ORIGINAL

In the

Supreme Court of the United States

DAVID L. JONES, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, RALPH EDWARDS, COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION,

PETITIONERS,

V.

NORTH CAROLINA PRISONERS' LABOR UNION, INC., ON BEHALF OF ITSELF AND ALL ITS MEMBERS,

RESPONDENTS.

No. 75-1874

Washington, D. C.
April 19, 1977

Pages 1 thru 59

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

m1

IN THE SUPREME COURT OF THE UNITED STATES

DAVID L. JONES, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION; RALPH EDWARDS, COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION;		
	Petitioners,	
v.		No. 75-1874
NORTH CAROLINA PRISONERS' LABOR UNION, INC., ON BEHALF OF ITSELF AND ALL ITS MEMBERS,		
	Respondents.	

Washington, D. C.

Tuesday, April 19, 1977

The above-entitled matter came on for argument at 10:50 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JACOB L. SAFRON, ESQ., Special Deputy Attorney General of North Carolina, Justice Building, Raleigh, North Carolina, 27602, for the Petitioners.

APPEARANCES (Cont'd):

KENNETH S. GELLER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C., 20530, for the United States as amicus curiae.

NORMAN B. SMITH, ESQ., 704 Southeastern Building, Greensboro, North Carolina, 27401, for the Respondents.

- - -

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in 75-1874, David L. Jones against North Carolina Prisoners' Labor Union.

Mr. Safron.

ORAL ARGUMENT OF JACOB L. SAFRON, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is before this Court upon direct appeal from a three-judge district court sitting in the Eastern District of North Carolina holding that the North Carolina Department of Correction, under its then announced policies, could not prohibit the formation and operation of the North Carolina Prisoners' Labor Union within the facilities of the North Carolina Department of Correction.

The three-judge court, paying lip service to the opinion of this Court in Pell v. Procunier, cites Pell and then immediately proceeds to emasculate the decision in Pell, subvert the holding of this Court in Pell and require the North Carolina Department of Correction to provide resources to the North Carolina Prisoners' Labor Union and all other organizations euqually neutrally applied.

We sought a stay of that order. The District Court denied a stay. We sought a stay from this Court and a stay was

denied from this Court.

As a result of the denial of stays, it became necessary for the Department of Correction to issue regulations pursuant to the opinion of the three-judge court. Those regulations are printed in the Respondent's brief, I believe, on page 16. However, the Respondent, in printing these regulations, has failed to provide one point.

These regulations provide -- The purpose of these rules is to regulate the activities of organized inmate groups, not sponsored by the Department of Correction, in compliance with --

Your Honor, I am reading right now from our regulations. This isn't indicated in the brief.

"The purpose of these rules is to regulate the activities of organized inmate groups, not sponsored by the Department of Correction, in compliance with the order issued by the three-judge panel in North Carolina Prisoners' Labor Union v. Jones, presently being reviewed by the United States Supreme Court.

"The Department of Correction reserves the right to amend these rules if that Court modifies the decision of the lower court."

In this case, the Department of Correction sought to take a moderate position. The three-judge court acknowledges the Department sought to take a moderate position. The three-

judge court recognizes and admits that the correctional officials have real and sincere doubts about this organization and fears concerning the results such an organization might bring. Yet, the three-judge court disregarded those fears.

Now, we have published regulations. Other organizations have gone with those regulations and are functioning. The Prisoners' Labor Union refused to comply. They filed their original self-serving declaration when they first formed themselves, which was insufficient. When we said it was insufficient, they sought an order to hold the correctional officials in contempt.

There was, as a result, an extensive plenary hearing.

QUESTION: This is all holding?

MR. SAFRON: This is post -- And I point out --

QUESTION: Well, what does it bear on?

MR. SAFRON: Well, we have issued these regulations because we could not get a stay. The court, at the contempt hearing, found that the petition to hold the defendant in contempt was sought with the sole intent to harass the defendants, the correctional officials and that we have done everything required of us.

The Prisoners' Labor Union does not currently exist, although under the rules if they would properly apply, they could exist. Anything that they say concerning any benefits the correctional system has derived is mere puffing on their

part.

According to the three-judge court, we opened the doors. We sponsored and recognized the Jaycees. It's an organization, of course, with national roots in outside society. It has served and has been determined to serve worthwhile rehabilitative goals of the Department of Correction. But we have opened the door and the three-judge court says the Fourteenth Amendment now denies us the opportunity to pick and choose among those organizations that can come in.

We have sponsored and worked with the Alcoholics Anonymous, obviously, an organization with outside organization which serves valid rehabilitative purposes.

At our youth facility, we have the Boy Scouts. Once again, an organization that serves valid rehabilitative purposes and has good solid roots in society.

But, because we have brought in the AA, because we have brought in the Jaycees and the Boy Scouts, now the three-judge court says we can no longer pick and choose among those organizations which utilize our resources, which utilize our time, and we must treat them all alike. And if we let someone come in from AA or the Boy Scouts from the outside, from free society, or the Jaycees, we must let someone come in from the Prisoners' Labor Union.

If we permit the Jaycees to send in bundles of publications for distribution to their members, we must permit

the Prisoners' Labor Union to send in bundles.

I would submit that the three-judge court has not properly read the decision of this Court in Ross v. Moffitt. There are, obviously, limits beyond which the Fourteenth Amendment cannot be stretched without breaking. And in this case, I submit, the Fourteenth Amendment has been broken asunder.

Furthermore, this Court announced quite clearly in Pell v. Procunier the basis under which correctional officials can pick and choose among various goals, and recognized the valid fears of correctional officials.

In this case, among those fears, is concerted action. Because even if the intent of this union is peaceable, I submit that common sense leads us to a conclusion that if their peaceable demands are not met that inmates, prisoners who have already demonstrated an inability to live within the law and quite often resort to violence as a means of determining their own ends, will of necessity resort to violence.

QUESTION: Well, the District Court said there would be time enough, at that point, to grant your relief, and certainly indicated it would grant relief if that happened.

MR. SAFRON: Your Honor, must the Department of Correction await a catastrophic incident --

QUESTION: That's what we are waiting to hear you argue.

MR. SAFRON: Must we await a catastrophic incident before there is a factual record which will support the fears and concerns of correctional officials? Must men be killed and injured, must property be burned before our fears have any validity? Must inmates be given the opportunity to use our facilities, our limited resources, must they be allowed to coalesce into formal organizations which if they said, "We are going to strike tomorrow and we have seventy-seven units in North Carolina," there would be no way for the State to respond?

We saw a horrible riot occur in 1968 when the so-called "Bulls of the Yard" had a very profitable hobby shop business going, where some of them were making so much money that the Internal Revenue Service brought suit for failure to pay taxes.

QUESTION: This was in your own institutions?

MR. SAFRON: Yes, sir.

And when that occurred --

QUESTION: Could that have been done without the cooperation of officials within the institution?

MR. SAFRON: Sir, when a new administration came into being, and that administration sought to emasculate the power of some of these inmate "Bulls," --

QUESTION: Well, could they have had it without the cooperation of the officials?

QUESTION: In the first instance?

MR. SAFRON: In the first instance?

If Your Honor please, I don't really believe cooperation is needed. The inmate peer structure is such that cooperation of the officials isn't required.

QUESTION: How could a man build up that kind of an institution within a prison walls without the officials knowing about it?

MR. SAFRON: Your Honor, at some point, officials do know about it, and in our situation --

QUESTION: They did know about it.

MR. SAFRON: -- when a new administration came into being an attempt was made to withdraw the power and riots occurred.

Now, we are quite familiar with the riots which occurred at Walpole as a result of the introduction there of the National Prisoners Reform Association. There is a book which is part of the record, "In Constant Fear," in which an inmate there tells how it was the introduction of the National Prisoners Reform Association which was the catalyst for the violence that occurred as the hardened, long-term inmates sought to take control of the institution.

The deposition of Warden Mullins of Rhode Island is part of the record in this case. The deposition of Warden Mullins is a horror story of what can happen in an institution.

When he arrived there wasn't a window left in that entire institution.

The National Guard and State Police were called down and for five to six months it was necessary for them to run that institution to restore law and order.

And, as Warden Mullins tells, when you have various diverse groups within an institution -- and in that case the Youth Commission trying to break away from the leadership of the reform association, the older, hard-core Mafia types, all of a sudden the members of the Youth Commission disbelieving how hard and violent the older inmates could be, in one instance were almost wiped out.

QUESTION: Mr. Attorney General, could I ask you two questions?

Is there anything in the District Court's findings relating to the problem of the older inmates?

MR. SAFRON: No, Your Honor, there isn't.

QUESTION: Is there anything on the record on that subject?

MR. SAFRON: The affidavits of the officials -- I am just illustrating, Your Honor. The deposition of Warden Mullins is a part of this record.

QUESTION: And he describes that as a danger?

MR. SAFRON: And he describes that as a danger.

Now, if Your Honor please, time is running quickly --

QUESTION: Let me ask you a second question. I had two questions.

Do you dispute the right of the prisoners to form a union?

MR. SAFRON: Your Honor --

QUESTION: You seem to in Point One of your brief, but the District Court said you did not. Have you changed your position or is it the same position?

MR. SAFRON: No. As I said in the beginning, we took a moderate position.

QUESTION: But did it include an objection to their forming a union?

MR. SAFRON: Yes.

QUESTION: Then the District Court misstated your position.

MR. SAFRON: The reason we are before this Court, the reason we are in the District Court is because the regulations were promulgated which prohibited the formation and operation of a prisoners' labor union within the walls of the North Carolina Department of Correction.

One concession, which was a moderate point, because we were concerned about First Amendment rights, is that the North Carolina Prisoners' Labor Union, under the auspices of one Robbie Purner, had an office in the City of Durham, and we did not say inmates could not join the Prisoners' Labor Union.

We have no regulations saying you cannot be a member of the Prisoners' Labor Union or you cannot be a member of the Klu Klux Klan or you cannot be a member of the Black Panthers.

We had no objection to inmates on a one-to-one situation writing to Ms. Purner, to this outside office, and being members of this outside organization. We objected to the formation, creation and implementation of concerted action within the facilities of the Department of Correction, the utilization of state resources and time and facilities and manpower because we have not said --

QUESTION: Didn't the District Court agree with you on that? It said they have no right to form or belong to a labor union for the purpose of taking concerted action to force their demands upon prison administrators.

I don't know what you are disagreeing with that the District Court -- with respect to what the District Court ruled against you.

MR. SAFRON: The District Court's ultimate conclusion is we must let them in or else stop all other organizations. To control this group, we would have to throw out Jaycees, AA, Boy Scouts, any other organization which the Department of Correction has determined serves a beneficial rehabilitative and penological need.

Now, we have not tried to interfere with the outside organization. Our interference, Your Honor, is with a concerted

organization within the Department of Correction. If they want to join any outside organization, if they are to receive literature from that organization, --

QUESTION: But, Mr. Attorney General, you won on that issue in the District Court, didn't you? Didn't he rule for you on the concerted action issue? Paragraph 1, on page 30 of the jurisdictional statement. I don't understand why you're -- Aren't you satisfied with that ruling?

MR. SAFRON: No, Your Honor. It means we must -- It means we have no decision. The court has emasculated the authority of the North Carolina Department of Correction to pick and choose among those organizations which will come in, those organizations which will utilize our resources.

QUESTION: The District Court said, in effect, you had to treat this union the same way you treated the Jaycees.

MR. SAFRON: Yes, Your Honor. We have no power to choose.

If Your Honor please, it is Mr. Geller's turn now for the Solicitor.

MR. CHIEF JUSTICE BURGER: Mr. Geller.

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.,

FOR THE UNITED STATES AS AMICUS CURIAE

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

As Mr. Safron has indicated, the District Court in

this case, has held that the State of North Carolina is required by the First Amendment to allow inmates in its penal institutions to solicit other inmates, orally or in writing, for the purpose of encouraging membership in the North Carolina Prisoners' Labor Union, and must also permit its inmates to receive outside correspondence and publications advocating prison unionism.

In addition, the court below has ruled that the Equal Protection Clause of the Fourteenth Amendment requires the state to accord the prisoners' union mass mailing and meeting privileges within its correctional institutions to the same extent that any other inmate organization enjoys such operating privileges.

The United States believes that this decision is incorrect and that the district court has intruded itself into an area that should properly be left to the sound discretion of correctional officials.

We believe, in addition, that if the lower court's decision is upheld it may lead to serious breaches of prison security and may impair efforts at inmate rehabilitation, as well.

Now, legal principles that govern this case are clear. Without question, the anti-union regulations of the North Carolina Bureau of Corrections, like those of the Federal Bureau of Prisons, restrict, to some extent, the associational

liberties of prison inmates.

But this Court has emphasized, on a number of occasions, that First Amendment rights are not absolute and that such rights must be considered in light of the special characteristics of the environment in which they are asserted.

Now, in the prison environment, the controlling standard was articulated three years ago in Pell v. Procunier. There, in upholding state and federal regulations that erected a blanket prohibition against face to face interviews of prison inmates by representatives of the news media, the Court stated that a prison inmate only retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological considerations of the correction system. Challenges to prison restrictions that are asserted to inhibit First Amendment rights, said the Court, must be analyzed in terms of the legitimate policies and goals of the correction system.

QUESTION: May I interrupt? Because I missed something, I know. Both you and the Attorney General mentioned that there is a Fourteenth Amendment violation found by the District Court.

MR. GELLER: That's correct.

QUESTION: Is that correct? I didn't find that in the opinion. I thought the opinion was all on the First Amendment.

MR. GELLER: No. The first part of the opinion, Mr. Justice Stevens, was of First Amendment considerations. In the second part of the opinion, the District Court found that the state must allow the North Carolina Prisoners' Labor Union to engage in meetings within the prison, in mass mailings and in allowing outsiders to come into the prison to the same extent that it allows any other inmate organization to enjoy those visits.

QUESTION: As I read it, what it was saying was that they have a First Amendment right and the measure of the right should be the same as is given to these other organizations.

I don't think it held, or did it, that the failure to treat them the same was a violation of the Equal Protection Clause?

MR. GELLER: I believe that it did, Mr. Justice Stevens.

QUESTION: I think it is on page 29 of the opinion and will be found in the jurisdictional statement. Makes it clear -- by application of the Equal Protection Clause of the Fourteenth Amendment. Middle paragraph on page 29.

MR. GELLER: That's correct, Mr. Justice Stewart. But the District Court did not extend the First Amendment principle so far as --

QUESTION: The Fourteenth Amendment. The First Amendment is not applicable to the State of North Carolina.

MR. GELLER: Right. The Fourteenth Amendment, that's correct. I assume Mr. Justice Stevens is talking about the Equal Protection Clause of the Fourteenth Amendment.

QUESTION: Do you think that's critical of the District Court's analysis of the Equal Protection argument?

MR. GELLER: Yes, we do. Certainly. The District Court, as we read the opinion, did not extend the First Amendment discussion, or the Fourteenth Amendment as it incorporates the First, so far as to say that the prisoners have a First Amendment right to receive mass mailings or to allow outsiders to come in to talk to them, but it held that they had that right under the Fourteenth, the Equal Protection Clause of the Fourteenth Amendment to the same extent that any other inmate organization within North Carolina's prisons is allowed to enjoy those rights.

QUESTION: Thank you.

MR. GELLER: We discussed at some length in our brief the serious problems that may reasonably be anticipated in the area of prisoner rehabilitation if inmate unions are allowed to function within the prison system.

We have pointed out, and Appellees have not disputed, that efforts to change the value system of individual prisoners or to achieve inroads in the prison social structure would be severely frustrated if correctional officials had to deal with, or at least answer to, an inmate group with pervasive influence

throughout the prison.

I would like to limit my discussion here to the potential impact of such prisoner groups upon an even more important correctional goal. One that this Court in Pell termed central to all other institutional considerations, that is,the internal security of the prison facilities themselves.

It cannot be emphasized too strongly that this case involves a claim,by prison inmates, that they have a constitutionally protected right to associate with other inmates and to engage in concerted activity within the confines of a prison.

Prisons are unlike any other institution in our society. They are closed communities of proven lawbreakers under the constant and close supervision of a limited staff.

For obvious reasons, related both to the type of people who constitute the inmate population and the conditions under which they inevitably must live, the atmosphere in prisons is frequently tense and volatile, having no counterpart in the outside world.

In these circumstances, we believe, the presence of any concerted activity among inmates is a cause for concern.

QUESTION: What is the significance of Paragraph 1 of Page 30?

Whatever right of association of any prisoner is derived from the First Amendment. They have no right to form

or belong to a labor union for the purpose of taking concerted action to force their demands upon prison administrators.

What's that mean?

MR. GELLER: I think it means, Mr. Justice Brennan, that the District Court acknowledged that if at some future time --

QUESTION: I know, but you've been saying that the demand here is that they want, in a concerted fashion, to assert certain rights as a prison labor union.

MR. GELLER: That's correct.

QUESTION: Doesn't this say they don't have those rights?

MR. GELLER: It states that if at any time in the future they begin to act as a group for the purpose of engaging in acts that the state may legitimately prohibit, the state, at that point, may move in.

We believe, as does the state --

QUESTION: Is that what it says? I thought it said whatever right they may have, if any, they have no right to form a labor union for the purpose of taking concerted action.

MR. GELLER: I understand that, Mr. Justice Brennan, but under the District Court's opinion, these collection of inmates would be allowed to engage in the first step that we believe would lead inevitably to concerted activity. There would be no --

QUESTION: Must that not be read with Paragraph 3, 2 and 3 on Page 32, Paragraph 3 saying, "The union and its inmate members shall be accorded the privilege of holding meetings generally under the same conditions as the Jaycees and the Boy Scouts and the Alcoholics Anonymous."

MR. GELLER: Well, that, of course, Mr.Chief Justice, relates to the equal protection analysis.

QUESTION: I am talking about the -- whether -- from whatever source it derives the impact on the prison is determined not by what's said in the opinion primarily, but what's said on Page 32, under Paragraphs 1, 2 and 3. That's the order of the court.

MR. GELLER: And that's incorporated in the judgment which follows in Appendix B, that's correct.

I think, under the District Court's opinion, these inmates have to be allowed to solicit other inmates. They have to be allowed to organize and coalesce into a group, and they have to be allowed to engage in such concerted activities as other inmate groups within the union, no matter how beneficial the other inmates groups' purposes are allowed to enjoy.

QUESTION: And all this derives from the holding of the court that although there is no constitutional right to form a union, once they have been permitted to form a union and invite AA and the Junior Chamber of Commerce and the Boy Scouts and others in, they must accord to this union precisely

the same privileges as are accorded to these other organizations, including meetings and concerted action within the prison.

MR. GELLER: The District Court has held that under the Equal Protection Clause, Mr. Chief Justice, that's correct. And we disagree with that. We think that there are obviously differences among inmate groups. Some have obvious beneficial purposes. Inmate leaders don't attempt to speak for other inmates in certain groups, such as Alcoholics Anonymous. In fact, the overwhelming weight of authority among correctional officials is that inmate groups should not be allowed to function, but that these other groups of obvious beneficial value should be allowed to function.

Now, there are a number of legitimate reasons, we believe, for this concern on the part of correctional officials. One is that inmates, like people generally, tend to behave with greater emotion and fewer inhibitions when acting as part of a group. Moreover, unlike the general population, prisoners have the shared characteristic, as Mr. Safron indicated, of having on one or more occasions resorted to seriously illegal means to achieve their goals.

A union, with a formal leadership and organizational structure, would always have the potential of engineering institution-wide or even system-wide outbreaks.

QUESTION: Couldn't these very same men set up an

AA unit?

MR. GELLER: Well, they could.

QUESTION: Could they?

MR. GELLER: We don't think it's important what they call their group.

QUESTION: Could they set up an AA unit?

MR. GELLER: If the warden would allow it. They would have to submit a charter to the warden explaining what the goals of the organization are. It doesn't really matter what they call themselves.

QUESTION: And they set it up as an AA unit.

MR. GELLER: That's correct.

QUESTION: And they have meetings at which meetings they decide to use concerted action to break down the rules of the yard. What would happen then?

MR. GELLER: Obviously, the prison authorities would move in at that point.

QUESTION: Why wouldn't it be just the same if it was called a union?

MR. GELLER: Because if it is called Alcoholics Anonymous --

QUESTION: It's the same people.

MR. GELLER: I understand that, Mr. Justice Marshall, but --

QUESTION: Merely because it's a union it can't meet.

MR. GELLER: If it calls itself a union --

QUESTION: Suppose the union meets on AA principles, that wouldn't be any good, would it?

MR. GELLER: It doesn't matter what it calls itself.

QUESTION: Well, why is it banned?

MR. GELLER: It's banned because --

QUESTION: Because it's a union.

MR. GELLER: No, because its announced goals are inimical to the rehabilitation of inmates and to the valid correctional goals of institutional security.

QUESTION: And what is that?

MR. GELLER: As I've explained, we think that an organized group of inmates has the inherent potential --

QUESTION: So organizing is important?

MR. GELLER: It's not the organizing, it's the fact that they have coalesced together for the purpose of presenting grievances.

QUESTION: Is the coalescing together the point?

MR. GELLER: No, it's what the impact is of what they plan to do.

QUESTION: What do they plan to do?

MR. GELLER: They plan to present grievances, as we understand it, although there has been some fluctuation. They plan to present grievances to prison officials about conditions.

QUESTION: What's wrong with that?

MR. GELLER: I think on an individualized basis it is not wrong, and it certainly is to be encouraged. What the state legitimately fears is that when they ban together for this purpose they will always have the expressed or the implied power to use force if they don't gain their -- gain what they believe is their right.

QUESTION: Well, couldn't they get together in the yard and have a meeting in the corner of the yard?

MR. GELLER: Obviously, there is a limit to --

QUESTION: Couldn't they?

MR. GELLER: The question is, we believe, what legitimate steps the prison officials are allowed to take at the outset when the organization has announced what its goals are. Must it wait, as Mr. Safron has said, until these evils actually come to pass, before it may take the first steps?

QUESTION: Mr. Geller, it seems to me, you rest your response to Justice Marshall on the goals of the union as being improper but the District Court found that there was no evidence tending to show that the inmates intend to operate the union to hamper and interfere with the proper interests of government.

So, if you are basing it on goals, it seems to me the finding forecloses your argument.

MR. GELLER: I don't think I can agree, Mr. Justice

Stevens.

First of all, this union has never operated within the prison system in North Carolina. So, although their announced goals seem laudable, I think that, as this Court acknowledged in Procunier v. Martinez, the courts must defer to the reasonably anticipated goals of the correctional officials, as they perceive the inmate organization to operate in the future.

But, secondly, I think we also have to take into account that once this union becomes a fixture in the prison system, it won't be operated by these responsible outside advocates of prison reform. It will be operated by the prisoners themselves.

Now, all of these goals --

QUESTION: Are there findings to that effect?

MR. GELLER: I think that the Appellees do not deny that these unions will be operated from within the prison.

QUESTION: Are there findings to that effect?

MR. GELLER: Well --

QUESTION: I don't think there are.

MR. GELLER: I'm not certain that the District Court --

QUESTION: Should we decide the case on the basis of the findings or should we do it de novo?

MR. GELLER: No. I think that the findings do

indicate the fact that this union is made up primarily of prison inmates and that it is governed by democratic principles and, therefore, I would assume that the majority vote would be made up of prisoners rather than outsiders.

QUESTION: In that respect, isn't it just like Mr. Justice Marshall's AA?

Your difference, as I understand it, is in their announced goals.

MR. GELLER: Absolutely.

QUESTION: And the District Court found the announced goals were harmless.

MR. GELLER: The District Court did, but we think that the District Court did not defer substantially to the expert judgment of correctional officials who should be able to look at these goals --

QUESTION: So you are asking us to set aside the District Court findings.

MR. GELLER: No. We think that the District Court findings are in clear violation of what this Court said in Pell v. Procunier. And in Procunier v. Martinez, the Court said that unless the fears of correctional officials are grossly exaggerated on the record, the Court must defer to them.

Now, we don't think that the court did that here. We think that the court substituted its judgment in this case.

QUESTION: You may be entirely right, but that's an argument for the proposition that the findings are erroneous. That's what you are arguing, I think.

MR. GELLER: We don't think it is a question of findings of fact, we think it is a question of what legal standard the District Court should bring to bear on the facts in the particular case. And we think that in this case it gave absolutely no deference to the legitimate findings and anticipated fears of the correctional officials. And, after all, it is the correctional officials who would have to deal with any outbreaks, if they should occur.

QUESTION: Mr. Geller, under the judgment, not the opinion as a whole, but under the judgment if the state excluded all of these organizations, they would be in compliance -- they wouldn't be in violation of the court's mandate, I take it?

MR. GELLER: They would not be in violation of the equal protection aspects of the court's mandate, but the court also said -- and it is the first paragraph on page 32 -- that all inmates in the North Carolina prison system have a First Amendment right to solicit and invite other inmates to join the union, and that's not dependant upon what other outside organizations are allowed to do.

QUESTION: And some of them conflict with their finding that there was no right to join a union, do they not?

MR. GELLER: Well, I am not --

QUESTION: Three or four pages earlier.

MR. GELLER: The District Court explicitly stated that it didn't have to reach that question because of what it perceived to be certain concessions by the state, but the state today -- and we believe they are correct -- disagrees with those findings of the District Court.

QUESTION: Is it not correct that in the District Court the state acknowledged that there was a right to join a union?

MR. GELLER: That's not correct, as we understand it.

QUESTION: That's what the District Court said. The state acknowledged and District Court is wrong there too then.

MR. GELLER: We believe it is wrong.

QUESTION: I thought that the District Court had said that North Carolina allowed them to join a union, not that North Carolina acknowledged the constitutional right to join a union.

MR. GELLER: That's correct. North Carolina, we think, is taking a very sensible position. It realizes there are some First Amendment interests on the part of prison inmates, so what it allows them to do is to engage in outside correspondence with union members, to receive correspondence from the union and to consider themselves union members,

because that doesn't raise any problems within the union.

It is only when they start to operate within the union --

QUESTION: Within the prison.

MR. GELLER: Within the prison, excuse me.

It is only when they operate within the prison, by talking to other inmates, attempting to organize other inmates, that the state wants to step in. It has no desire to limit discussions it has with outsiders about union activity.

MR. CHIEF JUSTICE BURGER: Mr. Smith.

ORAL ARGUMENT OF NORMAN B. SMITH, ESQ.,

FOR THE RESPONDENTS

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

We represent the Appellee prisoners' union here. The union is a prison reform and mutual self-help organization. It is not a labor union, in the ordinary sense. The union does not claim and has not claimed any right to bargain, strike or take any concerted disruptive action.

The union's objectives are to improve prison rehabilitation programs, to establish community-based facilities, such as halfway houses, to secure public support for reform legislation and administrative measures, to litigate prison rights issues, to act by democratic processes in a multiracial organization.

The union, contrary to the Solicitor General's statement, has existed and has had activities. There is a period of six months in existence prior to the adoption of the regulation in question, and then another twelve months existence subsequent to the District Court's decision.

Contrary to what Mr. Safron says, the union still exists. Indeed, newsletters were published within the last couple of months.

QUESTION: Mr. Smith, is the certificate of incorporation of the union in the papers before us?

MR. SMITH: It is a part of the record, if Your Honor please.

QUESTION: Does it authorize collective bargaining?

MR. SMITH: North Carolina incorporation laws allow incorporators to say, essentially, anything they want to in their papers. And there is no effort to review them and to pass upon their adequacy.

But, to respond directly to Your Honor's question, in Article 3 of the charter, the union does purport to say --

QUESTION: Where is that in the record?

MR. SMITH: It is not in the printed Appendix, if Your Honor please. It is simply a part of the record that came up from the District Court.

I have an extra copy and I would be happy to leave it with the clerk.

But, to respond to the question, it does purport to claim a desire to act as a collective bargaining agent.

QUESTION: That's certainly a declaration of intent, is it not, of the organizers?

MR. SMITH: Yes, on the other hand, it does not claim any right to take concerted action that would be disruptive of the prisons.

QUESTION: Well, you'd hardly state that if you had that in mind, in your articles of incorporation, would you?

MR. SMITH: Well, if Your Honor please, look at the unionized employees of the Federal Government. They have no right to strike or take illegal concerted action, yet virtually every agency is unionized. I think you can have all different varieties of unions.

QUESTION: Did you hear about the strikes in New York and San Francisco?

MR. SMITH: Yes, sir.

QUESTION: May I ask you, also, about the purposes of the union? Is it a fact, as stated in your opponent's brief, that after this suit was filed the union newspaper stated that the prisoners should be encouraged to organize for the right to collectively bargain for better conditions?

MR. SMITH: Yes, sir.

QUESTION: Did I understand you, at the beginning of your argument, to say that there is no purpose of the union to

bargain collectively?

MR. SMITH: The union realizes that that purpose is illegal under North Carolina law, and unless and --

QUESTION: Because of this suit you've changed basic objectives?

MR. SMITH: No, Your Honor.

One of the announced purposes of the union is to secure favorable legislation and one reform, one legislative reform the union would desire would be to allow prisoners to collectively bargain in North Carolina. I must say not a very hopeful and not a very probable purpose, but nonetheless that would be the way they would go about it.

They realize currently that even state employees are precluded from collective bargaining in North Carolina. So the purpose would await legislative reform, if ever.

But there is no intent to proceed unlawfully and to violate the state's laws in that regard, nor can that be gleaned from any of the papers in the record or from any of the evidence offered in court.

The union's activities in the first six months before the ban came into effect included the publication of newsletters, the recruitment of 2200 members, roughly one out of every six or seven inmates in North Carolina Department of Correction became a member.

Some modest alterations in correctional procedure

were claimed by the union, getting hot showers at one unit, additional clothing and new linen in another.

The record indicates, without any rebutting evidence, that the union defused certain racial incidents at Central Prison and brought about a degree of racial harmony there, that the personal responsibility of the members was enhanced through the democratic processes of the union and that the union helped to build self-reliance among its members.

Now, since the District Court judgment on May 12, '76, another twelve months of existence, I don't feel at liberty to depart from the record and discuss what has happened, except to say that the union does exist and that it does publish newsletters, contrary to Mr. Safron's assertions, and there is in the record the regulation that the Department of Correction adopted pursuant to the District Court's opinion.

The regulation applies neutrally to all organizations of inmates within the prisons. It imposes what we concede are legitimate and constitutional time, place and manner restrictions, such as a maximum of 25 people attending the meetings, and holding meetings only if adequate supervision is available.

The regulation of March 26, 1975, at issue here, on its face, prohibits solicitation of membership, denies the use of departmental property to the union and excludes outside organizers.

In addition, as applied, from the record, we learn

that the regulation banned the bulk mailing of newsletters by the union. Also, the regulation banned the circulation of any written material that could be deemed a channel for solicitation. So that we must regard any discussion of benefits, purposes or even existence of the union as being subject to that ban.

QUESTION: These regulations you were just referring to, Mr. Smith, were the ones that were challenged in the District Court, not the ones that were issued after the District Court judgment?

MR. SMITH: That is correct. I am referring to the March 26, 1975, regulations which are in issue.

Many individual newsletters and items of correspondence were interdicted and sent back to their senders or destroyed, including correspondence from persons outside the Correction Department, in direct defiance of the standards announced by --

QUESTION: Do you think the union should be able to solicit authorizations from prisoners for the union to act as collective bargaining representative?

MR. SMITH: If Your Honor please, I feel that that has an element of misrepresentation to it because they are not capable, under our law, of acting --

QUESTION: How about my question?

MR. SMITH: I should think it would be permissible

for the Department of Correction to say, "No. You may solicit memberships, but, please, don't represent that you are a collective bargaining agent, because you are not."

QUESTION: Well, the union did that, didn't it?

MR. SMITH: The union did that.

QUESTION: In its newspaper all the time, didn't it?

MR. SMITH: Well, it did that in its newspaper once or twice.

But, in any event, the state's response to that was too broad. The state went too far. The state didn't say, "Don't misrepresent." The state said, "Don't solicit in any form or manner."

And we submit, as the District Court properly decided, that this was an over broad stifling of the First Amendment rights.

QUESTION: Would you say you would have the same reaction to forbidding solicitation by prisoners, themselves?

MR. SMITH: I think it would be in defiance of the First Amendment to prohibit solicitation by the prisoners to join the union.

QUESTION: Just like it would be, you assert, for outsiders to solicit, either by mail or by visitation?

MR. SMITH: The regulations, if Your Honor please, do not say that outsiders could not solicit.

QUESTION: Exactly. Then it doesn't forbid them from soliciting for membership by visitation, does it?

MR. SMITH: Yes, that was done because --

QUESTION: By outsiders?

MR. SMITH: Yes, it said that outside organizers --

QUESTION: So none of the facilities may be used by anybody for solicitation purposes?

MR. SMITH: That is true.

Theoretically, outside organizers can solicit by mail. But in practice, and as the record shows, many, many pieces of mail, coming from outside organizers, were interdicted and sent back.

QUESTION: Well, some of them, you would seem to agree,could validly be interdicted, such as, seeking an authorization to act as a collective bargaining representative.

MR. SMITH: I don't think the response is interdiction, Your Honor. I think the response is a statement to the union, saying --

QUESTION: What do you do with a piece of mail that you get? Do you send it on to the prisoner?

MR. SMITH: I think this Court did the right thing in Procunier v. Martinez. It says you give notice and you give an opportunity to object and you have a neutral decisionmaker and, hopefully, some reason --

QUESTION: I know, but you do not send it on to the

prisoner, in response to Mr. Justice White's question.

MR. SMITH: All right. You withhold it and give notice to the prisoner.

QUESTION: All right. You give notice and then you have whatever kind of procedure you want, and you are the neutral observer and you are going to decide it. And you look at it and you see it is a solicitation for a collective bargaining representation.

Now, would you send it on to them or not?

MR. SMITH: No. I am going to write to the free world correspondent and say --

QUESTION: But you are going to withhold, interdict delivery of that piece of mail?

MR. SMITH: Yes, and I am going to do it pursuant to proper procedures.

QUESTION: All right, but you would interdict it, nevertheless.

MR. SMITH: I would.

QUESTION: How do you know, then, that every piece of mail you are talking about wasn't validly interdicted?

MR. SMITH: Well, the record says it wasn't. The record says it was just -- either disappeared or was sent back, returned to sender, addressee unknown, all sorts of illogical --

QUESTION: You mean it was never opened?

MR. SMITH: Yes.

QUESTION: How do you know what was in it?

MR. SMITH: The record shows it was opened.

QUESTION: Do you know what was in it?

MR. SMITH: The people who wrote the letters filed affidavits to the District Court, attaching copies of the letters, saying what was in it and what happened to the letters. There was no effort by the Department of Correction to follow the Martinez procedural requirements.

And, as I say, the response of the Department of Correction was extensive. They outlawed all solicitation, instead of solicitation that might have been --

QUESTION: But you want more than permission to solicit from outside. You wouldn't be satisfied with a decision here that said, well, the Court of Appeals was right insofar as it forbade solicitation on the premises.

MR. SMITH: Oh, no. I think we would insist, or would wish to insist upon prisoners having the right to solicit other prisoners to join the organization.

QUESTION: So, you say you would not be satisfied with just permission for outside solicitation.

MR. SMITH: No, Your Honor. No, we think that the First Amendment right of association goes broader than that.

QUESTION: (inaudible) -- outside organizers come in and solicit?

MR. SMITH: Well, this gets into the equal

protection analysis and we feel that we should be permitted to have outside organizers only to the same extent that other organizations, similarly situated and with similar goals and similar characteristics, are permitted to do.

QUESTION: Do you think the prison administrators can make their own value judgments on the purposes and the qualifications of these outside groups coming in to carry out activity?

MR. SMITH: Yes, sir, and when challenged under the Constitution, we think they have to support them with valid reasons and some evidence.

QUESTION: But you agree with, I think, Mr. Geller suggested in response to a question I put, that if they just excluded everybody then that would be a compliance with -- it would not be a violation of this judgment?

MR. SMITH: Well, I think there are some freedom of association principles involved here that could not be easily resolved by simply excluding everybody.

QUESTION: Well, didn't the District Court cast it precisely on terms that the so-called union must have the same rights, measured by the same dimensions and boundaries as these other public organizations?

MR. SMITH: As I understand the District Court's opinion, the solicitation of members was grounded upon right of association principles.

QUESTION: Solicitation by whom?

MR. SMITH: By the prisoners.

QUESTION: By outsiders?

MR. SMITH: No, by prisoners to prisoners.

QUESTION: Well, I am speaking of the outside. Suppose they exclude everybody. Suppose the state simply says this is too much of a problem. We are going to stop picking and choosing. No Junior Chamber of Commerce, no Boy Scouts, no Alcoholics Anonymous, no organizations.

MR. SMITH: Under the District Court's opinion, the things which were grounded on the Equal Protection Clause were meetings, mass mailing of literature and having outside people come in, and --

QUESTION: According to Paragraphs 1, 2 and 3 of 32 of the Jurisdictional Statement, that last part of the judgment?

MR. SMITH: I think Paragraph 1, if Your Honor please, the first clause of that, at any rate, is a First Amendment right of association judgment.

I think the second clause of Paragraph 1 and Paragraphs 2 and 3 are grounded upon the Equal Protection Clause.

QUESTION: The second clause of Paragraph 1 of the opinion is hardly compatible with the first clause, is it? This clause says, "Inmates and all other persons," and then after the semicolon, "provided, however, that access to inmates

by outsiders for the purpose of furthering the interests of the union may be denied."

MR. SMITH: It is not very well written, and I think --

QUESTION: That's putting it mildly, isn't it?

MR. SMITH: I think if I could amend my response to Mr. Justice Rehnquist's question, I think I would say -- I would excise the words "and all other persons" and would simply use the words "inmates shall be permitted to solicit and invite --"

QUESTION: You mean if you had been writing this opinion instead of the judges.

MR. SMITH: Then, I would add a footnote, saying, "other persons can do so only by correspondence."

In other words, I don't think that we can compel correctional departments to allow outsiders in unless there is some equal protection leverage present.

QUESTION: Now, on Number 2 -- that's what I was referring to, specifically -- Paragraph 2, Page 32, from the opinion, if they stop all mailing, bulk mailing from all sources then they wouldn't be violating the judgment.

MR. SMITH: I think I would be in trouble. I don't think I could say that the First Amendment encompasses a bulk mailing privilege.

QUESTION: And if they don't allow the Junior Chamber,

and the others to hold any meetings, then they can stop the union from holding meetings.

MR. SMITH: I think I would be in a lot of trouble there, too, Your Honor, yes, sir.

QUESTION: Maybe, that's what you are inviting the State prison authorities to do.

MR. SMITH: No. I think the state is bound --

QUESTION: I should say not you. I should say Court of Appeals or what --

MR. SMITH: District Court. It is a three-judge court.

QUESTION: District Court.

MR. SMITH: We feel that the experience has been so good from the Jaycees and the Alcoholics Anonymous and other groups that the state is learning how to handle associational interests in the correctional setting, and we feel that it will suffer no more from what our union proposes to do than it has from what these other organizations have done.

QUESTION: How about the Klu Klux Klan?

MR. SMITH: Well, it would depend on what kind of aims and purposes and what kind of proposed activities --

QUESTION: I haven't read its constitution, but I am sure that it reads very prettily.

MR. SMITH: I have, Your Honor, and it certainly does not -- Many of the things it includes would be incompatible

I think, with --

QUESTION: Well, would a prison administration be entitled to determine that in advance of, say, racial difficulties or racial violence in the prison, or would it have to await disorder and violence before it moved in to --

MR. SMITH: Your Honor, I think the state has already answered that question by saying that in its new regulations, its provisional regulations, assuming --

QUESTION: Which, as I understand it, promulgated under the coercion of this Court decree, it was left on stay.

MR. SMITH: I think the state has already dealt with that. They said submit us your constitution and bylaws, a detailed statement of your proposed operation and how your finances are going to be handled, and we are not going to let you come in unless you do certain things.

Well, right now, the union is in the process of trying to satisfy the department, under these regulations.

QUESTION: These regulations were under the compulsion of this Court decree, were they not?

MR. SMITH: Sure. But I am saying that's a rational way to go about deciding what organization can come in.

QUESTION: How? Can you tell, necessarily, from the constitution and bylaws of an organization what it -- Can't you rely on your actual knowledge? A lot of nations in the world have very fine constitutions, but they are also

dictatorships.

MR. SMITH: Surely. I think that's where proposed operations come in.

I think we have a duty, even in prison, to give free association and free speech --

QUESTION: To the Klu Klux Klan?

MR. SMITH: Well, Your Honor, that's a hypothetical that I am not prepared --

QUESTION: No. That's a real question. It is not out of the air.

MR. SMITH: I'd be inclined to think that they could --

QUESTION: The Klu Klux Klan is an organization which has members in various places in the United States, including, I would assume, the State of North Carolina.

MR. SMITH: Yes, sir.

QUESTION: Some of whom may be in prison.

MR. SMITH: I'd be inclined to think that the Klu Klux Klan could be kept out, unless it does an awfully good job of cleaning up its aims and purposes. Because its purposes are to foment racial hatred and to perpetuate --

QUESTION: I am sure that's not contained in its constitution, without really knowing, but I'd be morally certain that it doesn't say in its constitution, "Our purpose is to foment racial hatred."

MR. SMITH: I think it can be fairly readily perceived, from reading the constitution, as I recall. These things do stand out, but, moreover, the Klan has had years of operating history in which -- no one needs to recount that. Everyone knows it. But North Carolina Prisoners' Labor Union is a new organization.

QUESTION: Is it part of a national organization?

MR. SMITH: No, Your Honor, it is not.

QUESTION: Because there is something in the record about a similar union out in California.

MR. SMITH: There is a National Prisoners' Reform Association which is active in some states.

QUESTION: Under this decree, under this mandate, suppose the PLO, the Palestine Liberation Organization, which has some sort of de facto recognition in the United Nations, applied to come in on the same basis as these others. They could not be excluded any more than the Klan could be excluded, could they?

MR. SMITH: It would depend on an examination of their bylaws and constitution and their statement of principles.

QUESTION: The PLO has bylaws. They don't openly advocate terrorism, but we take judicial notice that they practice it.

MR. SMITH: They have an operating history of violence, and we don't have, as far as the union is concerned,

here. The only history we have is a good one. It shows the union is doing a lot of good things and the state is trying to suppress it.

QUESTION: Don't these hypothetical questions, which are obviously quite far from the present situation, suggest that the court maybe -- the District Court -- maybe didn't give the deference it should have given to the judgment ordinarily accorded to prison administrators and required by Pell v. Procunier.

MR. SMITH: I feel the state had a burden to come in with some facts to show that this union had the probability of doing some harm.

QUESTION: How do you show that the union will engage in violence any more than you could show that the PLO or the Klan would engage in violence? How do you show that as to the future? Just on the basis of their past performance?

MR. SMITH: Unless you have a past operating history or a statement of proposals which, in itself, indicates improper conduct, you would have to assume that the people will not be -- improperly conduct themselves. And, of course, the District Court made this point and it is a very important one. The District Court said the minute things seem to be going awry the correctional authorities can come in and stop.

QUESTION: And then you would have another lawsuit --

MR. SMITH: You litigate later.

QUESTION: And then you'd have another lawsuit in the District Court to determine whether they had acted properly then.

MR. SMITH: Maybe so. As long as there are --

QUESTION: Let's forget the violence for a moment. Wouldn't you say the same thing would happen, namely, the authorities could close down the union if it made some demands for collective bargaining?

MR. SMITH: If it demanded --

QUESTION: You are agreed that's illegal and that's not proper union conduct. Now, if the union is going around indicating to its members, or potential members, that that is its purpose and its function, and then it demands collective bargaining to improve conditions in the prison, could the state at that point say you have just demonstrated that you are engaging in illegal conduct, and we want you out of here now? Could it do that?

MR. SMITH: I think because collective bargaining would be unlawful under the state law, that would be a permissible response.

QUESTION: Now, the officials at this stage see that they are soliciting authorizations to be a collective bargaining representative. And that's what they are representing they are. Now, why must the union -- Why must the prison officials say, 'oh, this is a big joke. They know it is

illegal. They don't really mean it.

MR. SMITH: Well, the prison officials did say that, if Your Honor please. Whether they must or not, they conceded that in their brief in District Court. That was the opening paragraph in their brief in District Court. They said we agree that this is not a labor organization, it is a prison reform association.

So, if they agree and we agree --

QUESTION: Well, yes, but that isn't what I hear from the state.

MR. SMITH: Well, if Your Honor pleases, --

QUESTION: Whatever they said then, that isn't what they say now, and it also isn't what the union's papers say.

MR. SMITH: If Your Honor please, that was all worked out in District Court by agreement. The District Court understood it. The parties understood. I don't think they can be permitted to shift their position here.

QUESTION: When you say worked out by the District Court, I am not sure I follow you.

MR. SMITH: The plaintiffs made a representation that they weren't engaged in collective bargaining.

QUESTION: You don't mean the opinion was worked out jointly by counsel and the court?

MR. SMITH: No. I mean that those facts were agreed upon by the court, and the defendant's brief starts out with

those paragraphs. It is in the record and I have cited it in my brief. So that's a red herring, I think.

QUESTION: Could you cover the equal protection aspect of your case a little further?

MR. SMITH: Yes, sir.

QUESTION: Which one of these organizations that are permitted to exercise certain activities within the prison do you consider most closely analogous to the union?

MR. SMITH: I think that the Alcoholics Anonymous and the Jaycees both are quite analogous to the union.

QUESTION: Does the record show how many Jaycees there are, how many members in the prison?

MR. SMITH: I don't think so, Your Honor. There are a number, but I don't believe it says how many. And the same is true of the AA.

QUESTION: Would it be as many as 2,000 of each?

MR. SMITH: I would suspect so. I think there is a Jaycee unit in every prison unit. There are 77 of those.

QUESTION: Do the Jaycee chapters or organizations in North Carolina support before legislative bodies or otherwise look to their own economic interest --

MR. SMITH: The Jaycees, I am not sure, Your Honor. I am inclined to think that they do get involved in lobbying, but I can't be sure of that.

QUESTION: What kind of legislation would a Jaycee

organization support for the economic interest of its own members, as diverse as membership in the Jaycees is.

MR. SMITH: I guess various things which they deem to be in the interest of their members, much the same as the Chamber of Commerce would. But, I am sorry, Your Honor, I am not that closely acquainted with what they do.

QUESTION: What about the Alcoholics Anonymous?

MR. SMITH: I am sure they have taken positions on alcoholic rehabilitation and treatment programs and questions of whether alcoholics and drunks should be punished, and that sort of thing. In other words, things that are of interest to their --

QUESTION: If I read your brief correctly, on Page 7, you list among the goals of the union, the furtherance of economic and political rights of prisoners.

MR. SMITH: Yes.

QUESTION: And you really think that sort of goal is analogous to the goals of Jaycee state get-out-the-vote movements, and the like, really analogous to what a union has in mind?

MR. SMITH: Sufficiently analogous to invoke equal protection principles.

QUESTION: Has any legislative body in the United States ever thought the Jaycees were sufficiently analogous to a union to enact Jaycee labor legislation?

MR. SMITH: No, Your Honor, I don't think that the Jaycees --

QUESTION: Why did the national government think it was necessary to enact the NLRA?

MR. SMITH: I presume there was a lot of interest by the working people of this country.

QUESTION: And all sorts of things called unfair labor practices on both sides, weren't there? And the unions are in the business to promote political and economic activities of interest to their members, perfectly properly. I am not critical of that.

MR. SMITH: Yes, sir.

QUESTION: And you think the Boy Scouts are analogous.

MR. SMITH: Well, I do think the Boy Scouts become interested in a lot of legislation that is of importance to them, just like the Sierra Club does, like any other interest group.

I think that Your Honor is correct in saying that the Jaycees are perhaps broader than some interest groups, but the relative breadth or narrowness of the interest group, I don't think, should be constitutionally determinative of whether they are accorded equal protection of the law.

QUESTION: Does the record show what the activities of the Jaycees are with respect to North Carolina prisons?

MR. SMITH: Yes, sir, there is quite a bit in the record about that. They operate canteens. They have barbeques, wash cars, and so forth and so on.

QUESTION: Outsiders do, or prison inmates?

MR. SMITH: Prison inmates.

QUESTION: Who are members of it.

MR. SMITH: Yes.

QUESTION: They operate canteens and --

MR. SMITH: Have barbeques and chicken fries and they wash and wax cars --

QUESTION: Occupational activities.

MR. SMITH: Yes, that kind of thing.

QUESTION: These barbeques they run, do people come in to them?

MR. SMITH: Yes. They invite guests and family members in. Sometimes they hold --

QUESTION: Do they charge for it?

MR. SMITH: Yes, sir. And sometimes if they are honor grade they are permitted to hold them out in shopping centers and things like that.

QUESTION: And they make money on them?

MR. SMITH: Yes, sir, and the money is in turn used for worthwhile programs, including health, comfort and welfare of the inmates, I am correctly informed.

QUESTION: Mr. Smith, does the record tell us how the

union activities are financed?

MR. SMITH: Yes, Your Honor. There was some seed money. There was a grant, I think, of $1,000 from the AFL-CIO, and then something like $14,000 from a national prison reform association. Not the National Prison Reform Association, but a charitable organization that gives such grants. I've forgotten the precise name.

QUESTION: Southern Coalition for Jails and Prisons?

MR. SMITH: Yes. And there is a provision for dues in the bylaws, although dues, thus far, have not been collected, so I suppose the --

QUESTION: How long has the organization been in existence?

MR. SMITH: It was organized in the fall of 1974, six months before the regulations in question were adopted.

QUESTION: And it is a state-wide organization only?

MR. SMITH: That is correct. It doesn't go beyond the state.

QUESTION: Was it organized in a prison or outside?

MR. SMITH: It was organized within a prison, working with outside interested people.

QUESTION: So it has no real track record, has it?

MR. SMITH: Well, District Court looked at what it had done and determined that no indication of any wrong doing

or any illegal conduct was there. And, of course, we rely --

QUESTION: Not much evidence of any activity, as of the time of the District Court's decision.

MR. SMITH: Oh, roughly, one prisoner in seven had joined the union. They published a number of newsletters. They had quite a few activities. I would say there had been a good deal --

QUESTION: There seems to be a good deal of difference of opinion as to what their activities or even their purpose is.

MR. SMITH: Well, we think the record satisfactorily establishes that, and, of course, as to the post-judgment experience, that is not within the record, but we are satisfied that if ever that should be examined there would be no indication of any harm to any valid correctional interest.

QUESTION: Mr. Smith, suppose under this -- This Court affirmed in this case and then the Kiwanis and the Rotary and, you name them, fifty-nine other organizations decide to come in and have groups. Finally, the prison officials simply say, "We can't cope with all these people. We are going to limit it to ten organizations."

Would that violate the --

MR. SMITH: That's a tough question, if Your Honor please, but surely they have some discretion to keep themselves from being literally overrun with organizations. I don't

concede that that is likely to happen, but if it does I suppose a suitable remedy can be found for it.

QUESTION: By the courts?

MR. SMITH: Initially, by the correctional administrators, subject to court review if it is judicially challenged.

QUESTION: Maybe the court would appoint a special master to deal with all these continuing problems.

MR. SMITH: I would hope that would not be necessary, Your Honor. We agree that a lot of what they do is right. Like the new regulation, we are not about to challenge. We think it is right. The one that regulates time, place and manner, but we certainly can't concede that putting the union out of business was right.

Thank you, sir.

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

Do you have anything further, Mr. Safron?

REBUTTAL ORAL ARGUMENT OF JACOB L. SAFRON, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SAFRON: Yes, Your Honor.

First of all, I would like to point out that in our memorandum in the District Court this is what we said: Page 2 of the memorandum in the record:

"Apparently, the Plaintiff" (that's the labor union) "is not seeking to establish a National Labor Relations Board

type of labor union in the prison system."

That was our statement. We went on to say, more accurately, that they want to form as an organized group of elected representatives of inmates within the prison to meet together and to take their proposals, criticisms, suggestions, and the like, to the administration.

That is what we said in there.

Number two, we never have -- Let me phrase it this way: Our situation vis-a-vis the union, with its office located in Durham, is that inmates -- and we took that moderate position -- could join this organization, outside organization. And that's what I want to emphasize. We never denied their right to join an outside organization, as we have never denied the right of the inmates to join any organization of their choice. We couldn't do it. We couldn't perform lobotomies on them.

Now, these are copies of various newsletters which they published, one of which is attached to the complaint which is a part of the record in this case. That tells how an organizer came from California to attempt to organize the North Carolina Department of Correction.

I submit that this is part of a national group.

Every one of their newsletters contains the same authorization for representation for collective bargaining. That's -- The one that's in the record contains that. The ones

which were published subsequent contain that.

QUESTION: Other than the contribution of the AFL-CIO, is there anything in the record about a linkage between formal organized labor unions?

MR. SAFRON: No, Your Honor, that is the only.

QUESTION: But there is nothing unusual about the AFL-CIO contributing to correctional activities, is there?

MR. SAFRON: I can't answer that, Your Honor. I really don't know.

Now, I'd like to say this: That the design of our response in this case is based upon Paka v. Manson, the decision of the District Court for Connecticut. That was our basis for response and we followed the Paka holding almost verbatim. I would submit that Paka is an excellent discussion of the applicable law in this case. It is well thought out.

Now, the three-judge court never even mentions Paka, just disregards Paka, as if the decision doesn't exist.

Now, as far as alternatives, under Pell v. Procunier, In North Carolina, these prisoners are not held in outer darkness. Number one, they may write to anyone. And they write to the press and their letters appear in letters to the editor. They may write to anyone. They may be visited by the press. Unlike Pell v. Procunier, the press can come in and interview specific inmates.

We have an organized inmate grievance commission

which was funded this year at $125,000. It exists. According to their records last year, they handled 4,755 complaints from the inmates. So the inmates have full correspondence.

Last Saturday, the Secretary of Corrections spoke before the North Carolina Civil Liberties Union at their annual convention.

There are alternatives. That was the situation Pell spoke to. They are not held in outer darkness.

Now, I would submit further, under Pell, the "Big Man" theory is applicable. The organizers of this union, the inmates in the system, as revealed in Footnote Number 16, are inmates who have had a history of violence in the system. Two are murderers, third is a con-man who has even refused his own identity and we had to prove in federal court that he --

QUESTION: Would you deny them the right to join the AA unit?

MR. SAFRON: No, Your Honor, but the AA unit has outside representatives, members of society who have proven their worth in the outside community and have come in to lend their assistance to helping the inmates become rehabilitated and return to society.

That's the difference here. These outside individuals are out to serve a social good.

Now, the newsletter, as I showed the Court, copies are published in Durham at that office. The organization, if

it exists, doesn't exist within the prison system today. They have never satisfied our regulations and the federal court has found that they have not properly attempted to.

Now, if they say it exists -- newsletters have been printed -- yes, in Durham and they come in.

And, as I said previously, and as their Newsletter Number One, attached to their complaint, illustrates, it's part -- an attempt of a national organization.

And I would submit, and all the cases show, that there has, in fact, been an attempt, nationally, for these inmates to organize together.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 12:00 o'clock, noon, the case in the above-entitled matter was submitted.)