AELE Monthly Law Journal

ISSN 1935-0007
Cite as: 2016 (12) AELE Mo. L. J. 301
Jail & Prisoner Law Section – December 2016

Prisoners and Foreign Language Mail

❖ Introduction

Given the number of prisoners and detainees in U.S. prisons and jails, it is not a surprise that there are significant numbers of them for whom English is a second language, and even who primarily or only speak or read another language. Such prisoners may wish to send or receive mail in those languages to family and friends, and to receive foreign language publications. A wide variety of languages are involved, some of which, such as Spanish, are widely used in the U.S. and some of which are much rarer, even if spoken by millions on other continents.

This article, after briefly reviewing the general legal rules concerning prisoner mail, explores the question of whether there is a right of prisoners to send and receive foreign language mail. That is followed by a discussion of some of the limitations on any such right as well as a look at special circumstances, such as suspected involvement in terrorism, in which courts have approved stricter restrictions. The article ends with a listing of useful and relevant resources and references.

❖ General Rules Concerning Mail

Prisoners' rights to send and receive mail and to receive publications stems from the First Amendment. In *Pell v. Procunier*, #73-918, 417 U.S. 817 (1974), the U.S. Supreme Court found that prison inmates retain First Amendment rights to the extent that they are not inconsistent with their status as prisoners or with the legitimate penological objectives of

the corrections system. That case, however, involved contact between the prisoners and the press, such as inmate interviews, rather than having a focus on prisoner mail. The U.S. Supreme Court has, however, addressed legal issues concerning prisoner mail in a number of decisions. Procunier v. Martinez, #72-1465, 416 U.S. 396 (1974), decided the same year as *Pell v. Procunier*, addressed a California correctional practice of reading and censoring incoming and outgoing correspondence sent and received by prisoners.

Correctional officials censored or removed mail which was critical of facility operations, or which complained of correctional conditions or discussed grievances, as well as letters dealing with or discussing religious and political issues, and letters thought to be "lewd, obscene, or defamatory." All incoming and outgoing mail prisoners sent or received was subjected to this censorship.

The Supreme Court found these rules to be overbroad and unnecessary, while recognizing that there are legitimate interests in maintaining institutional order and discipline, and security interests in preventing escape and encouraging prisoners' rehabilitation.

The Court found that, in order to be supportable, such regulations must further an "important or substantial governmental interest unrelated to the suppression of expression," and the limitation of First Amendment freedoms must be no greater than is "necessary or essential to the protection of the particular governmental interest involved."

One of the most important Supreme Court cases on prison regulations, establishing some very broad general principles, is *Turner v. Safley*, #85-1384, 482 U.S. 78 (1987). This arose in the context of restrictions on correspondence between inmates, rather than with persons in the outside world.

In *Turner*, Missouri inmates challenged a state prison regulation that allowed correspondence between immediate family members who are inmates at different institutions within the state correctional system, and between inmates "concerning legal matters," but which allowed other inmate correspondence only if each inmate's classification/treatment team deemed it in the "best interests" of the parties.

While recognizing that prisoner correspondence implicates First Amendment rights, the Supreme Court rejected the argument that "strict scrutiny" or a very high standard of justification must be found to justify prison regulations that impinge on such prisoner constitutional rights.

Instead, the Court ruled, in a decision that applies to issues concerning prisoner mail, and to prison rules and regulations generally, that such regulations need only be "reasonably related" to "legitimate" penological interests.

To determine whether a regulation is reasonable, the Court stated, factors to be considered include:

> 1) whether there is a "valid" and rational connection between the regulation and a legitimate and neutral governmental interest put forward to justify it, which connection cannot be so remote as to render the regulation "arbitrary" or "irrational;"
>
> 2) whether there are alternative means of exercising the asserted constitutional right that remain open to prisoners, which alternatives, if they exist, will require a measure of judicial deference to the correctional officials' expertise;
>
> 3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, on inmates' liberty, and on the allocation of limited prison resources, which impact, if substantial, will require particular deference to correctional officials; and
>
> 4) whether the regulation represents an "exaggerated response" to prison concerns, the existence of a ready alternative that fully accommodates the prisoner's rights at minimal costs to valid penological interests being evidence of unreasonableness.

This standard does not give prison officials unbridled discretion to restrict prison correspondence, but it merely requires that there be a "rational" connection to legitimate governmental interests, such as prison security, and gives considerable deference to the expertise of correctional officials in operating correctional facilities.

In *Turner*, the Supreme Court found, the Missouri state inmate correspondence regulation at issue was reasonable and facially valid. It was "logically related" to prison officials' legitimate security concerns, which included that mail between prisons can be used to communicate escape plans, to arrange violent acts, and to foster prison gang activities.

Additionally, the regulation in question did not deprive the prisoners of all means of expression, but merely prevented communication with a limited group of people—other prisoners—with whom the officials have "particular cause to be concerned."

The Court found that the regulation was entitled to deference because of the significant impact that correspondence between prisoners can have on the liberty and safety of other prisoners and prison personnel, given testimony by prison officials that such mail can facilitate the development of informal organizations that threaten safety and security at correctional institutions.

The Court also noted that there was no "obvious, easy alternative" to the regulation, because monitoring correspondence between inmates would impose a considerable burden in terms of cost and the burden on staff resources needed for "item-by-item" censorship, not to mention creating a risk of missing some dangerous communications. The regulation, further, was "content neutral," and, in summary, did not unconstitutionally restrict prisoners' First Amendment rights.

These are the legal standards that also apply to analyzing any right prisoners might have to send and receive foreign language mail and publications.

❖ A Right to Send and Receive Foreign Language Mail?

Many prisons and jails have attempted to restrict prisoners' ability to communicate in foreign languages by sending or receiving mail in these languages or receiving publications printed in those languages. A common justification has been the argument that it might allow prisoners to engage in planning escapes or other criminal acts, or receive material provoking disorder and violence in facilities, but that correctional employees would have difficulty recognizing such material because of their inability to comprehend what was written or said.

Prisoners and their attorneys have argued that such restrictions may constitute discrimination against minority groups who speak foreign languages, particularly those who do not have a good mastery of English and as a result have trouble communicating in it when they try to correspond with friends and family who themselves may not know English.

This is a special concern with prisoners who are foreign nationals. Further, for some use of another language may be an important element of their religious practice or cultural identity. For Jews, for example, the use of Hebrew is important to religious identity, as is Arabic for many Muslims.

Taking these arguments into consideration, courts have long rejected complete blanket denials of prisoner correspondence and communication in foreign languages.

In *Kikumura v. Turner*, #93-1847, 28 F.3d 592 (7th Cir. 1994), for instance, the court held that a blanket refusal to permit inmates to communicate or receive publications in a language other than English is unconstitutional. The court implied, however, that the prisons may still refuse to allow it if they have made a good faith effort to translate the materials or have them reviewed by a prison employee or other available resource who

speaks the language, and found that such translation or review is either not possible or much too costly.

But such an exploration of the possibility of review or translation must be conducted on a case-by-case basis, rather than imposing a uniform blanket prohibition without bothering to make such an analysis.

In this case, the federal appeals court ordered further proceedings on a prisoner's claims for injunctive and declaratory relief against an alleged prison policy of excluding all Japanese language mail without any effort to screen or translate it. Prison officials were entitled to qualified immunity from damage liability; however, since the right to receive foreign language mail was not then "clearly established."

Similarly in *Thongvanh v. Thalacker*, #93-1788, 17 F.3d 256 (8th Cir. 1994). a federal appeals court upheld a $4,000 jury award to a prisoner whose native language was Lao, in a suit challenging a blanket prison rule requiring that all his correspondence be in English.

Spanish-speaking inmates were excepted from the "English only" policy and were allowed to correspond in Spanish because a prison employee, fluent in Spanish, was readily available to translate. Other exceptions have been made to the policy. The plaintiff, himself, was granted permission to correspond with his parents and grandparents in Lao. Arrangements were made to send this excepted correspondence to the Iowa Refugee Service Center in Des Moines, Iowa, for translation.

In this case, there was also evidence that a German inmate (as well as the Spanish-speaking ones) was excepted from the "English only" rule. While translating the letters was certainly more convenient for the facility than correspondence in Lao, there was a ready alternative with respect to translating Lao correspondence at the Iowa Refugee Service Center.

There was no explanation as to why all correspondence in Lao could not have been routed through the Refugee Service Center. Prison officials testified that the Lao-to-English translation service provided by the Refugee Service Center was cost-free, thus imposing no financial burden**.** Furthermore, the testimony of prison officials was that, while all correspondence was scanned and checked for contraband, only randomly selected letters—whether in English or another language— were actually read by prison officials.

❖ Limitations

Putting aside blanket restrictions, courts have sometimes upheld limitations on foreign language correspondence based on heavy financial or staffing burdens or the unavailability of resources, among other practical matters.

In *Yang v. MO Dep't of Corr.*, #15-2231, 2016 U.S. App. Lexis 14924 (8th Cir.), an inmate claimed that correctional officials violated his rights by censoring his Mandarin Chinese-language mail and denying him the ability to make phone calls to China. A federal appeals court upheld the rejection of his First Amendment claim, as the restrictions were reasonably related to legitimate concerns about security.

The regulations were neutral in furthering a substantial governmental interest unrelated to the suppression of expression. His equal protection claim was rejected as there was no evidence that the different treatment of Chinese speaking inmates from Spanish speaking inmates was motivated by race or national origin or was a pretext for discrimination.

The government was not required to bear the heavy financial burden of paying for Chinese translations. The prisoner had alternative means of communicating with outsiders. He retained the ability to make domestic calls, send correspondence in English, and receive visitors.

The prisoner objected that his family in China could not understand English, and that he could not fully express by writing in English. But an alternative "need not be ideal," the court commented. The plaintiff's own pro se pleadings in the lawsuit itself demonstrated that he could communicate adequately in English, and he testified that he believed that there was a translation service in the city where his family resides where his letters could be translated at their expense, an expense no constitutional provision required the prison to bear.

In *Ortiz v. Fort Dodge Correctional Facility*, #03-1868, 2004 U.S. App. Lexis 10200 (8th Cir.), the court found that a prison did not violate an inmate's rights by limiting his ability to correspond with family members in Spanish. He was fluent in English, and was allowed to correspond in Spanish with a family member who only knew that language. A rule limiting correspondence in foreign languages, subsequently abandoned, had been reasonably related to legitimate security concerns.

The case involved an Iowa inmate who was originally from Mexico City, Mexico. He had a native language of Spanish, but he was also fluent in English. In accordance with prison policy, he submitted a formal request to write letters in Spanish to various members of his family. At the time, prison policy allowed written communication in a foreign language if that was the only language in which the inmate could communicate.

The prisoner's unit manager allowed him to write letters to his sister in Mexico City in Spanish because that was the only language in which communication could take place, but denied his request as to all other family members, including his mother, who lived in the

U.S. The prisoner was also not allowed to receive letters in Spanish from those family members. He filed a grievance challenging the unit manager's application of the rule. While this grievance was pending, the prison changed its policy and permitted all inmates to correspond "in their preferred language," so that the prisoner was allowed to correspond in Spanish with all family members.

He filed a federal civil rights lawsuit against the facility and the unit manager asking for compensatory and punitive damages for the First Amendment violation he claimed occurred during the three months that he was unable to write or receive letters to or from certain family members in Spanish. The trial court found that the former policy of preventing such communications as part of monitoring prison mail was "reasonably related to a penological interest" and therefore found in favor of the defendants.

A federal appeals court upheld that result. While prisoners have a right to send and receive mail, prison officials have a legitimate interest in monitoring that mail for security reasons. The fact that the plaintiff prisoner identified several avenues by which an inmate could still plan an escape route or smuggle items into the prison even with the imposition of the English-only rule (such as speaking in Spanish on the phone) did not mean that the policy "was not rationally related to lessening those risks," the court reasoned.

The appeals court also noted that the facility changed its policy because of an "influx" of foreign-speaking inmates. "Instead of indicating that its policy was never related to a legitimate interest," as the prisoner suggested, the court stated, "we view this shift in policy as a constructive and continuing attempt" by the prison to "balance competing First Amendment concerns with safety concerns."

The prisoner had other avenues to communicate with family members, including in-person visits and phone calls. The appeals court also noted that the plaintiff prisoner did not identify a "cost-free way" for the prison to accommodate him.

He did not introduce any evidence of what the cost of hiring an interpreter would have been, whether the prison had any Spanish-speaking employees, whether other prisons could have interpreted the letters, or whether a social service agency was willing to translate the letters on the prison's behalf. Without proof of such a ready alternative, the prisoner did not show that accommodation of his request would not be burdensome.

Similarly, in *Sisneros v. Nix*, #95-1914, 95 F.3d 749 (8th Cir. 1996), a court found that prohibiting a prisoner from corresponding with relatives in Spanish and Apache languages did not violate his constitutional rights. An English-only rule was based on legitimate security concerns and hiring interpreters to translate foreign language mail would have

been unduly burdensome. Prison officials were, however, liable for the retaliatory transfer of the prisoner for filing grievances and lawsuits concerning the policy.

❖ Special Circumstances

Under some special circumstances, correctional officials and other government agencies may have a heightened interest in tighter restrictions on foreign language communication. A prime example of this is when a prisoner is suspected of or known to be involved in terrorist activities.

This is illustrated by *Al-Owhali v. Holder*, #11-1274, 687 F.3d 1236 (10th Cir. 2012), in which a prisoner convicted of terrorism-related crimes involving the 1998 bombing of the U.S. embassy in Kenya was subjected to special administrative measures forbidding him from receiving two Arabic language newspapers he had previously received and prohibiting him from corresponding with his nieces and nephews.

A federal appeals court rejected a claim that these measures violated his First Amendment rights. The government's interest in restricting his rights was reasonably related to legitimate penological interests, and the prisoner had the burden of showing that there was no legitimate, rational basis for the increased communication restrictions.

Given the belief that the prisoner had a "proclivity for violence" based on his conviction for acts of terrorism, the warden expressed the concern that "communications or contacts with persons could result in death or serious bodily injury to persons."

This was a rational basis for the restrictions. The restriction on the Arabic newspaper was similarly upheld as justified by the need to prevent him from receiving information and instructions in a manner difficult to detect.

❖ Resources

The following are some useful resources related to the subject of this article.

- 28 C.F.R. 540. Federal Bureau of Prisons regulations handling prisoner mail.
- Program Statement 5800.16, Mail Management Manual. Federal Bureau of Prisons.
- Inmate Mail. Wyoming Department of Corrections.
- Mail, AELE Case Summaries.
- Policy Directive: Prisoner Mail. State of Michigan.
- Computers, E-Mail, & Internet Issues**.** AELE Case Summaries.

- Telephone Access and Use**.** AELE Case Summaries.

❖ **Prior Relevant Monthly Law Journal Articles**

- Prisoner Mail Legal Issues, 2007 (6) AELE Mo. L.J. 301.
- Prisoners and Sexually Explicit Materials, 2010 (2) AELE Mo. L. J. 301.
- Legal Issues Pertaining to Inmate Telephone Use, 2008 (2) AELE Mo. L.J. 301.
- Prisoners, Parolees, Sex Offenders, Computers, and the Internet - Part 1, 2015 (5) AELE Mo. L. J. 301.
- Prisoners, Parolees, Sex Offenders, Computers, and the Internet - Part 2, 2015 (6) AELE Mo. L. J. 301.

❖ **References:** (*Chronological*)

1. The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates, U.S. Department of Justice, Office of the Inspector General, Evaluation and Inspections Division (September 2006 Report Number I-2006-009).

AELE Monthly Law Journal

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