No. 72950-1-I

COURT OF APPEALS, DIVISION ONE
THE STATE OF WASHINGTON

FRED STEPHENS,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

MOTION ON THE MERITS
REPLY BRIEF OF APPELLANT

Fred Stephens, Pro Se
Monroe Correction Complex
PO Box 888 TRU C-607
Monroe WA 98272

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CONSTITUTION, STATUTES and Rules

I. MOTION ON THE MERITS

Appellant Stephens moves the court for a ruling on the merits. His motion is based on two dispositive federal cases that held a blanket ban on internet mail unconstitutional. First, in Canadian Coalization Against the Death Penalty v. Ryan, 269 F.Supp.2d 1199 (D.Ariz 2003), the court held unconstitution an Arizona Depart. of Corrections (ADC) policy that prohibited inmates from "sending mail to or receiving mail from a communications service provider or from having access to the internet though a provider." Ibid. CP 78. The ADC claimed, as does the Respondents here, that their mail policy was meant to "preclude inappropriate contact with minors, victims or other inmates" and to protect the public. Ibid. CP 78. Second, the Ninth Circuit in Clements v. Calif. Department of Corrections, 364 F.3d 1148 (9th Cir. 2004), held the Prison's policy of restricting website pen-pal mail was unconstitutional. In both cases, the federal courts applied the Turner v. Safley test and did NOT find the policies reasonably related to a legitimate penological interest. In addition, a motion on the merits should be granted because, Stephens proffered evidence that impeached and debunked the declaration of Roy Gonzalez who claimed DOC could not determine the identity of the parties and claimed website communications created a risk to the security and safety of the prisons. CP 78. In accord, Jackson v. Pollard, 208 Fed App. 457 (2006).

II. INTRODUCTION REBUTTAL

This appeal by Fred Stephens a state prisoner, concerns denied access to the internet. His appeal focuses on three questions: First, whether the trial court incorrectly granted summary judgment to the Respondents. Second, whether the Respondents have denied Stephens his First Amendment right of free speech. CP 8-9. Third, whether free speech under the state constitution grants Stephens the right to acquire information from internet providers, and also whether an agency's prior restraint of speech is unconstitutional. CP-9. Oddly enough, the case is not about speech content. Instead, the DOC asks this court to shooting the messager--website providers. CP-64. Respondents' Reply Brief (herein Res.Rly) at pg 3.

Importantly, all of atty Cassie vanROOJEN's briefs (for Respondents) are limited in evidence to Roy Gonzales' declaration and his false narative that Third Party Mail, as applied, is prohibited because DOC cannot discern the identity of the parties. CP-64, CP 74-79.

III. REBUTTAL STATEMENT OF FACTS

The Respondents Reply Brief is riddled with false and misleading statements. 1. Respondents falsely claim "the Department presented evidence that third-party mail threatens the safety and security of the Department facilities?" Res.Rly pg 2. Meaning Roy Gonzales' single declaration. CP 76-79.

2. Stephens does not conceded that Inmate Scribes or Help from Outside are parties to any speech. The word "party" is a legal term. Res.Rply. pg 4. (Commercial forwarding firms like UPS or FedX are NOT "THIRD PARTIES" to speech). CP 111, 133 & 149.

3. Respondents incorrectly claim five mail rejections, there are six (6). CP 160 & 170; they did not defend against (g).

4. Respondents falsely blur all mail rejections into one type. Res.Rly pg 4. In fact, each mail rejection is different:

b) Mail rejection of 10/10/13 are two sample addresses. No correspondence took place. Obtaining addressings has never been the cause for rejections. CP 103. CP 168 para. 6.

c) Rejection of 12/6/13 is an email from Norma Didomo, she is properly identified my name & address. Importantly, her email alerts both DOC and Stephens that a letter will follow. CP 106-07.

d) Rejections of 3/5/14 are short introductory emails from six ladies, all are identified by location and email address. The emails are from a website MiGente.com. CP 125-130.

e) Rejection of 3/31/14 are six profiles of ladies from the Migente.com website. This rejection (CP 141) was mailed out to Help From Outside (CP 142) and then mailed back to Stephens. CP 28. Thumb nail ads are similar to yellow page advertising.

f). Rejection of 4/17/2015 are three requests from ladies who wish to initiate contact. CP 147.

g) Mail rejection of 7/1/14 is a print-out from a public website, www.elance.com, of professionals seeking work. Respondents have not answered this claim in briefing. CP-32, 160 & 170.

5. Stephens claims this statement is false as applied to email addresses: "the Department cannot discern the identity of the sender of mail." Res.Rly pg 3; CP 10, 16, 78 and 85 .

6. This statement of Respondents' is without foundation: "[t]he Department has determined that incoming third-party mail presents a threat to the safety and security of the facilities". Res.Rly. pg 3; CP 78-79. But, determined how? By who?

7. Respondents incorrectly claim DOC 450.100 disallows mail from the interent. See CP 10 and CP 85.

IV. PROPER STANDARD OF REVIEW

1. Legal Standards. Though Respondents correctly cite a few phrases for summary judgment, they ignore key points that weigh in Stephens' favor. To defeat summary judgment, Stephens need only "set forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue as a material fact." FDIC v. Uribe, 287 P.3d 694, 696 (2012). "A material fact precluding summary judgment is a fact that affects the outcome of the litigation. Garrison v. Sagepoint Financial, Inc., 345 P.3d 792, 800 (2015). "Where, as here, there are competing inferences that may be drawn from the evidence, the issue must be resolved by the trier of fact". Id.

2. Disputed Fact. The key material fact here is whether email addresses are sufficient to identify the sender. If Stephens' evidence contradicts or impeaches Respondents claims, then summary judgment was improper. Montaney v. J-M Mfg Co. Inc., 314 P.3d 1144, 1148 (2013) (But contradictory evidence on material factual issues preclude summary judgment).

V. ARGUMENT

A. SUMMARY JUDGMENT WAS IMPROPER BECAUSE STEPHENS PUT FORTH EVIDENCE THAT RAISED A GENUINE ISSUE OF MATERIAL FACT.

1. Issue One. This appeal boils down to Respondents' false claim that "the Department cannot discern the identity of the true sender [by the email address]". CP-64, CP-78 & 79. If DOC's claim is untrue or even debatable, their argument fails and summary judgment was improper. The Ninth Circuit considered the issue and stated that email addresses can be traced to the computer IP address. Clements v. CDOC, at 1152 (Expert testimony [that] it is easlier to determine the origin of a printed email than to track handwritten or typed mail). This fact is confirmed in State v. Pepin, 347 P.3d 906 (Div 3, 2015) (Ms. McCann, [forensic expert]...testified that ... software provides law enforcement with a computer IP address [IP is an unique address to each computer]. Also, law enforcement have authority to obtain the name and address of an email address. 18 U.S.C. §2703 (c)(2), cf RCW 19.190.020. Therefore, legal opinion clearly renders Gonzales' declaration deceptive. The inference in Stephens favor is that email addresses DO allow the party to be identified. Here, legal opinion must preclude summary judgment.

2. Rebuttal Evidence. Stephens gave the trial court evidence that debunked Gonzales' single bald assertion, to wit: (1) Exhibit #8, an email from Norma Didomo. The gmail identities each party by name and email address. CP-167. (2) Exhibit 9,

(hereafter "Ex") Emails from Rep. Jan Angel, Senators Pridemore and Eide. CP-29 & 318. Contrary to DOC policy, DOC allowed these Third Party Emails. The inference: DOC's Third Party Mail policy is arbitrary & capricious. (3) Ex #6 (CP-28) and Ex #10 (CP-30) were sent from Inmate Scribes and not rejected. Yet, there is essentially no difference between rejection #IN MCC: 3/5/14 (CP 123-130) and Ex #6 & 10. (4) Ex #16, Mr. Wininger declares that he receives emails from websites and facebook. CP-31. His declaration together with Ex #6 & 10 are sufficient to raise a genuine issue of material fact whether DOC actually applies its Third Party mail policy fairly, i.e. whether it is arbitrary & capricious. (5) Ex #19 & 20 were envelopes sent to Stephens, both the sender and address are bogus. CP-33 & 34. The bottom line, if DOC does not verify the return address on incoming mail, then a genuine issue of material fact exists whether Roy Gonzales testified falsely. If he did, then DOC's entire argument is a fraud. CP-16. (6) Ex #13 & 26 are Pen-Pal advertising directed at inmates. CP 40, CP-312 n.1 & 322. The inference: There is no legitimate penological interest in blocking internet emails because other prison systems allow printed emails from internet providers. CP-170, ¶13. We know that Wisconsin, Calif., Arizonia and the Federal BOP prisons (Corlinks) allow internet providers to send emails to their prisoners. CP-170. (See Candian Coalition, 269 F.Supp.2d 1199; Clements, 364 F.3d 1148,

and Jackson, 208 Fed Appx. 457). Last, Ex #24, Peder declares that DOC's J-Pay email system, as an alternative, has a false supposition that DOC discerns the party's identity of incoming emails to inmates. CP-37. However, Stephens asserts that DOC has no protocols to test the true identity of incoming emails (or US mail). CP-302. Peder's declaration together with Stephens' other exhibits raise a genuine issue of material fact whether DOC does discern the identity of thousands of citizens who send emails via J-Pay or the US Mail. If DOC does not discern the identity of citizens who send J-Pay emails or US mail, then the Third Party mail policy, as applied, is misrepresented--a lie. Thus, given Stephens' evidence, summary judgment was improper. CP-16.

B. THE RESPONDENTS ATTORNEY Ms. vanROOJEN MIS-REPRESENTS THE STANDARD OF REVIEW UNDER TURNER, WHERE SHE FAILS TO CITE CONTROLLING LAW.

1. Case Law. To mask Respondents' lack of evidence, attorney vanROOJEN misrepresents Ninth Circuit precedent citing Mauro v. Arpaio, 188 F.3d 1054, 1060 (CA 9 1999) claiming: "Prison officials need not prove...the prohibited material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future". Res.Rly pg 6-7. However, the Ninth Circuit clarified its Mauro opinion in Frost v. Symington, 197 F.3d 348 (CA 9 2001):

> "In Frost...the court clarified that the level of scrutiny to be applied to the decision of prison administrators depends on the circumstances in each case. When the inmate presents sufficient ... evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, Walker v. Summer, 917 F.2d 382... applies, and the state must present enough counter evidence to show... the connection is not so remote as to render the policy arbitrary or irrational". PLN v. Cook, 238 F.3d 1145, 1150 [CA 9 2001).

Clearly, atty vanROOJEN failed to alert this court of controlling precedent. She also fails to address Stephens' evidence that debunked the comon-sense connection between DOC's stated objective (prohibiting unauthorized contacts) and its THIRD PARTY MAIL policy. CP 65-66. Because Respondents did not answer with any counter evidence to support their bald assertion of "Security & Safety of the institution," the standard of Walker v. Summer applies. PLN v. Cook, id. Under Walker, Stephens prevails on Turner's first factor--"sine qua non". PLN v. Lehman, 397 F.3d 692, 699 (CA 9 2005). Under the facts of this case, summary judgment was improper. CP-15.

2. **Content** and **Distribution** bans. This case concerns a prohibition of speech that flows from internet providers. It is therefore a ban against distribution. Lawsuits under Turner are generally two types: First are Lawsuits that grieve mail censorship because of its content. Courts generally uphold regulations that censor mail content. e.g. Mauro v. Arpaio, (banning sexually explicit materials). Second are lawsuits that grieve

policies that restrict mail distribution. Courts have consistently held distribution based censorship unconstitutional: Foster v. Basham, 932 F.2d 732 (CA 8 1991) (holding policy that banned yellow pages unconstitutonal); Crofton v. Roe, 170 F.3d 951 (CA 9 WASH 1999) (regulation banning gift books and magazines from family & friends unconstitutional); PLN v. Cook, 238 F.3d 1145 (CA 9 2011) (ban on subscription non-profit news letter held unconstitutional); Morrison v. Hall, 261 F.3d 896 (CA 9 2001) (regulation requiring inmate mail to be sent 1st class or 2nd class was unconstitutional); PLN v. Lehman, 397 F.3d 692 (CA 9 WA 2005) (policy banning distribution of requested catalogs held unconstitional); Ashker v. Calif. DOC, 350 F.3d 917 (CA 9 2003) (policy that required approved vendor labels unconstitutional); and Hrdlicka v. Reniff, 631 F.3d 1044 (CA 9 2011) (ban on unsolicited publications raised genuine issue of material fact).

3. Forwarding Agents, Respondents' argue that Stephens' mail was rejected because "it came from commerical forwarding agents and contained third party communications." CP 66.[1/] This argument is laughable. No state inmate has direct access to the internet; all transactions are in reality third party that

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1. Communication defined. To convey knowledge or information about, make known. To transmit information. Merriam-Webster's Collegiate Dictionary 11th Ed. 2014.

require an agent to broker an inmate's request. The parties are: (1) The website entity, (2) family member or agent, and (3) the inmate. DOC's mail policy, as applied, permits them to deny internet speech in a manner that is arbitrary. The proof, the difference between mail received and rejected. CP-28, 29,30 & CP-60. The blanket ban of internet speech with the label "Third Party Mail" should be held unconstitutional.

C. ATTORNEY vanROOJEN'S REPLY BRIEF MISCONSTRUES ARTICLE I, SECTION 5 AND INCORRECTLY CITES CASE LAW.

1. Legal Cites. Respondents' cite State v. McKinney, 148 Wn.2d 20, 26 (2002), claiming a "two step" process to determine whether to conduct an independent constitutional interpretation. Res.Rly p10. McKinney is misquoted; instead, it holds:

> "[O]nce this court has determined that a ... provision of the state constitution has an independent meaning using the ... Gunwall [factors], it need not reconsider whether to apply a ... constitutional analysis in a new context."

The McKinney case does not support Respondents' argument, but it does support Stephens' argument that a Gunwall analysis was not necessary. CP 17. Next, citing State v. Wethered, 110 Wn.2d 466, 472 (1988), Respondents incorrectly argue that "the burden is on Stephens to show that [Art I, § 5] provides broader protection for incoming mail than ... [does] the First Amendment Res.Rly pg 11. However, Wethered, a 1988 case, is mis-cited and does not support Respndents' claim. The Wethered case simply

faults defendant, Wethered for not doing a Gunwall analysis. The case does not concern Art 1, § 5. The correct principle is that the "burden of justifying a restriction on speech remains on the state". Collier v. City of Tacoma, 121 Wn.2d 737, 747 (1993). Collier supports enhanced protection under Art 1, § 5.

D. PRINCIPLES OF STATE CONSTITUTIONAL LAW SUPPORT GREATER PROTECTION OF SPEECH IN THE CONTEXT OF STATE PRISONS.

1. State Law. In rebuttal to Respondents' claim that "Stephens has failed to demonstrate any basis for providing broader protection for incoming mail under Art 1, section 5". Stephens simply cites to RCW 72.09.530. CP 19-21. The statute grants inmates the right to receive and send mail; however, it does not authorize a ban against newspapers, magazines or books. Recognizing that the internet is the modern day newspaper. Prometheus Radio Project v. FCC, 373 F.3d 372 (CA 3 2004) ("Consumers generally view internet news sources as a substitute for daily newspapers"). The statute reads:

> [The policy] "**SHALL** protect the legitimate interests of the public and inmates in the exchange of ideas. The secretary SHALL establish a method of reviewing all incoming and outgoing material, consistent with constitutional constraints for the purpose of confiscating "anything" determined to be contraband". [My emphasis].

The legislature is presumed to enact laws with knowledge of existing court opinions. Jametsky v. Olsen, 179 Wn.2d 756, 766

(2014). The statute requires DOC to "review" incoming ... mail for content--contraband. DOC has no complaints about content of mail sent to Stephens. The statute also grants the public the right to communicate with Stephens, DOC voices no complaint about persons wishing to communicate with him.

In the context of prisons, greater protection of speech is found in RCW 72.09.530. There the words "constitutional constraints" mean that Stephens is entitled to the full panoly of court holdings interpreting Art 1, sec. 5., to include: (1) Free speech per Art 1, § 5 is a preferred right. O'Day v. King, 749 P2d 142, 146 (1988); (2) There is no presumption of constitutionality of an agency rule abridging freedom of speech. Adams v Hinkle, 322 P.2d 844, 848 (1958); (3) the burden to justify restricting speech belongs to the state. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114 (1997); (4) the state may only impair speech upon showing a compelling state interest". McCleary v. State, 173 Wn.2d 477, 518 (2012); and, (5) DOC must allege that social media websites and internet providers abuse the right of free speech. State v. Rinaldo, 36 Wn.App 86, 95 (1984).

In summary, the plain language of RCW 72.09.530 together with the court's opinions interpreting Art 1, sec. 5 establishes that our constitution provides greater protection in

the context of prisons than the First Amendment. Moreover, the statute cannot be interpreted to restrict services that distribute speech. Yet, that is precisely how DOC's Third Party mail policy functions.

E. RESPONDENTS MISAPPREHEND THE APPEAL PROCESS AND THE DOCTRINE OF PRIOR RESTAINT UNDER ART. I, SEC. 5.

1. Appeal. Respondents argue that Stephens' incoming "third party mail was constitutionally restricted under Turner, Stephens was not engaged in protected speech." Res.Rly pg 14. However, Respondents misapprehend direct appeal. On appeal this court conducts "**de novo**" review and includes the court's independent examination of the evidence. On appeal the court is not bound by the trial court's opinion. Keck v. Collins, 325 P.3d 306, 311 (2014).

2. Prior Restraint. Second, Respondents argue that there was no prior restriant because "the Department ... merely restricted his access to information." Res.Rly at 14. This is error. Our Supreme Court holds otherwise, "the right of free speech includes the 'fundamental counterpart' of the right to receive information." Voters Educ. Cmmt. v. Wash. State, 167 Wn.2d 470, 513 (2007); Fritz v. Groton, 83 Wn.2d 275, 296 (1974))). However, only rejection of 10/10/14 (CP-103) would be informational. (See *Ante*, pg 3). On the other hand, other mail holding "information" was not rejectred. CP-319, 324 &

328. Respondents' supporting cases are off point and concern the forced release of information. Res.Rly pg 15. For example, Halquist v. Dep't of Corr., 113 Wn.2d 818 (effort to force DOC to allow video tape of execution), and Fed Pub Inc. v Kurtz, 94 Wn.2d 51 (Plaintiffs sought access to closed courtroom).

3. PRIOR RESTRAINT. Respondents misapprehend Prior Restraint doctrine with this claim: "Stephens fails to identify a [DOC] restriction prohibitng future speech". Res.Rly at 15.

a) Art. 1, sec. 5 is more protective when it comes to prior restraints. Unlike the First Amendment our constitution categorically rules out prior restraints on constitutionally protected speech under any circumstances." Voters Educ. Committee, id at 513.

b) The constitution "absolutely forbids prior restraints against the publication or broadcast of constitutionally protected speech" where "the information sought to be retained were lawfully obtained, true, and a matter of public record." State v. Coe, 101 Wn.2d 364, 375 (1984).

c) The term prior restraint has been defined as "an [agency policy] or judicial order forbidding communications prior to occurrence. Simply stated, a prior restraint prohibits future speech, as apposed to punishing past speech." Soundgarder v. Eikenberry, 123 Wn.2d 750, 871 P.3d 1050, 1058 (1994). The

question of whether DOC imposes a prior restraint should "be treated first under our constitution" [i.e. Art 1, sec. 5]". State v. Coe, id at 359.

d) LAW APPLIED. In this case, DOC established a policy that blocks present and future speech, the proof: The multiple mail rejections. CP 76-79. By declaration, Roy Gonzales states: "Under DOC Policy 450.100, offenders are prohibited from engaging in any kind of third party communications" CP 75. And by letter CPM Padilla writes: "Printed email from someone other than the sender of the mail is considered third party [and is unauthorized]. CP 109 & 116. Thus, it should be crystal clear that DOC's Third Party Mail policy is a prior restraint. The policy announces that all present and future mail sent from social websites will be rejected. As a result, Stephens is prevented from learning the email address and phone number of citizens who wish to contact him. As defined by Soundgarder, supra, DOC's Third Party Mail prohibition is a prior restraint. The mail rejections fit the definition. CP-75, 116.

VI. RELIEF, COSTS and SANCTIONS

1. Stephens ask this court to overturn the trial court's grant of summary judgment and to remand for a trial on the issues of civil rights violations and retaliation.

2. Stephens moves the court for costs: Attorney fees, postage, photocopies and two dollars ($2.00) per page for his briefs and other documents filed with this court.

3. Stephens seeks sanctions against attorney Cassie vanRoojen for failure to bring controlling authority to the court's attention and for misrepresenting case law. Her citation to Mauro v. Apatio, supra was particularly misleading.

VII. CONCLUSION

The Third party mail policy is an exaggerated response to a described fear. Where in fact the Respondents have no evidence that inmates have used social media websites to circumvent no contact orders or inmate to inmate communications. The world has changed, the internet has become the modern newspaper. Therefore, based on the court file and the arguments presented, Stephens prays for reversal of summary judgment and for remand for a trial on this civil rights claims.

Submitted this 13 day of December 2015.

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CERTIFICATE OF MAILING

I, Fred Stephens, do hereby certify that on the date below I caused to be delivered to prison authorities for deposit in the United State's Mail, the following document(s):

1. "APPELLANT'S REPLY BRIEF"

MAILED TO:

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EXECUTED this ___ day of December 2015 at Monroe, Washington.

Fred Stephens, pro se
Monroe, WA.