No. 75-44

BURRELL, et al. v. McCRAY, et al.

Cert. to CA 4 (en banc) (Winter for the court; Field and Russell concurring and dissenting; Widener and Russell concurring and dissenting)

CONTENTS

Block 4-20-76

Attachments:

Comment, Exhaustion of State Administrative Remedies in Section 1983 Cases, 41 U. Chi. L. Rev. 537 (1974).

H.R. 12008 (introduced 2-19-76) providing, inter alia, exhaustion of adequate state administrative remedies for prisoner § 1983 suits.

INTRODUCTION

The most important issue in this case, and certainly the most clear-cut, is whether the prisoners in these various suits must exhaust their state administrative remedies before bring a suit in federal court under § 1983. As I pointed out in the pool memo, it is possible, albeit very difficult, to distinguish the prior cases and hold that adequate state administrative remedies must be exhausted. The impetus behind requiring exhaustion is, I think clear. The federal courts could use a reduction in their workload, and they should avoid where ever possible unnecessary interference with state prison systems--the states should be allowed to "clean their own house". Unfortunately, I think that a combination of two factors in this case prevent those objectives from being achieved. First, there is no res judicata or collateral estoppel effect to the state administrative findings of fact. Therefore, after the state determinations are made, the federal courts will still have the same burden if the prisoners chose to come into federal court. This Court cannot provide collateral estoppel effect. Congress can, and perhaps should do so (as it has done in the habeas situation). Second, the Maryland Commission cannot award damages. If damages could be awarded, cases might at very least be mooted out, and in any event, the courts could require exhaustion on the grounds that since it is possible that the state could provide everything that the prisoner seeks, the state should be given the first opportunity to do so. Since, however, the Commission

cannot award damages, every action involving a claim for damages will automatically come to federal court, which (without the ability to rely on the administrative findings of fact) will have to consider the case de novo (note that with the right to a jury trial in civil cases, and this Court's rulings that administrative findings are not admissible as evidence before a jury, the prisoner ~~may~~ might in any event be able to force a de novo review).

As the brief amicus curiae for the Center for Correctional Justice points out, the federal court caseload can be cut down, even without collateral estoppel effect, if the prisoners feel that they can and do get a "fair deal" in the state administrative process. The Maryland process, however, does not appear conducive to such a feeling. As the Center points out, a great number of the cases brought in Maryland under the grievance procedure are dismissed as frivolous without a statement of reasons. The time taken to process cases is unduly long (and not restricted by statute). The Commission's decision is only a "recommendation" which may be turned down without a statement of reasons. And most cases do not get hearings or are subject to ex parte communications on the part of the prison officials to which the prisoners cannot respond. All of these weaknesses contribute to the incentive of the inmate to go into federal court (either before or after administrative review). They also relate to the legal question of whether the administrative remedy here is "adequate" such as to require exhaustion.

I think that there unquestionably should be an exhaustion requirement where the complained-of action does not go into effect until after the administrative review. (See U. Chi. L. Rev. article, attached) That is the principle of the Administrative Procedure Act, and it also seems clearly supportable in the case law. I also think that a strong exhaustion argument can be made on comity grounds where the state is empowered to grant the prisoner all of the relief he seeks (and has an efficient procedure for so doing). Here, however, the state cannot grant the damages that are sought in each of these prisoner suits, and in addition, I think that there are some significant deficiencies in this particular state system (as the brief amicus for the Center points out, not all state systems suffer from these deficiencies).

I conclude that these prisoners were not required to exhaust administrative remedies. I think that the opinion can be written to prod Congress to do something about prisoners' § 1983 suits, and that it can also be written to suggest what sort of system might be appropriate for an exhaustion requirement. If the Court does decide to require exhaustion, I am not sure whether a principled distinction can be made between prisoners and all other § 1983 plaintiffs. Perhaps an argument can be made that there are special comity considerations in the running of prisons, but I think that I would be more comfortable if exhaustion were required across-the-board. Congress, of course, could distinguish prisoner suits from all other suits for the purposes of §1983

suits, but this Court--working with a statute that on its face makes no such distinction--is in quite a different position.

On the Eighth Amendment issue in the McCray cases, I think that the CA was right on the line between being correct and being incorrect, and I just am not sure where I would finally place it if I were forced to do so. If possible, it would be nice if the issue could be ducked. Of course, if exhaustion is required, then the issue need not be reached. If exhaustion is not required, the Eighth Amendment issue might still be vacated and remanded for reconsideration in light of the discussion in the death cases of the meaning of the Eighth Amendment.

Postscript: On February 19, 1976, a bill was introduced in Congress that would require exhaustion of state remedies in prisoner § 1983 suits. The bill does not specifically provide for collateral estoppel effects, but given that it explicitly provides for exhaustion, collateral estoppel might be implied. In any event, it indicates that Congress is working toward a solution. A xerox of the bill is attached [or a regular copy, if the library can get ahold of one in time].

DISCUSSION

As I noted in my pool memo, it can be argued that this Court has never held that a § 1983 plaintiff does not have to exhaust "adequate" state administrative remedies. Of course the legal world generally, and certainly the courts of appeals, thinks that there is no exhaustion requirement, so that imposing an exhaustion requirement would have the definite air of overruling prior cases. As I noted in my comments to the pool memo, you are one record twice in what seem to be clear approvals of a "no exhaustion" rule (in Ellis v. Dyson and in your special concurrence in Part II of Wilwording v. Swenson. Note that it was Part II of Wilwording that convinced Judge Widener that it was impossible to create an exhaustion requirement without overruling prior cases). If you think that the Court should not now create an exhaustion requirement--that the appropriate vehicle for that reform is Congress--then you can stop reading here. The rest of my memo will be based on the assumption that some sort of exhaustion requirement is to be adopted.

Assuming that § 1983 plaintiffs are to be required to exhaust "adequate" state administrative remedies, the question becomes whether the remedies involved here are "adequate". I would break that question down into two parts: first, whether as a matter of legal principles the remedy is adequate; and second, whether deeming that remedy adequate will further the Court's undoubted interest in reducing the

workload of the federal courts. In regard to the second consideration, I note that respondents argue that the burden of prisoners' § 1983 suits is not extremely great (most significant is the fact that a very high percentage of prisoner complaints involve matters such as good-time credits which now, under Prieser are treated as habeas and subject to exhaustion requirements (see statistics Petr. Br. at 42)). Resps also argue that there are numerous alternative means of reducing the burden of frivolous § 1983 suits other than exhaustion (see Br. for Resps at 44-61). Their arguments on alternatives have some merit, most especially with regard to the use of "writ forms" and magistrates. Assuming, however, that an exhaustion principle is nevertheless deemed desirable, I think that it is important to consider what types of exhaustion principles will actually reduce the federal courts' burden.

The most basic inadequacy is one common to all state systems, namely the inability of the federal courts to give collateral estoppel effect to the findings of fact of the administrative tribunal. Even if the case were tried to a state court, there might be difficulty giving collateral estoppel effect in the face of a Seventh Amendment claim to trial by jury unless the state court had provided a jury trial. I think that Congress could probably create collateral estoppel effects, either for a state court determination or even an administrative tribunal. The question of Seventh Amendment problems has never been decided (it is coming up with regard to OSHA next term), but I suspect that Congress can condition a statutory

cause of action however it likes [note that the problem never arose with regard to habeas because habeas is not "an action at common law" and so is not covered by the Seventh Amendment]. The power to give collateral estoppel effects to state findings in § 1983 suits, however, rests with Congress. I simply cannot see any way that this Court can sua sponte create such a rule for § 1983. As a result of the lack of collateral estoppel effects, every case that gets to federal court after exhaustion must essentially be relitigated. Therefore to the extent that the burden on the federal courts is to be reduced it must be reduced through ensuring that the prisoners actually obtain relief where proper. I note that the frivolous claims will still come to federal court (because the state system will not provide relief), but the administrative record, if properly made, can perhaps provide a useful tool for the federal judge or screening magistrate in identifying the frivolous cases. This use depends, of course, on the completeness of the administrative record and reasons--of which more below.

The first legal inadequacy of the Maryland system is the inability of the Commission to award damages. The

Maryland courts have even held that the Commission cannot award compensation for lost or stolen property (see Resps' Br. Appendix A). Not only does the inability to award damages make the remedy inadequate on the traditional analysis, but from a more practical viewpoint, exhaustion where damages are available can be justified on the grounds that the state will, if exhaustion is required, in fact be able to "clean its own house"--and incidentally moot out the federal claim because there is no authorization for double recovery (although punitive damages are not necessarily mooted out, most of those claims are so frivolous as to be dismissed on their face). Petitioners suggest that the inability of the Commission to award damages should not obviate the need to exhaust, because the Commission should still have the first opportunity to "clean its own house" by determining whether the actions complained of should be prohibited. Petrs argue that delaying the award of damages while an injunctive issue is litigated out will not unduly prejudice prisoners and will give the prison the opportunity to avoid federal intervention. This argument has two problems. First, it cannot be applied to pure damages suits on actions that are not alleged to be subject to recurrence (as is the case it at least one, and possibly both of McCray's suits). In the pure damages action, there simply is nothing for the Commission to do, nor does it have any particular expertise in determining whether a constitutional violation took place. Assuming that the Court said that "mixed injunctive/damages" suits were subject to exhaustion, the prisoners would simply

bring pure damages suits (since an award of damages is in essence a declaration that future conduct of the same sort will give rise to a damages award, the prisoner thus achieves the equivilant of an injunction at the same time). Second, even assuming that the federal court required exhaustion in "mixed" suits, the ultimate interference by federal courts in prison management would be no different. As noted above, a damages award is a declaration that similar future suits will succeed, and thus essentially injunctive in practice. If the federal court will ultimately have to determine whether there has been a constitutional violation in order to resolve the damages issue, the state has not avoided interference by determining first whether it thinks there was or was not a constitutional violation (of course, if the state awards the damages, the case becomes moot). Finally, the inability of the Commission to award damages means that any purely damage action is dismissed as "frivolous" because no relief can be granted. Since this is done without the development of a record or (generally) statement of reasons, the federal courts are not given a record to aid their screening of the case.

The second legal inadequacy in the Maryland scheme is the power of the Commission's Executive Director to dismiss complaints as "frivolous" without a statement of reasons. The major problem with this aspect of the system is that the Executive Director is not a "neutral", as are the regular members of the Commission. The Executive Director is appointed

by and serves "at the pleasure of" the Secretary of Public Safety. The dismissals of the Executive Director are the "final decision of the Secretary." Petrs argue that this flaw is cured by the fact that there is judicial review of these dismissals, but as resps point out, the only exhaustion requirement under consideration is of administrative remedies, and the only issue is whether those remedies are adequate. It might be possible to argue that the judicial component of the grievance system is merely part of the administrative remedy. The judicial review, however, is without any real record, and since the Executive Director is not required to give reasons, when the case comes to federal court after exhaustion (either including or not including state judicial review), there is little to alieviate the federal court's burden.

A third problem with the system is that the Secretary is permitted to (and testified that he normally does) request and receive ex parte communications from the prison officials before deciding on how to rule on the Commission's recommendation. The prisoner is neither notified of nor given an opportunity to rebut these communications.

A fourth problem is the time limits on decisions. The Commission acts without statutory time limits (the Sec'y must act on a recommendation within 15 days). Petrs argue that the Commission actually acts quite quickly (Br. for Petrs at 36-37), Frankly, I find the 13 weeks cited as the current speed not so speedy, and I note that that figure does

not include either the time for the Secretary's decision or the time for court review. If the Executive Director's dismissals are made "permissible" only by court review, then that time must be figured in. It is worth a question at oral argument to ask how long it takes to obtain court review.

Resps complain that the Commission's order is only a "recommendation". I do not think that there is anything inherently impermissible in having the original tribunal make merely a "recommendation", but this system has the additional difficulty of having the final say rest with an interested party--the Secretary of Public Safety, who may reject the recommendation without stating reasons. Petrs argue that the decision of the Secretary is really quite circumscribed, quoting from an opinion of the Maryland Attorney General (Br. for Petrs 35-36). It is well worth a question at oral argument as to the extent to which an opinion of the Md. Att'y General is binding on the Secretary or on the reviewing courts.

Respondents and Amicus Center also complain that too few complaints are given hearings. I do not find this in itself to indicate that there is any "inadequacy". It is very possible that very few merit hearings (although the experience in other systems is that a much higher percentage of complaints are found to have some merit and warrant some relief). What is bothersome in this system about the scarcity of hearings is 1) the influence of the non-neutral Executive Director's

dismissals, and the fact that neither the Executive Director nor the Commission is guided by standards or is required to give reasons. The latter requirements are clearly extremely important. Perhaps K.C. Davis has gotten to me ("Have you read the BOOK Mr. Block?"), but I consider a requirement of reasons and standards in administrative systems to be very important. Reasons and standards ensure that the complaint does indeed receive consideration, and that it is judged according to some reasoned principles. In addition, the provision of reasons would provide the federal courts who are to recieve the complaint after exhaustion with some outline of what is going on.

Respondents and the Center also complain about the absence of counsel and restrictions on the number of witnesses, etc. I do not find these aspects crucial from the legal standpoint of "adequacy". It would be preferable if the inmate were provided counsel (he is presently allowed counsel but not provided it--nor can the Commission appoint counsel even if it so desires), but I do not view it as critical. As to the ability of the Commission to structure the number of witnesses, that ability is entirely consistent with the special considerations of the prison environment outlined in Wolff v. McDonnell. In certain cases, a restriction may be too great, but the entire system does not become inadequate simply because such structuring is possible. The Center also raises the problem of ensuring that there will be no reprisals against inmate complainants or witnesses. The main briefs do not discuss this point, and it should be inquired into

at oral argument.

In sum, I have the following problems with creating an exhaustion requirement here:

1) There is little benefit to the federal courts because they cannot use principles of collateral estoppel. Congress is the only institution that can remedy that defect, and if this Court creates an exhaustion requirement without such a provision, perhaps Congress will feel that the pressure is off of them (note Congress is also able to distinguish between prisoners and others--something that this Court probably cannot do). If this particular remedy is found "inadequate" for the other reasons stated below, the opinion could be written so as to make clear to Congress that an amendment to the statute so as to give collateral estoppel effects is essential.

2) This particular system is inadequate because the Commission cannot award damages. This both makes it technically inadequate under traditional analysis and practically inadequate in that virtually every prisoner is going to ask damages and thus will end up in federal court. If damages were allowed by the state proceedure, at least some claims would be mooted out. As long as the federal courts will be adjudicating damages actions based on constitutional claims, the ultimate interference with prison administration will be the same as if they entertained injunctive suits, for no official will risk a second damages judgment.

3) In this system complaints can be dismissed as "frivolous" by a party (the Executive Director) who is not neutral and who need not give reasons.

4) The ultimate decision rests with the Secretary of Public Safety (who is not a neutral), who receives ex parte communications on behalf of the prison officials. Communications of which the prisoners are given no notice and to which they cannot respond.

5) The Secretary of Public Safety is not bound by any standards (except those in an Opinion of the Md. Att'y Gen.) and he need not give any reasons.

6) There are no fixed time limits for decisions by the Commission.

These are what I consider to be the basic inadequacies in this particular system. Aside from the collateral estoppel point, they can all be corrected--and have been corrected in many systems (see Brief Amicus of the Center). Not only do the deficiencies go to the theoretical legal inadequacy of the system, but they are also defects that will result in the federal courts being unable to significantly reduce their burden, both because the administrative record will be of little use, and because many inmates are likely to be unsatisfied with the administrative procedure.

Although I think that Amicus Center goes a bit far in its suggestions for, e.g., counsel, I think that basically its proposals are sound. Since the Court is essentially legislating an exhaustion requirement into the statute, there

is no reason why it should not be done right. If the state does not want to comply with the requirements, the only consequence is that federal prisoners will not be required to exhaust state administrative remedies. Since several states already meet the basic "neutrality, timeliness, hearings [where necessary], and reasons" standards, there is no reason to believe that other states will be unable to follow suit.

As noted briefly in the introduction, it seems settled law that where the state does not impose the objectionable condition until after administrative review, exhaustion is required. This is, of course, another "out" for the states in many situations.

Ultimately, the Court is faced with the problem that it is dealing with a statute that, on its face does not provide for exhaustion of either judicial or administrative remedies. Ultimately, I think that in light of the Court's prior prouncements, the responsibility for instituting an exhaustion requirement lies with Congress.

I close, however, with the observation that the Court might be able to essentially overturn all of the established law on § 1983 and hold that it creates a cause of action only where redress is unavailable in state courts or administrative agencies. This argument would proceed from the observation in Monroe v. Pape that the legislative objectives of the statute were threefold: 1) to override certain kinds of state

laws that were inconsistent with federal law; 2) to provide a federal remedy where state law was inadequate; and 3) to provide a federal remedy where the state remedy was available in theory but not in practice. It could be argued that whenever a state remedy (administrative or judicial) is available in practice, exhaustion is required. This would essentially mean exhaustion in all civil rights suits (state courts can enjoin discriminatory practices as well as federal courts); in all First Amendment "chill" questions (state courts are bound to declare a statute unconstitutional if they have the jurisdiction to do so and it is unconstitutional); and all other types of § 1983 suits. I am not sure to what extent this reading would reduce the load on the federal courts, losers would still come to federal courts. It would, however, give the states the first opportunity to "clean their own houses". On the other hand, it would also have the tendency to "exhaust" litigants in the literal sense--it would simply be extremely costly and time consuming ever to get into federal court. On the whole, I think that such an interpretation of § 1983 requires congressional action, but I mention it because I would not be surprised if it were advanced by Justice Rehnquist as the position that the Court should adopt. It is perhaps well to note that not even petrs or the amici states in support of petrs advance this extreme position which would, after all, overrule all settled law on non-exhaustion of state judicial remedies under § 1983.

On the Eighth Amendment issue in this case, I am simply uncertain of the correct outcome. The facts are fairly straightforward, and you can get as good a sense of what is going on as can I. The CA used all of the correct phrases in finding an Eighth Amendment violation, but those phrases were being stretched to a certain extent. I would have no trouble if the type of conditions to which McCray were subjected were used routinely as a means of dealing with a prisoner, and routinely no medical attention (the justification for the conditions) were provided. This sort of pattern and practice would seem appropriate for federal notice. Here, however, there were the special circumstances of weekend or holiday activity. The CA also appears to have created a rule of "reasonableness" for testing whether prison conditions are violative of the Eighth Amendment. I think that this probably goes a bit far. The rule is, rather, shocking or clearly unnecessary. I am not sure that the conduct here fits those descriptions. I must admit, however, that I have yet to get a firm grasp on how the standards of the Eighth Amendment are to be applied. In any event, I think that the opinion (which ever way it goes) should be written narrowly. If the CA was wrong, it was not too far wrong. If it was right, it was not right by much. Were I in conference, I might well reserve my vote until I saw how the opinion was written.

CONCLUSION

The problem of prisoners' § 1983 suits can be fully solved only by Congressional action providing collateral estoppel effects to state findings of fact. As noted in my introduction, Congress is moving in that direction. If this Court appears to "solve" the problem by requiring exhaustion, Congress may stop dead in its tracks.

Assuming that this Court does want to create an exhaustion requirement, the qualities of an "adequate" state remedy should be determined by reference both to traditional legal concepts of "adequacy" and to systems that will take care of cases so that they never arrive in federal court. For the reasons discussed in the memo, I think that this particular system is deficient in both respects. As the Center for Correctional Justice points out, however, not all state systems are deficient in these respects. If the Court is to create an exhaustion requirement, it should "do it right". It is well to remember that the states are not being enjoined to create such a system--the rule simply is that if they want exhaustion that is the type of system they should have. I find the basic criteria of the Center (with some modifications such as reducing the Center's emphasis on witnesses) very helpful in formulating a definition of an adequate system.

On the Eighth Amendment issue, I am up in the air. If the CA is correct, it is not correct by much; if it is incorrect, it is not too far wrong.

AMICI

Three briefs amicus curiae have been filed.

Several states have filed in support of petrs. Their brief adds nothing.

The ACLU has filed in support of resps. They engage in an interesting cost-benefit analysis of exhaustion in the various situations that may be presented (Br. at 10-16), but I do not find the analysis (although basically correct) very compelling.

The Center for Correctional Justice has filed a brief somewhat in support of resps but also suggesting the standards on which an administrative remedy should be deemed "adequate." I found their brief very interesting and very persuasive in several respects (referred to in the memo). I recommend reading their amicus brief.

QUESTIONS

1) How long does it take to get state court review of a dismissal by the Executive Director or of a final decision by the Secretary of Public Safety?

2) How binding are the Opinions of the Maryland Attorney General in regard to the standard of review of the Commission that is to be used by the Secretary?

3) Is there anything in this procedure that protects against reprisals against inmate complainants or witnesses?

4) Could the Maryland state courts provide money damages for the wrongs alleged here, and if so under what type of law?

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Supplemental Brief and Reply Brief.

Supplemental Brief: The supplemental brief makes two points: 1) the case should be dismissed as improvidently granted because only resp Stokes asked injunctive relief in the DC, and (for reasons explained in the br.) he has now abandoned his claim for injunctive relief--he now intends to press only for damages. Since the Commission cannot award damages, exhaustion is not required [and now no resp is asking anything but damages]. 2) the administrative relief is ineffective--citing statistics on length of time used to resolve complaints and the small number of complaints found meritorious.

Reply Brief

Attacks the statistics given in the main brief (with some corrections that are valid also for the supplemental brief concerning the number of claims found "meritorious"--resps do not take into account the cases resolved administratively without hearing). Otherwise adds nothing. The attack on the statistics concerning "meritious" claims does not make the remedy any more effective. As I stated in my bench memo, this sort of statistical evidence is really not relevant to the question of "adequate remedy". The reply br. also says that the high number of dismissals without a hearing is justified (in part because the commission will dismiss

where it does not have jurisdiction--but note it has no jurisdiction to award damages). The reply also says that a written reason is given every disposition after a hearing. It does not dispute resps' assertion that the dismissals without a hearing are not given written reasons.

Generally, I do not find that either the supplemental brief of the reply brief alter in any way my view of the case.

P.S. The supplemental brief is not as long as it looks. The bulk of its pages consists of two lower court opinions relating to the brief's claim that Stokes' equitable claims are now moot.

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