In the

Supreme Court of the United States

RAYMOND K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., Appellants,	)	
v.	)	No. 72-1465
ROBERT MARTINEZ, ET AL., Appellees.	)	

Washington, D. C.

December 3, 1973

Pages 1 thru 42

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

RAYMOND K. PROCUNIER, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL., Appellants,	:	
v.	:	No. 72-1465
ROBERT MARTINEZ, ET AL., Appellees.	:	

Washington, D. C.
Monday, December 3, 1973

The above-entitled matter came on for argument at 1:25 o'clock p.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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

W. ERIC COLLINS, ESQ., Deputy Attorney General of California, San Francisco, California; for the Appellants.

WILLIAM BENNETT TURNER, ESQ., 12 Geary Street, San Francisco, California 94108; for the Appellees.

- - -

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1465, Procunier v. Martinez.

Mr. Collins, you may begin whenever you are ready.

ORAL ARGUMENT OF W. ERIC COLLINS, ESQ.,

ON BEHALF OF APPELLANTS

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

First, I should like to apologize to the Court and to draw attention to a mistake in our reply brief, an omission at page 5, footnote 3, at the foot of page 5, which should read "Compare United States v. Wilson, 447 F.2d 1, 8 (9th Cir. 1973) with United States v. Savage" -- there is no citation -- the number is, as shown, "72-3145," it is a Ninth Circuit case, August 8, 1973, and has been cited by counsel for appellees, I believe, in their brief.

Q United States v. Savage?

MR. COLLINS: Yes, sir.

Q S-a-v-a-g-e?

MR. COLLINS: S-a-v-a-g-e.

Q Thank you.

Q And that is August 8?

MR. COLLINS: August 8, 1973.

Q Is that in your reply brief?

MR. COLLINS: Yes, Your Honor.

Your Honors, this action, under 42 USC 1983, the Federal Civil Rights Act, was brought as a class action by two California prison inmates, a Mr. Martinez, who has since escaped and is still at large, and a Mr. Earley, who is the representative of the class of all California inmates. It originally alleged full class or general actions on one claim for individual relief.

Pursuant to 28 USC 2281, a three-judge federal panel considered the general causes. One of these causes involved registered mail, and by a voluntary action on the part of the Director of the Correctional System, who was then and still is in the process of revising these various regulations, this aspect of the postal system was made available to inmates and that mooted the question.

There was a second cause, and that involved confidential mail from inmates to attendants. This, too, was mooted by the action of the California Supreme Court which, in In Re Jordan, which is cited in the brief, interpreted California Penal Code Section 2600 to find such a California statutory right in the inmates. This avoided the federal question.

The third individual claim was brought by Mr. Martinez, and this ultimately was mooted out, so we are then left with two general causes. The first was an attack under the First and Fourteenth Amendments on four California correctional regulations having to do directly or indirectly with

inmates' mail, inmates' personal or inmates' social mail. And the second cause was an attack under the Fifth Amendment and Fourteenth Amendment on access to the courts insofar as California controlled confidential interviews between inmates and their attorneys and assistants, too. All these regulations by the decisions of the three-judge federal court were found to be and declared unconstitutional insofar as they applied to mail or restricted access to the courts, that enforcement was enjoined and we appealed.

In addition, the Director was ordered to submit new regulations in accordance with the finding of fact and the conclusions of law of the District Court. This was done, too, and the new regulations were ultimately approved on August 1, 1973, and are now in effect in California.

Q No stay was sought while -- during the pendency of the appeal, I take it?

MR. COLLINS: I beg your pardon, sir?

Q California didn't seek a stay of the court judgment pending its appeal?

MR. COLLINS: Yes, Your Honor, we did.

Q And you were unsuccessful?

MR. COLLINS: We were unsuccessful in that endeavor.

Q Is the state willing to have the new regulations continue in effect?

MR. COLLINS: No, Your Honor.

Q You want to revert to the old ones?

MR. COLLINS: Yes, Your Honor. We wish the right to follow what we consider to be correct penological concepts.

Perhaps our first point is that the appeal is properly before this Court. We rely upon the statute, 28 USC 1253. This was, in the words of the statute, an interlocutory all-final injunction of a three-judge federal panel.

Now, in the Brown shoe case, that is Brown v. United States, there a merger between two corporations was held to be in violation of the Clayton Antitrust Act as a lessening of competition. On appeal, it was urged that the judgment was not final because the District Court retained jurisdiction in order to approve the plan of separation of these corporations.

Q Mr. Collins, was there any question raised of jurisdiction?

MR. COLLINS: Yes, Your Honor, by the appellants -- I beg your pardon, by the appellees, the appellees appeared to raise this question as to the prematurity. However, I will move quickly on and state this: We believe we have a finding of fact, conclusions of law, a declaration of unconstitutionality and an injunction. We think we can properly appeal.

However, we submit to you that the three-judge federal court should have abstained. Abstention, we submit, is appropriate and peculiarly appropriate. Not only are the regulations challenged and under attack, have not been

interpreted by the state's highest court, in our case the California Supreme Court, it is particularly appropriate where there is another and separate state statute which if fairly interpreted would provide a separate and distinct state ground which would moot the federal question.

We assert, and we submit to you, that that is our situation. We do have a statute, it is California Penal Code, Section 2600.

Now, in the Railroad Commission case, that Railroad Commission v. Pullman, and in the Reetz v. Bozanich case, that is the Alaskan constitutional case, in both of those it was the interpretation of either a state statute or a state constitution and not the regulation under attack which, fully interpreted, would have mooted the federal question, and this Court ordered abstention.

Q Mr. Collins, this was under a federal statute, was it not?

MR. COLLINS: This case was indeed, Your Honor, brought under the Federal Civil Rights --

Q Were any of the cases you cited brought under that statute?

MR. COLLINS: Not under the Federal Civil Rights Act, Your Honor, no. However, if any -- if under the Federal Civil Rights Act a constitutional right is asserted, as it must be, pursuant to Cooper v. Pate, then if there is a state

statute which would grant that right --

Q I am talking about abstention. Do you have an abstention case involving the Civil Rights Act?

MR. COLLINS: Off-hand, Your Honor, I have not a specific United States Supreme Court case to which I can refer. But I do suggest to you that no matter what act is being enforced, if it is reasonable for this Court to find a state statute which would avoid the federal question, then it should order its lower federal courts to abstain.

Now, there are cases -- I was saying, we do have a statute. It is California Penal Code, 2600, and it is cited in our brief, of course. But I would like to read just one little section which is as follows: "Pursuant to the provisions of this section, prison authorities shall have the authority to exclude obscene publications or writings, and mail containing information concerning where, how, or from whom such matter may be obtained; and any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence; and any matter concerning gambling or a lottery."

Now this we say is the limit of the California authority to exclude. In In Re Harrell, at 2 Cal. 3d 675, the California Supreme Court held that this statute, the one I just cited, was in fact the California inmates' bill of rights, and that the concept of civil death had been abandoned on the

State of California.

We submit it could be fairly argued and fairly interpreted, although I would be frank with you, it would be my duty as representing the Director to argue to the contrary in the appropriate state court, but nevertheless it would be fair to argue that the only exclusion authority of the California director is contained in this statute.

Now, as opposed to this, in their brief appellees argued that because a California Senate bill, section 1419, specifically and for the first time put into section 2600 the right of inmates to send social mail, that therefore there is no right statutorily in those inmates to send social mail. This may well be. But we point out that in that same bill, which incidentally never became law, but in that same bill there was an amendment which provided that the California authority, the California correctional authority should for the first time have specific authority to exclude writings on the grounds they would tend to incite, and I quote, "disobedience of prison rules." Therefore, we can argue on parity with the appellees that absent such specific authority there is no authority.

In short, we feel that the California Supreme Court could fairly and easily, and contrary to the position that we would take in that court, hold that there was indeed a California statutory right of inmates and that the Director

only had the power to exclude those matters specifically referred to in California Penal Code, 2600.

Q But you don't want to keep these new regulations in, do you?

MR. COLLINS: No, Your Honor, we do not want the new regulations.

Q Well, how do you -- what is the difference between the two? Did I understand you to say the Supreme Court could knock these old ones out?

MR. COLLINS: They might. We would argue seriously they should not, but they might. We have argued unsuccessfully, believe me, in our California Supreme Court before on prison regulations.

Q Oh, I thought you were arguing that the mistake was made by going to federal court, you should have gone to state court and California agreed that they were wrong. I misunderstood you, I guess.

MR. COLLINS: I see, Your Honor. Let me restate it. My argument is this, that a reasonable and valid argument could be made to the California Supreme Court that all of these regulations, what might be called exclusory regulations, presently under attack was without authority and therefore exactly like in the Railroad Commission v. Pullman case, were ultra vires acts.

Q But that case was not under a specific statute

which gave a federal cause of action, which this one is.

MR. COLLINS: That is correct, Your Honor, and --

Q And I assume you would oppose that in the Supreme Court of California?

MR. COLLINS: Yes, I would.

Q Just as vigorously are you are opposing it here.

MR. COLLINS: Just as vigorously, Your Honor, as here I am saying it is a reasonable argument.

Your Honors, I would like to address myself to the substantive question, and that involves the actual regulations. Now, four of them involved mail, and they are, very briefly, as follows: Rule 1205 -- they are all in the briefs that are before you -- and this had to do -- I beg your pardon, Your Honors.

There is 1205, which had to do with contraband, and that is any writings -- and I will omit some things -- which are inflammatory political, racial, religious or other beliefs. And also is subsection f. of that same rule, which includes writings which in the judgment of the warden or superintendent might tend to subvert prison order and discipline.

In addition, there is an actual mail regulation, which was also attacked, which said that the inmate may not send or receive letters that pertain to criminal activities. This, too, also contained this phrase, that a "lewd, obscene, or defamatory, and contain prison gossip or discussion of other

inmates," and this aspect too was attacked.

And finally, inmate behavior which prohibited or attempted to deter those who agitate, unduly complain, magnify grievances, or behave in any way which might lead to violence.

It is about these regulations that we are talking today. Now, we do concede and agree that certain specific federal constitutional rights do indeed follow an inmate inside the prison environment. These include, for example, the right of access to courts, the right not to suffer cruel and unusual punishment, and indeed perhaps the right to exercise religion.

But we ask this question, and that is do the First Amendment rights as we popularly understand them, and that is the right to communicate and receive ideas and to assemble for purposes of doing so, do these rights follow the inmate within the prison environment?

Our first position is that these do not, and we say with the Fifth Circuit rule in Frye v. Henderson -- again, it is cited in our brief -- that social mail is not a federal constitutional right but is a matter for prison administration. Now, we say this realizing that in that event there can be no federal burden upon us to justify the regulations if there is no underlying federal right, and we say it because we believe that the underpinning of those First Amendment rights does not exist.

Q Because they are in prison?

MR. COLLINS: No, Your Honor, not because they are in prison, although that is the resultant situation, but for this reason: As we understand it, the basic underpinning of these rights on which, as Judge Learned Hand said, we stake our all on the proposition that in a free society it is best to expose people to a free marketplace of ideas, and our fundamental belief is that from this clash of beliefs, good, bad and indifferent from this exposure, that ultimately long-term such a free society will only choose or will choose ultimately beliefs which will improve our awareness, increase enlightenment and protect the very freedoms that permit them to choose.

Put another way, perhaps we might say that the highest aspect of social wisdom is the long-term collective judgment of free people.

Q Mr. Collins, your answer to Mr. Justice Douglas' question is yes?

MR. COLLINS: Your Honor, the people, the persons who have been convicted and imprisoned have selected themselves out of such a free society.

Q When did they do it?

MR. COLLINS: By the acts --

Q When they committed the crimes?

MR. COLLINS: Yes, Your Honor.

Q They can still write letters.

MR. COLLINS: Yes, indeed, Your Honor.

Q Couldn't they?

MR. COLLINS: Of course you may write letters.

Q And you couldn't stop them, could you?

MR. COLLINS: Yes, Your Honor.

Q You could?

MR. COLLINS: It would depend on the kind of letters.

Q You mean the man is arrested and you can stop him from writing letters?

MR. COLLINS: Oh, no, Your Honor. No.

Q Well, when did the state first get the right to stop him from writing a letter?

MR. COLLINS: When did it first get the right? Your Honor, may I approach that backwards and say it is certainly true that it has the right to stop the writing of letters, and of course I am excluding such letters as access to the courts and the like.

Q Only because you have to.

MR. COLLINS: And letters, shall we say, to the counsel and their legislators. Again, that is a California statutory right, and other similar rights. But when that person is finally imprisoned within this controlled environment, it is precisely that.

Q Then the answer is yes?

MR. COLLINS: Yes, the answer is yes. The answer is that --

Q And the next question is why?

MR. COLLINS: Because, Your Honor -- and this is where I digress, perhaps --

Q Is it because he gave it up when he committed the crime?

MR. COLLINS: No, not -- yes, yes, that's true.

Q He gave up his First Amendment rights when he committed the crime?

MR. COLLINS: He gave up these particular First Amendment rights when he committed the crime, because the underpinning disappeared. You see, I am suggesting this --

Q Did he also give up his right to a trial?

MR. COLLINS: No, Your Honor.

Q Well, why do you pick out just one right that he loses?

MR. COLLINS: Because --

Q Did he give up his right to vote?

MR. COLLINS: No, Your Honor.

Q He can only give up his right to write a letter?

MR. COLLINS: Yes, Your Honor, and the reason is this: The basic underpinning for the right is, I believe, as I have stated, that ultimately in a free society this collective judgment will be made, correctly.

Q I suppose he gave up his First Amendment right to free assembly at the time of his conviction, not at the time

he committed the crime.

MR. COLLINS: Yes, Your Honor.

Q At the time of his conviction he could no longer freely attend any meetings he wanted to. I suspect there wouldn't be any question about that, because he is put in a cell every night.

MR. COLLINS: That is true, Your Honor. It is merely a concomitance of the same thing, and we believe that these people, when they have got into that situation, will not ultimately choose correctly, as we do for a free society.

Q Since you wrote your brief, this rather voluminous federal report, the Peterson report, is coming down dealing with this problem. I am wondering if you have had a chance to look at it?

MR. COLLINS: I regret not, Your Honor.

Q Because it seems to be largely at war with your brief.

MR. COLLINS: My point is that --

Q It deals only with recommendations.

MR. COLLINS: Precisely, Your Honor, and this is why I say that we are not talking about constitutional rights. It may well be --

Q But the appellee is talking about constitutional rights.

MR. COLLINS: Yes, Your Honor. The constitutional

right is when this Court delineates it. We may well -- and I notice my white light is on, but I am anxious to get to one of the points, Your Honor -- we may well have different penological concepts, and it may well be that the appellee is right, but that is not the question before this Court. The question is are we federally compelled to follow a particular recommendation.

Q Well, this case involves one fact, I assume, and that is that the prison authorities here censor letters, outgoing letters.

MR. COLLINS: They do indeed. They do, and they should.

Q Under what theory?

MR. COLLINS: Under the theory that they are controlling and guiding the environment of the person committed to their care.

Q But some of the censorship apparently relates to criticism of the prison authorities.

MR. COLLINS: Very well, Your Honor. The argument is made that this is a stifling of criticism. We say that is not true. First, there is ample way in which those criticisms can be made in a totally confidential and protected manner.

Q They could have a riot.

MR. COLLINS: A California statutory right to do so, under section 2600. We merely say this, that when it comes to

social mail as opposed to confidential mail, no, there is not such a right, not a federal constitutional right.

Your Honor, I have not reached the last point. I would like to touch very quickly on it. We have no objection to search the paraprofessionals, to the contrary, but we ask is it a federal right or is under federal compunction that California must admit paraprofessionals with the privileges of attendance to California prisons, especially when that class has not yet been delineated. We think not.

Q Because of the fact that it isn't an identifiable or otherwise regulated group?

MR. COLLINS: As yet, no. Our basic concept is this, the person who wishes to take part in this relaxation of security and the burden is on them to make this must have something more to lose than simply the sanctions of criminal law. We want them to be subject to professional discipline. Whether the standards of conduct is higher or the standard of proof is low, the more impartial and dispassionate peers will judge that conduct.

Your Honor, I believe I only have two minutes left, I would like to reserve that two minutes for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Turner?

ORAL ARGUMENT OF WILLIAM BENNETT TURNER, ESQ.,

ON BEHALF OF APPELLEES

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

The state has argued that the District Court should have abstained in this case on one issue only, that of male censorship rules, but there is no basis on which that issue could be decided on state law grounds. There is no uncertainty whatever about whether these rules apply to prisoners in California. They do. There is no uncertainty about whether they apply to all letters from prisoners to their family or friends. They do. And there is no uncertainty that these rules are designed to give the censoring guards absolute open-ended unchecked censorship power as to their contents. These rules were authoritatedly construed by Director Procunier in his testimony and deposition in this case to permit the censoring guard to fill in the blank, to find a reason that he would think would be appropriate for rejecting any particular letter. Director Procunier testified that that was permissible under the rules involved in this case.

Now, under California law, under section 5058 of the California Penal Code, the Director has complete unreviewable authority to make and change rules and regulations for the administration of the prisons. There is no restriction on that, and no state statute limits his discretion in any way.

Therefore, there is no state law basis for deciding the issue of mail censorship.

Q Mr. Turner, do you feel there is some right of censorship on the part of the prison authorities?

MR. TURNER: There is no contention in this case, Your Honor, that the prison official may not read every piece of mail going in or out of the prison involving family and friends of prisoners. Even though that practice has been abandoned by a large number of prison systems around the country and recommended by the National Advisory Commission on Criminal Justice Standards and Goals, there is no contention here that they may not read the mail. The contention here is limited to censoring the contents of the mail, rejecting letters and punishing prisoners for what they say in the letters.

Q Well, let's see if I have you then correctly understood. I take it you are conceding at least for purposes of this case they have the right to read. Do I understand you to say that they have the right not to censor in any respect?

MR. TURNER: I am not sure I follow that, Your Honor.

Q I am asking you, is that your position, that they may read but may not censor?

MR. TURNER: We are supporting the order of the District Court which permits the reading of all social mail, and the rules that were approved finally by the District Court on August 1 of this year permit the censoring of specific

contents that are deemed to present some danger to prison security or some other penal interest, and --

Q Well, at this point do you concede this is proper then for purposes of this case?

MR. TURNER: For the purpose of this case, yes, Your Honor.

The appellants have raised for the first time in this Court an issue regarding section 2600, subsection 4 of the Penal Code, and they suggest that that statute might have something to do with the resolution of this case, but the statute cannot be fairly interpreted to govern the issues presented here. Nobody has ever before suggested that it had anything to do with mail censorship.

Q Let me ask you on the cenorship issue, if I may, with you. Are you saying that absent any California statute defining the authority of the prison director or guidelines that a state court could -- presented with this question, would have to do exactly what a federal court does, apply the federal Constitution?

MR. TURNER: That's right.

Q What about the California Constitution?

MR. TURNER: It could apply the California Constitution, but the California courts say that under the California equivalent of the First Amendment, the federal precedents on constitutionality would govern.

Q I take it you are not making any claim that prisoners have whole First Amendment rights?

MR. TURNER: No.

Q They don't have the right of assembly in the sense that a free person has, do they?

MR. TURNER: No, there is no contention --

Q They can't call a meeting and make the director open up all the cells and gather out in the yard for a meeting, can they?

MR. TURNER: Certainly not. There is no right of assembly involved in this case at all, only the right of expression --

Q Well, I was just picking that as one very important right, First Amendment right, which people on the outside have, and you concede when they go in they don't have it?

MR. TURNER: We do, Your Honor.

Q And then the question of what other First Amendment rights they have lost is what is at issue here?

MR. TURNER: There are really three kinds of First Amendment rights involved here. One is the right of free expression. Another is the right of association with family and friends on the outside. And finally there is the right to petition for redress of grievances.

Q Well, how do you delimit the right of association with family and friends? Do you -- will you flush that

out a little?

MR. TURNER: Well, this is the only link that many prisoners have to the outside world at all.

Q But how far do you claim they are entitled to that right of association?

MR. TURNER: Well, only to the extent that they are allowed to maintain communicating --

Q Visitors, have visitors at the prison?

MR. TURNER: Well, that is not involved in this case.

Q But I am not sure what you mean now when you are saying the right of free association. To what extent?

MR. TURNER: Only to the extent of correspondence with the family and friends.

Q I wouldn't have thought of that as association when you are also talking about free expression by letters.

MR. TURNER: Well, I think expression is the basic part of the First Amendment, but there is also the right to petition for redress of grievances. I invite the Court's attention to the letters that were rejected by the prison administrator at Folsom Prison. They are exhibits to the deposition of Huel Morphis, and in those letters the prisoners were saying to their father or mother "please get me a lawyer to deal with this problem that I have," and that is the only way that they can get to a lawyer, is to write to their family to go out and hire them a lawyer. So the right to petition for

redress of grievances is also involved, even in the social mail context.

Q Well, you really are speaking to some extent of rights of visitation, are you not?

MR. TURNER: It is not involved at all in this case.

Q Aren't you talking about paralegal visitations?

MR. TURNER: Oh, that is a separate issue. That would be solely for the purpose of serving as an investigator for the lawyer.

Q Do you concede that the prison might have reasonable regulations as to hours of visitation --

MR. TURNER: Yes, indeed.

Q -- and numbers of visitors?

MR. TURNER: No doubt about it.

Getting back to section 2600, subsection 4, in order to have anything to do with mail censorship, this statute would have to be turned on its head. I invite the Court's attention to the statute which is reproduced as Exhibit B to the brief for appellants.

The structure of the statute is as follows: If a person is sentenced to imprisonment in California, all of his civil rights are thereby suspended, and he has none. That is what the statute provides. And then in the third paragraph, the statute states that this section shall not be construed so as to deprive such person of the following civil rights,

and then four specific civil rights are listed, and the fourth one is the right to purchase, receive and read any and all newspapers, periodicals and books accepted by the Post Office. Then there is a qualification on that right giving prison authorities the power to exclude obscene publications or writings and -- and this is the first mention of mail -- and mail containing information concerning where, how or from whom such matter -- referring to obscene publications or writings -- may be obtained.

Now, the statute thus takes away all civil rights except for specific ones, and this mention of mail is only a qualification and exception to an exception, if you will, and it just doesn't confer a general right in the prisoner not to have his mail censored.

Even if the statute were applicable, even if the structure of the statute were not as it is, the statute deals only with in-coming matter and not at all with out-going matter. It gives the prison officials the right to exclude certain things from the prison, but it doesn't deal with things that are going out. And the issues in this case involve what the prisoners are writing outside of the prison. Basically, it is the unduly complaining, the magnifying of grievances kind of things, those apply to prisoners' letters going out and not going in, therefore even if the statute could be interpreted the way the Deputy Attorney General would have it

read, it could only apply to a very small part of this case and would not significantly alter the constitutional issue.

The Supreme Court of California, in the Harrell decision, mentioned by counsel for appellants, did interpret this subsection of the statute. That court reads the statute the same way we do. In short, the issue of mail censorship could only be decided on federal constitutional grounds and is no basis for sending prisoners into the state prison system.

Turning to the substantive issue on mail censorship, it is essential to focus on exactly what the District Court did and what it didn't do. The regulations that the court invalidated have to be compared with the regulations that they finally approved on August 1st of this year, under which the state has been operating for several months.

The new rules which were approved by the District Court are printed in the supplement to the appendix at pages 195 and 196, and these rules give the prison officials very, very broad authority to censor mail, in-coming and out-going, for a whole variety of reasons.

Q Where are you reading now, what page of the supplement?

MR. TURNER: The supplement to the appendix, pages 195 and 196, Your Honor.

If there is something that the state needs in administering prisons and prisoner mail that isn't in these rules, the

state hasn't said what it is, didn't tell the District Court what it is, or hasn't told this Court what it is.

When you compare the rules given final approval by the District Court with the ones that they invalidated, you find that the net effect of what the court below did was to invalidate the following: prohibiting prisoners from writing letters in which they "unduly complain," in which they magnify grievances, in which they express inflammatory political or other views or beliefs which are defamatory, but that does not mean libelous; according to the testimony of one of the mail room officers that meant that the prison was belittling the staff or criticizing policy; and, finally, the catch-all, letters that are "otherwise inappropriate," this is the one that gives the censoring guards the right to fill in the blank on the checklist with whatever reason he deems appropriate. And of course the entire letter is rejected if any part is objectionable. The rest of the rules that were involved at the beginning of this case survived intact in substance in the rules approved finally by the District Court, and the state has not complained that any of these new rules leave any of their interests unprotected.

Q I want to see if I understand you. Looking at the old rules, these are the ones that is Exhibit C, are they not --

MR. TURNER: Yes.

Q -- to appellants' brief?

MR. TURNER: Yes, sir.

Q I gather that the one on page vi directed to rule 24028, that is one that did not survive, is that right?

MR. TURNER: Well, parts of it did. The obscenity --

Q Have you tried to correlate anywhere in your brief --

MR. TURNER: No, they would have to be compared, and it is not word for word. In substance, all of -- for example, obscenity --

Q Well, would you repeat again what you say survived and what went out?

MR. TURNER: Well, what went out were the provisions -- referring to Exhibit C, to the brief of appellants --

Q Yes.

MR. TURNER: -- in rule D-1201, the unduly complaining and magnifying grievances provisions came out.

Q The one I have -- that is the beginning of C, 1201?

MR. TURNER: Yes.

Q All right.

MR. TURNER: And then in 1205 --

Q May I ask, that means that somewhere we have something about do not agitate --

MR. TURNER: Or behavior which might lead to violence.

Q Yes.

MR. TURNER: The rules were enjoined, of course, only insofar as they apply to mail.

Q Yes. That is what I wanted to get. But do not agitate, one might agitate with mail, but did that still survive, did it?

MR. TURNER: Well, if you look at the rule finally approved, it would ban letters containing plans for activities in violation of institutional rules, and it is in violation of institutional rules to agitate, so I think that would still survive.

Q What is the next -- what about 1205?

MR. TURNER: 1205, under the contraband rule, insofar as it applies to mail at all, writings expressing inflammatory political, racial, religious or other views or beliefs when not in the immediate possession of the originator.

Q They went out? That went out?

MR. TURNER: Well, that went out insofar as it applies to mail.

Q Yes.

MR. TURNER: And then in 2402(8), on the next page --

Q May I ask then, what about f, 1205-f?

MR. TURNER: I think the substance of f has survived.

Q Has survived. All right.

MR. TURNER: And the first paragraph on the next page.

Q Right.

MR. TURNER: But then in 2404(8), defamatory went out, as well as what are otherwise inappropriate.

Q Is that it?

MR. TURNER: That's it.

Q Well, what does foreign matter mean in 2404, if someone writes in Spanish, does that go out?

MR. TURNER: I don't think that is meant to be words, Your Honor. I think that is substances. They may be getting at drugs or something of that nature.

Q All right.

MR. TURNER: These rules, unduly complaining and magnifying grievances and so on, are relics of an undistinguished past in prison administration, and they are not needed to run any prison, as the states that have done away with reading mail altogether show and as the new report of the National Advisory Commission on Criminal Justice Standards and Goals shows. Indeed, the state has never said in this case that it has any interest at all in enforcing these particular rules.

Q D-1201, I gather, by its terms, doesn't deal in so many words with mail, it is just kind of a general canon of behavior, isn't it?

MR. TURNER: That's correct, Your Honor, but it does apply to letters. We specifically asked in the request for admission does this apply to letters and the answer was yes.

It is in the record. And certainly the testimony of the censoring guards was that they frequently use the unduly complaining and magnifying grievances provisions to censor criticism of them or their policies.

Q Well, I presume it would be the last sentence of 1201 that was involved there, is that not so?

MR. TURNER: That's correct. That would be the only substance that --

Q That is the part that is now superseded?

MR. TURNER: Yes.

Q Well, that is unduly complain and magnify grievances of that last sentence?

MR. TURNER: That is correct.

What we are dealing with here is just expression, it is not obscenity, not libel, not fighting words, we are not talking about conduct, we are not talking about demonstrations or circulating anything within the prison. Moreover, this is expression contained in letters that are addressed to correspondents, people who are approved by the Department of Corrections.

We believe that the District Court's conclusion on the mail censorship rules was clearly correct and should be affirmed.

Q To understand that statement you just made, the department -- when you say people who are approved, does that

mean that the prisoner must provide a list of people to whom he would like to write a letter or letters, and that list must be approved before he may write to any of those people?

MR. TURNER: That is correct.

Q And you make no objection to this?

MR. TURNER: Not in this case. Turning --

Q Did you object to copying?

MR. TURNER: Copying of mail?

Q Yes.

MR. TURNER: Yes, we did.

Q And was that knocked out?

MR. TURNER: No, I am afraid it wasn't. Referring to page 198 of the supplement to the appendix, under the rules finally approved by the District Court, the officials still have the right to place in prisoner's file not only matters that are in violation of the rules but also anything they think is "relevant to assessment of the inmate's rehabilitation," which essentially could mean anything.

Q Well, do you think they have the right to put into -- to copy and keep every letter that is written?

MR. TURNER: We vigorously argued in the District Court that they didn't.

Q Well, what do you think happened under the rules as approved? May the prison do that or not?

MR. TURNER: Yes, they may.

Turning to the problem of investigators working for lawyers, once again I want to say it is essential to focus on exactly what the District Court did and what it didn't do and compare the former rule that was invalidated with the rules that were finally approved.

Q Suppose you find each one as you are going along.

MR. TURNER: All right.

Q We have got page vi at the end of appellant's brief for the old rules, is that right?

MR. TURNER: That is the old rules.

Q Now, where do we find the new ones?

MR. TURNER: The new rule is at -- page 198 of the supplement to the appendix.

Q That is B, is that right?

MR. TURNER: Yes, B. Investigators.

Q All right.

MR. TURNER: Now, the former rule was an absolute prohibition against attorneys using either law students or paraprofessionals for the purpose of interviewing prisoners whom they were representing or considering whether to represent. This was true, regardless of who the prisoner was, regardless of who the lawyer was, regardless of who the investigator was, regardless of the kind of case or the need to use an investigator, regardless of any other possibly relevant factor.

Now, after the initial decision of the District Court, the Department of Corrections voluntarily opened the class of investigators to permit law students who have been certified by the State Bar of California to serve as investigators. The only addition to that made by the District Court in its final order is to authorize the use of paraprofessional persons who had been certified as well by the State Bar of California. As of this time, there is no procedure and no certification by the State Bar for paraprofessionals. So the District Court has not ordered the department to do anything that it isn't doing voluntarily already.

Q When you say voluntarily, Mr. Turner, do you mean otherwise than under the compulsion of the District Court's judgment?

MR. TURNER: That's right. They were ordered to submit regulations that would permit the use of paraprofessionals but they began voluntarily allowing law students in before they were ever ordered to do so, months they were ever ordered to do so.

Q Was it before or after the rendition of the District Court opinion that they --

MR. TURNER: After the opinion, and while new regulations were being worked out.

The former rule that barred all use of paraprofessional assistants to lawyers was in fact a serious obstacle to

obtaining representation for indigent prisoners. These prisoners can't afford either a lawyer or the services of a state-licensed private detective.

Q The District Court's order with reference to these paraprofessionals is not self-executing, is it? You indicated that it is paraprofessional other than the law students certified, a paraprofessional certified by the State Bar, and you say they haven't certified any yet?

MR. TURNER: That's right.

Q And if they don't certify any, then that remains as some rhetoric?

MR. TURNER: That's right, an empty promise.

Q Unless they mandamus the state bar.

MR. TURNER: The State Bar of California has recommended legislation this last summer, because they think it is important to start paraprofessional use in all aspects of the practice of law to enhance the quality of legal services and expand the number of people that services can be rendered to. They want to do that through paraprofessionals, so I think they will get to it.

Q Your State Bar, that has reference to the integrated bar, doesn't it?

MR. TURNER: Yes.

Q And then I notice it says "or other equivalent legal professional body." Would that be some voluntary bar

association?

MR. TURNER: I am not sure what is meant by that.

Q You do have in California some voluntary bas associations?

MR. TURNER: Local bar associations.

Q Now, what is the constitutional right that is involved?

MR. TURNER: The right of access to the courts, effective access to the courts. It is the same right that was involved in --

Q Now you say the state has no business saying they want to guarantee that access through people who have a certain degree of qualification?

MR. TURNER: The state does have an interest, but that interest is certainly adequate right --

Q Well, you just disagree with where they drew the line?

MR. TURNER: Well, as in Johnson v. Avery --

Q Well, isn't that right, you think that the state required too much qualification for people?

MR. TURNER: Well, what it did was exclude a lot of people who could be very, very helpful in --

Q Well, they still exclude a lot of people.

MR. TURNER: They certainly do.

Q But I think, Mr. Turner, you are not --

MR. TURNER: No.

Q You are just defending this order with its deficiencies, whatever they may be?

MR. TURNER: That is correct.

Q But you were the plaintiffs?

MR. TURNER: Yes.

Q And you attacked this rule on the ground that the rule was unconstitutional because it restricted access to the courts, I take it?

MR. TURNER: That's correct.

Q And you agree, access to the courts can be restricted to people of satisfactory qualifications?

MR. TURNER: Well, I wouldn't put it that way.

Q Would you say that the state must allow access through people with no qualifications?

MR. TURNER: Certainly not, but --

Q Well, then you say with sufficient qualifications?

MR. TURNER: Well, we are talking about two different things, I fear. The prisoners have a right of access to the courts through whatever means don't involve any problems of prison security. The State Bar of California can certainly promulgate the standards for professional conduct, and the State Bar has --

Q I am talking about the prison. May the prison

say we will certainly permit access to the courts for prisoners, we agree they have the right, but we insist that they be through people of satisfactory qualifications?

MR. TURNER: Well, the question is what are satisfactory qualifications, and --

Q That's right.

MR. TURNER: -- in this case, the court below held that the state didn't have any interest really in --

Q So it is a constitutional matter, that you think the District Court was perfectly proper to disagree with the prison authorities as to what satisfactory qualifications were?

MR. TURNER: Well, that is because the prison authorities didn't attempt to justify the exclusion of the people that the District Court ordered should be let in, and the reason for the District Court's order is because this rule made the difference in very many cases whether a prisoner would have legal representation or not.

In this very case, my co-counsel was requested by a federal district judge to look into this case which had been filed pro se by the prisoner, investigate it and consider taking on an uncompensated appointment. When she tried to send a third-year law student working closely under her supervision to see the prisoner and get the facts, he was barred by this very rule and he was transferred and it happened again. That

is how this issue got in this case, and it took a good while to get this case prepared because of that rule. But as the record shows, in many other cases lawyers have been discouraged from getting involved at all with representation of prisoners because of the remoteness of prisons, they have to take days off from their office just to go get papers signed. They can't even send a messenger to get papers signed under this rule. They have to go in person, and that was a real handicap in representing California prisoners.

Q Well, it must be more than just getting papers signed because that can be done by mail, couldn't it?

MR. TURNER: Well, it could be done by mail if the documents didn't have to be explained or show the prisoner what is in them and so on.

Q There must be some interview process involved in which the paraprofessional that you are talking about is going to engage in some substantive discussion with the prisoner. Isn't that true?

MR. TURNER: Yes, it is the personal interview thing that is the most important, but to show how far the rule goes, it bars even going out to the prison for the person to --

Q The old rule?

MR. TURNER: Under the old rule.

We submit that this aspect of the case is controlled by the Court's decision in Johnson v. Avery, where the Court

struck down the jailhouse lawyer rule that prohibited prisoners from helping each other on legal work. Certainly if the state's interest there, if there is a burden on the state to justify banning jailhouse lawyers, which was not that in Johnson v. Avery, it ought to be a heavier burden of justification where you are talking about people who are closely supervised and certified by attorneys.

There is no contention, been no contention in this case that any harm would ever flow from the use of State Bar certified law students and paraprofessionals, and for all of these reasons, if the Court has no further questions, the judgment should be affirmed.

Q Well, actually it is true, isn't it, in the very State of California that problems have developed from what lawyers are brought into penitentiaries? A young man by the name of Bingham, I think he has never been seen since, was a lawyer. Isn't that correct?

MR. TURNER: I know what you refer to. I of course have no personal knowledge of any of those events.

Q As contrasted with what might go in and out by way of a prisoner petitioning a court, Johnson v. Avery situation, it is a real and not an imaginery problem with which these regulations deal, is it not?

MR. TURNER: Well, I think it is a real problem, but the Attorney General has made a lot of the fact that these

interviews will be confidential. That is a red herring because all interviews, all visits, social and other in California, are confidential. They are not monitored at all. They are visually monitored. A guard looks at you while you talk to the prisoner, but nobody is listening. That is even true of a social visit, and it would be true of the paraprofessionals as well.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Collins, you have only one minute left.

REBUTTAL ARGUMENT OF W. ERIC COLLINS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. COLLINS: Yes, Your Honor.

First, may I say that counsel is under certain misapprehensions. To answer Justice Rehnquist, it is true we did submit new regulations regarding law students, but that was not done voluntarily, it was done under compulsion of a finding of fact and conclusions of law of the court.

Second, it is his -- he is mistaken when he says that we do not monitor any non-confidential interviews. That is not true. We do and we reserve the right to do so in all non-confidential interviews.

I agree, counsel may be speaking from his personal experience, but that we submit is not controlling.

Your Honors, we think --

Q You mean when the man talks to his lawyer, it is monitored?

MR. COLLINS: No, not in any sense, Your Honor. That is the point, it is completely confidential. That is confidential.

Q And everything else is monitored?

MR. COLLINS: Anything else may be. We do not normally -- in that, counsel is correct, in that statement -- we do not normally but we do occasionally and we reserve the right to do so.

Q I thought you said it was monitored. Now you say occasionally.

MR. COLLINS: Your Honor, let me --

Q Does the person know when he is being monitored?

MR. COLLINS: No, unless it is a confidential interview, and then he knows he is not being monitored.

Q By confidential, you mean an interview with his lawyer or his lawyer's representative?

MR. COLLINS: Correct, Your Honor, precisely.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Collins.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:25 o'clock p.m., the case was submitted.]

- - -