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Constitutionality of Postcard-Only Policy for Incoming Prisoner Mail

❖ Introduction

A number of facilities, including some county jails, have implemented policies which attempt to restrict incoming non-privileged (i.e., other than mail from attorneys, courts, and government agencies) prisoner and detainee mail to postcards only, rather than allowing traditional multi-page letters in closed envelopes.

Such policies have proved to be controversial and have faced strenuous opposition from prisoners' rights advocates, as well as some lawsuits which have resulted in policies in some jurisdictions being struck down. See, for example, *Prison Legal News v. Columbia County*, #3:12-cv-00071, 942 F. Supp. 2d 1068 (D. Ore. 2013), in which a federal district court judge ruled that a county jail that adopted a rule that restricted incoming and outgoing personal inmate mail to only postcards was unconstitutional under the First Amendment. The court ruled that it violated the rights of the inmates themselves, individuals who write to them, and the publishers of the Prison Legal News publication. The interest in keeping contraband out of the

facility and reducing costs in screening mail did not outweigh the free speech rights involved.

Most recently, a federal appeals court in *Simpson v. County of Cape Girardeau*, #17-3782, 2018 U.S. App. Lexis 13 (8th Cir.), has upheld the constitutionality of such a policy under particular circumstances. This brief article first examines some general principles concerning prisoner mail, and then examines the facts of the Simpson case and the reasoning of the court as to why the policy withstood constitutional scrutiny. At the end of the article, there is a listing of useful and relevant resources and references.

❖ Some General Principles

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, 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 inmates, which alternatives, if they exist, will require a measure of judicial deference to the corrections 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 corrections 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 de minimis 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.

In *Thornburgh v. Abbott*, #87-1244, 490 U.S. 401 (1989), the U.S. Supreme Court found that the Turner analysis applies to restrictions on the rights of inmates *and* outsiders, and "any attempt to forge separate standards for cases implicating the rights of outsiders is out of step" with the supporting cases the Court expressly relied on in Turner.

❖ Facts

In *Simpson v. County of Cape Girardeau*, #17-3782, 2018 U.S. App. Lexis 13 (8th Cir.), a woman claimed that a county jail's new mail policy that permitted only postcards for incoming non-privileged mail violated her First and Fourteenth Amendment rights by impermissibly restricting her ability to communicate with her son who was then an inmate there.

At trial, she attempted to introduce incoming-mail policies from other institutions that permit inmates to receive multi-page letters in envelopes as evidence that the postcard-only policy was unreasonable. The district court excluded those policies as irrelevant and held that the postcard-only policy did not violate her constitutional rights.

When her son was first imprisoned at Cape Girardeau County Jail in Missouri, the jail had no restrictions on the length or number of letters that inmates received, and she wrote him several lengthy letters a week that included family photos, drawings by his nephew, and various pieces of personal information. On January 1, 2014, the county jail implemented a new incoming-mail policy requiring non-privileged mail to be sent on postcards:

> All non-privileged correspondence entering the Jail Facility must be post cards [sic]
>
> a) All postcards must be standard white postcards, no index cards or photographs.
>
> b) Postcards must be no larger then [sic] 5" X 7".
>
> c) Postcards will have their stamps removed and discarded prior to delivery to the inmate.
>
> d) Postcards must be addressed with the return address clearly readable.
>
> e) There will be no limit on how many postcards inmates can receive but inmates will be limited to ten postcards in their cell at any one time.
>
> f) Unacceptable postcards will be returned to sender
>
> 1) Defaced or altered postcards are unacceptable
>
> 2) No plastic/wrappings on postcards.

3) No labels or stickers will be accepted

4) No postcards with watermarks or stains

5) No postcards with bio-hazards, including lipsticks or perfumes

6) No postcards depicting nudity, weapons, alcohol or gang references.

The county's reasons for imposing the postcard-only policy were to reduce the risk of contraband entering the jail and to reduce the time that officers spent searching the mail. The other means of communication available to inmates at the time included fifteen-minute visits on Saturdays and collect phone calls that prisoners could place, costing $9.99 for ten minutes.

After the new policy was implemented, the plaintiff mother could not fit as much writing on a single postcard as she could in a letter, so she wrote multiple postcards and numbered them so that her son could read them in order. She claimed that the postcards were confusing because they did not always arrive at the same time or in order and if there were more than ten postcards, her son could not keep them all in his possession at once. She also testified that limiting her writing to postcards changed the nature of her communications with her son because anyone would be able to read what she wrote, including postal employees.

❖ Court Reasoning

The federal appeals court upheld the trial court's exclusion from evidence of incoming-mail policies from other institutions that permitted inmates to receive multi-page letters, holding that the exclusion of the other institutions' mail policies was harmless error and the postcard-only incoming-mail policy was constitutional.

The court ruled that the postcard-only policy was rationally related to the legitimate penological interests of an efficiently run and secure institution. Additionally, alternative means of communications were available such as collect calls, and visits, and the policy did not limit the number of cards that could be sent. The court explained that accommodating the plaintiff would result in a significant reallocation of resources and would interfere with the jail's ability to maintain security and efficiency.

The first issue on appeal was whether the district court committed reversible error when it excluded as irrelevant evidence of incoming-mail policies from other institutions.

The plaintiff argued that the trial court committed reversible error because the Supreme Court has held that the policies of other correctional institutions are relevant in deciding whether a jail's policy violates a constitutional right and excluding the other institutions' incoming-mail policies prevented her from presenting relevant, substantive evidence showing that the postcard-only policy was unconstitutional. The county argued that the court did not abuse its discretion because the plaintiff did not make an appropriate offer of proof to preserve the issue on appeal; she did not show how the policies were relevant or how their exclusion would be prejudicial; and considering the other prisons' policies would be a waste of time under Federal Rule of Evidence 403.

In this case, while the trial court excluded the policies from other institutions, it still considered Cape Girardeau's previous incoming-mail policy as an alternative policy. Cape Girardeau's previous policy did not meaningfully differ from the other institutions' incoming-mail policies. Cape Girardeau's previous policy and the other institutions' policies did not contain postcard-only restrictions, and all called for mail inspections before the mail was delivered to the inmates. Because these policies were materially indistinguishable, the other institutions' policies would not have made a difference in the trial court's analysis, so the exclusion of the other policies, even if erroneous for the sake of argument, was harmless.

The second issue on appeal was whether the postcard-only policy was constitutional under *Turner*. The appeals court noted that both institutional security and efficiency are legitimate governmental objectives, and found that the stated objectives justifying the policy appeared rationally related to those legitimate interests.

The first Turner factor is a rational relationship to a legitimate governmental objective. The defendant county implemented the postcard-only policy based on jail security and efficiency, not based on the content of the mail itself, and the policy applied to all non-legal, incoming mail. Therefore, the appeals court found that the postcard-only policy is neutral.

Although it might bolster the rationale for a postcard-only policy, the court stated that the county need not present evidence of previous incidents stemming from the

receipt by inmates of letter mail—"prison officials may also seek to prevent harm that has yet to occur."

"There is a common sense connection between the goal of reducing contraband in the jail and Cape Girardeau's postcard-only incoming mail policy," the court commented. The plaintiff argued that there was no valid rational connection between jail security and a postcard-only policy because there have been no previous incidents of contraband getting into the jail under Cape Girardeau's previous incoming-mail policy. "However, that is not the test. Cape Girardeau may seek to prevent harm that has yet to occur and, as a result, is not required to provide evidence of previous incidents of contraband reaching inmates through the mail in order to adopt a postcard-only incoming mail regulation."

The court also found a "common-sense connection between a postcard-only policy and promoting efficiency." Removing the need to open envelopes and shuffle through pages of letters could reasonably allow officers to spend less time and energy checking the mail for contraband.

The second Turner factor asks "whether there are alternative means of exercising the right that remain open to prison inmates." In this case, the plaintiff's ability to communicate with her son had not been completely eliminated. She could send him as many postcards as she liked, receive collect calls from him, and visit him on Saturdays. The "alternatives to letter writing need not be ideal, they need only be available."

The third Turner factor considers what impact the "accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." The court found that accommodating the plaintiff's demands would cause a significant reallocation of Cape Girardeau's financial resources and would interfere with its ability to maintain institutional security and efficiency.

> "Requiring Cape Girardeau to abandon the postcard-only policy would force the jail to dedicate more time and resources to searching the mail, which would detract from the officers' other duties related to security and inmate welfare. Furthermore, returning to a letter mail policy would increase the risk that contraband would reach the inmates, creating a greater threat to institutional security. The threatened impact to Cape Girardeau's institutional

efficiency and security is sufficient to convince us that returning to a letter mail policy would have a significant ripple effect on the inmates and jail staff. Therefore, we find that the third Turner factor weighs in favor of Cape Girardeau."

The final Turner factor asks whether there are any ready alternatives to the policy. The county's previous mail policy and the other incoming-mail policies showed that there are alternatives to the postcard-only policy. The question, however, was whether the cost of returning to a letter mail policy would have a greater than *de minimis* cost to the jail. "We think that it would as far as institutional security is concerned."

The appeals court cautioned, however, that its ruling that the postcard-only incoming-mail policy was constitutional was narrow. "*Turner* analysis is a fact-intensive inquiry requiring careful examination of the policies and institutions at issue in each case." The ruling, therefore, is by no means an indication that the court—much less other circuit courts, will automatically uphold postcard-only policies in all instances. A facility must be prepared to show that its policy meets the four *Turner* factors under the particular circumstances it confronts.

❖ **Resources•**

- Federal Regulations on Prisoner Correspondence, 28 C.F.R. 540.
- Inmate Mail. Arizona Department of Corrections (April 7, 2017).
- Inmate Mail Guidelines - Ventura County Sheriff's Office (Sept, 5, 2014).
- Inmate Mail Policy. New Hampshire Department of Corrections (Sept. 15, 2017).
- Mail. AELE Civil Case Summaries.
- Mail Management Manual, Federal Bureau of Prisons Program Statement 5800.16 (April 5, 2011).

❖ **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.
- Prisoners and Foreign Language Mail, 2016 (12) 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. Intercepting Prisoner Communication, Point of View, Alameda County District Attorneys' Office, Spring-Summer 2017.
2. Protecting Written Family Communication in Jails: A 50-State Survey, by Corey Frost, Prison Policy Initiative (May 19, 2016).
3. You've Got Mail: The promise of cyber communication in prisons and the need for regulation, Prison Policy Initiative (January 2016).
4. Postcard-only mail policies in jail, by Leah Sakala, Prison Policy Initiative (Feb. 7, 2013).
5. The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates, Evaluations and Inspections Report I-2006-009, U.S. Department of Justice, Office of the Inspector General. September 2006.

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