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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ARTHUR J. BLANCHARD, Petitioner V.
JAMES BERGERON, ET AL.

CASE NO: 87-1485

PLACE: WASHINGTON, D.C.

DATE: November 28, 1988

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1485, Arthur Blanchard v. James Bergeron.

Mr. Rosen, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM W. ROSEN

ON BEHALF OF THE PETITIONER

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

The Blanchard police brutality case presents two issues. The first is whether a contingent fee contract forms a cap on section 1988 reasonable fees, and the second is whether paraprofessional time should be included within the auspices of section 1988.

I came to this case after it had already been filed. A fellow attorney became ill and asked me to take it over. I reviewed it, decided that it had merit, and after that asked him what sort of fee arrangement he had.

He told me he had a 40 percent contingent fee contract with Mr. Blanchard, but that if I won, or the case was won, there would be fees under the Civil Rights Attorneys' Fee Award Act.

1 QUESTION: Mr. Rosen, tell me how those two
2 work together. Does the attorney get both fees?

3 MR. ROSEN: No, sir. I think you've got to
4 then look at what is meant.

5 For example, I would say 99 percent of all
6 negligence cases that are taken in the United States are
7 taken when the client comes in, a contingent fee
8 contract is accepted on that sort of basis.

9 But section 1988 applies to the end of the
10 case, and is not a relationship with the client, it is
11 the implementation of fees against a losing party who
12 has violated a civil rights.

13 QUESTION: Well, I understand all that. But I
14 want to know what the, what the attorney gets out of the
15 winning case. Does he get both fees?

16 MR. ROSEN: I don't think so. I think he gets
17 a reasonable fee as determined by the court, after
18 review of the Loadstar method. Now --

19 QUESTION: So that the contingent fee then,
20 arrangement, really means nothing?

21 MR. ROSEN: It is in, for general purposes, I
22 think, irrelevant as to the implementation of 1988
23 fees. May it be a consideration for enhancement for the
24 value of the vindication of a right, over and above what
25 the court may think is a satisfactory fee on an hourly

1 basis times hour -- hourly amount, a fee, time number of
2 hours, Loadstar.

3 QUESTION: Well, then you think the court
4 would fix the reasonable fee less the contingent fee?

5 MR. ROSEN: Justice Blackmun, I don't think
6 that the contingent fee per se is a consideration. I
7 think it is irrelevant in the, in the implementation of
8 1988.

9 I do not think that it is, it is a relevant
10 factor, because it is the private agreement between a
11 client and an attorney, whereas the implementation of
12 1988 comes at the end after all of the work has been
13 done and Congress, the intent of Congress, as I
14 understand it from the cases, are that this is part of
15 the vindication of the civil right.

16 QUESTION: I understand all that. But I can
17 also sense a lot of attorneys taking both fees.

18 MR. ROSEN: If 1988 is implemented correctly,
19 I do not think that both fees probably are necessary or
20 probably should be taken.

21 I think then you may get into the possibility
22 of consideration of windfall, but I don't think that's
23 -- I think it's a consideration but I think the
24 reasonable fee as instituted, as required by 1988, is
25 the primary consideration, and that primary

1 consideration is Loadstar.

2 QUESTION: Well, I'm wondering really why, in
3 a case that is subject to 1988, a contingent fee
4 arrangement is at all necessary or indeed indicated.

5 MR. ROSEN: I think the reason for that,
6 Justice Blackmun, is this. A client walks into an
7 attorney's office and says, I have --

8 QUESTION: I know exactly how it happens. You
9 don't have to tell me that. But I want to know where --

10 MR. ROSEN: He may not know -- the attorney
11 may not know what he has. He may not be aware that it
12 involves a civil right violation when someone comes into
13 his office.

14 Therefore, if it involves a negligence type of
15 situation, the standard agreement, as I say I think
16 probably 99 percent or more --

17 QUESTION: Well, that's a little high, after
18 my old practice days anyway.

19 MR. ROSEN: And I think, sir, that the, that
20 the standard before you even know what the investigation
21 will show as to what kind of case you have, is a
22 contingent fee contract.

23 Now, basically what the Fifth Circuit said to
24 me was that, Mr. Rosen, you didn't take, you didn't
25 adjust the contract, which was not mine to begin with,

1 but you did not go back and adjust the contract to say,
2 I'll take the higher of the 1988 or contingent fee or
3 whatever it was that should be adjusted.

4 what the Fifth Circuit says, next time you'll
5 know better. That's precisely what they said in their
6 opinion. I just don't think that's the correct
7 application of 1988.

8 QUESTION: Mr. Rosen, do you read the Fifth
9 Circuit opinion as saying that the \$4,000 attorney's fee
10 is payable by the defendant over and above the \$5,000
11 actual damages and the \$5,000 punitive damages?

12 MR. ROSEN: Yes, sir. Over, over and -- yes.
13 It is a fee on top of the actual damage portion.

14 QUESTION: So --

15 MR. ROSEN: Otherwise it would be, it would
16 certainly be a windfall to the defendant.

17 QUESTION: Yes. So the defendant will have to
18 pay \$14,000 under the Fifth Circuit's judgment?

19 MR. ROSEN: The defendant would have to pay
20 \$14,000 -- well, I hope that is what the Fifth Circuit
21 said.

22 Mr. Chief Justice, I cannot tell from reading
23 the Fifth Circuit opinion whether that is actually what
24 they meant. I would certainly hope that's what they
25 meant, but they don't say that the defendants shall pay

1 this additional amount, or that it shall come out of Mr.
2 Blanchard's portion.

3 I certainly hope it's the former of those, and
4 I think that clearly is the intent of this Court and the
5 intent of Congress to do that.

6 QUESTION: The District Court awarded you
7 \$7,500 in attorney's fees.

8 MR. ROSEN: Yes, sir.

9 QUESTION: And did you appeal from that?

10 MR. ROSEN: I appealed from that on two
11 bases --

12 QUESTION: And those are the two that you
13 raise here?

14 MR. ROSEN: Well, the first in the appeal to
15 the Fifth Circuit, the paraprofessional issue, was
16 included within the whole attorney fee issue.

17 But the second part, which I did not bring to
18 this Court, was the law court awarded me out of some
19 \$5,000 out-of-pocket expenses of my own on the case,
20 they awarded me about \$800. The Fifth Circuit
21 reimbursed me almost the whole \$5,000 approximately, so
22 I did not bring that issue to this Court.

23 The issue here involves the cap issue, and
24 obviously I cannot win on the paraprofessional issue
25 unless you reverse on the cap issue.

1 QUESTION: May I ask you a question about --
2 just following up really on Justice Blackmun's question
3 -- supposing you had not appealed, just received the
4 \$7,500 fee, and putting the costs to one side for a
5 moment.

6 Is it your understanding that \$4,000 of that
7 \$7,500 would have gone to the client and you would have
8 kept \$3,500? Or would it have all gone to you, or all
9 to the client?

10 MR. ROSEN: Justice Stevens, as a practical
11 matter, I have received no fee at the present time. So
12 that in answer to your question, my understanding is
13 that I would have received \$7,500 from the defendant.
14 And the client would get the entire \$10,000 --

15 QUESTION: Right.

16 MR. ROSEN: Which had been awarded, and I hope
17 and I think that's the way the process should work.

18 QUESTION: Or if the client had paid you the
19 -- say they had paid the principal judgment right away
20 while the fees were being debated, \$10,000 would have
21 been paid to the client, the client would have paid you
22 \$4,000 as the 40 percent contingent fee, then if
23 thereafter \$7,500 was recovered \$4,000 would go to the
24 client and \$3,500 would go to you.

25 MR. ROSEN: I think that's the way the system

1 should work.

2 That's, that's my opinion, because certainly
3 it would be hoped, under the intent of Congress, under
4 the civil rights statute, that if a judge or a jury
5 declares that Mr. Blanchard in this case was damaged to
6 the degree of \$5,000 compensatory and \$5,000 punitive
7 damages, it seems to me when you have the Civil Rights
8 Attorney's Fee Award Act, that the reasonable
9 compensation of the attorney should be based on that,
10 and the person who has had his rights damaged should
11 then get whatever the judge or jury has awarded.

12 QUESTION: Well, what would happen if an
13 attorney spent just a small number of hours on a case
14 and received a huge award, and he had a contingent fee
15 contract?

16 MR. ROSEN: Justice Kennedy, you mean a huge
17 award under the contingent fee?

18 QUESTION: Yes.

19 MR. ROSEN: Under the contingent fee --

20 QUESTION: And, and suppose that we'd all
21 stipulate that a reasonable fee would be \$20,000 but his
22 contingent fee was \$100,000, what happens then?

23 MR. ROSEN: I think then you get into the area
24 of whether or not the vindication of the particular
25 right was worthy of an enhancement and at that period of

1 time, at that time, then it is a question of looking at
2 what is the relationship and what does the contract call
3 for.

4 It may well --

5 QUESTION: Well suppose the, suppose the trial
6 court said a reasonable fee here is \$20,000, but the
7 judgment was huge, and under the contingent fee contract
8 the fee award under the contingent contract was
9 \$100,000?

10 MR. ROSEN: It may well be that a reasonable
11 fee then would be \$20,000, in your example, \$20,000.

12 QUESTION: It is. But does the attorney get
13 to keep the \$100,000 enforcing his contract against the
14 client?

15 MR. ROSEN: I don't think that the attorney
16 keeps the \$100,000, except --

17 QUESTION: You mean the contingency fee
18 contract is just, is just invalidated?

19 MR. ROSEN: Except to the degree for 1988
20 purposes, except to the degree of the value of the
21 enhancement of the right, of the enforcement of the
22 right --

23 QUESTION: You think 1988 was intended to
24 reduce the contractual entitlement of the lawyer?

25 MR. ROSEN: I think --

1 QUESTION: I mean, here you have a lawyer who
2 struck a deal for, you know, to get \$100,000, and you're
3 telling me 1988 was meant to somehow interfere with that
4 contractual agreement?

5 MR. ROSEN: I think there are two different
6 issues. I think the issue of the private contractual
7 relationship between the attorney and client is one
8 controlled by private law of contract and state law.

9 I think the 1988 issue -- and that comes into
10 play as I've mentioned at the very beginning of the
11 relationship. At the end, 1988 comes into play at the
12 end.

13 QUESTION: That's fine. But which one
14 trumps? Why doesn't he get \$100,000? That's all that I
15 don't understand. Why doesn't he --

16 MR. ROSEN: Clearly, from the basis of a civil
17 right litigation, 1988 does, under the supremacy clause
18 of the Constitution. And this Court basically has said
19 that in --

20 QUESTION: Well, the supremacy clause doesn't
21 have anything to do with a private contract.

22 MR. ROSEN: No, sir. It has nothing to do
23 with a private contract.

24 For example, suppose in the court's wisdom I
25 got \$1 worth of fee. Would I feel justified in the

1 hours and time put in to say to Mr. Blanchard, I think
2 under state law I will enforce this contract for
3 \$4,000? I think I would be justified.

4 Now --

5 QUESTION: Supposing that a client walks into
6 your office with something that you, being a
7 knowledgeable lawyer, know is a civil rights case, and
8 that there will therefore be an award of attorney's fees
9 if you win, and you tell the client, I think we can get
10 a judgment for \$100,000 here and if we do I think the
11 court probably is going to award another \$50,000 as
12 attorney's fees.

13 My arrangement with you is, I'm going to take
14 half of whatever the court awards, both as damages and
15 as attorney's fees. So if we get \$100,000 damages and
16 \$50,000 attorney's fees I will get \$75,000 and you will
17 get \$75,000.

18 Do you think that is a permissible
19 arrangement?

20 MR. ROSEN: I think it is permissible. I
21 think that the question is always in the civil rights
22 area the reasonable fee under 1988.

23 QUESTION: Well, do you --

24 MR. ROSEN: Then the question --

25 QUESTION: Supposing that you're an attorney,

1 you've negotiated that sort of an arrangement, you come
2 to the court and you say, this is what I want the
3 judgment entered for.

4 In other words, is the court going to uphold
5 that kind of a fee arrangement?

6 MR. ROSEN: Mr. Chief Justice, there are
7 various fee arrangements --

8 QUESTION: Well, I've given you one fee
9 arrangement. Will you answer my question?

10 MR. ROSEN: The court may uphold that fee
11 arrangement if they find it reasonable. Yes sir.

12 QUESTION: Well, what factors would they take
13 into consideration in deciding whether it was reasonable
14 or not?

15 MR. ROSEN: I think the fact of time spent on
16 the case, of market rate of billing hours, I think the
17 degree of success in the vindication of the civil
18 right. Somebody can certainly handle a case quicker or
19 achieve a result quicker than someone else, but that
20 still does not mean that a fee is reduced.

21 So there are a number of factors I think are
22 very valid. But simply to --

23 QUESTION: Mr. Rosen, the hypothesis is that
24 after taking into all, account all of those factors the
25 judge concludes that \$50,000 is a reasonable fee.

1 Then the question is if you have a contractual
2 right to another \$25,000 can you enforce the contract?

3 MR. ROSEN: I would have to say that, if the
4 court said a reasonable fee was \$50,000, then under that
5 civil -- if the only issue was the civil rights case --

6 QUESTION: Correct.

7 MR. ROSEN: Then I think that \$50,000 must be
8 accepted as the reasonable fee.

9 QUESTION: And that a private contractual
10 arrangement in the civil rights area for a higher fee
11 would be unenforceable as a matter of federal law.

12 MR. ROSEN: Unless there was an enhancement
13 factor that the court looked at.

14 QUESTION: No, no. All these enhancement
15 factors have been taken into account in determining the
16 court-awarded reasonable fee of \$50,000.

17 You're saying, as I understand you, that as a
18 matter of federal law precludes an additional fee, even
19 though the parties had contracted for it.

20 MR. ROSEN: I think in the civil rights area I
21 have to argue that is, that is the correct fee, if the
22 court says it is the correct fee.

23 QUESTION: The state court too?

24 MR. ROSEN: I'm not sure that applies to the
25 state court too, if there is a state, if there is a

1 state issue involved in it.

2 For example, the court, a couple of recent
3 cases that, Justice Marshall, clearly have said that
4 when it comes to a civil rights case, 1983 --

5 QUESTION: No, that's not my point. My point
6 is you get the \$75,000 from the federal side, and you'd
7 come back to the client and say, I also have one with
8 you for \$40,000. Does the state court enforce that
9 \$40,000 one?

10 MR. ROSEN: I think under the rulings of this
11 Court in the supremacy area that the federal civil
12 rights acts are supreme to that issue also.

13 I'm not quite sure I understand the question,
14 but I --

15 QUESTION: You said in the contract, if I win,
16 if I win I will give you 40 percent of what I make. And
17 not -- the one two words that are not in that contract
18 are civil rights.

19 Would that be enforceable after you collect
20 the federal money? Yes or no.

21 MR. ROSEN: I do not believe it would be
22 enforceable if the federal court had determined a
23 reasonable fee.

24 QUESTION: And the state court couldn't
25 enforce a state contract?

1 MR. ROSEN: The state court could enforce a
2 state contract were it not for the holdings of this
3 Court in the area of supremacy of the civil rights
4 statute.

5 Now, that may be talking against myself,
6 against my brother lawyers, but I think a reasonable fee
7 is a reasonable fee. The question is, have I, or what
8 is a reasonable fee for the work performed?

9 QUESTION: Well, you can get disputes as to
10 what's a reasonable fee. I've seen it run as high as 70
11 percent, which I didn't think was reasonable, but I
12 found people did think it was.

13 MR. ROSEN: Well, it's clear that both in
14 state and federal law, clear certainly in Louisiana that
15 cases go back to, I think, 1934 --

16 QUESTION: I'm talking about Louisiana.

17 MR. ROSEN: That if I took a 70 percent
18 contingent fee contract the courts are going to review
19 it, because the courts have final jurisdiction to review
20 attorney's fees.

21 If I took \$5,000 an hour as a fee, contract,
22 even if submitted to by the client, he later objected,
23 that is going to be subject to court jurisdiction to
24 review.

25 So it is going to be a subject which is

1 always, the final arbiter of it is going to be the
2 courts, no matter what court it is.

3 I would like to talk briefly -- one other
4 question, one other issue on the, on the cap, and that
5 is, we have been talking about fees and money and
6 proportions.

7 But we are really talking there about monetary
8 awards, and certainly it has been shown and held by many
9 courts that the monetary award is not the only factor.
10 If monetary awards were the only factor, then this would
11 be nothing more than a negligence case.

12 The other factors are the vindication of a
13 right. And that is, as I read the cases, the principal
14 issue, because many civil rights awards are not large,
15 monetarily, and certainly some ask for injunctive
16 relief. So there would be no fee then, if you had a
17 contingent fee contract.

18 Another question is, do I get, or does any
19 attorney get less by having a contingent fee contract
20 than he would by having no contract, nothing that said
21 anything? And that just doesn't seem the correct
22 application of 1988.

23 The second issue in this is whether
24 paraprofessional time should be included in 1988 fee,
25 fee award.

1 It certainly is to be included, it seems to
2 me, under the Loadstar calculation, and that is what I
3 ask the Court to do. It is to be included because if it
4 is not the cost of legal services will substantially
5 increase.

6 The work has to be done, the attorney has to
7 do the work or have the work performed, so that the work
8 performed by paraprofessionals, law clerks and
9 paralegals, done under the supervision of an attorney,
10 done subject to his responsibility and his malpractice
11 insurance responsibility, seems to me absolutely valid
12 to have that included --

13 QUESTION: You're going to add the secretarial
14 time, paper, paper clips?

15 MR. ROSEN: No, sir.

16 QUESTION: Electricity?

17 MR. ROSEN: No, sir. And the reason why,
18 Justice White, is this. Part of it, I suppose, is
19 tradition.

20 Never that I know about in my practice has
21 secretarial time or the paper clip cost of overhead been
22 included as a billable amount. Also --

23 QUESTION: Of course, in my day, we didn't
24 charge for paralegals either. And now apparently they
25 do. So maybe ten years hence paper clips will be

1 charged for.

2 MR. ROSEN: Well, I, I don't want to use a
3 crystal ball, Justice Blackmun, but --

4 QUESTION: Anything to increase it.

5 MR. ROSEN: I might add that in, since I have
6 been practicing, I do not know of any firm that does not
7 charge a market rate to its clients of paralegals and
8 law clerk time. I do not know of any firm that simply
9 accepts the expense of those services as simply
10 overhead.

11 There's another reason. Paraprofessionals are
12 a profession. They should be recognized as a
13 profession.

14 QUESTION: What do you mean when you say
15 they're a profession?

16 MR. ROSEN: Absolutely --

17 QUESTION: Well, I said what do you mean when
18 you say they're a profession? I didn't ask you if you
19 would repeat yourself.

20 MR. ROSEN: They are trained, they have a
21 course of study, they are certified. The American Bar
22 Association has a system of certification of many
23 schools.

24 They are in the same area as, for example,
25 emergency medical technician. They require special

1 training in order to perform their special duties.

2 QUESTION: But are their duties more akin to
3 what a lawyer performs or more akin to what a secretary
4 traditionally performed?

5 MR. ROSEN: My opinion is they are much more
6 akin to what a lawyer performs than what a secretary
7 performs.

8 QUESTION: Do you charge for Lexis and
9 Westlaw?

10 MR. ROSEN: I think there is a -- I don't
11 personally have Lexis and Westlaw, but I think there
12 usually is a charge for --

13 QUESTION: Well, in Louisiana do they usually
14 charge for that as a separate item?

15 MR. ROSEN: I think that is charged as a
16 separate item, but I cannot address it because I haven't
17 used that.

18 QUESTION: Actually, they're a paraprofession,
19 aren't they, they're not really a profession?

20 MR. ROSEN: Paraprofession, I suppose, is
21 correct.

22 They are certainly, Justice Scalia, I suppose
23 that they are, in my opinion, and I've been involved in
24 the paralegal area for more than ten years in helping to
25 organize the Tulane program, and have taught in two

1 schools, and I would say that they are much closer to a
2 profession today certainly than would be a legal
3 secretary.

4 And that's the reason I say to the Court, they
5 should be recognized as such. If it were not for their
6 work, attorneys would have to do the work. The contact
7 with witnesses, the law clerk in my particular case
8 accompanied me three days at trial and was a great
9 help. One of them did the first draft of the fee
10 application and researched the law on it.

11 These are not areas that a legal secretary
12 does. These are areas that are much more akin to what a
13 lawyer will have to do.

14 QUESTION: Now, is this a law clerk or a
15 paralegal that you're talking about who drafted the
16 first application for the fee?

17 MR. ROSEN: A law clerk.

18 QUESTION: Who had, who is in law school?

19 MR. ROSEN: Correct. Both -- there were two
20 at various times, after one graduated he was followed by
21 another. But both of them were seniors at Tulane
22 University law school.

23 QUESTION: Well now, would you have had a
24 paralegal possibly draft a fee application like that?

25 MR. ROSEN: Mr. Chief Justice, my opinion is

1 that, if at all possible, law students or law clerks
2 should do the legal research and paralegals, legal
3 assistants, should do the factual part.

4 Are paralegals trained to do legal research?
5 Yes, they are. Have they had as much experience? Have
6 they had as much training as the, someone in law school
7 who's a senior in law school? No, they have not.

8 So in the way I approach this particular case,
9 and the way I've used both, has simply been that the
10 primary duty of research is the law clerk, the primary
11 duty of the paraprofessional is the contact with the
12 investigation, the witness contact, although that was
13 also --

14 QUESTION: What does the, what does the
15 paraprofessional do when they're contacting witnesses?
16 Do they go out and interview the witness?

17 MR. ROSEN: Yes, sir.

18 QUESTION: By themselves?

19 MR. ROSEN: Yes, sir. I have had them do
20 that. As a matter of fact I've --

21 QUESTION: And is that a fairly common thing
22 for them to do?

23 MR. ROSEN: It's common in my office, Mr.
24 Chief Justice. As I say, I've taught the legal
25 interviewing course, and my paralegal on this particular

1 case was one of my students. So I had no question with,
2 with that individual talking to witnesses.

3 QUESTION: What if you asked your
4 brother-in-law to go out? He happened to be passing by
5 that way and you asked him to talk to this witness, just
6 to find out if this witness saw anything.

7 MR. ROSEN: Is he a member of my staff,
8 Justice Scalia? Is he a hired member under my control
9 and for whom I am responsible?

10 QUESTION: Oh, well, you offer him 50 bucks if
11 he'll do it.

12 MR. ROSEN: I don't -- I would not consider
13 that a paraprofessional. No, sir.

14 QUESTION: And that's, that's the line, you
15 can't bill it because he's not a paraprofessional?

16 MR. ROSEN: I would say it is not the common
17 practice. Let me put it the other way. It is the
18 common practice of billing market rate for paralegals,
19 legal assistants, and law clerks.

20 It is not the common practice, that I know
21 about, to bill the rate purely of somebody you hire out
22 as an investigator, as a subcontracted event. That
23 would be something that would have to be a cost but not
24 a market rate bill, and that --

25 QUESTION: Is all that in the record?

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MR. ROSEN: I'm sorry --

QUESTION: Is that in the record?

MR. ROSEN: I'm not --

QUESTION: What you've just said, that the custom of billing and all in New Orleans, is that in the record?

MR. ROSEN: I think it is, Justice Marshall.

QUESTION: You think? Didn't you try the case?

MR. ROSEN: I tried the case, but whether or not that particular item is in the record, it is certainly in the briefs, but --

QUESTION: Then you should have used a paralegal.

MR. ROSEN: I would like to reserve the rest of the time at the end.

1 CHIEF JUSTICE REHNQUIST: Very well, Mr.
2 Rosen. Mr. Guidry, we'll hear from you now.

3 ORAL ARGUMENT OF EDMOND L. GUIDRY, III
4 ON BEHALF OF THE RESPONDENTS

5 MR. GUIDRY: Mr. Chief Justice, and may it
6 please the Court:

7 The Fifth Circuit in this case properly
8 decided to limit the recovery of attorney's fees to the
9 amount which the Appellant had contracted with his
10 attorney to receive. Any recovery in excess of this
11 amount, of this amount, would provide a windfall either
12 to the Appellant or to his attorney.

13 The Civil Rights Attorney's Fees --

14 QUESTION: Well, are you, are you suggesting
15 that if the fee is limited to \$4,000 in this case, that
16 it must come out of their damages? Are you saying the
17 Defendant doesn't have to pay any fee?

18 MR. GUIDRY: No. I think that the Defendant
19 does have to pay in addition \$4,000 in attorney's fees.

20 QUESTION: And, so that the Plaintiff is
21 coming out better than his contingent contract --

22 MR. GUIDRY: Certainly. His obligation to his
23 attorney would be fulfilled by the Defendant's payment
24 of attorney's fees and he would receive the entirety of
25 his judgment.

1 QUESTION: Yes. All right.

2 MR. GUIDRY: The Civil Rights --

3 QUESTION: But the contract didn't provide for
4 that, did it?

5 MR. GUIDRY: I'm sorry?

6 QUESTION: The contract didn't provide for
7 that, did it?

8 MR. GUIDRY: The contract simply provided for
9 attorney's fees and 40 percent of the amount of the
10 recovery.

11 QUESTION: And the client was liable?

12 MR. GUIDRY: That's correct.

13 QUESTION: So we are going beyond the
14 contingent fee contract in order to reach the result
15 that you explained to Mr. Justice White?

16 MR. GUIDRY: In fact you are not, because if
17 the payment of attorney's fees under the statute, as the
18 statute indicates, is made payable to the Plaintiff,
19 then the Plaintiff simply under his attorney's fees
20 contract would then turn over the funds, \$4,000, to his
21 attorney and his obligation would be completed.

22 QUESTION: But you're arguing that the court
23 is limited and fixed by the terms of the contract. In
24 your answer to Mr. Justice White you've just indicated
25 that you can go beyond the contract by at least the

1 contract amount.

2 MR. GUIDRY: The attorney's fees are set by,
3 by the court, is what they are awarded. They are merely
4 limited by the contract because he had a contract
5 providing for, for a proportion of the recovery.

6 The Civil Rights Attorney's Fees Award Act is
7 a mechanism that was designed by Congress to provide
8 representation in civil rights cases to less fortunate
9 by shifting the burden of, the economic burden of
10 prosecution from the victim to the violator.

11 Simply we must look here that what Congress
12 intended to do, and their purpose in passing the Civil
13 Rights Attorney's Fees Award Act, was to provide counsel
14 for people who were less fortunate yet had their civil
15 rights violated.

16 In this case, Mr. Blanchard was able to obtain
17 counsel by signing a contingency fee contract for 40
18 percent of the recovery. Congress' purpose was
19 fulfilled.

20 QUESTION: Why then should the Defendant have
21 to pay anything? If the Plaintiff was perfectly capable
22 of getting a lawyer in the marketplace, on ordinary
23 terms, the purpose of the statute isn't triggered at
24 all.

25 MR. GUIDRY: Because the statute provides that

1 the court may award attorney's fees if a prevailing
2 party is successful in a civil rights action.

3 while Congress fully intended to make the
4 representation of the less fortunate attractive, they
5 certainly did not intend to provide windfalls either to
6 the plaintiffs or to their counsel.

7 A decision in this case not to allow a
8 recovery in excess of the contract amount would not act
9 as a disincentive in the future to attorneys handling
10 civil rights cases under different contractual bases.

11 In a recent case decided by the Fifth Circuit
12 in Hernandez versus Hill Country Telephone Cooperative,
13 Inc., the Fifth Circuit approved a contingency fee
14 agreement which was entered into between a counsel and
15 his client where the attorney would receive 50 percent
16 of the recovery if he was successful and no attorney's
17 fees were awarded.

18 In the event that attorney's fees were awarded
19 but less than 50 percent of the amount of the recovery,
20 then the plaintiff would make up the difference in the
21 attorney's fees.

22 If the plaintiff, if the plaintiff's counsel
23 received attorney's fees in excess of 50 percent of the
24 amount of the recovery, then the attorney would receive
25 the court-awarded fees and the plaintiff would receive

1 the entirety of his judgment.

2 Although the court was not excited about the
3 percentage charged by the attorney, they said that the
4 contract was not proscribed either by Johnson v. Georgia
5 Highway Express or other of that court's precedents and
6 also that the attorney's fees agreement was not
7 unreasonable.

8 QUESTION: Have you been involved in other
9 litigation like this? In 1983 cases?

10 MR. GUIDRY: No, I have not, Your Honor.

11 QUESTION: I wondered what the practice was.
12 Are fees awarded paid to the plaintiff, or to his
13 lawyer?

14 MR. GUIDRY: In all of the research that I
15 have done, I have not found any, any statutory or
16 jurisprudence that indicates that it should be paid to
17 one or the other.

18 QUESTION: Well, if the District Court says,
19 the statute means what it says, I must award a
20 reasonable attorney's fees to the plaintiff, and a
21 reasonable attorney's fee in this case is \$10,000, and
22 he says, pay it to the plaintiff, and it's paid to the
23 plaintiff, do you suppose the plaintiff could then say
24 to his lawyer, sorry, I'm only going to pay you \$4,000?

25 MR. GUIDRY: I think that he could say that if

1 he had a contingency fee contract that provided for an
2 amount different than the amount awarded by the court.
3 And that's the problem in this case.

4 QUESTION: Well, that's this case too. That's
5 this case.

6 QUESTION: I would think you would be
7 disagreeing then with the Court of Appeals, in a way.

8 MR. GUIDRY: I think that's exactly what the
9 Court of Appeals said in this case. It was my
10 understanding of the decision.

11 QUESTION: Well, your understanding then is in
12 this case, when \$7,500 was awarded, the client didn't
13 just keep \$4,000, he would keep the whole \$7,500, and
14 the lawyer would only get \$4,000.

15 MR. GUIDRY: That's correct.

16 QUESTION: So you two disagree on the meaning
17 of this judgment, if it had just -- it says the
18 Plaintiff gets the money. That's what the judgment
19 says. The Plaintiff shall recover the reasonable
20 attorney's fee of \$7,500.

21 MR. GUIDRY: The judgment says that, the
22 statute says the prevailing party, and then the
23 legislative history to the Civil Rights Attorney's Fees
24 Award Act, it indicates that, you know, if victims are
25 to be able to pursue their civil rights, then they must

1 be able to recover what it costs them to --

2 QUESTION: Of course, actually, I suppose if
3 you read the contract literally, they'd be entitled to,
4 the lawyer would be entitled to 40 percent of the
5 excess, because the recovery included \$10,000 plus
6 \$7,500, so his 40 percent ought to be on the total
7 \$17,500.

8 MR. GUIDRY: Depending on whether the contract
9 includes recovery of attorney's fees also.

10 QUESTION: Whereupon you'd have to reopen the
11 judgment to give that excess too, I, I assume.

12 MR. GUIDRY: Certainly.

13 QUESTION: No, the judgment is for \$17,500.
14 Put the two together and it's a matter of private
15 contract, he has to pay his debt of 40 percent.

16 MR. GUIDRY: That's correct -- whether or not
17 it would be covered by the contract I'm not certain.

18 By limiting the recovery of attorney's fees in
19 this case neither the Appellant nor Congress' intent to
20 foster the enforcement of civil rights is disserved.
21 The Appellant's obligation to the attorney is paid and
22 he received a favorable judgment without any cost to
23 himself.

24 The attorney may not accept another civil
25 rights case under a contingency fee contract providing

1 for a proportion of the damages, but it should not
2 prevent him from handling other civil rights cases under
3 different contractual bases.

4 The Fifth Circuit in Blanchard does not
5 conflict with this Court's decision in City of Riverside
6 v. Rivera, as had been claimed by the Appellant.

7 QUESTION: Excuse me. Can I ask how your
8 theory works to the case where there is no agreed
9 contractual price?

10 Let's assume the law firm is a public interest
11 law firm, it's provided its services for free. You've
12 just said that any reasonable attorney's fees awarded go
13 to the plaintiff.

14 So I assume you would say that in that case,
15 what, either no fees are awarded at all or else the
16 plaintiff gets reasonable attorney's fees, and if he
17 does he can keep them.

18 MR. GUIDRY: I think --

19 QUESTION: And the lawyer never gets
20 anything.

21 MR. GUIDRY: In the case of pro bono work and
22 in the case of public service legal corporations, that
23 Congress by approving the method of payment in Stanford
24 Daly and in the Davis case, which was cited in the
25 history --

1 QUESTION: Where did it prove that?

2 MR. GUIDRY: In the legislative history --

3 QUESTION: Oh.

4 MR. GUIDRY: To the Civil Rights Attorney's
5 Fees Award Act, Congress cited those two cases as being
6 cases where proper awards were made, one of which was to
7 a, in pro bono work, the other was to a non-profit
8 public service legal corporation.

9 And by approving both of those cases, we can
10 assume that Congress intended that they receive
11 attorney's fees for their work, even though they may be
12 prevented from entering into a contract with the
13 plaintiff to receive fees.

14 QUESTION: Well, that clear goes -- once you
15 concede that you concede the purpose of the act is, goes
16 beyond making the plaintiff whole, once you concede
17 that. I mean, in that case you don't have to give the
18 plaintiff a penny in order to make the plaintiff whole.

19 MR. GUIDRY: Certainly you have to give, you
20 have to make, to make the plaintiff whole you still have
21 to provide these funds, because without these funds
22 these public service corporations would not be able to
23 represent plaintiffs. So in that respect it makes
24 representation available to less fortunate citizens.

25 As the Fifth Circuit noted in its case, if

1 plaintiffs such as Arthur Blanchard are able to obtain
2 counsel to represent them under a contingency fee
3 arrangement providing for payment of attorney's fees
4 based on a proportion of the recovery, then in those
5 cases the attorney cannot be said to have relied upon
6 the statutory assurance that he would receive any other
7 fee than that provided in the contract.

8 Certainly I can tell the Court that when a
9 client comes into my office, before I accept the case on
10 any fee basis, I know what the case is about, and I know
11 what fee I will charge for a particular type case.

12 Certainly the more risky the case the larger
13 the percentage of attorney's fees which would be
14 charged.

15 QUESTION: But you don't always know, do you,
16 Mr. Guidry, who all the possible defendants are until
17 you do some investigation or have someone do some
18 investigation for you?

19 MR. GUIDRY: Certainly I think that is true,
20 but you certainly know what you feel is the chance of,
21 of being successful and what type of action you are
22 faced with before you agree to accept the case.

23 QUESTION: Well, does one invariably know when
24 a client walks in the door saying they've sustained some
25 sort of injury, that this is a 1983 case or this is not

1 a 1983 case?

2 MR. GUIDRY: One may not know from the start
3 whether or not it is a 1983 case, but you would not
4 accept the case until you determined what type of case
5 you were faced with.

6 QUESTION: You mean you wouldn't accept it
7 until you could tell whether or not it was a 1983 case?

8 MR. GUIDRY: I would not accept it unless I
9 knew what type of case I was --

10 QUESTION: Well, what do you mean by, what do
11 you mean by the words, "what type of case"?

12 MR. GUIDRY: Well, certainly they are, they
13 are -- I don't do any Sherman anti-trust work. So if a
14 client came into my office and presented me with facts
15 which I was not sure what type of case, or what law I
16 would be faced with, I would certainly research that
17 prior to agreeing to accept the case.

18 QUESTION: But a lawyer who, say, specialized
19 in plaintiff's personal injury work might not know just
20 from the client's original recital whether or not there
21 might be some sort of a public defendant that could be
22 joined that would make it, in part, a 1983 case I would
23 think.

24 MR. GUIDRY: That may be true in other cases.
25 In this case I don't think that was true, because the

1 facts of this case were that the Plaintiff alleged that
2 his jaw was broken by an on-duty police officer in
3 uniform.

4 QUESTION: Well, that seems pretty clear.

5 MR. GUIDRY: Certainly to the extent that fee
6 awards are intended to reflect fees charged in the
7 marketplace for legal services, enforcement of the
8 contract in this particular case is appropriate.

9 The Fifth Circuit held that the time billed by
10 law clerks is necessarily included in the contingency
11 fee contract. The contract does not provide for the
12 additional payment for legal support staff, whether it
13 be law clerks or paralegals.

14 The attorney under the contingency fee
15 contract is paid attorney's fees in the amount of 40
16 percent of the amount recovered. There was no evidence
17 presented at trial that there was any agreement to the
18 contrary, or that there was any other provision of the
19 contract which would require the payment of paralegals
20 and law clerks, in addition to the contingency fee
21 amount.

22 QUESTION: That's an easy question, if we
23 agree with you that the agreed-upon contingency fee is
24 the limit. Obviously when a lawyer agrees on a
25 contingency fee that's all he's supposed to get.

1 But suppose we disagree with you that that's a
2 limit of the award, and we think you can, the court can
3 give an award beyond the contractual limit, would you
4 think the court could allow paralegal time in that
5 award?

6 MR. GUIDRY: I think that the court can award
7 paralegal time in certain circumstances.

8 The case presented before this Court is that
9 the -- rather the decision of the Fifth Circuit is that
10 the paralegal award is included within the contingency
11 fee.

12 The District Court in this very case found
13 that paralegal and law clerk time was not necessary,
14 that the simplicity of this case prevented it. So
15 whether or not paralegal time, it may be recoverable
16 under different circumstances is something that is not
17 before the Court at this time.

18 Certainly if there was evidence presented at
19 the trial that the cost of paralegals and law clerks is
20 paid or billed to clients in that particular marketplace
21 as an addition to the fee charged by the attorney, then
22 I would say yes, it would be recoverable under 1988.

23 Any recovery of fees in excess of the amount
24 contracted, including paralegal and law clerk time,
25 would provide a windfall to the Plaintiff's attorney, in

1 derogation of Congress' purpose in passing the Civil
2 Rights Attorney's Fees Award Act.

3 The Fifth Circuit decision should be
4 affirmed. Thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
6 Guidry. Mr. Rosen, you have three minutes remaining.

7 REBUTTAL ARGUMENT OF WILLIAM W. ROSEN
8 ON BEHALF OF THE PETITIONER

9 MR. ROSEN: Thank you, Mr. Chief Justice. Let
10 me try to put to rest the windfall argument.

11 If 1988 is correctly applied it cannot be a
12 windfall. They are mutually exclusive. You can't have
13 a reasonable fee which is a windfall, at least as I see
14 it.

15 On the issue of what effect does the
16 contingent fee contract have, the contingent fee amount
17 in a contract may in fact be a reasonable fee, so that a
18 court must look, may want to look at the contract, and
19 the amount recovered, and may say that this is
20 reasonable, and therefore one becomes the other.

21 But I suggest to the Court that it may not be
22 reasonable, and it may be too, it may be too little or
23 it may be too less. And that is where 1988 comes into
24 play. The fee itself belongs to the attorney. There's
25 a 1934 Louisiana Supreme Court case on it, it was used

1 in a 1982 Louisiana appellate case, in 1982.

2 As to the allegations that this, we all knew
3 that an on-duty police officer broke my client's jaw.
4 The fact of the matter is that that wasn't known for
5 some -- the allegations were in the petition.

6 The question was, at the very beginning,
7 whether this happened in a -- he was in a bar room, he
8 was not in a condition to know exactly who it was who
9 hit him, as I understand it, at the very beginning, and
10 therefore without some investigation that then led to
11 the allegations that it did turn out in fact to be the
12 on-duty police officer.

13 As to the simplicity of the case, this is a
14 case against basically the only law officer in this part
15 of a rural Louisiana parish. There was substantial fear
16 that I found in contacting potential witnesses against
17 testifying against this police officer.

18 I was faced by two very competent counsel, one
19 for the bar and Mr. Guidry. And this is not, I don't
20 believe there's any civil rights case which are simple.
21 I use for the benefit of myself and my client, and in
22 the long run for the benefit, as it turned out, for the
23 Defendant the use of paralegals and law clerks. Their
24 time is compensable.

25 That is the system of keeping legal costs to a

1 minimum. They were very important in this case, and
2 their time and their services should be compensated.
3 And they should be compensated, I suggest --

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Rosen. Your time has expired.

6 (Whereupon, at 11:45 o'clock a.m., the case in
7 the 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:

NO. 87-1485 - ARTHUR J. BLANCHARD, Petitioner V. JAMES BERGERON, ET AL.

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

BY Judy Freilicher

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