IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. [redacted] 40

WILLIAM JOE JOHNSON,

Petitioner,

v.

HARRY S. AVERY, Commissioner, Department of Corrections

and

LAKE 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 PETITIONER

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Opinions Below

The opinion of the District Court for the Middle District of Tennessee is reported at 252 F. Supp. 783 (M.D. Tenn. 1966). The opinion of the Court of Appeals for the Sixth Circuit is reported at 382 F.2d 353 (6th Cir. 1967).

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on August 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1964). The petition for certiorari was filed on November 9, 1967, and was granted on March 4, 1968.

Constitutional Provisions and Statutes Involved

The First Amendment to the Constitution of the United States:

> Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances.

The Fifth Amendment to the Constitution of the United States:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law.

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1915 (d) (1964):

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 2242 (1964):

> 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.

Tennessee Code Annotated § 23-1801 (1955):

> Grounds for writ.—Any person imprisoned or restrained of his liberty, under any pretense whatsoever . . . may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint.

Tennessee Code Annotated § 40-2019 (Supp. 1967):

> Proceedings for writs—Indigency determined and counsel appointed.—In all proceedings for the writ of habeas corpus or the writ of error coram nobis, the court having jurisdiction of such matters shall determine the question of indigency and appoint counsel, if necessary . . .

Questions Presented

Whether a state prison regulation which prohibits a prison inmate from assisting a fellow inmate in preparing petitions for writs of habeas corpus and other legal papers, when no other help is available, is invalid under 28 U.S.C. § 2242 or the United States Constitution.

Whether a federal district court may intervene with a writ of habeas corpus to prevent prison officials from enforcing disciplinary sanctions against a prisoner who has violated a prison regulation which conflicts with federal law.

Statement

Petitioner, William Joe Johnson is a prisoner in the Tennessee State Penitentiary. He was placed in solitary confinement on several occasions for violating a prison regulation which reads:

> "No inmate will advise, assist or otherwise contract to aid another, either with or without a fee, to prepare Writs or other legal matters. It is not intended that an innocent man be punished. When a man believes he is unlawfully held or illegally convicted, he should prepare a brief or state his complaint in letter form and address it to his lawyer or a judge. A formal Writ is not necessary to receive a hearing. False charges or untrue complaints may be punished. Inmates are forbidden to set themselves up as practitioners for the purpose of promoting a business of writing Writs." (A. 89[7])

On the last occasion, after serving eleven consecutive months in solitary confinement, petitioner sought relief in federal district court under the Civil Rights Act of 1964. (A. 7) Construing the motion as a petition for habeas corpus (A. 7), the District Court held that the prison regulation conflicted with 28 U.S.C. § 2242, in that it had the effect of suppressing the assertion of federal constitutional rights in court by prisoners who are incapable of drafting their own petitions; the Court therefore ordered the release of petitioner from solitary confinement. (A. 49) On appeal, the Court of Appeals for the Sixth Circuit reversed; while that Court agreed with the District Court that petitioner had standing to question the validity of the prison regulation, and that a petition for habeas corpus was an appropriate procedure to attack the validity of disciplinary confinement, the Court held that judicial review of the internal affairs of a prison should be granted only in cases which clearly demonstrate an interference with fundamental constitutional rights. The Court went on to say that Tennessee has an undisputed right to regulate the practice of law within its boundaries, and that neither the Constitution nor 28 U.S.C. § 2242 provides a prison inmate a right to assist another inmate in legal matters. (A. 91)

Summary of Argument

The prison regulation here being questioned absolutely prohibits the giving of assistance by one prison inmate to another in preparation of a petition of habeas corpus. The practical effect of this prohibition is substantially to block access to the courts with jurisdiction to hear such cases when the petitioner is incapable of preparing an intelligible

petition without assistance of some kind. Petitioner submits this practice is in violation of the United States Constitution.

Petitioner further submits that 28 U.S.C. § 2242 as amended permits such assistance in the preparation of petitions.

Petitioner submits that this right to receive assistance carries with it a concomitant right in others to give the assistance needed in the preparation of these petitions.

Petitioner further submits that states may not abridge the right to apply for redress in the courts by calling the help received in the preparation of petitions "the practice of law". At most such assistance is clerical and the person assisting is not practicing law but is acting as a lay intermediary. In the absence of such assistance many prisoners would never be able to gain the attention of the courts. Further, if the state courts will not hear their causes, their capacity to exhaust state remedies is severely impaired. Since such assistance is available to persons who can afford counsel, the effect of this prison rule is to discriminate against the indigent and inarticulate prisoners in violation of the United States Constitution.

Petitioner submits that the federal courts have a duty to intervene in prison administration when, as here, the administration has acted in a fashion which interferes with fundamental rights guaranteed by the Constitution. Access to the courts is just such a right which must be protected.

Petitioner urges the view that there are other acceptable alternatives to this prison regulation. The state could provide free counsel for those prisoners who need counsel

or impose reasonable regulation on prison assistance, or provide access to public defenders charged with the responsibility of assisting prisoners. The State of Tennessee has not seen fit to adopt any of these alternatives. In the absence of some such alternatives many persons are being denied their constitutional rights because they are indigent or inarticulate.

ARGUMENT

1. A Prison Regulation Which Forbids One Inmate to Assist Another in Preparing Habeas Corpus Petitions Violates the Constitutional Right to Due Process of Law.

The prison regulation here in question does not seek reasonably to regulate Prisoner assistance; rather, it absolutely prohibits the activities of "jailhouse lawyers". Such a regulation has the effect of limiting, and perhaps denying altogether, a means of access to courts for those prisoners who are incapable of preparing their own petitions or obtaining assistance elsewhere. While an indigent prisoner may be able to obtain the assistance of court appointed counsel in both federal and Tennessee habeas corpus proceedings after he has presented a case with sufficient merit to entitle him to a hearing [*see* 28 U.S.C. § 1915 (d) (1964) and Tenn. Code Ann. § 40-2019 (1966)], there is no provision under either law for the appointment of counsel in the preparation of petitions. It is in this context that the prison regulation should be viewed.

From its experience with habeas corpus petitions, the District Court noted that many prisoners, inarticulate, illiterate or of substandard intelligence, would be "totally

incapable of preparing an intelligent petition" without assistance of some kind. Recent statistics compiled by Tennessee Prison officials indicate that, simply from the standpoint of intelligence, a substantial percentage of the inmates are incapable of drafting a meaningful petition. *See* Appendix to brief, *infra*, p. 19. *See also* Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 52 Duke L.J. (April 1968). The District Court also observed that the State of Tennessee has not provided other means through which illiterate prisoners can obtain access to qualified attorneys. Of course, the same educational, psychological or mental deficiencies which make it impossible for a prisoner independently to draft an intelligent petition would also make it unlikely that he could draft a letter which would arouse an attorney's interest. A further impediment to outside assistance by an attorney is the fact that the great majority of prisoners are indigent and unable to pay a legal fee, and rare indeed is the attorney who is willing to travel to the state penitentiary to listen to the story of an indigent prisoner. Under such circumstances, the consequence of this prison regulation is that access to federal and state courts is blocked for many prisoners. Indeed, such a regulation strikes at the very threshold of the only entrance to the courts. Petitioner respectfully urges that the regulation is in violation of his rights under the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution and under those decisions of this Court which declare that prisoners' channels to federal courts must not be obstructed by prison officials. *See e.g.*, *Dowd* v. *United States ex rel. Cook*, 340 U.S. 206 (1951); *White* v. *Ragen*, 324 U.S. 760 (1945); *Cochran* v. *Kansas*, 316 U.S. 255 (1942); *Ex Parte Hull*, 312 U.S. 546 (1941).

See also Coonts v. *Wainwright*, 2 Crim. L. Rep. 2495 (U.S. D.C. M.D. Fla., Feb. 29, 1968).

2. 28 U.S.C. § 2242 Grants Petitioner a Federal Right to Assist Other Inmates in Seeking Redress in Federal District Court.

In 1948, 28 U.S.C. § 2242 was amended to read: "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.*" (Emphasis added to show amendment) The District Court construed this provision to grant a federal statutory right to assistance by fellow prisoners in preparing petitions in the absence of an acceptable alternative means of assistance. Petitioner believes that since § 2242 authorizes a person to "sign and verify" a petition for another, and thus, in effect, to present the petition to the Court, *a fortiori* the section authorizes such a person to assist in drafting a petition. According to the legislative history, the amendment to § 2242 was not designed to restrict common law rights in habeas corpus petitions, but was intended to reflect "the actual practice of the courts." *See* H.R. Rep. No. 308, 80th Cong., 1st Sess., A 178 (1947). Numerous decisions relying on common law precedents affirm the right of one party to petition for habeas corpus for a second party if it is shown that the second party is incapable of filing his own petition. *See, e.g., Nash* v. *MacArthur*, 184 F.2d 606 (D.C. Cir. 1950); *Collins* v. *Traeger*, 27 F.2d 842 (9th Cir. 1928); *United States ex rel. Bryant* v. *Houston*, 273 Fed. 915 (2d Cir. 1921). Indeed, this Court has recognized the rule permitting a properly authorized third party to appear in behalf of another who is incapable of presenting a petition, *see Rosenburg* v. *United States*, 346 U.S. 273,

291 (1953) (dictum), and has heard cases on habeas corpus raised by third persons. *See, e.g., United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 263 (1954); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). This rule is clearly designed to insure that habeas corpus is equally available to persons who are incapable of preparing a petition.

Petitioner in the case at bar has never asserted a broad right to represent other inmates in actual court proceedings. Petitioner is arguing for a much narrower right to assist another inmate in getting his case before a Federal District Court, the primary task being the preparation of an intelligible letter or petition requesting the court to hear the case. Since the common law rule and, presumably, § 2242, permit one person to prepare a petition and appear before the court for another in proper cases, the rule should also protect a person who assists in preparing a petition even though his participation in the proceedings end in the preliminary stages. Otherwise the benefit conferred by the Amendment to § 2242 would be illusory to many prison inmates since illiterate or mentally handicapped prisoners are unlikely to have access to assistance from sources outside the prison.

3. Petitioner Is an Appropriate Party to Assert the Invalidity of the Prison Regulation.

While the constitutional or statutory right to prisoner assistance rests primarily in the inmate who receives assistance, since it is his right to court access which is protected, a concomitant right in others to give assistance is necessarily created. Otherwise the right to receive assistance would in most cases be rendered ineffective, since

to deny the person giving assistance is to deny the prisoner who cannot help himself. *See Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1, 8 (1964); *cf. Edwards* v. *California*, 314 U.S. 160 (1941), where defendant's conviction for assisting an indigent non-resident to enter the state was struck down, even though the primary right to freedom of movement was presumably in the person assisted.

4. The Prison Regulation in Issue Is Not an Appropriate Exercise of the State's Power to Regulate the Practice of Law.

The Court of Appeals upheld the validity of the prison regulation on the basis of the "undisputed right" of individual states to regulate the practice of law within its boundaries. However, recent cases indicate there is a limit on the state's power to regulate the practice of law when the regulation has the practical effect of restricting the ability of unsophisticated persons to seek legal redress in courts. *See United Mine Workers of America, Dist. 12* v. *Illinois State Bar Ass'n*, 88 S. Ct. 353 (1967); *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963). In any event, the federal right in the prisoners to free access to courts must take priority over any asserted State interest in the regulation of the practice of law. In *Ex Parte Hull*, 312 U.S. 546 (1941), the Court firmly asserted that "the state and its officers may not abridge or impair petitioner's right to apply to a Federal Court for a writ of habeas corpus." 312 U.S. at 549. The right to access would be of little value to the illiterate prisoner if the State could foreclose his only effective available assistance by declaring such assistance to be the unauthorized practice of law. Moreover, as mentioned earlier, petitions of habeas corpus presented

by a "next friend" have long been permitted by the courts (*see e.g., Nash* v. *MacArthur*, 184 F.2d 606 (D.C. Cir. 1950); *Collins* v. *Traeger*, 27 F.2d 842 (9th Cir. 1928); *United States ex rel. Bryant* v. *Houston*, 273 Fed. 915 (2d Cir. 1921), and this practice has never been viewed as an unauthorized practice of law. Even in Tennessee state courts, petitions prepared by other inmates have been permitted. *See Tennessee ex rel. Dawson* v. *Henderson*, No. 38461 (Tenn., filed Oct. 28, 1967), in which the court held that a hearing must be granted on a petition which, as the court acknowledged, was prepared by a prison "writ writer" (in fact, by William Joe Johnson, Petitioner in this case). Furthermore, the Tennessee Supreme Court has strongly indicated that it would not characterize all such clerical activities as unauthorized practice. *See Haverty Furniture Co.* v. *Foust*, 174 Tenn. 203, 124 S.W. 2d 694 (1939).

Of course, the traditional reason given for the state's authority to regulate the practice of law is that the state has an interest in protecting unwary clients from the consequences of bad advice given by unscrupulous or ill-trained attorneys. Legal advice in preparing a petition for habeas corpus, however, whether by trained counsel or by a fellow prisoner, will not have permanent detrimental effects, since the petitioner is always able to present later petitions. Also, unlike the practice of law generally, the preparation of petitions, such as in this case, is directly within the supervision of the court, which is in a position to prevent abuses and limit the consequences of bad advice. But most important is the fact that a proper petition for habeas corpus is only a clear and simple statement of the facts which merit relief; thus, an *acceptable* petition can be prepared by a person with a minimum of legal knowledge. It is a distortion to characterize this activity as the "practice of

law"—the assistance provided should be classified as "clerical"; petitioner is acting as a lay intermediary: one who sends a letter or other document to a court, calling the court's attention to facts which are thought to merit relief. Petitioner does not dispute the fact that the best legal advice can be received from a licensed attorney, but under the circumstances, prisoner assistance is certainly preferable to the alternative of no assistance at all. And no assistance at all is the inevitable result of interpreting and prohibiting petitioner's activities as the practice of law.

The prison regulation in this case makes no distinction between assistance in federal court and state court petitions, and the record does not show whether petitioner was disciplined for assisting in a federal or a state court petition. Petitioner believes this should not matter. As to federal court petitions, the state should not be permitted to discipline a prisoner for conducting an activity which is authorized and acknowledged by a federal district court, since the practice of law before a federal court is peculiarly within the province of supervision of the federal court and should not be subject to state regulation. *See Sperry* v. *Florida*, 373 U.S. 379 (1963); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966); *Lefton* v. *City of Hattiesburg*, 333 F.2d 280 (5th Cir. 1964). Furthermore, if there is a right to assist in federal court but not state court petitions, the prison regulation, absolute on its face, should be held invalid because of its inhibitive effects on protected activity (assistance in federal petitions), even though petitioner was disciplined for assisting in a state petition. *See Thornhill* v. *Alabama*, 310 U.S. 88 (1940). More important, petitioner believes that the right to assistance should be applied with equal vigor in state petitions, in view of the fact that a prisoner, in order to attack a conviction by

federal habeas corpus, must "exhaust his state court remedies." The state proceeding would become a stumbling block to federal relief if a prisoner cannot have assistance in state petitions since he may not be able to prepare an intelligible petition without assistance, so as to raise the merits in the state court and "exhaust his state remedies." Moreover, since the state has made available habeas corpus proceedings (*see* Tenn. Code Ann. Section 23-1801 (1955)), a prison regulation which has the effect of making these procedures available only to literate or wealthy prisoners violates the equal protection clause of the Fourteenth Amendment. *See Smith* v. *Bennett*, 365 U.S. 708 (1961). (Filing fee for state habeas corpus petitions held invalid.) The effect of the prison regulation is to discriminate against an identifiable class of illiterate or inarticulate prisoners, and this form of discrimination is just as invidious as a discrimination against indigents.

Petitioner also would point out to the court that respondent is not charged with the responsibility of promulgating rules regarding the unauthorized practice of law in Tennessee and thus the prison regulation in question may not be justified on that basis. *See Coonts* v. *Wainwright*, 2 Crim. L. Rep. 2495 (U.S.D.C. M.D. Fla., Feb. 29, 1968).

5. The District Court Had the Power and the Duty to Order the Prison Officials to Release Petitioner From Solitary Confinement.

While Federal courts have traditionally been reluctant to issue orders which may interfere with the internal administration of prisons, it has always been understood that a federal court has the *power* to issue such an order—the only question is whether the court *should* issue the particular order requested. It should be noted that the Fed-

eral District Court order in this case, ordering petitioner's release from solitary confinement, does not have the effect of supervising the internal affairs of Prison Administration. The order is negative in character: it prevents the enforcement of an invalid regulation. No affirmative duties are imposed on the prison officials which would require continued Court supervision. Moreover, as the Court of Appeals for the Sixth Circuit framed the issue, prison regulations are subject to review only if "it can be clearly demonstrated that they interfere with fundamental rights guaranteed by the constitution" (Appendix, p. 93). Petitioner submits that the right to free access to federal and state courts is such a "fundamental right". In *Ex Parte Hull,* this Court said that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." 312 U.S. 546, 549 (1941). *See also Dowd* v. *United States ex rel. Cook,* 340 U.S. 206 (1951); *White* v. *Ragen,* 324 U.S. 760 (1945); *Cochran* v. *Kansas,* 316 U.S. 255 (1942).

Summary

Petitioner recognizes that problems of discipline and inmate morale might justify regulation of "jailhouse lawyers." Petitioner submits, however, that any such regulation must not operate in such a way as to obstruct a systematic judicial consideration of prisoner petitions. The chief problem with the Tennessee prison regulation is its "overkill": less drastic measures would have sufficed. One state has solved this difficulty by providing an alternative means of assistance to prisoners through a public defender program. *See* Ind. Stat. Ann. §§ 13-1401 to 13-1406 (1956). In New Jersey, prisoners may receive assistance from li-

censed attorneys in preparing petitions by virtue of a New Jersey Supreme Court rule. *See* Rossmore & Koenigsberg, *Habeas Corpus and the Indigent Prisoner*, 11 Rutgers L. Rev. 611 (1957). In Oregon and Minnesota, trained attorneys represent the prisoners as public defenders. In North Dakota, the County Bar Associations have set up a voluntary arrangement through which licensed attorneys are sent to the prisons on a regular basis to provide free legal advice. *See* Note, *Constitutional Law: Prison "No-Assistance" Regulations and the Jailhouse Lawyer*, 52 Duke L.J. (April 1968). In any event, the District Court in this case was not unaware of disciplinary problems:

> This is not to say that state prison authorities may not impose reasonable restraints upon the activities of so-called "jail-house lawyers," activities which doubtless cause many problems, including problems of prison discipline and morale. It may be, for example, that a regulation prohibiting the giving or receipt of compensation for such services, or restricting and regulating the time when they could be rendered, if accompanied by reasonable sanctions, would pass muster. Indeed, a regulation prohibiting the practice altogether might well be sustained if the state afforded to prison inmates any reasonable alternative, such as an available list of qualified lawyers willing to volunteer their services, access to a public defender having statutory authority to represent them, or some other mode of ready and convenient contact with some qualified person capable of rendering them assistance in the preparation of their petitions or applications for habeas corpus relief. The present regulation, however, is absolute in its terms, it affords no alternatives, and it has the practical effect

of silencing forever any constitutional claims which many prisoners might have. (Appendix, p. 46).

In this case, the petitioner does not seek the right to practice law; nor does he seek an unfettered right to assist other inmates. What he does seek is the right to assist other inmates, subject to reasonable regulations, until the State of Tennessee has provided some alternative and effective means of assistance which assures that all inmates will have satisfactory access to the courts.

Petitioner has consistently maintained that he would not engage in this prohibited activity if there were any other effective way for prisoners to receive help in calling their causes to the attention of the appropriate courts. (Appendix, p. 80). At this time there is no decision from this court declaring that a right to counsel exists in post conviction habeas corpus proceedings. And, of necessity, no decision describes when such a right would obtain. Petitioner respectfully urges the court to find that such a right does exist; that it is an integral part of procedural due process under the First, Fifth, Sixth and Fourteenth Amendments; that the fact that habeas corpus is labeled a civil remedy must not be allowed to obscure the very real fact that its primary function in our society is as a procedure to regain liberty lost through the criminal process. *See Smith* v. *Bennett,* 365 U.S. 708, 712 (1961). To be effective, a right to counsel must attach at the crucial time in the process. If no assistance is provided at the time the petition for the court is being prepared, it is unlikely that the petition will ever reach the stage of an actual hearing before the court. To receive due process in a post conviction proceeding the right to counsel must not be withheld until a critical stage in the proceedings has been

reached and passed. The State of Tennessee has not only failed to meet its obligations to provide assistance but has gone further and, by the use of this prison rule, has placed an additional burden on potential petitioners by denying them even the minimal assistance of a fellow inmate's clerical work. There is no equality in a system which allows the rich, the articulate, or the literate to have their causes heard but denies or limits in any degree a hearing of the petitions for redress against the government of those who are poor, or illiterate, or inarticulate. A decision by this court allowing prisoners to assist fellow prisoners will be a desirable step forward, but the only lasting solution is one which will require appointment of trained counsel to assist in the preparation of such petitions.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded to the Court of Appeals with instructions to remand it to the District Court with instructions that Petitioner be released from solitary confinement and restored to his status as an ordinary prisoner and that the prison regulation prohibiting inmate assistance in the preparation of petitions for habeas corpus be declared void.

Karl P. Warden
Counsel for Petitioner

Appendix to Brief

Statistical Summary on Inmate Population Issued by the Tennessee State Penitentiary

Intelligence Quotient

July 1, 1965 to June 30, 1966

	Number of Inmates
Very Superior	0
Superior	9
Above Average	91
Average	690
Below Average	308
Inferior	169
Defective	157

July 1, 1966 to June 30, 1967

	Percentage of Inmates
Very Superior	none
Superior	1%
Above Average	6%
Average	49%
Below Average	22%
Inferior	12%
Defective	10%

Note: The following scale is suggested by the Beta Test Manual

Score	*Range*
Exceeding 129	Very Superior
120-128	Superior
110-119	Above Average
90-109	Average
80- 89	Below Average
71- 79	Inferior
Below 70	Defective