

In the

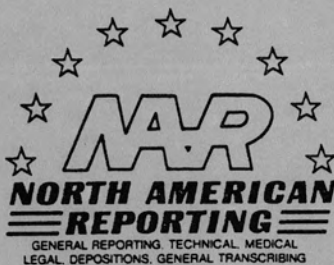
Supreme Court of the United States

ROBERT PARRATT AND FRANCIS)
LUGENBILL,)
)
) PETITIONERS,)
) No. 79-1734
)
) V.)
)
)
) BERT TAYLOR, JR.)

Washington, D. C.
March 2, 1981

Pages 1 thru 57

ORIGINAL



202/544-1144

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - :
3 ROBERT PARRATT AND FRANCIS :
LUGENBILL, :

4 Petitioners, :

5 No. 79-1734

6 v. :

7 BERT TAYLOR, JR. :
8 - - - - - :

9 Washington, D. C.

10 Monday, March 2, 1981

11 The above-entitled matter came on for oral ar-
12 gument before the Supreme Court of the United States
13 at 11:05 o'clock a.m.

14 APPEARANCES:

15 J. KIRK BROWN, ESQ., Assistant Attorney General, of
16 State of Nebraska, 2115 State Capitol Building,
Lincoln, Nebraska 68509; on behalf of the
17 Petitioners.

18 KEVIN COLLERAN, ESQ., 1900 First National Bank
19 Building, Lincoln, Nebraska 68508; on behalf of
20 the Respondent, appointed by this Court.

21
22
23 MILLERS FALLS
24 ERASE
25 COTTON CONTENT

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

J. KIRK BROWN, ESQ.,
on behalf of the Petitioners 3

KEVIN COLLERAN, ESQ.,
on behalf of the Respondent 23

J. KIRK BROWN, ESQ.,
on behalf of the Petitioners -- Rebuttal 50

- - -

MILLERS FALLS
ERASE 2
COTTON CONTENT

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We'll hear arguments
3 next in Parratt and Lugenbill v. Taylor.

4 Mr. Brown, I think you may proceed when you are
5 ready.

6 ORAL ARGUMENT OF J. KIRK BROWN, ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. BROWN: Mr. Chief Justice and may it please the
9 Court:

10 In my argument today I will address the petitioners,
11 Mr. Robert Parratt and Mr. Francis Lugenbill, as the defen-
12 dants. I will refer to Mr. Taylor as the plaintiff. These
13 are the positions they originally occupied in this action.

14 As a bit of factual background, in April, 1975, the
15 plaintiff was housed in a penal institution in the State of
16 Nebraska of which Mr. Parratt was the warden and Mr. Lugenbill
17 was the supervisor of the hobby counter, which is an internal
18 organism which provides hobby goods for inmates at that insti-
19 tution.

20 The plaintiff ordered hobby material while he was a
21 prisoner; money was deducted from his inmate account to pay
22 the vendor for those goods. Before the goods arrived the
23 plaintiff violated the disciplinary rule and was placed in
24 disciplinary segregation. When the hobby materials arrived
25 the plaintiff was still on disciplinary segregation and was

1 not entitled to have them at that point in time. The mater-
2 ials were signed into the institution by a Mr. Kosta and a
3 Mr. Gero, as a part of their clerical duties at the hobby
4 counter, and the material was held at the hobby counter for
5 the plaintiff.

6 In June, 1975 --

7 QUESTION: You say as a part of their clerical du-
8 ties. Doesn't your opposition claim that that was against
9 prison regulations?

10 MR. BROWN: They do. And I --

11 QUESTION: Do you agree?

12 MR. BROWN: Do I agree that it was against prison
13 regulations? No, I do not. I think if you look at the
14 answers to the interrogatories filed by defendant Parratt
15 and defendant Lugenbill, they indicate that those signatures
16 were affixed as part of their clerical duties. I admit that
17 this poses some problems at this point in time, particularly
18 in view of the fact that this case was resolved against us on
19 a motion for summary judgment. But, in our opinion, there
20 does appear to be some question with regard to that particu-
21 lar aspect of the case.

22 In June, 1975, the plaintiff was released from dis-
23 ciplinary segregation and requested that the hobby materials
24 be provided him. A search was made for them and they could
25 not be found. In October of 1975 the plaintiff filed his

1 first complaint with the U.S. District Court and the District
2 Court did not file the complaint and instructed him to return
3 and seek a remedy with the Department of Correctional Ser-
4 vices. In November of '75 the plaintiff filed a second com-
5 plaint. This complaint was filed but dismissed prior to issu-
6 ance of summons on the grounds that it was frivolous.

7 In March, 1976, a third complaint was filed and sum-
8 mons was issued. In April, 1977, counsel was appointed.
9 In June, 1978, the plaintiff filed his motion for summary
10 judgment, and in October of '78 a judgment was granted the
11 plaintiff against these defendants.

12 The plaintiff during this entire course of conduct
13 never filed a claim under the Nebraska Tort Claims Act for
14 return of the value of these materials, which, it is unques-
15 tioned, were lost at the institution.

16 I would like to address two questions which are
17 raised by our brief today in oral argument. First of all,
18 whether the existence of a state-created remedy for property
19 loss caused by the negligence of state employees provides ade-
20 quate legal process under the Fourteenth Amendment Due Process
21 Clause. Second, I would like to discuss whether simple negli-
22 gence in the context of a property loss case can create per-
23 sonal liability under Section 1983.

24 Mr. Justice Douglas in *Monroe v. Pape* set out three
25 basic purposes for the enactment of Section 1983. Number one

1 was to override unconstitutional state laws. Number two was
2 to provide a remedy where state laws were inadequate. Number
3 three was to provide a remedy where an adequate state law was
4 not in fact available to a plaintiff.

5 None of these goals are furthered by imposing lia-
6 bility on these defendants. There is no state law question
7 presented, and there is no showing on this record that an ade-
8 quate state remedy is not in fact available to a plaintiff
9 under these circumstances.

10 QUESTION: How would your argument change if the
11 inmate said, you've lost my property, and the answer is, yes,
12 we have. We did it negligently, but we lost it. And he
13 says, well, aren't you going to either replace it or pay me
14 for it? And they say, no, absolutely not. Do I have any
15 remedy? Not that we know of.

16 MR. BROWN: If that were the case, then I think
17 what you've got is a problem of denying the inmate, if in
18 fact that was within the power of the people, denying him
19 the access to his remedy.

20 QUESTION: Yes, it's no longer just a piece of
21 negligence, is it?

22 MR. BROWN: No. I think you have to characterize
23 the case entirely different. One way, it would be similar to,
24 at that point, infringing on that inmate's right to access
25 to the courts.

1 QUESTION: Well, suppose Texas law just hasn't got
2 any, there isn't any -- or Nebraska law, there just isn't any
3 remedy, internal remedy under the state law. The prison offi-
4 cials are perfectly correct. We just -- there just isn't any
5 remedy as far as we know of. And we're not going to pay you,
6 and we're not going to replace the property.

7 QUESTION: But that's no longer negligence. That's
8 a willful deprivation of his property, isn't it?

9 QUESTION: Exactly. They either are going to give
10 him a remedy or it's going to be that, isn't it?

11 QUESTION: Yes.

12 MR. BROWN: Well, but I think the thing that you
13 would -- I guess I would urge that type of situation be eval-
14 uated in the context not so much of imposing personal lia-
15 bility on these persons. If you have a person administering
16 an institution and, not by his personal participation, but
17 certainly property is lost on occasion in these institutions.
18 I don't know that you have a situation where the inmate comes
19 to him and says, I want to be paid, you lost my property.
20 And the warden says, in this case, yes, I know we lost your
21 property. I know the institution lost your property. I per-
22 sonally will not pay you. And the institution does not have
23 the authority to pay you.

24 It seems to me at that point you have a substantial
25 grounds for some interpretation in a declaratory or

1 injunctive sense as to whether or not the inmate has been
2 denied by the absence of a state remedy due process with
3 respect to that.

4 QUESTION: At least you wouldn't be making the same
5 argument here if that had happened. You wouldn't be making
6 -- what would you think about a 1983 action on those very
7 facts which you just -- ?

8 MR. BROWN: On those facts I would move directly to
9 my second argument regarding the basis of the negligence.
10 But it does seem --

11 QUESTION: But why? It isn't negligence any longer.
12 They just say, we're not going to pay you, We've lost your
13 property but we're not going to replace it or we aren't going
14 to pay you. As far as we know you haven't got any remedy.

15 QUESTION: Even though we concede that we wrongfully
16 deprived you of it. That is, deprived you of it through our
17 negligence.

18 MR. BROWN: I guess I've lost the trail here some-
19 how.

20 QUESTION: I'm just suggesting it is no longer just
21 a negligence question.

22 MR. BROWN: No, I think that's correct. I think
23 you have to --

24 QUESTION: Then it wouldn't do you any good to move
25 on to your second argument.

1 MR. BROWN: Well, if you've got the problem of what
2 is protected -- and I think you have to look at this in the
3 context, it seems to me, of personal liability, and just what
4 exactly the authority of these defendants is with respect to
5 repayment of these types of losses. Our position basically
6 is that the Constitution, the Fourteenth Amendment, does not
7 prohibit property deprivations. It only requires that a legal
8 process be available when deprivations occurred.

9 It is the process and not the property which is con-
10 stitutionally protected and constitutionally significant.

11 QUESTION: Mr. Brown, I'm not clear on your posi-
12 tion with respect to whether or not there is a process in
13 Nebraska.

14 MR. BROWN: Our position is --

15 QUESTION: First you imply that they failed to make
16 a claim under the Nebraska Claims Act and then you said the
17 burden is on them to demonstrate the absence of the Claims
18 Act, I guess. Well, what is your position on this, whether
19 or not there is a state remedy?

20 MR. BROWN: Our position is that a state remedy
21 exists and that if the plaintiff is to make out a case that he
22 has been denied property without due process of law, he not
23 only needs to show that he has lost his property but that by
24 some mechanism he has been denied due process of law, that
25 that loss has occurred to him without some type of adequate

1 process, whatever process might be found to be due him under
2 those circumstances.

3 QUESTION: Well, is it -- as a matter of fact, I
4 guess, you should be the expert on what Nebraska law is, here.
5 Is there a state procedure by which he could recover the mone-
6 tary equivalent of the value of his hobby?

7 MR. BROWN: The Nebraska State Tort Claims Act
8 regularly considers and regularly pays, where deemed appro-
9 priate, claims for property lost, property damage, this type
10 of thing, of the inmates of our state institutions.

11 QUESTION: I see.

12 QUESTION: And the inmate has to bring an action in
13 Court?

14 MR. BROWN: The inmate initially files a claim
15 with the State Tort Claims Board. That claim is administra-
16 tively --

17 QUESTION: That's your administrative agency.

18 MR. BROWN: -- is administratively reviewed. The
19 claim at that point is either determined, the department
20 against whom it occurred, and then, if the inmate is not satis-
21 fied with the result of that, he may appeal that directly to
22 our district court.

23 QUESTION: And that is -- but that is an appeal
24 rather than a trial, de novo?

25 MR. BROWN: Well, the trial would go de novo.

1 There is no record created in front of the Board. This is
2 simply an --

3 QUESTION: So it's not subject to review --

4 MR. BROWN: -- an administrative consideration of
5 whether the --

6 QUESTION: First? And then, there's an administra-
7 tive consideration first. And then if the inmate loses he
8 goes to court as a plaintiff?

9 MR. BROWN: That's correct.

10 QUESTION: And it's not a reviewing court?

11 MR. BROWN: No.

12 QUESTION: It's a trial court.

13 QUESTION: Jury trial?

14 MR. BROWN: The administrative review is simply --

15 QUESTION: A necessary provision preceding --

16 MR. BROWN: -- a jurisdictional step to get to the
17 district court.

18 QUESTION: What does he have to prove in adminis-
19 trative -- ?

20 MR. BROWN: At the administrative level I think
21 simply he would indicate the circumstances under which
22 his property was lost and the Department of Correctional Ser-
23 vices would have the option in this case of coming forward
24 and providing their side of the story. Quite frankly, in this
25 case, I don't see that the Department would have ever taken

1 the position, and very often they do not, that there was no
2 reason not to compensate this man for his loss. The diffi-
3 culty arises to a certain extent in that our Claims Board
4 is the only board funded in the State of Nebraska to pay this
5 type of claim. The Department of Correctional Services is
6 not funded. These are considered unappropriated expenses
7 and therefore the mechanism of the Claims Board is involved.

8 QUESTION: And Mr. Brown, if he loses and has to
9 go to district court, number one, does he get a jury trial?

10 MR. BROWN: I don't believe he does; no.

11 QUESTION: And what does he have to prove in dis-
12 trict court to recover?

13 MR. BROWN: In district court he would have to
14 prove that there was negligence on the part of the State of
15 Nebraska, or one of the employees of the State of Nebraska.
16 Simple negligence would suffice at that stage of the pro-
17 ceedings.

18 QUESTION: I suppose *res ipsa loquitur* would not
19 be far away, would it? I mean, the very fact it was lost, it
20 was sent to him, and lost?

21 MR. BROWN: Right. Under these facts I don't anti-
22 cipate that there would ever have been a dispute on that.
23 Our dispute is with regard to the proper forum to seek the
24 redress and not with regard to Mr. Taylor's entitlement to
25 reimbursement.

1 QUESTION: And would negligence be an issue in the
2 administrative proceeding as well?

3 MR. BROWN: Actually, their authority there is even
4 broader than that. There wouldn't even have to be --

5 QUESTION: They could give him the money without --

6 MR. BROWN: If they felt that there was some in-
7 equity involved, even less than negligence, they certainly
8 would have the authority to reimburse him at that point in
9 time.

10 QUESTION: What constitutional deprivation is
11 alleged in this case?

12 MR. BROWN: It was claimed that he was denied his
13 property without due process of law.

14 QUESTION: Contrary to the obligation of the State
15 not to take his property without compensating him, is that it?

16 MR. BROWN: I would answer --

17 QUESTION: I mean, is that the way you understand
18 it?

19 MR. BROWN: That's my understanding of it; yes.

20 QUESTION: But there was in effect an eminent do-
21 main case rather than a denial of due process?

22 QUESTION: They are different.

23 MR. BROWN: Well, I guess in my evaluation of this,
24 we aren't talking about an eminent domain case, because that
25 is where the element of intent comes in. And under these

1 circumstances, where there is no intentional taking, there is
2 certainly no opportunity to provide this man a pre-loss pro-
3 cess, whatever would be determined to be appropriate in that
4 taking, as in an eminent domain case where you could go in
5 and establish the value before the property is taken. That
6 opportunity simply isn't presented unless you have at least,
7 I would guess, at least a reckless or a wanton and willful --
8 you can argue in that span whether or not there is some
9 intellectual functioning --

10 QUESTION: But your answer to his claim consistently
11 has been and it still is here that there is no denial of due
12 process as long as the State has a suitable procedure to
13 compensate him.

14 MR. BROWN: That's correct.

15 QUESTION: So you're really saying that as long as
16 we compensate him or replace it, there's been no denial
17 of due process.

18 MR. BROWN: That's our position; yes.

19 QUESTION: And that would be true whether the claim
20 were a deprivation of property without due process of law, or
21 a taking of property without compensation.

22 MR. BROWN: That's correct.

23 QUESTION: But here he seeks also \$1,000 damages
24 and also \$1,000 punitive damages.

25 MR. BROWN: That's correct.

1 QUESTION: Which he couldn't get in the claims court.
2 court.

3 MR. BROWN: No, he could not get that in the claims
4 court. I guess our position would be, it seems to us under
5 a 1983 analysis, those damages run as a result of the consti-
6 tutional violation, and we are saying he never reached that
7 threshold.

8 QUESTION: Do you deny that somebody deprived some-
9 body of \$23 and you would fine him \$2,000 for it? It's no
10 problem?

11 MR. BROWN: That is, from a practical standpoint
12 that's one of our serious concerns. Even if as the 8th Cir-
13 cuit, what contact I had with them, their concern was, why
14 simply didn't we settle this case? Why didn't we get it out
15 of their hair?

16 Our position is, even if we took the position -- or
17 if we are finally informed that this type of thing does
18 establish a constitutional violation, we are still faced with
19 the substantial burden, if one of these cases is filed in the
20 district court, and we immediately go in and say, yes, we lost
21 the property. We now understand that that constitutes a viola-
22 tion of the Fourteenth Amendment, we're going to have 1988
23 hanging over our head, and every \$23 case is going to cost us
24 \$200 or \$300 or \$400 if we get there five minutes after the
25 filing hits the table. This, from a practical standpoint,

1 not from a legal standpoint, it poses a substantial problem
2 for the State. And that is one of the underlying problems
3 that we urge here. I don't think it's a basis for making
4 the decision, but it certainly is a practical problem that we
5 are faced with from the position of prison administration.

6 QUESTION: I take it, Mr. Brown, there are no provi-
7 sions for fees under the state claimant procedure? That's
8 the difference?

9 MR. BROWN: Basically it proceeds simply as any
10 other tort, state tort remedy.

11 QUESTION: Well, then, as a practical matter, unless
12 he can get free legal representation, he's not going to bring
13 a lawsuit. He's not even going to bring an administrative
14 proceeding, because the fee would be more than \$22.

15 QUESTION: I take it they proceed pro se normally
16 on a proceeding like that?

17 MR. BROWN: He certainly has the opportunity to
18 proceed pro se.

19 QUESTION: But may I ask about the adequate --
20 you're saying that's an adequate procedure, basically? Two or
21 three years ago we had a case involving the procedure that
22 must be followed in shutting off electricity, when the
23 billing procedure is bad, by a utility. And the Court held,
24 in effect, you had to advise the person of his rights in order
25 to have the process adequate. Is there any procedure for

1 advising the inmates as to the existence of this procedure?

2 MR. BROWN: At the present time there were.

3 I think if you look at the record, if you look at Exhibit B
4 on the plaintiff's complaint, it indicates that at least in
5 January, 1976, that he was aware of this state procedure.
6 Now, I do not know and the record does not indicate how he
7 came to be aware, but the second exhibit to his complaint is,
8 I need the numbers on my checks so I can file my state claim.
9 Apparently he was aware of it. Now, why at that point
10 having been provided that information he did not go forward
11 and file the claim, that's an answer I don't have. But --
12 and I do know from my personal contact with the system in the
13 last two years when I've worked with it, that they are regu-
14 larly informed, that if they have a problem like this, this
15 is the manner in which they can seek redress, is to proceed
16 through that type of mechanism.

17 QUESTION: General Brown, does Nebraska still have
18 the common law of torts practised in your courts?

19 MR. BROWN: I believe they do; yes.

20 QUESTION: Would a common law tort action and a
21 lien against the individuals alleged to have been responsible
22 for this loss, rather than against the State -- ?

23 MR. BROWN: I guess that would be another portion
24 of our argument. On these particular facts I have some ser-
25 ious questions as to whether liability could have been

1 established under a basic tort theory.

2 QUESTION: Suppose one of the prison guards, for
3 example, had an automobile accident resulting from his negli-
4 gence when he was taking a prisoner to and from a court for
5 hearing. Could the prisoner sue the guard in Nebraska under
6 the common law of torts doctrine?

7 MR. BROWN: I guess --

8 QUESTION: Why not?

9 MR. BROWN: I don't have the specific --

10 QUESTION: Could you bring a damage suit if you
11 were riding in my automobile and by gross negligence I caused
12 an accident? We can in Virginia. Can't you do that in
13 Nebraska?

14 MR. BROWN: I would assume so.

15 QUESTION: Well, what would the difference be, if a
16 prisoner is riding in a prison vehicle to the court and the
17 driver by gross negligence has an accident that results in
18 injury to the prisoner? Couldn't he bring a tort action under
19 state law?

20 MR. BROWN: I guess in the --

21 QUESTION: Against the driver? What's the differ-
22 ence between you and the prisoner, in those circumstances?

23 MR. BROWN: The difference, I suspect, basically,
24 between the driver, between a correctional officer operating
25 that vehicle, is more practical than legal, though I am not

1 certain whether I can answer your question or not, because I
2 have some concern as to whether or not the tort claim proce-
3 dure might forestall that type of action against someone func-
4 tioning as a state employee. I'm simply not certain on that.

5 QUESTION: You think as a matter of state law it's
6 possible that the injured party might be relegated to the
7 administrative proceeding?

8 MR. BROWN: I simply don't have an answer but I
9 certainly -- I guess from the State defense standpoint,
10 that would be an issue I would certainly want to look into
11 before I could give you a definite answer on that.

12 QUESTION: You say he has one remedy or the other,
13 though?

14 MR. BROWN: There may be an election also.
15 I simply --

16 QUESTION: But he has some kind of remedy, you will
17 concede that?

18 MR. BROWN: Certainly. Certainly. He's not fore-
19 stalled from any remedy whatsoever.

20 QUESTION: To compensate him for his personal
21 injuries?

22 MR. BROWN: Right. Moving on to the negligence
23 question, we think it must be viewed in the narrow context
24 of this case, and that is whether Section 1983 prohibits the
25 unintentional deprivation of property by persons acting under

1 color of state law, and whether such acts would create per-
2 sonal liability? We do not believe that the language of
3 Section 1983, cases of this Court interpreting Section 1983,
4 or the logic, purpose and public policy of that Act, support
5 liability in this instance.

6 There is no evidence that these defendants directly
7 caused or personally participated in the loss of this property.
8 *Rizzo v. Goodé* rejected liability without an affirmative parti-
9 cipation by the defendants even in an equitable action. And
10 I think we have to realize that the burden of proof, what
11 needs to be proved to obtain equitable or injunctive release,
12 or declaratory relief, under this Act, is not as stringent as
13 should be or what has been imposed to obtain personal lia-
14 bility.

15 QUESTION: Parratt was the superintendent of the
16 correctional facility?

17 MR. BROWN: Yes, chief executive officer; technically
18 the warden of that particular institution. Justice Blackmun
19 in *Baker v. McCollan* said that that reckless failure to
20 stop a pattern of clearly unconstitutional conduct by subor-
21 dinates could be enjoined under Section 1983, but in that
22 case there was no evidence that defendants knew that there
23 was a problem and that liability was then rejected. We think
24 we have a similar situation here. There's no indication on
25 this record that there was a general failure with the system,

1 and there's no question as to whether these men particularly
2 participated in it. So I think we've got a problem there.

3 QUESTION: Mr. Brown, if a prison guard stole an
4 article of personal property from an inmate, what remedy would
5 he have?

6 MR. BROWN: What remedy would the inmate have?

7 QUESTION: Yes. The guard had stolen an item of
8 personal property from the inmate's -- cell. Let's say he
9 took, if you allow transistor radios, that he took his radio
10 or took three books or whatever, stole them.

11 MR. BROWN: Well, I think, first of all, what you
12 have is an entirely different case than you have here. What
13 you're dealing with is an intentional act --

14 QUESTION: Right.

15 MR. BROWN: -- and it's not our position that
16 that type of act implicates the same problems we see with
17 negligence.

18 QUESTION: Well, does Nebraska have an action for
19 conversion or the equivalent of the old common law conversion?
20 Wouldn't that be a remedy against him?

21 MR. BROWN: I would think it would be, not to men-
22 tion -- this wouldn't aid -- would not necessarily aid the
23 inmate, but certainly we would, I think that would fall under
24 our criminal laws as well. But we're not talking about inten-
25 tional theft, we aren't talking even about a situation where --

1 what now?

2 QUESTION: You seem to be conceding that, in my brother
3 Powell's example, that would be a constitutional deprivation?

4 MR. BROWN: I'm basically saying that it presents a
5 much closer case because we're dealing with an intentional
6 act. I guess I'm not --

7 QUESTION: Well, why is it a closer case under your
8 first argument? I don't think it is. You'd still say, there
9 is this remedy in the claim procedure --

10 MR. BROWN: Certainly. That's correct under the
11 first argument, but I guess our position is that our second
12 argument could form an independent basis, even in the absence
13 -- certainly not all states have established the types of
14 procedures we're talking about here.

15 QUESTION: But your second argument seems to me to
16 blend two different thoughts. You on the one hand seem to be
17 arguing, well, they really don't have any proof of negligence.
18 And alternatively you seem to be arguing, even if there were
19 negligence, that 1983 would not provide a remedy. I'm not
20 quite sure whether you're arguing both; I think you are.

21 MR. BROWN: Well, okay, under these facts, I think
22 I'm placed in a rather awkward position. Our position,
23 basically, is that even if there was proof of negligence,
24 that it does not constitute a violation of Section 1983.
25 What we argued in our brief is that we don't even believe,

1 on this record, there is evidence of negligence. But I think
2 those are two distinct questions too. If the Court would
3 permit me --

4 QUESTION: Are you prepared to assume negligence
5 for your 1983 argument?

6 MR. BROWN: For those purposes, yes. I'd like, if
7 I could, to reserve the rest of my time.

8 MR. CHIEF JUSTICE BURGER: Mr. Colleran.

9 ORAL ARGUMENT OF KEVIN COLLERAN, ESQ.,

10 ON BEHALF OF THE RESPONDENTS

11 MR. COLLERAN: Mr. Chief Justice and may it please
12 the Court:

13 I am court-appointed counsel for the respondent in
14 this case, Bert Taylor, Jr. The respondent cannot concur with
15 the statement of facts as given this morning by the Attorney
16 General's office. I am somewhat shocked to find at this late
17 date that the Attorney General's office is now taking the
18 position that the conduct involved was not in violation of
19 the regulations of the institution. I think that they con-
20 cede as much in their brief.

21 The facts in this case, I think, can be --

22 QUESTION: What difference would it make for the
23 purposes of your case if you point that out?

24 MR. COLLERAN: The facts, Your Honor?

25 QUESTION: Yes.

1 MR. COLLERAN: If they weren't in violation -- ?

2 QUESTION: If it wasn't intentional?

3 MR. COLLERAN: Well, I think, first of all, there
4 is some evidence of intent. But aside from that, I think
5 that, I think the key is, Your Honor, is that they acted --
6 there was an established institutional procedure which they
7 violated, and I suspect that if there had been no institu-
8 tional procedures and if they had simply left Mr. Taylor's
9 property to the wind or whoever grabbed it when it came to
10 the institution, that there would be no difference.

11 But I'm just saying that I think the facts are
12 different than as related by the Attorney General's office
13 this morning, and they're considerably different.

14 I think the Attorney General's represented -- well,
15 as I stated, I think that they can be broken into three dif-
16 ferent categories, the first being the institutional procedure
17 that was in effect at all time pertinent hereto, and this was
18 set forth in the stipulated facts of the grievance supervisor
19 or officer prepared by the Attorney General's office, at his
20 suggestion, at a hearing on a motion for default judgment in
21 this particular case, filed on behalf of the respondent for
22 their failure to answer interrogatories.

23 And the grievance procedure was, as stipulated to,
24 that normal procedure when a package is received at the
25 institution addressed to an inmate, at the central mail room,

1 it is either that the package is delivered to the inmate's cell
2 where he signs the package receipt, or the inmate is notified
3 to pick the package up at the hobby center and to personally
4 receipt for it. And then it goes on to say that deviations
5 from this practice are only made in exceptional circumstances,
6 and there is no record of there being any exceptional circum-
7 stance in this case, which seems to me to be an entirely
8 different case from that as represented to the Court this
9 morning by the Attorney General's office.

10 QUESTION: It's an exceptional circumstance because
11 he was in isolation.

12 MR. COLLERAN: Well, there again, Your Honor, the
13 Attorney General's office has fabricated something out of the
14 record. There was nothing in the record to indicate that he
15 was in deadlock or anything else. He was transferred to the
16 adjustment center. The reason he was transferred there is
17 not in the record, and I know for a fact because I have repre-
18 sented Mr. Taylor since 1973, in this and another litigation,
19 that Mr. Taylor spent time in the adjustment center at his own
20 choosing from time to time because he felt the need to be in
21 the adjustment center for security reasons. There is nothing,
22 absolutely nothing in the record that would indicate that he
23 was there because of a disciplinary problem that --

24 QUESTION: It doesn't matter why, but the fact that
25 he was in the adjustment center would be an unusual

1 circumstance and probably explains why he wasn't available to
2 sign for the package.

3 MR. COLLERAN: I don't think so, Your Honor, not on
4 the facts of this case, because the facts of this case, the
5 supervisor's indicated that the fact that he was in the ad-
6 justment center was not an exceptional circumstance and did
7 not justify the conduct in this case.

8 QUESTION: In the present posture of the case, at
9 least, we can assume negligence --

10 MR. COLLERAN: All right.

11 QUESTION: On the part of the defendants.

12 MR. COLLERAN: I think there was.

13 QUESTION: At least for the purpose of the first
14 two issues, that have been the only issues argued here.

15 MR. COLLERAN: Okay. Well,

16 QUESTION: Can we assume negligence on a -- resolved
17 on a motion for summary judgment?

18 MR. COLLERAN: Yes, I think we can, Judge. I think
19 that -- Your Honor -- in this particular case, particularly,
20 I think that we have a situation where the property comes to the
21 institution after he has paid for it and ordered it in accor-
22 dance with institutional procedures. It is taken into cus-
23 tody when it comes to the mail room to be examined, and when
24 he goes to get the property later on it's not there. And the
25 reason that it's not there is because the institutional

1 procedures were violated, and the reason that the institu-
2 tional procedures were violated are set forth in the answers
3 to interrogatories filed on October 12, 1976, by the warden
4 and by the supervisor of the hobby center.

5 They set forth an institutional procedure that is
6 totally foreign to what actually should have been going on
7 out there.

8 QUESTION: Well, now we're arguing about whether
9 or not there was or was not negligence as --

10 MR. COLLERAN: Yes.

11 QUESTION: Quite properly, in response to my brother
12 Rehnquist's question. But it seemed to me that the Attorney
13 General in his first two arguments that he made orally here,
14 the only two that he made orally, both assume negligence.
15 Now, in his brief, there also is contested whether, the ques-
16 tion of whether or not there was or was not negligence.
17 I don't believe we took this case to decide that.

18 MR. COLLERAN: All right. Well, I didn't understand
19 the Attorney General's office to be that. I thought he was
20 saying in effect that they were in conformance with institu-
21 tional procedures and therefore were not negligent.

22 But assuming, if we can assume, at least, some
23 negligence -- and I think that the conduct on the behalf of
24 the petitioners goes far further than just simple negligence,
25 if we can categorize it. I think that to suggest in this

1 particular case that Mr. Taylor should have proceeded under
2 the State Tort Claims Act in Nebraska, frankly I find a little
3 bit shocking.

4 Mr. Taylor was represented by himself from the time
5 that he first filed this claim until April, mid-April of --

6 QUESTION: I thought you said you'd represented
7 him since 19-seventy-something?

8 MR. COLLERAN: On another matter, Your Honor. I
9 did not represent him on this particular case until I was
10 appointed in April of 1977.

11 QUESTION: He had retained you?

12 MR. COLLERAN: No, no. I was court-appointed in
13 that case as well.

14 QUESTION: But you said you kept talking to him.

15 MR. COLLERAN: He had a particular fondness --

16 QUESTION: About anytime he would go to this
17 separate place.

18 MR. COLLERAN: Well, I was going to get to that
19 right now, Your Honor.

20 QUESTION: What do you mean -- I don't see how you
21 can say absolutely that he didn't have counsel?

22 MR. COLLERAN: I'm saying that I represented
23 Mr. Taylor on an earlier action, at the institution. I was
24 not appointed and was totally unaware of this case until
25 April, 1977, two years after the taking of this property.

1 QUESTION: But he brought his intention to you,
2 didn't he?

3 MR. COLLERAN: No, he did not; not about this mat-
4 ter. He never did.

5 QUESTION: Well, then you want to withdraw your
6 statement that you represented him since 1970-something?

7 MR. COLLERAN: No, I do not want to withdraw my
8 -- I was simply --

9 QUESTION: I'm disappointed.

10 MR. COLLERAN: I was simply pointing out, Your
11 Honor, that I represented him since 1973 and I was aware of
12 the fact that he was sent to the adjustment center for rea-
13 sons other than disciplinary reasons in response to any
14 inquiry by Justice Stevens.

15 QUESTION: During the same time that this incident
16 occurred?

17 MR. COLLERAN: Yes, but I was totally unaware of
18 this, is what I'm saying. I was not advised of it until
19 April, 1977, when I was appointed by the Court to represent
20 him in this case. That's the first time I had knowledge that
21 he has lost his property out there. See, he had been trans-
22 ferred to the State of Arizona. He was serving time in other
23 institutions other than the State of Nebraska, so I did not
24 have day to day, week to week, or even month to month contact
25 with him. But what I'm saying is that at the time I was

1 appointed, there's a two-year statute of limitations under
2 the Nebraska Tort Claims Act.

3 QUESTION: Before you get to the time you were ap-
4 pointed, if I may, because we got diverted a little bit in
5 the response to my question about the Nebraska claims forum,
6 you said he was not represented, and it's kind of fanciful
7 to assume that he'd know about the procedure. Your opponent
8 has called our attention to Exhibit B, which is dated
9 January 8, 1976, in which he specifically makes reference to
10 information he needs for filing the small claims form.

11 MR. COLLERAN: Correct. That's an entirely differ-
12 ent procedure than the Nebraska Tort Claims Act. There is
13 also a small claims court in the State of Nebraska and he
14 tried to pursue the small claims court, which is the county
15 court and the municipal court for the City of Lincoln.
16 I tried to track down records, and it's not a part of this
17 record, but I tried to pursue this, and there is no record
18 either in the municipal court or the county court over there,
19 but that that is an entirely different proceeding than the
20 State Tort Claims Act which provides that he must first pro-
21 ceed under the administrative provisions of the Act. So,
22 and to suggest --

23 QUESTION: Why didn't he do that? Is it that he --
24 are you suggesting that the inmates don't know that there is
25 such a remedy?

1 MR. COLLERAN: I'm sorry, Your Honor? I didn't
2 hear.

3 QUESTION: Why did he not do that? Does the record
4 tell us anything about that?

5 MR. COLLERAN: Why he did not pursue the Tort
6 Claims Act?

7 QUESTION: Yes. It seems to me, if he can get \$32
8 back by filing an administrative proceeding, surely that's
9 better and more desirable than coming all the way up here?

10 MR. COLLERAN: Well,--

11 QUESTION: If not for him, at least for a lot of
12 other people.

13 MR. COLLERAN: Well, I think that there are several
14 deficiencies with the Nebraska Tort Claims Act, some of which
15 have been alluded to by this Court today. The first, of
16 course, is that there is no right to a trial by jury.

17 QUESTION: Well, but do you need a trial by jury in
18 this matter?

19 MR. COLLERAN: Well, but the Attorney General --

20 QUESTION: I'm talking about this specific case.
21 What is there to explain to us, if there in fact is the
22 remedy that your opponent has represented exists, how is it
23 that he wouldn't pursue it? Is it just the fact that there
24 are no fees available for counsel?

25 MR. COLLERAN: Oh, I think that's part of it.

1 I think, first of all, that he did try to pursue the grievance
2 procedures out at the institution and was denied those. And
3 I sort of assumed that he was -- I can't speak for him, but
4 I assume he was probably getting a little frustrated with the
5 system and he thought he could get relief in federal court.
6 But there is no provision for attorney's fees and there is no
7 provision for the appointment of counsel, which means in
8 every instance for Mr. Taylor and those similarly situated,
9 he's going to be going it alone against the considerable re-
10 sources of the State of Nebraska.

11 QUESTION: Well, Mr. Colleran, what about someone
12 who is not a prisoner, but who suffers a \$25 loss at the
13 hands of the state? Could he proceed pro se in the small
14 claims court in Lincoln against the state official
15 for a judgment of \$25?

16 MR. COLLERAN: Yes, I think he could, Your Honor.

17 QUESTION: He wouldn't necessarily have to sue the
18 State either, would he? Just sue the official?

19 MR. COLLERAN: Well, I think -- yes, I think he
20 has sued -- well, he could sue the officials in this particu-
21 lar case as well.

22 QUESTION: Well, do you think you could collect
23 from them? Did you sue them in their official capacity?

24 MR. COLLERAN: We sued them both individually and
25 in their official capacity.

1 QUESTION: So there isn't any -- suppose this case
2 had gone to trial and you get a judgment against the offi-
3 cials, can you collect it from them individually?

4 MR. COLLERAN: I think that -- you mean under the
5 small claims court?

6 QUESTION: Yes.

7 MR. COLLERAN: I assume that we could execute. In
8 this case, however, he was denied any relief under the small
9 claims court.

10 QUESTION: I understand that.

11 QUESTION: Was he in fact denied relief in the
12 small claims court?

13 MR. COLLERAN: Yes, according -- again, this is not
14 part of the record, but in talking with Mr. Taylor by long
15 distance phone, he told me he was summarily dismissed out.
16 He tried it twice, in fact, and was summarily --

17 QUESTION: It's all in the record?

18 MR. COLLERAN: No, it is not.

19 QUESTION: But it is in the record that the
20 attorney's fee was \$792.54.

21 MR. COLLERAN: That was stipulated to by the
22 Attorney General's office. And that, I would like to also
23 indicate, that we did not seek punitive damages in this case
24 of \$1,000. We abandoned that claim. The only thing we were
25 seeking was our compensatory damages in the amount of \$23.50.

1 QUESTION: It is in the complaint.

2 MR. COLLERAN: It is in the complaint, but we've
3 abandoned that.

4 QUESTION: But you didn't abandon \$792?

5 MR. COLLERAN: No, I did not, Your Honor. I think
6 that under the Civil Rights Act I'm entitled to an attorney's
7 fee. The prevailing party is entitled to attorneys' fees.

8 QUESTION: Which you couldn't get under the other
9 one.

10 MR. COLLERAN: Which we could not get, and I think
11 that that is a very important provision of this Act, because,
12 again, Mr. Taylor would have been forced to proceed pro se
13 under the State Tort Claims Act.

14 QUESTION: Well, he only got the \$25 back. That's
15 all he got was \$25, right?

16 MR. COLLERAN: If he'd been successful; yes, that's
17 correct.

18 QUESTION: Well, I mean, his judgment, that's all
19 he got? He got the same thing he would have gotten through
20 the administrative machinery. Didn't he?

21 MR. COLLERAN: No, I disagree with that.

22 QUESTION: Well, what else did he get?

23 MR. COLLERAN: I don't know that the administrative
24 procedure would have provided him anything at all. It is
25 administered by the Attorney General's office.

1 QUESTION: Well, it could have given it.

2 MR. COLLERAN: Well, theoretically, the remedy is
3 possible.

4 QUESTION: Well, haven't some people won when --
5 you didn't --

6 MR. COLLERAN: I'm sorry, Your Honor?

7 QUESTION: The only difference between what he could
8 have gotten under the administrative machinery and what he
9 did get here was zero. Is that correct?

10 MR. COLLERAN: Well, that's a considerable differ-
11 ence, I think, to my client.

12 QUESTION: Zero? He didn't get anything more.

13 MR. COLLERAN: I'm afraid I don't understand Your
14 Honor's question.

15 QUESTION: Well, the answer is that the only addi-
16 tional money obtained in this action as to -- contrasted
17 to what he could have gotten in the other action was counsel's
18 fees. That's my question.

19 MR. COLLERAN: Oh, I see. Well, yes, I think that's
20 probably correct. But, again, you know, this Court has held,
21 I think, since Monroe v. Pape that Section 1983 is supposedly
22 to be an addition to a state remedy that a state might have
23 provided. And I don't think that we can assume on this record
24 that the Administrative Procedures Act of the Tort Claims
25 Act would have been available, or a successful remedy to him.

1 It is a theoretical remedy, much the same as was discussed in
2 Monroe and in a line of cases since that time. And I think
3 to suggest, if we take Mr. Taylor and say, all right, for a
4 Fourteenth Amendment case you have to go under the State Tort
5 Claims Act, we're putting everybody under the State Tort
6 Claims Act, and it seems to me the end of Section 1983 for
7 Fourteenth Amendment cases.

8 QUESTION: In Fourteenth Amendment negligently
9 caused property damage cases. Because the converse of that
10 is, I suppose, is every automobile accident involving a state
11 employee is a 1983 claim where you're guaranteed attorney's
12 fees?

13 MR. COLLERAN: No, I don't think so, Your Honor,
14 not at all.

15 QUESTION: Why not?

16 MR. COLLERAN: I think that the thrust of Section
17 1983, or the color-of-state-law provision, is the misuse of
18 power. And simply because we have an automobile accident
19 involving a state employee does not mean that there has been
20 misuse of power.

21 QUESTION: Well, there's been -- but you stick
22 rather closely to the language of the Constitution. There's
23 been a deprivation of property without due process of law,
24 causing an injury to the plaintiff.

25 MR. COLLERAN: Well, that's correct, for the

1 Fourteenth Amendment. For Section 1983 it requires a misuse
2 of state power. And I'm saying that while he may have been
3 deprived of a constitutional right, it may be only a common
4 law tort, as opposed to giving him accessibility to Section
5 1983.

6 QUESTION: Is your claim based on negligence?

7 MR. COLLERAN: I think it is based upon the fact --

8 QUESTION: Yes, or no?

9 MR. COLLERAN: My claim is based -- well, on a yes
10 or no answer, I don't know that it's possible to --

11 QUESTION: Well, why not?

12 MR. COLLERAN: Pardon, Your Honor?

13 QUESTION: Why not? It's a very simple question.

14 MR. COLLERAN: Well, my claim is based upon a very
15 high degree of negligence, Your Honor.

16 QUESTION: Well, high degree -- it's negligence?

17 MR. COLLERAN: Yes, it is.

18 QUESTION: Then what's the difference between that
19 and a state truck that's racing down the street at 70 miles
20 an hour? That's a high degree of negligence, isn't it?

21 MR. COLLERAN: It is --

22 QUESTION: Doesn't that bring it within Justice
23 Stevens' question?

24 MR. COLLERAN: I think that first of all, with that
25 given set of facts -- let me, if I could, embellish the facts

1 a little bit. I think that --

2 QUESTION: Well, let me see -- I gather your posi-
3 tion is that 1983 requires both a violation of the Constitu-
4 tion and a violation under the color of state law.

5 MR. COLLERAN: That is correct.

6 QUESTION: And you say here there's a violation under
7 color of state law because of the participation of the warden
8 and the hobby manager --

9 MR. COLLERAN: That is correct.

10 QUESTION: Whereas in the automobile accident case
11 you can't prove a --

12 MR. COLLERAN: Misuse.

13 QUESTION: Under color of state law.

14 MR. COLLERAN: That's correct. There is no --
15 under these facts that you've just given me, there's no way
16 that I can say that there has been a misuse of state power.

17 QUESTION: Why not? Supposing that --

18 QUESTION: Why do you equate misuse of state power
19 with under color of state law? Under color of state law sim-
20 ply means that the person was employed by the state or acting
21 for purposes of the state, doesn't it?

22 MR. COLLERAN: Well, as I understand Section 1983,
23 I think, as I understand Section 1983, one of the purposes
24 for its creation was the misuse of state power, and it seems
25 to me the distinguishing feature here in this particular case

1 is, we have the warden, who is the chief administrative offi-
2 cial of the institution, and we have the individual who is
3 charged with the responsibility of protecting the respondent's
4 property taken into custody, and they are in effect violating
5 an affirmative duty placed upon them by the institution
6 itself, by ignoring --

7 QUESTION: Well, what's that got to do, really,
8 with whether or not there's a constitutional violation? And
9 there couldn't be a constitutional violation in this case
10 unless the state or its agencies were the defendants --

11 MR. COLLERAN: Yes.

12 QUESTION: Because the Constitution prohibits only
13 a state depriving somebody of property without due process of
14 law, or taking somebody's property without compensation. It
15 doesn't prohibit a private party from doing so.

16 MR. COLLERAN: I agree. Maybe I didn't understand
17 the thrust of Justice Rehnquist's question.

18 QUESTION: Where in this litigation was the talk of
19 the existence of a state tort claims act raised?

20 MR. COLLERAN: It was raised for the first time at
21 the application for rehearing in the 8th Circuit Court of
22 Appeals, and this, as I started to say, before was -- that was
23 a year ago, this time, which means that it was three years
24 after the statute of limitations had run on the respondent
25 in this claim.

1 QUESTION: This lawsuit really hasn't been tried,
2 has it? It went off in summary judgment?

3 MR. COLLERAN: That's correct, Your Honor.

4 QUESTION: Is the existence of the State Tort Claims
5 Act an affirmative defense on the part of the defendants?

6 MR. COLLERAN: Well, I don't know that it is under
7 the Nebraska law an affirmative defense, but the Attorney
8 General's office is charged with the administration of pro-
9 cessing the Tort Claims Act, and it seems to me that for the
10 year and some six months that they had notice of this claim,
11 Mr. Taylor claiming that he had been deprived of a constitu-
12 tional right, that they could have either raised that in their
13 pleadings or have told him in some other communication that
14 they felt that he was in the wrong court under the wrong law.

15 QUESTION: Well, it certainly was not raised in the
16 pleadings.

17 MR. COLLERAN: It certainly was not raised in the
18 pleadings; it was not raised at any time in the trial court.
19 It was not raised at any time in their brief. It the 8th
20 Circuit Court of Appeals it was raised for the first time in
21 their application for rehearing.

22 QUESTION: I'm merely asking whether we aren't spin-
23 ning our wheels with all this talk about the State Tort Claims
24 Act in the posture of the case as it is before us? I should
25 direct this to your opponent, not to you.

1 MR. COLLERAN: Well, yes; that's correct. I guess
2 it's our position, Justice Blackmun, that at this point in
3 time, it does seem to me that the State having raised it for
4 the first time in its application for rehearing, it's a little
5 tardy. The statute of limitations has run on Mr. Taylor now.
6 There's a two-year statute of limitations which expired, as
7 I indicated before, prior to the time that I was appointed
8 counsel in this case.

9 QUESTION: Suppose there had been ample notice to
10 him from the very outset about the tort claims procedure,
11 and he just ignored it?

12 MR. COLLERAN: I think that under the state of the
13 law in 1975, and as I understand the law even today, that
14 that would have -- it was his choice of forum. He has an
15 allegation of a federally protected or constitutional right
16 he thinks he's been deprived of.

17 QUESTION: Yes, but the argument on the other side
18 is not that exhaustion of administrative remedies is con-
19 trolling. It's a question of whether there can be a violation
20 of the Due Process Clause for depriving somebody of property
21 if you stand ready to pay him for it. And if there is that
22 procedure in place and if he knew about it, if they had given
23 him ample notice of it and he just ignored it?

24 MR. COLLERAN: Well, they didn't given him ample
25 notice, and to the extent that he was aware of the procedures,

1 the grievance procedures at the institution, he did pursue
2 those, and got nowhere.

3 QUESTION: Why isn't the same principle applicable
4 with respect to the small claims court proceeding as in your
5 responding to Justice White's question? He filed -- he said
6 he needed something to file in the small claims court? There
7 apparently was no obstacle to his filing there. You said he
8 wouldn't have had a lawyer there, but most small claims courts
9 operate with no lawyer on either side, as I understand it.

10 MR. COLLERAN: That is correct, and that is true in
11 Nebraska as well, Your Honor, and I'm just saying that in this
12 case, the only thing I know about his small claims application
13 is mentioned in the tag end of his complaint, and he said
14 that he tried it and was dismissed summarily out, twice. And
15 I attempted to run down the records of it, and they had no
16 trace of them, so I really don't know what went on in small
17 claims court.

18 QUESTION: You didn't file his complaint?

19 MR. COLLERAN: In the small claims court?

20 QUESTION: No, here?

21 MR. COLLERAN: No, I did not; it was a pro se com-
22 plaint filed some year and a half before.

23 QUESTION: He doesn't automatically get a lawyer in
24 the 1983 pro se action.

25 MR. COLLERAN: That's correct.

1 QUESTION: Mr. Colleran, may I put this hypothetical
2 to you? Let's assume that a state tax department through
3 negligence in the operation of its computer, for example,
4 failed to make a refund that was due a taxpayer, say, for two
5 or three years. Finally it came to the taxpayer's attention.
6 Would that case be analogous to this one, so it could be
7 a constitutional violation to justify a 1983 lawsuit?

8 MR. COLLORAN: If I understand your question, if
9 the computer malfunctions and the taxpayer is deprived of
10 some of his tax dollars?

11 QUESTION: He doesn't get his money for two or
12 three years, whatever the time. He doesn't get it when it is
13 due. Let's assume, to make the case perhaps easier for you,
14 that negligence is alleged. And if the people who operate the
15 computer had known exactly how to manage it the way it should
16 have been managed, that error would not have been made.

17 MR. COLLERAN: Well, I think that under those cir-
18 cumstances and perhaps with the situation with the racing state
19 state car, there would be, I think there would be the entitle-
20 ment of some qualified immunities, and if these qualified
21 immunities were --

22 QUESTION: But before you come to immunity, you
23 have to have liability. Would there have been liability
24 under 1983? A suit against the individual personally and
25 officially?

1 MR. COLLERAN: I guess I would have to say I don't
2 know. I think that if there had been -- had that been negli-
3 gence. -- I can't --

4 QUESTION: Would it be any easier for you if you
5 eliminated the computer and some clerk had simply made a
6 mathematical error, a stupid mathematical error, negligently,
7 that resulted in the delay in the payment of a just refund?

8 MR. COLLERAN: I think that if the individual
9 established the deprivation of a constitutional right and it
10 was --

11 QUESTION: Well, you're assuming the answer
12 when you say that.

13 MR. COLLERAN: That is correct. And I'm not cer-
14 tain what the deprivation would be in the particular hypo-
15 thetical that you have just set forth.

16 QUESTION: You think that's immediately and clearly
17 different from your case?

18 MR. COLLERAN: I think it is. I think that here
19 the individual ordered the property and in accordance with
20 institutional procedures relied upon those procedures and was
21 denied that property when it got to the institution.

22 QUESTION: If you're entitled to money, that's not
23 a deprivation of property if it's withheld from you?

24 MR. COLLERAN: Yes, I think it is. I think it would
25 be a deprivation, and assuming that there were some procedural

1 violations and there were allegations of negligence, then
2 that may well set forth a Section 1983 action.

3 QUESTION: Mr. Colleran, you say Mr. Parratt was
4 liable. Concededly, he had nothing to do with the misdelivery
5 or stealing, or whatever it was, of the packages, but because
6 he was warden and responsible for the administration of the
7 institution, I take it?

8 MR. COLLERAN: No, I think that there is more in-
9 volvement on the warden's part than that, Your Honor. I think
10 that, as I noted earlier, he was charged with the responsi-
11 bility of administering this procedure. And he was adminis-
12 tering a procedure that was worse than no procedure at all.
13 He testified under oath in his answers to interrogatories that
14 he felt the institutional procedure was that anyone who hap-
15 pened to be around, in effect, to receipt for an inmate's
16 property, could do so. And it seems to me this placed him
17 in a position where he could not supervise those under his
18 control, he could not correct the incorrect application of
19 the institutional procedures, and he could not supervise the
20 petitioner Lugenbill, who is charged directly with the control
21 and custody of the property.

22 QUESTION: What if his answer had been, to this
23 interrogatory, we have a perfectly satisfactory system in
24 our manual. I can't be there every day seeing what comes in
25 in the mail delivery. I rely on other people to do it.

1 Do you think you still could hold him liable for money
2 damages?

3 MR. COLLERAN: I think that if he made the institu-
4 tional procedures available to those charged with the direct
5 administration of this and saw to it that they got those
6 procedures, and perhaps instructed them that they should be
7 read and they should be thoroughly familiar with them, then
8 there would be a more tenuous connection with the warden in
9 in this case.

10 QUESTION: How about the Governor of Nebraska who
11 appoints the warden?

12 MR. COLLERAN: Well, I don't think that the Governor
13 -- I think that in this particular state the warden is under
14 a direct statutory duty to administer the institutional
15 procedures.

16 QUESTION: So, at least on the basis of respo-
17 deat superior, if you think, if you're correct in your
18 basic substantive claims, that he's the proper party
19 and defendant?

20 MR. COLLERAN: Well, I guess I think it's more than
21 respondeat superior.

22 QUESTION: Well, I know, but at least on that basis?

23 MR. COLLERAN: Yes. But I think, again --

24 QUESTION: I know; you think in this case, it is?

25 MR. COLLERAN: Yes; yes. I guess, in summing up,

1 I would say that -- and I recognize that this Court in Rizzo
2 has held that respondeat superior is not viable under Section
3 1983, but again, I think in this case there is more than that
4 involved.

5 I think that -- again, I think Mr. Taylor has been
6 deprived of a constitutional right.

7 QUESTION: What is the constitutional right?

8 MR. COLLERAN: The right to his property.

9 QUESTION: Is it just the right to his property,
10 period?

11 MR. COLLERAN: No, I think that he was deprived of
12 it without due process of law as well.

13 QUESTION: Then, you have to allege the absence of
14 due process. Justice Blackmun suggests there was an affirmative
15 defense. I wonder if, isn't perhaps the issue, who has the
16 burden of telling us whether or not there is an adequate
17 state remedy?

18 MR. COLLERAN: Well, I suspect that that burden
19 then properly belongs upon the State of Nebraska.

20 QUESTION: Well, why, if the constitutional viola-
21 tion is not just the deprivation of property, but the depriva-
22 tion of property without due process of law, perhaps one could
23 argue that you have the burden of demonstrating an absence of
24 available process?

25 MR. COLLERAN: Well, I think that, in a reading of

1 Section 1983 and the cases they have --

2 QUESTION: We're talking about the constitutional
3 violation now.

4 MR. COLLERAN: Correct. I'm sorry. I meant in
5 reading Monroe and the cases that have followed, I don't think
6 that there's been any intimation that the State Tort Claims
7 Act was a substitute for --

8 QUESTION: I thought your claim was that the very
9 taking of his property without charging him with anything,
10 without a hearing, without notice, was itself a deprivation
11 of his property without due process of law?

12 MR. COLLERAN: Absolutely. That is our position.

13 QUESTION: Well, where does the negligence come in?

14 QUESTION: The wrongful taking of his property.

15 MR. COLLERAN: It's a case of conversion, boiled
16 down to its simplest. They took property that belonged to
17 him into their custody --

18 QUESTION: Well, now, which is it? Is it conver-
19 sion? Is it taking without due process? What is it?

20 MR. COLLERAN: Well, I think, in this particular
21 case it's the taking without due process.

22 QUESTION: That's all you allege.

23 QUESTION: What if an inmate had taken it rather
24 than it disappearing the way it did?

25 MR. COLLERAN: Well, I think then, that if the

1 inmate -- you mean, had simply gone in his cell or something
2 and taken it?

3 QUESTION: Yes.

4 MR. COLLERAN: Well, I don't know, then, that
5 the -- I don't know that the state in that instance would be
6 responsible, or the warden, or the supervisor, just given
7 those set of --

8 QUESTION: Why not? Doesn't the State have an obli-
9 gation to watch the property of the inmates? Wouldn't that
10 be as valid a negligence theory as you've alleged here?

11 MR. COLLERAN: I don't think so, Your Honor. I
12 think there's an important difference in simply property dis-
13 appearing out of a cell and in a place where an individual
14 orders property through the United States mails in reliance
15 upon an institutional procedure, that he will be able to take
16 that property into custody when it gets there. And he orders
17 that property and pays for it and relies upon it, and then
18 finds when he gets out, the property has disappeared --
19 because institutional procedures haven't been followed. As
20 again, I stated earlier, this was worse than no procedure at all
21 because Mr. Taylor was left in the position where he thought
22 there was an institutional procedure to protect his property.
23 He finds out that not only is the institutional procedure not
24 being followed but there is one that has been placed into
25 effect, apparently by the warden, in the custody of the hobby

1 center, that is worse than no policy at all.

2 MR. CHIEF JUSTICE BURGER: We will resume there at
3 1 o'clock. You have about five minutes remaining to you,
4 counsel.

5 (Recess)

6 MR. CHIEF JUSTICE BURGER: Mr. Brown, you may
7 resume.

8 ORAL ARGUMENT OF J. KIRK BROWN, ESQ.,
9 ON BEHALF OF THE PETITIONERS -- REBUTTAL

10 MR. BROWN: Your Honor, first of all, I would like
11 to point out again, since it came up in Mr. Colleran's argument,
12 we do not look to the existence of the tort claims remedy as
13 an affirmative defense. Our view is that the existence of
14 that remedy or some similar remedy in fact provides the pro-
15 cess due under the Fourteenth Amendment. Therefore, if it is
16 absent in any forum -- it's against the plaintiff,
17 although he may not need to allege it specifically under
18 Gomez he certainly would have the burden of proving that as a
19 part of his prima facie case.

20 Second of all, with regard to the use or abuse of
21 state power, it seems to me on this record the only use of
22 state power here was the establishment of the bailment of
23 that property when it came into the institution. And the
24 loss of it, I don't think necessarily involves an abuse of
25 process in any respect.

1 QUESTION: Well, Didn't Monroe v. Pape say that
2 1983 is available, whether something is legitimate under
3 state law or illegitimate under state law?

4 MR. BROWN: I guess I don't understand.

5 QUESTION: Well, I thought that's what that case
6 held, and I thought that's what accounted for the multiplicity
7 of 1983 suits that followed in its wake. So long as the
8 defendant is a state officer, is what it comes down to, and
9 it's no defense to show that it was either legitimate or
10 illegitimate under state law.

11 MR. BROWN: No, what I'm saying is that the --

12 QUESTION: So there doesn't need to be an abuse of
13 state power.

14 MR. BROWN: I would think, for liability, there
15 does have to be some showing of an abuse of the power of the
16 state. Our position would be that that showing is necessary
17 to impose liability.

18 QUESTION: What you mean is abuse of a power amount-
19 ing to a violation of the Constitution, don't you?

20 MR. BROWN: Yes.

21 QUESTION: Your argument is that an abuse by way of
22 negligence does not violate the Constitution, is that it?

23 MR. BROWN: Yes. We're saying that this is a
24 threshold question, and simply that negligence, at least with
25 respect to the context of a property loss, negligent property

1 loss, simply does not cross the threshold of a constitutional
2 violation. Therefore it becomes in essence then a part of the
3 plaintiff's case.

4 QUESTION: What if the property had been worth,
5 instead of \$23.50, \$100,000?

6 MR. BROWN: I would make no distinction.

7 QUESTION: Is it your position the Tort Claims Act
8 is what takes care of that?

9 MR. BROWN: I think our position, as we briefed it
10 and it is today is that the Tort Claims Act provides that type
11 of remedy. I think this came out here also. Our small claims
12 remedy may. Due process being as flexible a concept as this
13 Court has pointed it out to be, I think any one of these
14 remedies might be evaluated as providing the process due.

15 QUESTION: In your brief you make a de minimis argu-
16 ment, and that argument wouldn't be available to you if the
17 property were \$100,000.

18 MR. BROWN: I made that argument because I know that
19 certain of the district court have employed that argument.
20 I felt it was obligatory on us to raise it. Quite frankly,
21 I don't have any personal belief in the strength of that
22 argument. With regard to any factual dispute, I would simply
23 point out that under Federal Rule of Civil Procedure 56, the
24 Court was obliged when granting summary judgment to review
25 all the pleadings on file and just ask the Court to review

1 them again. And finally, I would like to say that with
2 regard to the question of negligence and whether simple
3 negligence itself forms a cause of action under 1983, that
4 I think the interest shown by amicus on behalf of the
5 petitioners here, along with petitioners themselves, indicates
6 a strong desire for some guidance from this Court on that
7 question. And I would ask the Court if possible to provide
8 us some sense of where we stand on that question.

9 Finally, I think that if the penal systems of this
10 country are to improve, and I think we all desire that they
11 do, we'll need qualified, intelligent, and reasonable people
12 to run them. And I think we have to be careful not to make
13 penal administration a legal jungle that just has so much
14 potential for liability that actually no reasonable person
15 would want to work in that area.

16 QUESTION: Could the State of Nebraska in its
17 Constitution, from Federal Constitution, just abolish its
18 hobby program totally?

19 MR. BROWN: I would suspect this would be one of
20 the potentials. We would have to evaluate administratively
21 whether or not we want to carry on that type of activity, if
22 in fact our administrators are going to be held personally
23 liable for the loss of this type of material, when --

24 QUESTION: Are you indicating there are a lot of
25 losses? Certainly, you wouldn't reevaluate because of a

1 \$23 loss, would you?

2 MR. BROWN: We wouldn't want to reevaluate, but
3 certainly it would have to play a part in our thinking with
4 regard to any material we allow to be introduced into the
5 institution that is not constitutionally mandated. I'm sim-
6 ply saying that would have to be weighed in our consideration.

7 QUESTION: Would I be correct in assuming that
8 you've already done something to correct somebody from
9 stealing people's property?

10 MR. BROWN: Well, we thought we had a system at
11 that time, Your Honor. That system has basically been con-
12 tinued.

13 QUESTION: Well, my final question is, why didn't
14 you tell this man that he could get his remedy by the claims
15 act?

16 MR. BROWN: My understanding is that he was in-
17 formed. I was not personally involved at that point in time.

18 QUESTION: I see. Okay, if you don't know.

19 QUESTION: It's true there's \$23.50 involved here,
20 but is it reasonable to assume that a good many thousands of
21 dollars have been expended in professional time, printing
22 costs, legal proceedings?

23 MR. BROWN: That's very reasonable to assume.

24 QUESTION: Could I ask you if you think the Court
25 of Appeals was given an adequate opportunity to consider

1 your suggestion that there was a procedure available to
2 have this property paid for?

3 MR. BROWN: Mr. Colleran is right in the fact that
4 that issue was initially raised in our motion for rehearing,
5 but I think, as it relates to such a basic issue, that they
6 did have an opportunity to consider it. Certainly we don't
7 have any indication that they did.

8 QUESTION: But is there anything in the record to
9 indicate that this man was aware of the possibilities of this
10 procedure within the time limits that the procedure requires?

11 MR. BROWN: Well, I would point out to the Court,
12 first of all -- well, let me answer -- with the exception of
13 the Exhibit B, which I referred to earlier, which may or may
14 not relate to the State claims now -- or to the State tort
15 claims, whether it relates to our small claims, and I don't
16 know that that is distinguished, that's the only --

17 QUESTION: That was only when the complaint was
18 filed?

19 MR. BROWN: Right. My understanding is that's the
20 only thing in the record that would indicate his awareness
21 of the situation one way or the other. I would point out to
22 the Court, however, that under Section 81A,227(2) of the
23 Nebraska Act, it also provides for a waiver of the statute of
24 limitations under the Claims Act, if in fact the claimant
25 has initially gone to an improper forum. Now that is couched

1 in terms of a state forum, but I think, as was pointed out
2 earlier, that they might take a lenient view of that, that
3 situation, in the case of a proceeding to --

4 QUESTION: Does the record show what the conversa-
5 tion was when he found out his property was lost? Did he
6 ever ask people to replace it or to pay for it?

7 MR. BROWN: The record -- I will grant you, the
8 record in this case is very scanty. The record as I would
9 understand it indicates that he contacted a Mr. Rybolt, who
10 is one of the three parties whose sworn material is before
11 the Court, who was the grievance officer, to look into the
12 matter, and that searches were made to see if the material
13 could be found.

14 QUESTION: Otherwise, the State just shrugged its
15 shoulders? For prison people? They didn't purport to sug-
16 gest that they would pay for it or replace it?

17 MR. BROWN: There simply is no showing on this
18 record as to what happened, and I question the propriety of
19 really informing you beyond that because, first of all, I was
20 not personally involved in it.

21 QUESTION: Yes; all right. Thank you.

22 MR. BROWN: And I think we ought to stick to what
23 is on the record. But again, it seems to me, you have the
24 question of where the burden falls as to -- inform.

25 Apparently, from the record, Mr. Taylor was aware that some

1 remedy was available to him. Beyond that, quite frankly,
2 the record is not very elaborate. Thank you.

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

5 (Whereupon, at 1:09 o'clock p.m., the case in the
6 above-entitled matter was submitted.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MILLERS FALLS
ERASE
COTTON CONTENT

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1734

ROBERT PARRATT AND FRANCIS LUGENBILL

V.

BERT TAYLOR, JR.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will T. Lilo

1981 MAR 9 PM 3 57

RECEIVED
SUPREME COURT U.S.
MARSHAL'S OFFICE