IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979



No. 79-935

MARVIN ALLEN,
STEVEN JACOBSMEYER,
and
UNKNOWN POLICE OFFICERS,

Petitioners,

vs.

WILLIE McCURRY,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent Pro Se

WILLIE McCURRY,

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# BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent Pro Se

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Comes now respondent Willie McCurry and respectfully submits his Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit (hereinafter referred to as Petition) filed in this cause.

## OPINIONS BELOW

The opinion of the District Court, filed October 13, 1978, is reported at 466 F. Supp. 514 (E.D. Mo. 1978) (App. A to Petition). The opinion of the Court of Appeals filed October 1, 1979, reversing the judgment of the District Court, is reported at 606 F.2d 795 (8th Cir. 1979) (App. B to Petition).

## JURISDICTION

The judgment of the Court of Appeals was filed October 1, 1979. Respondent received the Petition December 15, 1979, and this Brief in Opposition is filed within thirty days of that date. Sup. Ct. R. 24(1). This Court has jurisdiction to consider the Petition under 28 U.S.C. § 1254(1).

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## QUESTION PRESENTED

Whether the Court below was correct in holding collateral estoppel inapplicable in actions under 42 U.S.C. § 1983 raising search and seizure claims when to apply collateral estoppel would eliminate the only viable federal forum in which respondent can vindicate his fourth amendment rights.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. IV provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. XIV provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.1/

Section 1 of the Civil Rights Act of 1871 (the "Ku Klux Klan Act"), 17 Stat. 13, 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other per-

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

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1/ This Court has for many years held that the fourth amendment is applicable to the actions of state officials through the due process clause of the fourteenth amendment. See, e.g., Wolf v. Colorado, 338 U.S. 25, 25-8 (1949).

## STATEMENT OF THE CASE

On July 17, 1978, respondent filed a claim under section 1983 of the Civil Rights Act of 1871 (42 U.S.C. § 1983 (1970)) for damages against individual police officers alleging the following violations of his constitutional rights: (1) The police officers conspired to conduct an illegal search of his home; (2) his home was illegally searched; and (3) he was assaulted by police officers upon being arrested. 606 F.2d at 797; (Petition, App. B, A-6; App. D).

In response thereto, petitioners filed their Motion to Dismiss and Motion for Partial Summary Judgment. (Petition, App. E). The District Court granted respondent's motion for summary judgment, dismissing respondent's entire complaint with prejudice on the ground that:

> [T]he only issue in the instant lawsuit - whether the entrance into plaintiff's home and the resulting search was lawful - was litigated on the merits of his criminal trial in state court and determined adversely to his position. Therefore, plaintiff may not collaterally attack that determination and he is collaterally estopped from relitigating the constitution-

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466 F. Supp. at 515-16; (Petition, App. A, A-3).

In reaching its determination, the District Court relied upon an order issued by the Circuit Court of the City of St. Louis, State of Missouri. This order dealt with respondent's motion to suppress evidence filed in his state court criminal trial and circumstantially related to the fourth amendment violation he alleges in his federal court section 1983 action. The state court sustained plaintiff's motion for suppression in part, and denied it in part. Substantively, the state court's order reads:

> "Defendant's Motion to Suppress heard and submitted and overruled in part and sustained in part as follows:
>
> "(a) Motion to suppress overruled as to those items found in plain view such as a gun and drugs on a dresser top, and a shotgun.
>
> "(b) Motion sustained as to drugs and items found in drawers or among tires are suppressed."

(Petition, App. E, A-27).

On appeal, the Court of Appeals for the Eighth Circuit reversed the District Court, concluding that "because of the special role of federal courts in protecting civil rights . . . and because habeas corpus is now unavailable to [respondent], see Stone v. Powell, supra, 428 U.S. at 492-94 and n.37, it is our duty to consider fully, unencumbered by the doctrine of collateral estoppel, [respondent's] § 1983 claims." 606 F.2d at 799; (Petition, App. B, A-10 - A-11).

## ARGUMENT

### THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY DECIDED THE ISSUES PRESENTED IN THIS CASE.

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## ARGUMENT

### THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY DECIDED THE ISSUES PRESENTED IN THIS CASE.

### A.

### COLLATERAL ESTOPPEL IS INAPPLICABLE TO THE BASIC ALLEGATIONS IN RESPONDENT'S COMPLAINT.

As noted in respondent's Statement of the Case, supra, his complaint alleges three constitutional violations: (1) a conspiracy to conduct an illegal search of his home; (2) an illegal search of his home; and (3) an assault. As to respondent's assault claim, petitioners have properly

declined to challenge a reversal of the district court's order. The appellate court's reversal of the district court's dismissal of respondent's fourth amendment claim is likewise properly unchallengeable. Even if collateral estoppel was an appropriate doctrine in section 1983 cases alleging the violation of fourth amendment rights, the state court clearly held that respondent's fourth amendment rights were violated. The state court, in fact, suppressed certain evidence. (Petition, App. E, A-27).

The Missouri Court of Appeals, in considering respondent's appeal from his state court criminal conviction, recognized that the police officer conducting the search of plaintiff's home,

> found additional contraband in dresser drawers and hidden in some tires on a porch. Those items were not in plain view. After hearing on defendant's motion to suppress, the trial court sustained the motion as to those items found in drawers and the tires and denied the motion as to those items in plain view.

State v. McCurry, 587 S.W.2d 337, 340 (Mo. App. 1979); (Petition, App. C, A-15) (emphasis supplied).

Beyond question, the state court held that a search was conducted and evidence seized in violation of the fourth amendment. Thus, respondent is entitled to raise this

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State v. McCurry, 587 S.W.2d 337, 340 (Mo. App. 1979); (Petition, App. C, A-15) (emphasis supplied).

Beyond question, the state court held that a search was conducted and evidence seized in violation of the fourth amendment. Thus, respondent is entitled to raise this violation of his constitutional rights, and a conspiracy to do so, in an action under section 1983 unencumbered by the doctrine of collateral estoppel.

Since this "meritorious" claim was litigated with "success in state court," petitioners should have no objection to its receiving "full attention from the federal courts. . . ." (Petition, p. 12). One wonders whether, under these circumstances, petitioners will so strongly support the applicability

of collateral estoppel or "issue preclusion" to an assertion by respondent that the constitutionality of this search has already been determined in his favor. (Petition, p. 7, n.2).

B.

PETITIONERS HAVE TOTALLY IGNORED SECTION 1983'S LEGISLATIVE HISTORY AND TOTALLY MISREAD STONE V. POWELL, 428 U.S. 465 (1976).

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The only issue potentially before this Court on certiorari would be whether respondent is collaterally estopped from utilizing a federal forum to challenge the constitutionality of that portion of petitioners' search and seizure pursuant to which evidence was admitted against respondent in state court. Notably, since this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), rendered federal habeas corpus unavailable to respondent, section 1983 provides the only viable means by which he may obtain a federal forum.

Section 1983's legislative history plainly establishes

from utilizing a federal forum to challenge the constitutionality of that portion of petitioners' search and seizure pursuant to which evidence was admitted against respondent in state court. Notably, since this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), rendered federal habeas corpus unavailable to respondent, section 1983 provides the only viable means by which he may obtain a federal forum.

Section 1983's legislative history plainly establishes that it was enacted to provide a federal forum for litigants in respondent's position who might have had an inadequate opportunity to protect their constitutional rights in state courts. See Monroe v. Pape, 365 U.S. 167, 180 (1961). Representative Coburn's comments during the debates over the Civil Rights Act's passage reflect congressional concern with the effectiveness of state courts in protecting federal rights. He stated:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence; cannot be put under

> terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage. . . . We believe we can trust our United States courts, and we propose to do so.

Cong. Globe, 42d Cong., 1st Sess. 460 (1871) (Representative Coburn). See also, Mitchum v. Foster, 407 U.S. 225, 240-41 (1972) (quoting Senator Osborn, Representative Coburn, and Representative Perry); Monroe v. Pape, 365 U.S. 167, 172-87 (1971).

The Supreme Court has stated that section 1983's legislative history

> makes evident that Congress clearly conceived that it was altering the relationship between the State and the Nation with respect to the protection of federally created rights; it was concerned that state instrumentalities could not protect those rights, it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.

Mitchum v. Foster, 407 U.S. 225, 242 (1972). See also, Harrison v. NAACP, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting); Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Va. L. Rev. 859, 866-68 (1976); Comment, The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions, 1975 U. Ill. L. F. 95, 98-99 (1975).

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The foregoing sources clearly reveal that the Congress which passed section 1983 had little faith in the ability of state courts to fairly adjudicate federal constitutional claims, and that it specifically intended to provide a supplementary federal remedy to protect such rights even where adequate state remedies existed. Congressional concern was centered on the protection of individual rights, not federalism, judicial resources, comity, or other policies

underlying the doctrine of collateral estoppel.

Congress has never altered its intent to make federal courts the primary protectors of constitutional rights through section 1983. As noted by Justice Douglas:

> The choice made in the Civil Rights Acts of 1870 and 1871 to utilize the federal courts to insure the equal rights of the people was a deliberate one, reflecting a belief that some state courts, which were charged with original jurisdiction in the normal federal-question case, might not be hospitable to claims of deprivation of civil rights. Whether or not that premise is true today, the fact remains that there has been no alteration of the congressional intent to make the federal courts the primary protector of the legal rights secured by the Fourteenth and Fifteenth Amendments and the Civil Rights Acts.

Harrison v. NAACP, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting). See also, e.g., Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts as guardians of the peoples' federal rights); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250, 263-64 (1974) ("state courts may actually be less qualified" than federal courts to render constitutional decisions).

Nonetheless, many courts have held collateral estoppel

Harrison v. NAACP, 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting). See also, e.g., Mitchum v. Foster, 407 U.S. 225, 242 (1972) (federal courts as guardians of the peoples' federal rights); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II, 60 Va. L. Rev. 250, 263-64 (1974) ("state courts may actually be less qualified" than federal courts to render constitutional decisions).

Nonetheless, many courts have held collateral estoppel applicable in actions under section 1983. Only two circuits, however, considered the applicability of collateral estoppel in section 1983 actions raising search and seizure claims, and both of these cases were decided prior to this Court's decision in Stone v. Powell, 428 U.S. 465 (1976), which eliminated habeas corpus as a means for obtaining a federal forum in such cases. See Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968). Moreover, many of the courts

which have applied collateral estoppel in section 1983 actions expressly based their holdings on the availability of a federal forum through habeas corpus. See Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977); Thistlethwaite v. New York, 497 F.2d 339, 343 (2d Cir.), cert. denied, 419 U.S. 1093 (1974); Alexander v. Emerson, 489 F.2d 285, 286 (5th Cir. 1973) (per curiam); Moran v. Mitchell, 354 F. Supp. 86 (E.D. Va. 1973). Therefore, the only issue before this Court on certiorari would be whether Stone v. Powell, 428 U.S. 465 (1976) read in the light of section 1983 legislative history renders collateral estoppel inapplicable in section 1983 actions raising search and seizure claims. Whether collateral estoppel is applicable in section 1983 actions generally is not an issue the Court need reach in this case. The court below held collateral estoppel inapplicable under the circumstances of this case, and respondent submits that the court below was unquestionably correct.

Petitioners argue that the opinion of the court below

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Petitioners argue that the opinion of the court below is in conflict with this Court's holding in Stone v. Powell, 428 U.S. 465 (1976). (Petition, p. 6-10). As to this argument, petitioners have wholly misread Stone's holding.

Petitioners correctly state that in Stone, this Court held that where a state court "has provided an opportunity for full and fair litigation of Fourth Amendment claims," relief by way of habeas corpus is unavailable since the deterrent effect of such relief on unlawful police conduct is minimal. Id. at 494-96 (footnotes omitted); (Petition, p. 6). However, petitioners are incorrect in placing the emphasis in their analysis of Stone upon the concept of judicial economy.

Clearly, this Court's major concern in Stone was whether relief by way of habeas corpus in cases involving alleged violations of fourth amendment rights furthered the "primary justification" for the exclusionary rule, i.e., deterrence of illegal police practices. Id. at 486. It rejected habeas corpus as a viable means for reviewing state court exclusionary rule decisions because the "additional contribution [to the deterrence justification], if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs." Id. at 493 (portion in brackets added).

The societal costs of applying the exclusionary rule are basically that,

> the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.

Id. at 489-90 (footnotes omitted). The major cost of the

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Id. at 489-90 (footnotes omitted). The major cost of the rule is, therefore, that it "deflects the truthfinding process and often frees the guilty." Id. at 490.

The holding in Stone presents absolutely no barrier to the use of section 1983 as a means for providing a federal forum to litigants alleging incorrect state court decisions on fourth amendment issues. A section 1983 action neither "deflects the truthfinding process" nor does it "free the guilty." Id. at 490. It merely provides a damage remedy. Moreover, Chief Justice Burger, concurring in Stone, partially justified the elimination of habeas corpus relief as a remedy for fourth amendment claims on the basis that alternative

remedies were still available. Id. at 500-01. As stated by the court of appeals below, "[a] § 1983 damage action is clearly one of the more obvious of such alternative remedies." 606 F.2d at 799; (Petition, App. B, A-10).

Thus, the opinion below is correct on the merits and in conformity with both the congressional intent underlying section 1983 and this Court's opinion in Stone.

C.

PETITIONER'S INTERPRETATION AS TO THE APPLICABILITY OF COLLATERAL ESTOPPEL WOULD DENY A FEDERAL FORUM TO LITIGANTS WITH MERITORIOUS FOURTH AMENDMENT CLAIMS, THEREBY CONTRAVENING SECTION 1983'S INTENT AND PURPOSE.

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Petitioners assert that by applying collateral estoppel in cases such as the instant one, meritorious claims will receive prompt attention from federal courts while groundless civil litigation will be avoided. This assertion, of course, presupposes that the only meritorious search and seizure claims are ones in which a state court has applied

Petitioners assert that by applying collateral estoppel in cases such as the instant one, meritorious claims will receive prompt attention from federal courts while groundless civil litigation will be avoided. This assertion, of course, presupposes that the only meritorious search and seizure claims are ones in which a state court has applied the exclusionary rule. In sum, petitioners are asking this Court to assume that the state courts are always correct when ruling on fourth amendment issues. Section 1983's legislative history clearly discloses that Congress felt otherwise and intended to place responsibility for the protection of individual constitutional rights in the federal courts. See p. 7-9, supra.

Moreover, there is no need to fear an onslaught of groundless civil actions. The Federal Rules of Civil Procedure provide wholly adequate means for dealing with

groundless lawsuits. If a complainant is unable to allege facts sufficient to state a cause of action, his cause will be dismissed under Fed. R. Civ. P. 12(b)(6). If he is unable to demonstrate the existence of any material issues of fact, summary judgment under Fed. R. Civ. P. 56 will dispose of his case.

Nor do law enforcement officers who act with a good faith-reasonable belief in the legality of their actions need fear vexatious lawsuits. A good faith-reasonable belief in legality is a complete defense under section 1983, even if the challenged conduct actually violated an individual's constitutional rights. See, e.g., Pierson v. Ray, 386 U.S. 547 (1967).

The real problem is that, should this Court uphold the applicability of collateral estoppel, federal district courts will be tempted to totally dismiss meritorious claims even though collateral estoppel is only arguably applicable to a portion of a cause. This is exactly what occurred in the instant case. See p. 5-7, supra; 446 F. Supp. at 515;

386 U.S. 547 (1967).

The real problem is that, should this Court uphold the applicability of collateral estoppel, federal district courts will be tempted to totally dismiss meritorious claims even though collateral estoppel is only arguably applicable to a portion of a cause. This is exactly what occurred in the instant case. See p. 5-7, supra; 446 F. Supp. at 515; (Petition, App. A, A-1 - A-3). Furthermore, litigants with meritorious fourth amendment claims, in which a state court decision was simply wrong, will never be provided with the federal forum contemplated by Congress in enacting section 1983. As to respondent's claim, the court below specifically noted that it was "serious and substantial." 606 F.2d at 799; (Petition, App. B, A-11).

The bottom line is that Congress, through section 1983, intended to provide litigants in respondent's position with a federal forum in which to vindicate their constitutional claims. Lacking a habeas corpus remedy, section 1983 is respondent's only avenue into federal court. As stated by

Chief Justice Marshall, the courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 19 U.S. (6 Wheat) 262, 404 (1821). It would simply be improper for the courts to refuse to hear meritorious claims out of a fear that non-meritorious claims might be filed. Thus, respondent asserts that the opinion below is correct and that certiorari should be denied.

D.

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS OR EIGHTH CIRCUIT DECISIONS.

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The specific issue addressed by the court below was "whether [respondent's] § 1983 claim raising search and seizure questions is barred by collateral estoppel" even though "search and seizure claims, except in a few situations, can no longer be raised by state prisoners in federal habeas corpus actions." 606 F.2d at 798; (Petition, App. B, A-9). It specifically disclaimed any intent to consider the applicability of collateral estoppel in section 1983 actions

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which the court below sustained on appeal. 606 F.2d at 799.

This Court decided Stone on July 6, 1976. Most of the cases cited by petitioners were decided prior to Stone and/or did not involve search and seizure claims. Therefore, these cases did not consider the absence of federal habeas corpus review of state court decisions on search and seizure claims. (Petition, p. 15-19). See, e.g., Martin v. Delcambre, 578 F.2d 1164 (5th Cir. 1978) (no search and seizure claim); Winters v. Lavine, 574 F.2d 46 (2nd Cir. 1978) (same); Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977) (same); Meadows v. Evans, 550 F.2d 345 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977) (same); Mastracchio v. Ricci, 498 F.2d 1257 (1st Cir. 1974), cert. denied, 420 U.S. 909 (1975) (no search and seizure claim, prior to Stone); Thistlethwaite v. New York, 497 F.2d 339 (2nd Cir.), cert. denied, 419 U.S. 1093 (1974) (same, court applied collateral estoppel in partial reliance on availability of habeas corpus remedy); Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) (same); Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1970) (prior to Stone); Kauffman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970) (no search and seizure claim, prior to

denied, 420 U.S. 909 (1975) (no search and seizure claim, prior to Stone); Thistlethwaite v. New York, 497 F.2d 339 (2nd Cir.), cert. denied, 419 U.S. 1093 (1974) (same, court applied collateral estoppel in partial reliance on availability of habeas corpus remedy); Brazzell v. Adams, 493 F.2d 489 (5th Cir. 1974) (same); Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1970) (prior to Stone); Kauffman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970) (no search and seizure claim, prior to Stone); Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968) (prior to Stone).

The case upon which petitioners appear to place the greatest weight is Metros v. United States District Court, 441 F.2d 313 (10th Cir. 1971). (Petition, p. 15-16). As noted above, Metros was decided prior to Stone and, therefore, the Tenth Circuit could not possibly have addressed the issues resolved by the court below. Moreover, the plaintiff in Metros unsuccessfully sought post-conviction relief in

the state and federal courts prior to bringing his action under the Civil Rights Act for damages. 441 F.2d at 314. The Court quoted Palma v. Powers, 295 F. Supp. 924 (N.D. Ill. 1969), a section 1983 action, noting that relitigation of the issues decided by the state court was unnecessary because "'the litigant is afforded an avenue for relief from an erroneous or unjust decision in the first court by appeal or some other appropriate means of re-examination.'" 441 F.2d at 317. Thus, in Metros, the plaintiff had already been afforded an "appropriate means of re-examination" and a federal forum through the utilization of federal habeas corpus relief. Id. Plaintiff in the instant case will not have this opportunity if the trial court's judgment is upheld. There was also a noteworthy concurrence by Judge Holloway in Metros, arguing that collateral estoppel was inapplicable because the issues presented in state court were not identical to those in plaintiff's civil rights action. 441 F.2d 318-19. See also, Brubaker v. King, 505 F.2d 534 (7th Cir. 1974).

Petitioners also rely on Meadows v. Evans, 550 F.2d 345, 351 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977) (separate dissenting and concurring opinion of Circuit Judge Tjoflat). Circuit Judge Tjoflat's opinion

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Petitioners also rely on Meadows v. Evans, 550 F.2d 345, 351 (5th Cir.) (en banc), cert. denied, 434 U.S. 969 (1977) (separate dissenting and concurring opinion of Circuit Judge Tjoflat). Circuit Judge Tjoflat's opinion cannot possibly create a conflict with the decision below in the instant case since the case did not involve a search and seizure claim and the comments cited by petitioners relating to fourth amendment claims were purely dicta. 550 F.2d 350-51.

Notably, Circuit Judges Goldberg, Tuttle, and Goldbold joined in Judge Tjoflat's opinion. Circuit Judge Goldberg issued a separate opinion also, joined by Judges Tuttle and

Goldbold, which states in relevant part:

> I would note that previous cases applying the doctrine elaborated by Judge Tjoflat have justified enforcement of a collateral estoppel bar in part on the availability of the federal habeas forum for redetermination of the prisoner's constitutional claim. See Brazzell v. Adams, 493 F.2d 489, 490 (5 Cir. 1974). Under the recent Supreme Court decision in Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067, however, alleged violations of the fourth amendment may not be redetermined in federal habeas proceedings once fully and fairly litigated in the state courts. Application of the doctrine developed by Judge Tjoflat to such claims would accordingly preclude any federal forum from inquiring into a fourth amendment claim litigated in state criminal proceedings. I simply note that application of collateral estoppel to claims covered by Stone would raise an additional, troublesome question not involved in the case at bar.

550 F.2d at 345-46 (emphasis supplied).

Thus, contrary to petitioners' assertions (Petition, p. 17), the opinion of the Eighth Circuit in the instant case did not create a conflict with decisions from the Fifth or Tenth Circuits.

In a more recent case, cited by petitioners as creating a conflict (Petition, p. 15), the Fourth Circuit stated that it did not "see any practical problem" with applying collateral estoppel in section 1983 cases,

> raise an additional, troublesome question not involved in the case at bar.

550 F.2d at 345-46 (emphasis supplied).

Thus, contrary to petitioners' assertions (Petition, p. 17), the opinion of the Eighth Circuit in the instant case did not create a conflict with decisions from the Fifth or Tenth Circuits.

In a more recent case, cited by petitioners as creating a conflict (Petition, p. 15), the Fourth Circuit stated that it did not "see any practical problem" with applying collateral estoppel in section 1983 cases,

> as long as the state prisoner-plaintiff has or has had, access to a federal forum for the determination of his federal constitutional claims. Most state court prisoners do have such a right of access through 28 U.S.C.A. § 2254, but there are exceptions. Under Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), state court prisoners complaining of searches and seizures would usually have no such access to a federal forum. Others may be unable to meet the "in custody" requirement of § 2254, and never could have met it. Application of the rule of preclusion by reason of a state court conviction in those cases, therefore, 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. This problem has been noted by others, including Judge Goldberg in his separate opinion in Meadows v. Evans, 550 F.2d 345 (5th Cir. 1977); by Judge Coffin in Mastracchio v. Ricci, 498 F.2d 1257, 1260 n.2 (1st Cir. 1974); by Judge Merhige in Moran v. Mitchell, 354 F.Supp. 86 (E.D.Va. 1973).

Rimmer v. Fayetteville Police Dept., 567 F.2d 273, 276 (4th Cir. 1977).

The only case respondent is aware of that considered and determined the post-Stone affect of collateral estoppel on section 1983 actions raising fourth amendment claims is Clark v. Lutcher, 436 F. Supp. 1266 (M.D. Pa. 1977) (probable cause for arrest). The decision in Clark was in conformity with the decision below.

Petitioners' allegations as to a conflict within the Eighth Circuit are wholly frivolous. The Eighth Circuit has simply never addressed this issue before the instant case. 606 F.2d at 798; (Petition, App. B, A-8 - A-10). Nor does the decision below open the door as to the applicability of collateral estoppel in section 1983 actions generally. The Court below specifically limited its decision to the situation

and determined the post-Stone affect of collateral estoppel on section 1983 actions raising fourth amendment claims is Clark v. Lutcher, 436 F. Supp. 1266 (M.D. Pa. 1977) (probable cause for arrest). The decision in Clark was in conformity with the decision below.

Petitioners' allegations as to a conflict within the Eighth Circuit are wholly frivolous. The Eighth Circuit has simply never addressed this issue before the instant case. 606 F.2d at 798; (Petition, App. B, A-8 - A-10). Nor does the decision below open the door as to the applicability of collateral estoppel in section 1983 actions generally. The Court below specifically limited its decision to the situation where, under Stone, federal "habeas corpus is now unavailable." 606 F.2d at 799; (Petition, App. B, A-11).

Based on the foregoing, respondent submits that the decision below does not conflict with the decisions from any circuit and is correct on the merits.

E.

## THE DECISION BELOW GIVES APPROPRIATE CONSIDERATION TO FEDERAL-STATE COMITY.

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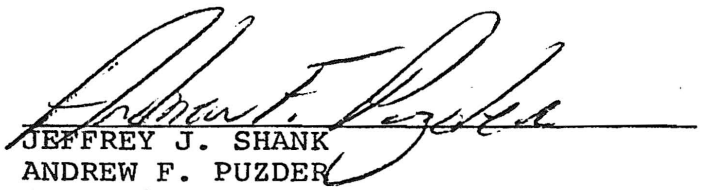
In deference to the Missouri state courts, the Court below held that the district court should abstain from hearing respondent's section 1983 claim "until the Missouri courts have had the opportunity to directly review [respondent's] conviction and the underlying search of his home." 606 F.2d at 799; (Petition, App. B, A-11). However, the Court below further noted that in "refusing [respondent] immediate relief", it was committing him to "perhaps years of litigating his § 1983 claim," which appeared to the Court to be "serious and substantial." 606 F.2d at 799; (Petition, App. B, A-11).

Respondent agrees that it is regrettable that he will be denied immediate relief, but submits that federal-state comity and the orderly administration of justice justify the decision of the Court below.

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
by Respondent Pro Se

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of January, 1980, a copy of the enclosed Brief for Respondent in Opposition was mailed, postage prepaid, to Mr. Jack L. Koehr, City Counselor; Mr. John J. Fitzgibbon, Associate City Counselor; and Mr. Robert H. Dierker, Jr., Assistant City Counselor, Attorneys for Petitioners, 314 City Hall, St. Louis, Missouri, 63103.

Steven F. Fitzgibbon

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