

Case Nos. 03-3229, 03-3230, and 03-3227

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PRISON LEGAL NEWS, INC., *
Plaintiff/Appellant, *
vs. *
CHARLES SIMMONS, *
Defendant/Appellee. *

KRIS ZIMMERMAN, *
Plaintiff/Appellant, *
vs. *
CHARLES SIMMONS et. al, *
Defendants/Appellee. *

JOSEPH E. JACKLOVICH, SR. *
Plaintiff/Appellant, *
vs. *
CHARLES SIMMONS et. al, *
Defendants/Appellee. *

Brief of Amicus Curiae American Civil Liberties Union of
Kansas and Western Missouri in Support of Reversal

On appeal from the United States District Court for the District of Kansas
The Honorable G. Thomas VanBebber
District Court Case Nos. 02-4054, 00-3370, and 01-3017

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INTERESTS OF *AMICUS CURIAE*

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization of more than 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Kansas and Western Missouri is one of its affiliates. The ACLU established the National Prison Project to protect and promote the civil and constitutional rights of prisoners. In its 30-year history, the National Prison Project has successfully represented over 100,000 confined men, women, and children. It has often participated as *amicus curiae* or as direct counsel in cases involving the constitutional rights of prison inmates and persons, including publishers, who seek to communicate in writing with prisoners.

PRELIMINARY STATEMENT

Subscription publications are one of the few ways for prison inmates to obtain information on topics of interest ranging from health, news, or religion, to simply jokes or poems. But many publications are beyond most inmates' limited financial resources. Thus the only way those inmates can obtain them is by gifts from family members or friends. Because of the widely-recognized rehabilitative benefits of subscription publications, federal prisons and state prisons around the country allow inmates to receive gift subscriptions.

The Kansas Department of Corrections, however, has banned gift subscriptions and, at the same time, placed stringent monetary limits on the amount inmates can spend directly on publications. The KDOC also does not inform the publisher if a subscription has not been delivered because of these policies. The KDOC has asserted security and rehabilitative justifications for its out-of-step treatment of gift subscriptions. It purportedly fears that allowing gift subscriptions could lead to strong-arming—one inmate threatening another in order to receive a gift subscription. The KDOC also apparently believes that the ban on gift subscriptions provides an incentive for good behavior.

In addition to running contrary to other prison systems, the KDOC's policies are arbitrary, irrational, and a violation of the First Amendment. The KDOC's asserted security justification is totally undercut by its policy of allowing outsiders

to deposit cash directly in inmates' accounts. Strong-arming is far more likely to occur with cash than with a gift subscription. In any event, the KDOC could simply require anyone purchasing a gift subscription for an inmate to complete a special purchase order form identifying the publication, the inmate for whom the publication was purchased, and the identity of the subscription purchaser. A similar purchase order is already required when an inmate purchases a subscription directly, and thus this alternative would impose little or no additional burden on prison officials. And it fully answers any security concerns by allowing prison officials to track the source of a gift subscription.

Further, the KDOC's rehabilitative justification hardly justifies a blanket ban on gift subscriptions. A blanket ban is far too restrictive and does nothing either to promote a change in behavior by the worst-behaved inmates or reward the best-behaved inmates. A rational incentive-based system would allow gift subscriptions for inmates who earn the privilege of receiving them instead of banning them for all inmates.

Finally, the KDOC's policy of not notifying a publisher when its publication is withheld from an inmate is contrary to well-established law. At a minimum, the publisher is entitled to notice and an opportunity to protest the KDOC's decision.

The Kansas Court of Appeals recently struck down the DOC's blanket ban on gift subscriptions.¹ This Court should too.

ARGUMENT

“There is no iron curtain drawn between the Constitution and the prisons of this country.”² Thus, although imprisonment requires a prisoner to forfeit certain rights and privileges, prisoners enjoy basic constitutional guarantees, including the right to free speech.³

The enforcement of inmates' First Amendment rights serves important societal interests. Society has a strong interest in ensuring that inmates maintain contact with their communities and families, both for the beneficial effect on inmate morale and well-being while confined, and for the value in promoting inmates' reintegration into society upon release.⁴ As the Supreme Court observed:

Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process. . . . Correspondence

¹ *Rice v. Kansas*, 76 P.3d 1048 (Kan. Ct. App.), review granted, No. 02-89759-AS, 2003 Kan. LEXIS 620 (Nov. 12, 2003) Although the grant of review by the Kansas Supreme Court technically renders *Rice* to be without precedential value, *amicus curiae* submits that its reasoning is persuasive and should be followed by this Court.

² *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); see also *Turner v. Safely*, 482 U.S. 78, 84 (1989) (“prison walls do not form a barrier separating prison inmates from the protections of the constitution”).

³ *Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9 (1989).

⁴ See, e.g., *Morrison*, 261 F.3d at 904 n.7 (citing Willoughby Mariano, *Reading Books Behind Bars Reading Programs For State Prison Inmates And Juvenile Hall Wards Are Critical To Helping Offenders Develop Literacy And Avoid Return To Crime, Experts Say*, L.A. Times, Jan. 30, 2000, at b2); *Clement v. California Dep't of Corrections*, 220 F. Supp. 2d 1098, 1110 (N.D. Cal. 2002) (“there are, in short, recognized rehabilitative benefits to permitting prisoners to receive educational reading material and maintain contact with the world outside the prison gates.”).

with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community.⁵

Recognizing prisoners' free speech rights under the First Amendment, courts have regularly enforced prisoners' rights to receive information and correspondence from the outside world. For example, courts have struck down prison regulations—

- banning all mail sent by third or fourth class or bulk rate as applied to for-profit subscriptions,⁶
- banning all standard rate mail as applied to nonprofit organization mail,⁷ and
- banning regular mail containing Internet-generated materials.⁸

And two decisions, one by the Ninth Circuit and one by the Kansas Court of Appeals, have struck down prison regulations that banned all gift subscriptions.⁹

Those courts found the categorical ban to be unjustified by the concerns asserted by prison officials and therefore an impermissible abridgement of prisoner's First Amendment rights. Indeed, federal and state prisons around the country allow

⁵ *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (quoting Policy Statement 7300.1A of the Federal Bureau of Prisons and Policy Guidelines for the Association of State Correctional Administrators), *rev'd on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

⁶ *Morrison v. Hall*, 261 F.3d 896, 904 (9th Cir. 2001).

⁷ *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001).

⁸ *Clement v. California Dept. of Corrections*, 220 F. Supp. 2d 1098, 1109-13 (N.D. Cal. 2002).

⁹ *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999); *Rice*, 76 P.3d at 1054.

inmates to receive gift subscriptions.¹⁰ This Court should follow the two published appellate decisions on this point and the prevailing practice at prisons around the country and reverse the decision of the district court.

1. The KDOC's Blanket Ban on Gift Subscriptions Violates the First Amendment.

A. The District Court Erred in Crediting the KDOC's Asserted Security Justification.

(1) *The KDOC's Strong-Arming Justification is Without Merit.*

In *Rice v. Kansas*,¹¹ the Kansas Court of Appeals struck down the identical regulation at issue here. The court agreed with the district court's rejection of the strong-arming justification proffered by the prison officials, concluding that strong-arming was just as likely, or indeed more likely, to occur when the subject of it was cash, yet the prison officials allowed persons outside the prison to send cash for deposit in inmate accounts.¹² The court found *Crofton v. Roe*¹³ to be persuasive on this point. In *Crofton*, the Ninth Circuit struck down a similar ban on

¹⁰ See 28 C.F.R. 540.70 (1996) (“[T]he Bureau of Prisons permits an inmate to subscribe to or receive publications without prior approval, and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution, or if it might facilitate criminal activity.”); 7 NYCRR § 712.1(a) (2003) (“inmates shall be allowed to subscribe to and possess a wide range of printed matter such as books, magazines and newspapers, usbject to the provisions of this directive, because these items may prompt constructive development”); see also *Procurier*, 416 U.S. at 414 n.14 (“While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.”).

¹¹ 76 P.3d 1048 (Kan. Ct. App. 2003).

¹² *Id.* at 1053.

¹³ 170 F.3d 957, 960 (9th Cir. 1999).

gift subscriptions and rejected the prison officials' strong-arming justification, finding:

The state's argument weakened by its allowance of family and friends of inmates to send money, a practice which also raises strong-arming concerns. The ability of persons on the inmate's visiting list to send gift packages and money, but not constitutional protected publications, [is] also [troubling].¹⁴

The district court did not even address this portion of Crofton or how it related to the KDOC's similar policy of allowing cash gifts to inmates. This Court should follow the compelling rationale of *Rice* and *Crofton* and overturn the district court's ruling.

(2) *The KDOC's Tracking Justification is Without Merit.*

Rice also addressed the tracking justification accepted by the district court. Its reasoning on this point is persuasive and should be followed by this Court. *Rice* rejected the KDOC's argument that allowing access to gift subscriptions would interfere with their interest in monitoring the source of funds and property directed to inmates and the distribution or disbursement of funds and property by inmates:

We also do not accept respondents' argument that allowing access to gift periodicals for inmates would necessarily interfere with a legitimate government interest in monitoring the source of funds and property directed to inmates and the disbursement or distribution of funds and property by them. The record contains no evidence of any reason that respondents cannot develop an alternate [special purchase order] to cover gift periodicals; such a form could require the ordering friend or family member of the inmate to state the cost of the periodical, the source and manner of

¹⁴ Id. at 960.

payment, and any other data needed for the prison business office and mailroom to perform their monitoring functions.¹⁵

A special purchase order is already required for subscriptions purchased directly from an inmate's account.¹⁶ As in *Rice*, the record here contains no evidence of any reason that the prison officials could not develop a slightly modified SPO to cover gift periodicals.¹⁷

B. The District Court Erred in Crediting the KDOC's Rehabilitative Justification.

The district court apparently credited the rehabilitative justification offered by the KDOC, although it did not analyze this issue in any detail. To the extent that it found a rational relationship between the ban on gift subscriptions and the maintenance of an incentive system for good behavior, it was wrong. *Rice* again is persuasive on this point:

If respondents wish to press the promise of access to gift periodicals into the service of their security and rehabilitation goals, it would be rational to *permit* such access under IMPP 11-101 *but only* as one of the rewards for good behavior and attainment of a higher 'level.' It is not rational to eliminate *all* access to *all* gift periodicals for *all* inmates, be they model prisoners or habitual disciplinary rule violators. A blanket ban is too broad a restriction on the First Amendment rights of the well behaved and fails to restrict the ill behaved in any manner designed to promote a change in their ways.¹⁸

¹⁵ Rice, 76 P.3d at 1054.

¹⁶ February 20, 2001, KDOC Interdepartmental Memorandum [need reference to record]

¹⁷ *Id.*

¹⁸ 76 P.3d at 1054.

A blanket ban on gift subscriptions is totally inconsistent with any rational rehabilitative system, and any such justification should be rejected by this Court.

2. Prison Legal News has a Due Process Right to Receive Notice and an Opportunity to Protest when its Publications are not Delivered to KDOC Inmates.

The law is clear. “[P]ublishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers.”¹⁹

Both the inmate and the publisher must be notified when a publication is rejected and given a reasonable opportunity to protest that decision.²⁰

The district court sidestepped this Due Process requirement by concluding that, since there was a blanket ban on gift subscriptions and on the receipt of subscriptions by Level 1 inmates, the long-established law in this area somehow did not apply.²¹ *Amicus curiae* is unaware of any court making the distinction made by the district court here, and the district court cited no authority for its holding on this point. To the contrary, a “publisher’s First Amendment right must not depend on” receiving notice from the inmate.²² Indeed, disapproval of a publication may be unconstitutional whether done on a case-by-case basis or under a blanket policy. In either instance, the only way a publisher such as PLN can challenge an

¹⁹ *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 106 (4th Cir. 1996).

²⁰ *Procunier*, 416 U.S. at 418-19 (affirming district court requirement that both inmate and author of rejected letter be notified of the rejection and given a reasonable opportunity to protest that decision).

²¹ *Zimmerman v. Simmons*, 260 F. Supp. 2d 1077, 1086 (D. Kan. 2003).

²² *Montcalm*, 80 F.3d at 109.

unconstitutional rejection is for it to receive notice. PLN has a “legitimate First Amendment interest in access to prisoners”²³ and is entitled to notice and an opportunity to be heard if that access is denied.

3. The \$30 Limit on Subscription Purchases violates the First Amendment.

Amicus curiae agrees with the arguments made in Appellants’ Brief on this point and adopts those arguments by reference.

CONCLUSION

The standard for this Court to apply in reviewing the KDOC’s policies policies “is not toothless.”²⁴ The KDOC’s blanket ban on gift subscriptions and its failure to notify publishers when a subscription is not delivered are arbitrary, irrational, and unconstitutional. The decision of the district court should be reversed.

Respectfully submitted,

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²³ *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001).

²⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989).

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CERTIFICATE OF SERVICE

I hereby certify that the appropriate number of copies were mailed, postage prepaid, this ____ day of December, 2003, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Tenth Circuit Local Rule 32.1 because this Brief was prepared with Word version ___ and, pursuant to the word count of that software, the Brief contains ___ words. This Brief was prepared in Times New Roman 14-point font.

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