

Burrell v. McCray, No. 75-44

The attached opposition to the Motion to Strike Respondent Prisoners' Supplemental Brief adds nothing.

The Supplemental Brief itself might be used as an argument for a dig, insofar as it states that equitable remedies are no longer at issue. The inadequacy of state remedies is, of course, much clearer with regard to damages, which cannot be awarded by the Commission. Of course most of the cases, as granted, did not involve damages.

Personally, I think that the case should not be dug [is "dug" the past tense of the initialism "dig"?]. I think that the case is a good vehicle to prod Congress, a prodding that might be very effective given that bills are now pending to deal with the problem of prisoner suits. As I stated in my bench memo, I think that Congress can distinguish between prisoner suits and other § 1983 suits and can also give collateral estoppel effects to state determinations of fact, neither of which this Court can do. A bit of guidance and prodding therefore seems desirable. If necessary, the case could be written to deal only with non-exhaustion of damage claims--which might get a unanimous Court [Justice Powell may stick to his proposed overruling of Monroe v. Pape no matter what]. In any event, I think that the case should not be dug, but rather should be used to prod and to guide Congress.

WHB 5-6-76