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United States v. Ross and the Container Cases -- Another Chapter in the Police Manual on Search and Seizure

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CASE NOTE

CONSTITUTIONAL LAW—INDIGENT STATE PRISONERS MUST BE PROVIDED WITH THE ASSISTANCE OF ATTORNEYS IN PREPARING AND FILING LEGAL PAPERS.

The United States Supreme Court has held that prisoners have a constitutional right of access to the courts.¹ Specifically, prisoners must be provided with adequate law libraries or assistance from persons trained in the law to aid them in the preparation and filing of legal papers.² In *Hooks v. Wainwright*³ the United States District Court for the Middle District of Florida addressed the issue of access to the courts by prisoners in Florida's correctional institutions. The *Hooks* court concluded that the mandate of meaningful prisoner access to the courts can only be satisfied by requiring prison authorities to provide indigent state prisoners with the assistance of attorneys and adequate law libraries.⁴

The judiciary will generally refrain from interfering with the administration of prisons by invoking a principle commonly referred to as the "hands-off" doctrine.⁵ This doctrine has been eroded by many Supreme Court decisions in the last forty years.⁶ Although still a factor in judicial decision making, it cannot be used to avoid intervention when constitutional rights are threatened.⁷ The constitutional right of prisoners of access to the courts was not recognized by the Supreme Court until *Ex parte Hull*⁸ in 1941. In *Hull* the Court struck down a prison regulation which had been used to

1. *Bounds v. Smith*, 430 U.S. 817 (1977).

2. *Id.* at 828.

3. 536 F. Supp. 1330 (M.D. Fla. 1982).

4. *Id.* at 1352.

5. See *Adams v. Ellis*, 197 F.2d 483, 485 (5th Cir. 1952) ("[I]t is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."). For a discussion of the "hands-off" doctrine, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

6. For a summary of cases in the developing area of prisoners' right of access to the courts, see Annot., 52 L. Ed. 2d 779 (1978).

7. *Bounds*, 430 U.S. at 832 ("While we have recognized that judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims.'"); *Johnson v. Avery*, 393 U.S. 483, 486 (1969); *Eisenhardt v. Britton*, 478 F.2d 855, 855 (5th Cir. 1973); *Hooks*, 536 F. Supp. at 1336.

8. 312 U.S. 546 (1941).

prevent a prisoner from filing for a writ of habeas corpus.⁹ In *Johnson v. Avery*¹⁰ the Supreme Court went one step further and struck a regulation which did not operate as an absolute ban on filing a petition but which was found to be an effective denial of access to the courts.¹¹ The regulation prohibited prisoners from assisting each other in legal matters.¹² Since there never had been an obligation for the courts to appoint counsel for prisoners wishing to seek post-conviction relief,¹³ the Court reasoned that an indigent, illiterate prisoner would be denied access if he could not receive assistance from fellow inmates in drafting petitions.¹⁴ The court held that the state had a duty not to prohibit such assistance unless and until it furnished some "reasonable alternative," thus imposing a negative duty upon the state.¹⁵

In *Younger v. Gilmore*¹⁶ this negative duty became an affirmative obligation to provide access to an adequate law library or to equally effective alternatives of legal assistance.¹⁷ The *Younger* ruling was reaffirmed by the Supreme Court in 1977 in *Bounds v. Smith*,¹⁸ and the *Bounds* opinion stands today as the principal Supreme Court expression of prisoners' constitutional right of access

9. *Id.* at 548-49. The prisoner prepared his petition and took it to a prison official to be notarized. The prison official took the papers and not only refused to notarize them but also refused to mail them. The prisoner then gave his father a copy of the petition to mail, but it was confiscated by the prison guards. Finally, the prisoner attempted to mail a letter to the Clerk of the Supreme Court but the letter was intercepted and sent to a legal investigator for the state parole board. *Id.* at 547.

10. 393 U.S. at 483. Johnson concerned a motion for habeas corpus relief. *Id.* at 484. The rationale was extended in *Wolff v. McDonnell*, 418 U.S. 539 (1974), to cover an action under 42 U.S.C. § 1983. The court noted:

The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.

Id. at 579.

11. 393 U.S. at 487.

12. *Id.* at 484.

13. *Id.* at 488. See also *Barker v. Ohio*, 330 F.2d 594 (6th Cir. 1964) (prisoner has no right to appointed counsel when seeking a writ of habeas corpus).

14. 393 U.S. at 488.

15. *Id.* at 490. *Accord* *Coonts v. Wainwright*, 282 F. Supp. 893, 896 (M.D. Fla. 1968), *aff'd per curiam*, 409 F.2d 1337 (5th Cir. 1969).

16. 404 U.S. 15 (1971), a per curiam decision affirming *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970), by citing *Johnson v. Avery*, 393 U.S. at 483, without discussion.

17. *Gilmore v. Lynch*, 319 F. Supp. 105, 110-11 (N.D. Cal. 1970), *aff'd per curiam sub nom.*, *Younger v. Gilmore*, 404 U.S. 15 (1971).

18. 430 U.S. at 817-18.

to the courts.¹⁹

The Court in *Bounds* held that the right of access can be assured by providing prisoners with an adequate law library or assistance from persons trained in the law. *Bounds* left the states free to devise alternatives and, in fact, the Court encouraged experimentation,²⁰ with the requirement that any program or combination of programs must satisfy the constitutional requirement of meaningful access for all prisoners.²¹ The Court limited its holding to the preparation and filing of legal papers,²² and the opinion suggested that it may be further limited to a claim which attempts a "vindication of fundamental civil rights,"²³ or when a new trial or release from confinement is sought.²⁴

The dimensions of the constitutional right of "meaningful access" had not been defined by *Bounds* when Harold Raymond Hooks initiated the present litigation in 1970. Hooks, an indigent inmate confined to Avon Park Correctional Institution filed a civil rights²⁵ class action²⁶ alleging that the insufficiency of legal services in prisons maintained by the Florida Department of Corrections constituted a denial of due process of law, equal protection of the law and access to the courts.²⁷ Hooks initially sought to have the

19. For a discussion of *Bounds* and its implications, see Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds?* 53 IND. L.J. 207 (1978).

20. 430 U.S. at 830-32.

21. *Id.* at 823.

22. *Id.* at 828.

23. *Id.* at 827.

24. *Id.* The *Hooks* court apparently read the decision as being limited to state and federal habeas corpus proceedings and federal civil rights proceedings. *Hooks*, 536 F. Supp. at 1352.

25. Title 42 U.S.C. § 1983 (1976) (as amended by Pub. L. No. 96-170, § 1, 93 Stat. 1284 (Dec. 29, 1979)), provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

26. The class was certified on December 6, 1972, and consisted of "all indigent inmates who are presently or will hereafter be in the custody of defendant Louie L. Wainwright, Secretary, Florida Department of Corrections." *Hooks*, 536 F. Supp. at 1331 & n.3 (footnote omitted).

27. *Hooks v. Wainwright*, 352 F. Supp. 163, 165 (M.D. Fla. 1972). *Hooks* originally filed a state habeas corpus petition to challenge his state court conviction. The petition was summarily denied by the Florida Fourth District Court of Appeal. *Hooks*, 536 F. Supp. at 1332. Thereafter, he filed two complaints in the federal district court. The first sought to compel the Clerk of the Florida Supreme Court to send *Hooks* free of charge a copy of an opinion he needed to prepare his appeal. The Clerk had demanded the usual five dollar fee for this

prison law library facilities upgraded or to have counsel provided by the state to assist inmates with their legal documents.

Judge Charles R. Scott wrote for the federal district court in 1972, more than nine years before his opinion in the present case, and found "invidious discrimination on account of poverty" had been established since indigent inmates were not provided with either assistance of counsel or library materials adequate to enable them to pursue post-conviction relief.²⁸ The parties and four amici curiae²⁹ were ordered to develop proposals which would satisfy the state's obligations under *Younger v. Gilmore*.³⁰ All four amici curiae concluded that libraries alone, without professional legal assistance, could not ensure meaningful access to the courts by indigent inmates. The defendant's proposal (hereinafter the Wainwright proposal) entailed an enlarged statewide library system.³¹ The court took the matter under advisement, and four-and-a-half years later found that the Wainwright proposal, as implemented,³² was unsatisfactory in light of the then recently announced Supreme Court opinion of *Bounds v. Smith*.³³

service. The second complaint sought to compel defendant Louie Wainwright to provide Hooks with access to a law library and a typewriter. Both complaints were dismissed without prejudice by the district court on July 23, 1971, even though *Younger v. Gilmore* was pending before the Supreme Court. *Id.* at 1332-33 & n.6. Hooks appealed the dismissal order which was vacated by the United States Court of Appeals for the Fifth Circuit. The cause was remanded for further proceedings in light of *Younger*. *Hooks v. Wainwright*, 457 F.2d 502 (5th Cir. 1972).

28. *Hooks*, 352 F. Supp. at 168.

29. The United States of America, The Florida Bar, the Florida Volunteer Parole Aide Program, and Professor L. Harold Levinson. *Hooks*, 536 F. Supp. at 1333-34.

30. 404 U.S. at 15. The district court said that the plan should include, among others, the following considerations: where, and in which institutions professional or quasi-professional services would be provided; the nature and extent of those services; and the method of access to such services by those indigent inmates confined in institutions where legal services were not available. *Hooks*, 352 F. Supp. at 169. Thus, the district court first intimated that law libraries alonemight be insufficient. *Hooks*, 536 F. Supp. at 1334.

31. *Hooks*, 536 F. Supp. at 1334.

32. The program included some library facilities and, in addition, the Prison Project which was developed in 1973. *Id.* at 1344 n.9. See *infra* note 95 for a discussion of the Prison Project.

33. *Id.* at 1336 (citing *Hooks v. Wainwright*, 578 F.2d 1102 (5th Cir. 1978)).

In 1975, three inmates in the custody of the Florida Department of Corrections filed a motion for leave to intervene, complaining that despite the district court's order of December 6, 1972, indigent prisoners in Florida were not being provided with meaningful access to the courts. *Id.* at 1334 & n.8. The motion to intervene was granted and plaintiff-intervenors obtained a preliminary injunction forbidding the state from discontinuing the Prison Project, and requiring the state to assume all of its financial support when federal funding expired on October 1, 1977. *Id.* at 1335. The program was to be maintained by the state until the court approved a plan ensuring access to the courts by all of Florida's inmates. The order was affirmed in *Hooks v. Wainwright*, 578 F.2d at 1102.

An additional four-and-a-half years passed and the parties still were unable to agree on a suitable statewide plan.³⁴ During that time the complaint was amended to include the claim that the assistance of state-provided counsel, in addition to adequate law libraries, was required in Florida by *Bounds*. The parties asked the court to determine whether Wainwright's final proposal was adequate. The district court studied the final Wainwright proposal, which provided for law libraries and inmate law clerks, and found the proposal insufficient for several reasons: not all of Florida's prisoners would have direct physical access to an adequate library; the high rate of illiteracy among prisoners ensures that most would be unable to conduct meaningful legal research alone; and inmate law clerks were not sufficiently qualified to assist prisoners in conducting meaningful research.³⁵

In analyzing the physical access requirement, the court noted that 21,575 inmates were housed in eighty widely dispersed facilities³⁶ ranging in size from major institutions to road prisons and vocational training centers.³⁷ Wainwright's proposal called for seven major libraries³⁸ and twenty less complete libraries³⁹ at the

34. *Hooks*, 536 F. Supp. at 1336-37.

35. *Id.* at 1341, 1346.

36. See also *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971), cert. denied, 409 U.S. 968 (1972), in which the court of appeals held that a Texas plan for providing prisoner access to the courts should take into account the great geographical dispersion of correctional facilities.

In *Novak* the prison regulations prohibited inmates from assisting each other in legal matters. The prison officials argued, however, that they were providing the prisoners with a reasonable alternative in the form of a small library, a room set aside for writ writing and two full-time attorneys. In addition, there was a law student summer program through which three students were hired during the summer of 1970. *Id.* at 663. The court found that although it was not certain that this plan was not a reasonable alternative, the state failed to meet its burden of proving the plan was a reasonable alternative, due to the high illiteracy rate, language problems and geographical dispersion. *Id.* at 663-64.

37. *Hooks*, 536 F. Supp. 1337 (citing Annual Report of the Florida Department of Corrections, FY 1980-81 at 58).

38. The court noted that the seven major libraries would contain the following materials:

1. Florida Statutes Annotated (West), 65 volumes
2. Florida Digest (West), 37 volumes
3. United States Code Annotated (§§ 1981-1985, West), 42 volumes
4. Southern Reporter 2d Series, Florida Cases (West)
5. Criminal Law Reporter (Bureau of National Affairs)
6. Black's Law Dictionary (Revised 4th ed.)
7. Supreme Court Reporter (1950 to date, West), 45 volumes
8. Federal Reporter 2d Series (1950 to date, West)
9. Federal Supplement (1950 to date, West)
10. Shepard's United States Citations
11. Shepard's Federal Citations

state's largest institutions.⁴⁰ The court stated that the materials available at the major libraries were "relatively complete," but the twenty smaller libraries would lack "West's Federal Reporter 2d Series or Federal Supplement . . . any type of case reporter containing opinions of the United States Supreme Court . . . and any volumes of [United States Code Annotated] relating to federal habeas corpus remedies or federal crimes and criminal procedure,"⁴¹ volumes which other courts have required.⁴²

One major deficiency of the Wainwright proposal was that the remaining prisoners in minor institutions would have no physical access to a law library. Considering further that the smaller libraries were deficient, fully one-half of Florida's inmates would be without direct access to an adequate library.⁴³ The defendant argued that each of the many minor facilities need not be equipped

12. Wright & Miller, Federal Practice and Procedure (West)
13. LaFave & Scott, Hornbook on Criminal Law
14. Shepard's Florida Citations
15. Florida Jurisprudence (1st and 2d Series)
16. Adkins & Harrison, Florida Criminal Law and Procedure Annotated
17. Modern Federal Practice Digest (West)
18. West's Federal Practice Digest (West)

Hooks, 536 F. Supp. at 1338 n.15. The court noted that two works not on the above list would be of particular importance to inmates: Sokol's Federal Habeas Corpus (2d ed. 1969) and Antieau's Federal Civil Rights Acts: Civil Practice (1971). *Id.*

39. The court noted that the twenty smaller libraries were supposed to contain the following materials:

1. Florida Statutes Annotated (West), 65 volumes
2. Florida Digest (West), 37 volumes
3. Florida Practice Series
4. United States Code Annotated (§§ 1981-85)
5. Southern Reporter 2d Series (Florida Cases) (West)
6. Criminal Law Reporter (Bureau of National Affairs)
7. Black's Law Dictionary (Rev. 4th ed.)

Hooks, 536 F. Supp. 1339 n.17. For studies of what has been found to be the minimum standards for prison law library collections, see *Prison Law Library Service: Questions and Models*, 72 LAW LIBR. J. 598 (1979) (hereinafter *Prison Law Library*); Reeves, *The Evolving Law of Prison Law Libraries*, 3 NEW ENG. J. PRISON LAW 131 (1976).

40. The major libraries were located at Apalachee Correctional Institution, Avon Park Correctional Institution, Broward Correctional Institution, Florida State Prison, Glades Correctional Institution, Sumter Correctional Institution and Union Correctional Institution. Hooks, 536 F. Supp. at 1338.

41. *Id.* at 1338-39.

42. See *Cruz v. Hauck*, 627 F.2d 710, 720 (5th Cir. 1980) (dicta) (Federal Supplement); *Wade v. Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978) (Federal Reporters), *aff'd*, 591 F.2d 1338 (3d Cir. 1979); *Mitchell v. Untreiner*, 421 F. Supp. 886, 902 (N.D. Fla. 1976) (requiring United States Supreme Court Reports; Lawyers' Edition, Second Series; and United States Code Annotated, Titles 18, 28, and 42, §§ 1891-1988, among others).

43. Hooks, 536 F. Supp. at 1339.

with a library because prisoners could order photocopies of materials from one of the major libraries.⁴⁴ The court noted that an inmate forced to rely on photocopied materials would be required to know the citation of the precise case or statute upon which he intended to rely.⁴⁵ A related difficulty was that an inmate on death row or in administrative confinement in a facility with a law library normally would be limited to three volumes or cases per week.⁴⁶ The court strongly objected to such a shot in the dark approach to legal research. It followed the reasoning of many other courts and found that it would be "absurd to expect that anyone, particularly an untrained and typically uneducated prisoner, could conduct meaningful legal research" under such an arrangement.⁴⁷

44. *Id.* at 1342-43. The witnesses for the Wainwright proposal testified that prisoners at institutions without a law library could request a transfer to another institution. The court responded that it would be an unsatisfactory policy to require an inmate at a facility which provides a great deal of freedom to transfer to a high security facility in order to enjoy his or her right of access to the courts. *Id.* at 1343.

45. *Id.* at 1343.

46. *Id.* at 1342.

47. *Id.* at 1343. *Jones v. Diamond*, 594 F.2d 997, 1024 (5th Cir. 1979) (It is "impossible for them to know what cases to look up to buttress their claims and where those cases could be found."), *rev'd in part on other grounds*, 636 F.2d 1364 (5th Cir. 1981), *cert. dismissed*, 453 U.S. 950 (1982).

The court in *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979), stated that "[s]imply providing a prisoner with books in his cell . . . gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration." *Williams* involved three differing factual situations. First, in the Virginia state prison, the prisoners had access three times a month to a library which lacked some required materials and had appointed counsel to assist them in "any legal matter relating to their incarceration." *Id.* at 1338. The court found this program met the *Bounds* mandate of meaningful legal access. *Id.* at 1339. Second, in South Carolina, prisoners in the maximum security section were not allowed direct physical access to the library but were allowed time in a library cell from which they could request specific materials. In addition, legal assistance was provided by the public defender's office and a law student program for the preparation of habeas corpus petitions. *Id.* at 1338. The court found this program provided meaningful access. *Id.* at 1339. Finally, in a Richmond City Jail, prisoners were given access to an adequate library but only for forty-five minutes, three times a week. No research assistance program was available. *Id.* at 1338-39. The court found this program to be facially unconstitutional since such severe time restrictions on direct access could only be upheld if trained research assistants were also available. *Id.* at 1340.

United States ex rel. Wolfish v. Levi, 439 F. Supp. 114, 129 (S.D.N.Y. 1977) ("effective legal research is impossible where it must be attempted at a remote distance from the volumes, with hopeful stabs at three books at a time spaced over intervals of two days or so"), *aff'd in part, rev'd on other grounds*, 573 F.2d 118 (2d Cir. 1978), *rev'd on other grounds*, *Bell v. Wolfish*, 441 U.S. 520 (1979). *But see* *Fluhr v. Roberts*, 460 F. Supp. 536 (W.D. Ky. 1978) (in which an interlibrary loan program was approved); *Prison Law Library Service*, *supra* note 39, at 602-03 (interlibrary loan programs have the potential for meeting the constitutional obligations of the states).

The court did not address two factors which might distinguish minor institutions from facilities required to have extensive law libraries. As the defendant pointed out, many prisoners housed in road prisons or community correctional institutions have some freedom to come and go. It might have been argued that being held in an unequipped prison is not a denial of access if a prisoner had an adequate opportunity to visit an outside library.⁴⁸ On the other hand, a prisoner who must spend each night in a camp distant from any urban area has in reality no greater opportunity for meaningful research than if he had absolutely no freedom to come and go. A second distinguishing factor would be the duration of the confinement. One confined for only a week without access to an extensive law library probably would not be heard to complain that his right of access to the courts has been denied by the state.⁴⁹

The second reason announced by the district court for rejecting Wainwright's proposal, and the basis for the court's finding that law libraries alone were insufficient to provide meaningful access to the courts was that the high rate of illiteracy among Florida's prisoners rendered them incapable of conducting meaningful legal research.⁵⁰ As the Court of Appeals for the Fifth Circuit noted in *Cruz v. Hauck*,⁵¹ it is not enough merely to supply books when inmates lack the educational or linguistic skills to use them.⁵² The *Hooks* court cited ample evidence that many of Florida's prisoners cannot understand a law book because they are either undereducated or do not read English.⁵³ At the 1973 evidentiary hearing, it

48. There is also a potential standing issue. See *Prison Law Library*, *supra* note 39, at 601. ("A prisoner must be able to allege and prove that he suffered an actual injury because the prison authorities failed to provide either a law library or assistance from persons trained in the law.")

49. See Fluhr, 460 F. Supp. at 537-38.

50. *Hooks*, 536 F. Supp. at 1341. Much has been written on the problems of the indigent, illiterate prisoner. See, e.g. *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363, 375 (1974); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 KAN. L. REV. 493, 508 (1970); Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343 (1968).

51. 627 F.2d 710.

52. *Id.* at 720-21.

53. *Hooks*, 536 F. Supp. at 1337-38, 1344 n.24. Even if the underlying facts constitute the basis of a valid claim, the petition may be presented to the court in an unintelligible form because of the prisoner's inability to comprehend the law. In a study of 170 applications for writs filed by Florida prisoners without the assistance of counsel, all contained at least one misconception of the law. Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 504 n.6 (1969) (citing Kerper, *On "Writs" and "Resocialization,"* 1967 AM. J. CORRECTION 30). Accord Larsen, *supra* note 50, at 352.

was established that over one-half of Florida's prisoners read below the seventh grade level,⁵⁴ while legal materials were of college or college graduate level in reading difficulty.⁵⁵ For those prisoners, reading a law book would be like "attempting to read a book written in a foreign language."⁵⁶ Today over one half of Florida's inmate population is functionally illiterate⁵⁷ and the vast majority are unable to afford counsel.⁵⁸

The result, in the district court's experience, was that pro se petitioners were likely to produce complaints that were frivolous or unintelligible.⁵⁹ This seems to be the consensus of both the judiciary⁶⁰ and commentators,⁶¹ although the Supreme Court in *Bounds* found pro se petitioners capable of using law books to raise serious and legitimate complaints.⁶²

Even if the claim is intelligible and not frivolous, it may be in a form insufficient to withstand judicial scrutiny.⁶³ The court in

54. *Id.* at 1337.

55. *Id.* at 1343.

56. *Id.* at 1344 (footnote omitted). Another analogy was provided by The Florida Bar: "[G]ranting prisoners the use of a law library without the interpretive expertise of a lawyer may be analogized to giving prisoners surgical equipment without a physician." *Id.* at 1334.

57. *Id.* at 1337.

58. *Id.* at 1338 (95%).

59. *Id.* at 1344.

60. See *Fay v. Noia*, 372 U.S. 391, 445 (1963) (Clark, J., dissenting); *United States v. Simpson*, 436 F.2d 162, 166-68 (D.C. Cir. 1970); *Coonts v. Wainwright*, 282 F. Supp. at 895. But see *Dreyer v. Jalet*, 349 F. Supp. 452, 485 (S.D. Tex. 1972), *aff'd per curiam*, 479 F.2d 1044 (5th Cir. 1973).

61. See *supra* note 50.

62. 430 U.S. at 826 ("We reject the State's claim that inmates are 'ill-equipped to use' the tools of the trade of the legal profession, making libraries useless in assuring meaningful access.") *Contra* 430 U.S. at 836 (Stewart, J., dissenting) ("More than 20 years of experience with *pro se* habeas corpus petitions as a Member of this Court and as a Circuit Judge have convinced me that 'meaningful access' to the federal courts can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use."); *Johnson*, 393 U.S. at 498 (White, J., dissenting).

63. The court quoted the following excerpt from an inmate's letter to illustrate that there are numerous prisoners with potentially legitimate claims which may go unanswered without the assistance of counsel:

I need help. Hope you understand cause these people don't.

Lt. [name omitted] had me place in open holding cell where I was once again viciously assaulted. My lip was tore and I was beaten and bruised over my whole body. I was tooken to M.T. I was treated by placeing 36 striche's in my [unintelligible] lip area.

. . . .

I am a register Epileptic and know Hemophilic. I have ask for Phychiatric Treatment. Please let explain. 1. I been rape. 2. I watch my best friend get stabb 27 time. He die right front my face. 3. I use to be on hard drugs till I come to prison. 4. My parent abuse me. Like takeing your hands put them on stove.

Hooks viewed this result as likely,⁶⁴ both for the illiterate inmate and the "highly intelligent and insightful" litigant, such as *Hooks*.⁶⁵ The Supreme Court has held that a complaint should only be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁶⁶ The pro se complaint should be held to a less stringent standard than pleadings drafted by lawyers,⁶⁷ and should be liberally construed by the courts.⁶⁸ Even though a habeas corpus petition or a civil rights complaint need only be a simple recitation of facts giving rise to a cause of action,⁶⁹ competent research is a necessity. Issues such as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available must be researched.⁷⁰ A petitioner "must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action."⁷¹ Thus the average prisoner, because of his lack of education and legal skills might not be able to even set forth a simple statement of facts which would show him to be entitled to relief.⁷²

The court in *Hooks* assumed that prisoners also lacked the ability to grasp the procedural intricacies necessary to establish a claim.⁷³ Florida prisoners seeking federal habeas corpus relief are

Take a belt beat you till the blood run out.

. . . .
I afraid to go to sleep. I stay awake. I can see me being rape or me takin that neelle putting it in my arm or my father putting my hand on the stove it's driving me crazy.

Please I need help. I use to be at the state hospital I sure [unintelligible] stay. Please Judge Scott can you set an pointment with you like me talk to you. The Dr. toll me she couldn't sent me state hospital for help.

. . . .
Please I need help. I don't have but a mouth to go. I need to be somewhere I can get help. I will stay as long as you see fit. For me to stay.

Hooks, 536 F. Supp. at 1353-54.

64. *Hooks*, 536 F. Supp. at 1344-45. *Accord Note, Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 509-10 (1969).

65. *Hooks*, 536 F. Supp. at 1333.

66. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

67. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

68. *Schaefer v. Stack*, 641 F.2d 227, 228 (5th Cir. 1981) (dicta).

69. *Bounds*, 430 U.S. at 825.

70. *Id.* *Gilmore*, 319 F. Supp. at 110.

71. *Bounds*, 430 U.S. at 825. See *Jacob & Sharma, supra* note 50, at 518-20.

72. See *Krause, A Lawyer Looks at Writ-Writing*, 56 CAL. L. REV. 371, 374 (1968).

73. 536 F. Supp. at 1345-46. *Hooks* wrote the following letter to the late Honorable William A. McRae, Jr., in regard to pursuing an appeal of the denial of his state habeas corpus action:

required by statute⁷⁴ to first exhaust all state remedies.⁷⁵ Most federal habeas corpus petitions brought by prisoners are dismissed because they have failed to exhaust these remedies.⁷⁶ Likewise, in an action under 28 U.S.C. § 1983, a complaint may be dismissed because the inmate is unable to understand and respond to court orders directing him to amend a defective pleading, or to respond to a motion to dismiss or a motion for summary judgment.⁷⁷

Finally, the *Hooks* court analyzed the alternative of using inmate law clerks.⁷⁸ One concern was that the clerks would be unwilling to anger those officials who were responsible for their elevated status. Thus, they would be reluctant to assist in civil rights actions against prison authorities.⁷⁹ The court, however, cited no instance in which this occurred.⁸⁰ Another concern was that since inmate law clerks themselves would be prisoners, they could not interview witnesses, investigate cases, appear in court, or make long distance telephone calls.⁸¹ The court also noted that the number of inmate law clerks would be small and they would not be available at all facilities. Their ability to respond to all the written requests for assistance was doubted.⁸² Another potential problem, although not noted by the court, is that a small contingent of jailhouse lawyers

What am I supposed to do now. The order [denying his habeas corpus petition] does not give me the slightest indication why the petition was denied. There is no record for appeal, so therefore only grounds for appeal would be mere conjecture on my part. I don't even know if I can appeal the order. If I can appeal it, how do I do it? How much time do I have? To what Court? Who is the Defendant in an appeal? Is it Louie Wainwright through direct appeal? Or is it the Court of Appeal through Mandamus? Or have I now exhausted my state remedies? I have absolutely no idea what to do.

Id. at 1332.

74. Title 28 U.S.C. § 2254 (b) (1976) provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

75. *Leonard v. Wainwright*, 601 F.2d 807, 808 (5th Cir. 1979).

76. *Hooks*, 536 F. Supp. at 1345.

77. *Id.* Turk, *Forward: Access to the Federal Courts by State Prisoners in Civil Rights Actions*, 64 VA. L. REV. 1349, 1353-54 (1978).

78. *Hooks*, 536 F. Supp. at 1346-50.

79. *Id.* at 1348. Accord Wexler, *The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects*, 7 CRIM. L. BULL. 139, 144 (1971).

80. The court did go to great lengths, however, to make an analogy between the pressure experienced by in-house attorneys and prisoner writwriters. *Hooks*, 536 F. Supp. at 1348-49.

81. *Id.* at 1348.

82. *Id.* at 1347.

could not be expected to become competent in every area of the law from which the prison population would produce grievances. One commentator has noted that sentence computations and detainers are areas which the professional writwriter does not handle.⁸³

The real basis, however, for the court's objection to the use of inmate law clerks was that they could not obtain the skills and abilities possessed by attorneys. The court called reliance on such "jailhouse lawyers"⁸⁴ a "facade . . . that forces all prisoners in need of legal assistance to rely upon a group of ill-trained laymen who attempt to pass themselves off as lawyers."⁸⁵ Their limited training could not enable them to either understand or formulate meaningful legal reasoning.⁸⁶ By the court's own experience, even the reasoning of veteran writwriters was "convoluted" and "nonsensical."⁸⁷ Unflattering views of jailhouse lawyers are disputed by some,⁸⁸ but enjoy widespread acceptance.⁸⁹

The court reinforced its basic assumption that inmate law clerks were unqualified to function as lawyers by noting that many writwriters sought the assistance of attorneys in preparing their personal cases. The court cited this occurrence as evidence that the writwriters were well aware of their own very severe limitations.⁹⁰ Although the Wainwright proposal involved a thirty-hour legal research course given by West Publishing Company to the inmate law clerks, future clerks would be trained only by their predecessors. Indeed, it must be questioned how much legal expertise can be obtained in thirty-hours where the goal of the course is merely to "teach the bare-bones mechanics of legal research."⁹¹ Furthermore, the court noted that unlike an attorney, an inmate law clerk could not operate independently of the influence of prison

83. Wexler, *supra* note 79, at 145. Another commentator found, however, that even a lawyer who had not specialized in criminal law might be unable to fully develop a constitutional claim. Note, *Providing Legal Services to Prisoners*, 8 GA. L. REV. 363, 387 (1974).

84. For discussions concerning the jailhouse lawyer, see Wexler, *supra* note 79; Larsen, *supra* note 50.

85. Hooks, 536 F. Supp. at 1346.

86. *Id.* at 1347.

87. *Id.* at 1348.

88. See *Prison Law Library*, *supra* note 39, at 610; Wexler, *supra* note 79, at 143.

89. Johnson, 393 U.S. at 488 (Fortas, J., for the majority), 499-500 (White, J., dissenting); Wetmore v. Fields, 458 F. Supp. 1131, 1146-47 (W.D. Wis. 1978); Larsen, *supra* note 50, at 348-49; Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 520-22.

90. Hooks, 536 F. Supp. at 1348.

91. Hooks, 536 F. Supp. at 1340 (footnote omitted).

authorities.⁹²

The court concluded that lawyers apparently enjoy analytical skills not shared by writwriters, law students or paralegals. In the court's opinion lawyers are:

able to directly contact an inmate, listen to his claim, draw out the essential facts, disregard the extraneous facts, analyze the problem in light of existing law, and then decide whether the claim should be pursued, either because it is meritorious under existing law or because recent legal trends make it reasonably likely that favorable new law could be established or unfavorable precedent overturned. In short, lawyers not only understand the law, but also possess the training and experience to use it effectively.⁹³

In summary, the *Hooks* court held that the Wainwright proposal was flawed because all prisoners were not afforded a means to obtain meaningful access to the courts. The court emphasized that many prisoners would not be granted direct physical access to an adequate law library. The proposal ultimately failed, however, because the court believed the typical prisoner was intellectually incapable of conducting meaningful legal assistance alone and because inmate law clerks could not provide meaningful legal assistance since they could not function as attorneys. The most significant aspect of the *Hooks* decision was that the court ordered the parties to submit new proposals which "must incorporate the assistance of attorneys."⁹⁴ The court stated that consideration should be given to the following:

1. Any acceptable plan must ensure meaningful access to the courts on behalf of *all* persons . . . committed to the custody of the Florida Department of Corrections.
2. Attorney-assistance can be constitutionally limited, under *Bounds*, to the preparation and filing of actions challenging the legality of a prisoner's confinement (Fla.R.Crim.P. 3.850 proceedings and state and federal habeas corpus proceedings) and the legality of the conditions of a prisoner's confinement (federal civil rights proceedings).
3. The attorney-assistance program should be structured so that the attorneys, although funded by the state of Florida, would be

92. *Id.* at 1348-49.

93. *Id.* at 1350-51 (footnote omitted).

94. *Id.* at 1352.

able to function independently. . . .

4. Defendant should give serious consideration to a plan similar to that proposed by plaintiff-intervenors. . . .⁹⁵

5. The plan should provide for the continuation of defendant's law library and inmate law clerk program in order to enable prisoners to represent themselves should they desire to do so.⁹⁶

The decree in *Hooks* which requires the assistance of attorneys rests solely on the *Bounds* mandate that the state has an affirmative duty to provide "meaningful access" to the courts for all prisoners.⁹⁷ The district court did not analyze the constitutional source for the right of access,⁹⁸ but the Supreme Court has held that it is founded on the due process clause of the fourteenth amendment.⁹⁹ The court was clearly sympathetic to the plight of prisoners,¹⁰⁰ but was pleased to assume the posture of having its hands tied by *Bounds*.¹⁰¹ Perhaps this is because the Middle District has "frequently been maligned for being 'soft' on prisoners."¹⁰² The *Hooks* court thus left the Supreme Court responsible for the significant effects of the decision.¹⁰³

95. The plan proposed by plaintiff-intervenors consisted of twenty attorneys assisted by seven paralegals and seven secretaries. Since Florida's prison population has grown in the four years since the plan was offered, a larger staff might now be required. *Hooks*, 536 F. Supp. at 1352 n.37. The attorneys would be assigned to various offices located throughout the state. The court apparently favored this plan because it would operate as an expanded version of Florida Institutional Legal Services, Inc. (Prison Project). *Id.* at 1352. The Prison Project provided indigent inmates in three of Florida's larger penal institutions with a wide range of free legal services, including assistance in collateral attacks on convictions and civil rights actions. *Id.* at 1334 n.9. See Belz, *Legal Services for Florida's Inmates: Expanding Access to the Courts by Hooks and Bounds*, 56 FLA. B.J. 183, 184-85 (1982).

96. *Hooks*, 536 F. Supp. at 1352.

97. *Id.* at 1349-52.

98. In his 1972 decision in *Hooks v. Wainwright*, Judge Scott found a denial of equal protection and due process of law and a violation of the constitutional imperative of access to the courts. 352 F. Supp. at 166.

99. *Wolff v. McDonnell*, 418 U.S. at 579. See Potuto, *supra* note 19, at 207-27, for an analysis of the constitutional basis of *Bounds*.

100. 536 F. Supp. at 1341, 1353.

101. "Fortunately, the burden of deciding whether or not the right of meaningful access exists does not lie with this Court. The Supreme Court has said that it does exist and this Court is bound to follow that decision to the best of its ability." *Id.* at 1346.

102. *Id.* at 1353.

103. Consequently, the question of whether inmates *should* be afforded meaningful access to the courts is no longer open to discussion. Rightly or wrongly, wisely or unwisely, the highest court of our land has answered that question affirmatively. Therefore, the only question left to decide is what type of plan would be sufficient under the factual record developed in this case to ensure meaningful access to the courts on behalf of Florida's inmates.

Hooks, 536 F. Supp. at 1340.

The court apparently foresaw an adverse reaction among some unincarcerated elements of society who would object to the additional expense of providing attorneys for prisoners. But in the court's view, providing assistance of counsel would "result in reduced costs" for both the federal judiciary and the state of Florida.¹⁰⁴ First, the quality of petitions filed would be substantially improved by the attorneys' assistance in drafting. This would lessen the "amount of time typically required to peruse and construe pro se petitions."¹⁰⁵ Secondly, the court anticipated that the assistance of counsel would lessen the workload of the federal courts and the state attorney general's office by reducing the "tremendous number of prisoner petitions presently being filed."¹⁰⁶ Many institutional civil rights actions would be resolved through discussions between the attorney and prison officials.¹⁰⁷ In addition, many frivolous claims would never be filed since "presumably" an inmate would follow his counsel's advice.¹⁰⁸

The court's position that minimally trained inmates could not function as attorneys is well supported. The *Hooks* opinion may be reversed, however, because the Supreme Court has not mandated the use of attorneys or their equivalent. The mandate in *Bounds* was merely that prisoners be provided "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."¹⁰⁹ Access to the courts is recognized as a constitutionally guaranteed right, but one which requires only "meaningful access."¹¹⁰ If attorneys do not exclusively possess the ability to provide meaningful access, then the *Hooks* court has misapplied *Bounds*. *Bounds* left the states free to devise any means of access to the courts so long as that access is meaningful and rea-

104. *Id.* at 1351-52.

105. *Id.* at 1352. See *supra* notes 59-72 and accompanying text.

106. *Id.* at 1351. See also Jacob & Sharma, *supra* note 50, at 520-21.

107. *Hooks*, 536 F. Supp. at 1351. See also *Bounds*, 430 U.S. at 831.

108. *Hooks*, 536 F. Supp. at 1351. Another potentially significant effect of providing attorney assistance to prisoners has been suggested. It would serve to combat the social harm created when a prisoner attempts to litigate his case alone. In such a situation he is likely to lose respect for the legal system, and the process of rehabilitation will be thwarted. Jacob & Sharma, *supra* note 50, at 511-12; *Providing Legal Services to Prisoners*, *supra* note 50, at 377-79. See also *Bounds*, 430 U.S. at 829-30.

109. 430 U.S. at 825. See also *Cruz v. Hauck*, 627 F.2d at 720 ("The central question in evaluating whether a law library adequately provides meaningful access to the courts is whether the facility will enable the prisoners to fairly present their complaints to a district court."); *Lynott v. Henderson*, 610 F.2d 340, 342 n.1 (5th Cir. 1980) ("Prisoners do, however, have a right of access to a threshold level of legal information or aid.").

110. 430 U.S. at 823.

sonably adequate. If one who is not a licensed attorney is able to understand and use the law effectively, it is no answer that an attorney possesses greater training and experience.

Indeed, the *Hooks* court may have gone beyond what the Eleventh Circuit may be inclined to define as meaningful access if prior Fifth Circuit case law remains precedent.¹¹¹ In *Stevenson v. Reed*¹¹² the District Court for the Northern District of Mississippi addressed the issue of whether "as a constitutional minimum, prison inmates are entitled to access both to an adequate law library and state-supplied legal counsel"¹¹³ for purposes of habeas corpus or civil rights actions. The court held that attorneys were not required when prisoners had access to an adequate law library.¹¹⁴ This decision was affirmed, per curiam, by the Fifth Circuit Court of Appeals.¹¹⁵

The facts in *Stevenson* are similar to those in *Hooks*. In *Stevenson* the court acknowledged that the inmates had never been provided with legal counsel of any description.¹¹⁶ The court established that "most prisoners would not be able to well comprehend and make intelligent use of the law library materials."¹¹⁷ The court noted that there were a number of inmate writwriters but that they were scattered throughout the various facilities and that "it is possible that a particular camp may be bereft of a 'jail-house' lawyer."¹¹⁸

The *Stevenson* court invoked the *Johnson v. Avery*¹¹⁹ standard of "reasonably adequate" access. The *Stevenson* court held that the standard of "reasonably adequate" access could be fulfilled by a "reasonable, straightforward and intelligible statement" which could be produced through the "experience and native intelligence . . . [of] a competent writwriter."¹²⁰ The court stated:

111. The Eleventh Circuit adopted as precedent the decisions of the former Fifth Circuit handed down before October 1, 1978. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

112. 391 F. Supp. 1375 (N.D. Miss. 1975), *aff'd per curiam*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

113. *Id.* at 1377.

114. *Id.* at 1383.

115. *Stevenson v. Reed*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

116. 391 F. Supp. at 1378.

117. *Id.* at 1379 (footnote omitted).

118. *Id.* at 1378.

119. 393 U.S. at 483.

120. 391 F. Supp. at 1382 (emphasis added). The court also approved of the use of an institutional attorney or a "free-world paralegal." *Id.* at 1382.

State-supplied legal counsel would . . . be of material benefit to any modern correctional facility . . . [b]ut . . . our Constitution does not require all that is or may be deemed socially desirable. . . . Neither . . . must penitentiary administrators "adopt every proposal that may be thought to facilitate prisoner access to the courts." Alternative programs may be adopted which, without legal counsel, permit prisoners to seek out necessary assistance . . . and under which effective access to the courts is possible.¹²¹

Stevenson briefly addressed the 1972 decision of *Hooks v. Wainwright*.¹²² The court rejected the suggestion to follow *Hooks* "to the extent that it may be read as requiring both counsel and a full and complete law library."¹²³ It can be argued that this rejection of the earlier *Hooks* decision should not be dispositive upon appeal of the present *Hooks* decision. The rejection was based on the earlier *Hooks* opinion's reliance on the equal protection clause of the fourteenth amendment. The present decision is based, however, on the Supreme Court's mandate in *Bounds* which was premised on the due process clause.¹²⁴

Whether the stance of the *Stevenson* court will be the position taken by the Eleventh Circuit upon the appeal of the present decision remains to be seen. Contrary to the *Hooks* findings, the *Stevenson* court found that institutional writwriters were competent to provide meaningful access.¹²⁵ The *Hooks* court found Florida's writwriters not to be competent and emphasized that different factual situations will require different methods of providing meaningful access.¹²⁶

Secondly, *Stevenson* was a pre-*Bounds* decision in which the court found the constitutional minimum was "reasonably adequate" rather than "meaningful access." It is likely, however, that the difference in the articulation of the standards is not significant. The Supreme Court itself in *Bounds* phrased the issue as what form or forms of assistance were needed to provide prisoners a "reasonable adequate opportunity" to present their claims to a

121. *Id.* at 1382 (citations omitted).

122. 352 F. Supp. at 168.

123. 391 F. Supp. at 1381 n.9.

124. 430 U.S. at 818.

125. 391 F. Supp. at 1382. "We note first that no evidence has been presented that Parchman is devoid of competent writwriters. To the contrary, this court knows from its records and files that writs are received on almost a daily basis." *Id.*

126. *Hooks*, 536 F. Supp. at 1341 ("[t]he decision . . . today rests upon this factual record.").

court.¹²⁷ In *Jones v. Diamond*,¹²⁸ a post-*Bounds* decision, the Fifth Circuit reaffirmed the *Stevenson* holding. Although not specifically addressing the issue of attorneys, the court in *Stevenson* held that meaningful access for prisoners at that institution was satisfied because the library had been found to be adequate. Therefore, for "all convicted criminals . . . at Parchman, the State would, in all likelihood, have fulfilled its obligation under *Bounds*."¹²⁹ In addition, in another post-*Bounds* Fifth Circuit case, *Lynott v. Henderson*,¹³⁰ the court in dicta equated the meaningful access standard of *Bounds* with "access to a threshold level of legal information or aid."¹³¹ Therefore, it is quite possible that the Fifth Circuit equates "meaningful access" with "reasonably adequate" and "threshold level." If this is true, then, the court in *Stevenson* applied the proper constitutional standard in a case factually similar to the case at hand to reach an opposite conclusion. The Eleventh Circuit may be inclined to follow the Fifth Circuit's approach in *Stevenson* and reverse the *Hooks* decision.

Judge Scott claimed to find support¹³² for his position that lawyers are an essential ingredient of Florida's duty to provide inmates with meaningful access to the courts in another Fifth Circuit decision, *Cruz v. Hauck*.¹³³ A reading of the case, however, fails to reveal support for the court's interpretation. The language in *Cruz*, that "[u]nless the library adequately provides access to the courts for all inmates, some other assistance should be available for the initiation of habeas corpus and civil rights actions,"¹³⁴ does not properly lead to the conclusion that "some other assistance" refers to the assistance of counsel. It had been claimed that all indigent inmates in *Cruz* were being provided with counsel. The court, however, was forced to remand the case to determine whether this assistance was available at the time of the filing of legal papers, as required by *Bounds*.¹³⁵ The language of *Cruz* which was emphasized in *Hooks* does no more than restate the *Bounds* mandate of either state-provided law libraries or other forms of assistance. It makes no suggestion as to what form this assistance must take. In-

127. 430 U.S. at 825.

128. 594 F.2d 997.

129. *Id.* at 1024.

130. 610 F.2d 340.

131. *Id.* at 342 n.1.

132. *Hooks*, 536 F. Supp. at 1350.

133. 627 F.2d 710.

134. *Id.* at 721.

135. *Id.*

deed, the opinion repeatedly offers suggestions of forms of assistance, other than counsel, which would be adequate by themselves in satisfying *Bounds*. These alternate forms included paralegal and paralibrarian assistance and writwriters.¹³⁶ Thus, Judge Scott can point to no decision directly supporting his position, and instead he must rely on the unique characteristics of Florida's inmates and prison system as demonstrated in the factual record.¹³⁷

The decision in *Hooks* is one which the court conceded might appear to be a radical departure from precedent.¹³⁸ Indeed, the district court recognized the import of its holding and thus certified its decision as an appealable order.¹³⁹ Yet, Justice Rehnquist in his dissent in *Bounds* foresaw such a ruling as only a logical extension of the majority's reasoning.¹⁴⁰ Justice Rehnquist was quite correct. Formulation of the parameters of the *Bounds* definition of meaningful access to the courts was left to the lower courts with little guidance. It is not surprising then that one would conclude that only a licensed attorney possesses that degree of competence and familiarity with the intricacies of the law to provide access that is truly meaningful. It may be that the federal judiciary prior to the *Hooks* decision had intruded upon the prison system as far as judicial restraint would allow.¹⁴¹ On the other hand, the provision of attorney assistance to indigent, illiterate prisoners may be an idea whose time has finally come. The Supreme Court, although addressing another aspect of the right to counsel issue,

136. *Id.* 720-21.

137. *Hooks*, 536 F. Supp. at 1341.

138. *Id.* at 1352.

139. *Id.* at 1353. 28 U.S.C. § 1292(b) (1976) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

140. 430 U.S. at 841 (Rehnquist, J., dissenting). See *Constitutional Law-Corrections-Prisoners' Constitutional Right of Access to Courts Imposes Duty on State to Provide Prison Law Libraries*, 23 VILL. L. REV. 613, 624 (1978) (noting professional or quasi-professional assistance was the logical extension of *Bounds* but that the opinion could be interpreted to require attorneys).

141. Special Project, *Of Trumpeters, Pipers, and Swingmen: What Tune Is the Burger Court Playing in Right to Representation Cases?* 29 VAND. L. REV. 776, 803 (1976).

said fully fifty years ago that:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.¹⁴²

Many would agree that these words apply equally as well to proceedings involving post conviction relief.¹⁴³

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142. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

143. *Wetmore v. Fields*, 458 F. Supp. 1131, 1142, 1146-47 (W.D. Wis. 1978); Comment, *Constitutional Law: Prisoners' Right of Access to Legal Materials*, 26 U. FLA. L. REV. 161, 164-66 (1973); Comment, *Prisoners' Rights - Access to Courts*, 42 U. COLO. L. REV. 275, 290-91 (1970); Larsen, *supra* note 50, at 363; *Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States*, 33 F.R.D. 363, 385 (1963).