

JUL 9 1968

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

N

40

WILLIAM JOE JOHNSON,
Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections,
and

LAKE F. RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF FOR THE RESPONDENTS.

GEORGE F. McCANLESS,
Attorney General & Reporter,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

DAVID W. McMACKIN,
Assistant Attorney General,
State of Tennessee,

Supreme Court Building,
Nashville, Tennessee,

Counsel for Respondents.



INDEX.

	Page
Questions Presented	1
Argument	2
I. Neither the Language Nor the Policy of 28 U. S. C., § 2242 Authorizes the Petitioner to Pre- pare Habeas Corpus Applications for Other Inmates	2
II. A Prison Regulation Which Forbids Penitenti- ary Inmates From Preparing Petitions for Writs of Habeas Corpus for Other Inmates Neither Denies Nor Unduly Restricts Reasonable Ac- cess to the Courts	4
Conclusion	10
Certificate of Service	11
Appendix to Brief	13
Chapter 38—Post Conviction Procedure	13

Cases Cited.

Austin v. Harris, 226 F. Supp. 304 (D. C. W. D., Mo. 1964)	8
Brabson v. Wilkins, 19 N. Y. 2d 433, 227 N. E. 2d 383 (1967)	9
Childs v. Pegelow, 321 F. 2d 487 (4th Cir. 1963), cert. denied, 376 U. S. 932 (1964)	7
Cochran v. Kansas, 316 U. S. 255 (1942)	4
Collins v. Traeger, 27 F. 2d 842 (9th Cir. 1928)	3
Darr v. Burford, 339 U. S. 200 (1950)	6
DeWitt v. Pail, 366 F. 2d 682 (9th Cir. 1966)	8
Dowd v. United States, 340 U. S. 206 (1951)	5

Gibbs v. Burke, 337 U. S. 773 (1949)	6
Gusman v. Marrero, 180 U. S. 81 (1901)	2
Hatfield v. Bailleaux, 290 F. 2d 632, 637 (9th Cir. 1961), cert. denied, 368 U. S. 862 (1961)	6, 7
In Re Johnson, 277 F. Supp. 267 (D. C. E. D., Tenn. 1967)	5
In Re Schoengarth, 57 Cal. Rptr. 600, 425 P. 2d 200, 207 (1967)	7
Landman v. Peyton, 370 F. 2d 135 (4th Cir. 1966), cert. denied, 388 U. S. 920 (1967)	7
Lee v. Tahash, 352 F. 2d 970 (8th Cir. 1965)	7
Nash v. MacArthur, 184 F. 2d 606 (D. C. Cir. 1950), cert. denied, 342 U. S. 838 (1951)	3
Owens v. Russell, 277 F. Supp. 390 (D. C. M. D. Penn. 1967)	9
Price v. Johnston, 334 U. S. 266 (1948)	6
Roberts v. Peppersack, 256 F. Supp. 415, 433 (D. C., Md. 1966), cert. denied, 389 U. S. 877 (1967)	7
Sanders v. United States, 373 U. S. 1 (1963)	6
Siegel v. Ragen, 180 F. 2d 785 (7th Cir. 1950), cert. denied, 339 U. S. 990 (1950)	9
Sostre v. McGinnis, 334 F. 2d 906 (2nd Cir. 1964), cert. denied, 379 U. S. 892 (1964)	7
State ex rel. Callahan v. Henderson, ... Tenn. ..., 417 S. W. 2d 789 (1967)	8
State ex rel. Johnson v. Heer, 219 Tenn. 604, 412 S. W. 2d 218 (1966)	5
United States ex rel. Bryant v. Houston, 273 Fed. 915 (2nd Cir. 1921)	2
United States ex rel. Funaro v. Watchorn, 164 Fed. 152 (C. C. S. D. N. Y. 1908)	2
United States ex rel. Wakeley v. Pennsylvania, 247 F. Supp. 7 (D. C. E. D., Penn. 1965)	7

United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965), cert. denied, 382 U. S. 817 (1965)	7
United States v. Myers, 244 F. Supp. 826 (D. C. E. D., Penn. 1965)	7
Vida v. Cage, 385 F. 2d 408 (6th Cir. 1967)	7
Walker v. Pate, 356 F. 2d 502 (7th Cir. 1966)	7
Wilson v. Dixon, 251 F. 2d 338 (9th Cir. 1958), cert. denied, 358 U. S. 856 (1958)	3
Wilson v. Dixon, 256 F. 2d 536 (9th Cir. 1958)	3

Texts and Statutes Cited.

Ex Parte Dostal, 243 Fed. 664 (D. C. N. D. Ohio 1917)	2
Ex Parte Hull, 312 U. S. 546 (1941)	4
Ex Parte Wilson, 235 F. Supp. 988 (D. C. E. D. S. C. 1964)	8
Ex Parte Wilson, 242 F. Supp. 537 (D. C. E. D. S. C. 1965)	8
Tenn. Code Ann., §§ 40-3801-3824	5, 8
28 U. S. C., § 2242	1, 3, 4

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 1195.

WILLIAM JOE JOHNSON,
Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections,
and

LAKE F. RUSSELL, Warden, Tennessee State Penitentiary,
Nashville, Tennessee,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit.

BRIEF FOR THE RESPONDENTS.

QUESTIONS PRESENTED.

Whether 28 U. S. C., § 2242 authorizes the petitioner to prepare habeas corpus petitions for other penitentiary inmates.

Whether a prison regulation prohibiting penitentiary inmates from preparing petitions for writs of habeas corpus for other inmates denies or unduly restricts reasonable access to the courts.

ARGUMENT.

I.

Neither the Language Nor the Policy of 28 U. S. C., § 2242 Authorizes the Petitioner to Prepare Habeas Corpus Applications for Other Inmates.

In **Gusman v. Marrero**, 180 U. S. 81 (1901), this Court held that a private citizen may not maintain a suit to compel the release of another regardless of his friendship and sympathy with the person detained or of his concern that unconstitutional laws might be enforced. Early decisional law, however, permitted one person to sign and verify petitions on behalf of another in certain instances where the party in interest lacked physical access to the courts and where the third-party applicant demonstrated a sufficient interest in the proceeding. Thus, an attorney was permitted to verify a habeas petition in a deportation case. **United States ex rel. Funaro v. Watchorn**, 164 Fed. 152 (C. C. S. D. N. Y. 1908):

“[I]t has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained . . .” 164 Fed. at 153.

Relatives, parents and guardians having a superior right to the custody and control of a person illegally detained have been permitted to make an application on behalf of members of the Armed Forces. **Ex Parte Dostal**, 243 Fed. 664 (D. C. N. D. Ohio 1917). This practice was limited somewhat by the decision of **United States ex rel. Bryant v. Houston**, 273 Fed. 915 (2nd Cir. 1921), requiring that a “next friend” application set forth some reason or explanation, satisfactory to the court, why the complaint is not signed and verified by the person detained and fur-

ther that a sufficient relationship be shown between the parties. It has also been held that a petition may be signed and verified by a person authorized to act on behalf of another who is in peril of being removed from the jurisdiction of the court before he can act in person. **Collins v. Traeger**, 27 F. 2d 842 (9th Cir. 1928).

Section 2242 of the Judicial Code was amended in 1948 to follow the actual practice of the courts:

“Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended **or by someone acting in his behalf.**”

Therefore, in **Nash v. MacArthur**, 184 F. 2d 606 (D. C. Cir. 1950), **cert. denied** 342 U. S. 838 (1951), an attorney was permitted to sign and verify a petition filed on behalf of certain Japanese nationals. However, in **Wilson v. Dixon**, 256 F. 2d 536 (9th Cir. 1958), the Court held that the latter phrase did not abolish the requirements that a satisfactory reason or explanation be given why the detained person did not sign and verify the complaint and that a showing be made as to the relationship between the “next friend” and person detained. Also see the connected case of **Wilson v. Dixon**, 251 F. 2d 338 (9th Cir. 1958), **cert. denied** 358 U. S. 856 (1958).

The District Court, relying on the 1948 amendment, held that § 2242 created a federally-protected right in the petitioner to prepare habeas applications for fellow inmates. The Court of Appeals found to the contrary:

“The provision of the law authorizing someone to act on behalf of a prisoner whose release is sought, relates only to the act of signing or verifying the petition, and we do not interpret that authorization to include the preparing of legal papers and serving as an attorney in violation of state law. In addition, the inability or incompetency to which this section is

addressed is not the inability to draft legal papers as the District Court seems to hold. Most laymen lack that ability and it would hardly be necessary to include a special provision of law to authorize the employment of trained legal assistance in preparing papers. It seems clear that the situation to which this provision was meant to apply, is one where physical or mental handicaps prevent the prisoner from personally signing or verifying the petition, not one wherein lack of intelligence or legal training keep him from drafting his own papers.”

The District Court’s construction of § 2242 and more particularly the amendment thereto is at best tenuous. The statute in question deals with the sufficiency of habeas applications and in certain instances permits third parties to sign and verify petitions on behalf of another for good cause shown. The provisions of § 2242 are procedural rather than substantive and it is respectfully submitted that this statute cannot properly be construed as conferring a federally-protected right in the petitioner to prepare habeas applications on behalf of other inmates of the Tennessee State Penitentiary. This section of the Judicial Code would further appear to be inapplicable to the case at bar since the petitions prepared by Johnson are actually signed and verified by the person or persons on whose behalf they are filed.

II.

A Prison Regulation Which Forbids Penitentiary Inmates From Preparing Petitions for Writs of Habeas Corpus for Other Inmates Neither Denies Nor Unduly Restricts Reasonable Access to the Courts.

A denial of or undue restraint on reasonable access to the courts violates the due process and equal protection clauses of the Constitution. **Ex Parte Hull**, 312 U. S. 546 (1941); **Cochran v. Kansas**, 316 U. S. 255 (1942) and

Dowd v. United States, 340 U. S. 206 (1951). It is upon this premise that the petitioner's position must be bottomed.

The instant case presents a somewhat different twist in that the petitioner does not contend that he himself has been denied reasonable access to the courts but rather insists that other inmates are denied access when he (petitioner) is prohibited from preparing petitions in their behalf. As a matter of fact, the petitioner has filed numerous petitions on his own behalf. See e. g. **In Re Johnson**, 277 F. Supp. 267 (D. C. E. D., Tenn. 1967), and **State ex rel. Johnson v. Heer**, 219 Tenn. 604, 412 S. W. 2d 218 (1966).

The State of Tennessee has attempted to provide penitentiary inmates with an effective, uncomplicated and expeditious procedure within which to challenge the constitutionality of criminal convictions. These provisions are codified in Tenn. Code Ann., §§ 40-3801 through 3824. Tennessee's Post-Conviction Procedure Act is set forth in its entirety in the Appendix to the Brief. Under this Act, all that is required is a simple statement of fact alleging a deprivation of a constitutional right. Legal citations are neither required or desired. Allegations contained in petitions filed by penitentiary inmates are liberally construed and are viewed in a light most favorable to the petitioner. Wide leeway is given within which to amend and in many cases, appointed counsel will amend the petitions after consultation with the petitioner.

“40-3807. **Amendment of petitions not in prescribed form.**—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, **with the aid of counsel**, to file an amended petition.

“40-3815. **Dismissal, withdrawal or amendment of Petitions.**—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments.

* * * * *

“40-3821. **Determination of indigency—Appointment of counsel and court reporters.**—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014—40-2043.”

Habeas applications are accorded similar treatment when filed in the Federal Courts. *Price v. Johnston*, 334 U. S. 266 (1948); *Gibbs v. Burke*, 337 U. S. 773 (1949); *Darr v. Burford*, 339 U. S. 200 (1950), and *Sanders v. United States*, 373 U. S. 1 (1963).

Access to the courts has been defined to mean “the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one’s personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.” *Hatfield v. Bailleaux*, 290 F. 2d 632, 637 (9th Cir. 1961), cert. denied, 368 U. S. 862 (1961). Another definition has been extended to include “not only the right to place a petition for relief in the mails . . . but also

the right to possess in his cell the legal materials which the inmate desires to include in such a document while they are being collated into mailable form.” **In Re Schoengarth**, 57 Cal. Rptr. 600, 425 P. 2d 200, 207 (1967).

That penitentiary inmates are afforded reasonable access to the courts in Tennessee is beyond peradventure. This is certainly true within the historical understanding of that phrase. There of course is a distinction between access to the courts and a means to effect a remedy. **Roberts v. Peppersack**, 256 F. Supp. 415, 433 (D. C., Md. 1966), *cert. denied*, 389 U. S. 877 (1967). Prison rules and regulations governing the latter have been consistently upheld. **Hatfield v. Bailleaux**, *supra*; **Lee v. Tahash**, 352 F. 2d 970 (8th Cir. 1965); **Walker v. Pate**, 356 F. 2d 502 (7th Cir. 1966); **Vida v. Cage**, 385 F. 2d 408 (6th Cir. 1967); **United States v. Myers**, 244 F. Supp. 826 (D. C. E. D., Penn. 1965); **United States ex rel. Wakeley v. Pennsylvania**, 247 F. Supp. 7 (D. C. E. D., Penn. 1965), and **Roberts v. Peppersack**, *supra*.

State officials have been authorized to adopt, promulgate and enforce rules and regulations with reference to the internal management and discipline of prison inmates. The courts traditionally have expressed a reluctance to interfere with prison administration unless it can be clearly demonstrated that certain rules or regulations violate fundamental Constitutional rights. **Childs v. Pegelow**, 321 F. 2d 487 (4th Cir. 1963), *cert. denied*, 376 U. S. 932 (1964); **Sostre v. McGinnis**, 334 F. 2d 906 (2nd Cir. 1964); *cert. denied*, 379 U. S. 892 (1964); **United States v. Marchese**, 341 F. 2d 782 (9th Cir. 1965), *cert. denied*, 382 U. S. 817 (1965); **Landman v. Peyton**, 370 F. 2d 135 (4th Cir. 1966), *cert. denied*, 388 U. S. 920 (1967).

The activity of the petitioner within the confines of the State penitentiary unquestionably presents substantial disciplinary problems. The presence and curtailment of inmate “writ-writers” is not unique in Tennessee. See

e. g., *DeWitt v. Pail*, 366 F. 2d 682 (9th Cir. 1966), and *Austin v. Harris*, 226 F. Supp. 304 (D. C. W. D., Mo. 1964). In the last analysis, it is the "inmate-client" himself who will inevitably suffer the most from the practice of "jailhouse lawyers". Numerous petitions prepared by the petitioner are in the record before the Court. Petitioner raises substantially the same grounds in every petition. See *State ex rel. Callahan v. Henderson*, ... Tenn. ..., 417 S. W. 2d 789 (1967). In many instances, the "inmate-client" will have little knowledge or comprehension of the factual averments contained in the petition prepared in his behalf. It is not inconceivable that possible meritorious claims may be overlooked entirely or subjected to inadequate factual development due to the standardized potpourri of spurious allegations inserted in every petition prepared by the petitioner. Some institutions have established "writ rooms" in an attempt to eliminate the influence of "jailhouse lawyers". It has been noted that such rooms are "probably more of a blessing than a curse". *Ex Parte Wilson*, 235 F. Supp. 988 (D. C. E. D. S. C. 1964). Also see the connected case of *Ex Parte Wilson*, 242 F. Supp. 537 (D. C. E. D. S. C. 1965). It is lack of legal knowledge rather than illiteracy which encourages fellow inmates to seek the services of the petitioner. For some time, the petitioner has held himself out as having a superior skill and knowledge in this field, an illusion unfortunately shared by many in the prison population. The Court below correctly recognized that "no favor is granted to the other prisoners by allowing the representation by one untrained in the complexities of post-conviction procedure and unrestrained by the values, ethics, and traditions of the law." 382 F. 2d at 357.

The petitioner is engaged in the practice of law under any definition. See e. g. T. C. A., § 29-302. He is neither assisting (in the true sense of that word) nor is he acting merely in a clerical capacity. It is clear from the record

that the petitioner, alleging substantially the same constitutional violations, drafts these petitions from beginning to end. "Obviously the right to practice law or to maintain a law department within the confines of a state penitentiary is not a right secured by the Constitution of the United States." **Siegel v. Ragen**, 180 F. 2d 785 (7th Cir. 1950), cert. denied 339 U. S. 990 (1950). In this regard, the Court below held as follows:

"In essence, then, the ruling of the District Court allows petitioner to engage in activity in the state prison which would constitute a crime if conducted outside the penitentiary . . .

"The main thrust of the District Court's opinion on this issue was that petitioner's services are needed to make other prisoners' rights to habeas corpus effective in light of their own limited abilities. We believe that on closer analysis this right to effective post-conviction procedures does not warrant so drastic a limitation on the power of the state to regulate discipline in its penal institutions and to control the practice of law within its borders." 382 F. 2d at 356.

The distinction between obstructing access to the courts and prohibiting one prisoner from drafting legal papers for another was considered in **Brabson v. Wilkins**, 19 N. Y. 2d 433, 227 N. E. 2d 383 (1967):

"There is an essential difference between obstructing a prisoner's access to a court in his own right and a rule stopping him from drawing up legal papers for other prisoners. No prisoner has a constitutional right to draw legal papers for other people. It is not possible to deduce such a right from anything said or decided in *Ex Parte Hull* . . ." 227 N. E. 2d at 384.

The **Brabson** decision was cited with approval in **Owens v. Russell**, 277 F. Supp. 390 (D. C. M. D. Penn. 1967):

"Owens is not being denied access to the courts by a rule prohibiting another inmate with more legal

ability from drawing his petition for him. All that is required in a habeas corpus petition is a statement of the facts on which the petitioner bases his claim that he is being held illegally.” 277 F. Supp. at 391. Respondents respectfully submit that the Court below properly concluded that:

“The problem of providing effective access to legal assistance at all stages of criminal justice, from pre-trial to post-conviction, certainly deserves the concern which the District Court showed in this case. However, its solution is more likely to be assured if it is attended to by the bench, bar, and law schools rather than left to the *ad hoc* procedures sanctioned in the District Court.” 382 F. 2d at 357.

CONCLUSION.

The petitioner clearly has not been denied access to the courts. Submitted, neither have the other inmates of the Tennessee State Penitentiary. Although the petitioner’s motive in this regard is immaterial, it would be unrealistic to consider same entirely altruistic. It is true that some prisoners may have more ability than others. This fact, however, does not justify the activity of the petitioner within the confines of the State Penitentiary. Should a prisoner overlook a ground for relief in one petition, he may, of course, file another. There is absolutely no reason to believe that prison officials would fail to notify the court should an inmate advise them of a complete inability, either mental or physical, to prepare a habeas application on his own behalf. Prisoners do not seek the services of the petitioner due to illiteracy but rather state that they lack the necessary “legal knowledge”. Tennessee provides penitentiary inmates with a fair and simple procedure within which to challenge the constitutionality of criminal convictions. Once a petition is filed, counsel is appointed almost as a matter of course.

Although the regulation in question was undoubtedly adopted as a disciplinary measure, it will inevitably be the “inmate client” who suffers the most from this practice. Surely, little benefit results from the filing of substantially identical petitions on behalf of numerous inmates. There is an essential difference between obstructing a prisoner’s access to the courts and a regulation prohibiting the petitioner from drafting legal papers for others. It is therefore respectfully submitted that neither the intent nor the effect of the regulation in question denies or restricts access to the courts.

GEORGE F. McCANLESS,
Attorney General & Reporter,
State of Tennessee,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

DAVID W. McMACKIN,
Assistant Attorney General,
State of Tennessee,
Supreme Court Building,
Nashville, Tennessee 37219,
Counsel for Respondents.

Certificate of Service.

Karl P. Warden,
Vanderbilt University Law School,
Nashville, Tennessee 37203;
Pierce Winningham,
Clement and Smith,
Suite 1035,
J. C. Bradford Building,
Nashville, Tennessee 37219.

APPENDIX.

APPENDIX TO BRIEF.

CHAPTER 38—POST-CONVICTION PROCEDURE.

Section.

- 40-3801. Title.
- 40-3802. When prisoners may petition for post-conviction relief.
- 40-3803. Filing of petition.
- 40-3804. Contents of petition and supporting papers.
- 40-3805. When relief granted.
- 40-3806. Processing of petitions by clerk of trial court.
- 40-3807. Amendment of petitions not in prescribed form.
- 40-3808. Petitions for habeas corpus may be treated as petitions under this chapter.
- 40-3809. Procedure when petition is before the court.
- 40-3810. Presentation of evidence at hearing—Transportation of petitioner.
- 40-3811. Scope of hearings.
- 40-3812. When ground for relief is “previously determined”.
- 40-3813. Furnishing certified copies of documents or other parts of the record to indigent petitioners.
- 40-3814. District attorney-general shall represent state.
- 40-3815. Dismissal, withdrawal or amendment of petitions.
- 40-3816. Recording of evidentiary hearings.
- 40-3817. Taking of evidence.
- 40-3818. Final disposition of petitions.

- 40-3819. Notice of final judgments by clerk of court.
- 40-3820. When petitioner denied right of appeal in violation of the Constitution—Procedure.
- 40-3821. Determination of indigency—Appointment of counsel and court reporters.
- 40-3822. Appeal after final judgment.
- 40-3823. Supreme Court may promulgate rules of practice and procedure.
- 40-3824. Bail during new trial or delayed appeal—Exception.

40-3801. **Title.**—This chapter may be referred to as the “Post-Conviction Procedure Act.” [Acts 1967, ch. 310, § 27.]

40-3802. **When prisoners may petition for post-conviction relief.**—A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied. [Acts 1967, ch. 310, § 1.]

40-3803. **Filing of petition.**—To begin proceedings under this chapter, the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the state of Tennessee as the defendant. No filing fee shall be charged. [Acts 1967, ch. 310, § 2.]

40-3804. **Contents of petition and supporting papers.**—The petition shall briefly and clearly state:

1. Petitioner’s full name and address;
2. The indictment number, if known, and the offenses for which the sentence was pronounced;

3. The name and location of the court which pronounced the sentence;

4. The date the sentence was pronounced;

5. The terms of the sentence;

6. What restraint of liberty is presently being imposed;

7. Who is imposing the present restraint, and when it commenced;

8. Any appeals and all other applications for relief previously filed including the date decided, the court, the grounds asserted and the result;

9. The names of the lawyers who have represented the petitioner and at what stage of the proceedings;

10. Facts establishing the grounds on which the claim for relief is based, whether they have been previously presented to any court and, if not, why not. If no prior petition under this chapter has been filed, the petition shall set forth each of the individual grounds, if any, required by the rules of the Supreme Court;

11. Whether the petitioner has a lawyer and, if not, whether he has funds to hire a lawyer; and

12. Any other information required by rule of the Supreme Court.

The petition shall have attached affidavits, records or other evidence supporting its allegations or shall state why they are not attached. [Acts 1967, ch. 310, § 3.]

40-3805. When relief granted.—Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the Constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the

trial if either Constitution requires retrospective application of that right. [Acts 1967, ch. 310, § 4.]

40-3806. Processing of petitions by clerk of trial court.—When the clerk of the trial court receives any petition applying for relief under this chapter, he shall forthwith:

- (1) make three (3) copies of the petition,
- (2) docket and file the original petition and its attachments,
- (3) mail one (1) copy of the petition to the attorney-general and reporter, Supreme Court Building, Nashville,
- (4) mail or forward one (1) copy of the petition to the district attorney-general,
- (5) mail or forward one (1) copy to petitioner's attorney, and
- (6) notify the judge. [Acts 1967, ch. 310, § 5.]

40-3807. Amendment of petitions not in prescribed form.—No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition. [Acts 1967, ch. 310, § 6.]

40-3808. Petitions for habeas corpus may be treated as petitions under this chapter.—A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and appropriate, notwithstanding anything to the contrary in title 23, chapter 18 of the Code, or any other statute. [Acts 1967, ch. 310, § 7.]

40-3809. Procedure when petition is before the court.—When the petition has been competently drafted and all pleadings, files and records of the case which are before

the court conclusively show that the petitioner is entitled to no relief, the court may order the petition dismissed.

In all other cases the court shall grant a hearing as soon as practicable. The trial court shall issue such interlocutory orders, including a stay of execution, as may be required.

Where the petitioner is under the death sentence, the judge of any court of record with criminal jurisdiction in the county where the prisoner is confined or the justice of any appellate court may for good cause stay execution pending the filing of the petition with the trial judge and his interlocutory action thereon. [Acts 1967, ch. 310, § 8.]

40-3810. Presentation of evidence at hearing—Transportation of petitioner.—If the petitioner has had no prior evidentiary hearing under this act and in other cases where his petition raises substantial questions of fact as to events in which he participated, he shall appear and testify.

If the petitioner is imprisoned, the warden shall arrange for transportation of the petitioner to and from the court upon proper orders issued by the trial judge. The sheriff of the county where the proceeding is pending shall have the authority to receive and transport the petitioner to and from the penitentiary and the court, if the court so orders or if for any reason the warden is unable to transport him. The sheriff shall be entitled to the same costs allowed for the transportation of prisoners as is provided in criminal cases upon the presentation of the account certified by the judge and district attorney-general. [Acts 1967, ch. 310, § 9.]

40-3811. Scope of hearings.—The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded

because they have been previously determined, as herein defined. [Acts 1967, ch. 310, § 10.]

40-3812. When ground for relief is “previously determined.”—A ground for relief is “previously determined” if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. [Acts 1967, ch. 310, § 11.]

40-3813. Furnishing certified copies of documents or other parts of the record to indigent petitioners.—If the judge finds that the petitioner is indigent as defined in § 40-2014, the judge is empowered to issue an order directed to the clerk of any court in Tennessee to furnish without cost to the petitioner certified copies of such documents or parts of the record on file in his office as may be required. [Acts 1967, ch. 310, § 12.]

40-3814. District attorney-general shall represent state.—The district attorney-general shall represent the state and respond by proper pleading on behalf of the state within thirty (30) days after receiving notice of the docketing or within such time as the court orders. If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney-general is empowered to obtain them at the expense of the state and shall file them with the responsive pleading or within a reasonable time thereafter. The district attorney-general shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys-general.

It shall be the duty and function of the state attorney-general and his staff to lend whatever assistance may be necessary to the district attorney-general in the trial and

disposition of such cases. In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the state attorney-general and his staff shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals. [Acts 1967, ch. 310, § 13.]

40-3815. Dismissal, withdrawal or amendment of petitions.—The court may grant leave to withdraw the petition at any time prior to the entry of the judgment, may freely allow amendments and shall require amendments needed to achieve substantial justice and a full and fair hearing of all available grounds for relief. The district attorney-general shall be allowed a reasonable time to respond to any amendments.

The court shall look to the substance rather than the form of the petition and no petition shall be dismissed for technical defects, incompleteness or lack of clarity until after the petitioner has had reasonable opportunity, with aid of counsel, to file amendments. [Acts 1967, ch. 310, § 14.]

40-3816. Recording of evidentiary hearings.—All evidentiary hearings shall be recorded. [Acts 1967, ch. 310, § 15.]

40-3817. Taking of evidence.—Evidence may be taken orally or by deposition, or in the discretion of the judge by affidavit. If affidavits are admitted, any party shall have the right to propound written interrogatories to the affiants or to file answering affidavits. [Acts 1967, ch. 310, § 16.]

40-3818. Final disposition of petitions.—If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judg-

ment or order a delayed appeal as hereinafter provided and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

Where the petitioner has court-appointed counsel, the court may require petitioner's counsel to file a verified statement of dates and times he has consulted with petitioner and this statement shall become a part of the record. [Acts 1967, ch. 310, § 17.]

40-3819. Notice of final judgments by clerk of court.—The clerk of the court shall send a copy of the final judgment to the petitioner, the petitioner's counsel of record, any authority imposing restraint on the petitioner and the attorney-general and reporter at Nashville. [Acts 1967, ch. 310, § 18.]

40-3820. When petitioner denied right of appeal in violation of the Constitution—Procedure.—When the trial judge conducting a hearing pursuant to this chapter finds that the petitioner was denied his right to an appeal in the nature of a writ of error from his original conviction in violation of the Constitution of the United States or the Constitution of the state of Tennessee and that there is an adequate record of the original trial proceeding available for such review, the judge can:

(1) If a bill of exceptions was filed, grant a delayed appeal in the nature of a writ of error.

(2) If, in the original proceedings, a motion for a new trial was filed and overruled but no bill of exceptions was

filed, authorize the filing of the bill of exceptions in the convicting court and the order authorizing the filing shall be deemed to be the order or action of the court which occasioned the filing of said bill of exceptions as authorized by § 27-111.

(3) If no motion for a new trial was filed in the original proceeding, authorize such motion to be made before the original trial court within thirty (30) days. Such motion shall be disposed of by the original trial court as if the motion had been filed under authority of § 27-201.

Any bill of exceptions filed pursuant to this section may be approved by the judge of the court wherein the petitioner was convicted irrespective of whether such judge presided over the case at the time of the original trial.

An order granting proceedings for a delayed appeal shall be deemed a final judgment for purposes of the review provided by § 40-3822. If either party does appeal, the time limits provided in this section shall be computed from the date the clerk of the trial court receives the order of the appellate court determining the appeal.

The judge of the court which sentenced a prisoner who has sought and obtained relief from that sentence by any procedure in a federal court is likewise empowered to grant the relief provided in this section. [Acts 1967, ch. 310, § 19.]

40-3821. Determination of indigency—Appointment of counsel and court reporters.—Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by §§ 40-2014-40-2043. [Acts 1967, ch. 310, § 20.]

40-3822. Appeal after final judgment.—The order granting or denying relief under the provisions of this chapter shall be deemed a final judgment, and an appeal may be

taken to the Court of Criminal Appeals by simple appeal. A motion for a new trial shall not be required for such appeal. [Acts 1967, ch. 310, § 21.]

40-3823. Supreme Court may promulgate rules of practice and procedure.—The Supreme Court may promulgate rules of practice and procedure consistent with this chapter, including rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners. [Acts 1967, ch. 310, § 22.]

40-3824. Bail during new trial or delayed appeal—Exception.—When a new trial or delayed appeal in the nature of a writ of error is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail. [Acts 1967, ch. 310, § 23.]

Effective Date. Acts 1967, ch. 310, § 28.

July 1, 1967.