St. Mary's Law Journal

Volume 8 | Number 3 Article 12

9-1-1976

Prisoner Correspondence with Courts, Prosecuting Attorneys, Probation and Parole Officers, Governmental Agencies, Lawyers, and the Press Is Subject to Constitutional Protections Which Limit Regulation by Prison Officials.

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CONSTITUTIONAL LAW—Prisoner Rights—Prisoner Correspondence with Courts, Prosecuting Attorneys, Probation and Parole Officers, Governmental Agencies, Lawyers, and the Press Is Subject to Constitutional Protections Which Limit Regulation by Prison Officials

Taylor v. Sterrett,

532 F.2d 462 (5th Cir. 1976).

Joseph Taylor and other prisoners of the Dallas County jail brought a civil rights suit against Dallas County Judge W.L. Sterrett and other persons charged with the responsibility of supervising the jail, claiming that certain jail conditions violated their constitutional rights.[1] The district court issued a permanent injunction prohibiting the sheriff from opening or censoring mail transmitted between the prisoners and certain of their correspondents.[2] It also ordered the sheriff not to allow anyone to see a prisoner unless that prisoner had consented in advance to see the person.[3] Defendants appealed to the Court of Appeals for the Fifth Circuit. Held—*Affirmed and modified in part; vacated in part, and remanded.* Prisoners' constitutional rights require that prison officials not open mail transmitted from inmates to courts,

1. The prisoners brought suit under 42 U.S.C. § 1983 (1970) to redress violations of their constitutional rights made under color of state law and sought declaratory and injunctive relief under 28 U.S.C. § 2201 (1970) against several specified practices and conditions at the Dallas County jail. The federal courts acquired jurisdiction over this suit in accordance with 28 U.S.C. § 1343 (1970), *as amended*, 28 U.S.C. § 1343(1) (Supp. V, 1975), which authorizes federal courts to hear complaints alleging violations of constitutional rights.

2. Taylor v. Sterrett, 344 F. Supp. 411, 412 (N.D. Tex. 1972), *aff'd in part, vacated in part, and remanded*, 499 F.2d 367 (5th Cir. 1974). On remand the district court issued an unreported order which sought to comply with the Fifth Circuit's recommendations that the district court reconsider its permanent injunction in light of the United States Supreme Court decisions in Wolff v. McDonnell, 418 U.S. 539 (1974), and Procunier v. Martinez, 416 U.S. 396 (1974). The instant case represents an appeal by the prison officials from the unreported district court order. Taylor v. Sterrett, 532 F.2d 462, 464 (5th Cir. 1976).

3. Taylor v. Sterrett, 344 F. Supp. 411, 422-23 (N.D. Tex. 1972), *aff'd in part, vacated in part, and remanded*, 499 F.2d 367 (5th Cir. 1974). On remand the district court modified this order by attempting to confine its application to those officials engaged in plea bargaining. The instant case again remanded this provision to the district court by requiring it to provide a constitutional justification for restricting the visits of district attorneys' investigators to those prisoners who consent in advance to see them. Taylor v. Sterrett, 532 F.2d 462, 464 (5th Cir. 1976). Since the instant case and this case note are primarily concerned with the constitutional basis of prisoner correspondence rights, analysis of the restrictions imposed on the access of investigators to prisoners will not be made.

prosecuting attorneys, probation and parole officers, governmental agencies, lawyers, and the press. Prison officials may open mail transmitted from these sources to inmates, but the opening of such mail must be done in the presence of the inmate and be limited to a search for contraband.[4]

Courts have traditionally accepted a "hands-off" attitude toward prisoner complaints regarding prison administration.[5] The rationale for this approach has generally been a judicial recognition of prison management objectives accompanied by an admission that courts are poorly equipped to attempt to resolve the problems of prison administration.[6] Thus, the courts leave virtually complete power over prison administration to the executive and legislative branches.[7] The Supreme Court has apparently condoned this traditional approach by holding that the nature of the penal system justifies the withdrawal or limitation of many rights and privileges of prisoners.[8] As such, many early prisoners' rights cases adopted the position that prisoners suffered a "civil death" because of their conviction and as a consequence lost all of their normal rights.[9] One case went so far as to hold that convicts were to be regarded as "slaves of the state."[10]

Generally, a prisoner's right to send and receive mail has been included in the "hands-off" doctrine.[11] Especially with regard to the censorship of mail, there has been a consistent judicial reluctance to apply constitutional standards to the protection of prisoner correspondence rights.[12]

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4. Taylor v. Sterrett, 532 F.2d 462, 473-75, 480-82 (5th Cir. 1976).

5. *E.g.*, Procunier v. Martinez, 416 U.S. 396, 404 (1974); Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied*, 348 U.S. 859 (1954); Adams v. Ellis, 197 F.2d 483, 485 (5th Cir. 1952).

6. *E.g.*, Procunier v. Martinez, 416 U.S. 396, 404-05 (1974); Main Road v. Aytch, 522 F.2d 1080, 1085-86 (3rd Cir. 1975); *In re* Jordan, 103 Cal. Rptr. 849, 851 (1972).

7. *See* Comment, *Prisoners and Their Basic Rights*, 11 IDAHO L. REV. 45, 45-47 (1974) (excellent historical treatment of hands-off doctrine and corollary justifications of federal abstention and failure to exhaust alternative remedies); Note, 79 DICK. L. REV. 352, 354 n.18 (1975); Note, 6 SETON HALL L. REV. 167, 170-71 (1974).

8. Price v. Johnston, 334 U.S. 266, 285 (1948).

9. Sullivan v. Prudential Ins. Co., 160 A. 777, 778 (Me. 1932). *See generally* Note, *Prisoners' Rights to Unrestricted Use of the Mails*, 1 NEW ENGLAND J. PRISON L. 80-83 (1974); Note, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988 (1970) (excellent historical analysis of the civil death doctrine).

10. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871).

11. *See* Procunier v. Martinez, 416 U.S. 396, 406 (1974); Lee v. Tahash, 352 F.2d 970, 972 (8th Cir. 1965).

12. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 409 (1974) (first amendment coverage avoided by Supreme Court by basing its holding upon the rights of those persons corresponding with prisoners rather than prisoner correspondence rights); Berrigan v. Norton, 451 F.2d 790, 792-93 (2d Cir. 1971) (failure of prisoner to comply with prison regulations restricting dissemination of writings outside prison resulted in incomplete record precluding court's review of first amendment violations); Brown v. Wainwright, 419 F.2d 1308 (5th Cir. 1969) (removal of stamps by prison officials from prisoner's outgoing mail constituted theft of property rather than a violation of prisoner first amendment rights).

During the past thirty-five years, different courts have evolved various balancing tests which have attempted to weigh prisoner rights against legitimate governmental interests in the operation of prisons.[13] In formulating these balancing tests, the courts have recently begun to develop a constitutional basis for prisoner correspondence rights. Despite these advances, there remains a notable absence of any uniform procedure for balancing the first amendment rights of prisoners to uncensored correspondence against the interests of prison officials in prison management.[14] The Supreme Court has not yet recognized the existence of prisoner first amendment correspondence rights.[15]

The government's interests in the operation of prisons have fairly constantly been deemed to be security, rehabilitation, and punishment.[16] Prisoners' rights, however, have been defined in the context of broad judicial generalizations.[17] Although a few cases have attempted to define prisoners' correspondence rights with courts, attorneys, and the press with a greater degree of precision,[18] there has generally been no accompanying attempt to expand these definitions into a formulation of broad constitutional standards.

The Court of Appeals for the Fifth Circuit in *Taylor v. Sterrett*[19] referred to many of the earlier decisions on prisoner rights and developed a seemingly simple two-fold approach to prisoner correspondence rights by applying first and fourteenth amendment safeguards to a prison context. In developing this approach the court divided correspondence into six categories: letters to courts, prosecuting attorneys, probation and parole officers, governmental agencies, lawyers, and the press.[20] The court also directly confronted the

13. *See* Pell v. Procunier, 417 U.S. 817, 827-28 (1974) (government's interest in security of prison outweighed prisoner's rights to private interviews with members of press); *Ex parte* Hull, 312 U.S. 546, 549 (1941) (prisoner's right to petition for a writ of habeas corpus outweighed prison officials' interests in determining accuracy of petition).

14. Procunier v. Martinez, 416 U.S. 396, 407 (1974).

15. Wolff v. McDonnell, 418 U.S. 539, 575-76 (1974); *cf.* Cruz v. Beto, 405 U.S. 319, 322 (1972) (restrictions prohibiting a prisoner from corresponding with his Buddhist religious advisor violated prisoner's first amendment right to free exercise of religion); Cooper v. Pate, 378 U.S. 546 (1964) (limitations on prisoner's right to purchase religious publications violated his first amendment right to free exercise of religion rather than his correspondence rights).

16. Pell v. Procunier, 417 U.S. 817, 822-23 (1974); Procunier v. Martinez, 416 U.S. 396, 413 (1974).

17. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 (1974) (prisoner retains first amendment rights that do not conflict with prisoner status); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (prisoner retains all previously held rights except those taken from him by law); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) (prisoner rights are limited to those in which the law "in its benignity accords them").

18. Pell v. Procunier, 417 U.S. 817, 834 (1974) (press); *Ex parte* Hull, 312 U.S. 546, 549 (1941) (courts); Mills v. Sullivan, 501 F.2d 939, 940 (5th Cir. 1974) (attorneys).

19. 532 F.2d 462 (5th Cir. 1976).

20. *Id.* at 470.

issue of the constitutional basis of prisoner correspondence rights[21] instead of resorting to the "hands-off" doctrine or other approaches which had been used by different courts to circumvent constitutional issues.[22] The court based its decision on a general belief that there are fundamental rights retained by prisoners, including the right to correspond freely.[23] In defining these rights with regard to the six categories, the court accepted the need for balancing them against the legitimate interests of prison officials.[24]

The court first decided that a prisoner's constitutional rights prohibit the opening of mail to a correspondent in any of the categories.[25] It also held that mail from correspondents in these categories may only be opened in the presence of the prisoner and must be limited to a search for contraband.[26] This leaves the prisoner with the right to insist that this mail not be read by prison officials.

Taylor represents the first time that any court has attempted to establish, in a single case, clear guidelines on prisoner constitutional rights with regard to these six categories of correspondents. By basing its decision on constitutional principles, the Fifth Circuit exhibited a boldness which has rarely been seen in the area of prisoner rights litigation. Only two years before, the United States Supreme Court in *Procunier v. Martinez*[27] was presented with an opportunity to make a broad constitutional declaration of prisoner correspondence rights, but avoided the issue by reasoning that since the interests of both the prisoner and the correspondent were involved in prison mail censorship regulations, the interests of the prisoner's correspondent as a free citizen were clearly deserving of first amendment protections.[28] By so holding, the Supreme Court postponed a determination of a constitutional basis of prisoner correspondence rights. In his concurring opinion Mr. Justice Marshall noted that the Court had unfortunately avoided the issue of the con-

21. *Id.* at 469.
22. Cases cited notes 5 and 12 *supra.*
23. Taylor v. Sterrett, 532 F.2d 462, 466 (5th Cir. 1976).
24. *Id.* at 468-69.
25. *Id.* at 473-74, 480, 482; *see* Frazier v. Donelon, 381 F. Supp. 911, 919 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1134 (1976) (prison officials precluded from opening and reading all outgoing mail to courts); Lamar v. Kern, 349 F. Supp. 222, 224-25 (S.D. Tex. 1972) (prison officials cannot censor or withhold mail to courts, attorneys, and administrative and public officials). *Contra,* Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972) (prison officials can open and read all outgoing mail).
26. Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976); *see* Wolff v. McDonnell, 418 U.S. 539, 577 (1974); *cf.* Adams v. Carlson, 488 F.2d 619, 631-32 (7th Cir. 1973) (prison officials must show facts supporting a reasonable suspicion that attorneys are engaged in smuggling contraband inside prison to justify restricting attorney-prisoner visitations). *Contra,* Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied,* 404 U.S. 1049 (1972).
27. 416 U.S. 396 (1974).
28. *Id.* at 408-09.

stitutional rights of prisoners.[29] According to Justice Marshall, prisoners should be "entitled to use the mails as a medium of free expression not as a privilege, but rather as a constitutionally guaranteed right."[30] As a result, *Taylor* could be viewed as an attempt by the Fifth Circuit to follow the recommendations presented by Justice Marshall.

Although the Fifth Circuit considered adopting the *Martinez* approach, it held that since *Taylor* involved a limited number of correspondents, the application of constitutional standards was justified.[31] After a lengthy analysis of many earlier decisions, the Fifth Circuit settled on an approach that was based on a prisoner's rights in two constitutionally protected areas: the right to access to the courts, and the right to enjoy free expression and petition for redress of grievances.[32]

A prisoner's right to have access to the courts was the central theme underlying much of the court's reasoning and provided the basis for the holding with respect to prisoner's correspondence rights with courts, defense lawyers, prosecuting attorneys, and probation and parole officers. The *Taylor* court noted that this protection was provided by the due process clause of the fourteenth amendment and was supplemented by the sixth amendment right to effective counsel.[33] Although many other courts have recognized the existence of a prisoner's constitutional right to have access to the courts both generally and in the specific context of correspondence, *Taylor* significantly expanded the applicability of this principle. Only shortly after its decision in *Procunier v. Martinez*,[34] the Supreme Court in *Wolff v. McDonnell*[35] noted that it had not extended the applicability of the access to the courts provision any further than protecting an inmate's right to prepare a complaint.[36] Thus,

29. *Id.* at 422 (Marshall, J., concurring).

30. *Id.* at 423 (Marshall, J., concurring); *see* Pell v. Procunier, 417 U.S. 817, 824 (1974) (inference that prisoners have first amendment right to correspond with media); State v. Ellefson, 224 S.E.2d 666, 669-70 (S.C. 1976) (search and reproduction of prisoner's letters by prison officials violates prisoner's first amendment rights unless prison officials show proper jail purpose, probable cause, or exigent circumstances). *Contra*, Stroud v. United States, 251 U.S. 15, 21 (1919) (opening prisoner correspondence and using contents to establish prisoner's guilt allowed); Lee v. Tahash, 352 F.2d 970, 973 (8th Cir. 1965) (prisoner has no absolute right to send correspondence to public officials); Ortega v. Ragen, 216 F.2d 561-62 (7th Cir. 1954) (no federal right to receive mail).

31. Taylor v. Sterrett, 532 F.2d 462, 466 (5th Cir. 1976).

32. *Id.* at 468-70.

33. *Id.* at 470-72; *see* Johnson v. Avery, 393 U.S. 483, 485 (1969); *Ex parte* Hull, 312 U.S. 546, 549 (1941); Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973).

34. 416 U.S. 396 (1974).

35. 418 U.S. 539 (1974).

36. *Id.* at 576. In considering a Nebraska prisoner correspondence regulation requiring that mail from attorneys to prisoners be opened in the presence of the prisoner without being read by prison officials, the Supreme Court held that it would not be necessary for it to decide which, if any, of the first, sixth, or fourteenth amendments would be applicable to this context of attorney-prisoner correspondence. Rather, the Court held that if any of these constitutional provisions were involved, the Nebraska prison

like *Martinez*, *Wolff* left unresolved the constitutional basis for a prisoner's objections to the opening and reading of his mail by prison officials.[37] In fact, the *Wolff* holding prompted the prison officials in *Taylor* to argue that they could read any prisoner correspondence.[38]

In recognizing a prisoner's constitutional right to access to the courts, the court held in *Taylor* that before prison mail restrictions will be allowed to limit a prisoner's access to the courts the state must clearly show that its interests cannot be furthered by less restrictive means.[39] As a result, the burden was placed upon prison officials to justify mail restriction policies in view of the likely infringement on prisoner rights.[40] This requirement for justification extends to all prisoner correspondence with courts, defense lawyers, prosecuting attorneys, and probation and parole officers.[41] The court concluded that all incoming correspondence from these sources could only be opened by prison officials in the presence of the prisoner and must be limited to a search for contraband.[42] No outgoing correspondence from the prisoner to these sources may be opened.[43]

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regulations clearly did not infringe upon any of these hypothetical prisoner correspondence rights. *Id.* at 576; *see* Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Avery, 393 U.S. 483, 485 (1969); *Ex parte* Hull, 312 U.S. 546, 549 (1941).

37. Taylor v. Sterrett, 532 F.2d 462, 467 (5th Cir. 1976); *accord*, Gates v. Collier, 501 F.2d 1291, 1313 (5th Cir. 1974); *see* Comment, *A Giant Step Backwards: The Supreme Court Speaks Out on Prisoners' First Amendment Rights*, 70 NW. U.L. REV. 352, 360 (1975).

38. Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976).

39. *Id.* at 472.

40. *Id.* at 472. In analyzing restrictions imposed upon a prisoner's correspondence with attorneys, the Fifth Circuit held that virtually any mail restriction that impeded the attorney-client relationship would infringe upon the prisoner's right of access to the courts. *Id.* at 472; *accord*, Goodwin v. Oswald, 462 F.2d 1237, 1243 (2d Cir. 1972).

41. Taylor v. Sterrett, 532 F.2d 462, 475-76 (5th Cir. 1976).

42. *Id.* at 462, 475; *cf.* Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (state regulation requiring prisoner mail from attorneys to be opened only for inspection for contraband and in the presence of prisoner did not violate prisoner constitutional rights); Adams v. Carlson, 488 F.2d 619, 630 n.18 (7th Cir. 1973) (prison officials must show facts supporting a reasonable suspicion that attorneys are engaged in smuggling contraband inside prison to justify restricting attorney-prisoner visitations). *Contra*, Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (prison officials can open and read incoming mail without contraband limitation).

43. Taylor v. Sterrett, 532 F.2d 462, 473-74 (5th Cir. 1976); *see* Frazier v. Donelon, 381 F. Supp. 911, 919 (E.D. La. 1974), *aff'd mem.*, 520 F.2d 941 (5th Cir. 1975), *cert. denied*, 96 S. Ct. 1134 (1976) (prison officials precluded from opening and reading all outgoing mail to courts); Lamar v. Kern, 349 F. Supp. 222, 224-25 (S.D. Tex. 1972) (prison officials cannot censor or withhold mail to courts, attorneys, and administrative and public officials). *Contra*, Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (prison officials can open and read outgoing mail).

44. Taylor v. Sterrett, 532 F.2d 462, 478 (5th Cir. 1976); *cf.* Lamar v. Kern, 349 F. Supp. 222, 224-25 (S.D. Tex. 1972) (prisoner's constitutional rights of free speech and right to petition for redress of grievances prohibited prison officials from censoring and withholding prisoner correspondence between courts, attorneys, and administrative and public officials).

Although the Fifth Circuit recognized that prisoner correspondence with governmental agencies and the press also had a bearing upon future legal proceedings and therefore indirectly affected a prisoner's access to the courts, the court nevertheless held that prisoners' rights to correspond with persons in these two categories were more accurately based on the prisoners' rights of free expression and the right to petition for redress of grievances.[44] By recognizing the right to send and receive mail as one granted by the first amendment[45] and by taking note of earlier cases which had established the right of prisoners to first amendment protections,[46] the court held in *Taylor* that prison restrictions upon correspondence between prisoners and governmental agencies and the press clearly constituted an infringement upon a prisoner's first amendment rights.[47] In examining the threat posed by prisoner correspondence with governmental agencies and the press, the Fifth Circuit concluded that from the facts established in the record, these two categories of prisoner correspondence would be afforded the same treatment as those categories protected by a prisoner's access to the courts.[48] Considering the relative ease with which the court applied the first amendment protections to these two areas of prisoner correspondence, it could be argued that a subsequent application to a prisoner's correspondence in general might not be far behind.

While *Taylor* could conceivably be viewed as a carte blanche declaration of prisoner correspondence rights, there is considerable evidence of an attempt by the court to balance the interests of prisoners and prison officials. It is apparent that the Fifth Circuit has attempted to provide prison officials with several judicially acceptable forms of mail restrictions. It can also be argued that these restrictions limit the applicability of the decision and create additional problems. These restrictions include the rights of prison officials to search for contraband in all incoming correspondence,[49] conduct probable cause search and seizures,[50] insist upon the identification of an attorney and a member of the press before a prisoner's correspondence with such persons

45. Blount v. Rizzi, 400 U.S. 410, 416 (1971), *citing* United States *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

46. Generally these protections have involved a prisoner's freedom of religion. *See* Cruz v. Beto, 405 U.S. 319, 322 (1972); Cooper v. Pate, 378 U.S. 546 (1964); Walker v. Blackwell, 411 F.2d 23, 24 (5th Cir. 1969).

47. Taylor v. Sterrett, 532 F.2d 462, 479-82 (5th Cir. 1976).

48. *Id.* at 479-82.

49. *Id.* at 475.

50. *Id.* at 475. One writer has advanced the argument that prison officials should be required to show that they have probable cause to believe that the inspection of prisoner correspondence will reveal physical contraband or criminal activity before correspondence with courts, attorneys, and public officials should be allowed to be opened, inspected, or censored. Note, *Prison Mail Censorship and the First Amendment*, 81 YALE L.J. 87, 111 (1971).