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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 84-849

TITLE KENTUCKY, DBA BUREAU OF STATE POLICE, Petitioner V.
JAMES E. GRAHAM, ET AL.

PLACE Washington, D. C.

DATE April 16, 1985

PAGES 1 - 36

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ALDERSON REPORTING

(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KENTUCKY, DBA BUREAU OF

4 STATE POLICE,

5 Petitioners,

6 v.

7 : No. 84-849

8 JAMES E. GRAHAM, ET AL.

9 Washington, D.C.

10 Tuesday, April 16, 1985

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 1:54 o'clock p.m.

14 APPEARANCES:

15 GEORGE M. GEOGHEGAN, JR., ESQ., Assistant Attorney
16 General of Kentucky, Frankfort, Kentucky; on behalf
17 of the petitioners.

18 JACK M. LOWERY, JR., ESQ., Louisville, Kentucky; on
19 behalf of the respondents.

	C O N T E N T S	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	GEORG E M. GEGHEGAN, JR., ESQ.,	
4	on behalf of the petitioner	3
5	JACK M. LOWERY, JR., ESQ.,	
6	on behalf of the respondents	14
7	GEORGE M. GEGHEGAN, JR., ESQ.,	
8	on behalf of the petitioner - rebuttal	35
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

PROCEEDINGS

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Kentucky doing business as Bureau of State
4 Police against Graham, et al.

5 Mr. Geoghegan, I think you may proceed now
6 whenever you are ready.

7 ORAL ARGUMENT OF GEORGE M. GEOGHEGAN, JR., ESC.

ON BEHALF OF THE PETITIONER

9 MR. GEOGHEGAN: Thank you.

10 Mr. Chief Justice, and may it please the
11 Court, this case is here on Kentucky's petition for writ
12 of certiorari to the United States Court of Appeals for
13 the Sixth Circuit.

14 The State of Kentucky submits that the United
15 States Court of Appeals for the Sixth Circuit erred when
16 it affirmed the award of the attorneys' fees which was
17 rendered to the United States District Court for the
18 Western District of Kentucky.

19 After briefly summarizing the facts of this
20 case, I intend to explain to this Court precisely why
21 the court below erred in its construction of Hutto v.
22 Finney, and why in any event 42 United States Code
23 Section 1988 provided no authority for the award of
24 attorneys' fees in this particular case.

QUESTION: You may assume that we are

1 generally familiar with the facts as you have set them
2 out in your brief.

3 MR. GEOGHEGAN: Yes, Your Honor.

4 Of course, Your Honors, this particular case
5 arose as the result of a homicide which occurred in
6 Kentucky. A search ensued after the homicide. The
7 search was of the home of James E. Graham, which was the
8 father of the chief suspect in the case. A complaint
9 was filed in the United States District Court for the
10 Western District of Kentucky. That was, of course, the
11 aftermath of the search in this case.

12 In that complaint which was filed in the
13 District Court, the State of Kentucky was named as a
14 defendant, Kenneth Brandenburgh in his official capacity
15 as commissioner of the state police and individually and
16 the state and local police who were involved in the
17 search in their individual capacities only. There also
18 was an action against the cities of Hodgenville and
19 Elizabethtown and Hardin County, Kentucky.

20 The crucial point here is that the complaint
21 sought only damages for the injuries that occurred
22 during the search of the home in question. It did not
23 seek injunctive relief or declaratory relief.

24 The court below a couple of months after the
25 action was filed dismissed the State of Kentucky as a

1 party defendant citing --

2 QUESTION: You are referring to the District
3 Court?

4 MR. GEOGHEGAN: Yes, Your Honor. The District
5 Court dismissed the State of Kentucky as a party
6 defendant based upon the Eleventh Amendment and upon
7 citing *Hutto v. Finney* and in its order, which may be
8 found at Page 14A of the petition for writ of
9 certiorari, it indicates that the court felt that it was
10 improper to award attorneys' fees against the State of
11 Kentucky in this case when the relief sought on the
12 merits was retrospective in nature.

13 Now, some nine months after the court
14 dismissed Kentucky as a party defendant, they entered --
15 the remaining parties entered into settlement
16 negotiations. The case was settled. The settlement
17 provided -- and incidentally, the settlement was ordered
18 filed in camera by the District Court.

19 The settlement provided \$45,000 to the
20 plaintiffs from Kenneth Brandenburgh personally and in
21 his capacity as agent for the Kentucky State Police
22 Legal Fund, which is a voluntary association, no
23 connection with the Commonwealth of Kentucky.

24 They had previously settled with Hardin County
25 and the City of Elizabethtown for some \$15,000.

1 Now, simultaneously with the settlement in
2 this case, the District Court entered an agreed order
3 dismissing the parties in the case, and this order may
4 be found at Page 15A of the appendix, petition for writ
5 of certiorari, and the order indicated no fault was
6 found on the part of any of the parties.

7 But Paragraph 15 of this order entertained an
8 award of attorneys' fees against the State of Kentucky.
9 Now, the State of Kentucky had not had any idea that
10 there was going to be a request, or that anyone was
11 going to look to it for attorneys' fees from the date of
12 dismissal until the date of this order, which was about
13 nine months later, I believe.

14 QUESTION: In this case I guess only damages
15 were sought.

16 MR. GEOGHEGAN: Your Honor, that is correct.

17 QUESTION: Would your position be any
18 different, and could the state be liable for attorneys'
19 fees had injunctive relief been requested in the
20 original action?

21 MR. GEOGHEGAN: Your Honor, had injunctive
22 relief been requested in this action, it would seem to
23 me to be in the same type situation as *Hutto v. Finney*,
24 and in that case if prospective relief were awarded
25 against a state officer acting in his official capacity,

1 it would be permissible to award attorneys' fees
2 ancillary to that. Assuming it --

3 QUESTION: If it were awarded, if injunctive
4 relief were in fact granted.

5 MR. GEOGHEGAN: If injunctive relief were in
6 fact awarded against a state officer in his official
7 capacity.

8 Now, after the court entered this order -- I
9 think we indicated on Page 10 of our brief that we
10 didn't have notice about the request for attorneys' fees
11 until September 2nd. That is not correct.

12 We did know about it as of July the 1st, 1982,
13 because that is when the court entered the agreed order,
14 and thereafter we responded some 13 days later to a
15 motion for attorneys' fees from the plaintiffs.

16 We responded to that motion. The court then
17 on September the 2nd entered an order awarding, and he
18 did this without a hearing, the court ordered and
19 directed that attorneys' fees be awarded against the
20 State of Kentucky, but set a hearing to determine the
21 amount of the fees later on.

22 Now, at this point the State of Kentucky filed
23 two separate motions to vacate the order. One was filed
24 by Justice, or by the Attorney General of Kentucky.
25 And as a part of that motion to vacate that the Attorney

1 General filed, he attached excerpts of a report
2 conducted as the result of an extensive investigation of
3 the search incident in question.

4 And those excerpts, which can be found at
5 Pages 26A and 28A of the petition, the appendix to the
6 petition for writ of certiorari, indicated that the
7 officers at the scene of the search acted in an
8 unprofessional manner and used excessive force.

9 The court, after holding a hearing to
10 ascertain the amount of the fees, awarded costs to the
11 plaintiff in the approximate amount of \$64,000,
12 including an attorney's fee of some \$58,000.

13 The court appealed this case to the United
14 States Court of Appeals for the Sixth Circuit, and that
15 court affirmed in a concurring opinion.

16 The first point we raise before this Court
17 today is the language of 42 United States Code Section
18 1988 itself provides no authority for attorney's fees.

19 QUESTION: Before you get into your argument,
20 may I ask just one factual question --

21 MR. GEOGHEGAN: Yes, Your Honor.

22 QUESTION: -- about the order to dismiss the
23 state as a party back in November. It ends up saying
24 "This is not a final and appealable order." Does that
25 mean that the parties contemplated that something might

1 be revised with -- what -- does that have any
2 significance at all?

3 MR. GEOGHEGAN: As far as I can see, Your
4 Honor, that has no significance in the case.

5 QUESTION: Okay.

6 MR. GEOGHEGAN: Now, under the American rule,
7 a prevailing party is not ordinarily entitled to a fee,
8 the prevailing party is not, from the losing party under
9 ordinary circumstances.

10 This Court has recognized two exceptions to
11 the rule, the bad faith exception, which is not the
12 situation here; the other exception is when Congress
13 adopts the statute which does authorize the court to
14 award attorneys' fees to a prevailing party.

15 This is the situation we have in this
16 particular case. In 42 United States Code Section 1988
17 Congress provided the authority for a court to award
18 attorneys' fees to a prevailing party, a party who
19 prevails under, in this particular situation, it would
20 be under 1983.

21 Now, the question before this Court on this
22 issue is very narrow, and it is just this, whether the
23 plaintiffs in this case were the prevailing parties as
24 to the Commonwealth of Kentucky.

25 Now, we have a complaint that was filed in

1 this case. The complaint sought no injunctive or
2 declaratory relief. The agreed order entered by the
3 court indicated that no fault was found on behalf of any
4 of the parties. There is no evidence in this case which
5 would indicate that the police on that incident
6 following the homicide were following any policies of
7 the State of Kentucky or custom of the State of
8 Kentucky.

9 And in fact exactly the contrary is shown by
10 the proof in the form of the report from the Attorney
11 General. That indicates that the police were violating
12 the policies of the State of Kentucky, and perhaps most
13 importantly in this case, the District Court dismissed
14 the State of Kentucky as a party defendant by virtue of
15 the Eleventh Amendment. Kentucky --

16 QUESTION: Counsel, if this lawsuit had been
17 on the state side in the commonwealth courts, would the
18 commonwealth be a proper party defendant?

19 MR. GEOGHEGAN: Your Honor, we would contend
20 had that occurred that under 1983 Kentucky would not be
21 a proper party defendant, and secondly, there is no
22 proof to indicate that the State of Kentucky was
23 responsible for the policies that were followed by the
24 police on this particular occasion.

25 QUESTION: Of course, the second stated reason

1 doesn't go to whether it could be a defendant anyway,
2 but you would say no under 1983?

3 MR. GEOGHEGAN: Your Honor, that would be our
4 contention. You are correct. The Eleventh Amendment,
5 of course, would not apply in state court.

6 Our point is that the State of Kentucky has
7 prevailed in this case on absolutely every aspect on the
8 merits, yet the state was saddled with the attorneys'
9 fees. Now, it is our contention that although the
10 plaintiffs were in fact the prevailing parties as to the
11 remaining defendants in this case, they were not the
12 prevailing party as to the Commonwealth of Kentucky, and
13 the court erred by awarding attorneys' fees under that
14 Section 1988.

15 The plaintiffs could have obtained attorneys'
16 fees in this particular case from the remaining
17 defendants, but they bargained away those rights in
18 their settlement negotiations.

19 Now, the second issue that I would like to
20 present to the Court today is concerned with the
21 Eleventh Amendment, and it likewise is a very narrow
22 issue as well. This Court has recognized that the
23 Eleventh Amendment bars a suit in federal court against
24 a state by a citizen of the same state or other states.

25 And in this particular case the trial court

1 recognized this principle and accordingly dismissed the
2 State of Kentucky. But this Court has also recognized
3 that under the fiction in Ex Parte Young a court may
4 award prospective relief against a state officer in his
5 official capacity enjoining him from carrying out a
6 policy of the state or a state statute which runs afoul
7 of the Constitution.

8 If the court does that, is to award that kind
9 of prospective relief, this Court has then recognized in
10 Hutto v. Finney that it is permissible to award
11 attorneys' fees ancillary to that type of prospective
12 relief.

13 The reason for that is because the state is in
14 fact for all purposes -- is for all practical purposes
15 the party in the case, although not named as a party.
16 This Court has not held likewise with regard to
17 retrospective relief against a state. This Court has
18 never held that 1983 abrogates the Eleventh Amendment so
19 as to provide retrospective relief against the state.

20 The State of Kentucky would submit that that
21 would apply likewise to 1988. Essentially what we are
22 saying is that an attorney's fee has no greater status
23 than the award on the merits that it is ancillary to.
24 And in this case there was no award on the merits
25 against the State of Kentucky. It was prohibited by the

1 Eleventh Amendment.

2 The only award at all was against the
3 remaining defendants in their individual capacities.
4 Since there was no award on the merits against the State
5 of Kentucky in this case, then an attorney's fee
6 ancillary is prohibited in the case.

7 QUESTION: May I ask one more question?

8 MR. GEOGHEGAN: Yes, Your Honor.

9 QUESTION: Your brief recites that there were
10 \$64,870 some of costs, of which \$58,000 were attorneys'
11 fees. There were \$10,000 in costs that were not
12 attorneys' fees. What is your position with respect to
13 the costs not the fees?

14 MR. GEOGHEGAN: Your Honor, my position would
15 be the same as the attorneys' fees, but I am afraid that
16 we did not appeal that part of the decision.

17 QUESTION: I see. You only appealed the fee
18 part, so the other --

19 MR. GEOGHEGAN: Your Honor, that is correct.

20 QUESTION: I see.

21 MR. GEOGHEGAN: For these reasons, I submit
22 that the judgment of the United States Court of Appeals
23 for the Sixth Circuit should be reversed, and a reversal
24 according to the arguments that I have made would
25 require no modification of the existing case law of this

1 Court.

2 Thank you.

3 CHIEF JUSTICE BURGER: Mr. Lowery.

4 ORAL ARGUMENT OF JACK M. LOWERY, JR., ESQ.,

5 ON BEHALF OF THE RESPONDENTS

6 MR. LOWERY: Mr. Chief Justice, and may it
7 please the Court, I think it would be helpful at the
8 outset to briefly review the two statutes that are
9 involved in this appeal.

10 The first, of course, being 1983, simply
11 provides that every person who subjects or causes to be
12 subjected another person of a violation of his
13 constitutional rights shall be liable to that person in
14 an action in law, suit in equity, or other proper
15 proceeding --

16 QUESTION: How did the state fit into that?
17 How does the state fit into that statute?

18 MR. LOWERY: Judge, I guess the best you could
19 say was that counsel named them imprudently. Probably
20 the worst you could say is they named them ignorantly.

21 Actually, the truth falls somewhere in
22 between. We were concerned at that point in the case
23 that it might be necessary to make a record, that there
24 might be an issue, the right to name a state, that the
25 efficacy of the Eleventh Amendment could even be an

1 issue.

2 And so, to make sure that the State of
3 Kentucky received full notice, we named them as a party.
4 Now, the District Court, we take no issue at all with
5 the action of the District Court in dismissing them, but
6 we do call to the attention of the Court that --

7 QUESTION: Well, if they had never been
8 joined --

9 MR. LOWERY: If they had never been joined --

10 QUESTION: If they had never been joined,
11 could a fee be assessed against them?

12 MR. LOWERY: Yes, sir. Hutto says, and the
13 Senate reports and House reports say that a fee may be
14 assessed against the state where they are not named as a
15 party. Now, that is pure Hutto, as well Mayer against
16 Gagney. That is well settled law, as far as I know, and
17 is not disputed as far as I know.

18 So, we did name the state. We did think that
19 it might be desirable to make a record. And as it
20 turned out it was not, because the matter was settled
21 and that issue was never raised on appeal.

22 The other part of the statute that I am
23 referring to here, of course, is 1988, which simply
24 provides that anyone who vindicates constitutional
25 rights under '83 as the prevailing party shall be

1 awarded a reasonable attorney's fee as part of the
2 cost.

3 Now, as a very preliminary and basic response
4 to the argument that only injunctive relief,
5 retrospective relief will trigger the workings of 1988,
6 I simply look at the wording of 1983.

7 And had I been requested by Congress to sit
8 down and help them draft an all-inclusive provision, one
9 not restricted to retrospective relief, but one that
10 included a broad arsenal of legal remedies available to
11 those whose constitutional rights were violated, I don't
12 believe I could improve on this language.

13 I was taught that an action at law means to go
14 into court and ask for damages, and a suit in equity is
15 a suit where you undertake to get injunctive relief. We
16 think it is self-evident as far as the wording itself of
17 Section 1983 is concerned.

18 The real question, it seems to me, is what was
19 the intent of Congress in enacting 1988? Did Congress
20 intend to make it restrictive? Did they intend to make
21 it all-inclusive?

22 QUESTION: Did they intend to amend the
23 Eleventh Amendment?

24 MR. LOWERY: Well --

25 QUESTION: Well, while you are at it, why

1 don't you bring that in?

2 MR. LOWERY: All right, sir. As far as the
3 Eleventh Amendment is concerned, we are faced with
4 Edelman, the Edelman case. The Edelman case was a case
5 not brought under 1983. There was no attorney's fee
6 involved in Edelman, but it was a case in which
7 injunctive relief was approved. The Eleventh Amendment
8 didn't bar injunctive relief, but it did bar retroactive
9 damages.

10 Then comes along Fitzpatrick against Bitzner,
11 written by the same Justice, of course, but it cast in
12 my mind grave doubt on Edelman. It held just the
13 opposite. That was a different statute, of course. It
14 was a Title 7 statute, I believe, involved in
15 Fitzpatrick, but Fitzpatrick awarded attorneys' fees, it
16 awarded injunctive relief, it awarded damages.

17 Then you come along with Mayer against Gagney
18 that says if the Eleventh Amendment ever barred suits of
19 this nature, it was discharged by Congress in 1988.
20 There is a concurring opinion in Hutto that suggests
21 that that is a burning question now.

22 But in my view it is a question that does not
23 have to be reached in this case because here we are
24 dealing with attorneys' fees and attorneys' fees only,
25 which are different. Attorneys' fees are different,

1 because Hutto says, and it takes about two pages to say
2 it, attorneys' fees are not damages. That is where the
3 Attorney General confuses and conflicts his arguments.

4 QUESTION: Did I understand you to concede
5 that the state was not a proper party?

6 MR. LOWERY: On the merits. Yes, sir.

7 QUESTION: Then suppose mistakenly,
8 inadvertently, you included the State of New York as a
9 party defendant. Then the court promptly dismissed
10 them. Could you collect fees against the State of New
11 York?

12 MR. LOWERY: No, sir. I think --

13 QUESTION: What is the difference?

14 MR. LOWERY: I beg your pardon?

15 QUESTION: What is the difference between
16 Kentucky in New York in this setting and on this
17 record?

18 MR. LOWERY: In my judgment, Your Honor, our
19 naming the State of Kentucky was like suing the west
20 wind with the law being as it was then. All it required
21 was a motion to dismiss. If no motion had been made and
22 some type of default action -- in the first place, I
23 don't think a District Court could be found in this
24 country that would enter one. At least they are no
25 worse off --

1 QUESTION: I would like to see you collect
2 one.

3 MR. LOWERY: Well, that is true. At least
4 they are no worse off by being named than they would be
5 if they were not even named.

6 MR. GEOGHEGAN: But how can you say you
7 prevailed against them if you concede that you had
8 nothing against them on the merits and the claim was
9 dismissed?

10 MR. LOWERY: Because we never had any standing
11 to proceed against them. That was not a matter in
12 issue.

13 QUESTION: My question is, how can you say
14 that you -- in order to get attorneys' fees under
15 Section 98, you have to show that you as against the
16 State of Kentucky are the prevailing party.

17 MR. LOWERY: Yes, sir.

18 QUESTION: How do you show that?

19 MR. LOWERY: In the case of a state, since you
20 cannot name a party, the way you become a prevailing
21 party is to name a policymaking official and sue him in
22 his official capacity.

23 As recently as January, Branden against Holt,
24 decided by this Court, said in three recent cases, we
25 have suggested that a person becomes liable to his

1 entity if he is named in his official capacity. We now
2 make that point explicit.

3 QUESTION: Yes, but you didn't sue these
4 people in their official capacity.

5 MR. LOWERY: Oh, yes, sir. We sued
6 Commissioner Brandenburgh in his official capacity, and
7 that is not contested.

8 QUESTION: But he was not defended by the
9 State of Kentucky.

10 MR. LOWERY: No, sir, he was not. The State
11 of Kentucky took the unusual position in this case that
12 after the horse was out of the stable, and after the
13 Attorney General in an independent investigation found
14 out all these wrongdoings it cited in its brief, they
15 decided that the best way out of the case was just to
16 abandon Commissioner Brandenburgh, which is what they
17 attempted to do, we think ineffectually. We don't think
18 it is possible for a state to abandon a policymaking
19 official.

20 QUESTION: Did you allege in your complaint in
21 which you sued Brandenburgh that he was the authorized
22 agent of the State of Kentucky?

23 MR. LOWERY: Oh, yes, sir, and as a matter of
24 fact, we have cited the Kentucky Revised Statutes that
25 spell out his authority. He was the Number One ranking

1 police officer in the State of Kentucky.

2 QUESTION: Suppose the government of the state
3 goes out and raises a lynch mob and then lynches
4 somebody. Do you think you can recover some either
5 damages or fees against the state?

6 MR. LOWERY: Yes, sir, I do, by suing the
7 governor in his official capacity, he being official --

8 QUESTION: Don't you also have to prove that
9 when he performed the lynching function, the lynch mob,
10 he was acting in his official capacity, not outside his
11 official capacity?

12 MR. LOWERY: Judge, in my view this is not a
13 scope of employment type of situation. The governor is
14 official policy. Commissioner Brandenburgh is official
15 policy. That is why there is not going to be this huge
16 floodgate of litigation that has been referred to by the
17 amici.

18 QUESTION: On your theory, the governor shoot
19 somebody in a duel, then it is the act of the state,
20 too, isn't it?

21 MR. LOWERY: The state becomes liable.

22 QUESTION: In some states that is not true.

23 MR. LOWERY: I beg your pardon?

24 QUESTION: In some states you can't sue the
25 governor. I will give you the citation. Volume I of

1 the Arkansas Reports.

2 MR. LOWERY: Well, then, I don't know what
3 you --

4 QUESTION: Page 1. You can't sue them.

5 MR. LOWERY: I would take it that you could
6 under a 1983 in federal court in that state, however.

7 QUESTION: Well, that is different. You
8 didn't have 1988 then.

9 MR. LOWERY: Right, sir.

10 QUESTION: When Arkansas started.

11 MR. LOWERY: Right. I am only referring to
12 that situation.

13 QUESTION: What other route would you have
14 other than to argue that you can get attorneys' fees cut
15 of the state? Give me one reason why they were
16 included.

17 MR. LOWERY: Why they weren't what?

18 QUESTION: Why they were included other than
19 that you wanted to do just what you are doing now, argue
20 for attorneys' fees out of the state?

21 MR. LOWERY: Well, may I say this? May I cite
22 the Court, to answer that question, an opinion, I
23 believe, by Justice Powell in which he pointed out that
24 the request for attorneys' fees is a uniquely separable
25 inquiry that cannot even commence until after the merits

1 are over.

2 There is not a prevailing party until the
3 merits are over. Once the merits are over, for the
4 first time now can be addressed the question of
5 attorneys' fees.

6 QUESTION: Did he say that? Was that written
7 in the context of the case where the party plaintiff did
8 not prevail against the party against whom fees are
9 sought?

10 MR. LOWERY: Judge, I won't quote the facts
11 precisely, but I say the concept that the Commonwealth
12 of Kentucky was a prevailing party simply because they
13 were erroneously at that time and assuming the Eleventh
14 Amendment continues to be in full efficacy --

15 QUESTION: Well, how can you get attorneys'
16 fees for being "erroneous?"

17 MR. LOWERY: We get attorneys' fees, Your
18 Honor, by --

19 QUESTION: You made a -- You put them in. It
20 was a mistake. Right? Is that true?

21 MR. LOWERY: As it turned out. It might not
22 have been a mistake.

23 QUESTION: But was it?

24 MR. LOWERY: Yes, we will say it was a
25 mistake.

1 QUESTION: Can you give me any other case
2 where any lawyer officially got a fee for making a
3 mistake?

4 MR. LOWERY: Not for making a mistake. Fee
5 entitlement comes in this case by the actions of a
6 policymaking state official, the Commissioner of the
7 Kentucky State Police, and cur obtaining a settlement
8 against him.

9 QUESTION: You say that if Kentucky had never
10 been named as a party, you should, by naming the
11 official in his official capacity, you are entitled to
12 fees against the state.

13 MR. LOWERY: Yes, sir.

14 QUESTION: And you shouldn't be deprived of
15 them because you made a mistake by naming the state
16 commissioner.

17 MR. LOWERY: You say it better than I do,
18 Judge. Yes, sir. That is my point.

19 To get back to this retroactive --
20 retrospective, I am reminded of an illustration that
21 comes to my mind. Here is a commissioner of
22 corrections. He puts ten prisoners per cell. He gives
23 them 1,000 calories a day. He deprives them of medical
24 attention. Hutto all over.

25 Is it a 1983 action? Yes. Would you be

1 entitled to attorneys' fees if you prevailed? Yes.

2 Would you be entitled to retrospective relief? Yes.

3 Now, the same commissioner of corrections,
4 same penitentiary, same prisoner, even, and he overhears
5 the two guards saying, we are going down and fix that
6 guy for starting all this turmcil, and they go down and
7 they beat the guard up.

8 Retrospective relief? No. It is already over
9 with. It has already happened. It is not an ongoing
10 thing, but it is a constitutional violation. And in our
11 view Congress did not pick and choose.

12 Congress didn't say we want to grant certain
13 amendments with an award of attorneys' fees.

14 QUESTION: Do you think you could have --
15 suppose you hadn't settled. Do you think you could have
16 gotten an award for damages against the commissioner?

17 MR. LOWERY: Judge, when you are representing
18 the plaintiff you always hope that.

19 QUESTION: Yes, but I mean, would there have
20 been any legal barrier to getting a judgment against him
21 in his official capacity?

22 MR. LOWERY: No, sir. No, sir.

23 QUESTION: If you could have gotten that sort
24 of a judgment in his official capacity, could you have
25 collected it from the State of Kentucky?

1 MR. LOWERY: Yes, sir. That is exactly what
2 we are trying to do here.

3 QUESTION: Which of our cases support that
4 rather surprising view?

5 MR. LOWERY: Brandon against Holt. Hutto
6 against Finney.

7 QUESTION: Well, Hutto against Finney didn't
8 involve retrospective damages.

9 MR. LOWERY: Well, Fitzpatrick against -- what
10 is it, Fitzpatrick against --

11 QUESTION: Well, you know that 1983 did not
12 deprive the states of their sovereign immunity.

13 MR. LOWERY: Oh, yes, sir, I know that.

14 QUESTION: Well, so this is a 1983 suit, and
15 you say that just by the simple mechanism of suing an
16 official in his official capacity, you can get a
17 judgment for damages against the state?

18 MR. LOWERY: You don't do it that way.

19 QUESTION: All right, you get a judgment
20 against the official in his official capacity, and then
21 you collect it.

22 MR. LOWERY: Then you ask the District Judge
23 to have a hearing on what you are entitled to.

24 QUESTION: And you say that in that way you
25 avoid the sovereign immunity of the state.

1 MR. LOWERY: Yes, sir, because, Judge, and the
2 reason you do, the reason you do is that attorneys' fees
3 are not damages.

4 QUESTION: No, I am not -- I am talking about
5 damages now.

6 MR. LOWERY: Well, no, no, sir. The state is
7 still shielded from the award of damages.

8 QUESTION: But you still think you could get a
9 judgment against the official in his official capacity.

10 MR. LOWERY: Yes, sir.

11 QUESTION: Well, it wouldn't do you any good
12 because you couldn't collect it from the state.

13 MR. LOWERY: Sir?

14 QUESTION: You couldn't collect it from the
15 state. You would have to collect it from him or no
16 one.

17 MR. LOWERY: Well, I think you could collect
18 it from the state.

19 QUESTION: What if the legislature just
20 refused to appropriate any money? What are you going to
21 do, levy on the state capitol?

22 MR. LOWERY: No, sir, I think the District
23 Court would order the state to --

24 QUESTION: Under the legislature?

25 MR. LOWERY: No, sir. Would order in this

1 case a commissioner, the present commissioner of the
2 state police -- Hutto against Finney spells it out --
3 the agency involved. The District Court wouldn't have
4 any problem.

5 QUESTION: What you say is that the plaintiff
6 cannot name the state as a party in the 1983 action, but
7 it can name a state official in his official capacity,
8 get an award of damages against him, and then go into
9 the District Court on a kind of supplemental proceeding,
10 and the District Court will order the state to pay the
11 damages?

12 MR. LOWERY: Within its discretion. If the
13 District Court had been sitting there and supervising
14 this entire thing, thinks the claim is spurious --

15 QUESTION: Then the Eleventh Amendment really
16 is a matter of form, since there are very good ways of
17 avoiding it.

18 MR. LOWERY: No, sir, because if Your Honor
19 will refer to Hutto, Hutto takes about two pages saying
20 that 1988 does not come under the Eleventh Amendment
21 because attorneys' fees are not damages. Now, that
22 distinction has to be made.

23 QUESTION: Is there anything that you can
24 point to in Congress or any place under the sun that
25 said that the Eleventh Amendment does not apply to 1988

1 except you? Now, name anything else, anybody else.

2 MR. LOWERY: All right, sir, Hutto --

3 QUESTION: Telephone conversations.

4 MR. LOWERY: Hutto against Finney.

5 QUESTION: Said that?

6 MR. LOWERY: Yes, sir.

7 QUESTION: Certainly there is language in
8 Hutto against Finney that might lend some support
9 perhaps to your position, but it didn't involve
10 retrospective damages, did it?

11 MR. LOWERY: No, ma'am, it didn't, but
12 Fitzpatrick did.

13 QUESTION: Just --

14 MR. LOWERY: Fitzpatrick against Bitzer did.

15 QUESTION: Didn't Corey against White have
16 something to say about getting relief directly from the
17 state?

18 MR. LOWERY: I am not familiar with that case,
19 Your Honor. Yes, Judge, to answer your question, the
20 Mayer case, Mayer against Gagney, says --

21 QUESTION: You said Hutto didn't you?

22 MR. LOWERY: Both Hutto and Mayer.

23 QUESTION: Well, read me one of them now.

24 MR. LOWERY: All right, sir.

25 QUESTION: Don't paraphrase. Just read it.

1 And I want it to say that the Eleventh Amendment is not
2 precluded in 1988, end quote.

3 MR. LOWERY: If I can find it, Judge, I will
4 read it to you.

5 QUESTION: All right.

6 MR. LOWERY: All right, sir. And here I am
7 referring on Page 662. Now, this is the Lawyers'
8 Edition that I have a copy of here. I trust that won't
9 cause problems.

10 QUESTION: You are reading from what?

11 MR. LOWERY: The Lawyers' Edition, Second.

12 QUESTION: What case?

13 MR. LOWERY: Mayer against Gagney.

14 QUESTION: Oh, yes.

15 MR. LOWERY: And I am referring -- the US
16 citation is 448 US 132.

17 "Moreover, even if the Eleventh Amendment
18 would otherwise present a barrier to an award of fees
19 against the state, Congress was clearly acting within
20 its power under Section 5 of the Fourteenth Amendment in
21 removing that barrier.

22 "Under Section 5, Congress may pass any
23 legislation that is appropriate to enforce the
24 guarantees of the Fourteenth Amendment.

25 "A statute awarding attorneys' fees to a

1 person who prevails on a Fourteenth Amendment claim" --
2 pardon my breathlessness -- "falls within the category
3 of appropriate legislation."

4 QUESTION: It didn't say that the Eleventh
5 Amendment was written out of it. You have got to
6 consider the Eleventh Amendment.

7 MR. LOWERY: Oh, well, I don't dispute --

8 QUESTION: Well, that is what I asked you for,
9 where it said that you couldn't consider the Eleventh
10 Amendment.

11 MR. LOWERY: Judge, here is more language.
12 Now, this is from Hutto, quoting that case. "This Court
13 has never viewed the Eleventh Amendment as barring such
14 awards, even in suits between states and individual
15 litigants."

16 Now, that is another quotation of Hutto
17 against Finney.

18 QUESTION: That is not this case. This is
19 where you deliberately put somebody in there solely for
20 the purpose of getting counsel fees out of the state.

21 MR. LOWERY: Judge, my putting them in at that
22 stage of the proceedings --

23 QUESTION: You admitted you didn't mean to do
24 it. You made a mistake.

25 MR. LOWERY: I don't think I made a mistake.

1 I think I probably -- well, I made a mistake in the long
2 run in doing it. I knew what I was doing when I did
3 it. And I think perhaps had I to do it over, I wouldn't
4 have done it. But at that stage I --

5 QUESTION: And then we wouldn't have had all
6 of this, would we?

7 MR. LOWERY: Judge, at that point, on the
8 merits, they weren't liable for attorneys' fees. They
9 weren't liable at all for anything. They weren't liable
10 on the merits. The question of attorneys' fees only
11 came up after the merits was over.

12 QUESTION: Just to clarify it in my mind, your
13 claim for fees would be precisely the same if you had
14 never named the state as a defendant?

15 MR. LOWERY: Yes, sir. That's exactly right.
16 And I wanted to mention this Brandon against Holt case.
17 "In at least three recent cases arising under 1983, we
18 plainly implied that a judgment against a public servant
19 in his official capacity imposes liability on the entity
20 that he represents, provided, "the Court goes on, "of
21 course, the public entity received notice and an
22 opportunity to respond."

23 QUESTION: That doesn't solve your Eleventh
24 Amendment problem, because there you are talking about
25 the City of Memphis.

1 MR. LOWERY: You are talking about a city
2 here. However, the three cases that the Court relied
3 on, two of them were a city and one was a state.

4 QUESTION: The one in the state was Hutto
5 against Finney?

6 MR. LOWERY: Yes, sir.

7 QUESTION: What was the vote in Hutto against
8 Finney?

9 MR. LOWERY: I beg your pardon?

10 QUESTION: How did the Court divide in Hutto
11 against Finney?

12 MR. LOWERY: Judge, I don't recall. It was a
13 divided Court.

14 QUESTION: Mr. Lowery, can I ask one other
15 question?

16 MR. LOWERY: Yes, sir.

17 QUESTION: Because there is some confusion in
18 my mind about the difference between suing one in his
19 official capacity and one in his individual capacity.

20 MR. LOWERY: Right.

21 QUESTION: And you read the complaint clearly
22 as saying you sued them in their official capacity, but
23 may I direct your attention to the order in July of '82
24 when the individual defendants were dismissed and the
25 District Judge said that no claims for attorneys' fees

1 shall be made by any party plaintiff against any of the
2 individual party defendants or the Kentucky State Police
3 Legal Fund, a voluntary association.

4 Now, as I understand, they weren't ever even a
5 party to the lawsuit, were they?

6 MR. LOWERY: No, they were not.

7 QUESTION: But does not that paragraph suggest
8 that he thought they were being sued in their individual
9 capacity?

10 MR. LOWERY: Well, Judge --

11 QUESTION: Or do I misread it?

12 MR. LOWERY: -- I don't have the complaint in
13 front of me, but I think we probably did sue them in
14 their individual capacity. Keep in mind, Your Honor,
15 most of these defendants were not policymaking
16 officials. They were sergeants and patrolmen, and they
17 were this and that and the other. They --

18 QUESTION: Do you think the mere fact that you
19 allege an officer is a policymaking official, that is
20 sufficient to be an allegation that you are suing him in
21 his official capacity?

22 MR. LOWERY: Yes, sir. Now, you have to go
23 ahead and prove it.

24 QUESTION: Well, there wasn't much of a
25 dispute about what the responsibilities of the --

1 MR. LOWERY: No, sir, and there has been no
2 dispute in this case that he was a policymaking
3 official.

4 Any others?

5 Thank you very much.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further?

8 ORAI ARGUMENT OF GEORGE M. GEOGHEGAN, JR., ESQ.,

9 ON BEHALF OF THE PETITIONER - REBUTTAL

10 MR. GEOGHEGAN: Mr. Chief Justice, may it
11 please the Court, I will waive rebuttal, unless this
12 Court has any questions.

13 QUESTION: May I just ask, I don't know, maybe
14 this is cut cf line because of that order, but could
15 these fees have been recovered from the individual
16 defendants in their individual capacities?

17 Assume that they had gotten a judgment on the
18 merits for the amount of the settlement and then went in
19 for fees, and then the state takes a position. Now,
20 would they have been able to get the same fee award from
21 these individuals?

22 MR. GEOGHEGAN: Your Honor, our pcsition is
23 that they could get the fee awards, could have gotten
24 the fee awards from the individuals, and I think we
25 indicated earlier in the argument they had negotiated

1 away those rights.

2 QUESTION: They stipulated that away, is your
3 view, in the settlement.

4 CHIEF JUSTICE BURGER: Thank you, gentlemen.

5 The case is submitted.

6 (Whereupon, at 2:33 o'clock p.m., the case in
7 the above-entitled matter was submitted.)

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CERTIFICATION.

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-849 - KENTUCKY, DBA BUREAU OF STATE POLICE, Petitioner V.

JAMES E. GRAHAM, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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