In the

Supreme Court of the United States

RUSSELL G. OSWALD, et cetera
and the NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,

Petitioners,

v.

EUGENE RODRIGUEZ, MICHAEL KATZOFF
and JOHN KRITSKY,

Respondents.

No. 71-1369

Washington, D. C.
January 9, 1973

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Washington, D. C.

Tuesday, January 9, 1973

The above-entitled matter came on for argument at 1:50 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MRS. LILLIAN Z. COHEN, Assistant Attorney General of Counsel, the State of New York, 80 Centre Street, New York, New York 10013 for the Petitioners

HERMAN SCHWARTZ, ESQ., 77 West Eagle Street, Buffalo, New York 14212 for the Respondents

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1369.

Mrs. Cohen, you may proceed whenever you are ready.

ORAL ARGUMENT OF MRS. LILLIAN Z. COHEN,

FOR THE PETITIONERS

MRS. COHEN: Thank you. Mr. Chief Justice, and may it please the Court:

The question presented by these cases is whether state prisoners, complaining about the manner of their confinement, should be able to obtain equitable relief under the Civil Rights Act, given the applicability of the federal habeas corpus statute.

When these actions were commenced, each of the respondents was confined in a state prison. Each was in custody, pursuant to a valid state court judgment of conviction.

Each had been deprived of good conduct time credits by the Department of Corrections as a result of a disciplinary action and each immediately proceeded to the Federal District Court with a combined petition for a writ of habeas corpus and Civil Rights complaint.

In each case, the district court held a hearing and granted relief on the merits, rejecting the state's argument that the actions were in the nature of habeas corpus

applications.

Each of the Respondents was released from physical confinement as a result of the district court's decision.

Individual panels of the Second Circuit heard appeals by the state taken in all three cases. The panels which reviewed Rodriguez and Katzoff reversed the district court on the ground that the applications were in the nature of habeas corpus petitions and there had been a failure to exhaust the state court remedy.

Before Kritsky was decided, a motion to en banc Rodriguez and Katzoff was granted and Kritsky was ordered included in the en banc consideration. Counsel were directed to brief and be prepared to argue two specific questions unrelated to the merits of these cases.

The first was the applicability of the doctrine of abstention and the second was the need to exhaust the state court remedies.

After this Court's decision in Wilwording against Swenson, the circuit court reversed the panel decisions in Rodriguez and Katzoff and affirmed the district court in all three cases.

It is evident from the eight opinions that were written by the court below that until this Court decided Wilwording, the Second Circuit was evenly divided in considering this case, by a vote of six to six on the

question of whether the claims raised should first have been presented to the state courts and what is even more interesting is, aside from the diverse opinion, the division of opinion between the members of the court, is the fact that even among those who were very firm in their belief that the state should first have considered these claims, there was no agreement as to whether exhaustion of remedies was required under the habeas corpus statute or whether exhaustion of remedies should be required under the Civil Rights Act.

Judges Friendly, Mansfield and Mulligan believed that these are all habeas corpus petitions and that the exhaustion requirement of section 2254 is applicable.

Judges Lombard, Moore and Hayes believed that these might be considered as Civil Rights actions, but that in any event, despite the earlier decisions of this Court, exhaustion of state judicial remedies was in order.

After Wilwording, a majority of the court below felt that they were bound to accept the inmate's choice of remedy and based upon these earlier decisions of this court, held that exhaustion of state judicial remedies would not be required in these cases.

Petitioners seek reversal of the decision below on the ground that the choice of remedy should not lie with the inmate, as it presently does because any claim he may

raise regarding the legality of his custody is essentially in the nature of habeas corpus.

Custody is at the heart of the habeas corpus statute. Section 2241 says, "The writ of habeas corpus shall not extend to a prisoner unless he is in custody in violation of the Constitution."

Section 2254 says that, "A federal court shall not entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court conviction only on the ground that he is in custody in violation of the Constitution."

The decisions of this Court, which we cite in our brief, make it clear that custody, as it is used in the statute, refers not simply to the reason the inmate is being confined, but to all the incidents of confinement as well.

Wilwording against Swenson reaffirmed this in the context of the 8th Amendment claims that were there raised. Actually, the respondents in this case do not deny the validity of this classification so much as they fear the application of the exhaustion requirements in section 2254 and the arguments which they raise in reply to the question which the state has presented to the court and which is really not so much the invention of the state in this case as it is the concern of the circuit court which enbancked these cases, relate to the exhaustion requirements, whether or not there is

any detriment to the inmate.

The reason which they emphasize the most, and which I believe to be the least tenable, is that there will be a delay to the state prisoner in reaching a federal forum.

The reason I feel that this is the least tenable is that delay in reaching a federal court for a state prisoner or for any citizen has relevance only insofar as there is no adequate state court remedy.

Q Mrs. Cohen, is this a question that should be decided by this court just on the basis of competing policy considerations, or is it basically a statutory inquiry as to what Congress has provided?

MRS. COHEN: Well, I commenced my argument with a reading from the statute of sections that I am sure this bench is very familiar with. I think that, initially, the proper classification of these cases is determined by statute. In this case you have a habeas corpus statute. The essence of that statute is custody and it is custody in the context of a state court judgment of conviction and the sentence which follows.

Therefore, I think that the jumping-off point for any consideration of where state prisoner claims should be presented is the habeas corpus statute. Of course --

Q Even though the state prisoner isn't attacking the judgment under which he is convicted?

MRS. COHEN: Yes, I think that, based upon the decisions of this court, we have passed the point where conceptually, the habeas corpus statute -- or legally, the habeas corpus statute is devoted simply to state court judgment of conviction and sentence. I think this Court made that clear, as I said, in Wilwording against Swenson in the context of 8th Amendment claims; it did so in the context of Johnson against Avery, which raised a question about the constitutionality of a state prison regulation.

And as I say, I don't believe that Respondents really deny the appropriateness of this classification, that if you -- they don't claim that these cases are not properly habeas corpus. I suppose if you asked them which category they would prefer to be in, they would say that if they really had to choose one or the other, their choice would lie with the Civil Rights Act, but that is simply because the decisions of this Court today are that the exhaustion of state judicial remedies would not be required.

Q Also -- but also damages?

MRS. COHEN: In the beginning, I would point out, cases before this Court do not raise damage claims.

Q I understand that, but if you had the choice to make and you wanted -- you would like to retain whatever possibility there is to get damages?

MRS. COHEN: Well, the position that is taken by the state does not preclude a damage action by the inmate.

Q Under what?

MRS. COHEN: The Civil Rights Act. Habeas corpus is not a remedy for damage action and we are not arguing that. I don't --

Q Yes, but you would -- would you say that there had to be an exhaustion of state remedies first, or not? On the damage question?

MRS. COHEN: Not on the pure damage question and we did not argue that in our initial brief when we set forth the way in which we believed the damage could be handled.

Q So this is really -- so this isn't -- the state's position is this is really, in some respects, both? It is proper under both procedures?

MRS. COHEN: Yes. But in one situation, what we are saying is, that if the claims that are in the nature of equitable claims, which should be properly treated under the habeas corpus statute, because of the custody considerations and because of other policy considerations as well. The pure damage action is incumbent under the Civil Rights Act.

Q Do I misunderstand you when I understand this, that your claim is that, first of all, it is limited to cases involving prisoners in state custody?

MRS. COHEN: Yes.

Q And secondly, that when the complaint is either of the custody of itself or of the conditions of the custody and when the -- and insofar as the relief is, either release or correction of the conditions of those custodies, then habeas corpus is and must be, should be an exclusive remedy.

MRS. COHEN: That is a perfect summary of the position which we adopt and which is consistent with the decisions of this court. This court has made it clear that habeas corpus applies exactly for this kind of claim. Now --

Q And questions of damages can properly be left to an action under the Civil Rights Act.

MRS. COHEN: That they can and, not only that, but that -- damages --

Q And that they are not appropriate in habeas corpus?

MRS. COHEN: That's right.

Q Not a kind of a relief that a habeas corpus petition can give.

MRS. COHEN: That is why I believe that what we are asking the court to hold in these cases is not at all as revolutionary as counsel for Respondents would suggest.

But, also important, given the nature of prison rights litigation, is the fact that damages really play a very small part in Civil Rights litigation.

Q I see that, Mrs. Cohen. I gather -- am I right in my history? -- that the extension of habeas corpus to state prisoners came in about 1867, did it not?

MRS. COHEN: Yes.

Q And the predecessor of 1983 which was what, the old section one of the old Ku Klux Klan Act, wasn't it?

MRS. COHEN: Yes.

Q Was that about --

MRS. COHEN: That was about 1871, I think.

Q -- 1877?

MRS. COHEN: Yes.

Q Is there anything in the legislative history of either to indicate that Congress -- of course, we are dealing with two federal statutes -- that Congress meant that the prisoner should have to take one and couldn't go to the other if he preferred?

MRS. COHEN: There is absolutely nothing in the history of either statute to indicate that either statute was intended to reach these claims at all.

Q Then on what basis do you suggest that we should say to the state prisoner, "Congress said that you have to go to a federal habeas in these situations and that you can't invoke the remedy of 1983."

MRS. COHEN: I am not asking this Court to say that Congress said that the state prisoner should go to habeas

corpus statute. What I believe is that Congress did not create the situation which exists right now. There is nothing in the history to show that either of these statutes should reach these prison rights claims.

Q Well, then --

MRS. COHEN: The fact is that it is only within the last ten years that these claims are considered --

Q Then on what basis are you suggesting that we should say to the state prisoner --

MRS. COHEN: Because --

Q -- that "Congress has provided you with two remedies, but you must take the federal habeas. You may not invoke the 1983."

MRS. COHEN: To begin with, it is on the basis of decisions by this Court that both of these remedies have been held applicable to these claims, so for that reason I suggest that it lies with this Court to remedy the situation that is created. I would also point out that there is nothing in either of these statutes to preclude the consideration of challenges to conviction and sentence under the Civil Rights Act and yet I don't think anyone would suggest that seriously, nor would this court consider seriously that the Civil Rights Act was available to challenge your custody insofar as your conviction may have been unconstitutionally obtained.

Q You want to limit 1983 to damage claims?

MRS. COHEN: For prisoners.

Q Which it should be.

MRS. COHEN: For state prisoners, yes. Because I think that the state prisoner can get the kind of relief that he needs and he can get it just as efficiently, if not more efficiently, given the nature of the habeas corpus remedy by restricting it to that.

Q With state prisoners, the gravanum of whose complaint is the custody or the conditions of custody.

MRS. COHEN: Yes, and necessarily --

Q You wouldn't limit it to -- you wouldn't say, they can't bring Civil Rights suits in other contexts, just because they're prisoners?

MRS. COHEN: No, as I expressed the question initially, I am saying that in the context of claims that relate to the legality of their custody.

Q Right or the --

MRS. COHEN: Or the incidents of their custody in any custody.

Q Right.

MRS. COHEN: And as I say, you are not depriving the inmate of anything by saying that he is restricted to what is really the appropriate statute. He is -- the argument that is relied upon by Respondents, as I indicated before, is the

alleged delay in reaching forum, but, given adequate state remedies, the delay is not a source of prejudice to the inmate. In the case where you have --

Q If they are not, then he doesn't need to exhaust them.

MRS. COHEN: Not at all. Exactly. That is exactly the standard for the operation of section 2254. For example, in Wilwording against Swenson, this court held that Missouri provided no remedies to state prisoners for the presentation of this type of claim.

Presumably, since the Wilwording decision, Missouri has not created any new remedies or any remedies at all. Every state prisoner in Missouri could come directly to a federal court and present his claims by way of habeas corpus. There is not a question of any delay.

On the other hand, where you have a state like New York, which has remedies, we believe that the interests of the state and its responsibility for these cases require that the application of the section 2254 requirement apply. You have --

Q Which administrative remedies?

MRS. COHEN: I am referring to both remedies here.

Q Well, does he have to pursue, if they are alternative, does he have to pursue both?

MRS. COHEN: Well, administrative remedies would

not apply in every situation in any event. I think that if you had a situation where an inmate was challenging the constitutionality of a regulation, you would not --

Q He would go to a court.

MRS. COHEN: He would go directly to a court because it would not lie within the power of the administrator to review it, so in that context, the administrative exhaustion would not result in any delay, either.

On the other hand, if he is going to be suing the Department of Correction on the ground that a regulation was improperly applied to him, it seems to me that the claim is not ripe until the Department of Corrections has taken some action with respect to it. Now --

Q That would then involve exhaustion of the administrative process, including judicial, state judicial review, if any.

MRS. COHEN: That is right. That is right.

Q So that if he is complaining about problems in the prison, he would have to go for habeas corpus?

MRS. COHEN: Exactly. But that is -- well, that is the remedy this Court has already recognized as applicable to these cases.

Q So that if he is serving life imprisonment and he complained about the fact that they hit him over the head with a club, his relief is to be released?

MRS. COHEN: Oh, no, because the one thing that the decisions of this court have made clear in expanding the custody concept of the habeas corpus statute is that release is not the sole relief that can be granted under the habeas corpus statute.

The habeas corpus statute says the court shall deal with the situation as law and justice require and that means that he would be relieved of the illegal restraint under this remedy. He would not be released from physical confinement. It is in the statute.

Q The prison has a standard rule in all the prisons in New York that redhaired people shall not eat. Habeas corpus?

MRS. COHEN: Yes, because this is an incident of custody. In this case, what you have is a restraint that goes beyond the legal inips of a sentence that has been imposed by state court.

Q You don't think the Civil Rights Act would reach that?

MRS. COHEN: The Civil Rights Act would not reach it unless there was a basis for a tenable damage claim, in which case the inmate could come to the federal court and make damage claim.

Q The 1983 isn't limited to damages.

MRS. COHEN: No, it is not. On the other hand --

Q It is also equitable.

MRS. COHEN: On the other hand, you are dealing with a situation --

Q And you wouldn't have a right to get an injunction to say, "Follow the Constitution and stop violating it."

MRS. COHEN: The -- well, the view we take is that habeas corpus is actually a better remedy than the injunctive proceeding because, presumably, the inmate would come in and seek a preliminary injunction under the Civil Rights Act so that he would get his food but the habeas corpus statute would provide him with just as expeditious a review and it would give him a final determination, expeditiously.

Q It would provide him with food.

MRS. COHEN: Oh, yes, because --

Q As soon as he filed it?

MRS. COHEN: Excuse me?

Q As soon as he filed his habeas corpus he would get his food.

MRS. COHEN: Well, there is -- it depends whether you are talking about filing his habeas corpus. For example, in New York -- New York has an injunctive remedy. If this inmate who is not getting his food in New York went into court, under the injunctive remedy specifically applicable to constitutional claims raised by state prisoners, he would

get his injunctive relief right under that statute. It is designed to reach that kind of claim.

Q The state statute?

MRS. COHEN: Yes, and that is --

Q Which I am not -- I haven't reached that yet. Is there any action in habeas corpus that is similar to it, TRO?

MRS. COHEN? Well, my point is that there is no relief for it.

Q Is there?

MRS. COHEN: No.

Q And there is nothing like a preliminary habeas corpus, is there?

MRS. COHEN: No, there is a final habeas corpus --

Q That's all I wanted to know.

MRS. COHEN: There is a final --

Q So if you wanted some immediate relief, how can you get it in habeas corpus as swiftly as you can by temporary restraining order?

MRS. COHEN: Because when he comes into federal court on a habeas corpus petition, the statute, the habeas corpus statute, requires that that application be expeditiously decided, unlike a Civil Rights Act where there is no legal injunction in the statute that the action has to be specifically decided.

Q It is difficult for me to believe that before coming to the habeas corpus court, we must go to state court.

MRS. COHEN: But that only assumes that state remedies are inadequate and what I have been referring to now is an injunction proceeding that is available by statute, specifically for this type of thing.

Q In the state courts?

MRS. COHEN: Yes, it is, it is an --

Q It wouldn't be a habeas corpus suit there, or anything of the kind. It would be a specific, equitable action provided for by the state law.

MRS. COHEN: Provided for in state law and enacted --

Q He would have to first exhaust, I thought you told us, the state-administered remedies?

MRS. COHEN: Well, he would have to, but in that respect it wouldn't be any different than if he were a federal prisoner. A federal prisoner, before he can come into a court, any court -- well, federal court -- and seek any relief from his confinement, must pursue his administrative remedies.

Q How about a 1983 suit?

MRS. COHEN: He can't come in under 1983 because if he is suing the federal administrator if there is no

state action --

Q But let's assume it were a 1983 suit against state people? You don't have to exhaust administrative remedies?

MRS. COHEN: Yes. We are saying that if there are administrative remedies available, that the inmate who is being deprived of food -- suppose you have a situation of a very vindictive warden, as Mr. Justice Marshall suggested, who will not give food to redheads. There is nothing to prevent the correction of that by the Commissioner of the Department of Corrections upon an appropriate appeal. The case might never reach a federal court, based upon that, based upon that assumption, but in any event, the -- and as I say, if this were a federal prisoner who had the same grievance against his warden, he would have to pursue that remedy before he could come to a federal court for injunctive relief, and that is a disparity which Respondents have never answered except to say that section 1983 does not apply to the federal prisoner.

Why is it so much more onerous for a state prisoner to have to exhaust available administrative remedies which really go to the rightness of the claim? And the fact is --

Q I thought you decided that they don't have to do it in 1983?

MRS. COHEN: Well, that is what I am asking this

Court to reconsider in this case because, to the extent that 1983 has been extended to state prisoners for purposes of equitable relief, it seems to me that that is an inappropriate extension and that it should be withdrawn.

Now, the Respondents cite figures that are --

Q And your reason is?

MRS. COHEN: That habeas corpus is the appropriate statute. It deals with custody and it deals with state prisoners' custody.

Q So that a state prisoner, whatever happens to him, his sole relief in the federal courts is by habeas corpus?

MRS. COHEN: That is right, and you are not depriving him of anything. You are giving him an expeditious remedy, a remedy which I think we have demonstrated works more quickly for him in terms of getting him relief and places less of a burden on him of going forward with his action.

Q How is it quicker than a preliminary injunction?

MRS. COHEN: Well, the preliminary injunction -- one disadvantage that I see --

Q You can make preliminary injunction in three days.

MRS. COHEN: But that assumes a sophistication on the part of the inmate to seek a preliminary injunction.

Based upon my experience, if I may refer to that, I have yet to see a pro se application for a preliminary injunction. They, initially, will file a -- there may be, in cases where counsel is representing the petitioner -- but in pro se cases they will file a Civil Rights complaint. They will ask for their relief. It will be treated the way any other civil complaint is treated and --

Q Now, if you take my case, he has the finest criminal lawyer in the world.

MRS. COHEN: The disadvantage that I see is that you'd get a bifurcated decision. If you do this under the Civil Rights Act, you go in and you get a preliminary injunction under the Civil Rights Act and then you --

Q Then he starts eating.

MRS. COHEN: Yes. And then you have to get an underlying -- a final determination as to whether or not there is validity to the claim.

Q In the meantime, he is eating.

MRS. COHEN: He is eating.

Q And if he goes the other way, he won't be eating?

MRS. COHEN: No, my point is --

Q Until the habeas corpus is decided.

MRS. COHEN: There is no reason why the habeas corpus can't result in a speedier decision and, in fact, I

think it does, given the emergency situation which you imposed.

Q How much time do you have to reply to the habeas corpus petition?

MRS. COHEN: Twenty days. I will say --

Q That is 20 days and nights?

MRS. COHEN: No, that is not so, be cause --

Q Right?

MRS. COHEN: Habeas corpus is na emergency remedy. That is the concept of habeas corpus remedy.

Q Oh, I know, it takes precedence and I also know the size of the dockets in our present -- in some courts, means that you get one year instead of four.

MRS. COHEN: As a practical matter, these are Civil Rights actions and these -- ostensibly, the options before this Court now were emergency actions, too and yet, there was no decision in these cases -- in one of these cases -- for 10 months, which passed by a long shot the time in which the man involved claimed he was entitled to be released. So that it is not so clear that under the Civil Rights Act there is going to be a more expeditious remedy.

Q I would think that there was a possibility that you could get preliminary injunction sooner than you could get a final decision in any case.

MRS. COHEN: Suppose we were to take the preliminary

injunction hypothetical in the context of good time cases?

Q Well, why not take a TRO while you are at it?

MRS. COHEN: A temporary restraining order?

Q Which can be given in three seconds.

MRS. COHEN: There is nothing to preclude the operation of the habeas corpus statute in that way. There is nothing that says that a judge has to wait for a response from the state and, in fact, in upstate New York, typically, the state does not put in any opposition in these cases. They are decided right off the cuff by the judge to whom the petition is presented.

Q Well, I can't put my ticket on what happens in upstate New York or upstate Podunk. I am talking about the general difference between habeas corpus and temporary restraining orders and preliminary injunctions and I know you can get a TRO without any notice in nothing flat.

MRS. COHEN: But I --

Q But I never heard of a writ of habeas corpus being issued without giving the other side an opportunity to open its mouth.

MRS. COHEN: And based upon the experience that I have seen in my office in virtually every habeas corpus application upstate, and probably the reason we wind up with so many appeals in the Second Circuit is the fact that we never put in a response upstate. Those judges get the

petitions and they decide them without any response from the state. So there is no uniform --

Q And how soon do they decide?

MRS. COHEN: Well, the very study that was cited --

Q I mean, we are so far out of the record in this case, I don't mid going that one step further.

MRS. COHEN: I don't have specific figures except that the study that is cited by respondent indicates that in some cases, the average is four months, but that doesn't mean that it can't be sooner and it doesn't mean that it can't be later. The average in the ordinary Civil Rights action has no comparison. It is much slower.

The reason that Petitioners are urging this Court to hold that an exhaustion requirement is applicable is because it is -- it places the responsibility with the state, which is where it belongs. It is the state courts which place these people in custody. It is the state which should decide the limits and incidents of the sentences that it imposes.

The good conduct cases are a perfect example of this because, as we heard in the prior case considered by this court today, things like good time parole elegibility all enter into the sentencing process. There is a direct relationship there between sentences as imposed by state courts and how sentence is carried out. It is in that

situation that we think that the state courts have the responsibility of deciding these cases first.

Another example are cases involving the place of confinement where a man is claiming that "I should not be in a state prison. I should be in a hospital" or "I should be in a narcotics addiction control center."

Here you are talking about the very justification for sentence and you are talking about something where the responsibility lies with the state courts which imposed the sentences and, similarly, the reason -- another reason for requiring this is that the state is regulating virtually every aspect of the inmates' confinement.

Unlike any comparable situation with the ordinary citizen, you have the state -- a situation where virtually every action which is taken with respect to the inmate is state action and lends itself to litigation. If there is no exhaustion requirement, it seems to me that the federal courts are going to have to bear the burden of these cases and they are going to have to become involved in this very complex regulatory scheme.

The need to have some guidelines for considering these cases I think was expressed with great urgency by the court below and I think that they are asking this Court for guidance and we believe that the answer to their problem lies in the habeas corpus statute, not with Congress, but

with the statute which is already on the books and which is applicable and that cases challenging conditions of confinement, no less than cases challenging conviction, share a common denominator which is custody, and that they belong under the habeas corpus statute.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Cohen.

Mr. Schwartz.

ORAL ARGUMENT OF HERMAN SCHWARTZ, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I should first like, if I may, to take a minute or two to give some of the facts underlying these cases because although the only issue for this Court is the jurisdictional issue, the only issue on which cert was granted, the lower court, the Court of Appeals in its en banc decision affirmed all three cases on the merits and the merits were argued in several.

The first two cases, Kritsky and Rodriguez involved very serious disciplinary due process issues in which men were denied good time on cases which the district court and affirmed by the circuit court found were grossly deficient procedures.

Mr. Katzoff, who received relief very quickly, by the way, was punished with 60 days good time loss and 60 days

solitary confinement for writing two mildly derogatory comments, "creep" and "cigar-smoking S.O.B." in diaries which he did not circulate and in which, as the Court of Appeals and the district court found, every institution in which he had been, permitted him to keep.

Those are the merits and on each of those three cases, the circuit court affirmed on the merits after discussion and consideration of both.

Now, what the state is asking in this case is really very simple. It is asking the Court to repudiate a long line of well-established principles, most recently re-affirmed last term in two cases, in Wilwording and in the footnote in Humphrey v. Cady, footnote 18, to the effect that a state prisoner can challenge the conditions of confinement under 1983.

We are not urging this Court to reclassify every case as 1983. We do not deny that habeas corpus may be available. This Court said so last term and that is not the issue in this case.

The issue in this case is whether every habeas corpus case -- every prisoners' rights case, every 1983 case, shall be carved out of the jurisdiction of 1983 and construed not the way this Court, not the way I am told lower courts have construed them, namely as 1983 cases, but shall construe them as habeas corpus cases requiring an

exhaustion requirement and we say, as Mr. Justice Brennan pointed out, the statute was enacted in 1871. There was obviously no thought at that time, I am quite sure, to deal with prisoners' cases. They obviously were dealing with problems of friction between federal and state courts, as was pointed out in Mitchum and Foster quite clearly, and it was very clear that they gave a federal forum in what was then an almost revolutionary change in the federal jurisdiction, a federal forum for federal rights and without having to go all the way through the state system and in 1961 in Monroe and Pape and in every case since then, including three prisoner cases, Holton and Schaeffer, Wilwording and Humphrey and Cady, which raises related problems about the proper place of confinement for someone committed under the Wisconsin Sexually Deviant Act. In every one of these cases, this Court has said flatly, there is no requirement of exhaustion of either administrative or judicial remedies.

Q Mr. Schwartz?

MR. SCHWARTZ: Yes, sir.

Q Do you think a 1983 action would lie to challenge a judgment under which a man was being held, a state court judgment if the frame was unconstitutional.

MR. SCHWARTZ: No, your Honor, that's very clearly a habeas corpus issue, not because of the nature of the classification, but because of the policy involved in the

exhaustion doctrine. The policy in the exhaustion doctrine is very clear. It is to avoid friction between the judgment of a state court which it has entered or in which it is holding somebody in custody and the judgment of the federal court. That was the basis for ex parte Royal and that is what is involved and that is why several courts have said that when an attempt was made to challenge a conviction under 1983, that was really an attempt to evade and we would say we quite agree. An attempt to evade simply should not be permitted because it is an attempt to evade the exhaustion requirement.

But what we are dealing with here, and this is the essence of it, we are dealing with administrative action which occurs in a variety of settings with a variety of consequences and with a variety of remedies. The question about damages was absolutely on point in terms of what is at stake here because these are damage actions as well as equitable actions. It depends on whether the thing is monetary, but whatever benefits are sought to be gained from an exhaustion requirement would immediately be defeated by that and not because it is a question of evading it but because, according to the state's own argument, both remedies are available. Always both forms are available and every 1983 -- every challenge to conditions can obviously be a challenge for monetary damages.

The fact is that the state, in its brief, goes somewhat farther than they went in oral argument because what they said is if there is a damage claim, one has to go into the state court to get the merits decided and then into federal court to get damages.

Now, the claim that this is habeas corpus because it is custody --

Q Even if that were so, if the state court's determination were adverse to the claim, then it would be res judicata --

MR. SCHWARTZ: Yes, it would, your Honor.

Q -- in the 1983, wouldn't it?

MR. SCHWARTZ: I take it that is the clear implication. I can't see any reason why it wouldn't be, which, in effect --

Q I don't understand that that is the state's contention, that, in short, exhaustion of state remedies is necessary before a 1983 action.

MR. SCHWARTZ: Your Honor, on page 40 in their brief they say, "On the contrary, if an inmate obtains relief in the state courts by demonstrating a violation of the constitutional right --"

Q If he does.

MR. SCHWARTZ: Yes. "--there is no --"

Q That doesn't say he has to go to the state courts.

MR. SCHWARTZ: Well --

Q Quite a different point.

MR. SCHWARTZ: I'm sorry, your Honor?

Q Quite a different point.

MR. SCHWARTZ: Well, if the exhaustion philosophy that they are urging --

Q That is the whole point. They concede that there need not be exhaustion before a Civil Rights action is brought. That is the whole point of the argument.

MR. SCHWARTZ: If -- damages action -- well, if that is the case, then the entire policy of what they are urging, which is the burden on the courts, friction, all of the rest goes out the window and there is no point to it at all. After all, classifications, whether or not one is going to carve out an exception, and again I say, your Honors, that the statute gives the right to a state prisoner under 1983. They are going to carve out an exception and the exception is in order to avoid federal-state friction, in order to somehow avoid the burdens on these courts.

Q You say the statute gives the right to the prisoner under 1983. If you read 1983 literally, without regard to the habeas corpus provision, you could use it to challenge the state judgment of conviction, couldn't you?

MR. SCHWARTZ: That is quite true, your Honor and it is at that point that the fundamental policy involved in

ex parte Royal comes into the picture. Such a policy does not apply here. What we are dealing with is administrative action.

After all, in 1948, when Judge Parker tried to get the habeas corpus statute amended even more, the problem that he raised was that of a federal district judge sitting in judgment on the Supreme Court of the state. What the state is urging would produce precisely that because it would require that there be state recourse, state judicial remedies. In fact, they go farther. They make prisoners do a double job, contrary to what this Court said in Wilwording, that state prisoners are not held to a higher standard, they would make it doubly higher, first the administrative jump, which is difficult to see from their argument as to habeas corpus, and then the judicial jump and what would then happen is that a federal district court would be sitting in judgment on a state supreme court's ruling on whether or not there was a violation of the federal Constitution.

Now, that will, if anything, exascerbate the federal-state relations because that is precisely the kind of problem that some of the movements for amendment of the habeas corpus act produced.

Q You mean, the state courts would rather be by-passed completely than second-guessed? Is that

your argument?

MR. SCHWARTZ: Well, we are dealing with state administrative action here and most of the state courts have frankly said that because many of the state courts still retain the hands-off doctrine and many of the states courts still say that this is a matter for the executive and, your Honors, prisons are really not that unique. The same argument --

Q So you don't deny that these prisoners wouldn't have a remedy in the state courts, do you?

MR. SCHWARTZ: They -- it depends on the particular state. In New York they would have.

Q Well, let's talk about New York.

MR. SCHWARTZ: They would have an action for equitable relief under Section 79C, yes, of the New York Civil Rights law.

Q So there is a provision in the New York laws to resort to state courts?

MR. SCHWARTZ: Yes.

Q Do you think the New York courts would prefer to be by-passed altogether?

MR. SCHWARTZ: It is hard for me to answer what a whole group of courts would prefer to do, a whole group of individuals.

Q Well, we have a representative of the state

coming here saying that the state does not prefer to be by-passed.

MR. SCHWARTZ: I would take it, then, they would not prefer to be by-passed. I would take the Attorney General's recommendation on that. But, of course, the whole premise of the Civil Rights Act, as Cruz let out, and Monroe and Pape and in Mitchum and Foster, is that when we are dealing with federal rights, a suitor has the right to a federal forum and he has the right without exhaustion and cases are legion to that effect.

Just last year, on the administrative issue, in --

Q You still agree, don't you, that the 1983 statute must be accommodated to the federal habeas corpus statute? And when you do get into the area of challenging a judgment, at least then you say that 1983 although literally on its face reads on this situation, it nevertheless does not cover it.

MR. SCHWARTZ: That is right, your Honor.

Q And you would also say, I suppose, that if you are not challenging a judgment but you are claiming release from custody for failure to get good time or what? Would you say --

MR. SCHWARTZ: No. No, on the --

Q -- that is a 1983 case?

MR. SCHWARTZ: Yes, your Honor, because the good

time factor is purely fortuitous because to make the issue turn on whether or not good time is involved makes it turn on whether the action of the state that is challenged involves the sanction involving the release of good time. And --

Q And that, historically, the federal habeas corpus would reach something even before judgment, wouldn't it?

MR. SCHWARTZ: Yes. Initially, it was available for prejudgment.

Q Historically, it would reach something that would only before a judge and court.

MR. SCHWARTZ: That is right, but, essentially, what we are dealing with is still action by a state court. That is the problem of the friction. That is what gave rise to ex parte Royal. In fact, ex parte Royal deals with the prejudgment situation. It deals with a lawyer who was confined before the trial. But -- and insofar as we are dealing with review of state court action, and it is the state court, here the exhaustion doctrine applies. But if we are dealing with good time, a simple hypothetical will illustrate it.

Suppose the state has a rule that prohibits black and white prisoners from mingling together and two such prisoners -- two white prisoners or black prisoners do. One man is deprived of good time and the other man, we'll say,

loses a good job. And those things happen all the time.

The first man, challenging exactly the same conduct, will have to exhaust and go through the entire state system

The second man will not, if one makes a turn on good time. And if somebody else chooses to sue for damages for this kind of thing, again, the very same state interest, the very same state action, simply because there a different remedy, he will then have to go in and sue. He will then be permitted to --

Q Am I to understand now that you are arguing that habeas corpus would not be available in some of these situations?

MR. SCHWARTZ: Habeas corpus? Well, this Court has said that habeas corpus lies to challenge the conditions of confinement --

Q Are you saying there is a choice between habeas corpus and 1983 --

MR. SCHWARTZ: I am saying --

Q -- is that what you are saying?

MR. SCHWARTZ: I am saying that this Court said precisely that.

Q What is your position?

MR. SCHWARTZ: My position is that this cases raises the question of whether 1983 is available. If I had to choose, I probably would say, these are essentially

challenges to administrative action, official state action, therefore 1983 would be more appropriate. On the other --

Q What is your choice?

MR. SCHWARTZ: If I -- well, that is a choice. If you are forcing me to say that it be -- If you are asking me to say, the choice is either an exclusive 1983 or habeas corpus, then, clearly, I choose an exclusive 1983 because that is precisely what the 1871 statute was established for.

Q But you also, I gather -- don't you imply that -- a view that it may be that both remedies are available and it is up to the prisoner to choose which.

MR. SCHWARTZ: I am saying that that is what this Court has said. That is precisely what -- in the wording, part two of the Wilwording decision opens precisely with that line. Part two says, "Moreover, although cognizable and federal habeas corpus -- see Johnson and Avery -- petitioners may also be left to plead causes of action under the Civil Rights Act"and I am saying that this Court has given them that right.

This case does not raise that issue of whether he has an habeas corpus right. In this case, what --

Q Do you mean that you agree with the state here? Are you suggesting we would have to overrule Wilwording?

MR. SCHWARTZ: Absolutely.

Q Disavow at least that sentence?

MR. SCHWARTZ: Absolutely. Not only that, but you would have to move directly backwards from what you did -- what courts have done in Wilwording and in other cases. What courts have done frequently is to say that we will construe the habeas corpus as 1983.

What the state is saying is, construe 1983 as habeas corpus.

Now, there are claims that the federal courts are being overburdened and that is obviously a very appealing and important argument. If the federal court is overburdened with one kind of case, it means justice is denied to everyone. But that problem with that argument is, first of all, the 1871 statute or any statute has never been construed to allow a carve-out because of that problem.

Secondly, the whole question of burden is something that we really don't know. The statistics in the ABA brief, and as you know, the ABA filed an amicus brief in support of the Respondents position. The ABA points out that something like 3.4 percent of the civil cases are prisoner Civil Rights Act cases.

The statistics show they take up very little time.

Well, be that as it may, the fact is that these complicated questions of burdensomeness,of appropriate remedy, are appropriately for Congress. These involve studies.

They involve studies of what is a proper alternative and in some cases, as the ABA points out properly, the Congress has decided to introduce an exhaustion requirement such as -- with -- you state utilitiy regulation. In other cases, there may be many other devices to handle these problems but, certainly, as we discovered in the mid-60's in connection with habeas corpus, the burden was not what it seemed and over time, it evened out and flattened out and that would be true here as well.

The most -- in some ways, the most interesting aspect of the state's argument is the request for an exhaustion of administrative remedies. If this is habeas corpus, where does that come from?

What this Court is really asking, what the state is really asking this Court to do, is to overrule the long line of decisions in 1983 cases and the line of recent prisoner decisions in 1983 cases where the exact same issues were raised.

The exact same arguments were presented and dismissed in per curiams.

They are asking this Court to repudiate those. In Holton and Schaeffer, the Attorney General of Pennsylvania said, "Prison cases are unique and this will produce multitudinous litigation." This Court rejected that argument unanimously and per curiam.

In McNeese, the Attorney General argued that education is unique and therefore we have to have special exhaustion requirements. This Court rejected that.

Now, I think I have probably said enough to respond to most of the points that seemed to me to be worth mentioning on this. I would say only with respect to one other thing and that is this:

Our prisons today are in a mess. Nobody has made that point more clear than the Chief Justice and the President, and there are signs of change. And those signs of change, as Maurice Siegler, chairman of the Federal Parole Board, said, are in part a result of the actions of the federal courts doing what the 1871 Act said they should do and that is, to make the Constitution apply to areas where the states are not fulfulling constitutional mandate.

For this Court now to repudiate this long line of cases, to say 1983 is not available, is to say to the prisoner, not meaning that you are a second-class citizen, which all society says, anyway, but to say to him that you are second-class with respect to access to federal courts and with respect to federal rights.

And it seems to me that that would be a devastating thing to say at this time in our history when there are beginnings of signs of some improvement and prison change. I --

Q Would you say that a prisoner is a second-class

citizen with respect to access to federal courts because he has to exhaust in a habeas corpus challenge or judgment?

MR. SHCWARTZ: No, not to a judgment because who else is there who challenges judgments except prisoners of one kind or another?

Q Well, who challenges prison regulations besides prisoners?

MR. SCHWARTZ: Oh, I am talking about the whole range of federal rights and education elsewhere. As it happens, others can challenge regulations except prisoners there. I guess their families can, if they are suing for damages and there was harm to them, but, essentially, I quite agree with that insofar as by second class I mean, as opposed to other litigants seeking to affirm federal rights and I would yield the balance of my time unless the Court has questions on this issue.

Q Mr. Schwartz, could I ask you, the 1983 approach would be subject to the normal rules of res adjudicata, I take it?

MR. SCHWARTZ: Yes, your Honor, it would be. I see no reason to think that it would not be.

Q Well, assume we agree with you that a prisoner resorts to the state courts first.

MR. SCHWARTZ: Yes.

Q And then comes to the federal court with a

1983 action?

MR. SCHWARTZ: I would assume that it is res judicata, just as it is with any other litigant.

Q Even if his action in the state court is habeas corpus?

MR. SCHWARTZ: Yes, because -- well, to be perfectly honest, I would think that --

Q How did we ever get to that contrary position in part two of Wilwording?

MR. SCHWARTZ: Well, the issue in Wilwording, on that particular issue, was that there was some question as -- I'm sorry, are you talking between the state habeas and the federal?

Q Well, under your position, if you brought a state habeas corpus action first --

MR. SCHWARTZ: Yes.

Q -- and then were turned down and then you purported to bring a 1983 action in the federal courts, res judicata?

MR. SCHWARTZ: Yes, except he was dismissed there on jurisdictional grounds in the state court. Missouri said that there was no remedy that was available, always, this isn't the right remedy, and I would think res judicata would never apply in that context. Missouri, I think, in that case, did not consider the issue on the merits.

Q But if they had?

MR. SCHWARTZ: I think if they had, I think that he suffers the burden of any other litigant, which is that if he has had one day in court, he has had one day in court, assuming that it was a full and fair hearing and that there were no infirmities.

Q But if you were purporting to bring a federal habeas corpus action, you say that should be available as a matter of choice, then he must have -- if he chose the wrong remedy in the first place in the state court, he should be sent back to get the right one if it is available.

MR. SCHWARTZ: Well, that is a matter of habeas corpus lore.

Q Well, I agree with you, but isn't that right under the statute?

MR. SCHWARTZ: It's an available state -- yes, it is an available remedy, yes. Which would mean, of course, that his attempt to get his federal right would be prolonged even further --

Q Yes.

MR. SCHWARTZ: -- in a situation when he may be, as Mr. Justice Marshall says, not eating.

MRS. COHEN: I believe I have --

MR. CHIEF JUSTICE BURGER: Mrs. Cohen, you have about three minutes left.

REBUTTAL ARGUMENT OF MRS. LILLIAN Z. COHEN

ON BEHALF OF THE PETITIONER

MRS. COHEN: That's fine.

There are two points that I would like to reply to. First, contrary to what counsel has suggested, we are not asking this Court to overrule the Wilwording decision. The specific holding of Wilwording is entirely consistent with our position. The claims there were habeas corpus claims. The question was whether or not the exhaustion requirement applied and this Court held that the claims were cognizable as habeas corpus claims and, in fact, that the exhaustion requirement applied. It is the dictum in Wilwording that we are asking the Court to reconsider and, just as a point of interest, I would like to tell the Court that in Wilwording, on the remand, despite the dictum of this Court, the parties and the Court are still considering these cases as habeas corpus petitions because of the res judicata problem.

The second point I would like to reply to is the figures that were cited by counsel with regard to the numbers of cases that are being brought in the federal courts right now: The fact is that the figures cited in the American Bar Association study seemed to show a drop in the rate of increase of prisoners' Civil Rights actions and, to me, that suggests a real, substantial reply to the concern of counsel

for Respondents that these claims are not being reviewed.

Prison conditions have not changed overnight. The prison population has not decreased overnight and yet there are less of these claims coming into the federal courts in the last two years. They must be being decided someplace and it seems to me that what is happening is that, in line with the change that has been reflected in recent decisions, not only of the federal courts but also of the state courts, you are getting prison conditions corrected by state administrators and/or by state courts. And I think that that is a response to the exhaustion objection that is being raised today.

Q Well, Mrs. Cohen, do you think that the numbers of cases is ever relevant to a constitutional question?

MRS. COHEN: Not at all.

Q If there is a constitutional question.

MRS. COHEN: I -- don't believe that at any point in these cases we have argued that the numbers of cases is a legal justification for action. At most, we have suggested that, as a consequence of the approach which we suggest, there may be a reduction in the numbers of cases brought, but that is strictly fall-out. That is not a legal argument.

MR. CHIEF JUSTICE BURGER: Thank you --

Q Is this a constitutional question?

MRS. COHEN: I think very clearly it has the right -- yes, I think that the --

Q Or is it a matter of which one of these statutes is applicable, or both?

MRS. COHEN: Well, I think it has to be considered a mixed question because you are talking about constitutional rights and the right to redress of Constitution.

Q The underlying claims are constitutional claims.

MRS. COHEN: And you are talking about the right to present these claims and obtain review and I think that that that is a constitutional question.

Q Well, but if neither 1983 nor the habeas corpus statute were on the books, could these prisoners go into United States District Court and obtain the relief they sought?

MRS. COHEN: Only if they were able to meet the $10,000 jurisdictional requirement for general litigants.

Q Well, let's say there was not that statute, either.

MRS. COHEN: They wouldn't have any recourse then.

Q No, but this is a statutory problem, isn't it? It is not constitutional.

MRS. COHEN: Yes, I guess it is.

Q So do you think we should tomorrow amend 1983 to support your position?

MRS. COHEN: They could.

Q Or amend the habeas corpus act?

MRS. COHEN: I don't see that it has to amend the habeas corpus statute.

Q No, I know, but Congress could change this whole picture, couldn't it?

MRS. COHEN: Yes, but as I think I indicated earlier --

Q I don't see how it is a constitutional question.

MRS. COHEN: -- Congress has not brought us to the point that we are at. It is the decisions of this Court that have.

Q I know that.

MRS. COHEN: And I think that that is why it lies with this Court to resolve the problem and give guidance to the front line federal courts that have to handle these cases.

Q Yes, but supposedly, our past decisions have proceeded on the basis that we were even then interpreting a statute and purporting to apply the Congressional wills on our own.

MRS. COHEN: I think that that activity would require further action by the state in light of the

arguments that we have made today.

Q To take the other alternative, that we are construing two alternative statutes or you are arguing two alternative statutes.

MRS. COHEN: Yes.

Q Do the numbers of cases become relevant in how we construe the statute?

MRS. COHEN: Well, I think what they have done is emphasize the relevance of how the statute should be construed. I say that, not to avoid this question.

Q My question is, may judges take that into account?

MRS. COHEN: I don't think it is a legal justification, no. No.

MR. CHIEF JUSTICE BURGER: Thank you, Mrs. Cohen.

Thank you, Mr. Schwartz.

The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case was submitted.)