Crofton v. Ocanaz

United States District Court for the Eastern District of Washington
December 17, 1996, Decided ; December 17, 1996, Filed
Case No. 2:95-cy-03142-LRS

Reporter: 1996 U.S. Dist. LEXIS 22770
CLAYTON CROFTON, Plaintiff, v. DOMINGO OCANAZ, et al., Defendants.

Subsequent History: .
Affirmed, Crofton v. Roe, 170 F.3d 957, 1999 U.S. App. LEXIS 5223, 99 C.D.O.S. 2195, 99 Daily Journal D.A.R. 4219 (9th Cir. Wash. 1999).

Disposition: [*1] Defendants' motion for summary judgement GRANTED IN PART and plaintiff's motion for summary judgment GRANTED IN PART. Plaintiff's claim for injunctive and declaratory relief GRANTED and Defendants ENJOINED from refusing the delivery of plaintiff's gift publications. Plaintiff's claims for compensatory and punitive damages, costs, and attorney's fees DENIED. Plaintiff's *First* and Fourteenth Amendment claims DISMISSED WITH PREJUDICE, and Judgment entered in favor of defendants.

Counsel: CLAYTON CROFTON, plaintiff, Pro se, Shelton, WA.

For JANE ROE, OCANAT, defendants: Martin E Wyckoff, Attorney General of Washington, Olympia, WA.

Judges: LONNY R. SUKO, United States Magistrate Judge.

Opinion by: LONNY R. SUKO

Opinion

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court is defendants' supplemental motion for summary judgment, **Ct. Rec. 44,** and plaintiff's [*2] motion for summary judgment, **Ct. Rec. 38.** Also before the court are plaintiff's motions for appointment of counsel, reopening discovery, and contempt. **Ct. Recs. 50, 51.** Upon hearing without oral argument, plaintiff appeared *pro se,* and defendants were represented by Assistant Washington State Attorneys General Martin E. Wyckoff and Colleen B. Evans.

In plaintiff's amended complaint, [1] plaintiff claims the WSP mail room improperly rejected a book sent to him by his stepfather by diverting the book to the property room. Subsequently, plaintiff says he was informed by defendant Ocanaz, an employee of the property room, that the book would not be delivered to the plaintiff. As it turns out, the book was ultimately delivered to the plaintiff some two months after it had been received.

[*3] In his original complaint, plaintiff sought compensatory and punitive damages, as well as injunctive relief "regarding WSP practice of diverting books not ordered through institutional channels." Apparently, plaintiff alleges that the book from his stepfather was transferred to the property room because it was not ordered through the appropriate channels. Following the transactions alleged in his original complaint, defendant Wood purportedly reduced to writing a previously unwritten policy requiring that all publications be received directly from facility approved vendors and be purchased only by the inmate. The new written policy explicitly prohibits receipt of gift publications, including subscriptions. The court then granted plaintiff leave to amend his complaint to add a claim regarding the written policy.

Essentially, plaintiff is challenging established WSP policy pertaining to inmate receipt of publications. Plaintiff further requests declaratory and injunctive relief regarding defendants' mail delivery practices, along with costs and attorney's fees. Plaintiff also challenges defendants' rejection of books not ordered through appropriate channels, including gift publications. [*4] Plaintiff also alleges that the property room inspection policy deprives inmates of property without providing procedural due process. Defendants claim that the transfer of packages, including publications, to the property room is required for inspection of the packages for contraband and is therefore reasonably related to a legitimate penological interest. Further, defendants claim that the publisher-only requirement and the prohibition of gift publications furthers legitimate penological interests.

FACTS

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[1] Although plaintiff did not formally file an amended complaint, he filed a "Supplemental Complaint" when he requested leave to file a new complaint. Ct. Rec. 26. Leave was granted and, construing plaintiff's pleadings liberally, the court considers plaintiff's "Supplemental Complaint" as an amended complaint.

Plaintiff is an inmate presently incarcerated at the Washington State Penitentiary (WSP) in Walla Walla, Washington. Defendant Domingo Ocanaz is a correctional officer employed by the Department of Corrections (DOC) employed in the WSP property room. Defendant Tana Wood is the Superintendent of WSP.

The WSP mail room processes incoming and outgoing mail for 3,200 inmates. Defendants estimate that the seven employees in the mail room handle approximately 10,000 to 20,000 pieces of mail per day.

Inmate correspondence is regulated by WSP Field Instruction 450.100. The Field Instruction in effect during the summer of 1995 was superseded on October 9, 1995 by a newer version [*5] of the instruction and an Administrative Bulletin dated May 21, 1996.

The Field Instruction in effect at the time plaintiff's stepfather mailed the book stated:

> Inmates may receive a reasonable number of books, newspapers, magazines, and other publications directly from the publisher provided they do not constitute a threat to the order and security of the institution or meet the obscenity or sexually explicit definitions of this instruction or DOP or DOC policy.WSP Field Instruction 450.100 (effective 11/20/93). The superseding Field Instruction provides:
>
> Inmates may receive books, newspapers, magazines, and other publications directly from the publisher provided they:
>
> a. Are paid for in advance by the inmate;
>
> b. Do not constitute a threat to the order and security of the institution;
>
> c. Are not obscene or sexually explicit as defined in this field instruction;
>
> d. Are not a threat to legitimate penological objectives; and
>
> e. Do not exceed authorized storage allowances.WSP Field Instruction 450.100, section H.1. (effective 10/09/95). The WSP Administrative Bulletin supplementing this particular provision of the instruction [*6] states that

section H(1)(a) of the instruction "means the publication must be paid for by the inmate with funds from his account. Gift subscriptions/publications (a subscription or publication paid for by someone other than the inmate) are prohibited." WSP Administrative Bulletin (dated 05/21/96).

The only exception to the requirement that inmates purchase all items is the allowance of inmates to receive Quarterly Gift Packages. WSP Field Instruction 450.101 states that quarterly gift packages may be received only from a person on the inmates' approved visiting list. Further, only items that are not available to the inmate may be included in the gift packages. Books and other publications are not allowed to be sent in gift packages.

In addition to quarterly gift packages, inmates are allowed to receive two vendor packages per year. All vendor packages must be sent from an approved vendor using funds from the inmate's individual trust account. WSP 450.101

To order vendor packages, including publications and curio supplies, an inmate must complete a Disbursement Request and Order Form and submit the forms to a counselor or unit supervisor. The counselor then reviews the forms to ensure [*7] that they meet established criteria. The forms are then forwarded to the Property Sergeant, who reviews the request to ensure that the purchase will not exceed established property limits. WSP 450.101; 540.030.

Inmates housed in the general population may possess books and periodicals "in an amount not exceeding the capacity of a carton 18" x 12" x 10"." WSP Administrative Bulletin supplementing DOC Policy 440.000 (dated September 8, 1995; effective October 8, 1995).

On August 10, 1995, the WSP mail room received a book entitled "The Whisper of the River" from the University of Washington Bookstore to be delivered to plaintiff. The book had been purchased by plaintiff's stepfather as a gift. The book was logged in by a mail machine operator. On August 14, 1995, a property room clerk transported the book from the mail room to the property room for inspection.

On August 28, 1995, defendant Ocanaz told plaintiff that the book would have to be sent out of WSP because it was not ordered through the proper institutional channels. Plaintiff apparently laughed and walked away.

During the months of September and October 1995, plaintiff spent time in both the WSP intensive management unit [*8] and the WSP hospital. Defendant states that

plaintiff's placement during this time prevented discussion of disposition of the book. Defendant Streck eventually spoke with plaintiff at the hospital and learned the name of the book.

On October 27, 1995, defendant Streck delivered the book to plaintiff.

On November 8, 1995, plaintiff filed suit, challenging the "rejection" of his book and the WSP practice of diverting books to the property room if not ordered through institutional channels. On July 18, 1996, the court granted plaintiff leave to amend his complaint to add a challenge to the superseding Field Instruction requiring publications to be purchased by the inmate.

Plaintiff claims that his step-father indicated a wish to send plaintiff another book, but plaintiff instructed his step-father not to do so because it would be rejected.

PLAINTIFF'S COLLATERAL MOTIONS

A. Appointment of Counsel

This court has discretion to designate counsel pursuant to *28 U.S.C. § 1915(d)* only in exceptional circumstances. *Wilborn v. Escalderon,* 789 F.2d 1328, 1331 (9th Cir. 1986) (citations omitted). Determining whether exceptional circumstances [*9] exist requires evaluating the likelihood of success on the merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of the legal issues involved. *Id.* (citation omitted). "Neither of these factors is dispositive and both must be viewed together before reaching a decision on request for counsel under *section 1915(d)*." 789 F.2d at 1331.

In the instant case, plaintiff is more than capable of articulating his claims. Further, plaintiff's likelihood of success on the merits of his claims are not enhanced by the prospect of appointed counsel. Therefore, the court will deny plaintiff's request.

B. Discovery and Contempt

Plaintiff claims that reopening of discovery is necessary because defendants have failed to provide him with copies of pertinent documents. Plaintiff further requests that the court hold defense counsel in contempt for this failure. The court has examined plaintiff's request and is of the opinion that the additional discovery requested by plaintiff is not critical to the disposition of his case. The ultimate issues involved are of a legal, rather than factual, nature. Furthermore, plaintiff's motion to [*10] hold defendants in contempt is inappropriate; defendants have not failed to obey an order of the court. Therefore, defendants requests for reopening of discovery and contempt are denied, and the court proceeds to the parties' cross-motions for summary judgment.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.,* 521 F.2d 1129 (9th Cir.), *cert. denied,423 U.S. 1025, 46 L. Ed. 2d 399, 96 S. Ct. 469 (1975)*. Under *Rule 56*, a party is entitled to summary judgment where the documentary evidence produced by the parties permits only one conclusion. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Semegen v. Weidner,* 780 F.2d 727 (9th Cir. 1985). Summary judgment is precluded if there exists a genuine dispute over a fact that might affect the outcome of the suit under the governing law. *Anderson,* 477 U.S. at 248.

The moving party has the initial burden to prove that no genuine issue of material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). [*11] Once the moving party has carried its burden under *Rule 56*, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In ruling on a motion for summary judgment, all inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Matsushita,* 475 U.S. at 587. Summary judgment is required against a party who fails to make a showing sufficient to establish an essential element of a claim, even if there are genuine factual disputes regarding other elements of the claim. *Celotex,* 477 U.S. at 322-23.

Neither party contests the underlying facts of this case; rather, both parties move for resolution of plaintiff's claims as a matter of law. The court agrees that summary judgment is appropriate; no facts are in dispute and the constitutionality of the challenged regulations may be determined as a matter of law.

DISCUSSION

A. Mootness

[*12] Defendants argue that plaintiff's claims are moot because he eventually received his book. Therefore, defendants contend that no actual controversy exists between the parties. Plaintiff responds that his case meets one of the exceptions to the mootness doctrine.

Federal jurisdiction over a claim depends on the existence of a "case or controversy" under Article III of the Constitution. *GTE California, Inc. v. Federal Communications Comm'n,* 39 F.3d 940, 945 (9th Cir. 1994). "In general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." Public Utilities Comm'n of California v. Federal Energy Regulatory Comm'n, 100 F.3d 1451, 1996 WL 668457 (9th Cir. Nov. 20, 1996) (internal quotes and citations omitted). If a court is not able to grant effective relief, it lacks jurisdiction and must dismiss the case. *GTE California,* 39 F.2d at 945. A case otherwise moot will nevertheless be heard if an exception to the mootness doctrine applies. *Id.* One exception to the doctrine is voluntary cessation of allegedly illegal conduct. *Public Utilities Comm'n of California,* 100 F.3d 1451, at *6 [*13] . Voluntary cessation of such conduct does not deprive a federal court of jurisdiction unless "there is no reasonable expectation that the wrong will be repeated." *Id.* (internal quotes and citations omitted). The standard "is whether the defendant is free to return to its illegal action at any time. 100 F.3d 1451, *Id.* at *7. The Ninth Circuit has implied that this exception only applies if the voluntary cessation occurred because of the litigation. *Id., citing Nome Eskimo Community v. Babbit,* 67 F.3d 813, 816 (9th Cir. 1995).

This court does not lack jurisdiction over plaintiff's case. First, although plaintiff eventually received his book from defendants, an actual controversy still exists between the parties. Defendants continue to prohibit receipt of gift publications, and plaintiff claims that he instructed his step-father not to send more books as gifts because of this prohibition. Additionally, defendants still transfer books and other publications from the mail room to the property room for inspection, delaying plaintiff's receipt of these items. Therefore, the court is still able to grant effective relief, should the court rule in favor of plaintiff's [*14] claims.

Moreover, even if the case is moot, the voluntary cessation exception would apply to these facts. Defendants voluntarily suspended their allegedly illegal conduct by ultimately delivering plaintiff's book. However, under the current regulations, defendants are free to prohibit any further receipt of gift publications. Finally, it is arguable that defendants gave plaintiff his book in response to plaintiff's lawsuit. Plaintiff's original complaint is dated October 5, 1996, although it was not formally filed with the court until November 8, 1995. However, it is possible that defendants knew of plaintiff's intent to file a complaint. Accordingly, this court has jurisdiction to hear plaintiff's case.

B. First Amendment Claims

The Supreme Court has articulated several principles applicable to prisoner claims alleging violations of constitutional rights. First, "federal courts must take cognizance of the valid constitutional claims of prison inmates." *Turner v. Safley,* 482 U.S. 78, 84, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* Thus, prison inmates [*15] possess the right of free speech and religion under the *First* and Fourteenth Amendments, including the right to receive publications. *Bell v. Wolfish,* 441 U.S. 520, 545, 550-51, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); *Thornburgh v. Abbot,* 490 U.S. 401, 407, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989); *Procunier v. Martinez,* 416 U.S. 396, 407-11, 40 L. Ed. 2d 224, 94 S. Ct. 1800, 71 Ohio Op. 2d 139 (1974); *Pepperling v. Crist,* 678 F.2d 787, 791 (1982) ("The blanket prohibition against receipt of the publications by any prisoner carries a heavy presumption of unconstitutionality."); *see also Sizemore v. Williford,* 829 F.2d 608, 610 (7th Cir. 1987) (in absence of legitimate penological interests, prisoners retain *First Amendment* right to receive and read publications); *Brooks v. Seiter,* 779 F.2d 1177, 1180 (6th Cir. 1985) (receiving mail from "outside source" is protected *First Amendment* right).

Additionally, the Ninth Circuit has overruled a district court decision granting summary judgment against a prison inmate who was challenging the publisher-only rule for softbound books. *Johnson v. Moore,* 926 F.2d 921, 924 (9th Cir. 1991). [*16] The court noted that such a rule "clearly restricts the flow of information to the prisoner," and found that prison officials had not made a sufficient showing that security considerations necessitated the rule for the purposes of summary judgment. *Id.*

Finally, in an unpublished opinion addressing some of the same regulations at issue in the instant proceeding, the Ninth Circuit stated that "the lack of a reasonable relationship with a valid penological objective would be fatal to the rule restricting the receipt of any item sent through the mail if items are not ordered and approved in advance through facility-designated channels and the publisher-only rule." *Richey v. Spalding,* 48 F.3d 1228, 1995 WL 72390 (9th Cir.). Although the court is aware that an unpublished opinion may not be cited as precedent, the opinion demonstrates that the Circuit has recognized *First Amendment* rights of prisoners in this context. Therefore, restricting access to incoming publications implicates the *First Amendment* rights of inmates.

Nevertheless, the Supreme Court has also held that restrictions upon prisoners' constitutional rights are permissible, so long as those restrictions [*17] are "reasonably related to legitimate penological interests." *Turner v. Safley,* 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S.

Ct. 2254 (1987); *Thornburgh v. Abbott,* 490 U.S. 401, 407, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989). This standard reflects the view that prisoner administrators, and not the courts, should resolve difficult and complex questions of institutional operations. *Turner,* 482 U.S. at 89. Further, the standard is necessary so that courts avoid becoming the ultimate arbiters of every administrative problem in correctional institutions. *Id.*

The Court has set forth factors relevant to the determination of reasonableness, including: 1) whether a "valid, rational connection" exists between the prison regulation and a legitimate and neutral government interest; 2) whether alternative means of exercising the restricted constitutional right remain open to inmates; 3) the extent to which the accommodation of the asserted right will impact the prison staff and resources; and 4) whether the regulation is an "exaggerated response" to prison concerns in light of available alternatives. *Turner,* 482 U.S. at 89-91; [*18] *Johnson v. Moore,* 926 F.2d 921, 924 (9th Cir. 1991).

Although the standard enunciated by the Court in *Turner* reflects the deference owed to prison administrators, the Court did not intend for courts to simply rubberstamp the decision of prison officials. For example, the Court explains that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner,* 482 U.S. at 89-90. Thus, a court is required to closely examine whether a regulation is reasonably related to legitimate penological interests. With these principles in mind, the court proceeds to the challenged regulations.

1. Property Room Inspection

Plaintiff argues that diverting or transferring publications from the mail room to the property room for inspection unconstitutionally infringes on his *First Amendment* rights by restricting his immediate access to such publications. Plaintiff infers that defendants transferred his book because it was not ordered through proper institutional channels. Plaintiff also claims that such diversion impermissibly interferes with his right [*19] to receive mail. Defendants argue that such diversion is normal practice with all vendor and gift packages, including publications, so that the packages can be inspected for contraband, placed on an inmates' personal property inventory, and stamped with the inmates identification number. Defendants maintain that the legitimate penological interest of security justifies the transfer of publications from the mail room to the property room for inspection.

WSP regulations provide that "all quarterly packages and purchases from a vendor will be processed through the Property Room," and that "all books, publications, or letters, regardless of the sources, which are intended for inmate use or possession, will be forwarded to the Mail Room for inspection prior to delivery or availability to the inmate." WSP Administrative Bulletin dated September 8, 1995; WSP Field Instruction 450.100 (effective 10/09/95). Additionally, the field instruction governing inmate property provides that all incoming property will be transported to the property room for inspection and inventory. WSP Field Instruction 440.000, section V.A.3. Although the Administrative Bulletin could indicate that books and other [*20] publications may be transferred to the property room for inspections, the regulations make clear that any item purchased from a vendor, which would necessarily include a publisher, shall be transported to the property room for inspection. Plaintiff claims that such transfer is a "diversion" or "rejection" of his property and unduly infringes upon his *First Amendment* rights.

Plaintiff's claim regarding this issue is without merit. First, it is highly doubtful whether this action actually infringes upon plaintiff's *First Amendment* rights. Plaintiff's access to publications is not restricted by this process, it is simply temporarily delayed. Additionally, contrary to plaintiff's assertions, an item is not "rejected" if it is diverted to the property room; all vendor packages are transferred to the property room for inspection, regardless of content.

Even if plaintiff's constitutional rights were implicated, the regulation serves an important penological interest. Clearly, inspection of incoming items for contraband is reasonably related to the legitimate penological interest of security. Without such inspection procedures, an inmate could direct an outsider to conceal contraband inside [*21] a book or magazine which could then enter the prison population undetected. Therefore, diverting packages, including books and other publications, from the mail room to the property room for inspection does not violate the *First Amendment* rights of plaintiff.

2. Publication Purchase Policy

Plaintiff next contends that the regulation requiring plaintiff to purchase publications from an approved publisher or vendor violates his *First Amendment* rights. It is well-established that prison officials may require inmates to purchase publications directly from the publisher or an approved vendor. *Bell v. Wolfish,* 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Therefore, plaintiff cannot show that the publisher-only rule violates his constitutional rights.

The requirement that inmates may receive books or subscriptions from a publisher only if the inmates themselves purchase the publications requires closer examination. As stated above, a regulation restricting an

inmate's right to receive publications is an infringement on their *First Amendment* rights and will only be sustained if the regulation is reasonably related to a penological interest. *Thornburgh,* 490 U.S. at 407; [*22] *Turner,* 482 U.S. at 89.

Defendants maintain that the regulations at issue, including the prohibition against publications purchased by a third party, address penological concerns of fire hazards, space and storage, contraband, and strong-arming. The court addresses each stated interest in turn.

Defendants argue that limiting the number of gifts that an inmate may receive is reasonably related to legitimate penological interests of fire hazards and storage space. The court agrees that those are legitimate concerns, however, the regulation is not reasonably related to the stated interests. First, WSP has other regulations limiting the number of books that an inmate may possess, which undoubtedly address the concern of fire hazards. According to a recent WSP Administrative Bulletin, inmates may possess books so long as they fit inside a carton measuring 18" x 12" x 10". Therefore, prohibiting gift publications is not rationally related to the interest of storage space as WSP already limits the number of books that an inmate may possess.

Even if the regulation is reasonably related to the interest of storage space, it is clearly an "exaggerated response" to prison [*23] concerns in light of available alternatives. In looking at whether a particular prison regulation is an exaggerated response, a prison regulation need not meet a "least restrictive" test or analysis. *Turner,* 482 U.S. at 90. However, if an alternative "fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91. In this case, prison officials already possess a viable and enforceable alternative: the restriction on the number of books that an inmate may possess. Thus, prohibiting gift publications due to storage and fire hazard concerns is an exaggerated response to the stated interest.

Second, defendants proffer the penological interest of preventing contraband from entering the institution. Again, this is a valid interest, but it is not rationally related to prohibiting gift publications when those publications are ordered directly from the publisher. Defendants offer no rational distinction between the risk of contraband if an inmate orders a publication directly from the publisher or if an [*24] inmate's family member orders a publication directly from the publisher. In both instances, the publication is mailed directly from the publisher, lessening the opportunity for concealment of contraband. The receipt of both books by the inmate is subject to compliance with content and storage restrictions. Therefore, defendants fail to show a reasonable relationship between the blanket prohibition of gift publications and the stated interest of contraband.

Defendants suggest that the efficiency of prison operations could be compromised by a flood of gifts, and therefore, the amount of gifts received by an inmate must be limited. However, with respect to gift books or publications, defendants do not simply limit the number that may be received, they prohibit *all* gift publications. Furthermore, defendants do not proffer why reasonable limitations on the number of gift publications, such as those prescribed for gift and vendor packages, would not address concerns of mail and property room efficiency. Moreover, the number of books or publications that a particular inmate may order is not restricted so long as the number of publications do not exceed storage limitations.

The most [*25] reasonable argument defendants proffer in support of the prohibition against gift subscriptions is the threat of strong-arming. Defendants maintain that if inmates were allowed to receive gift publications, inmates could threaten outside friends or family with retaliatory harm if the friend or family member did not send a book requested by the inmate. However, defendants do not cite specific evidence or facts in support of this argument; they simply state that defendant Wood is aware of situations where people outside the institution have been threatened or physically harmed due to deals struck inside the prison. Defendants do not explain what kind of deals resulted in actual or threats of physical harm or whether those instances involved gifts of any kind, particularly books.

Furthermore, defendants' argument is diluted by their statement that a friend or family member may instead send an inmate money to purchase a book. This argument appears to suggest that the threat of strong-arming is greater in the case of gift publications rather than money. As such, the blanket prohibition against gift publication is not reasonably related to the penological interest in preventing strong-arming. [*26] Moreover, inmates are allowed to receive gift packages in addition to monies sent by persons on the inmates visiting list. Defendants offer no legitimate interest to prevent those same persons from purchasing and sending a publication, the receipt of which is protected by the *First Amendment*.

Finally, the court notes that defendants assert that plaintiff did not receive the book immediately after inspection because it was not properly ordered through institutional channels. Defendants concede that the book was ordered and delivered through an approved vendor, however, the book was purchased by someone other than plaintiff. Nonetheless, defendants ultimately delivered the book to

plaintiff, despite the fact that it was not purchased by plaintiff. Defendants do not explain why plaintiff was ultimately given the book if it was ordered improperly. Indeed, defendants delivering of the book demonstrates the arbitrary nature of this particular regulation.

Defendant Wood asserts that the receipt of books should not be addressed differently from other property that an inmate may receive. However, this argument fails to recognize that the right to receive publications is protected by the *First Amendment* [*27] and any restriction on that right must reasonably serve legitimate penological interests. If gift publications were limited rather than completely prohibited, the court might reach a different conclusion. However, the court's decision must be based on the regulations as written. Therefore, as explained above, the absolute prohibition against gift publications does not reasonably serve such interests.

C. Fourteenth Amendment Claim

Finally, plaintiff claims that the diversion of books to the property room and rejection of books if not ordered through the proper channels deprives him of property without due process. However, the temporary deprivation of property resulting from the property room inspection does not restrict plaintiff's access to publications. *Sizemore v. Williford,* 829 F.2d 608, 610 (7th cir. 1987). Even if the diversion and inspection did implicate a constitutional right, inspecting packages for contraband, including books, is reasonably related to the legitimate penological interest of security. Further, plaintiff has an adequate post-deprivation remedy if a book or publication is ultimately rejected by utilizing the WSP grievance [*28] procedure. Therefore, plaintiff's allegation that defendants have violated his due process rights must fail.

D. Qualified Immunity

Plaintiff requests compensatory and punitive damages. The court notes that plaintiff has not shown that he suffered any damages. Plaintiff's book was ultimately delivered to him, and plaintiff has not offered evidence showing that defendants destroyed other items mailed to him. Furthermore, punitive damages are not appropriate under the circumstances. Finally, even if plaintiff did suffer damages, defendants are entitled to qualified immunity.

Permitting damages suits against government officials can result in substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). Accordingly, "Government officials performing discretionary functions[] generally are shielded from liability for civil damages [in a *section 1983* action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a [*29] reasonable person would have known." *Id.* at 818. This "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson v. Creighton,* 483 U.S. 635, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Rather, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640-641. In other words, "in the light of preexisting law, the unlawfulness must be apparent." *Id. See: Lum v. Jensen, et al.* 876 F.2d 1385 (9th Cir. 1989), *cert. denied493 U.S. 1057, 107 L. Ed. 2d 951, 110 S. Ct. 867 (1990)*; *The Presbyterian Church (USA) v. United States,* 870 F.2d 518, 527 (9th Cir. 1989); *Tribble v. Gardner et al.,* 860 F.2d 321, 324 (9th Cir. 1988), *cert. denied490 U.S. 1075, 104 L. Ed. 2d 650, 109 S. Ct. 2087 (1989)*.

There are three inquiries relevant to the qualified immunity test: 1) the identification of the specific right allegedly violated; 2) the determination of whether that right was so "clearly established" as to alert a reasonable [*30] officer to its constitutional parameters; and 3) the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. Regardless of whether the constitutional violation occurred, qualified immunity should be granted if the right asserted was not "clearly established" *or* the officer could have reasonably believed that his particular conduct was lawful. *Romero v. Kitsap County,* 931 F.2d 624, 627 (9th Cir. 1991) (citations omitted). The first two inquiries are pure questions of law. The third inquiry, although ultimately a legal question, may require some factual determinations. *Id.* at 628 (citations omitted).

In this case, the court assumes that plaintiff's *First Amendment* right to receive publications is clearly established. However, the court finds that defendants reasonably believed that their conduct in prohibiting gift publications was lawful. Current regulations allow inmates to purchase books and the prison offers an interlibrary loan system. Accordingly, even if plaintiff was able to show damages, defendants are entitled to qualified immunity.

CONCLUSION

Defendants fail to show a [*31] rational connection between WSP's absolute prohibition on gift publications and the stated penological concerns of contraband, storage space, and strong-arming. Therefore, the prohibition against gift publication violates plaintiff's *First Amendment* rights and plaintiff is entitled to injunctive and declaratory relief with respect to that particular prison regulation. However, defendants articulate legitimate penological interests for subjecting publications to

inspection and requiring such publications to be ordered directly from the publisher. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgement is **GRANTED IN PART** and plaintiff's motion for summary judgment is **GRANTED IN PART.** Plaintiff's claim for injunctive and declaratory relief is **GRANTED** with respect to the WSP regulation prohibiting receipt of all gift publications, and Judgment shall be entered in favor of plaintiff accordingly.

Defendants are **HEREBY ENJOINED** from refusing the delivery of plaintiff's gift publications, under Field Instruction 450.100 Section H.1.a. currently in effect, upon their delivery by the postal service to the WSP mail room, so long as the content [*32] of the publications meets institutional regulations and the bulk of the publications meets institutional storage requirements.

Plaintiff's claims for compensatory and punitive damages, costs, and attorney's fees are **DENIED.**

IT IS FURTHER ORDERED that plaintiff's *First* and Fourteenth Amendment claims challenging WSP's policy of transferring publications to the property room for inspection and the policy of requiring books to be purchased from the publisher are **DISMISSED WITH PREJUDICE,** and Judgment shall be entered in favor of defendants accordingly. Each party shall bear its own costs.

DATED this *17th* day of December, 1996.

LONNY R. SUKO

United States Magistrate Judge

JUDGMENT IN A CIVIL CASE

DECISION BY COURT:

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED. That a judgment be entered pursuant to the court's order filed December 17, 1996, whichs GRANTS in part plaintiff's motion for summary judgment and GRANTS in part defendant's motion for summary judgment. Each party shall bear its own costs.