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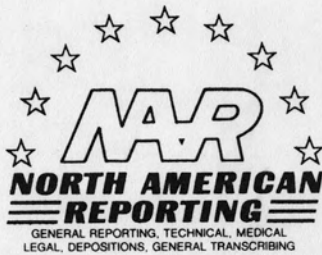
Supreme Court of the United States

OFFICIAL TRANSCRIPT OF PROCEEDINGS • ~~NOT FOR QUOTATION OR DUPLICATION IN ANY FORM~~

MARVIN ALLEN ET AL.,)	
)	
PETITIONERS,)	
)	
V.)	No. 79-935
)	
WILLIE McCURRY,)	
)	
RESPONDENT.)	
)	

Washington, D.C.
October 8, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

MARVIN ALLEN ET AL.,

Petitioners,

v.

WILLIE McCURRY,

Respondent.

No. 79-935

Washington, D. C.,

Wednesday, October 8, 1980

The above-entitled matter came on for oral argument
at 11:05 o'clock a.m.

BEFORE:

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

APPEARANCES:

JOHN J. FITZGIBBON, ESQ., Associate City Counselor, Rm. 314
City Hall, St. Louis, Missouri 63103; on behalf of the
Petitioners.

JEFFREY J. SHANK, ESQ., 408 Olive Street, Suite 802,
St. Louis, Missouri 63102; on behalf of the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Allen v. McCurry.

Mr. Fitzgibbon, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN J. FITZGIBBON

ON BEHALF OF THE PETITIONERS

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

This case is a multi-facet case which arose out of the 8th Circuit. It concerns the proposition as to whether or not collateral estoppel applies when a prisoner seeks to invoke the jurisdiction of the Federal District Court under 42 United States Code Section 1983.

In this particular case the 8th Circuit held that because of the special role of the federal courts in protecting civil rights and because habeas corpus is now unavailable to the appellant in this case under the decision of Stone v. Powell, it is the duty of that court to consider fully, unencumbered by the doctrine of collateral estoppel, the appellant's 1983 claims.

This goes back to a number of decisions of this Court, and I guess you would have the starting point would be the original Ku Klux Klan Act, or the Civil Rights Act, wherein the Congress gave the power to federal courts to determine

1 constitutional rights and to give persons remedies for damages
2 and a federal forum to air their constitutional claims, the
3 reason being that there was great distrust that the state courts
4 would not comply with federal constitutional law, and make a
5 mockery of justice.

6 ~~mocke~~ However, this particular Act has been somewhat modi-
7 ~~fiel~~ fied. I believe this Court has stated that the state courts
8 are able to rule constitutional issues involving federal
9 constitutional law, and that some trust has to be placed in
10 state courts concerning this issue.

11 Going back to the Civil Rights Act, I believe that in
12 this day and age things have drastically changed and that state
13 courts are applying constitutional law, federal constitutional
14 law, and are complying with all decisions of this particular
15 Court, especially in the role of search and seizure.

16 QUESTION: Mr. Fitzgibbon, can I ask you a question
17 about the procedural posture of this case? As I understand it
18 the respondent in this case was convicted in the trial court,
19 or his motion to suppress was denied, and he had an appeal
20 pending to the Missouri state courts on that point at the time
21 he brought his 1983 question.

22 MR. FITZGIBBON: That is correct.

23 QUESTION: And the Court of Appeals for the 8th
24 Circuit didn't -- although it said you can't use collateral
25 estoppel once the state process is finished, it directed the

1 Federal District Court to abstain while he, the defendant,
2 perfected his appeal through the Missouri court system.

3 MR. FITZGIBBON: Right. And also the 8th Circuit has
4 reference to the Missouri Court of Appeals decision in that case
5 regarding the hearing that he had on his motion to suppress the
6 evidence. They were aware of that particular decision and it
7 so states in their decision.

8 QUESTION: And did the case go to the Missouri
9 Supreme Court, Mr. Fitzgibbon?

10 MR. FITZGIBBON: No, it did not. It is limited on
11 this particular issue to the Missouri Court of Appeals so that
12 there was no further --

13 QUESTION: Could he have gone to the Missouri
14 Supreme Court?

15 MR. FITZGIBBON: Pardon me?

16 QUESTION: Could the defendant have taken his convic-
17 tion to the Missouri Supreme Court?

18 MR. FITZGIBBON: No, Your Honor, not under our law.
19 It would have to stop at the Missouri Court of Appeals, and it
20 would not go to the Supreme Court.

21 QUESTION: Or could it have come here from the
22 Missouri Court of Appeals?

23 MR. FITZGIBBON: From the Missouri Court of Appeals?
24 It could have come here by way of certiorari. And of course,
25 under Stone v. Powell, it couldn't very well come here under

1 habeas corpus.

2 QUESTION: No, but cert. might have been sought here
3 from the Missouri Court of Appeals?

4 MR. FITZGIBBON: It could have come very well by
5 petition for certiorari to this particular Court.

6 QUESTION: Bring me up to date. What is the status
7 of the criminal case on the state side? Has it been affirmed?

8 MR. FITZGIBBON: It was affirmed by the Missouri
9 Court of Appeals.

10 QUESTION: Was cert. applied for?

11 MR. FITZGIBBON: Pardon me?

12 QUESTION: Was cert. applied for?

13 MR. FITZGIBBON: I am not familiar with that particu-
14 lar point because I am not the prosecutor in the case, I repre-
15 sent the police officers. Whether or not cert. was applied for
16 or not I really don't know, in this particular case.

17 QUESTION: When you speak of cert. are you speaking
18 of cert. to the highest court in Missouri?

19 MR. FITZGIBBON: No, sir. Certiorari to the Supreme
20 Court of the United States. I am not familiar as to whether
21 or not that's --

22 QUESTION: Well, certiorari from the Missouri Court
23 of Appeals which for this case is the highest court in Missouri.
24 There is no right to go to the Supreme Court of Missouri on
25 the criminal case, as I understand that. Am I correct?

1 MR. FITZGIBBON: No, not under our state law. No.
2 The Missouri Court of Appeals determines those issues and that
3 is final. It appears that in the --

4 QUESTION: I'm sorry, Mr. Fitzgibbon, did the Missouri
5 Court of Appeals decide the Fourth Amendment claim?

6 MR. FITZGIBBON: Yes, Your Honor, they did. They
7 decided that the search and seizure was lawful and that he was
8 convicted upon constitutional standards of search and seizure
9 and therefore his conviction should be affirmed.

10 QUESTION: And that turned on federal law?

11 MR. FITZGIBBON: On federal law, and they so cited
12 the federal rules concerning that in federal cases.

13 QUESTION: Couldn't that issue have been taken to the
14 Missouri Supreme Court?

15 MR. FITZGIBBON: No, Your Honor.

16 QUESTION: I see.

17 MR. FITZGIBBON: I guess you'd have to go back to
18 the Civil Rights Act to find out what the effect was and whe-
19 ther or not collateral estoppel should apply. The federal rules,
20 federal cases, cases of this Court, I guess seem to indicate
21 that there are some common law defenses available in a 1983
22 action. And some of those defenses would be, for instance,
23 judicial immunity under Stump v. Sparkman and recognized de-fen-
24 sions to 1983 actions. And this is imbedded into the common
25 law. And the question is whether or not should the common law

1 defenses be now abandoned because of 42 U.S. Code Section 1983?

2 There are recognized defenses to that. For instance,
3 the statute of limitations. If you don't file your claim with-
4 in a certain period of time, you don't have any claim any more.
5 Of course, that being statutory law it is imbedded that stale
6 claims should not be heard by courts.

7 In this particular instance, I think there is no
8 doubt that the common law always did recognize that collateral
9 estoppel will apply, that if you have had a fair and full
10 hearing on an issue, in my words, you only get one bite at the
11 apple, the idea being to give some finality to litigation. It
12 has to stop somewhere.

13 Now, the issue in this particular case is if the
14 prisoner in this particular case was given a full and fair
15 hearing in the state court's suppression of the evidence case.
16 Does he now have a right, notwithstanding the fact that it has
17 been shown by the Missouri Court of Appeals that the search
18 was legal and constitutional, can he now go to the Federal
19 District Court on a petition for damages and relitigate that
20 same issue which has been litigated before in a state criminal
21 proceeding?

22 QUESTION: Counsel, certainly that issue is here, but
23 straighten me out on one other little detail. There is an
24 assault claim here also, isn't there?

25 MR. FITZGIBBON: Right.

1 QUESTION: And there is a statement in some of the
2 briefs on the other side that Judge Meredith, if it was Judge
3 Meredith, bypassed or failed to pass upon that issue. What's
4 your comment on that one?

5 MR. FITZGIBBON: When we started off this case I
6 asked the court for partial summary judgment on the issue that
7 we're here on today, and the court, I guess inadvertently,
8 granted me full summary judgment, which I really didn't ask for.
9 I was willing to go to trial with the assault.

10 QUESTION: So that may have to go back?

11 MR. FITZGIBBON: That -- yes; yes. That probably will
12 be tried.

13 QUESTION: That was remanded by the Court of Appeals?

14 MR. FITZGIBBON: That was remanded and that issue
15 should be tried. I didn't address that issue; I wanted to get
16 this issue into the eye of the Court so they could rule on this
17 particular thing in our Circuit.

18 Now, some of the cases have made distinctions on
19 whether or not you voluntarily go into a court, submit to their
20 jurisdiction, get a result which you don't like, and then try
21 to relitigate that same issue. I don't think the test is whe-
22 ther you voluntarily go into court. In *Montana v. United States*
23 the United States Government voluntarily went into court, into
24 a state court involving a constitutional issue and asked the
25 court to rule on those issues, and the court did.

1 Then the United States tried to get into the federal
2 system, to have another bite at that particular apple when the
3 court in the state court had ruled the federal constitutional
4 issues in that particular case. Now, the cases that were cited
5 by the 8th Circuit, or where they say that -- well, these cases
6 were before Stone v. Powell, and therefore, since Stone v.
7 Powell has taken away habeas corpus on Fourth Amendment viola-
8 tions, virtually, that therefore we have to have a federal forum
9 and some of these cases go off on the theory, well, since it's
10 a criminal case, the prisoner didn't ask to be in the courtroom
11 and the prisoner didn't really ask to have these particular
12 issues decided but he was forced to be there and he was forced
13 to bring up these issues -- and they take off on a tack saying,
14 well, if he wants to have a 1983 action for damages, then he
15 can't litigate that in the state court, he's going to get con-
16 victed because he's not going to bring that up. I think that's
17 absolutely false.

18 If a person is in court and is going, may have to do
19 some time, he is going to bring up that particular issue of
20 suppression of the evidence and litigate that as fully as pos-
21 sible. I think the last thought in somebody's mind who is in
22 that courtroom is, oh boy, my damage claim is going to come up
23 now, they are vitally interested in having an acquittal in that
24 particular case.

25 QUESTION: Is his damage claim for assault against the

1 officers that he shot or some other officers?

2 MR. FITZGIBBON: In his motion -- he had a cross mo-
3 tion for summary judgment and in that cross motion for summary
4 judgment he identified another police officer who he alleges
5 assaulted him while he was lying on the ground with his hands
6 behind his back. The two officers that he shot, of course,
7 didn't have anything to do with the particular assault because
8 they were immediately, got medical aid and they were taken off
9 to the hospital. So it would be a third officer who he identi-
10 fied in his cross petition for summary judgment.

11 I don't think that the test is whether an issue is
12 decided, whether you're there voluntarily or involuntarily.
13 I think that the test that should be applied in state court
14 proceedings is to whether or not he had a full and fair oppor-
15 tunity to litigate this particular issue, to present witnesses
16 on behalf of himself on the suppression issue, and that that
17 should be binding, and if the state court finds that this is
18 constitutional.

19 QUESTION: What would you say if the state court
20 finding had been the other way and that the evidence was
21 excluded?

22 MR. FITZGIBBON: If the evidence was excluded --

23 QUESTION: And then this suit were brought against
24 these particular police officers and the plaintiff claimed
25 that the issue had been concluded in the criminal trial and he

1 needn't present any evidence?

2 MR. FITZGIBBON: There is one case which holds, I be-
3 lieve, that the transcript of the testimony in that case could
4 be by stipulation introduced to reach a result. But the --

5 QUESTION: You say that the police officers can use
6 this judgment in the criminal case defensively?

7 MR. FITZGIBBON: Right.

8 QUESTION: But you wouldn't say that a plaintiff
9 could use a contrary judgment offensively?

10 MR. FITZGIBBON: He could go back, if the issue is
11 decided in his favor, certainly, under 1983.

12 QUESTION: We have different parties then.

13 MR. FITZGIBBON: It could go in. I don't think the
14 courts have distinguished in collateral estoppel or what they
15 call issue preclusion; or -- you have three things --

16 QUESTION: When the police officers had never had an
17 opportunity to litigate and argue in good faith and so forth?
18 That could be precluded.

19 MR. FITZGIBBON: As I understand the question, if it
20 were determined in his favor that the search was unlawful --

21 QUESTION: Right.

22 MR. FITZGIBBON: -- then he could fully litigate his
23 1983 claims in the Federal District Court.

24 QUESTION: Litigate, but could he get summary judg-
25 ment? I think that was what Justice White was asking.

1 MR. FITZGIBBON: No, no. You couldn't get summary
2 judgment because then it depends on whether or not there was
3 good faith and probable cause to recognize defenses to actions
4 for illegal search and seizure.

5 QUESTION: Well, let's assume that in the criminal
6 trial it was predetermined there was not probable cause. Would
7 that issue be open in a 1983 suit?

8 MR. FITZGIBBON: It would be open in a 1983 suit?

9 QUESTION: Yes.

10 MR. FITZGIBBON: Or he could proceed to trial, in a
11 jury trial against the police officers. It's not preclusive
12 upon the police officers.

13 QUESTION: But typically, in your criminal trial, a
14 motion to suppress may be granted notwithstanding the good
15 faith immunity of the officers in a 1983 action, and if
16 there were then, the motion to suppress were granted, wouldn't
17 that be conclusive as to the violation of the constitutional
18 rights in a 1983 action, so that the only matter open would be
19 the good faith of the officers?

20 MR. FITZGIBBON: I think at that time the good faith
21 of the -- many times the officers may violate the Constitution
22 inadvertently through lack of knowledge on their part of what
23 the law is, the law is such a morass of rules for the police
24 officer. I don't think they intentionally try to violate any-
25 body's rights, they violate by inadvertence.

1 QUESTION: All you have to do today is to win on de-
2 fensive collateral estoppel. You don't need to solve the
3 problem of offensive. I guess you're just saying that once there's
4 been a determination that there was no constitutional violation
5 that the defendant shouldn't be able to --

6 MR. FITZGIBBON: Have another bite at the apple, Your
7 Honor.

8 QUESTION: Well, actually, isn't that issue here
9 because isn't it true that the Missouri court did suppress evi-
10 dence found in the drawer and in a tire?

11 MR. FITZGIBBON: That's correct, Your Honor.

12 QUESTION: And suppose they have therefore decided
13 as a matter of collateral estoppel that to that extent there
14 was a violation of Fourth Amendment rights?

15 MR. FITZGIBBON: No, Your Honor, because the whole
16 posture of this particular case was based on a conspiracy of
17 the two officers to conduct an illegal search, the two officers
18 that were shot by this prisoner.

19 QUESTION: And we have a state court adjudication that
20 there was some violation of the Fourth Amendment rights in this --

21 MR. FITZGIBBON: Not by them.

22 QUESTION: Not by them?

23 MR. FITZGIBBON: No. The whole tenor of the thing is
24 that these two police officers who came up to the door to buy
25 narcotics conspired to illegally have a search and seizure of

1 this particular property.

2 QUESTION: The officer who opened the drawer and
3 looked in the tires is not a defendant?

4 MR. FITZGIBBON: Is not a defendant. That's Officer
5 Brand. He is a different -- he was called the seizing officer
6 in the case. But that is not the particular issue in this case.
7 The posture is that he started, he alleges that our two police
8 officers conspired to illegally search his home.

9 QUESTION: I know it's really not relevant but I have
10 some problems with your damage theory that you're going to, that
11 they're going to wrestle with if they win; but --

12 MR. FITZGIBBON: If you're talking about the stuff
13 which was suppressed, it's narcotics. What are his --

14 QUESTION: I'm trying to understand if it was not
15 suppressed, if they -- I would hate to be the trial judge trying
16 to decide how to apportion, how to award damages if you ulti-
17 mately lose.

18 MR. FITZGIBBON: Well, that's another problem that we have.

19 QUESTION: Mr. Fitzgibbon, no reference is made, is
20 there, in the appellate court's decision to Mincey v. Arizona?

21 MR. FITZGIBBON: In the appellate, in the 8th Circuit,
22 of Mincey v. Arizona? No. The 8th Circuit made no mention of
23 that.

24 QUESTION: I just wonder on the issue of collateral
25 estoppel, because that's intervening law; it's relevant here.

1 What then was the posture of your collateral estoppel?

2 MR. FITZGIBBON: Are you saying that because -- well,
3 the Missouri Court of Appeals went into this particular issue
4 and said that --

5 QUESTION: Doesn't Mincey v. Arizona have some bearing
6 on the resolution of that?

7 MR. FITZGIBBON: The Missouri Court of Appeals ruled
8 on that particular issue --

9 QUESTION: Under Mincey?

10 MR. FITZGIBBON: And said -- yes, Your Honor.

11 QUESTION: Oh, did it?

12 QUESTION: Which court of appeals are you referring
13 to now?

14 MR. FITZGIBBON: I'm referring to the Missouri Court
15 of Appeals, not to the 8th Circuit. The 8th Circuit just
16 didn't even get into the issue as to whether or not these facts
17 show that there was an illegal search and seizure.

18 QUESTION: Do we have that opinion of the -- I was
19 under the impression that there was no reference in the
20 Missouri Court of Appeals opinion to the intervening decisions.

21 MR. FITZGIBBON: I believe it might be in the petition
22 for certiorari. It wouldn't be in the brief, it would be in
23 the petition for cert.

24 QUESTION: Did this gentleman demand the return of the
25 narcotics which he said were unlawfully seized?

1 MR. FITZGIBBON: I think he was only interested in the
2 evidence that was seized and used against him in the particular
3 proceeding, the criminal proceeding.

4 QUESTION: Ordinarily in Missouri, if the court holds
5 that the contraband was unlawfully seized, do they give it back
6 to him or is it --

7 MR. FITZGIBBON: You can't give marijuana back to
8 somebody. It's contraband; it has to be destroyed.

9 QUESTION: That's what I was thinking.

10 MR. FITZGIBBON: If you want to get into the issue of
11 what was the street value of the heroin, and that's the ques-
12 tion of damages, I don't see how we're going to reach that.

13 QUESTION: It might not impress a jury very much as
14 as an amount of damages.

15 MR. FITZGIBBON: I don't think so. I don't think so.

16 QUESTION: Mr. Fitzgibbon, is this the Missouri Court
17 of Appeals opinion at Appendix C of the petition?

18 MR. FITZGIBBON: Yes, Your Honor.

19 QUESTION: I just looked at it and I don't see any
20 reference to Mincey.

21 MR. FITZGIBBON: It's on page -- Appendix 16. It's
22 the first page.

23 QUESTION: Oh, I see. I beg your pardon. I see it
24 cited.

25 MR. FITZGIBBON: There was a reference made to it.

1 QUESTION: Thank you.

2 MR. FITZGIBBON: I have come to a further conclusion
3 on this case concerning the exclusionary rule, and in Stone
4 v. Powell this Court went into the exclusionary rule and the
5 results concerning this, that there is probably some displeasure
6 with the exclusionary rule because it, I guess it shunts away
7 whether or not a person is guilty or innocent and goes into the
8 evidence, whether or not this evidence was seized legally or
9 illegally.

10 It seems that if the exclusionary rule were abolished
11 I myself would be willing to defend each and every police offi-
12 cer on a damage claim. It appears that the exclusionary rule
13 doesn't really accomplish that much. The deterrent effect of
14 that is placed upon society when I think the deterrent effect
15 should really be placed upon a police officer, the police offi-
16 cer who does -- say, intentionally -- violate somebody's rights
17 by an illegal search and seizure.

18 It seems to me that the onus of that should be placed
19 upon the police officer in an action for damages and that the
20 exclusionary rule should be very much curtailed and that the
21 evidence which is found in the possession -- I believe, by this
22 Court, as it has already indicated -- possession of burglar
23 tools, possession of heroin, some great evidence in a trial
24 that this person is particularly versed and skillful --

25 QUESTION: Mr. Fitzgibbon, what is -- do you think

1 though that what you're urging here is just some federal court
2 policy about collateral estoppel or is it a statutory construc-
3 tion problem under 1983 or what?

4 MR. FITZGIBBON: I don't think it's a -- under 1983
5 I don't believe that there is any history, that the framers of
6 that particular law and the congressional reports on this show
7 any indication that they wish to abolish collateral estoppel.

8 QUESTION: Well, historically, hasn't collateral
9 estoppel required some mutuality or not?

10 MR. FITZGIBBON: I believe the courts have gone fur-
11 ther, and mutuality -- you mean the mutuality of the same
12 parties and the same issues?

13 QUESTION: Yes.

14 MR. FITZGIBBON: No, that would be res judicata.
15 But they talk of collateral estoppel where the issue is put
16 into focus and there's a full trial, full, fair, hearing
17 on that, that that should be collateral estoppel on this par-
18 ticular case.

19 QUESTION: Let me ask you, do you know what the result
20 would be in the Missouri courts if there was a suit under state
21 law against these officers for illegal search and seizure?

22 MR. FITZGIBBON: They could go either way in our
23 state courts.

24 QUESTION: Well, would the state courts say that the
25 legality of the search had already been determined in the

1 criminal trial and so dismiss the case on collateral estoppel
2 grounds or not?

3 MR. FITZGIBBON: If a full and fair hearing were --

4 QUESTION: Is that the Missouri rule?

5 MR. FITZGIBBON: Yes. I think counsel has given me
6 the case of LaRose v. Casey and the answer is, yes.

7 QUESTION: So you think that if a 1983 suit were
8 brought in the state courts, the Missouri courts would dismiss
9 the case on collateral estoppel grounds?

10 MR. FITZGIBBON: Yes, sir.

11 QUESTION: If you had no assault element.

12 MR. FITZGIBBON: Right. I'm just talking about the
13 search and seizure matter.

14 QUESTION: Well, your colleague on the other side
15 doesn't agree with that, does he, or not?

16 MR. FITZGIBBON: I don't think he does.

17 QUESTION: Do you think it makes any difference what
18 Missouri law is in this case, or is it just a question of
19 federal law?

20 MR. FITZGIBBON: It's a question of collateral estop-
21 pel under the common law.

22 QUESTION: Well, should we look to see what the result
23 would be in Missouri or would it be just a uniform rule country-
24 wide, a matter of federal law?

25 MR. FITZGIBBON: A matter of federal law involving

1 collateral estoppel as to whether or not it applies in 1983
2 actions.

3 QUESTION: Mr. Fitzgibbon, I notice that neither the
4 Court of Appeals of the 8th Circuit nor you nor your opponents
5 mention the decision of this Court in Stefanelli v. Minard at
6 342 US which strikes me as being very much on point with your
7 case, except there there the injunction was sought under 1983
8 before the evidence was introduced and it was an effort to
9 enjoin the use by the prosecution of the evidence in the crimi-
10 nal case.

11 MR. FITZGIBBON: I'm not familiar with that case,
12 Your Honor. I guess under the doctrine of abstention they would
13 allow, should allow the state courts to continue their criminal
14 prosecution and the criminal processes against --

15 QUESTION: They surely have them in adequate remedy
16 by way of a motion to suppress, have they not?

17 MR. FITZGIBBON: There's an adequate remedy in the
18 state court to do so, yes.

19 QUESTION: Mr. Fitzgibbon, assuming that the defendant
20 suppressed the evidence in a state court proceeding and then he
21 was indicted on a similar charge brought in the federal court,
22 would he be able to plead in the federal court collateral
23 estoppel and prevent the federal prosecutor from using the
24 evidence?

25 MR. FITZGIBBON: If there were a full and fair hearing

1 below.

2 QUESTION: Yes; assume a full and fair hearing before
3 the state tribunal and the state court suppressed it. I take
4 it you would say that would be binding in a subsequent related
5 federal prosecution raising somewhat similar issues in which
6 the same evidence was required --

7 QUESTION: Or involving the same search.

8 QUESTION: In which your question involved the same
9 search; right.

10 MR. FITZGIBBON: I think that the state decision on
11 constitutional law would be binding. I think the states do
12 have the power.

13 QUESTION: Then we're really not talking about the
14 construction of 1983, because if you take the position that it
15 would apply in a federal criminal prosecution, it's a somewhat
16 broader concept.

17 MR. FITZGIBBON: Yes, Your Honor.

18 QUESTION: I'm not saying it's wrong, but it's not
19 just construction of 1983, but it's some doctrine that would
20 apply in other areas too.

21 MR. FITZGIBBON: The doctrine, the common law doctrine
22 of collateral estoppel.

23 QUESTION: Well, your point is that 1983 actions
24 should not be exceptions from the generally applicable doctrine.
25 Is that right?

1 MR. FITZGIBBON: That's correct. Your Honor, that's
2 correct.

3 QUESTION: Even when the 1983 action is based upon a
4 Fourth Amendment violation, than even in the presence of Stone
5 v. Powell.

6 MR. FITZGIBBON: That's right, Your Honor.

7 QUESTION: Which is really what the 8th Circuit
8 limited this exception to, as I understand it.

9 QUESTION: Well, on that formulation, then, it's
10 both. It's also a 1983 statutory construction problem to the
11 extent that you construe 1983 as not intending an exception.

12 QUESTION: Yes.

13 MR. FITZGIBBON: As I say, in conclusion, I would be
14 willing to defend any police officer concerning illegal search
15 and seizure and give them, if the Court needs some remedy for
16 these persons who claim that their Fourth Amendment constitu-
17 tional rights were violated and action for damages for this
18 rather than excluding the evidence of any particular criminal
19 trial.

20 QUESTION: Well, that's not really before us, is it?

21 MR. FITZGIBBON: No, Your Honor, but following the
22 full feeling of this, since habeas corpus was taken away in
23 Stone v. Powell, the 8th Circuit has tried to give some kind of
24 a remedy --

25 QUESTION: An alternative.

1 MR. FITZGIBBON: -- some kind of an alternative remedy
2 so that a federal court will look at this particular problem.

3 QUESTION: Did you move for rehearing en banc in the
4 8th Circuit?

5 MR. FITZGIBBON: In the 8th Circuit? No. We asked
6 for no rehearing. We directly petitioned this Court for cer-
7 tiorari.

8 MR. CHIEF JUSTICE BURGER: Mr. Shank.

9 ORAL ARGUMENT BY JEFFREY J. SHANK

10 ON BEHALF OF THE RESPONDENT

11 MR. SHANK: Mr. Chief Justice, and may it please the
12 Court:

13 I think it particularly appropriate at this time,
14 possibly, to review briefly the factual setting for clarifica-
15 tion purposes.

16 Respondent filed his civil rights action alleging
17 three general areas, one, the assault matter, which has been
18 discussed with the Court; secondly, he raised a search question
19 in two areas, one, a conspiracy situation and secondly alleging
20 individual defendants.

21 The petitioner filed his motion to dismiss and motion
22 for partial summary judgment. He alleged in the motion to dis-
23 miss as to the assault, failure to state a cause of action, and
24 as to the remainder in that motion to dismiss, res judicata.

25 As to his motion for partial summary judgment, he

1 raised the issue of res judicata, solely.

2 The District Court granted petitioner's motion for
3 summary judgment in toto, did not consider the motion to dis-
4 miss. The District Court in relying --

5 QUESTION: The District Court in other words granted
6 more than the defendant had asked.

7 MR. SHANK: That's correct, sir. And neither did he
8 -- it appeared the Court might have been ruling on the motion
9 to dismiss and used the terminology under the summary judgment.
10 That's unclear.

11 The District Court said that the only issue that it
12 had was whether or not the entrance into the respondent's home
13 was lawful and that this was litigated in state court. The
14 state court in the criminal proceedings at the trial level
15 held, one, that a portion of the evidence should be suppressed,
16 and a portion of it was not.

17 QUESTION: That was the contraband drugs, is that
18 correct, that were excluded?

19 MR. SHANK: Anything that was found in some drawers,
20 in some tires, evidence that was found in plain view.

21 QUESTION: Were the drugs concealed in spare tires in
22 the car?

23 MR. SHANK: That's my understanding. There were some
24 drugs found outside as well as, in a plain view situation as
25 well as otherwise.

1 QUESTION: Now, as your colleague told us, there's a
2 difference, is there, in the officers involved in the search
3 of the tires and the drawers, the evidence that was suppressed?
4 A different officer than any of these defendants?

5 MR. SHANK: There was one other officer that was --

6 QUESTION: Were any of these defendants involved in
7 those searches?

8 MR. SHANK: They would have been involved. As to the
9 conspiracy claimed it's quite possible that the named officers
10 officers Jacobsmeyer and Allen would have been involved in the
11 conspiracy to violate the --

12 QUESTION: Dealing with the suppressed items?

13 MR. SHANK: Correct, sir. Also, as to the -- we also
14 pled, or the respondent who was pro se pled that there were
15 unknown defendants. We subsequently learned the names of those
16 particular defendants, and the 8th Circuit gave us leave to
17 amend the assault claim and we would also think it would be
18 appropriate to amend as to the individual defendants who would
19 be involved in the violation of the constitutional rights.

20 QUESTION: Is the alleged conspiracy of the officers
21 a conspiracy by them to find the drugs or to find -- or was it --

22 MR. SHANK: To conduct -- to conduct the unlawful
23 search. Yes, sir.

24 The Missouri Court of Appeals upheld, as we've dis-
25 cussed, the findings of the state court.

1 QUESTION: Why was that conviction, why was it not
2 cert., sought here?

3 MR. SHANK: To this Court, Your Honor?

4 QUESTION: Yes.

5 MR. SHANK: As a practicality of the situation, I be-
6 lieve respondent had retained counsel and had no access to any-
7 one to file the writ other than possibly pro se. I think
8 that's a practical reason for it.

9 QUESTION: When did this happen? When did the Court
10 of Appeals decision come down? Approximately?

11 QUESTION: August 14, 1979.

12 MR. SHANK: In '79, in the Missouri Court of Appeals.

13 QUESTION: And by that time this action was pending
14 in the --

15 MR. SHANK: Yes, sir, it was. Yes, sir. The Dis-
16 trict Court --

17 QUESTION: Well, are you -- was this just, was this
18 an inadvertent oversight, are you suggesting, that no review
19 of the Missouri Court of Appeals decision was sought? Or how
20 are we to take your answer?

21 MR. SHANK: I don't think the respondent had the
22 knowledge or the ability at that time to proceed with the writ
23 of certiorari before this Court. I can't tell the Court that it
24 was an intelligent or a knowing decision not to seek a writ of
25 certiorari before this Court. It could have been; we don't

1 know. If the Court would be asking, would that be providing a
2 remedy, as opposed to the federal court, to proceed in a civil
3 rights action to review the matter, we would suggest that the
4 congressional and legislative history of 1983, the fact that
5 the District Court would be able to give a more inclusive fact-
6 finding of the circumstances, the fact that the respondent in
7 the state case -- defendant there -- was really compelled to
8 raise those issues there --

9 QUESTION: Well, you recall, it used to be that --
10 until we overruled it -- that under Darr and Burford you couldn't
11 go into the federal habeas unless you first sought cert. in
12 this Court. But I guess it's never been the rule that you
13 could not come, start a 1983 action without first exhausting
14 by application for cert. with this Court.

15 MR. SHANK: To my knowledge there is no exhaustion
16 requirement for 1983 action.

17 QUESTION: When was the damage action against the
18 police officers commenced, approximately again? Before or after
19 the Court of Appeals decision?

20 MR. SHANK: Before it.

21 QUESTION: Well, then, he was aware at the time the
22 Court of Appeals decision came down that he was, had a suit
23 pending for damages against the officers involving the very
24 elements concerned in the Court of Appeals. Isn't that so?

25 MR. SHANK: He would have been aware of that; yes, sir.

1 QUESTION: Well, would you think his counsel was aware
2 of it, whoever was his counsel at that time?

3 MR. SHANK: If the Court is asking me if he was aware
4 if counsel was aware that a civil rights action had been filed,
5 I would tend to believe he probably was not, because the respon-
6 dent filed the pro se motion and certainly would have sought
7 assistance of counsel, I'm sure, at that time.

8 QUESTION: Mr. Shank, your office did not represent
9 him in the state court proceedings?

10 MR. SHANK: No, sir, we were appointed by the 8th
11 Circuit Court of Appeals to represent him on the appeal from the
12 Federal District Court's decision.

13 QUESTION: How can you assume that counsel, that the
14 client wouldn't tell the counsel he had a case pending? How can
15 you assume that he would not do that?

16 MR. SHANK: Well, my sole --

17 QUESTION: I know that they don't want to tell the
18 truth but I mean --

19 MR. SHANK: No, I would -- my basis on that is from
20 the tenor of the petition filed, or the complaint filed in the
21 Federal District Court. Certainly if counsel was involved, the
22 petition, the complaint as filed would have been in a lot bet-
23 ter form.

24 QUESTION: Don't you think that counsel was obliged
25 to tell the federal court that we have another case pending in

1 the state court? Don't you think that was a duty upon the
2 counsel?

3 MR. SHANK: I believe in the Court of Appeals level
4 the Court of Appeals was aware of it at that time.

5 QUESTION: Well, they stayed that in that court.

6 MR. SHANK: Yes.

7 QUESTION: My question is, isn't that a duty of
8 counsel to tell the court that some other court is hearing this
9 same matter?

10 MR. SHANK: The Federal District Court?

11 QUESTION: Any court.

12 MR. SHANK: Any court?

13 QUESTION: Any court. Don't you think that's a duty
14 to tell the court that?

15 MR. SHANK: Under our interpretation of 1983, it
16 would not be because we would --

17 QUESTION: I know -- but I'm talking about the rela-
18 tionship between client and the court.

19 MR. SHANK: If the first case pending would be deter-
20 minative of the second case, then I think there would be a duty.
21 Except that if it would not be, I don't feel that there would be
22 a duty to inform the second court.

23 QUESTION: And you'd lead the court to a position where
24 it would have two courses with contrary rulings.

25 MR. SHANK: Well, it's quite possible --

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QUESTION: And you'd be responsible for it.

MR. SHANK: Well, it's quite possible that the federal court could then, could abstain while the state court was handling its receivings.

QUESTION: The court couldn't abstain if they didn't know about it.

MR. SHANK: I understand that.

QUESTION: And whose duty was it to notify them?

MR. SHANK: I understand what the Court is saying.

QUESTION: But you were not counsel at the trial level, as I understand it?

QUESTION: No, he wasn't.

MR. SHANK: No, sir, nor at the --

QUESTION: You were neither in the state court nor -- was he represented at all in the state court?

QUESTION: I'm not saying it about you because I knew you weren't there.

MR. SHANK: In the state trial court he was represented by counsel.

QUESTION: But in the United States District Court on the 1983 he was not?

MR. SHANK: No, sir, it was filed pro se.

QUESTION: So if anyone was to tell the federal district judge, it would have to be the respondent himself. There was no lawyer then.

1 MR. SHANK: Part of the -- in that case in the Federal
2 District Court, the defendant could raise the issue similar, as
3 he did here, and it would come before the court.

4 QUESTION: Mr. Shank, returning for a moment to the
5 failure of your client to seek certiorari here from the Court of
6 Appeals of Missouri judgment affirming the conviction, isn't
7 one of the underpinnings of our opinion, Stone v. Powell, the
8 right that -- the fact that this Court is open to remedy
9 erroneous rulings on search and seizure? And if you allow a
10 1983 action in every case where Stone v. Powell bars
11 habeas, you're pretty well overruling Stone v. Powell.

12 MR. SHANK: Well, sir, in the Stone v. Powell matter
13 I believe the Court indicated that if a state court provided a
14 full and fair hearing or opportunity to raise the Fourth
15 Amendment issues, the habeas corpus would not be an available
16 remedy to a respondent or defendant. Our feeling is that it's
17 the federal court in reviewing that would only be reviewing a
18 due process situation. It would not be reviewing the substan-
19 tive application of the constitutional rights, whether or not
20 the substantive rights had been violated. It would be looking
21 as to whether or not there was a hearing, whether or not evi-
22 dence was presented, not necessarily how the law was applied.
23 It's quite possible the law could have been applied inappro-
24 priately.

25 QUESTION: But, in each case, wouldn't the guts of the

1 constitutional claim or the federal claim be the unlawful search
2 and seizure?

3 MR. SHANK: The underlying claim would be but what
4 the court would be reviewing would not be the same.

5 QUESTION: Why not?

6 MR. SHANK: Well, I feel that the reviewing court, if
7 we use the full and fair opportunity kind of test, would only
8 be reviewing whether or not there was a hearing on the issue,
9 whether or not their evidence was presented, and that type of
10 situation. But I don't believe the reviewing court's going to
11 look at how the law was applied to the facts. It's quite possi-
12 ble that the state court could apply law that's contradictory
13 to the present status of the federal --

14 QUESTION: Well, then, doesn't Stone v. Powell say,
15 you petition for certiorari here rather, because relief is not
16 available on habeas corpus.

17 MR. SHANK: So it would be as a matter -- you could
18 proceed under the habeas corpus. Of course, if there was a
19 denial of a full and fair hearing, if there was, if the court
20 found that there was that denial, then of course habeas would
21 be available. And likewise, if we get into the realm of the
22 collateral estoppel issue, the ruling on the habeas might well
23 void the conviction itself, so collateral estoppel would never
24 come into play.

25 QUESTION: But do you make any claim that there was

1 not a full and fair hearing in the Missouri courts on the
2 search and seizure issue?

3 MR. SHANK: No, we did not raise that claim before
4 this Court.

5 QUESTION: Well, indeed, you have to assume that
6 there was a full and fair hearing, otherwise federal habeas
7 corpus would be available and the reasoning of the Court of
8 Appeals for the 8th Circuit would be inapplicable.

9 MR. SHANK: Correct. We would have proceeded through
10 habeas; yes, sir.

11 QUESTION: Of course, the other side of this coin
12 that Mr. Justice Rehnquist has raised is that if collateral
13 estoppel applies, then in effect state court is the final
14 arbiter.

15 MR. SHANK: That's correct.

16 QUESTION: And 1983 is, has its roots cut out from
17 under, if it ever applied. Of course, historically, you'd
18 probably have something else again.

19 MR. SHANK: Well, again, our position would be that
20 clearly the collateral estoppel is inapplicable to 1983.

21 QUESTION: At all, ever?

22 MR. SHANK: Well, yes, but that's not the issue we're
23 raising before the Court.

24 QUESTION: And then, to go further, than did the
25 Court of Appeals for the 8th Circuit?

1 MR. SHANK: Yes, sir. The Court of Appeals gave us
2 a very limited issue, and that's all we're asking this Court --

3 QUESTION: Limiting the elimination of the doctrine
4 of collateral estoppel to cases, 1983 cases where the claim is
5 the Fourth Amendment violation and post-Stone v. Powell?

6 MR. SHANK: Correct. That way there would be no
7 viable federal forum to vindicate the Fourth Amendment rights.

8 QUESTION: Do you think it's relevant at all whether
9 where in 1983 was adopted in 1871 -- collateral estoppel
10 had a requirement of mutuality? Do you think it's relevant at
11 all to our decision here? If we're dealing with a construction
12 of 1983 and if where 1983 was required collateral estoppel was
13 not recognized except in situations of mutuality, does that
14 apply here?

15 MR. SHANK: Our position would be, no, but we're not
16 -- we go beyond that to clearly -- the two-prong test that
17 petitioner suggested, whether or not a common law application
18 would be applied, is that assuming, which it was, mutuality
19 applied, then this case would never have gotten here in the
20 first place, because I don't believe there was mutuality of the
21 parties, so the federal court never would have been able to
22 present the issue.

23 QUESTION: All I'm asking -- if you are urging that
24 as part of your position?

25 MR. SHANK: No, sir. Our position would be in the

1 issue before this Court, collateral estoppel is inapplicable.

2 QUESTION: But not for that reason?

3 MR. SHANK: Not for that reason.

4 QUESTION: Doesn't the 8th Circuit opinion really
5 fall between two stools, in effect, and they leave what could
6 be arguably the worst possible result? It says, in effect,
7 for the Federal District Court not to intervene in 1983 until
8 the matter has gone all the way through the state courts, but
9 then it may intervene.

10 MR. SHANK: That's correct.

11 QUESTION: So that if you're talking about considera-
12 tions of federalism or comity, perhaps there is a greater
13 affront to the state systems if the federal court does not
14 intervene until it's, say, gone to the highest court of the
15 state, and then the federal court decides differently than the
16 highest court of the state.

17 MR. SHANK: But we feel that we would not be inter-
18 fering with the comity of federalism because we would never be
19 in a position asking necessarily for the state conviction to be
20 overturned, we're not asking that a person in respondent's
21 case be removed from jail, we're not asking that the state limit
22 or revise the application of, say, the exclusionary rule.
23 So we don't feel that we're really interfering with the state
24 court.

25 QUESTION: What is the rule in Missouri?

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MR. SHANK: As to -- ?

QUESTION: Collateral estoppel. About mutuality.

MR. SHANK: There is no mutuality in my understanding of collateral estoppel in the State.

QUESTION: So that if there were a suit in the state courts similar to this suit here, it wouldn't be thrown out on -- or there would be no mutuality requirement?

MR. SHANK: Correct, sir, and we would have a set of circumstances similar to that's before this Court, the defendant in that case could raise the doctrine of collateral estoppel quite possibly.

QUESTION: And what would the Missouri -- well, and what do you think the state courts would say? What would they decide?

MR. SHANK: Would they apply collateral estoppel? I think the state court probably would. That's enough -- that's the whole reason for the --

QUESTION: Well, you don't really know. The state court might find the same exception that the Federal Court of Appeals found.

MR. SHANK: Well, I think the doctrine lying behind the Civil Rights Act itself was that there would be a federal forum to prevent the possibility of a state --

QUESTION: Well, this Court has held that there could be an action, a 1983 action in a state court.

1 MR. SHANK: Correct. I understand that.

2 QUESTION: And the State of Missouri might find the
3 same exception to its generally applicable rule of collateral
4 estoppel as did the Court of Appeals for the 8th Circuit.

5 MR. SHANK: Correct. And it may not.

6 QUESTION: Historically, don't you understand that
7 mutuality was required for collateral estoppel? And that it's
8 only a relatively modern development?

9 MR. SHANK: That's correct, sir. At the time the
10 Civil Rights Act of 1871 was passed, mutuality did exist.

11 QUESTION: Do you know when the first Missouri case
12 was that didn't require mutuality?

13 MR. SHANK: No, sir, I don't. I'd be glad to brief
14 that to the Court.

15 QUESTION: Mr. Shank, I take it from what you say
16 that if instead of having a Fourth Amendment issue you had a
17 Fifth -- say you were bringing a 1983 case on the theory that
18 a confession had been extorted by force or violence, would
19 collateral estoppel apply in that situation?

20 MR. SHANK: In that situation a habeas corpus remedy
21 would be available and in that circumstance the federal forum
22 would be available and we would -- again, our position would be
23 the legislative history of the Civil Rights Act clearly pre-
24 cludes it. But quite possibly that would be a logical course
25 to follow.

1 QUESTION: Your answer is that collateral estoppel
2 would apply?

3 MR. SHANK: Yes, under --

4 QUESTION: In a 1983 suit?

5 MR. SHANK: Under those circumstances.

6 QUESTION: And under the decision now before it.

7 It's not y MR. SHANK: ha Correct.s?

8 QUESTION: It's not your view that it ought to be?

9 MR. SHANK: No, sir, my view would be that the legis-
10 lative history is clear that 1983 precludes the application
11 of collateral estoppel in any circumstance.

12 QUESTION: I take it you don't regard this Court as a
13 federal forum?

14 MR. SHANK: Oh, yes; yes, sir. I'm just saying that
15 the opportunity at the time when the State Court of Appeals has
16 ruled and this respondent in this particular case had, we can
17 assume, a choice into which court he could proceed, I feel that
18 it could have proceeded here or it could have proceeded into
19 Federal District Court.

20 QUESTION: Mr. Shank, I'm not clear on one thing. You
21 argue that the collateral estoppel defense does not apply in the
22 1983 action for the reason that a federal forum must be avail-
23 able to try these issues. Now, would that reasoning apply
24 if you brought a 1983 action in the state court, which, as one
25 of my colleagues suggested, you could?

1 MR. SHANK: If the state court reviewed the Civil
2 Rights Act and applied the legislative history -- and I'll use
3 the word correctly here, it's I think then, that it would have
4 to be using the Federal Rules and that it could deprive a
5 respondent of, you know, the federal forum.

6 QUESTION: I gather from what you're saying is the
7 contour of the 1983 action, whether brought in federal or state
8 court, has to be the same?

9 MR. SHANK: That would be our position, now, just
10 for unifying purposes for the federal and state courts to fol-
11 low.

12 QUESTION: Even though your reason for asserting the
13 need for disregarding the defense would not apply if you elected
14 to sue in the state court?

15 MR. SHANK: Yes, Your Honor.

16 QUESTION: And even though you could come here from
17 the highest court of Missouri if you felt the highest court of
18 Missouri had misinterpreted 1983?

19 MR. SHANK: Correct, but I think that choice would be
20 as open for respondent. He was compelled into the state court
21 situation by whatever reason. His first opportunity to make a
22 choice as to which court he wants to go into would be after
23 the Missouri -- in this case, the Missouri Court of Appeals had
24 filed its ruling. There would be no other way for him to pre-
25 serve his federal claim. He's basically forced to have it

1 ruled upon in the state court, because if he does not he cer-
2 tainly would risk conviction. And I don't think as a practical
3 matter that many people would want to take that risk involved.
4 We then get to -- to follow that up, if I may, we then get to
5 the point, then, if the state courts are able to preclude the
6 litigation of civil rights under the Civil Rights Act, under
7 those circumstances the Civil Rights Act for all intents and
8 purposes would be dead in the majority of the cases.

9 QUESTION: Well, what do you do with Stefanelli v.
10 Minard, which refused to enjoin the use of evidence in a state
11 court even though the contention was that it had been seized
12 contrary to the Fourth Amendment?

13 MR. SHANK: Well that, I would say, if it's come to
14 those certain set of circumstances, the Court was merely ab-
15 staining to let a state court make its determination, then cer-
16 tainly I don't think that would necessarily have to preclude
17 the litigation of the issue later on once the state court had
18 finished.

19 If I may, to restate the issue we are asking this Court
20 Court specifically to rule on, it is whether or not collateral
21 estoppel is inapplicable in 1983 actions alleging Fourth Amend-
22 ment violations when the collateral estoppel would violate 1983
23 legislative intent to provide a viable federal forum in which
24 someone could vindicate his Fourth Amendment rights. As the
25 Court is well aware, this Court has never considered this

1 particular issue on point. Prior to 1976 in the Stone v.
2 Powell decision, there had only been two federal appellate
3 courts that had ruled. Subsequent to 1976, other than the
4 court below in this matter, there has only been two matters
5 ruled on, two cases ruled on. Recently a 9th Circuit case,
6 in August, 1980, ruled that collateral estoppel would be inap-
7 plicable, and in particular it noted that because there was
8 no right to appeal to the Supreme Court, it felt that the
9 collateral estoppel would not be applicable.

10 All those cases, these latter cases, rely heavily on
11 the legislative history, which clearly show that the Civil
12 Rights Act was intended to --

13 MR. CHIEF JUSTICE BURGER: We will resume there at
14 1 o'clock. You have about five minutes remaining.

15 MR. SHANK: Okay. Thank you, Your Honor.

16 (Recess)

17 MR. CHIEF JUSTICE BURGER: Mr. Shank, you may proceed.

18 QUESTION: Mr. Shank, just before the noon recess
19 you mentioned a couple of recent decisions, one in the 9th
20 Circuit in this general area?

21 MR. SHANK: Yes, sir.

22 QUESTION: Are they in your brief?

23 MR. SHANK: No, sir. One was just decided in August,
24 1980. It's styled, Johnson v. Mateer, et al. And I just got
25 the number. It's number 78-1012.

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QUESTION: In the 9th Circuit?

MR. SHANK: Yes, sir.

QUESTION: Do you have the full cite there now?

MR. SHANK: Yes, sir, I do. It's Johnson v. Mateer.

QUESTION: How do you spell Mateer?

MR. SHANK: M-a-t-e-e-r, et al. And it's United States Court of Appeals, 9th Circuit, 625 Fed 2d 248.

QUESTION: Two-four-eight?

MR. SHANK: Yes, sir.

QUESTION: And what did that case decide?

MR. SHANK: That was decided on August 7, 1980.

QUESTION: And what did it decide, what did it hold?

MR. SHANK: It held that collateral estoppel would be inapplicable in a situation as we've presented to this Court. It's on all fours.

QUESTION: In this particular situation, Fourth Amendment claim?

MR. SHANK: Yes, sir.

QUESTION: So you say that's in accord with the 8th Circuit line?

MR. SHANK: Yes, sir.

QUESTION: Did you say there were two recent cases or one?

MR. SHANK: That is the most recent. The only other case would be the lower court decision and a case back in 1977

1 by a Federal District Court.

2 QUESTION: How about all the cases cited in the foot-
3 note in Preiser v. Rodriguez ?

4 MR. SHANK: Those, Your Honor -- most -- Preiser was
5 decided before Stone, I believe.

6 QUESTION: So all of these turn on the effect of
7 Stone?

8 MR. SHANK: In our opinion that is one of the major
9 considerations; yes, sir.

10 QUESTION: But is it not true that your basic position
11 is that Stone is immaterial?

12 MR. SHANK: No, sir. We feel for the purposes of
13 the issue before this Court it is all-encompassing because --

14 QUESTION: Yes, but I think you responded to an
15 earlier question that if this were a Fifth Amendment claim you'd
16 still make the same argument.

17 MR. SHANK: Yes, sir. Well, we would there have the
18 availability of habeas corpus and we'd have the federal forum.

19 QUESTION: Right, I understand. I'm not talking about
20 habeas corpus. I'm talking about the 1983 suit for damages
21 brought in a federal court where a state court had applied a
22 Fifth Amendment -- on the Fifth Amendment issue had acted con-
23 trary to the position your client would take in 1983. You say no
24 collateral estoppel there, also?

25 MR. SHANK: Yes, sir. In a broad sense of it, I would

1 be in a position to suggest that we don't feel that the legis-
2 lative history would allow collateral estoppel to apply in any
3 1983 action.

4 QUESTION: Well, let me test it out. Suppose there's
5 a Fourth Amendment claim brought in on federal habeas claiming
6 that there wasn't a full and fair hearing in the state court
7 and the Federal District Court agrees, holds a new hearing, and
8 finds that there was no violation of the Fourth Amendment and
9 denies the petition for habeas corpus. Then the petitioner who
10 is a defendant in the state court in the criminal action sues
11 on 1983 claiming a violation of the Fourth Amendment, and sues
12 the police officers. The police officers say, collateral
13 estoppel. What would you say?

14 MR. SHANK: Assuming that the Federal District Court
15 upheld the constitutionality of the search, he would then in
16 that instance have been provided the federal forum that we feel
17 that is a basic requirement for the 1983 action.

18 QUESTION: And you wouldn't claim a -- you would say
19 that collateral estoppel applies?

20 MR. SHANK: Well, going beyond that point, then,
21 I would also suggest that it should not, based on the legisla-
22 tive history, but limiting it to the very issues before us, we
23 would -- under those circumstances, then we would have the
24 availability of the federal forum, which we did not in this
25 case.

1 QUESTION: So you think that's what is really at issue
is the -- QUESTION: So you think that's what is really at issue
2 is the --
3 is the --

4 MR. SHANK: The federal forum, in this particular
instance, is all-important.

5 QUESTION: So you're really saying this is a 1983
6 policy?

7 MR. SHANK: Involving Fourth Amendment; yes, sir.

8 QUESTION: And that this Court was not a federal forum?

9 MR. SHANK: I'm not saying it was not a federal forum.
10 It's clearly a federal forum, Your Honor. I'm saying that it
11 is not a federal forum that this particular man would have to
12 necessarily choose. One problem that may arise with exercising
13 a writ of certiorari in this Court, it's quite possible that a
14 pro se matter may involve a period of time and the civil rights
15 action could actually -- maybe the statute of limitations would
16 preclude it.

17 QUESTION: Well, logically, I suppose you'd say, if
18 he had come directly here and we had granted certiorari and we
19 had passed on the Fourth Amendment and we sustained the state
20 court, that then he could not go into 1983 because he had had
21 his federal forum.

22 MR. SHANK: Under the issue we're asking the Court
23 to decide, yes, sir. Thank you, Your Honor.

24 QUESTION: You wouldn't say that if we had
25 just denied cert.?

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MR. SHANK: No, sir.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:05 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

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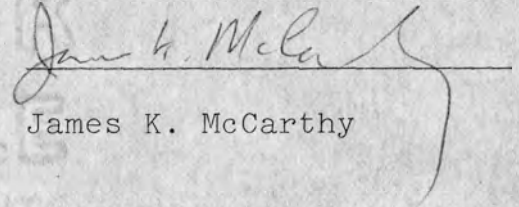
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No. 79-935

Allen v. McCurry

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