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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X  
ROBERT SHAW, ET AL., :  
Petitioners :  
v. : No. 99-1613  
KEVIN MURPHY :  
- - - - -X

Washington, D.C.  
Tuesday, January 16, 2001

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:58 a.m.

APPEARANCES:

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Helena, Montana; on behalf of the Petitioners.  
PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae,  
supporting the Petitioners.  
JEFFREY T. RENZ, ESQ., Missoula, Montana; on behalf of  
the Respondent.

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1 P R O C E E D I N G S

2 (10:58 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 99-1613, Robert Shaw v. Kevin Murphy.

5 Mr. Ohler.

6 ORAL ARGUMENT OF DAVID L. OHLER

7 ON BEHALF OF THE PETITIONERS

8 MR. OHLER: Mr. Chief Justice, and may it please  
9 the Court:

10 This case presents the question of whether an  
11 inmate has a freestanding right to provide legal  
12 assistance to another inmate which entitles correspondence  
13 from that inmate to special protection under the First  
14 Amendment.

15 With respect to the facts of this case, the  
16 question may be phrased --

17 QUESTION: There's some discussion in the briefs  
18 about the penalties that were imposed on the prisoner by  
19 virtue of his writing the letter that he wrote. I guess  
20 those are not at issue here?

21 MR. OHLER: I don't believe they are, Your  
22 Honor. In fact, I believe the respondent in his brief at  
23 page 10 indicated that Mr. Murphy did not seek expungement  
24 of the disciplinary action that was taken against him.

25 We believe, and with respect to the facts of

1 this case, the question may be whether an inmate can evade  
2 censorship of communication and discipline for insolent  
3 language contained in a letter to another inmate which  
4 also contains legal advice.

5 If an inmate does not have a free --

6 QUESTION: Can we take it as a given that this  
7 was insolent language, because, you know, I'm somewhat  
8 dubious whether this was insolent language, but that's a  
9 given in this case?

10 MR. OHLER: We believe it's a given. We don't  
11 believe that Mr. Murphy contested whether or not there was  
12 sufficient evidence to find that he was insolent, and in  
13 fact --

14 QUESTION: He had the opportunity to contest  
15 that? He could --

16 MR. OHLER: He did, Your Honor, and as I  
17 indicated to the question from Justice O'Connor, he has  
18 not sought expungement of that disciplinary infraction.

19 If an inmate does not have a freestanding right  
20 to receive legal assistance, as this Court stated in Lewis  
21 v. Casey, then the corollary must be true, an inmate does  
22 not have a freestanding right to render legal assistance.

23 It is petitioners' position that legal advice is  
24 entitled to no greater protection than speech in general  
25 in a prison context.

1                   QUESTION: Mr. Ohler, may I ask if -- at least I  
2 understood that the position of the United States is not  
3 the same as the one that you are telling us about, nothing  
4 else being at issue but the insolence and the other  
5 charge. I thought that the position of the United States  
6 was that this should be remanded for consideration of  
7 those factors of that part of the case in light of Turner  
8 v. Safley. Is that wrong?

9                   MR. OHLER: That is the position of the United  
10 States, and that is a position that we disagree with.  
11 It's our position that once the cloak of special  
12 protection is removed from the legal advice, the legal  
13 advice privilege as we termed it in the brief, the  
14 question is whether or not legal advice under the Turner  
15 analysis, or whether or not the prison's disciplinary  
16 policy under the Turner analysis is reasonably related to  
17 a legitimate penalogical interest, and we believe it is.

18                   Once that determination has been made, that the  
19 policy is valid and, in fact, the respondent has conceded  
20 that, he's not contested the facial validity of that  
21 policy, but once the validity of that policy under Turner  
22 is determined, then the only question, we believe, is  
23 whether or not Mr. Murphy in fact violated the policy and,  
24 as I mentioned to Justice Scalia's question, he has not  
25 raised that question, and that's a due process question

1 that was not raised below.

2 In Turner itself the court did not distinguish  
3 between legal communications and other types of  
4 communication between inmates, and there is no logical  
5 reason why legal communication should be entitled to any  
6 different standard of review than other types of speech,  
7 including political speech.

8 QUESTION: Well, suppose you have a prison  
9 where, in a disciplinary proceeding, not a criminal charge  
10 but a disciplinary proceeding, one inmate, as the custom,  
11 often represents another. Do you think then the so-called  
12 inmate law clerk would have a privilege to communicate  
13 with the inmate that he's representing?

14 It's maybe a little hard for you to answer,  
15 because we have to assume a lot of regulations and stuff  
16 that are not in play, but just to flat out say that  
17 there's never this right is somewhat -- goes somewhat far,  
18 I think.

19 MR. OHLER: Well, in this case, and this case is  
20 an example, perhaps, of the hypothetical you pose, but  
21 Mr. Murphy had the opportunity in this case to communicate  
22 to the Inmate Tracy. He could have provided the legal  
23 advice that was contained in the letter, don't plead  
24 guilty, have your attorney get a hold of me, I've got some  
25 information. Inmate Murphy went beyond that and --

1                   QUESTION: No, but my question is, does he have  
2 a right to send the communication? You say there's no  
3 right at all, we don't have to get into insolence or  
4 interpretation of the letter, there's just simply no  
5 right, but I'm suggesting that in some instances there  
6 might be.

7                   MR. OHLER: With respect to inmate-to-inmate  
8 communications it's our position, no, that there is no  
9 right for inmate-to-inmate communications.

10                  QUESTION: Even when one inmate's representing  
11 another in, say, a grievance proceeding, or, pardon me, a  
12 disciplinary proceeding?

13                  MR. OHLER: Not with respect to communication  
14 under the Turner opinion, Your Honor.

15                  QUESTION: Well, if -- are you answering your  
16 question limited simply to sending letters, or are you  
17 saying that one inmate can be assigned to defend another,  
18 and the prison may preclude all communication between them  
19 of any sort whatsoever? Are you saying that?

20                  MR. OHLER: No, Your Honor, we're not saying  
21 that.

22                  QUESTION: Okay.

23                  MR. OHLER: No.

24                  QUESTION: So you're limiting it simply to  
25 written -- your answer to Justice Kennedy is limited

1 simply to written statements?

2 MR. OHLER: Correct.

3 QUESTION: And you take the position, then, that  
4 if an inmate were, by the prison, assigned to provide  
5 legal assistance to another prisoner, that no written  
6 communication could be sent from the one providing the  
7 assistance to the other prisoner?

8 MR. OHLER: Under Turner, I believe Turner can  
9 be read that way. Under the facts of this case, the only  
10 thing that the prison was punishing was the insolent  
11 language contained in the communication, and the prison in  
12 this case did permit that communication to occur between  
13 Inmate Murphy, who is a law clerk, and Inmate Tracy.

14 QUESTION: What possible interest would the  
15 prison have in prohibiting -- assuming you allowed an  
16 inmate to provide legal services to another, which  
17 sometimes I understand happens, what interest of the  
18 prison is there in making sure that it is never done in  
19 written form, which the prison can then read?

20 MR. OHLER: With respect to an inmate law clerk  
21 program, as occurred here --

22 QUESTION: Yes.

23 MR. OHLER: -- we permitted, the prison  
24 permitted communications between --

25 QUESTION: But you just told me that you would



1 not allow any written communication, even though a law  
2 clerk assignment had been made.

3 MR. OHLER: I'm sorry, I may have -- I misspoke  
4 or misunderstood. I was simply saying that Turner seemed  
5 to imply that with respect to inmate-to-inmate  
6 correspondence, that communications could be prohibited by  
7 a prison and, in Turner, in fact, the regulation at issue,  
8 which was at the Lorenz Correctional Facility in Missouri,  
9 as practiced at that particular prison, precluded legal  
10 communications, and --

11 QUESTION: Well, you don't have to go that far  
12 in this case, nor do we.

13 I mean, really, all you're asserting in this  
14 case is that normal prison regulations, including those  
15 against displaying insolence towards the prison guards, do  
16 not become suspended when there are communications  
17 involving legal representation. Isn't that as far as we  
18 would have to go in order to give you all that you're  
19 interested in here?

20 MR. OHLER: That is correct, Justice Scalia.

21 QUESTION: Well, I'm slightly mixed up, because  
22 I thought, suppose that Inmate A wants to represent Inmate  
23 B, but he isn't. I thought you were saying that's this  
24 case, and there's no special right to be a lawyer. You  
25 don't have a constitutional right to get to be a lawyer,

1 any more than you get to be an architect, right?

2 MR. OHLER: Correct.

3 QUESTION: But there's a different situation. A  
4 is representing B. In that case, B, not A, has a right to  
5 legal representation, which may involve sending letters.  
6 Is that right?

7 MR. OHLER: If we're going to term the  
8 communication that occurred here as representation --

9 QUESTION: This has nothing to do with that, I  
10 thought. Am I not right that A is not representing B in  
11 this case, he'd just like to?

12 MR. OHLER: That's correct, yes.

13 QUESTION: All right. So if we're writing an  
14 opinion, I guess, shouldn't I be careful, drawing on your  
15 personal view, not some case but your view as a lawyer, to  
16 make certain that we don't say, we don't talk about the  
17 situation where B, who is the person who needs a lawyer,  
18 he may well have a right to get communications from his  
19 lawyer that is different from the ordinary right just to  
20 speak. Am I right?

21 MR. OHLER: Yes, Your Honor.

22 QUESTION: Okay. Now, what about the case where  
23 we have an association of people who help to provide  
24 lawyers to inmates?

25 I'm obviously thinking of NAACP v. Button, for

1 example, and maybe that association of lawyers, or people  
2 who want to give lawyers to inmates, has a few inmates in  
3 it. Might they have a special right?

4 MR. OHLER: Your Honor, with respect to --

5 QUESTION: Do you want to say we don't have to  
6 get into that here?

7 MR. OHLER: I don't think we have to get into  
8 that. I think the NAACP cases and the In re Primus line  
9 of cases dealt with access to courts.

10 In fact, I think this Court used that language  
11 in the Primus case, dealt with access to courts by free  
12 citizens, and providing free citizens with the tools to  
13 gain a foothold into the court and to advance their civil  
14 rights, and there is a large amount of jurisprudence from  
15 this Court relative to the right of access as it applies  
16 to inmates, and we believe that that jurisprudence  
17 controls, relative to the right of access by inmates in a  
18 prison setting.

19 QUESTION: Would it have been the same offense,  
20 in your view, if the -- was it Murphy, had sent the letter  
21 not to Tracy but to Tracy's assigned counsel?

22 MR. OHLER: That would be another matter and, in  
23 fact, that correspondence could have occurred, and the  
24 difference between that situation and the situation that's  
25 presented in this case is the correspondence that is going

1 outside the prison, and so it's -- the confrontational  
2 aspect of Inmate Murphy's letter is not the same, because  
3 it's being sent outside the prison.

4 QUESTION: Suppose it were sent to an  
5 investigative reporter?

6 MR. OHLER: That would have been fine. Once  
7 again, we don't have that confrontational aspect that  
8 occurred when this correspondence remained within the  
9 prison.

10 QUESTION: Well, in both of Justice Ginsburg's  
11 hypotheticals, I assume the prison authorities would read  
12 the letter first, or am I wrong about that? It's a  
13 hypothetical, but I assume -- that's your regulation.  
14 Don't you read everything that goes out?

15 MR. OHLER: No. Our policy permits outgoing  
16 correspondence to go out, and is only --

17 QUESTION: Whether or not it's read. It's not  
18 read?

19 MR. OHLER: It's only read if there's a  
20 reasonable probability to believe that it contains certain  
21 types of information that would be detrimental to the  
22 prison, so in most cases outgoing correspondence is not  
23 read.

24 QUESTION: What is the confrontation that you're  
25 talking about? I may not understand what you mean.

1 MR. OHLER: Well --

2 QUESTION: You spoke about confrontational  
3 aspect. What do you mean by that?

4 MR. OHLER: The language contained in the letter  
5 was disparaging about Correctional Officer Galle.

6 QUESTION: Yes.

7 MR. OHLER: And it was a challenge to the  
8 authority of Correctional Officer Galle in particular,  
9 but correctional staff in general, and it's that --

10 QUESTION: Well, it was a challenge to his  
11 exercise, or as the letter claimed, his abuse of  
12 authority.

13 MR. OHLER: Correct, and there were also other  
14 comments in there concerning his sexual orientation which  
15 this Court I believe in Thornburgh recognized as a  
16 security concern in the prison context.

17 QUESTION: Right. What's the confrontation?  
18 Are you talking about the confrontation between the person  
19 who writes the letter and the prison censor who reads it?

20 MR. OHLER: No. I think the confrontational  
21 aspect of that, and the challenge to authority, goes  
22 between Inmate Murphy and Officer Galle.

23 QUESTION: Well, Officer Galle never saw the  
24 letter, could not have been, I take it, expected to see  
25 the letter. The only person who could be expected to see

1 the letter, other than the recipient, was the prison  
2 censor.

3 MR. OHLER: The problem is, we don't know what  
4 happens to the letter once it gets -- assuming that the  
5 letter was transmitted to Inmate Tracy, that letter could  
6 have been --

7 QUESTION: Yes, but you're talking about the  
8 confrontational aspect of the letter.

9 QUESTION: I thought you meant that it  
10 encourages the recipient to become confrontational with  
11 the guards.

12 MR. OHLER: It does that also, Your Honor.

13 QUESTION: It does that also?

14 MR. OHLER: Yes.

15 QUESTION: Oh. But that's not what you meant by  
16 its confrontational aspect. Then I share Justice Souter's  
17 perplexity. I don't understand who he's confronting.

18 I mean, I can understand how it's not good for  
19 prison discipline to allow prisoners to incite one another  
20 against the guards. If that's what you're talking about,  
21 it makes sense, but how one letter from one prisoner to  
22 another prisoner confronts the prison guards, that's  
23 beyond me.

24 MR. OHLER: And that's one aspect of it, and  
25 that is a concern, is that in fact this particular inmate

1 that the letter was sent to had just recently assaulted a  
2 correctional officer. This letter would tend to incite  
3 Inmate Tracy.

4 The other concern is what this Court termed a  
5 ripple effect when --

6 QUESTION: More so than if his lawyer had told  
7 him, his lawyer said, I got this letter from a fellow  
8 inmate, what do you think of it, or if an investigative  
9 reporter asked him? Would it be less -- would that be  
10 less of a problem?

11 MR. OHLER: There are -- there still are  
12 concerns there, Justice --

13 QUESTION: You have no control over the lawyers,  
14 I take it.

15 MR. OHLER: That's correct.

16 QUESTION: You do have control over the  
17 prisoners.

18 MR. OHLER: That's correct.

19 QUESTION: More or less.

20 MR. OHLER: Yes, Your Honor.

21 Mr. Chief Justice, I'd like to reserve my  
22 remaining time.

23 QUESTION: Very well, Mr. Ohler.

24 MR. OHLER: Thank you.

25 QUESTION: Ms. Millett, we'll hear from you.

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ORAL ARGUMENT OF PATRICIA MILLETT  
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
SUPPORTING THE PETITIONERS

MS. MILLETT: Mr. Chief Justice, and may it please the Court:

The court of appeals' categorical protection of inmate legal advice from rules that reasonably regulate all other prison correspondence is inconsistent both with this Court's precedents and with realities of prison management. In our view prisoners -- and in this Court's view, prisoners have a right of access to the courts to press their own grievances and claims, but this Court has never recognized a freestanding First Amendment right on the part of other inmates to get involved in each others' litigation efforts. That is particularly true when the litigating inmate is already represented by an attorney.

In Lewis v. Casey, this Court held that while inmates must be allowed to bring suits challenging their own convictions and conditions of confinement, impairment of any other litigating capacity, and that would include serving as a legal advisor, is simply going to be incidental and perfectly constitutional consequences of conviction and incarceration.

QUESTION: Ms. Millett, will you clarify for us what the United States would remand? What would be open



1 to the court below to consider, assuming we accept your  
2 first position that there is no right of, to represent --  
3 one inmate to another to represent each other? There's no  
4 attorney-client relationship that stems from any  
5 constitutional guarantee. Let's say we accept that. What  
6 would you remand on?

7 MS. MILLETT: The remand would be on an as-  
8 applied challenge to this particular communication. It  
9 would not be a request, as the Ninth Circuit found here,  
10 for categorical protection of all inmate communications of  
11 legal advice. The question would be whether application  
12 of the insolence regulation to this particular  
13 communication, looking at its particular content, would be  
14 consistent with the First Amendment under a --

15 QUESTION: But am I wrong, or was the petitioner  
16 wrong in suggesting that that had not been raised?

17 MS. MILLETT: Well, our understanding is that  
18 what was not raised is whether or not this communication  
19 fell within the definition of insolence or violation of a  
20 due process, or interference with a due process hearing  
21 under the terms of the regulations, and that's not what  
22 we're saying should be remanded. What we're saying should  
23 be remanded is whether there's an as-applied  
24 constitutional challenge to application of those  
25 regulations to this communication.

1           QUESTION: Which would be based on that same  
2 thing. I mean, what would an as-applied challenge be  
3 based on unless it is the fact that in fact this  
4 regulation wasn't violated?

5           MS. MILLETT: No, you could have -- prisons  
6 could have a regulation. For example, they could decide  
7 that insolence could includes any, for example, criticism  
8 of a guard, so that -- and those might well pass facial  
9 constitutionality under a Turner v. Safley analysis, but  
10 you could still find that a comment to a guard that, you  
11 know, that's a bad hair cut, would fall within the meaning  
12 of insolence, and so would fall within the regulation, but  
13 would not survive a Turner v. Safley as-applied analysis  
14 because it would not be a security --

15           QUESTION: Are you suggesting that there are two  
16 levels of application of Turner, that even if a regulation  
17 on its face, so to speak, is valid under Turner, it could  
18 be invalid as applied?

19           MS. MILLETT: Absolutely, and I think that's  
20 what -- for example, in Thornburgh v. Abbott this Court  
21 upheld regulations as applied to the public generally --  
22 I'm sorry, not as applied, facially, the application of a  
23 prison regulation limiting the types of publications and  
24 magazines that could come into a prison, but remanded for  
25 as-applied review of whether publication by publication

1 the prison's decision to keep a particular publication out  
2 violated the First Amendment, and that's all that we think  
3 the remand here would need to encompass. But the  
4 important thing to keep in mind, and the main problem with  
5 the Ninth Circuit --

6 QUESTION: Did he raise that question below?

7 MS. MILLETT: That's our understanding of the  
8 complaint, and it's based in part on the magistrate  
9 judge's analysis which is in the petition appendix, where  
10 they talk about the failure of the State to come forward  
11 at that stage with information showing why this particular  
12 communication was a threat to security.

13 QUESTION: Well, I take it --

14 QUESTION: So in your view there is --

15 QUESTION: -- that is going to whether the  
16 regulation was violated, whether this particular  
17 communication was, indeed, insolence towards the guard.  
18 Isn't that perfectly explicable as raising the issue of  
19 whether the regulation was violated?

20 MS. MILLETT: Well, we understood that argument  
21 in the complaint, that analysis by the magistrate judge  
22 and respondent's, including respondent's arguments here  
23 about whether, you know, how this particular communication  
24 does or does not challenge security interests as an as-  
25 applied challenge, but we're not here because we have a

1 strong interest on that. If we've misunderstood the  
2 record, and there is no as-applied challenge in the case,  
3 then there would be no basis for a remand.

4 QUESTION: Is another way of saying what you're  
5 trying -- maybe I don't quite get it, that even though he  
6 doesn't have a First Amendment right to act as a lawyer  
7 and practice law in the prison context, he had a First  
8 Amendment right to write this particular letter?

9 MS. MILLETT: Yes. Well, our position is that  
10 there's no special First Amendment status accorded to this  
11 communication because it was legal advice.

12 QUESTION: Right, but just under ordinary First  
13 Amendment review --

14 MS. MILLETT: Exactly. Exactly. That -- the  
15 crux of our point is that Turner v. Safley is a sufficient  
16 test to review all prison regulations, and --

17 QUESTION: In your view there's a First  
18 Amendment right for prisoners to communicate with each  
19 other? I mean, does -- that has to be the beginning  
20 point, based on my understanding of your argument.

21 MS. MILLETT: Well, our position is that inmates  
22 could always claim that and then the burden would be on  
23 the prison to show in the circumstances that there is or  
24 is not.

25 For most of the time there's a lot of prisoner

1 communication that goes on that does not affect prison  
2 security.

3 QUESTION: But that's a very substantial  
4 holding.

5 QUESTION: Yes.

6 QUESTION: You're asking us to have a  
7 foundational proposition that there's a First Amendment  
8 right for prisoners to communicate.

9 QUESTION: We've never held that.

10 MS. MILLETT: The -- I think the premise of the  
11 recognition that you read would be reviewed under *Turner*  
12 *v. Safley*, and I think a regulation that said, prisoners  
13 shall never, under all circumstances shall never speak to  
14 another inmate, no inmate shall ever speak to another  
15 inmate, would have to be reviewed under *Turner v. Safley*,  
16 and the Government would have to come in and show why any  
17 communication at all between inmates is a threat to  
18 security.

19 QUESTION: There's another point, too, that if  
20 the prison regulations do permit communication, there is  
21 still -- there arguably could be a First Amendment right  
22 to say certain things in those communications without --  
23 in other words, they say, we'll let you write letters, but  
24 we're going to tell you exactly what you can say. That's  
25 a rather strange view. Well, anyway --

1 MS. MILLETT: I'm sorry if I misunderstood your  
2 question. Our only position is that there certainly may  
3 be circumstances, in fact, in which it would be  
4 appropriate for a prison to say, there shall be no  
5 communications at all between inmates, either curfew  
6 times, or lockdown situations, or high security --

7 QUESTION: Well, I thought this involved such a  
8 situation. The person to whom respondent wanted to  
9 communicate was in a maximum security section.

10 MS. MILLETT: He was.

11 QUESTION: And I had understood the prison did  
12 not permit communication from prisoners in other parts of  
13 the prison with lesser restrictions to prisoners in the  
14 maximum security. Am I wrong?

15 MS. MILLETT: Our understanding is that he was  
16 allowed to write a letter to this inmate, so there was not  
17 a complete ban on communication between people, inmates in  
18 respondent's category and this high risk, or this maximum  
19 security unit. There was not a complete ban on  
20 communications. It was just the content of this letter.

21 Clearly, any communication that is written  
22 between prisoners must be consistent with valid  
23 penalogical limitations on those, and those would include  
24 that communications not be insolent or incite one inmate  
25 against another, inmate against another or against guards

1 or prison staff.

2           The important thing, we think, to keep in mind  
3 with respect to the Ninth Circuit's rule is that the  
4 Turner v. Safley test is sufficient for purposes of  
5 analyzing any First Amendment claims to speech or other  
6 rights invoked by prisoners and that beyond that, prison  
7 correspondence involving legal advice does not have any  
8 special exemption from those rules, should not be analyzed  
9 under any separate standard and, in fact, can present the  
10 exact same dangers that routine correspondence does.

11           They can -- according special status, as the  
12 Ninth Circuit has done, to inmate correspondence could  
13 allow that type of correspondence to become a ready  
14 vehicle for secretly coded communications and other  
15 illicit communications. Jailhouse lawyers are frequently  
16 a menace to prison discipline, and they could be allowed  
17 through special treatment to set up an order or a  
18 hierarchy that would compete with the prison order system.

19           In addition, the circulation among inmates of  
20 potentially volatile allegations and accusations can, in  
21 the judgment of prison officials, exacerbate the already  
22 extremely tense relations between prison officials and  
23 inmates and that, much like in Jones v. North Carolina  
24 Prisoners Labor Union, where this Court held that prisoner  
25 communications, prisoner assertions of First Amendment

1 speech and association rights that are focused on  
2 encouraging an increase in adversarial relations between  
3 prison and staff can be regulated and restricted  
4 consistent with legitimate penalogical objectives.

5 And finally, it's important to keep in mind that  
6 there are ample alternative channels for inmates to  
7 communicate information bearing on a case. They can  
8 communicate with attorneys, Government officials, courts  
9 and other members of the public. They may bring their own  
10 grievances or lawsuits. The appropriate analysis, we  
11 think, is Turner v. Safley and, beyond that, the -- to the  
12 extent someone is concerned about information getting into  
13 courts. Thank you.

14 QUESTION: Thank you, Ms. Millett.

15 Mr. Renz, we'll hear from you.

16 ORAL ARGUMENT OF JEFFREY T. RENZ

17 ON BEHALF OF THE RESPONDENT

18 MR. RENZ: Thank you, Mr. Chief Justice, and may  
19 it please the Court:

20 It appears to me that the State prison here is  
21 proposing a change in the Turner rule which the Turner  
22 opinion does not accommodate. As I understand the State's  
23 position, so long as their rules are neutrally drawn, and  
24 so long as the rules on their face satisfy Turner, then  
25 they are free to apply them in any manner in which they



1     deem fit. I don't think that Turner says that. I don't  
2     think that Turner nor Abbott contemplate that.

3             This is an as-applied case, it was an as-  
4     applied case, and it always has been an as-applied case,  
5     with the single exception that Mr. Murphy challenged the  
6     rules on their face as vague, and the vagueness issue, the  
7     facial vagueness issue is not before this Court. This  
8     case is strictly about punishment of content of speech.

9             I think there are several issues here that are  
10    not in dispute. First, this is speech that, if uttered  
11    outside the prison, is without question protected by the  
12    First Amendment. Second, this communication was permitted  
13    within the prison. That is, Mr. Murphy was permitted  
14    under the prison's regulations to write to Mr. Tracy. And  
15    third, if these two things are true, as they are, then  
16    Turner and Abbott provide the analytical framework for  
17    this case.

18            QUESTION: Well, I thought the Ninth Circuit  
19    articulated at least some freestanding First Amendment  
20    right of a fellow prisoner to offer legal advice to  
21    another prisoner. At least there's language to that  
22    effect in its opinion.

23            MR. RENZ: I think that the language in the  
24    Ninth Circuit's opinion --

25            QUESTION: Do you defend that as a proposition

1 here?

2 MR. RENZ: Well, I would contend, Your Honor,  
3 that the Ninth Circuit was being somewhat circular when  
4 they said that the prison's emphasis is at a low edge, ebb  
5 when the language is legal advice.

6 QUESTION: No, but --

7 QUESTION: Well, do you contend -- excuse me.  
8 Do you contend that the prisoner has a freestanding First  
9 Amendment right to offer legal advice to another prisoner?

10 MR. RENZ: No. No, we do not contend that.

11 QUESTION: But that's the only --

12 QUESTION: The question presented.

13 QUESTION: That's the question that was  
14 presented. Justice O'Connor put the question to you.  
15 That's the question in the blue brief. That's the end of  
16 the case.

17 MR. RENZ: That's not the end of the case, Your  
18 Honor. I'm the respondent, and this Court may affirm the  
19 judgment of the Ninth Circuit on any grounds that appear  
20 in the record.

21 QUESTION: Well, but I mean, this is the  
22 question that we're interested in.

23 MR. RENZ: Yes, but this in my view is a  
24 straightforward Turner application.

25 QUESTION: Well, but do you have an answer? Are

1 you saying that you agree that the question presented,  
2 does the First Amendment of the United States Constitution  
3 grant a State prison inmate an independent right to assist  
4 another State prison inmate, do you agree that that is not  
5 a correct statement of the law?

6 MR. RENZ: I would agree with that, yes, but  
7 what we have here is, we have a communication permitted by  
8 the prison that contained information and contained legal  
9 advice, and Mr. Murphy was punished for what he said. He  
10 was punished for what he said and the prison has never,  
11 ever stated why that punishment advanced the interests it  
12 articulates. It has never shown the connection between  
13 its articulated interests and the punishment of  
14 Mr. Murphy, and that is exactly what Turner and Abbott  
15 require. That has never happened here.

16 QUESTION: Mr. Renz, would you clarify -- what  
17 we were told before was that you had waived all of that,  
18 that you were not contesting the disciplinary action that  
19 was taken against him. I think that's what we were told  
20 was your position.

21 MR. RENZ: I'm not sure --

22 QUESTION: We were told that you were not  
23 contesting the disciplinary action that was taken.

24 MR. RENZ: If the question is whether we are  
25 seeking relief to purge the discipline, that's right.

1                   QUESTION: Well then, what sort of relief are  
2 you seeking?

3                   MR. RENZ: We're seeking declaratory relief,  
4 Your Honor, that says the prison may not do this without  
5 demonstrating some sort of connection between its  
6 interests and what it has done. Remember, it has punished  
7 Mr. Murphy.

8                   QUESTION: But you said you're not challenging  
9 the punishment. That's what's so odd about this. The  
10 reference -- Murphy does not seek expungement of his  
11 record, the record, I take it, being the record of his  
12 discipline.

13                   MR. RENZ: That's correct, Your Honor.

14                   QUESTION: Well, if you're not challenging that,  
15 then I don't understand what interest you have in an  
16 abstract statement of what the law should be in another  
17 case.

18                   MR. RENZ: Well, Mr. Murphy continues to be  
19 imprisoned. He continues to give legal advice for the  
20 prisoners. He's seeking, and sought in this lawsuit  
21 prospective relief.

22                   QUESTION: But that's -- I think what's  
23 bothering us is, we understand that there very well may  
24 properly be requests for declaratory relief of a general  
25 sort, but what you're seeking here apparently isn't

1 declaratory relief as a general sort. It's a declaration  
2 that an as-applied challenge, this challenge, this  
3 communication, this instance only, is valid because  
4 there's a First Amendment violation, and yet with respect  
5 to this specific instance you're not asking for any  
6 relief. It doesn't seem to fit into any of our recognized  
7 categories of litigable issues.

8 MR. RENZ: I think I understand the question.  
9 Mr. Murphy wants to continue giving legal advice without  
10 the fear of sanctions, and a declaration that the prison  
11 may not do this without demonstrating some connection  
12 between its punishment and the interests it articulates --

13 QUESTION: Okay, but is -- I'm sorry. I was  
14 going to say, as a general proposition, you've already got  
15 that in Turner and Safley, and you either want something  
16 specific to this case, though without any relief in this  
17 particular case, or you want something broader, and when  
18 you state what the broader relief is that you might want,  
19 it seems to be about the same level of generality as  
20 Turner and Safley itself, so we're stuck as to what we can  
21 do for you --

22 MR. RENZ: I see.

23 QUESTION: -- even if we accept your position.

24 MR. RENZ: The -- let me catch up. The -- Mr.  
25 Murphy wrote this letter. He said these words. He wants

1 to continue to be able to say these words without fear of  
2 sanction. Saying to the prison that you may not punish  
3 these words without showing us more means that he is armed  
4 with something in the future when the prison comes to him  
5 and says --

6 QUESTION: Well, Mr. Renz, you say he wants to  
7 continue to say these words, but I take it you don't mean  
8 exactly these words. I mean, he's not going to report  
9 exactly the same incidents if he wants to write to another  
10 inmate. You mean, a letter like this?

11 MR. RENZ: A letter like this. Remember, the  
12 prison has acted to apply its rules in a certain way.  
13 It's extended the scope of its rule to encompass this kind  
14 of speech. Now, the prison is free to do that so long as  
15 they show a connection between its interests and the  
16 extension of the rule and the punishment of Mr. Murphy,  
17 but they haven't done that here.

18 QUESTION: Well, if you say that you're in  
19 agreement that there's no special right to render legal  
20 advice, then all this is is a question whether or not this  
21 communication, or other communications like them, can, for  
22 general purposes be suppressed, and the fact that he wants  
23 to give legal advice, he doesn't have a right to do that.

24 MR. RENZ: I think that's --

25 QUESTION: I just don't know what -- this is

1 just a routine prison disciplinary case once you concede  
2 the main proposition on which we granted the case.

3 MR. RENZ: Well, he certainly has no special  
4 right. I mean, he was hired and retained as a legal  
5 clerk. He was under the practices of the prison permitted  
6 to communicate and assist Mr. Murphy, even though  
7 Mr. Murphy may have had counsel.

8 But the question here is whether he can be  
9 punished by the prison for his communication, and the  
10 prison has taken a rule, expanded its scope to encompass  
11 Mr. Murphy's speech, and they've not articulated a basis  
12 for it.

13 QUESTION: Turner v. Safley dealt with a  
14 constitutional right, I mean, you know, the right to  
15 marry, and you know, rested on the proposition that it is  
16 settled that a prison inmate retains those constitutional  
17 rights that are not inconsistent with his status as a  
18 prisoner. Once you've acknowledged that there is no  
19 constitutional right to provide legal advice to another  
20 prisoner, which was the question presented, how does  
21 Turner v. Safley come into play?

22 MR. RENZ: Well, I disagree with your statement,  
23 Justice Scalia. There is a constitutional right to  
24 provide advice to another prisoner. The question is  
25 whether it survives a Turner analysis. In this case, it

1 survives the Turner analysis.

2 QUESTION: Now you have me confused. I thought  
3 you acknowledged, in response to Justice O'Connor, that  
4 there is no constitutional right to assist another State  
5 prison inmate with a pending court case.

6 MR. RENZ: As I understood Justice O'Connor's  
7 question, it was whether or not there was a special, sort  
8 of elevated right, and I would have to agree --

9 QUESTION: A freestanding First Amendment right  
10 to represent another prisoner, and I thought you told me  
11 no, there is not, that you did not defend --

12 MR. RENZ: Then --

13 QUESTION: -- what it was the Ninth Circuit  
14 panel said.

15 MR. RENZ: Then, Justice O'Connor, I apologize,  
16 because I misunderstood your question. If --

17 QUESTION: Well, are you defending the Ninth  
18 Circuit, or are you not? Do you adopt their reasoning,  
19 and are you prepared to defend it?

20 MR. RENZ: I'm prepared to defend it. If we --

21 QUESTION: Let's rephrase that, because I read  
22 the question to you before and I thought I got a different  
23 answer. Let's make absolutely sure where you stand on  
24 this thing.

25 The question presented is, does the First



1 Amendment to the United States Constitution grant a State  
2 prison inmate an independent and freestanding right to  
3 assist another State prison inmate with a pending court  
4 case even if the State supplies other forms of legal  
5 assistance to the prison inmate?

6 Now, is that a correct statement of the law or  
7 an incorrect statement of the law?

8 MR. RENZ: I -- as I construe it, I think it's a  
9 fair statement, and that is that were Mr. Murphy outside  
10 the prison, he would have an independent and freestanding  
11 right --

12 QUESTION: But he's inside the prison.

13 MR. RENZ: That's correct, and once he is inside  
14 the prison we then engage in the Turner analysis. I'm not  
15 sure if --

16 QUESTION: I'm at a loss to --

17 MR. RENZ: I'm at a loss, too. If we take --  
18 what I'm saying is that we don't have an independent  
19 freestanding right that survives, or stands outside of  
20 Turner. I think that is a correct statement.

21 QUESTION: Well then you really don't defend the  
22 Ninth Circuit's decision.

23 MR. RENZ: To the extent that they create a  
24 right outside of Turner --

25 QUESTION: Okay.

1           MR. RENZ:  -- but they didn't do that.  They  
2 engaged in a straightforward Turner analysis.

3           QUESTION:  They did have a whole paragraph  
4 where -- I thought a whole paragraph where the Ninth  
5 Circuit says there's a special right that every prisoner  
6 has to represent other prisoners.  I mean, it's on -- it's  
7 appendix page 9 here.  It says, the prison discipline of  
8 Murphy implicates the First Amendment right recognized by  
9 this Court in Rizzo, where we held the provision of legal  
10 assistance to fellow inmates is an activity protected by  
11 the First Amendment.  And then they said, several of our  
12 sister circuits have refused to recognize a constitutional  
13 right to assist others.

14           MR. RENZ:  Yes.

15           QUESTION:  It's not a right to get assistance.  
16 It's a right to assist others.  Everybody has a  
17 constitutional right to be a lawyer.

18           MR. RENZ:  Justice Breyer, that's right.

19           QUESTION:  That's how I read it.

20           MR. RENZ:  That's right.

21           QUESTION:  I didn't know you had that right, and  
22 I haven't seen it.

23           MR. RENZ:  But the holding in Rizzo was, Rizzo  
24 was a retaliation case decided at the pleadings stage, and  
25 in that case the prisoner was free to assist other

1 prisoners in his particular prison.

2 QUESTION: Do you think there is a separate,  
3 freestanding right to assist others in pressing legal  
4 claims? That's where A wants to represent B. I'm not  
5 talking about B's right to get assistance. I'm talking  
6 about A's right to go to somebody and say, I want to  
7 represent you. Do you think there's a special,  
8 freestanding, First Amendment right to do that?

9 MR. RENZ: To provide assistance?

10 QUESTION: Yes.

11 MR. RENZ: Not outside of Turner.

12 QUESTION: Oh, I mean -- all right. I didn't  
13 read Turner recently, so don't say not outside of Turner.  
14 Just say yes or no.

15 MR. RENZ: Well, yes, there is in the sense that  
16 we have the same kind of right outside of prison.

17 QUESTION: Is there? I didn't know there was.  
18 I mean, everyone has a right to go assist other people as  
19 a lawyer?

20 MR. RENZ: Not as a lawyer, Your Honor, but of  
21 course --

22 QUESTION: Do you have -- what is there, a  
23 special First Amendment right to be a lawyer? I don't  
24 know what it is.

25 MR. RENZ: Well, if --

1 QUESTION: I'm not saying there isn't one.

2 MR. RENZ: Oh, no, I understand.

3 QUESTION: I'm just saying I'm not familiar with  
4 it.

5 MR. RENZ: If the Brotherhood of Trainmen can  
6 send a union secretary to another trainman and say, don't  
7 settle this case, go see this lawyer, and that is  
8 protected under the First Amendment --

9 QUESTION: You mean, there's a special First  
10 Amendment right to do that? I mean, maybe there is. I  
11 just haven't seen it. I don't know. I'm not familiar  
12 with it. What case -- is there a case that says that?

13 MR. RENZ: It's the Brotherhood of Trainmen,  
14 Your Honor.

15 QUESTION: And there you have a special right to  
16 give somebody legal assistance that's different from your  
17 ordinary First Amendment right?

18 MR. RENZ: No, not different from the ordinary  
19 First Amendment.

20 QUESTION: You don't think that stemmed from  
21 some labor union contract dealing with discipline of  
22 employees and union members?

23 MR. RENZ: I -- in terms of the right of  
24 association?

25 QUESTION: Right.

1           MR. RENZ: I don't think necessarily because of  
2 Primus and --

3           QUESTION: In the private world, outside the  
4 labor contract, no labor union agreement, and you just  
5 have a nonlawyer who wants to give legal advice to  
6 somebody else. Is there some freestanding First Amendment  
7 right to give legal advice? You don't have to be a  
8 lawyer. You have some right to go give legal advice to  
9 somebody?

10          MR. RENZ: I would suggest, Your Honor, that  
11 the -- it depends upon what we call legal advice. Someone  
12 on the street can say, gee, you know, this car ran over  
13 you, your case is worth a lot of money, you should go see  
14 a lawyer. That's legal advice, but it certainly isn't the  
15 sort of legal advice that we'd consider in terms of what  
16 lawyers give.

17          This is much the same character of the advice  
18 that Murphy gave. Gee, I know about these things about  
19 Mr. Galle. You should have your lawyer get a hold of me  
20 on this.

21          QUESTION: That sounds like somebody saying, I'm  
22 a witness, a potential witness for you, but not that I  
23 have a right to give you legal advice.

24          MR. RENZ: And part of that communication from  
25 Mr. Murphy said that exactly, Justice Ginsburg. He said,

1 this happened to me, and that makes him a competent  
2 witness.

3 QUESTION: Well, it seems to me that you're  
4 arguing for some kind of a right for somebody with  
5 relevant information to convey it to someone who's in  
6 trouble, but that's not the theory that the Ninth  
7 Amendment, Ninth Circuit proceeded on, and I'm wondering  
8 where they got it from. Was it in your briefs? Did you  
9 argue that theory to the Ninth Circuit, that there is a  
10 right of one person to represent another?

11 MR. RENZ: I suspect that it may have come from  
12 our argument in which we articulated that the prison has  
13 no legitimate interest in regulating a communication that  
14 is intended for a court outside the prison. I can't say.  
15 I don't see that specifically in the Ninth Circuit's  
16 opinion.

17 QUESTION: Would you object to an opinion from  
18 us that says the following? There are passages in the  
19 Ninth Circuit's opinion that suggests there exists a  
20 special, separate, freestanding right of a prisoner to  
21 represent someone else, even if he doesn't want it, or  
22 whatever. We are not aware of any such right. Of course,  
23 the First Amendment applies to prisons as anywhere else,  
24 and so we've written about that, so go back and consider  
25 it.

1                   MR. RENZ: I think that's a fair statement of  
2 the law, Justice Breyer.

3                   QUESTION: That's what you'd like?

4                   MR. RENZ: Yes.

5                   QUESTION: What about adding, and we're not  
6 certain how you happen to be in Court, because there might  
7 be a problem here of declaratory relief. What you asked  
8 for in your complaint was a declaration that Rule 009 and  
9 022 are too vague, and that this violated -- and that you  
10 can't have a policy in a prison which says content of a  
11 letter is relevant to discipline.

12                  MR. RENZ: Well, now we're talking about  
13 fashioning relief --

14                  QUESTION: Yes.

15                  MR. RENZ: -- and I think that's for the lower  
16 court.

17                  QUESTION: But you'd be happy to be thrown back  
18 into the briar patch, essentially, right?

19                  (Laughter.)

20                  MR. RENZ: I would not be objecting to being  
21 thrown into the briar patch. I think it's fair to say  
22 that the crafting of relief is something that needs to be  
23 done. We haven't done that yet.

24                  QUESTION: Well, there are many other  
25 imaginative solutions of this case that can be devised, I

1       suppose, and this would knock off one of them, anyway.

2               MR. RENZ: I think so. I mean, we're sort of  
3 jumping down the road here when we talk about the form of  
4 relief. I mean, the form of relief hasn't been crafted  
5 yet, and I think that we can do that.

6               QUESTION: Mr. Renz, I don't want to invade your  
7 attorney-client privilege or anything like that, so don't  
8 answer the question if you think it's improper, but I'm  
9 just very puzzled, how is it that you're not challenging  
10 the discipline to your client, when you're challenging the  
11 basis for the discipline?

12              MR. RENZ: Well, as we read Edwards -- well,  
13 Edwards hadn't been decided yet. As we read Heck and  
14 played Heck out it was argued that we were not in a  
15 position to purge the sanction against him. To the extent  
16 that --

17              QUESTION: But the sanction must have adverse  
18 consequences for his future status in prison, doesn't it?

19              MR. RENZ: That would be true, but an opinion  
20 from the district court order of the Ninth Circuit that  
21 said he was -- what he had done was protected by the  
22 Constitution would certainly vitiate that.

23              QUESTION: Not if you're not asking to have it  
24 expunged. It would still be on his record.

25              MR. RENZ: It would be on his record, but --



1                   QUESTION: I'm very puzzled. I just don't  
2 understand.

3                   MR. RENZ: -- the holding of the Court that what  
4 he had done was protected by the Constitution and was  
5 legal and permitted would also be before the parole board  
6 or whoever might see that information.

7                   QUESTION: You could get it expunged later. I  
8 mean, this is a strange manner of litigating, that you  
9 bring a declaratory judgment that something that's been  
10 done to you was unlawful, and then bring a second suit to  
11 undo what was done to you because it has been declared to  
12 be unlawful. I don't understand it. I'm not sure that  
13 the conditions for a declaratory judgment exist when it  
14 is -- I mean, it is equitable relief, and I'm not sure a  
15 court should provide it --

16                   MR. RENZ: Well, we also --

17                   QUESTION: -- when there is available to you  
18 legal relief that will give full satisfaction to your  
19 client.

20                   MR. RENZ: We do seek conjunctive relief in this  
21 case, Judge -- Justice --

22                   QUESTION: Well, I understand that. That's  
23 equitable, but --

24                   MR. RENZ: Yes.

25                   QUESTION: -- I don't think that a court ought

1 to give that if you don't care enough about what's  
2 happened to you to seek to have that undone. I don't  
3 understand that.

4 QUESTION: Several years ago we held in a habeas  
5 corpus case where the person sought declaratory relief,  
6 also from the Ninth Circuit, incidentally, that when  
7 there's a specific remedy provided you can't impose a  
8 declaratory judgment on top of it.

9 MR. RENZ: Uh-huh, but this Court also held in  
10 Edwards v. Ballistock, and that was a prison discipline  
11 case, that the correction of that prison discipline was  
12 not something that was cognizable under section 1983.

13 If there are no further questions, I'll submit  
14 the case.

15 QUESTION: Thank you, Mr. Renz.

16 Mr. Ohler, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF DAVID L. OHLER

18 ON BEHALF OF THE PETITIONERS

19 MR. OHLER: Mr. Chief Justice, I don't have any  
20 rebuttal, but I would be happy to answer any questions.

21 QUESTION: Would you respond to the last point?  
22 Was there any manner in which this litigant could have  
23 gotten the allegedly unlawful imposition of discipline  
24 undone through the courts? Was there no means by which  
25 that could have been done?

1           MR. OHLER: I believe that he could have sought  
2 expungement of the disciplinary infraction.

3           QUESTION: How would that proceed? He'd  
4 challenge it before the prison administration and, if it  
5 was rejected by the prison administration, then he would  
6 go where? Surely the State court, I assume he could have  
7 gone.

8           MR. OHLER: He could have gone to the State  
9 court, yes.

10          QUESTION: And what about Federal court?

11          MR. OHLER: It seems to me that he could have  
12 raised that in this particular case, Your Honor.

13          QUESTION: What if he were now to go back to the  
14 district court and ask to amend the complaint and say,  
15 under my prayer for any other relief, or whatever the  
16 language is, I would like to have this order expunged from  
17 my record? Would that be untimely?

18          MR. OHLER: It seems to me it would be untimely,  
19 Your Honor, but I don't have a firm answer with respect to  
20 the law.

21          CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ohler.

22          The case is submitted.

23          (Whereupon, at 11:46 a.m., the case in the  
24 above-entitled matter was submitted.)

25