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Legal Issues Pertaining to Inmate Telephone Use

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1. Introduction

While the origin of the <u>telephone</u> is still disputed by some, with various persons engaging in fierce partisanship as to whether the true inventor of the device was Johann Philipp Reis, Antonio Meucci, Elisha Gray, Thomas Edison, or Alexander Graham Bell, one thing is certain—today, they are everywhere, and it is estimated that there are almost four billion mobile and fixed line subscribers. Popular culture uniformly references and depicts—in thousands of books, television shows, and movies, the right to make a phone call upon being taken into custody by law enforcement.

Detention and correctional facilities, however, do place limits on the use of the telephone by detainees and prisoners. There have been numerous lawsuits challenging various restrictions placed on access and use of the telephone by correctional officials. This article takes a brief look at some of the common legal issues that have arisen in these cases.

While there are a number of cases mentioned below involving phone calls to or from attorneys and their prisoner/detainee clients, this article does not attempt to be comprehensive in discussing the complex questions that may arise in that context. This article also does not attempt to address special issues that may arise as to accommodations in telephone equipment for inmates with disabilities, such as the hearing impaired, relating to media access to incarcerated persons, or

special administrative measures imposed by the courts in some instances against prisoners accused or convicted of involvement in ongoing terrorist, mob, or gang activities. At the conclusion of this article, there are links to a number of useful resources relevant to prisoner telephone use.

2. Limits on phone use

Both federal and state courts have upheld a variety of reasonable restrictions on prisoner phone use, particularly when justified by legitimate penological interests such as maintaining security, preventing escape, combating the introduction of contraband, avoiding the use of phones for fraudulent and other criminal purposes. Additionally, they have noted that making a phone call is only one means of communicating with others, which can also be accomplished through visitation and through writing or receiving letters, so that restrictions on phone calls do not necessarily equate to a denial of a First Amendment right to communicate.

Prisoners do not have a right to unlimited phone access and use. Accordingly, the assignment of a prisoner with a history of using the phone to carry out criminal activity to a security classification restricting his phone privileges did not violate his free speech rights, a federal appeals court held, and served legitimate interests in public and institutional safety by lowering the possibility that he would use the prison phones for criminal purposes. Perez v. Federal Bureau of Prisons, No. 06-3983, 229 Fed. Appx. 55, 2007 U.S. App. Lexis 8331 (3rd Cir.). Also see Washington v. Reno, #93-6414, 35 F.3d 1093 (6th Cir. 1994), upholding Federal Bureau of Prisons regulations on inmate phone calls on a new direct-dial (as opposed to collect call) phone system, and rejecting arguments that they violated the First Amendment rights of either prisoners or the persons called.

In <u>Arney v. Simmons</u>, #95-3036, 26 F.Supp.2d 1288 (D. Kan. 1998), a court upheld a rule restricting prisoners to calling persons on a 10-person telephone call list, modifiable at 120-day intervals, as reasonable. See also <u>Pope v. Hightower</u>, 98-6944, 101 F.3d 1382 (11th Cir. 1996), ruling that telephone rules restricting prisoners to making calls only to up to ten persons on a list did not violate First Amendment rights to communicate with friends and family, and <u>Benzel v. Grammer</u>, #88-1827, 869 F.2d 1105 (8th Cir. 1989), <u>cert. denied</u>, #89-5042, 493 U.S. 895 (1989), finding that a prisoner had no First Amendment right to phone non-attorney, non-relative males.

Sometimes, specific state statutes or regulations may arguably provide detainees or prisoners with particular phone call privileges. In <u>Valdez v. Rosenbaum</u>, #01-35300, 302 F.3d 1039 (9th Cir. 2002), however, a federal appeals court ruled that a federal pretrial detainee being held in an Alaska county jail did not have a constitutionally protected liberty interest in telephone usage on the basis of an

Alaska state statute, so that restrictions that were imposed by the jail on his telephone access did not violate his due process or First Amendment rights.

The restrictions were imposed on the basis of a request by a federal prosecutor, which resulted in the detainee's phone access being suspended because five new defendants who were allegedly involved in the drug smuggling conspiracy that the detainee was accused of leading were about to be indicted. It was argued that allowing him telephone access might result in a danger to those seeking to execute arrest warrants on these suspects.

In response, the state officials placed the detainee in administrative segregation, where he was not permitted to make or receive any telephone calls except one a day with his attorney. In order to call his attorney, he also had to submit a written request (he was, however, permitted to confer with his attorney in person at the jail and to receive in-person visits by friends and family). The phone restrictions were continued for approximately four-and-a-half months, during which several of the fugitives sought were arrested. The Assistant U.S. Attorney had the phone restrictions lifted as "moot" after one of the other co-defendants was released on bail.

The federal appeals court rejected the argument that an Alaska state statute created a constitutionally protected liberty interest in telephone access. Alaska Stat. Sec. 33.30.231(a), the court noted, merely provides for "reasonable access" to a telephone, and gives prison officials discretion to determine what is reasonable access under the circumstances. This did not mandate a particular result or give any prisoner a "due process" constitutional right to telephone access.

As for the prisoner's First Amendment claim, the court noted that the use of a telephone only provides one means of exercising this right, and the plaintiff had adequate opportunities to communicate by the receipt of visitors, the sending and receiving of mail, and the ability to communicate daily with his attorney both in person and by telephone. Allowing him telephone access in an unrestricted manner would have required the defendants to allocate additional resources to monitor his telephone conversations to ensure that he did not 'try to tip off his cohorts."

Similarly, in Whitfield v. Dicker, #01-3605, 41 Fed. Appx. 6 (8th Cir. 2002), the court found that limits on a pretrial detainee's telephone privileges in segregation before and after disciplinary hearings did not violate his First Amendment rights. The detainee did not show that his placement in segregation before and after hearings was for a punitive reason rather than for reasons of institutional security. He also did not show that any actual injury was caused by his having to use the telephone "while it was noisy or in the evening," instead of directly before and after hearings.

See also <u>Harrill v. Blount Co., Tenn.</u>, #94-5284, 55 F.3d 1123 (6th Cir. 1995), stating that even if the refusal to allow an arrestee to make a phone call to her father violated a Tennessee state statute, it did not violate her federal constitutional rights; so that defendant law enforcement officers were entitled to qualified immunity from liability.

In <u>Carlo v. City of Chino</u>, 95-55798, 105 F.3d 493 (9th Cir. 1997), however, a federal appeals court ruled that a jail watch commander was not entitled to qualified immunity for failure to allow an arrestee to place a phone call; finding that a California state statute clearly established the right to make such calls.

Sometimes, a prisoner claims that use of a phone is necessary to protect other rights, such as the right to property. In one case, <u>King v. Fed. Bureau of Prisons</u>, No. 03-2431, 415 F.3d 634, 2005 U.S. App. Lexis 14092 (7th Cir.), a federal appeals court reinstated a federal prisoner's lawsuit against a prison warden claiming that his rights were violated by a prohibition on him calling his stockbroker to order that a stock be sold in certain circumstances.

The case involved an inmate at a federal prison in Illinois who sued both the warden and the Bureau of Prisons, arguing that they had violated his federal constitutional rights when he was forbidden to phone his stockbroker. The trial court dismissed his claims as frivolous, but the appeals court found that this determination was premature.

He was the owner of certain stocks that he wanted to instruct his broker to sell if their prices fell below specified levels. The prison told him that he was forbidden to call the broker. A Bureau of Prisons regulation allowed prisoners to submit a list of thirty telephone numbers that they want to call. The prison may remove a number from the list if it determines that allowing the prisoner to call the number would endanger the welfare of the prison or the public.

In this case, however, the procedure provided to remove such a number, as specified in 28 C.F.R. Sec. 540.101(a)(3) was allegedly not followed. Instead, the prisoner was evidently allowed to make one call to his stockbroker and then issued a disciplinary citation for misusing his telephone privileges, "which has discouraged him from repeating the attempt."

The prison argued that calling a stockbroker was improper because a prisoner is not allowed "to conduct a business," pursuant to 28 C.F.R. Sec. 541.13, so that this was a permissible restriction on the prisoner's phone privileges. But the appeals court rejected this, finding that this was not a justification for the prison's policy, since the prison denied that it has tried to prevent the prisoner from communicating by mail the same information that, communicated by phone, it calls the conduct of business.

The appeals court also commented that, "unless one is engaged in a financial business," ordering a broker to sell stock is "no more the conduct of a business than asking a real estate broker to sell one's house is." Millions of people, the court noted, own stock despite not being engaged in the securities business. The "no business" regulation itself states that it does not prohibit correspondence necessary to enable a prisoner to protect property and funds that were legitimately the prisoner's at the time of their commitment. Under this rationale, a prisoner can correspond about refinancing an existing mortgage or sign insurance papers, but may not operate a mortgage or insurance business while incarcerated.

The appeals court further found, however, that even if the prison acted arbitrarily, "which so far as appears it is," the prisoner had no constitutional claim unless the action deprived him of a constitutional right. It rejected the prisoner's argument that not letting him talk to his broker on the phone violated his freedom of speech, reasoning that an order to sell, "like a threat intended to intimidate," is not the kind of verbal act that the First Amendment protects. "It has no connection to the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial."

The prisoner also argued, however, that by preventing prompt communication with his broker, the prison deprived him of his property. He wanted to be able to sell some of his stocks promptly if their price fell, "lest the price continue falling." The court stated that if the prison is allowing the prisoner to correspond by mail with his broker, the inability to phone the broker might impair his ability to protect his property by delaying his transactions, "but it is not destroying that ability."

How grave the impairment is we cannot say on this limited record; it is conceivable, however, that forbidding King to telephone his broker could be an actionable deprivation of property, and his claim was therefore prematurely dismissed. We add that the impairment is not so grave that it could not readily be justified by security or other concerns, but, to repeat, these have not been argued.

On remand, the appeals court found, it also needed to be clarified whether the prison was also forbidding the plaintiff to contact his broker by mail or whether, as the prison claimed, he was free to do so.

3. Discipline for telephone rule violations

Disciplining a prisoner for alleged violations of rules concerning telephone access and use is subject to due process requirements.

In <u>Cook v. Warden, Fort Dix Correctional Institution</u>, No. 06-1054, 241 Fed. Appx. 828, 2007 U.S. App. Lexis 14772 (3rd Cir.), the court found that a prisoner

disciplined for engaging in a prohibited third party telephone call at a New Jersey prison had sufficient written material both from that facility and from a Pennsylvania prison at which he had previously been housed, to give him notice that the call he made was forbidden. The use of the Pennsylvania prison's handbook at the disciplinary hearing, rather than the New Jersey prison's handbook, did not violate his due process rights. Further, the hearing officer wrote a detailed report stating the evidence relied on and the reasons for the discipline.

On the other hand, the imposition of discipline on a prisoner for violating the telephone policy by phoning a former inmate on home confinement was a violation of his due process rights when he did not have fair notice that the policy applied to phoning former prisoners confined at home as well as to those now in halfway houses. Seehausen v. Van Buren, #02-378, 243 F. Supp. 2d 1165 (D. Ore. 2002).

In another case, the court found that a prisoner's unauthorized use of a cell phone violated prison regulations barring actions which circumvented telephone call monitoring procedures in place at the facility, and that the loss of visitation privileges imposed on him was an appropriate sanction when he had obtained the unauthorized cell phone from a visitor. <u>Rutledge v. Attorney General of the U.S.</u>, No. 05-3160, 163 Fed. Appx. 120 (3rd Cir. 2006).

In <u>Sinde v. Gerlinski</u>, #3:02-1043, 252 F. Supp. 2d 144 (M.D. Pa. 2003), the court found that "some evidence" supported a disciplinary finding that a prisoner had used a clandestine cellular telephone without authorization, when one number called was only on his approved calling list and the other inmates, who had admittedly used the phone, identified him as among the persons who had used it.

Because there is no absolute right to telephone access, revocation of a prisoner's phone privileges is an available sanction in discipline cases involving other misconduct. In Ziegler v. Martin, No. 01-2677, 47 Fed. Appx. 336 (6th Cir. 2002), the court held that correctional officials' denial of a prisoner's access to yard exercise and telephone access for approximately one month when he was classified as having refused a job assignment was not a violation of his rights. After the prisoner pursued the proper avenues to get himself classified as medically unable to work, his access to yard exercise and telephone access was restored.

4. Foreign language phone calls

Correctional facilities often monitor prisoner phone calls made to friends and family, for security purposes. What about prisoners whose calls are made in a

foreign language, which may not be understood by correctional personnel doing the monitoring? In <u>Boriboune v. Litscher</u>, No. 03-1747, 91 Fed. Appx. 498, 2003 U.S. App. Lexis 26540 (7th Cir.), the court ruled that barring prisoners from making phone calls in languages other than English without prior authorization is not a violation of First Amendment rights.

The case involved a Wisconsin prisoner who is originally from Laos. He was issued three misconduct reports for speaking to his mother on the phone in his native language, Lao. Under a policy at the prison, inmates are prohibited from speaking on the phone in a language other than English without the prior express approval of a social worker. The prisoner was found guilty on two of the three misconduct reports (with the first downgraded to warning), and was placed in disciplinary segregation with the loss of telephone privileges for a time as a result.

The prisoner had followed the procedure and asked for permission from the social worker, receiving permission after a three-month delay, but being issued the three misconduct reports during that three-month period. He then filed a federal civil rights lawsuit claiming that the policy violated his First Amendment rights.

The federal appeals court acknowledged that "prisoners have a right under the First Amendment to communicate with others outside the prison," but also noted that there was some doubt that this amounted to an "unqualified right for a prisoner to have access to a telephone." Even if there is some First Amendment right to telephone access, the court commented, there are limits to that right which may be imposed as long as the regulation is "reasonably related to a legitimate penological interest."

In this case, the policy prohibiting conversations in other languages without prior approval was justified by the prison's need to control "secret means of communication" to help "prevent conspiracies and escapes." This, the court reasoned, "is certainly a legitimate penological concern."

The court pointed out that the prison policy did not outright ban phone calls in languages other than English, but only required that a prisoner seek permission ahead of time before speaking another language on the telephone.

This would presumably enable the prison to monitor his calls in a manner equivalent to the monitoring of English-language calls, if it thought this was advisable. This policy also incorporates reasonable limits: it does not, for example, affect Boriboune's [the prisoner] ability to receive visits or mail from his family and friends.

The prisoner pointed to an earlier decision, <u>Kikumura v. Turner</u>, #93-1847, 28 F.3d 592 (7th. 1994), which ruled unconstitutional a policy barring prisoners from receiving materials written in any language other than English. The court found

that the rule in that case would only apply when a prison "makes no effort at all to accommodate the constitutional rights of prisoners native in languages other than English."

In this case, however, the policy includes a reasonable accommodation, permission from a social worker, "that allows a prisoner to speak in a foreign language on the telephone."

5. Monitoring of conversations

Courts have generally upheld properly adopted and announced policies and practice of monitoring prisoner's non-attorney telephone conversations for security purposes.

In <u>Commonwealth v. Ennis</u>, #SJC-08858, 785 N.E.2d 677 (Mass. 2003), Department of Corrections telephone access regulations prohibiting three way or conference calls from correctional facility phones were found to have been properly adopted to prevent the use of phone systems for illegal activities.

Statements that a defendant made, after being added to a phone call from an inmate to a co-defendant which the Department was monitoring, were not "unlawfully" intercepted, when the Department did announce to the initial parties to the call that their conversation would be recorded and attempted to prevent additional parties from being added to the call.

Other cases upholding the monitoring of inmate phone calls include:

- * <u>Arney v. Simmons</u>, #05-3036, 26 F.Supp.2d 1288 (D. Kan. 1998), finding that a rule providing for the monitoring and recording of calls was reasonably related to preventing escapes, introduction of contraband, and the perpetration of frauds.
- * Gilday v. Dubois, 96-1831, 124 F.3d 277 (1st Cir. 1997), ruling that monitoring and recording of prisoner telephone calls did not constitute "interception" of calls in violation of a Massachusetts state law when prisoners and those they talked to on the phone were both aware that calls would be recorded. The system also did not violate federal wiretap laws since the parties receiving calls implicitly consented to recording by accepting the call after hearing a prerecording message warning them of the monitoring and recording.
- * <u>Cacicio v. Sec. of Public Safety</u>, #SJC-07078, 665 N.E.2d 85 (Mass. 1996), finding that prison regulations which provided for the recording of all inmate

phone calls other than those to attorneys did not violate either the Fourth Amendment or the provisions of the Massachusetts state constitution.

6. Access to courts and attorneys

Communications between prisoners or detainees and attorneys raise a large number of special issues, relating to the right to counsel and the constitutional right of access to the courts, as well as the privacy and confidentiality of attorney-client communications. The brief discussion below does not attempt to be exhaustive of the issues that arise in this context.

A necessary preface which must be stated to any consideration of this area is that federal courts in recent years have rejected prisoner claims of denial of access to the courts if the plaintiff is unable to show that the claimed deprivation or denial of privileges by correctional officials can be shown to have caused actual injury to a pending case. See Robinson v. Gunja, #03-1262, 92 Fed. Appx. 624 (10th Cir. 2004), ruling that a prisoner could not pursue a federal civil rights claim over alleged interference with his right of access to the courts based on the warden's decision to end his telephone access to legal personnel. The prisoner failed to show that this resulted in prejudice to his ability to pursue non-frivolous litigation. Additionally, the prisoner was not denied access to a telephone system, which was monitored, and failed to show that he had submitted a request form to make an unmonitored phone call to legal personnel on that system.

For a discussion of more general case law in this area, see <u>Access to Courts and Legal Information</u>, 2007 (1) AELE Mo. L.J. 301.

That being said, there are court decisions stating that communicating privately with attorneys by phone may be essential to access to the courts and to the right to counsel. See Murphy v. Waller, #94-1820, 51 F.3d 714 (7th Cir. 1995) ("Restrictions on a detainee's telephone privileges that prevented him from contacting his attorney violate the Sixth Amendment right to counsel. . . In certain limited circumstances, unreasonable restrictions on a detainee's access to a telephone may also violate the Fourteenth Amendment.").

Also see: <u>Johnson-El v. Schoemehl</u>, #88-1252, 878 F.2d 1043, 1051 (8th Cir.1989) (ruling that prisoners' challenges to limits on the time and number of phone calls were sufficient to state an arguable claim for violation of their right to counsel), and <u>Tucker v. Randall</u>, #89-2812, 948 F.2d 388 (7th Cir. 1991)(stating that denying a pre-trial detainee telephone access to his lawyer for four days could implicate the Sixth Amendment)

Other cases of interest in this area include:

- * Miller v. Carlson, #74-382, 401 F. Supp. 835 (M.D. Fla. 1975), aff'd & modified on other grounds, 563 F.2d 741 (5th Cir. 1977), in which the court issued an injunction barring the monitoring of prisoners' phone calls to their attorneys.
- * In re Ron Grimes, #A040219, 208 Cal. App. 3d 1175 (1989), in which the court found that a change by a county jail from coin-operated to collect-only calls could violate the constitutional rights of detainees because some private attorneys, as well as the public defender's office and some other county departments would not accept collect calls.
- * Simpson v. Gallant, #02-15, 223 F. Supp. 2d 286 (D. Maine. 2002), ruling that a jail's refusal to allow pretrial detainee access to a telephone to arrange for bail after he was placed in disciplinary segregation for violations of jail rules did not violate his Fourteenth Amendment due process rights. The detainee still had the ability to use the mail and to meet with his attorney in relation to bail issues.

7. Relevant Resources

- The Federal <u>Bureau of Prisons</u> (BOP) has <u>regulations</u> which govern prisoner phone access and use. 28 C.F.R. Secs. 540.100-540.105. Topics covered include procedures for phone access and use, monitoring of inmate telephone calls, inmate telephone calls to attorneys, responsibility for inmate misuse of telephones, and expenses of inmate telephone use. The BOP has also issued a <u>Program Statement Number 5264.07</u> containing additional details of its policies on inmate phone access and use.
- "Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges," USDOJ/OIG Special Report (August 1999).
- The South Dakota Department of Corrections, on its website, addresses <u>frequently asked questions</u> about inmate telephone access.
- Arizona Department of Corrections <u>policy</u> on prisoner phone calls.
- New Hampshire Department of Corrections <u>frequently asked questions</u> about prisoner phone calls.
- "Dialing While Incarcerated: Calling for Uniformity Among Prison
 Telephone Regulations," by Nicholas H. Weil, 19 Journal of Law & Policy
 427 (2005), published by Washington University Law School, St. Louis,
 Missouri.
- Connecticut Department of Correction, <u>Administrative Directive</u> on Inmate Communications, including telephone calls effective August 1, 2005
- Texas Dept. of Criminal Justice, <u>Offender Orientation Handbook</u>, § J. Telephone Calls (2004)("It is the policy of the TDCJ to allow eligible

offenders to make telephone calls. An offender's use of the telephone is an earned privilege based on a good conduct and work record.")

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