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MEMORANDUM

TO: Mr. Justice Powell DATE: October 15, 1975

FROM: Phil Jordan

No. 75-44 BURRELL v. McCRAY

Exhaustion of Administrative Remedies in Section 1983 Cases Brought by State Prisoners

This brief memo will set out the precedents on the question of exhaustion of administrative remedies by state prisoners, and summarize some of the arguments in favor of a change in the law established by those precedents.

I. The Precedents

One commentator has noted that this Court once implied that exhaustion of state administrative remedies was a prerequisite to a § 1983 suit in federal court. Comment, Exhaustion of State Administrative Remedies in § 1983 Cases, 41 U. Chi. L. Rev. 537, 541 (1974), citing Lane v. Wilson, 307 U.S. 268, 274 (1939). Be that as it may, in the last 15 years the Court has stated several times and more and more emphatically, that exhaustion is not required. And no distinction has been made between prisoners and other § 1983 plaintiffs.

The seminal case, as in so much of § 1983 doctrine, is Monroe v. Pape, 365 U.S. 161 (1961). The important passage is well known:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

365 U.S. at 183. Monroe did not involve, expressly, an issue of exhaustion of state remedies at all, and if it involved one by implication it was a question of exhaustion of judicial remedies. The Court nevertheless relied upon Monroe two years later in McNeese v. Board of Education, 373 U.S. 668 (1973), to hold that plaintiffs attacking racial segregation in public schools did not have to exhaust state administrative remedies.* Four years later, in Damico v. California, 389 U.S. 416 (1967), the Court cited Monroe and McNeese in holding again that exhaustion of state administrative remedies was not necessary.

There have been additional holdings to the same effect, and numerous statements of the nonexhaustion rule in dictum, but citation to those instances would be redundant. More important is what the Court has said, specifically, about prisoner suits and exhaustion. The first case on that score was Houghton v. Shafer, 392 U.S. 639 (1968) (per curiam)

*The Court in McNeese, in what can only be termed an alternative holding, stated grave doubts that the administrative remedy under state law was adequate, and held that "when federal rights are subject to such tenuous protection" exhaustion would not be required. 373 U.S. at 676.

in which the Court held both that a prisoner did not have to exhaust administrative remedies, and that the particular administrative remedy in that case was inadequate. Three years later, in Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam), the Court held that a habeas corpus application could have been treated as a § 1983 complaint, and that as such there was no exhaustion requirement. The Court uttered in Wilwording the oft-quoted statement that "state prisoners are not held to any stricter standard of exhaustion than other civil rights plaintiffs." 404 U.S. at 251. Finally, in Preiser v. Rodriguez, 411 U.S. 475 (1973), the Court's holding that certain prisoner complaints alleging deprivation of good time credits had to be brought in habeas corpus with its attendant exhaustion requirements could be taken, by implication, to reaffirm the previous holdings that exhaustion was not required under § 1983: it hardly would have seemed worth the candle in Preiser to argue over whether the complaints were properly habeas or § 1983, if exhaustion could have been required in either event. See 411 U.S. at 477.

From this very brief survey of the precedents, which has left out some of the later ones not involving prisoners, a couple of points can be made. First, there is indeed a substantial volume of precedent for the position that exhaustion of administrative remedies is not required in § 1983 suits. Second, all of the precedent traces back to Monroe's cryptic and probably unnecessary passage, and each

case in the string cites the previous ones without any analysis at all. Third, the only two cases dealing specifically with prisoners - Houghton and Wilwording - each had alternative holdings. In Houghton, the Court could have rested its decision on its finding that exhaustion of the administrative remedy provided there would have been a "futile act," 392 U.S. at 640. In Wilwording, the Court held, in addition to the nonexhaustion point regarding § 1983, that the prisoner had already exhausted all channels required of him by the habeas corpus statutes, under which his action also lay.

Judge Winter, writing for the Fourth Circuit in the instant case, Burrell v. McCray, thought himself bound by the weight of this precedent, even as he acknowledged that some if not most of it consisted of invocations of previous decisions that were equally unenlightening. Judge Winter did note that the several Fourth Circuit district courts whose decisions were then under review, as well as at least one district court in Connecticut, had stated that "no decision of the Supreme Court squarely holds that the complaint of a state prisoner, which, if well-founded, is capable of prompt and complete redress by an administrative official, can be brought directly into a federal district court under § 1983 without any attempt at exhaustion of administrative remedies." See Petn. at 80a, quoting from Kochie v. Norton, 343 F. Supp. 956, 960 (D. Conn. 1972). It is because of Judge Winter's concern about the rather noncategorical voice of the precedents,

and the strivings of the various district courts to work around that precedent, that I believe the Court should take this case and settle the issue once and for all. None of the previous decisions, especially neither of those dealing with prisoners, evidences a mature reflection on the policies by this Court. See Wilwording, supra, 404 U.S. at 252-53 (Burger, C.J., dissenting); Damico, supra, 389 U.S. at 418 (Harlan, J., dissenting).

The name of Judge Friendly should be invoked at this point, in order to show that some good appellate judges remain unconvinced that this Court has shut off the administrative exhaustion requirement. Judge Friendly wrote a famous opinion a few years back in which he canvassed this Court's opinions to that date and concluded:

> Despite the breadth of some of the language . . . we thus read those decisions as simply condemning a wooden application of the exhaustion doctrine in cases under the Civil Rights Act. Exhaustion of state administrative remedies is not required where the administrative remedy is inadequate, . . . or where it is certainly or probably futile. . . . A quite different situation would be presented, for example, when a complaint alleged that a subordinate state officer had violated the plaintiff's constitutional rights by acting because of bias or other inadmissible reasons, by distorting or ignoring the facts, or by failing to apply a constitutional state standard, and the state has provided for a speedy appeal to a higher administrative officer. . . . We shall need much clearer directions than the Court has yet given . . . before we hold that plaintiffs in such cases may turn their backs on state administrative remedies and rush into a federal forum, whether their actions fall under the Civil Rights Act or come under general federal question jurisdiction.

421 F.2d at 569. Since Eisen this Court has decided several additional per curiams seemingly reaffirming a no-exhaustion rule, including Wilwording. CA2 nevertheless has reaffirmed its exhaustion requirement even after those cases, in Blanton v. State University of New York, 489 F.2d 377 (1973) (Friendly, J.) See Comment, supra, at 545. And that court has indicated in dictum that it would be reluctant to give in to this Court without categorical directions to do so, because of "the benefits to be derived from a sensible application of the exhaustion doctrine." Plano v. Barker, 504 F.2d 595, 597 (1974) (Smith, J.). It should be emphasized that CA2's position applies to all state plaintiffs, and not just to prisoners.

II. Discussion of the Policies.

We have already discussed the difficulty, perhaps the impossibility, of finding some "theory" on which to hang an exhaustion-of-administrative-remedies requirement, given the straightforward and all-inclusive language of § 1983 itself. As I understood where we stood at the end of our short discussion, we agreed that the only principled ground on which to impose such a requirement would be considerations of comity. Thus, the "theory" would be akin to the Younger line of cases and, as a matter of fact, to the original reasoning behind the exhaustion requirement in habeas corpus. Because imposing an exhaustion requirement on such grounds would necessitate

lining up all of the policy reasons for keeping federal courts off the front lines in prisoner cases as opposed to other § 1983 cases, I will discuss only those reasons in the remainder of the memorandum. (If the case is granted, there will be time to do more. It is these possible distinctions between prisoners and other § 1983 plaintiffs that will convince the Conference to grant, anyway - if anything will.)

The first argument for requiring state prisoners to exhaust administrative remedies is that federal prisoners apparently have to do so. In Waddell v. Aldridge, 480 F.2d 1078 (3d Cir. 1973), a panel of Van Dusen, Aldisert, and Rosenn held (in a three-page per curiam) that prisoners at the federal penitentiary at Lewisburg, Pennsylvania, could not bring an essentially First Amendment free exercise clause complaint into federal court without first having pursued the administrative remedies provided for them by the Bureau of Prisons. That remedy consists of a so-called "Prisoner's Mail Box," which is the right of any federal prison to write the Bureau for redress of grievances occurring at the individual prison level. The court based its decision on policy considerations and noted that the Fifth Circuit had held similarly. See Light v. United States, 430 F.2d 932, 933 (5th Cir. 1970).

The only difference between federal prisoners and state prisoners is that federal prisoners cannot bring their actions under § 1983, while state prisoners can. The only way to justify that difference is to appeal, as proponents of the

"immediate entree to the federal courts" argument invariably do, to some assumed hostility or insensitivity on the part of state agencies, including prisons, toward constitutional rights. But that is at best only a hoary argument, and it ignores a strong argument that cuts exactly the opposite way: since federal prisons and federal courts are parts of the same system, there would be no inter-system "friction" created by a no-exhaustion rule, but there is the potential for such friction when federal courts open their doors to state prisoners who then bypass remedies provided by the state system itself. (I purposely refrained from using the term comity or anything like it, since that concept is normally associated with the relationship between federal and state courts. But the concept of federal-state friction conveys the same idea, of course).

A second argument for treating state prisoners differently from other state § 1983 plaintiffs is what I would term the "long range" argument. The premise of this argument is that allowing state prisoners to run to federal court and sue individual prison officials, instead of forcing them first to appeal for redress to higher authorities within the prison system itself, actually retards the purpose that supposedly is trying to be served. That purpose, in a "long range" sense, is improvement of state prison systems so that constitutional deprivations will occur less frequently. But does not permitting immediate suit for monetary damages simply deter good people from entering prison service? Does it not

create resentment on the part of those who do serve? Does it not bypass the hierachy of the prison system itself, and thus prevent them from having any incentive to make basic policy decisions that would improve the system as a whole? As Judge Aldisert puts it, "there appears to be little rational relationship between federal civil rights actions against underpaid prison guards, wardens, and deputy wardens, and the reluctance of state legislatures to spend the funds necessary to clean up the horrible conditions in some state prisons. The reverse is more likely true."

Requiring exhaustion of adequate administrative remedies would reverse these twin tendencies of the present no-exhaustion rule to isolate the policy-makers from the problem and to put the burden on the lowliest employees of the prison system. As the policy-makers became more informed of the recurring problems through the processing of those problems by the administrative body, and as they saw that remedying the problems could cut down on the number of cases going on to federal court, they should develop some incentive to clean up the practices and conditions causing the complaints. Friction between inmates and guards should be reduced with the removal of the threat of immediate suit from the guards' shoulders. In the "long range" view of things, the situation might be better for all concerned, including prisoners.

I would divide the remainder of the arguments in favor of exhaustion into those premised upon the need to help the

courts, and those premised upon special state interests in prisoner suits. As for the former, perhaps the major argument is that requiring prisoners to go through administrative agencies would produce a factual record that would enable a court better to deal with the case should it have to do so. Prisoners, of course, are notorious for shotgun complaints charging everything under the sun and none of it very well. Justice Rehnquist has even suggested that the courts reasonably could refuse to apply the liberal rule of construction to prisoner complaints, because of the tendency of prisoners to write wild ones for invalid reasons - for example, to get a hearing outside prison walls, or to earn "legal fees" from their prisoner "clients." Cruz v. Beto, 405 U.S. 319, 325-328 (1972) (Rehnquist, J., dissenting). The administrative process could help remedy this problem by focusing the prisoner's complaint and developing its factual background.

A second way in which exhaustion would help the courts is by bringing to bear the expertise of officials closer to the actual problems. It is no secret that judges have less familiarity with life inside prison walls than with life on the outside, where most disputes arise that wind up in courtrooms. It seems perfectly proper to distinguish suits arising inside prisons on that basis alone, and to require that prisoners take their various complaints to the experts first. Those persons may be able to devise ingenious remedies that would benefit the prisoner more than monetary damages

against a guard ever could. Furthermore, since most prisoner suits under § 1983 now get dismissed with no relief at all, an expert agency almost surely would be able to give some kind of relief - or at least a sympathetic ear - to many more prisoners than now get anything at all from the courts. As a result exhaustion again may benefit not only the courts, but prisoners themselves.

Finally, a look at the peculiar state interests involved in prisoner suits. Primary among them, to me, is the state's interest in the punishment and rehabilitation of those who have broken its laws. We fully recognize the state's interest in punishing them by keeping the federal authorities out of the prosecution process; why should the feds jump right into the rehabilitative process without even giving the state a chance? It would seem reasonable to recognize that state prison authorities, like everyone else, will make mistakes while doing their jobs (some of those mistakes will even cost prisoners constitutional rights), but that the authorities should also have the first chance to correct those mistakes.

The second major state interest is really an amalgam of state and federal interests. It is plain difficult to transport state prisoners to federal courts for hearings in any volume, and the possible outcome of such a hearing - a sweeping injunction against a prison practice affecting many more prisoners than the one in the suit - often creates havoc in the prison system. Those two problems are in some respects

distinct, but they are also connected in showing that there are practical and logistical problems under the present scheme that could be reduced with an exhaustion requirement. Presumably, the administrative agency that would handle prisoner complaints would be located at the prison or nearby. Most prisoners' beefs could be settled or washed out without much loss of time or expense of travel. (Also, the present incentive for prisoners to bring suit just in order to get outside prison walls for a day would be reduced.) And the greater flexibility of the administrative body to fashion remedies less drastic than those the federal courts must often resort to would lead to less disruption than occurs now. The present disruption from federal court injunctions has to interfere with achievement of the purpose of the prison: punishment and rehabilitation.

Finally, there is the state interest mentioned in the opinion in Preiser, supra, and some other Court opinions, namely, that the state is in constant contact with its prisoners. Such contact naturally produces friction, but such friction surely could be defused through some means with less potential for actually increasing it than the present system of immediate § 1983 suits.

III. Final Comments.

Without going into detail, I should point out that an exhaustion requirement would be subject to the normal exceptions to any administrative exhaustion rule. Exhaustion would not

be required if the administrative agency were biased, if the administrative proceedings were clearly futile or inadequate or did not offer due process, if the agency were incapable of granting the requested relief,* if the state agency in bad faith attempted to block access to the court, or if the injury complained of were continuing and threatening to become irreparable in the absence of immediate recourse to the courts. I mention these exceptions because they probably take care of many of the usual objections to an exhaustion requirement - particularly the objections that state agencies would be biased or so slow that eventual recourse to the court would be too late to remedy the wrong.

Mentioning these exceptions does necessitate, however, also mentioning the potential problems their recognition would produce. If all of these are established as exceptions, as traditional exhaustion doctrine requires that they be, a lot of court time could be taken up in hearings aimed at determining whether a particular case fits one or more of them. This would be a particularly recurring problem in relation to the exception for biased agencies, since prisoners would be sure to claim that particular defect in every body set up to hear their complaints. Perhaps a very high standard of proof on the question of bias would have to be developed.

P.J.

ss

*I suppose this exception would mean that state administrative remedies would have to include the possibility of recovering damages, since otherwise a prisoner could always go straight to court.

APPENDIX

The administrative remedy for Maryland prisoners is described in Maryland Code Ann., Art. 41, § 204F. That statute sets up a five-man Inmate Grievance Commission (IGC) as a separate agency within the State's department of corrections. The Governor appoints the Commission members, at least two of whom must be lawyers and at least two of whom must be trained in correctional services.* There is provision for a permanent executive director and such support services as are necessary.

Under § 204F, the first question that arises when an inmate brings a grievance is whether the State's Division of Correction (the normal prison administration) or the Patuxent Institution (in the case of special offenders incarcerated there) has a grievance procedure applicable to the particular complaint. If it does, and if the IGC considers the procedure to be "reasonable and fair," the IGC can require exhaustion of the procedure before the inmate can bring his complaint to the IGC.

After exhaustion of the Division of Correction or Patuxent procedure, or in the event none exists, the inmate

*The statute empowers the Governor to remove any member on account of "acceptance of another office or the conduct of other business conflicting with or tending to conflict with the performance of Commission duties." § 204(F)(c)(4). Thus, the legislature has anticipated the need to avoid conflicts of interest.

submits his grievance to the IGC for preliminary review. If the Commission determines at this initial stage that the grievance is "on its face wholly lacking in merit," the Commission may dismiss it without a hearing and without specific findings of fact. The inmate then may proceed directly to court.

If the Commission finds that the grievance is not wholly without merit, a panel of at least three members must hold a hearing "as promptly as practicable." The hearing may be held at the inmate's institution. The Commission has the power of subpoena and the right to examine and copy any documents relevant to its inquiry. The inmate may appear before the Commission and may call witnesses subject to the Commission's discretion as to relevancy and number (which discretion must be exercised reasonably). He has the right to a retained attorney upon request, but there is no provision for appointment.

Promptly after the hearing, the Commission must issue the decision of the panel majority. Such decision must include findings of fact, conclusions and one of two dispositions:

(1) If the Commission finds the complaint meritless, it must promptly forward an order of dismissal to the complainant, who may seek judicial review immediately.

(2) If the Commission finds any merit in the complaint, it must promptly forward an order to that effect to the Secretary of Correctional Services. Within 15 days, the Secretary must either affirm the

Commission, or "reverse or modify the order where he disagrees with the findings and conclusions of the Commission." The Secretary may order the appropriate official at the relevant institution to follow the Commission's recommendations "in whole or in part," or the Secretary may take "whatever [other] action he deems appropriate in light of the Commission's findings." The Secretary's order, whatever it is, must be forwarded promptly to the inmate, who can then go to court.

The statute prohibits judicial review until exhaustion of this grievance procedure. Review must be sought in the local state court where the inmate is confined. Review is limited to "a review of the record of the proceedings before the Commission and the Secretary's order, if any, pursuant to such proceedings." Furthermore, the court is to determine only "whether there was a violation of any right of the inmate protected by federal or State laws or constitutional requirements." Presumably, the statute refers only to such a violation occurring during the grievance procedure, and not to such a violation by the original act that gave rise to the grievance.

Shooting pretty much from the hip, I see one red flag in the grievance procedure. This is the provision that allows the Secretary of Correctional Services to reverse the findings and conclusions of the Commission and, apparently, to disregard

its recommendations if he finds that "appropriate". The Secretary quite obviously is not an unbiased reviewer of Commission decisions, and he probably would have a tendency to "correct" any Commission recommendation that he deems "unfair" to the prison officials involved. In addition, I do not believe the Secretary should have the power to reverse Commission findings, since the Commission will have heard witnesses and judged credibility whereas the Secretary will deal only with a cold record.

The statute makes no provision for the award of monetary damages to inmates.

As I understand the law of exhaustion, the statute's provision for state court review of the administrative record and procedure would not require the federal court to wait for final state court action. The relevant question for § 1983 purposes would be whether the administrative procedure had afforded the inmate a sufficient remedy, and I do not see how the state court's limited review would affect that question. This point may require further thought, however.

Finally, there is one problem in the statute that undercuts its value in helping the federal courts to know what prisoners' complaints are all about. I refer to the provision that allows the Commission to dismiss, without a hearing and without findings of fact, any grievance that it considers wholly without merit on its face. No one can predict what kinds of grievances the Commission will treat that way. If