

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 TIMOTHY BOOTH, :

4 Petitioner :

5 v. : No. 99-1964

6 :

7 C. O. CHURNER, ET AL. :

8 - - - - -x

9 Washington, D.C.

10 Tuesday, March 20, 2001

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:15 a.m.

14 APPEARANCES:

15 NANCY WINKELMAN, ESQ., Philadelphia, Pennsylvania; on
16 behalf of the Petitioner.

17 GERALD J. PAPPERT, ESQ., First Deputy Attorney General,
18 Harrisburg, Pennsylvania; on behalf of the
19 Respondents.

20 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting Respondents.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF NANCY WINKELMAN, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF GERALD J. PAPPERT, ESQ. On behalf of the Respondents	22
ORAL ARGUMENT OF IRVING L. GORNSTEIN, ESQ. On behalf of the United States, as amicus curiae, supporting Respondents	40
REBUTTAL ARGUMENT OF NANCY WINKELMAN, ESQ. On behalf of the Petitioner	43

1 P R O C E E D I N G S

2 (11:15 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 99-1964, Timothy Booth v. C.O. Churner.

5 Ms. Winkelman.

6 ORAL ARGUMENT OF NANCY WINKELMAN

7 ON BEHALF OF THE PETITIONER

8 MS. WINKELMAN: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves an excessive force action
11 brought by a State prisoner under Section 1983 that was
12 dismissed on the grounds that the prisoner had not
13 exhausted the Commonwealth of Pennsylvania's three-tiered
14 prison grievance system. The case turns on an issue of
15 statutory construction, whether when first enacting and
16 then amending Section 1997e(a), to limit the exhaustion
17 provisions to, quote, such administrative remedies as are
18 available.

19 Congress intended to require a prisoner, whose
20 remedy is one for monetary damages, to address a past-
21 completed constitutional violation to exhaust a prison
22 grievance system that cannot provide such a remedy. Of
23 course, the backdrop of this case is that there's no
24 general exhaustion requirement in Section 1983. But what
25 is key here is that when Congress first enacted the

1 Section 1997e exception in 1980 and then when it amended
2 Section 1997e in 1996, while dramatically strengthening
3 and changing the exhaustion provision in many respects, it
4 retained the key words, such administrative remedies as
5 are available.

6 QUESTION: But they also took out the words
7 about effective, did they not?

8 MS. WINKELMAN: That's correct, Your Honor.
9 Congress took out the words plain, speedy and effective in
10 1996, along with making exhaustion mandatory rather than
11 discretionary, removing the stay provision and a number of
12 other changes. The purpose of taking out plain, speedy
13 and effective, though, those words did not drive the
14 result that we're seeking here. They didn't drive the
15 inquiry of whether, in fact, the prison grievance system
16 could provide the relief. What those words -- what the
17 work that those words did in the prior statute, and this
18 is evident from looking at the present statute, which is
19 reprinted on page 5A of Respondent's brief.

20 QUESTION: In this case the statute says, no
21 action. It doesn't say particular claim for something.
22 It says no action shall be brought until such
23 administrative remedies as are available are exhausted.
24 Your client, I take it, brought an action and in that
25 action, he wanted a transfer of records, a bunch of

1 different things, as well as damages. So at least as far
2 as this case is concerned, why wasn't there for that
3 action remedies to exhaust, namely all the transfer part,
4 all the other parts?

5 MS. WINKELMAN: Your Honor, when Mr. Booth
6 brought his claim, it's true that he sought both what we
7 know as injunctive relief and money damages and in fact
8 that was the basis upon which Respondents opposed our
9 petition for writ of certiorari, that this was a mixed
10 case. But the question that we presented was a money
11 damages only case and that's the question that's before
12 --

13 QUESTION: Just looking at the statute, the
14 statute, though, and the statute refers to action and this
15 is a mixed action. And I would think there's a very
16 strong argument that whatever you think about somebody who
17 runs into court and files a claim only for money damages,
18 where a prisoner asks for both, he shouldn't be able to
19 bring his money claim in court until after he's exhausted
20 his prison remedies in respect to what there is to exhaust
21 and there's a lot.

22 MS. WINKELMAN: Actually, Your Honor, the Courts
23 of Appeals have taken a different approach. The Tenth
24 Circuit --

25 QUESTION: So that's what I want to know, what's

1 the rationale for allowing a person who has the mixed
2 claim to go to Federal court at all, if he doesn't first
3 go and exhaust what he has to exhaust?

4 MS. WINKELMAN: The Courts of Appeals haven't
5 explained their reasoning in the decisions, but one
6 possibility would be a practical one, which is if in a
7 mixed claim situation the prisoner has to go back and
8 exhaust both the injunctive and the monetary part, it's
9 likely that their monetary claim -- they would risk
10 -- face a high risk of forfeiting their money claim
11 because it would be too late to exhaust that through the
12 prison grievance system. Pennsylvania's, for example, is
13 five days. It's 15 days for bringing your initial
14 grievance. So if Mr. Booth's case had been dismissed, he
15 would have been out of time, in all likelihood by that
16 point, to pursue the money claim through the grievance
17 procedure, which is why I think the Courts of Appeals had
18 approached the issue and dealt with this problem by
19 permitting --

20 QUESTION: I don't follow that if he hadn't come
21 to court at all. If the rule is, if you want more than
22 one kind of relief, you must go to the administrator
23 within five days, whatever. So the idea is, I think what
24 Justice Breyer was suggesting, that is if you have a mixed
25 claim, this -- what you're trying to present, you said,

1 the question we presented is damages only. You want this
2 Court to treat this case as though there were never any
3 claims, anything else other than money damages and I
4 understand that that's how you would like this case to be
5 treated, but if we take this very case, I am not following
6 your argument that there would be any loss of time and a
7 time bind for the defendant if you must go swiftly to the
8 prison system and name everything.

9 MS. WINKELMAN: My argument Justice Ginsburg is
10 that when he brought his -- he brought his mixed action,
11 that is true. If he had been -- if that action had then
12 been dismissed, go back and exhaust because there are
13 injunctive claims in here that need to be exhausted, he
14 would have been, he would have been time-barred from
15 pursuing the money damages claim then in Federal court
16 because he had to bring his grievance, under
17 Pennsylvania's grievance procedure, within 15 days of the
18 incident. By the time he brings his action in Federal
19 court, the Federal court then dismisses. He's too late.

20 QUESTION: But the point is he should never have
21 come to a Federal court. On the interpretation that
22 you've got a mixed claim, don't come to Federal court,
23 exhaust.

24 MS. WINKELMAN: If our interpretation is right on the
25 money damages point, and I'd like to go there, if that's

1 right then the approach that the Tenth Circuit took in the
2 Miller case, I think, addresses the concern. The prisoner
3 brings a mixed claim. The court allows the money damages
4 aspect of the claim that the Tenth Circuit agrees does not
5 have to be exhausted to go forward, thereby avoiding this
6 problem of the prisoner perhaps losing the money damages
7 claim all together because they could never exhaust the
8 claim. It's too late.

9 QUESTION: May I ask you about that? Is it your
10 position, let's say, it was, you were seeking nothing but
11 money, that it is not required even to take the first
12 step. Here there were three steps in the grievance
13 procedure, the first was taken. There was an
14 administrative complaint filed.

15 MS. WINKELMAN: That's correct, Your Honor.

16 QUESTION: But then the prisoner said, I'm not
17 going to go on to steps two and three. But I take your
18 argument to be, if you want money, you don't even have to
19 take step one. You can go directly to court. You don't
20 have to complain within the prison system at all.

21 MS. WINKELMAN: It's not exactly if you want
22 money. It's if what you are seeking and the relief that
23 you're seeking, that the prisoner's seeking in the 1983
24 action, is not available, cannot be provided --

25 QUESTION: I'm just asking you to answer that

1 question yes or no. On your theory, am I right, is not
2 available, you don't even have to take step one?

3 MS. WINKELMAN: That's correct, Your Honor.

4 QUESTION: I don't understand how you get there
5 from the statute. I mean, you would have the statute read
6 until such administrative remedies providing the same
7 relief are exhausted and it doesn't say that. It says
8 until such administrative remedies as are available. I
9 mean, that's a very broad phrase, such administrative
10 remedies as are available. It could be all sorts of
11 remedies, damages, injunctions. On what basis do you want
12 it limited to only those remedies that provide your client
13 the same relief he wants in the 1997e action. I don't
14 understand that.

15 MS. WINKELMAN: I think the answer to that
16 question, Justice Scalia, lies in the whole purpose of
17 administrative exhaustion. What are we talking about
18 here? We're talking about, in any context, prisoner
19 context, or security context, any other context, an
20 individual going to an administrative agency when that
21 agency can provide the relief. Here there's no question
22 --

23 QUESTION: I understand that. That may well be
24 with respect to those exhaustion requirements that are
25 devised by the courts without any statutory requirement,

1 but it is entirely conceivable that an exhaustion
2 requirement would have other purposes as your opponents
3 claim here, simply making the prisoner go through a
4 lengthy procedure that may satisfy him even though the
5 relief is not the same or that may persuade him that the
6 factual basis for his claims are so insubstantial that
7 it's no use troubling the Federal courts with them. There
8 are a lot of other reasons for making him go through these
9 hoops before he is one of the, what, 45,000 prisoners a
10 year who run into Federal court right away. That seems to
11 be a perfect valid purpose and it seems to me that the way
12 the statute reads.

13 MS. WINKELMAN: Your Honor, if Congress had
14 intended to require exhaustion in every case, a blanket
15 exhaustion rule, it would have and could have written such
16 a statute, but it didn't do that in 1980 and when Congress
17 had the opportunity in 1996, and I want to go back to the
18 question about effective because I don't think I answered
19 that completely.

20 When Congress had the opportunity in 1996 to
21 create this kind of blanket exhaustion, we want all
22 prisoner problems to go through the prison grievance
23 system, it didn't do that, it retained the six words.

24 QUESTION: I don't know what possible language I
25 would use if I were writing a statute to demand precisely

1 that result, other than the language, until such
2 administrative remedies as are available are exhausted. I
3 mean, that seems to me to do precisely what you say
4 Congress hasn't done.

5 MS. WINKELMAN: Let me suggest to you what we
6 -- that the kind of the statute that we would think would
7 be this blanket exhaustion, exhaustion every case, it's a
8 good thing for prisons. The statute is at issue in
9 McNeil, the Federal Tort Claims Act, an action shall not
10 be instituted under the FTCA unless the claimant shall
11 have first presented the claim to the appropriate Federal
12 agency. So this statute could have said Congress could
13 have, rather than advertently leaving in the words, until
14 such administrative remedies as are available, Congress
15 could have written a broad exhaustion statute.

16 QUESTION: Well, I'm not sure that that would
17 work. It seems to me that the statute that the Congress
18 has here is better. There may be cases, not just as
19 Justice Scalia indicated where the claim is insubstantial,
20 there may be cases where it's very substantial. But the
21 courts are certainly helped by having a -- suppose they
22 had a hearing, the guard was disciplined, reprimanded.
23 They restored whatever disciplinary demerits or they
24 erased any disciplinary action that was taken against the
25 Petitioner. That would be very helpful to the court. Now

1 maybe they can't give damages, but that's the next stage.

2 MS. WINKELMAN: It might be --

3 QUESTION: And you're saying that it's just
4 irrelevant to the courts, that there are some disciplinary
5 mechanisms that the prisoner -- that cover this incident.
6 It's not saying that he has to apply for library
7 privileges or something. It is to cover this incident and
8 help clarify and crystallize the situation. Then he goes
9 and asks for damages.

10 MS. WINKELMAN: Justice Kennedy, it's not --
11 this isn't a general prison notification. There may be
12 benefits to having prisons know about problems in the
13 first instance. We don't dispute that. We don't dispute
14 that there are benefits to prison grievance systems, but
15 the point here and our argument is that Congress kept in
16 these words. It didn't create an FTCA type statute and
17 what's important --

18 QUESTION: The FTCA statute doesn't work because
19 you don't make a claim for damages. What the Congress is
20 saying here is there are other benefits besides simply
21 processing this claim. We want to have the entire
22 incident investigated first and you can't make that
23 parallel between the FTCA and this statute. This statute
24 served purposes that are not served by the FTCA example
25 you put out and this statute is -- it doesn't seem to me

1 that the Congress could have taken the FTCA analogy to
2 accomplish the result that it wants to accomplish here.

3 MS. WINKELMAN: If the result is that all prison
4 complaints and all prison problems are aired through the
5 prison grievance system first, then I submit that Congress
6 could have created that type of statute, but Congress
7 didn't do that.

8 QUESTION: Well, I would agree with you that
9 Congress perhaps could have been clearer about it. But I
10 want to ask you just a textual question to see whether we
11 disagree on that. I will admit that when I first looked
12 at the statute I thought remedies referred to form of
13 relief. But after reading the briefs and reading the
14 statute a few more times, I came to the conclusion that,
15 in fact, remedies was an ambiguous word. It could either
16 mean form of relief or it could mean administrative
17 process.

18 And one of the textual clues, it seems to me,
19 that's in there to indicate that Congress meant
20 administrative process was its use of the word exhaust.
21 We don't normally speak of exhausting the relief that you
22 get. I mean, like running through the money damages and
23 having a good time, that's what -- I mean, exhaustion
24 usually refers to exhausting a particular process. So
25 just at kind of step one, the textual point here seemed to

1 me probably to make a better argument or support a better
2 argument, that what Congress was talking about when it
3 used relief was administrative process rather than -- a
4 remedy rather. It was using administrative process rather
5 than particular relief awarded. Would you comment on
6 that?

7 MS. WINKELMAN: I agree that there's some
8 ambiguity in the word remedy and procedure and it's
9 something certainly that we've struggled with, with the
10 word remedy in the statute, that sometimes it can mean an
11 administrative procedure and sometimes it can mean the
12 right. Where we've come out is that in this statute it's
13 probably doing double duty in some sense, but when it --

14 QUESTION: Well, if it's doing double duty,
15 doesn't that nix your case?

16 MS. WINKELMAN: I don't think so, Your Honor,
17 because it's still an administrative remedy as are
18 available. It means both procedure and it means something
19 that can actually give you the right, the relief that you
20 seek, something that can actually redress the wrong.
21 That's the meaning of remedy.

22 QUESTION: One of the practical difficulties of
23 your interpretation is that I gather a prisoner by simply
24 saying he wants money damages in any case can avoid the
25 grievance system entirely even though money damages might

1 not be a major part of what he wants.

2 MS. WINKELMAN: Chief Justice Rehnquist, this
3 problem of bypass, I think, is a little, somewhat
4 overblown in some of the briefs. It's conjectural. In
5 fact, the empirical evidence would point to the contrary
6 that in the Circuits, in the Fifth and the Ninth Circuits,
7 that have held our way on the money damages point, there
8 hasn't been this bypass and this explosion of litigation
9 and that makes sense because if what the prisoner wants,
10 the prisoner can, in fact, get through the prison
11 grievance process, then just like the State's amicus brief
12 points out, numerous grievances are resolved in a
13 prisoner's favor. They would go there. I need a
14 different cell. I need to be housed without a smoker.
15 Why would they give up the injunctive relief that they
16 want simply to get into Federal court where they have to
17 today pay a filing fee, at least in installments, where
18 they risk losing one of their three lifelong strikes if,
19 in fact, their proceeding IFP and their case is dismissed?
20 So --

21 QUESTION: Ms. Winkelman, I wanted to get a
22 clearer handle than I now have on the nature of the claim
23 you think you have. You were candid in saying before, if
24 you have this kind of claim, you can go directly to court
25 with no administrative filing at all. Suppose the

1 administrative process does include some kind of monetary
2 relief, but it's got a cap, say a thousand dollars capped.
3 And your client's view is they beat me to a bloody pulp
4 and a thousand dollars wouldn't begin to compensate me for
5 my injury. Could such a person, in your view, go directly
6 to court because there's no available remedy? There's a
7 monetary remedy but it's capped.

8 MS. WINKELMAN: Your Honor, in that situation,
9 Justice Ginsburg, the prisoner would have to go through
10 the prison grievance system because the prison grievance
11 system, while it couldn't provide the one-to-one
12 correlation of the relief could provide the category of
13 relief and certainly our position wouldn't preclude a cap
14 such as the one that you posit your hypothetical.

15 But in that situation there is a monetary
16 damages remedy available. It may not be a perfect remedy.
17 It may not be the one-to-one fit, but the difference
18 between that case and our case, is that in our case there
19 was no monetary damages remedy available at all and that's
20 why Mr. Booth, as a matter of administrative exhaustion,
21 didn't have to go through that process.

22 Remember, when we're talking about
23 administrative exhaustion and Congress can be presumed to
24 have been legislating when it chose and then retained
25 these words, such available -- such administrative

1 remedies as are available, that there's a long-standing
2 jurisprudence in the administrative law area about the
3 futility --

4 QUESTION: I'd like to ask you now, I understand
5 the nature of the claim you're asserting. Suppose I were
6 of the view, this statute is nor crystal clear. It could
7 be read either way. It could be read to say, if there's
8 administrative process, you have to exhaust it or it could
9 be read to say, only if the kind of relief you're seeking
10 is available must you exhaust. Then when the text doesn't
11 tell me which one of those is right. Why isn't the proper
12 perspective what Congress was trying to do? One thing we
13 know Congress was trying to do, is to curtail prisoner
14 litigation. Why wouldn't it be appropriate for a court to
15 say well that's going to be how I break the tie? The text
16 could be read either way, but I know that Congress wanted
17 to curtail prisoner litigation so I'm going to read it the
18 way that will keep cases out of court.

19 MS. WINKELMAN: Certainly that was a purpose of
20 the Prison Litigation Reform Act. We acknowledge that and
21 there are numerous provisions in the PLRA that go to that
22 point, the filing fee, the three strikes provision, all
23 the enhanced mechanisms for a district court's screening
24 of prisoner complaints. And even this very statute was
25 amended in significant respects to channel far more

1 grievances and complaints through the grievance system
2 before they could come to court.

3 It's mandatory rather than discretionary.
4 There's no more stay. There's no more Federal oversight
5 of the adequacy of the State procedures, but Congress fell
6 short we believe when it retained those words against a
7 backdrop of administrative law jurisprudence about
8 futility. When it retained those words, Congress intended
9 to preserve that avenue for prisoners and, in fact, there
10 are other parts --

11 QUESTION: Ms. Winkelman, when Justice Ginsburg
12 followed up on her question, I thought she was going to
13 follow-up by asking what if the damages available in the
14 prison grievance procedure were only \$50? I presume your
15 answer would be the same since there is a damage remedy
16 available in the administrative procedure you have to
17 exhaust, which means that, you know, that what you're
18 proposing to us besides not, in my view, corresponding to
19 the text of the statute doesn't even have the virtue of
20 providing fairness it seems to me. Why should it be if I
21 can get \$50 I have to go through the prison grievance
22 procedure when I'm claiming \$10,000 of actual damages? It
23 doesn't make any sense.

24 MS. WINKELMAN: Certainly, Justice Scalia, there
25 would be some threshold at which the prison grievance

1 system's damages might be so nominal as to not be the kind
2 of relief that we're talking about. I don't know exactly
3 where that line is. But the other point in terms of
4 statutory interpretation is that, if all Congress meant to
5 do was to say that prisoners have to go through every
6 prison grievance system, then these words would be
7 superfluous. What could they mean, such administrative
8 remedies as are available? Certainly, if there's not a
9 procedure in existence, Congress wasn't trying to say a
10 prisoner has to go through that.

11 QUESTION: If you're right, Ms. Winkelman,
12 Federal judges are going to have to say, does this prison
13 system allow for damages? And maybe it won't always be
14 clear whether it does or not. And secondly, what is the
15 cutoff point in damages, which you say there must be,
16 between just allowing enough to require exhaustion and not
17 requiring it and not awarding enough. So, you're putting
18 more uncertainty into the Act it seems to me.

19 MS. WINKELMAN: I think actually, Chief Justice
20 Rehnquist, we're putting less uncertainty into the Act
21 than Respondents' reading is because, even Respondents
22 don't take the extreme position that such administrative
23 remedies as are available means any procedure in
24 existence. Even Respondents acknowledge that the
25 procedure has to be, the administrative remedy has to be

1 capable of addressing the subject matter of the prisoner's
2 complaint.

3 And with that in mind that would create more
4 work on the district courts because instead of just
5 looking at what the prisoner is seeking, what relief and
6 then is that available in the grievance system, they're
7 going to have to parse through the subject matter of the
8 complaint, parse through whether the grievance system can
9 actually address that, which I think it would create more
10 work for the district courts.

11 QUESTION: But, I mean, as is opposed to
12 applying for a library card, is there really going to be
13 much doubt about whether a prison system can address a
14 type of grievance?

15 MS. WINKELMAN: But if that's the case, Your
16 Honor, then I'd go back to the point then the words are
17 superfluous, why are they in there if there's no doubt?

18 QUESTION: What words? I don't understand. You
19 did say that before and I didn't understand what you
20 meant. What --

21 MS. WINKELMAN: If all Congress meant was, is
22 there a procedure in existence or does the procedure
23 address the subject matter, it didn't need to say such
24 administrative remedies as are available because certainly
25 it goes without saying that there would have to be a

1 grievance procedure in existence and that that procedure

2 --

3 QUESTION: Why does it have to go without --

4 MS. WINKELMAN: Because Congress couldn't have
5 been intending to write a statute that would require a
6 prisoner to exhaust if there was no procedure in existence
7 to begin with.

8 QUESTION: No, but the argument is -- as are
9 available, as we'll hear the complaint. I mean, obviously
10 they'll hear it, but I take it that they're willing to
11 hear it. He has a complaint about something, guard hit
12 me, as are exhausted. I mean, do you see the obvious
13 thing? Am I -- what's the answer to that?

14 MS. WINKELMAN: But available means --

15 QUESTION: Available means they'll hear it. Of
16 course if they won't hear, you don't have to go there.
17 Will they hear it in your case or not?

18 MS. WINKELMAN: In that case, again I think it
19 goes without saying, I think that those words then aren't
20 necessary. Certainly if the prison grievance system -- if
21 there's no grievance procedure or if it won't hear this
22 type of complaint, then nobody's suggesting that the
23 prisoner would have to go through it. Congress didn't
24 need to add those six words and retain those six words if
25 that's all it meant to do. I'd like to reserve the

1 remainder of my time for rebuttal.

2 QUESTION: Very well, Ms. Winkelman.

3 Mr. Pappert, we'll hear from you.

4 ORAL ARGUMENT OF GERALD J. PAPPERT

5 ON BEHALF OF THE RESPONDENTS

6 MR. PAPPERT: Mr. Chief Justice, and may it
7 please the Court:

8 In the PLRA, Congress changed the exhaustion
9 scheme that it had previously imposed upon prisoners
10 because it had not worked. It had not controlled the
11 explosive growth in prisoner litigation. Congress amended
12 the scheme by deleting the requirements that the
13 administrative remedies be plain, speedy or effective and
14 by withdrawing from the courts the discretion to determine
15 whether or not exhaustion is required.

16 In light of these changes, it is clear that
17 Congress wants prisoners to exhaust their prison
18 administrative processes whether or not those processes
19 can provide the prisoner the relief he or she says they
20 need.

21 QUESTION: And what does that mean? I mean,
22 that's the -- I mean, I imagine this is a case, which it
23 isn't, which is only money damages were at stake. There's
24 nothing else at stake. What does it mean to exhaust a
25 process where all you want is money and they can't give

1 you any money, what does that mean?

2 MR. PAPPERT: Your definition of available, Your
3 Honor, is ours. If the prison will in any way accept the
4 prisoner's complaint and address it.

5 QUESTION: And what does it mean? What does it
6 mean to accept it and hear it when the prisoner's only
7 asking for money? What does that mean? Can you give
8 content? I know I wanted to hear her response, but I'm
9 still puzzled by my own question.

10 MR. PAPPERT: What it means, Your Honor, is what
11 Congress wanted and that is that there is a presumption
12 that underlies, I think, the Petitioner's point and your
13 initial question, which is that, just because money's not
14 available there is nothing that this process can do for
15 the prisoner.

16 QUESTION: Well, his complaint is not money.
17 His complaint is that a guard whacked him over the head or
18 something of that sort.

19 MR. PAPPERT: Yes, Your Honor.

20 QUESTION: And the way the statute reads, it
21 says with respect to prison conditions, no action shall be
22 brought with respect to prison conditions until such
23 administrative remedies as are available are exhausted and
24 I gather the condition here is the fact that guards go
25 about whacking people over the head and the remedies for

1 that are presumably whatever remedies the prison provides
2 for when you get whacked over the head, which might
3 include money damages, but might not.

4 MR. PAPPERT: Well, remedy in this statute means
5 process, Your Honor. Congress wanted the inmates to
6 exhaust their administrative process.

7 QUESTION: Even though there's nothing at the
8 end of it? You mean it's just a process. We, you know,
9 we're not going to give you anything but we're going to
10 have a hearing and then an appeal and then a second
11 appeal. Of course, you can't get any relief. Surely it
12 doesn't mean that.

13 MR. PAPPERT: No, it doesn't. No, it doesn't,
14 Your Honor. And where I respectfully differ with your
15 question is again the presumption that it means nothing.
16 The process means nothing if there isn't money at the end
17 of the line and the reason that that is not correct is
18 that there is an indefinite and almost endless list of
19 ways that the prison could satisfy the prisoner, short of
20 money. There is always a possibility that the prison can
21 satisfy the prisoner short of giving him or her money
22 because in essence the currency equivalence isn't money.
23 Money has a value within the prisons, but the currency of
24 prisons is in-kind relief. And there are many things
25 within a prison that money can't buy and that are very

1 valuable to the prisoner.

2 QUESTION: Well, come on, this is a sort they
3 likes-to-but-what kind of an argument. What -- if indeed
4 what the prison can provide is more attractive to the
5 prisoner than money presumably you wouldn't need this
6 statute to make him go through the prison procedure. He
7 would use it.

8 MR. PAPPERT: You would still need the statute.
9 Again because Congress wanted as many of these claims
10 going through the administrative process as possible
11 because they wanted as few --

12 QUESTION: Well, that's a different argument.
13 Don't tell me that you're helping the prisoner because
14 there a lot of things that he would think even more
15 valuable than money. If he would think them even more
16 valuable than money, he'd use them. This is forcing the
17 prisoner to go through the prison procedure, which
18 presumably he doesn't want to go through.

19 MR. PAPPERT: He says he doesn't want to go
20 through it, Your Honor, but again I think we make a
21 mistake to equate what the prisoner says he wants or needs
22 when he files a grievance, with what the prisoner says he
23 wants once he files his civil rights complaint. And the
24 entire premise upon which the Petitioner's interpretation
25 is based is that there's absolutely nothing the process

1 can do for him and that's simply not true.

2 There are many things the process can do for
3 him, but Your Honor, in your hypothetical if the prisoner
4 goes through the process, if he doesn't accept any of the
5 various forms of relief that he's offered, if his
6 allegations, of course, are found to be true by the
7 prison, he can still go to court. We have no problem with
8 that. This is just a mechanism to try to weed as many of
9 the court claims out as possible.

10 QUESTION: And I assume the statute of
11 limitations on his money claim or any other claim that he
12 cannot get in the prison grievance system would not start
13 running until the exhaustion of the administrative
14 remedies?

15 MR. PAPPERT: I do not think so, Your Honor. I
16 believe the statute of limitations claim may start to run
17 earlier and if it does, that is just something that
18 Congress took into mind when it imposed no doubt a
19 dramatic difference in how they wanted prisoner litigation
20 handled. Such that, you know, as long as he goes through
21 the process, he conceivably can still file a Federal court
22 claim. The administrative process will be over with in
23 most cases before a statute of limitations on an
24 underlying claim --

25 QUESTION: But if it's not -- you're saying,

1 tough luck. You're saying Congress built a process, which
2 the prison -- if the prison wants to defeat ultimate
3 relief in court, could just string it out till the time
4 limit is up and say, well, too bad, we got you.

5 MR. PAPPERT: Your Honor, I agree with part of
6 your question and respectfully disagree with the second
7 part. There may be an instance where there is a harsh
8 result following the prison process and if the statute of
9 limitation expires it's for a number of reasons. First of
10 all being that Congress wanted to leave the setting of the
11 deadlines to the discretion of the States and the
12 departments of corrections and the local institutions.
13 So --

14 QUESTION: I could understand the deadlines for
15 within the prison process. I don't understand something
16 that says we give you -- the clock starts ticking when the
17 event occurs, when the alleged assault occurs. And even
18 if you're in the twirls of the administrative process, it
19 continues to tick and if the time is up while you're still
20 in the administrative process, too bad, you can't get to
21 court, but that's what you're telling me this statute
22 does. And I don't see the rationale to that.

23 MR. PAPPERT: Well, the rationale is, Your
24 Honor, first of all, the second part of your prior
25 question ties into my answer to this question. That was,

1 you indicated that the prison could in effect drag the
2 process out. We would not agree with that. And we would
3 say that if the administrative process is not honored by
4 the prison, the prisoner will still have a remedy. We are
5 not saying that courts do not have the discretion under
6 this statute to determine whether exhaustion has, in fact,
7 taken place.

8 QUESTION: Well, if that's so, why doesn't it
9 --

10 QUESTION: A court might well say that a remedy,
11 which took a greater length of time than the statute of
12 limitations, was not available since the idea of
13 exhaustion of remedies is to get ready to go to court.

14 MR. PAPPERT: Well, the idea of exhaustion of
15 remedies, Mr. Chief Justice, is to prevent having to go to
16 court, as Congress wanted this statute to work.

17 QUESTION: Well, at any rate a predicate to
18 going to court. It contemplates the idea that at the end
19 of the administrative road, the prisoner may still want to
20 go to court.

21 MR. PAPPERT: Yes Your Honor.

22 QUESTION: Why do you take the position -- there
23 may be a very simple answer to this, but I don't know what
24 it is. Why do you take the position that it, why you
25 assume that the statute of limitations on the damage

1 action cannot be tolled?

2 MR. PAPPERT: I wouldn't assume that, Your
3 Honor, and that was the point I was leading to.

4 QUESTION: If you don't assume that then you
5 don't have the problem that you got into with Justice
6 Ginsburg.

7 MR. PAPPERT: Right.

8 QUESTION: Could have eliminated the last couple
9 of minutes of a very difficult discussion.

10 MR. PAPPERT: I was honestly trying to get to
11 that, Your Honor, and that is, that that's my point behind
12 the fact that courts do not lose the discretion here to
13 determine whether exhaustion has taken place, which means
14 that the prisoner's put in the position that Justice
15 Ginsburg referred to and for no good reason that the
16 prison simply dragged out the process. The prisoner can
17 still --

18 QUESTION: Justice Souter was saying less than
19 that. Justice Souter was saying, and I confess I don't
20 know any other situation in which you are compelled to
21 exhaust and the statute keeps on running while you're
22 exhausting. That seems to be a very unusual situation.
23 Justice Souter was suggesting that the statute of
24 limitations is simply tolled while you're exhausting and
25 you think that is conceivable too, isn't it?

1 MR. PAPPERT: We believe that the prisoner could
2 make an equitable tolling argument at the appropriate
3 time, yes, Your Honor. But another point here though is
4 that, under the Petitioner's interpretation, we still have
5 the problem Justice Ginsburg referred to. If there's a
6 short deadline for the bringing of the claim to the
7 administrative process, whether or not there's relief at
8 the end of the line that the Petitioner wants, they still
9 may have that very situation. So the Petitioner's
10 interpretation of the statute doesn't satisfy some of the
11 problems that could come.

12 QUESTION: Well, I'm somewhat concerned about
13 your cautious answer. You said, well he could make
14 argument that there's equitable tolling. That indicates
15 to me that the State at some later time is to going take
16 the position there's no tolling and that's of great
17 concern. If that's your position, I'd like to know it.

18 MR. PAPPERT: That was in the context, Your
19 Honor, of what I thought was Justice Ginsburg's hypo of
20 the prison unreasonably dragging out the process for the
21 purposes of blowing the statute of limitations. And what
22 I was saying in response to that is, that in situations
23 like that, we would determine that exhaustion -- we would
24 feel that exhaustion has taken place if, for example, the
25 prisoner submits his claim, the prison sits on it, they do

1 not honor their deadlines under the exhaustion process.
2 Exhaustion has taken place under that and what I am saying
3 is there's no prohibition on a court recognizing that.

4 QUESTION: I am concerned about the fact that
5 there's no general tolling of the statute of limitations.
6 Suppose the State in all good faith is behind, and -- how
7 long is the statute of limitations for filing on the
8 court.

9 MR. PAPPERT: In Pennsylvania under these facts,
10 it would be two years, Your Honor.

11 QUESTION: All right. I can see a court, prison
12 system taking 18, 19 months and you say there's no
13 tolling.

14 MR. PAPPERT: Well, if the deadlines in this
15 process are honored by Pennsylvania, the process would
16 take on average probably under 90 days, Your Honor. If
17 the deadlines have not been honored and the prison has, in
18 effect, sat on the grievance, the prisoner would have a
19 remedy, yes. The Petitioner's interpretation of the
20 statute I think most importantly would reintroduce the
21 effectiveness requirement that came out in some prior
22 questions.

23 And it would also allow the prisoner to bypass
24 the process simply by manipulating the relief that he
25 requests. And there's no better example of that, I think

1 in response to a question, we heard that it's not just
2 money. Money might not be the only issue and we get to
3 the questions of the caps and that is that next time it
4 may be that the prisoner wants the prison regulations be
5 declared unconstitutional.

6 And he says that you can't declare it
7 unconstitutional, prison, so I have to go the Federal
8 courts. There will be different ways to evade the process
9 other than by saying that money is all that the prisoner
10 really wants and that is a risk here. And that, in fact,
11 happened in one of the cases cited by the Petitioner in
12 the Fifth Circuit where the prisoner filed a mixed claim,
13 as in some of the prior questions, the magistrate
14 recommended dismissal of the claim based on failure to
15 exhaust. The prisoner quickly amended his claim and made
16 it solely a money damages case and the Fifth Circuit
17 allowed that. I mean, that's a clear example of empirical
18 evidence of how a prisoner got around the exhaustion
19 requirement and that we know is contrary to what Congress
20 wanted in this statute.

21 QUESTION: May I ask you to clarify one other
22 thing? As I recall, in your brief, you said one of the
23 virtues of the administrative process is that it can
24 establish a factual record, but I think part of this,
25 isn't it part of the Pennsylvania rules that whatever's

1 developed in the grievance system cannot be used in court?

2 MR. PAPPERT: Yes, Your Honor, and that's - it
3 is. Under the Pennsylvania process it's almost as though
4 a provision tries to foster use of the grievance process
5 by putting it into the context of settlement negotiations.
6 We were not speaking in terms of a factual record as a
7 lower court would deliver to an appellate court. But what
8 we meant there was there can still be an investigation.
9 There can be the gathering and preservation of evidence by
10 the prison, all of which can narrow the claims that do
11 make it to court and that's what we meant by the value in
12 a record sense of exhausting the process.

13 QUESTION: May I just clarify one thing in my
14 own mind about your position? I understand if the
15 prisoner files a case in which he just asks for damages
16 and nothing else, it's accusing a guard of beating him up
17 on a particular occasion. You'd say he must exhaust and
18 maybe you can satisfy him by transferring the guard or
19 moving or something like that, but supposing the guard is
20 dead and there's nothing that could be done to remedy a
21 situation except money damage, do you still say he should
22 exhaust?

23 MR. PAPPERT: Yes, Your Honor. Yes, Your Honor
24 because --

25 QUESTION: And why again in that hypothetical?

1 MR. PAPPERT: In that hypo, even though there
2 could be no action taken against the guard, there could
3 still be something that the prison could give the prisoner
4 that would satisfy him. The problem with the Petitioner's
5 interpretation of the statute is, we will never know that.
6 We don't know that in this case before the claim gets to
7 Federal courts and we will not know that in all the cases
8 that are similar to this that follow because we never gave
9 the prison the chance to try.

10 QUESTION: Could you give me an example of this.
11 My hypothetical is he sues because he was assaulted by a
12 guard who since died and nothing else he wants but money.

13 MR. PAPPERT: Yes.

14 QUESTION: What could the prison give him that
15 would help him?

16 MR. PAPPERT: The types of relief that they
17 could try to satisfy him with, Your Honor, again, could be
18 one of any -- a single -- a better cell assignment, a
19 single cell, extra privileges.

20 QUESTION: Let's add to the mix and say the
21 prison transferred the prisoner immediately to another
22 prison so there's nothing at all they can do for him
23 there.

24 MR. PAPPERT: Your Honor, there are -- yes, Your
25 Honor, and I'll assume under your question that there's

1 absolutely nothing the prison can do for that prisoner.
2 Congress focused more broadly in this statute and there
3 still things that can benefit the other inmates who remain
4 at the prison and the prison itself by putting the prison
5 on notice of the problem and giving the prison the first
6 opportunity to correct it. So those are benefits that can
7 flow generally from exhaustion of the process. Even
8 though under your question, Your Honor, that particular
9 prisoner was not satisfied.

10 QUESTION: Do you consider that to be an
11 administrative remedy, even though it doesn't give any
12 benefit to the inmate at all. That's pretty tough
13 statutory construction.

14 MR. PAPPERT: Well, again, our --

15 QUESTION: Until such administrative remedies as
16 are available are exhausted, I'd be inclined to say that
17 if the prison can't give me any satisfaction that's going
18 to do me any good, there is no administrative remedy
19 available.

20 MR. PAPPERT: Well, we define remedy as process,
21 Your Honor. Remedy is not relief --

22 QUESTION: Oh, that's nice.

23 MR. PAPPERT: -- under this statute.

24 QUESTION: It doesn't say process though, it
25 says remedies.

1 MR. PAPPERT: The words are used interchangeably
2 in the statute and when we do speak of exhaustion of
3 remedies we don't, as I believe Justice Souter pointed
4 out, we don't speak of exhaustion of the money or the
5 injunctive relief, we speak of exhaustion of the process.
6 So I would respectfully differ with you there, but again
7 even in your question --

8 QUESTION: It means a process that provides
9 relief.

10 MR. PAPPERT: Yes.

11 QUESTION: Then what if your prison system,
12 describing the procedure, says the following relief can be
13 given and they give a bunch of examples, but none of them
14 include the hypothetical you've given me. You're
15 suggesting there's sort of an undefined category of relief
16 that might be granted by the warden independently, not as
17 a result of a particular proceeding as I understand it.

18 MR. PAPPERT: I'm not sure I understand what
19 you're referring to, Justice Stevens.

20 QUESTION: Well, my hypo was the dead guard.

21 MR. PAPPERT: Yeah, oh, okay.

22 QUESTION: And you say well they might give him
23 a different cell or they might give him library privileges
24 or something like that, but if none of that is prescribed
25 in the procedure, that is, you know, the prison

1 disciplinary remedy procedure, can you still say that's a
2 part of the available remedies?

3 MR. PAPPERT: Yes, Your Honor. The procedure
4 itself does not list in it what a prison can or cannot --

5 QUESTION: Supposing the procedure has a limited
6 set of remedies that it does authorize.

7 MR. PAPPERT: Okay.

8 QUESTION: And then you're still saying, but
9 that still would not be exhaustive. Is that what you're
10 saying?

11 MR. PAPPERT: We are still saying that the
12 prisoner under your question, Your Honor, would have to
13 exhaust the process because one, there still may be
14 something that can satisfy him. Two, even if there isn't,
15 there may be something that can benefit the prison and the
16 other inmates and three, that even if all the above fail,
17 the prisoner can still go to court and that's all Congress
18 really wanted.

19 QUESTION: But you're not saying that there
20 would be a satisfaction of the statute in the case in which
21 the prison literally simply provided a forum for
22 complaints and said we'll never do anything about them,
23 but if you want to get them off your chest, sure you can
24 come in and tell us. You're not claiming that that would
25 satisfy?

1 MR. PAPPERT: That would not, Your Honor, and
2 again that gets to our definition of available. If the
3 prison will accept and address the complaint, he has an
4 available remedy. Under your question, the prison --

5 QUESTION: In other words, if some remedy of
6 some sort is available, that's what you're saying.

7 MR. PAPPERT: It doesn't hinge as much on
8 remedy, Your Honor, as it does on whether the prison will
9 take the complaint and address it in any way and under
10 your question --

11 QUESTION: Okay, but if it -- when you say
12 address, I assume address with the object of providing
13 relief if there is merit in the complaint, some kind of
14 relief.

15 MR. PAPPERT: No, that would more be the
16 Petitioner's interpretation of the statute as meaning that
17 the prisoner has to get what he wants, that would not be
18 our interpretation --

19 QUESTION: No, I mean that is the prison's
20 argument, but I mean, I'm suggesting that perhaps the
21 prisoner would have a good argument here if the prison
22 said, we have a system that does not provide relief. We
23 simply have a system in which you can come up and make
24 your complaints and feel better for having talked to
25 somebody. The prisoner would say there surely, in that

1 case, we don't have to go through the -- under the statute
2 does not require us to go through --

3 MR. PAPPERT: That would not be an available
4 remedy, Your Honor.

5 QUESTION: Why not? It's a procedure. It's a
6 procedure and it's available. I thought you say remedy
7 means procedure. You can't have it both ways.

8 MR. PAPPERT: It is not, Justice Scalia, as I'm
9 interpreting the question. I'm interpreting the question
10 --

11 QUESTION: You're saying procedure leading to
12 some conceivable relief.

13 MR. PAPPERT: No, I'm just saying, will they
14 address it all? And under your question, Your Honor, the
15 prison is saying, you can bring us the complaint. We're
16 not going to do anything about it, but if it makes you
17 feel better, you can drop it on our doorstep, there is no
18 available remedy there. That is almost -- that's an
19 exclusion of the claim.

20 QUESTION: What about a chaplain in the armed
21 forces, which perhaps sometimes serves that purpose, you
22 know you go talk to the chaplain, nothing much happens.
23 Thank you, Mr. Pappert.

24 MR. PAPPERT: Thank you, Your Honor.

25 QUESTION: Mr. Gornstein.

1 ORAL ARGUMENT OF IRVING L. GORNSTEIN
2 ON BEHALF OF THE UNITED STATES
3 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS
4 MR. GORNSTEIN: Mr. Chief Justice, and may it
5 please the Court:

6 The PLRA requires an inmate to exhaust available
7 administrative remedies without regard to whether they
8 offer the relief that the inmate seeks in court. So if an
9 institution responds to legitimate complaints about
10 excessive force through such means as disciplining the
11 officer involved --

12 QUESTION: May I just, so I'll be sure I have
13 time to get your answer. What if the system doesn't
14 provide any relief at all for the particular grievances in
15 my example?

16 MR. GORNSTEIN: Then we would say that no
17 administrative remedies are available.

18 QUESTION: You would. So you would just agree
19 with the State on that point.

20 MR. GORNSTEIN: On that small point and I don't
21 think it would come up very much because almost often --
22 almost in all cases there would be something that the
23 administrative process could do about the complaint and
24 here we're talking about a complaint about excessive
25 force. So the available remedies that have to be in

1 existence is just something that addresses complaints
2 about excessive force and it could be transferring the
3 inmate to another area, it could be disciplining the
4 officer involved and directing the officer not to repeat
5 that conduct and that would show that administrative
6 remedies are available and an inmate would have to
7 exhaust, even if he only wants to seek money in court.

8 Now that conclusion follows when the textual
9 changes that Congress made in the statute. Before the Act
10 was amended, exhaustion could only be required when the
11 available administrative remedies were effective. And
12 this Court said in McCarthy against Madigan that
13 administrative remedies are not effective when the inmate
14 seeks only money and the administrative process does not
15 offer that specific form of relief.

16 QUESTION: And it was dictum there, of course.

17 MR. GORNSTEIN: Of course, it was dictum, but when
18 Congress is reviewing a statute and are attempting to
19 amend it, it's very unlikely that Congress is going to
20 make fine distinctions about whether this Court had a
21 holding or an analysis that was necessary to the holding
22 or that it was dicta. What Congress was faced with was an
23 interpretation of the term effective and the Court
24 interpreted it to mean then when administrative remedies
25 do not offer money and the inmate is seeking money, the

1 administrative available remedies are not effective and in
2 that context, Congress's elimination of the term effective
3 shows that Congress intended to require inmates to exhaust
4 available remedies in all cases, including ones like that
5 in McCarthy, in which the inmate seeks only money and the
6 available remedies do not offer money.

7 So what we have, what the statute essentially
8 says to an inmate, is if you have a complaint about prison
9 conditions and the administrative process will address it
10 in some way, you must give the administrative process a
11 chance to do it to your satisfaction and if they cannot do
12 that --

13 QUESTION: Your interpretation of the word
14 remedy is more than process then, it's some relief.

15 MR. GORNSTEIN: I think it's some relief, but
16 that's what I think is implicit in a grievance procedure.
17 I would just use the word grievance procedure. A
18 grievance procedure is something that offers some relief
19 for the kind of complaint that an inmate is complaining
20 about.

21 And the reason Congress made the particular
22 changes that it made here is it wanted to reduce the
23 enormous burden that these kinds of cases were placing on
24 Federal district courts and the change that it made
25 accomplishes that in two important ways. First of all, an

1 inmate may start out wanting nothing other than money and
2 he may end up being satisfied with something else. And
3 second of all, you have cases where the inmate receives a
4 decision on the merits and he decides after seeing that
5 decision that this is not a claim that's worth pursuing in
6 court.

7 And finally, it's important to note that very
8 few State administrative programs offer money for anything
9 other than personal property loss. So the consequence of
10 accepting the Petitioner's construction here would be that
11 an inmate would have the ability in a wide range of case
12 to avoid the exhaustion requirement simply by formulating
13 a complaint that seeks only money. If the Court has
14 nothing further --

15 QUESTION: Thank you, Mr. Gornstein. Ms.
16 Winkelman, you have three minutes remaining.

17 REBUTTAL ARGUMENT OF NANCY WINKELMAN
18 ON BEHALF OF THE PETITIONER

19 MS. WINKELMAN: And I have three points, Your
20 Honor. Number one, there's been a lot of discussion about
21 the types of remedies, disciplining the guard, apologies
22 and so forth. I would point out and emphasize that none
23 of what has been mentioned is a remedy to the prisoner for
24 the particular wrong. In this case, Mr. Booth was
25 assaulted by prison guards. The only remedy available to

1 address that wrong to him is money damages.

2 Transferring the prison guard is not going to
3 provide redress to Mr. Booth for the wrong that was
4 inflicted upon him. And as counsel for the Respondent
5 conceded, Mr. Booth has a high risk of forfeiting his
6 money damages claim under Section 1983 completely for no
7 reason. The prison grievance system cannot remedy that
8 wrong. He has everything to lose.

9 QUESTION: How is that a forfeit? How does he
10 forfeit it?

11 MS. WINKELMAN: Because if he misses one of
12 these short time frames through the prison grievance
13 system as is pointed out in McCarthy --

14 QUESTION: That's the part I don't understand.
15 Suppose it's 15 days, all right he has to file in 15 days,
16 what's the problem?

17 MS. WINKELMAN: If he -- the prison grievance
18 system has three levels. If he misses one of those time
19 frames as this Court pointed out in McCarthy, he has a
20 high risk of forfeiting his Federal claim all together
21 because when he --

22 QUESTION: That's true of any claim that he has
23 to -- I mean, that would be true of every claim --

24 MS. WINKELMAN: That's true, but in the
25 injunctive context, he has something to gain. Here he has

1 nothing to gain. The second point is, is that in terms of
2 what about couldn't it just mean that the prison grievance
3 will hear the complaint. I would return this Court to the
4 words in First Iowa of 55 years ago. When Congress
5 intends for a litigant to do something futile, it has to
6 be explicit about it. Here Congress was far than explicit
7 about it. Under our view, we think it was said the
8 opposite. At best it was ambiguous, but certainly
9 Congress didn't explicitly require a prisoner to do a
10 futile act.

11 And the final point on the deletion of the word
12 effective, I would point the Court to the prior statutory
13 scheme because the words plain, speedy and effective in
14 that scheme right on the face of the statute went only
15 towards the procedural aspects of the State grievance
16 procedure. Did it prevent against reprisals? Could it
17 deal with things quickly enough? That's what Congress
18 took out. But what Congress left in was such
19 administrative remedies as are available, which we believe
20 have force and in this situation the only remedy available
21 was to pay damages.

22 QUESTION: Thank you, Ms. Winkelman.

23 MS. WINKELMAN: Thank you.

24 CHIEF JUSTICE REHNQUIST: The case is submitted.

25 (Whereupon, at 12:11 p.m., the case in the

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above-entitled matter was submitted.)