

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ROY HECK, Petitioner v. JAMES HUMPHREY, ET AL.

CASE NO: No. 93-6188

PLACE: Washington, D.C.

DATE: Monday, April 18, 1994

PAGES: 1-55

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 ROY HECK, :
4 Petitioner :
5 v. : No. 93-6188
6 JAMES HUMPHREY, ET AL. :

7 - - - - -X
8 Washington, D.C.
9 Monday, April 18, 1994

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:04 a.m.

13 APPEARANCES:

14 CHARLES ROTHFELD, ESQ., Washington, D.C.; on behalf of
15 the Petitioner.
16 MATTHEW R. GUTWEIN,, ESQ., Deputy Attorney General of
17 Indiana, Indianapolis, Indiana; on behalf of the
18 Respondents.

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in 93-6188, Roy Heck v. James Humphrey.

5 Mr. Rothfeld.

6 ORAL ARGUMENT OF CHARLES ROTHFELD

7 ON BEHALF OF THE PETITIONER

8 MR. ROTHFELD: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 The principal question in this case is whether a
11 State prisoner who wants to bring a section 1983 damages
12 action in Federal court challenging assorted
13 constitutional violations that took place during the
14 course of a criminal investigation must first exhaust
15 State postconviction remedies.

16 QUESTION: Let me ask you, if I may, Mr.
17 Rothfeld, about the theory under which your case was
18 brought under 1983. Did it involve -- did it claim that
19 things which happened at the respondent's -- or the
20 petitioner's trial violated the Constitution?

21 MR. ROTHFELD: It is focused on acts that took
22 place during the course of the investigation leading up to
23 the trial, so it does not focus on any particular trial
24 event. It doesn't focus on the introduction of evidence,
25 for example.

1 QUESTION: And is it logical to say that if your
2 client were to win his case, that still would not, under
3 some sort of collateral estoppel doctrine, vitiate the
4 judgment of conviction?

5 MR. ROTHFELD: Well, I think, Your Honor, it
6 quite clearly would not vitiate the judgment of conviction
7 for a number of reasons. First of all, part of the
8 problem in this case, and one of the fundamental questions
9 in this case, involves the court of appeals test, which is
10 does a damages claim involve an attack on the validity of
11 the conviction. And we think that that question is simply
12 not meaningful in a case like this.

13 Petitioner, and prisoners in his situation, are
14 not attacking the validity of their convictions. They're
15 attacking particular constitutional violations that they
16 assert occurred at the hands of particular individual
17 defendants. And there is nothing, necessarily, about such
18 a challenge that calls into question the validity of the
19 conviction in any sense, because --

20 QUESTION: Is this --

21 QUESTION: What would be an example of one of
22 their claims, and the constitutional basis for it?

23 MR. ROTHFELD: One claim that's made in this
24 case is that exculpatory evidence or potentially
25 exculpatory evidence was destroyed by law enforcement

1 investigators. It's possible that that occurred -- that
2 could have been a constitutional violation. It could be
3 remediable on any number of theories, and yet it could
4 have been harmless error at the trial. It may have had no
5 affect on his conviction.

6 QUESTION: But that really does have a bearing
7 on the trial, doesn't it? I mean, you wouldn't be
8 claiming the destruction of evidence if you weren't
9 interested in that evidence being used at the trial.

10 MR. ROTHFELD: Well, there are a variety of ways
11 in which a damages claim can proceed, apart from the use
12 of the evidence of trial. Prisoner could simply be asking
13 for nominal damages for the violation of the
14 constitutional right. He could be asking for punitive
15 damages because of reckless disregard of constitutional
16 rights by particular law enforcement officers. There
17 could be a whole host of --

18 QUESTION: Could it be asking for consequential
19 damages for false imprisonment?

20 MR. ROTHFELD: Well --

21 QUESTION: Wrongful imprisonment?

22 MR. ROTHFELD: There are, I suppose, two types
23 of other damages that could be involved, Justice Souter.
24 One is the one that you're suggesting. Another, just to
25 mention it, is the sort of ancillary damages that you and

1 Justice Ginsburg discussed in your separate opinions
2 recently in Albright v. Oliver, the kind of reputational
3 injury or other kinds of sort of direct injuries that are
4 unrelated to the condition.

5 QUESTION: Well, let's just stick to the first
6 category. Could they claim them?

7 MR. ROTHFELD: I think they could claim that,
8 Your Honor.

9 QUESTION: Well, if they did claim them, then it
10 really would go to the heart of the lawfulness of the
11 imprisonment and conviction.

12 MR. ROTHFELD: Well, there are several
13 observations, I think, to make in response to that. It is
14 true that that particular aspect of the prisoner's claim,
15 and only that aspect of the prisoner's claim, in a sense
16 turns on sort of a but-for question: Would the conviction
17 have occurred but for the constitutional violation?

18 But even answering that question in the
19 affirmative and saying that the prisoner would not have
20 been convicted had the constitutional violation not
21 occurred does not, in any sense, sort void the conviction
22 or say that it is voidable now.

23 QUESTION: No, but in -- if that's the -- if the
24 answer turns out to be that there would have been no
25 conviction and there is being a claim -- and a claim is

1 being made for consequential damages, then the State, in
2 that case, is faced with the possibility of sitting back
3 and doing nothing and letting the damages pile up or
4 letting the person go.

5 MR. ROTHFELD: Well --

6 QUESTION: And I suppose if the damages amount
7 to anything in substance, the State is going to say we'd
8 better get this guy out of here before he costs us any
9 more money.

10 MR. ROTHFELD: Well, that would be a practical
11 decision that the State would have to make, Your Honor,
12 but in terms of whether or not exhaustion is required,
13 which is the question here, I think that the Court has to
14 look at the principles that are served, the policies that
15 are served by the habeas exhaustion requirement.

16 QUESTION: Mr. Rothfeld, what about just looking
17 to normal tort principles. This is an old Federal tort
18 statute. I assume it incorporates normal tort principles
19 such as causality. It seems to me that one of the
20 standard requirements, if you're bringing a cause of
21 action which depends upon the unlawfulness of a
22 conviction, is that the conviction have been set aside.
23 You cannot bring a tort action for malicious prosecution,
24 for example, unless you've been acquitted.

25 Why should you be able to bring this tort action

1 for those constitutional violations that hinge upon
2 innocence without first getting the conviction set aside
3 or having been declared innocent? I mean, other
4 violations, for example unreasonable searches and
5 seizures, I suppose you can sue on, no matter what, but
6 your damages from being unlawfully detained, you're
7 entitled to them only if you're unlawfully convicted. And
8 why shouldn't we apply normal tort principles saying
9 you're not -- you're considered to be lawfully convicted
10 unless and until that's set aside.

11 MR. ROTHFELD: Well --

12 QUESTION: That's just normal tort law.

13 MR. ROTHFELD: I think, Your Honor -- and, first
14 of all, that argument has not been suggested at any point
15 during the course of this litigation, but I think, in any
16 event, that suggestion goes to the merits of the claim.
17 All that we're concerned with here is whether or not a
18 1983 action can be brought, whether this district court
19 has jurisdiction to entertain the action. It may be --

20 QUESTION: Well, it goes -- but it goes also to
21 just standard questions of respect for the validity of
22 outstanding judgments. You have a judgment here that is
23 deemed correct and it has not been set aside.

24 MR. ROTHFELD: Well, I think --

25 QUESTION: And yet you're contending that you

1 can ask for damages for the enforcement of that judgment.
2 And I think the underlying concern is whether this suit
3 should just be dismissed on its merits at the outset.

4 MR. ROTHFELD: Well, let me give you two
5 responses to that, Justice Kennedy. First of all, I think
6 that is a question relating to the merits. And it may be
7 that, on remand, that aspect and only that aspect of the
8 petitioner's claim could be dismissed on such a theory
9 which, as I say, has not been propounded at any point
10 during the course of the litigation now.

11 I don't think the Court needs to concern itself
12 with that. It needs to concern itself only with whether
13 the action can proceed to a disposition on the merits.

14 QUESTION: Well, I suppose -- excuse me.

15 QUESTION: Go ahead.

16 QUESTION: I suppose we do, when one of the
17 issues is whether or not we should stay this suit or allow
18 it to be dismissed. If most of these cases, most of your
19 damages are going to be foreclosed by the existence of the
20 criminal judgment, then it seems to me that you have a
21 very, very weak case for saying that the suit and this
22 action should remain in the docket of the district court.

23 MR. ROTHFELD: No, I understand that suggestion,
24 Justice Kennedy, but I think, first of all, there are
25 other claims which are presented in this case, claims

1 for -- as we read the complaint, and it is a pro se
2 complaint which is not written artfully, but as we
3 understand it, it asks for nominal damages and punitive
4 damages, as well as this aspect of compensatory damages.

5 In addition, as a matter of the law of issue
6 preclusion or claim preclusion, which is what I think your
7 question goes to, it is not the case that a petitioner --
8 even a petitioner asking for these kinds of consequential
9 damages is attacking the validity of his conviction or
10 calling the validity of the judgment into question.

11 Petitioner -- it may be that if a claim has been
12 adjudicated in the course of the return of the conviction,
13 that that question has been adjudicated and it may be that
14 there would be issue preclusion in that case.

15 QUESTION: What if it wasn't adjudicated but
16 could have been adjudicated?

17 MR. ROTHFELD: If it was not adjudicated, Your
18 Honor, the question would be one of collateral estoppel
19 rather than res judicata or the new more fashionable
20 terminology of issue preclusion rather than claim
21 preclusion, because there are actually different parties
22 involved in the litigation. The State, of course, was
23 involved in the criminal conviction. This action is
24 brought against individual named defendants acting in
25 their individual capacities.

1 And, in addition, there are different claims
2 involved. Obviously, the State's claim involved its
3 criminal prosecution --

4 QUESTION: Yes, but surely if you claim that
5 there was a destruction of evidence by the State and which
6 violated the Constitution, that could have been raised at
7 trial.

8 MR. ROTHFELD: That could have been raised at
9 trial, Your Honor, that's true, but if the question is one
10 of issue preclusion, the rule to be followed is -- in a
11 case like this, because it's a State judgment which is at
12 issue, one would look to the preclusion law of the State.
13 And Indiana's preclusion law provides that an issue that
14 could have been raised but was not raised is not precluded
15 in subsequent litigation, and therefore it would be open
16 to review.

17 QUESTION: And why do you say the parties are
18 different here?

19 MR. ROTHFELD: The State of Indiana was, of
20 course, the party adverse to petitioner in the criminal
21 case. Petitioner has not sued the State of Indiana, and
22 couldn't sue the State of Indiana, which is not a person
23 under section 1983. He has sued individual State officers
24 acting in their individual capacities.

25 QUESTION: Well, are you so sure that that

1 wouldn't -- that that wouldn't be treated as the same
2 parties, for issue preclusion?

3 MR. ROTHFELD: I think this is an issue which is
4 debated in the briefs, Your Honor. We think it is
5 reasonably clear that they would not be treated as the
6 same parties for purposes of issue preclusion. As a
7 matter of black letter law --

8 QUESTION: Suppose the State is paying the
9 counsel fees, providing counsel. Suppose the State is
10 providing counsel to the defendants?

11 MR. ROTHFELD: Let me give you several answers
12 to that question, Justice O'Connor. First of all, I think
13 that --

14 QUESTION: Ginsburg.

15 MR. ROTHFELD: Oh, excuse me, Justice Ginsburg.
16 I'm sort used to looking at the other end of the Court,
17 Justice O'Connor.

18 I think that as a black letter rule, individual
19 parties sued in their individual capacities and parties
20 sued in their official capacities are treated as distinct.
21 As to the question you raise specifically, the Court has
22 set out -- has considered this question in the case of
23 Montana v. United States and has listed a number of
24 factors that could come into play in determining whether
25 or not a party that in some sense sponsors the litigation

1 or pays for the litigation is deemed to be, to use the old
2 terminology, in privity with the party who is actually
3 facing judgment in the case.

4 QUESTION: In control of the litigation.

5 MR. ROTHFELD: In control of the litigation is
6 one of the factors that the Court has indicated is
7 relevant. I think as to whether or not a court is likely
8 to find collateral estoppel in such a case, or to cite the
9 Court to Sherlock Holmes and the dog that didn't bark,
10 there has never been such a case that either the State of
11 Indiana or that we have found, in which an individual who
12 is sued in his individual capacity and receives an adverse
13 judgment, that judgment is then used to bind the State. I
14 think that --

15 QUESTION: Of course, you could say the same
16 thing in all the malicious prosecution cases. The State
17 is not going to be bound if the individual officer loses
18 for malicious prosecution. Nonetheless, we don't allow
19 the action to proceed. The basis for not allowing it has
20 never been res judicata or claim preclusion or issue
21 preclusion; it's just been you don't bring this tort
22 action until you've established that, indeed, your
23 incarceration is unlawful.

24 MR. ROTHFELD: Well, certainly, to prevail on
25 the merits the petitioner would have to show that his

1 incarceration is unlawful in the sense that he would not
2 have been convicted but for the happening of the
3 constitutional violation --

4 QUESTION: No, no, in malicious prosecution you
5 don't get into the courthouse. You are not allowed to
6 show that it's unlawful. You go over to the criminal side
7 and get it set aside, or you win your prosecution -- you
8 win in the criminal case. You can't come in when you're
9 in jail and sue somebody for malicious prosecution, you
10 simply can't, whether there's issue preclusion, claim
11 preclusion, or not, you can't do it.

12 MR. ROTHFELD: Well, I think, Your Honor, that
13 is, again, a question that would go to the merits that
14 would govern this type of litigation.

15 QUESTION: Well, I don't think, Mr. Rothfeld,
16 you can separate -- you can have this very narrow
17 jurisdictional analysis that you're trying to limit it to,
18 as opposed to the merits. I mean, we've got to be
19 concerned with how this affects traditional notions of res
20 judicata and tort actions and that sort of thing.

21 MR. ROTHFELD: Well, I think there are several
22 points, Justice -- Chief Justice Rehnquist. Well, the
23 Court certainly can take into account traditional notions
24 of res judicata. The Court has already addressed,
25 essentially, an identical question in Preiser v. Rodriguez

1 and Wolff v. McDonnell, in which prisoners were bringing
2 actions attempting to shorten their sentences. And the
3 Court held quite clearly in Wolff v. McDonnell and
4 indicated quite expressly in Preiser v. Rodriguez that if
5 a prisoner is suing for money damages, he can proceed
6 immediately in Federal courts while --

7 QUESTION: Neither of those cases involved
8 attacks or what could be attacks on judgments of
9 conviction.

10 MR. ROTHFELD: That's true, Your Honor, but for
11 purposes of the habeas policies, the Court held quite
12 expressly in Preiser --

13 QUESTION: It didn't -- it couldn't have held
14 with respect to judgments of convictions since those were
15 not involved in either of them.

16 MR. ROTHFELD: No, that is true, Your Honor, but
17 the Court did hold in Preiser that -- in response to the
18 argument that actually had been made by the prisoners in
19 that case, that habeas policies were concerned only with
20 judgments of conviction rather than with the length of a
21 sentence, that both concerns were equally close to what
22 the Court called the core of habeas corpus and that that
23 was the basis for the Court's conclusion that exhaustion
24 was necessary, in Preiser.

25 Applying that same conclusion here and

1 determining whether or not exhaustion is necessary here,
2 the Court's conclusion there that a damages action could
3 proceed simultaneously with a State action asking for
4 earlier release, I think is dispositive here.

5 QUESTION: Well, hasn't every court of appeals
6 that's considered this decided that the State prisoner
7 cannot bring a section 1983 damages action to challenge
8 the constitutionality of the conviction, in effect?

9 MR. ROTHFELD: I don't think that's quite true,
10 Justice O'Connor. There --

11 QUESTION: They seem to be pretty uniform, and I
12 thought in Tower against Glover, which I don't believe you
13 cited, we reserved the question.

14 MR. ROTHFELD: Well, the Court reserved the
15 question in Tower, Your Honor, and said it had -- didn't
16 have to express an opinion on the subject, which was quite
17 clearly true in Tower. The Court in Tower did not cite
18 Wolff v. McDonnell, which is a case which we think is
19 actually dispositive here, and I think clearly cannot be
20 read as a sub silentio overruling of Wolff v. McDonnell.

21 As to the question of what the courts of appeals
22 have done, I think at least one court of appeals we cite
23 in our brief and in the petition -- it's a case called
24 Mack v. Varelas, a relatively recent Second Circuit
25 decision which has, we think, indicated that petitioners

1 need not exhaust their damages action in a case such as
2 this.

3 There actually was a Second Circuit case called
4 Ray v. Fritz which the Court cited to in Preiser as a
5 illustration of the type of damages action that it thought
6 could proceed, which also involved a claim by prisoners
7 who were seeking earlier release and I think indicates
8 clearly what the Court had in mind in saying that when a
9 prisoner means to pursue a damages action, that does not
10 call into question -- that is not going to lead to his
11 release. He cannot do that.

12 I think --

13 QUESTION: Mr. Rothfeld, may I leave theory for
14 a moment and ask you a question about practical effect.
15 Is it fair to say that at least in most States, the effect
16 of the exhaustion rule, which is -- which you are
17 protesting, would really simply require you to complete
18 the direct appeal?

19 Because I'm assuming that most States would
20 require a Fourth Amendment issue to be raised at trial or
21 before trial, and if it were not, would not allow it --
22 would find it barred or waived on State habeas, so that as
23 a practical -- if that is true as a practical matter,
24 would the rule that you object to in effect require you to
25 do anything more, in practice, than simply complete the

1 direct appeal?

2 MR. ROTHFELD: As you indicate, Justice Souter,
3 it would turn on the content of the State postconviction
4 rules.

5 QUESTION: Yeah.

6 MR. ROTHFELD: Clearly, in this case the Seventh
7 Circuit thought that there was a postconviction proceeding
8 that could provide relief of some sort to the petitioner
9 in this case. In many cases it will certainly be true
10 that a prisoner is not going to have any additional avenue
11 available beyond that that's presented on direct appeal.

12 QUESTION: It'll be -- won't that be true in
13 most cases? I mean, isn't that generally the State rule?

14 MR. ROTHFELD: That probably is the general
15 rule. Now, most State rules have exceptions for what they
16 call cases involving fundamental unfairness, and I think
17 that what this suggests is that our rule is -- as a matter
18 of judicial administration, is a much simpler matter,
19 because the State -- the Federal court presented with a
20 damages action is not going to have to determine whether
21 or not there is a State proceeding available. It can
22 simply adjudicate the 1983 claim on the merits.

23 QUESTION: What was the -- what was the
24 proceeding in this case that was thought to be available
25 by the Seventh Circuit?

1 MR. ROTHFELD: Well, the Seventh Circuit didn't
2 identify what it had in mind. We presume that it had in
3 mind Indiana's postconviction remedy statute, which, as
4 Justice Souter suggests is true in most cases, would have,
5 as a general matter, require a prisoner to raise -- would
6 bar a prisoner from raising in postconviction proceedings,
7 a claim that either he had raised in his direct appeal or
8 a claim that he could have raised but did not raise. But
9 there is an exception in that Indiana statute for claims
10 going to the fundamental fairness of the proceeding, and
11 it may be that the Seventh Circuit had that in mind.

12 QUESTION: Is there anything that could come up
13 in habeas. I was trying to think if there was anything
14 that you couldn't convert into a 1983 damage claim that
15 you could bring for specific relief, let me out. Is it
16 not so that every habeas claim could be stated alternately
17 as a 1983 damage claim?

18 MR. ROTHFELD: That certainly would be true in
19 most cases, because whenever there has been a
20 constitutional violation, there will be at least nominal
21 damages available as a remedy. But the fact is, there is
22 always going to have to be a set of proceedings, because
23 the State proceedings do not provide for damages, State
24 postconviction remedies, and Federal -- and the section
25 1983 proceeding, of course, concededly does not provide

1 for release. So there was always going to have to be a
2 set of postconviction --

3 QUESTION: But if you're right, then wouldn't
4 this make a massive change. You could always -- if you
5 would rather go into Federal court and in damage format,
6 you could always do that, bypass any State postconviction
7 remedy, and skip Federal habeas as the first step.

8 MR. ROTHFELD: It would permit a prisoner to go
9 immediately into Federal court. I suggest that's not a
10 change so far as this Court's jurisprudence is concerned
11 because, as I said, in Wolff v. McDonnell and in Preiser
12 v. Rodriguez, this Court indicated quite clearly that a
13 prisoner damages action can proceed immediately,
14 simultaneously with the prisoner's postconviction relief
15 proceedings in the State court.

16 I mean, the Court, it said -- and this is the
17 Court's language from Preiser, that if a prisoner is
18 seeking damages, he is not asking for immediate or early
19 release, and he is not attacking the length of his
20 sentence or the validity of his sentence. And in such a
21 case, damages are not an appropriate or available remedy
22 in habeas. That was the rationale for the Court's
23 conclusion in Preiser, which was applied in Wolff, that
24 exhaustion is not necessary in damages claims. And there
25 is a logical --

1 QUESTION: Well, Mr. Rothfeld, in Tower, which
2 Justice O'Connor referred to, there is an express
3 statement that we have not decided this point yet, and it
4 also refers to Preiser. I mean it's not as if it were
5 written in ignorance of Preiser, the Tower statement.

6 MR. ROTHFELD: That's true, Mr. Chief Justice.
7 But, again, Tower simply indicated that the Court was not
8 going to express an opinion on that, and Tower did not
9 cite to Wolff, which we think is a clear holding of this
10 Court that damages actions can proceed -- damages actions
11 that involve the validity of procedures used to establish
12 the length of a sentence, those actions can proceed
13 simultaneously with an action in State court.

14 QUESTION: So that insofar as holdings are
15 concerned, we really haven't decided this question, that
16 is whether a 1983 damages action which would amount to a
17 collateral challenge to judgment of conviction could
18 proceed?

19 MR. ROTHFELD: Well, I think that in terms --
20 the question should be separated into two parts, Mr. Chief
21 Justice. The Court has decided, as I've said, that
22 actions that can proceed in habeas -- clearly the actions
23 in Preiser and in Wolff could proceed in habeas so far as
24 the length of the sentence was concerned, could proceed
25 immediately and simultaneously in a Federal damages

1 action. It is true that the Court has not applied that
2 directly in a case involving challenge -- what Indiana
3 terms or what respondents term a challenge to the
4 conviction. But that, as I think I've -- we discussed
5 earlier, goes to the merits of the case.

6 QUESTION: Well, you don't agree, then, with the
7 statement in Tower that we have never decided whether 1983
8 could proceed without exhaustion?

9 MR. ROTHFELD: I think that -- I will have to
10 say that I think that that does not take into account the
11 decision in Wolff, which was not cited --

12 QUESTION: Well, why didn't you cite Tower in
13 your brief?

14 MR. ROTHFELD: I think that all that Tower does,
15 Your Honor, is indicate that the Court is not going to
16 express an opinion on the subject, which was clearly what
17 the Court meant to do in Tower. The issue was not
18 presented in Tower, not briefed in Tower. And we think
19 that -- indeed, the respondents don't rely on Tower. They
20 cite to Tower for some collateral question or issue, but
21 don't say that Tower is dispositive of the question here
22 or that Tower indicates a clear opinion of the Court on
23 the question here.

24 I think it does not. The Court simply says it's
25 not going to express an opinion on the subject, and

1 obviously the Court will have to determine what it meant
2 in Wolff. But we think it is clear from the face of the
3 Wolff opinion that the Court concluded that exhaustion is
4 not necessary in these circumstances, whether or not a
5 petitioner can prevail on the merits of his challenge
6 which somehow implicates the conviction. And, as I've
7 suggested, I don't really think the challenge here does
8 implicate the conviction.

9 QUESTION: Mr. Roth, under your theory, if you
10 can proceed first in section 1983 suit for damages, I
11 assume the petitioner would not then have any issue
12 preclusion against him if he subsequently sought habeas?

13 MR. ROTHFELD: That is correct. If he -- well,
14 if he prevails, obviously, in his 1983 action.

15 QUESTION: Well, even if he lost that 1983 --

16 MR. ROTHFELD: If he loses --

17 QUESTION: He can go right into Federal habeas
18 and make claims all over again, based on the same facts, I
19 assume.

20 MR. ROTHFELD: Well, he would have to -- before
21 he could go into Federal habeas, he would have to exhaust
22 his State remedies, if any are available, and at that
23 point he would go into Federal court and litigate the
24 question. If he has already lost on these very issues,
25 then he will be estopped and disposing of the habeas

1 petition on the merits will be a simple matter.

2 QUESTION: Why? You think he's estopped? I
3 wouldn't have thought so.

4 MR. ROTHFELD: I would think, Your Honor, if the
5 issue is --

6 QUESTION: I thought there were cases holding
7 that there isn't any issue preclusion there.

8 MR. ROTHFELD: In a subsequent habeas.

9 QUESTION: Uh-hum.

10 MR. ROTHFELD: In a subsequent Federal habeas
11 action he would, yes, but in a subsequent State
12 post-conviction proceeding -- maybe I -- I misunderstood
13 your question. He could well be estopped in a subsequent
14 State proceed. In fact --

15 QUESTION: I've lost the exchange here. You
16 were talking about his being estopped after he exhausts
17 and then he comes back with a 1983 action.

18 MR. ROTHFELD: If he exhausts the State
19 remedies --

20 QUESTION: Yes, and loses.

21 MR. ROTHFELD: And loses, I think he would be
22 estopped -- and he litigates the question, he would be
23 estopped in a subsequent 1983 action. In fact, in Preiser
24 that is the very reason that the Court indicated that a
25 1983 action should proceed immediately. The prisoners in

1 Preiser had argued that if they were obligated to exhaust
2 their claims first in State proceedings, that if they lost
3 they would be estopped in a subsequent 1983 action. And
4 the Court's response was that may well be true, but your
5 solution is to bring your 1983 action now.

6 QUESTION: Why shouldn't it work the other way,
7 that if you litigate and lose in 1983 on the same issue,
8 you should lose it -- I mean why isn't that Federal
9 adjudication just as good as the State adjudication would
10 have been, if you --

11 MR. ROTHFELD: It is, Your Honor. And if you --
12 if --

13 QUESTION: So then you're changing the answer
14 you just gave to Justice O'Connor saying you would be
15 subject to issue preclusion.

16 MR. ROTHFELD: You would be subject to issue --
17 my answer to Justice O'Connor -- maybe I've confused the
18 point, but my answer to Justice O'Connor is that in the
19 State proceeding you are subject to issue preclusion. If
20 you lose -- if you bring your 1983 action first and lose,
21 the prisoner is then subject to preclusion in the State
22 subsequent postconviction relief proceeding.

23 Now, if the prisoner then goes back to Federal
24 habeas, the preclusion rules are different in Federal
25 habeas because, as a general matter, preclusion is not a

1 doctrine that's applied there. But the prisoner clearly
2 would be estopped in the 1983 -- in the State
3 post-conviction proceeding if he loses the 1983 action.

4 QUESTION: Well, you say issue of preclusion
5 isn't applied in Federal habeas. Are you speaking of the
6 rule going back to Salinger against Lazlo where they said
7 that your one -- one habeas petitioner dismissal doesn't
8 bar the bringing of another?

9 MR. ROTHFELD: I'm referring, Your Honor, to the
10 nonpreclusive effect of a State court judgment. Whether
11 or not a 1983 judgment, in Federal court in which the
12 prisoner loses, could be used to estop him in a subsequent
13 habeas action is a separate question, and it may well be
14 that estoppel's available there.

15 If there are no further questions now, Mr. Chief
16 Justice, I'll reserve the balance of my time.

17 QUESTION: Thank you, Mr. Rothfeld.

18 Mr. Gutwein.

19 ORAL ARGUMENT OF MATTHEW R. GUTWEIN

20 ON BEHALF OF THE RESPONDENTS

21 MR. GUTWEIN: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 At issue in this case is the proper order in
24 which our judicial system should consider State prisoners'
25 attacks on the validity of a conviction. Petitioner's

1 rule in this case is a very simple one, it's very easy to
2 apply, very easy to understand, but it creates a new order
3 and one that is very different than the order that
4 Congress considered was appropriate in enacting the
5 exhaustion requirement in section 2254(b), and the order
6 that this Court has generally deemed appropriate in its
7 comity jurisprudence such as Younger, which --

8 QUESTION: Well, that may be true as a general
9 rule, but why should it be true in a Fourth Amendment case
10 when there is a practical matter? Under Stone there isn't
11 any Federal habeas so that there's no -- there's no
12 Federal policy of exhaustion that needs to be served. Why
13 don't we have a separate rule for Fourth Amendment issues?

14 MR. GUTWEIN: We believe that Fourth Amendment
15 issues, assuming that they actually attack the legality of
16 the conviction, should require exhaustion. And that is
17 because the rule of comity is that State courts should
18 have the initial opportunity to decide the issues, both
19 factual and legal, of whether a State prisoner's
20 conviction is lawful.

21 QUESTION: So in Fourth Amendment cases you're
22 resting it not on the habeas exhaustion requirement, but
23 on an independent rule of comity.

24 MR. GUTWEIN: Exactly. In the Fourth Amendment
25 context, this Court has held, under Stone v. Powell, that

1 the comity interests there are supreme. That this Court,
2 so long as there's been a full and fair opportunity to
3 review the matter, will defer completely to the State
4 court's judgment. And I believe it is backwards to
5 suggest that in the habeas context where the comity is at
6 its greatest, that that should be a justification in the
7 1983 context to short circuit, at that point, the State's
8 opportunity to initially decide that question.

9 QUESTION: But the rule of comity, in effect,
10 would enact an exhaustion requirement for 1983 which is
11 not required by habeas policy?

12 MR. GUTWEIN: That is correct. But let me mind
13 you that some States may not follow Stone v. Powell.
14 Indeed, Indiana does not follow Stone v. Powell.

15 QUESTION: Well, I'm not concerned about what
16 the States may do, but, I mean, it seems to me that your
17 strongest argument is, as a general rule leaving aside the
18 particular claim involved, that if you don't, in effect,
19 have the rule that you want, you in effect are allowing an
20 end run to be made in the habeas exhaustion rules. And
21 you concede that that argument doesn't apply when the
22 claim is a Fourth Amendment claim because under Stone v.
23 Powell there isn't going to be a Federal relitigation
24 anyway.

25 MR. GUTWEIN: That is correct, Your Honor.

1 QUESTION: Okay. And as a practical matter,
2 then, it seems to me that your argument for comity is
3 really an argument for an exhaustion requirement under
4 1983 which is independent of Federal habeas policy.

5 MR. GUTWEIN: That is correct. But we win under
6 your first theory, and we'd be perfectly happy with that,
7 but we have a second theory that is, as you suggest --

8 QUESTION: What was my first theory?

9 (Laughter.)

10 MR. GUTWEIN: That if a State prisoner can do an
11 end run around section 2254, that that ought not be
12 allowed, and therefore to the extent that 2254 --

13 QUESTION: Yeah, but that doesn't apply here
14 because of Stone.

15 MR. GUTWEIN: We believe it does apply here,
16 because -- and this is a matter in the record. This
17 petitioner is not making a Fourth Amendment claim, and we
18 believe that that's quite clear in the record.

19 QUESTION: I thought he was.

20 MR. GUTWEIN: He is not, and let me refer to you
21 to his complaint. And I'm now looking at page 4 of the
22 Joint Appendix, at the very bottom of page 4 it says
23 between May and July of 1987, and that is the conduct
24 about which he complains after that, conduct that occurred
25 between May and July of 1987.

1 Now, he refers to a search on page 5 of the
2 Joint Appendix that occurred in 1986, and that's the only
3 search he refers to. He is not complaining about that
4 1986 search, and there -- indeed, there is good reason for
5 him not to complain about that, and that is because he
6 filed -- the search in this case, as we indicated in our
7 statement of facts, occurred in October of 1986. He filed
8 this action in December of 1988, and therefore that search
9 would have been barred by the statute of limitations, and
10 therefore there was an awfully good reason for him to not
11 complain about that search.

12 QUESTION: Well, that doesn't mean he wouldn't
13 complain about it. Maybe he didn't know it was barred by
14 the statute of limitations.

15 MR. GUTWEIN: That's possible too, but we
16 believe the plain language of this complaint, where he
17 says between July -- May and July of 1987, and then he
18 goes on to complain about conduct. So he's not
19 complaining about a search here. And I would also point
20 out that in the Seventh Circuit he also did not complain
21 about a search there also.

22 QUESTION: I'm curious about your statement
23 about being barred by limitations with regard to the
24 second issue in the case. Is it your position that this
25 claim would be barred by limitations? And, if so, how

1 does that cut with respect to the question of whether one
2 should stay the proceeding or dismiss it?

3 MR. GUTWEIN: Justice Stevens, in this case
4 Indiana's tolling rule is really quite clear, that where
5 the initiation of an action cannot proceed until another
6 action is completed, that first action is tolled.

7 QUESTION: Well, then -- then you've given us an
8 incorrect answer with respect to these allegations because
9 these are not barred by the limitations.

10 MR. GUTWEIN: No, I don't believe that's
11 correct. His --

12 QUESTION: You can't have it both ways.

13 MR. GUTWEIN: No, we -- his section 1983 action
14 would not be tolled. Okay, excuse me, would not be barred
15 by the statute of limitations.

16 QUESTION: Because it would be tolled.

17 MR. GUTWEIN: This action would be tolled --

18 QUESTION: Because --

19 MR. GUTWEIN: This action, the 1983 action would
20 be tolled. But once, now, this action can be brought,
21 then there would be a question of whether the allegations
22 contained within that action were actually timely. So I
23 think that those are two quite separate issues of
24 whether -- when he initially brought the 1983 action,
25 whether it would be tolled. And it would not, the

1 properly pled allegations.

2 QUESTION: So he has -- I'm a little puzzled.
3 It would be barred because at the time he filed the
4 complaint 2 years had run between the time of the search
5 and the time of the filing of the complaint.

6 MR. GUTWEIN: That is correct. Now, the
7 allegations that were --

8 QUESTION: But if he had not filed any complaint
9 at all, but waited until he set aside his conviction and
10 then filed a complaint, it would have been tolled.

11 MR. GUTWEIN: No. Because if later he had filed
12 no complaint and he still complained, then, about conduct
13 between 1987 -- excuse me, then complained about conduct
14 in 1986, that would still be barred.

15 QUESTION: Well, wouldn't it depend if the
16 search was alleged to have infected his conviction?
17 Suppose it was a search unrelated to his conviction?
18 Suppose the product of that search was not introduced at
19 trial? Then there would certainly be no time bar, right?

20 MR. GUTWEIN: I think there would be in that
21 case, because then the injury -- if the search was never
22 introduced -- excuse me, if the evidence was never
23 introduced.

24 QUESTION: Yeah.

25 MR. GUTWEIN: Then, presumably, the injury --

1 QUESTION: Was the search.

2 MR. GUTWEIN: -- Would occur in 1986.

3 QUESTION: Then it would be -- it would be --
4 there's no basis for saying that he had to bring a habeas
5 action first, and therefore it would be time barred.

6 MR. GUTWEIN: That's correct.

7 QUESTION: Okay. But, now, what if it -- what
8 if the evidence was introduced? Is your position it is
9 automatically subject to a prior habeas action you have to
10 exhaust?

11 MR. GUTWEIN: No. If the evidence was
12 introduced, then the injury would have begun to occur when
13 he was convicted.

14 QUESTION: Yeah, but you -- but you still --
15 don't you argue that the exhaustion requirement applies
16 and that he has to go to habeas first, no?

17 MR. GUTWEIN: Yes, we do, that's correct.

18 QUESTION: Why is that? What if he says in his
19 1983 argument in his petition; this evidence was
20 introduced but I acknowledge that its effect in the
21 conviction was harmless error? What if he says that in
22 his 1983 action?

23 MR. GUTWEIN: If he says that in his 1983
24 action, then he need not exhaust.

25 QUESTION: Then he doesn't have to exhaust,

1 okay, right.

2 MR. GUTWEIN: Because he then is not, by
3 definition, attacking the legality of his conviction.

4 QUESTION: Well, what if he doesn't say it, but
5 it's really a close question?

6 MR. GUTWEIN: If it's really a close --

7 QUESTION: Do we assume that it did infect the
8 conviction, or do we look into the facts?

9 MR. GUTWEIN: I believe -- our position is that
10 if you cannot tell, the burden here should rest on the
11 State prisoner, because of the really quite serious
12 effects that allowing this kind of short circuiting around
13 State judicial remedies would have. And so unless that
14 prisoner can be really quite convincing that this is not
15 an attack on the validity of a conviction, then he ought
16 to exhaust.

17 QUESTION: What harmful effects? What harm
18 accrues to the State where he's not asking for damages for
19 his continuing incarceration -- there I can see the State
20 would say, well, gee, you know, he's been held -- we're
21 civilly liable for day -- or somebody is, for his
22 day-by-day incarceration; we'd better let him out.

23 All that's involved is a past unlawful search
24 and seizure; it's uncertain whether that infected his
25 conviction or not. Why not let the 1983 proceed, so long

1 as he's only claiming damages from the search and seizure?
2 What harmful effect would there be to let it proceed?

3 MR. GUTWEIN: I believe the harm is this, and
4 that is that if the 1983 court would decide an issue that
5 must be decided in a later proceeding seeking his release,
6 then at that point the State court has been denied the
7 initial opportunity to decide an issue of whether his
8 conviction is proper or not, and it's confined --

9 QUESTION: Well, you say -- you say that there's
10 issue preclusion. The State court would be bound by the
11 1983 determination.

12 MR. GUTWEIN: It is possible that the State
13 court would be denied, would be bound.

14 QUESTION: Well, let's decide now whether it
15 does or doesn't, I mean.

16 MR. GUTWEIN: You cannot decide right now.
17 Based upon this Court's decision in United States v.
18 Montana, it depends upon, as Justice Ginsburg averted to,
19 the degree of control of the government of the nonparty in
20 that action. And as we're standing here today because
21 this 1983 action has not ever yet been pursued or tried;
22 we don't know what kind of control the State would have
23 exercised in that action.

24 So I believe that it is -- by its nature, the
25 Montana test is a fact-specific test, and therefore it is

1 impossible to generalize at this point. But even if
2 they're not bound, Justice Scalia, even if there's a
3 matter of pure res judicata principles, the practical
4 effects would be enormous here.

5 QUESTION: I don't -- why should we make this
6 prisoner exhaust simply because the State voluntarily
7 chooses to cause itself to be bound by the -- I mean if
8 it's an automatic issue preclusion thing, it seems to me
9 you have a strong case. But if, as you're telling me,
10 it's not automatic and that there will be issue preclusion
11 only if the State is confident enough or stupid enough,
12 one or the other, to come in and manage the defense, I
13 don't see that that has any claim to our equitable
14 consideration. The answer for the State is stay out of
15 the case.

16 MR. GUTWEIN: We don't believe that's an
17 acceptable answer here for a couple of reasons. First of
18 all, the State may well have very real and serious
19 interests to protect in this type of litigation. For
20 example, the State may be, as Indiana here is, statutorily
21 obligated to indemnify these officers, assuming they acted
22 within the scope of their duties.

23 In addition, in these types of litigation there
24 may be legal questions at issue that may affect State
25 policies that the State wants to preserve and protect

1 against and adverse legal judgment. Those are very real
2 consequences. And to put the State in this horrible box
3 of saying you can either protect your interests or you can
4 stay out is really, we believe, an unacceptable position
5 here, particularly for what petitioner is asking for.

6 In addition, we believe that that creates a
7 tremendous hardship on the individual officers themselves,
8 who often must rely upon the State for this type of
9 representation. Otherwise, they have to go out and hire
10 outside counsel. And these are, you know, police officers
11 making \$15,000 a year. They don't have that kind of --
12 and they find themselves in these kinds of lawsuits all
13 the time, every day.

14 QUESTION: Mr. Gutwein, there's one point that
15 you made a little bit earlier, and I wanted to make sure I
16 understood it properly. That is on the second part,
17 whether this case should have been dismissed or held in
18 abeyance. You said Indiana law is crystal clear there
19 would be tolling. If that's true, then would you object
20 to a dismissal without prejudice conditioned on your
21 agreement not to raise any limitation bar should this
22 litigant come back, after exhausting, into the Federal
23 forum on a 1983 claim?

24 MR. GUTWEIN: Let me offer one caveat that
25 exists in every tolling provision, and even in the State

1 provision, and that is that tolling does not apply where
2 the prisoner, in this case, does not act diligently. And
3 therefore it's a little difficult to stand here today and
4 waive our statute of limitations defense when we don't
5 know whether he'll act diligently or not. That is always
6 an issue, but that's an issue whether it's a stay or it's
7 a dismissal. But presuming that he acts diligently, the
8 State of Indiana will not press a statute of limitations
9 defense. There's just no legal basis for it.

10 QUESTION: You know, I bring this up because
11 it's done routinely when States dismiss a case for forum
12 nonconvenience. There's no mechanism for transfer from
13 one State to State, so the State judge will usually say,
14 well, I'll dismiss this case but I don't want the
15 plaintiff to be left when he goes into State number two
16 and faces statute of limitation defense. Or defendants
17 will say, sure, we'll waive the statute of limitations,
18 dismiss, and the plaintiff can rebring it in the
19 convenient forum.

20 So I'm suggesting that why wouldn't that
21 mechanism apply here? Maybe you could have a caveat about
22 he's got to be diligent about reinstating the litigation.
23 But you would have no objection to making the dismissal
24 without prejudice, conditioned on your not raising the
25 statute of limitations.

1 MR. GUTWEIN: No objection whatsoever, Your
2 Honor.

3 Let me, again, emphasize the practical
4 consequences of the rule that they propose here. They
5 propose that based upon the prayer for relief alone, the
6 fact that he has limited his request for damages, ought to
7 get you immediately into Federal court. That result would
8 surely provide an incentive for State prisoners to bring
9 these section 1983 actions immediately.

10 Let's take -- and the fact that he has limited
11 his request to damages and not expressly asked for release
12 does not, in any way, militate the serious comity
13 considerations that are at issue in these kinds of cases.

14 QUESTION: May I ask a question on that relief.
15 In this case his damages all seem to flow from his
16 confinement, as you read the complaint, but he has this
17 allegation about destroying his wife's clothing and so
18 forth. Supposing instead of destroying his wife's
19 clothing, he said he destroyed my house, they burned it
20 down, or did some -- caused some serious physical property
21 damage as well as keeping him, could he maintain that
22 action? Could he claim damages for the loss of property
23 during an illegal search without exhausting?

24 MR. GUTWEIN: Yes, he could.

25 QUESTION: He could.

1 MR. GUTWEIN: Because that loss of property
2 would not, in any way, be an attack on the legality of his
3 conviction.

4 QUESTION: Even though the proof -- say that the
5 allegations he would prove would, incidentally, all
6 demonstrate that the conviction is improper. A set of
7 facts -- you can see what I mean.

8 MR. GUTWEIN: Sure, yeah. No. In that case, if
9 a determination by the 1983 court would also be a
10 determination that in subsequent proceeding the State
11 court, or possibly even the Federal habeas court, would
12 have to make, we believe that comity requires that that
13 prisoner exhaust.

14 QUESTION: Even though he has one count in his
15 complaint for damages that are totally unrelated to his
16 conviction.

17 MR. GUTWEIN: That is correct, Your Honor. But,
18 let me emphasize that this is merely a timing question.
19 As I began the argument, this involves the orderly
20 disposition of these claims, and if there is no statute of
21 limitations bar, presuming that he exhausts the State
22 claims diligently, then he can later come back and bring
23 that damages action.

24 And I think it's important to emphasize here
25 that his immediate need for damages for that claim surely

1 is not as great as a State prisoner's immediate need for
2 release in this Court.

3 QUESTION: Well, he could have dependents who
4 could use the money. I mean, there could be cases in
5 which the money would have a present value that wouldn't
6 be very useful to him if he had to wait till his kids
7 graduated from school, from college.

8 MR. GUTWEIN: That is true. But both Congress
9 and this Court have consistently recognized that when a
10 prisoner is seeking the restoration of their liberty,
11 something that surely has a far greater value than mere
12 damages, that delay is appropriate so that we may allow
13 the State the opportunity, initially, to decide those
14 questions.

15 QUESTION: Yes. But as Justice Souter pointed
16 out, you may be talking about -- this is a kind of
17 confused complaint, but you could have a complaint that is
18 totally Fourth Amendment based, so there's no Federal
19 habeas relief later on, and in which one of the claims is
20 for property damage that doesn't affect his conviction,
21 even though it might also establish the conviction is bad.
22 And you say he should nevertheless wait until -- why
23 should he wait in that case?

24 MR. GUTWEIN: The reason why is because of the
25 potential for short circuiting the State processes in that

1 case; that the value, the comity values that both Congress
2 and this Court have repeatedly emphasized, that it is
3 critical in our judicial system that State courts have the
4 initial opportunity to decide these issues. And in that,
5 under your hypothesis, a necessary element of a later
6 State claim would have been decided by the Federal court,
7 and therefore the State court would have been denied the
8 opportunity to decide that issue.

9 Now, I admit that that's a -- that's a difficult
10 question, and luckily -- I'm glad that that question is
11 not at issue in this case. This is a square attack on the
12 legality of the conviction. This is a petitioner who says
13 all of my damages flow from the fact that I am wrongfully
14 confined. But as a general matter -- putting aside the
15 more difficult cases, as a general matter, in these types
16 of cases when a State prisoner says I should have never
17 been in jail, those types of claims, if decided by a 1983
18 court, will inevitably lead to a State prisoner hopping
19 across the street, going over to the State courthouse, and
20 seeking his relief. And as a practical matter --

21 QUESTION: What about a case in which he alleges
22 that he was brutalized in obtaining a confession from him,
23 and he wants just damages covering the pain and suffering
24 of going through the beating, and that's all he asks for,
25 but, again, it might show that the confession -- you know,

1 the conviction should be --

2 MR. GUTWEIN: Exactly. In some ways ---

3 QUESTION: He'd still have to wait there too,
4 wouldn't he?

5 MR. GUTWEIN: I believe that's an easier case,
6 that's right. Because if he establishes that and it's no
7 harmless error, and it's relatively difficult to establish
8 harmless error when a confession has been beat out of an
9 individual and coerced.

10 QUESTION: What if he said, nevertheless the
11 confession was true, so I really am guilty, but I still
12 want damages for the beating I took, what about that case?

13 MR. GUTWEIN: It would go right to Federal
14 court. Please proceed, get your money. Because in that
15 case if he says I'm innocent -- I'm guilty, I'm the
16 convict here, I ought to be in jail.

17 QUESTION: Who does he make -- who does he give
18 that assurance to? I mean the judge that he's bringing
19 the suit before, or does he file an affidavit,
20 acknowledgement of guilt which will later be binding upon
21 him in the State habeas proceeding. I don't know how he
22 goes about doing this.

23 MR. GUTWEIN: In a variety of manners. First of
24 all, I presume that he would state this in his complaint,
25 because if his complaint just says a confession was beat

1 out of me, it was coerced.

2 QUESTION: But it was true. If he says that in
3 his complaint, then his complaint does not question the
4 State proceeding, okay. So he has to say it in his
5 complaint.

6 QUESTION: Well, I don't know that even that is
7 correct under some of our precedents which say that the
8 reason for suppressing -- it is not a defense for the
9 State in trying to get a confession admitted to show that,
10 in fact, it's true, if it was, in fact, coerced. So that
11 an acknowledgement that a statement he made was true but
12 nonetheless coerced would still require its exclusion at
13 trial, I think.

14 MR. GUTWEIN: In that case, then I believe that
15 he ought to exhaust.

16 QUESTION: Isn't it true generally that a
17 judicial admission in one case doesn't carry over to the
18 next? Say an admission -- you make a request -- in
19 response to a request for admission under Rule 36, if you
20 do that in one case are you stuck by it in the next case
21 and the next case?

22 MR. GUTWEIN: I'm not sure that's the rule. It
23 is possible, but I'm not sure that that completely makes a
24 difference here, whether it's a mere judicial admission.
25 I believe what is critical here is that if this -- viewing

1 the substance of the complaint rather than it's form,
2 viewing the substance of this complaint, if this can be
3 viewed as an attack on the convictions so that a
4 determination, should it be favorable, would be the same
5 determination that a later State court would make -- that
6 petitioner, in order to not short circuit the State
7 judicial proceedings, ought to exhaust.

8 But let's take really the most difficult case
9 here. I think the most difficult case is if the prisoner
10 doesn't want to be released. And I think there's good
11 reason in these cases to not really believe these
12 petitioners. Any petitioner that says please pay me
13 because I'm wrongfully confined, but yet I don't want to
14 be released, I think there's good reason to be suspicious
15 of that.

16 But let's take really the hardest case, that we
17 actually believe this petitioner that he no interest
18 whatsoever in release, that there is still good reason to
19 require to go ahead and exhaust. Because there are two
20 consequences that would follow from a successful judgment
21 in his favor.

22 Number one, he would, in fact, get damages.
23 And as was averted to in the other -- earlier questioning,
24 any rational State, when a petitioner receives a 20-year
25 sentence and in year one gets damages to pay him for those

1 next 20 years, would feel coerced to release that
2 prisoner, even if he doesn't want to be released. States
3 are not in the business of paying prisoners to be in jail.

4 But second, not only the -- and this Court
5 recognized that in Fair Assessment v. McNary -- the
6 inherently coercive effects of a damages judgment. So as
7 a purely practical matter, putting aside res judicata,
8 formal issue preclusion, as a purely practical matter,
9 that damages judgment should prevent -- would cause a
10 State to release him.

11 QUESTION: Well, how does that practical
12 consideration transfer into the theory that you want us to
13 adopt in this case? Are you saying that just as a matter
14 of comity, that these cases should all be dismissed if
15 they implicate some of the actions of prosecuting
16 officials that were performed in connection with obtaining
17 the conviction, just have a broad rule of comity --

18 MR. GUTWEIN: There are two separate --

19 QUESTION: That is that sweeping?

20 MR. GUTWEIN: We don't believe that that's --
21 there are two separate grounds for our theory. One is
22 Congress' desire in section 2254(b) that State prisoners
23 ought to first exhaust before they attack the legality of
24 their conviction. But, second, on top of that, we believe
25 that there are general comity principles that are fully

1 implicated here, and that those comity principles --

2 QUESTION: Well, I'm wondering if those might
3 not go even beyond attacking the legality of a conviction.
4 As we've indicated by some of the hypotheticals here, some
5 of these determinations, some of these inquiries will not
6 necessarily bear on the validity of the conviction. But I
7 had thought you were indicating that even those suits
8 should be held in abeyance until the lawfulness of the
9 custody and the conviction had been determined.

10 MR. GUTWEIN: That is correct, Justice Kennedy.
11 This Court -- this case presents a relatively narrow
12 issue, and that is a direct attack on the legality of the
13 conviction, and therefore this Court could rule in that
14 narrow manner, based upon sort of pure 2254(b) principles.
15 But we believe that the most rational system here is one
16 that takes into account those other cases outside of pure
17 2254(b) principles. This Court need not decide that
18 issue, but we believe that that is really the most
19 rational, orderly system for handling attacks on
20 convictions.

21 Let me address for a moment issue two. Their
22 argument is this case has to be dismissed merely because
23 there is jurisdiction, and in addition because of the
24 statute of limitations bar. Let me address the
25 jurisdictional point for a moment. The fact that there is

1 jurisdiction alone does not require a stay, as this
2 Court's habeas cases demonstrate. There may be -- a
3 12(b)(1) lack of jurisdiction dismissal may not be
4 appropriate, but a 12(b)(6) dismissal is appropriate. We
5 believe that exhaustion is a requirement for these types
6 of claims, and therefore even though there is
7 jurisdiction, he has not satisfied a prerequisite and
8 dismissal is appropriate under 12(b)(6) and that ought to
9 be enough.

10 Furthermore, the cost of these cases being on
11 the docket is really very real. The fact is that the vast
12 majority of these cases will not be meritorious, and
13 there's a real cost to getting rid of those cases. A
14 Federal court has to look for these nonmeritorious cases,
15 has to review the file, has to send an order, has to
16 receive that order back. All of that takes time, and that
17 is not cost free.

18 In addition, there's a cost to our office. We
19 also have to respond to these cases. In addition, there
20 is a cost to the defendants themselves who, in this case,
21 are defendants in a \$3 million lawsuit. That affects
22 their credit rating and that could prevent them from
23 buying a house. There's a very real tangible cost. So
24 there are real costs, but there is --

25 QUESTION: You'd have none of those problems if

1 you agreed to stipulate that you won't raise this statute
2 of limitations if the plaintiff ever sues you again on
3 this claim, with reasonable diligence.

4 MR. GUTWEIN: We establish the mortgage -- that
5 gets rid of the mortgage problem, but that does not get
6 rid of the fact that Federal courts have to work hard to
7 get rid of these nonmeritorious cases off of its docket.
8 It may --

9 QUESTION: I thought you agreed that that would
10 be all right, that you would stipulate to a dismissal
11 without prejudice, conditioned on your not raising the
12 statute of limitations should the plaintiff come back to
13 court after exhaustion.

14 MR. GUTWEIN: That's correct. We would be happy
15 with that result.

16 QUESTION: You'd be happy -- you're not
17 stipulating that we have authority to impose it.

18 MR. GUTWEIN: No, that's correct.

19 QUESTION: I mean, it's done in forum
20 nonconvenience cases because that is an equitable
21 doctrine, after all.

22 MR. GUTWEIN: That's true.

23 QUESTION: But you're claiming that you have a
24 right to dismissal without that stipulation, aren't you?

25 MR. GUTWEIN: A 12(b)(6) dismissal, that is

1 correct, we have a right to that dismissal. The mere fact
2 that this Court has a quote, virtually unflagging
3 obligation to exercise jurisdiction does not in any way
4 resolve the stay versus dismissal issue, and that is
5 really the vast majority of petitioner's argument.

6 If the Court has no more questions, we would
7 urge that the Court affirm the judgment of the Seventh
8 Circuit.

9 QUESTION: Thank you, Mr. Gutwein.

10 Mr. Rothfeld, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF CHARLES ROTHFELD

12 ON BEHALF OF THE PETITIONER

13 MR. ROTHFELD: A couple of points, Mr. Chief
14 Justice.

15 First of all, I think that the central question
16 in this case is one that has been identified by Justices
17 Scalia and Stevens in some of their questions. The fact
18 is that petitioner in this case, and petitioners in cases
19 like this, are not necessarily attacking the validity of
20 their conviction.

21 Respondents have focused entirely on the element
22 of petitioner's claim which asks for damages for the
23 period of his confinement. He also asks for what we
24 understand to be nominal damages and for punitive damages
25 which could be awarded notwithstanding any determination

1 regarding whether or not that conviction was properly
2 returned at the time that it was returned.

3 And respondents don't really offer this Court
4 any test at all for resolving these cases. In fact,
5 whenever a petitioner -- whenever a prisoner advances a
6 claim that there was a Fourth Amendment violation, or any
7 sort of violation as to which harmless error might apply,
8 there is no way of determining, on the face of that
9 complaint, whether or not that calls into question the
10 validity of the conviction.

11 I mean Judge Coffin wrote, I think, a very
12 thoughtful opinion for the First Circuit on precisely this
13 point in a case called Guerro v. Mulhearn, which is
14 discussed in the briefs, in which he noted that it's
15 impossible to determine, without going through the entire
16 line of analysis, if the search was unconstitutional. Did
17 it produce investigative leads, did those leads lead to
18 the discovery --

19 QUESTION: Well, why not apply kind of an
20 analogy of Rose against Lundy and say that if there's
21 doubt about the thing, dismiss.

22 MR. ROTHFELD: Well, I think there's no
23 justification for that, Chief Justice Rehnquist. As a
24 general matter, of course, the Court has held repeatedly
25 that Congress intended that 1983 claims not be exhausted.

1 Now, there's a specific reason for the exception
2 recognized for that in Preiser. The specific exemption is
3 that the Court found that it was the intent of Congress
4 that section 2254(b), the Federal habeas exhaustion
5 requirement, applied when the petitioner actually filed
6 what was a habeas petition, an action seeking an
7 injunction that would lead to his release.

8 The Court said that is a habeas petition and you
9 must exhaust under section 2254. But the Court went on to
10 say -- and I think it's clear from the face of the habeas
11 statute, that a petitioner who is asking for something
12 other than release is not filing a habeas claim, and as
13 respondents -- I think as my colleague from Indiana
14 conceded, they are not saying that the section 2254(b)
15 exception applies. They are applying or asking the Court
16 to create a much more far-reaching comity exception to the
17 general 1983 rule that does not provide for exhaustion.

18 The Court has never done that in a situation
19 such as this. The Court has never said that although you
20 can bring a section 1983 action at some point, you'll have
21 to hold off doing it now because there are some general
22 State interests -- which I think, really, have not been
23 clearly articulated for the Court as to precisely what
24 they are.

25 The reason that the Court and Congress have

1 required exhaustion in the habeas setting is that for a
2 Federal court to issue a writ of habeas corpus is an
3 extraordinarily intrusive thing. It sets aside a State
4 judgment, it requires a State official to take action in
5 an area of considerable concern to the State, and it short
6 circuits the use of State judicial proceedings,
7 post-conviction proceedings. None of that is true of a
8 damages action. It has no effect on --

9 QUESTION: It's also an equitable proceeding so
10 that we have -- I mean it's a prerogative writ, so we have
11 much more discretion, traditionally, in refusing to grant
12 the petition.

13 MR. ROTHFELD: That is also true, Justice
14 Scalia, which is a reason why habeas should be
15 differentiated from section 1983. The damages action has
16 none of those consequences. Not only does it not call
17 into question the validity of the conviction; it does not
18 require the State to do anything other than to pay the
19 damages judgment. It does not short circuit the use, as
20 respondent suggest, of State postconviction procedures,
21 because the prisoner is still going to have to go into
22 State court if he wants release.

23 Those are the concerns that have motivated the
24 Court in all the line of habeas cases emphasizing the
25 importance of exhaustion; none of them are present here.

1 And that is particularly important when, as I emphasized,
2 it is the case that for many of these claims it's not
3 going to be apparent, on the face of the complaint,
4 whether or not the validity of the conviction is in any
5 manner called into question. And I think given the force
6 of the 1983 no exhaustion rule repeatedly applied by the
7 Court, that should be dispositive here.

8 QUESTION: Is the essence of your argument this
9 is just like the old days when you had a claim at law or a
10 claim for specific relief in equity, you could pick which
11 one you want?

12 MR. ROTHFELD: Well, I think that's right,
13 Justice Ginsburg -- and I'll get the name right this time.
14 I think that the Court has repeatedly recognized that a
15 plaintiff, as a general matter, is the master of his
16 claim. The Court recognized that principle in this very
17 context in Wolff v. McDonnell and Preiser v. Rodriguez,
18 and there is no reason to retreat from it now.

19 The prisoner who prevails in his 1983 damages
20 action is still going to have to go into State court. He
21 is most definitely and emphatically not short circuiting
22 the State postconviction process.

23 QUESTION: But, what if you were to be asked to
24 stipulate that you can proceed if you would agree not to
25 urge any issue preclusion or res judicata in any

1 subsequent habeas?

2 MR. ROTHFELD: Since we think that there would
3 not be any such preclusion, I think that that would be
4 fine with the prisoner.

5 Thank you very much.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Rothfeld.

8 The case is submitted.

9 (Whereupon, at 12:03 p.m., the case in the
10 above-entitled matter was submitted.)

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ROY HECK, Petitioner v. JAMES HUMPHREY, ET AL.

CASE NO.: 93-6188

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