OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARCUS C. ZINERMON, ET AL., Petitioners V. DARRELL E. BURCH

CASE NO: 87-1965

PLACE: WASHINGTON, D.C.

DATE: October 11, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

MARCUS C. ZINERMON, ET. AL.,

Petitioners,

v. : No. 87-1965

DARRELL E. BURCH,

Washington, D.C.

Wednesday, October 11, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

LOUIS F. HUBENER, III, ESQ., Assistant Attorney General of Florida, Tallahassee, Florida; on behalf of Petitioners.

RICHARD M. POWERS, ESQ., Tallahassee, Florida; on behalf of Respondent.

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P R O C E E D I N G S

11:01 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1965, Marcus Z. Zinermon versus Darrell E. Burch.

Mr. Hubener, you may proceed whenever you're ready.

ORAL ARGUMENT OF LOUIS F. HUBENER, III, ESQ.

ON BEHALF OF PETITIONERS

MR. HUBENER: Thank you. Mr. Chief Justice, and may it please the Court:

This case arises under 42 U.S. Code Section 1983. I will focus on two issues.

First, whether and how the Ingraham, Parratt and Hudson trilogy applies to the deprivation of a liberty interest, that being the allegedly intentional deprivation of an involuntary commitment hearing for a mental patient.

And, secondly, whether Florida's procedures and remedies are adequate to provide the process due a voluntary mental patient.

The 11th Circuit plurality opinion founders on its analysis of Hudson and Parratt. It holds that the respondent, Mr. Burch, who was transferred to Florida State Hospital in a highly disturbed and even psychotic condition, states a Section 1983 claim simply because the petitioners, who are hospital employees, were in a position to provide a hearing, they had a duty to provide one, and, therefore, it was an actionable abuse

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of power not to do so.

The plurality acknowledged that the petitioners, however, did not comply with state law requiring an involuntary commitment hearing, and Mr. Burch alleges that petitioners knew he was not capable of giving informed consent to admission as a voluntary patient, and that notwithstanding that, they deprived him of the hearing for commitment.

QUESTION: Mr. Hubener, it's not altogether clear to me whether the complaint is that the state failed to comply with procedures for involuntary admissions or whether the complaint says the voluntary admission procedure violates due process because it doesn't provide a way of determining whether the patient is capable of giving consent.

Which do you think we're dealing with?

MR. HUBENER: Well, I -- I --

QUESTION: It isn't clear to me.

MR. HUBENER: I understand your uncertainty, and I think we are dealing with the first question. Nevertheless --

QUESTION: Not necessarily. I'm -- I'm --

MR. HUBENER: But what --

QUESTION: I'm really not sure.

MR. HUBENER: I intend to address both possibilities in my argument. I do contend that the Florida procedures are adequate and that they do require that when a voluntary patient is admitted, that someone who is qualified to do so should

determine whether he is capable of giving consent. Now, supposedly --

QUESTION: Does is require a doctor's assessment of -- of the capacity of the person to consent?

MR. HUBENER: Well, a doctor's, or someone who meets the statutory definition of a qualified mental health professional. That doesn't necessarily --

QUESTION: That is a requirement that we find in Florida law?

MR. HUBENER: I believe that Florida law does require it.

QUESTION: Do you have a citation?

MR. HUBENER: No, I do not.

QUESTION: Oh.

MR. HUBENER: It would be --

QUESTION: You certainly wouldn't find that a burdensome requirement?

MR. HUBENER: No. Not at all. I'll come back to that point. But I just wanted to go into the Parratt and Hudson --

QUESTION: Does Florida law also require that when somebody comes into a hospital for physical treatment that there be some special procedure to make sure that the person is compos mentis?

MR. HUBENER: I don't know. If you're speaking of just a --

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QUESTION: Well, why --

MR. HUBENER: -- a general hospital --

QUESTION: Yeah. Is this a general rule? Do you think the Constitution requires that when a person expresses something and says, this is what I want to do, the state nonetheless cannot take that person at his word with -- MR. HUBENER: I know of no --

QUESTION: -- implementing some procedure beforehand?

MR. HUBENER: I know of no requirement under the law that --

QUESTION: Might that be a sensible constitutional rule? That prima facie, the state is entitled to think that people mean what they say and are competent to say what they mean?

MR. HUBENER: I think so. Unless there is some real reason to doubt it. And then I don't think that any doctor is going to initiate any kind of serious or significant treatment.

QUESTION: Well, is there reason to doubt it in this case?

MR. HUBENER: Was there reason to doubt that he could not be a voluntary inpatient?

QUESTION: Was there reason to doubt his competence to -- to give consent to various procedures?

MR. HUBENER: Well, there was -- there was reason to doubt his competence because he was a paranoid schizophrenic. He was suffering from hallucinations.

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QUESTION: So, on its face then Justice Scalia's proposed rule wouldn't apply to this case.

MR. HUBENER: No. But I thought he was talking about a general hospital situation.

QUESTION: Yeah.

MR. HUBENER: Here -- Here it's different. And we are -- by virtue of the fact that we never got past the complaint stage, we pretty much have to accept that he was not able to give his consent as an informed patient.

But in refusing to consider Florida's procedures and --

QUESTION: Excuse me. Let me pursue. Do we have to accept that it was apparent when he walked up that he was a paranoid schizophrenic? He says, I want to be admitted. Now, anybody who wants to be admitted to a mental institution you concede is entitled to have some procedures before he can be admitted? Is that -- is that what you have conceded?

QUESTION: Well, he can sign in either -- he can come in and apply to be a voluntary patient.

QUESTION: Right.

MR. HUBENER: In which case some determination should be made that he is capable of giving informed consent, as that term is statutorily defined.

QUESTION: And you think the Constitution requires that for all patients who apply to a state-run mental institution to obtain some treatment? And there is an automatic violation of

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the Constitution if --

MR. HUBENER: At least in the --

QUESTION: -- although the person seems totally rational, it's ipso facto a violation of the Constitution if there are no procedures to make sure that this person who wants to be admitted can really give consent?

MR. HUBENER: Well, it's an uncertain -- it's an uncertain judgment. I think --

QUESTION: Well, in this case hadn't the man already been diagnosed at the Diagnostic Center as having --

MR. HUBENER: Yes.

QUESTION: -- mental problems of a sufficient degree to warrant his treatment in a mental hospital?

MR. HUBENER: That's correct.

QUESTION: So, the diagnosis had already been obtained here.

MR. HUBENER: They had made a diagnosis --

QUESTION: Before there was ever a consent form offered to him?

MR. HUBENER: The record is not clear as to the timing. There was a diagnosis made at the Community Mental Health Center where he was initially taken.

QUESTION: Right.

MR. HUBENER: And during the time he was there he signed a voluntary consent. But obviously his problems had been

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diagnosed to a certain degree by the time he came to Florida State Hospital.

But the allegation here is that the petitioners willfully -- although they knew he could not be accepted as a voluntary patient, they did so anyway. They willfully denied him the commitment hearing to which he claims he was entitled, and in doing so, they also violated state law. The -- the -- that is an unforeseeable act when somebody willfully violates the law in this manner. The controlling inquiry in the Hudson case was solely whether the state is in a position to provide for pre-deprivation process and not whether the errant employees are.

So you look at it from the perspective of the state. And in Hudson, this Court specifically rejected the argument that because an agent can provide pre-deprivation due process then, as a matter of law, as a matter of course, he must do so.

The Court said that reflects a fundamental misunderstanding of Parratt. Parratt versus Taylor recognized that a due process deprivation could occur as the result of the failure to follow state procedures.

Contrary to this, the plurality opinion says that disregard of state law or procedures can never be unauthorized when the state agents had some authority to act.

The petitioners here only had the authority to accept Mr. Burch as a voluntary patient, if he qualified to be one. They

had no authority to commit him.

In Ingraham versus Wright, there is a state law that authorized paddling of unruly school students. And the court recognized that corporal punishment was an intentional act and that it involved 14th Amendment liberty interests. But, yet, the court found, or recognized, no 1983 claim for damages in that case for physical injuries resulting from paddling because state remedies were adequate.

We submit that if Ingraham is consistent with Parratt and Hudson, and vice versa, then the use of excessive and even injurious force in Ingraham was not authorized even though the paddling was.

And so it is here. The petitioners disregarded the limits of their authority and they failed to initiate commitment proceedings when they allegedly knew that Mr. Burch could not give his informed consent. These acts were unforeseeable to the state and they were certainly, in this particular circumstance, beyond its control.

Now, Florida's Mental Health Act --

QUESTION: Is this an argument that there was no state action?

MR. HUBENER: No, it's not. No.

QUESTION: What is it?

MR. HUBENER: There was state action but the particular acts were simply beyond the control of the state, as were the

acts --

QUESTION: And therefore? And therefore what?

MR. HUBENER: They were random and unforeseeable to the state within the -- the context of the Parratt and Hudson analysis.

QUESTION: And therefore what?

MR. HUBENER: Well, therefore, you look to the adequacy of the state remedies and procedures to determine what process is due.

QUESTION: Well, this assumes that it's the involuntary admission procedure that wasn't followed.

QUESTION: Yes.

MR. HUBENER: Well, it assumes two things. One, that they knew that he couldn't be a voluntary patient, and secondly, that they did not take action to voluntarily commit him. Those actions were beyond the control of the state in the sense of Parratt and Hudson and, therefore, we look to what procedures and remedies Florida provides to determine if they are adequate.

QUESTION: And what remedies does Florida provide?

MR. HUBENER: Well, there are -- there are a number of remedies. I think in terms of damages there are -- there is a right -- a statutory cause of action for the breach of any right or privilege due a mental patient. In this case, he was not properly evaluated as a voluntary patient so he would have a statutory cause of action for that.

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Further, the Florida case law -- the Everett versus Florida Institute of Technology which is cited in the brief -- recognizes a cause of action for false imprisonment when admission procedures are not followed. So, he has damage remedies under Florida law.

Florida has waived its sovereign immunity in tort and there is really no contention here from Mr. Burch, as I read his brief, that the damage remedies under Florida law are not adequate.

Beyond that, the state provides easy access to its circuit court for habeas corpus relief. Virtually anyone can question the detention of a mental patient in circuit court. Virtually anyone has standing. A friend or a relative, or guardian, or representative, an attorney -- all may question the detention of a mental patient in circuit court. Habeas corpus proceedings are available to question the denial -- I mean, the abuse of any procedure for the patient.

The voluntary patient, obviously, is going to have some kind of mental problem he is contending with, and he is protected because on admission, if he has no legal guardian, he is entitled to the appointment of two representatives, one of whom, by statute, is supposed to be a close relative if such a person is available. These guardians or representatives have a duty to act in the patient's best interests.

Both the patient and the guardian or representative are

given -- must be given -- written notice of the patient's right to discharge at the time of the admission and every six months thereafter. The voluntary patient may request discharge orally or in writing, and he must be discharged within three days.

QUESTION: Mr. Hubener, one of the -- the 11th Circuit's plurality opinion said, as I understood it, that this case is different from Parratt -- or Parratt, however one pronounces it -- because in this case the state had given these officials the authority to deprive the respondent of his liberty interest, or his claimed liberty interest. Whereas, in Parratt and in Hudson, the state officials there had had no state authority to do what they did.

How -- how do you answer that?

MR. HUBENER: Well, they -- they did not have such authority. What authority they had was to make this determination, if he was qualified to be admitted as a voluntary patient. If they decided he was not, then they had no authority to do anything other than arrange for a commitment hearing.

So, they had no authority to deprive him of his liberty. They had authority to properly admit him as a voluntary patient. That was all.

QUESTION: But that's kind of -- certainly contrary to the law of agency in a sense. Lots of agents have express authority to do only one sort of thing, but yet courts will say they have ostensible authority or apparent authority to do other things

beyond that just by reason of the position they hold.

Do you think that principle would have any application here?

MR. HUBENER: No, I don't. I don't think they had implied authority because what they are accused of doing is keeping him there without following proper procedures against -- apparently against his will. They certainly had no authority to do that and to specifically act contrary to what the law required.

QUESTION: Well, what if -- what if the state were to put out a bulletin to all policemen that you have no authority to detain anyone in violation of his Fourth Amendment rights, and then a policeman goes out and arrests somebody without probable cause and locks him up? Would it be a defense to a 1983 action to say that this -- this officer had no authority to lock the person up if it was in violation of his Fourth Amendment rights?

MR. HUBENER: No, it would not be a defense in that case to say that he had no authority to do that. But, similarly, in Parratt and Hudson, the agents had no authority to destroy property, which they did, and which they did intentionally.

These people had no authority to detain Mr. Burch without following proper procedures. And the question is -- I mean, it is looked at from the perspective of the state. What could the state have done to prevent that when a person does not act in compliance with a specific mandate?

QUESTION: Excuse me. I'm not sure what your concession

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to the Chief Justice was regarding the 1983 action? Were we talking about an action against the city or an action against the individual police officer?

MR. HUBENER: Whose?

QUESTION: You're assuming -- yes -- you're assuming a city has a policy of no unlawful searches and seizures and is not careless in implementing that policy, or what not, and an individual officer conducts an unlawful search and seizure and you think there would nonetheless be a 1983 action against the city or just against --

MR. HUBENER: No, I didn't -- no, I didn't say that.

QUESTION: Just against the officer?

MR. HUBENER: Right.

QUESTION: Now, what are we talking about in this case? An action against the individuals --

MR. HUBENER: We are --

QUESTION: -- or an action against the --

MR. HUBENER: We are talking about an action against the individuals.

QUESTION: Just against the individuals?

MR. HUBENER: But their -- their --

QUESTION: For their failure to provide procedures?

MR. HUBENER: That's right.

QUESTION: Maybe you've answered this -- I'm not quite clear. But your statement that the action was unauthorized

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because they didn't follow the right procedure --would it not have been authorized if they had followed the right procedure?

MR. HUBENER: Well, if they had followed the right procedure, they would not have committed him. A court would. Only -- only a court would have authority to involuntarily --

QUESTION: Well, they had -- they did have authority to accept voluntary patients, didn't they?

MR. HUBENER: Yes.

QUESTION: If they followed whatever you say? Got the right consents and so forth? So they did have authority to accept the man as a patient and keep him there for a period of time.

MR. HUBENER: If -- if he properly qualified as a voluntary patient.

QUESTION: Isn't that the difference between this case and the ones the Chief Justice suggested to you? That no matter what procedure they followed they didn't have authority to take his belongings or cause him to slip and fall on the staircase, whatever it is?

MR. HUBENER: Right. Right. Right.

QUESTION: So there is that difference between the cases?

MR. HUBENER: I think so. I'm sorry if I didn't make it clear before.

QUESTION: Well, that gets back to my concern and question that I started with when you began your argument.

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If the objection is to the inadequacy of the procedure for voluntary admissions, then do you think Parratt applies?

MR. HUBENER: No. But, as I understand --

QUESTION: Uh-huh.

MR. HUBENER: -- as I read the complaint, the 11th Circuit opinions and the brief in here, there is not a challenge from Mr. Burch to the adequacy or inadequacy of Florida's procedures.

QUESTION: Well, it appeared to be challenging it on an as applied sort of a challenge. That --

MR. HUBENER: As far as the admission of a patient is concerned, I think that the statutes define who and who cannot be a voluntary patient, and one must be able to give informed consent to treatment in order to be a voluntary patient.

Now, I think this requires, especially in the case where somebody is suffering from some obvious disturbance, that a mental health professional make that determination. Otherwise, the right --

QUESTION: But you can't give me any --

MR. HUBENER: No.

QUESTION: -- citation to any particular Florida requirement that that be done?

MR. HUBENER: No. I can -- I can -- I could point out that the statutes require that anyone who is admitted to a facility be seen for an examination by an M.D. within -- I believe it's 12 or 14 hours. But I think under this chapter a person has a

right to have that -- to have that made. And if it's not done, he has an action under the statute for the denial of that right. So, it would be extremely foolish for somebody not to try to make that determination if they were going to treat him and keep him.

That's why I don't think it can be -- it is a determination that can be made by a desk clerk, as one of the briefs suggests, because a desk clerk, in the ordinary sense of that word, has no competency whatsoever to determine someone's mental status.

QUESTION: What if this suit hadn't been brought but the -- the plaintiff resorted to the so-called post-deprivation remedies under Florida law? What would that have been?

MR. HUBENER: An action for damages. Probably for -- probably in alternatives --

QUESTION: If he brought such an action against the individuals, wouldn't the individuals have the opportunity to say, well, we know that we didn't give him the procedures that would have been required for an involuntary commitment, but now we want to show you that he would have been committed involuntarily, and we were quite right and we just were negligent, maybe, in not giving him these procedures. But if we would have given them to him, surely he would have been involuntarily committed.

MR. HUBENER: Well, I think --

QUESTION: In which event there wouldn't be any real

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damage, except maybe a peppercorn for not giving him the -- for not giving him the procedures at the time.

MR. HUBENER: Well, I think the same might be true under Section 1983 as far as any negligent action on their part is concerned because this Court --

QUESTION: But you think under -- under -- at least under Florida law if they mistakenly didn't give -- if they wouldn't have been entitled to hold him involuntarily, he could have gotten damages under Florida law?

MR. HUBENER: That's -- that's the clear implication of the Everett case, that he had a common law action of false imprisonment, where the people involved in the admission of a patient did not comply with the statutory procedures. And --

QUESTION: General, may I ask you one question? Did you finish your answer?

I just don't recall. How did you distinguish this case from the Chief Justice's hypothetical involving police officers who make arrests without probable cause? You, there, I think conceded that there would be an action against the officers --

MR. HUBENER: Well, that --

QUESTION: -- even though I suppose there is an adequate state remedy for false arrest in every --

MR. HUBENER: If the police officer had more authority than -- than did the individuals here. They had --

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QUESTION: They did -- but under his hypothetical they had no authority to make arrests without probable cause. Just as your people have no authority to accept a patient without either a hearing or a valid consent.

MR. HUBENER: Well, there would clearly be a 1983 action based on a violation of the Fourth Amendment for that kind of conduct.

QUESTION: Well, why isn't there here?

MR. HUBENER: Well, the -- the --

QUESTION: I mean, why is it different? I'm not --

MR. HUBENER: Well, what they're accused of is providing him -- depriving him of procedural due process as distinguished from a specific guarantee of the Bill of Rights.

QUESTION: Oh.

MR. HUBENER: And that -- when that is the case, the state is entitled to provide post-deprivation process.

QUESTION: I see. Your distinction is that that's a Fourth Amendment case and this is a Fourteenth Amendment case. That's your difference.

MR. HUBENER: Well, that is -- that is one difference. But I think the Chief Justice's question was -- really compared the authority of the police officer to the authority of --

QUESTION: Of the admitting agent here.

MR. HUBENER: -- these people that the police officer would have the authority to arrest. They --

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QUESTION: But your people have the authority to admit.

MR. HUBENER: As a voluntary patient, if they do what they are supposed to do.

QUESTION: Right. The same way the police have the authority to arrest if they do what they are supposed to do. I mean, I don't understand that difference.

I understand the Fourth Amendment and the Fourteenth Amendment difference. But that's the only difference, isn't it? I must have missed something; I don't -MR. HUBENER: To the extent the police officer deprives somebody of some procedure to which he's entitled, then it would be comparable. To the extent that he -- he violates the Fourth Amendment, it would be a different consideration.

QUESTION: Well, isn't it a -- isn't it a --what kind of a constitutional violation do you think it is if some psychiatrist is walking down the street and he runs into someone he thinks is crazy so he just has him picked up and taken to the hospital?

MR. HUBENER: Well, there -- there is no state action there.

QUESTION: Well, he happens to be a state -- he happens to be a state employee and he takes him to a state hospital and the state hospital holds him. What kind of a violation is that?

MR. HUBENER: Well, there may or may not --

QUESTION: Is there any difference between that and a

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policeman picking somebody up without probable cause?

MR. HUBENER: Not in -- not in -- no, I don't see where --

QUESTION: Well, isn't it a Fourth Amendment violation?

MR. HUBENER: Well --

QUESTION: The state seizes somebody and takes him off to the asylum and holds him?

(Pause.)

QUESTION: You may answer the question.

MR. HUBENER: No, I don't think. Not in a civil case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hubener.

Mr. Powers.

ORAL ARGUMENT OF RICHARD M. POWERS, ESQ.

ON BEHALF OF RESPONDENT

MR. POWERS: Mr. Chief Justice, and may it please the Court:

Parratt v. Taylor clearly does not apply when a pre-deprivation hearing is constitutionally mandated and the state is in a position to provide such a hearing.

In this case, there is no dispute that one --a predeprivation hearing was constitutionally mandated, and, in fact, there is no dispute really that the state was in a position to provide such a hearing.

The state attempts to turn Parratt's --

QUESTION: Do I have to accept that? I mean, you're saying the Court could not decide that there is no -- no necessity for any process when a person voluntarily does something? I couldn't decide the case on that basis because all the parties have conceded that?

MR. POWERS: Well, I'm not sure --

QUESTION: Because, frankly, I have trouble with it. I mean, I can understand how someone who has wrongly been -- whose voluntariness has wrongly been assumed, negligently or what not, may have a cause of action in tort or something for negligence in not looking behind what he says. But I have a lot of difficulty in saying that beyond that there must be provided a procedure, that there is a procedural right when somebody comes in and says, "I want to be committed" --

MR. POWERS: Well, this --

QUESTION: -- to do some studies or what not to make sure that what he says is what he means. And --

MR. POWERS: This is not -- your question doesn't really involve this case, the facts of this case, in the sense that this case is here on the pleadings. And the pleadings, if accepted as true -- the allegations if accepted as true -- materially in this respect in answering your question are as follows.

That if a judgment was made, the judgment that was made, as alleged in paragraph 27, was that he was not competent to

give consent. In other words, I allege that -- the complaint alleges that they knew, the petitioners knew, that he was not competent.

QUESTION: When he walked in?

MR. POWERS: When he walked in or after they did their initial evaluation. They did, in fact, make a medical judgment initially of his incompetence, and that's not in dispute. And then they made a medical judgment, as the pleading alleges, that he -- that he was not competent to consent. Or, in the alternative --

QUESTION: Well, is your complaint simply that the involuntary procedures were not followed?

MR. POWERS: My complaint --

QUESTION: Is that -- is that what it boils down to? That you've alleged everything you have to allege to show that involuntary commitment procedure should have been followed and the state didn't do it. Is that the nub of your complaint?

MR. POWERS: That's the -- part of my complaint. Obviously implicated in this appeal are the adequacy of the voluntary admission procedures which --

QUESTION: Well, that's what I'm trying to get at.

MR. POWERS: -- which have been put into --

QUESTION: Didn't you -- didn't you give up any argument that the voluntary procedures were inadequate?

MR. POWERS: I don't know that I gave it up as a legal

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matter.

QUESTION: Or didn't allege it?

MR. POWERS: My complaint initially was founded on the fact -- and it was admitted as true and it's been litigated from the trial court forward -- on the basis that -- again, taking the allegations of paragraph 27 -- that there was an intentional act here. That if there was a judgment -- if there was a judgment at all -- that he was not competent. And then, in spite of that judgment, they intentionally accepted him as a voluntary patient. They --

QUESTION: So you are not challenging here the voluntary admission procedures as such?

MR. POWERS: Well, I'm challenging them in the sense that they've been put in issue in this case in the appeal, and they've been specifically been put in issue by the petitioners.

Interestingly enough -- of course, this case was decided prior to Daniels -- but, interestingly enough, negligence has never been alleged by the petitioners up until now.

QUESTION: Yeah, but at least you can tell me what your complaint --

MR. POWERS: My complaint, I believe --

QUESTION: -- is challenging, can't you?

MR. POWERS: -- fairly read and given liberal construction, would involve both a challenge to the -- the act of intentionally depriving this respondent of a hearing and also

a challenge to the voluntary admission procedures if they are construed by this court to allow -- to allow a person to be involuntarily committed without any judgment whatsoever concerning his ability to do that, to voluntarily consent.

QUESTION: Then you're back to my question. I mean, you're either relying on your paragraph 27 or you aren't. If you're relying on your paragraph 27, then this case does not involve erroneous voluntary admission. It involves an involuntary commitment. Your claim is that this person was knowingly committed without having given consent.

MR. POWERS: That's correct. That --

QUESTION: So this --

MR. POWERS: -- is the essence of my claim.

QUESTION: And -- and therefore we don't have to confront the question at all what voluntary commitment procedures have to be adopted by this state.

MR. POWERS: I don't believe this Court -- it is necessary for this Court to decide --

QUESTION: And it's possible for me to think that you don't need any voluntary commitment procedures.

MR. POWERS: It's very possible --

QUESTION: Okay.

MR. POWERS: -- to decide this case --

QUESTION: What you're saying in effect is that on the allegations of this complaint it denied due

process to give this respondent only the voluntary commitment procedures?

MR. POWERS: Only the involuntary commitment procedures.

QUESTION: Oh, I thought they'd given him -- I thought they'd given him the voluntary commitment procedure.

MR. POWERS: No. The allegations of the complaint, your Honor, are that they knew that he was not competent to give consent, and in light of that knowledge, they deprived him of the procedural safeguards to begin with that are embodied in involuntary commitment procedures.

QUESTION: Well, Mr. Powers, do you think that -- do you think that -- you may be able -- may be right that they didn't give him the procedures necessary for an involuntary commitment. You certainly allege that.

But do you think that's the same thing as alleging they weren't entitled to hold him? They certainly didn't give him the procedures, but it could be that if they had given them to him they would have been quite entitled to hold him.

MR. POWERS: Well, this Court is -- in a sense the question misses the point of the case in that is it necessary to be result oriented to answer constitutional questions. I think in Logan v. Zimmerman Brush, the Court addressed that particular question specifically saying, in Logan's case, it wasn't necessary to show that he would have prevailed had he been given the pre -- or had he actually --

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QUESTION: I think you could prevail. It's just a question of what kind of remedy you're going to get.

MR. POWERS: I think in this case --

QUESTION: You can prevail --

MR. POWERS: -- what he was deprived of --

QUESTION: -- but you can certainly -- if you're right that they should have given him the involuntary procedures and they didn't, you're certainly going to prove a deprivation of procedural due process. But that doesn't necessarily determine what the remedy is.

MR. POWERS: The remedy under federal constitutional law or the remedy under state law?

QUESTION: Well, you're in under 1983 action.

MR. POWERS: Under constitutional law --

QUESTION: That's under federal law.

MR. POWERS: -- under 1983 I understand the remedy to be that if I prove it's a constitutional deprivation, I prove my case.

QUESTION: Well, a deprivation of procedural due process. That's right. But what kind of a remedy does that entitle you to?

MR. POWERS: It entitles me to damages, as I understand the law.

QUESTION: Because they weren't entitled to hold him at all during this entire period?

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MR. POWERS: Well, that's -- that's the way the case would be litigated at trial. I don't know that their entitlement -- the entitlement, unfortunately, in this case --and that's the problem with the denial of the procedures -- is that what would have happened to this particular individual we'll never know.

But we do know that had the procedures been followed, that the jurisdiction of the court would have been invoked, that he'd been appointed a counsel, that he'd have had the right to an independent medical judgment, that the court would have retained jurisdiction, that the court had a very -- a lot of options in the treatment.

The court could have ordered an evaluation for five days. The court could have ordered outpatient treatment. The court could have ordered a combination of inpatient and outpatient.

QUESTION: You don't think that these individual defendants would -- in this 1983 action say, yes, we deprived this person of procedural due process, but we want a hearing now to see if we would have given him those procedures, we would have been entitled to hold him?

MR. POWERS: In the federal -- in the federal context do I think they would ask for such a --

QUESTION: Well, would they be entitled to have it by way of a mitigation or as a defense or as going to the remedy? You know Cary against Pifas?

MR. POWERS: I'm not familiar with the facts of that case.

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Your problem is that you're second-guessing what a state circuit judge would have done. And without -- we can't go back to the situation that existed at the time of the deprivation, and we can't go back and elicit from a circuit judge what he might have done. We can't --

QUESTION: Mr. Powers, I take it you agree that the involuntary admission procedures are constitutionally adequate if they are followed?

MR. POWERS: That's been the --

QUESTION: You accept that?

MR. POWERS: I -- we -- I accept that.

QUESTION: And you just complain that the state did not follow those procedures in this case --

MR. POWERS: I did complain --

QUESTION: For involuntary commitment?

MR. POWERS: I did complain about that.

QUESTION: Uh-huh. And you think that Parratt does not apply? What are the state remedies available to someone if the state fails to apply those procedures?

MR. POWERS: In the context of state remedies, the state remedies would be an action for damages for false imprisonment, assault and battery, and maybe medical malpractice. It would be subject to 728 -- 768.28 which is a waiver of sovereign immunity statute which involves --

QUESTION: And why shouldn't Parratt and Hudson indicate

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that your client is left of whatever remedies and damages are available for what happened?

MR. POWERS: Of course, the argument here is that Parratt and Hudson do not apply and therefore adequate state remedies aren't an issue.

QUESTION: Well, is it your position that these acts were authorized or unauthorized by the State of Florida?

MR. POWERS: Well, in the sense of Logan v. Zimmerman, for instance, I think that the cases are hardly distinguishable. And I think in that sense the acts were authorized.

In Logan, as the Court knows, the commission of Illinois was entrusted with starting a procedure within --

QUESTION: Well, they -- they --

MR. POWERS: -- 120 days and they didn't do it. Now, clearly, the commissioner or some lesser employee wasn't authorized to let the statute run any more than these particular individuals were authorized to commit this man without a hearing knowing he wasn't competent to consent. If he were --

QUESTION: Well, so far as the state procedures are concerned, you cannot commit somebody without capacity until there is a hearing. And so, in that sense, these procedures were unauthorized -- in that sense -- were they not?

MR. POWERS: In that strict sense the -- the acts of the petitioners were contrary to state law.

QUESTION: And unauthorized.

MR. POWERS: As -- as were, in essence, the acts of the commission in not convening a hearing in Logan.

QUESTION: All right. But that's always the sense in which we ask in 1983 litigation whether or not the acts are authorized and unauthorized. We look to see what the state law provides, don't we?

MR. POWERS: Well, this Court -- in Logan the Court looked to see what the state law provided and determined that the state law was defective because --

QUESTION: There the state law was just 180 degrees wrong.

MR. POWERS: It -- it was defective in the sense that it permitted this to happen. It permitted the commission to allow the statute to run and thereby extinguishing a cause of action. The state law here permits this to happen too by entrusting -- I mean, entrusting to these individuals -- the state enacts constitutional provisions and trusts the constitutional -- or, the enforcement of those provisions to these individuals, and these individuals then deprive the respondent of his rights. I don't --

QUESTION: Well, that's -- that's always the case. But other than -- insofar as the state law is concerned, these acts were unauthorized, were they not?

MR. POWERS: Well, I think in following up -- QUESTION: The state statutory procedure just did not contemplate that this should happen.

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MR. POWERS: I keep getting back to the distinction between authorized and contrary to state law. I don't think that they are the same, and I would follow-up on Mr. Chief Justice Rehnquist's colloquy concerning agency.

I think in this particular case you've entrust -- the State of Florida has entrusted the implementation of Chapter 394 to these agents. I've in essence sued everybody I could sue who had a part in this. And this action is fairly attributable to the state, as the lower court so held. And I don't know how you'd distinguish then what is the state.

I mean, is it -- is it -- if we called these people, instead of petitioners, if we called them -- or mental health professionals, if that's what they are -- if we called them the receiving board of Florida State Hospital --

QUESTION: Yes, but doesn't -- doesn't Hudson versus Palmer really require that we make this inquiry because it makes a distinction between authorized and unauthorized acts?

MR. POWERS: I think Parratt, Hudson and Logan all emphasize the impracticability of the hearing and not necessarily the random and unauthorized nature of an act. That clearly the cases talk about both, but they talk about --in the case of Logan, it emphasized that particular language in Parratt, that we're talking about the impracticability of a hearing.

And it's my argument that it turns Parratt on its -- you

know, on itself by going at it through random unauthorized, i.e., contrary to state law, thus impractical.

That's an illogical assumption. There was nothing impractical about a hearing here. These -- these -- these petitioners had enormous opportunities to provide a hearing. They had -- three days prior to the admission at Florida State Hospital he had been diagnosed and treated, and the diagnosis and treatment hadn't changed. And they had 149 days after that to invoke the jurisdiction of the court and they never did it. I --

QUESTION: But there was no showing here -- there was not even an attempt to show, I take it, that there was a pattern or practice of these violations?

MR. POWERS: Well, there -- there -- I've not alleged, for instance --

QUESTION: There was no attempt to show it in this case, was there?

MR. POWERS: Yes, there was. And the attempt was through the Exhibit G which I attached to the complaint, through paragraph 27 of the complaint. Exhibit G is, of course, a letter from the Health and Rehabilitative Services which runs the hospital and it involves the results of an internal investigation. And Exhibit G, if I may quote -- it's found on page 2 of my brief -- the hospital itself found that -- and I quote -- "documentation that you, the respondent, were heavily

medicated and disoriented on admission was found and it was concluded that you were probably not competent to be signing legal documents. This matter was discussed at the Human Rights Advocacy Committee for Florida State Hospital meeting on August 4, 1983 and hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent."

And there is nothing in the complaint that I've alleged that distinguishes Mr. Burch from anybody else in that situation. It's my allegation, and I think I've fairly pleaded it, by attaching that reliable document versus just an unsupported assertion in my complaint, that this was the practice. This was what --

QUESTION: Was there any finding in the district court that there was a pattern or practice?

MR. POWERS: That wasn't the plurality holding of -- in the district court or --

QUESTION: Yes, in the district court was there a finding?

MR. POWERS: No, in the district court there was -- there wasn't a finding one way or the other. Unfortunately, this case was on the docket at the district court at the same time the panel decision in Gilmere was from the 11th Circuit. And, of course, that was vacated en banc and I believe that the district court's decision, as I think the district

court Chief Judge thought, was compelled by the panel decision which was an erroneous decision. But it was decided on Parratt, Hudson and the panel decision in Gilmere and this -- this particular issue was not --

QUESTION: Well, Mr. Powers, suppose that we think Parratt applies to deprivations of liberty interests such as this, and that it would apply to an unauthorized individual departure from adequate state commitment procedures, what then is left of your due process claim?

MR. POWERS: Well, if your question is that these petitioners are an individual departure and not a rogue act, as in Parratt and Hudson, then what's left of my 1983 claim -- if the Court doesn't recognize the voluntary -- the attack on the voluntary procedures, then I would say what's left of my 1983 claim is a substantive due process violation.

And, of course, that doesn't answer your question because Parratt doesn't apply to a substantive due process violation. But there is -- there is an allegation, if you fairly read the complaint -- in fairness read that -- there was a substantive due process violation --

QUESTION: Mr. Powers, doesn't it -- doesn't it torture these facts to make this a due process violation of any sort?

I mean, it seems to me if your client were shot dead by a policeman with no justification, you wouldn't bring a cause of

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action for denying him his right to a fair trial. I mean, you know, you'd bring a state action for -- for murder, for -- or possibly a federal action for unlawful seizure. But it's very strange to characterize it as a -- as a due process violation.

And you have the same thing here. Your claim is that your client -- against his will according to your paragraph 27 -- was incarcerated, his bodily integrity was violated. And what you're complaining about is denial of due process?

I mean, it seems to me that -- why is this a due process claim. Everything in the world is a due process claim then, if this is. Why --

MR. POWERS: Well --

QUESTION: It seems to me you could have brought an action for -- for assault or whatever in -- in treating this person with -- with the medicines against his will. The state would have tried to defend by saying the person should have been -- should have been committed anyway and you could fight it on that ground. Then you'd say, well, he wasn't committed, in fact.

MR. POWERS: Well, you could fight --

QUESTION: But that isn't a due process case.

MR. POWERS: You could fight any case in state court where they've -- they've waived sovereign immunity. But Section 1983 liability and the jurisdiction of the federal courts is not dependent on what happens to exist at the state level.

QUESTION: So, in -- in the murder case I began with, do

you think you could bring a suit under 1983 for failure to provide a fair trial?

MR. POWERS: No, I think I could bring a suit under 1983 for a Fourth Amendment violation and for substantive due process violation. A case very like Gilmere v. City of Atlanta.

QUESTION: Well, maybe this is a substantive due process violation only and not a procedural due process violation only.

MR. POWERS: Well, I think it's both. The -- and I've argued both from the filing of the complaint. It's -- I've argued in the trial court and the 11th Circuit that it's both.

The 11th Circuit, of course, in its plurality opinion, decided it on procedural grounds.

QUESTION: May I just make sure I understand your position. If the chief of police orders a policeman to go out and shoot a suspected criminal because he thinks he's guilty of a crime, or something like that, you don't think that would be a deprivation of life without due process?

MR. POWERS: I think it would be a deprivation of life without due process.

QUESTION: Then why did you concede the contrary to Justice Scalia?

MR. POWERS: Well, I -- I would -- I would characterize that -- that particular action the same way the court -- initially I would characterize it the same way the court in Gilmere did, and that was that, you know, there is no amount of

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procedures that can be taken that would permit that. And that kind of analysis leads you to a substantive due process analysis.

QUESTION: No. There are procedures by which a state can put a man to death if he's guilty of a crime.

MR. POWERS: The state can never, without justification, kill a man.

QUESTION: No, I'm assuming they have all the evidence in the world. The man -- he's a criminal, they could indict him and all the rest. But they go out and shoot him instead.

MR. POWERS: Well, then, in that context -- I mean, there is clearly --

QUESTION: Now, this is the same case -- why isn't this the same case?

MR. POWERS: There are -- there are --

QUESTION: They may have all the facts on this fellow but they didn't give him the hearing.

MR. POWERS: There are procedural implications to your -- to your facts situation, clearly. I mean, is it a denial of due process? Is it a denial to a speedy trial? You have other incorporated rights that of course come into play when you're dealing with a criminal.

QUESTION: And you'd have -- in that case you do have established procedures by which you indict people and all the rest. You just didn't follow them in this case.

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MR. POWERS: I think the way the decisions are occurring -- since Parratt, though, the wise practitioner would be better off alleging a substantive right or an incorporated right than a procedural due process right in the context of that -- of that fact hypothetical.

QUESTION: Why? Because it's spontaneous and unpredictable that somebody would do that? Is that the reason?

MR. POWERS: That's -- I mean, if you read --if you read -- I mean, that's why we're here. Because we have some difficulty applying Parratt v. Taylor to various situations, and this is one of them, and yours certainly would be another.

QUESTION: But Justice Stevens changed my hypothetical a little from what this case is. This is not a case where the police chief told them, go out and kill somebody. It's a case where the police officer in the -- while on duty took it upon himself to do that, contrary to the police chief's policy. That's what we have here, isn't it?

MR.POWERS: No, we have a hospital administrator who took it upon himself to have his people --

QUESTION: In either case, it would be unauthorized, would it not?

(Laughter.)

MR. POWERS: Well, if the police chief told his deputy to go out and kill somebody, then I don't -- if he was the final authority in the matter, I don't see how the

state could argue that that was unauthorized.

QUESTION: Why don't you try to get in a couple of sentences on your own.

(Laughter.)

MR. POWERS: This Court has already visited this issue in Monroe v. Pape more than a quarter of a century ago. And the argument, of course, in Monroe v. Pape was exactly the argument that we've got here and that is, in Monroe, the state had laws against unlawful search and seizure. They weren't followed and the state was arguing that Section 1983 doesn't apply in that situation because it was not authorized by state law.

The Court in Monroe said that that's not the nub of the difficulty, so to speak. In fact, to quote the Court, the Court said, there was no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. And the nub of the difficulty here primarily is the lack of enforcement of -- of the Chapter 394.

I want to say a few things about the application of this -- of the rule in Parratt and Hudson, and I guess Daniels -- to liberty interest. There is a -- this Court could very well make a principled distinction between a property loss, as was found or as occurred in Parratt and Hudson, and a liberty deprivation on the basis that a liberty deprivation cannot be restored, it cannot be replaced; you can't give somebody back his liberty as you can his property. You can buy somebody another hobby kit,

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you can give him the $23.50 back. You can replace his law books. You can replace his papers or you can pay him for them.

But a liberty deprivation is complete. The harm is done upon the deprivation. And on that basis the Court could, in a principled fashion, distinguish Parratt and Hudson and not apply it to liberty.

Justice O'Connor, using Justice O'Connor's --QUESTION: Well, excuse me. But I thought in Parratt it would have been an adequate remedy if you didn't give him the hobby kit back but gave him money. Wouldn't that have been enough?

MR. POWERS: In Parratt that would have been enough.

QUESTION: Well, why can't you give money here? The liberty has been deprived but you can compensate it by money --

MR. POWERS: You can't --

QUESTION: -- just as you compensated the loss of the hobby kit by money.

MR. POWERS: It's very difficult. I think the analysis -- obviously, any compensation that's going to be given has to be given in money. That's the -- that's the --

QUESTION: Right. Money is not a hobby kit -MR. POWERS: That's the law.

QUESTION: -- and money is not liberty.

MR. POWERS: But there is something greater in value, there is something greater -- there is a greater deprivation when you

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lock somebody up and deprive him of his liberty and introduce him to a system mind-altering drugs than when you take away a hobby kit that can easily be replaced for $23.50.

Justice O'Connor in her concurring opinion in Hudson I believe, if I'm reading the opinion correctly, found the distinction or possible distinction in referring to the Fifth Amendment's taking clause. And the taking clause -- you were talking about rightness, and the Hudson case wasn't right for adjudication because the Fifth Amendment incorporated and the Fourteenth Amendment requires a taking without just compensation.

And you can't get to the constitutional question until you get to the question of whether or not there has been just compensation. There is nothing in the Constitution that talks about the taking of liberty without just compensation.

There is a distinction which I believe this Court could recognize and not apply the doctrine of Parratt --the rule of Parratt and Hudson to liberty interest.

In closing, I'd like to say that as I understand the Court's pronouncements since Parratt, this Court is unanimous in its unwillingness to trivialize the Constitution by constitutionalizing common law torts.

I think more -- I think that this case doesn't trivialize the Constitution, but it really epitomizes the struggle between individual rights and the power of government. What trivializes

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the Constitution is to suggest that in a case such as this where you're dealing with a massive curtailment of liberty, to remand it back to state court and defer -- that the Constitution must defer to state court remedies -- that trivializes the Constitution in my opinion.

If there are no further questions, I'll conclude.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Powers.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

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No. 87-1965

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BY Judy Freilichek

(REPORTER)