In the

Supreme Court of the United States

EVELLE J. YOUNGER, et al.,

Appellants

v

ROBERT O. GILMORE, JR., et al.,

Appellees

No. 70-9

Pages 1 thru 47

Washington, D.C.
October 14, 1971

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v.	:	No. 70-9
ROBERT O. GILMORE, JR., et al., Appellees.	:	

Washington, D. C.,

Thursday, October 14, 1971.

The above-entitled matter came on for argument at 11:41 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

GEORGE R. NOCK, ESQ., Deputy Attorney, 6000 State Building, San Francisco, California 94102, for the Appellants.

JOHN ESHLEMAN WAHL, ESQ., 1255 Post Street, Suite 1128, San Francisco, California 94109, for the Appellees.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 9, Younger against Gilmore.

Mr. Nock, you may proceed.

ORAL ARGUMENT OF GEORGE R. NOCK, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NOCK: Mr. Chief Justice, and may it please the Court:

Five years ago last month the Director of Corrections of California adopted a new regulation regarding prison law libraries. It was in response to a certain problem he faced.

In twelve of the institutions under his control, there were few if any law books at all. In two of them, San Quentin and Folsom, there had, over the years, accumulated a rather ragged collection of law books, mostly case reports, and mostly more than ten years old. Of course, such obsolete law books were worse than useless, they were potentially dangerous, because they were misleading.

Nonetheless, despite the poor condition of these law libraries, inmates at other institutions had the mis-impression that they were first-class libraries, and were deluging the Director with requests for transfers to San Quentin and Folsom, in order to utilize the library facilities.

The new rules attempted to solve both problems by standardizing the libraries at all fourteen institutions. This

was to be done by providing a carefully selected list of what were called basic codes and references, namely --

Q All these events you're describing are since this case arose?

MR. NOCK: Well, the adoption of the regulation, Your Honor, came prior to the filing of this complaint. The regulation was adopted on September 19th, 1966, and the complaint was filed in response to the adoption of the regulation, on October 27th.

Q Then I misunderstood you, Mr. Nock; I thought you said within the last five months.

MR. NOCK: Oh, I beg your pardon. If I did, I was certainly in error. Five years.

Q Oh. Well, whichever was the error, now I have it clear: five years.

MR. NOCK: Thank you, Your Honor.

This carefully selected list of law books contained the various codes of the State of California defining penal offenses, the State and Federal Constitutions, a law dictionary, rules of this Court, the California Courts, the Court of Appeals for the Ninth Circuit. Inadvertently omitted, and regrettably so, were the rules for the Federal District Courts in California.

And also in the list were The Standard Work on California Criminal Procedure, Mr. Witkin's work of that title,

and a subscription to the Weekly Law Digest, a California publication that summarizes the most recent decisions of this Court and the California Court, in all areas, including criminal law.

The response was the filing of this complaint on October 27th, 1966, by the plaintiffs, a group of inmates. They challenged the constitutionality of the regulation, because it provided, as a necessary part of the standardization plan, that law books, existing law books at the two institutions, San Quentin and Folsom, would have to be removed.

Counsel was ultimately appointed, the very able gentleman on my right; and thereafter, acting at all times through counsel, the inmates filed an amended complaint alleging new causes of action not related to the instant appeal, and filing a motion for a three-judge court.

This motion was denied. But plaintiffs were able to persuade the single judge to certify the question, as a propriety of the three-judge court, to the Court of Appeals for the Ninth Circuit; and an interlocutory appeal on that issue was taken. The Court of Appeals held that it was a case for a three-judge court, and reversed the order of the District Court.

We disagreed, and filed a certiorari petition, arguing as strongly as we could that it was not a three-judge court case.

Opposition was requested and filed, but certiorari was unanimously denied.

The case went back to the District Court, where a three-judge court was convened. The court met on August 6th, 1969, and requested that the parties isolate the issue suitable for a three-judge court determination, and specified them clearly, to aid the court as much as possible in reducing the issue to those of law.

We complied by filing lengthy stipulation, a settled statement of issues, which listed five issues, the first two of which we consider relevant to the instant appeal, and that was the constitutionality under, first, the due process clause, and,second, the equal protection clause of these regulations.

We stipulated suggested relief, which included, should the court find the regulation unconstitutional, merely a declaration of its unconstitutionality, and an injunction against its enforcement.

Q Mr. Nock, let me ask you one thing: in Regulation 330.041, "There shall be established in each institution a standard set of basic codes and references which shall consist of and be limited to:" naming 11. Not included in that list are the United States Reports. Does that mean that if, at my death, I were to bequeath a set of United States Reports to the State of California for use in the San Quentin prison that they would not be accepted?

MR. NOCK: Under present regulations they would not be accepted at San Quentin prison, Your Honor; they would be accepted by the State Library of California to add to its prisoner collection, which is circulated among the various inmates, upon request, subject to the availability of the requested item.

As the regulation shows, some of the State Library collections are missing, but they do contain all the case reports that any California prisoner could possibley desire.

Q Well, what is the policy behind the regulation which prohibits the existence of all or part of the U. S. Reports, which, I suppose, are the final authority on constitutional rights?

MR. NOCK: Standardization, Your Honor, to give inmates in all 14 institutions the same access to locally placed law books.

If Your Honor were to bequeath 14 sets to the State of California for use in its penal system, there would be no problem in distributing these 14 sets to these various 14 institutions.

Q Except that the regulation limits it to the 11 items mentioned, and does not include a set of the U. S. Reports.

MR. NOCK: Correct, Your Honor. The regulation did not contemplate anyone's bequeathing an extensive collection

of law books to the State. But the regulation is capable of instant revision by the Director of Corrections, at his pleasure.

In its present form, of course, it does bar just that; but it would be revised under appropriate circumstances to effect the aims of standardization.

Q What if an inmate purchases one volume of the United States Reports that he wants, can he buy one? Let's assume he has the money and he orders it from the Government Printing Office.

MR. NOCK: Yes, he may. He may --

Q So anybody with some money can have a fairly adequate law library available to him alone.

MR. NOCK: It depends on your definition, Your Honor, of adequacy. The regulations stipulate that personal possession of law books, or any books, is limited to space available.

In San Quentin, for example, --

Q All right, space available. But he could buy a textbook on the preparation of petitions for habeas corpus, which wouldn't be available in either the prison or the State Law Library, let's say?

MR. NOCK: That's correct, Your Honor.

Q He could have it in his cell?

MR. NOCK: Yes, indeed.

Q But he couldn't loan it to anybody?

MR. NOCK: That's not clear under present regulations. Lending would be discouraged. I'm not prepared to say it would be impossible. The regulations are fluctuating; I don't have all of them at hand.

Q Is there any regulation about hard covers as distinguished from soft?

MR. NOCK: Only institutional regulations. San Quentin allows, as part of its space limitation, ten hard-cover volumes of whatever description, legal or otherwise, plus two orange boxes full of unbound materials.

Q That's for each prisoner?

MR. NOCK: For each prisoner. It will vary from institution to institution, depending on the space available.

The District Court held a second hearing, oral argument. At no time had the court given any indication that it intended to or was even considering granting relief broader than that asked for in the complaints, or embraced within the stipulation. But it did. It held that the list of law books was unconstitutional, and that the State had an obligation to furnish either an extensive -- and it seems very extensive -- collection of law books, or, alternatively, to provide lawyers or law students to assist the inmates, or to provide some unspecified and perhaps not even conceived of other method of assisting inmates in preparation of their

petitions and complaints.

From that order enjoining the enforcement of the regulation, and mandating new regulations, we have appealed, and we contend that this Court has jurisdiction to hear the instant appeal:

That the regulations in question do not deny access to the courts to inmates; do not deny them equal protection of the law; and that the mandatory injunction of the District Court violates the 11th Amendment.

The issue of jurisdiction is one which the parties have not raised. We are in agreement that this Court has jurisdiction.

The issue has been raised by the Court itself, in its order requesting a special memorandum on the issue of the three-judge District Court's jurisdiction; the order coming shortly after the filing of the jurisdictional statement, and in the postponement rather than notation of jurisdiction, in Feburary of this year.

Q Mr. Nock, assuming a man that was an inmate wanted to file a petition under 2255, what book in that list would you say would help him?

MR. NOCK: Oh, I'm sorry. Under 2254, the California Weekly Digest would be of some value, depending on how far back it went. Witkin's book on California Criminal Procedure would be of greater value, but --

Q California Criminal Procedure would help him under 2255?

MR. NOCK: 2255, is that the Federal prisoners?

Q I mean 54.

MR. NOCK: 54. The Federal Habeas Corpus. Yes, because Witkin's Criminal Procedure contains the applicable constitutional law, the decisions of this Court, and the other federal courts, defining constitutional rights.

It would help him in determining what his rights are so that he can set out the facts which he thinks give rise to a denial of these rights. That would be the function of Witkin's.

If he wanted to know which court to file in, if he wanted to know whom to name as respondent, he's going to have to rely on word of mouth. I have never heard of an inmate making a serious error in either of those situations.

But if he wants to get -- to perform the necessary procedural requisites to getting a petition filed, all he has to do is fill out the 11-page form provided by the prison, free of charge, to all inmates, approved by the local district courts for inmates' use.

Q This California thing would help him in doing that?

MR. NOCK: It will help him in finding his substantive rights, yes, indeed.

Q That's what I mean.

Q Let's see, what's the date of publication of Witkin's?

MR. NOCK: The original book goes back to, I think, 1963; it's supplemented annually or bi-annually by pocket parts or pamphlet supplements, or both.

Q It's California Criminal Procedures, isn't it?

MR. NOCK: Yes.

Q The title doesn't indicate that it has anything to do with the federal laws.

MR. NOCK: Well, I urge your perusal. A deep perusal of it would show that all of the significant cases of this Court and the Ninth Circuit, with regard to substantive constitutional rights of prisoners, are there.

Our position on jurisdiction is the simple one of res judicata: that the issue has been determined by a final judgment of the Court of Appeals.

We can't say too much else. We argued that it wasn't a three-judge court case. We lost our argument before this court. The judgment became final. And now we can only assert that it would be terribly inequitable, at this late date, for the Court to hold that there was no jurisdiction and send the matter back for a further appeal.

The case is nearly five years old.

If we are still litigating the proper composition

of the tribunal to determine it, then the law has failed. And we think that any discretion reposing in this Court should be exercised in favor of assuming jurisdiction, and that by viewing the case, the judgment that the Court of Appeals has res judicata, there is no discretion, jurisdiction is clear and must be accepted.

With regard to the question of access to the court, we do not believe that law books are necessary for access to the courts. It's a cliche to say, but it's equally true, that all an inmate has to do is set out, in reasonably intelligible form, a statement of the facts in his case. This statement might be fairly long, if the facts of this case are complex. It might be short, if he's claiming that he pleaded guilty because he was beaten or because he was promised something that he didn't get. But all he has to do is set them out.

The court will apply the law. Arguments, citations of authority are traditionally considered not only unnecessary but perhaps even improper in habeas corpus petitions themselves. Notwithstanding that lawyers will append a memorandum of points in authorities in most cases.

Inmates are not well equipped to use law books. At least they are not well equipped to use the United States Reports, the California Reports, the Federal Reports, U. S. Law Week, and the other publications alluded to by the District

Court as not being present.

It is questionable of what value those books would be to an inmate in helping him to file a Section 2254 petition, as Mr. Justice Marshall asked, because they do not give, in any reasonably accessible and understandable form, the rules for jurisdiction, the venue, that an inmate might have a little trouble getting. He gets those from the form, from Mr. Witkin's book, and from the Weekly Law Digest.

Q I'm not sure, Mr. Nock, is it the State's position that there is no duty whatever, constitutionally required, to supply any law books?

MR. NOCK: That is our position, Your Honor. It is not.

Q So, therefore, whatever you provide is a matter of grace?

MR. NOCK: Constitutionally, yes. We believe that most of the States provide no law books at all. And this violation --

Q But in the issues here, is that the issue here that we have to decide?

MR. NOCK: That is one issue, because the court enjoined the enforcement of the regulation requiring removal of law books from two institutions. To get an outright reversal of that order, we have to contend that there is no constitutional right at all.

We would be happy, of course, with the finding that if any constitutional right exists, it is met by this list.

And I might add, there are omissions in the list which presumably would be rectified, in the event of an affirmance. Minor omissions, such as the absence of the United States Code -- the Judicial Code, I should say, 28 U.S.C. --

Q District Court rules?

MR. NOCK: District Court rules certainly should be in there. That was a serious but inadvertent error.

For three volumes, two of them paperback, one of hard cover, would provide what we think are all the conceivable omissions; namely, the volume containing 28 U.S.C., Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, the volume containing the rules for all California and California federal courts, and Mr. Sokol's book on Habeas Corpus.

But, with those possible deficiencies, we submit that the list adequately provides for the inmates' needs.

Equal protection has worked its way in here as a sort of makeweight. The District Court relied on it, but the basic thrust of its position was that the restricted nature of the law book list denied inmates access to the courts.

We think that it's not particularly fruitful to

speak of equal protection in this context, because if inmates are, by their indigency, disadvantaged so greatly that they are denied access to the courts, then of course equal protection would be denied. But you have got no other circumstances.

The mere fact that they are not as well off as a rich man is not -- does not add much to the discussion that equal protection is really not the major issue. Although we will give it some attention in our Reply Brief.

Finally, the 11th Amendment issue is of considerable importance. That Amendment has not been much discussed by this Court in recent years, but it has been given a great deal of attention in the lower courts, as many lower courts have acceded to the temptation to order the States to appropriate money.

Judge Gignoux, in his opinion in Westberry vs. Fisher, 309 F. Supp. 12, has effectively answered these contentions.

At this time, with the Court's permission, I would reserve the time remaining after lunch for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:02 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Wahl, you may proceed.

ORAL ARGUMENT OF JOHN ESHLEMAN WAHL, ESQ.,

ON BEHALF OF THE APPELLEES

MR. WAHL: Mr. Chief Justice, and may it please the Court:

This case is about tools which are necessary for access to the courts. In the English-speaking world, in the common-law countries, the history of development of tools which are necessary for access to the courts has been a history wherein the executive has resisted the extension and the granting of these tools, starting with the great struggle to achieve the great Writ of Freedom, the Writ of Habeas Corpus, highlighted by the English statute in 1695, wherein treason defendants were allowed to have counsel at their trials.

Before 1695, neither treason nor felony defendants, of course, could have counsel.

Then highlighted by our own Sixth Amendment, because at that time in England even felony defendants could not have counsel, they did not get the right to counsel until 1836.

Finally highlighted by our great line, your great line of equal protection cases, granting rights to transcripts

and counsel; beginning, perhaps, in 1956 with Griffin vs. Illinois through Anders vs. California, and so on and so forth.

As I have mentioned, the executive has historically resisted the making available of tools for access to the courts, and we believe that the executive branch of the California Government again does so here, and does so strongly and does so quite ably, through my brother Nock.

We concur with the Attorney General of California that this is a proper case to be heard by a three-judge court, and the three-judge court was properly convened. We think the strong interest of the California Government in resisting the order granting relief, which came from that three-judge court, shows that this is the kind of case that Congress had in mind in passing Section 2281 of Title 28.

This regulation, which was promulgated pursuant to authority granted by the California penal code, by the California Director of Corrections involves the legislative policy of California. Section 5058 of the California Penal Code allows the Director of Corrections to provide regulations -- to establish regulations for the government of the California prisons and to change them at his pleasure.

And he has done so here, as counsel pointed out.

In September of 1966, five years ago, he promulgated a regulation limiting law books in prison libraries to 12 named law books, with which you're familiar from counsel's

argument.

He also, incidentally, in the same transmittal letter in which he promulgated that regulation, promulgated an additional regulation ordering all law books in inmates' personal possession removed and destroyed.

Since that time the California Legislature has enacted California Penal Code Section 2600, which allows inmates to receive and own law books in their own cells.

But the restriction, and this is the whole aspect of this regulation which is really onerous: the restriction of prison libraries to 12 named law books, we contend, violates the rights of indigent inmates -- and only indigent inmates -- to access to the courts, which is an integral aspect of due process of law, and their rights to equal protection of the laws.

Q Well, on that jurisdictional point on lawbooks, do you have any comment on the Hatfield case, which is not cited in your brief?

MR. WAHL: Not that was not cited in my brief, Mr. Justice Blackmun. The Hatfield case I think supports our position, and is distinguishable from this case, because Hatfield had to do with the regulations involved in one Oregon prison. This regulation applies Statewide to all California prisons and penal institutions.

Q And Oregon had only one penitentiary?

MR. WAHL: Well, no, sir; but I believe the regulation attacked there was a time, space, and method regulation in one particular Oregon prison. It was attacked by the inmate of that prison.

Q In other words, you would distinguish Hatfield rather than take the position that it was erroneously decided?

MR. WAHL: I would -- I could argue either way, Mr. Justice Blackmun.

Q As long as you get away from it.

MR. WAHL: I don't think the case is a good case. I think the dictum in the case, concerning -- or stating that prison authorities have no obligation to provide prisoners with opportunities to search for legal loopholes is a feeling type of statement, but I do not think that it reaches the questions which we reach here; which are, access to the courts and due process -- due process of law, access to the courts, and equal protection of the laws, with regard to indigent prisoners.

Q Mr. Wahl, you mentioned a recently enacted California statute that permits inmates to have law books in their cells, did you say?

MR. WAHL: Yes, Your Honor, Justice Brennan, the Section 2600 was enacted, I believe, in 1969 -- am I not correct, counsel?

'68. After this case was -- after this action was

filed, and after we had obtained a temporary restraining order, which, although it's almost moot at this point, remains in effect by stipulation and order, prohibiting California prison officials from removing books from inmate's cells, and destroying them.

Q Well, what quotations are there on that? I suppose there must be space limitations of some kind.

MR. WAHL: Yes, Your Honor. The inmates may purchase law books and legal opinions, anything that's allowed to pass through the United States Post Office, with the exception of perhaps matter which might be considered obscene or inflammatory; this is perhaps a gray area in that regard. But subject only to reasonable limitations concerning space.

Q Well, do you find any strength for your position, your equal protection position in that fact?

MR. WAHL: Yes, Your Honor, I do.

The best tool you can have if you want to go into court is a lawyer, the best lawyer you can get. The second best tool, if you can't afford a lawyer, is access to the law, access to the opinions, to the substance, to the procedural writing on the law.

I think the inmate that's very wealthy can retain counsel. The inmate that has means, but not quite as much means, can buy law books. The inmate that has nothing can buy nothing.

Q So he may supplement -- he may purchase books, as I understand it, outside the list of 12 that are available in the prison library?

MR. WAHL: Yes, he may.

Q Whereas, you say, you suggest the indigent can't?

MR. WAHL: The indigent may not, or cannot; cannot.

Q Mr. Wahl, in this building, as you know, we have a splendid library with many thousands of volumes, and the Department of Justice has a comparable library with many thousands of volumes. On a constitutional basis, how can you stop short of giving every prison the same kind of tools that we have here to decide the cases, and that the Department of Justice and the California counterpart has to carry out these duties?

MR. WAHL: Chief Justice, I think this is the most difficult question, but it's the question which we squarely meet. I think that you do not have to give inmates, obviously, Benedict on Admiralty; this is the extreme. Obviously they don't need this.

Q Well, let's narrow it down to --

MR. WAHL: But, on the --

Q -- should they have everything that we have and that the Department of Justice has, that the Attorney General in California has, on matters relating to criminal law and habeas corpus and post-conviction memos?

MR. WAHL: No, Your Honor, they should not. They do not need this. They should have what they need for meaningful access to the courts on the first round, I might say, --

Q How many volumes is that?

MR. WAHL: I would say --

Q Which volumes are -- I won't ask you to list them, but who is going to identify those volumes?

MR. WAHL: In the argument in the court below, Judge Zirpoli asked Mr. Nock and myself if we could coordinate on establishing a list of law books for California prisons.

Q Did Judge Zirpoli have some idea that you could speak for all the inmates of all the prisons in California?

MR. WAHL: I think he -- he only asked the question, Your Honor, and I said that I would consider this one of the most weighty responsibilities that anybody could have; but I would attempt it. Because it would be better than the present situation.

I think that counsel supports our position that additional books are needed in his brief.

Q As a matter of policy but not as a matter of constitution, I think. He has a very narrow limitation on that.

MR. WAHL: Well, he doesn't say that the constitution requires it.

Q He did in oral argument this morning. In oral

argument this morning he said none by the constitution. As a matter of policy he was willing to say that it was desirable to have some.

MR. WAHL: Yes. I believe, though, that when he admits in his opening brief, on page 22, that three additional law books in the prison libraries would give a knowledge of venue, jurisdiction, proper parties respondent, and exhaustion of remedies, and perhaps -- although he does not say this -- even proper remedies.

For instance, whether it should be a petition for Writ of error coram nobis, or petition for Writ of Habeas Corpus, which, in California, are brought in different courts. Petition for habeas corpus is brought in the court which has jurisdiction over the county, in which the prisoner is incarcerated; petition for writ of error coram nobis is brought in the court where the petitioner was convicted.

He admits in his brief that three more books would give these procedural, or this procedural law, make it available to the prisoners.

Q But in his argument he said that the court would resolve these procedural points; all the prisoner has to do is fill out the form.

MR. WAHL: Well, Your Honor, that is no substitute for law books. If it is, then we should --

Q No substitute for law books, but what value do

do you place on it?

MR. WAHL: I put very little value on it. I think that -- counsel's position is, or, rather, the State's position is that this -- that all an inmate needs to do is allege the facts on a blank, on these banks forms, and hand them in, so to speak, and the courts will do everything that's necessary to insure that the inmate gets a fair hearing.

Well, this is impossible. By the number of petitions that are filed. The inmate who files a post-conviction petition has a tremendous burden, because he has already had a trial. Perhaps he's had an appeal, but, as you know from the brief of amicus, California does not at this point inform inmates who have been convicted that they have a right to an appeal and a right to counsel on appeal immediately after their appeal.

So, many times, the inmate's first shot at a, in essence, a substitute for appeal is a petition for writ of error coram nobis, or a petition for habeas corpus.

Q Can I ask you, at what stage in a collateral relief proceeding is an attorney appointed in the California courts? Or is he ever?

MR. WAHL: In general, Your Honor, and I can't speak for all proceedings, I have been appointed in one proceeding myself, and that was in a petition for writ of error coram nobis. After the inmate has filed his petition with the court,

and the court had decided that this petition was worthy of appointment of counsel.

Q Well, counsel isn't automatically assigned in the collateral proceedings immediately upon the filing of the petition?

MR. WAHL: No, he is not. He is not. The inmate has to --

Q It's only when the court decides there's some substance to it?

MR. WAHL: Only when the court decides there's some substance.

Q But then counsel is appointed?

MR. WAHL: Yes, Your Honor.

Q To conduct the proceedings in the lower court?

MR. WAHL: Right.

Q And then on appeal?

MR. WAHL: And on appeal.

Q Is that uniformly true in all counties of California? Or only in some?

MR. WAHL: I believe it's true through the State, Your Honor.

Q Is that under a statute or court rule, or what?

MR. WAHL: It is -- counsel may be appointed pursuant to two statutes, part of the California Penal Code, for trial court or first-instance proceedings, and for appellate pro-

ceedings. There is one statute that covers first-instance appointment, and one statute that covers appellate appointment.

Q Do you think that with some effort that -- it might take you a year, but do you suppose you and someone else could make up a handbook on habeas corpus with some forms and some fundamental ground rules that would be adequate in your terms to guide an indigent prisoner?

MR. WAHL: I'm sure that somebody could do this, but it would have to be more than a handbook, it would have to be perhaps a book with a supplement, and the supplement should --

Q That's what I mean, a looseleaf thing that would be kept up to date, --

MR. WAHL: Yes.

Q -- on the fundamental rules.

MR. WAHL: Witkin's Criminal Procedure was cited by counsel early --

Q Yes.

MR. WAHL: -- and I was fairly certain, but I checked during the noon hour, and it's supplemented every two years. The latest supplement in your library upstairs is dated -- Mr. Witkin's promulgating letter is dated January 15, 1970.

This is insufficient. I think that it would be possible, Justice White, to write and publish the kind of book you're talking about, and I think this is embraced within the terms of the three-judge court's order. The three-judge court

did not order an extensive augmentation of prison law libraries, it left the whole matter open. It merely ordered the State to come up with new regulations prior to September 1st, which a person will see.

Q Well, let me ask you another thing. Was there, in your petition or in the findings of the three-judge court, anything to show that any of the named plaintiffs had been disadvantaged themselves with respect to regulations that we are now talking about? Namely, did they -- was it alleged that they had wanted to file or were in the process of filing, and that they had been denied certain books that they needed.

Is there any showing of any specific impact of these regulations on these plaintiffs?

MR. WAHL: I believe that there was, in the original complaint, not in this -- in the original complaints. There were four original complaints, three filed from San Quentin and one from Folsom.

Q It's a class action, or --

MR. WAHL: It is not a true class action, we've abandoned the class --

Q So, in other words, we're talking about the named parties?

MR. WAHL: Yes, Your Honor, --

Q And --

MR. WAHL: -- there were --

Q -- I just wondered if there was some showing of the impact of these regulations on these people, these book regulations. Aside from the restrictions which apparently voiced out of the case on -- the regulations prevent the loaning of legal materials from the hands of one prisoner to another; or preventing one prisoner to help another.

MR. WAHL: Justice White, I think you're referring to the regulations prohibiting inmates from owning, not loaning; owning personally owned law books.

Q I see. Right. And that all washed out?

MR. WAHL: Yes, that's washed out. California still prohibits inmates from --

Q Now --

MR. WAHL: -- from loaning material back and forth.

Q -- is that an issue in this case?

MR. WAHL: It was an issue in the lower court; we did not file a cross appeal, because Judge --

Q All right. So that is not an issue in this -- before us?

MR. WAHL; Well, only insofar as it's part of the basic substratum of the whole opinion. This is not a case just having to do with law books and --

Q I understand that, but --

MR. WAHL: -- this is access to the courts over the whole gambit of facilities provided by the State.

Q I don't see anything in the findings of the District Court showing that these particular plaintiffs had ever made an effort to get any law books if they ever wanted to file a petition about anything.

MR. WAHL: I believe, Your Honor -- the reason I say I believe is because I have not read the original complaints as opposed to the amended complaint for a long time. But I believe that they allege specifically that the denial of law books infringed their ability to file post-conviction petitions and actions under the Civil Rights Act of 1871. Certainly in the amended complaint we did so allege.

Q Well, after all, you know, these particular plaintiffs might be learned lawyers.

MR. WAHL: Robert O. Gilmore --

Q They might be extremely skillful in this matter. They might know all they need to know.

MR. WAHL: Robert O. Gilmore, Jr., is not, Your Honor. He's -- I think he's a three or four-time loser from --

Q Well, that might make him very skillful.

[Laughter.]

Right?

MR. WAHL: I -- he may have attained a good knowledge of law over the years, but I think even a lawyer -- if I were incarcerated, without the use of law books I would hate to rely on my memory. Because my memory would stop, for one thing,

as of the moment of my incarceration. I would not know any continuing cases.

The appellees say they haven't the money to provide the books. But, first of all, we haven't decided what books are necessary. If, for instance, we go fairly far, and if Mr. Nock and I were to have this task -- if we were to go fairly far and say the inmates should have all California Reports, all California Appellate Reports, all United States Reports, and all Fed Supp and Fed 2d Reports, plus the texts that have already been allowed, plus the rules of the District Court, plus Sokol on Federal Habeas Corpus --

Q How many sets in each prison?

MR. WAHL: One set perhaps in each prison.

Q Well, Mr. Wahl, if you prevail, I take it, we would have to lay down some kind of a standard, would we not, of this constitutional right, to provide access to the books. What would you suggest as a standard? I heard you say earlier something about whatever may be adequate to the need. Just what does that mean?

MR. WAHL: Your Honor, I almost have to go back to the kind of thinking that was followed by this Court before you overruled Betts vs. Brady?. In each case, where somebody comes to the court and says, "I cannot file a petition because there aren't the law books necessary." I don't think you run into that problem, because I think that if you order that, or

if you affirm this order, I don't think there will be extreme difficulty in working out some kind of a library to start out with.

Q Does this order suggest a -- I thought the order did nothing more than say these regulations are no good; come up with new ones. Did it provide any standard to guide the Commissioner of Corrections as to what the new regulations should provide?

MR. WAHL: No, Your Honor, it's not specific standards, not by saying these reports or those reports or these books.

Q It just said the existing list was inadequate?

MR. WAHL: It said that the existing list was inadequate and that some regulation should be promulgated which would provide the first-instance petitioner with enough access to the law to allow him meaningful access to the courts on the first time he files his petition.

Q And none of these -- none of these things on this list would be -- could be satisfied except by having it at the prison? The State law library would not be enough?

MR. WAHL: Your Honor, the way the State law library works --

Q Well, your answer is that --

MR. WAHL: No. No. The State law library is completely -- it's just not feasible. Each inmate is allowed

to send in a postcard asking for five volumes once a week. And he usually gets back another postcard saying they're all out or they're not in circulation -- well, I don't want to represent that as a fact usually. But quite often this happens.

Q Mr. Wahl, assuming that this Court should sit down and list the books which the prisons in California have to have, Federal Reports, U. S. Reports, et cetera -- oh, excuse me -- once we do that, what do we do with the habeas petition, year after next, which says that in Federal Supplement they don't have the project reports in it?

MR. WAHL: Well, Your Honor, I don't know the answer to that, but I think that constitutional law --

Q Well, you don't want us to be supervising the libraries of the prisons, do you?

MR. WAHL: No, I don't think that's --

Q Well, what compromise do you have between that and doing nothing to offer?

MR. WAHL: I don't think we reach that question, because I think that the -- the only question here is whether this order, which requires -- which asks for new regulations, should stand or fall. Or be modified.

Q Don't you think the State of California was entitled to the benefit of the wisdom of these three judges who have this idea on what would satisfy them?

MR. WAHL: Yes, Your Honor, I do.

Q Well, did they give any indication of what they had in mind?

MR. WAHL: They ordered the State to come up with new regulations on --

Q But what books? What books?

MR. WAHL: They -- they --

Q If they don't know, how should the Director of Prisons know?

MR. WAHL: Well, Your Honor, they did not require books.

Q Well, what did they require?

MR. WAHL: They pointed --

Q As they see it.

MR. WAHL: -- pointed out -- they pointed out three examples, and the judges said, of course the alternatives are legion. Justice White suggested one which has never been discussed, below or between counsel and myself.

Q In any county of the State is there a Legal Aid Society or a Public Defender or something like that, who is available at all to a prisoner who wants to file a petition?

MR. WAHL: There is legislation -- there is prospective legislation which will establish a Statewide post-conviction or, perhaps not all post-conviction, but appellate defense corps. There are Public Defenders now in California, in a

number of counties. But these Public Defenders only represent on appeal if they decide the appeal is worthwhile.

Q But there is no Public Defender, the scope of whose duties extends to answering a call for help from a prisoner who wants to file a petition for habeas corpus?

MR. WAHL: Not to my knowledge. The American Civil Liberties Union --

Q Well, Mr. Wahl, if there were something like that, you probably wouldn't be here asking for books for the prison libraries, would you?

MR. WAHL: That is correct.

Q If there were a provision that any inmate would have the services of counsel.

MR. WAHL: That is correct. I think that it would be cheaper, of course, to provide law books in prison libraries than to establish a Statewide system of appellate defenders. But, of course, dollar considerations are not the important thing.

Q When you get through with the flood of petitions, why, maybe it would be cheaper to have lawyers.

Q Some places have experimented with placing a Legal Aid lawyer right in the institution. Has California done any of that, other than with the student programs?

MR. WAHL: Not to my knowledge, Your Honor.

Q They have had the student programs, have they

not?

MR. WAHL: They have had some attempts to take students out to the prisons.

Q But you say this proposed legislation looks toward this very thing?

MR. WAHL: This is my understanding, and I believe it has not passed even one house yet; I believe it's pending in the Senate, I'm not sure.

Your Honors, when you overruled Betts vs. Brady in 1963, in deciding Gideon, a great number of the kinds of problems which you're touching on here were urged upon you by the State of Florida, that if you do this you'll encourage litigation because new tools, in that case counsel, would be available, be made available to many, many defendants and inmates; that there'd be an enormous burden on the taxpayers and that the matter would create myriad and complex new legal questions.

Q You don't think it has?

MR. WAHL: I think that the effect of it has been practically --

Q Well, from the vantage point that I sit, I don't know that I can say it hasn't.

MR. WAHL: Well, the practical effect in this case, I think, would be therapeutic and educational. It's much better to let inmates try to get out of prison using law books

than in more socially unacceptable ways. The psychological effect on a poor man who can't have more than the 12 books which the executive says he can have, when somebody else in the next call has 14 lawyers in a New York firm working on his case, is rather profound.

Inmates know what laymen generally know: effective access to the courts has to include knowledge of the law, through some kind of tool. Otherwise, there's no need for the bar. There would just be a need for the bench.

If you put the duty on the judge for protecting the rights of the post-conviction petitioner, you make the judge an advocate. And I think that the inmate has to have knowledge of the law to allege facts -- I won't touch on that, more than briefly. He doesn't know what facts to allege unless he has knowledge of the law. He doesn't know how to allege the facts and which facts are not relevant or material at all.

Here you have a situation where California makes habeas corpus and coram nobis available, but denies their effective availability to paupers. And this would seem to violate all your line of equal protection cases.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you --

Q Mr. Wahl, just before you sit down: there was some discussion in the briefs of the various -- of the forms

that are provided for the use of prisoners wanting to make application for habeas corpus and other collateral relief. I don't find any such forms, example forms, in the Appendix anywhere.

Are there any? Have I missed it?

MR. WAHL: I -- we didn't -- I don't believe we put them in, Justice Stewart, in the Appendix. There are about six pages of dittoed eight-and-a-half by eleven-and-a-half paper asking various questions. The question about the facts having to do with post-conviction relief say: Briefly allege the facts which you -- A question like this: Briefly allege the facts which you think entitle you to relief.

Q Aren't those forms in the original record lodged here?

MR. WAHL: I'm sure they are in the original record, yes.

Q Yes. And are these provided by both the State and the Federal courts --

MR. WAHL: They are, yes.

Q -- in California?

MR. WAHL: Yes.

Q By all of the States and Federal courts, that is the appropriate ones, where such writs may be filed?

MR. WAHL: Yes.

Q Okay.

MR. WAHL: And they are similar in nature, the --

Q And they are in the record?

MR. WAHL: They are in the record, yes, sir.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wahl. Now, you have ten minutes, Mr. Nock.

REBUTTAL ARGUMENT OF GEORGE R. NOCK, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. NOCK: Thank you, Your Honor.

On the point of the forms, raised by Mr. Justice Stewart, they are indeed in the original record; and, furthermore, we filed an amicus brief in the case of Johnson vs. Avery, 393 U.S. 483, a couple of terms ago.

In connection therewith, we lodged for the Court ten sample copies of each of the three forms available.

Q May I ask again what that case was?

MR. NOCK: Beg your pardon?

Q In connection with what case were they furnished?

MR. NOCK: Johnson vs. Avery, Your Honor.

Q Oh, yes.

MR. NOCK: Mr. Justice Blackmun asked Mr. Wahl about the Hatfield case. I would only make the observation that, although I have no personal knowledge as to whether Oregon at that time had only one penitentiary or more than one, I got the distinct impression from reading the opinion that it had

more than one, and I felt that the opinion was written upon that premise.

Perhaps the matter should be investigated before the case can be held to stand for the authority -- to stand for the proposition that a three-judge court is not required.

Q Well, this -- there is no question that this is a Statewide application, is there?

MR. NOCK: No question at all.

Q And it's the order of a single administrator authorized by statute to propound the regulations?

MR. NOCK: Indeed.

Q Aren't there plenty of cases in this Court recognizing a three-judge court in this situation?

MR. NOCK: No.

Q We had one a couple of terms ago involving Arizona cantaloupes, in which the order of the -- the administrative order affected apparently only one cantaloupe grower, although it was normally a Statewide application to have this three-judge court, and we entertained a direct appeal here.

MR. NOCK: Well, I missed that one, Your Honor. I'm not familiar with any others except Herkness vs. Arian, which didn't decide the particular point, and the affirmance of the Poresky case, which is cited in the earlier certiorari petition and Mr. Wahl's brief.

Mr. Justice Brennan asked about Penal Code Section 2600. That is the section which is called the inmates' bill of rights. It doesn't mention law books. It just give inmates the right to purchase, receive and read written material of all descriptions with certain specific exceptions.

It has been interpreted, and I think correctly, by the Director of Corrections as requiring that inmates be allowed to purchase law books up to specified space limitation. But it's rather ironic in that the full record will show that, prior to the enactment of this section, prison rules forbade inmates to own personally owned law books -- to possess personally owned law books.

And the reason for this, and the basis on which we defended it, was equal protection. The Director did not want to have the affluent inmate allowed to own more than the -- to own law books not available to the indigent inmate. And he was forced to abandon this position because of the conflict of the statute, and didn't want to litigate in the State courts the unconstitutionality of the statute upon that ground.

The appointment of counsel in collateral proceedings, as raised by Mr. Justice White, is detailed in People vs. Shipman, which is cited in our brief, that's at 62 Cal.2d. That's S-h-i-p-m-a-n. Whether in coram nobis, as that case dealt with, or habeas corpus; when a facially meritorious petition is presented, then counsel is appointed, normally, to

handle the evidentiary hearing.

There is no appeal from habeas corpus proceedings in California.

Q You have to re-file them?

MR. NOCK: You re-file in the higher court; and the appointment of counsel does not necessarily carry forward. There is appeal in coram nobis cases.

Q But if they file a facially adequate petition in the higher court, counsel is appointed?

MR. NOCK: Yes, indeed.

And in coram nobis, if counsel was appointed in the trial court, then, as a matter of practice, counsel is always appointed automatically in the court reviewing the denial of coram nobis, as was the case in litigation which Mr. Wahl and I handled at an earlier stage.

The Chief Justice asked how many sets of these books were in each prison, and the regulations provide that there will be sufficient copies to provide regular access on not less than a weekly basis. That's Administrative Manual, Section 330.042, which is set out in both briefs and the Appendix.

Q Does that mean, then, that in some prisons there are several sets available?

MR. NOCK: Well, the regulation has not been fully implemented, because of this litigation. But -- and I don't know whether there is more than one set in any prison now. But

there will be, to be sure, if they are fully improvised.

Q There is at least one set?

MR. NOCK: Indeed, an infinite number of sets, in theory.

Mr. Justice White also asked if there were any Legal Aid attorneys or Public Defenders. There are not for the purposes of habeas corpus, although in one county, Solano County, where a major penal institution is located, the judge automatically appoints counsel -- appoints the Public Defender as counsel whenever an order to show cause is issued. He does not, however, normally confer with prisoners.

Some county Public Defenders will continue to represent their clients, their trial clients, on post-conviction proceedings; whether they're allowed to do so is a matter between them and their particular board of supervisors. There is neither authorization nor prohibition on a Statewide basis.

Q If a lawyer is appointed for an indigent at a criminal trial and it results in a conviction, then does he have the duty under your State law to appeal the case if his client wants him to?

MR. NOCK: Yes. He has the duty to file a notice of appeal, which gets the case up to the appellate court, which then appoints counsel if the defendant is indigent and he --

Q The appellate court then appoints counsel?

MR. NOCK: Appoints counsel. They --

Q Does he appoint the same lawyer or a different one?

MR. NOCK: Usually a different one. Usually the same lawyer doesn't want to handle it. But if he requests it, or if the client requests it, he's normally appointed.

Q And that's to the District Court of Appeals?

MR. NOCK: It's now denominated simply as the Court of Appeals, but --

Q There are various of them in the district?

MR.NOCK: Yes, there are a number.

Q And then there's the discretionary petition, then, to the Supreme Court of California?

MR. NOCK: Yes.

Q Does counsel get appointed at that stage for an indigent? Or is the same lawyer who was appointed by the Court of Appeals, does he have the duty of carrying it further?

MR. NOCK: There is no --

Q That is, in affirmance of the conviction?

MR. NOCK: There is no duty to petition for a hearing. Counsel is appointed to represent the individual in the Court of Appeals, is authorized to petition for a hearing, and normally does. But he's not obliged to do so. If the California Supreme Court grants a hearing, it appoints counsel, who is usually the same counsel appointed in the Court of Appeals, but not necessarily.

Q Well, how does he get in there? How does he get into the -- he has no help in preparing the petition to the California Supreme Court?

MR. NOCK: Well, not if the attorney does not do it for him. But normally an attorney will, at least if his client requests it, petition for a hearing. I'd say in nine out of ten cases they do.

Q Would he be required to?

MR. NOCK; He's not required to. Because he has the option of concluding any --

Q Would he be paid for it if he --

MR. NOCK: Yes.

Q -- if he did it?

MR. NOCK: Yes.

Q So, they are much more often represented by counsel than are petitioners for writs of certiorari here to our Court, who are indigent?

MR. NOCK: Oh, yes. Yes, indeed. In nearly every case. I only recall a couple of cases where an indigent filed his own petition for hearing. And I know of none where an attorney has refused to file one upon the request of his indigent client. But he will often write the client and say, "Well, this appeal was frivolous to begin with, and I see no point in bothering the Supreme Court", and the client will, often as not, agree.

Q Mr. Nock, I gather, then, this new legislation, which Mr. Wahl mentioned to us, won't change the situation very much, or will it?

MR. NOCK: I am unfamiliar with the legislation, Your Honor; it's news to me.

The question was raised as to whether this -- or rather Mr. Wahl indicated that our position was that this would encourage, the use of law books would encourage litigation. We take no such position. I have no idea whether it would encourage litigation or not.

Personally, I think law books would make no difference in the volume of litigation or question whether or how many -- the percentage, I should say, of frivolous petitions. Legal assistance, with lawyers and law students, might cut down the volume of frivolous petitions somewhat, although that is speculative; we would have to rely on the experience of States which have adopted the Uniform Post-Conviction Procedures Act.

From what I can tell by reading the William & Mary Law Review article, 12 William & Mary Law Review article on the subject of The Verdict is Not in Yet, as to how effective that Uniform Post-Conviction Procedures Act has been, or its equivalent has been in cutting down the number of frivolous petitions.

Q Is that Law Review article in your brief?

MR. NOCK: No, it's cited in the brief of amici,

and it's at 12 William & Mary Law Review, beginning at page 149. It's a very extensive and thorough survey of post-conviction remedies, done for the Federal Judicial Institute.

Q Volume 12, what page?

MR. NOCK: Page 149.

Q Thank you, sir.

MR. NOCK: It runs for about 75 pages.

And I thank Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nock.

Mr. Wahl, you acted at the appointment of the Court and at our request, and we want to thank you for your assistance to the Court and of course the assistance to your client.

MR. WAHL: Thank you for your appointment, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

[Whereupon, at 1:43 p.m., the case was submitted.]