# Supreme Court of the United States



**In the Matter of:**

WILLIAM JOE JOHNSON,

Petitioner,

vs.

HARRY S. AVERY,
Commissioner of Correction, et al.

Respondent.

**Docket No.** 40



**Place** Washington, D. C.

**Date** November 14, 1968

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C O N T E N T S



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

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William Joe Johnson :

: Petitioner

vs. :

: No. 40

Harry S. Avery, Commissioner of Correction, et al., :

: Respondent

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Washington, D. C.
Thursday, November 14, 1968

The above-entitled matter came on for argument at 1:25 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

CHIEF JUSTICE WARREN: No. 40, William Joe Johnson versus Harry S. Avery, Commissioner of Correction, et al.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Warden.

ORAL ARGUMENT OF KARL P. WARDEN

ON BEHALF OF PETITIONER

MR. WARDEN: Mr. Chief Justice, may it please the court, I am counsel for William Joe Johnson who is a prisoner in the Tennessee State Penitentiary in Nashville, Tennessee. As of the time of this argument today William Joe Johnson has served approximately three years in solitary confinement or in maximum security or in segregated environment within the penitentiary. This confinement is over and above that confinement called for by his sentence, which is a life sentence for the crime of rape.

The reason for this extraordinary confinement is because he has violated one rule of the Tennessee state prison system, and that rule is here being challenged today. That rule is that no inmate shall advise, assist or otherwise contract to aid another, either with or without a fee, to prepare writs or other legal matters.

The United States District Court which first heard this case determined that his confinement was arbitrary and capricious and that it was in violation of Title 28, United

States Code, annotated Section 2242, and it was in violation of the United States Constitution.

The Court of Appeals reversed the District Court. Our argument here today seeks to have the United States Court of Appeals reversed, to have further enforcement of this prison rule ended, and to have William Joe Johnson returned to the general prison population and these unnecessary restraints on his liberties ended.

The basis for our argument is fivefold. The two major points we wish to make are that, first off, the state of Tennessee, by enforcing this prison rule, and by providing no alternative assistance, has effectively blocked access to the courts by those prisoners who are indigent and inarticulate or illiterate, and that to so prevent these people from being heard is a violation of due process, a violation of equal protection, and a violation of the First Amendment freedoms of speech and the right to petition for redress of grievances.

Our second principal point is that this prison regulation is not a proper exercise of the state's limited power to regulate the practice of law for two reasons.

One, this is not the practice of law; and two, even if it should be considered the practice of law it is beyond the power of the state to restrict this particular kind of practice.

Our further points are that Title 28, section 2242 of the United States Code annotated reflects the ancient common

law right of one layman to prepare, sign and verify petitions of habeas corpus for those who cannot help themselves.

And the final two points are that the petitioner does have standing to raise these issues, and that was the holding of both the district and the court of appeals, and finally that this is a proper case and circumstance for federal courts to intervene with state prison management. And apparently this has been agreed to by the State of Tennessee in its supplemental brief provided that the court finds that these regulations are in violation of federal rights.

Now as to our first point. It is clear that a prisoner who can employ an attorney will be fully and well heard by whatever court he wishes to petition. But it is equally clear that if this prisoner is indigent that he has, then, only four alternatives. One of these is to be able to talk some lawyer into representing him.

The second is to proceed pro se. The third is to get help from someone untrained in law. The fourth is just to forget about it altogether and let his claim go by the board.

As to the first of these alternatives. If he can talk a lawyer into taking the case, all of us who practice law know what happens to the attorney who agrees to help one indigent prisoner. He is immediately inundated with letters from not only that prison but from every prison in the country requesting similar aid.

Q Are there not some states which provide legal services for prisoners? It seems to me California has that.

A. California has an amicus brief here, Your Honor. I do not believe that California provides counsel for indigent prisoners.

Q But some assistance?

A. They provide assistance of prison guards and chaplains, Your Honor.

Q They have a clerical staff, too, do they not?

A. Apparently, yes sir.

Q And apparently the courts have cooperated by setting up these forms with check-lists.

A. Yes, Your Honor, although I expect to argue a bit today that these forms were in fact not much better than the no assistance at all that the State of Tennessee provides.

Your Honor, in the event that this attorney does receive these letters, what happens ultimately is that the claims, the just claims and the unjust claims alike, all go in the waste-basket. While we ought to applaud an attorney who is willing to help an occasional indigent prisoner we still cannot rely on casual or whimsical charity to preserve the constitutional guarantees of persons imprisoned in the United States.

It is not a sufficient answer here to say that prison authorities will help these people. First off there is no showing that these prison authorities, the guards, chaplains,

clerical help, and so on, are any more competent to provide assistance than is a fellow inmate.

Secondly, it is clear that the prisoner knows full well that the interests of his keeper and his own interests are not absolutely identical. There is, there always will be a real credibility gap between the inmate and his keeper.

The prisoner will want someone he can turn to, someone he can talk to, someone he can trust -- if not his lawyer then his friend. And his friend is much more likely to be a fellow inmate than it is to be his keeper.

I think the millions and millions of dollars that the legal profession and government have spent in the past few years trying to bridge the communication gap between the poor and the courts, the legal profession, by moving law offices out into neighborhoods, by allowing forms of lay intermediary assistance, all these show that this credibility gap here is a very real thing and ought to be recognized.

And finally on that point, as an aside, if it is the practice of law for an inmate to help write petitions, why is it not the practice of law when it is done by a prison guard or chaplain as apparently it is done in California?

The activities --

Q I suppose it does not go to your rhetorical question, but the practice is, is it not, that people who indulge in the activities in which your client indulged charged their fellow

inmates everything that the traffic will bear, and presumably prison employees do not.

A. There is not one shred of evidence in this case that my petitioner has charged anyone for his services. I do not deny that prisoners could charge. I would deny that it would be a proper thing to do, of course.

The activities of the petitioner here are attacked as being the practice of law. It is said that the state has the right to regulate the practice of law and that since petitioner was practicing law he can be properly stopped by the state prison authorities.

We claim first that this is not the practice of law, that there was no claim here whatsoever to represent these prisoners in court, that there was no pursuit of these cases beyond the minimal help of helping them articulate what their claim was, that he did not sign and verify these petitions for the inmates, that he returned these petitions to the inmates and they signed them and verified them themselves even if they had to sign it with an "X" as happened in some instances.

Q. Suppose he set up an office in Nashville and held himself out to do precisely that? Don't you think the bar association would be rather concerned about whether that was the practice of law?

A. Yes sir, I am absolutely certain that the Nashville Bar Association would be concerned. They are a little bit

fearful about me being up here today, as a matter of fact.

Q Mr. Warden, is the issue as narrow as the proper interpretation of 2242 -- is it the issue before us now?

A Your Honor, I think that is only one of the issues before us today. I think there is a very real question here of First Amendment guarantee and I think that goes beyond the question raised directly by 2242.

Q If we were to say, perhaps we can agree with this as a matter of interpretation of 2242 -- isn't that what the district court did?

A The district court did that, yes, Your Honor, but they also found that this was an arbitrary and capricious act on the part of the federal prison authorities which was a denial of equal protection to those persons who could not articulate their own claims.

Q Then your answer is that we have to reach the constitutional claim?

A No, Your Honor, I do not think you would have to reach the constitutional point. Of course, we had to raise the constitutional claim because that is one facet of our argument. I don't think you have to reach that in order to decide this case.

But if I may say so,sir --

Q We would have to reach it if we didnot agree with you on 2242.

A Yes, sir you certainly would in order to adopt our

view of the case.

Q Incidentally, I gather this came up -- this has been treated all along as an issue for habeas?

A Yes, sir, it has.

Q Is he a state or federal prisoner?

A He is a state prisoner, Your Honor.

Q That is how we get 2242 into it.

A I suppose so, Your Honor.

All William Joe Johnson has done in this case is to help these men articulate those things that they would have said for themselves if they had been able to say them for themselves.

Q You must agree, he has to have standing. Did he have standing?

A Sir, both the district court and the court of appeals agreed that he had standing.

Q You are not challenging that then.

A It is raised in the California amicus brief. It was not raised by the State of Tennessee.

Q Why does he have standing? Can you tell me that?

A Yes, your Honor, I will try to. Over and above the question of whether the two lower courts agreed that he had standing, he is in solitary confinement now for violation of this rule, and this rule is the one we are here challenging today, and in order to challenge this rule today we have to show

why it is in violation of the constitutional rights of these indigent illiterate prisoners.

Q How long has he been in solitary?

A. For almost three years.

Q Was that continuous?

A. He was turned loose at the end of the time when the district court decided this case, Your Honor, and I am going outside the record, Your Honor -- he was put in the day that the Court of Appeals decision came down.

There were breaks in this total three year period because he would promise he wouldn't do it any more and they would turn him loose and he would do it again.

Q I understood this from the record.

A. Yes, sir, he wasn't very trustworthy about that sort of thing.

Q He was persistent in asserting his claimed rights.

A. This man comes closer, Your Honor, to being a modern day Don Quixote than anyone I ever heard of.

It seems to me that we have never doubted the common law right of one layman to petition for another layman and the one who is being held captive could not speak for himself and when the one doing the petitioning is not an officious intermedler. At most William Johnson here was a lay intermediary. All he ever did was call the court's attention to these men. He did not benefit in any way except the satisfaction one human

being gets from helping another.

Even if this court should find that his activity was the practice of law, and we vigorously maintain it was not, still the state's power to regulate stops short of the power to restrict unsophisticated persons from seeking legal redress in the courts for their claimed unlawful imprisonment.

Both federal and state law provide a route by which an imprisoned person can petition for release from imprisonment but by effectively denying an identifiable class of persons the right to use this law, hereby making the road impossible for the indigent, inarticulate and illiterate, this post-conviction remedy becomes illusory. This is not just a deprivation of First Amendment rights, but it is also then a denial of equal protection laws.

Q I suppose there are, or have been or may be, in the penitentiary of Tennessee lawyers.

A. Yes, Your Honor, unfortunately that is true.

Q That is a rule which would be denied them. I presume they would be disbarred because of their convictions if it is for an infamous crime. This rule would not allow them to use their particular expertise.

A. No inmate would be allowed to use --

Q How about the Arizona case which the court decided in the last term where the layman is seeking to represent an indigent?

A. Yes, Your Honor. I think that the rational of that case would be entirely appropriate here although this man was operating outside of an environment where there was a rule which prohibited any help at all. That is exactly what this rule does.

This rule does not cut off help just for illegitimate claims. It cuts off help for all claims. That is the only way it can be viewed because these people cannot read, they cannot write, and Tennessee statistics --

Q. That was the situation with the defendant in the Arizona case.

A. Yes, Your Honor, it was, except it is my understanding that the man who filed the petition for him was not a fellow inmate but was someone outside.

Q. They were both on the outside but the problem, I think, would be the same of illiteracy, indigency --

A. Yes, Your Honor, I think it would be.

Q. You do not cite this Arizona case.

A. No, I did not.

Q. I suppose there is an element of considerations here --

A. Your Honor, I think there is an interest of the state here in the manner of preserving order in the penitentiary, but I would say this.

I think we must always distinguish between desires and interests. I am sure that the prison authorities desire that they have a prison full of docile, unthinking prisoners

who don't cause any trouble.

I would like for my children and my students back here not to cause me any trouble, and to do just exactly what I tell them to do.

But in the long run that would not be in my interest and it would not be in their interest, and it would not be in the society where they live, so I think we must distinguish these things.

Q Is it also true that this is not a question of regulating but it is a question of prohibiting?

A It is a question of absolutely prohibiting, Your Honor.

Q It is not a question of regulating.

A If it were, Your Honor, if the State of Tennessee had provided some reasonable alternative whereby these people that I think are being discriminated against, could have had access to the court in a realistic fashion, then we would not have perhaps have to have this case today.

Q This is the point. I suppose you could very well make an arguable case for the prisoner to have the right to have some help from some competent source, without being forced or logically hold that a fellow inmate has the constitutional right to furnish it. I suppose you are up here claiming some right on your client's part.

A My client's right to write, Your Honor, from these --

Q Solely?

A No, he is also in solitary confinement.

Q I understand that. There is certainly a legitimate review between him and the state.

A Yes, sir.

Q But is he claiming some constitutional right himself, just to represent his fellow prisoners?

A He claims only this, Your Honor -- that the state has not provided an acceptable alternative to his providing help for them, and that he is being punished for doing that which the state has prohibited.

Q What would you say if the evidence were that he not only represented prisoners but he constantly collected money from them for it and the rule of the prison was he may help other prisoners but he may not collect money and if you do you go to solitary confinement.

A Your Honor, then I think he would be in solitary confinement for having collected the money.

Q Even though there was quite a dispute between him and the prisoner.

A Sir, if I understand your question then my answer is that they would have an absolute right to put him in solitary confinement for taking money. There is no question in my mind about that.

I may as well add this to it, too. Even if this

court should find that there is some right to counsel at this critical stage of the post-conviction proceeding here, I think there might still be a constitutional question as to whether one prison inmate could turn to a fellow inmate and say, "You reckon I ought to go to a lawyer?"

If that is sanctioned then I think we are strictly on First Amendment rights at that point.

And this rule would prohibit that.

Q I understand that. Of course, that is not the point here. He did more than advise going to a lawyer.

A Yes, sir, he did. He wrote out these petitions by hand.

Q So you can say as well that is what the state is preventing him from doing.

A The state here has claimed a number of interests, one in prohibiting the unauthorized practice of law; one in keeping good order in the penitentiary. I have spoken to that but I would like to add this one thing -- there was no showing in this case, and there can't be any showing, that the fact that one prisoner helps another prisoner articulate his claim to a court necessarily is going to create great disorder in a prison system.

In fact, I think it could be argued that these people who are in the penitentiary, who are inarticulate, illiterate, indigent, who have no way to express these claims might very well be a greater source of disruptions to prison discipline

than one who was allowed to have his case heard by a court.

Q Do you happen to know whether this is peculiar, this regulation to Tennessee or is it typical of other prison regulations?

A Your Honor, I am of the opinion and impression, I should say that it is a fairly common prison regulation. I think California has it with a little variance in the form.

When I was in Utah recently I saw something in the paper out there that said they had it. I think New York has it. There are a number of jurisdictions which have it. I can't tell you how many there are.

The state has also claimed an interest here which the prison authorities say falls on their side of the scale of balancing the interest, and that is in keeping the court dockets from being clogged. But this rule prohibits with fine and equal impartiality, the legitimate claim along with the illegitimate claim, and there certainly cannot be any kind of a showing that a legitimate claim filed by an inmate who had inmate assistance clogs the court any more than a legitimate claim filed by an inmate who has a lawyer to help or by an inmate acting pro se.

In this rule it prohibits all of them,the legitimate claims and the illegitimate claims.

Under the very narrow view of the state of Tennessee and the State of California that presumed state interest here in

prohibiting the unauthorized practice of law, seems to be served in whole part by allowing people to appear either pro se or with attorneys. This ignores completely the indigent, illiterate and incompetents who can neither act effectively nor can they afford an attorney. The statistics that are provided by the State of Tennessee show that 44 percent of the people in the Tennessee state penitentiary are of below average intelligence. 22 percent of the people in the Tennessee state penitentiary are of defective mentality.

Now these people might be able to scratch out something on a piece of paper. A lot of them can't even do that. But it just does not seem realistic to me to say that they can act effectively pro se, that they can call their claim to the attention of a court or lawyer in such a fashion that that claim will be understood.

These people are the ones who are being discriminated against.

The State of Tennessee has provided no alternative means for these people. The State of California has provided a series of forms which these people might use and fill out but the central question on those forms that these people are to fill out for themselves is really the central question that must be answered in Tennessee, and that is that this inmate must be able to articulate why it was that he has been deprived of his constitutional rights -- just a simple statement of the

deprivation of constitutional rights.

I found it a bit difficult to pen a simple statement of constitutional rights and I have had the benefit of a legal education and these people matriculated in the streets. I don't believe it is taught there.

Mr. Chief Justice, I have asked to reserve a few moments of my time.

Thank you.

MR. CHIEF JUSTICE WARREN: You may. Mr. Fox.

ORAL ARGUMENT OF MR. THOMAS E. FOX

FOR RESPONDENTS

MR. FOX: Mr. Chief Justice, may it please the court, on the question of federal statute, I have said in my supplemental brief that I really do not think that is a serious question because there the statute says that application for writ of habeas corpus shall be in writing, signed and verified by the person for whose relief it is intended, or by someone acting in his behalf.

I do not think that goes any further than the ministerial act of signing or verifying a petition to be filed. I don't think that contemplated preparation of petition, so I do not believe that statute can be relied upon as was done by the trial judge, the district judge. The Court of Appeals thought to the contrary and I think certainly that that is too involved an interpretation of that statute.

On the question of whether or not this is the practice of law, that does not answer the question. Certainly the state of Tennessee cannot regulate the practice of law in such a way as to deny prison inmates access to the courts, so I think this is a different situation really from what it is on the outside.

I tried to think that -- well, here are inarticulate people. Here are people who cannot write their names. You have the same types of people on the outside. Why wouldn't the same rule apply?

The only difference that I can see is that this is favorable to people inside the penitentiary. They really have more cause to petition the courts than the people on the outside. I think that might be justification for it.

I think certainly that any rule that the State of Tennessee has which would tend to deny these people access to court, we do not contest that. We know that would be in violation of constitutional rights.

Q What do you do if a prisoner asks for a lawyer?

A If the court please, under present procedure since the adoption of our post-conviction procedure act, which was adopted after this case was started but before it was decided by the United States Circuit Court of Appeals in Cincinnati, we provide a form in the statute for making a petition.

Then in one of these sections we provide that no

petition will be dismissed until full opportunity has been given to freely amend it with the assistance of counsel.

So I say that any man who can say "My rights are being denied me" and signs his name to it and gets into federal court or in our state courts, it is that broad. Counsel will be appointed for him under the statute and the counsel will be given an opportunity to amend it freely.

Then if it cannot be amended so as to make out justification or to allege a cause of action then it can be dismissed.

Q What happens if the prisoner can't even say that much? Would this regulation reach his getting assistance from a fellow prisoner, even to do that much?

A The regulations may be a little broad and it may be susceptible to the construction that my worthy opponent has given it, to aid or assist. I think those words used in context mean to act in the capacity of giving legal advice, not in helping a man to write out a statement and make his mark or sign his name to it. I do not think that it should be given that broad a construction.

I agree it is possible, and I have learned that any statute, any regulation that I have ever had experience with, if the court determined to give it an unconstitutional construction it can be done. I think that. I do not believe there is any question about that.

However, I do not think a fair construction would go that far with this.

Q Mr. Fox, what is the intent of the state of Tennessee in keeping this man in solitary confinement for three years?

A. If the court please, it is talked about as punishment but it is also a preventive measure. The man said and his counsel said --

Q What is so bad about what he is doing?

A. I think from the cases I have read, there is not much evidence in the record on it, but the director of the federal bureau of prisons instructed the wardens at the federal prisons to provide a writ writers room and the purpose of it was to prevent the writ writers from helping prisoners write petitions.

I find from reading cases that most of the courts, most of the state courts in the 50 jurisdictions have had similar rules.

Here is what they say about it. This is what was said about it in one federal court.

"Most laymen lack the ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers."

It just says that it permits the more aggressive type to take advantage of the other prisoners who arenot quite so

aggressive. In some of the cases, I believe that in Hatfield versus Bailleaux from the Ninth Circuit, it just says that even though it is said that no charge is made that it is almost impossible to find a case where a charge is not made. It might be required in --

Q Is there any evidence in this record?

A No sir, no evidence in this record to that effect. We insist if it gets back to that then the decree of the district court is wrong because there is no evidence either way on those questions.

Q Mr. Fox, let us take the case of a man who is indigent in your penitentiary in Tennessee, and I suppose there are many of them.

A Yes sir, I am sure that there are.

Q Let us assume that he is also illiterate, and I am sure they have many of those, have they not?

A Yes sir.

Q Suppose he has a good cause for relief. How under your regulation and the practice in your state can he get relief?

A If the court please I think this.

The regulation provides "aid or assist." I don't say that that goes to the ministerial functions. I think that if in that position I had cause of action I don't know why I could not ask somebody to write it for me and they would perform

nothing more than a ministerial act of writing what I say. Then they could allow me to make my mark. I don't believe that our regulation ought to be construed broadly enough or inclusive enough to eliminate that type of situation.

Q It has been has it not?

A I don't believe it has. If so I don't know it, unless Judge Miller, the District Judge, put that kind of construction on it, and I think if he did that it really was not necessary because, as I said before, I think we have to construe our regulations and statutes in accordance with their context or environment and keep in mind the thing that was attempted to be permitted.

Q Tell me how far you think a man such as I suggested could go under your regulation.

A I think when it gets beyond a ministerial act --

Q A ministerial act. What can he do actually?

A Under the statute certainly another inmate can sign it for him -- the prisoner -- and he could verify it under the federal statute. We do not deny that he has that right and the federal statute gives him that right. That was in existence when our regulation was made. I know that nobody in my state would intend to contradict or ignore or be in conflict with federal law because we understand that.

Q He can sign it and verify it. What else can he do?

A I would think that he might, if the man told him

what to write, he could write it.

Q What --

A If the prisoner told the other prisoner what he wanted written I think he could do that. I think the regulation is subject to that type of construction.

But here is the problem, and I am not sure there is enough evidence in this record to show what takes place -- but it was observed in Hatfield versus Bailleaux, the court said "We observe from the 2255 cases which have come before this court that the penalties of perjury do not deter the writ writer from writing whatever they want to."

That is the kind of thing our regulation was designed to get rid of.

This is outside the record but the court might know that usually those petitions are about that thick; they are not limited to what --

Q You don't think we are familiar with them?

A I don't know whether they have been here or not. You have no reported opinions on it. At least I found none. Maybe the petitions haven't gotten up here.

Q If you think that is a novel experience in this court --

A If the court knows about those things that is what we are trying to eliminate.

Q Wouldn't I assume that Judge Miller in Nashville gets

quite a few of them.

A. Yes sir, he does.

Q. Yet he says the regulation is bad.

A. Yes sir, he did that.

Q. He is the one suffering the most, is he not?

A. He suffers a lot. I think other judges suffer just as much.

Q. Didn't his ruling say in so many words that he didn't need your help?

A. Judge Miller?

Q. Yes.

A. If the court please I don't remember that in his petition --

Q. He said he didn't need that regulation.

A. Yes sir, but we are here because we say Judge Miller was wrong and because the Court of Appeals in Cincinnati said that he was wrong. Judge Miller might be right but we are here because we insist he was wrong and the Court of Appeals of Cincinnati put it on the basis more so on the practice of law.

I accept that theory because the court said it but I do not think that quite gets to it because, as I said earlier, it seems to me there is no question but what it is the practice of law. A state cannot regulate the practice of law in such a way as to prevent people from coming to court.

Q. Are we entitled to assume that in these 2200 cases

which you get in your courts that the main purpose of this regulation is to relieve the court of a difficult burden?

A That is one reason. The other is that all the prison officials, state and federal that I have read about, and I think the cases I have read are nearly enough to include all of them, they say it undermines prisons on discipline and morale and it is impossible to repatriate and rehabilitate prisoners after they come under the influence of a writ writer who is unscrupulous and is not deterred by the penalties of perjury, who uses the people for his own purposes rather than the purposes the penitentiary designed -- to reform people of that sort. Rehabilitation is impossible once the writ writers get control of the members of the prison.

Here is what I looked for a moment ago. This is what one of the courts said in Hatfield versus Bailleaux: "Prison officials testified that if permitted to engage in such practices, aggressive inmates of superior intelligence exploit and dominate weaker prisoners of inferior intelligence. The practice also tends to develop a group of inmate leaders which is discouraged in all institutions."

Q What are you readin g from?

A I am reading from Hatfield versus Bailleaux. That is the Ninth Circuit case, if the court please.

I also got that 2255 cases from that same case, the Ninth Circuit case.

Q Mr. Fox, do you still argue that there is no standing here?

A. No sir. As far as the man's right to petition to be released from solitary confinement I think he has standing.

Q But if the case is mute, this case seems to me to have a rather peculiar posture. If we should vindicate the right of the inmate to consult with a fellow inmate for the first inmate's benefit, that is one thing. But here, what we are asked to do, really, as I understand it, is to hold that an inmate has the right as a matter of regular practice, is that not so? To help other inmates in preparing petitions for post-conviction relief?

A. Yes.

Q It is a little puzzling as to whether it is a question of standing or something else. I was wondering whether that is really different from other type cases we have on petition of Certiorari in this court. I have forgotten the jurisdiction in which an inmate himself applies for relief because the prison authorities won't let him consult with other inmates and provides no alternative.

Petitioner here, if I correctly understand this, is asking us not only to release him from what offhand seems to be a very onerous treatment by the Tennessee prison authorities -- he also asks us to establish his right to engage in the practice of furnishing this kind of advice and assistance to

other inmates.

Do I correctly analyze this?

A. Yes sir. It is insisted upon by counsel that the writ writer has that right because the inmate who has the cause has that right. He cited authority from it. I didn't think that sounded too unreasonable so I didn't question that-- provided it is found that this kind of help is necessary for prisoners.

Q You do not think that what is too unreasonable?

A. To say that one inmate had a right to assist another inmate who was in need of his help. There is no question about his need. It is reasonable to find that the other inmate who did know how to assert his right, that he could go to another person and have that person assert it.

I think, if I understand the question properly, because of free speech they have a right to hear the news and disseminate it. I hear that argument about the right of the press in the court, to take pictures, and so on. They say the public has a right to know and because of that we have a right to gather that information and give it to the public.

I thought that was a similar sort of analagous thing. I didn't contest it. Perhaps I should have.

Q That is the standing point you are addressing yourself to?

A. Yes.

Q The standing of him -- this petitioner to assert somebody else's rights, that is what you are really talking about?

A I did not contest that. I just --

Q Your adversary suggested that, at least in part, perhaps almost entirely, this petitioner's rights are derivative of somebody else's.

A I did not contest that assuming that it was not objectionable on the grounds of prison discipline and order and rehabilitation of prisoners.

Q Actually we held in the Button case, didn't we, that that organization and the ACP could assert the rights of others who did not want themselves to be litigants in courts, and we laid it on First Amendment grounds. Of course we didn't say they could assert those rights of others through non-lawyer in court. We --

A No sir.

Q We did say that we didn't have any non-lawyer problem here. But that sort of bears on this, doesn't it?

A Yes, I think that is the case that was cited in opposing counsel's brief.

Q But part of the rational of that case was great unlikelihood that the rights would ever be asserted otherwise.

A That is right.

I noted that I have stated this a little bit

differently from Mr. Warden's question. He is talking about the right of inmates to help others when there is no other aid available. I just state it broadly on the question of one inmate having the right to aid another.

If he insists now that it is not necessary and he does not have that right when there is other aid available, our position is that our post-conviction statute now makes it awfully easy for any person to get into court, either federal or state court, with his petition because he gets his petition up there and it is not to be dismissed until an opportunity is given to freely amend it with the aid of counsel. Then he gets legal help.

One other question now about the type of punishment that was imposed upon the writ writer. I think it ceased to be punishment and it became a necessary measure for prison discipline and the security of the prison.

This man said and his counsel said in the hearing in the federal district court that he expected to continue to write writs without regard to what the regulations were and without regard to anything else except when another means was provided.

So in order to stop him, not as a matter of punishment, he has to be segregated or the prison officials have to spend their time surveilling the other prisoners to see that they do not get his help.

So it seems to me it is a lot easier and more justifiable to put this man in prison and then the officials have more time to spend with the other prisoners and give them the help they need.

Q Putting him in solitary confinement?

A Segregate him from other prisoners.

Q That means solitary confinement, does it not?

A Yes sir. Any time he decided that he would not write any more he would be released.

Q There are lots of penalties involved in the unauthorized practice of law but that is kind of a new one, is it not?

A Yes sir, but this is a new situation in the prison. I think you have to consider the practice of law in this situation is different from any other situation. I couldn't find a case which dealt with these circumstances. I think it is a peculiar case.

Q Would this rule apply to a lawyer?

A I think so, yes sir. I don't know that I fully understand the question. If there were a lawyer in prison --

Q Assuming there might be a lawyer in the penitentiary in Tennessee, this rule would apply to him?

A Yes sir. I think so. I think it applies to everybody there.

Q Wouldn't that be a little silly?

A. I don't know. If a lawyer has committed a felony and he is in a penitentiary, he has proven he is untrustworthy, that he cannot be depended upon and he is not a man of good character, that is one of the requirements of practicing law.

Q. Then you are actually protecting the inmates from him -- even though the inmates want him?

A. Yes sir.

Q. Do you have automatic disbarrment in Tennessee for conviction of a felony or --

A. Yes sir, I think that is generally the rule. I am not really familiar with it, but I do know that to be admitted you have to show evidence of good character. And it seems to me once you are put in the penitentiary the presumption is that you are not a man of good character.

Q. Do you have a public defender?

A. Yes, we have one in Nashville and Davison County. And we do in Memphis.

Q. Where is this prison?

A. There are three prisons. One is in Nashville, the other between Nashville and Memphis, and one in--

Q. And you have a public defender in that county?

A. No sir. I've heard this, though, off the record --

Q. I don't know why you couldn't have the hours and let the public defender see him, if you have one.

A. I understand that(some of Mr. Warden's students

can correct me on this) it was arranged for them to go and hear the complaints and go and write the petitions for the people who were entitled to them.

They heard the complaints and didn't come up with any petitions so the next time they went out there nobody came to see them. They had no clients. That is the sort of thing we are trying to eliminate, these petitions.

One of the courts said the petitions were stereotyped. I take it to mean that each petition had the same thing as all the others in it.

It is evident that this is what happens. These writ writers, everything they know about the law they put in the writ whether it is applicable to this particular inmate or not.

Q This petitioner wasn't put in solitary confinement because he wasn't practicing law well, was he?

A. No sir, I would say this. If he had limited his petitions to the cases that a lawyer would advise a petition in, there never would have been this kind of rule. You would not have the petitions we have had, because most of these petitions, as indicated by the Hatfield versus Bailleaux case, perhaps --

Q Did this gentleman have a monopoly of the business, or were there other writ writers?

A. I understand there are others, if the court please, but maybe the others, when they started solitary confinement agreed to stop and did stop their practice. This is the only --

Q Does the record show the number of writs this man prepared?

A No sir. It shows he has filed several for himself and several for other people. He filed one for himself, the record shows, of forty-five pages.

Q I would be surprised if all fourteen of them were not identical. They usually are.

A Yes sir. They put it all in. There is no question about it -- what they know, they put in.

Q I don't think the ones we get here differ from the one Judge Miller got.

A They are probably the same thing. I just did not know they had gotten up here.

Q By the thousands.

A Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Warden, you have a few moments.

MR. WARDEN: Mr. Chief Justice, unless the court has further questions of me, I have nothing further to add.

MR. CHIEF JUSTICE WARREN: Thank you, Mr. Warden.

Before we adjourn today I want to revert to the case of Perez versus California, No. 39.

I see Mr. Fetros is still in the courtroom. I want to say that I neglected to say to him what I usually say on behalf of the court on behalf of those lawyers who have accepted

an appointment to represent an indigent defendant in this court.

We consider that a real public service, Mr. Fetros, and we are grateful to you as we are to all lawyers who undertake that service.

We thank you for your representation. We will adjourn.

(Whereupon, at 2:35 p.m. the Court recessed, to reconvene at 10:00 a.m. on Monday, November 18, 1968.)