PRELIMINARY MEMORANDUM

Summer List 15, Sheet 2

No. 75-44 CFX

BURRELL (guard)

v.

McCRAY (prisoner)

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

Federal/Civil

Timely

[Under same number: Smith v. McCray, McClellan v. Stokes, and Boslow v. Washington]

1. SUMMARY: Four separate §1983 suits brought by prisoners were dismissed in district court for failure to exhaust state administrative remedies. In two of the suits (the McCray suits) the DC ruled in the alternative that the prisoner was not entitled on the merits to recover. CA 4 heard the cases en banc, and ruled unanimously that exhaustion was not required. In the

two McCray suits, it also ruled (4 to 3) that McCray had proven a denial of his right to be free from cruel and unusual punishment (Majority: Haynsworth, Winter, Craven, Butzner. Dissenting: Russell, Field, Widener). The McCray cases were remanded for a determination whether recovery was barred by official immunity, and the other cases were remanded for trial.

2. FACTS: Four separate prisoner suits are involved here.

McCray brought two separate suits against guards based on two incidents in which he allegedly was placed naked in an isolation cell for a period of 48 hours. He claimed deprivation of liberty without due process and imposition of cruel and unusual punishment. In one suit, he sought only compensatory and punitive damages; in the other, the CA said his complaint could be read to ask injunctive relief as well as damages (see petn at 74a).

Stokes brought suit against prison officials, alleging that they had violated his 1st and 14th Amendment rights by denying him access to political newspapers. He sought declaratory and injunctive relief and both punitive and compensatory damages.

Washington brought suit against prison officials, alleging that he suffered injuries and deprivations of his constitutional rights as a result of the failure of a prison doctor to provide him with necessary medical care. He sought declaratory relief and compensatory and punitive damages.

The administrative remedy (described in detail petn at 6-9, 19a-26a) involves filing a complaint with the "Inmate Grievance Commission" (established by statute and consisting of two lawyers,

two persons with experience in the fields of prisons or public safety, and one member of the public-at-large). The Commission may utilize a number of procedures to dismiss a complaint without a hearing or it may hold a hearing and then dismiss the complaint (all of these decisions apparently are judicially reviewable). If the Commission, after a hearing, finds a complaint to have merit, it submits a recommendation to the Secretary of Public Safety and Correctional Services who may accept or reject the recommendation. The Secretary's order is judicially reviewable. There is no provision for the award of damages.

3. CONTENTIONS: Petrs attack CA 4's ruling that exhaustion is not required, and contend that CA 4 was incorrect in ruling that McCray had proven a denial of his right to be free from cruel and unusual punishment.

A. Exhaustion of Administrative Remedies.

All parties agree that this Court seems to have held that plaintiffs under 42 U.S.C. § 1983 need not exhaust state administrative remedies. See Monroe v. Pape, 365 U.S. 167 (1961); McNeese v. Board of Education, 373 U.S. 668 (1963); Damico v. California, 389 U.S. 416 (1967); Houghton v. Shafer, 392 U.S. 639 (1968); Wilwording v. Swenson, 404 U.S. 249 (1971); Carter v. Stanton, 405 U.S. 669 (1972); Metcalf v. Swank, 406 U.S. 914 (1972); Steffel v. Thompson, 415 U.S. 472 (1974); Preiser v. Rodriguez, 411 U.S. 475 (1973).

Petrs go through the process (endlessly duplicated in recent law review commentaries) of showing that it is possible (albeit difficult) to read these cases as not reaching the

question whether adequate state administrative remedies need be exhausted. The primary arguments made by petrs and Widener's dissent,*/ however, rest on Gibson v. Berryhill, 411 U.S. 564 (1973), Wolff v. McDonnell, 418 U.S. 539 (1974), and Huffman v. Pursue, 420 U.S. 592 (1975).

Gibson v. Berryhill is cited for the language:

> Whether [no exhaustion requirement] is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one if its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide . . . (411 U.S. at 574-75)

Petrs cite this as showing that an exhaustion requirement may be appropriate. Respondents answer that the important words in that quote are: "and where the individual charged is to be deprived of nothing until the completion of that proceeding . . ." and such is not the case here. It is difficult to find a cognizable injury where the administrative action has not yet taken place (except where the hearing itself is unconstitutional).

Wolff v. McDonnell is cited for the principle that the rights of prisoners may be restricted by the "needs and exigencies of the institutional environment." 418 U.S. at 555. Resps answer that applying Wolff to § 1983 suits is directly contrary to the statement in Wilwording v. Swenson, 404 U.S. at 249: "State prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs. Houghton v. Shafer, 392 U.S. 639 (1968)." Resp also notes that none of the prison interests recognized in Wolff even suggest that exhaustion be required in the damage actions here; and there is no strong relationship between those interests and the injunctive relief requested here.

*/ Widener finally concludes that, but for Part II of Wilwording v. Swenson, 404 U.S. 249 (1971), he would find an exhaustion requirement here.

Huffman v. Pursue is cited for the principle that exhaustion is required in some § 1983 suits. Respondents answer that Huffman was concerned with the Younger v. Harris problem, and quote footnote 21 in Huffman, which stated:

> By requiring exhaustion of state appellate remedies for the purposes of applying Younger, we in no way undermine Monroe v. Pape, 365 U.S. 167 (1961). There we held that one seeking redress under 42 U.S.C. § 1983 for a deprivation of federal rights need not first initiate state proceedings based on related state causes of action . . . . (420 U.S. at 609 n.21)

Petrs also note the statement in Monroe that the primary purposes of § 1983 were to override certain state laws, to provide a remedy where state law is inadequate, and to provide a federal remedy where a state remedy, although adequate in theory, is unavailable in practice (365 U.S. at 173-74). Respondents answer that the unique role of the Civil Rights Acts has long been recognized, and this role includes the fact that exhaustion will not be required when rights are sought to be protected through suit under § 1983.

Finally, petrs cite to the concern expressed in Procunier v. Martinez, 416 U.S. 396, 405 & n.9 (1974) (in the context of a review of general prison policy) about the problems of undue court interference in prison administration. Footnote 9 specifically mentions the possibility of development of internal grievance procedures or federal court abstention. Resps recognize these possibilities, and suggest that the Court can properly prod Congress to enact an exhaustion requirement. They argue, however, that only Congress can enact that exhaustion requirement, and it has not yet done so. They also argue that

the availability of § 1983 relief will not render useless the development of internal procedures, for if the internal procedure is quick and effective, inmates will resort to it.

Respondents stress that to impose an exhaustion requirement would be contrary to the scheme set forth in Preiser v. Rodriguez, 411 U.S. 475 (1973), under which challenges to the fact or length of confinement must be brought as habeas petitions subject to exhaustion requirements, but challenges to conditions of confinement may be brought under § 1983 "in federal court without any requirement of prior exhaustion of state remedies." 411 U.S. at 494. Preiser does not speak to the question whether challenges to conditions (rather than fact or length) of confinement that might be brought as habeas actions, must be brought as habeas actions subject to the exhaustion requirements. Wilwording v. Swenson, supra, however, seems to foreclose that argument.

Respondents also assert that their cases fall within the rule that exhaustion is never required when the remedy to be exhausted is inadequate. They state that the administrative remedy here is inadequate because there is no provision for the award of either compensatory or punitive damages. They note that Washington's claim is only for damages. It would be a waste of resources to litigate the constitutionality of the prison officials' actions in a federal damages suit, but deny injunctive relief pending an administrative determination of the constitutionality of that very same action.

B. THE EIGHTH AMENDMENT VIOLATION

As might be expected, this question is extremely fact-specific. The events leading up to McCray's special detention and the conditions in the cells in which he was detained are described in detail in the CA's opinion, petn at 84a-95a. Resps note that use of the mental observation unit and the practice of stripping inmates or housing them in bare cells has been discontinued, resp at 22.

Briefly, the DC's findings (accepted by the CA) and the CA's holdings based on those findings are as follows.

McCray v. Smith -- McCray (obviously a somewhat difficult prisoner) was making a disturbance. A guard (Smith) ordered him removed to isolated confinement "to prevent him causing a greater disturbance among the other inmates." While McCray was being removed, he began shouting insults and threatening to do bodily harm to himself. Smith took this as an indication of mental instability, and directed that McCray be placed in isolated confinement without any clothes or bedding, in order to prevent him from harming himself. McCray was given a mattress during the night by a guard, and he dug into the mattress in order to use it for a blanket (he was later disciplined for destroying the mattress). The cell had a toilet and a sink; McCray was given no materials with which to clean himself or the cell, and he was fed in plastic cups. McCray was placed in the cell at 11:30am Nov. 20. The next morning, Smith checked on him and found that he had smeared feces over himself and the cell wall. Smith had McCray bathed and returned to the isolation cell for another twenty-four hours, at the same time, Smith

notified the prison psychologist that he had placed McCray in isolation because of fear for his mental stability. After another twenty-four hours in isolation (48 hours total), McCray was, according to Smith, "acting alright" and was returned to his regular cell. The record is unclear whether McCray was ever seen by the psychologist. The prison regulations directed that when an inmate is placed in isolation because of questions about his mental health, the psychologist should be contacted immediately and the prisoner should be evaluated within twenty-four hours.

The CA ruled that, for a punishment to be a violation of the Eighth Amendment, it must be "shocking" and "arbitrary". A punishment is arbitrary if there is a less severe alternative that could have achieved the same purposes. See petn at 89a n.3. The CA found in the case against Smith that the conditions of confinement in the cell came "perilously close to a denial of Eighth Amendment rights" but declined to rest its holding on those grounds (saying the record was not sufficiently complete). It rested its finding of an Eighth Amendment violation on the holding that, although a prisoner whose mental condition is suspect may be isolated and subjected to protective measures:

> [I]f expert medical help is not forthcoming within a reasonable period of time, the deprivations, discomforts and suffering resulting from such confinement must be alleviated and less barbarous means of protection must be provided.

Since neither medical help nor alleviation of the conditions was forthcoming in this case, the CA found a violation of the Eighth Amendment and remanded for a determination whether recovery was barred by official immunity (a good faith belief on the part of Smith that he was acting legally).

McCray v. Burrell -- A fire occurred in McCray's cell (whether accidental or set was not clear). Burrell, Captain of the Guards took McCray to the dispensary where he was treated for burns. Burrell had doubts about McCray's mental stability and ordered him placed in a mental observation cell. The Nurse notified a physician that McCray had been placed in the mental observation cell, but he was not seen by a physician until three days later. McCray spent two days in the cell, Jan. 1 to Jan 3. There was no sink, and the only sanitary facility was an "oriental toilet", a hole in the floor, six to eight inches across, covered by a removable metal grate which was encrusted with the excrement of previous occupants. McCray was not permitted to bathe, shave or have or use articles of personal hygiene, including toilet paper. The CA held that the conditions in the cell were, in themselves, a violation of the Eighth Amendment, and that there was a second violation in Burrell's failure to either provide medical help or alleviate the conditions by use of a less drastic means of protection.*/

As with Smith, the CA remanded for a determination whether Burrell was protected by official immunity because of a good faith belief that what he was doing was constitutionally permissible. In an addendum to the opinion, the CA commented on Wood v. Strickland, 420 U.S. 308 (1975), and stated that its view of official immunity was consistent with, and supported by Wood.

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*/The CA recognized that Burrell was not responsible for the failure of the doctor to appear, but stated that when it became clear that the doctor was not coming, Burrell should have acted to alleviate the conditions.

Field dissented on the grounds that the DC's findings of no Eighth Amendment violation were not clearly erroneous, and that the guards had acted properly in view of the needs of the situation, and had certainly not treated McCray in a "base, inhuman and barbaric" manner. He emphasized the DC's finding that the principal reason for the Burrell isolation was protection of the other prisoners from possible fires and other major disruptions over the New Year's holiday when most of the prison staff was on leave. He noted that there was no evidence of pervasive abuses, or punishment for exercise of constitutional rights, or prolonged confinement in "strip cells" (distinguishing various Eighth Amendment cases). He also objected to what he viewed as the constitutionalization of the institutional directive that medical help be provided within twenty-four hours, again emphasizing that the principal reason for confinement was protection of other prisoners.

Petrs mirror Field's arguments exactly. Respondents answer that Eighth Amendment cases have found certain conditions to be cruel and unusual punishment. Resps stress that this is a fact-specific situation and that the mental observation cell is no longer in use, so that the case is not certworthy.

4. DISCUSSION

A. Discussion of Exhaustion

CA 4 aptly summarized the present state of the law:

> [W]e are constrained to conclude that the holding that exhaustion is required may be reached only by either legislation conditioning resort to 42 U.S.C. § 1983 upon the exhaustion of available administrative remedies, or by the Supreme Court's re-examination and modification

> of its controlling adjudications on the subject. Congress has not enacted such legislation. The Supreme Court has not yet begun a re-examination of its previous holdings and we have no basis on which to predict that it will, or, if so, with what result. (petn at 76a)

It is possible, although difficult, to distinguish this Court's prior decisions as not addressing the question of exhaustion of adequate state administrative remedies, see petn at 16-20; "Exhaustion of State Administrative Remedies in Section 1983 Cases," 41 U. Chi. L. Rev. 537, 542-47 (1974). The difficulties in such an approach are discussed at length in CA 4's opinion, see petn at 76a-83a. The difficulties involve, e.g., distinguishing Damico v. California, 389 U.S. 416 (1976), in which the Court stated that it was error for the DC to dismiss a § 1983 complaint "solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust adequate administrative remedies.'" (389 U.S. at 416-17).

If the Court decides to consider the problem of exhaustion, this case does present the critical problem of the pure damage claim where the administrative remedy does not provide for damages. If a pure damage claim need not be exhausted, a plaintiff can effectively determine, through the principles of collateral estoppel, a later administrative injunctive action based on the same wrong.

No element in the case presents the intermediate situation of Gibson v. Berryhill where the administrative action is pending and all adverse effects are suspended pending completion of administrative review. See also Administrative Procedure Act § 704 (requiring exhaustion of adequate remedies where the adverse action is suspended pending administrative review).

There is no conflict in the circuits. No circuit requires exhaustion of state administrative remedies in suits under § 1983.

The certworthiness of this issue depends on whether the Court is interested in imposing a requirement of exhaustion of state administrative remedies on suits brought under § 1983. This cert. memo has attempted to review briefly the arguments made in the petition and response. The academic debate on the subject has been long and often complex. Neither the papers filed to date nor this memo review the full range of arguments that might be made in full briefs on the subject.

B. Discussion of the Eighth Amendment Question

The CA's "treatment-or-alleviation" approach seems to be a novel combination of the concepts that 1) denial of necessary medical treatment is an Eighth Amendment violation, see Twomey v. Wright (7th Cir, 11/19/74), cert. denied, 43 U.S.L.W. 3528 (No. 74-979); and 2) certain conditions are a violation of the Eighth Amendment, see, e.g., Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

Nevertheless, neither the petition nor the CA dissent treats the majority opinion as anything other than a fact-specific determination. I also note that petrs may be found to be protected by official immunity.

There is a response. Ops in petn.

9/9/75 Block

See attached
WHB

The idea of exhaustion of prisoner complaints is enticing because of the resulting administrative convenience to the courts. The Court has said, however, that no exhaustion is required, and it is virtually impossible to make a principled distinction between this case and past cases. Congress enacted § 1983 and, although the Court has engaged in the task of interpretation in the past, I think that the state of the law is now such that Congress is the only proper vehicle for the imposition of an exhaustion requirement.

On the practical side, I simply do not see any way of imposing an exhaustion requirement on a federal, pure damages claim (there is a federal right to damages). As noted in the memo, any exhaustion requirement as to injunctions would then be avoided by the plaintiff seeking ~~first~~ first damages in federal court and then, after receiving a constitutional adjudication, seeking the injunction in the administrative proceeding.

As a general study on the matter, I recommend the Chicago Law Review note cited in the memo.

On point from your writings is the following quote from Ellis v. Dyson, 95 Sup. Ct. 1691, 1695 (May 19, 1975):

> Exhaustion of state judicial or administrative remedies in Steffel was ruled not to be necessary, for we have long held that an action under § 1983 is free of that requirement.

See also your special concurrance in Part II of Wilwording.

Finally, I strongly believe that the rights of prisoners to have equal access to the courts should not be restricted unless significant safety interests of the type discussed in

Wolff v. McDonnell are involved, and no such interests have been demonstrated here (nor is it easy to visualize the safety interests in having an administrative tribunal rather than a federal court adjudicate claims based on constitutional violations).

DENY

WHB 9/9/75