## QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals was correct in holding collateral estoppel inapplicable in actions under 42 U.S.C. § 1983 alleging fourth amendment violations when to apply collateral estoppel would violate section 1983's legislative intent to provide a viable federal forum in which respondent can vindicate his fourth amendment rights.

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No. 79-935

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

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MARVIN ALLEN, STEVEN JACOBSMEYER, UNKNOWN POLICE OFFICERS, AND THE CITY OF ST. LOUIS POLICE DEPARTMENT, *Petitioners,*

v.

WILLIE MCCURRY, *Respondent.*

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**On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

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## BRIEF FOR RESPONDENT

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## 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, unknown police officers, and the City of St. Louis Police Department 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 for Certiorari, A-5-A-6; A-21) (hereinafter Pet. Cert.).[1]

In response thereto, petitioners filed their Motion to Dismiss and Motion for Partial Summary Judgment. (Pet. Cert. A-25). The District Court granted respondent's motion for summary judgment, dismissing

[1] Because this case is proceeding without an Appendix, citations will be to the appendices to the petition for certiorari and/or directly to original documents in the record. Respondent is proceeding *in forma pauperis* and with appointed counsel from the Court of Appeals. Therefore, this Honorable Court is having respondent's brief printed from a manuscript prepared by counsel. Respondent is, of course, most grateful and is quite sure the printing office will do its normal excellent job. However, his counsel will be unable to examine page proofs before this brief is filed and would like to apologize in advance for any typographical errors which may turn up in this brief.



respondent's entire complaint with prejudice on the grounds 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 at 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 constitutionality of the search.

466 F. Supp. at 515-16 (Pet. Cert., 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."

(Pet. Cert., 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*, 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 (Pet. Cert., A-10 - A-11). The Court specifically limited its holding to illegal search and seizure claims brought under section 1983 by persons denied federal habeas corpus relief under *Stone*. 606 F.2d at 798 (Pet. Cert., A-19).

## SUMMARY OF ARGUMENT

Respondent submits that the Court of Appeals correctly held collateral estoppel inapplicable in the instant action.

## I.

Section 1983's statutory language and legislative history are unequivocal. The statute admits of no defenses on its face. *Owens* v. *Independence*, _____U.S._____, _____, 100 S.Ct. 1398, 1407 (1980). Its legislative history establishes a clear congressional intent to provide complainants alleging violations of their civil rights with a federal forum, "State authorization in the premises to



the contrary notwithstanding." Cong. Globe, 42d Cong., 1st Sess., 416 (1871) (Representative Biggs). It is also clear that the remedy provided by section 1983 extends to the actions of state courts. *Mitchum* v. *Foster*, 407 U.S. 225, 241-2 (1972). Congress simply determined that the state courts standing alone were unable to adequately protect federally created civil rights, and Congress never altered its intent to make the federal courts the guarantors of basic federal rights against state power. *Mitchum* v. *Foster, supra,* 407 U.S. at 239; *Harrison* v. *NAACP,* 360 U.S. 167, 181 n.1 (1959) (Douglas, J., dissenting).

State courts act through their judgments and rulings. Since section 1983 clearly extends to the actions of state courts, such judgments and rulings cannot possibly estop a federal court in a section 1983 action. To hold collateral estoppel applicable in such cases would clearly subvert the congressional intent underlying section 1983.

Nonetheless, certain federal courts have applied collateral estoppel in section 1983 actions. The better reasoned of these cases have premised the applicability of collateral estoppel on the availability of federal habeas corpus relief. Although perhaps in conflict with section 1983's legislative history, this approach is at least logically sound since habeas corpus provides a federal forum and thereby satisfies the congressional intent underlying section 1983. The decision below is consistent with such cases because the Court of Appeals premised its refusal to apply collateral estoppel on the unavailability of federal habeas corpus for search and

seizure claims under *Stone* v. *Powell*, 428 U.S. 465 (1976). Following *Stone*, section 1983 is respondent's only viable avenue into federal court. No other Circuit has addressed the collateral estoppel issue in this context.

If collateral estoppel is held to apply in the instant case, criminal defendants compelled into state court will be forced to choose between litigating their fourth amendment claims in state court or increasing the possibility of conviction by holding such claims back for litigation in a subsequent section 1983 federal action. Congress intended to grant complainants a federal forum through section 1983, not a Hobson's choice between federal court and a state conviction.

Holding collateral estoppel inapplicable in the instant case should not open the floodgates of litigation. The Court of Appeals limited its opinion to a restricted group of cases in which there is a special need after *Stone* for access to a federal forum. The Federal Rules of Civil Procedure contain adequate means for dealing with frivolous claims. *See* Fed. R. Civ. P. 12(b) (6) & 56. Police officers acting with a good faith reasonable belief in the legality of their actions need not fear vexatious lawsuits under section 1983 because they will have qualified immunity. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967). However, to hold collateral estoppel applicable in the instant case would preclude meritorious claims from reaching the federal courts, thereby subverting the congressional intent underlying section 1983. As concerns respondent's claim, the Court of Appeals



characterized it as "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

Moreover, to hold collateral estoppel inapplicable would comport with doctrines of federal-state comity. Section 1983 simply provides a damages remedy, it does not overturn state court criminal convictions, release the guilty, or require a new trial.

General principles of tort law or rules of preclusion as evinced by *Montana* v. *United States*, 440 U.S. 147, 153-4 (1979) and 28 U.S.C. § 1738 are inapplicable in the instant case because the special circumstances set forth above arising from the nature of section 1983 require an exception to such general rules of preclusion. Both *Montana, supra*, 440 U.S. at 155, and cases interpreting section 1738 (*See, e.g., American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972) recognize the appropriateness of such exceptions.

Thus, the Court of Appeals decision is well founded and should be affirmed.

## II.

As an additional point in support of the need for a federal forum to protect fourth amendment rights, respondent notes that the state court's opinion admitting certain evidence at respondent's trial and as affirmed by the Missouri Court of Appeals is in conflict with federal constitutional pronouncements both by this Court in *Mincey* v. *Arizona*, 437 U.S. 385 (1978) and the Eighth

Circuit in *United States* v. *Young*, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977). In the instant case, Officer Brand, the "seizing officer" (606 F.2d at 796 (Pet. Cert., A-5), was permitted to enter respondent's home based on a murder scene exigent circumstances rationale, after any apparent exigencies had subsided, specifically to conduct a search for evidence, not a search for occupants. At the time Officer Brand conducted this search, there were approximately thirty-five officers at the scene to guard against the loss or destruction of evidence, had the police decided to obtain a warrant. Yet, no warrant was sought or granted. This is exactly the kind of search this Court held unconstitutional in *Mincey* and the Eighth Circuit held unconstitutional in *Young*.

## III

Even apart from the foregoing, respondent has an action against petitioners for an unconstitutional search and seizure under section 1983 unimpeded by collateral estoppel because the state court suppressed certain evidence. (Pet. Cert., A-27). Unquestionably, as the record stands, there was illegal search of respondent's home, and the state court so held. Whether respondent can recover damages for this search is, of course, a matter for trial. However, there is no question but that respondent can at least recover nominal damages. *Carey* v. *Piphus*, 435 U.S. 247 (1978).



## ARGUMENT

**I. The Court Of Appeals Was Correct In Holding Collateral Estoppel Inapplicable In Actions Under 42 U.S.C. § 1983 Alleging Fourth Amendment Violations Because: (1) Collateral Estoppel Is An Inappropriate Doctrine In Such Actions In Light Of The Civil Rights Act Of 1871'S Legislative History And The Importance Of The Rights Protected Thereunder: And, (2) This Court's Decision In *Stone v. Powell*, 428 U.S. 465 (1976) Eliminated Habeas Corpus As A Remedy For Fourth Amendment Claims Litigated In State Courts, Thus Leaving Individuals In Respondent's Position Without Any Means To Obtain A Viable Federal Forum Other Than Section 1983.**

**A. Section 1983'S Legislative history clearly requires that respondent be provided with a federal forum for his Fourth Amendment claim, unencumbered by the Doctrine of Collateral Estoppel.**

Section 1983's statutory "language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owens* v. *Independence*, _____ U.S. _____, _____, 100 S. Ct. 1398, 1407 (1980). It unequivocally imposes liability upon "every person" who, under color of state law or custom "subjects, or causes to be subjected, any citizen of the United States . . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws. . . ." 42 U.S.C. § 1983 (*See* Petitioner's Brief, p.3) (Hereinafter Pet. Br.).

Because the applicability of any particular defense in section 1983 actions is a matter of statutory interpretation, the Civil Rights Act's legislative history is of particular import. *See Owens* v. *Independence,* _____, _____, 100 S. Ct. 1398, 1407 (1980). Section 1983 was originally enacted as section 1 of the Civil Rights act of 1871. 17 Stat. 13. It was specifically designed to enforce the fourteenth amendment and thereby establish "the role of the Federal Government as the guarantor of basic federal rights against state power. . . ." *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). Section 1983's legislative history plainly establishes that Congress enacted this legislation to provide a federal forum for litigants in respondent's position to protect their federally guaranteed constitutional rights. *See Monroe* v. *Pape,* 365 U.S. 167, 180 (1961). *See generally* Comment, *Collateral Estoppel in Section 1983 Actions After Stone* v. *Powell: McCurry* v. *Allen,* 64 Minn. Rev. (forthcoming June, 1980).

This Honorable Court has expressly noted that

> [i]t is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or *judicial.*" Ex parte Virginia, 100 U.S. 339, 346, 25 L..Ed. 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.



*Mitchum* v. *Foster, supra,* 407 U.S. at 240.

Various statements by the legislators involved in the Civil Rights Act's enactment leave no doubt that, as noted by this Court in *Mitchum* v. *Foster, supra,* 407 U.S. at 238-42, Congress was concerned with the inability of state courts to protect individual rights and intended to place responsibility for the ultimate protection of such rights in the federal courts. As stated by Representative Lowe, the

> records of the [state] tribunals are searched in vain for any evidence of effective redress [of federally secured rights] . . . . What less than this [the Civil Rights Act of 1871] will afford an adequate remedy? The Federal Government cannot serve a writ of mandamus upon State Executives or upon State courts to compel them to observe and protect the rights, privileges and immunities of citizens. . . . The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired.

Cong. Globe, 42d Cong., 1st Sess., 374-6 (1871) (hereinafter Cong. Globe).

Representative Perry stated:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices . . . . [A]ll the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice.

Cong. Globe at App. 78.

Representative Kerr, speaking in opposition to the Civil Rights Act's passage, stated that section 1983's predecessor

> gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in Federal courts.

Cong. Globe at App. 50.

Senator Thurman, speaking in the same vein, stated that section 1983's predecessor

> authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States.



Cong. Globe at App. 216.

Representative Coburn stated most eloquently:

> 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 at 460.

In describing the Act, Representative Biggs seems to have been addressing the very issue of collateral estoppel when he stated:

> 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.

Cong. Globe at 416

The congressional debates over section 1983's predecessor were not even about whether the Act "extended to actions of state courts, but whether this innovation was necessary or desirable." *Mitchum* v. *Foster, supra,* 407 U.S. at 241-2 (footnote omitted).

Thus, this Court has held that 28 U.S.C. § 2283, which is an absolute bar to injunctions against state

court proceedings in most suits, does not apply to a suit brought under section 1983 seeking to enjoin state court proceedings. *Mitchum* v. *Foster, supra*, 407 U.S. at 242-3. In so holding, the Court concluded 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, supra,* 407 U.S. at 242. *See also, Monroe* v. *Pape,* 365 U.S. 167, 172-83; *Harison* 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 Nw. L. Rev. 859, 866-68 (1976); Comment, *The Collateral Estoppel Effect of State Criminal Convictions in Section 1983 Actions,* 1975 U. Ill. L.R. 95, 98-99 (1975).

Contrary to petitioner's assertion that section 1983's legislative history "is probably best described as equivocal" (Pet. Br., p. 19) the foregoing sources make it evident 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 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 resourses, comity, the federal case load, 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).

Given section 1983's unequivocal legislative history, it is difficult to see how any question would arise as to whether a state court decision on constitutional issues could have collateral estopel effect in a federal court action under section 1983. Congress plainly intended that section 1983 would extend to state court actions involving federally protected constitutional rights. *Mitchum* v. *Foster, supra* 407 U.S. at 241-2. State courts act through their judgments and rulings. How then can a state court

judgment or ruling on issues involving federally protected constitutional rights estop a federal court in an action under section 1983. Clearly, if congressional intent is to be fulfilled, collateral estoppel is wholly inapplicable under these circumstances.

Various Supreme Court Justices have, in fact, indicated that traditional notions of collateral estopel and *res judicata* may be inapplicable in Civil Rights Act cases; while no Supreme Court case has directly held these doctrines applicable. *See Preiser* v. *Rodriquez,* 411 U.S. 475, 509 n.14 (1973) (Brennan, J., dissenting with Douglas, J., and Marshall, J., joining in dissent); *Lauchli* v. *United States,* 405 U.S. 965, 965-8 (1972) (Douglas, J., dissenting from denial of certiorari); *Florida State Bd. of Dentistry* v. *Mack,* 401 U.S. 960, 961-2 (1971) (White dissenting from denial of certiorari with Burger, C.J., joining in dissent).

### B. The opinion of the Court of Appeals is consistent with *Stone* v. *Powell,* 428 U.S. 465 (1976) and lower court decisions holding collateral estoppel applicable in section 1983 action prior to Stone.

Notwithstanding the foregoing unequivocal legislative history, many federal courts have held collateral estoppel applicable in actions under section 1983. The courts that considered section 1983's legislative history often expressly qualified their holdings on the availability of an alternative federal forum for section 1983 complainants through habeas corpus. *See, e.g.,*



*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. *Mitchel* 354 F. Supp. 86 (E.D. Va. 1973).

For example, in *Moran* v. *Mitchell,* 354 F. Supp. 86 (E.D. Va. 1973), the plaintif was arrested and convicted on the basis of evidence obtained in a search of is car. The state court denied his motion to suppress, and the appellate court denied him leave to appeal. Plaintiff then brought a section 1983 suit for damages and simultaneously petitioned the federal district court for a writ of habeas corpus. The section 1983 suit defendants moved for summary judgment asserting the collateral estoppel effect of the state court judgment. *Id.* at 87.

The Court noted that to apply collateral estoppel in a section 1983 suit puts state criminal defendants to a "Hobson's choice." *Id.* at 88. If such a defendant contests this constitutionality of a search at the state level, then he may not sue for damages in federal court if his motion to suppress is overruled. However, if he preserves the issue for a federal damages action, he increases the possibility of conviction. *Id.*

The Court also expressed "some doubt" as to the applicability of collateral estoppel in section 1983 cases. *Id.* This doubt stemmed "from the clear congressional purpose behind the Civil Rights Act of providing a federal remedy to litigants who possess a state remedy in theory, but not in practice." *Id.* However, the court

found that in this case federal habeas corpus available to "satisfy the congressional concerns behind the Civil Rights Act." *Id.* at 89. It held that a state conviction would collaterally estop a section 1983 plaintiff only if relief by way of habeas corpus was available to him, or he had unsuccessfully challenged his conviction in a habeas proceeding. *Id.* at 89-90.

This approach to section 1983 litigation is at least logically sound, although perhaps in conflict with the above stated legislative history. Habeas corpus does provide individuals with a federal forum, thereby satisfying congressional concern that such a forum be available. Moreover, the ability to bring a habeas corpus action indirectly preserves the possibility of gaining access to a federal forum for a section 1983 action. If a criminal defendant is successful in his habeas action, the prior state judgment no longer has collateral estopel effect and he can proceed with his section 1983 action. *See Rimmer* v. *Fayeteville Police Dept.*, 567 F.2d 273, 277 (4th Cir. 1977 (dictum)); *Mastracchio* v. *Ricci*, 498 F.2d 1257, 1260 n.2 (1st Cir. 1974 (dictum)).

However, in light of this Court's decision in *Stone* v. *Powell*, 428 U.S. 465 (1976), the habeas corpus justification for applying collateral estoppel in section 1983 cases involving fourth amendment claims is no longer valid. 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.



428 U.S. at 494-96. Since, under *Stone*, habeas corpus is no longer available to the great majority of state criminal defendants alleging fourth amendment violations, the Court below held collateral estoppel inapplicable in the instant case. 606 F.2d at 799 (Pet. Cert. A-10, A-11).

Petitioners have alleged that the opinion below is in conflict with this Court's holding in *Stone*, emphasizing comments in *Stone* as to limited judicial resources, judicial economy, and federal-state comity. (Petitioners' Brief, p.27) (hereinafter Pet. Br.). It is in this respect that petitioners most seriously misread not only *Stone*, but section 1983's purpose and legislative history.

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. 428 U.S. 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). As concerns section 1983, however, this Court recently noted that it "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent as well. *Owens* v. *Independence*, *supra* _____U.S. at _____, 100 Ct. at 1416 (citations omitted).

The societal costs of applying the exclusionary rule which concerned this Court in *Stone* were 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 rule is, therefore, that it "deflects the truthfinding process and often frees the guilty."* *Id.* at 490. A section 1983 action, however, neither "deflects the truthfinding process" nor does it "free the guilty." *Id.* at 490. It merely provides a damage remedy and deterrence. Moreover, Chief Justice Burger, concurring in *Stone,* partially justified the elimination of habeas corpus relief as a remedy for fourth amendment claims on the need for alternative remedies. *Id.* at 500-01 (Burger, C.J., concurring). As indicated by the foregoing legislative history and 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 (Pet. Cert. A-10).[2]

[2] However, the Chief Justice has also noted that section 1983 standing alone would be insufficient to protect fourth amendment rights. *See Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting). ("The problems of both error and deliberate misconduct by law enforcement officials call for a workable remedy. Private damage actions against individual police officers concededly have not adequately met this requirement, and it would be fallacious to assume today's work of the Court in creating a remedy will really accomplish its stated objective.").



As to the cases cited by petitioners for the proposition that "lower federal courts have consistently recognized the appropriateness of applying principles of res judicata and collateral estopel in § 1983 actions," (Pet. Br., p. 17), it is noteworthy that this Court decided *Stone* on June 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.[3] Moreover, certain of the cases cited by petitioners are distinquishable from the instant case on other grounds.

For example, in *Smith* v. *Sinclair,* 424 F. Supp. 1108 (W.D. Okl. 1976), the court totally failed to ad-

[3] *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 (2d Cir. 1978) (same); *Rimmer* v. *Fayetteville Police Dept.*, 567 F.2d 273, 276 (4th Cir. 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*); *Brown* v. *DeLayo*, 498 F.2d 1173 (10th Cir. 1974) (same); *Thistlethwaite* v. *New York*, 497 F.2d 339 (2d 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. 1971) (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*); *Brown* v. *Chastian*, 416 F.2d 1012 (5th Cir. 1969), *cert. denied*, 397 U.S. 951 (1970) (no search and seizure claim, prior to *Stone*); *Hammer* v. *Town of Greenburgh*, 440 F. Supp. 27 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978) (no search and seizure claim); *Palma* v. *Powers*, 295 F. Supp. 924 (N.D. Ill. 1969) (prior to *Stone*).

dress the availability of a federal forum issue. However, this was appropriate in *Smith* because the plaintiff's original criminal trial had been in a federal court. 424 F. Supp. at 1110. The Court specifically noted that most of the issues plaintiff raised on appeal "were precisely the same issues presented to the federal court in his bank robbery trial and directly determined by the court adversely to him." *Id.* at 1111. The Court in *Smith* had no reason to address the issues presented in the instant case. The plaintiff in *Smith* had his federal forum, and section 1983's legislative intent to provide such a forum was satisfied.

*Rodriquez* v. *Beame*, 423 F. Supp. 906 (S.D.N.Y. 1976) is perhaps worthy of some note because it was decided on December 21, 1976, five months after *Stone*. However, the court makes no reference to *Stone*, nor does it discuss section 1983's legislative intent to provide a federal forum.

The plaintiff in *Rodriquez* alleged two constitutional violations: (1) an arrest without probable cause; and (2) absence of *Miranda* warnings, and the use of threats, trickery, and force in obtaining confessions. 423 F. Supp. at 907. The court found that collateral estoppel precluded relitigation of the issues decided adversly to plaintiff at his state court suppression hearing. It stated that the supression hearing held that plaintiff's confessions given after arrest and interrogation were lawful. *Id.* at 907.

Alleged violations of an individual's *Miranda* rights may still be raised by way of habeas corpus. *See Brewer*



v. *Williams*, 430 U.S. 387 (1977) (by implication). *Stone* applies only to fourth amendment claims. Thus, the court in *Rodriquez* may have considered the plaintiff's claim as basically involving *Miranda* rights and felt no need to consider *Stone* or the availability of a federal forum. This conclusion is strengthened by the court's total failure to mention plaintiff's fourth amendment arrest without probable cause claim after its initial recognition that such a claim was before it. The court never mentions whether the state court made a specific finding on plaintiff's fourth amendment claim. While it is unclear exactly what the court in *Rodriquez* considered in reaching its holding, it is clear that the court totally failed to discuss section 1983's legislative intent to provide a federal forum. Notwithstanding the foregoing, it is noteworthy that not even the court in *Rodriguez* dismissed the plaintiff's claim with prejudice, as the trial court did in the instant case. The court in *Rodriguez* dismissed the complaint with the caveat that the case would be re-opened if the suppression hearing decision was overruled. 423 F. Supp. 908. Given the availability of habeas corpus for the presentation of cases involving alleged violations of an individual's *Miranda* rights, the plaintiff in *Rodriguez* might well have had his suppression hearing decision reversed in federal court subsequent to the dismissal of his section 1983 action.

In their Petition for Writ of Certiorari, petitioners placed significant reliance upon *Metros v. United States District Court*, 441F.2d 313 (10th Cir. 1971) (Pet. Cert.,

P. 15-16). They also cite this case in their brief (Pet. Br., p. 17). 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 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 in *Metros* 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 erroneous or unjust decision in the first court by appeal or some other appropriate means of re-examination.' " 441 F.2d at 317. 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.* Respondent 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).

In a more recent case, cited by petitioners (Pet. Br., p. 17), 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, other than the Eighth Circuit's opinion below, to respondent's knowledge, that discusses collateral estoppel, section 1983, and *Stone* in reaching its holding is *Clark* v. *Lutcher*, 436 F. Supp. 1266 (M.D. Pa. 1977). *Clark* held collateral estoppel inapplicable in section 1983 actions involving fourth amendment rights.

### 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.

Petitioners assert that "a majority, perhaps a significant majority, of § 1983 claims filed against State officials, including law enforcement officers, especially those filed by convicted and imprisoned felons, are insubstantial and even frivilous" and that should this Court fail to apply collateral estoppel in such cases "the risk will be enhanced that harassed District Judges may pay insufficient attention to meritorious claims." (Pet. Br. p.14-15). This Machiavelian approach to law enforcement sets the tenor for petitioners' entire brief (as well as the Americans for Effective Law Enforcement, *et al.*'s Amicus Curiae Brief). In effect, petitioners are asking this Court to ignore section 1983's legislative intent, and all meritorious claims that should be filed thereunder in the future, because there may also be insubstantial claims. Certainly this is not the approach to be taken by the guarantors of those rights we hold most sacred in a free society, including the right to be free from unconstitutional searches and seizures.

Moreover, there is no need to fear an onslaught of groundless civil actions. The opinion below did not create a general exception to the applicability of collateral estoppel in all section 1983 cases, but only in a restricted group of cases in which there is a special need



after *Stone* for access to a federal forum. The Federal Rules of Civil Procedure provide wholly adequate means for dealing with groundless lawsuits which might arise within this restricted group of cases. 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 or frivolous lawsuits. A good faith-reasonable belief in legality is a complete defense under section 183, even if the challenge conduct actually violated an individuals constitutional rights. *See, e.g., Pierson* v. *Ray*, 386 U.S. 547 (1967). If law enforcement officers act in bad faith or without a reasonable belief in legality, they should be liable in an action under section 1983.

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* 466 F. Supp. at 515; (Pet. Cert., 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 its meritorious nature

and characterized it as "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

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 (1831). It would simply be unthinkable for the branch of government entrusted with the protection of individual constitutional rights to avoid hearing meritorious cases because insubstantial cases might be filed.

Moreover, as noted in *Moran* v. *Mitchell*, *supra*, 354 F. Supp. at 88 and *Clark* v. *Lutcher*, *supra*, 436 F. Supp. at 1272, state court criminal defendants who choose to litigate their fourth amendment claims in a federal forum will truly be put to a Hobson's choice should this Court hold collateral estoppel applicable in the instant case. Should this Court so hold, a state court criminal defendant with a valid fourth amendment claim will only be able to have his claim heard in a federal forum if he foregoes raising it in his state court criminal trial; thereby increasing the likelihood of his conviction. Few defendants will be willing to risk a criminal conviction on the premise that they may obtain damages in a subsequent federal action.This is especially true since, to succeed in a state court suppression hearing, the defendant need merely prove that he has standing and that



the search was unconstitutional. While in section 1983 actions, the plaintiff must not only demonstrate that he has standing and that the search was unconstitutional, he must additionally overcome the good faith-reasonable belief defense available to police officers in section 1983 actions. *See*, *e.g.*, *Pierson* v. *Ray*, 386 U.S. 547 (1967).

Given the infrequency with which individuals would bring section 1983 actions under these circumstances, and the unavailability of habeas proceedings under *Stone*, the exclusionary rule would become the sole means available to most state criminal defendants for protecting fourth amendment rights. Yet, it is clear that the exclusionary rule was never meant to supplant damage actions as a remedy for violations of fourth amendment rights. In *Ney* v. *California*, 439 F.2d 1285 (9th Cir. 1971), the Ninth Circuit directly addressed the relationship between the exclusionary rule and section 1983, stating:

> "The Civil Rights Act long antedates the exclusionary rule; the creation of that rule by the Supreme Court, first for the federal courts and later for the state courts, was not designed to, and did not, limit the remedies created by the Congress when it enacted the Civil Rights Act."

*Id.* at 1288. The Court further noted that if a successful state prosecution, based upon the use of information obtained in violation of defendant's constitutional rights, could bar a civil rights action against the offending officers, "the Civil Rights Act would, in many cases, be a dead letter." *Id.* It held that plaintiff's section 1983 action for denial of counsel during interroga-

tion was not barred by his prior state court conviction. *Id.*

Although this Court has indicated an unwillingness to "assume that there now exists a general lack of appropriate sensitivity to constitutional rights" in the state courts (*Stone* v. *Powell*, *supra*, 428 U.S. at 493-4 n.35), it is still pertinent to note that lacking habeas corpus review the application of the exclusionary rule is left to state judges, insulated from federal courts by the remoteness and improbability of Supreme Court review. This Court has recognized the insufficiency of such review for protecting constitutional rights. See, *England* v. *Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 416 (1964). *See also*, *Stone* v. *Powell*, *supra*, 428 U.S. at 526 (Brennen, J., dissenting); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II*, 60 Va. L. Rev. 250, 264 (1974).

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), Justice Brennan, joined by Justice Marshall, specifically noted state court disinclination to follow "federal constitutional pronouncements" on fourth amendment issues after *Stone* eliminated federal habeas corpus review. 437 U.S. at 404. It was because of problems such as Justice Brennan noted in *Mincey* that Congress enacted section 1983 and placed guardianship of federal constitutional rights in the federal courts. To deny litigants in respondent's position the right to utilize the federal courts to protect his fourth amendment rights would clearly violate the very purpose behind section 1983's enactment.



### D. General principles of tort law are not determinative of the issues in this case

It is of no avail to petitioners that section 1983 "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) (Pet. Br., p.15-16). Section 1983 is not a "font of tort law" nor does it create " a body of general federal tort law. . " *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). Whether any given immunity or defense applies in an action under section 1983 is essentially a question of statutory construction. *Owen* v. *Independence*, *supra*, _____ U.S. at _____, 100 S.Ct. at 1407. As stated above, section 1983's statutory language admits of no defenses and its legislative history clearly discloses congressional intent to provide complainants a federal forum for the vindication of their constitutional rights, "State authorization in the premises to the contrary notwithstanding." Cong. Globe at 416 (Representative Biggs).

Clearly, Congress intended that federal court jurisdiction under section 1983 would extend "to the actions of state courts . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 241-2 (footnote omitted). It seems quite obvious under these circumstances that the actions of state courts, i.e., their judgments and rulings, do not have traditional tort law collateral estoppel effect. In short, specific congressional intent with respect to section 1983 overrides general principles of tort law. Even the principal case cited by petitioners on this point, *Montana* v.

*United States,* 440 U.S. 147 (1979), notes that in applying collateral estoppel courts must first determine whether any "special circumstances warrant an exception to the normal rules of preclusion." 440 U.S. at 155. The instant case simply presents special circmstances arising from the nature of section 1983 and requiring an exception to general rules of preclusion.

### E. The decision below gives appropriate consideration to federal-state comity.

Petitioners contend that the Court of Appeals' reliance on "the special role of the federal courts in protecting civil rights" (606 F.2d 799 (Pet. Cert., A-10)), is "patently erroneous" given section 1983's legislative history and concurrent state court jurisdiction under the statute. (Pet. Cert., p.19). This Court was obviously aware of section 1983's concurrent jurisdictional provision when it recognized congressional intent under section 1983 to establish "the role of the Federal Government as a guarantor of basic federal rights against state power . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 239. Thus, the Court of Appeals' recognition of this special role can hardly be considered patently erroneous. As demonstrated above, section 1983 clearly contemplates a special role for the federal courts in protecting individual rights.

Petitioners seem to feel that it somehow helps their position to demonstrate that section 1983 provides for concurrent federal-state court jurisdiction. (Pet. Br. p.19-24). It has never been respondent's position that section 1983 deprived the state courts of jurisdiction



over constitutional issues. Surely if a plaintiff chooses to bring his section 1983 action in state court, nothing in section 1983 or its legislative history would prevent him. Respondent's contention is that Congress intended, through section 1983, to provide individuals in respondent's position with the opportunity to utilize a federal forum for the protection of their federally protected constitutional rights. This certainly does not mean that if such individuals feel their rights can be better protected in state courts they should be forced into federal courts. The choice is the complainant's under section 1983, however, not the state's.

In the instant case, respondent was compelled into the state court system. As noted above, if collateral estoppel is held to apply, individuals so compelled will be forced to choose between litigating their fourth amendment claims in state court or increasing the possibitlity of conviction by holding such claims back for litigation in a subsequent section 1983 federal action. The choice Congress intended to grant plaintiffs in section 1983 actions was between state and federal court, not a Hobson's choice between federal court and a state conviction.

Moreover, a federal court ruling on a search and seizure claim would not vitiate a state court ruling as to the applicability of the exclusionary rule. A section 1983 action does not free the convicted state court defendant, nor does it require a new trial, it merely provides a damages remedy. The exclusionary "rule is not a personal constitutional right", nor is it "calculated to

redress the injury to the privacy of the victim of the search and seizure . . ." *Stone* v. *Powell*, *supra*, 428 U.S. at 486. It is simply "a judicially created means of effectuating the rights secured by the Fourth Amendment." *Id.* at 482. Thus, holding collateral estoppel inapplicable in actions involving fourth amendment rights would in no way "disturb the jurisdiction of state courts" in applying the exclusionary rule, as petitioners apparently fear. (Pet. Br. P.20).

Lastly, respondent notes that, 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 (Pet. Cert., A-11). However, the Court below further noted that in "refusing [respondent] immediate relief", it was committing him to "perhaps several years of litigating his § 1983 claim," which appeared to the Court to be "serious and substantial." 606 F.2d at 799 (Pet. Cert., A-11).

Respondent agrees that it is regretable 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.

### F. The federal res judicata act, 28 U.S.C. § 1738 is inapplicable under the facts of this case.

Petitioners further offer 28 U.S.C. § 1738 as "adducing an additional reason for applying a federal rule



of colateral estoppel to this case," although they do not rely on § 1738 as an "independent basis for reversing the Court of Appeals". (Pet. Br. p.25 n.5). Clearly, petitioners have good reason not to rely on section 1738 as an independent basis for reversing the court below. Even the cases which have applied section 1738 often recognize that "implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application of "section 1738. *Red Fox* v. *Red Fox*, 564 F.2d 361, 365 n.3 (9th Cir. 1977). *See*, *e.g.*, *American Mannex Corp.* v. *Rozands*, 452 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972); *Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184, 188-90 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955).

> As one commentator has stated:
>
> [I]f a federal purpose or interest will be undermined by allowing collateral estoppel effect, as might occur when a determination of law would be given this effect or when the availability of federal procedure is a prerequisite to carrying out the intent of Congress implicit in its definition of the substantive federal claim, a valid reason may exist for denying collateral estoppel effect. In any event, the federal purpose and interest which might be undermined by applying collateral estoppel must be balanced against the policy reasons which support this res judicata doctrine.

Note, *Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations*, 53 Va. L. Rev. 1360, 1384 (1967).

As respondent has submitted throughout this brief, section 1983 is clearly a federal statute representing compelling federal policies and justifying a departure from general rules of collateral estoppel, such as section 1738. This Honorable Court was faced with an analogous issue in *Mitchum* v. *Foster*, *supra*, 407 U.S. 225, wherein it held that 28 U.S.C. § 2283, which is an absolute bar against injunction of state court proceedings in most cases, is inapplicable in cases under 42 U.S.C. § 1983 seeking to enjoin a state proceeding. Similarly, in the instant case, it seems unfathomable given section 1983's legislative history and congressional intent, that collateral estoppel could serve to deny respondent a federal forum for consideration of his search and seizure claim, when section 1983 clearly extends to "the actions of state courts . . ." *Mitchum* v. *Foster*, *supra*, 407 U.S. at 241-2.

## II. Respondent's Claim Is Serious And Substantial And Evinces State Court Unwillingness To Advance To Federal Court Holdings On Fourth Amendment Issues.

In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), Justices Marshall and Brennan noted a disinclination on the part of the state court to follow "federal constitutional pronoucements" on fourth amendment issues following *Stone* v. *Powell*, *supra*. *Id.* at 404. The instant case is notable for as similar disinclination on the part of the Missouri courts.



In *Mincey*, a group of police officers went to the petitioner's home to purchase heroin. A shoot-out occured in which one police officer was killed and other individuals injured. The uninjured officers took control and guarded the suspects and premises. Within ten minutes, homicide detectives arrived and proceeded to gather evidence. Their search was extensive and lasted four days. The evidence seized was subsequently used to convict the petitioner. The Arizona Supreme Court sustained the conviction based on a murder scene exception to the fourth amendment's warrant requirement.

This Court reversed petitioner's conviction holding that the Arizona murder scene exception was inconsistent with the fourth and fourteenth amendments and that the warrantless search "was not constitutionally permissible simply because a homicide had recently occurred there." 437 U.S. at 395.

In the instant case, a group of police officers went to respondent's home to purchase heroin. A shoot-out occured in which two police oficers were injured. Additional officers arrived until there were about thirty-five officers on the scene. After all the officers had arrived, one of the officers announced with a bullhorn, "We are police, let us in," and "Come out of the house, no action will be taken." Appellant and his father than came out of the house. The officers, suspecting that there were additional persons within, rushed into the house to check. Some time thereafter, exactly when is not clear from the record, Officer Brand, who had been designated as the "seizing officer," entered the house

and found the items which are the subject of the search respondent contends is unconstitutional. 606 F.2d at 796 (Pet. Cert., A-5). Officer Brand did not believe that there were other occupants present in respondent's residence. 587 S.W.2d at 340 (Pet. Cert., A-16).

The Missouri Court of Appeals upheld the constitutionality of Officer Brand's search notwithstanding that: (1) Officer Brand entered respondent's residence after it had been rushed to check for other residents and after respondent had been arrested (606 F.2d at 796 (Pet. Cert., A-5)); (2) Officer Brand entered to search for evidence, not for other occupants, and was designated the "seizing officer" or "seizure officer" (606 F.2d at 796 (Pet. Cert., A-5); 587 S.W.2d at 339 (Pet. Cert., A-14); (3) Officer Brand did not even believe that there were other occupants in the house (587 S.W.2d at 340 (Pet. Cert., A-16); and, (4) there were approximately thirty-five officers at the scene to guard the house and prevent evidence being lost, destroyed, or removed had the police decided to obtain a warrant (606 F.2d at 796 (Pet. Cert., A-5)).

The Missouri Court's justification for upholding this search was that Officer Brand entered pursuant to an emergency situation and the evidence admitted at trial was in plain view. 587 S.W.2d at 340-41 (Pet. Cert., A-16 - A-18). In so holding, the Missouri court ignored many of the very factors this Court considered relevant in *Mincey*. In actuality, about the only relevant factual distinction between the instant case and *Mincey* is that the search in *Mincey* lasted four days while the



search of respondent's home may have been for a shorter time: respondent is unsure. Nonetheless, the temporal length of the search was not the determining fact in *Mincey*. Moreover, the search in the instant case was, as in *Mincey*, far reaching, including a search of dresser drawers and old tires.

Even apart from *Mincey*, the Missouri Court ignored the federal constitutional pronouncements of the Eighth Circuit. In *United States* v. *Young*, 553 F.2d 1132 (8th Cir.), *cert. denied*, 431 U.S. 959 (1977), evidence technicians conducted a warrantless search of the appellant's home after a shootout and a subsequent warrantless entry by police to search for occupants. The trial court admitted the evidence so seized. Although recognizing that the police officers were lawfully in appellant's home and that they could lawfully seize evidence in plain view, the Court of Appeals further stated that:

> The seizure of money taken from the bedroom wall by the evidence technicians, however, does not fall within the exigent circumstance exception to the search warrant requirement, and should have been excluded. The technicians were looking for evidence, not robbers, at a time when the house had already been secured and after appellant had been arrested. A search warrant should have been obtained before proceeding further. *See Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *United States* v. *Carter*, 173 U.S. App. D.C. 54, 522 F.2d 666 (1965); *United States* v. *Gamble*, 473 F.2d 1274 (7th Cir. 1973).

553 F.2d at 1132. (Even though the Court of Appeals clearly held this search unconstitutional, appellant's conviction was affirmed because the Court determined that the admission of this evidence was harmless error).

Respondent submits that under the plain facts of this case and the federal constitutional pronouncements in *Mincey* v. *Arizona, supra*, and *United States* v. *Young, supra*, the search conducted by Officer Brand was *prima facia* unconstitutional. Of course, this is not the form within which to fully explicate the merits of respondent's "serious and substantial" claim. 606 F.2d at 799 (Pet. Cert., A-11). Respondent offers the foregoing synopsis merely to demonstrate the need for a federal forum to protect fourth amendment rights and, more particularly, to protect respondent's rights in the instant case.

**III. Notwithstanding The Unavailability Of Federal Habeas Corpus, Collateral Estoppel Is Inapplicable In The Instant Case As Concerns The Basic Allegations In Respondent's Complaint Because (1) The State Court Held That Respondent's Fourth Amendment Rights Were Violated: And, (2) No Court Has Considered Plaintiff's Assault Claim.**

As noted in respondent's Statement of the Case, *supra*, and as specifically held by the Court below (606 F.2d at 797 (Pet. Cert., A-5)), respondent's 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. (Pet. Cert., A-21-A-24). As concerns respondent's assault sclaim, petitioners have properly declined to challenge a reversal of the district court's order. (Pet. Br., p.6 n.2). 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 docrine in section 1983 cases alleging the violation of fourth amendment rights (which it is not), the state court clearly held that respondent's fourth amendment rights were violated. The state court, in fact, suppressed certain evidence. (Pet. Cert., 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); (Pet. Cert., 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.

Petitioners plainly admit that if respondent's complaint is "read as alleging that the Petitioners conspired to conduct, and did conduct, a search which was illegal in scope, then perhaps Respondent is not estopped." (Pet. Br. at p.36). Yet petitioner's attempt to avoid the plain impact of this statement by alleging that respondent's complaint seeks "redress solely for the alleged warrantless intrusion into his house, pursuant to an alleged conspiracy" as opposed to the search actually conducted. (Pet. Br. pp.11, 37). A simple reading of respondent's complaint reveals the inanity of this argument. Respondent, proceeding *pro se*, clearly alleged that petitioners "searched the house without obtaining a warrant. . . ." (Pet. cert., p.A-2, ¶ 5). Respondent's complaint quite obviously contends that the illegal search actually conducted as well as illegal entry of his home and the conspircy to enter and search violated his fourth amendment rights.

Nonetheless, even if it could be said that respondent's complaint was vague, *pro se* complaints by state prisoners are held to "less stringent standards than formal pleadings drafted by lawyers. . . ." *Haines* v. *Kerner*, 404 U.S. 519, 520-1 (1972). *See also Corby* v. *Conboy*, 457 F.2d 251, 253 (2d Cir. 1972). Such complaints should only be dismissed when a court can "say with assurance that under all the allegations . . . it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Haines* v. *Kerner*, 404 U.S. 519, 520-21 (1972). Given the state court's order suppressing certain



illegally obtained evidence, it appears beyond doubt that respondent can prove a set of facts in support of his illegal search and seizure claim entitling him to relief.

Petitioners further agree that respondent's claim cannot involve evidence suppressed by the state court because respondent was "keenly aware" that this suppressed evidence "would furnish no basis for liability in damages . . . ." (Pet. Br. p.37). While it is certainly unclear just what a *pro se* complainant drafting a pleading in the state penitentiary would be keenly aware of, it is clear that petitioners have misstated the law. Respondent undoubtedly has a cause of action against petitioners for damages based on a search pursuant to which evidence was seized and suppressed by the state court. The cases petitioners cite lend no support to their assertion to the contrary, and in actuality support respondent's position.

In *Mastracchio* v. *Ricci*, 498 F.2d 1257 (1st Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (Pet. Br. p.37), a section 1983 complainant alleged that his constitutional right to a fair trial was violated by the admission into evidence at his state court criminal trial of a police officer's allegedly perjured testimony. The Court held that since the nature of this testimony was an essential element of complainant's state court criminal trial, the issue as to whether it was actually perjured was resolved against the complainant in state court and collaterally estopped his section 1983 action. (The Court also noted the possibility that an exception to the applicability of collateral estoppel in section 1983 actions might be appropriate in a case where habeas corpus was unavailable). (498 F.2d at 1260 n.2).

Alternatively the Court noted that, if it were to assume the admission of the allegedly perjured testimony was not essential to the complainant's conviction, he would lack a cause of action because he had "not suffered any damages as a result thereof." 498 F.2d at 1261. That is, if the allegedly perjured testimony did not affect complainant's conviction, he received a fair trial so as to comport with his right to a fair trial. The right to a fair trial was the only right complainant alleged had been violated. The issue was whether that right had been violated so as to create section 1983 liability, not whether the complainant could prove actual damages. In the instant case, respondent's fourth amendment rights were clearly violated apart from any possible effect this violation might have had on his right to a fair trial. As such, respondent has a cause of action under section 1983 for the illegal search and seizure pursuant to which the state court suppressed evidence.

The second case cited by petitioners, *Carey* v. *Piphus*, 435 U.S. 247 (1978) (Pet. Br. p.l37), unequivocally supports respondent's contention that he has an action under section 1983 in connection with the evidence suppressed by the state court. In *Carey*, this Court held that section 1983 complainants who failed to prove any actual damages in connection with a violation of their constitutional right to procedural due process were nonetheless entitled to maintain an action for nominal damages. This court specifically noted that "[a] number of lower federal courts have approved the award of nominal damages under § 1983 where deprivations of constitutional rights are not shown to have caused actual injury." 435 U.S. at 266-7 n.24. Such cases include section 1983 actions involving violations of fourth amendment rights. *See, e.g., Sexton* v. *Gibbs*, 327 F.Supp. 134, 142-3 (N.D. Tex. 1970), *aff'd.*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972). *See generally* cases cited in *Hostrop* v. *Board of Junior College Dist. No. 515*, 523 F.2d 569, 579 (7th Cir. 1975), *cert. denied*, 425 U.S. 63 (1976) (cited in *Carey* v. *Piphus, supra*, 435 U.S. at 264 n. 21.



The problem in *Carey* was that the complainants had gone to trial and failed to prove any actual damages. 435 U.S. at 251-52. This can hardly be utilized to limit a damages recovery in the instant case since respondent has yet to be granted the opportunity to present evidence. *Carey* certainly cannot be utilized to establish that respondent was "keenly aware" (Pet. Br. p.37) that he would be unable to recover damages in connection with the illegal search that resulted in the state court's order suppressing certain evidence. *Carey* specifically holds to the contrary.

Petitioner's argument that respondent is unable to state a cause of action against petitioners in connection with the unlawful search and seizure of the evidence suppressed at his trial demonstrates the anomalous nature of petitioner's entire approach to interpreting section 1983. If plaintiff is collaterally estopped from raising a search and seizure claim as to evidence admitted at his criminal trial, as petitioners allege, and is further precluded from raising such a claim as to items excluded

from his criminal trial, as petitioners allege, no state court criminal defendant would ever have a cause of action under section 1983 for a violation of his fourth amendment rights. Under this approach, if the evidence comes in, the defendant is estopped and if it's excluded, there is no damage and, therefore, no liability. Such a circuitous approach to interpreting section 1983 is obviously contrary to the Civil Rights Act's legislative history.

Although, as set forth above, respondent believes petitioners are arguing that respondent cannot state a cause of action against petitioners as to the illegal search and seizure which resulted in a state court suppression of evidence because he will be unable to prove damages, it is also possible that petitioners are arguing that respondent cannot state such a claim because petitioners Allen and Jacobsmeyer were incapacitated at the time the unlawful search occured and, therefore, cannot be held liable. As noted in respondent's Statement of the Case, his cause of action is against named individual police officers, unknown police officers, and the City of St. Louis Police Department. Clearly respondent can proceed against the City of St. Louis. *See Owen* v. *Independence*, _____ U.S. _____, 100 S. Ct. 1398 (1980); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978). Respondent can also proceed under section 1983 against police officers Allen, Jacobsmeyer and others who were involved in a conspiracy to deprive him of his constitutonal rights *See e.g. Phillips* v. *Trello*, 502 F. 2d 1000, 1004 (3d Cir.



1974); *Birnbaum* v. *Trussell*, 371 F. 2d 672, 676, (2d Cir. 1966); *Hahn* v. *Sargent*, 388 F. Supp. 445, 450 n. 5 (D. Mass.), *aff'd*, 523 F. 2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); *Ames* v. *Vavreck*, 356 F.Supp. 931, 940 (D.Minn. 1973). Respondent may proceed against the individual police officers who actually conducted the illegal search and seizure (*see, e.g., Monroe* v. *Pape*, 365 U.S. 167, 171-2, 187 (1961)), and the officers who assaulted him (*see, e.g., Rosenberg* v. *Martin*, 478 F.2d 520, 526 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973); *Collum* v. *Butler*, 421 F.2d 1257, 1259-60 (7th Cir.1970)

Although respondent was unaware of the identities of the officers who actually conducted the illegal search and seizure and assasulted him at the time he filed his section 1983 complaint, he has subsequently learned their identities.[4] The district court did not rely on the fact that respondent's action was, in part, against unknown officers in dismissing his complaint perhaps because respondent, at the very least, stated a claim against the City of St. Louis for violations of his constitutional rights and against officers Allen and Jacobsmeyer for conspiracy. Nonetheless, the Court of Appeals noted that respondent "learned the name of the police officer who allegedly assaulted him subsequent to

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[4] Officer Brand conducted the illegal search. Officer Brand had been designated by the officer in charge of the operation, Sgt. Hammer, as the "seizure officer". 587 S.W.2d at 339 (Pet. Cert., A-14). Respondent's complaint was dismissed with prejudice less than three months after he filed suit. He has not, as yet, had an opportunity to amend.

the filing of the § 1983 action," and held that respondent "should be granted leave to amend his complaint in this respect." 606 F.2d at 797 n.1 (Pet. Cert., A-6 n.1).

Respondent submits that the Court of Appeals correctly provided respondent leave to amend his complaint and that it would be unjust to preclude state prisoners acting *pro se* from amending section 1983 complaints that state actionable causes of action for constitutional violations. It is hardly likely that an individual will be able to elicit a police officer's name while that officer is beating him or searching his home long after he is removed from the premises and incarcerated.

Respondent has clearly demonstrated the existence of viable causes of action under section 1983 against the named as well as the unknown defendants. Upon remand to the district court, respondent is and has been prepared to amend his complaint to add the individual defendants involved in the deprivation of his constitutional rights and not already named. Respondent submits that the absence of these additional names from his complaint should not serve as a basis for dismissal.

Nonetheless, it is clear that respondent has stated a claim against petitioners Allen and Jacobsmeyer for their participation in a conspiracy to violate respondent's constitutinal rights and that the actual occurrence of an illegal search violating those rights is apparent on this record. As such, respondent submits that this Court should remand respondent's cause to the district court for further proceedings.



## CONCLUSION

For the foregoing reasons, respondent submits that the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for further proceedings consistent therewith.

Respectfully submitted,

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