

The Burger Court Opinion Writing Database

Burrell v. McCray

426 U.S. 471 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 5, 1976

Re: 75-44 - Burrell v. McCray

MEMORANDUM TO THE CONFERENCE:

The conference action in this case was somewhat ambivalent and I "passed" on the first round. This was followed by a discussion of a DIG treatment with a substantive sentiment in that direction. (Four to affirm, two reverse, three leaning to DIG.)

Given all other current problems, I now favor that disposition which will allow us to wait for a "cleaner" case to resolve some of the troublesome issues raised.

I will defer action until you can each consider this alternative.

If there is no majority to DIG, I will ask Bill Brennan to assign this case since I remain very skeptical on outright reversal.

Regards,

WRB

To: Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Douglas
 Mr. Justice Harlan
 Mr. Justice Burger
 Mr. Justice Rehnquist

From: Mr. Justice Black
 Circulated: MAY 25 1976

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 75-44

Robert Burrell et al.,	}	On Writ of Certiorari to the United States Court of Ap- peals for the Fourth Circuit.
Petitioners,		
v.		
Milton McCray et al.		

[June —, 1976]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

To: Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Harlan
 Mr. Justice Burger
 Mr. Justice Goldwater
 Mr. Justice Tamm

From: Mr. Justice Black

Circulated: _____

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2nd DRAFT

JUN 11 1976

SUPREME COURT OF THE UNITED STATES

No. 75-44

Robert Burrell et al.,
 Petitioners,
 v.
 Milton McCray et al. } On Writ of Certiorari to the
 United States Court of Ap-
 peals for the Fourth Circuit.

[June 14, 1976]

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE WHITE dissents. He would affirm the judgment of the Court of Appeals.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 5, 1976

RE: ⁷⁵⁻⁴⁴No. 74-55 Burrell v. McCray

Dear Chief:

I adhere to the position I stated at conference
that I do not think it is appropriate to D.I.G. this
case. I would still affirm.

Sincerely,

Bul

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1976

RE: No. 75-44 Burrell v. McCray

Dear Chief:

Since it's getting so late in the year I suggest
that the above, an argued case, should be considered
at tomorrow's conference so that we'll know how it will
be disposed of.

Sincerely,

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1976

MEMORANDUM TO THE CONFERENCE

RE: No. 75-44 Burrell v. McCray

I shall circulate a dissent in the above case
but probably not in time for announcement of the case
next week.

W.J.B. Jr.

RC
ON
AR

12/14

Decided _____, _____, 1976

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 5/27/76

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-44

Robert Burrell et al.,
Petitioners,
v.
Milton McCray et al. } On Writ of Certiorari to the
United States Court of Ap-
peals for the Fourth Circuit,

[June —, 1976]

MR. JUSTICE BRENNAN, dissenting.

Certiorari was granted in this case, 423 U. S. 923, to consider the questions:

1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of state administrative remedies was not required in an action brought pursuant to 42 U. S. C. § 1983.

2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray v. Burrell*, #74-1042, and *McCray v. Smith*, #74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits.

Following the grant of the writ of certiorari, the parties fully briefed and orally argued these questions. The result of their efforts is today's one-line order dismissing the writ of certiorari as improvidently granted. That order plainly flouts the settled principles that govern this Court's exercise of its unquestioned power to dismiss writs of certiorari as improvidently granted.

We have held that such dismissals are proper only when the more intensive consideration of the issues and the record in the case that attends full briefing and oral

To: The Chief Justice
Mr. Justice Stewart ✓
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 6/1/76

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-44

Robert Burrell et al.,
Petitioners,
v.
Milton McCray et al. } On Writ of Certiorari to the
United States Court of Ap-
peals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Certiorari was granted in this case, 423 U. S. 923, to consider the questions:

"1. Whether the United States Court of Appeals for the Fourth Circuit erred when it held that exhaustion of state administrative remedies was not required in an action brought pursuant to 42 U. S. C. § 1983.

"2. Whether the United States Court of Appeals for the Fourth Circuit erred when it reversed the judgments of the District Court in *McCray v. Burrell*, #74-1042, and *McCray v. Smith*, #74-1043, based on a finding that Respondent McCray's Eighth and Fourteenth Amendment rights were violated under the circumstances of those cases and remanded for determinations on the merits." Pet. for Writ of Cert., at 2-3.

Following the grant of the writ of certiorari, the parties fully briefed and orally argued these questions. The result of their efforts is today's one-line order dismissing the writ of certiorari as improvidently granted. That order plainly flouts the settled principles that govern this Court's exercise of its unquestioned power to dismiss writs of certiorari as improvidently granted.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 12, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-44, Burrell v. McCray

I continue to be of the view that the writ in this case should be dismissed as improvidently granted.

P.S.
P. S.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 25, 1976

No. 75-44 - Burrell v. McCray

Dear Chief,

I agree.

Sincerely yours,

PS,
1

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 27, 1976

Re: No. 75-44 - Burrell v. McCray

Dear Chief:

Please note at the foot of your per curiam
that I dissent and would affirm the judgment of
the Court of Appeals.

Sincerely,



The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

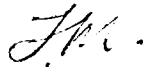
May 26, 1976

Re: No. 75-44, Robert Burrell v. Milton McCray

Dear Bill:

Please join me.

Sincerely,



T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 21, 1976

Re: No. 75-44 - Burrell v. McCray

Dear Chief:

After reflection, I would be willing to DIG this
case.

Sincerely,



The Chief Justice

cc:- The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543 ✓

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 25, 1976

Re: No. 75-44 - Burrell v. McCray

Dear Chief:

I, too, agree.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

-----The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 20, 1976

No. 75-44 Burrell v. McCray

Dear Chief:

As the sun is almost down (I promised to let you know by then), I write to say that I will "join four" in a DIG of the above case.

I do this with reluctance, and - in all candor - only because I regard this disposition as preferable to a formal Court opinion reaffirming a shaky rule that in my view is not in the best interest of anyone: the prisoners, the courts, our federal system, or the public.

The rule exists almost by virtue of default. It cannot be supported by the history or purpose of § 1983, and the precedents which support it represent the accretion of several PC opinions none predicated upon argument and full consideration by the Court.

I voice the above views as an explanation of why I am willing to DIG this case when, under normal standards, it is difficult to justify such action. But given the choice of a Court opinion enshrining what I believe to be singularly bad law, or DIG'ing the case without a more conventional reason, I reluctantly come down in favor of the latter.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

✓
✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 21, 1976

Re: No. 75-44 - Burrell v. McCray

Dear Chief:

Lewis' letter to you of May 20th mirrors exactly my sentiments about this case, and for exactly the reasons which he states, I, too, will join in a DIG.

Sincerely,



The Chief Justice

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543 ✓

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1976

Re: No. 75-44 - Burrell v. McCray

Dear Chief:

I, too, agree.

Sincerely,



The Chief Justice

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

No. 75-44

From: Mr. Justice Stevens

Circulated: 5/26/76

Robert Burrell, et al.,)
))
Petitioners,)
))
v.)
))
Milton McCray, et al.)

Recirculated: _____

On Writ of Certiorari to the
United States Court of
Appeals for the Fourth
Circuit.

[June 1976]

MR. JUSTICE STEVENS, concurring.

Had I been a member of the Court when the petition for certiorari was presented, I would have voted to deny because the opinion of the United States Court of Appeals for the Fourth Circuit correctly states the applicable law. For the same reason, I voted to affirm after oral argument. Although I did not vote to dismiss the writ as improvidently granted, I do not dissent from that action for two reasons.

First, it is my understanding that at least one member of the Court who voted to grant certiorari has now voted to dismiss the writ; accordingly, the action of the Court does not impair the integrity of the Rule of Four.

Second, just as the Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 183, so also, we

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

Printed
 1st DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

Circulated:

No. 75-44

Recirculated: 5/28/76

Robert Burrell et al.,
 Petitioners,
 v.
 Milton McCray et al. } On Writ of Certiorari to the
 United States Court of Ap-
 peals for the Fourth Circuit.

[June —, 1976]

MR. JUSTICE STEVENS, concurring.

Had I been a Member of the Court when the petition for certiorari was presented, I would have voted to deny because the opinion of the United States Court of Appeals for the Fourth Circuit correctly states the applicable law. For the same reason, I voted to affirm after oral argument. Although I did not vote to dismiss the writ as improvidently granted, I do not dissent from that action for two reasons.

First, it is my understanding that at least one Member of the Court who voted to grant certiorari has now voted to dismiss the writ; accordingly, the action of the Court does not impair the integrity of the Rule of Four.

Second, just as the Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, *The Monrosa v. Carbon Black, Inc.*, 359 U. S. 180, 183; so also, we should retain the power to take like action when our further study of the law discloses that there is no need for an opinion of this Court on the questions presented by the petition. Even though I agree with MR. JUSTICE BRENNAN that the questions in this case are important, I am nevertheless persuaded that the state of the law applicable to the facts disclosed by