No. 79-935

ALLEN

v.

McCURRY

CERT TO CA 8

(Lay, Heaney, McMillian)

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SUMMARY

This case presents the question whether federal principles of res judicata should be applied to bar a suit under § 1983, brought after a state criminal prosecution in which the constitutional issue raised in the § 1983 suit, the legality of a search and seizure, had been presented and decided. Resp was convicted on the basis of evidence seized during a search of his house, conducted after a shoot-out with police. The search was justified as an emergency search for additional occupants of the house. The state CA suppressed some evidence not found in plain view, but held the entry and search for occupants permissible under the fourth amendment, and evidence found in plain view by a "seizure officer" admissible at resp's trial. The federal DC dismissed resp's subsequent § 1983 suit against the police officers as collaterally estopped. The CA 8 reversed, holding that because collateral attack through habeas corpus on fourth amendment claims in federal court was barred by Stone v. Powell, 428 U.S. 425 (1976), it must ignore preclusion in order to provide a federal forum for the civil rights claim.

I conclude that this Court should not adopt a rule barring § 1983 suits for fourth amendment violations when the issue was decided in a prior state criminal prosecution. Although the legislative history is not definitive, I consider its import plainly to disfavor this conclusion. Additionally, applying collateral estoppel to subsequent civil damages suits will more greatly harm federal interests than it will advance the interests of comity between state and federal governments.

I. FACTS

In the evening of April 9, 1977, several plain-clothed policemen went to resp's house to attempt to make a drug buy. Resp opened his door at their knock and, having heard their request, told them to wait until he got what they wanted. Resp returned 30 seconds later with a gun, with which he shot and seriously injured the two policemen at the door. Their back-up men, hidden in nearby bushes, opened fire, and a gun battle ensued, heightened by the arrival of other police forces. After ten or fifteen minutes, police stopped firing and ordered the occupants of the house out. Resp and his father emerged. The entry and search followed, during the course of which one officer found the pistol used in the assault, a shot gun, and some heroin and drug paraphenalia. The officer who located these items had been designated the "seizure officer," whose sole duty in this type of situation was to locate and preserve evidence discovered during the emergency search. There was some evidence presented at resp's trial that the seizure officer arrived on the scene late, after the house was secured, and went through the house for about an hour.

Resp was tried in state court and convicted of one count of possession of controlled drugs and two counts of assault with intent to kill. At his trial, he moved for suppression of the evidence seized during the search, claiming that it was seized in contravention of his fourth and fourteenth amendment rights. The St. Louis Circuit Court (the trial court) granted his motion in part, suppressing the items found "in drawers and among tires." Petn. at A-27. It denied suppression of "items

found in full view such as a gun and drugs on a dresser top and a shot gun." Id.

The Missouri Ct. of Apps. (Satz, J.) affirmed this ruling, holding that the search, lasting approximately an hour, was legitimate in scope and length, despite the presence and activities of the "seizure officer." The police were justified in searching throughout the house for other occupants, and their seizure of any items found in plain view in areas where a person could have been found was permissible. These items were "inadvertently" found within the reasoning of Coolidge v. New Hampshire, 403 U.S. 443, 469-70 (1971) ("inadvertence" excludes having anticipated the presence of evidence and having entered with the intent to seize it). The police department's use of a specifically designated "seizure officer" was simply an efficient use of personnel. By giving one person the responsibility of caring for any discovered evidence, the practice freed most of the officers to deal with the exigencies of the situation. The CA approved the trial court's suppression of items that were not found in plain view because in those instances the seizure officer had exceeded the permissible limits of the search.

After his conviction, but before its affirmance on appeal, resp filed a § 1983 suit in U.S. DC (E.D. Mo.) against the police officers who had conducted the search. (He included the two officers he had shot.) His complaint alleged that these officers had conspired to violate his fourth amendment rights by searching his house without a warrant. He claimed that the sole purpose of the search was to locate contraband and not to

search for other occupants and that the police had secured the house and had waited an hour before searching, during which period they easily could have obtained a warrant. Resp also alleged that one of the officers had assaulted him after his arrest, while he was handcuffed and helpless. Resp sought $1,000,000 in damages and a declaration that his fourth amendment rights had been violated.

II. DECISIONS BELOW

A. District Court

The DC (Meredith, J.) granted petrs' (defendants') motion for summary judgment and dismissed the § 1983 suit with prejudice. It held that resp was collaterally estopped from raising his claim because "the only issue in the instant lawsuit--whether the entrance into plaintiff's home and the resulting search was lawful--was litigated on the merits at his criminal trial in state court and determined adversely to his position." Petn. at A-3.

B. Eight Circuit

The CA 8 (Lay, Heaney, McMillian) reversed. First, it held that the DC had failed to address resp's allegation of an unlawful assault. The DC was directed to give that claim "appropriate consideration" on remand. On the collateral estoppel issue, the CA also reversed, confining its holding to cases involving fourth amendment claims. Noting the numerous other CAs that have held res judicata principles generally applicable to § 1983 cases, the CA declined to address conclusively "the general question whether collateral estoppel applie[s] to § 1983 actions when the issues raised in the § 1983 suit were determined adversely to the § 1983 plaintiff in an underlying state criminal trial." Petn. at A-7.

The CA felt that it must treat separately the narrower issue of the "relitigation" of search and seizure claims because of Stone v. Powell, 428 U.S. 465 (1976), by virtue of which only very few search and seizure claims can be raised by state prisoners in habeas corpus actions in federal court. If

collateral estoppel applies to bar § 1983 actions raising these fourth amendment claims, victims of unconstitutional searches and seizures will be denied any federal forum. The CA discounted the force of the prior holdings on grounds either that they were decided prior to Stone or that they had not dealt with fourth amendment claims.

The CA noted that many of the other CAs, in applying res judicata to § 1983, had relied on the availability of habeas corpus as an alternative. Additionally, Stone's holding itself (barring relitigation of fourth amendment claims on habeas corpus) was justified partially by the existence of alternate ways of reaching a federal forum, principally a § 1983 damages action.

Thus, the CA concluded that "because of the special role of federal courts in protecting civil rights, . . . and because habeas corpus is now unavailable to appellant, . . . it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, appellant's § 1983 claims." Petn. at A-11.

The CA remanded the case, with orders to hold it in abeyance pending disposition of resp's direct appeal in state court.

III. CONTENTIONS

A. Petrs

Petrs advance both legal and policy arguments in favor of applying "normal" rules of collateral estoppel to cases brought in federal court under § 1983 after state criminal prosecutions. Their legal reasoning focuses on 1) the tort background and legislative history of § 1983 and 2) the import of 28 U.S.C. § 1738. Their policy reasons include considerations of comity, judicial integrity, and economy of judicial resources.

1. Reasons for Applying Collateral Estoppel

Petrs argue that federal principles of collateral estoppel, as exemplifed by Montana v. United States, 440 U.S. 147 (1979), are fully applicable to suits under § 1983. In Montana, the Court held that the U.S. Government's suit in federal district court on the constitutionality of a state tax statute was barred by its prior voluntary submission of the issue to the state court, which had ruled against the party with whom the U.S. was in privity. In that case the Court endorsed the principle that a litigant deserves only one "full and fair opportunity for judicial resolution of the same issue." Where state and federal courts have concurrent jurisdiction over an issue, the fact that the initial resolution of an issue takes place in state court is irrelevant to the application of collateral estoppel.

Petrs advance a number of reasons why § 1983 cases should not be treated differently. They point to "intimations" to that effect in prior cases. See, e.g., Huffman v. Pursue, 420

U.S. 592 (1975); Wolff v. McDonnell, 418 U.S. 539 (1974); Preiser v. Rodriguez, 411 U.S. 475 (1973). They argue that collateral estoppel is necessary to "stanch 'the torrent of civil rights litigation of the last 17 years.'" Petrs' Brief at 14. They also claim that "risks inherent in the uncontrolled relitigation, via § 1983, of constitutional claims already fully litigated in state court" can be avoided by the use of traditional collateral estoppel principles. A major argument is that § 1983 is based on traditional tort concepts, Pierson v. Ray, 386 U.S. 547 (1967), among which should be numbered the traditional concept of collateral estoppel.

Petrs cite the "overwhelming majority" of prior cases that have found collateral estoppel applicable. These cases used a traditional analysis based on examination of the policy factors embodied by the rule. In none of these cases was the question of the availability of habeas corpus relief in federal court crucial.

Petrs argue that the legislative history of § 1983 reveals that Congress intended to maintain the states' concurrent jurisdiction over federal constitutional questions and therefore to retain traditional rules of preclusion. Section 1983 was intended to be only a "supplementary" remedy, to be used when the state remedy "adequate in theory, was not available in practice." The only alteration caused by passage of § 1983 was an enlargment of federal jurisdiction, not a retraction of state jurisdiction. It gave federal courts a new remedy. It was not intended as a "mechanism for collateral attack on state judgments."

Petrs attempt to distinguish two pertinent cases: Mitchum v. Foster, 407 U.S. 225 (1972) and England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Mitchum, in which the Court held that § 1983 fell within the exception to the federal anti-injunction act and was therefore available to enjoin state court proceedings, is not pertinent because it involved only a state court proceeding, not an attack on a final state court judgment. In England, the Court refused to grant preclusive effect to a state court judgment disposing of a constitutional claim, entered after a federal court, with which the claim originally had been lodged, had abstained from hearing the case. The federal court had abstained and had remitted the parties to state court in hopes that the statute would be construed to avoid the constitutional problem. Petrs distinguish England rather incoherently on grounds it is "exceptional," "arising precisely because § 1983 does evince a Congressional policy of preserving concurrent state jurisdiction over federal constitutional questions."

A separate claim is that 28 U.S.C. § 1738 imposes on federal courts the duty to give state court judgments the same full faith and credit they would receive from the state court itself. That section reads:

> [The authenticated] Acts, records and judicial proceedings [of the States] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Yet, while relying on this section, petrs simultaneously argue

for a federal rule of preclusion, not application of divergent state practices, for the sake of uniformity. They assert that by applying federal rules of collateral estoppel federal courts can achieve the policy of § 1738, which petrs argue "embodies a Congressional policy that there be an end of litigation." Petrs admit that some federal statutes present "countervailing and compelling federal policies" that require § 1738 to be set aside, but they flatly maintain that § 1983 does not.

Petrs argue that the availability of habeas corpus relief in federal courts is an irrelevancy and cannot influence the outcome of this case. They intimate that the CA simply was dissatisfied with the holding of Stone v. Powell. Additionally, they argue that the policies implicit in Stone, its expressions of discontent with the exclusionary rule's costs to society, actually will be advanced by application of collateral estoppel to § 1983 suits. Stone held that the exclusionary rule, a judge-made means of safeguarding fourth amendment rights through deterrence, should be construed with an eye towards comity, usefulness, efficiency, and the need for finality. Collateral estoppel, also a judge-made rule, advances these same interests. Therefore, its application here will complement Stone's purposes.

2. Principles of Collateral Estoppel in § 1983 Suits

Petrs outline how collateral estoppel should work in § 1983 suits. Their "first principles," modeled on customary collateral estoppel analysis, include concepts of final judgment, same parties, and same issues, but they modify these concepts slightly.

They argue that a state trial court judgment should be considered "final" regardless of pending appeals. In cases where "there is a possibility that the state judgment will be reversed on appeal," petrs suggest that the federal DC could stay its dismissal of the § 1983 suit to avoid running of statutes of limitation.

The "party" concept they find simple enough, especially where the prior state proceeding was criminal. They discount the fact that a defendant's presentation of a constitutional claim in a criminal prosecution in some sense would be "involuntary," arguing that § 1983 was not intended to guarantee a federal forum and that state courts can be trusted to "give full and fair consideration to criminal defendants' constitutional claims." I find these arguments non sequiturs.

As to whether the prior state proceeding had involved the "same issue," petrs advise a close examination of the record to see whether the state court "afforded a 'full and fair opportunity' for litigation of the federal constitutional issue." If the record shows any procedural due process defects, such as ineffective assistance of counsel, the case should have no preclusive effect. The federal court also should determine whether "controlling facts or legal principles have changed significantly since the state court judgment" and whether the same controlling facts are raised in the two actions. Finally, the court should determine whether the prior case decided the issue "on the merits."

Petrs add several factors to the traditional collateral estoppel inquiry. These factors, previously outlined by this

Court in Montana, which would militate against giving a prior suit preclusive effect, include the presence of 1) unmixed questions of law, 2) initial invocation of a federal forum, with subsequent remittance to state procedures (the England case), and 3) manifest unfairness or inadequacy in the procedures afforded in the prior suit.

Applying these principles to the case at hand, petrs conclude that collateral estoppel bars the second § 1983 suit. Resp raised exactly the same search and seizure issue at his criminal trial; the issue was decided on its merits; and resp alleges no procedural defects. Although resp was granted some relief, it is clear he is proceeding not on the minor issue that the search exceeded reasonable bounds, but on the grounds that the entire search was illegal. This issue was decided by the state court against him.

B. Resp

Resp's position is that § 1983 was intended to provide a federal forum, not just a federal remedy available in either state or federal court. Congress, he argues, decided that the state courts standing alone could not adequately protect federally created civil rights. "The Congress which passed section 1983 had little faith in the ability of state courts to fairly [sic] adjudicate federal constitutional claims, and . . . it specifically intended to provide a federal remedy to protect such rights, even where adequate state remedies existed." To support this theory, resp quotes from the debates and relies on this Court's prior interpretations of § 1983's legislative history.

1. Legislative History and Past Interpretations of § 1983

In part, the language resp refers to from the debates includes several statements that the Act gives an action "in Federal courts." Other proponents of the Act discussed the lawlessness of the Southern court system and their intent to use federal courts as more trustworthy. In particular, resp relies on one comment by Representative Biggs: "First, for the violation of the rights, privileges, and immunities of the citizen a civil remedy is to be had by proceedings in the Federal courts, State authorization in the premises to the contrary notwithstanding."

Resp cites Mitchum v. Foster, 407 U.S. 225 (1972), for the proposition that § 1983 intended to establish the federal courts as the special protector of constitutional rights. In that case, the Court (Stewart, J.) held that § 1983 was within an exception to the federal anti-injunction act, 28 U.S.C. § 2283, which forbade federal courts to enjoin state court proceedings. It described § 1983 as "an important part of the basic alteration in our federal system wrought in the Reconstruction era . . . ." This "new structure of law" established "the role of the Federal Government as a guarantor of basic federal rights against state power." "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." 407 U.S. at 238-39. "The very purpose of § 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights--to protect the people from

unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" 407 U.S. at 242 (quoting Ex parte Virginia, 100 U.S. 339 (1880)).

Because the Act was intended to alter the relationship between state and federal government, instituting the federal authorities as the final arbiters of civil rights, resp argues that it would violate the congressional intent for this Court to abdicate its position and to give the state courts final say on any constitutional issue. Any refusal to provide a federal forum would be especially incongruous in light of the obvious intention to provide a remedy against illegal actions by state courts themselves.

2. Reasons for Not Applying Collateral Estoppel

Resp refutes petrs' reliance on the policies espoused in Stone v. Powell. Stone, he argues, is an entirely different case. Although prior cases applying res judicata to § 1983 have relied on the presence of habeas corpus as an alternative that would satisfy congressional intent to provide a federal forum for constitutional claims, resp claims they were misguided though well-meaning. Resp argues that refusal to apply collateral estoppel to § 1983 cases would be consistent with Stone. The reason for the Court's decision in Stone was its perception that allowing the exclusionary rule to function on application for habeas corpus in federal court (after exhaustion) would have no deterrent effect on the policeman who committed an illegal search. Rather, the costs it would impose in terms of jeopardizing the truth-finding process of trial and freeing criminals would outweigh its deterrence value. Section

1983, however, was passed with a different goal in mind: compensation to victims as well as deterrence. See Owen v. City of Independence, No. 78-1779 (Jan. 8, 1980). Because § 1983 is not tied to an innocence/guilt determination, it cannot "free the guilty." At most it will result in a damages award.

The prior cases that dealt with the collateral estoppel effect of state court proceedings are distinguishable. Either they were decided before Stone, or they involved a prior voluntary choice of a state forum. Resp refers to one post-Stone case, Clark v. Lutcher, 436 F. Supp. 1266 (M.D. Pa. 1977), which held collateral estoppel inapplicable. In another, Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977), the CA (Haynsworth, C.J.), applying collateral estoppel to bar a § 1983 suit on an issue of improper identification that had been adjudicated in plaintiff's criminal trial, noted:

> "Application of the rule of preclusion by reason of a state court conviction in [search and seizure] cases . . . may deny a state court prisoner access to a federal forum entirely. Since it was the general intention of the Civil Rights Act to provide access to a federal forum for the adjudication of federal constitutional rights, the Civil Rights Act itself may present a bar to foreclosure of the issue in those cases."

For a number of reasons, petr argues that denying a federal forum would contravene § 1983's intent and purpose. First, meritorious claims (ones in which the state court decided wrongly under federal standards) will be dismissed. He notes that in this case the CA expressly noted the substantiality of his claim. Second, criminal defendants will be put to a choice whether to present valid defenses to introduction of evidence in their criminal trials or to preserve their right to litigate for

damages an unconstitutional search. Also, petr argues that the exclusionary rule, which was never meant to supplant the damages remedy supplied by § 1983, would become the sole method for vindicating fourth amendment rights. Resp relies for this proposition on Ney v. California, 439 F.2d 1285 (9th Cir. 1971); however, in that case, a prior conviction was held no bar to a subsequent civil rights suit because the issue in question, a claim that right to counsel had been violated, had not been litigated in the prior criminal prosecution by agreement among the parties to exclude that evidence. The CA 9 (Duniway, J.) did state the following by way of dictum:

> "Moreover, if a successful state prosecution, based upon the use of information obtained by violating the defendant's constitutional rights, could bar a civil rights action against the police for violating his rights, either by analogy to the law of malicious prosecution or on theories of res judicata or estoppel by judgment, the Civil Rights Act would, in many cases, be a dead letter."

Also, all rulings on fourth amendment claims would be by state courts, insulated from federal courts by the remoteness and improbability of Supreme Court review.

It does not answer the question, resp contends, to state that § 1983 must be read against a background of tort principles. The first source of the statute's interpretation must be its legislative history, which declares that a federal forum is essential. The federal courts' jurisdiction under § 1983 extends to state courts' actions; these actions cannot have preclusive effect upon the federal courts. Montana specifically notes that "special circumstances" may warrant exceptions to its rule that collateral estoppel will apply

between state and federal forums. 440 U.S. at 155. This statute is one of those circumstances.

Also, federalism concerns must be addressed in light of the statute's intended special role for federal courts. Section 1983 did alter the relationship between federal and state courts in order to establish federal courts as the arbiters of civil rights. The concurrent jurisdiction of state courts under § 1983 is of no impact. Here resp was forced into state courts. He had not choice of forum, as was contemplated by the Act. Allowing resp's suit to proceed will not harm the prior state court's judgment on the exclusionary rule. At most, it will result in damages assessed against specific police officers. The CA was careful to further comity by abstaining while the state appeal was pending, despite the potential worthiness of resp's claim.

Section 1738 is simply inapplicable. As made clear in Mitchum v. Foster, 407 U.S. 225 (1972), this is one of the federal statutes whose policies require departure from the full faith and credit rule.

Resp maintains that he has a serious and substantial fourth amendment claim under federal standards. He relies on Mincey v. Arizona, 437 U.S. 385 (1978) (Stewart, J.), in which the Court held illegal Arizona's "murder scene" exception to the warrant requirement. In that case, a narcotics raid ended in a gun battle, killing and wounding several people. After the narcotics agents had searched the premises briefly for other occupants, homicide detectives arrived and took charge. They conducted an exhaustive four-day search without obtaining a

warrant and located evidence used in subsequent convictions. The Court held the evidentiary search unconstitutional, although the state supreme court had held it justified to determine the "circumstances of death." The Court recognized and approved emergency searches conducted to aid wounded or discover killers, even if those searches result in the seizure of evidence in plain view. Yet, it required that such searches be "strictly circumscribed by the exigencies which justify [their] initiation" (quoting Terry v. Ohio, 392 U.S. at 25-26). Resp argues that the facts in this case may fall within the Mincey analysis because he claims the "seizure officer" did not arrive and begin his search until after the house was secured and no emergency existed.

Additionally, he claims the suit should not have been dismissed with prejudice because no court had addressed his assault claim. No claim of res judicata could be made to bar litigation of that issue.

C. Amici

1. Americans for Effective Law Enforcement (AELE)

This group, apparently in conjunction with the State of Maryland and the City and County of San Francisco, has submitted a highly inflammatory amicus brief, which states the this § 1983 claim is identical to the preceding exclusionary rule claim and that collateral estoppel therefore should apply under Stone's analysis.

AELE asserts that the CA 8 merely sought to "subvert" the holding of Stone v. Powell, and it presents statistical evidence of the rise in civil rights litigation over the past 15 years in

support of their contention that the Court should apply collateral estoppel in order to halt the "avalanche" or "torrent" of "groundless civil litigation that will be engendered by" the CA's decision. It claims that to do otherwise will cause courts to ignore or overlook the few meritorious claims that come before them. It also claims that the Court must act to protect "law enforcement officers from the harassment and vexation of groundless civil litigation."

2. ACLU/Eastern Missouri

In a brief that is only slightly less inflammatory, the ACLU emphasized the importance of the federal courts as guardians of civil rights. It distinguishes the Stone rationale (guilt/innocence v. deterrence) from § 1983, which involves direct vindication of constitutional violations. Removing § 1983 suits from the effect of rules of preclusions would further important federal interests without imposing the costs to society relied on in Stone. Section 1983 suits supply all of the deterrent effect, by imposing damages on wrongdoers, that the exclusionary rule sought to create, without any harm to the workings of the criminal justice system. The threat of damages is even more potent as a deterrent to wrongful action than the threat that evidence will be excluded.

In addition, this result is necessary to provide an adequate mechanism for control of state court enforcement of fourth amendment rights. Preclusive effect of state court criminal judgments will allow divergent holdings and will encourage states to ignore federal precedent.

The ACLU also refutes the statistics offered by AELE on the

"flood" of litigation. The argument on numbers is highly speculative and should not be relied on in deciding what the intentions of the drafts of § 1983 were.

IV. DISCUSSION

Because the situations in which this issue of preclusion will arise are so various, I think the Court should not adopt a single rule of res judicata governing all federal cases that follow state rulings. The conflicting goals behind comity and deference to prior state adjudication, on the one hand, and preservation of a federal forum for final interpretation of constitutional rights, on the other, must be balanced, and the major goal must be to reconcile the two needs without excessively damaging either. The result in a given case should vary according to the presence or absence of variables that I will attempt to lay out here. Because this is the first case in which the Court directly has addressed this issue, I think it necessary to set out what could be a useful general theory. Applying that theory to the facts in this case, I believe, leads to denying res judicata effect in this case to the prior state court resolution of the fourth amendment issue.

A. Factors Favoring Application of Res Judicata to § 1983

1. Traditional Purposes of Res Judicata

There is no dispute that the imposition of res judicata to bar relitigation either of a claim or of certain issues in a case advances important judicial goals: judicial efficiency and economical use of resources, protection of the integrity and finality of prior court judgments, and prevention of harrassment and inconvenience to litigants. James, Civil Procedure § 11.1 at 517-18. Res judicata also prevents double recoveries for the same cause of action, and it promotes stable decision-making and respect for individual courts and the

judicial system as a whole. The Court generally has held that decisions of state courts must be given preclusive effect in federal court, on the basis of these considerations. See Montana v. United States, 440 U.S. 147, 153 (1979). The Court there stated that "[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judical resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."

2. Federalism Interests

In cases involving federalism and the respect to be paid by federal courts to state court adjudications, courts must be sensitive to additional factors, including both minimization of friction between the two sovereigns and yet maintenance of the special roles given to federal courts by Congress. In balancing federal and state interests, this Court has fashioned doctrines of abstention. See Huffman v. Pursue, 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). These timing rules are based on "a strong judicial policy against federal interference with state criminal proceedings." 420 U.S. at 600. They seek to allow state institutions the freedom to perform their separate functions in separate ways. 401 U.S. at 44. These cases caution against wholesale refashioning of state court judgments, and indicate that any rule allowing relitigation of any state decisions must take into account the delicate balance of power between state and federal courts.

The Court also has articulated a general federal law of res judicata giving effect to prior state court judgments. See Montana v. United States, 440 U.S. 147 (1979). In Montana, the Court held that general modern principles of res judicata would be applied in federal court to evaluate prior state judgments. However, the Court also held that part of the doctrine would be a determination "whether other special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155.

Finally, § 1738 does represent some sort of congressional policy to award state judgments full faith and credit in federal court. However, the Court has recognized that this section requires no more than that normal rules of res judicata apply. Halvey v. Halvey, 330 U.S. 610, 615 (1947).

3. Prior Cases

The majority of the circuits passing on this issue have given prior state judgments collateral estoppel effect. Many of these, as resp notes, dealt only with previous suits brought by the § 1983 plaintiff in state court. See, e.g., Jennings v. Caddo Parish School Board, 531 F.2d 1331 (5th Cir. 1976) (teacher's having obtained prior state judicial determination that her firing was non-discriminatory precluded § 1983 claim on that ground); Rios v. Cessna Finance Corp., 488 F.2d 25 (10th Cir. 1973) (prior resolution of wrongful replevin counterclaim in state court barred subsequent § 1983 claim for unconstitutional deprivation of property rights). Others, however, have precluded suits under § 1983 even when the claimant was forced to bring his initial claim in state court. See, e.g., Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481

(9th Cir. 1973) (prior liquor license revocation proceedings held to preclude subsequent § 1983 action claiming these proceedings violated constitutional rights because the issues could have been raised in the state proceedings); Coogan v. Cincinnati Bar Ass'n, 431 F.2d 1209 (6th Cir. 1970) (final judgment of state court suspending lawyer from practice held to bar subsequent § 1983 suit on issues not raised, but which could have been raised, in prior suit). These cases do not contain much reasoning, but a major item of analysis is that direct review by certiorari in the Supreme Court is sufficient oversight of state court judgments on constitutional issues. In many of these cases, the losing party did not file for cert.

The cases dealing with issues raised in criminal prosecutions also generally apply collateral estoppel principles. See, e.g., Rimmer v. Fayetteville Police Dept., 567 F.2d 273 (4th Cir. 1977) (plaintiff's having raised identification issue in prior criminal prosecution precluded his § 1983 suit on that issue); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974). These cases, contrary to petrs' arguments, contain many references either to a voluntary choice of forums or to the availability of initial (i.e., fact-finding) review of the claim by a federal court. See, e.g., Rimmer, 567 F.2d at 276; Thistlethwaite v. New York, 497 F.2d 339, 341 (2d Cir. 1974); Moran v. Mitchell, 354 F. Supp. 86, 88-89 (E.D. Va, 1973). The circuit courts also are far from uniform or certain in their interpretations. Many courts have declined to apply res judicata to suits under § 1983. See Wecht v. Marsteller, 363 F. Supp. 1183, 1190 (W.D. Pa. 1973). Also, recent cases

have begun to question the wisdom of accepting prior state judgments, especially where the civil rights plaintiffs did not raise the constitutional claim in the prior case. See Lombard v. Board of Education, 502 F.2d 631, 635-37 (2d Cir. 1974); Ney v. California, 439 F.2d 1285 (9th Cir. 1971). Thus, while the clear majority of circuits view res judicata as routinely applicable to § 1983, their approaches vary considerably depending on the exact circumstances of the case. A flat rule outlawing any res judicata effect clearly would have to overrule all of these cases. A carefully drawn set of principles that permitted differing results in different circumstances, however, would preserve the majority of these cases, and would provide guidance to limit the variances.

B. Factors Favoring An Exception to Res Judicata

1. Legislative History of § 1983

The legislative history of § 1983 reveals a very strong intent to set up the federal courts as the source of a new federal remedy against what was perceived as southern lawlessness. There is no definitive statement that I could find as to how the concurrent jurisdiction between federal and state courts was to operate, but the record is replete with references to the ineffectiveness of the southern states' judicial systems in dealing with the Ku Klux Klan's acts of terrorism. Rep. Osborn's speech on April 13, 1871, was typical. He asserted:

> "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress

> should [enact protective legislation]. . . .
>
> The question now is, what and where is the remedy? I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent to suppress the local disorders, or to maintain law and order, we should not have been called upon to legislate upon this subject at all. But they have not done so. We are driven by existing facts to provide for the several States in the South what they have been unable fully to provide for themselves; i.e., the full and complete administration of justice in the courts. And the courts with reference to which we legislate must be the United States courts."

See also Cong. Globe, 42d Cong., 1st Sess., App. at 184-85 (comments of Rep. Platt regarding incidents of murder and mayhem by Ku Kluxers unpunished by state authorities); comments quoted in Monroe v. Pape, 365 U.S. 167, 173-80 (1961). The acts of the Ku Klux Klan extended to suborning perjury, rigging jury lists so that Ku Klux members would fill juries and control the outcomes of cases, intimidating judges and other officials through force, and taking justice into their own hands. Because the perception that judicial processes were inadequate was so prevalent in the debates, I have no doubt that the placing of the jurisdiction over this new cause of action in federal hands was as important to the 42d Congress as the creation of the cause of action itself. The language of the debaters concerning the chaos of state affairs is very strong. Those who opposed the bill also emphasized the extent to which it would allow the federal courts to usurp state processes.

Also, at the time of passage of the Act, notions of res judicata and collateral estoppel were much narrower than at present. For one, identity of parties was a prerequisite; for another, the concept of "mutuality of estoppel" foreclosed its

operation in numerous cases. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); Cromwell v. County of Sac, 94 U.S. 351 (1876); Restatement of Judgments § 93 (1942). Cf. Parkland Hosiery Co. v. Shore, 439 U.S. 322 (1979) (abandoning the mutuality doctrine for res judicata analysis). I consider it most likely that the proponents of the Act would have disapproved the present-day expansive application of res judicata to § 1983 actions. I also consider it likely that they would not have permitted any preclusive effect from state judgments in federal civil rights cases, had the issue been put. Thus, if the general import of the legislative history is controlling, this Court must hold that § 1983 represents an exception to the full faith and credit policy of § 1738 and that collateral estoppel should not be a bar to suits in federal courts under § 1983.

Nevertheless, the legislative history is not definitive because no one addressed straightforwardly the issue of res judicata and collateral estoppel. While the intent clearly was to establish a federal forum as an alternative for plaintiffs who could get no satisfaction from state courts, no attempt was made to divest the states of their concurrent jurisdiction. As the Court noted in Monroe, "[s]ection 1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. The Court has built upon that perception in later cases to establish the validity in § 1983 cases of traditional tort defenses. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976). Thus, the Court may determine that despite the strong

consciousness at the time of passage that most plaintiffs would seek a federal forum because of the dangers of using the state forum, the Act does not foreclose operation of traditional notions of res judicata, including foreclosure when a plaintiff initially has sought resolution of an issue in state court. Whether the operation of "traditional" notions would include modern expansive doctrine would be a separate question.

2. Prior Interpretations of § 1983

This Court also repeatedly has recognized that § 1983 expresses a strong congressional policy in favor of federal courts acting as the primary and final arbiters of constitutional rights. In Monroe v. Pape, 365 U.S. 167 (1961), the Court determined that a § 1983 plaintiff need not exhaust available state tort remedies for an alleged unconstitutional act before he could proceed under § 1983 in federal court. The analysis in Monroe, although it was for the different purpose of determining the meaning of "under color of state law," is striking in its clear perception that the 1871 legislative intent was to provide access to federal courts because the state courts were perceived as helpless or unwilling to act. Justice Douglas recurred repeatedly to the perceived necessity of substituting a federal forum for the ineffective, although plainly legally available, state remedies. For example, he states that "[i]t was not the unavailability of state remedies but the failure of certain State to enforce the laws with an equal hand that furnished the powerful momentum behnd this 'force bill.'" 365 U.S. at 174-75. Also, "[w]hile one main scourge of the evil--perhaps the leading one--was the Ku Klux

Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law." 365 U.S. at 175-76 (emphasis in original). "There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." 365 U.S. at 176. As he concludes:

> "It was abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." 365 U.S. at 180.

Similar language can be found, as resp has noted, in Mitchum v. Foster, 407 U.S. 225 (1972) (§ 1983 offers "a uniquely federal remedy"); McNeese v. Board of Education, 373 U.S. 668 (1963) (prior resort to state administrative remedies is not required before suit under § 1983 may be filed); and Zwickler v. Koota, 389 U.S. 241, 245-49 (1967) ("These [federal] courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution . . . ."), among other cases.

The case of England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964), which petrs seek to distinguish, also contains an affirmation of the special role of federal courts in interpreting the Constitution. The Court held in that case that:

"There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims. Such a result would be at war with the unqualified terms in which Congress, pursuant to constitutional authorization, has conferred specific categories of jurisdiction upon the federal courts. . . . [Abstention's] recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law."

3. Other Factors

The Court must consider whether application of res judicata principles to § 1983 claims will interfere with important federal policies. A decision to allow broad res judicata impact carries with it the conclusion that federal courts are not necessary to pass initially on constitutional claims. Such a policy in effect will give the state criminal courts final say over many issues of constitutional rights. It is true that in every case a disappointed litigant will have access to certiorari review in this Court, but I believe, first, that the Court does not have the capacity to review all state court applications of constitutional principles. The Court must conserve its review power for those few cases that present issues with precedential value or broad reach. The result of this policy will be significantly less uniformity in interpretation of constitutional matters, especially in the criminal law area. State courts, entirely apart from the suspicions harbored by the 42d Congress, are not as well equipped as federal courts to pass on constitutional matters.

They are not as well insulated from political matters, often being elected officials; they are not as familiar with constitutional law; they also have less concern with the impact of their decisions beyond their geographical confines. They are likely to have a more parochial approach to articulating federal constitutional law. Also, the posture of these cases, the intermixture of the constitutional issue with the guilt-finding process, lends itself to a slighting of the constitutional issue, which is really subsidiary to the main point of the litigation. Reserving a federal forum for an independent investigation of constitutional issues will enhance the quality of constitutional theory, as well as its consistency.

C. A General Theory of Res Judicata in § 1983 Cases

I believe the opposing factors detailed above can be reconciled within one framework of analysis, largely that of modern res judicata doctrine. A current formulation of the doctrine of issue preclusion (collateral estoppel), found in Restatement (Second) of Judgments, § 68 (Tent. Draft No. 4, April 15, 1977), states:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."

The Restatement, however, notes several pertinent exceptions to this general rule. Relitigation of an issue may be allowed if "[a] new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of

jurisdiction between them," or "[t]here is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial actions, [or] . . . (iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments, § 68.1 (Tent. Draft No. 4, April 15, 1977).

Thus it is clear that the doctrine itself requires some individualized inquiry into the factors present in each case. Two articles that I have read in the course of preparing this bench memo have presented what appears to be a useful analysis of the factors that should govern the preclusive effect to be given prior state adjudications of constitutional issues in subsequent § 1983 actions. One article details the factors that should lead to a conclusion that "preclusion would be likely to compromise the federal courts' own role in articulating and implementing constitutional principles" as follows:

> "(a) The state court or agency had an institutional interest in deciding as it did.
> (b) The constitutional claim relates to the manner of the state decision rather than to the point of original dispute between the parties.
> (c) The issue relates more to an individual's relationship with the state than with another person.
> (d) The state decision was made without a full and fair hearing of the facts.
> (e) There is a special need for federal court fact-finding.
> (f) The plaintiff initially had or reasonably believe that he had no choice of forum.
> (g) The remedies sought in federal court

> differ significantly from those available in state proceedings."

McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250, 276-77 (1974).

A second formulation of these factors comes from Note, Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions, 27 UCLA L. Rev. 177, 196 (1979), which sums up as follows:

> "First, did the 1983 plaintiff elect to litigate in state court, that is, to waive access to federal factfinding? Second, even if the 1983 plaintiff made a valid waiver, did the state proceeding serve as an adequate substitute for the federal process? Third, are the interests in providing for a federal forum outweighed by possible disruption of the relationship between state and federal courts?"

Some of these factors, of course, have no impact on this case. Applying these factors to the particulars at hand, however, does lead to a conclusion that collateral estoppel should not apply, for the following reasons. First, the defendant here had no choice of forum. It seems manifestly unfair to put a defendant to the choice of either raising a search and seizure claim to exclude evidence or pursuing a suit for damages against the individual officers who perpetrated a search. It also seems counterproductive, especially if the exclusionary rule is viewed as only supplementary and not as the preferred method of defending against fourth amendment violations. See Stone v. Powell, 428 U.S. 465, 489-93 (1976). Although it seems obvious to me that given such a choice a defendant is more likely to raise the claim in the criminal prosecution to decrease the likelihood of conviction than he is

to save the claim to pursue the phantom of damages, litigants should be encouraged to choose an initial federal forum for fourth amendment claims, rather than to disrupt the process of criminal trial with confusing exclusionary claims.

Second, arguably § 1983 represents a congressional policy in favor of federal court fact-finding. In other cases, the legislative history of § 1983 has been closely examined for direction. See Maine v. Thiboutot, No. 79-838 (June 25, 1980); Owen v. City of Independence, No. 78-1779 (April 16, 1980). In this case, I believe that this close examination supports an exception to res judicata effect, at least in cases like this one.

Third, there is a state interest present in the criminal prosecution that may bias a court against finding in favor of an asserted right because the court must consider the innocence/guilt inquiry as the central purpose of the trial. In this case, the court was presented with the dilemma of excluding relevant, and perhaps crucial, evidence. It is possible that that factor swayed its perception of the constitutional issue.

Fourth, the § 1983 action is against the individual officers, who were not parties to the original prosecution. Relitigation against them of the constitutional claim will not produce harrassment or double recoveries. Allowing res judicata to have effect will permit non-parties to gain the benefit of the prior judgment, although the converse would not be true (offensive use of collateral estoppel, as in Parklane Hosiery).

Fifth, § 1983 has a different purpose than the exclusionary rule, and to foreclose access to a § 1983 remedy will foreclose

the possibility of damages. The exclusionary rule would become the sole method of vindicating fourth amendment rights, an undesirable result because a damages action against the individual who is responsible for violating civil rights would be a more effective remedy and a more effective deterrent than the exclusionary rule.

Finally, I perceive a lessened impact on federal-state relations than was present in the abstention cases. Those cases involved the actual disruption of ongoing state proceedings. This case does not involve any possible of reversing or setting aside a state judgment. Even if resp wins his fourth amendment claim in federal court, he will not be able to set aside his conviction. The greatest damage allowing the suit to proceed could work would be to create the possibility of inconsistent federal and state resolutions of a single issue arising out of a single set of facts. That risk is less than the risk of allowing state courts to reach inconsistent results among each other and in conflict with federal standards.

A final factor to consider in this case is that the DC was clearly wrong in dismissing this suit with prejudice. Resp did raise a new issue, not litigated in the prior criminal prosecution, of whether he was unconstitutionally assaulted upon arrest. In effect, the DC applied claim preclusion when only issue preclusion, even under its own analysis, was warranted.

V. CONCLUSION

Because the legislative history strongly supports the inference that § 1983 was considered a special remedy to be available specially in federal court, and because the balance of factors indicate that only a minimal amount of damage to federal-state relations will be worked, I conclude that the Court should create an exception to the normal federal rule of res judicata for state judgments in the case of criminal prosecutions in which a defendant "involuntarily" has been led to raise constitutional issues in a state proceeding. I do not believe the Court need fashion a general rule, but I foresee that in many other cases prior state adjudications of constitutional issues should be given preclusive effect.