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# Access to the Courts and Attorneys

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Sincerely,

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# Access to the Courts and Attorneys

**Reference Number:** CTAS-1418

"The Supreme Court of the United States recognizes the existence of a constitutional right of access to the courts and has identified the sources of the right of access in the prisoner context as the Due Process Clause, the Equal Protection Clause, and the First Amendment." *Phifer v. Tennessee Bd. of Parole*, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002) (citations omitted). "The right to meaningful access to the courts ensures that prison officials may not erect unreasonable barriers to prevent prisoners from pursuing all types of legal matters." *Id*., (citations omitted).

"Although the exact contours of this right are somewhat obscure, the Supreme Court has not extended the right to encompass more than the ability to prepare and transmit a necessary legal document to a court. A prisoner must show an actual injury to prevail on an access-to-the-courts claim." *Breshears v. Brown*, 150 Fed.Appx. 323, 325 (5th Cir. 2005) (citations omitted).

While a First Amendment right to access to the courts clearly exists, no claim for interference with this right exists unless plaintiff alleges that defendants prevented him from filing a nonfrivolous legal claim challenging his conviction. The plaintiff must allege that he has suffered an actual injury to state a claim. The plaintiff must allege that a nonfrivolous claim was lost or rejected, or that the presentation of such a claim is currently being prevented. *Clark v. Corrections Corporation of America*, 113 Fed.Appx. 65, 67-68 (6th Cir. 2004) (citations omitted).

# Access to the Courts

**Reference Number:** CTAS-1419

The landmark case in the area of a prisoner's right of access to the courts is *Bounds v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

> In Bounds, the Supreme Court noted that prisoners must be afforded meaningful access in their criminal trials, on their appeals as of right, and in their habeas and civil rights actions. In holding that the right to affirmative assistance applies in these contexts, the Supreme Court explained "we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.... Habeas corpus and civil rights actions are of 'fundamental importance ... in our constitutional scheme' because they directly protect our most valued rights."

*Phifer v. Tennessee Bd. of Parole*, 2002 WL 31443204, *10 (Tenn. Ct. App. 2002).

However, since the United States Supreme Court decided *Bounds*, the scope of the right of access to the courts "has been the subject of further litigation which has served to limit and define the types of litigation to which the [right] applies." *Id*. The Sixth Circuit Court of Appeals has held that it would be "an unwarranted extension of the right of access" to require states to affirmatively assist prisoners "on civil matters arising under state law." *John L. v. Adams*, 969 F.2d 228, 235-236 (6th Cir. 1992). And, in *Knop v. Johnson,* 977 F .2d 996, 1009 (6th Cir. 1992), the court held that the right of access to the courts requires affirmative assistance for inmates "only in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration."

> This view was subsequently adopted by the United States Supreme Court: Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration. Lewis v. Casey, 518 U.S. 343, 355, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

*Reinholtz v. Campbell,*64 F.Supp.2d 721, 730 (W.D. Tenn. 1999). *See Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003) ("However, a prisoner's right of access to the courts is limited to direct criminal appeals, habeas corpus applications, and civil rights claims challenging the conditions of confinement.").

> The Court in Lewis also found that Bounds did not create any independent right of access to legal materials. The Court specifically found that Bounds did not establish a right to a law library or to legal assistance, but that "[t]he right that Bounds acknowledged was the (already well-established) right to access to the courts." 518 U.S. at 350, 116 S.Ct. at 2179. Meaningful access to the courts is the touchstone. It is the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts that is protected, not "the capability of turning pages in a law library." 518 U.S. at 356-57, 116 S.Ct. 2182.

*Phifer v. Tennessee Bd. of Parole*, 2002 WL 31443204, *11 (Tenn. Ct. App. 2002) (footnote omitted). *See also Benjamin v. Kerik*, 102 F.Supp.2d 157, 162 (S.D. N.Y. 2000) (“The *Lewis* Court repudiated the expansive understanding of its prior decision in *Bounds v. Smith*, and held that prisoners do not have a freestanding right to law libraries or legal assistance.”) (citations omitted).

“Although prisoners maintain a right of access to the courts, they do not have the right of access to a law library.” *Jackson v. Wiley*, 352 F.Supp.2d 666, 679 (E.D. Va. 2004) *citing Strickler v. Waters*, 989 F.2d 1375, 1385 (4th Cir. 1993). An inmate is not denied his right of access to the courts simply because a jail’s law library is inadequate or because an inmate’s access to that library has been restricted in some way. *Id*. Access to a jail's law library may be restricted during lockdown where inmates have access to other forms of legal advice. *Id*. at 680, *citing Johnson v. Williams*, 768 F.Supp. 1161 (E.D. Va. 1991). “States have a duty to provide inmates with *either* an attorney or access to law libraries to prepare for trial. States need not provide both law libraries and advisors.” *Id*.

“There is no constitutional right to any particular number of hours in the law library.” *Thomas v. Campbell*, 12 Fed.Appx. 295, 297 (6th Cir. 2001), *citing Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985). *See also Davidson v. Edwards*, 816 F.2d 679, 679 (6th Cir. 1987) (Table) (“Restricted access to the library is not a per se denial of access to the courts. Rather, access to the library need only be reasonable and adequate.”).

The Tenth Circuit Court of Appeals has held that the “availability of law libraries is only one of many constitutionally acceptable methods of assuring meaningful access to the courts, and pretrial detainees are not entitled to law library usage if other available means of access to court exist.” *United States v. Cooper*, 375 F.3d 1041, 1051 (10th Cir. 2004). “It is well established that provision of legal counsel is a constitutionally acceptable alternative to a prisoner's demand to access a law library.” *Id*. at 1051-1052. The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts. *Ishaaq v. Compton,* 900 F.Supp. 935, 941 (W.D. Tenn. 1995).

An inmate who has court-appointed counsel on direct appeal has no constitutional right of access to a law library in preparing his defense. *Caraballo v. Federal Bureau of Prisons*, 124 Fed.Appx. 284, 285 (5th Cir. 2005) (citation omitted). *See also United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004) (same). Moreover, “many federal circuit courts have held that a prisoner who knowingly and voluntarily waives appointed representation by counsel in a criminal proceeding is not entitled to access to a law library.” *Degrate v. Godwin,*84 F.3d 768, 768-69 (5th Cir. 1996) (citing cases).

An inmate’s right of access to the courts is not violated merely because his attorney refuses to accept collect phone calls. *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004).

A prisoner’s right of access to the courts includes the right to receive legal advice from other prisoners only when it is a necessary "means for ensuring a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Pendleton v. Mills*, 73 S.W.3d 115, 124 n. 10 (Tenn. Ct. App. 2001), *citing Shaw v. Murphy*, 532 U.S. 223, 231 n. 3, 121 S.Ct. 1475, 1480 n. 3, 149 L.Ed.2d 420 (2001); *Bounds v. Smith,* 430 U.S. 817, 825, 97 S.Ct. 1491, 1496, 52 L.Ed.2d 72 (1977). However, "an inmate does not have an independent legal right to help other prisoners with their legal claims." *Thaddeus-X v. Blatter*, 175 F.3d 378, 395 (6th Cir. 1999) (citations omitted). “Rather, a ‘jailhouse lawyer's’ right to assist another prisoner is wholly derivative of that prisoner's right of access to the courts; prison officials may prohibit or limit jailhouse lawyering unless doing so interferes with an inmate's ability to present his grievances to a court.” *Id*. *See also King v. Zamiara*, 150 Fed.Appx. 485, 492 (6th Cir. 2005) (“[A]n inmate engages in protected activity by providing legal assistance when his assistance is *necessary* to provide another inmate with constitutionally-protected access to the courts.”).

An inmate’s right of access to the courts “does not encompass a requirement that prison officials provide a prisoner with free, unlimited access to photocopies.” *Logue v. Chatham County Detention Center*, 152 Fed.Appx. 781, 784 (11th Cir. 2005). In *Logue*, the inmate alleged that jail officials violated his right to access to the courts based on the denial of his requests for multiple photocopies of supporting exhibits, including lengthy transcripts, for his use in an unrelated habeas corpus proceeding. The Eleventh Circuit

Court of Appeals upheld the district court's dismissal of Logue's claim because Logue failed to allege an *actual injury* by showing that the denial of the photocopies actually impeded a nonfrivolous claim. The court stated: "Here, Logue did not assert that the California court rejected his habeas petition because of the missing attachments and, thus, we discern no actual injury giving rise to a violation of his access to the courts." *Id*. *See also Miller v. Donald*, 132 Fed.Appx. 270, 272 (11th Cir. 2005) (finding prison officials did not deny inmate his right to access the courts by refusing his request that they provide him with free photocopies of legal documents he was required to serve on defendants in a civil rights action before a California federal court where the inmate failed to allege that the California federal court would not accept service of, or that he was unable to produce, hand-copied duplicates).

Likewise, in *Courtemanche v. Gregels*, 79 Fed.Appx. 115, 117 (6th Cir. 2003), the Sixth Circuit Court of Appeals recognized that "the right of access does not include a per se right to photocopies in whatever amount a prisoner requests." "[T]he right of access to the courts is not unrestricted and does not mean that an inmate must be afforded unlimited litigation resources." *Thomas v. Rochell*, 47 Fed.Appx. 315, 317 (6th Cir. 2002). *See also Negron v. Golder*, 111 P.3d 538, 544 (Colo. App. 2004) ("There is no constitutional right to photocopy services."); *Walters v. Thompson*, 615 F.Supp. 330, 340 (N.D. Ill. 1985) (Inmates are not entitled to unlimited free photocopying as a matter of right.); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983) ("broad as the constitutional concept of liberty is, it does not include the right to Xerox").

Inmates shall have unrestricted and confidential access to the courts. Inmates shall have the right to present any issue before a court of law or governmental agency. The facility shall establish reasonable hours during which attorneys may visit and/or telephonically communicate. Inmates shall have access to legal materials. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(8).

## Access to Counsel

**Reference Number:** CTAS-1420

Pursuant to state regulations, the jail must have a written policy providing that prisoners will be allowed to have confidential access to their attorneys and their authorized representatives at any reasonable hour. Rules of the Tennessee Corrections Institute, Rule 1400-1-.12(7).

"Access to counsel is not only a right under the Sixth Amendment, but is one means of insuring access to the courts."*Arney v. Simmons*, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (citations omitted). The opportunity to communicate privately with an attorney is an important part of meaningful access to the courts. *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir.1980). "However, the Sixth Amendment does not require in all instances full and unfettered contact between an inmate and counsel." *Arney*, 26 F.Supp.2d at 1296. "The constitutionally relevant benchmark is *meaningful,* not total or unlimited, access." *Campbell v. Miller,* 787 F.2d 217, 226 (7th Cir.), *cert. denied,* 479 U.S. 1019, 107 S.Ct. 673, 93 L.Ed.2d 724 (1986) (emphasis in original).

Prison officials have the authority to impose reasonable regulations and conditions regarding attorney visits, so long as they do not interfere with an inmate's communication with his attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted). "The extent to which that right is burdened by a particular regulation or practice must be weighed against the legitimate interests of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials." *Procunier v. Martinez*, 416 U.S. 396, 420, 94 S.Ct. 1800, 1814-1815, 40 L.Ed.2d 224 (1974). *See Department of Corrections v. Superior Court*, 131 Cal.App.3d 245, 250-255 (Cal. App. 1 Dist. 1982) (upholding termination of personal contact visits with attorney and substitution of specified noncontact visits as reasonable and necessary in the interest of institutional security and public protection). *But see Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that a prisoner's right of access to the courts includes contact visitation with his counsel).

A 24-hour notice requirement prior to legal visitation does not violate an inmate's right to access to counsel. *Campbell v. Miller*, 787 F.2d 217, 226-227 (7th Cir. 1986) ("Despite these restrictions, attorneys may visit inmates four days a week. That provides inmates with a reasonable opportunity to receive professional legal assistance.").

While prisoners have a right to meet with their attorney, they do not have a right to meet as a group with an attorney. *Boyd v. Anderson*, 265 F.Supp.2d 952, 969 (N.D. Ind. 2003) (citations omitted).

County jail inmates who wish to consult with an attorney must be provided with a reasonable degree of privacy. *Nicholson v. Choctaw County*, 498 F.Supp. 295, 310 (S.D. Ala. 1980), *citing Jones v. Diamond*,

594 F.2d 997, 1024 (5th Cir. 1979); *Ahrens v. Thomas*, 434 F.Supp. 873, 898 (W.D. Mo. 1977). *See also Owens-El v. Robinson*, 442 F.Supp. 1368, 1389 (W.D. Pa. 1978) (finding that the attorney visiting room, while occasionally overcrowded, was sufficient to permit attorneys to consult with their clients and to properly prepare a defense, and therefore did not violate inmates' constitutional rights).

## Telephone Calls to Attorneys

**Reference Number:** CTAS-1421

Inmates must be permitted telephone access to contact the courts and their attorneys under certain circumstances. *Green v. Nadeau*, 70 P.3d 574, 578 (Colo. App. 2003). However, some reasonable restrictions on inmates' ability to access counsel by telephone does not deny inmates "their constitutional right to access the courts and counsel." *Mullins v. Churchill*, 616 N.W.2d 764, 770 (Minn. App. 2000) (upholding policies regulating inmate use of telephones that required inmates to provide attorney's name and telephone number and explanation of why inmate could not contact attorney by mail). The right to counsel under the federal Constitution is the right to counsel's effective assistance, and not the right to perfect representation or unlimited access to counsel. The right to confer with counsel does not include the right to confer by telephone with counsel as frequently as the inmate or the attorney desires. *Washington v. Meachum*, 680 A.2d 262, 282 (Conn. 1996). *See also Aswegan v. Henry,* 981 F.2d 313, 314 (8th Cir. 1992) (stating "[a]lthough prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone use") (citations omitted).

> The federal courts have had a few opportunities to deal specifically with the question of restrictions placed upon telephone communications between attorneys and prisoners. In Williams v. ICC Committee, 812 F.Supp. 1029 (N.D. Cal. 1992), for example, the court said that an inmate could state a claim only if he could demonstrate that the phone was his only avenue for meaningful access to his lawyer because he was unable to contact the lawyer by mail, or was denied visits from his lawyer. In another case, Bellamy v. McMickens, 692 F.Supp. 205 (S.D. N.Y. 1988), the court ruled that a prisoner's civil rights were not violated simply because he could not telephone his attorney whenever he wanted, but was subject to delays imposed by prison regulations.

*Hall v. McLesky*, 83 S.W.3d 752, 759 (Tenn. Ct. App. 2001). In *Hall*, the court held that the temporary interruption of telephone service to an inmate's attorney did not prejudice the inmate such that he was deprived of his constitutional right to meaningful access to the courts, and thus, the inmate could not invoke the protections of 42 U.S.C. § 1983. The court found that the restriction imposed upon the inmate's access to his attorney was of limited scope and duration and was related to a legitimate regulatory purpose on the part of prison administration. *Id*.

In *Ishaaq v. Compton,* 900 F.Supp. 935, 941 (W.D. Tenn. 1995), the court found that denying a convicted inmate's request to make a telephone call to his attorney, on the ground that the inmate lacked sufficient money in his trust fund account, did not deny the inmate access to the courts in violation of the First Amendment and could not be the basis for a § 1983 civil rights claim where the inmate failed to demonstrate actual interference.

“The essence of this right is, however, the access itself, not the convenience of the access. Convenience is not a right of constitutional magnitude. Any inconvenience an inmate experiences in handling a lawsuit is merely ‘part of the penalty that criminal offenders pay for their offenses against society.’” *Id*. at 941, (citations omitted).

“The choice among various methods of guaranteeing access to the courts lies with prison administrators, not inmates or the courts.” *Id*., *citing Knop v. Johnson*, 977 F.2d 996, 1008 (6th Cir. 1992). “The alternative avenues open to state authorities to protect a prisoner's right of access to the courts are precisely that – alternatives. The choice between alternatives lies with the state. A prisoner who chooses not to avail himself of the alternative provided has no basis – constitutional or otherwise – for complaint.” *Id*. *See also Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985) (“In addition, the state, not the inmate, has the right to choose among constitutionally adequate alternatives.”).

Limited access to attorney telephone calls is not a constitutional violation as long as inmates can communicate with their counsel in writing or in person. *Ingalls v. Florio,* 968 F.Supp. 193, 203-204 (D. N.J. 1997). *See also Pino v. Dalsheim,* 558 F.Supp. 673, 675 (S.D. N.Y. 1983) (unlimited personal and mail communication with attorney constitutionally sufficient because state is not required to provide best manner of access). Policies requiring inmates to obtain prior written authorization to telephone their attorneys and

limiting those calls to one per week have been found reasonable in light of the inmates' ability to correspond with attorneys through mail and during prison visits. *Robbins v. South*, 595 F.Supp. 785, 789-790 (D. Mont. 1984).

In *Cacicio v. Secretary of Public Safety*, 665 N.E.2d 85, 92 (Mass. 1996), the Massachusetts Supreme Court held that regulations that placed time limits on attorney telephone calls and prohibited toll-free calls did not violate an inmate's right to effective assistance of counsel, where the inmate was permitted to make unmonitored telephone calls to five separate attorneys on the inmate's calling list as well as three legal services organizations. The court found that these limitations, "when viewed in conjunction with an inmate's ability to use the mails and have visits, provide sufficient access to attorneys." *Cf. Beyah v. Putman*, 885 F.Supp. 371, 374 (N.D. N.Y. 1995) (Prison officials can restrict inmates' access to counsel by telephone as long as the inmates have some other avenue of access.); *Bellamy v. McMickens,* 692 F.Supp. 205, 214 (S.D. N.Y. 1988) (Although prisoners have a right to gain access to counsel from prison, they have no right to unlimited telephone calls and "restrictions on inmates' access to counsel via the telephone may be permitted as long as prisoners have some manner of access to counsel.").

In *Tucker v. Randall*, 948 F.2d 388, 390-391 (7th Cir. 1991), the Seventh Circuit Court of Appeals noted that in certain circumstances, denying a pretrial detainee access to a telephone for four days after his arrest may violate the Constitution. The court stated that the Sixth Amendment right to counsel would be implicated if a pretrial detainee was not allowed to talk to his lawyer for the entire four-day period. However, in *United States v. Manthey*, 92 Fed.Appx. 291, 297 (6th Cir. 2004), the Sixth Circuit Court of Appeals stated that the failure of a pretrial detainee's attorney to accept collect telephone calls does not violate the inmate's due process right of access to the courts when the inmate has the assistance of an attorney during the course of his criminal trial.

In *Carter v. O'Sullivan*, 924 F.Supp. 903, 911 (C.D. Ill. 1996), the district court found that a 19-day delay in contacting a convicted state inmate's attorney, after the inmate refused to put the attorney on his call list, did not deprive the inmate of the reasonable opportunity to communicate with his attorney. The court further found that the inmate was unable to show any prejudice to pending or contemplated litigation, which is a requirement for liability under 42 U.S.C. § 1983.

Providing telephone access to counsel is clearly one appropriate way to guarantee an inmate an opportunity to have his or her legal claims, both civil and criminal, properly framed and brought before a court of competent jurisdiction. However, this is only one of several ways of assuring inmates the opportunity to present their legal claims to the courts. Reasonable access to a law library within the correctional facility, consultation with attorneys or their representatives through the mails and personal visits, and consultation with attorneys over the telephone within facility guidelines are all valid methods of ensuring that inmates are not denied the access to the courts. *Washington v. Meachum*, 680 A.2d 262, 285 (Conn. 1996) (citations omitted).

## Monitoring Telephone Calls to Attorneys

**Reference Number:** CTAS-1422

In *Massey v. Wheeler*, 221 F.3d 1030, 1036 (7th Cir. 2000), the Seventh Circuit Court of Appeals noted the importance of unmonitored communication between attorneys and inmates but stated that the court could find no cases that establish a right to unrestricted and unlimited private telephone calls.

In *Robinson v. Gunja*, 92 Fed.Appx. 624, 626-627 (10th Cir. 2004), the Tenth Circuit Court of Appeals upheld the dismissal of a pretrial detainee's claim that his Fourth Amendment rights were violated when prison officials monitored his telephone calls to attorneys and paralegals. Robinson failed to follow prison regulations, which required inmates to submit a request to make unmonitored legal telephone calls. The court found that because Robinson was using the inmate telephone system, which was clearly subject to monitoring, he had no reasonable expectation of privacy and his rights were not violated. The court also found that, because calls placed on the inmate telephone system were subject to recording and monitoring, the district court properly dismissed Robinson's Fifth and Sixth Amendment claims.

> The legality of monitoring inmate calls to an attorney is not settled. It has been held that the presence of a custodial officer when prisoners place or receive a phone call is constitutionally objectionable. See Moore v. Janing, 427 F.Supp. 567, 576 (D. Neb.1976). It has also been held that prison officials may tape a prisoner's telephone conversations with an attorney if such taping does not substantially affect the prisoner's right to confer with counsel. Tucker v. Randall, 948 F.2d 388, 391 (7th Cir. 1991).

*Arney v. Simmons*, 26 F.Supp.2d 1288, 1296 (D. Kan. 1998) (finding that the automatic monitoring of attorney calls on “facility phones” presented no constitutional infringement where inmates were allowed to make unlimited nonmonitored calls on “inmate phones”).

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