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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-935

MARVIN ALLEN, STEVEN JACOBSMEYER
and UNKNOWN POLICE OFFICERS,
Petitioner,

vs.

WILLIE MCCURRY,,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals, Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI, AS AMICUS CURIAE IN SUPPORT OF THE RESONDENT

PRELIMINARY STATEMENT

This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Consent to file this brief has been granted by counsel for Petitioners and counsel for Respondent. Letters indicating the consent of both parties are on file with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal and fair treatment under

the law. The American Civil Liberties Union of Eastern Missouri (ACLU/EM) is composed of two thousand members and geographically covers three quarters of the State of Missouri. As a member organization of the American Civil Liberties Union, ACLU/EM is committed to resist any denigration of the civil rights guaranteed by the United States Constitution and to encourage the vigorous and sustained enforcement and protection of those rights.

Amicus believes that this case, concerning the scope of relief under the Civil Rights Act for an illegal search and seizure, presents a significant issue relating to the protection of fundamental rights and societal values incorporated in the Fourth Amendment to the United States Constitution.

The criminally accused are subjected to the scorn and abuse of society. A heinous and brutal criminal act will activate an almost instinctive desire to retaliate with brute force and violence against the perpetrator. While such action by a police office may be rationally explained as the result of such irrational behavior, such behavior is unlawful and only enhances the brutalization of the law enforcement system. Effective deterrence of this behavior should be fostered. This case presents this Court with the opportunity to place its imprimatur upon a form of relief which would supply a needed degree of such deterrence.

ARGUMENT

I. Introduction

The instant proceedings present this Court with the opportunity to answer the following question: whether society's interest in protecting those rights guaranteed by the Fourth Amendment outweigh the policies of collateral estoppel, primarily finality and judicial economy, in the narrow context of a proceeding commenced by a state prisoner whose access to a federal forum for habeas corpus relief has been terminated by the decision in *Stone* v. *Powell*.[1] Hypothesizing that a state prisoner's constitutional rights are violated in a search and seizure, and further that evidence thus unlawfully obtained is erroneously introduced at his trial and that federal habeas corpus relief is not available, this Court must determine whether Section 1983 of the Civil Rights Act remains an unimpeded avenue of civil relief.[2]

Amicus strongly urges this Court to approve the remedy sought by Respondent herein. The protection of federal civil rights presents demands so special as to overshadow the policies enforced by res judicata principles at least in the narrow context of the question presented here.[3] Strict application of the rules of

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[1]428 U.S. 465 (1976). The precise issue has not been previously ruled or addressed outside of dicta by this Court. Inconclusive references to the issue have appeared in *Ellis* v. *Dyson*, 421 U.S. 426, 437 (1975) (Powell , J., dissenting); *Preiser* v. *Rodriguez*, 411 U.S. 475, 509 N. 14 (1973) (Brennan, J., dissenting); *Wilwording* v. *Swenson*, 404 U.S. 249, 252 (1971) (Burger, C.J., dissenting); *Perez* v. *Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., dissenting).

[2]428 U.S. at 494; it is noteworthy that even in *Stone* v. *Powell* it was recognized that federal habeas corpus relief would remain available to litigate the Fourth Amendment claim under certain circumstances, *Id.* at 482.

[3]Torke, "Res Judicata in Federal Civil Rights Actions Following State Litigation," 9 *Ind. L. Rev.* 543, 543 (1976); *see also generally* *"Developments in the Law—Section 1983 and Federalism,"* 90 Harv. L. Rev. 1133 (1977); Theis, "Res Judicata in Civil Rights Cases: An Introduction to the Problem," 70 Nw. U. L. Rev. 859 (1976).

collateral estoppel would preclude effective enforcement of these rights which are so fragile and so vital to our shared vision of society. The federal courts should and must remain the primary guardians of constitutional rights upon whom primary and powerful reliance for vindicating these rights has been imposed.[4]

II.

Recognition of a Clear Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding Is Supported By the Decision of This Court in *Stone* v. *Powell* And Is Justified By the Special Role of Constitutionally Guaranteed Rights In Our System of Government.

In *Stone* v. *Powell* this Court held that in the context of federal habeas corpus relief the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal, and the substantial societal costs of application of the rule persist with special force.[5] For these reasons it was ruled that such relief might not be granted on the ground that evidence obtained in an unconstitutional search or seizure was introduced at a state prisoner's trial.

[4] *Steffel* v. *Thompson*, 415 U.S. 452, 463-465, 472-73 (1974).

[5] 428 U.S. at 494-95.

In prior discussion of the basis for these conclusions the Court noted that the principal rationale for the exclusionary rule is the deterrence of future unlawful police conduct.[6] The Court also declared that application of that rule deflects the truthfinding process and often frees the guilty.[7] The core of the analysis supporting the holding was stated as follows:

> But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe, however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal.[35] Even if one rationally could assume that some additional incremental deterrent effect would be

[6] *Id.* at 484.

[7] *Id.* at 490.

> presented in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.[8]

As the discussion above suggests, *Stone* v. *Powell* was not a decision premised on rules of res judicata. The focus of *Stone* v. *Powell* was primarily on the harmful impact of the exclusionary rule on certain aspects of the criminal justice system. Central to its analysis was the conclusion that the costs of the exclusionary rule to the truth-seeking process of the criminal trial outweighed the benefits of deterrence of unlawful police behavior. Concluding that federal habeas corpus relief bore but a tenuous link to the subsequent behavior of law enforcement personnel, the Court ruled that the costs to society of release of the Defendant, convicted in an otherwise valid state proceeding were too great, despite the damage to constitutional values. Fourth Amendment search and seizure claims were distinguished from other claims of violation of constitutional rights on the basis that the fruits of such claimed violations were often persuasive and tangible evidence, not inherently suspect.

Extrapolating on these principles, amicus believes that permitting Section 1983 relief in the context of similar claims following a state proceeding is logical, proper and necessary.

Though *Stone* v. *Powell* was decided against the background of a prior and final state judgment, res judicata values played but a secondary and tangential role in the analysis. Indeed, it seems clear that federal review of the state court ruling would have been upheld had the Court concluded that the social costs in terms of the deflection of the truth-finding processes and the resulting release of at least some state prisoners guilty of criminal offenses were outweighed by the deterrent effects of

[8] *Id.* at 493-94.

enforcement of the exclusionary rule. Absent this conclusion habeas corpus relief would have been found warranted as it was earlier found to be in *Kaufman* v. *United States.*[9] In reversing the *Kaufman* decision in *Stone* v. *Powell,* the Court did not indicate that the basic premises underpinning federal habeas corpus review of state proceedings were invalid. As this Court earlier stated:

> "Plainly the interest in finality is the same with regard to both federal and state prisoners. With regard to both, Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack."[10]

It is logical and proper to grant Section 1983 relief in this present context because the deterrent effect of such relief would be significant, while the detriment to the truth-finding process would be non-existent. The results of the state proceeding would be unaffected by a judgment in a Section 1983 action that the Plaintiff's constitutional rights had been violated in the

[9] 394 U.S. 217 (1969).

[10] Id. at 228; the Court has been in full agreement on the proposition the "principles of *res judicata* are, of course, not wholly applicable to habeas corpus proceedings." *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973); *see also Fay* v. *Noia,* 372 U.S. 391, 423 (1963). *Res judicata* operates in a severely diluted fashion in habeas corpus. *Torke, supra* note 3, at 567. The author there suggests that the state criminal defendant is in a singularly sympathetic position and, that a "special res judicata" should be applied in Section 1983 actions which he files. *Id.* at 569. *Cf.* Comment, "The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions," 1975 *U. Ill. Law Forum* 95, 106. It is thus clear that the full faith and credit statute, 28 U.S.C. §1738, has but attenuated applicability in this field.

seizure of evidence which was admitted at the state trial. Thus the truth-finding processes of the criminal trial would go untainted.

Meanwhile, the deterrent effect of such relief would be substantial. The relief would be aimed directly at the persons or entities responsible for the unlawful conduct. The onus of any relief would not be diffused generally throughout society, but would be focused and specific.[11]

Applying the reasoning of *Stone* v. *Powell* to the present question facing the Court, one commentor has declared:

> "Section 1983 actions fare better under this balancing test. The social costs of section 1983 actions are not as high because they do not culminate in the release of guilty persons from custody. In addition, the benefits may be more significant. The deterrence of police misconduct that would result from allowing section 1983 actions for damages against policemen and municipalities might be far greater than that achieved by applying the exclusionary rule upon collateral review. The threat of monetary liability is likely to have a greater impact than the prospect of losing a conviction. Moreover, in cases like *McCurry* it is a mistake to assess the benefits of collateral review solely in terms of deterrence. Section 1983 also serves as a vehicle for victim compensation."[12]

[11]Additional actions may also be necessary to bolster the deterrent effect of Section 1983 judgments, *see generally* Project, "Suing the Police in Federal Court," 88 *Yale L. J.* 781 (1979). Need for such supplementary deterrence merely indicates that permitting Section 1983 relief alone would not provide the full effect required, not that it is unnecessary or ineffectual.

[12]Comment, "Collateral Estoppel in Section 1983 Actions After *Stone* v. *Powell: McCurry* v. *Allen*," 64 *Minn. L. Rev.* 1060 (1980).

A civil remedy recoverable against individuals is logically a more effective deterrent than a remedy imposing a penalty on society as a whole in the form of exclusion of unconstitutionally obtained evidence. "It is almost axiomatic that the threat of damages has a deterrent effect. . ., surely particularly so when the individual official faces personal financial liability."[13]

The same reasoning was drawn upon in the recent decision of *Owen* v. *City of Independence* in which the majority commented that, "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . ."[14] A decision favorable to Respondent might do much to enhance the deterrent effect of Section 1983 relief by drawing the municipal employer into the relief granted.

This Court in deciding *Stone* v. *Powell* commenced from the proposition that federal court review of state court judgments involving the federal constitutional rights of criminal defendants is warranted and mandated by Congress and the Constitution. An underlying premise of *Stone* v. *Powell* is that protection of the federal constitutional rights of criminal defendants is a special domain of the federal courts. The federal hand should be stayed only where to do otherwise would produce minor benefit at great cost to society.

The decision of the U.S. Court of Appeals for the Eighth Circuit meshes extremely well with these principles.

That decision provides a federal right of action to review a state court judgment denying a criminal defendant relief on his claim of violation of his constitutional rights while in no way in-

[13]*Carlson* v. *Green*. 100 S.Ct. 1468, 1473 (1980).

[14]100 S.Ct 1398, 1415 (1980).

terfering with the truth-seeking processes of the criminal proceeding or otherwise subjecting society to the costs found unacceptable in *Stone* v. *Powell.* While res judicata principles may be offended by this result, the Court has recognized by the very rationale of the *Stone* decision that those principles have a more limited range of viability in the context of federal constitutional decision-making in criminal proceedings.

Thus the decision of the Court of Appeals stakes out a well-placed meeting ground between the policies calling for special protection of federal constitutional rights and the interests of society demanding that the guilty not go free because the constable blundered.

Stone v. *Powell,* contrary to the analysis of Amici in Support of Petitioners, did not place significant emphasis on judicial economy as a rationale for its decision. While mentioned as one aspect of the background of the decision, amicus believes that that policy plus the related benefits of finality of decision would not have been enough to lead this Court to the result of that case.

The potential deterrent effect of Section 1983 relief in this setting is substantial. Its costs to society in terms of deflection of the truth-seeking processes are non-existent. In the context of federal constitutional rights the normal rules of finality have but a limited role. Permitting this form of relief would thus potentially provide a substantial benefit to society in enforcement of constitutional rights with necessary and acceptable costs to society through relitigation of certain constitutional claims.

III.

Recognition of Such A Rule is Necessary to Provide An Adequate Mechanism for Federal Regulation and Control of State Court Enforcement of the Fourth Amendment Prohibition of Unreasonable Searches And Seizures.

Another and independent reason why Section 1983 relief in this setting is necessary in the aftermath of *Stone* v. *Powell* is that state courts have been left relatively unchecked in their interpretation and application of the Fourth Amendment since that decision. Review by the United States Supreme Court provides an ultimate, but limited, mechanism for assuring compliance by state courts with the dictates of that Amendment. As pointed out by Justice Marshall in his concurrence in *Mincey* v. *Arizona:*[15]

> "Prior to *Stone* v. *Powell,* there would have been no need to grant certiorari in a case such as this, since the federal habeas remedy would have been available to the defendant. Indeed, prior to *Stone* petitioner here probably would not even have had to utilize federal habeas, since the Arizona Courts were at that earlier time more inclined to follow the federal constitutional pronouncements of the Ninth Circuit, as discussed above. But *Stone* eliminated the habeas remedy with regard to Fourth Amendment violations, thus allowing state court rulings to diverge from lower federal court rulings on these issues and placing a correspondingly greater burden on this Court to ensure uniform federal law in the Fourth Amendment area."

Thus *Stone* v. *Powell* has weakened the constraints which bound the state courts to respect their obligation to enforce the rights guaranteed by the United States Constitution, while at the

[15] 437 U.S. 385, 402 (1977).

same time increasing the burden on this Court by necessitating increased grant of direct review of cases raising Fourth Amendment issues.

State court reluctance to apply the exclusionary rule in a vigorous and steadfast manner would naturally be supported by the decision in *Stone* v. *Powell.*[16] The same factors which drove this Court to eliminate federal habeas corpus review with respect to claims that unconstitutionally seized evidence was introduced at a state prisoner's trial motivate state court judges to loosen the strictures of the exclusionary rule.

While it is impossible to verify that state court judges introduce a balancing process into their application of the exclusionary rule, cases such as *Mincey* v. *Arizona* suggest such is in fact their practice. A state tribunal is naturally reluctant to exclude evidence which as stated in *Stone* v. *Powell,* is "typically reliable and often the most probative information bearing on the guilt or innocence of the Defendant. The state tribunal may thus effectively decide a question different from that presented to the federal court in a complaint based on Section 1983.

Furthermore, since the federal plaintiff is forced to raise his federal claim in the criminal trial as a defendant, he had no choice but to submit these constitutional issues to the state tribunal. The state forum will thus be frequently confronted with important and substantial federal constitutional claims which the criminal defendant is unwillingly compelled to litigate. The criminal defendant should not be penalized by his

[16]*Cf. Mitchum* v. *Foster,* 407 U.S. 225, 242 (1972) (antipathy of state officers, including state judicial officers, could only be avoided by access to a federal forum).

[17]437 U.S. at 404.

[18]428 U.S. at 490.

inability to select the forum for presentation of these claims. This circumstance largely distinguishes this case from all those civil cases in which a party has the opportunity to choose the forum in which to litigate his claims.[19]

The remedy sought by Respondent is thus necessary to the federal function of assuring state compliance with federal constitutional guarantees, a function this Court cannot alone perform. It is desirable and necessary to provide a federal forum free from the distortive pressures under which a state tribunal must rule on the Fourth Amendment issues presented before it in a typical suppression hearing.

IV

Potential Increase in Litigation As A Result of Establishment of a Rule Permitting the Maintenance of an Action for Damages Under 42 U.S.C. §1983 On the Basis of a Claim of Unlawful Search and Seizure Which Had Previously Been Raised in a Prior State Criminal Proceeding is Highly Speculative, Exaggerated And Of Minor Significance to a Determination of the Substantive Questions Presented.

Careful husbandry of judicial resources is a valuable goal. However, for the following reasons, Petitioners and Amici in support of Petitioners place too much emphasis on this policy goal in their application of collateral estoppel principles to claims based upon alleged unlawful search and seizure which have been previously raised in a prior state criminal proceeding.

It is inherently impossible to predict how many cases may be brought in the future seeking damages for the violation of a state prisoner's Fourth Amendment rights in the seizure of evidence which has been subsequently admitted as evidence at

[19]*See, e.g., Thistlethwaite* v. *City of New York,* 497 F.2d 339, 345 (2nd Cir. 1974); *Tang* v. *Appellate Div. of New York Supreme Court,* 487 F.2d 138, 143 (2nd Cir. 1973), *cert denied,* 416 U.S. 906, (1974).

his trial. It is correct that the total number of civil rights actions have increased in recent years, as pointed out by Petitioners and amici in support of Petitioners. But this fact cannot be used as the basis for any conclusion with respect to the future frequency of the type of action filed by Willie McCurry. To do so entails the grossest speculation.

The research of this amicus has revealed only five cases decided in the Federal Courts of Appeals for the period of January, 1945 to April, 1980 which involved the issue now before this Court.[20] Only six reported decisions of the Federal District Courts have been found which treat this same question during the period of January, 1960 to April, 1980.[21] (The Office of the Administrator of the Courts unfortunately does not keep records narrowly defining the nature of federal cases and was thus unable to state the number of cases involving this issue for the period of its recordkeeping). Finally, it is obvious that much of the impetus to seek Section 1983 relief for this narrowly circumscribed zone of constitutional deprivation has only developed with the decision in *Stone* v. *Powell*. Prior to that decision habeas corpus relief was available for a state prisoner's vindication of these Fourth Amendment rights.

Thus, all considered, it is expremely speculative to predict that a "torrent" or "avalanche" of litigation would result from

[20]Cases found from the federal appellate court raising or decided on this narrow issue were *Covington* v. *Cole*, 528 F. 2d 1365 (5th Cir. 1976); *Davis* v. *Eide*, 439 F. 2d 1077 (9th Cir. 1971); *Brubaker* v. *King*, 505 F. 2d 534 (7th Cir. 1974); *Bethea* v. *Reid*, 445 F. 2d 1163 (3rd Cir. 1971); *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965). Both traditional and computerized research tools were used in the case search undertaken to collect the decisions of the federal trial and appellate courts raising this question.

[21]The cases found were *Clark* v. *Lutcher*, 436 F. Supp. 1266 (M.D. Pa. 1977); *Simms* v. *Reiner*, 419 F. Supp. 468 (N.D. Ill. 1976); *Clark* v. *Illinois*, 415 F. Supp. 149 (N.D. Ill. 1976); *Clark* v. *Zimmerman*, 394 F. Supp. 1166 (M.D. Pa. 1975); *Moran* v. *Mitchell*, 354 F. Supp. 86 (E.D. Va. 1973); *Basista* v. *Weir*, 225 F. Supp. 619 (N.D. Pa. 1964).

the decision of the U.S. Court of Appeals for the Eighth Circuit. Certainly such a decision would permit state prisoners access to the federal court and thereby add some additional cases to the federal docket, but such was the intention of the drafters of Section 1983 and this access is necessary to preserve the primacy and force of the guarantees of the constitution.

Finally, amicus would also suggest that the absolute number of cases which might be filed is not the relevant inquiry. Judicial economy, in the context of collateral estoppel rules, is premised on a desire to prevent fruitless, wasteful and oppressive litigation of specific claims, not on wholesale rejection of certain types of claims or calculations of the total number of claims which may be brought in a specific context.

Amicus respectfully suggests that the Court should focus on the question whether federal interests outweigh the policies of res judicata in the context of a single case. The answer to this question with respect to a single case would provide the answer to the question whether the volume of litigation would be justified. For, if this form of relief is found justified and necessary in the context of a single case in order to provide an added deterrent to unconstitutional and lawless behavior, then it will similarly be justified for each subsequent case. Total volume of cases thus becomes irrelevant.[22]

Again, amicus suggests that the relevant inquiry should be whether in this setting federal interests in the protection of constitutional rights require a federal forum be available at some stage of a criminal proceeding and whether the devotion of the federal courts' time and energy to that task is justified. Having answered this question the absolute number of cases is unimportant.

[22]Amicus in any case believes that that volume would not be great in view of the highly limited context of this case, involving a Fourth Amendment claim relating to an alleged search and seizure previously litigated in a state court proceeding.

CONCLUSION

The protection of federal civil rights presents special demands which overshadow the policies of res judicata. A civil action for relief pursuant to 42 U.S.C. §1983 provides a maximum of deterrence of illegal searches and seizures while imposing a minimum of cost on society at large. The deterrent effect of such litigation, where federal habeas corpus relief is not available, justifies the subordination of res judicata policies in order to enhance the protection of federal civil rights.

Amicus submits that the ruling of the U.S. Court of Appeals for the Eighth Circuit was correct. That decision properly held that this Court's opinion in *Stone* v. *Powell* supports and requires the conclusion that relief in accordance with the Civil Rights Act be permitted to a state prisoner whose federal civil rights have been violated in the search and seizure of evidence subsequently admitted at his criminal trial. This holding comports with the long-standing doctrine that normal principles of res judicata do not apply with full vigor in the context of protection of the constitutional rights of state prisoners. It would create a significant deterrent to unlawful police behavior while minimizing the cost to society of such deterrence.

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