In the

Supreme Court of the United States

ROBERT BURRELL, ET AL.,

Petitioners,

v.

MILTON McCRAY, ET AL.,

Respondents.

No. 75-44

Washington, D.C.
April 27, 1976

Pages 1 thru 53

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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v.	:	No. 75-44
MILTON McCRAY, ET AL., Respondents.	:	

Washington, D. C.,

Tuesday, April 27, 1976.

The above-entitled matter came on for argument at 1:24 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANCIS B. BURCH, ESQ., Attorney General of Maryland, One South Calvert Building, Baltimore, Maryland 21202; on behalf of Petitioners.

CHARLES F. MORGAN, ESQ., 341 North Calvert Street, Baltimore, Maryland 21202; on behalf of Respondents.

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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 argument next in No. 75-44, Burrell v. McCray.

Mr. Attorney General, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANCIS B. BURCH, ESQ.,

ON BEHALF OF PETITIONERS

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

The cases here today are consolidated, three cases dealing with three inmates of the Maryland State Penitentiary. One is McCray, one is Mr. Stokes, and the other is Mr. Washington. We will give a few facts with respect to Mr. McCray, since that was the only case that was decided on its merits by the Fourth Circuit.

The only common issue with respect to Messrs. Stokes and Washington is the single issue as to whether or not the exhaustion of state administrative remedies is required.

McCray is now confined in the Maryland Penitentiary, serving 28 years for having been guilty of four counts of assault with intent to murder. During the first four years of his confinement, he filed 37 civil rights actions in the Federal District Court in Baltimore. Thereafter he filed additional civil rights actions, so there are now 55 actions that have been filed by Mr. McCray, eight of which deal with

habeas corpus relief and the balance of which deal with civil rights relief.

Until the Circuit Court in this case, which we say wrongly, gave some remedy to Mr. McCray, not any one of his petitioners gave him any relief whatsoever. Judge Field, of the Fourth Circuit, in his dissent, described McCray from his litigious history as a chronic troublemaker and malcontent who is engaged in a ceaseless array of frivolous civil suits at public expense based upon allegations that have already been repeatedly found meritless. And I would say that as of today these civil actions that have been filed by Mr. McCray have cost the State of Maryland something in excess of $350,000.

McCray alleges deprivation of Eighth and Fourteenth Amendment rights in 1971 in two separate occurrences, a month apart, alleging improper punishment, illegal conditions of confinement, and denial of medical care.

The Fourth Circuit declared that the condition of McCray's two days' solitary confinement resulting from his disturbance and misconduct violated the Eighth and Fourteenth Amendments, prohibition against cruel and unusual punishment.

QUESTION: Was he in the penitentiary in Baltimore?

MR. BURCH: Pardon me, sir?

QUESTION: The penitentiary in Baltimore is where he was?

MR. BURCH: The Maryland State Penitentiary in

Baltimore City, yes.

QUESTION: Well, is that solitary still down underground?

MR. BURCH: Well, I really don't know, Mr. Justice Marshall, I haven't been down there so I am not sure exactly where it is.

It is the South Wing segregation division, which I understand is not underground. It is not underground.

The Fourth Circuit remanded the issue on monetary damages and the qualified immunities of the prison guards to the District Court for further determination. But in our view it is unnecessary for this Court to reach the merits of the McCray case, and therefore we will not deal further with the facts.

We submit that the District Court of Maryland was correct in its threshold determination that the widely recognized principle of exhaustion of state administrative remedies required the respondents in these cases to present their complaints concerning the conditions and circumstances of their confinement first to the Maryland Grievance Commission before approaching the federal courts.

The Maryland Inmate Grievance Commission procedure is an adequate and an effective state administrative remedy, and the decisions of this Court do not, in our view, hold that where there is an adequate administrative remedy a litigant

may seek relief in the federal courts without first exhausting that administrative remedy.

We believe that this view is implicit in Mr. Justice Douglas' comment in McNeese. In that particular case, he stated, "Moreover, it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." And I might say that this particular quote admittedly followed the citation of the opinion of this Court in Lane v. Wilson, 307 U.S., and we believe that Lane v. Wilson, the predecessor of Monroe, specifically held by implication, if not by direct holding, that where there was an effective state administrative remedy, that this must be exhausted before a 1983 suit may be entertained by the federal courts.

QUESTION: Mr. Attorney General, what would the Maryland Commission have done in this case if the allegations of the petition were true, what remedy would have been the appropriate remedy that the Commission could have given?

MR. BURCH: If the allegations were true, the Commission could have changed the system with respect to -- they could take discriplinary actions against the guards who were involved in question, they could have notified the superintendent of the institution that the procedures would have to be changed, and they would have notified -- in this particular

case, there was a question of the two-day solitary confinement without Mr. McCray being clothed. This was done for his own protection. But if the administrative grievance commission were to have made a determination that this was improper, they could have issued directions which would be binding upon the agency to correct that situation.

QUESTION: But if the allegations were true, they were not following rules which were already in effect, isn't that correct? Doesn't he allege that there was a rule that required immedate --

MR. BURCH: Well, it is very difficult to state exactly what Mr. McCray alleged, because the allegations in the complaint were prepared by him in his own hand and they are not particularly articulate.

QUESTION: Well, at least the Court of Appeals thought he had alleged that there was a violation by the prison officials of the prison's own rules.

MR. BURCH: Well, it may well be that he could have claimed that they were a violation of the prison's own rules, but at least the Grievance Commission, as approved by the action of the Secretary, would have been able then to take remedial action within the institution itself --

QUESTION: That would have been to discipline the guards?

MR. BURCH: -- to see that this occurrence did not

occur again, and that would be the nature of the relief that was requested, which was both declaratory and injunctive. There was a request for monetary damages.

QUESTION: Mr. Attorney General Burch, I think there is a statement in the majority opinion of the Court of Appeals to the effect that a state is required to follow its own procedural rules, and of course that is certainly true in the federal government. Do you agree that that is a constitutional requirement as to the states?

MR. BURCH: Well, I would not say that it is necessarily a constitutional requirement unless it involves a constitutional right, but certainly it would be the most desirable thing, that a state be required to follow its own rules.

QUESTION: Well, if it is not a constitutional right, then presumably a federal court has no business imposing it on a state.

MR. BURCH: It certainly would not have the right to impose that burden on the state unless it involved the infringement of a constitutional right, it would seem to me.

I might say also that Mr. Justice Harlan, in Damico, read the majority opinion in McNeese to hold that the requirement of exhaustion -- that the requirement of exhaustion of an adequate state remedy was not condemned in Monroe.

In the ninety years prior to the passage of the Civil Rights Act of 1871, the ninety years that passed between then

and the holding in Monroe, this Court and the lower federal courts assumed with good reason that exhaustion principles applied in 1983 action where there was an adequate administrative state remedy.

Furthermore, as early as 1886, this Court, in Ex Parte Royal, decided that a state prisoner seeking federal habeas corpus relief under what is now section 2254 could first be required in the discretion of the court to apply to the state court for such relief. This specific mandatory requirement, by the way, was not written into section 2254 by the Congress until 1948, some sixty-two years later, and certainly what was true under Royal as to the predecessor of section 2254 should be equally as applicable in 1983 cases.

Next to life itself, the most cherished right guaranteed by the Constitution is that of a person's right to his freedom. This Court has held in legions of cases that property and other rights are insignificant in comparison to one's right to his liberty.

If this be the case, then by what possible logica can it be said that state administrative remedies need be exhausted before one can invoke federal court jurisdiction to seek relief from alleged illegal incarcertation while those same remedies need not be exhausted with respect to alleged conditions of confinement such as food privileges, censorship, et cetera?

To us the question, we submit, is to answer it; or,

more simply stated, has this Court said in the past that the state can be trusted with the most precious of all person's rights, his liberty, but yet cannot be trusted with his property rights and other privileges? We certainly think this is not the case.

Monroe simply held that the right to litigate in the state courts could not deprive a citizen of his right to immediate recourse to the federal courts, but in so holding, this Court specifically noted that one of the three main purposes of 1983 was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.

As this Court knows, the doctrine of Monroe was extended two years laters in McNeese, a school system case, to a questionable administrative remedy, as contrasted with the judicial remedy in Monroe.

In McNeese, Justice Douglas addressed it for the first time, that the court's supplementary language in Monroe actually represented a fourth purpose. But as Judge Noel, in Egner v. Texas City, said, "to read the court's supplementary language as creating a fourth and virtually unlimited occasion for the application of section 1981 would render superfluous Monroe's extensive previous discussion of the second and the third statutory purposes."

Then eight years after McNeese, in the majority per

curiam opinion in Wilwording, the statement appears -- and I might say without war -- that an inmage need not seek questionably available administrative remedies. We submit, however, that as the dissenters did in the Fourth Circuit, this loose statement from the per curiam Wilwording holding is based upon a faulty reading of the predecessor cases and should not and does not represent the state of the existing law.

Moreover, the unanimous views of all seven of the Circuit Court judges below reflected a deep disenchantment with a non-exhaustion rule followed and applied only because they said we have no alternative, and the agitation that this Court reexamine and modify its earlier decisions.

We would hope that a reexamination will result in a clarification of the per curiam Wilwording holding in favor of a narrower and more accurate reading of the six-to-three majority opinion in Monroe. Such a clarification, we submit, is similar to the one undertaken by this Court in 1973 in Miller v. California. There it was stated that the Ross test of obscenity had been drastically altered in 1966 by the plurality opinion in Memoirs v. Massachusetts, so as to require prosecutors to prove a negative that the material is utterly without redeeming social value.

Following this Court's opinion in Memoirs, a multitude of per curiam opinions breathed life into the utterly without redeeming social value test and thereby seemed to establish

that as a basic test which was thereafter considered controlling in numerous lower court decisions under the doctrine which we call creeping stare decisus.

The Miller decision however finally returned the case law in this area to its proper and established path. As this Court was shorn of its questionable role as a super-censor, and as the lower courts were shorn of their roles as censors by the reexamination and clarification of Memoirs by Miller. So also will this Court only be shorn of the role of super-warden by a proper clarification of Monroe and its progeny in this case. The same, of course, would apply to the role of the lower federal courts as being the wardens of the various institutions throughout this country.

The nature of the administrative remedy provided by the legislature of Maryland makes the time and the setting particularly right for re-analyzing and restating the law of this very thorny subject.

Maryland's Inmate Grievance Commission presents this Court with a case of first impression. Two if its members must be lawyers and two of its members must be expert in the field of correction. The commission is headed by an executive director who has significant professional experience and significant professional assistance. Only those grievances or complaints which are wholly lacking in merit may be dismissed without a hearing. All of the rest must be the subject of a

hearing on the merits, with the full panoply of due process rights. The commission must decide the matter promptly in a written order, containing findings of fact, delivered to the Secretary, who must affirm, modify or reverse within fifteen days. If the action is favorable to the inmate, the Secretary is directed to implement the order and to take whatever action he deems appropriate in light of the commission's findings. If unfavorable, judicial review is immediately available to the inmate in the state courts under the Administrative Procedure Act.

Surely, it cannot be said that Maryland's remedy is inadequate solely because it does not provide for money damages, which are appropriate -- which are really not appropriate or available in the vast majority of 1983 prisoner suits.

Meaningful relief in practically all such cases is achieved by declaratory or injunctive relief, that is determination of an unconstitutional prison practice. And the narrow category of cases where monetary damages may be appropriate and available, the federal court could simply stay its hand until the completion of the administrative proceeding, thus gaining the benefit of the record there made.

As the District Court below said in Washington, the short answer to this is that since the commission has been invested with powers comparable to the equity power of a

federal court, the prisoner will not be prejudiced by delaying an award of damages until the previous procedures have been exhausted.

Respondents have raised several objections to the adequacy of Maryland's administrative remedy. They say that 54 percent of the grievances filed are dismissed without a hearing, as wholly lacking in merit, and that in only 11.4 percent of the cases is the grievance found to be meritorious.

First of all, we would note that 938 or 55 percent of the cases disposed of were disposed of administratively to the satisfaction of the inmate generally through the offices of the commission. And of the remaining 744 cases, 191 were decided in favor of the inmate. This represents a 66 percent favorable disposition, instead of the 11.4 percent as alleged by the respondents.

We would also note that the federal court, under section 1915, possesses the identical authority to dismiss wholly frivolous and forma paupa suits and respondents' own statistics establish that only 4.9 percent of federal civil rights suits ever reach trial, and it is not unlikely that an even lower percentage are ultimately disposed of favorably to the inmate.

Finally, respondents complaint about the lapse of 24 weeks between the filing of the complaint and the final decision thereon. The actual time today, we would say, is 94.9

days. The average time elapsing between the date of the filing of all grievances and all dispositions is only 40.6 days. By contrast, the elapsed time in federal court between the filing of a 1983 prisoner suit and its ultimate disposition at the trial table is, we understand, some 24 to 36 months.

To comprehend the problem that Maryland has sought to be and the context of that problem, it is helpful to remember the language of Mr. Justice Stewart in Preiser, who, after discussing the intime day-to-day relationship of the in- with the state, commented, "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the states the first opportunity to correct the errors made in the internal administration of their prisons."

Mr. Justice Powell expressed similar concerns in Procunier, and Mr. Justice Marshall in McKart, and, if I may, I would like to quote from his language in that case. At page 1663, Mr. Justice Marshall said, "Certainly very practical notions of judicial efficiency come into play as well. A complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene, and notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors.

Finally, it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its practices."

QUESTION: Mr. Attorney General, is the practice under which this man has been complaining still in existence?

MR. BURCH: Is it still what?

QUESTION: In existence in this penitentiary?

MR. BURCH: As far as I know, the practice of --

QUESTION: Of stripping a man and putting him in solitary, is that still being practiced?

MR. BURCH: Solitary confinement is being practiced in what are considered to be the appropriate cases.

QUESTION: It is still being practiced?

MR. BURCH: Where it is an appropriate case. Now, in this particular instance --

QUESTION: No, I mean you have known about this case, haven't you?

MR. BURCH: That's right, yes, sir.

QUESTION: And you made no effort to change the practice, have you?

MR. BURCH: The practice has been changed.

QUESTION: I thought you said it had not.

MR. BURCH: Let me say this, first of all, Mr. Justice Marshall: We disagree with the findings of the Circuit Court, the Fourth Circuit in this case. Judge Northrop, the court

below, made very extensive findings of fact and found that the practice which he complained about was not improper, was not illegal, did not violate any of his constitutional rights. We think that the Fourth Circuit made a serious mistake in violating the long established principle that the findings of fact by the court below, who had the opportunity to see the witnesses, to hear the witnesses, to test the credibility of the witness, that all of the information before it, that the Fourth Circuit would come in and reverse in the manner in which it did.

QUESTION: I respectfully ask you for an answer to my question. Is the practice still in existence?

MR. BURCH: Are you asking me is there solitary confinement under certain extreme cases?

QUESTION: Like this one.

MR. BURCH: No. Like this one? Yes, they would be, because we say they have not been a violation. Now, if you ask --

QUESTION: Now, I thought you were asking this Court to give Maryland a chance to take care of its own problems.

MR. BURCH: That is correct.

QUESTION: You have had that chance and you haven't done anything about it.

MR. BURCH: Well, the case has not finally been disposed of on its merits, Your Honor.

QUESTION: But the practice is still there?

MR. BURCH: We say that in the proper case, solitary confinement is still used.

QUESTION: It will stay there.

MR. BURCH: In the proper case.

QUESTION: It will stay there until somebody goes through the state route, so far as you are concerned?

MR. BURCH: Well --

QUESTION: You would say it would stay there until the federal courts get through with it and approve it in appropriate cases, too?

MR. BURCH: There is no question about that, Your Honor, and I am just saying that we are not -- the state has not abolished the practice where it is necessary for the protection of the inmate, as it was in this case, where it is necessary for the protection of the other population of the institution --

QUESTION: Why is it necessary to take his clothes away from him? Didn't you say you stripped him?

MR. BURCH: He was put in isolation for the purpose of protecting him because he had acted in the very strange manner, he had threatened to do harm to himself, he was -- his clothes were taken away from him so he couldn't strangle himself. Had it not been done so and had the man taken his clothes or his belt or his shirt or his underwear, whatever it might be, and hung himself, then there would have been a 1983

action in the federal courts claiming that the state had failed to do what was necessary to protect this man against himself.

QUESTION: Does the state of Maryland have any psychiatric treatment?

MR. BURCH: Yes, they have psychiatric treatment provisions.

QUESTION: Did they treat him?

MR. BURCH: They tried to obtain --

QUESTION: Did they treat him?

MR. BURCH: Within a matter of two or three days they were able to get the psychiatrist to come in and to interview him and to give him treatment.

QUESTION: After he had his clothes taken away from him and thrown into solitary?

MR. BURCH: They made an effort over the weekend, which in this particular instance --

QUESTION: And they found he was perfectly all right?

MR. BURCH: I am not saying he was perfectly all right. I am saying that maybe somebody made a mistake in not going out and getting the particular psychiatrist, but that doesn't mean the system is bad. That doesn't mean that hereafter that won't be corrected, and I believe it will be corrected.

QUESTION: Well, I asked --

MR. BURCH: I say that maybe an error was made in that particular regard.

QUESTION: I thought -- I asked you had it been corrected, and you said it had not. I guess I misunderstood you.

MR. BURCH: If Your Honor please, I understood your question to suggest that maybe the whole question of solitary confinement was eliminated from the prison system. If that is what Your Honor's question was, the answer is no. If it was have steps been taken to see that in the future if you have a situation such as this and a psychiatrist is needed or a psychologist is needed and he is not available, additional remedial steps will be taken to see that he is made available -- yes, those remedies have been established and those steps have been taken, and to that extent I think that is all the state could be expected to do, but we say again, we do not think that the decision of the Fourth Circuit is correct when it made the determination that the lower court was in error.

QUESTION: Mr. Attorney General, on that very question, am I correct in understanding that the Court of Appeals did not disagree with the findings of fact, but rather drew different inferences from those findings?

MR. BURCH: They did. The Court of Appeals accepted the facts as found, but in effect said, as a matter of law, they amounted up to a denial of constitutional rights under the Fourteenth Amendment.

QUESTION: Forty-eight hours with clothing in a cell, without heat and so forth, was cruel and unusual?

MR. BURCH: But we respectfully disagree with that.

QUESTION: Yes. But the Court of Appeals would not be bound on that kind of question by the judgment of the District Court, would it?

MR. BURCH: The Court of Appeals obviously would have the right to make whatever determination it saw fit under the law.

QUESTION: But it is not like setting aside a finding of fact as clearly erroneous?

MR. BURCH: No, we think that it was clearly erroneous on the part of the Fourth Circuit Court of Appeals to make such a finding of law on the basis of the facts as established in the record.

QUESTION: Mr. Attorney General, may I ask you a question?

MR. BURCH: Yes, sir, Mr. Justice Powell.

QUESTION: Let's come back to the adequacy of the administrative remedy. Most of these prison cases, at least most of the ones I have seen, claim damages. Thay may also request injunctive or declaratory relief. What is this board, this commission that you have described, what does it do with a damage claim?

MR. BURCH: The commission cannot award damages.

QUESTION: I understand that, but does it make any finding with respect to the entitlement to damage or --

MR. BURCH: I do not believe that it makes any finding of fact with respect to damages, but I do believe that what it does is it develops a record which the Federal District Court, where a claim for damages has been made at the appropriate time, may then have the benefit of that record, a determination on the face of the record as to whether there has been a substantive denial which on the face of it would seem to entitle him to damage, with the right in the federal court then to take such additional action as it deems necessary, such additional testimony as it deems necessary in order to give full and final relief.

QUESTION: Are there any decisions of the Federal District Court in Baltimore that indicate whether that record is admissible in evidence?

MR. BURCH: I know of none. As a matter of fact, they have used it, Mr. Stutman tells me, in summary judgment proceedings in Maryland, and we know as a matter of fact that of the 2,504 cases tried before the Inmate Grievance Commission, about four or five or six of them have subsequently been filed as civil rights actions in 1983 cases, and in those cases the record has been made available to the court and the court has made good use of that record.

Your Honor, Mr. Chief Justice, I would like to reserve the last several minutes. There are some other things I would like to point out. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Morgan.

ORAL ARGUMENT OF CHARLES F. MORGAN, ESQ.,

ON BEHALF OF RESPONDENTS

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

The State of Maryland is asking the Court for a decision on the broad question of whether a Maryland prisoner may be required to exhaust state administrative remedies in an action properly before it under 42 U.S.C. 1983, alleging violations of constitutional rights.

The fundamental defect in the state's argument is that the asserted remedy, the Maryland Inmate Grievance Commission, is not an adequate administrative remedy under the circumstances of these cases. In addition, the state misconceives the proper role of this Court in asking that an exhaustion requirement be judicially grafted onto the Civil Rights Act of 1871.

Whether the exhaustion of administrative remedies doctrine is to be made applicable to 1983 cases is a matter for Congress and not the courts to decide.

The cases before the Court do not present a proper vehicle for a ruling on the broad constitutional question urged by the state. The facts require only a holding that there is no adequate administrative state remedy for these plaintiffs. Even in the case where the exhaustion doctrine is recognized to

apply, exhaustion is not required if the proposed remedy is found to be inadequate or if the purposes of the doctrine will not be served. These cases present exactly that situation.

First, with regard to Milton McCray's separate actions against Mr. Burrell and Mr. Smith, the only relief sought by McCray in these cases is damages for being subjected to violations of his Eighth and Fourteenth Amendment rights.

As the Attorney General pointed out, McCray does request damages, however, he was incorrect in stating that McCray requested declaratory and injunctive relief in those cases.

If I may refer the Court now specifically to the Appendix, pages 12 and 16 of McCray's pro se complaints, page 22 is his amended complaint in Burrell, page 43 and 137 are the opening statements by counsel at the evidentiary hearings in both of those cases, and all of that indicates clearly that the only request being made by McCray in those cases was for damages.

I believe when his original pro se complaint was filed in one of the cases, he requested injunctive relief because at that time he was being subjected to the conditions he was complaining about, but by the time the case came to trial it was quite evident that the only issues before the District Court had to do with damages.

QUESTION: How many actions has Mr. McCray brought?

MR. MORGAN: The record reflects that, Your Honor. I am not sure what the number was. I think the Attorney General said 37, and that may be accurate.

QUESTION: All in the Federal District Court or were some of them just internal grievances?

MR. MORGAN: Well, I believe some of them were in the state court system, as well.

QUESTION: But you think some 37 court actions?

MR. MORGAN: That is reflected somewhere in the record in Chief Judge Northrop's opinion. I don't have the figure, but it is high.

QUESTION: I thought he said 55. It doesn't make any difference, but --

MR. MORGAN: I am not sure about that.

QUESTION: It is a difference of 18.

MR. MORGAN: As the state concedes, the Maryland Inmate Grievance Commission does not have the authority to award either compensatory or punitive money damages, and when an administrative agency is not empowered to grant relief, effective relief or, in this case, any relief, it must be deemed to be an inadequate remedy, and exhaustion should not be required.

In addition, in both of McCray's cases, the District Court held evidentiary hearings and ruled on the merits. The Court of Appeals reversed the District Court and also reached

the merits, remanding the cases to the District Court for determination of whether Burrell and Smith may have availed themselves of qualified immunity and good-faith defense.

QUESTION: Mr. Morgan, to back up a minute, what authority does this Maryland Commission have to enforce its rulings?

MR. MORGAN: Well, Your Honor, the Commission under the statute has no enforcement authority whatsoever.

QUESTION: For example, they couldn't issue an injunction, could they?

MR. MORGAN: No, Your Honor. The only thing that they can do is make a recommendation to the Secretary of the Department of Public Safety and Correctional Services, who would then enforce the recommendation if he saw proper to do so.

QUESTION: If he wanted to?

MR. MORGAN: Well, he has the authority under the statute to review all --

QUESTION: There is no compulsion?

MR. MORGAN: There is no compulsion.

QUESTION: I mean you couldn't, the Commission couldn't change what was going on in the penitentiary?

MR. MORGAN: No, Your Honor, not the Commission directly. It only makes a recommendation to the Secretary.

QUESTION: What is the history of it? Do they or do

they not make corrections pursuant to recommendations?

MR. MORGAN: The prison system?

QUESTION: Yes.

MR. MORGAN: Well, Your Honor, I don't think there is anything in the record that reflects that one way or another. There was some testimony taken in one particular case where in fact McCray had gotten relief from the Grievance Commission which had been affirmed by the Secretary on the question of whether he should be present when his cell was searched. The evidence indicated at the hearing that that directive of the Commission had never been enforced by the Maryland Penitentiary and that the excuse that they used was that they had a shortage of manpower. That is the only example that I know of in the record.

No purpose would be served inasmuch as McCray's case has already been ruled on the merits in having him go back to the state administrative remedy at this late stage in his cases.

In John Washington's case against officials of Maryland's Pautuxant Institution for denial of medical treatment is also a claim for damages. He requested declaratory relief in his pro se complaint, but the declaratory relief was only to the extent necessary to achieve an award of damages on the declaration.

The Inmate Grievance Commission again cannot provide

the relief requested to Washington because it has no power to award damages and therefore it again is an inadequate administrative remedy in his case.

QUESTION: Mr. Morgan, didn't we have that sort of bifurcation in Preiser, it was clear that the damage claim of a prisoner could be retained on the docket of the District Court but that his claim for other relief might have to go through state exhaustion?

MR. MORGAN: Yes, sir, I think that was implicit in Preiser and perhaps even discussed there, but the circumstances are quite different here, where there is no request for equitable relief being made in any of these cases. The only request for relief is for damages.

In addition to the fact that the Grievance Commission cannot award the relief to Washington that he wants, Washington was released from confinement from Pautuxant Institution in --

QUESTION: All of them involve, I take it, as a predicate to damage award, a declaration of some breach of federal law?

MR. MORGAN: It would require a finding of fact by the District Court.

QUESTION: A determination that there was a violation of the Federal Constitution rights?

MR. MORGAN: That would be required in the District Court, yes, sir.

In addition to the fact that McCray cannot be awarded the relief he seeks by the Grievance Commission, he has been released from Pautuxant and by the terms of the Grievance Commission statute he can no longer file a complaint with the Grievance Commission, so we would suggest that the issue of exhaustion in McCray's case is moot -- rather, in Washington's case, is moot at this time.

The fourth case before the Court, that of James E. Stokes against officials of the Maryland Penitentiary, alleging that the institution's procedures and standards for censorship of literature prisoners may read and receive are unconstitutional, should also be decided by the Court on narrow grounds. In his pro se complaints, Stokes sought damages and injunctive relief.

For purposes of his damage claim, again the Inmate Grievance Commission is an inadequate state remedy. And as we indicated in the supplemental brief which respondents filed, because of two recent judicial decisions which directly affect Stokes, he no longer finds it necessary to pursue his claim for equitable relief when his case returns to the District Court. Stokes has authorized us to state here today that he will only request damages when his case again reaches the District Court.

He has been transferred from the Maryland Penitentiary to Pautuxant Institution, where he is now committed as a

defective delinquent for an indeterminate sentence under an order by a judge of the Baltimore City Circuit Court. Although that decision has been appealed by the state, Stokes has no present interest which is affected by Maryland Penitentiary censorship regulations.

In addition, the identical constitutional claim made by Stokes to the regulations at the penitentiary has been decided by District Court Judge Kaufman in another case filed by another penitentiary prisoner. Whatever the outcome of the state's appeal in that case, Stokes' equitable claim will be resolved there.

QUESTION: Well, what if on the state's appeal that is reversed?

MR. MORGAN: Well, Your Honor, we are not saying that the decision in the Hopkins case, which is the case I was referring to, will necessarily rule in Stokes' favor, but it will resolve Stokes' issue one way or another. The issue is identical, Your Honor. Stokes is claiming that the standards for censorship of literature at the penitentiary and also the due process safeguards in connection with the censorship decision-making were inadequate and denial of due process.

QUESTION: So you say that however the Court of Appeals rules on it, it will either -- a decision in favor of the appellant here will be unfavorable to your client, and a decision in favor of the appellee will be favorable to him and

he will be bound in either event?

MR. MORGAN: He will be bound by that, except with regard to his damage claim, which applies only to his specific instance of being denied specific literature several years ago.

For all of these reasons, under the facts of the cases before the Court, Maryland does not provide an adequate administrative remedy for these plaintiffs.

There is another reason why the Court should not decide the broad question of policy raised by the state. If section 1983 is to be amended by adding an exhaustion of state administrative remedies requirement, that amendment should be made by legislation and not by judicial decree. The state, in asking the Court to assume the -- the state is asking the Court to assume the rule of Congress.

In fact, the state's own argument leads inescapably to the conclusion that any fundamental change in the scope of 1983 should be made by Congress.

QUESTION: Mr. Morgan --

MR. MORGAN: Yes, Your Honor?

QUESTION: -- why do you say that only Congress could make some interpretation of section 1983?

MR. MORGAN: Well, Your Honor, that was exactly the point I was about to develop, if I can carry through with it.

QUESTION: Fine.

MR. MORGAN: Why is Congress --

QUESTION: Why do you say that we lack power to reinterpret, if we decided to do it, 1983? Prior to 1963, in Monroe v. Pape, this was certainly an unsettled issue at best.

MR. MORGAN: Yes, Your Honor. Well, the position that we take with regard to that is that in Monroe v. Pape, this Court interpreted congressional intent behind section -- what was then 1979, which is now section 1983. That congressional intent was stated in Monroe v. Paper and has been stated by the Court in decisions subsequent to that. The congressional intent was that the state remedy be -- that the federal remedy be supplementary to the state remedy and that the state remedy need not be first exhausted before the federal remedy may be invoked.

Now, what the state is suggesting in this case is that this Court reinterpret the intent of section 1983. There is no further evidence before the Court that the interpretation of legislative intent in Monroe v. Pape was incorrect. The state's position is that, because Maryland has an adequate Inmate Grievance Commission, that now the Court is free to disregard the intent that was expressed in Monroe v. Pape and to create an exhaustion requirement. Now, our position --

QUESTION: I can understand, Mr. Morgan --

MR. MORGAN: More directly answering your question --

QUESTION: Well, may I interrupt you --

MR. MORGAN: Yes, sir.

QUESTION: -- because it might shorten your answer. I can understand how you could argue with some force that there are precedents of this Court that should not be reconsidered, but you are suggesting, are you, that we have no authority to reconsider them?

MR. MORGAN: I am not suggesting that the Court has no authority, Your Honor.

QUESTION: What are you arguing?

MR. MORGAN: But we are arguing that this would be an improper role for the Court to take.

QUESTION: Improper?

MR. MORGAN: An improper role for the Court to take, particularly with regard to prisoner grievance mechanisms, for some of the reasons that I would like to express, if I may.

What the substance -- and I think this goes more directly to your question, Your Honor -- what the substance of the petitioners' argument is is that because times are now different than they were in 1871, an exhaustion of remedies rule for 1983 is now appropriate. This argument, however, should be made to Congress and not to the Court, and the reason is that if times have changed, as the state argues, it is Congress which should reevaluate the policies underlying its 1871 determination that there should be no exhaustion of state remedies in 1983. For example --

QUESTION: What is your authority for saying that

Congress made a determination in 1871 that there should be no exhaustion of administrative remedy? I mean does that come from legislative history?

MR. MORGAN: Your Honor, I think that comes from a long line of decisions from this Court, beginning with Monroe v. Pape and extending through Damico and McNeese and District of Columbia v. Carter, and all the cases that are cited in the --

QUESTION: Okay. You can argue it on two different grounds here and it strikes me that perhaps -- at least I don't understand you as to be firmly committed to one or the other or to perhaps both. You can say that, regardless of what the prior cases of the Court have said, even if we are writing on a clean slate, you go back to the legislative history and it is clear that Congress did not intend that administrative remedies to be exhausted, or you can say that even though there might be doubt as to the legislative history, the precedents of the Court say that administrative remedy should not be exhausted. Now, do you assert both of those grounds or, if not, which one?

MR. MORGAN: But we assert that the question of what legislative intent was behind 1871 is no longer open, that that question has been decided by this Court in Monroe v. Paper and reaffirmed over and over in the other decisions.

QUESTION: Even though in Monroe v. Paper the Court

was confronted only with judicial remedy?

MR. MORGAN: Well, that's true, only judicial remedies in that case, Your Honor --

QUESTION: We are not bound by dicta, are we?

MR. MORGAN: No, sir, but past Monroe v. Paper there was a series of decisions that decided that the intent of the 1871 Act applied not only to judicial but also to administrative remedies and also that it applied to remedies which were available and adequate, that the fact of adequate available remedies made no difference in what the congressional intent was. And having established that as the congressional intent, it would be improper in the absence of some evidence that there was different congressional intent for anyone besides Congress to reevaluate the policies that underly the 1871 Act.

We would suggest that this is a particularly inappropriate time for the Court to act on this because at this very moment there are two bills pending before Congress --

QUESTION: I don't know why you use the term "inappropriate." To Mr. Justice Powell, you suggested lack of power. Now, which is your point?

MR. MORGAN: Well, Your Honor, I think it is really -- the proper term is inappropriate. I think what I am suggesting is that under the circumstances of what the state is arguing in this case, that this Court should give proper deference to the role of Congress in amending section 1983.

As an example, I think the way in which the Court handled Preiser v. Rodriguez, where the Court gave specific deference to explicit congressional intent in the habeas corpus statute and thereby carved out an exception to section 1983, there was no exhaustion requirement attached to 1983 but because of explicit congressional intent that there should be certain cases which cannot be brought under 1983, then under those circumstances there should be exhaustion and it seems to me that that is what we are arguing, that there should be that proper deference given to what Congress intended, especially in this case, where the Court has already found what Congress intended in Monroe and all the cases that followed.

As I was mentioning, there are two bills presently pending before Congress. Congressman Railsback has introduced H.R. 12008 and Congressman Rodino has introduced H.R. 12230, and both of these bills are now pending before the House Committee on the Judiciary. If the bills are enacted, they would amend section 1983 to impose an exhaustion of state administrative remedies requirement for state prisoners.

In addition to the broader policy question --

QUESTION: What are they, both in committee?

MR. MORGAN: Yes, sir, they are both before the House Committee on the Judiciary.

QUESTION: They are both introduced in the House, one by the Chairman of the committee?

MR. MORGAN: One by Mr. Rodino and one by Mr. Railsback.

QUESTION: Have there been any hearings on them?

MR. MORGAN: I don't know, sir. I don't believe so. And I believe there is also another bill that has been introduced by Congrsssman Kastenmeier which does not specifically speak to exhaustion of administrative remedies, but I believe which has provisions in it which deal with the problem that the District Courts have in handling prisoner complaints.

QUESTION: Mr. Morgan, do those bills merely provide for exhaustion in prisoner cases or in cases generally?

MR. MORGAN: I can speak to the Railsback bill specifically. That specifically is directed to prisoners, and I believe that Rodino's bill is also specifically directed to prisoners.

QUESTION: Well, what do you suppose the underlying -- what do you understand the underlying argument for exhaustion to be, what is the rationale that has been suggested? Is it to avoid decision of constitutional issues? Is that it, or what is it?

MR. MORGAN: I'm sorry, sir, do you mean the rationale for exhaustion --

QUESTION: What is the rationale, as you understand it, that is being offered for a requirement of exhaustion?

MR. MORGAN: I think what the state is saying in this

case, Your Honor, is that because the State of Maryland has developed what they say is an adequate state administrative remedy, that this Court should then require state prisoners to exhaust that remedy.

QUESTION: Although concededly there is no damage remedy and concededly I suppose administrative processes in the Maryland prison isn't going to decide a constitutional question?

MR. MORGAN: I think that in the way in which the Inmate Grievance Commission is set up, there is certainly far from any guarantee that the Inmate Grievance Commission is going to be adequately able to solve constitutional questions.

QUESTION: Well, administrative procedures usually don't declare some prison regulation unconstitutional, for example?

MR. MORGAN: Well, I think at most what the Grievance Commission could do would be to declare that a prison regulation no longer meets sound correctional standards, but I don't think it is qualified to declare something unconstitutional.

QUESTION: At the most that exhaustion -- isn't the most that exhaustion would produce is a remedy that would perhaps obviate a resort to the federal court?

MR. MORGAN: I think that that is one of the primary policies that underly an exhaustion requirement in any

circumstances. In a sense --

QUESTION: I suppose, first of all, that the hope of a lot of these potential lawsuits would disappear through accommodation in the administrative remedy stage and they would therefore never get to court; and, secondly, that those that did get to court would perhaps save the judge time because some of the issues might have been eliminated or at least -- and others refined, and the position of the state would be better known and the administrative procedure would have served to separate some of the wheat from the chaff. I suppose those are the two -- would be the two grounds for these proposed bills and for the position of the state in this case?

MR. MORGAN: It would seem to me, Your Honor, that the fundamental purposes of exhaustion should be to create a record for the District Court and also to allow the agency an opportunity to correct its own errors.

QUESTION: To correct matters, to solve the problem before it ever got to court.

MR. MORGAN: And I think that those two --

QUESTION: Are you suggesting that in the federal court there wouldn't be a de novo determination based on a hearing?

MR. MORGAN: No --

QUESTION: You wouldn't think it would be bound by the record?

MR. MORGAN: No, sir, we are suggesting just the opposite in our brief.

QUESTION: I take it you mean they would be aided, the Federal District Court would be aided by whatever record was made --

MR. MORGAN: Well --

QUESTION: -- but not limited to it?

MR. MORGAN: Yes, sir. What I was leading to was in the habeas corpus situation, for example, where Congress has enacted specific statutes and says specifically how the District Court may use the state court proceedings, now there is no such statute in existence now as to how the District Court can use state administrative remedies proceedings.

QUESTION: Well, I think that now if either side objected to the use of any part of the record, there might be some trouble, if the judge nevertheless used it.

QUESTION: The ordinary laws of evidence would be applicable.

QUESTION: Some might be admissible and some might not.

MR. MORGAN: Well, we take the position that under the grievance commission statute as it presently exists without enabling legislation from Congress, that the District Court simply cannot use the record of the administrative agency proceeding as any more than a matter of interest to read the facts

of what perhaps happened. But as far as using it in the decision-making process, we would say that that would be inappropriate in the absence of legislation. And more particularly, we believe that legislation is particularly -- that that kind of a requirement should not be imposed without legislation because, really, it is only Congress who is able to evaluate all the interests that are involved, the state's interest, the court's interest, and the prisoner's interest, in setting up what would be an effective remedy that would serve the purposes of allowing the agency to correct its own errors and also serve the purposes of the District Court, and no --

QUESTION: Are you familiar with the report of the Director of the Federal Bureau of Prisons showing that in one year after they had inaugurated internal grievance procedures, prisoners complained to the Federal District Courts dropped by approximately one-third?

MR. MORGAN: I haven't seen that report, Your Honor.

QUESTION: There is a statement of the Director of Prisons in the appendix to your brief, isn't there --

MR. MORGAN: Well, Your Honor --

QUESTION: -- as a dissenting opinion?

MR. MORGAN: -- that was a dissenting opinion. Mr. James Bennett is a member of the commission in Maryland, and I think his dissenting opinion is particularly relevant to the

situation before the Court, because in that opinion he describes the really chaotic decision-making and fact-finding process of the Inmate Grievance Commission, and certainly that kind of a remedy is not the kind of a remedy that will serve any valuable purpose in the District Court.

QUESTION: Mr. Morgan, when did the Commission commence to function?

MR. MORGAN: I think it was 1971 legislation that set up the Commission, and I think they began to function about a year later.

QUESTION: Does the record show how many cases the Commission has processed to final decision?

MR. MORGAN: In our supplemental brief I think that we brought those statistics up to date.

QUESTION: If they are in the brief, do you recall generally what they are?

MR. MORGAN: I think that they are referred to -- certainly the record of the case at the time that there was an evidentiary hearing in the court contained that information, and I think it has been updated through our supplemental brief and also through some of the materials filed by the state in the case.

QUESTION: Is there any indication as to what percentage of the final decisions of the Commission in fact are taken into the federal court?

MR. MORGAN: No, Your Honor, I haven't heard that. The Attorney General stated today a figure which I haven't heard before, and --

QUESTION: I heard him state that.

MR. MORGAN: -- I don't believe that figure is in the record, and I haven't heard it from any other source. I do know that as far as the most recent performance of the Grievance Commission, in the supplemental brief that we filed, we indicated recent statistics that indicate in only one out of a hundred cases of prisoner complaints does the Grievance Commission grant relief, and that is relief granted after a hearing and after final review by the Secretary, and that is during the past four-month period.

Earlier -- and this is reflected in the record of the case, and is on page 80 of our brief -- the Attorney General made reference to the allegation that the Grievance Commission informally resolves many of the complaints that come before it and therefore there is no need for a hearing. However, in discovery in this case, we asked the Executive Director about specific cases over, I believe, a 90-day period, which he described as a typical period of time for the commission, and during that period of time there were 45 complaints administratively dismissed, and only 4 of those were complaints that were informally resolved to the satisfaction of the inmate. So we would suggest that of that 55 or 65 percent of the cases

which are administratively dismissed, only a very small percentage of those, perhaps 10 percent or less, are actually resolved to the satisfaction of the prisoner -- that, and when added to the fact that only 1 percent of those which ultimately go to a hearing, indicates a very, very low number of cases.

QUESTION: Does the record show many --

QUESTION: Mr. Morgan, what do you mean by the term "satisfaction of the inmate"?

MR. MORGAN: Your Honor, that term was used by the Executive Director in his deposition, and I think again that indicates the difficulty in trying to impose an exhaustion requirement to 1983, because it is difficult to say what it means "to the satisfaction of the inmate." Does it mean that he will no longer pursue his claim into court? Does it mean to his satisfaction within the confines of Grievance Commission jurisdiction, which means that he will go on for damages, or what? It is really extremely difficult to say what the state means by the Grievance Commission having responded satisfactorily to an inmage.

QUESTION: Mr. Morgan, do you know if those statistics are very different from the percentage of cases that are resolved satisfactorily to the inmate that are filed in federal court?

MR. MORGAN: No, sir, I don't know what the statistics

are on that.

QUESTION: It is a fairly low percentage there, too, I believe.

MR. MORGAN: I imagine it is low, Your Honor, and I wasn't suggesting the figure to show that a lot of prisoner complaints are meritorious and the Grievance Commission is turning them down. I brought that figure to the attention of the Court to indicate that giving the agency an opportunity to correct its own action is not what the Grievance Commission is doing. It is only correcting its own action in one out of a hundred cases.

QUESTION: Well, it is finding that the original action need not be corrected, isn't that a fair statement, from its point of view?

MR. MORGAN: Perhaps, yes, sir.

If I may, I would like to direct just the last few minutes that I have in the case to the merits of Milton McCray's claims. The facts of these cases are set forth in the brief and basically the important facts are that McCray was placed into isolated confinement on two separate occasions. The conditions of isolated confinement in one case, the Burrell case, were particularly severe, more so than in the Smith case. In that situation, he was placed in a small cell, naked, without any bedding, without any mattress, the cell was cold, there was no toilet in the cell, he was denied all elements of

personal hygiene for a two-day period, was even denied toilet paper during that period of time. His toilet was a 6- to 8-inch in diameter hole in one corner of the cell, with an iron grating over it, which was encrusted with the excrement of prisoners who had been in that cell before him. He remained there for two days without ever receiving any kind of counseling, medical attention or professional help from a psychiatrist or a psychologist.

And the basis of our argument is that, although there was perhaps a reason to have placed McCray into an isolated confinement situation, because he needed to be isolated from the rest of the population to avoid creating a disturbance and for his own protection, our claim is that the conditions of isolated confinement and the length of isolated confinement for McCray were arbitrary under the circumstances and a violation of the Fourteenth Amendment.

The directive, the regulation of the Maryland Prison System provided a liberty interest that McCray had in not being thrown into isolated confinement for arbitrary reasons. In addition to that, Wolff v. McDonnell seems to establish that some minimal form of due process is available to a prisoner before going into solitary confinement. Under these circumstances, we say that McCray was not entitled to a Wolff v. McDonnell hearing, but what we do say is that he was entitled to a minimum of procedure in order to assure that the conditions

of confinement and the length of confinement were necessary. And we say that the rule of reasonableness in this case is Maryland Penitentiary's own administrative directive, that the Court of Appeals gave proper deference to Maryland prison officials by suggesting that that was the minimum constitutional standards.

In answer to the question posed earlier by Your Honor, we are not suggesting that the mere violation of a state regulation raises a constitutional claim in this case. We are saying that, first of all, the regulation serves two purposes in the case: First of all, it establishes a liberty interest on the part of McCray, an interest that cannot be deprived without some kind of minimal procedure to assure that it is not arbitrarily deprived; and, second, the regulation provides a standard for what is minimally reasonable under the circumstances. It is --

QUESTION: I suppose you could argue, too, that since the state has been willing to adopt it, it doesn't unreasonably frustrate the goals of the prison administration?

MR. MORGAN: That certainly is our position, Your Honor, and in the brief we cite a number of other state and federal prison regulations which are similar or even more restrictive of prison officials. So certainly what Maryland has imposed on its own prison officials is the bare minimum under these circumstances, and McCray didn't get them.

QUESTION: Mr. Morgan, just to make sure I understand

I take it you would be here even if you agreed that the prison procedure, the grievance procedure was as adequate as a grievance procedure could be, you would still say that there is no need to exhaust it?

MR. MORGAN: Yes, sir, we take a position that the adequacy of the remedy is not the controlling factor. The controlling factor is the policy argument which underlies section 1983.

QUESTION: And that even though a good and adequate grievance procedure might scream out or obviate the necessity of considering 75 percent of the cases, nevertheless the plaintiff should be able to directly file under 1983?

MR. MORGAN: We believe that that kind of an exhaustion requirement cannot at this point be grafted onto the Civil Rights Act without congressional amendment.

QUESTION: Mr. Morgan, you also rely on the Eighth Amendment in your constitutional claim, don't you?

MR. MORGAN: Yes, sir, we do.

QUESTION: You didn't mention that.

MR. MORGAN: And the only reason I didn't direct myself to it is because the red light was on. I would be glad to do so.

QUESTION: No, I just wanted to be sure.

MR. MORGAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Attorney General.

ORAL ARGUMENT OF FRANCIS B. BURCH, ESQ.,

ON BEHALF OF PETITIONERS -- REBUTTAL

MR. BURCH: May it please the Court, very quickly I would like to point out, Mr. Justice Rehnquist, that in our view there was no administrative remedy available in 1871 when the 1871 Act was passed, so obviously Congress could not have been addressing itself to administrative remedies.

Secondly, as I said, the 753 of the habeas corpus act, which was passed in 1867, as construed by the Supreme Court in Ex Parte Royal, held that it was discretionary with the court as to whether an exhaustion shall be required. At least, that is what should be held in this case, that it is discretionary with the lower court as to whether there is such an adequate administrative remedy that exhaustion should be required.

QUESTION: What do you think the basis for requiring exhaustion is, Mr. Attorney General?

MR. BURCH: The basis for requiring the exhaustion is to give the opportunity to the court -- first of all, it is federal comity, federalism and comity as between the national system and the state system --

QUESTION: Yes, but if he is claiming a denial of constitutional rights, are you suggesting that your administrative procedure would entertain a denial of constitutional rights?

MR. BURCH: I would say that the same situation would prevail with respect to the 1983 cases as prevailed with respect

to the habeas corpus cases. There certainly is far greater reason to not have exhaustion of remedies --

QUESTION: Wel, I know, but certainly your state courts are bound by the Federal Constitution and --

MR. BURCH: That is exactly right, and so are our administrative agencies.

QUESTION: I know, but you don't usually see administrative agencies entertaining claims of constitutional law.

MR. BURCH: Oh, yes, they do, Your Honor. We so advise them through the office of the Attorney General, that they must construe --

QUESTION: That they are adjudicating, that you can present claims of -- Eighth Amendment claims, for example?

MR. BURCH: We certainly could. They have a right to counsel. Counsel can raise any issue before the administrative commission. We in the office of the Attorney General represent the commission --

QUESTION: Well, an administrative agency, for example, couldn't declare one of the regulations that had been issued unconstitutional, could it?

MR. BURCH: They may hold that relief should be granted it would appear that the particular regulation is unconstitutional. They may hold that relief may be granted.

QUESTION: In the administrative --

MR. BURCH: But there is also a right of appeal to the

state courts, and in the last analysis after there has been the sifting out, there is the opportunity to go into the federal courts under 1983.

QUESTION: Mr. Attorney General, do you consider this an adequate remedy? Three members of the Commission found the grievance lacking in merit and ordered the case dismissed. This member was erroneously listed as concurring in the result. This was apparently due in part to the fact that there was, as usual, no discussion of the case among the members prior to the drafting of the order, and also to the general confusion, din and noise surrounding the proceedings, held in a basement room that had been scopped out during the construction of the building of the penitentiary in 1804.

MR. BURCH: Mr. Justice Marshall, I don't know what you are reading from.

QUESTION: I am reading from no less than James V. Bennett, who you all know.

MR. BURCH: I know Mr. Bennett.

QUESTION: But do you think that is accurate?

MR. BURCH: I have no knowledge of the particular --

QUESTION: Well, it is in the brief of the respondents, the appendix.

MR. BURCH: Is this with respect to the McCray case?

QUESTION: It is in there. It is in the --

MR. BURCH: It is in the McCray case?

QUESTION: Robert Burrell, et al. v. McCray, et al., No. 75-44.

MR. BURCH: Well, I can only say that it is certainly his opinion and I am not in a position to comment upon that, Your Honor. If that is Mr. Bennett's opinion, that is his opinion.

We say that at least the Court ought to give the District Court the opportunity to make a determination as to whether or not the remedy is adequate, whether it be in this case or whether it be in any other case or whether it be in any case throughout the United States, because some relief must be granted to the states and to the federal courts if we are going to see that there is an expeditious handling of all the state prisoner complaints throughout the United States, and we say that, unlike what Mr. McCray's attorney has said, we say that actually there are far more cases where there are favorable decisions in favor of the inmate by virtue of the use of the inmate grievance provisions than there are otherwise, because of the following of the 1983 cases.

I would ask the Court please to look at Lane v. Wilson in 307 U.S., which is not cited in our brief, and Covington v. Edwards in 264 Fed 2d, because I think they give the background historically of what the 1983 cases permitted with respect to administrative remedies.

Thank you.

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

[Whereupon, at 2:27 o'clock p.m., the above-entitled case was submitted.]

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