ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2169

TITLE GILBERT A. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL., Petitioners v. JOHN FRANKLIN PROSISE

PLACE Washington, D. C.

DATE April 20, 1983

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hIN THE SUPREME COURT OF THE UNITED STATES

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GILBERT A. HARING, LIEUTENANT, ARLINGTON COUNTY POLICE DEPARTMENT, ET AL., Petitioners, v. JOHN FRANKLIN PROSISE : No. 81-2169

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Washington, D.C.

Wednesday, April 20, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:16 o'clock a.m.

APPEARANCES:

DAVID R. LASSO, ESQ., Arlington, Virginia; on behalf of the Petitioners.

NORMAN A. TOWNSEND, ESQ., Alexandria, Virginia; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Haring against Prosise.

Mr. Lasso, you may proceed when you are ready.

ORAL ARGUMENT OF DAVID R. LASSO, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LASSO: Mr. Chief Justice, and may it please the Court, this case presents the issue of whether a person who pleaded guilty in state court to making illegal drugs and who did not raise the validity of the search that produced the essential evidence of that crime can later bring an action under 42 United States Code Section 1983 claiming that that same search was unconstitutional.

The issue in this case can be stated perhaps even more narrowly. Can the 1983 action be brought even though the Respondent, Mr. Prosise, had numerous opportunities to raise the validity of that search in the state court? Can he bring this action even though he has never claimed that he had inadequate counsel? And can he do so even under the circumstances where he tried to withdraw his guilty plea, claim his innocence, and even then not raise the validity of the search?

The error of the Fourth Circuit Court of Appeals is that it adopts as a policy --

QUESTION: Mr. Lasso, I take it there was no motion to suppress in the Circuit Court.

MR. LASSO: That is correct, Justice Rehnquist. At no time was there a motion to suppress.

As a policy matter, the Fourth Circuit has adopted a rule which encourages the accused to bypass the very state processes which are designed to protect the important constitutional rights embodied in the Fourth Amendment. In effect, the Fourth Circuit has sanctioned a rule which allows the abuse of those state processes. That kind of flat rule of non-preclusion does not advance concerns of finality of judgment, conservation of judicial resources, avoidance of vexatious litigation, and it certainly does not further any interest of federal-state comity.

Now, the essential facts in this case are very straightforward. Mr. Prosise entered into a plea agreement with the commonwealth. He agreed to plead guilty to the manufacturing of phencyclidine, or -- also called PCP or angel dust, in exchange for the dropping of a charge of possession of PCP. During the guilty plea hearing, which included testimony from Detective Allen, who conducted the search and obtained the warrant, and all the evidence that he found, the trial judge said, and I quote, very briefly, "The court finds

there is a sufficient factual basis, and upon the evidence heard this morning the court finds the defendant guilty of the manufacture of phenclyclidine as charged in the indictment."

Now, over a month later, the sentencing hearing took place. During the sentencing hearing, Mr. Prosise testified in his own behalf and began to claim his innocence. He claimed that there was one essential drug not found in his apartment that would produce PCP. Therefore he was innocent.

The trial judge said, "I will consider this as a motion to withdraw the guilty plea." He said, "I will deny the motion." Quoting again, very briefly, the judge said, "The commonwealth had a good, strong case that formed the factual basis for the plea. It was quite clear if the defendant had been exposed to trial, he would have been convicted by a jury."

Again, at no time was a motion to suppress ever made, and the lower court never mentions the crucial importance that this search played in the conviction of Mr. Prosise. Apparently this is so because the lower court simply finds such considerations irrelevant to its new rule that there will be no preclusion whatever in a guilty plea case involving a Fourth Amendment claim.

If that decision --

QUESTION: Mr. Lasso, do you think that the absence of a motion to suppress played any part in the reasoning of the Court of Appeals for the Fourth Circuit?

MR. LASSO: Well, yes, Justice Rehnquist, it did. They simply -- In other words, it was not litigated. Therefore it could not come into play in the sense of Allen versus McCurry, so they avoided Allen versus McCurry in that way.

QUESTION: As you read the Court of Appeals opinion, does it reserve the question as to whether there would be preclusion had there been a suppression hearing, or does it say there would have been preclusion?

MR. LASSO: I think it perhaps reserves that question. It is very unclear. It reserves the question also of what happens when you have certain affirmative defenses that could be made, affirmative defenses that would stop the prosecution altogether. It avoids that question.

What it says is that looking at the law, the law is developing into one major determining factor, and that is incentive to litigate, and if a person has incentive to litigate in the lower court during his

conviction, then there should be preclusion. However, the mistaken assumption of the Fourth Circuit is that it simply isn't worth the effort for a District Court or a Trial Court to determine in guilty plea cases like this whether or not there is incentive.

QUESTION: What was Prosise sentenced to?

MR. LASSO: He was sentenced initially to 25 years in the state penitentiary. At the time he gave his guilty plea, the judge asked him, did he know that he could possibly receive 40 years in the state penitentiary. He said that he did. He had been advised.

There isn't any question in this case, really, but that Mr. Prosise -- excuse me, Mr. Prosise had every incentive in the world to litigate this search. It could have been done easily, at no cost to him, and in a sense, his decision to forego making such a motion to suppress is really tantamount, I would think, to an admission that there would be no merit to it.

In any event, he chose not to do so.

QUESTION: Has he at any time ever raised a question of effective assistance of counsel or lack of it?

MR. LASSO: No, Your Honor, he has not.

Now, the other assumption of the Fourth

Circuit -- there are two others which are, I believe, mistaken. The first is, is that this rule of non-preclusion is somehow consistent with Virginia law. The other mistaken assumption is that Mr. Prosise and persons like him somehow have a right to be in federal court at least one time to raise these Fourth Amendment claims.

I believe that this Court in Allen versus McCurry laid that assumption to rest once and for all. There is no universal right to be in the federal court to litigate Fourth Amendment claims. The proper place for a claim in this case to have been raised would have been during the state criminal process.

Now, under 40 -- I'm sorry, under 28 U.S. Code Section 1738, the Virginia law of preclusion apparently should apply. That appears to be the decision of this Court in Kremer versus Chemical Construction Corporation.

QUESTION: You would agree with that approach?

MR. LASSO: Yes, Your Honor, I would.

QUESTION: The problem in part is the possible uncertainty about what Virginia law is. For example, we have a brief filed here coming out of the Virginia Law School that says that it is clear that Virginia law is contrary to your position

MR. LASSO: My thought on that is that they

are plainly incorrect. One case that they never discuss in that amicus brief nor in any of the briefs filed on behalf of the Respondent is the case of Souders versus Gabrielson.

QUESTION: Which has no written opinion. You cited it in your brief, but your opponent did not refer to it.

MR. LASSO: That's correct. That case was found by me after the Fourth Circuit decision. It was unavailable to the Fourth Circuit, but that decision is a case directly on point that affirmed the Trial Court, and the Virginia Supreme Court said that collateral estoppel would apply to a guilty plea situation.

QUESTION: What effect does Virginia give to those unreported decisions?

MR. LASSO: There is no case in the Virginia Supreme Court which indicates whether it would be given one particular weight or another, but the fact is is that it does exist. Admittedly, the Fourth Circuit didn't have it, but when you combine the holdings in Souders and then you look to the only other case that is really close, which is Eagle Star and British Dominions Insurance Corporation versus Heller, you see that the Virginia Supreme Court has a rule which applies when the convicted person is the plaintiff. All of the other

cases cited by the Respondent and the amicus -- amici do not refer to the fact that all of those cases are on the other side. In other words, it doesn't come up that the convicted person is the plaintiff and he is trying to profit from his own illegal conduct.

QUESTION: But in any event you are content to let it rest on whatever Virginia law would determine, I take it.

MR. LASSO: I would think that we are commanded to do that under 1828, Section 1738. In fact, of course, the Fourth Circuit said that it was unclear, and it said that over and over again, that there was no case, or at least a reported case, directly on point in the Virginia Supreme Court that it could --

QUESTION: Well, and then the Court of Appeals proceeded to decide what Virginia law was, and normally I suppose this Court defers to that kind of a determination, does it not?

MR. LASSO: Normally it would defer, but if you read the Fourth Circuit very carefully, it never decided what the Virginia Supreme Court rule was. It said that it was unclear, it could not find anything, and then it went on to develop broad principles of collateral estoppel which it said it felt that the Virginia Supreme Court would also accept, and I would

submit to this Court that the Virginia Supreme Court would never accept a flat rule of nonpreclusion if that rule would allow someone like Mr. Prosise to bring into question the very integrity of his state court conviction.

There is no escaping the fact in this case but that if Mr. Prosise is allowed to pursue his claim under Section 1983, he will question the integrity of that conviction. The search that he seeks to litigate is the search that produced the evidence of the crime. It is not a search that had nothing to do with this case.

QUESTION: But he wasn't convicted on the search. He was convicted on his own guilty plea.

MR. LASSO: He was convicted on his own guilty plea, but --

QUESTION: Period. Period.

MR. LASSO: He was convicted on that, but he -- but during that time, the fact, the evidence that was available was the evidence that was produced by the search. Was it -- Were it not for that evidence, he would never have pleaded guilty.

QUESTION: Does --

MR. LASSO: Excuse me, Your Honor?

QUESTION: Does the state of Virginia have a rule on guilty pleas comparable to Rule 11 of the

federal criminal rules that the sentencing judge makes an inquiry as to the factual basis of the plea?

MR. LASSO: There is a -- there is a very brief factual inquiry. Now, the rule requires that the plea has to be determined to be voluntary and intelligent. It doesn't require that you put on -- actually put on evidence. But the factor here is is that that evidence was presented to the court. It was brought up, and the trial judge found that that was a factual basis for the plea, so this case can be very much narrower than that, being that there was a factual basis for the plea.

QUESTION: May I ask you if you would make the same basic argument if you had a case in which there were, say, two different sets of evidence that supported the guilty plea, one of which was -- there was no challenge to the legality of the seizure, but as to some of the evidence there was a question as to the legality of the seizure, and then he pleaded guilty, and the undisputed evidence would be enough to support the guilty plea, but he nevertheless files a 1983 action just like this, saying there is some kind of a constitutional right to damages. How would you deal with that kind of a case?

MR. LASSO: It presents a difficult question.

The question, even if the Fourth Circuit's rule was adopted, in a sense, that aspect of it which is incentive to litigate, you could inquire nonetheless into the incentive to litigate that other search. In other words, was there still some evidence --

QUESTION: What would be the incentive? It is just cumulative evidence of a crime of which he is admittedly guilty.

MR. LASSO: Well, the position would be that he should nonetheless, if there is evidence there that is at all important, then he should raise that at the first opportunity.

QUESTION: But what is the purpose? I mean, why should he make a judge go through a hearing on all that if it is not going to accomplish anything?

MR. LASSO: Well, the next question is, why should he deliberately bypass that opportunity and then litigate it later and not be --

QUESTION: Because it is relevant to a damage claim and totally irrelevant to a guilty plea determination.

MR. LASSO: If that position were taken, then that would at least eliminate the second search. In other words, he would be precluded on the second search, which was essential evidence of the crime, and at least

you would have a rule --

QUESTION: Yes, if he doesn't challenge that. I am just saying there is no constitutional issue as to some of the evidence, and that is enough to support the guilty plea, but there is a constitutional issue as to a seizure and a search which he doesn't want to bother litigating in the criminal trial because there is no purpose to it, but he does want to assert a damage claim. Why shoulin't he be allowed to do that?

MR. LASSO: If it had nothing to do with the conviction, if the evidence was --

QUESTION: Well, it was cumulative. It was there, but he pleaded guilty.

MR. LASSO: Then an argument would be, you could then again look to state law if it were clear, but perhaps that is one instance when that search might be litigated in a 1983 action. Now, another consideration would be this aspect of waiver that has been commented on heavily in my briefs. The trial judge, Judge Bryan, looked at the case of Tollett versus Henderson, and in that case he was faced with a situation where it was clear that antecedent constitutional infirmities could not be raised when someone's very liberty was at stake, and he had to ask himself the question of whether it made sense to then say that although you can't seek your

liberty, you could then seek money damages.

Now, Tollett versus Henderson is admittedly a habeas corpus case. There is no question about that. And it is stretching to case to say that it ends every inquiry here, ends all prior unconstitutional conduct, but there is an underlying policy consideration, it seems to me, in Tollett that stands for the proposition that the kinds of issues like Fourth Amendment claims, they should be raised during the state process, and if they are not raised, and if you take advantage of the plea bargain, there shouldn't be a time when you can later come back and raise those claims. At some point finality must attach, and I think that that is the policy consideration of Tollett.

QUESTION: You fail to draw the difference between criminal and civil, do you not?

MR. LASSO: I am saying that the policy consideration is similar.

QUESTION: You say the criminal case, when you end a criminal case, you also end the civil case. Is that your argument?

MR. LASSO: Justice Marshall, I am saying that during the criminal case, all inquiries into the claims that were relevant to that criminal case should be ended. There should be finality.

QUESTION: Including the civil case.

MR. LASSO: Including the civil case, because if you don't --

QUESTION: Isn't that a novel rule?

MR. LASSO: Well, this case is novel. This is the first time this comes up. But I don't think it's a novel proposition to suggest --

QUESTION: I don't think it's novel to file a civil case involving a criminal prosecution. That has been done several times.

MR. LASSO: Well, I am sure it has. The question is, is what kinds of claims should be ended, and it seems to me that the kind of claim that should be ended at the very least is the kind of claim Mr. Prosise makes here when he seeks to attack the search that produced the very evidence of his crime.

QUESTION: Is this estoppel or something?

MR. LASSO: Excuse me, Justice --

QUESTION: Like estoppel?

MR. LASSO: It is like estoppel. It has been -- the Fourth Circuit just dismissed it out of hand and said waiver has nothing to do with this case. In fact, waiver has something to do. That same court --

QUESTION: Do you think that he intelligently waived his criminal -- his civil case?

MR. LASSO: I think he intelligently and voluntarily waived any right to claim that the search and seizure was illegal. I --

QUESTION: Civil? Civilly?

MR. LASSO: I think it has got to apply to that. There is -- I think the rule -- that is the position that was suggested by the Respondent, that at some point there has to somehow be an inquiry of the defendant, do you waive perhaps all of your claims under 1983, or some other statute. I don't think that's necessary, and it seems to me --

QUESTION: Well, I think Johnson versus Zerbst says in order to show a waiver you have to show it.

MR. LASSO: Well, what Johnson --

QUESTION: Not infer it.

MR. LASSO: Excuse me, Justice Marshall. What I believe Johnson versus Zerbst says is that there must be an intelligent relinquishment of a known right. Johnson versus Zerbst does not say that every conceivable cause of action, if it is statutory or common law, has to be outlined. I think it is -- there doesn't need to be some litany recited to the defendant that he is waiving all conceivable claims.

QUESTION: Well, your theory is that he deliberately gave up his right of civil action, and then

filed a civil action.

MR. LASSO: That's correct.

QUESTION: That doesn't make sense to me. If he gave it up, why did he file it?

MR. LASSO: If it gave it up is exactly right. If he gave it up and in a sense admitted that there was no merit to it, why should the court spend its time litigating that Fourth Amendment claim now? What does he seek to gain? In his --

QUESTION: It's a different court. Unless the civil and criminal courts in Virginia are the same.

MR. LASSO: It is a different court, but what he seeks to bring into question is the integrity of his conviction. What we are really asking here is a sensible rule of judicial administration, conserving precious judicial resources. Why should he --

QUESTION: Mr. Lasso, may I ask you another -- You say he brings into dispute the integrity of his conviction, but I don't understand that any of the relief he could possibly get here would set aside the guilty plea, would it? He is asking for damages.

MR. LASSO: He is asking for damages --

QUESTION: He will stay in jail no matter what happens, as I understand the record, anyway.

MR. LASSO: Well, he should stay in jail,

because ---

QUESTION: I mean, even if he wins he stays in jail.

MR. LASSO: That's correct. However, when these types of claims are brought, what he has asked for in his relief in Joint Appendix Page 12 and 13 is, he asks for relief in the amount of $2,725,000, claiming that the conviction has ruined the rest of his life, and for the worry he is going through while he spends his time in the penitentiary. It is clear --

QUESTION: Well, I would agree with you it is unlikely he is going to recover that, and I would also think --

MR. LASSO: It is very unlikely.

QUESTION: -- it would be unlikely that the time in jail will be an element of damage. I don't think that's an element of damage. But suppose you have an excessive force situation or something like that, which he alleged here, but there was no merit to it, I guess.

MR. LASSO: That's correct, and excessive --

QUESTION: But supposing they beat him up.

MR. LASSO: An excessive --

QUESTION: Why should that be foreclosed?

MR. LASSO: I am sorry. Justice Stevens, an

excessive force issue would be under the due process clause. That could be taken up separately. But the question of whether the search was legal, whether there was probable cause, that is --

QUESTION: Well, but you could have an excessive -- say you have a coerced confession case, and he alleged that he was maltreated in order to get the confession, and then he goes ahead and enters a guilty plea on the ground that there is additional evidence of guilt. Could he sue under 1983 for the physical harm and --

MR. LASSO: Physical harm, perhaps, but that's -- but that's --

QUESTION: Well, why is that different from this?

MR. LASSO: -- but the physical harm is the due process claim. The physical harm --

QUESTION: Well, he waived it in the criminal trial. By pleading guilty, he waived any objection to the confession in my hypothetical.

MR. LASSO: The issue that --

QUESTION: Why would that be different?

MR. LASSO: Excuse me. The issue you are raising is not the coerced confession. In other words, if he has a claim of a coerced confession, and that the

confession should not be -- come in as evidence in his crime, then he should litigate that claim when there is a process available to him --

QUESTION: Even if he thinks there is other evidence of guilt and he would rather plead guilty and get the criminal trial over again? How does the state benefit from such a rule?

MR. LASSO: The state -- well, again, that goes beyond the facts here, because here, it is not an issue that has only cumulative effect or some peripheral effect. It is an issue that is the crime. It is the evidence of the crime. And I am saying that you can take this case and look at it very narrowly, start with the proposition that that issue should be litigated when he is in state court, when he has got a process available to him. He shouldn't be allowed to abuse that process and say, I choose not to litigate it here, I am going to somehow adjourn later and litigate that claim for damages in the federal court.

QUESTION: So you are only asking us to decide the case in which all the evidence supporting the guilty plea was the subject matter of the search?

MR. LASSO: Well, essential evidence. I am saying if you use the approach even that the Fourth Circuit itself suggested, which is incentive to

litigate, if you take a flexible position here, you can have a court very easily look at the record, see what the incentive to litigate the issue is, and if there is incentive to litigate, then that issue should be precluded.

QUESTION: Mr. Lasso, I can see how someone who perhaps faced a sentence of 30 days or 60 days for the offense charged might seek to avoid Stone against Powell by simply pleading guilty and figure he'd get his hearing on the search and seizure question in a 1983 action in the federal court, but in a pending sentence of 20 or 25 years, you would think that would be far more important in the eyes of an accused than some rather putative recovery in a damages action.

MR. LASSO: I couldn't agree more, Justice Rehnquist, and that is the point of this case. Those are the facts we have here. Forty years in the penitentiary. Why didn't he raise that claim which, had he been successful, he wouldn't have been convicted? There would have been no evidence. An inquiry like that could have been made by a trial court and a decision reached very easily, and that is at least a flexible rule. The Fourth Circuit was not satisfied with that, though. The Fourth Circuit used the cliche, the game is not worth the candle. In other words, don't even take

the effort to look back at the record. And yet earlier in that same opinion it said, well, there are -- sometimes this can be done easily.

QUESTION: Well, the Fourth Circuit focused in its analysis of preclusion on incentive to litigate. Did they reach the conclusion that the accused here had no incentive to litigate?

MR. LASSO: They seem to suggest that. But they ultimately don't have to base it on that holding, because they find, they said in the run of 1983 cases, this kind of inquiry simply isn't going to be worthwhile. I

QUESTION: Mr. Lasso -- excuse me.

MR. LASSO: I am sorry. I was just going to say, I would suggest that the inquiry is worthwhile. It could have in this case eliminated trial on that search and seizure issue.

QUESTION: It just occurred to me that all the arguments you are making here could be made to a jury in this case, and I can't conceive of a jury bringing in more than 15 cents.

MR. LASSO: Well, I would think a jury would bring in nothing --

QUESTION: That's right. But all this argument would be valid argument, would it not?

MR. LASSO: Well, except for one thing. If the jury brought in 15 cents, that is a prevailing judgment. Officers would then be faced with at least perhaps paying attorney's fees, and that is the kind of anomaly you want to avoid. Why litigate it at all? Why not dispose of it in a motion for summary judgment, as was done here, and then you don't waste your time in a jury trial? Now --

QUESTION: Of course, that is the hope of every defendant, I suppose.

MR. LASSO: Oh, I am sure.

QUESTION: In all fields of law. Get rid of it on a motion for summary judgment. Don't waste your time with a trial.

MR. LASSO: That's correct, and that was my hope here.

(General laughter.)

QUESTION: Well, of course, he might have won.

MR. LASSO: Pardon me, Justice?

QUESTION: He might have won his suppression motion.

MR. LASSO: Had he won his suppression motion, we would then be faced with the question of what preclusive effect, if anything, should be given to

winning.

QUESTION: You mean, you are suggesting that he couldn't then sue for damages?

MR. LASSO: Well, he'd have a better case. One additional point might be the good faith of the police officers which is a defense --

QUESTION: Yes.

MR. LASSO: -- in a 1983 case, and is not necessarily brought up during the motion to suppress.

QUESTION: That is -- even if you lose this case, that defense would still be there, good faith.

MR. LASSO: That's correct. That's what I'm saying, that it then becomes a more difficult question of what happens when you win a motion to suppress.

QUESTION: I understood one of your underlying propositions when you were talking about the burden on the courts was that the courts should not be burdened with having to determine for a second time whether this was or was not an unreasonble search, and that his guilty plea was a waiver of any claim whatever that it was an unreasonable search.

MR. LASSO: I think that's correct, and in fact the Fourth Circuit in the case of Cramer versus Crutchfield reached that conclusion. It said that a claim of malicious prosection, which in that particular

case turned upon a search and seizure question, that that search and seizure issue had been waived. Despite that holding in Cramer versus Crutchfield, they again dismissed out of hand any notion of waiver.

I have reserved five --

QUESTION: Is the state's consent necessary to accept a guilty plea in Virginia?

MR. LASSO: I am sorry?

QUESTION: Well, he pled guilty here. Did he have to have the consent of the prosecution?

MR. LASSO: To plead guilty? No, he has a right to plead guilty, but he engaged.

QUESTION: The prosecution can't say, we are going to go to trial?

MR. LASSO: No. He could -- He didn't have to plead guilty. He chose to plead guilty. He took advantage of a plea agreement. And that was that. The decision of the Fourth Circuit should be reversed, and the case should be dismissed.

Thank you.

CHIEF JUSTICE BURGER: Mr. Townsend.

ORAL ARGUMENT OF NORMAN A. TOWNSEND, ESQ.,
ON BEHALF OF THE RESPONDENT

MR. TOWNSEND: Thank you. Mr. Chief Justice, and may it please the Court, the fundamental question

before the Court today is whether the exclusionary rule is to become the sole and exclusive remedy for intentional Fourth Amendment violations in instances when the search in question resulted in the seizure of evidence or contraband.

Petitioners argue that the Fourth Circuit has abandoned settled law to create a remedy benefitting only convicted felons.

QUESTION: He was represented by counsel at the guilty plea, I take it.

MR. TOWNSEND: He was, Your Honor. But in Volume 1, which is the pleadings filed in this Court, Tab 13, Mr. Prosise filed a memorandum in opposition to defendant's motion to dismiss and for summary judgment in which he has a section entitled "Ineffective Assistance of Counsel." The last sentence in that --

QUESTION: He was raising that in the 1983 case?

MR. TOWNSEND: Yes, sir. And in the last sentence of that --

QUESTION: Let me be sure I have that clear. He was raising in the 1983 case a claim of ineffective assistance of counsel at the time of his guilty plea?

MR. TOWNSEND: Yes, sir. He stated, and I quote, "Plaintiff states that he never had adequate

assistance of counsel throughout his pretrial, trial, and post-trial procedures."

QUESTION: Well, do you know of any authority that allows the setting aside of a guilty plea in a 1983 action?

MR. TOWNSEND: He is not attempting to set aside the guilty plea, Your Honor. I think that goes to the question of whether there was adequate incentive to litigate, or whether the procedures leading to the guilty plea were adequate. He was stating that the reason that no search and seizure issue was -- I mean, motion was raised at the trial level was because he was ineffectively assisted by trial counsel.

QUESTION: Did the Fourth Circuit rely on that aspect of the case?

MR. TOWNSEND: The court did not at all rely on that.

Your Honor, Allen versus McCurry, I think, settled the question that under collateral estoppel, once a court has decided an issue of fact or law that is actually necessary to the judgment, that the decision may preclude, not does automatically, but may preclude relitigation of that issue in a subsequent civil rights action. But in Allen this Court reserved the question of whether it precludes issues not actually raised and

litigated.

The Court also disclaimed fashioning any new, more stringent variety of collateral estoppel for 1983 cases raising Fourth Amendment issues. At the same time, the Court disclaimed that it was creating a rule of collateral estoppel that turns on the single question of whether the 1983 plaintiff had a full and fair opportunity to litigate the question in state court.

Rather, the Court stated that they were merely -- that you were merely applying the conventional doctrine of collateral estoppel. That conventional doctrine of collateral estoppel has been established in federal court since 1876, in the case of Cromwell versus Sack County, and the Court -- and Petitioners in this case are asking this Court to disturb well-settled collateral estoppel law by abandoning the rule that the issue must have been actually litigated in the trial court and that the decision was necessary to that judgment.

QUESTION: What issues in your view were litigated on the guilty plea? What went into the guilty plea before a court could accept it?

MR. TOWNSEND: That a factual basis exists for the elements -- finding the elements of the offense.

QUESTION: And that there were no valid

defenses?

MR. TOWNSEND: No, they waived valid defenses. Tollett versus Henderson would seem to imply that there is -- although Tollett is not exactly a waiver case, as this Court has pointed out in Menna, but that those then become irrelevant to the question of factual guilt. Mr. Prosise is not challenging his factual guilt. Rather, he is seeking to litigate a separate, entirely separate question, that is, whether aside from his guilt of the underlying offense, another violation of law occurred by the police officers in this instance.

I would also point out that Petitioners seem to have conceded in their argument that were there untainted evidence in the case to support the guilty plea, that their position would be that they were not precluded from litigating that question.

I would point out in the record in this case that there was in fact untainted evidence sufficient to support a factual finding of guilt in this case. In the Joint Appendix at Page 24 is reproduced the search warrant affidavit, and in the search warrant affidavit it indicates that after arresting Mr. Prosise for the domestic dispute that prompted the police in coming to his apartment in the first instance, that they patted him down as a search incident to the arrest and found

phencyclidine in his pocket.

Also, having disarmed him in the house, his fiance with whom he was having the dispute told the officers that Mr. Prosise was manufacturing PCP. So, together with the phencyclidine found in his pocket and the statements of his fiance, there was sufficient evidence in the record aside from the evidence seized by going through the closets of Mr. Prosise's house with which to support a finding of guilt.

I would point out that this Court made very clear in Allen that 28 USC 1738 controls, that Virginia law as a result must be looked to to determine the preclusive effect of the guilty plea in this case. Petitioners have relied to a great extent in their reply brief and today in oral argument on the denial of the writ of error in Souders versus Gabrielson.

I would point out to the Court that in Brunswick County versus Peebles and Purdy, which is reported at 138 Virginia 348, the Supreme Court said, and I will quote very briefly, "The effect of the refusal of the writ of error in the former case was to affirm the decision of the court below in that particular case, but the refusal of the writ did not decide the question in any other case."

In fact, the law of Virginia --

QUESTION: Was that referring to the Souders case?

MR. TOWNSEND: No, it was not. That is the decision that was rendered, Your Honor, in 1924, by the Virginia Supreme Court.

QUESTION: Mr. Townsend, supposing we were simply talking about diversity of jurisdiction here, and it wasn't a 1983 case at all. Do you think that the federal court sitting in Alexandria would be bound by a Circuit Court decision on Virginia state law if there were no controlling precedent from the Supreme Court of Virginia?

MR. TOWNSEND: I don't believe so, Your Honor, particularly in light of the question -- in light of the fact that Virginia law, although there is no Supreme Court case particularly on the question of suppression of evidence, neither is there a Circuit Court case dealing with that. Petitioners have pointed to Souders, which is not a suppression of evidence case. That is a case involving excessive force, which is also a Fourth Amendment case as well as a due process case, but it does not involve the suppression of evidence.

I don't -- getting back --

QUESTION: You say that Souders is no closer even if it were a Supreme Court of Virginia decision on

the merits, than the cases you have cited?

MR. TOWNSEND: It would be a closer question, to be sure, had it been rendered by the United -- I mean, by the Virginia Supreme Court, because it is a Fourth Amendment question in some respects, although the Fourth Circuit Court of Appeals was looking for an issue dealing with the admissibility of evidence on Fourth Amendment grounds, and this -- the court -- the Fourth Circuit Court of Appeals was very carefully to narrowly construe or narrowly answer that particular question and no other question. It specifically reserved the question of whether any 1983 issue might be precluded, and whether issue elements might be precluded because there was no Virginia Supreme Court on point. So, even though Souders may have been decided by the Virginia Supreme Court, because it did not involve the particular question that the Fourth Circuit was looking at, which is the admissibility of evidence, then it probably, although the Fourth Circuit probably would have given that such persuasive effect that they may have reached a differing result than they did, it is not certainly controlling.

QUESTION: Is there a way we can examine that decision ourselves?

MR. TOWNSEND: The Souders decision, Your

Honor? Well, it is in the record of the Virginia Supreme Court. I believe that it was -- I believe that the --

QUESTION: Suppose we thought it was very relevant to the issue, different from you, and that the Court of Appeals didn't know about it. Well, let me put it to you this way. Suppose after the Court of Appeals had decided this case, the Virginia Supreme Court decided and published an opinion in a case right in the teeth of what the Court of Appeals thought Virginia law was.

MR. TOWNSEND: Well, I believe that --

QUESTION: That there is preclusion. Suppose that had happened. I would think we would probably remand to the Court of Appeals to reconsider the case in the light of what has been declared to be the Virginia law, wouldn't we?

MR. TOWNSEND: I think that that would probably be the result.

QUESTION: Well, what about this case then? Was it cited to the Court of Appeals?

MR. TOWNSEND: Not that I am aware of. No, sir. But I would point out that on questions of interpretation of state law, that this Court has generally accepted the interpretation reached by the Court below.

QUESTION: Well, we can't -- Let's suppose you agreed that Souders was right on, and that it was contrary to what the Court of Appeals said Virginia law was. Let's just suppose that, and it wasn't cited to the Court of Appeals.

MR. TOWNSEND: It was or was not?

QUESTION: It was not.

MR. TOWNSEND: I would think that if it were on all fours, the Court would probably be required --

QUESTION: To remand.

MR. TOWNSEND: -- or would probably remand to the Court of Appeals for reconsideration in light of that decision, but I would point out again that the Virginia Supreme Court has expressly said that denial of writ of error is a discretionary review, and such denials have no precedential effect.

QUESTION: Well, Mr. Townsend, do you see the inquiry to be made by a Court of Appeals or a District Court here in determining what state law is for purposes of preclusion to be any different than the inquiry of a state -- of a federal court sitting in a diversity case trying to ascertain what state law is?

MR. TOWNSEND: I believe that there is some difference in the fact that a 1983 action is different than a diversity action. A 1983 action has a special

status in the law of the federal courts.

QUESTION: But so far as preclusion is concerned, I gather that the focus of the Fourth Circuit and, I take it, the focus of your argument here that Virginia law is such and such is -- the object is to find out what Virginia law is.

MR. TOWNSEND: I believe that if this Court -- our position is that the Virginia law is settled that criminal convictions, whether by plea or by trial, have no collateral estoppel effect in Virginia. However, if the Court were to agree with the Fourth Circuit Court of Appeals that that question remains unsettled, then the Court may look to general rules of collateral estoppel which reach the same result as the Court of Appeals said. The Court of Appeals was not fashioning any new law to benefit these defendants, but was merely making an application of settled collateral estoppel law.

QUESTION: Would you --

QUESTION: Mr. Townsend -- oh, excuse me. I was just trying to -- this side of the bench was trying to get a question over there.

MR. TOWNSEND: Yes, sir.

QUESTION: Justice Stevens, for the last three hours, he has been trying to get a question.

(General laughter.)

MR. TOWNSEND: I will certainly give him the opportunity.

QUESTION: I just wanted to ask you -- I thank you, Brother Marshall -- is it not a fact that in the Souders case the plea of guilty was to assault and battery of a police officer, which was flatly inconsistent with the civil claim of excessive force, so that that case is quite different from this?

MR. TOWNSEND: It is.

QUESTION: Here, there is nothing inconsistent with the plea of guilty to possession of controlled substances and still having an illegal search, but there it seems to me it is -- I don't know why we have to wrestle with that case.

MR. TOWNSEND: I don't believe that we do. I don't believe that that question is on point. I don't believe that it deals with the issue that the Fourth Circuit Court of Appeals was looking to answer that said that the Virginia Supreme Court had not addressed, and I don't believe that we need deal with Souders at any length at all.

The Virginia rule is clear that three factors must exist in order for collateral estoppel to apply that do not exist in this case. That is that the issue has been actually litigated. That is that the decision

was necessary to the judgment below. Not necessary to the conviction, as Petitioners continue to argue. Petitioners continue to argue that without this evidence, there could have been no conviction, that the requirement for collateral estoppel is that without the litigation of the question that Mr. Prosise now seeks to litigate, there could have been no decision below.

And the third requirement that Virginia requires is mutuality of judgment. That is, had the decision reached the opposite result, that the Petitioners would have been precluded. And it is clear that Petitioners would not have been precluded from defending against this charge had the trial court litigated the issue and decided that it was an illegal search.

So, in order to find as Petitioners would have the Court do on collateral estoppel grounds under Virginia law we are going -- the Court would have to abandon those three requirements, but even if the Court were to look to collateral estoppel law as established in the federal courts, although the federal courts have abandoned in Park Lane Hosiery the requirement of mutuality of judgment, the federal court still adhered to the rule that the issue must have been actually litigated and necessary to the decision.

I would point out that this Court said that in Briscoe versus LaHugh, March 7th of this year, in a footnote by Justice Stevens. It indicated that were the question of perjury of the police officers not litigated, the collateral estoppel would be inappropriate, so as recently as March 7th of 1983, this Court seems to be retaining the requirement of collateral estoppel that the issue be actually litigated.

Turning to the question of whether the Circuit Court rendered an inflexible rule but rather we should look to incentive to ligitate, I would point out that that would be adding an entirely new level of inquiry at the summary judgment stage in 1983 actions. That has a very difficult -- that is very difficult to resolve, which is exactly what the Fourth Circuit pointed out. It would raise questions of fact that are inappropriate for summary judgment disposition. There would be questions of what is the burden of proof, who has the burden of proof, is there untainted evidence, are there other untainted charges, was there plea bargaining that went into the question?

I see it.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

MR. TOWNSEND: Thank you.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 12:58 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Townsend, you may continue.

ORAL ARGUMENT OF NORMAN A. TOWNSEND, ESQ.,
ON BEHALF OF THE RESPONDENT - CONTINUED

MR. TOWNSEND: Thank you, Mr. Chief Justice.

I believe at the time that we recessed, Your Honor, we were speaking about the difficulties of assessing the incentive to litigate question in a 1983 action. I would point out that there are many, many reasons for pleading guilty aside necessarily from the factual guilt that induce individuals in criminal courts to plead guilty.

QUESTION: But isn't it the obligation of the court as under Rule 11 of the federal system that a court will not accept a guilty plea unless he is satisfied, unless the court is satisfied of guilt in fact and in law?

MR. TOWNSEND: Yes, Mr. Prosise is not contesting the fact that he is guilty in fact of --

QUESTION: And in law.

MR. TOWNSEND: And in law, and he is not contesting the legality of that conviction, nor is he seeking relief from custody.

QUESTION: I got an intimation that you were

suggesting something to the contrary in your first statement.

MR. TOWNSEND: No, I -- if I did imply that, I didn't mean to, and I am sorry. I think this Court has made clear in the Brady trilogy and North Carolina versus Alford that there are many reasons one might plead guilty aside from factual guilt so that if an actual litigated requirement remains in the collateral estoppel of field, that --

QUESTION: I still find that statement inconsistent with your immediately prior response.

MR. TOWNSEND: Mr. Prosise is not questioning his factual guilt, but there are other individuals besides Mr. Prosise that this decision will impact upon, and I was just getting at the point that the Court shouldn't adopt an incentive to litigate analysis or necessarily collaterally estop essential elements of the offense because of the fact that a plea by itself doesn't necessarily --

QUESTION: Suppose he had gone to trial and had been found guilty. What would your position be?

MR. TOWNSEND: And had not litigated the issues?

QUESTION: Well, if he went to trial, I assume he would litigate everything that he conceivably thought

he could litigate.

MR. TOWNSEND: I think the question of whether he would be precluded then is already answered by Allen versus McCurry, that had he litigated those, he definitely would be precluded, absent a claim of ineffective assistance of counsel that could then be established in the District Court, but I think that question is already answered clearly by this Court's decision in Allen.

QUESTION: Mr. Townsend --

MR. TOWNSEND: Yes, sir.

QUESTION: -- both of the courts below ruled on the excessive force issue. Why did they not also rule on the validity of the search?

MR. TOWNSEND: I think the court felt that it was improper to reach the merits of the question because collateral estoppel being a defense to the merits was more appropriately addressed, and that the merits needn't be reached because Mr. Prosise didn't have the right to bring the suit in the first --

QUESTION: Wasn't the issue of excessive force also addressed to the merits?

MR. TOWNSEND: There was no collateral estoppel claim made as to the excessive force charge. The collateral estoppel claim was made as to the search

and seizure.

QUESTION: Only to it?

MR. TOWNSEND: Excuse me, sir?

QUESTION: Only to that?

MR. TOWNSEND: Yes, sir.

QUESTION: The district judge found the search was valid, and then went on and addressed the collateral estoppel issue.

MR. TOWNSEND: I don't think -- well, as an initial matter, I think the District Court misunderstood the allegations of the Fourth Amendment issue. The District Court found that the search warrant was valid without looking at whether there had been an intentional misstatement of fact or even a fabrication of the law -- rather, fabrication or alteration of the crime scene in order to establish that. I believe that it was based on a misinterpretation of the central allegations in the 1983 claim, but --

QUESTION: Did someone make a finding that there may have been consent to this search?

MR. TOWNSEND: The -- I don't believe there was a finding of consent to the search. I think there was a footnote in the District Court opinion saying that it would appear that Ms. Denny, who was Mr. Prosise's fiance and living in the apartment, gave consent, but I

would point out that in the record in the District Court, Ms. Denny filed an affidavit contesting that, saying that she did not in fact consent to the search, so that is a disputed fact that would have to be resolved aside from a -- on a summary judgment motion.

I think again the District Court neglected to look at that. I think the District Court took the facts largely from the affidavits submitted by the officers in support of their summary judgment motion, and overlooked the affidavits of Ms. Denny and the verified nature of the complaint. So that even though the District Court did intimate an opinion as to the legality of the search, I think it was no more than an opinion. I think it was erroneous, and with not the benefit of looking at all the facts on the case. And I --

QUESTION: Mr. Townsend, was the grounds upon which the District Court granted summary judgment on the Fourth Amendment claim solely collateral estoppel, or was it both collateral estoppel and on the merits of the claim?

MR. TOWNSEND: No, I believe -- it was not solely on collateral estoppel, but neither was it on collateral estoppel on the merits. It was on collateral estoppel and waiver grounds, analyzing the Tollett versus Henderson decision, and then extending the

rationale of Tollett versus Henderson to preclude litigating antecedent constitutional claims in a 1983 action.

QUESTION: So you say the District Court didn't grant summary judgment on the merits of the Fourth Amendment claim?

MR. TOWNSEND: No, the District Court did not. The District Court did state that on initial looking at the claims, it would appear that the merits -- or looking at the merits, it would appear that the search was valid, but I don't reach that because he is collaterally estopped from getting there, or if he is not collaterally estopped, then he has waived his right by pleading guilty.

Turning to the waiver question, I think the court was clearly incorrect and rather the Circuit Court is correct that there was no waiver arising from that, that the rationale for Tollett versus Henderson is that individuals should not be permitted to come into court and then contest the fact that they are actually guilty by way of habeas corpus in an effort to seek their release from custody to vacate and set aside the conviction itself.

Tollett, of course, was not a waiver case at all, as this Court has said. Tollett was limited to

habeas corpus challenges to the conviction, and Mr. Prosise is not seeking declaratory injunctive relief that his conviction was invalid, but rather is seeking to litigate the entirely separate question of whether the police officers committed a violation of the law.

I think Preiser versus Rodrigez, this Court made clear that habeas corpus and money damages under 1983 are entirely separate and distinct remedies, and that the policy considerations I think this Court indicated in Allen itself, the policy considerations underlying habeas corpus have no application to the 1983 context. So that the rationale supporting the Tollett decision precluding individuals from subsequently coming into court and contesting the validity of their conviction have no application in this case.

I think, rather, if the Court is going to look at the waiver principle in the case, the Court should look at the Wainwright versus Sykes deliberate bypass considerations. I don't think that even in those cases that there arises a waiver from this, because in Tollett versus Henderson the Court said that where the individual waives or bypasses a state procedure that then forecloses them from habeas corpus relief, that you can't come and get habeas corpus relief in state -- or, rather, in federal court. But that is inapposite to

this case because in Virginia there is no collateral estoppel corrusive effect to a guilty plea criminal conviction in a subsequent civil action. The criminal case and the civil case are two separate things.

In this instance we have a deliberate Fourth Amendment violation alleged by these officers. Petitioners state repeatedly that Mr. Prosise wants his cake and to eat it, too, that is, he wants the benefits of his plea offer but still be able to come and litigate a 1983 action to the antecedent Fourth Amendment violations.

Respondent would argue that the officers want their cake and eat it, too. Petitioners want their conviction, but still want this Court to insulate them from a 1983 action for a Fourth Amendment violation that has nothing to do with the conviction or the finality of the state court judgment.

QUESTION: Well, when you say the Petitioners want their conviction, who gave them that conviction?

MR. TOWNSEND: Mr. Prosise, and he is not seeking in any way to avoid his guilty plea now, although he did initially attempt to withdraw his guilty plea. When that was denied by the Virginia Supreme Court on voluntariness grounds, he thereafter sought no further relief on that basis, but was content to let

that decision of the Virginia Supreme Court lie, and has still not to this day, to my knowledge, sought in any way to vacate or avoid the consequences of his plea, but separately is seeking money damages for a distinct violation of his constitutional rights.

I think that there are significant policy considerations against applying the Tollett waiver rationale to this case. First of all, it would preclude Fourth Amendment issues if it were extended to 1983 actions that had no relief in state criminal cases. For instance, under the Kerr line of cases coming out of this Court, where an individual cannot contest the legality of their arrest as a means of avoiding prosecution, that is a distinct Fourth Amendment violation for which there is no remedy in the state criminal process.

QUESTION: Mr. Townsend, what if the Fourth Circuit is affirmed here and your case goes to trial and your client is still in jail, and the Virginia authorities say, you know, that he doesn't have parole coming, he can't get out of jail? What are you going to do when it comes to calling witnesses?

MR. TOWNSEND: Well, as a factual matter, Mr. Prosise is not in jail.

QUESTION: What happened to the 20-year term?

MR. TOWNSEND: The 25-year term was reduced to 12 years, and under Virginia parole guidelines, he has now made parole. He served almost four years, I believe it was. So that as to Mr. Prosise's individual case, it would present no problem. As to instances where it would present a problem, I believe that a habeas corpus ad prosecutorium or --

QUESTION: Testificanum.

MR. TOWNSEND: -- ad testificanum, rather, excuse me, would permit the federal court to bring Mr. Prosise from the jail to the District Court for resolution of the problem.

The decision below, I would submit, is consistent with the important governmental concerns in the enforcement of criminal law. The purpose of criminal courts is not to enforce private rights, but rather to vindicate public interest in enforcing criminal laws, while, of course, at the same time safeguarding the defendant's individual rights by assuring the reliability of the conviction.

However, Fourth Amendment questions do not in any way raise into question the legality or the reliability of the state criminal conviction. I think that permitting collateral estoppel upon conviction in 1983 actions wouldn't -- or rather, the purpose of 1983,

rather, is to provide compensation for injured persons, deterrent to police officers, and redress for abridgement of constitutional rights itself.

The deterrence from the -- the deterrent effect as to Fourth Amendment violations arises from a direct statement to the constable who has blundered that impermissible actions have occurred. An exclusionary ruling by a trial court does not have that effect, whereas a damage action against the police officers individually would have a more direct deterrent effect.

I don't believe that this harsh result should obtain in this case, primarily because there is a serious question about the incentive to litigate. There are also serious questions about the adequacy of the full and fair opportunity to litigate, especially in cases such as this. There was not a single charge arising against Mr. Prosise. There were four charges against him. He was facing nearly 80 years in the penitentiary. The state, by offering a plea offer, if this Court were to extend the reasoning of the Petitioners, could by the expediency of making a good plea offer to criminal defendants, could insulate the state entirely from Fourth Amendment liability under 1983.

Thank you.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further, Mr. Lasso?

ORAL ARGUMENT OF DAVID R. LASSO, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. LASSO: Mr. Chief Justice, a few brief remarks on rebuttal.

The point was made that he had no opportunity. I don't think that claim can be taken seriously. There is no question here but that he had opportunity to make a motion to suppress. I think it also overlooks the fact of the ease with which a motion to suppress could have made. There is nothing complicated or difficult about making a motion to suppress.

The other point made, which hints, and it was in response to a question by the Chief Justice, was the anomaly that will be created when you are dealing with the trial situation, and that is, if a person goes to trial and litigates the claim, then the Respondent would say that he is precluded. However, what happens if that same person goes to trial, does not litigate the claim, what happens to that Fourth Amendent issue?

The Fourth Circuit said in Cramer versus Crutchfield that is a waiver. He cannot litigate that Fourth Amendment claim. So the question is, what is the

difference between Cramer versus Crutchfield when you have a trial and you don't raise the claim, and here, when you have a plea of guilty and you don't raise the claim?

The police officers would submit that there is no practical difference. There is no question but that in each instance a court can look and determine the incentive to litigate, and here, he had 40 years facing him. He had every incentive in the world. He could have litigated that issue. He chose not to do so, and the federal courts should not then be burdened with litigating before a jury the question of a search when it could have been litigated easily in the state court processes.

What needs to be clarified here is, this is a plea of guilty to manufacturering PCP. It is not a plea to possession. I don't think that it can be argued that there was sufficient other evidence here of manufacturing simply because his fiance in a fit of emotion said, he is making PCP.

The trial judge said very clearly when the plea was made, the factual basis of the plea this morning that I am accepting is what I have heard today, and that was the evidence produced by the search. Later, Mr. Prosise tried to withdraw that plea. He

tried to assert his innocence, and the trial judge said, once again, I will not allow you to withdraw your plea because I have already heard sufficient factual basis to find you guilty, and that is the evidence of the search.

So, there is no question here but that that evidence was crucial, it was important, and that is what he was convicted on.

QUESTION: Could he have then made a motion to suppress?

MR. LASSO: It may be that at that point -- it was the sentencing hearing. It may have been too late, but he never even raised that issue. Once again, he failed to make the point that the search was illegal. If he ever claimed that, why didn't he make it?

What this case really presents is a fundamental policy question. Should this Court endorse a rule which encourages litigants like Mr. Prosise to deliberately bypass the opportunities afforded to him in the state criminal process? Those same opportunities are designed to protect his civil rights. They would allow him in the criminal context to challenge the conduct of the police officers.

QUESTION: I suppose the state would perhaps rather have no exclusionary rule at all?

MR. LASSO: I am sure many people would

support the taking away of --

QUESTION: In which event if the Fourth Amendment means anything there would be suits for unlawful searches.

MR. LASSO: That's correct. The fact is, however, the exclusionary rule does exist, but if it didn't exist, we would then be left under 1738 to in a sense begin to look closer at state law, what will the states do if the federal court eliminates the exclusionary rule? The state courts -- I see that my time is up.

In conclusion, I would simply ask this Court to adopt a rule of judicial administration that will preclude Mr. Prosise from bringing his claim and ask this Court to reverse the Fourth Circuit. Thank you.

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

(Whereupon, at 1:16 o'clock p.m., the case in the above-entitled matter was submitted.)

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