BENCH MEMO

No. 82-738

MIGRA

v.

WARREN CITY SCHOOL DISTRICT BD. OF EDUC., et al.

Cert to CA6 (Edwards, Kennedy, Celebrezze) (order)

Issues Presented: 1. Whether the Full Faith and Credit Statute, 28 U.S.C. §1738, requires a federal court sitting in Ohio to bar an action based on 42 U.S.C. §§ 1983 and 1985 when the claims could have been raised, but were not, in a prior state court proceeding involving state law claims arising out of the same incident?

2. Whether Ohio's statute of limitations for libel and slander applies to petr's §1983 claim that resps deprived her of the liberty interest in her reputation and her property interest in continued employment by spreading malicious rumors about her private life? (This issue was not raised in the cert petn but was addressed in the briefs on the merits).

3. Whether petr stated a claim upon which relief could be granted when she alleged that resps violated her constitutional

rights by arbitrarily refusing to rehire her? (This issue was not raised in the cert petn but was addressed by petr in her merits brief).

Background: In 1976 petr, Ethyl Migra, was hired as the supervisor of elementary education by the Warren City School District. She was employed under annual contracts through the 1978-1979 school year. On April 17, 1979, resp Warren City Bd. of Educ. passesd a unanimous resolution to renew Migra's contract for the 1979-1980 school year. On April 23, 1979, Migra tendered a letter to one of the board members and asked that it be delivered to the superintendant. The board member delivered the letter the next morning. Later that evening, resp Henry Angelo (the president of the board) called a special meeting of the board during which the board voted not to renew Migra's contract. Migra was subsequently notified of this decision.

Two months later, Migra filed a complaint in state court against the board and the individuals who voted for non-renewal of her contract (resps Angelo, Swan, and Miller). The complaint alleged: (1) that Migra's 1979-1980 contract was non-renewed in a manner that violated state law, (2) that resps anticipatorily breached the contract, (3) that Angelo, Swan, and Miller maliciously conspired to deprive Migra of her contract rights, and (4) that the same individuals conducted an unlawful meeting for the purpose of depriving Migra of her contract rights.

The state trial court entered judment in favor of Migra on the contract issues, finding that Migra had accepted the board's

offer before it was rescinded and that the April 24th meeting was null and void because of various procedural defects. The court also found that, contrary to Migra's allegation, the individual defendants had not violated the state Sunshine Act by meeting and discussing Migra's contract status in a non-open meeting. The court ordered the board to reinstate Migra and pay her the contract rate, less the sum she had already recieved from unemployment compensation. As permitted by state law, the court reserved and continued Migra's conspiracy claim and made no determination on the question of the liability of the individual defendants. Subsequently, on July 9, 1980, the court granted Migra's motion to dismiss the conspiracy claim without prejudice.

On July 10, 1980, one day after her motion to dismiss the conspiracy claim was granted by the state court, Migra filed the present action in federal district court. Named as defendants were the board, the individual defendants in the state court action, and four other persons who were then, or previously had been, members of the board. In the complaint, Migra alleged (1) that resps' refusal to renew her 1979-1980 contract was the result of her exercising her First Amendment rights through her participation in a social studies curriculum proposal and her support for desegregation in the school district, (2) that the refusal to renew her contract violated her equal protection rights because it was based on unlawful and irrelevant criteria, (3) that the decision to terminate her contract was made without the type of hearing required by the due process clause, (4) that resps deprived her of the liberty interest in her reputation and

the property interest in continued employment by circulating rumors concerning her private life, and (5) that the board arbitrarily refused to rehire her for the 1980-1981 school year. The DC granted resps' motion for summary judgment.

The DC first ruled that the doctrine of res judicata barred Migra from bringing all but the claim that resps arbitrarily refused to rehire her for the 1980-1981 school year. Migra's claim that her Fifth and Fourteenth Amendment property and due process rights were violated because of the non-renewal of her 1979-1980 contract had been ruled on by the state court, the DC held. Migra's First Amendment claim had not been raised in the prior proceeding, however, so a different rule might apply, the DC observed. Although this Court had decided that res judicata applied to §1983 claims which had actually been adjudicated in state court, Allen v. McCurry, 449 U.S. 90 (1980), there was a split among the circuits over whether a final judgment in a state court acts as a bar to §1983 issues which might might have been presented in the state proceeding but were not. The CA6, however, had held that a final judgment is res judicata to all the issues which might have been presented in the prior proceeding. Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (CA6 1970), cert. denied, 401 U.S. 939. Therfore, Migra was precluded from bringing her First Amendment claim as well. The claim that Migra was defamed by resps was also barred because it arose out of the same claim and set of circumstances which were litigated in the state court. Further, such a claim was barred by the Ohio statute of limitations for defamation, which applied

to the federal action because of 42 U.S.C. §1988, the DC ruled. Finally, the DC ruled that Migra's complaint concerning the board's failure to hire her for the 1980-1981 school year failed to state a claim upon which relief could be granted because Migra had failed to assert any entitlement to employment past the 1979-1980 school year and had otherwise failed to indicate how the board's refusal to rehire her violated her constitutional rights. The CA6 affirmed by order "for the reasons spelled out in considerable length in the thoughtful and well reasoned order and opinon of District Judge John Manos."

Summary of the Arguments: Migra argues that the present suit is not barred by 28 U.S.C. §1738, which requires federal courts to give the same effect to state court judgments which would be given them by courts of that state. Ohio law requires the application of res judicata only if the subsequent suit is based on the same cause of action. This is the traditional standard recognized by this Court as early as Cromwell v. County of Sac, 94 U.S. 351 (1876). Here the two suits relate to the same subject matter, but they are not based on the same cause of action. The case relied upon by resps, Johnson's Island, Inc. v. Board of Township Trustees, 431 N.E. 2d 672 (Ohio 1982), does not establish that Ohio has adopted a broad definition of "cause of action" for res judicata purposes. The definition issue was not addressed in Johnson, which held that a plaintiff cannot assert as claims matters that could have been asserted as defenses in a prior action.

Migra also argues that res judicata does not apply in the present circumstances because her state tort claim (the conspiracy claim) was dismissed without prejudice. Since there has been no final judgment on the tort claims, res judicata does not apply to these §1983 and §1985 claims, which are a species of tort liability. Migra also contends that the doctrine of res judicata does not apply at all to her First Amendment claim because the DC admitted that the claim was not litigated by the state court.

Migra's final argument with respect to the res judicata issue is that requiring a plaintiff to litigate his federal claims in conjunction with his state court action is antithetical to the established policy of the Civil Rights Act. Migra argues that this issue was decided in Haring v. Prosise, No. 81-2169 (June 13 1983), in which the Court ruled that a conviction in a state court upon a plea of guilty does not preclude the convict fromsubsequently asserting a §1983 claim for an alleged Fourth Amendment violation that was never considered in the state court proceedings.

Migra also raises two issues which were not raised in the cert petn. She argues first that the DC erred in applying the Ohio statute of limitations for defamation to her claim for injury to her reputation. She contends that the reputational injury claim is more analogous to the tort of conspiracy to injure a person by libel or slander, which under Ohio law is a separate tort with a longer statute of limitations. She also argues that the DC erred in dismissing her claim relating to the

board's refusal to rehire her for the 1980-1981 school year. The DC failed to realize that although Migra did not have tenure, she could have shown that under the circumstances she had a legitimate entitlement to the job.

Resps first argue that Ohio law would preclude Migra from litigating in state court the claims she now seeks to litigate in federal court. The key issue is what is a cause of aciton for res judicata purposes under Ohio law. While early Ohio decisions adopted a narrow definition of res judicata, the Ohio Supreme Court's latest decision on the issue, Johnson Island, indicates that Ohio has now joined the majority of jurisdictions in adopting a broad definition of cause of action, one which precludes a plaintiff from relitigating a claim arising out of the same group of operative facts from which the previously litigated claim arose. In Johnson's Island, a plaintiff was precluded from challenging the constitutionality of a zoning ordinance because in an earlier action in which it was enjoined from proceeding with its project because the project violated the zoning ordinance, plaintiff had failed to raise the consitutionality defense. Even though the constitutionality of the statute was based on a different legal theory than the issue lititgated in the first cause of action, the court held that plaintiff was barred.

Thus, resps argue, the Ohio S. Ct. has adopted the broader "factual unit" definition of cause of action. Under that definiton Migra is precluded from relitigating a claim which arose out out the same operative facts as her earlier action

which resulted in a final judgment. The fact that the state court dismissed without prejudice Migra's conspiracy claim is irrelevant, resps maintain. Even if that same claim would not be barred in a subsequent action, there is nothing in the doctrine of res judicata which would allow the defendant to assert a new claim arising out of the same operative facts when that claim could have been raised in a prior case which proceeded to final judgment.

Resps next contend that if Migra's claim is barred by Ohio law (and thus by §1738) there is nothing about §1983 which requires an exception to the normal operation of §1738. This Court in Allen v. McCurry, 449 U.S. 90 (1980), has already indicated that traditional notions of res judicata apply to §1983 cases. The majority of the federal circuits (the 1st, 5th, 6th, 7th, and 10th) are in accord with that view. Only the CA2 and CA3 have expressed an opposite opinion, and the CA3 opinion is not squarely in conflict because the federal court action in New Jersey Educ. Ass'n v. Burke, 579 F.2d 764 (CA3 1978) was commenced before a final decision by the state court. Normal res judicata principles had therefore not yet come into play because there was not yet a final state court judgment. Further, adopting such an exception would violate the principles of federal-state comity.

Resps also argue that neither Migra nor amici present any compelling reason for adopting a §1983 exception to §1738. Nothing in the legislative history of §1983 indicates an intent to amend §1738. Further, contrary to Migra's argument,

plaintiffs are not precluded from bringing their claims in a federal forum. They must simply chose whether to bring their claims in federal or state court. Finally, there are policy considerations which militate against recognizing such an exception. If such an exception were adopted, more §1983 cases which could have been litigated in state courts would be thrust upon the already overburdened federal courts. In addition, the principles of finality, repose, and fairness to defendants would be undermined if res judicata is not applied in the present circumstances.

Resps also respond to Migra's statute of limitation argument, maintaining that Migra's claim for damage to her reputation is most like a libel and slander claim under Ohio law and that, accordingly, the one-year statute of limitation applies.

Amicus the National Education Association (NEA) aruges that §1738 should not be interpreted to require preclusion in cases like the present one, citing four reasons for that conclusion. First, if such claims are precluded, plaintiffs are likely to bring all of their claims, including state law claims, in federal court. This is not in harmony with the principles underlying the concept of federalism.

Second, since most plaintiffs, if forced to choose, will bring all their claims in federal courts, those courts, already overworked, will be swamped with more claims, both state and federal. The likely result will be that the federal courts will either abstain on the state law issues or refuse to exercise

pendant jurisdiction over such claims, with the ultimate result that state claims will be tried in state court and federal claims in federal court, the same as if the preclusion doctrine did not apply. Thus, the same result will be reached, but after an additional step has been taken. This is not the type of judicial efficiency the doctrine of res judicata was designed to achieve.

Third, the policies behind §1983 will be implicated if a rule of preclusion is adopted in this case. Section 1983 was designed to put federal courts between the states and the people. Mitchum v. Foster, 407 U.S. 225, 239 (1972). The statute was passed because Congress was skeptical that state courts would adequately protect the constitutional rights of their citizens. Requiring a plaintiff to bring his federal claims in state court would therefore undermine the purpose of the statute.

Finally, the narrow definition of "cause of action" which existed when §1983 was passed makes it even more unlikely that Congress intended the result reached by the lower court in this case. Even if Congress wanted normal res judicata rules to apply when §1983 was enacted, that is no indication that Congress intended to preclude a plaintiff from raising a §1983 claim which was not raised before the state court.

Amicus Edwin F. Mandel Legal Aid Clinic repeats many of the arguments made by the NEA. In addition, the clinic points out that in England v. Louisana State Bd. of Medical Examiners, 375 U.S. 411 (1963) this Court held that a plaintiff can sue in federal court after state law claims arising out of the same incident are adjudicated in state court. In England, plaintiffs

originally brought the action in federal court. When the federal court abstained to allow the state court to act, the Court held that the federal court was not required to give preclusive effect to the state court's determination of the constituional issue involved. The clinic also reasserts Migra's argument that since her state tort action was dismissed without prejudice, she should not be barred from bringing this federal tort action since there is no judgment to act as a bar.

Amicus ACLU argues that Ohio law would not preclude Migra from litigating the §1983 claims if she brought them in state court. This is because Ohio has adopted the narrow definition of cause of action for res judicata purposes. The Ohio test for determining whether a cause of action is the same as that litigated in a prior case is three-pronged: (1) is the same demand involved, i.e. tort or contract injuries; (2) will the same evidence sustain each cause of action; and (3) did the claims in each action accrue at the same time. Norwood, v. McDonald, 52 N.E. 2d 67, 74 (1943). When this test is applied to the case at hand, it is obvious that the §1983 claims are separate causes of action from the contract claim on which judgment was entered.

The ACLU repeats many of the arguments of the other amici in support of the proposition that §1738 does not require preclusion in §1983 cases like the present one. In addition, the ACLU raises other arugments in support of that propostion, noting that refusing to give preclusive effect to the state court judgment in this case would not implicate the policies behind

§1738 because preclusive effect could still be given to issues actually decided by the state court. Further, the policies behind the doctrine of res judicata will not be served to any appreciable degree by precluding claims such as the present one because the federal issues will have to be decided by some court and it is likely that the federal courts will decide the issue just as rapidly and efficiently as would the state courts.

Finally, the ACLU, in a footnonte, contends that even if the libel and slander statute of limitations applies to Migra's claim for injury to her reputation, that does not require dismissal of that claim because Ohio law provides that a dismissal without prejudice tolls the statute of limitations. Since Migra's conspiracy claim (the most analogous claim to her reputational injury claim) was dismissed without prejudice, the statute was tolled with respect to this claim. The ACLU notes that it is not clear whether the statue of limitations issue is before the Court.

Amici Maryland and the American Council of Education repeat many of the arguments made by resps. In addition, they argue that there is no basis for concluding that state courts cannot adjudicate §1983 claims as well as federal courts and that the policies behind the res judicata doctrine (conserving judicial resources, fostering respect for the state court system, preserving the validity of prior proceedings, etc.) will all be served by precluding Migra from proceeding with her claim. They also note that the identical issue is raised in a suit pending before the CA4, Kutzik v. Young, No. 82-1264.

Discussion: The threshold issue is whether Migra would be precluded from raising the present claims in an Ohio state court. "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so." Allen, 449 U.S., at 98 (citing 28 U.S.C. §1738). Therefore, if Ohio would not preclude Migra from raising the federal claims, §1738 does not apply. Thus, the need to ascertain Ohio law is clear. Unfortunately, the nature of Ohio law on the subject is not as clear.

Ohio, like the majority of jurisdictions, has adopted the traditional rule that res judicata in the form of claim preclusion applies only when the cause of action raised in the subsequent action is the same as that adjudicated in the prior proceeding. The confusion arises in determining what constitutes a cause of action for this purpose. In 1968, the Ohio Supreme Court noted that there are three generally accepted definitions of cause of action for res judicata purposes: (1) the narrow "legal theory" definition (each legal theory consitutes a separate cause of action), (2) the "primary right-primary duty" definition (the facts from which the plaintiff's primary right and the defendant's corresponding primary duty arise consitute the cause of action), and (3) the "factual unit" definition (a cause of action is a group or aggregate of operative facts arising out of a common transaction or occurence). Henderson v. Ryan, 233 N.E.2d 506, 508-509 (Ohio 1968). In Henderson, the court noted that Ohio adhered to the "primary right-primary duty"

definition, which focuses on the substance of the wrongful act rather than the theory of recovery (the focus under the narrower "legal theory" definition) or the breadth of the transaction out of which the which the act arose (the focus of the broader "factual unit" definition). Id. at 509-510.

If the "primary right-primary duty" definition is used, it can be argued that most of Migra's claims are precluded since they arose out of the same wrongful act (resps' wrongful termination of Migra's contract) as the state court claims on which there has been a valid final judgment. However, it could also be argued that the First Amendment claim arose out of a separate wrongful act involving the breach of a separate duty (resps' duty not to penalize Migra for the exercise of her First Amendment rights) and that, accordingly, Migra is not precluded by state law from litigating this claim.

Moreover, it is clear that under this definition Migra's reputational injury claim is not barred because it arose out of a separate wrong. The reputational injury claim, like the state-lawed-based conspiracy claim which was dismissed without prejudice, arises out of a separate wrongful act committed by resps (conspiracy to injure Migra by spreading rumors about her private life). Since there has been no final judgment with repsect to this wrongful act, Migra would not be precluded from litigating a claim arising from that act. Thus, if the "primary right-primary duty" definition of cause of action applies in Ohio, Migra would, at most, be precluded from litigating some of her §1983 claims.

Resps contend that two cases decided since Henderson (Johnson's Island (discussed above) and Sharp v. Shelby Mutual Insurance Co., 239 N.E. 2d 49 (Ohio 1968)) reveal that the Ohio Supreme Court has adopted the broader "factual unit" definition, which if applied in the present case would bar Migra from litigating any claim arising out of her contract squabble with resps. Sharp is not directly on point, however. In Sharp, the court was asked to decide whether plaintiff had stated a joint cause of action within the meaning of a state service of process statute. The court restated the three definitions of cause of action it had articulated in Henderaon and then applied each of the definitions to the facts of the case before it, concluding that "under any of the proffered definitions of the term 'cause of action,' plaintiff's petition does not state a 'joint casue of action' which is required to bring it within [the state law in question]." 239 N.E. 2d, at 54. Thus, the court did not decide which definition would apply for res judicata purposes. Nor did it clearly abandon the "primary right-primary duty" definition in favor of the "factual unit" definition. It is therefore unlikely that Sharp changed the law of res judicata in Ohio, especially since it was decided shortly after the court expressly adhered to the "primary right-primary duty" definition in Henderson.

Reliance on Johnson's Island is similarly suspect. The court in Johnson's Island did not explain which definition of cause of action it was utilizing. Therefore, it would seem safe to infer that the definition previously adhered to was still being utilized. And, while it can be argued that the two claims

involved in that case ((1) that the zoning ordinance did not apply to Johnson's Island because of its prior non-conforming use of the land and (2) that the ordinance was unconstitutional) can be considered a single cause of action only under the broader "factual unit" definition, it is possible that the court determined that the two claims arose out of the same wrongful act (application of the zoning ordinance to Johnson's Island) and that, accordingly, the claims involved a single cause of action under the "primary right-primary duty" definition.

If forced to decide, I would have to conclude that Ohio continues to adhere to the "primary right-primary duty" definition and that, accordingly, at most, only some of Migra's claims are precluded by state law. However, the issue is not clear, one way or the other. Therefore, the best approach may be to assume, without deciding, that Ohio law would preclude Migra from bringing her federal claims in state court at this time. If the Court then determined that §1738 applies with full force to §1983 claims, it could remand the case to the district court for a determination Ohio law. This would permit the district court in Ohio to have the first crack at what is not an easy question of Ohio law and would also ensure that the Court reaches the issue it obviously wanted to reach when it granted the cert petn.

Assuming that Ohio law would preclude Migra from bringing the present claim in state court and that, accordingly, §1738 would normally require the federal court to dismiss her complaint on grounds of res judicata, the next question is whether a different result is required because those claims are grounded in

the Civil Rights Act, specifically 42 U.S.C. §§ 1983 and 1985. This is the issue on which the circuit courts are in conflict, as you noted in your dissent from the denial of cert in Castorr v. Brundage, No. 82-48 (Oct. 12, 1982). The First, Fifth, Seventh, Eighth, Ninth, and Tenth circuits are in agreement with the Sixth Circuit that a §1983 claimant is precluded by res judicata from relitigating not only the issues which were actually decided in the state proceeding, but also the issues which might have been presented. Lovely v. Laiberte, 498 F.2d 1261 (CA 1), cert. denied, 419 U.S. 1038 (1974); Jennings v. Caddo Parish School Bd., 531 F.2d 1331 (CA 5 1976); Robbins v. Dist. Court, 592 F.2d 1015 (CA8 1979); Lee v. City of Florida, 685 F.2d 196 (CA 7 1982); Scoggins v. Schrunk, 522 F.2d 436 (CA9 1975), cert. denied, 423 U.S. 1066 (1976); Spence v. Latting, 512 F.2d 93 (CA 10), cert. denied, 423 U.S. 896 (1975). The Second and Third circuits have held to the contrary. Lonmbard v. Board of Ed. of New York City, 502 F.2d 631 (CA2 1974), cert. denied, 420 U.S. 976 (1975); New Jersey Ed. Ass'n v. Burke, 579 F.2d 764 (CA3), cert. denied, 439 U.S. 894 (1978). I agree with the majority in this case, concluding that there is nothing about §1983 which requires a different result from that normally compelled by §1738 (the analysis is the same for §1985 claims).

First, the legislative history argument advanced by Migra and amici is unpersuasive. Since "repeals by implication are disfavored," Allen, 449 U.S., at 99, there must be a clear showing that Congress intended to restrict the application of §1738. However, there is simply nothing in the legislative

history cited by Migra or amici which establishes that Congress did not want §1738 to apply to §1983 claims. Although it is clear that many members of Congress did not trust state courts as much as they did federal courts when the Civil Rights Act was passed, Congress did not preclude state courts from litigating such claims as it might have. Moreover, there is nothing in the legislative history or scheme of the Civil Rights Acts which indicates that Congress intended to relieve plaintiffs who choose to go to state court from the normal effects of the Full Faith and Credit statute.

While the definition of res judicata may have been narrower when the Civil Rights Act was passed, Congress must have been aware (if it considered the issue at all) that §1738 contemplated an evolution in state law on the subject. Section 1738 is not strictly a rule of res judicata, it is also a rule of federal-state comity, which requires federal courts to apply the state res judicata rules whatever they may be. Unless those state rules conflict with some overriding federal policy, there is no reason they should not be honored. In the present situation, contrary to Migra's contentions, there is simply no direct conflict.

Migra and amici argue that giving effect to Ohio's res judicata rules in this case will contravene the policies behind §1983. More specifically, they contend that the purpose of §1983 was to provide plaintiffs with a federal forum in which to adjudiate their constitutional claims. Precluding a plaintiff from raising such claims in federal court is therefore

unacceptbale, Migra and amici maintain. This argument might have persuasive force had Migra been the defendant in the prior state court proceeding. In that situation she would indeed be precluded from ever having a chance to raise the federal claims in a federal forum. However, in this case Migra had the opportunity to bring her claims in federal court. Instead, she chose to proceed in state court. Thus, it was Migra who precluded herself from litigating the claims in a federal forum. Amici argue that if Migra had brought her original claims in federal court, the federal court would have been forced to adjudicate state law claims, a result which undermines the concept of federalism. But the fact that pendant jurisdiction is available renders that argument unpersuasive. If the concept of federalism required that federal courts refuse to adjudicate state law issues whenever possible, pendant jurisdiction would never be permissible.

Nor are the practical considerations advanced by Migra and amici persuasive. In any event, these considerations do not provide a sufficient basis for refusing to give full effect to §1738. Migra and amici contend that if a rule of preclusion is adopted for cases like the present one, federal courts will be flooded with §1983 claims to which state law claims will be attached. The courts will be forced to take on this extra work or to abstain or refuse to exercise pendant jurisdiction. If the court chose the latter course (abstention or refusal to exercise pendant jurisdiction), the result will be the same as if no preclusion were applied in the first place: state courts will

adjudicate state issues and federal courts will adjudicate federal issues. This identical result will be reached only after an additional step is taken, Migra and amici argue, so it is best not to apply the rule of preclusion in the first place.

This flood of litigation argument is not compelling. I think most plaintiffs would want to bring all their claims in a single forum even if they were not forced to do so. Moreover, some of those forced to chose will probably choose to litigate their claims in state court. This could lead to a reduction in the federal workload. In any event, the increase in the number of cases brought in federal court will likely be minimal. More importantly, an increase in the federal workload is not a valid basis for refusing to give full effect to a validily enacted statute. If Congress is concerned with the level of increased work §1738 causes, it can adjust the rules accordingly.

Finally, the cases cited by Migra and amici do not compel the result for which they argue. England does not stand for the proposition that federal courts should adjudicate §1983 claims after a state court has had a opportunity to do so. The plaintiff in England brought the case in federal court in the first place. The Court merely held that, having chosen the federal forum, plaintiff should not be prevented from having his federal claims adjudicated there merely because the federal court chose to abstain on the state law issues. As this Court noted in Allen, "[t]he holding in England depended entirely on this Court's view of the purpose of absension in such a case." 449 U.S., at 101 n. 17. Nor does Haring hold that a plaintiff cannot

be precluded from raising a §1983 claim which he could have raised in the prior state proceeding. In Haring the Court expressly noted that §1738 did not require preclusion because, under the facts presented in that case, Virginia law would not bar the plaintiff from litigating the issues in state court. The Court went on to hold that there was nothing outside of §1738 which would require that the federal court give preclusive effect to the state court decision in question. Thus, I would hold that §1738 bars a plaintiff from litigating in federal court §1983 claims which could not be litigated in state court because plaintiff had an opportunity to raise the issues in a prior state proceeding.

I see no reason for reaching the statute of limitations issue (which is really an issue of state law) or the 12(b)(6) issue. These issues were not raised in the cert petition. As you observed in your concurring opinion in Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 859 (1982), "Rule 21.1(a) states that '[o]nly the questions set forth in the petition or fairly included therein will be considered by the Court.'" Migra presents no reason for ignoring this rule, and the issues she seeks to raise are not of sufficient importance to require the Court to search for one.

Kevin

August 25, 1983