

Office-Supreme Court
FILED

MAY 2 1964

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

NO. 1134 MISC.

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.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM G. CLARK,

Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago (1), Illinois, (FI 6-2000),

Attorney for Respondent.

RAYMOND S. SARNOW,

EDWARD A. BERMAN,

Assistant Attorneys General,

Of Counsel.

INDEX.

The Questions Presented.....	PAGE 1
Statement of Facts.....	2
Reasons for Denying the Writ:	
I—The proper application of the doctrine of judicial notice by the Court of Appeals distinguishes this case from those in other jurisdictions. That court correctly denied petitioner's complaint	2
II—The simple and direct answer to plaintiff's contention that counsel should have been appointed to assist him is that the question of "substantial violations of constitutional rights" is determined within the discretion of the District Court. Therefore, if that court believes as it did here that no substantial constitutional violations are present, surely it need not appoint counsel	5
Conclusion	6

CASES AND STATUTES CITED.

Beauharnis v. Illinois, 343 U. S. 250.....	3
Brown v. Bd. of Education, 347 U. S. 537.....	3
Fulwood v. Clemmer, 295 F. 2d 171 (D. C. Cir. 1961)...	2
In re Ferguson, 55 Cal. (2d) 663 (1961).....	3
Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754.....	3
Pierce v. La Vallee, 293 F. 2d 233 (2nd Cir. 1961).....	2
Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961).....	2
West Coast Hotel Co. v. Parrish, 300 U. S. 379.....	3
Wigmore, Evidence, Sec. 2567, note 6 (3rd ed. 1940)....	3
Federal Civil Rights Act, 42 U. S. C. sec. 1983.....	6

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

NO. _____

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.)

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

THE QUESTIONS PRESENTED.

1. Can an appellate tribunal take judicial notice of relevant social studies presented to it for the first time in the brief of one of the parties?
2. Is the District Court required to hold an evidentiary hearing and to appoint counsel in the present case where, based upon the rule that facts if well pleaded are admit-

ted, no "substantial" violation of constitutional rights is set forth?

STATEMENT OF FACTS.

Respondent adopts petitioner's Statement of the Case as substantially correct except as altered in the Argument set forth below.

REASONS FOR DENYING THE WRIT.

I.

The proper application of the doctrine of judicial notice by the Court of Appeals distinguishes this case from those in other jurisdictions. That Court correctly denied petitioner's complaint.

The unanimous decision of the United States Court of Appeals for the Seventh Circuit is a full and complete answer to the contentions of the petitioner herein.

However, since that decision does not attempt to or otherwise deal with the various cases cited by petitioner under Point I, where he asserts this decision "conflicts with decisions in other circuits", we examine briefly distinguishing features of this case.

Petitioner does not contend, nor was it the case, that the question of judicial notice of social studies relating to the Black Muslim Movement was before the various courts in *Pierce v. La Vallee*, 293 F. 2d 233 (2nd Cir. 1961), *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961) and *Fulwood v. Clemmer*, 295 F. 2d 171 (D. C. Cir. 1961). The fact of the matter is that, as respondent asserted before the Court of Appeals, those cases were not decided in the light of judi-

cial notice of the grave dangers that are reflected in the materials presented to and considered by the Court of Appeals.

The concept of judicial notice of authoritative studies, be they of law enforcement authorities, treatises, law review articles or any texts, is recognized in the Court of Appeals decision and is authoritatively set forth throughout the decisions in *Brown v. Bd. of Education*, 347 U. S. 537, *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, and *Beauharnis v. Illinois*, 343 U. S. 250 (see many footnotes). An appellate tribunal *may consider additional* information by judicial notice. Wigmore, *Evidence*, Sec. 2567, note 6 (3rd ed. 1940); *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754.

Those cases are no authority for the proposition that authoritative studies must be presented in the trial court, or that the Court of Appeals abused its discretion by permitting respondent to append the instant study to its brief.

The validity, credulity and authority of the Security Section Report, aside from being confirmed by our daily experience with the so-called "Black Muslim Movement," is confirmed by the discussion of the California Supreme Court in *In re Ferguson*, 55 Cal. (2d) 663 (1961), where assembling and discussing inflammatory Muslim doctrines was held to be "action" subject to reasonable regulation.

After noting the safeguards underlying federal constitutional guarantees and the court's reluctance to apply those doctrines "to state rules reasonably necessary to the orderly conduct of the state institution," the court said, at page 672:

"However, it is apparent that the Muslim beliefs in black supremacy, and their reluctance to yield to any authority exercised by 'some one [who] does not believe in [their] God,' present a serious threat to the maintenance of order in a crowded prison environ-

ment. Even conceding the Muslims to be a religious group it cannot be said under the circumstances here presented that the Director of Corrections had made an unreasonable determination in refusing to allow petitioners the opportunity to pursue their claimed religious activities while in prison. See *Akamine v. Murphy*, 108 Cal. App. 2d 294, 296."

Because of the "potentially serious dangers to the established prison society presented by Muslim beliefs and actions," the Director of Correction's suppressive approach to the problem was held not an abuse of discretion.

Therefore, the inherently dangerous nature of the Muslim "religion" both within and without the Illinois Penitentiary System is manifest.

Certainly any movement, whether allegedly "religious" or secular which has as its objective the overthrow of the Government of the United States by violence can rationally be circumscribed within the confines of prisons walls without violating any constitutional guaranty.

While no court has attempted, as far as we know, to define "religion" or to hold that the Black Muslim Movement is not "religious", there is no question but that certain movements, for example, the Communist Movement, are so dangerous to society that much of the protection of the Fourteenth and First Amendments is denied. To place the matter otherwise, can any group under the pretext of a religious facade seek to organize and practice avowed objectives, disruptive and dangerous to society, within an Illinois Penitentiary? Or does prison discipline compel restrictions above those allowed beyond prison walls?

Aside from the allegations of the complaint by petitioner in the District Court, as the Court of Appeals observed and as petitioner himself admitted in his brief before that court,

the dangers present in the respondent Warden Ragen's mind were certainly clear, present, and real, for petitioner states at page 10 of his brief:

"upon one interview the then warden, Joseph E. Ragen, confided to me he feared I was an organizer and had ulterior motives, and in his observation of me I was always surrounded by one-hundred to 150 inmates (mostly colored and Mexican) and with the population being 4/5 African (colored) and there were rumored to be 900 inclined to Islam. And about 800 sympathizers (his figures) he feared that I and my associates would be able to control his prison."

Hence, petitioner admits that the Warden has observed him surrounded by one hundred to one hundred fifty inmates sympathetic to the Black Muslim Movement and that the Warden told petitioner he feared that this group was attempting to seize control of his prison. Certainly a warden with these legitimate fears has every justification for suppressing "a clear and present danger".

Therefore, the decision of the Court of Appeals for the Seventh Circuit denying Cooper's complaint for relief under the Civil Rights Act was correct.

* * * * *

II.

The simple and direct answer to plaintiff's contention that counsel should have been appointed to assist him is that the question of "substantial violations of constitutional rights" is determined within the discretion of the District Court. Therefore, if that court believes as it did here that no substantial constitutional violations are present, surely it need not appoint counsel.

Any view to the contrary would lead to counsel being appointed in all cases where violations of constitutional rights,

no matter how specious, are alleged. But the Federal Civil Rights Act, 42 U. S. C. sec. 1983, never contemplated nor does it require the appointment of counsel in all cases.

On the other hand, if as plaintiff asserts his claims do raise "substantial" questions that require a hearing in the District Court, this matter is placed in a totally different posture. Then the issue of appointed counsel involves a concept other than that in this case.

This court has never enunciated a blanket rule that counsel must be appointed in all indigent State prisoner cases and in all federal habeas corpus cases, much less in every Federal Civil Rights Act case. Under the rationale submitted above, this case requires no such appointment.

Conclusion.

For the reasons urged herein, respondent respectfully submits that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM G. CLARK,

Attorney General of the State of Illinois,
160 North La Salle St., Suite 900.
Chicago (1), Illinois, (FI 6-2000),

Attorney for Respondent.

RAYMOND S. SARNOW,

EDWARD A. BERMAN,

Assistant Attorneys General,

Of Counsel.

Office-Supreme Court, U.S.
FILED
MAY 2 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963.

NO. 1134 MISC.

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.)

RESPONSE TO PETITION FOR WRIT OF
CERTIORARI.

RECEIVED
MAY 2 1964
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM G. CLARK,

Attorney General of the State of Illinois,
160 North La Salle Street, Room 900,
Chicago (1), Illinois, (FI 6-2000),

Attorney for Respondent.

RAYMOND S. SARNOV,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

INDEX.

The Questions Presented.....	PAGE 1
Statement of Facts.....	2
Reasons for Denying the Writ:	
I.—The proper application of the doctrine of judicial notice by the Court of Appeals distinguishes this case from those in other jurisdictions. That court correctly denied petitioner's complaint	2
II.—The simple and direct answer to plaintiff's contention that counsel should have been appointed to assist him is that the question of "substantial violations of constitutional rights" is determined within the discretion of the District Court. Therefore, if that court believes as it did here that no substantial constitutional violations are present, surely it need not appoint counsel	5
Conclusion	6

CASES AND STATUTES CITED.

Beauharnis v. Illinois, 343 U. S. 250.....	3
Brown v. Bd. of Education, 347 U. S. 537.....	3
Fulwood v. Clemmer, 295 F. 2d 171 (D. C. Cir. 1961)...	2
In re Ferguson, 55 Cal. (2d) 663 (1961).....	3
Kennedy v. Parrott, 243 N. C. 355, 90 S. E. 2d 754.....	3
Pierce v. La Vallee, 293 F. 2d 233 (2nd Cir. 1961).....	2
Sewell v. Pegelow, 291 F. 2d 196 (4th Cir. 1961).....	2
West Coast Hotel Co. v. Parrish, 300 U. S. 379.....	3
Wigmore, Evidence, Sec. 2567, note 6 (3rd ed. 1940)....	3
Federal Civil Rights Act, 42 U. S. C. sec. 1983.....	6

IN THE
Supreme Court of the United States
OCTOBER TERM, A. D. 1963.

NO. _____

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.)

**RESPONSE TO PETITION FOR WRIT OF
CERTIORARI.**

THE QUESTIONS PRESENTED.

1. Can an appellate tribunal take judicial notice of relevant social studies presented to it for the first time in the brief of one of the parties?
2. Is the District Court required to hold an evidentiary hearing and to appoint counsel in the present case where, based upon the rule that facts if well pleaded are admit-

ted, no "substantial" violation of constitutional rights is set forth?

STATEMENT OF FACTS.

Respondent adopts petitioner's Statement of the Case as substantially correct except as altered in the Argument set forth below.

REASONS FOR DENYING THE WRIT.

I.

The proper application of the doctrine of judicial notice by the Court of Appeals distinguishes this case from those in other jurisdictions. That Court correctly denied petitioner's complaint.

The unanimous decision of the United States Court of Appeals for the Seventh Circuit is a full and complete answer to the contentions of the petitioner herein.

However, since that decision does not attempt to or otherwise deal with the various cases cited by petitioner under Point I, where he asserts this decision "conflicts with decisions in other circuits", we examine briefly distinguishing features of this case.

Petitioner does not contend, nor was it the case, that the question of judicial notice of social studies relating to the Black Muslim Movement was before the various courts in *Pierce v. La Vallee*, 293 F. 2d 233 (2nd Cir. 1961), *Sewell v. Pegelow*, 291 F. 2d 196 (4th Cir. 1961) and *Fulwood v. Clemmer*, 295 F. 2d 171 (D. C. Cir. 1961). The fact of the matter is that, as respondent asserted before the Court of Appeals, those cases were not decided in the light of judi-

cial notice of the grave dangers that are reflected in the materials presented to and considered by the Court of Appeals.

The concept of judicial notice of authoritative studies, be they of law enforcement authorities, treatises, law review articles or any texts, is recognized in the Court of Appeals decision and is authoritatively set forth throughout the decisions in *Brown v. Bd. of Education*, 347 U. S. 537, *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, and *Beauharnis v. Illinois*, 343 U. S. 250 (see many footnotes). An appellate tribunal may consider additional information by judicial notice. Wigmore, Evidence, Sec. 2567, note 6 (3rd ed. 1940); *Kennedy v. Parrott*, 243 N. C. 355, 90 S. E. 2d 754.

Those cases are no authority for the proposition that authoritative studies must be presented in the trial court, or that the Court of Appeals abused its discretion by permitting respondent to append the instant study to its brief.

The validity, credulity and authority of the Security Section Report, aside from being confirmed by our daily experience with the so-called "Black Muslim Movement," is confirmed by the discussion of the California Supreme Court in *In re Ferguson*, 55 Cal. (2d) 663 (1961), where assembling and discussing inflammatory Muslim doctrines was held to be "action" subject to reasonable regulation.

After noting the safeguards underlying federal constitutional guarantees and the court's reluctance to apply those doctrines "to state rules reasonably necessary to the orderly conduct of the state institution," the court said, at page 672:

"However, it is apparent that the Muslim beliefs in black supremacy, and their reluctance to yield to any authority exercised by 'some one [who] does not believe in [their] God,' present a serious threat to the maintenance of order in a crowded prison environ-

ment. Even conceding the Muslims to be a religious group it cannot be said under the circumstances here presented that the Director of Corrections had made an unreasonable determination in refusing to allow petitioners the opportunity to pursue their claimed religious activities while in prison. See *Akamine v. Murphy*, 108 Cal. App. 2d 294, 296."

Because of the "potentially serious dangers to the established prison society presented by Muslim beliefs and actions," the Director of Correction's suppressive approach to the problem was held not an abuse of discretion.

Therefore, the inherently dangerous nature of the Muslim "religion" both within and without the Illinois Penitentiary System is manifest.

Certainly any movement, whether allegedly "religious" or secular which has as its objective the overthrow of the Government of the United States by violence can rationally be circumscribed within the confines of prisons walls without violating any constitutional guaranty.

While no court has attempted, as far as we know, to define "religion" or to hold that the Black Muslim Movement is not "religious", there is no question but that certain movements, for example, the Communist Movement, are so dangerous to society that much of the protection of the Fourteenth and First Amendments is denied. To place the matter otherwise, can any group under the pretext of a religious facade seek to organize and practice avowed objectives, disruptive and dangerous to society, within an Illinois Penitentiary? Or does prison discipline compel restrictions above those allowed beyond prison walls?

Aside from the allegations of the complaint by petitioner in the District Court, as the Court of Appeals observed and as petitioner himself admitted in his brief before that court,

the dangers present in the respondent Warden Ragen's mind were certainly clear, present, and real, for petitioner states at page 10 of his brief:

"upon one interview the then warden, Joseph E. Ragen, confided to me he feared I was an organizer and had ulterior motives, and in his observation of me I was always surrounded by one-hundred to 150 inmates (mostly colored and Mexican) and with the population being 4/5 African (colored) and there were rumored to be 900 inclined to Islam. And about 800 sympathizers (his figures) he feared that I and my associates would be able to control his prison."

Hence, petitioner admits that the Warden has observed him surrounded by one hundred to one hundred fifty inmates sympathetic to the Black Muslim Movement and that the Warden told petitioner he feared that this group was attempting to seize control of his prison. Certainly a warden with these legitimate fears has every justification for suppressing "a clear and present danger".

Therefore, the decision of the Court of Appeals for the Seventh Circuit denying Cooper's complaint for relief under the Civil Rights Act was correct.

* * * * *

II.

The simple and direct answer to plaintiff's contention that counsel should have been appointed to assist him is that the question of "substantial violations of constitutional rights" is determined within the discretion of the District Court. Therefore, if that court believes as it did here that no substantial constitutional violations are present, surely it need not appoint counsel.

Any view to the contrary would lead to counsel being appointed in all cases where violations of constitutional rights,

no matter how specious, are alleged. But the Federal Civil Rights Act, 42 U. S. C. sec. 1983, never contemplated nor does it require the appointment of counsel in all cases.

On the other hand, if as plaintiff asserts his claims do raise "substantial" questions that require a hearing in the District Court, this matter is placed in a totally different posture. Then the issue of appointed counsel involves a concept other than that in this case.

This court has never enunciated a blanket rule that counsel must be appointed in all indigent State prisoner cases and in all federal habeas corpus cases, much less in every Federal Civil Rights Act case. Under the rationale submitted above, this case requires no such appointment.

Conclusion.

For the reasons urged herein, respondent respectfully submits that the petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 North La Salle St., Suite 900.
Chicago (1), Illinois, (FI 6-2000),
Attorney for Respondent.

RAYMOND S. SARNOW,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.