

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1947

TITLE VINCENT T. CERBONE, JUSTICE OF THE VILLAGE COURT,
VILLAGE OF MT. KISCO, NEW YORK, ET AL., Petitioners V.
LYNN H. CONWAY

PLACE Washington, D. C.

DATE November 5, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 VINCENT T. CERBONE, JUSTICE OF :

4 THE VILLAGE COURT, VILLAGE OF :

5 MT. KISCO, NEW YORK, ET AL., :

6 Petitioners :

NO. 84-1947

7 v :

8 LYNN H. CONWAY :

9 -----x

10 Washington, D.C.

11 Wednesday, November 5, 1986

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:49 a.m.

15 APPEARANCES:

16 MICHAEL F. CLCSE, ESQ., New York, N.Y.; on

17 behalf of the Petitioners

18 GEORGE RUSSEL MILLER, ESQ., New York, N.Y.; on

19 behalf of the Respondent.
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1 P R O C E E D I N G S

2 CHIEF JUSTICE REHNQUIST: We will hear
3 arguments next in Cerbone against Conway.

4 Mr. Close, you may proceed whenever you're
5 ready.

6 ORAL ARGUMENT OF MICHAEL F. CLOSE, ESQ.,
7 ON BEHALF OF THE PETITIONERS

8 MR. CLOSE: Mr. Chief Justice, and may it
9 please the Court:

10 Good morning.

11 This is a dispute about a \$400 check;
12 actually, a \$430 check. Underlying it is a dispute
13 about a car repair that was apparently not authorized,
14 or at least allegedly not authorized.

15 It's been going on now for almost ten years.
16 It's been in seven or eight courts before it got to this
17 Court.

18 Now, the plaintiff and respondent admits in
19 the record that this case reached the Federal courts
20 because it was not timely under State law. They'd blown
21 the State statute of limitations against the target
22 defendant.

23 QUESTION: This is the kind of a case that
24 gets the legal profession in ill repute, isn't it?

25 MR. CLOSE: Well, Justice Oakes' opinion below

1 did take umbrage at I think some of my own actions in
2 this case, and certainly my client's actions.

3 Yes, my client is also substantively appalled
4 that we are still litigating a \$400 check.

5 It's our contention, both literally and
6 colloquially, that you can't make a Federal case out of
7 it. It just never belonged in Federal court. It was
8 something that should have been resolved in small claims
9 court or the justice court.

10 QUESTION: Exactly, and it should have been
11 settled long ago.

12 MR. CLOSE: Yes, Your Honor.

13 QUESTION: How can people of this type afford
14 the litigation to come up here on it?

15 MR. CLOSE: Well, the problem with that -- the
16 answer to that is not in the record.

17 The dispute begins in April of 1977 when the
18 respondent's car blew up on an interstate highway.
19 "Blew up" is their phrase.

20 It was taken under tow to Bano Buick, which is
21 the co-petitioner here. And although the parties
22 disagree on what, they do agree that the car needed a
23 totally new engine.

24 Now, the Conways' version of the facts -- and
25 we have to accept that for purpose of today's argument

1 -- is that they would go out and look in the local
2 junkyards for a replacement engine, and that Bano Buick
3 was not supposed to do anything until the Conways had
4 found the engine that they wanted put back into the 1973
5 Opel, which was the faulty car.

6 Now, Mr. Conway, Jeff Conway, went out and
7 found engines, looked -- scoured the area. And
8 apparently, when he found the engine that he said should
9 be put into the car, he called up Bano Buick and said,
10 hey, I've got the engine.

11 Well, Bano Buick then said, oh, glad you
12 called. We're just about to start your car. And we'd
13 like you to come down and pick it up.

14 Apparently, he says, what are you talking
15 about? I haven't authorized it.

16 Well, anyway, he and Mrs. Conway come down.
17 They get to the -- they get to the car dealership, and
18 they see in the car what they say -- and we have to
19 accept this as true also for purposes of today -- they
20 saw a junk engine that he had seen in another Croton
21 Falls junkyard, and he had turned that engine down
22 because he didn't think it was a good enough engine to
23 put in the car.

24 So whatever argument they had, their version
25 of the dispute is that -- which they swear to -- is that

1. they were bullied and intimidated by Bano Buick. Bano
2. Buick was going to -- if they wanted to put in a
3. different engine, was going to charge them more money,
4. and whatever.

5. Their phrase is that, in fear they wrote out
6. the check for the amount and initiated their escape and
7. left.

8. The next day the usual practice of Bano is to
9. deposit their checks. They deposited the disputed
10. check, which is No. 154. It's dated the 10th of May,
11. 1977. Bano deposits the check. It comes back:
12. Insufficient funds.

13. They say they hold the check a couple of days,
14. and they call in to see if there's sufficient funds.
15. They redeposit the check. This time it comes back:
16. stop payment.

17. Now, at this point the parties disagree as to
18. who exactly said what. The Banos claim they made a
19. reasonable offer to settle with the Conways, to say,
20. we'll give you credit for the old engine, but we'll
21. charge you for the work. The Conways dispute that.

22. Whatever it was, they couldn't reach a
23. settlement then of this dispute, as to whether the check
24. would be honored, or what Banos would do on it.

25. And with negotiations at an apparent impasse,

1 apparently the Banos went to my client, who is the
2 village justice and also a local lawyer, and they
3 brought the check to him. And such advice which is
4 third-hand in the record, as he said to us, look, the
5 first -- the bounced check is a criminal whatever, and
6 the subsequent stop payment has got nothing to do with
7 it, because it's after the check.

8 I would have thought that advice was correct
9 under State law at the time that he gave it anyway.

10 QUESTION: How soon are you going to the point
11 in this case?

12 MR. CLOSE: Excuse me, Your Honor?

13 QUESTION: How soon are you going to get to
14 the Constitutional point about a check that bounced?

15 MR. CLOSE: Well, I think -- our point is that
16 there is no Constitutional claim at all.

17 Her complaint, as we see it, because the false
18 arrest claim is out of the case. It's barred by the
19 statute of limitations.

20 QUESTION: On that point, the respondent tells
21 us that under New York law the respondent's arrest is
22 part of her malicious prosecution claim.

23 MR. CLOSE: Your Honor, I --

24 QUESTION: And under New York law, an arrest
25 made without a warrant and lacking probable cause gives

1 a cause of action for malicious prosecution in New
2 York. Is that right? You concede that that's true?

3 MR. CLOSE: Well, no. Malicious prosecution
4 might require a little more than arrest. But she has
5 more than an arrest here. She has an actual
6 prosecution. So she had the --

7 QUESTION: Well, if you'd answer my question,
8 apparently what the respondents tell us is that New York
9 law would give a cause of action for malicious
10 prosecution for the making of an arrest without a
11 warrant and lacking in probable cause.

12 MR. CLOSE: No, she's wrong to the extent that
13 she's suggesting that she can recover damages for the
14 false arrest as part of her malicious prosecution claim.

15 We -- we -- I cite in my reply brief all the
16 cases she cites. There is dicta to that effect. None
17 of the cases she's relying on in fact deal with this
18 problem of what happens if you can correct for malicious
19 prosecution but not false arrest.

20 QUESTION: Well, let's suppose that they're
21 right, and that under New York law a false arrest claim
22 is part of malicious prosecution. Do the -- are you
23 suggesting that we then have to redefine what is
24 malicious prosecution as a matter of Federal law, or
25 what?

1 MR. CLOSE: Well, if she were correct that
2 it's not -- that it's not -- then that leads to the
3 result that the court below was wrong in dismissing the
4 claims of arrest and imprisonment as time barred.

5 The cases she cites for that proposition don't
6 say that. The reason is -- it's dicta, and the reason
7 is, in almost every case, you have a false arrest and a
8 malicious prosecution together. You always sue for
9 both.

10 In the cases where you have to distinguish
11 recovery from one theory than the other, we have cited
12 in our reply briefs, the courts have uniformly held what
13 you can recover for under New York law -- and we don't
14 concede New York law actually governs this -- what you
15 can recover for under New York law for false arrest is
16 everything up to the arraignment. And from the
17 arraignment onwards is malicious prosecution.

18 Therefore, if New York law is controlling, New
19 York law clearly is that she can only recover from the
20 arraignment forward.

21 QUESTION: Is New York law controlling?

22 MR. CLOSE: No, or the court below did not
23 hold that. They relied on Federal law under Singleton.
24 And they -- they -- the court below held that these
25 questions of accrual and so forth were governed by

1 Federal law.

2 They looked at Singleton, although Singleton
3 then incorporates a State law anyway. And the court
4 below held that Singleton was controlling and dismissed
5 it.

6 We've always regarded the false arrest and
7 imprisonment claims as out of the case because the court
8 below dismissed them as time barred. And we don't --
9 they're not here because she didn't cross petition.

10 With those claims out of the case, it's much
11 simpler to analyze. The question is --

12 QUESTION: Well, may I just interrupt? How
13 can you say they're out of the case when the Second
14 Circuit said they were in the case?

15 MR. CLOSE: Well, but the Second Circuit said
16 they were out of the case, also.

17 QUESTION: Well, but only on the State law
18 cause of action. Under the 1983 cause, they -- as I
19 understand it -- they say the complaint alleges seven
20 hours of detention, great humiliation, ridicule and
21 mental anguish and so forth. And these allegations are
22 quite sufficient to constitute a Constitutional
23 deprivation of liberty action under 1983.

24 So they held for 1983 purposes they were part
25 of the case.

1 MR. CLOSE: No, because -- for statute of
2 limitations purposes, if you look at the statute of
3 limitations ruling, which is at 822, I believe --

4 QUESTION: Well --

5 MR. CLOSE: -- they are ruling, as a matter of
6 State law, if we're just talking about State law, she's
7 way out of court on State law, Mr. Justice Stevens. On
8 State law, she has a one-year statute. If we're talking
9 about State law, that's governed by Section 215.3 of the
10 CPLR, and both malicious prosecution and false arrest
11 are one-year statute and she's out.

12 QUESTION: Well, I don't understand the Second
13 Circuit to be talking about State law there.

14 MR. CLOSE: Well, I'm sorry, then I don't
15 understand your question.

16 QUESTION: Well, I'm puzzled when you say that
17 the seven hours of detention and so forth are out of the
18 case --

19 MR. CLOSE: Yes, Your Honor.

20 QUESTION: -- when the Second Circuit, as I
21 read their opinion on page A4, says this is part of
22 their -- the basis for their determination that her
23 liberty was affected by what happened.

24 MR. CLOSE: And I -- that's dictum, because it
25 -- that's just dictum because it ignores what he just

1 did at A22.

2 The only imaginable theory of recovery that is
3 even possibly in the case is Section 1933 -- 83. And
4 under A22, they've dismissed, very plainly, Mrs.
5 Conway's civil rights claims based on arrest or false
6 imprisonment are barred by the statute.

7 QUESTION: But false arrest and malicious
8 prosecution are not themselves Constitutional claims.
9 You could have a Constitutional claim, I would think,
10 simply for wrongful deprivation of liberty, which is
11 protected by the Fourteenth Amendment.

12 MR. CLOSE: Yes.

13 QUESTION: And these people were detained for
14 a certain period of time, weren't they?

15 MR. CLOSE: But the detention is -- he just
16 held that to the extent that this is a 1983 claim based
17 on detention, and that's the argument in Singleton, that
18 is time barred as a matter of 1983 law. And that is
19 exactly what the holding is at A22; that that part is --
20 and he relies back on Singleton, which had, again,
21 addressed this as a matter of 1983 law, what statute to
22 apply it and when to apply it.

23 I can't explain A4 except to say that they
24 forgot what they did at A22, and the point about the
25 seven hours of detention is dictum. What he's talking

1 about is the great humiliaticn and ridicule and mental
2 anguish.

3 QUESTION: Well, I mean, the Second Circuit
4 obviously ruled in favor of the respondents on some
5 point, because it's you who are here and not they.

6 MR. CLOSE: Yes, yes, Your Honor.

7 QUESTION: What was the basis upon which you
8 think the Second Circuit ruled in favor of the
9 respondent?

10 MR. CLOSE: Because she alleged malicious
11 prosecution. That was timely under 1983. And malicious
12 prosecution, as such, I read them saying, is actionable
13 under Section 1983.

14 QUESTION: Do you agree with that?

15 MR. CLOSE: No, I don't agree with that. But
16 I think that is the question that's here.

17 QUESTION: You think that was their reason?

18 MR. CLOSE: And actually, there's a fair
19 amount of circuit court authority which would support
20 the idea that if you have malicious prosecution under
21 common law, and you can satisfy "color of law" under
22 1983, that you therefore have a Section 1983 claim.

23 I read them as deciding that point in favor of
24 the respondent. I think that they are wrong, but that's
25 what they -- that's what they hold. And they would

1 hardly be the only circuit on that point. k

2 QUESTION: But here, of course, you don't have
3 merely what might be normal elements of malicious
4 prosecution. You have a substantial period of
5 detention.

6 MR. CLOSE: Well, before -- she was -- they
7 took her to the village court. Village court is only at
8 night. And it starts at 6:30, so that people can do
9 their jobs during the day, and then they go at night.

10 The judge was on trial. And she was -- until
11 she was arraigned, she was at court. But that's all
12 pre-arraignment. And for the cases we cite in our reply
13 brief if, if -- you know, if New York law -- assuming
14 New York law governs on that point, it's all -- that
15 point is time barred.

16 QUESTION: Mr. Close, part and parcel of the
17 conduct that underlies the malicious prosecution claim
18 in this case is that a phony criminal charge was filed,
19 and that the individual charged was required to appear
20 and sit around the court for a long time waiting to
21 enter a plea, and was required to go back I don't know
22 how many times -- eight, nine, whatever it was -- many
23 times, in addition to the reputational injury.

24 So the sum total of what underlies the
25 malicious prosecution here is a great many appearances

1 that were alleged to be unlawfully imposed on this
2 person, and improperly, because it was a false charge to
3 begin with.

4 Do you think there's any deprivation of
5 liberty involved in that kind of a process?

6 MR. CLOSE: Well, assuming now we're talking
7 about everything post-arraignment, the answer is no,
8 that is not the -- that's just another way of saying
9 that I was a defendant in a frivolous suit, and I had to
10 go to court eight or nine times, which is a 45 minute
11 drive from where she lives.

12 QUESTION: Well, this Court has held for
13 example that being suspended from public school as a
14 student for ten days or so is a deprivation of liberty.

15 And yet you say that being hauled in to the
16 criminal court on a false charge and made to wait and
17 appear and reappear is not; is that right?

18 MR. CLOSE: Yes, that is not -- our first --
19 the first two questions on which the petition is granted
20 is that the right to be free of frivolous suits is not,
21 as such, part of the liberty protected by the due
22 process clause.

23 QUESTION: Criminal case.

24 MR. CLOSE: Well, I don't think -- first of
25 all, I don't think it makes any difference -- this is a

1 criminal case, but I don't think there's a
2 Constitutional difference between a frivolous criminal
3 case and a frivolous civil case.

4 In either case you're -- we cite in our
5 opening --

6 QUESTION: But a defendant in a criminal case,
7 though, has to appear.

8 MR. CLOSE: Yes, Your Honor, that is true. We
9 relied on Gerstein v. Pugh, which indicated that in the
10 absence of an allegation that you had a burden other
11 than the burden to appear for trial -- now, my answer
12 might have been different if -- if -- first of all, if
13 she'd been incarcerated; if she hadn't been released on
14 her own recognizance; if she -- if there were some
15 significant restraint other than the mere burden of
16 appearing for trial, my answer might be different.

17 But based on Gerstein v. Pugh, we say the mere
18 fact that you have to appear for trial is -- is -- does
19 not really -- does not of itself indicate a liberty
20 interest within the meaning --

21 QUESTION: Mr. Close, may I just ask you again
22 --

23 QUESTION: What happens if you don't appear?

24 MR. CLOSE: Well, as the record shows, if you
25 don't appear, eventually they'll send out a warrant

1 letter?

2 QUESTION: And where do you end up?

3 MR. CLOSE: Excuse me?

4 QUESTION: And where do you end up? In the
5 jail.

6 MR. CLOSE: Well, if she continued to refuse
7 the warrant, yes, she'd eventually be -- she could
8 actually be put in jail.

9 QUESTION: So you don't consider that
10 important at all.

11 MR. CLOSE: Well, I don't consider that
12 different than any civil case.

13 QUESTION: (Inaudible.)

14 MR. CLOSE: Well, Your Honor, I don't think
15 that distinguishes this from the civil case that we cite
16 in our brief. And New York doesn't even recognize a
17 cause of action for bringing a frivolous civil case.

18 And there are just as equal burdens in
19 defending a frivolous civil case as in defending a
20 frivolous criminal case, and in the civil case, you
21 don't have any remedy at all. You know, the exact same
22 allegations -- malicious, frivolous, baseless; you knew
23 you should never sue me, you sued me anyway, you asked
24 for millions of dollars -- doesn't state a claim for
25 relief at all.

1 And we therefore claim that the mere
2 allegation that you were subject to a baseless suit is
3 in not itself --

4 QUESTION: But Mr. Close, let me just go back
5 --d

6 MR. CLOSE: I'm sorry.

7 QUESTION: -- to this question Justice
8 O'Connor really raised with you before.

9 You say, just these mere allegations. But as
10 I understand it, the statute of limitations bars the
11 separate tort for false arrest, and there's no question
12 about it.

13 But on the malicious prosecution, is it not
14 correct that it was the same prosecution continuing from
15 June of '77 until September of '79?

16 MR. CLOSE: Yes, Your Honor.

17 QUESTION: And now if the action for malicious
18 prosecution is timely, would it not be a part of the
19 cause of action to take into account all of the facts
20 concerning that prosecution, including the detention?

21 MR. CLOSE: No.

22 QUESTION: Why is that not part of the
23 malicious prosecution claim whether it's a matter of
24 Federal or State law?

25 MR. CLOSE: Because they -- the -- she's

1 claiming here as -- that there's a, you know, a false
2 and fraudulent arrest --

3 QUESTION: It's a part of the proceeding which
4 she said was malicious.

5 MR. CLOSE: Yes.

6 QUESTION: She spent seven hours in
7 detention. It was part of the proceeding. That is the
8 basis of a malicious prosecution case, was it not?

9 MR. CLOSE: Well, if that's really true, then
10 I -- the court below erred in dismissing on the statute
11 of limitations. Then what did they dismiss when they
12 dismissed?

13 QUESTION: The state law cause of action for
14 false arrest.

15 MR. CLOSE: No, Justice Stevens, there never
16 was --

17 QUESTION: Maybe they did err. Maybe they did
18 err. But they did keep alive the malicious prosecution
19 portion of the 1983 claim.

20 MR. CLOSE: That's true.

21 QUESTION: And what is that makes you so sure
22 that the only evidence that would be admissible in
23 support of that claim is what happened after some
24 intermediate point in the prosecution. I don't
25 understand that.

1 QUESTION: Well, the Court of Appeals itself
2 specifically recited the -- this detention as part of
3 the malicious prosecution.

4 MR. CLOSE: And they only could do that by
5 overlooking their earlier holding.

6 QUESTION: That may be, but they did it.

7 QUESTION: Do you suppose -- yes, and do you
8 suppose that evidence of the detention is an element of
9 damages under malicious prosecution?

10 MR. CLOSE: Well, the trouble with that --

11 QUESTION: Don't you suppose that damages can
12 be collected for that as part of the --

13 MR. CLOSE: The answer, relying on my reply
14 brief at 16 and 17, is that, no, she is -- we cite, in
15 fact, a case under New York law where you can recover
16 from malicious prosecution, but you can't recover for
17 false arrest. That's Miller v. City of New York.

18 And Miller v. City of New York answers that
19 damage question. And it says, 19 -- middle of page 19
20 in my brief -- plaintiff must establish his damages
21 resulted from malicious prosecution, and not from the
22 false imprisonment.

23 QUESTION: Mr. Close, refresh my
24 recollection. Section 1983 doesn't refer to malicious
25 prosecution, does it?

1 MR. CLOSE: As such.

2 QUESTION: It doesn't refer to any State tort,
3 as such, does it?

4 MR. CLOSE: Yes, Your Honor. No, Your Honor,
5 it does not.

6 QUESTION: It gives a cause of action for
7 violation of someone's Federal right to life, liberty,
8 or property?

9 MR. CLOSE: Yes.

10 QUESTION: So there is no necessary
11 correlation between your cause of action under Section
12 -- no reason whatever to believe that there's any
13 necessary correlation between your right of action under
14 1983, and whatever State cause of action you might have.

15 MR. CLOSE: I agree, but the court below did
16 not.

17 QUESTION: So it's really quite irrelevant how
18 New York State chooses to define its cause of action for
19 malicious prosecution, isn't it?

20 MR. CLOSE: That's true.

21 QUESTION: And we have to look at each element
22 of what happened here to see whether each separate
23 element -- the arrest, the later filing of the criminal
24 complaint -- or the prior filing of the criminal
25 complaint, the later proceedings, each separate element

1 to see whether any one of them constituted a deprivation
2 of life, liberty or property without due process.

3 MR. CLOSE: Yes, Your Honor.

4 QUESTION: And it doesn't matter to us how New
5 York chooses to define these things for tort purposes.

6 MR. CLOSE: For tort purposes, but necessarily
7 for statute of limitations purposes.

8 QUESTION: Well, except to the extent -- that
9 also, except to the extent that we have to refer to a
10 New York statute of limitations in absence of a Federal
11 one.

12 MR. CLOSE: Well, Singleton went a little
13 beyond that. Singleton also held you look to State
14 rules of accrual as well. But they were consistent with
15 what they -- what they -- what they deemed to be any
16 Federal interest.

17 QUESTION: Yes, well I -- it seems to me --
18 you're confusing me, anyway, and it doesn't seem to me
19 your helping your case by choosing to analyze this on
20 the grounds on New York tort law.

21 MR. CLOSE: I'm not.

22 QUESTION: Which is not what this suit is
23 about at all. It's about 1983.

24 MR. CLOSE: I agree. I agree. And Singleton
25 -- I mean, our response on statute of limitations is

1 that Singleton v. City of New York is a Federal law
2 case, and the Second Circuit held that this was barred
3 as a matter of Federal law. So it's not in the case.

4 And as to the malicious prosecution claim, we
5 say it's not a species of liberty protected by the due
6 process clause at all.

7 So that's timely under 1983, or the court
8 below held it was timely. That claim is just not a
9 claim of Constitutional dimension. And even if --

10 QUESTION: Well, what if there had never been
11 -- what if there had never been an allegation in this
12 case of a false arrest? Just malicious prosecution.

13 MR. CLOSE: Yes, which is all that's
14 remaining. I understand the court below would be
15 holding she stated a claim for relief.

16 QUESTION: Yes, and it would have been wrong,
17 you suppose, for the court to consider evidence of
18 detention, as part of the malicious prosecution
19 allegations?

20 MR. CLOSE: Well, Justice White, when you use
21 the word "evidence" as opposed to "damages," evidence
22 may come in because it may be relevant to something.
23 She has to prove conspiracy. The arrest might be proof
24 of the conspiracy.

25 It's not part of -- she's not recovering

1 damages --

2 QUESTION: Suppose the allegation is that some
3 person convinced a policeman or a judge to get out a
4 warrant for somebody; we just want to get this person.
5 Let's get him arrested and put him in jail, and these
6 may be trumped up charges, but meanwhile -- but we'll
7 get back at them.

8 Let's just suppose it's something as nasty as
9 that, a malicious prosecution case. Couldn't a
10 malicious prosecution case include a plan to keep
11 somebody in jail?

12 MR. CLOSE: Could it? I mean, yes, in some
13 sense, if she were kept in jail. It doesn't answer the
14 statute of limitations problem.

15 QUESTION: Well, this person was kept in jail
16 on a trumped up charge, before her allegation.

17 MR. CLOSE: Before her arraignment. And
18 arraignment separated the one tort from the other, for
19 the purposes of recovering damages.

20 QUESTION: What do you mean by malicious --
21 again, you're answering a question as to what a
22 malicious prosecution case would consist of. What
23 malicious prosecution case? Under New York law? Under
24 New Jersey law?

25 MR. CLOSE: Well, the court below held New

1 York law governs

2 QUESTION: Are we talking about a malicious
3 prosecution case here?

4 MR. CLOSE: Yes, that's --

5 QUESTION: We are?

6 MR. CLOSE: -- that's what the court below
7 held. I think it's incorrect.

8 QUESTION: I thought we were talking about a
9 1983 claim.

10 MR. CLOSE: But the court below held the two
11 claims are virtually identical. And in fact we quote
12 that language in a subsequent case, where they say that
13 the elements of the tort are identical.

14 We say, that's wrong, because you have to show
15 a Federal right. And we don't see any Federal,
16 Constitutional claim at stake here.

17 And the mere claim that you were subjected to
18 a baseless suit, which is the gravamen of malicious
19 prosecution, is not Constitution. And if --

20 QUESTION: Your position is that some of the
21 elements which may go to making a malicious prosecution
22 claim under New York law may constitute a violation of
23 1983; and others may not.

24 MR. CLOSE: Well, to make a --

25 QUESTION: And you have to look at each one to

1 see whether it violates 1983 or not.

2 MR. CLOSE: If she had said, lock, they
3 prosecuted me because of my race, she would have a 1983
4 claim, not because there's a generalized guarantee
5 against frivolous lawsuits, but because there is a
6 guarantee against different treatment because of your
7 race.

8 If she said, they prosecuted me maliciously
9 because I was a Democrat or a Republican, or whatever,
10 then there'd be a First Amendment claim.

11 If she said, you know, they prosecuted me
12 because I'm protesting the war, or anything like that,
13 there could be -- I made that concession below, and the
14 court thought it was dispositive.

15 I'm not asking you to hold that malicious
16 prosecution could never be actionable as a matter of
17 1983; I am asking you to hold that the bare bones
18 allegation that the suit is frivolous, okay, meritless,
19 is not as such a species of liberty under the Fourteenth
20 Amendment, because the Constitution does not extend to
21 you a guarantee against frivolous suits as such.

22 And that's all I see in this case for this
23 plaintiff.

24 Alternatively, relying on Hudson and Parratt,
25 we say you have an adequate State law remedy anyway, and

1 her only problem is that it's time barred. And because
2 you have an adequate remedy at State law, even if it is
3 a due process violation, relying on say, Bonner v.
4 Coughlin, Hudson, and Parratt, that -- so what? I don't
5 see the due process clause as being implicated?

6 QUESTION: (Inaudible).

7 MR. CLOSE: Yes, Your Honor, it's in the
8 appendix to the petition.

9 QUESTION: In the Joint Appendix.

10 MR. CLOSE: No, it's in the appendix to the
11 petition for certiorari.

12 QUESTION: All right.

13 MR. CLOSE: If the Court has no other
14 questions, I'll reserve the balance of my time.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
16 Close.

17 We'll hear now from you, Mr. Miller.

18 ORAL ARGUMENT OF GEORGE RUSSELL MILLER, ESQ.,

19 ON BEHALF OF THE RESPONDENT

20 MR. MILLER: Mr. Chief Justice, and may it
21 please the Court:

22 This is a classic 1983 case. This is not a
23 case about a \$400 check.

24 This is a case about Lynn Conway's right not
25 to be abused, and to be persecuted by the State criminal

1 justice system.

2 Here the petitioners intentionally misused the
3 State's coercive powers to destroy Lynn Conway's
4 Constitutional rights. They conspired to use that
5 system for their own self-serving ends in their attempt
6 to extort money from her to pay for work that had been
7 shoddily done, and as to which she probably did not owe
8 a penny.

9 In this conspiracy they ran roughshod over her
10 Constitutional rights. They had her arrested, knowing
11 that she had committed no crime. They hauled her into
12 Justice Cerbone's courtroom, where he dispensed his own
13 brand of home town justice, to the benefit of his family
14 and his clients.

15 She was stripped of her Sixth Amendment right
16 to a speedy trial.

17 QUESTION: Let's assume that the only thing I
18 think that your client suffered which I would accept as
19 a deprivation of life, liberty or property, without due
20 process, was the detention in the jail facility.

21 MR. MILLER: Yes, Your Honor.

22 QUESTION: Why isn't that time barred?

23 MR. MILLER: Your Honor, we have two separate
24 causes of action under New York law. And really we're
25 talking --

1 QUESTION: I don't care about New York law.
2 I'm talking about 1983.

3 MR. MILLER: We're talking 1983, but we're
4 using -- as 1983 has done in the past, picking up the
5 tort law as a model on which to model itself.

6 The --

7 QUESTION: But there's quite a difference.
8 New York tort law does not require, for recover, a
9 deprivation of life, liberty or property, as the Federal
10 Constitution does.

11 So you can't take every element of whatever
12 tort chooses to define to be an element of a 1983 action.

13 MR. MILLER: No, you cannot, you're correct on
14 that, Your Honor. And the malicious prosecution tort,
15 and the notion behind a malicious prosecution, focusses
16 on the bringing of an unfounded claim for a malicious
17 purpose.

18 It does not focus on the arrest itself,
19 although it would sweep up the arrest.

20 QUESTION: But I'm not talking about a
21 malicious prosecution tort. I'm talking under 1983
22 about the deprivation of life, liberty or property
23 without due process of law.

24 I'm not talking about a malicious prosecution
25 tort. Now, just make believe that that's the way I'm

1 going to approach this case.

2 So I want to look and find some deprivation of
3 liberty. And the clear one that I find is keeping your
4 client in custody before the arraignment.

5 MR. MILLER: Yes, Your Honor. This is part --

6 QUESTION: All right. But that occurred a
7 long time ago. Now why isn't that time barred?

8 MR. MILLER: That would not be time barred,
9 because this was a continuing conspiracy, Your Honor.
10 You can look at the conduct that was initiated when they
11 decided to commence the prosecution to have her
12 arrested, up until the moment that the charges were
13 finally dismissed.

14 QUESTION: 1983 does not give a cause of
15 action for a conspiracy. Read the text of 1983. It
16 does not give a cause of action for a conspiracy. It
17 gives a cause of action for the deprivation of the life,
18 liberty or property. 1985 gives a cause of action for
19 conspiracy.

20 MR. MILLER: However, this court has
21 recognized in, say, Adickes v. Kress, the notion of a
22 conspiratorial element as stating a cause of action.

23 QUESTION: You can use the existence of a
24 conspiracy to attribute State action to private actors;
25 for that purpose, we've used conspiracy. But have we

1 ever used a conspiracy under 1983 -- has there ever been
2 a cause of action given for conspiring under 1983? 1983
3 doesn't speak of conspiring as a cause of action.

4 You know, there are Federal crimes of
5 conspiracy. It's a separate crime in itself. But it's
6 not an offense in itself under 1983, is it?

7 MR. MILLER: I had not seen this Court hold
8 specifically that it is. I would not say that it would
9 be barred. I would say that the issue has not come
10 before this Court.

11 This Court has not held that it is not -- that
12 a conspiracy is not a violation of 1983. Indeed, when
13 you look at the "subjects or causes to be subjected"
14 language of the statute itself, that would seem to imply
15 that conspiratorial conduct would be incorporated in
16 that.

17 However, I can think of no specific holding.

18 QUESTION: Is there a State tort of
19 conspiracy, do you know, as a separate tort?

20 MR. MILLER: I believe there is, Your Honor,
21 but I'm not altogether certain.

22 Also, there are other substantive rights that
23 were violated here, Your Honor. There was the Sixth
24 Amendment right to a speedy trial. Two years and 82
25 days elapsed from the date of her arraignment -- or --

1 until the date when the charges were finally dismissed.

2 Now, that -- part of that time is attributable
3 to her own conduct in bringing the appeal. However,
4 that is not -- that still does not change the fact that
5 there were 180 days that had elapsed; and that 180 days
6 is three times the period that is allowed by 3030 of the
7 New York Criminal Procedure law.

8 Now, while that is not binding on this Court
9 for the notion of speedy trial, it does suggest -- give
10 some sort of guideline as to what would be the speedy
11 trial idea under New York law.

12 QUESTION: Well, Mr. Miller, do you think that
13 where a person is not convicted, that speedy trial
14 analysis really adds much to the basic concept of
15 deprivation of liberty?

16 MR. MILLER: I believe it does, Your Honor.
17 Because the person who is sitting there with charges
18 pending against them does go through great mental
19 anguish. They do not know what is happening.

20 If they are confronted with a court such as
21 Justice Cerbone's court, where they may -- they have no
22 idea what is going to happen. They know that the judge
23 is biased against them. That becomes an awfully long
24 time, Your Honor.

25 QUESTION: Well, but surely you could recover

1 for however long or however short it is if you can show
2 simply a deprivation of liberty without due process of
3 law.

4 MR. MILLER: That is correct, Your Honor.
5 There is -- there was the deprivation of liberty.
6 Technically, she was under arrest during this entire
7 period. While she had been released on her own
8 recognizance, she was within -- under the custody of the
9 State.

10 QUESTION: Your opponent relies heavily on the
11 Hudson v. Palmer and Parratt v. Taylor for the
12 proposition that New York law provided adequate remedies
13 for this detention.

14 MR. MILLER: Yes, Your Honor, they do rely on
15 that. But in the -- I would direct your attention to
16 Your Honors' opinion in Parratt at page 535, where you
17 wrote that in any 1983 action, initial inquiry must
18 focus on whether the two essential elements of a 1983
19 cause of action are present, one, whether the conduct
20 complained of was committed by a person acting under
21 color of state law; clearly we have that here. And two,
22 whether this conduct deprived a person of rights,
23 privileges, or immunities secured by the Constitutional
24 laws of the United States.

25 And here we have the substantive due process

1 right of the unbiased form, plus we have the specific
2 Constitutional guarantees against the illegal search and
3 seizure, and against the right to a speedy trial.

4 QUESTION: But Parratt went on to say, I think
5 -- and I think Hudson v. Palmer reiterated it -- that in
6 some situations you had to look at the State remedy that
7 was provided for the petitioner's claim to decide
8 whether there had been any deprivation.

9 MR. MILLER: Yes, you did, Your Honor. But
10 you were also, in those two cases, dealing with specific
11 property interests. These were State-created rights;
12 not Federally-created rights.

13 And as Justice Stevens in his concurring
14 opinion in Daniels set forth the procedural due process
15 claim, it is not the deprivation of property that is
16 actionable; it is the fact that the property is deprived
17 without due process of law. Without adequate redress,
18 it becomes actionable under 1983.

19 So that in the Hudson and Parratt, you were
20 dealing with property -- State-created property
21 interests. And the State did provide redress, albeit it
22 was post-deprivation rather than pre-deprivation.

23 QUESTION: Do you claim that there is some
24 right, privilege or immunity at issue here other than
25 the due process deprivation?

1 MR. MILLER: Other than the speedy trial and
2 the unbiased forum and the false -- the bad arrest.
3 There is also a fourth -- basically, a procedural due
4 process claim. And that was Justice Cerbone's stripping
5 away Lynn Conway's right to a malicious prosecution
6 action under State law.

7 QUESTION: But these are all under the
8 category of due process?

9 MR. MILLER: No, they are not, Your Honor.
10 The last one -- well, the last one is a procedural due
11 process, which I would distinguish from the substantive
12 due process claimed.

13 QUESTION: Didn't you lose your great
14 humiliation, ridicule and mental anguish in your catalog?

15 MR. MILLER: That, Your Honor, is the injury
16 that she sustained. I think we have to distinguish
17 between the rights that are deprived, and the injury
18 that is sustained as a result of that deprivation.

19 QUESTION: Do you contend that her reputation
20 is any part of the liberty that is protected?

21 MR. MILLER: I do not. That was quite soundly
22 decided in Paul v. Davis, Your Honor.

23 QUESTION: (Inaudible.)

24 MR. MILLER: I think it was a million dollars,
25 Your Honor. Under New York --

1 QUESTION: And a million punitive. One and
2 one makes two.

3 MR. MILLER: Yes, Your Honor.

4 QUESTION: And so that is the damage she
5 suffered?

6 MR. MILLER: That is the allegation, Your
7 Honor. We still have the burden of proving it. This is
8 coming up on a summary judgment motion.

9 QUESTION: If you can get to it.

10 MR. MILLER: In addressing the reply brief
11 that the petitioners have served, they make much of the
12 fact that Lynn Conway had violated Section 190.05 of
13 the New York Penal law.

14 In fact, at the time she wrote the check, she
15 had sufficient money in the bank, in her account, to
16 cover that check. At page 28 of the Joint Appendix, you
17 will see her bank statement, which shows that on the
18 10th and 11th of May, she had \$441.37 in her account, or
19 \$10 more than this check was for.

20 If Bano Buick had gone down to the bank the
21 following morning after she had picked up her car and
22 cashed the check, they would have been paid in full.

23 The petitioners make much --

24 QUESTION: Is that under New York law or
25 Federal law?

1 MR. MILLER: That is under the New York law,
2 Your Honor?

3 QUESTION: Well, what are we doing with it?

4 MR. MILLER: Well, that is -- goes to the
5 issue of --

6 QUESTION: (Inaudible) rewrite the law of
7 malicious prosecution of New York, aren't you?

8 MR. MILLER: Your Honor, we are looking here
9 at a 1983 claim. Now, the Second Circuit had adopted,
10 under the adoption rule of Section 1988, had picked up
11 the New York law of malicious prosecution as being --
12 that the same elements that would state a claim for
13 malicious prosecution would state a claim for 1983
14 violation.

15 I think that, in short, what it is doing is
16 what this Court has done, is to model a 1983 claim on
17 existing State law. But this Court obviously is not
18 bound by the State law.

19 The question that I was raising was whether,
20 under the malicious prosecution notion, there was
21 probable cause, or whether there had in fact been a
22 criminal violation.

23 And in fact, she had not violated Section
24 190.05 of the New York law.

25 The petitioners make much of the adjournments

1 and delays in this case. However, it appears that
2 Justice Cerbone's clients, the Martabanos, who were
3 conducting this private prosecution, did not show up on
4 four of the occasions.

5 It's very hard to object to that in those
6 situations. And it does not change the fact that there
7 180 days that elapsed from the date -- she entered her
8 plea on August 4th, 1977, to the time her attorney
9 brought a motion to dismiss for failure to prosecute
10 within a speedy time. That was on February 1st, 1978.

11 QUESTION: Do you think there's some
12 difference between your ability to recover for the
13 detention in jail for seven hours, and your ability to
14 recover for pain and suffering or loss of reputation for
15 purposes of 1983?

16 MR. MILLER: I think under the Court -- as I
17 see it being framed under 1983, I think they all go into
18 the same hopper, Your Honor.

19 I think there is, perhaps, harder damage, when
20 you have the arrest. And it's very hard to quantify the
21 damage for injury to reputation.

22 If you look at the -- at the Paul case, for
23 example --

24 QUESTION: But if there hadn't been an illegal
25 detention, you don't think the Paul case would cause you

1 trouble?

2 MR. MILLER: I think the Paul decision --
3 there there was no attempt to deprive anybody of any
4 State right -- or of any rights. That was a clearly
5 negligent act by the police chief.

6 What had happened though, here, this was part
7 of the conspiracy to get money out of my client. It was
8 an intentional act.

9 If, let's say, in Paul, Davis had been -- they
10 had known that Davis was a communist sympathizer or
11 whatever, and in order to get back at him, they'd
12 included him -- his mug shot in the list of active
13 shoplifters, I think that would have been a very
14 different case, Your Honor.

15 QUESTION: Did the Second Circuit deal with
16 Paul, or not?

17 MR. MILLER: It did not, Your Honor.

18 QUESTION: And did it deal at all with the
19 availability of a State remedy?

20 MR. MILLER: It did, sort of in passing, Your
21 Honor, on page A4 of the Appendix, I believe. It is not
22 what I would call the most -- it is not a terribly
23 scholar discussion of that issue.

24 QUESTION: Well, what would you say if one of
25 the grounds for dismissal was that there's a perfectly

1 adequate State remedy here, and there's just no
2 Constitutional violation as long as there is such a
3 remedy?

4 MR. MILLER: Your Honor, I would say that that
5 would run squarely contrary to the holding in Monroe v.
6 Pape. Because Monroe had held that there is no sort of
7 exhaustion requirement, or abstention doctrine that the
8 Federal courts must observe.

9 QUESTION: Well, what about Parratt and Hudson?

10 MR. MILLER: Parratt and Hudson, Your Honor,
11 limit themselves by their own terms to procedural due
12 process claims. And that is where the right that is
13 being vindicated is a State-created right.

14 The inquiry then becomes whether the right is
15 a -- whether there's a deprivation of that State created
16 property interest without due process of law.

17 It's only when you have the absence of due
18 process of law that the Federal interest becomes
19 implicated. That, I would submit, does not apply when
20 you're dealing with substantive Federal rights, either
21 specific guarantees of the Constitution, or with
22 substantive due process.

23 QUESTION: Well, certainly Hudson involved a
24 claim of intentional abuse of process.

25 MR. MILLER: Yes, Your Honor, but there was no

1 claim that this was an Eighth Amendment cruel and
2 inhuman punishment type of violation. There was no
3 claim of any other Constitutional right being violated.
4 There was no claim -- the court specifically considered
5 whether there was a zone of privacy that had been
6 invaded. And the court concluded that there was no zone
7 of privacy that was relevant in that particular case, or
8 a zone of privacy where the prisoner had a reasonable
9 expectation that his possessions would not be searched.

10 QUESTION: Neither of those involved some
11 illegal imprisonment?

12 MR. MILLER: No, they do not, Your Honor.

13 QUESTION: Is it your position that Parratt
14 just doesn't reach liberty interests?

15 MR. MILLER: That Parratt, Your Honor, does
16 not -- yes, that is my position, Your Honor. At least
17 not a liberty interest that is secured by the
18 Constitution.

19 In other words, if we're dealing with the
20 Constitutional right --

21 QUESTION: What's the difference? I thought
22 the line you were drawing was whether it was a
23 procedural due process claim. And I can understand your
24 trying to draw a line there.

25 But if it is a procedural due process claim,

1 what difference does it make whether it's life, liberty
2 or property as the issue?

3 MR. MILLER: I don't think it makes much of a
4 difference, Your Honor, that's what I was just saying.

5 QUESTION: It doesn't?

6 MR. MILLER: What I was saying is, if it's a
7 State created liberty interest that is not -- does not
8 have an analog under the Federal Constitutional rights,
9 then the State would become liable only if it makes the
10 deprivation without adequate redress.

11 QUESTION: That isn't the case here?

12 MR. MILLER: That is not the case here because
13 there are specific Federal rights that have been
14 violated, Your Honor.

15 QUESTION: Tell me the Federal rights again.

16 MR. MILLER: The four rights that we're
17 alleging, first, is the speedy trial right, which is the
18 Sixth Amendment with specific guarantee. The arrest,
19 which is a Fourth Amendment guarantee.

20 Then there is a substantive due process right,
21 that is, the right to an impartial forum.

22 And then finally there is the right to have
23 her cause of action untampered with. And Justice
24 Cerbone went down -- or had appended to the docket
25 sheet, not on the merits, in an apparent attempt to

1 destroy the cause of action under New York State law for
2 malicious prosecution.

3 QUESTION: I assume that the courts below
4 didn't address the Sixth Amendment claims at all. They
5 would be open. They just weren't considered, is that
6 right?

7 MR. MILLER: They were not addressed below,
8 Your Honor.

9 QUESTION: So we don't have to consider that?
10 I mean, that's separate and apart and not yet addressed.

11 What we have before us is what --

12 MR. MILLER: Well, Your Honor, I think that
13 claim --

14 QUESTION: -- the due process claim?

15 MR. MILLER: -- if this Court reverses the
16 Second Circuit and requires a dismissal of the cause of
17 action, the the Sixth Amendment claim, speedy trial
18 claim, can never be raised. The action would be time
19 barred.

20 So I would say that it has to come up now, if
21 ever. And it was alleged in the complaint, Your Honor.

22 QUESTION: How many of these Federal rights
23 would -- that you just mentioned in answer to me a
24 minute ago would be time barred if you couldn't tack
25 them on to the malicious prosecution?

1 MR. MILLER: At present, all.

2 QUESTION: Would be time barred?

3 MR. MILLER: Would be time barred, Your
4 Honor. Well, I take that back. They were timely as of
5 the time they were raised.

6 Now, they would be time barred, if this cause
7 of action is dismissed.

8 QUESTION: Oh, no, that's --

9 MR. MILLER: The speedy trial would not have
10 matured until such time as the cause of action -- the
11 criminal complaint was dismissed. Because there would
12 be no indication as to how long it had been before the
13 case would have been dismissed until that -- September
14 20th, 1979.

15 The interference with the malicious
16 prosecution cause of action, that occurred on September
17 20th, 1979, at the end of the period. It was the arrest
18 that occurred at the beginning.

19 The petitioners make the argument that the
20 substantive due process is not properly before this
21 Court, and it was never considered by the Second
22 Circuit.

23 It fact, it had been considered. The Second
24 Circuit did not feel that it had to rely upon that.
25 Now, I suspect there may have been some -- that Judge

1 Oakes' treatment of the case was that he felt that seven
2 hours of detention was sufficiently enough to remand the
3 case for trial that he need not go exploring for other
4 Constitutional rights.

5 But as long as there is one Constitutional
6 right, we submit that this case has to go to trial in
7 the District Court.

8 The petitioners have tried to make an argument
9 that there is a cutoff point at the moment of
10 arraignment under New York law between the false arrest
11 claim, which ceases from the moment of arraignment.

12 From this they seek to infer that there is the
13 beginning of a malicious prosecution cause of action
14 that starts at the moment of arraignment.

15 That is squarely belied under New York law.
16 Sheldon v. Carpenter, for example -- and I quote from 4
17 New York 580 -- states that in an action for malicious
18 prosecution, the plaintiff is entitled to recover
19 damages, not only for his unlawful arrest and
20 imprisonment and for the expense of his defense, but for
21 the injury to his name and character by reason of the
22 false accusation.

23 Now, this is at least a clear indication of
24 New York's intent on the malicious prosecution cause of
25 action.

1 We submit that this Court is clearly not bound
2 by New York State law in formulating the causes of
3 action under 1983. But 1983 should form a model. It
4 should indicate the conduct that is wrongful, for
5 example, the conduct of conspiring, as it were, to do a
6 number on Lynn Conway, to get money from her, to make
7 her pay on a check for work that was not done.

8 Here, Lynn Conway suffered from the
9 petitioner's abuses of the criminal justice system.
10 They conspired to violate her Federal rights in a scheme
11 to extort money.

12 They had her arrested. She was handcuffed,
13 forced into the police car, hauled to the village court
14 of Mt. Kisco some 45 minutes away. She was held under
15 confinement for seven hours. She was arraigned at 1:30
16 in the morning, and released on her own recognizance.

17 Then she was hauled before Justice Cerbone's
18 courtroom, where, under the Mt. Kisco quaint custom, the
19 Martabanos, who were the complaining witnesses, also
20 handled the private criminal prosecution.

21 Nor surprisingly, the Martabanos, who were
22 Justice Cerbone's cousins and clients, managed to
23 prevail, under the Assistant District Attorney stepped
24 in and said that they would not go forward with the
25 case.

1 And that point, Justice Cerbone screamed out
2 through the courtroom, you will continue to try this
3 case -- or prosecute this case. You will try it, and
4 you will get a conviction.

5 Lynn Conway was stripped of her right to a
6 speedy trial. Two years and 82 days elapsed from the
7 date of her arrest, until the date that she was finally
8 released.

9 Her cause of action for malicious prosecution
10 had been stripped.

11 In short, the respondent submits that the
12 petitioners, Alfred Martabano, Alfred V. Martabano, Bano
13 Buick, and Vincent Cerbone, engaged in a classic
14 violation of Section 1983.

15 They conspired to deprive Lynn Conway of
16 rights, privileges, and immunities secured by the
17 Constitution and laws of the United States.

18 Thank you.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
20 Miller.

21 Mr. Close, do you have anything further? You
22 have four minutes remaining.

23 REBUTTAL ARGUMENT OF MICHAEL F. CLOSE, ESQ.,

24 ON BEHALF OF THE PETITIONERS

25 MR. CLOSE: Answering Mr. Justice Scalia's

1 question, there is no tort of conspiracy recognized by
2 New York law.

3 They contend that Mrs. Conway had sufficient
4 funds, and that if the check -- if he had rushed down to
5 deposit the check, it would have cleared.

6 The record doesn't sustain that contention.
7 She had already drawn against the funds that the account
8 shows as of 5/10/77.

9 So it would be true that the check would clear
10 only if the check No. 154, which is at stake, was
11 presented under the bank's rules, before 153, 152. As
12 soon as any of the earlier written checks had cleared,
13 she would be insufficient.

14 That, under the New York statute, is
15 insufficient funds when she wrote it, because the
16 statute requires that you have sufficient funds that you
17 haven't already drawn upon.

18 As far as the other theories of liability --
19 Sixth Amendment and docket notation -- they're just not
20 properly here, because they would lead to a very
21 different judgment than the judgment we are appealing.

22 The holding below is that whatever is common
23 law, malicious prosecution, under New York law, is
24 necessarily a 1983 case.

25 QUESTION: Isn't it correct that the judgment

1 you're appealing is an order that has the effect of
2 denying a motion to dismiss?

3 MR. CLOSE: Yes.

4 QUESTION: So that the case is just ready to
5 get started for trial?

6 MR. CLOSE: Yes.

7 QUESTION: So that's all that's at stake, is
8 whether there's enough here to go to trial.

9 MR. CLOSE: Yes, but the rationale of the
10 decision below, in response to my argument that Paul v.
11 Davis, Baker v. McCollan, and Gerstein v. Pugh, which
12 said malicious prosecution is not a claim under 1983,
13 the court below said, no, look, this is New York law.
14 It's valid under New York law.

15 His theory of Sixth Amendment would lead to a
16 very different kind of judgment, and so would his docket
17 notation theory.

18 So they're not arguments that would sustain
19 the ruling below, and therefore, I don't think that
20 they're properly presented.

21 And for the reasons we state in our brief, we
22 don't think substantive due process has anything to do
23 with the case. We don't think that Mrs. Conway has
24 anything in common with Mrs. Roe. You know, she's just
25 not within -- she's not within the realm of privacy

1 interests, which are protected by that doctrine.

2 And she is invoking the doctrine because she
3 wants an additional Federal remedy to what's already
4 adequate under State law.

5 She's not like Mrs. Roe who comes here because
6 she has no remedy under State law at all. So Mrs.
7 Conway's complaint can't be considered under the
8 substantive process doctrine.

9 Unless the Court has any other questions about
10 the record, the petitioner will rest.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
12 Close.

13 The case is submitted.

14 (Whereupon, at 11:45 a.m., the case in the
15 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1947 - VINCENT T. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL., Petitioners V.

LYNN H. CONWAY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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