

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. 1134 Misc.

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SUPREME COURT, U.S.

Thomas Cooper,
Petitioner,

vs.

Frank J. Pate, Warden,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Thomas Cooper,
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vs.

Frank J. Pate, Warden,
Respondent.

Petition for Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITIONER prays that a writ of certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on November 5, 1963.

Citations to Opinion Below

The opinion of the Court of Appeals for the Seventh Circuit is reported at 324 F. 2d 165 (1963) and is reproduced herein as Appendix A.

Jurisdiction

The jurisdiction of the Court is invoked under 28 U.S.C., Sec. 1254 (1). The judgment of the Court of Appeals for the Seventh Circuit was entered on November 5, 1963. On January 23, 1964 this Court granted an application for an extension of time within which to file this petition to and including March 4, 1964.

Questions Presented

1. Whether a prisoner in a state penitentiary has a right to obtain the Koran and other literature connected with the observance of his religion under the free exercise clause of the First Amendment and the due process clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether state officials violate the establishment and free exercise clauses of the First Amendment and the due process and equal

protection clauses of the Fourteenth Amendment by isolating Muslim prisoners and prohibiting them from obtaining the Koran and other religious literature and communicating with ministers, while placing no comparable restrictions on prisoners adhering to other religious faiths.

3. Whether a federal court of appeals violates the provisions of the First and Fifth Amendments of the Constitution of the United States by holding that the members of a movement which professes to be a religion are not entitled to the protection of the First Amendment and by basing such a holding on its own judicial notice of a report by the Chicago Police Department.

4. Whether the federal courts must appoint counsel to assist in a proceeding brought by an indigent state prisoner under the Federal Civil Rights Act, 42 U.S.C. Sec. 1983, alleging substantial violations of his constitutional rights by prison authorities.

Statutes and Constitutional Provisions Involved

The federal statutory provisions under which proceedings were brought herein include 28 U.S.C. Sec. 1343, and 42 U.S.C. Sec. 1983. The proceedings below raise substantial questions under Amendments I, V, and XIV of the Constitution of the United States. The text of all relevant statutory and constitutional provisions appears in Appendix B.

Statement of the Case

Petitioner is currently incarcerated in the Illinois State Penitentiary at Joliet. Respondent is the Warden of that institution. Petitioner is an adherent of the Islamic religion.¹

1. Although petitioner did not specifically allege the nature of his religion in his complaint, he refers several times therein to "Islamic" religious material and "Islamic" discrimination. See Original Record on Appeal, pp. 5-7.

IN THE SUPREME COURT OF THE UNITED STATES

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Motion for Leave to Proceed
In Forma Pauperis

NOW COMES PETITIONER, by Alex Elson, one of his attorneys, and respectfully asks this honorable Court for leave to file the attached petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit without pre-payment of costs and to proceed in forma pauperis. The petitioner's affidavit in support of this motion is attached hereto.

Alex Elson

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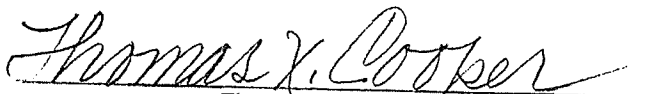
One of Petitioner's Attorneys

STATE OF ILLINOIS)
COUNTY OF WILL) SS

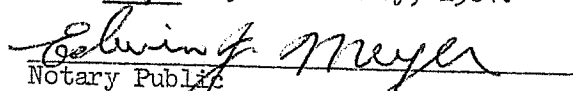
I, THOMAS X. COOPER, being first duly sworn, depose and say that I am the petitioner in the cause herein, and in support of my application to proceed without being required to prepay costs or fees, state:

1. I am a citizen of the United States and of the State of Illinois.
2. Because of my poverty I am unable to pay the costs of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said cause.
5. The nature of the cause is as follows:

I am currently a prisoner incarcerated in the Illinois State Penitentiary at Joliet. I am also a registered member of Temple Number 2 of the Muslim cult of Islam located at 5335 South Greenwood in the City of Chicago, Illinois. For the last several years, various officials of the Illinois State Penitentiary at Joliet have prohibited me from securing a copy of the Holy Koran, Muslim newspapers, arabic language books, visits from Ministers of my faith, and have also kept me continually in isolation cells. On July 5, 1962, I filed a complaint in the Federal District Court for the Northern District of Illinois; that court, and the Court of Appeals for the Seventh Circuit have denied me any judicial relief. Until about six weeks ago, I had been unable to secure counsel to represent me.


Thomas X. Cooper

Subscribed and sworn to before me
this 17 day of January, 1964.


Notary Public

U.S.P.
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On July 5, 1962, petitioner filed pro se in the Federal District Court for the Northern District of Illinois a handwritten complaint he variously styled as "Petition for Relief under Civil Rights Act" and "Petition for Relief and Declaratory Judgment under Civil Rights Act." (Or. Rec. 5).² Jurisdiction was invoked under "the authority of the U.S. Code, Title 28, Sec. 1443, and 1343 et. seq." (Or. Rec. 5).

In his complaint petitioner alleged generally that he was the subject of deliberate religious discrimination by prison authorities and that such discrimination was forbidden by the provisions of Amendments IV, VIII, and XIV and "the equal protection clause and the due process clause" of the federal constitution. (Or. Rec. 6).

In particular petitioner stated:

1. That he had been denied permission by prison authorities to purchase a copy of the Koran; (Or. Rec. 5).
2. That he had been denied permission by prison authorities to purchase copies of Arabic and Swahili language books and other "Islamic materials;" (Or. Rec. 5-6).
3. That he had been denied permission to consult with a minister of his faith; (Or. Rec. 5).
4. That prison authorities had for a number of years kept him in constant isolation from fellow prisoners; (Or. Rec. 6).
5. That the above-stated actions by prison officials were motivated by the latter's hostility to his religion; (Or. Rec. 6).
6. That prisoners adhering to faiths other than his were freely able to purchase Bibles, language books and other material related to the study of religion, and were given privileges not accorded him. (Or. Rec. 6).

Respondent filed a motion to dismiss petitioner's complaint for failure to state a claim upon which relief could be granted, thus admitting

2. As hereinafter employed, "Or. Rec." refers to the Original Record on Appeal compiled by the Clerk of the District Court. Other documents to which reference is made herein may be found in the Record of Proceedings before the Court of Appeals for the Seventh Circuit, hereinafter referred to as "Court of Appeals." Both the Original Record and the Court of Appeals Record have been transmitted to and filed with the Clerk of the Court along with this petition.

the truth of petitioner's factual allegations for purposes of the proceedings. (Or. Rec. 31). The trial judge granted respondent's motion. No specific findings were made nor was any opinion filed by the trial court. (Or. Rec. 33).

Petitioner filed a notice of appeal to the Court of Appeals for the Seventh Circuit from the judgment of dismissal (Or. Rec. 38) and submitted a handwritten brief in that court. In addition to the large amount of irrelevant material contained therein the latter reiterated the allegations in petitioner's complaint (Court of Appeals, Appellant's Brief, pp. 6, 8, 9), invoked the First, Fifth and Fourteenth Amendments of the federal constitution (Court of Appeals, Appellant's Brief, pp. 3, 5), and cited Pierce v. La Vallee, 293 F. 2d 233 (2nd Cir. 1961) for the proposition that substantial allegations of religious discrimination by a state prisoner are entitled to a hearing (Court of Appeals, Appellant's Brief, pp. 5, 11).³ Respondent's principal argument on appeal was,

"The Court can take judicial notice from official and otherwise accredited social studies that the 'Black Muslim Movement', despite its pretext of a religious facade, is a subversive organization proscribed by the laws of the United States and the State of Illinois. Therefore the plaintiff may constitutionally be debarred from overt participation in its activities and its publications may be censored, at least in a prison."
(Court of Appeals, Appellee's Brief, p. 7).

The "official study" of which respondent asked the court below to take judicial notice is a report prepared by a branch of the Chicago Police Department, printed as Appendix I in respondent's brief in the Court of Appeals. (Court of Appeals, Appellee's Brief, pp. 10, 17-40).

On the day set for argument of the appeal, representatives of the Attorney General of Illinois appeared for respondent. Petitioner's motions to have counsel appointed and for an auxiliary writ of habeas corpus had been previously denied by the court and he was neither

3. Certified copies of the briefs submitted below by petitioner and respondent are attached to the Record of Proceedings before the Court of Appeals and are provided herewith to aid the Court in considering this petition. Said briefs are referred to herein as "Appellant's Brief" and "Appellee's Brief."

present nor represented. (Court of Appeals, orders of March 28 and September 16, 1963). The court ordered the matter taken on the briefs without hearing any oral argument. (Court of Appeals, order of September 18, 1963). There is no indication in the record that petitioner waived oral argument. On November 5, 1963, the court handed down its opinion and judgment affirming the dismissal of petitioner's complaint. A copy of the court's opinion is attached as Appendix A herein.

Until several months ago petitioner had been without an attorney and had acted pro se in all the proceedings below. Immediately prior to the time petitioner's case was decided by the Court of Appeals he began writing to present counsel requesting assistance in his case. A few weeks after said decision, present counsel for petitioner agreed to represent him.

Reasons for Granting the Writ

I. THE DECISION BELOW CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

The presentation to the Court of this petition is necessary because the federal district court and the court below have refused to allow a hearing on the merits to a state prisoner complaining under the Civil Rights Act, 42 U.S.C. Sec. 1983, of specific and significant instances of religious discrimination by prison authorities, even though petitioner's allegations were admitted as true by respondent's motion to dismiss. The holding below that such a complaint fails to state a cause of action requiring a hearing is in conflict with decisions reached by federal courts of appeals in at least three other circuits.

In the Second Circuit, three inmates of a New York penitentiary filed a Civil Rights Act complaint alleging that they were being denied permission to purchase the Koran and contact spiritual advisors, and that they were being subjected to solitary confinement because of their religious beliefs. Pierce v. La Vallee, 293 F. 2d 233 (2nd Cir. 1961). In reversing the district court's dismissal of the complaints, Circuit Judge Clark wrote:

"... [W]e feel constrained to hold, notwithstanding the cited adverse rulings, that the present complaints, with their charges of religious persecution, state a claim under the Civil Rights Act which the district court should entertain." 293 F. 2d 233, 235. ⁴

The court in Pierce noted the "preferred" position accorded freedom of religion and conscience by prior decisions of this Court and cited as precedent for its ruling a Fourth Circuit case, Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961).

Sewell involved a complaint under 42 U.S.C. Sec. 1983 by prisoners charging that federal authorities placed them in solitary confinement

⁴. After a hearing on remand, it was held that certain actions taken by prison authorities could not be characterized as religious discrimination, 212 F. Supp. 865 (1962), aff'd per curiam 319 F. 2d 844 (1963), cert. denied U.S. (Feb. 17, 1964).

on limited rations and denied them the opportunity to recite their prayers, contact ministers, receive publications, and wear religious medals, solely because of their Muslim faith. Although the complainants were federal prisoners, the court did not base its holding that the complaints required a hearing on any theory of special jurisdiction or powers to review treatment of federal prisoners, but stated broadly:

"... [I]t has never been held that upon entering a prison one is entirely bereft of all his civil rights and forfeits every protection of the law." 291 F. 2d at 198.

In support of its position the court cited cases involving state as well as federal prisoners.

Last, in Fulwood v. Clemmer, 295 F. 2d 171 (D.C. Cir. 1961), a "petition" by an uneducated prisoner containing allegations that he was being kept in solitary confinement and otherwise mistreated by officials of the District of Columbia jail, solely "because his religion is 'Islam'", was held to require a remand for an eventual hearing on the merits by the district court, as well as the appointment of counsel to aid in the presentation of the prisoner's case. See especially the concurring opinion of Judge Edgerton, 295 F. 2d 171, 173-176.

The court below based its ruling in part on a number of cases in the Seventh and Ninth Circuits in which federal courts have refrained, as the court put it, from exercising "supervisory direction" over penitentiary "discipline." See A-3, infra. An extensive collection of these cases appears in Pierce, supra, 293 F. 2d 233, 234-235. The Ninth Circuit has noted in a recent case that this Court appears to approve of the decisions in Pierce and Sewell, supra; Stiltner v. Rhay, 322 F. 2d 314, footnote 5 at 316 (9th Cir. 1963). The conflict of recent decisions between the Seventh and Ninth Circuits on the one hand, and the Second, Fourth, and District of Columbia Circuits on the other, is clear as to both holdings and principle. This Court should resolve it by granting certiorari and reversing the decision below.

II. THE DECISION BELOW IS ERRONEOUS AND IN CONFLICT WITH PREVIOUS DECISIONS OF THIS COURT,

A. As Permitting an Establishment of Religion;

Taking the allegations of petitioner's complaint as admitted,

authorities in the Illinois state penitentiary sanction the purchase and possession of Bibles and other literature connected with religious observance by Christian and Jewish prisoners, but deny such rights to Muslim inmates. In addition, the privilege of living with other prisoners rather than in isolation is granted and denied on the same basis. More is involved here than a non-coercive or symbolic preferment of one religious belief over another. Unlike the school children in the Prayer Cases who were subjected to religious exercises conducted by state employees for a short period each day,⁵ prison inmates live in a completely controlled environment. In such a setting official approval of some religions and disapproval of others amounts to outright coercion -- the inmate whose continued privileges depend on official acceptance of his creed may well find dissent an expensive luxury. This Court's oft-repeated definition of the establishment clause in Everson v. Board of Education, 330 U.S. 1, 15-16 (1947), makes it absolutely clear that the courts below committed serious error in refusing to allow petitioner an opportunity to challenge constitutionally defective practices by state authorities.

B. As an Unwarranted Interference with the Free Exercise of Religion;

Petitioner sought in his complaint below to secure three rights of fundamental importance in the practice of his religion: the right to purchase and read the Koran; the right to purchase and read books teaching languages in which Islamic religious works were originally written; and the right to consult a minister of his faith for spiritual advice.

Assuming that state authorities may have a legitimate interest, in spite of the free exercise clause, in limiting the religious practices of prison inmates in certain circumstances,⁶ it is relevant to inquire whether the specific conduct sought to be regulate here "invariably

5. Engel v. Vitale, 370 U.S. 421 (1962); School District v. Schempp, 374 U.S. 203 (1963).

6. For example, prisons lacking adequate facilities might find it impossible to honor religiously-based dietary customs. But see Childs v. Pegelow, 321 F. 2d 487 (1963).

posed some substantial threat to public safety, peace or order." Sherbert v. Verner, 374 U.S. 398, 403 (1963). Doubtless the state could not seriously contend that the practices forbidden to petitioner here would pose any threat outside prison walls. It is difficult to understand how the allowance of these limited requests even in a prison environment creates a danger to the safety and order of a prison system, especially in view of the fact that state officials apparently permit the exercise of similar rights by non-Muslim inmates. At any rate, the burden of establishing the existence of such a threat rests with the state. Sherbert, supra, at 407; Cantwell v. Connecticut, 310 U.S. 296 (1940). And the proper and normal manner of testing whether the state can sustain that burden is a hearing on the merits.

Petitioner's complaint should rightfully have been dismissed only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which should entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The courts below have decided, assuming that they employed the aforementioned standard, that it would be impossible for petitioner to show a set of facts in which the reading of religious literature and consultation with ministers would pose no threat to prison order. Apparently this conclusion was based on the purportedly dangerous nature of the ideas with which the religion imputed to petitioner is associated. See infra, pp.10-13. However, in the context of the free exercise clause the proper concern of state authorities and of the federal courts must be actions, not ideas, whether inside or outside prison walls. Cantwell v. Connecticut, supra.

C. As Sanctioning a Violation of the Equal Protection Clause of the Fourteenth Amendment;

Petitioner alleged in his complaint that he was denied equal protection of the laws because rights and privileges withheld from him were granted to inmates of other religious affiliations. In failing to hold that such a complaint stated a cause of action, the courts

below have overlooked important decisions of this Court construing the equal protection clause of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U. S. 356 (1886), Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), and Brown v. Board of Education, 347 U.S. 483 (1954), stand for the proposition that the state is forbidden to grant or deny rights solely on the basis of race or creed. Moreover, even if it be concluded that the benefits petitioner seeks to secure from prison authorities are mere privileges, not rights guaranteed by the First and Fourteenth Amendments, such privileges may be granted or denied only in accordance with a rational standard. Yick Wo and Takahashi, supra. A classification dependent only on religious affiliation as is here alleged is not a "rational" one within the meaning of the equal protection clause. Niemotko v. Maryland, 340 U.S. 268, 272-273 (1951).

D. As Unsupported by the Record Herein, or by any Facts Properly the Subject of Judicial Notice, Contrary to the Freedom of Conscience Provisions of the First Amendment and the Due Process Clause of the Fifth Amendment.

The court below committed several errors of law which, because of the nature of the rights asserted herein, amount to a violation of the freedom of conscience provisions of the First Amendment and the due process clause of the Fifth Amendment.

The basis for the court's decision that petitioner be denied basic First Amendment rights is not altogether clear from its opinion. The decision can only be explained by assuming that the court below reached the following conclusions:

1. The report of the Security Section of the Chicago Police Department, of which the court was asked to take judicial notice, is properly a subject for such notice.
2. The assertions made in the report are true or substantially true.
3. Those assertions support the conclusion that the Black Muslims are a subversive organization.
4. Petitioner is a member of the "Black Muslim Movement."

5. Petitioner personally subscribes to the beliefs and goals of the Black Muslims.

6. Because he is a member and subscribes to the beliefs of a subversive organization, petitioner poses a threat to the safety and order of the state penitentiary.

Each of these six conclusions, as briefly noted below, is erroneous. Individually and in the aggregate they raise substantial constitutional questions.

Conclusion 1:

Although the court was asked by respondent to take judicial notice of a supposed "fact",⁷ the court appears to have taken notice not of the "fact" asserted but of a report of the Chicago Police Department offered by respondent to support its contention and printed as Appendix I to respondent's brief below. See A-2, 3, infra. The power of taking judicial notice of the contents of official reports and documents, although largely a matter of discretion for the federal courts, is one that should be exercised with caution and attended with procedural safeguards. Brown v. Piper, 91 U.S. 37, 43 (1875); 5 Moore, Federal Practice 1345-1346 (2nd ed. 1951); McCormick, Evidence 708-712 (1954). The party against whom the evidence judicially noticed will be used should be given appropriate notice, and an opportunity to contest the authenticity and reliability of such evidence. Wigmore, Evidence, Secs. 2567-2568a (3rd ed. 1940).⁸ If judicial notice is requested of disputable sociological, economic or statistical facts, those facts should appear in authoritative studies. Brown v. Board of Education, 347 U.S. 483, 494, footnote 11 (1954); McCormick, supra, 706. If judicial notice is taken of official documents or reports, those reports should be matters of public record. McCormick, supra, 704.

7. That the "Black Muslim Movement ... is a subversive organization ..." Court of Appeals, Appellee's Brief, p. 7.

8. Procedural safeguards, would seem particularly important for judicial notice at the appellate level since no effective review of an appellate court's decision to take judicial notice of questionable documents or facts may be available.

None of these general rules governing judicial notice was followed in the procedure sanctioned below. The single report of which judicial notice was taken by the court can be called an "authoritative racial study" (A-2, infra) only in jest. It is completely undocumented, filled with irrelevancies and conjectures, and fails utterly to distinguish between assertions of fact and the opinions of its anonymous authors.

Conclusions 2 and 3:

The truth or falsity of the assertions in the report of the Chicago Police Department's Security Section cannot be dealt with effectively in this petition. No record on this question was made below and, since petitioner was without an attorney, no challenge was made in the Court of Appeals to the reliability and accuracy of the information contained in said report. Suffice it to say that in a court hearing where petitioner was represented by counsel, many of the assertions contained in the report could be seriously questioned.

This Court has available to it the text of the report. (Court of Appeals, Appellee's Brief, pp. 17-40). Even if it be assumed momentarily that the assertions contained therein are substantially true, a careful reading of the report discloses no basis for the conclusion that the Black Muslims are an organization which is "subversive," either generally, or under some specific statutory standard undesignated by the court below.

Conclusion 4:

No evidence was offered or taken sustaining the conclusion that petitioner is a member of an organization called the Black Muslims. The only specific and meaningful evidence in the district court record of petitioner's affiliations are the references in his complaint to "Islamic" reading material and "Islamic religious discrimination."

Conclusion 5:

There was no testimony taken before the district court and no evidence in the record before the court below as to what petitioner believes or does not believe.

Conclusion 6:

There was no evidence taken before the district court and none available to the Court of Appeals on the question of whether the beliefs and requests of the petitioner in this case posed a threat to the safety and order of the state penitentiary. Of course, the language from the Chicago Police Department's report about Muslims in certain prisons, quoted in the court's opinion, does not and could not establish the likelihood that petitioner in this case would incite to violence merely because he believes in Islam or reads the Koran.

The reasoning of the court below is remarkably like that attempted in a lower court and rejected by this Court in Schneiderman v. United States, 320 U.S. 118 (1943). There a district court revoked the naturalization of Schneiderman on the grounds that he had falsely sworn allegiance to the Constitution when he in fact held views opposed to our form of government. The district court extrapolated Schneiderman's views from his membership in the Communist Party. In reversing the decision, this Court noted the conflicting evidence introduced as to the program and goals of the Communist Party and stated:

"...So uncertain a chain of proof does not add up to the requisite 'clear, unequivocal, and convincing' evidence for setting aside a naturalization decree. Were the law otherwise, valuable rights would rest upon a slender reed, and the security of the status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times..." 320 U.S. 118 at 159. 9

Not only do the procedural errors asserted above raise a constitutional question under the First Amendment; they also suggest that the federal courts may, by denying the plaintiff a fair hearing and a decision reasonably based on a record, effectively deprive a litigant of the due process of law guaranteed by the Fifth Amendment. Freedom

9. See Stasiukevich v. Nicolls, 168 F. 2d 474 (1st Cir. 1948) for the view that Schneiderman forbids courts from taking judicial notice "that the Communist Party advocates the overthrow of the Government of the United States by force and violence." 168 F. 2d 474, note 5 at 480. Compare Dennis v. United States, 341 U.S. 494 (1951), in which 16,000 pages of testimony were taken to establish the goals of the Communist Party and the actions of its leaders.

of conscience is part of the liberty protected by that clause. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In cases involving freedom of conscience this Court has been especially careful to require that limitations upon that freedom be sustained only after adherence to narrowly circumscribed procedures which exhibit "sensitivity" to the important interests at stake. Speiser v. Randall, 357 U.S. 513, 525 (1958).

Had petitioner been an attorney and present when this cause was heard below, he might have reminded respondent and the court of what Mr. Justice Douglas said in Fowler v. Rhode Island:

"...[A]part from narrow exceptions not relevant here ... it is no business of courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment." 345 U.S. 67, 69-70 (1953).

III. THE FAILURE OF THE COURT BELOW TO APPOINT COUNSEL WAS AN ABUSE OF DISCRETION CALLING FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Although previous decisions of this Court suggest that a right to the appointment of counsel by federal courts exists for indigent prisoners only in criminal cases, the special circumstances of these proceedings required the court below to appoint counsel as requested by petitioner. Petitioner is an indigent, unlearned in the law. The allegations he makes of religious discrimination are specific and called for the appointment of counsel at an early stage. Certainly at the stage in the proceedings characterized by respondent's attempt to remove petitioner and his religion from the protection of the First Amendment -- via the technical device of judicial notice -- the court should have appointed counsel in the interest of basic fairness as well as to insure that all aspects of the grave issues it considered would be carefully presented. Realistically, the court's order taking the case on the briefs meant that petitioner's claims received no hearing at all. The allegations herein merited more than the cursory treatment they received below.

In at least three other cases involving civil challenges to alleged religious discrimination by prison authorities, counsel has been appointed by federal courts. Pierce v. La Vallee, 293 F. 2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961); Fulwood v. Clemmer, 295 F. 2d 171 (D.C. Cir. 1961). In a dissent to a contrary decision, Chief Judge Sobeloff of the Fourth Circuit expressed grave concern over failure to appoint counsel, Childs v. Pegelow, 321 F. 2d 487, 491, 492 (1963).

This Court has not previously considered the extent to which federal courts are obligated to appoint counsel in civil actions brought by prisoners challenging alleged religious or racial discrimination. The increasing number of such cases in recent years (See infra, p. 16) makes imperative the announcement of a clear policy. At least in cases like the present one, the appointment of counsel should prove an effective means of conserving court time and of separating meritorious from frivolous claims.

IV. THE DANGEROUS NATURE OF THE PRECEDENT SET BY THE DECISION BELOW, AND THE NUMBER OF CASES AND PERSONS POTENTIALLY AFFECTED BY IT REQUIRE THIS COURT TO GRANT CERTIORARI.

In a proceeding in which petitioner, an unrepresented indigent prisoner, claimed serious and specific instances of religious discrimination by state penitentiary officials, the courts below summarily dismissed his complaint on the grounds that petitioner is associated with a "movement" known as the "Black Muslims", determined to be subversive on the basis of a police report. If federal courts may designate an individual or organization as "subversive", without reference to an ascertainable legal standard proscribing specific conduct and without clear evidence to justify the invocation of that standard, a novel technique has been found by which the First Amendment may be circumvented. All that is required is a police dossier well-larded with references to "fifth column", "Communists", "sedition", "conspiracy", "violence" and the like,¹⁰ and the doctrine of judicial notice. To permit the provisions in our federal constitution safeguarding freedom of conscience to be so easily swept aside, even in the case of penitentiary inmates, provides a dangerous precedent for future conduct by state or federal officials.

A substantial number of cases alleging religious discrimination by prison authorities have occupied the attention of federal and state courts within recent years. A partial list includes: Pierce v. LaVallee, 293 F. 2d 233 (2nd Cir. 1961); Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961); Childs v. Pegelow, 321 F. 2d 487 (4th Cir. 1963); Roberts v. Pegelow, 313 F. 2d 548 (4th Cir. 1963); Fulwood v. Clemmer, 295 F. 2d 171 (D.C. Cir. 1961); Brown v. McGinnis, 10 N.Y. 2d 531, 180 N.E. 2d 791 (1962), In re Ferguson, 55 Cal. 2d 663, 361 P. 2d 417 (1961). Estimates of the number of prison inmates professing Islam as a religion are not readily available.¹¹ However, given the apparent attractiveness of the Muslim sect in this country to a growing number of Negro citizens, it seems

10. These terms appear at several points in the Police Department report discussed above.

11. The major study of the Muslims speaks passingly of "at least three temples behind prison walls," without giving any documentation for the statement. Lincoln, The Black Muslims in America, 24, 211 (1961).

proper to assume that the questions raised by this case will persist.¹²

Conclusion

For the reasons stated in this petition, this Court is requested to review and reverse the decision below.

Respectfully submitted,

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¹². Lincoln, supra at 106, estimates the Muslims have 100,000 members and are growing rapidly.