

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES SUPREME COURT

DEAN DEAKINS, ET AL.,)
)
) Petitioners,)
)
v.)
)
WILLIAM MONAGHAN, ET AL.)

No. 86-890

PAGES: 1 through 49
PLACE: Washington, D.C.
DATE: October 14, 1987

Heritage Reporting Corporation

Official Reporters
1220 L Street, N.W.
Washington, D.C. 20005
(202) 628-4888

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

-----x
DEAN DEAKINS, ET AL., :
Petitioners, :
v. : No. 86-890
WILLIAM MONAGHAN, ET AL. :

-----x

Washington, D.C.
Wednesday, October 14, 1987

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 1:39
o'clock p.m.

APPEARANCES:

LARRY R. ETZWEILER, ESQ., Deputy Attorney General of New
Jersey, Trenton, New Jersey; on behalf of the petitioners.
EDWARD N. FITZPATRICK, ESQ., Newark, New Jersey; on behalf
of the respondents.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

LARRY R. ETZWEILER, ESQ.

on behalf of the petitioners

3

EDWARD N. FITZPATRICK, ESQ.

on behalf of the respondents

22

LARRY R. ETZWEILER, ESQ.

on behalf of the petitioners - rebuttal

45

1 P R O C E E D I N G S

2 (1:39 p.m.)

3 CHIEF JUSTICE REHNQUIST: You may proceed whenever
4 you are ready, Mr. Etzweiler.

5 ORAL ARGUMENT OF LARRY R. ETZWEILER, ESQ.

6 ON BEHALF OF THE PETITIONERS

7 MR. ETZWEILER: Mr. Chief Justice, and may it please
8 the Court, we are here today asking this Court to overturn
9 a decision which threatens grave interference with state grand
10 jury proceedings. It is our concern that the lower court's
11 opinion will encourage disgruntled subjects of state grand
12 jury investigations to file 1983 suits in the hopes that they
13 can sidetrack the state grand jury process or obtain discovery
14 under liberal civil discovery standards which are not available
15 in the criminal context.

16 I will briefly summarize the facts. Petitioners in
17 this case are all state law enforcement officers who have been
18 sued in a 1983 action requesting both injunctive relief and
19 money damages. The petitioners executed a search warrant
20 issued by Judge Lenox, an assignment judge in New Jersey who
21 supervises the state grand jury.

22 At the time of the execution of the search warrant
23 there was a dispute. The plaintiffs claimed that the state
24 wasnot leaving an adequate inventory to expalin what had been
25 taken. And the plaintiffs accordingly telephoned Judge Lenox

1 and obtained from Judge Lenox an order that all of the
2 evidence that was being taken should be sealed in evidence
3 boxes pending judicial resolution of the inventory problem.
4 Also at the time of the execution the state issued three
5 state grand jury subpoenas upon the plaintiffs, two of which
6 the plaintiffs complied with, and a third of which and also a
7 fourth subpoena which was issued later, the plaintiffs success-
8 fully moved to quash, again before Judge Lenox.

9 At a later date in an attempt to resolve the
10 inventory dispute the plaintiffs came to the division of
11 Criminal Justice in Trenton, went through the evidence with a
12 court reporter to take an inventory, and in the process of
13 doing this came upon evidence which the plaintiffs claim was
14 being retained illegally by the state in that their Fourth
15 Amendment or attorney-client privileges or work product
16 privileges were being violated, and accordingly, in view of
17 their complaint, the state again resealed this evidence, not
18 the entirety of it but just three boxes of it pending judicial
19 resolution of this question which the state sought by an order
20 to show cause again before Judge Lenox compelling the plaintiffs
21 to explain why this resealed evidence should not be unsealed.

22 At that proceeding the plaintiffs relied upon
23 attorney client and work product privileges. The plaintiffs
24 filed suit. They did so after the motion to quash and after
25 the first partial unsealing but before the show cause order.

1 The District Court in viewing these proceedings concluded that
2 with respect to the equity portion of the lawsuit, that is,
3 with respect to the plaintiff's claim for an injunction for
4 the return of property, that these proceedings showed that the
5 Younger abstention doctrine should apply, and accordingly the
6 District Court dismissed the equity portion.

7 With respect to the damages portion, the court
8 concluded that the pendency of the damages action would sub-
9 stantially impede the state's criminal investigation, and it
10 also dismissed this portion of the suit. The plaintiffs
11 appealed to the United States Court of Appeals for the Third
12 Circuit. The Third Circuit in viewing these proceedings con-
13 cluded that the District Court erred, concluding that these
14 proceedings were not adequate to invoke the Younger absten-
15 tion doctrine, and remanded the matter to the District Court
16 for a hearing on the merits of the plaintiffs' request for
17 injunctive relief.

18 With respect to the damages portion, the Third
19 Circuit concluded that even if the Younger abstention were
20 applicable, the District Court would have no discretion to
21 dismiss and it would only be allowed to stay the damages
22 claim pending the Younger abstention proceedings.

23 We submit that the Third Circuit erred --

24 QUESTION: Mr. Etzweiler, some time in your
25 argument are you going to address your opponent's claim that

1 the case is moot?

2 MR. ETZWEILER: I wasn't initially intending to, but
3 I will be happy to entertain questions on that question.

4 QUESTION: Well, I don't know that I have any
5 questions. I was just -- you are going to leave it to your
6 brief, basically.

7 QUESTION: Well, I have a question, if I may. What
8 difference will it make whether we just dismiss the case or
9 in effect adopt Judge Adams' position in the Third Circuit?

10 MR. ETZWEILER: With respect to the damages claim?

11 QUESTION: Well, is basically what is at issue, what
12 is your argument here is whether the damage claim should be
13 dismissed?

14 MR. ETZWEILER: Well, we are arguing both that the
15 District Court has discretion to dismiss the damage claim, and
16 also that the District Court was correct with respect to the
17 Younger proceedings on the injunctive claim.

18 QUESTION: Why do we have to fight about the
19 injunction now, when, as I understand it, they no longer seek
20 injunctive relief, and everybody agrees you can fight these
21 issues out in the state court?

22 MR. ETZWEILER: They have agreed that they would
23 amend the complaint. They haven't yet done that. Also, one
24 of the points is, there is currently allegations of criminal
25 conduct which has resulted in the issuing of state grand jury

1 proceedings again with respect to these plaintiffs. I guess
2 what I am trying to say is that this issue can come up again
3 before them.

4 QUESTION: But involving the same parties?

5 MR. ETZWEILER: Involving the same parties, yes.
6 Let me see.

7 QUESTION: Is there some likelihood that is going
8 to happen?

9 MR. ETZWEILER: Well, that -- I can't --

10 QUESTION: It can, but is it any more likely to
11 happen to them than it is to anybody else walking around?

12 MR. ETZWEILER: There is an ongoing criminal
13 investigation going on. Subpoenas have been issued. I, of
14 course, am not at liberty to divulge what has happened in the
15 course of the state grand jury proceedings, but --

16 QUESTION: You say they haven't dismissed their
17 complaint yet. Is it clear that they can dismiss their
18 complaint when the proceedings are up here? Is there anything
19 they could have done beyond saying to the appellate court, we
20 no longer have this claim?

21 MR. ETZWEILER: What they have said is that if this
22 Court will dismiss the claim as moot, we will -- if this Court
23 will dismiss the petition as moot, we will amend the complaint
24 to delete our request for injunctive damages.

25 QUESTION: What more could they have done? Can you

1 and amend a complaint when the proceeding is on appeal? Can
2 you go into the court of first instance and say, even though
3 this whole proceeding is under the jurisdiction of another
4 court, I want to amend my complaint?

5 MR. ETZWEILER: I don't know, Your Honor, but there
6 is another factor, and that is that not all the plaintiffs
7 have been indicted. The issue still remains in live contro-
8 versy, for example, with respect to Mr. James, who hasn't, as
9 I understand it, agreed to dismiss this claim with prejudice.
10 He could come back later on the same claim.

11 Also, this type of question --

12 QUESTION: Mr. James is not a party.

13 MR. ETZWEILER: Yes, he is, Your Honor. He is one
14 of the respondents, and he is also a party who has not been
15 indicted. Not all the plaintiffs have been indicted.

16 QUESTION: (Inaudible) agreed not to seek an
17 injunction? That is what --

18 MR. ETZWEILER: I think they have agreed to amend
19 their complaint if this Court will dismiss the case as --

20 QUESTION: Both the indicted and the unindicted.

21 MR. ETZWEILER: I don't know if they have agreed
22 to do so dispositively on the merits and not come back into
23 court and petition --

24 QUESTION: Yes, but they are all in the same
25 position, all of the respondents.

1 MR. ETZWEILER: Well, they are not quite all in the
2 same position in that only some of them have been indicted and
3 some have not.

4 QUESTION: As regards their agreement with respect
5 to the injunction, they are all in the same boat.

6 MR. ETZWEILER: They are not quite in the same boat
7 because the plaintiffs who have been indicted would of
8 necessity resolve their Fourth Amendment claims, I presume, in
9 the course of the state criminal litigation. That is not
10 necessarily true with respect to the plaintiffs --

11 QUESTION: Well, the respondents have also said
12 it is all right just to stay, that their damage suit be
13 stayed, haven't they?

14 MR. ETZWEILER: They have offered that, yes.

15 QUESTION: No injunction, and stay the damages suit
16 until the Fourth Amendment issue is settled in the state
17 court.

18 MR. ETZWEILER: That is the offer which they have
19 made, yes.

20 QUESTION: And isn't that the relief you seek?

21 MR. ETZWEILER: No, we seek a reinsertion of the
22 District Court opinion. We don't want the damages action --

23 QUESTION: But the only difference is that you get
24 a dismissal of the damage claim, but it is not with prejudice.

25 MR. ETZWEILER: That's correct.

1 QUESTION: So whether you stay it or you just,
2 you know, close the case and let them file it two years from
3 now, what difference does it make?

4 MR. ETZWEILER: Well, the pendency of the damages
5 action has a chilling effect.

6 QUESTION: Does it have any more chilling effect
7 than a letter to you saying, as soon as these proceedings are
8 over I am going to refile the case?

9 MR. ETZWEILER: Psychologically it does.

10 QUESTION: But that is all that we are asked. Our
11 time is devoted to save the psychological concern.

12 MR. ETZWEILER: Well, but these are very important
13 for the states --

14 QUESTION: I understand, but we generally decide
15 lawsuitss We don't, you know, assuage people's feelings
16 about --

17 MR. ETZWEILER: Yes, I know, but this is an important
18 factor under the Younger comity considerations. Even the
19 pendency of this action is going to, for example, make it hard
20 for our investigators to apply for credit when they apply for
21 mortgages and their mortgage companies get nervous. Is stands
22 as a sword over them that makes them less enthusiastic about
23 proceeding with the criminal matter. It makes other investi-
24 gators shy about becoming involved in the criminal prosecution.
25 This is why the --

1 QUESTION: Yes, but if it was just dismissed without
2 prejudice, people who really know what they are doing would
3 have the same concern. They would know that if they lose on
4 the state proceeding on the Fourth Amendment claim, the
5 damages action can be reinstated.

6 MR. ETZWEILER: I beg your pardon, Your Honor? If
7 they lose in the --

8 QUESTION: Can't they file the case again? They
9 can file the case again if they win in the state proceeding,
10 and there is a holding that there was a violation of the
11 Fourth Amendment.

12 MR. ETZWEILER: Yes. Of course, it would be pre-
13 ferable if they would take all of these claims into the state
14 system where a single judge could --

15 QUESTION: They are not required to do that.

16 MR. ETZWEILER: I agree.

17 QUESTION: And you are not asserting that. They
18 have every right to file their 1983 damages claim in the
19 Federal District Court, don't they?

20 MR. ETZWEILER: That's correct, Your Honor.

21 QUESTION: Sure. Now, what about if the statute
22 of limitations runs on them because it is dismissed? Isn't
23 that a consideration for the District Court to make in
24 determining whether to dismiss or not? Isn't that something
25 they should think about?

1 MR. ETZWEILER: It very well may be. It is not a
2 consideration which was brought to the attention of the
3 District Court in this instance.

4 QUESTION: So long as the state proceeding goes first
5 if New Jersey law allows it you will get the benefit of res
6 judicata from any favorable findings that the state court
7 makes on the Fourth Amendment issue.

8 MR. ETZWEILER: I think that is probably correct,
9 Your Honor.

10 QUESTION: And that is true whether the federal
11 damages suit is stayed or dismissed, isn't it?

12 MR. ETZWEILER: That's correct, but with respect to
13 the question of the stay or dismiss, another reason we think
14 that the District Court should have discretion in these
15 matters is that plaintiffs whose desire is to impede the grad
16 jury investigation are going to have an incentive to attach
17 damage claims to equity actions when they file 1983 lawsuits.

18 QUESTION: But you are not arguing here, as I under-
19 stand it, and as I understand your response to Justice
20 O'Connor, you are not arguing that there is no proper damages
21 action here in the event that it is determined either in the
22 state court or somewhere else that there has been a violation
23 of the Fourth Amendment. All you are saying is the damages
24 action perhaps should have been dismissed without prejudice
25 rather than stayed.

1 MR. ETZWEILER: We are arguing that the District
2 Court has discretion, yes.

3 QUESTION: Let me pursue that just a second.
4 Suppose we were in the District Court now and they came up
5 with a motion to dismiss all their equitable claims, and they
6 said, all we are interested in is damages, and we are willing
7 to wait until all the state proceedings are over. Given those
8 facts, would the district judge have discretion to dismiss
9 the damage claim?

10 MR. ETZWEILER: We would submit that it would, but
11 of course our case is much easier, because we have got the --

12 QUESTION: And say the statute of limitations is
13 going to run. Could they dismiss it and just say, I don't
14 want to hear this? I mean, doesn't a federal judge have a
15 duty to -- I don't understand your theory. Why would he have
16 discretion to dismiss a valid claim?

17 MR. ETZWEILER: He would have --

18 QUESTION: Say they had never filed an equitable
19 action. He just filed a damage action. Could he just dismiss
20 it because he doesn't want to hear it?

21 QUESTION: Because if he doesn't do it they will
22 be unhappy.

23 MR. ETZWEILER: Well, because we don't view the
24 dismissal again as a dismissal on the merits. We don't have --
25 we would submit that he would have the discretion. Of course,

1 in the absence of a claim for --

2 QUESTION: Even if there had never been an equitable
3 claim asserted?

4 MR. ETZWEILER: We would submit that, but that it
5 not --

6 QUESTION: He doesn't like cases like this, so he
7 will dismiss it?

8 MR. ETZWEILER: I beg your pardon?

9 QUESTION: I don't understand your theory. How can
10 a federal judge say, I don't like these 1983 suits, I will
11 just dismiss it as a matter of discretion.

12 MR. ETZWEILER: Well, he can do it under the comity
13 considerations which underlie the Younger abstention doctrine,
14 underlie, for example, this Court's opinion in Fair Assessment
15 versus McNulty on the theory that the pendency even of the
16 stayed damages action is going to have a chilling effect upon
17 these investigators as they attempt to pursue the criminal
18 prosecution, and also for policy --

19 QUESTION: It seems to me you have got pretty
20 timid investigators in New Jersey.

21 MR. ETZWEILER: We also have in this case other
22 facets which supported the district court's discretion in
23 this matter, and that's the many questions of state law that
24 were very much intertwined -- intertwined with the federal claims.
25 For example, part of the federal claim here is that --

1 QUESTION: (Inaudible) stay. That --

2 MR. ETZWEILER: They may be resolved. They won't
3 necessarily be resolved with respect to the parties who aren't
4 in the state criminal --

5 QUESTION: But they are not -- the difference in
6 whether the federal court resolves them first has nothing to
7 do with whether you have a stay or a dismissal. That is a
8 totally irrelevant factor.

9 MR. ETZWEILER: That's correct, Your Honor, yes.

10 Going back to the -- with respect to the Third
11 Circuit's opinion again, which had covered not only the
12 damages action but also, of course, the request for injunc-
13 tive relief, it is our posture that the Third Circuit's
14 opinion will enable subjects of grand jury investigations to
15 chill investigations, to use discovery that they cannot
16 obtain in the course of the criminal investigation, and also
17 will result in dual litigation, enmeshing both the federal
18 court and the state court in supervising the state grand
19 jury procedures which are contrary to our system of federalism
20 and the comity principles that lie at the basis of Younger.

21 Perhaps I could talk a bit about the discovery
22 question. Even with respect to the -- with the injunctive
23 portion of this suit, the plaintiffs would also have access
24 to discovery. In this instance, at the time of the filing
25 of the suit, with that filing they served a request for

1 deposition and for the production of documents. Among the
2 documents which they wanted were documents which divulge what
3 the instructions our investigators had been given before they
4 went to execute the search warrant. It is apparent that that
5 type of information could divulge or might divulge to the
6 plaintiffs the theory of the state's case.

7 QUESTION: Presumably you could get a protective
8 order from the Federal District Court if the District Court
9 is going to delay hearing the case in any event.

10 MR. ETZWEILER: Yes, Your Honor, but of course the --
11 ascertaining whether the protective order is appropriate may
12 very well require the federal judge to look into the grand
13 jury investigation to ascertain what information should be
14 privileged, what information should not be privileged. It
15 might require the federal judge to pull in the prosecutor, to
16 ask him what is happening in the course of this criminal
17 investigation.

18 Essentially it requires the federal judge or may
19 require the federal judge to supervise the grand jury process
20 just -- or as the state judge should be doing. We submit that
21 this is contrary to our notions of federalism.

22 QUESTION: But again that would not happen if you
23 were to enter an order vacating the judgment of the Court of
24 Appeals and directing that in accordance with the representa-
25 tion of the opponents, the equitable claims all be dismissed

1 and the damage action be stayed. You would be protected from
2 this particular risk.

3 MR. ETZWEILER: We would be protected, but the
4 rule allowing a permanent stay is not necessarily a good rule
5 for this Court to adopt as national policy.

6 QUESTION: I am just wondering about disposing of
7 this litigation. That would protect your interest in this
8 litigation. Maybe not your views of national policy.

9 MR. ETZWEILER: Well, it is still going -- it would
10 not protect our investigators as they go out and apply for
11 mortgages as they have the --

12 QUESTION: Well, it would protect them -- you
13 were talking about the concerns of discovery and the federal
14 judge butting into the state procedure. It would protect you
15 from that.

16 MR. ETZWEILER: Yes, it would protect us from that.
17 It would not --

18 QUESTION: But not the credit rating of the officers
19 involved. I agree with that.

20 MR. ETZWEILER: Right. It would not offer us the
21 full protection which --

22 QUESTION: Nothing but a judgment on the merits will
23 do that.

24 MR. ETZWEILER: Or a judgment of dismissal not on
25 the merits.

1 QUESTION: Well, if the claim isn't destroyed, if
2 it isn't, with prejudice, it won't protect them.

3 MR. ETZWEILER: But the pending litigation will not
4 be hanging over these -- the subjects of the investigation.
5 Also, if these plaintiffs, it would be preferable if these
6 plaintiffs would pursue all their claims in the state court
7 system where they have remedies, including 1983 remedies,
8 because in a coordinated system we can then have a state judge
9 ascertaining, for example, from his review of the grand jury
10 process, whether limited aspects of discovery could go forward,
11 whether limited aspects of the damages action could go
12 forward. It is possible that through limited proceedings, for
13 example, the damages action could be determined to be subject
14 to dismissal under the Harlow versus Fitzgerald standard.
15 That would certainly be preferable to these plaintiffs other
16 than letting this action hang completely in the federal court
17 pending the Younger abstention proceedings.

18 QUESTION: Of course, I suspect the only reason in
19 Younger itself we didn't enter a stay instead of direct
20 dismissal is simply because what was asked for was something
21 we simply would not do. That is, enjoin a state criminal
22 proceeding. It had nothing to do with psychological impact.
23 And had not the request been something we are just not
24 unwilling to do by reason of federal-state comity, I expect
25 that -- why should a stay be the normal remedy rather than

1 dismissal unless what you are asking for is something that
2 comity absolutely prevents the federal courts from doing, and
3 damages, comity, there is no reason why granting damages inter-
4 feres with a state's proceeding, right?

5 QUESTION: If the federal court damages suit went
6 forward and concluded before the stage proceeding there would
7 be res judicata there.

8 MR. ETZWEILER: There very well may be, yes.

9 QUESTION: At least there would have to be a stay.

10 MR. ETZWEILER: I think Mr. Justice --

11 QUESTION: Why do you oppose a stay?

12 MR. ETZWEILER: We oppose -- we submit that the
13 matter should be in the discretion of the district court.

14 QUESTION: Why? Why? As Justice Scalia -- why
15 should that be so?

16 MR. ETZWEILER: Because -- essentially for three
17 reasons. The Younger opinion will be intimidating, the con-
18 tinuation of the damages action will be intimidating investi-
19 gators. If the stay is not mandatory, these plaintiffs will
20 be continually coming back, asking for a lifting of the stay,
21 which will involve the federal judge in looking into the grand
22 jury process. We don't want to encourage plaintiffs who are
23 simply seeking to hinder the process of the grand jury
24 investigation to join a damages action along with their
25 injunctive claim, and we think that this is consistent with

1 the Younger doctrine, somewhat responding to Justice Scalia's
2 question in that Younger was concerned about federal processes
3 which would enmesh the Federal District Court in disrupting or
4 having a negative impact upon matters of importance in state
5 proceedings.

6 QUESTION: A negative impact would have occurred in
7 Younger no matter when you did it. So long as you enjoin a
8 state criminal proceeding, you are going to have that impact.
9 So we said, get out of here, we are not going to do that.
10 Whereas in this case it is not the case that giving damages
11 will inevitably impair the state criminal proceeding. It
12 depends entirely on when they are given. So why is the stay
13 the only remedy that you should be able to obtain?

14 MR. ETZWEILER: A rule which would always mandate
15 that stay would again -- I guess there's two possibilities
16 with the stay. Number One, it is subject to being lifted.
17 Or, Number Two, it is not subject to being lifted. Neither
18 of those possibilities is necessarily good. Subject to being
19 lifted, of course, upon the plaintiff's contention that the
20 grand jury proceedings are not going expeditiously, then you've
21 got the federal judge intervening.

22 If it is not subject to being lifted, then a
23 preferable rule would be for the states to take the matter
24 over so that it can ascertain whether the damages action can
25 continue without interference upon the grand jury process.

1 May I reserve --

2 QUESTION: Could I ask you a question? Wasn't the
3 grand jury proceedings terminated before we even granted
4 certiorari?

5 MR. ETZWEILER: An indictment was returned. That's
6 correct.

7 QUESTION: An indictment was returned.

8 MR. ETZWEILER: With respect to this --

9 QUESTION: And what is the status of the criminal
10 proceeding?

11 MR. ETZWEILER: The indictment? It is still in
12 pretrial proceedings.

13 QUESTION: Well, has there been a motion to return
14 the material, and is there some proceeding pending to decide
15 whether there was a violation of the Fourth Amendment?

16 MR. ETZWEILER: My understanding is that the plain-
17 tiffs have not yet filed such a motion. But I got that from
18 the last time I talked with the attorney who is prosecuting
19 the matter. I presume they still will file such a motion.

20 QUESTION: Isn't there some limit, some time limit
21 on when they can do that?

22 MR. ETZWEILER: There may be. My understanding -- I
23 can't answer that question. There is, of course, a time
24 limit, but often judges extend the time limit, especially in
25 very complex cases such as this. Thank you.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Etzweiler.
2 Mr. Fitzpatrick, we will hear now from you.

3 Let me ask you, Mr. Fitzpatrick, your brief on Page
4 21 talks about the mootness issue, and you say at the sentence
5 beginning on the fourth line from the bottom of that page,
6 "Under these circumstances, plaintiffs have no further
7 interest in pursuing their claim for injunctive relief in the
8 federal courts. If this case is remanded to the District
9 Court, plaintiffs will amend their complaint to eliminate any
10 claim for injunctive relief and will further move to stay the
11 damages portion of their Section 1983 action."

12 Now, I take it that is your position.

13 ORAL ARGUMENT OF EDWARD N. FITZPATRICK, ESQ.

14 ON BEHALF OF THE RESPONDENTS

15 MR. FITZPATRICK: That is our position, and it is
16 our position for all of our clients, including Mr. James, who
17 is not under indictment.

18 QUESTION: And you speak for all of your clients.

19 MR. FITZPATRICK: I speak for all of our clients
20 in this Court and below, and we said that, Mr. Chief Justice,
21 because in essence what has occurred here is, events have
22 overtaken the need for injunctive relief. There is an
23 indictment. There are motions pending. One motion has
24 already been granted. Our Fourth Amendment claim with
25 respect to lawyer-client privilege has been vindicated in the

1 Superior Court in Bridgeton, New Jersey, by Judge Serata.

2 Indeed --

3 QUESTION: That just relates to some of the
4 material.

5 MR. FITZPATRICK: It relates to some of the
6 materials, and there is a motion pending with respect to our
7 other Fourth Amendment claims as well. We had a forum, at
8 the time there was an indictment, we had a forum for those
9 claims. We raised those claims in the New Jersey forum.
10 Indeed, the Court has disposed very early on of the lawyer-
11 client privilege document and returned certain documents to
12 us as a result of our Fourth Amendment claims, and has under
13 consideration today, and has a motion before him today with
14 respect to other of our Fourth Amendment --

15 QUESTION: Has that motion been argued, Mr.
16 Fitzpatrick?

17 MR. FITZPATRICK: It has not been argued, Your Honor.
18 We have asked for an October 31st date. We are trying to
19 move that along because -- for practical reasons. We have
20 clients who have essentially been put out of business by
21 the pendency of the indictment, so we are making efforts to
22 move that alongs We made the motion and we believe it will
23 be heard, if it is not October 31st of this year, it will be
24 shortly thereafter.

25 MR. FITZPATRICK: Well, I take it the answer to

1 the mootness argument is that this case isn't moot because
2 the entire case should have been dismissed by the district
3 judge.

4 MR. FITZPATRICK: We are prepared to argue that.
5 We are prepared to support the majority of the Third Circuit.

6 QUESTION: I know. There is a good argument that
7 it shouldn't have been dismissed, but there is an argument
8 that it should have been, and that is the issue here, so why
9 is the case moot?

10 MR. FITZPATRICK: That was the issue when we were
11 seeking injunctive relief, because it is the injunctive --

12 QUESTION: I know, but the claim is that the entire
13 case should have been dismissed.

14 MR. FITZPATRICK: I understand that, but it should
15 have been dismissed because of the alleged intrusion on the
16 investigative process by our seeking injunctive relief, not
17 by our seeking damages, and what they argue, that since we
18 sought injunctive relief, our claim not only for injunctive
19 relief but for damages should be dismissed --

20 QUESTION: And that still is the claim.

21 MR. FITZPATRICK: And that still is the claim,
22 but we are not making it --

23 QUESTION: That raises an issue right here in this
24 Court.

25 MR. FITZPATRICK: But we are not seeking, we are

1 no longer seeking the injunctive relief.

2 QUESTION: I know, but you are seeking to stay in
3 court on the damages claim.

4 MR. FITZPATRICK: Yes, we are.

5 QUESTION: The other side says you shouldn't even
6 be in court on that basis.

7 MR. FITZPATRICK: Yes, Justice, we are. We are
8 seeking to stay in court, and we are seeking to stay in the
9 federal court on the damage issue albeit stayed, and we have
10 agreed to the stay.

11 QUESTION: Yes, you want to stay there and the other
12 side says, no, you shouldn't even be there on that.

13 MR. FITZPATRICK: That's correct. That's exactly
14 what this --

15 QUESTION: And so we have an issue under Younger.

16 MR. FITZPATRICK: Well, you have an issue under
17 Younger, but what we say is essentially it is a moot issue
18 because the reason that Younger would be applicable, or the
19 reason it was argued that Younger was applicable to us below
20 is that we were seeking certain injunctive relief which we
21 are no longer seeking. That didn't happen --

22 QUESTION: Well, but up here the attorney for the
23 state is telling us that even if the injunctive relief is
24 no longer sought, that somehow Younger principles mandate that
25 the trial court's decision to dismiss the remaining damages

1 action is appropriate.

2 MR. FITZPATRICK: They have argued that, Justice.

3 QUESTION: Yes, so why don't you address yourself
4 to that?

5 MR. FITZPATRICK: Well, with respect to that, I
6 would say where is the intrusion, where is the necessity --
7 where to comity principles come into play so as to deprive us
8 of what the Congress -- deprived our clients of what the
9 Congress has given them, that is, a right to go into the
10 federal court with a 1983 lawsuit.

11 The Congress passed the law and said that essen-
12 tially under the jurisdiction section, that we have the right
13 to original jurisdiction in the federal courts. It is
14 defeated -- that is a right that was given to us. It is
15 defeated only if by our bringing that particular action we
16 are now going to impose ourselves in a way that would violate
17 the federalism principle on the state process, that is, the
18 investigative process, the grand jury process, or some other
19 state process. In this case it would be investigative and
20 grand jury.

21 What we say is, at that stage we were seeking
22 certain injunctive relief which they could argue would impose
23 upon that particular state those particular state processes.
24 We say that is no longer the case. That happened, unfortuna-
25 tely, about ten or fifteen days after the Circuit Court

1 decided this case. So that what we argue at this stage with
2 respect to mootness, Justice, is that there is no longer any
3 reason for the Federal Court to abstain from a case which is
4 validly before it based on comity principles and based on
5 federalism principles.

6 QUESTION: You are arguing the merits of one of the
7 issues that is before us now.

8 MR. FITZPATRICK: I am sorry, Your Honor.

9 QUESTION: You are arguing the merits of an issue
10 that is before us now. Is that the rule under Younger?

11 MR. FITZPATRICK: Yes, we believe the rule under --
12 we believe that Younger allows, obviously, and mandates
13 abstention under certain circumstances, and what are the
14 circumstances? It was essentially a three-pronged test.

15 QUESTION: Abstention on the damages claim or on
16 the injunctive claim?

17 MR. FITZPATRICK: Well, we say that only on the
18 injunctive claim. We say if we brought a damage suit only
19 originally in the federal court there would be no basis for
20 Younger abstention.

21 QUESTION: Well, would there be a basis for
22 staying the claim until --

23 MR. FITZPATRICK: Yes. We think there would be
24 an argument. At that point in time, Chief Justice, we may
25 very well have argued against it, but today we will not

1 argue against it, and I believe our briefs have indicated that.

2 QUESTION: So then the life part of this case is
3 the petitioners are saying the District Court has discretion
4 to dismiss rather than stay a damages claim in this situation.
5 You say, no, they must only stay it. And does that really
6 make a lot of difference?

7 MR. FITZPATRICK: Whether they stay it or dismiss it?

8 QUESTION: Yes.

9 MR. FITZPATRICK: Yes. I think it makes a lot of
10 difference, because as has been pointed out here we have
11 statute of limitation problems in the event it is not. I
12 mean, there is a two-year statute of limitations. The two
13 years is long past.

14 QUESTION: But the reason that there is no inter-
15 ference is that in this criminal proceeding where you are --
16 the state proceeding that is going on is a criminal proceeding
17 in which you are making a motion to return certain evidence,
18 and there is no way in that proceeding to get damages.

19 MR. FITZPATRICK: That is only partially so, Justice,
20 because --

21 QUESTION: Well, if there was an ongoing state
22 proceeding that would give you the remedy, you would be
23 interfering with a state court.

24 MR. FITZPATRICK: Justice, you see, our case goes
25 far beyond our Fourth Amendment claims.

1 QUESTION: Yes.

2 MR. FITZPATRICK: And what we say is, we now have a for
3 um for Fourth Amendment claims. Where is our forum, Justice,
4 where is our forum for our claim of deprivation of liberty?
5 Where is our forum for our Fifth Amendment claims? Where is
6 the forum for our claim in our complaint that we were deprived
7 of our property, at least on a temporary basis? Those are all
8 claims that cannot be litigated in the present criminal
9 proceeding in New Jersey.

10 QUESTION: Now, were any of those claims other
11 than the Fourth Amendment claim embraced in your request for
12 an injunction against the state proceeding?

13 MR. FITZPATRICK: No, they were not. No, they
14 were not. No, they were not. Just the Fourth Amendment
15 claim, Your Honor, was embraced in the injunctive request,
16 is my recollection. So that the injunctive request really
17 only went to part of our case, and what we argue to this Court
18 is that we are entitled to a federal forum on damages because th
19 that is all that is left in this case. Had the situation
20 been as it is today, we would have never moved for injunctive
21 relief.

22 QUESTION: May I ask you a question?

23 MR. FITZPATRICK: Because it wasn't necessary.

24 QUESTION: You say about the injunction you are not
25 fighting for it. Would it be your position that it would be

1 appropriate for this Court to vacate the judgment of the Third
2 Circuit insofar as it contemplated further proceedings for
3 equitable relief? Do you have any -- as a litigant --

4 MR. FITZPATRICK: Your Honor, we believe that would
5 dispose of the --

6 QUESTION: I know it would dispose. Do you have
7 any interest in a litigant in not seeing that happen, just --

8 MR. FITZPATRICK: As a litigant, no. As a lawyer,
9 obviously, I do. But our litigants do not have an interest
10 in that, because they do not seek --

11 QUESTION: So your litigants really have no interest
12 in defending that portion of the Court of Appeals' judgment.

13 MR. FITZPATRICK: That's correct.

14 QUESTION: The only thing you want to do is be able
15 to maintain your damage action.

16 MR. FITZPATRICK: That's correct. Indeed, the
17 dissent at the Court of Appeals was a dissent only with
18 respect to --

19 QUESTION: I understand. You would be happy with
20 Judge Adams' position.

21 MR. FITZPATRICK: We will take either of the opinions
22 at the Third Circuit at this stage. I must say we argued at
23 the Third Circuit --

24 QUESTION: But you really don't care, your
25 litigants really don't care.

1 MR. FITZPATRICK: The litigants do not care. It is
2 of no moment to any litigant in this case that injunctive
3 relief would be available. They are not looking for it and
4 don't want it.

5 QUESTION: The correctness of the District Court's
6 action, whether it should dismiss or -- should have dismissed
7 or should have stayed depends on what the factual situation was
8 at that time, at the time that it took that action, and at
9 that action the injunction matter was alive. Could we
10 reverse the District Court on the basis of a new state of
11 facts? It seems to me that its action was either right at the
12 time or wrong at the time.

13 MR. FITZPATRICK: Well, that's correct.

14 QUESTION: And if there should have been a dismissal
15 then because there was an injunction pending, why shouldn't
16 we say that?

17 QUESTION: You should say that if that's what the
18 judgment of this Court is based on those facts. I haven't
19 gotten to argue that, but I would argue to this Court that
20 the District Court was there. But you can say that, and if
21 this Court were to say precisely what Your Honor has just
22 said, and leave our damage case in place, it would be of no
23 moment to our litigants.

24 Now, I think it is important again taking up the
25 different stages, and I had intended to argue that, because

1 frankly, it is our position before this Court that at no stage
2 was there -- was Younger abstention appropriate even as
3 events came about. The one thing that we would point out to
4 the Court is that we did not seek to enjoin the prosecution,
5 as they did in Younger. We did not seek to declare unconsti-
6 tutional the statute which the investigation such as it was
7 was going forward.

8 We did not attack the investigation. That was not
9 the focus of the attack in this case. The attack in this
10 case was an attack on the conduct of individual state officers
11 in performing that investigation. We didn't say the state
12 shouldn't be able to indict these people because there is
13 something wrong with the statute, it is unconstitutional, or
14 it is in bad faith. We don't allege that the investigation in
15 this case was in bad faith.

16 QUESTION: You allege it violated the Fourth
17 Amendment, among other things.

18 MR. FITZPATRICK: We allege that the investigation
19 as carried out by the individual defendant petitioners in this
20 case was conduct which violated the constitutional rights of
21 the respondent. We allege that. And in doing so we did not
22 ask to enjoin the prosecution, and today we do not ask to
23 enjoin even those acts. We ask that the case go forward with
24 respect to damages.

25 QUESTION: You have got, in this criminal

1 proceeding you have got the rest of your Fourth Amendment
2 claim pending.

3 MR. FITZPATRICK: Yes, we do, Your Honor. No, we
4 do not. We have another part of our Fourth Amendment claim
5 pending. If Your Honor please, let me explain that to you.

6 QUESTION: Part of it is over.

7 MR. FITZPATRICK: Part is decided, part is before
8 the Court, and part --

9 QUESTION: You don't want to go forward on the
10 damages claim on that part in the federal court.

11 MR. FITZPATRICK: See, we don't have --

12 QUESTION: Because if you did and had it decided,
13 it would foreclose the state court.

14 MR. FITZPATRICK: You see, Your Honor, we don't have
15 a Fourth Amendment claim for damages per se. What we have
16 alleged in our complaint is that there are a host of constitu-
17 tional violations which were caused by an improper effort by
18 the state to coerce several of the clients to give testimony
19 against other individuals in Cape May County.

20 Our Fourth Amendment claim is really threefold.
21 One, it had to do with return of documents that were subject
22 to lawyer-client privilege. It had to do with the return of
23 documents that were outside the scope of the warrant. And it
24 had to do with the officers going -- the way they conducted
25 the search, the way they went out into the yard of this

1 particular area and looked at the serial numbers, for instance,
2 on all of the construction equipment that was there, had
3 nothing whatever to do with what the warrant was issued for.
4 It was simply an effort to find out really --

5 QUESTION: What were your clients indicted for?

6 MR. FITZPATRICK: They were indicted for conspiracy,
7 a bribery case essentially, conspiracy and bribery. It had
8 nothing to do at all with the equipment. The effort was to see
9 if they could pick up a serial number off the piece of
10 equipment that was stolen or some problem with it so that they
11 could then come in and use that to browbeat them to give
12 testimony against other people who they wished to indict.

13 That was the effort we allege -- that we have no --
14 we have no forum for that, even today, because it doesn't
15 challenge the warrant. The warrant didn't say that they could
16 go out in the yard and look at the equipment in the yard. The
17 magistrate, the judge who issued the warrant, he didn't say
18 they could do that. They took that upon themselves. They
19 took that upon themselves.

20 The magistrate or the judge in this case who issued
21 the warrant did not say, listen, fellows, go in there with a
22 blank subpoena and if you see something that you want, we will
23 have an attorney sign the subpoena in blank, and if you see
24 something that isn't under the warrant but you want to pick it
25 up later, fill out this grand jury subpoena and hand it to

1 him, which is what we allege in our complaint occurred.
2 They stacked up all these documents that weren't -- had
3 nothing to do with the warrant, sat down with their blank
4 subpoena, and issued a blank subpoena. We can't challenge the
5 warrant on that basis because the judge didn't authorize that
6 type of --

7 QUESTION: You can challenge all of -- you can raise
8 all of these Fourth Amendment questions in state court now,
9 the same way that you could sue for damages on them in the
10 federal court, can't you?

11 MR. FITZPATRICK: We can raise them only insofar
12 as they affect documents that are presently in the possession
13 of the state or those that would be offered, say, in evidence,
14 those that are evidence against us.

15 QUESTION: Or any verbal testimony by officers
16 gained contrary to the warrant.

17 MR. FITZPATRICK: Correct, Your Honor. Yes,
18 Justice, we could.

19 QUESTION: Well, could I ask to make sure --

20 MR. FITZPATRICK: But there won't be. You see --

21 QUESTION: Weren't there more -- how many defendants
22 have been indicted? Three?

23 MR. FITZPATRICK: Two defendants, two at one
24 company. One company, one partnership, and one individual.

25 QUESTION: How many of the plaintiffs have not been

1 indicted?

2 MR. FITZPATRICK: Three.

3 QUESTION: Three, and two of them --

4 MR. FITZPATRICK: Three, but one individual, one
5 partnership, and one company.

6 QUESTION: And one company. Now, so those -- those
7 are still -- those are unindicted plaintiffs.

8 MR. FITZPATRICK: Yes, Your Honor. Yes.

9 Now, if -- at different times in the progeny of
10 Younger the Court has looked at what facts should we look at
11 in determining whether or not Younger should apply. For
12 instance, in Middlesex County, the belated effort by the New
13 Jersey Supreme Court to provide that petitioner a remedy for
14 his constitutional claims was considered even though that
15 didn't occur until after the Third Circuit's decision.

16 In the Hicks case there was an indictment that was
17 considered. What we argue to this Court is, we are prepared
18 to analyze this case at any stage and argue to the Court that
19 there was never an ongoing state proceeding which was an
20 adequate forum for all of the relevant issues which we raised
21 in the District Court, and that is because there was never a
22 forum even today that would allow us to raise those constitu-
23 tional claims except for some of the constitutional claims
24 under the Fourth Amendment.

25 QUESTION: Is it not true that the claims that are

1 not -- could not be decided in a state forum are all damages
2 claims?

3 MR. FITZPATRICK: No, there are other claims which --
4 there are other claims -- I am sorry. I missed part of your
5 question. Are you saying to me that --

6 QUESTION: Are those claims that you say can only
7 be decided in the federal court, such as trying to put
8 pressure on your people to testify? There is no state forum
9 for that, but you are not seeking -- you never sought an
10 injunction against that, did you?

11 MR. FITZPATRICK: No, we did not.

12 QUESTION: You just wanted damages.

13 MR. FITZPATRICK: We did not, and there is a state
14 forum.

15 QUESTION: Oh, sure.

16 MR. FITZPATRICK: In all honesty I must say that we
17 could file the exact pleading in the state court, but the
18 Congress allowed us to file it in the federal court, and we
19 chose to do it.

20 QUESTION: Yes.

21 MR. FITZPATRICK: So there is a forum. The question,
22 as I --

23 QUESTION: But it seems to me that to the extent
24 that you are describing claims that you think you have no
25 state remedy other than a 1983 claim are basically damage

1 claims.

2 MR. FITZPATRICK: Yes. Yes. Correct.

3 QUESTION: And you are willing to --

4 MR. FITZPATRICK: On all of them, even the one
5 aspect of the Fourth Amendment that we can't raise as a
6 damage claim. It is not an injunctive claim. We have no
7 injunctive claims any longer. The injunctive claims were
8 mooted by what occurred.

9 QUESTION: You did say, Mr. Fitzpatrick, you could
10 have brought your 1983 claims for damages in the state court
11 if you chose?

12 MR. FITZPATRICK: Yes, we could have.

13 QUESTION: But you had the option of federal or
14 state court.

15 MR. FITZPATRICK: Yes, Justice, we had an option.
16 We believe the Congress gave us that option. We selected
17 the federal court. And we believe that in applying Younger
18 this Court ought to respect, and we argue to you you should
19 respect our choice of forum, unless what we are doing is so
20 offensive to the principles of comity --

21 QUESTION: Let's just assume that the only claim
22 that you had in the federal court for which you ask an
23 injunction and damages was simply that there was a -- certain
24 of the evidence was seized in violation of the Fourth
25 Amendment, and you won an injunction, and then there was an

1 indictment, and you could raise -- every claim you had except
2 damages could be raised in the criminal proceeding. Would
3 you say that the federal proceeding could go forward just on
4 damages?

5 MR. FITZPATRICK: I would argue yes, and I also
6 know I would be in a lot of trouble in this Court in arguing
7 yes, but I would argue to you yes, but the fact is that --

8 QUESTION: Well, yes, but --

9 MR. FITZPATRICK: -- that is not our case.

10 QUESTION: Well, I know, but you keep saying you
11 could go forward on your damages claim, but if that proceeding,
12 if the federal case was decided before the state case, you
13 would be foreclosing the state court from deciding your Fourth
14 Amendment claim.

15 MR. FITZPATRICK: Justice, I don't believe that in
16 the real world, that there is any chance that that could
17 happen, especially given the calendars, what they are in
18 New Jersey today. We would never get a decision.

19 QUESTION: Just say that you would never go forward
20 on your damages claim in my example in the federal court.

21 MR. FITZPATRICK: I am sorry, you lost me. Or maybe
22 I lost myself.

23 QUESTION: I don't think the state criminal
24 proceeding is as much, almost as much interfered with by
25 a holding in the federal court that evidence has been seized

1 in violation of the Fourth Amendment.

2 MR. FITZPATRICK: Yes, Your Honor, and I can under-
3 stand it makes it a much closer --

4 QUESTION: And if it takes as long to get to the
5 criminal proceeding as this, as it may be that the federal
6 court could get your damages case decided before anything
7 significant happens in the state court.

8 MR. FITZPATRICK: Most doubtful that that could
9 happen, but let me get back to the earlier point, Justice,
10 which you made.

11 If that were the only case, that is, our Fourth
12 Amendment claims that we now have pending in New Jersey,
13 that would make this case a closer case. That would make it
14 a much closer case respecting whether there ought to be
15 Younger abstention, because obviously the state provided us
16 a forum. It did it in a way that we didn't appreciate. That
17 was through an indictment. But we have a forum to test it
18 except for damages. But that is not this case. This case
19 goes far beyond anything which we are now or can litigate in
20 the state court. It goes to violations of -- 1983 violations
21 far beyond those aspects of the Fourth Amendment, and that is
22 why we most respectfully argue to this Court, you must look
23 at our entire case. Look at and find out whether or not
24 there was an ongoing state proceeding at any stage which could
25 have allowed us to litigate those claims, the claims of

1 deprivation of liberty, the claims of deprivation of property,
2 having nothing whatever to do with the matters under which our
3 clients are indicted. Indeed, I say to you, whether or not
4 our clients are convicted is irrelevant to that lawsuit because
5 either the state officers on October 5th, 1984, when they
6 went there, they either violated the constitutional rights of
7 our clients or not, and even if they were guilty of something,
8 even if they were guilty of something, they were entitled not
9 to have their rights violated, and we allege they were
10 violated in more ways than merely the seizing of the documents
11 which are now being challenged pursuant to our Fourth
12 Amendment motions in the state court.

13 QUESTION: May I ask you one question about state
14 procedure?

15 MR. FITZPATRICK: Yes, sir.

16 QUESTION: In this case, I don't remember his name,
17 there is one state court judge that seems to have been super-
18 vising the grand jury, issued the --

19 QUESTION: Lenox.

20 QUESTION: Lenox. He operated in about three
21 different areas of the law. Is that typical, or is that
22 just kind of a coincidence?

23 MR. FITZPATRICK: That is most unusual. If we
24 were to file a state case it would be in Cape May County, and
25 Judge Lenox is in Trenton. It happens because Judge Lenox

1 is the assignment judge in Trenton. The state grand jury sits
2 in Trenton, and Judge Lenox has been assigned to supervise
3 the procedure of the state grand jury.

4 QUESTION: He doesn't automatically do that as
5 assignment judge?

6 MR. FITZPATRICK: No, but he also had a second role.
7 It happened that he was the issuing magistrate for the warrant
8 as well, but the state could have gone to any judge. Indeed,
9 municipal magistrates are available, and others. In this case
10 they chose, because they regularly take their business to
11 that court -- it just happens it is across the street, so that
12 is why they go there.

13 QUESTION: He is the one who is ruling on things
14 like whether some documents were seized that were not
15 described in the warrant and so forth. Is that because he was
16 in charge of the grand jury, because he was the assignment
17 judge, or because he issued the warrants?

18 MR. FITZPATRICK: It is because -- frankly, I
19 arrived on the scene on October 5th and got Judge Lenox on
20 the phone, and I was the lawyer who complained that we
21 weren't getting a receipt for these documents, so when
22 Judge Lenox said that, he said, seal them all, and he put
23 them under seal.

24 The federal case -- you have to understand the
25 chronology.

1 QUESTION: You did that because he was the
2 issuing --

3 MR. FITZPATRICK: He was the issuing magistrate or
4 the issuing judge, but the chronology is important, Justice.
5 This case was started before the state filed an ex parte order
6 to show cause. There was no proceeding pending. There was
7 no state proceeding pending when this complaint was filed, so
8 if this Court were to look at where we were on December 27th,
9 1984, when this complaint was filed, there were no state
10 proceedings pending. The state proceeding came, and I wrote
11 it down, but it is some time in February or March of 1985, by
12 virtue of an order to show cause that the state brought.
13 They brought it, and then, of course, let that order to show
14 cause sit there.

15 We argue to you reason tells us that they did that
16 so that they could have created a proceeding that they could
17 go to the federal court and say, oh, look, there is a pro-
18 ceeding in New Jersey on some of these same matters, so you
19 ought to throw these plaintiffs out of the Federal District
20 Court because they, despite the urging of Judge Lenox, for
21 over a year they did absolutely nothing with the order to
22 show cause. Nothing occurred. It just sat there. And then
23 when something happened we wrote to Judge Lenox, and Judge
24 Lenox said this case is deemed withdrawn because of this hiatus
25 and this inaction.

1 So that while they were bound and determined to get
2 this order to show cause, certainly the state showed not so
3 great diligence on following up on the order to show cause,
4 although they obviously pointed to it at every stage in the
5 federal proceeding.

6 Finally, Justices, let me say that the Potomac case,
7 the Potomac Electric Company case, juxtaposed to our case, I
8 think amply demonstrates what the true differences are. In
9 that case the plaintiff sought to have declared unconstitution-
10 al the underlying statutes with which they were threatened an
11 indictment, and they sought to have -- essentially affect
12 the investigation by having the statute it was based on
13 declared unconstitutional. Not so here. In our case we did
14 not do that, and that is the difference, because if there was
15 an -- if you consider the grand jury to be an ongoing state
16 proceeding, we would argue to the Court that it is not an
17 ongoing state judicial proceeding, and that there is no
18 certainty that Potomac Electric would have forgotten to argue
19 its case.

20 Indeed, since there was no indictment, what we
21 argue indeed came true in Potomac Electric. They never got to
22 be able to argue the constitutionality of the ongoing statute
23 because there was no indictment, but in our case that is not
24 what occurred. We are not challenging that. We are not
25 challenging any statute, and therefore we are in a different

1 position. We are in a position where there is absolutely
2 no adequate forum in the state court by virtue of an ongoing
3 proceeding even if there is an indictment.

4 QUESTION: After you have gone over all of this,
5 do you agree that if we say injunction is out, damages are
6 in, you are satisfied?

7 MR. FITZPATRICK: I am satisfied and I will go
8 home, Your Honor.

9 QUESTION: Well, what is all this argument about?

10 MR. FITZPATRICK: It is over as far as I am con-
11 cerned, Justice Marshall. Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fitzpatrick.

13 Mr. Etzweiler, you have four minutes remaining.

14 ORAL ARGUMENT OF LARRY R. ETZWEILER, ESQ.

15 ON BEHALF OF THE RESPONDENTS - REBUTTAL

16 MR. ETZWEILER: With respect to the mootness
17 question, and it is particularly with respect to the mootness
18 of the question whether state grand jury proceedings are
19 judicial proceedings for the purposes of the Younger absten-
20 tion doctrine, this is certainly a case which is capable of
21 repetition but evasive of review.

22 This Court has before it two cases, the PEPCO
23 versus Sachs case out of the Fourth Circuit, it has this
24 case out of the Third Circuit holding directly conflicting
25 theories. In the PEPCO case the grand jury chose not to

1 return an indictment. In this case the grand jury chose to
2 return an indictment. It is very likely every time this
3 issue arises in the Third Circuit by the time it gets to this
4 Court, even in a very complex case as of this nature in which
5 the grand jury pleadings were extensive, one status or the
6 other is going to arise.

7 Therefore, it would be a basis of review -- evasive
8 of review. It is certainly capable of repetition in this
9 case because there are grand jury proceedings outstanding with
10 respect to the plaintiffs because these plaintiffs may again
11 have a search warrant or other proceedings in the course of
12 those grand jury proceedings because these plaintiffs have
13 agreed to abandon their injunctive claim with respect to
14 this indictment but they haven't agreed to abandon these
15 claims with respect to any future criminal proceedings which
16 may ensue and which currently are under investigation.

17 Also, what we are reviewing here is the propriety
18 of the District Court opinion in which a dismissal was
19 entered. That dismissal was premised in part upon the
20 facts as existed at the time it entered its judgment, and it
21 was premised in part upon its conclusion that Younger
22 applied by virtue of the ongoing grand jury proceedings. To
23 review that judgment and to review whether that dismissal was
24 proper requires an adjudication of the first question which we
25 have raised, that is, whether the grand jury proceedings are

1 state proceedings for purposes of the Younger abstention
2 doctrine. That is with respect to mootness. With respect
3 to when the state proceedings were started and with respect
4 to part of what my opponent here was saying in his argument,
5 we submit that the proceedings, the state proceedings were
6 started first of all with Mr. Fitzpatrick's telephone call to
7 Judge Lenox seeking the sealing order. They may have been
8 started earlier with the Judge's issuing of a search warrant.
9 In our last brief filed in this matter we made some comparison.
10 A search warrant is very much like an ex parte writ of
11 attachment. State officials go to a judge. They submit an
12 affidavit. They get an order which is called a search warrant.
13 That allows them to go and take property, and to retain that
14 property until such time as the plaintiffs come into Court
15 in New Jersey under a Rule 357 motion explaining why the state
16 should not retain that property.

17 That is very much like an ex parte writ of
18 attachment which this Court, I think, in Trainor versus
19 Hernandez found sufficient for a state ongoing proceeding, so
20 we dispute the proceedings in this case started at the late
21 date which my opponent says. We submit they started much
22 earlier.

23 Third, with respect to the question whether these
24 plaintiffs are seeking to enjoin the grand jury, I want to
25 point out, first of all, the Perez versus Ledesma case,

1 which -- the Third Circuit had no problem with this question.
2 They agreed taking documents away from a grand jury investi-
3 gation which would substantially interfere with these pro-
4 ceedings, and they partially relied upon case law from this
5 case. I think if you look at Perez versus Ledesma you will
6 find, that was one of the companion cases to Younger, that in
7 this case this Court held that the District Court's adjudica-
8 tion that Texas officials had to return property was a sub-
9 stantial interference.

10 Thank you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Etzweiler.

12 The case is submitted.

13 (Whereupon, at 2:36 o'clock p.m., the case in the
14 above-entitled matter was submitted)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-890
CASE TITLE: Dean Deakins, et al., v. William Monaghan, et al.
HEARING DATE: October 14, 1987
LOCATION: The Supreme Court of the United States

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States.

Date: October 20, 1987

Margaret Daly

Official Reporter

HERITAGE REPORTING CORPORATION
1220 L Street, N.W.
Washington, D.C. 20005

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'87 OCT 21 P3:11