In the

Supreme Court of the United States

FRANK L. RIZZO, et al.,

Petitioners

vs.

GERALD G. GOODE, et al.

No. 74-942

Washington, D. C.
November 11, 1975

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v.	:	No. 74-942
GERALD G. GOODE ET AL	:	

Washington, D. C.

Tuesday, November 11, 1975

The above-entitled matter came on for argument at 2:28 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
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

JAMES M. PENNY, JR., ESQ., Assistant City Solicitor, 1580 Municipal Services Building, Philadelphia, Pa. 19107
For Petitioners

PETER HEARN, ESQ., 2001 The Fidelity Building, Philadelphia, Pennsylvania 19109
For Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-942, Frank Rizzo against Gerald Goode.

Mr. Penny, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES M. PENNY, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. PENNY: Mr. Chief Justice and if it please the Court:

This case is before you on writ of certiorari to the Third Circuit Court of Appeals and concerns the propriety of the entry of mandatory injunctive relief where the District Court expressly found that the Defendants had not violated Plaintiff's constitutional rights where there was no continuing course of conduct to enjoin and where there was an adequate remedy of law.

This case is before this Court in consolidated form. It originated as two separate cases filed and tried, for the most part, in 1970. They were consolidated in 1973 by the district judge for purposes of relief.

The Plaintiffs are essentially the same, individual plaintiffs suing on behalf of the class of all Philadelphia citizens and on behalf of a specifically included class of all Philadelphia's black citizens.

The Defendants also are essentially the same.

They are the mayor, the police commissioner and the managing director of Philadelphia and, in addition, a police captain.

The class Plaintiffs averred that the Defendants, these defendant city officials had engaged upon a course of conduct of the basest, lowest form of racial discrimination. The averment was that these city officials had made a conscious decision to deprive a segment of Philadelphia's society of their basic constitutional freedom.

It was averred that genocide was the goal, that now-Mayor Rizzo had actually planned and was attempting to carry out the extermination of Philadelphia's black community and the vehicle for carrying out this plan was supposedly the Philadelphia police department, whose officers, it was alleged, were ordered, directed and encouraged to trample upon the constitutional rights of Philadelphia's citizens and, in particular, Philadelphia's black citizens.

After 21 days of testimony and after 250 witnesses, or approximately 250 witnesses, the court was forced to conclude that on those allegations, Plaintiffs utterly failed to prove their case.

The court concluded that there was no policy of racial discrimination. There was no policy to violate constitutional rights. The court refused to find that any defendant violated any constitutional right of any class plaintiff or any individual plaintiff.

Additionally, aside from the claims of palpably unconstitutional conduct, Plaintiffs in the Goode case averred that the police department's internal disciplinary procedures for disciplining police officers were and, in their words, "inadequate."

They averred they had a right and a need to adequate administrative procedures internal to the police department and they demanded a remedy in the form of the adoption of their scheme for their, in their words, "adequate internal procedures."

The court heard evidence on this issue and decided that the police department's procedures were, indeed, inadequate in terms of disciplining police officers and in terms of receiving citizen complaints.

Yet, both the District Court and the Circuit Court pointed out that there was absolutely no constitutional right in the plaintiffs or in the class plaintiffs to have any improved procedures.

Essentially, the basic question is whether a citizen has a constitutional right enforceable in the federal courts for his elected officials and his elected officials' appointees to act wisely or adequately or efficiently and the court said no, they don't have that right but nevertheless the relief was entered and it was entered because the court heard evidence and made findings regarding separate,

individual, independent incidents of police misconduct. There are approximately 38 to 40 introduced at trial. The court made findings and it is not entirely clear from the court's opinion but it appears that upon approximately 25 of these incidents the court concluded that the police officers involved who were not defendants did act unconstitutionally towards these individual citizens.

The question --

QUESTION: I noticed that in Judge Fullam's opinion that in the Goode case he makes specific findings with respect to several of those incidents. This was an unconstitutional invasion of the Plaintiff's rights. But in the COPPAR case I don't find those specific findings.

MR. PENNY: In the COPPAR case there -- on two of the incidents the court made a finding. I think one, he characterized the police action as an overreaction. That was in the Locke and Perry incident where the finding was that the police officer had a bucket of water thrown on him from the third floor when he was checking out a stolen car and then the police went in and did overreact.

The other one was the Brown and Smalley incident where, I believe he used the words, "The police acted unreasonably," although he didn't use the words "unconstitutionally."

I am -- when I said approximately 25 incidents I

am just giving you the best estimate that you could, out of the whole case, find maybe 25 incidents or so where there was conduct which is arguably unconstitutional. I don't say that Judge Fullam concluded that in 25 incidents.

Judge Fullam's conclusions as to unconstitutionality, I believe, only go to the -- six of the incidents in the Goode case.

QUESTION: Mr. Penny, this Court stayed Judge Fullam's order, did it?

MR. PENNY: Yes, your Honor.

QUESTION: Has there been any extent of compliance with it despite its stay?

MR. PENNY: No, your Honor, the changes have not been implemented as far as I know. I haven't checked on it but I don't believe I would be stating the facts in all candor if I said they were. I don't think they have been.

The court found, on the basis of these individual sporadic incidents of conduct, these 25 or so incidents, that they had occurred in the past and that in the future, sporadic incidents also would occur and the question is, assuming that a remedy can be awarded in the absence of a right -- and you must remember that the district court refused to find that the Defendants -- these Defendant city officials had embarked upon any policy to violate anyone's constitutional rights, but assuming that their remedy is

proper, some remedy, the question is whether the court's prediction that these individual incidents will occur in the future on a part of persons not defendants presents an appropriate case for the entry of mandatory injunctive relief.

Now, generally, I believe that for a single act or an independent act in violation of one's constitutional rights by another one acting under color of state law, the typical remedy is damages.

However, if a Plaintiff establishes a continuing course of conduct, something that is violating his constitutional rights and immediately threatens to violate his constitutional rights in the future, then that Plaintiff is entitled to have that conduct stopped. But here we have 25 incidents involving 30 police officers strung out over a period of three years where the court found in that same period that there were 300,000 arrests.

During that period of time there were approximately 8,000 police officers and there are literally millions of police/citizen interactions which did not amount to arrest.

The Plaintiffs not only failed to establish a course of conduct to be enjoined, they failed to establish a pattern of conduct.

We have 25 incidents, each one, against -- if properly pleaded, against the appropriate defendant, may well

be eligible for damage relief. You put them together in one case, you still have 30 separate incidents without a single unifying characteristic, other than you have Philadelphia police officers who I don't think in this case are acting any differently -- and I think as the judge found, the case is typical of most urban police departments, that in the course of events, in the course of happenings, unconstitutional actions by police officers do occur.

We see this in bad arrests. We see this in violations of rights in arrests. It happens. There is nothing mysterious about it.

QUESTION: I take it you are conceding that there have been some constitutional violations here but no greater than anywhere else under the impact of police duties.

MR. PENNY: I think that it is a fair reading of Judge Fullam's opinion that there were incidents here which violated the constitutional rights of certain persons.

However, the perpetrators of that conduct were not defendants, they were individual police officers and there is no thread running through this conduct. There is nothing, there is no motivation behind it. There is nothing directing it and that is what separates this case from Allee versus Medrano, from Hague versus the C.I.O., from Lankford versus Gelston out of the Fourth Circuit which was cited by this Court in Allee, where each one of those cases

involved a policy determination by police or municipal officials that we are going to violate the constitutional rights of certain people. We are going to run the farm workers out of the Rio Grande Valley. We are going to run the C.I.O. out of Jersey City. We are going to search the homes of black citizens based on anonymous tips. We are going to do it.

And the court comes in. It sees that conduct and says, no, you are not. You stop it.

Here, there is nothing to stop. The attempt and the hope of this relief is that maybe these future unknown acts that are specific that we don't know who they are going to be perpetrated by, who the victim is, when they are going to occur, where they are going to occur, how they are going to occur or why they occur.

QUESTION: Or whether.

MR. PENNY: Or whether they are going to occur, except that the court did find that it was probable that it would occur but it is still guesswork.

QUESTION: I suppose you could even go so far as to say that with 8,000 policemen operating in a large city in the metropolitan area, that you could conceive that that 25 incidents or 30 incidents of violations would occur in the same time span.

MR. PENNY: Over the course of a three-year period?

QUESTION: Yes.

MR. PENNY: I think I could, your Honor.

QUESTION: It would be rather remarkable if it was that low.

MR. PENNY: I think that would be true also, your Honor. I think -- the Circuit Court used the term pattern. I don't believe Judge Fullam did but I think the Circuit Court used the term "pattern of police abuse was established."

But as I understand the word "pattern," it is an outgrowth of Title VII where Congress has said, you don't have to show an intentional policy to do anything to discriminate in your employment. All you have to do is show the effects of your existing policies and if the effect of those existing policies is to demonstrate a pattern of conduct statistically, then the courts will do something about it. But there is no similar provision in 1983.

There is no pattern here. There is no clear and imminent threat which should be or can be enjoined.

The question as to who, when, where, how and why are unanswered in the record and they are unanswerable and the failure -- and this remedy, as I said, only hopes to stop future unknown acts. We don't know if it will or not and the reason we don't know is because it doesn't go to any unconstitutional conduct.

Unless you are prepared to say that inadequate procedures are in themselves unconstitutional, then the remedy -- and the District Court was not prepared to say that. The Circuit Court was not prepared to say that -- then the remedy doesn't enjoin anything that is unconstitutional. It just substitutes the court's judgment on the adequacy of internal police department administrative procedures.

Now, Plaintiffs concede that it is impossible to frame injunctive relief which would stop the constitutional violations shown in this case, which would stop these future various and independent acts.

The reason is not because of anything unique to the police department. It is not unique to this case -- or to the Defendants in this case. The reason is because of a fundamental failure in the Plaintiffs' case. That is, they failed to prove the underlying policy. They failed to prove the continuing course of unconstitutional conduct.

They failed to prove the existence of something which could be enjoined. And the real impossibility of framing such injunctive relief in view of this fundamental fault in their case comes to the fore when you understand that they have attempted to present these unrelated incidents of police conduct.

For this purpose, to create an injunctive decree which will preserve for all time and for all people, every

conceivable right existing under the Constitution from violation for any police officer because there is no definition of the rights here. There is no definition of who, when, where, how and why.

I respectfully submit --

QUESTION: Mr. Penny, may I interrupt you just for a minute? You mentioned the fact, as I understood it, that over the three-year period there were 300,000 arrests and about 25 or 30 specific examples of police misconduct introduced in evidence.

Is there any evidence in this record of comparable police misconduct and to the effect that it is more likely to occur in Philadelphia than in other large cities?

MR. PENNY: No, your Honor. In fact, Judge Fullam says that it is rather typical of any urban police force at -- I believe it is on page 123 of the Appendix.

"A review of this material suggests that the problems disclosed by the record in the present case are not new and are fairly typical of the problems afflicting the police departments in major urban areas."

QUESTION: Is that on page 123a?

MR. PENNY: Yes, your Honor. I believe it is.

Yes, your Honor, about two-thirds of the way down after the succession of citations to various treatises and commission reports.

Because of the failure of the Plaintiffs to establish the existence of any conduct whatsoever on the part of the defendant city officials in this case, as I said, the court, in view of the allegations, the court was forced to make that statement, that there was no policy, mandatory injunctive relief is inappropriate.

First of all, because it is beyond the power of the court because it is just fundamental that where you fail to establish a right against the defendant you cannot have a remedy.

Secondly, it is even assuming that a remedy would be appropriate, there is nothing here to enjoin. There is no conduct. It is just guesswork.

Thank you, your Honors. I would like to reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Hearn.

ORAL ARGUMENT OF PETER HEARN, ESQ.,

ON BEHALF OF RESPONDENTS

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

At no point in their presentation today do the Petitioners address themselves to the findings which Judge Fullam did make. To the contrary, they blithely and incorrectly assert that both the District Court and the Court

of Appeals found that they had engaged in no legal wrongdoing.

However, there were a number of express findings upon which this relief was predicated. These findings --

QUESTION: That is a different statement than you -- that may be so but was there some finding that these particular defendants did wrong?

MR. HEARN: Yes, sir, there was a finding that they engaged in a policy to avoid or minimize the consequences of proven police misconduct.

QUESTION: What page is that?

MR. HEARN: That is on page 124a of the Appendix.

QUESTION: And did they find that a constitutional wrong on these defendants or what?

MR. HEARN: Mr. Justice White, the premise of both the District Court and the Court of Appeals was that the defendants tolerated, condoned or acquiesced in the misconduct of those under their supervision and control.

QUESTION: Where is that finding?

MR. HEARN: Well, the finding is that there was a policy to avoid or minimize the consequences of proven police misconduct.

QUESTION: Now, this is --

MR. HEARN: That is on page 124a.

QUESTION: This is 5.

QUESTION: At some point, would you juxtapose that with finding number 3 above and suggest what you think the relationship is? The finding that the evidence does not disclose any conscious departmental policy of racial bias or of discriminatory enforcement on racial lines.

MR. HEARN: Yes, sir, the finding three above I believe addresses itself simply to a policy of racial bias and I believe the finding to which I had just adverted, the number 5, has to deal with the failure to do anything about all forms of illegal conduct by police officers, whether it is the application of excessive force, whether the question of illegal arrest.

In other words, I think that he is saying in number three that there is no express racial motivation here but I believe to the contrary in number 5 he has expressly found that there is a policy of condoning this unaceptably high number.

QUESTION: Mr. Hearn?

MR. HEARN: Yes, sir.

QUESTION: Do you read the word police misconduct in that finding 5 that you just quoted as being the equivalent of constitutional violations or as embracing something more than that?

MR. HEARN: There was evidence beyond the scope of unconstitutional conduct. There was considerably more

evidence of unconstitutional conduct than my brother would indicate. As to what the court meant by this term I do not know but certainly our case is grounded upon specific findings of unconstitutional activity which was acquiesced in and condoned where there was a policy to minimize or avoid the consequences by those who were condeded and found to be in position of supervision and control.

QUESTION: If Judge Fullam then followed your theory of the case or in order to have his findings support your theory, you would have to read misconduct to mean constitutional violations in that finding, wouldn't you?

MR. HEARN: Well, I think that we can get some glean on what Judge Fullam intended by referring to page 130a where he concludes toward the bottom of his opinin in the next to last paragraph, "Violations of constitutional rights by police do occur in an unacceptably high number of instances," and so I would submit, Mr. Justice Rehnquist, that he is talking about unconstitutional acts as affording the underpinning, the basis for the remedy that he entered. Now --

QUESTION: The answer to Mr. Justice Rehnquist's question is yes.

MR. HEARN: Yes, sir, that is correct.

Both the District Court on page 124a and the Court of Appeals did use the word "pattern." As I have said,

it found that the number of violations was unacceptably high and with respect to whether there were two years, three years or a shorter period, in the Goode case there were six incidents over 15 months involving just two police officers.

In the COPPAR case, which was later consolidated with the case in which I was counsel originally, there were 28 incidents over a period of five months.

There was also extensive testimony that this was basically a tip-of-the-iceberg problem and that moreover there was a policy by the department to discourage the filing of complaints whereby this information would come to the attention of the senior officers so that the time period, I submit, is much greatly reduced over what was indicated to the Court earlier and that, indded, there was a greater concentration when the temporary restraining order entered by Judge Fullam was in effect.

There were some 16 incidents in the COPPAR case over a three and a half month period prior to the entry of that restraining order and there were 12 incidents during the one and a half months in which the restraining order was in effect so that the frequency was ascending that the bulk of the evidence in this case is in a much more confined period and as I have said, the period of concentration was greater when there was a court order restraining on constitutional activity.

QUESTION: Is there any reason to think that any of the concentration was due to the Black Panther convention activity in September of that year? I believe that was why the restraining order was initially entered, wasn't it?

MR. HEARN: Well, it was entered about that time. I do not believe there was any connection, factual connection, that these incidents which were proven did not grow out of that convention and by the way, I think that the reference to one sentence in the complaint of the case that was later consolidated with Goode to the reference to genocide and that the reference to the 6,000 advocates of violence and non-violence who were coming to the City of Philadelphia is no more than an attempt to discredit this case before this Court.

In fact, as we have attempted to point out, the convention itself was not involved in these incidents and, moreover, it was attended by a much smaller number, something like 500 people. It was entirely peaceful and it involved largely residents of the City of Philadelphia.

QUESTION: Mr. Hearn, before you go on, I note in the Court's opinion that it refers to some very general matters here. It recites The President's Commission on Law Enforcement at page 123a, referring to President Johnson's Commission of 1967, described the Philadelphia Highway Patrol as a "skull-cracking division" and then it gives some quotations.

Can you enlighten me on how something that happened several years before with a different police department has any relevance to this -- the findings in this case?

MR. HEARN: Well, I believe that this is a reference published by a governmental advisory commission of the highest order.

QUESTION: Assuming it is entirely correct, that the Philadelphia Highway Patrol indeed was guilty of having a skull-cracking division, what does it have to do with Philadelphia police, the police department? Are the two connected in some way or are they under the same --?

MR. HEARN: Well -- oh, yes, sir, the Philadelphia Highway Patrol is a part of the Philadelphia Police Department and one of the defendants here in both cases is Captain Murphy, who is the commander of the Highway Patrol and there was evidence of a substantial number of incidents here involving highway patrolmen and I believe that that was the basis of the reference to it by Judge Fullam.

Now --

QUESTION: Is the Highway Patrol a traffic unit, Mr. Hearn?

MR. HEARN: No, sir, definitely not. It is -- I am going mildly outside of the record but I believe it is an elite group that where there are more stringent physical requirements. I believe it is considered to be a more mobile,

a more forward, aggressive entity as a part of the department. It is not related to the control of traffic at all. I mean, it does have the right to arrest for speeding and the like, but --

QUESTION: I suppose the procedures of that inquiry were not adversary in any sense, were they?

MR. HEARN: Before the Commission, Mr. Chief Justice?

QUESTION: Before the Commission.

MR. HEARN: Not to my knowledge. I am not entirely certain how the record and the findings of the Commission were developed, however.

QUESTION: Well, one of the members of this Court was on the Commission, Counsel; Justice Powell, I think.

MR. HEARN: But I think that the essential point that the Petitioners fail to understand here is that we are not talking about a right to the procedure which is set forth in Judge Fullam's decree.

That is the remedy. The right that was violated was the acts of those who were under the supervision and control of the Defendants.

The remedy is what Judge Fullam concluded on the basis of his findings of fact and his consideration of the entire record was the most appropriate but mild remedy.

As to what this decree does, I think it is

particularly important to point out that it is procedural only. This decree has nothing to do with what the substantive standards are that are applied to police activities.

It has nothing to do with who decides. This is police judging police.

All that this decree does is to specify that there will be complaint forms of a certain kind available, that they will be distributed at certain locations, that the investigation will not involve what the facts disclosed were the inhibiting element of the chain of command, that there would be a six-month statute of limitations, so to speak,relative to the submission of these complaints, that there will be minimal investigational steps and minimal time periods, that anonymous complaints will be handled and that frivolous complaints will be screen out.

There is a procedure for eliminating frivolous complaints.

The hearing that is involved only if there is a dispute on the facts as to a non-frivolous complaint and, finally, there is a provision that records will be kept for a period of two years.

QUESTION: How about the decision maker?

MR. HEARN: The decision maker is no different. The decision maker is the Commissioner of Police or his deputy in certain cases, but there is --

QUESTION: Is this the provision on 129a in the Appendix in the opinion?

MR. HEARN: No, this is Judge Fullam's directive to the police department. He said that they were to offer a program which would be addressed to the general problem and then on 129a he is discussing some of the points that he believes --

QUESTION: He says, "Adjudication of non-frivolous complaints by an impartial individual or body, insulated so far as is practicable from chain of command pressures."

Now, is that -- the police would have to conform with that directive if the injunction were not stayed.

MR. HEARN: That is correct, but --

QUESTION: But what did he mean by that? Do you know?

MR. HEARN: Well, he meant that the evidence showed, Mr. Justice White, that district commanders -- that would be somebody running a police station or precinct -- tended to inhibit the flow of the complaint if it were made in that district, that it was in their interest to not report complaints about what --

QUESTION: Well, I just wonder, who is supposed to make the decision now? Do you know what he meant by an impartial individual or body to make decisions?

MR. HEARN: Well --

QUESTION: Did he mean non-police?

MR. HEARN: No, he did not.

QUESTION: How do you know he didn't?

MR. HEARN: Well, because the decree makes it clear that it is police, that it is the police commissioner.

QUESTION: Oh, the cpolice commissioner.

MR. HEARN: Yes, sir.

QUESTION: Well --

MR. HEARN: Perhaps I could illuminate, Mr. Justice White. This was a general directive by Judge Fullam but I submit that it has to be considered along with the decree that was actually entered and the decree makes it clear beyond any doubt that there is no change whatsoever in the designation of the people who pass judgment on this conduct so that it is --

QUESTION: Mr. Hearn --

MR. HEARN: Yes, sir.

QUESTION: -- what about the procedures that are at 133a to about 145 in the letter to Judge Fullam by Mr. McNally? Are those -- were they acceptable or accepted or what?

These are the procedures, as I read this letter, intended to comply with the decree of March 14th.

MR. HEARN: That is correct.

QUESTION: And have they been made effective?

MR. HEARN: Following --

QUESTION: They are in the petition for writ of certiorari, are they not?

MR. HEARN: The final decree is, Mr. Justice Blackmun. As modified, Mr. Justice Brennan.

In other words, Judge Fullam directed that a program be submitted by the Defendant and this is premised upon the good faith of the defendants in which we fully concur that with mild pressure from the Court that they would, in effect, put their house in order.

QUESTION: Mr. Hearn, let me back up a little bit to the last paragraph of Judge Fullam's opinion. You attached your case here on constitutional grounds, did you not?

MR. HEARN: Yes, sir.

QUESTION: Now, Judge Fullam, after 67 pages of writing, a very comprehensive opinion, says, "In conclusion, it should be emphasized that this Court has not decided that the Plaintiffs and the class they represent have a constitutional right to improved departmental procedures for handling civilian complaints against police," and yet that is precisely the relief that he ordered, is it not?

MR. HEARN: It is, Mr. Chief Justice Burger, the remedy that he ordered but this case was not tried nor was it the Plaintiffs' contention at any time that we had a

right to that.

The right that we are claiming is not to have violations on the street by those under the supervision and control of the Defendants in an unacceptably high number.

QUESTION: At this stage, on review, we are not concerned especially or particularly with what you asked but what the court decided.

You cast it on constitutional grounds. The court granted some relief while at the same time conceding that there was no constitutional right to the relief.

Now, that leaves only -- as least, I suggest to you, isn't his fall-back position that this must be under some supervisory jurisdiction if it isn't constitutional?

And he is exercising a supervisory jurisdiction over a state, is he not?

MR. HEARN: Mr. Chief Justice, I disagree with your wording of the --

QUESTION: Well, now, you tell me what it is.

MR. HEARN: -- last paragraph because I believe that --

QUESTION: You mean, you disagree with what I read from the --

MR. HEARN: No, sir, I don't. I don't disagree with what you read. I disagree with your interpretation because I believe that in the following sentence he goes on

to say what the court has decided is that under existing circumstances, violations of constitutional rights by police do occur in an unacceptably high number of instances and in the absence of change in procedures such violations are likely to continue to occur and that revision of procedures for handling civilian complaints is a necessary first step in attempting to prevent future abuses.

QUESTION: That is an entirely logical extension of the part that I read but where does a United States District Judge, what is the source of his authority to impose a supervisory power over a state or a municipal government in these circumstances?

Isn't his power limited to granting damages or injunctions in the ordinary sense to stop doing something?

MR. HEARN: No, sir, I believe it is not and I believe that the school desegregation cases are examples of remedies fashioned to achieve a right --

QUESTION: Do you think that this is a parallel to desegregation?

MR. HEARN: I don't think that it is a factual parallel but as it relates to the interplay between right and remedy, I believe that it is comparable to the reapportionment cases and to the desegregation cases that 1983 -- section 1983 in the Fourteenth Amendment, as this Court said in Monroe versus Pape , includes or involves, brings within

its sphere, under the rubric of color of state law, those state officials who are unable or unwilling to enforce a state law and that this is what the unconstitutional activity is and that the court had before it a number of possibliities. It could have entered an injunction of the sort that it had for a temporary restraining order for a short period of time, which is much like the decree in Allee -- Allee versus Medrano which simply says you may not engage in unconstitutional activity henceforth, but I submit that that leads to exactly the thing that courts should seek to avoid and that is the bringing in, the hauling into court of specific police officers to stand under the test of hindsight for some act that they might have done at 10th and South Street on a particular night.

QUESTION: But won't you get a certain amount of hauling in here if the district captain didn't process the complaint in 45 days? I mean, there are certainly directives in Judge Fullam's order that would be basically contempt citations.

MR. HEARN: If there was a wilful failure to do something mandated by the order I submit, Mr. Justice Rehnquist, that would be appropriate for a contempt proceeding.

But there is also a retention of jurisdiction here and that if the defendants at any time for any of the reasons that they argued here -- in many instances for the first time --

make this order unworkable, then they can go back. They can present to Judge Fullam evidence about the impact on the operations room which they claim here but never claimed below and never produced any evidence on below -- and he would consider that and make a finding and if he thought that it were proper contention and that we didn't have any evidence contrary that was properly cognizable, that he would make a finding and modify his order.

This procedure allows for exactly the working out of these elements of mechanical difficulty, shall I say, as the decree goes along.

QUESTION: Mr. Hearn, just let me follow this analogy. Suppose people in Philadelphia came to the federal judge, both of them, and said,"The local assessor is following improper practices in assessment of real estate, favoring some people over others and thereby inflicting a denial of the equal protection." And the judge heard all the evidence about how one house was valued at 25 percent more than another house that he, the judge, concluded, was of the same value and that he found 25 or 50 or 1,250 illustrations of that. Do you think the judge would have the power to order the assessor or the county or the municipality to make up a new set of regulations as to how they should go about the assessment of their property for tax purposes?

MR. HEARN: Assuming, Mr. Chief Justice, that

the contention that the plaintiffs in such a case would make is unconstitutional -- and I am not prepared --

QUESTION: Oh, yes, I said denial of equal protection.

MR. HEARN: -- on this -- then I would submit that the court could formulate relief which it concluded would be most likely to avoid a recurrence of the unconstitutional practice.

Now, certainly, the type of order that you contemplate which goes into an entire revision of the process --

QUESTION: That isn't very much different from what you have got here, is it?

MR. HEARN: I believe it is. I believe this is a very --

QUESTION: No, no, just to paraphrase him, just to simply say that you have got to improve your procedures for handling assessments of real estate property under your statutes, substituting real estate for police complaints here.

MR. HEARN: Well, but of course, the specific decree I think is the one that would govern more so than that language. I think that -- that language, I think, is predicated upon, in great part, a procedure endorsed in the Yale Law Journal which was cited, I believe, in your dissenting opinion in Allee with respect to allowing the

defendants to develop the program, to assume their good faith in this situation.

QUESTION: Sometimes you cite a Law Review article because we do not endorse it, not because we endorse it.

MR. HEARN: Well, sir, I understood the reference to it to be approving but I could be incorrect, but the point --

QUESTION: Well, Mr. Hearn, may I ask, what we have here, of course, is the final judgment which is appended to the Appendix.

MR. HEARN: Yes, sir.

QUESTION: Attached to that is a procedure. It runs several pages and goes even down to the colors of the various sheets, original, yellow, pink, golden rod, green, blue. Who drafted the procedure?

MR. HEARN: The procedure was drafted by the Defendants, the Petitioners here initially. All of that reference to the circulation of various-colored documents to the fact that it is a numbered directive -- this says Directive 127 --

QUESTION: Well, how -- the basic, you are suggesting -- you tell me, was submitted by the defendants. Now --

MR. HEARN: The format, sir.

QUESTION: How much was added to this, by the judge or by whom?

MR. HEARN: Then we submitted, using their format, certain proposed revisions, and we expanded the scope of investigation and made certain other procedural steps along the line but the -- all of the great specificity that you were referring to --

QUESTION: Yes.

MR. HEARN: -- the fact that we have what I submit appears to be something that it is not, and that is, a federal district judge telling a police department that the golden rod copy goes to the operations division or something of that sort, that is simply not involved.

QUESTION: Well, I gather this was a part of his order, though.

MR. HEARN: It is involved in it but this was just like in the school desegregation cases, this was a plan developed by the people that, I submit, are best able to do it.

QUESTION: But a court order, they didn't volunteer it.

MR. HEARN: They didn't volunteer it, Mr. Justice Rehnquist, but I think this is the most appropriate form of remedy here. There is some coersion involved.

QUESTION: Well, an injunction is coersive.

MR. HEARN: Yes, sir, that is right, I agree. When you have a record such as the findings here of unconstitutional activity, I think that it is appropriate and, indeed, the duty of the Federal District Court to do something and the question here is, did it go about it in the least intrusive --

QUESTION: Basically what you are arguing, I take it, is that there has been a violation of constitutional rights. Equitable remedies therefore are indicated. Those who are within the discretion, in the first instance, of the trial judge, that in this instance he accepted some suggestions -- considerable, I gather -- from the Defendants as to how they could bring about the kind of remedy that he had in mind. That was then revised and he adopted the whole works.

MR. HEARN: That is correct, Mr. Justice Brennan.

QUESTION: And you are saying that it was all within the equitable jurisdiction of district judges to fashion remedies where there has been a finding of violation of constitutional rights.

MR. HEARN: I agree with that and that is our contention.

QUESTION: I thought, Mr. Hearn -- am I mistaken in thinking that the basic decree that is involved in this case is the one that appears from 20a to 23a of the Appendix

to the Petition for the Writ of Certiorari?

MR. HEARN: That is correct and, Mr. Justice Stewart, we have also --

QUESTION: That is the decree, isn't it?

MR. HEARN: That is the decree and we have also included in the Appendix the original proposal of the Defendants --

QUESTION: As to how they propose to comply with the decree.

MR. HEARN: That is right, and then Judge Fullam's changes to it.

We tried to present a record for your consideration as to how the decree evolved and I -- yes, sir --

QUESTION: Well, I was going to ask you -- go ahead, but just tell me if I am wrong in thinking that the -- what appears from 20a to 23a in the Appendix is the decree that is involved in this case?

MR. HEARN: That is correct.

QUESTION: What is Appendix A to the decree?

MR. HEARN: It is a part of the decree.

QUESTION: Well, then, it is from page 20a to page 37a, is the decree.

MR. HEARN: I am sorry. That is correct. I was addressing to its location in the Petition for Writ of Certiorari. Yes, that is correct, sir.

QUESTION: The first paragraph says, "In accordance with Appendix A."

MR. HEARN: On page 20a, Mr. Justice Stewart.

QUESTION: I see.

MR. HEARN: Substantially in the form set forth there and nowhere in the decree is there a reference to matters that I believe have troubled this Court before, such as whether training, weaponry or the like are involved or whether there is any kind of violation of questions of comity or state criminal procedure. None of these questions are involved.

QUESTION: It is much more comprehensive, isn't it?

MR. HEARN: No, sir, I think it is much less comprehensive, much more limited and restrained than it is --

QUESTION: But all of it flows from the paragraph which begins with his statement that he has not decided that there is any constitutional right but nevertheless he is going to order them to improve their procedures and then the product of that juridical declaration is a final judgment that is contained from 20 to page 37a.

MR. HEARN: Mr. Chief Justice, I believe that he has found that there is a violation, a pattern of violations of constitutional rights which occur in --

QUESTION: Except that there is no constitutional right for improved departmental procedures, which he then

proceeds to order.

MR. HEARN: He orders it as a remedy, sir, not because there is a right to that particular procedure. There is not, and we contend there is not, just like -- and I do refer to the school/segregation cases, among others, as situations where courts are faced with the terribly difficult question of trying to have an impact, trying to relieve the violations that it found to occur and do so in the least intrusive way.

QUESTION: In whose behalf?

MR. HEARN: In behalf of the Plaintiffs and the class that they represent, which is --

QUESTION: Does the class just include those people whose constitutional rights have been violated, whether named or not?

MR. HEARN: The class is all citizens of the City of Philadelphia and the --

QUESTION: Whether their constitutional rights have been violated or not.

MR. HEARN: There was no express finding that it is limited to those whose rights have been violated, but the judge held that violations of the rights of the members of this class occur in an unacceptably high number of instances and were likely to recur unless there was the imposition of some appropriate federal remedy.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Hearn.

MR. HEARN: Thank you, sir.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Penny?

MR. PENNY: Yes, your Honor.

REBUTTAL ARGUMENT OF JAMES M. PENNY, ESQ.

If it Please the Court, I would like to correct a misconception. The Defendants did not come close to drafting the decree or the Appendix to the decree.

What happened was, on March 14th of 1973, the District Court entered the opinion, the long opinion which is set out in the printed Appendix.

The Court ordered the Defendants to submit a program.

Now, the order was unappealable and as the Court recognizes and mentions several times, at various points in the record we had objected to the right of the Court on this record to enter any decree but nevertheless we couldn't appeal at that time and we, in good faith, complied with the court order.

We submitted a proposal. That proposal was four pages long and had four pages of forms attached, three pages of schematic designs and one, the fourth page, was a form for the -- the citizen complaint form itself.

QUESTION: So, following up on Mr. Justice White's

suggestion, that is at least 10 pages, isn't it?

MR. PENNY: No, that's -- that is eight pages total. It is eight pages total, four pages of flow charts and forms and four pages of a directive.

The court's directive is 14 pages long exclusive of any flow charts and forms. They are not there.

We submitted something and it is totally unlike what the court eventually implemented.

I want to address the right versus remedy issue. This case can be construed in two ways. Either the court entered relief because it did determine that the procedures were inadequate and despite what it said about not having a constitutional right to adequacy, decided to render them adequate anyhow.

Or, the court decided that the Defendants could be held liable despite the court's conclusion that they hadn't violated the Constitution and either of those two events, the relief, the remedy is thoroughly improper.

It is either a remedy without a right or it is a remedy where the court recognizes it doesn't have a right to question the wisdom of the executive branches of local government.

As for the inadequacy, it has been asserted to you that it was only raised in the question of a remedy. Paragraph 18 of the Goode complaint, inadequacy is alleged.

Paragraphs 49 to 53, the need for a mandatory injunction in the form of adequate procedures and the right to relief in that form.

Paragraph at page 21a, paragraph 2, a and b of their wherefore clause demanding relief, they demand revision of the procedures.

These procedures and the disciplinary procedures did not arise back in 1973. They have been in this case since the beginning. That was the reason this suit was filed.

As far as the analogy with the school desegregation cases, in every one of those cases there is a policy of unconstitutional conduct which is stopped immediately -- to paraphrase one of this Court's opinions, the relief will halt segregation and will halt it now.

And the same with reapportionment cases. There is nothing equivalent here. This decree does not enjoin anything other than what the court deems is inadequate.

We don't know if it is ever going to prevent any unconstitutional conduct because we don't know what the court is talking about other than something will happen in the future.

There was some question about the meaning of the court where the court said, it is the policy of the department to discourage the filing of such complaints to

avoid or minimize the consequences of proven misconduct and to resist disclosure of the final disposition of such complaints.

This was brought out to the Court at the beginning in Mr. Hearn's remarks, stating that that is a policy determination by the Court.

I believe -- it seems they are to be somewhat irreconcilable with paragraph three of the findings, as you pointed out, Mr. Chief Justice, but if you turn to page 128a of the Appendix, it is explained that what the court is talking about there is the policies of the department being the procedures of the department had the result of minimizing and discouraging complaints.

"The complaints are handled on a chain of command basis" and this results in a tendency to minimize and discourage complaints so when the court said, talking about the policy to minimize complaints, it wasn't talking about a wilful policy on the part of the department to discourage complaints. What it was talking about was the end result of the duly authorized departmental policies.

Finally, Mr. Hearn's remarks mentioned that the effect of the decree is actually very mild and he says if we want to change it or if we can't live with it, we can go back to court.

Well, we shouldn't have to go back to court. A

mandatory injunction is always harsh. It is the most extraordinary form of judicial remedy and in this case it results in the District Court taking power to itself which the statutes of Pennsylvania place elsewhere.

QUESTION: Mr. Penny, may I ask you a question about the decree? As I read it, whenever a complaint is filed resulting in disputed facts, an adversary hearing is then required.

MR. PENNY: Yes, your Honor.

QUESTION: Is that correct?

MR. PENNY: I believe -- well, first of all, this only goes to complaints which don't allege criminal conduct. If the complaint alleges criminal conduct, it is elsewhere.

QUESTION: Yes.

MR. PENNY: And when I say criminal conduct, I am not sure if the judge intended to subsume federal criminal conduct, which may take this case out of all civil rights violations also but where, in a nonfrivolous, non-criminal complaint, there is a factual dispute, the case is supposed to be moved to a substantially altered police board of inquiry which is to conduct hearings for the purpose of resolving the issues and determining the liability of the officers.

QUESTION: That is an adversary proceeding, as I judge, with counsel, the right to examine and cross-examine

witnesses, and that right is required.

MR. PENNY: Yes, your Honor, the Complainant has the right to be represented by counsel, to cross-examine the police officers, there is a stenographic record taken and it is available to any complainant so long as he avers a case where there is a factual dispute.

QUESTION: Is that new procedure in Philadelphia?

MR. PENNY: Very new, your Honor.

What the court has done here, and I try to point this out in the brief, is create a system which is a mirror image of the court.

The police department's regulations are designed, disciplinary regulations, are designed to go at violations of police regulations. They were never designed to provide an open forum for the people who have complaints about the police department. It is a disciplinary tool and it involves a police officer and his relation to the department.

Under the existing procedures, the complainant has no right to counsel. He has no right to demand a hearing and he has no right to accuse or to confront the accused in the present situation, though I believe he does have this right under the court's decree.

QUESTION: Under the decree, would the policeman still be entitled to assert Fifth Amendment rights or is that gone, too?

MR. PENNY: I don't imagine that Judge Fullam would require the waiver of the Fifth Amendment rights. It does present a severe hardship to the police officer who is, on the one hand, a defendant in the civil suit for damages and on the other hand must submit to this procedure within the police department, in this procedure contemplated by Judge Fullam. It --

QUESTION: In all seriousness, I suppose his answers would be admissible against him in a civil suit for damages.

MR. PENNY: That is precisely my point, your Honor, because there is stenographic record taken and he would be testifying under oath. I think it is the best form of discovery available for any Civil Rights plaintiff. He'd file the complaint. He'd go to the department and get everything he wants and it certainly puts the department or the police officer at a severe disadvantage in the subsequent civil rights suit for damages.

One further point, Mr. Chief Justice, with your example regarding the assessors. This really goes far farther because with at least the assessors you have a finite number of homes.

There is only a certain number of properties to assess and there are only a certain number of problems that could arise. With the police department there is literally

almost an infinite number of chances for something to occur and I think that the scope of this is far beyond your example of the assessors and this is an extremely, extremely substantial interference with the rights of the police department and the rights of the Defendant city officials here where the court has refused to find that they violated anyone's constitutional rights and repeats that -- says that twice during its opinion.

I thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:30 o'clock p.m. the case was submitted.]