again there was a mistake of words. If it were a true 1983 claim, it would not merge with any State claim, it would stand on its own.

QUESTION: Where ---

MR. DOAN: And then ---

QUESTION: Where did the court say that? In the Appendix?

MR. DOAN: Pardon me? I'm saying this.

QUESTION: Do you have an Appendix reference? Well, you're telling us what the court said, I thought.

MR. DOAN: No, I'm saying if the court made a mistake, it used the word "merge", Your Honor.

QUESTION: Oh.

MR. DOAN: Or it used the word -- I believe our Colorado Supreme Court used the word, that it would be "engrafted" upon the Colorado Wrongful Death Act.

I'm saying that the Colorado Wrongful Death Act stood on its own in this case, and it provided all of the things that this Court said the person would be entitled to if

they had a claim that existed under 1983.

The Court, in Monroe, provided that it would have -- there would be four purposes of that case, and that would be to provide a remedy to declare that there were any unconstitutional State laws, to override those unconstitutional State laws. And I cannot determine, from the way this case is framed, whether or not the petitioner is asking the Court to declare the Colorado Wrongful Death Act and the Colorado rule of damages in that case unconstitutional.

QUESTION: Well, as I understand the Colorado Supreme Court, it accepted the fact that there could be, or that it would entertain a 1983 action for the wrongful death of the son, --

MR. DOAN: That's correct.

QUESTION: -- but that the Colorado damage limitations would apply to it.

MR. DOAN: That's correct.

QUESTION: And if -- let's assume that the only cause of action that had been pleaded here in the complaint was a 1983 cause of action. The Colorado Supreme Court, I take it, would have held that the Colorado courts entertain that cause of action, but that the Colorado Wrongful Death statute limitations apply to it, and you would have had the same result.

MR. DOAN: That is absolutely correct.

QUESTION: Now, if that's the -- would you have thought the Colorado Supreme Court would have made a legal error if the case had come to it in that posture, and it had decided just what it did?

MR. DOAN: It would have made no difference at all, if Your Honor please, and the result would have been exactly the same.

If every circuit case which dealt -- most of them dealt with survival, that's cited by the appellant in this case, were applied, the result would also be the same.

QUESTION: Well, do you suggest that -- I know you must -- you probably support the Colorado Supreme Court's ruling that the Colorado damage limitation applies.

MR. DOAN: Yes, I do, Your Honor.

QUESTION: But do you -- are you arguing here that no 1983 action was pleaded at all, no valid action was pleaded at all?

MR. DOAN: I believe that it was not validly pleaded, that's correct.

QUESTION: All right. Now, why is that?

MR. DOAN: Because it does not set forth a claim for anything other than the mother's denial of what she terms as her right to raise her child. And that that does not rise to the level of what would constitute a constitutional claim.

QUESTION: Now, apparently the Colorado Supreme Court

didn't rule that way, did it? It didn't --

MR. DOAN: Colorado ---

QUESTION: It didn't proceed on that basis.

MR. DOAN: The Colorado Supreme Court agreed with the trial court that, regardless of what you called it, the net result is going to be the same, in effect.

QUESTION: I see.

QUESTION: Well, formerly, though, didn't the trial court dismiss the 1983 claim?

QUESTION: Yes.

MR. DOAN: At the conclusion of all of the evidence in the case, it did dismiss what was referred to --

QUESTION: Well, then your Supreme Court --- if I read the opinion at page 48 of the Appendix correctly --- "However, because the instant suit was brought in state court and joined with a suit under the state wrongful death statute, the trial court properly ruled that the two actions were merged so that the 1983 claim should be dismissed."

MR. DOAN: That's right.

QUESTION: So does it come here as a case in which the 1983 claim has been dismissed?

MR. DOAN: Yes, it does, Your Honor, and that's the way it's before the Court.

QUESTION: Well now, does the petition for certiorari present the question whether or not the action in dismissing

the 1983 claim should be reviewed? Looking at the questions presented at page 2 of the brief of the petitioner, this seems to assume that the 1983 action was sustained, because the damages were erroneously -- the standard of damages; am I wrong?

MR. DOAN: In answer to that question, if Your Honor please, it's my belief that the only thing that's before this Court is her plea that the damages in the case are inadequate.

QUESTION: Well, how do they get here if, as it gets here, we have a judgment dismissing the 1983 claim? How do we get to the issue of damages under 1983?

MR. DOAN: I frankly do not know how we got here on that issue, because the only issue framed, as it now comes back in the reply brief, is the issue that the damages are inadequate, and the wrong measure of damages was used.

QUESTION: Well, in his questions presented in the petitioner's brief, not very articulately but at least it's arguable -- that's at page 2 of the white brief -- arguable that he is challenging the constitutionality of the limit which the action of the State court placed on a 1983 action; that is, applying the Colorado Wrongful Death Act limit, as Justice White earlier suggested, to a 1983 action.

Now, what do you -- can the question presented be read that way?

Or do you still say that he's just complaining about the quantum of damages?

MR. DOAN: I still believe, Your Honor, that that is in fact that the question that he has attempted to raise in this Court, regardless of how he wishes to label it.

QUESTION: The 1983 action was dismissed in the trial court, --

MR. DOAN: Yes, Your Honor.

QUESTION: -- and that was never appealed; --

MR. DOAN: It was not.

QUESTION: -- and so it's out of the case. And I don't quite see, therefore, how this question can arise.

MR. DOAN: The 1983 action was dismissed because the trial court says: You have available to you a complete remedy under the Colorado Wrongful Death law.

Now, our trial court was a little more astute than that, it went one step further and said: "Under 1983, where I can find no federal right of action to exist, no right of survival to exist, I am directed to look to 1988; and when I look to 1988, 1988 tells me that I don't find any federal rule for the measure of damages in a wrongful death action because there is no such federal action. Again I must look to the State rule.

"And to get to that rule, the closest State tort would be wrongful death. Therefore, I'm applying the wrongful

death damage rule of the State of Colorado, which is the nearest, closest thing, and which I'm directed by the court to do."

They cite, for instance, Brazier, which I know that
[If]
Mr. Justice Marshall is familiar with. /This case had been tried in that court at that time, the result would be exactly the same. Because in that case, the court went to 1988 to find a way to have the action survive, and said it should then look to Georgia law and adopt the Georgia law, and if we said it was Colorado law that had to be applied, they would have found the same measure of damages in this case in that case.

And the only thing that I can say before the Court is that it seems to me, and the attempt to evaluate this matter, that really what they're talking about is the damages are inadequate and we want a special rule of damages to be created, where we can punish police officers.

QUESTION: Well, let me back up again to this question presented. If we take this to be the question presented to this Court, "can the State measure of damages cancel and displace an action brought pursuant to 1983?"

Now, his 1983 action was dismissed, as several members of the Court have pointed out.

MR. DOAN: Yes, sir.

QUESTION: And there was no review of that by the Supreme Court of Colorado, was there?

MR. DOAN: Well, they referred to it.

QUESTION: Well, did the Supreme Court -- I'll put it this way: Tell me what you think the Supreme Court of Colorado said, other than what they said in that short paragraph on page 48 about it being engrafted -- what did they say about the dismissal? Did they affirm the dismissal, or did they evade the question?

MR. DOAN: They only -- that's all they said, that it was engrafted upon, because, in fact, the rule of damages in the case would be exactly the same, by whatever name you called it. Whether you call it wrongful death or by 1983, you always get to the same rule of damages.

QUESTION: Well, the dissent of Chief Justice Pringle and Justice Groves would tend to support you. They are saying that "I do not believe that Colorado's judicial limitation of net loss as a measure of damages for wrongful death applies to actions under 1983."

Well, that's the way, at least, the dissenters read the Court's opinion.

Then, is that question here at all?

MR. DOAN: I can't see how it is, Your Honor, because, as I interpret the sum and substance of the petition, the brief, the reply brief, the issue is that damages were inadequate and, in effect, saying we didn't get enough because you limited us to net pecuniary loss.

And I don't see how that issue is before the Court, because our Colorado Supreme Court said: We have followed that rule for years, we follow it in this case; that is the rule, it's the majority rule in wrongful death cases in the United States.

And, I believe, Your Honor, Mr. Chief Justice, if I may refer to the Appendix, at page 43 of the Appendix, Mr. Justice Hodges, in ruling upon the case, defined it this way: "She appeals from this judgment solely on the damage issue."

It would appear to me that the majority in the case and the dissent in the case considered it that way, and I respectfully submit to the Court that that is exactly the only issue that is before this Court.

And if I may say, in conclusion, the petitioner is asking the Court to create something which this Court, I feel, has clearly indicated does not exist, and that's a federal common law rule of damages.

In this case, what would happen if the director of that Day Care Center was in the building at the same time as the officer, they both fired simultaneously, they both fired a fatal shot? Under the petitioner's request here, there would be a special rule of damages, which he says this Court should create, I guess, under 1983, that would take away all of the other aspects of the Colorado Wrongful Death statute.

QUESTION: Could you help me a minute in the Appen-

dix?

MR. DOAN: Yes. I will try.

QUESTION: I notice on page 1, in the chronological list of docket entries, under the date of November 14, 1974, your motion to strike the third claim for relief, which is the 1983 claim, was granted. Is that right?

November 14, 1974.

MR. DOAN: That is correct, Your Honor.

QUESTION: All right. Now, when you turn over to page 40, this is after the trial, there was a motion for new trial.

Page 40. I notice in paragraph 2, one of the grounds of the motion is, "The court erred in dismissing plaintiff's claim brought pursuant to 42 U.S.C. 1983."

MR. DOAN: Yes, Your Honor. That's the motion for new trial.

QUESTION: That's right. And then when you get to the Supreme Court -- then there was an appeal by the plaintiff, petitioner here, right?

MR. DOAN: Yes, Your Honor.

QUESTION: The Supreme Court, and what I read you at page 48 of its opinion, apparently affirms, whatever the reason may be, the dismissal of the 1983 claim. Is that right?

MR. DOAN: I think that would be construed as --

QUESTION: Well, it says, in so many terms, in so many words, that the "1983 claim should be dismissed".

And then at the very end of the opinion, the judgment is affirmed.

MR. DOAN: That is correct, Your Honor.

QUESTION: Right. Now, at page 51 are the dissents, obviously dissenting from the notion that the 1983 action should have been dismissed. Right?

MR. DOAN: That's not what I would have interpreted they are dissenting from.

QUESTION: I see.

MR. DOAN: I believe that they say they are dissenting from the fact that the pecuniary loss rule, in essence, Colorado Wrongful Death measure of damages, would not apply in a 1983 action.

QUESTION: Well, no, but unless they assume the 1983 action has been wrongfully dismissed, and that the 1983 action is there, that dissent is meaningless.

QUESTION: Exactly.

MR. DOAN: Well, it could be certainly construed that way, Your Honor. But it doesn't make any --

QUESTION: All right. Then, my last question: The question presented in the brief for the petitioner at page 2, the second sentence is, as a question presented, "Can the State measure of damages cancel and displace an action

brought pursuant to 42 U.S.C. 1983?"

Does that bring before us the question whether the 1983 action was properly dismissed?

MR. DOAN: Well, I would submit, if Your Honor please, that it does not.

QUESTION: That is doesn't.

MR. DOAN: That it does not.

QUESTION: But, in any event, if it does, I take it the first question we have to decide is whether or not the 1983 action was properly dismissed before we reach the question of measure of damages.

MR. DOAN: Well, that would be, of course, absolutely correct if that were the issue before the Court: the correctness of it.

QUESTION: If they presented that in the question.

QUESTION: It certainly hasn't been presented with any crystal clarity, I must say.

QUESTION: Well, there's no question that one of the specific issues argued in the Colorado Supreme Court was whether or not the 1983 action was appropriate -- was properly dismissed.

I have got the brief here of the plaintiff or the appellant in that case, and that is one of the specific questions asserted to the Colorado Supreme Court.

MR. DOAN: Well, I would say that it was argued,

Mr. Justice White, because what they were complaining about was not in reality the dismissal of 1983, it was because in -- you didn't use the right measure of damages, and had you said it's 1983 instead of wrongful death, then you should have used punitive damages, you should have used some federal rule; and that's what the argument was all about.

QUESTION: Is there some difference in the elements necessary to prove recovery, as you understand it, as between a Section 1983 claim, such as was pleaded here, and the Colorado Wrongful Death statute?

MR. DOAN: No, I know of no other rule, Mr. Justice Rehnquist, that could be used in the case. Because there is no federal rule of damages in the case, and where there is no federal rule, 1988 says you shall look to the State law and apply it in the trial and disposition of the cause.

QUESTION: But take the substance of the action rather than the remedy. If the plaintiff makes out a claim under the Wrongful Death statute, under these circumstances, would he also make out a claim under 1983, and vice versa?

MR. DOAN: No, because there is no -- there is no federal wrongful death. He couldn't state a claim under 1983 for wrongful death, because it doesn't exist. 1983 says you shall look to and apply 1983 where there is no remedy otherwise.

And the upshot of what -- and if they got the purest

thing that they wanted in this case, they would have one rule that would apply to police officers, who are the only people carrying guns, and another rule that would apply to a private shopkeeper if he had shot the plaintiff under these circumstances.

So I submit, if the Court please, that there is absolutely no basis for recovery in this action; and we ask that the Court affirm the judgment below and restate to the lower courts of this land the tenets of Monroe, and set forth explicitly what Monroe means, in regard to what is available in a 1983 action, and perhaps this kind of confusion will again be avoided in this Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Rees?

REBUTTAL ARGUMENT OF DAVID K. REES, ESQ.,

ON BEHALF OF THE PETITIONER

MR. REES: Yes, I do, Your Honor.

If it please the Court:

First, let me clear up the question of the posture --

QUESTION: What question do you think you presented here, if any?

MR. REES: The question that I presented was: did the Colorado courts err when they held that Section 1983 -- this action is governed by the Colorado net pecuniary loss

rule. As a result of that holding, the trial court held that the two actions were duplicitous, and, consequently, it dismissed the claim. It thus used the Colorado net pecuniary loss rule to cancel the claim under 1983. And we did intend --

QUESTION: Did the court address itself to your amended complaint, or your original complaint?

MR. REES: Oh, no, that's the -- this motion was made at the end of the evidence. It was the amended complaint.

QUESTION: I see.

MR. REES: It was on the motion --

QUESTION: So he was addressing it to the complaint which did not mention 1983.

MR. REES: Well, it doesn't have the reference to the statute, but we --

QUESTION: Well, in the face of the complaint which preceded it, which explicitly went on for a page or so mentioning 1983. Is that not so?

MR. REES: I don't remember -- I think we did mention 1983 in the preceding one. It was, at all times, understood by all parties that we were continuing our 1983 claim, that -- and that we have all of the elements there, its it's fact pleading, and we did plead the elements, and the court treated it as a 1983 action in ruling on the motion to dismiss. The Colorado Supreme Court treated it as a 1983

action in affirming. And the parties have always treated it as a 1983 action, and it was always understood.

Further, the jury instructions that we tendered were jury instructions for a Section 1983 action. There was no misunderstanding on that point at any time.

And the reason the question is postured as it is, is because the basis of the Colorado court's ruling -- because the basis of their ruling was that the Colorado rule of damages applied, and therefore the district court acted properly in dismissing the complaint.

So, when I drafted the issue for cert, I thought that that language, which is perhaps sloppy, fairly included the question of the dismissal, as it had been litigated properly at every stage, and was clearly the thrust of our problem: was that they had dismissed it, but that they had dismissed it because of the rule of damages they had applied.

QUESTION: Well, do you agree that before we get to the issue of damages, what the proper test, whether it's federal or State, of damages is, we have to decide whether or not you have a 1983 cause of action?

MR. REES: I think that's fair.

QUESTION: I suppose it's not relevant, Mr. Rees, but would it be a reasonable assumption that the jury, in fixing the damage at \$1500, in effect and as a practical matter, awarded a sum to cover the funeral expenses of this man?

MR. REES: Plus \$500.

QUESTION: Plus 500.

MR. REES: Of course she will never see a penny of that money, it cost more than that to try the lawsuit.

And that's the heart of the thing. The federal deprivation of rights, and this pitiful antiquated remedy, which restricts the deprivation of Mrs. Jones' rights.

QUESTION: When you say the antiquated remedy, you're speaking of the Colorado rule --

MR. REES: The net pecuniary loss rule.

I'd like to say just very briefly what we do feel the proper damages would include. They would include a deprivation for the loss of her civil rights, which are themselves compensable, and punitive damages are available under 1983.

I would like to reply briefly to two statements by Mr. Doan.

One, --

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Rees.

MR. REES: Oh, excuse me.

Thank you, Your Honor.

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

[Whereupon, at 2:34 p.m., the case was submitted.]