

COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
48<sup>TH</sup> JUDICIAL CIRCUIT  
DIVISION \_\_\_\_

CIVIL ACTION NO. \_\_\_\_\_

– *Electronically Filed* –

**KENTUCKY DEPARTMENT OF PUBLIC  
ADVOCACY,**

*PLAINTIFFS*

**KENTUCKY ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS,**

**CHRISTOPHER KOTERAS,**

**MICHAEL FUGATE,**

**JAMES HUFFMAN, and**

**SHELMONTAY ADAMS**

vs.

**The KENTUCKY DEPARTMENT OF  
CORRECTIONS, through COOKIE CREWS,  
COMMISSIONER, in her Official Capacity Only,**

*DEFENDANTS*

**The KENTUCKY JUSTICE AND PUBLIC  
SAFETY CABINET, through KERRY HARVEY,  
SECRETARY, in his Official Capacity Only,**

**BRANDY HARM, WARDEN, BELL COUNTY  
FORESTRY CAMP, in her Official Capacity  
Only,**

**ABBY MCINTIRE, WARDEN, BLACKBURN  
CORRECTIONAL COMPLEX, in her Official  
Capacity Only,**

**JAMES DAVID GREEN, WARDEN, EASTERN  
KENTUCKY CORRECTIONAL COMPLEX, in his  
Official Capacity Only,**

**KEVIN MAZZA, WARDEN, GREEN RIVER  
CORRECTIONAL COMPLEX, in his Official  
Capacity Only,**

**VANESSA KENNEDY, WARDEN, KENTUCKY  
CORRECTIONAL INSTITUTION FOR WOMEN,  
in her Official Capacity Only,**

**SCOTT JORDAN, WARDEN, KENTUCKY STATE  
PENITENTIARY, in his Official Capacity Only,**

**ANNA VALENTINE, WARDEN, KENTUCKY  
STATE REFORMATORY, in her Official  
Capacity Only,**

**DANIEL AKERS, WARDEN, LEE ADJUSTMENT  
CENTER, in his Official Capacity Only,**

**LARRY CHANDLER, WARDEN, LITTLE SANDY  
CORRECTIONAL COMPLEX, in his Official  
Capacity Only,**

**AMY ROBEY, WARDEN, LUTHER LUCKETT  
CORRECTIONAL COMPLEX, in her Official  
Capacity Only,**

**BRAD ADAMS, WARDEN, NORTHPOINT  
TRAINING CENTER, in his Official Capacity  
Only,**

**JESSIE FERGUSON, WARDEN, ROEDERER  
CORRECTIONAL COMPLEX, in her Official  
Capacity Only,**

**BELINDA SANCHEZ, ACTING WARDEN,  
SOUTHEAST STATE CORRECTIONAL  
COMPLEX, in her Official Capacity Only, and**

**BOBBI JO BUTTS, WARDEN, WESTERN  
KENTUCKY CORRECTIONAL COMPLEX, in her  
Official Capacity Only**

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**VERIFIED COMPLAINT SEEKING  
DECLARATORY AND INJUNCTIVE RELIEF**

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**A. Preliminary Statement**

1. For nearly 50 years, the Kentucky Department of Corrections' policy was to open incoming privileged legal mail in the presence of the incarcerated recipient, inspect it for contraband only, and deliver it to the recipient. *See Reneer v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992); CPP 16.2. The Department of Corrections has not formally changed this policy, but at the end of 2020, several facilities began the practice of confiscating all incoming legal mail, photocopying it, and delivering the photocopy to the recipient. This practice has been repeatedly grieved to the Commissioner of the Department of Corrections, who in each case has denied the grievance and approved of the practice.

2. This case is filed on behalf of attorneys and individuals who are incarcerated, whose ability to confidentially communicate has been substantially compromised by the Department of Corrections' actions. It seeks declaratory and injunctive relief, both temporary and permanent, prohibiting the Department of Corrections from confiscating legal mail.

**B. Jurisdiction and Venue**

3. This is a challenge to the Kentucky Department of Corrections' practice of confiscating and photocopying all incoming privileged mail, in violation of the First, Sixth, and Fourteenth Amendments of the United States Constitution, §§ 2 and 11 of the Kentucky Constitution, KRS Chapter 13A, and

501 KAR 6:020, CPP 16.2. This Court has jurisdiction to hear this challenge as a declaratory judgment action pursuant to KRS 418.040, 418.045, CR 81, § 2 of the Kentucky Constitution, and all other applicable law. Alternatively, this Court has jurisdiction to hear the claim as a mandamus action pursuant to KRS 23A.080, SCR 1.040(6), § 112(5) of the Kentucky Constitution, and all other applicable law.

4. Venue is proper in Franklin County pursuant to KRS 452.005 and 452.405(2), as both the Kentucky Department of Public Advocacy and the Kentucky Department of Corrections are headquartered in Franklin County, Kentucky.

### **C. Parties**

5. **Plaintiff Kentucky Department of Public Advocacy:** The Kentucky Department of Public Advocacy is “an independent agency of state government,” which is responsible for creating and maintaining a ‘state sponsored and controlled system for . . . [t]he representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement.” KRS 31.010(1). The Department is charged with “improving the operation of the criminal justice system with regard to indigent defendants and other defendants in criminal actions,” including “improving representation of defendants in criminal actions in particular, or the interests of indigent or impoverished persons in general.” KRS 31.030(8). This authority includes the authority to take “other activities . . . necessary to carry out the provisions of [Chapter 31]”. As of October 1, 2021, the Department employed 331 attorneys,

who represent clients in approximately 150,000 new cases per year. DPA estimates that at least 500 current clients are incarcerated in DOC facilities. DPA maintains this action on behalf of itself, and the attorneys employed by DPA.

6. **Plaintiff Kentucky Association of Criminal Defense Lawyers (KACDL):** KACDL is a private, not for profit organization created to “preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure justice and due process of law for those persons accused of crime within the Commonwealth of Kentucky.”<sup>1</sup> The KACDL has 255 members, many of whom have clients who are presently incarcerated in DOC facilities.

7. **Plaintiffs Christopher Koteris #255779, Michael Fugate #099185, James Huffman #296645 and Shelmontay Adams #300472,** are individuals incarcerated in Department of Corrections institutions. Each has grieved the issue of photocopying privileged mail, and exhausted his grievance through the Commissioner. See LAC Grievance Numbers 21-025 (decided 3/12/21)(Koteris); 21-077 (decided 4/7/2021)(Fugate); LLCC Grievance Number 21-163 (decided 5/20/21)(Huffman); KSR Grievance #21-638 (decided 9/21/21)(Adams).<sup>2</sup>

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<sup>1</sup> KACDL Mission Statement, <https://www.kacdl.net/content.asp?contentid=140> (last checked 10/3/2021).

<sup>2</sup> Mr. Adams grievance was incorporated into a group grievance proceeding through inmate Derwin Nickleberry as lead grievant. The Commissioners resolution of each grievance is attached to this complaint, per KRS 454.415(3).

8. **Defendant Kentucky Department of Corrections, through Commissioner Cookie Crews:** The Kentucky Department of Corrections is the agency charged under Kentucky law with housing state inmates, including the duty to transfer state inmates to state institutions. KRS 196.030; KRS 197.065. The Kentucky Department of Corrections has the regulatory authority to “Promulgate administrative regulations for the government and discipline of the penitentiary, for the government and official conduct of all officials connected with the penitentiary, and for the government of the prisoners in their department and conduct.” KRS 197.020(2). Along with the Justice and Public Safety Cabinet, the Kentucky Department of Corrections has promulgated 501 KAR 6:020, which incorporates CPP 16.2 by reference. DOC’s main offices are located in Frankfort, KY. The Kentucky Department of Corrections appears through the Commissioner, Cookie Crews, in her official capacity only.

9. **Defendant Justice and Public Safety Cabinet, through Secretary Kerry Harvey:** The Justice and Public Safety Cabinet is created by KRS Chapter 15A, and as relevant here, is responsible for administering criminal justice agencies, including the Kentucky Department of Corrections. All such agencies shall be directly responsible to the secretary and shall have such functions, powers, and duties as provided by law and as the secretary may prescribe.” KRS 15A.020(2). The Secretary “possesses the authority to promulgate all regulations that he “deems necessary or suitable for the proper administration of the functions of the cabinet or any division in the cabinet, including qualification for the receipt of federal funds and for cooperation with

other state and federal agencies.” KRS 196.035. Along with the Kentucky Department of Corrections, the Justice and Public Safety Cabinet has promulgated 501 KAR 6.020, which incorporates CPP 16.2 by reference. The Justice and Public Safety Cabinet’s main offices are in Frankfort, KY. The Justice and Public Safety Cabinet appears through its secretary, Kerry Harvey, in his official capacity only.

10. **Defendant Brandy Harm, Warden, Bell County Forestry Camp:** Bell County Forestry Camp (“BCFC”) is a DOC facility responsible for housing state inmates, located in Pineville, KY. It appears BCFC has not yet implemented a mail copying policy for privileged mail, but upon information and belief, is expected to do so soon. Warden Harm appears in her official capacity only.

11. **Defendant Abby McIntire, Warden, Blackburn Correctional Complex:** Blackburn Correctional Complex (“BCC”) is a DOC facility responsible for housing state inmates, located in Lexington, KY. It appears BCC has not yet implemented a mail copying policy for privileged mail, but upon information and belief, is expected to do so soon. Warden McIntire appears in her official capacity only.

12. **Defendant James David Green, Warden, Eastern Kentucky Correctional Complex:** Eastern Kentucky Correctional Complex (“EKCC”) is a DOC facility responsible for housing state inmates, located in West Liberty, KY. In January, 2021, EKCC initiated a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate for RHU

inmates. Upon information and belief, that program is now applied to all inmates. Warden Green appears in his official capacity only.

13. **Defendant Kevin Mazza, Warden, Green River Correctional Complex:** Green River Correctional Complex (“GRCC”) is a DOC facility responsible for housing state inmates, located in Central City, KY. Upon information and belief, at the beginning of August of 2021, GRCC initiated a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Warden Mazza appears in his official capacity only.

14. **Defendant Vanessa Kennedy, Warden, Kentucky Correctional Institution for Women:** The Kentucky Correctional Institution for Women (“KCIW”) is a DOC facility responsible for housing state inmates, located in Peewee Valley, KY. KCIW has not yet implemented a mail copying policy for privileged mail, but upon information and belief, is expected to do so soon. Warden Kennedy appears in her official capacity only.

15. **Defendant Scott Jordan, Warden, Kentucky State Penitentiary:** The Kentucky State Penitentiary (“KSP”) is a DOC facility responsible for housing state inmates, located in Eddyville, KY. Upon information and belief, KSP implemented a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate, in September 2021, for all inmates. Warden Jordan appears in his official capacity only.

16. **Defendant Anna Valentine, Warden, Kentucky State Reformatory:** The Kentucky State Reformatory (“KSR”) is a DOC facility



responsible for housing state inmates, located in La Grange, KY. KSR adopted a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate, on or about August 9, 2021. As part of that process, KSR has amended its internal policy KSR 16-00-02 on August 25, 2021. The regulation was amended without amending the promulgating regulation, 501 KAR 6:030 or subjecting the changes to public comment. Warden Valentine appears in her official capacity only.

17. **Defendant Daniel Akers, Warden, Lee Adjustment Center:** Lee Adjustment Center (“LAC”) is a privately owned prison, contracted with the Kentucky Department of Corrections to house state inmates. They are contractually obligated to adhere to all state policies and procedures issues by the DOC. On January 27, 2021, LAC adopted a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Warden Akers appears in his official capacity only.

18. **Defendant Larry Chandler, Warden, Little Sandy Correctional Complex:** Little Sandy Correctional Complex (“LSCC”) is a DOC facility responsible for housing state inmates, located in Sandy Hook, KY. Upon information and belief, early in 2021 LSCC implemented a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Warden Chandler appears in his official capacity only.

19. **Defendant Amy Robey, Warden, Luther Lockett Correctional Complex:** Luther Lockett Correctional Complex (“LLCC”) is a DOC facility responsible for housing state inmates, located in La Grange, KY. In spring 2021

LLCC implemented a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Warden Robey appears in her official capacity only.

20. **Defendant Brad Adams, Warden, Northpoint Training Center:** Northpoint Training Center (“NTC”) is a DOC facility responsible for housing state inmates, located in Burgin, KY. NTC has not yet implemented a mail copying policy for privileged mail, but upon information and belief, is expected to do so soon. Warden Adams appears in his official capacity only.

21. **Defendant Jessie Ferguson, Warden, Roederer Correctional Complex:** Roederer Correctional Complex (“RCC”) is a DOC facility responsible for housing state inmates, located in La Grange, KY. Around March 30, 2021, RCC implemented a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Warden Ferguson appears in her official capacity only.

22. **Defendant Belinda Sanchez, Acting Warden, Southeast State Correctional Complex:** Southeast State Correctional Complex (“SSCC”) is a DOC facility responsible for housing state inmates, located in Wheelwright, KY. On or about May 10, 2021, SSCC implemented a practice of confiscating incoming privileged mail, copying it, and delivering only the photocopy to the inmate. Acting Warden Sanchez appears in her official capacity only.

23. **Defendant Bobbi Jo Butts, Warden, Western Kentucky Correctional Complex:** Western Kentucky Correctional Complex (“WKCC”) is a DOC facility responsible for housing state inmates, located in Fredonia, KY. It

includes both a secure facility for male inmates, and the Ross-Cash Center, which is a facility for female inmates located outside the fenced perimeter. WKCC has not yet implemented a mail copying policy for privileged mail, but upon information and belief, is expected to do so soon. Warden Butts appears in her official capacity only.

#### **D. Factual Background**

24. In *Preston v. Cowan*, 369 F. Supp. 14 (W.D.Ky. 1973), an incarcerated individual sued the Kentucky Department of Corrections concerning the handling of mail, including the handling of incoming privileged legal mail.

The court stated:

With respect to incoming mail addressed by a person in the privileged class to the inmate, ... the Court holds that the prison officials may inspect such privileged incoming mail for contraband only, and only in the presence of the inmate. The prison authorities would be given the right to retain the envelope but must hand the letter to the inmate without reading it in his presence.

*Id.* at 24 (emphasis added).

25. Thus, absent any court ruling otherwise, legal mail received by the Kentucky Department of Corrections must be opened in the presence of the recipient, inspected for contraband only, and delivered to the recipient. See *Renner v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992) (describing the policy and finding that violation of this policy supported a § 1983 claim).

26. The current mail policy available on the DOC website<sup>3</sup> states that “Incoming privileged mail shall be opened in the presence of the inmate and inspected for contraband.” CPP 16.2 II.C.1. Additionally, incoming privileged mail “shall not be read if the sender is adequately identified on the envelope . . .” CPP 16.2 II.C.2. Furthermore, if the mail does not contain contraband, it is to be delivered to the recipient, which “shall be recorded as to the date and time of delivery to the inmate.” CPP 16.2 II.C.6.

27. In the spring of 2020, shortly after the beginning of the pandemic, security officers at several institutions began to regularly contact the offices of DPA and other law offices, for the purposes of verifying that the legal mail entering the facility was authentic. The reason given for the verification was an increase in “fake legal mail,” i.e., mail sent by non-legal senders, intended to resemble privileged mail, presumably for smuggling purposes.

28. There has been no case where a licensed attorney intentionally attempted to send drugs into a DOC institution through confidential legal mail.

29. To the best of its knowledge, DPA responded to all verification requests and verified all the mail it had sent to DOC. While this practice stopped in most facilities by late 2020, staff at the Green River Correctional Complex continued to verify the mail until August 2021. DPA is not aware of any case

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<sup>3</sup> Of note, the regulation currently posted online is not the regulation which was incorporated into 501 KAR 6.020, when it was last adopted on September 1, 2020. While this is but one example of DOC’s wholesale noncompliance with the requirements of KRS 13A.130(1)(a), the modifications do not appear to affect the policy’s requirements that privileged mail be opened in the presence of the recipient, inspected for contraband only, and delivered to the recipient.

where privileged mail which had been verified by a DOC facility contained contraband of any kind.

30. Upon information and belief, beginning in 2020 or early 2021, the Commissioner and/or Deputy Commissioner orally indicated to prison Wardens that they would be permitted to adopt a practice of confiscating incoming legal mail. However, this was not reduced to writing in any formal agency policy and no attempt was made to change CPP 16.2 II.C., which as noted above, requires the mail to be opened in the presence of the recipient, inspected for contraband only, and delivered to the recipient.

31. Different institutions have adopted this practice at different times over the course of 2020 and 2021. In fact, some facilities merely posted a memo in the mailroom announcing the change, while others made unpromulgated changes to their internal policies to reflect it.

32. Still, these policy changes maintain the practice of opening the mail in the presence of the incarcerated recipient, and the written memo or policy often directs that the mail be copied in the recipient's presence as well. However, the recipient's ability to observe the copying of their legal mail varies widely among facilities. For example, at Lee Adjustment Center the recipient may observe the copying process through a six-inch opening. The copier is located on the opposite wall from the opening, and the mail is copied by an employee whose back is to the incarcerated recipient, with the copying process entirely out of the recipient's view.

33. The disposal of confiscated legal mail also varies by institution and individual. Most facilities permit an incarcerated individual who receives legal mail to choose between whether to return the legal mail to the sender or shred it. Some facilities require that the incarcerated recipient pay the cost of returning legal mail. The incarcerated recipient often cannot view what happens to their legal mail after the copying process is completed. Prison staff could read the legal mail prior to shredding or returning it. Likewise, there is no clear policy as to how shredded legal mail is to be handled. At one facility, for example, incarcerated individuals have observed bags of shredded mail left in public areas, accessible to all. And even if the shredded documents could not be reconstructed, the fact that prison employees would leave the shredded documents in an unsecured area certainly undermines the stated concern for smuggling.

34. Photocopying does not ensure that incarcerated recipients receive the same document that was sent either. Incarcerated recipients of legal mail often receive copies that are deficient or incomplete. For example, recipients have been given copies that omit entire pages (such as only copying one side of a two-sided document), or pages that are misaligned or illegible.

35. Due to the volume of individuals seeking legal mail, and the process of returning or destroying the mail, recipients are often not given the time needed to fully review the mail before the original is destroyed or returned.

36. Incarcerated individuals have long been told that prison copiers are programmed to retain an image of everything copied on it, for security reasons. The retention of a scanned image of all incoming confidential legal mail would

render any “destruction” of the mail ineffective, as the scanned image could still be reviewed. As there is no written policy of any kind governing this process, nothing prohibits a DOC facility from retaining copies in this way. While it appears that the Deputy Commissioner has asked by email that institutions ensure that copiers are not programmed to retain copies of privileged mail, upon information and belief Plaintiffs assert that it may continue to occur at some facilities.

37. Incarcerated individuals have grieved this issue to the Commissioner level, without success. For example, in response to a grievance which challenged the action as inconsistent with policy and with the Constitutional rights of the incarcerated individuals, including an allegation that images of copies are being retained, the Commissioner responded:

I have reviewed your grievance. As stated at all levels of the grievance, all mail including privileged mail is copied and given to the inmate. This is due to inmates attempting to introduce dangerous contraband into the facility. Due to the serious security issues this matter raises, this office has the authority to authorize the action. The process is now standard throughout the Department and policy is being revised to address it. Since you do receive a copy of your mail, there should be no issue with this matter. Finally, there is no evidence that staff are reading your legal mail or that staff are printing copies of your legal mail for future reading. Therefore, I concur with the facility on this matter.

May 20, 2021 Commissioner’s Response to LLCC Grievance #21-163.

38. During the COVID-19 pandemic, attorneys have increasingly been forced to exclusively rely upon the U.S. Mail for confidential communication with incarcerated clients. Physical visits have been prohibited for most of the past 18

months, and even now are only limited to vaccinated individuals, who are generally only permitted to have non-contact visits with a high degree of supervision. Some facilities have permitted confidential Zoom calls, while others have not. Calls over Securus phones are difficult due to the poor quality of phones, and may be recorded. JPay messages are not secure or confidential. For these reasons, confidential communication through the U.S. Mail has become integral to the attorney-client relationship.

39. Lawyers have an ethical duty to protect against the potential disclosure of their communications with their clients. See SCR 3.130, Rule 1.6. When the confidentiality of those communications is threatened, attorneys are duty bound to take steps to ensure that those communications remain confidential.

40. Courts have recognized for centuries that communications between a client and his/her attorney must be protected from disclosure to third parties. In fact, confidentiality is described as the “cornerstone” of the attorney-client relationship.

41. Clients who fear disclosure of their communications may be reluctant to confide important facts to their attorneys. Similarly, the lack of free communication inhibits the ability of attorneys to provide advice and representation. The need for confidentiality, therefore, is indispensable to the attorney-client relationship.

42. Privileged communications between Plaintiff organizations and their clients include, among other things, questions from attorneys about facts



that could be important to pending matters, answers to such questions from clients, questions from clients as to how they can act to preserve or protect their legal rights, discussions about legal strategy or drafts of pleadings or discovery responses, and an attorney's assessment of the client's case or certain issues within that case. In many cases, the adverse party in those underlying matters is the DOC or its staff.

43. Upon learning that mail sent to incarcerated clients is being photocopied, and disposed of in an uncertain fashion, attorneys have had to change what they will communicate through the U.S. Mail. Whereas in the past an attorney correspondence might discuss a confidential investigation report, or other information that is known only to the defense, now attorneys must consider the possibility that their mail will be read or perhaps even retained by staff, and some attorneys have chosen not to mail those documents to their clients at all to avoid this risk. This realization has chilled the communication between attorney and client.

44. While the Commissioner has indicated in grievance responses that the DOC intends to change its policy, DOC has never formally announced this policy change, or subjected it to public comment. To the extent that internal policies have been changed at the facility level, those internal changes have also not been formally announced or subjected to public comment. Attorneys and their incarcerated clients are therefore unaware of a particular correctional facility's current practice until the client has a chance to witness it firsthand and report to their attorneys.

45. It does not appear that any other statewide corrections system currently confiscates and photocopies incoming privileged legal mail. There is no evidence that doing so significantly impacts smuggling operations.

46. Many states do require attorneys to verify their mail, prior to opening, through control numbers or a different method. See, e.g., MI DOC Policy Directive 05.03.118 at EE-KK (eff. 3/1/2018)(Requiring staff to confirm the sender if it appears that the item “may have been mailed from someone other than the identified sender”); Pa. Dep’t of Corr., DC-ADM 803, §1.D. (eff. 8/10/2020) (requiring privileged senders to obtain a control number, and to send mail using that number for verification purposes). Verification ensures that the mail is authentically legal mail, which achieves the stated objective of the mail copying policy. As verification can occur before the envelope is opened, it does not threaten the confidentiality of the contents of the legal mail.

## **E. Claims for Relief**

### **I. This Court Should Grant Declaratory and Injunctive Relief Requiring Strict Compliance with CPP 16.2, Which Requires that the Original Mail be Provided to the Inmate.**

47. Plaintiffs incorporate all prior paragraphs, as if fully set forth herein.

48. The Department of Corrections “shall” “[p]romulgate administrative regulations for the government and discipline of the penitentiary, [and] for the government and official conduct of all officials connected with the penitentiary.” KRS 197.020(1)(a).

49. The Department is required to promulgate by regulation “[e]ach statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; or affects private rights or procedures available to the public.” KRS 13A.100(1).

50. These requirements direct that the Department of Corrections must promulgate regulations on any generally applicable procedure, especially where, as here, those procedures impact the rights or procedures available to the public. *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478, 486 (Ky. 2009).

51. As recently as September 1, 2020, the DOC re-promulgated 501 KAR 6:020, which incorporates CPP 16.2 by reference. 46 Ky.R. 2318, 2923. Individual institutions have likewise promulgated institutional procedures through regulations. *See, e.g.*, KSR PP 16-00-02, promulgated in 501 KAR 6:030 on August 6, 2018, 44 Ky.R 2269, 2511.

52. Neither DOC, nor individual Wardens, may “modify” “expand upon” or “limit” an administrative regulation, through “internal policy, memorandum, or other form of action.” KRS 13A.130(1)(a) and (b). Any “action violative of this section or the spirit thereof is null, void, and unenforceable.” KRS 13A.130(2).

53. DOC has authorized and allowed institutions to adopt by memorandum, or unpromulgated amendments to their internal policies, a practice of confiscating privileged legal mail, photocopying it, and delivering only the photocopy to the recipient. This is not permitted by CPP 16.2.

54. In this case, the various forms of action employed in this matter, whether an internal policy, memorandum, or un-promulgated regulation, all deliberately attempt to modify the promulgated version of CPP 16.2, and are therefore “null, void and unenforceable.”

55. Unless an injunction is granted, the Defendants will be permitted to ignore the requirements of KRS Chapter 13A – requirements intended to ensure that policies receive adequate notice, public comment, and debate – in their handling of confidential privileged legal mail.

56. This Court should grant an injunction requiring strict compliance with CPP 16.2, as promulgated, as well as all other related promulgated regulations.

**II. This Court Should Find that Copying Privileged Legal Mail Violates the First Amendment Rights of Attorneys and Incarcerated Individuals, and Grant Declaratory and Injunctive Relief Prohibiting the Copying of Legal Mail.**

57. Plaintiffs incorporate all prior paragraphs, as if fully set forth herein.

58. Although imprisonment necessarily involves a loss of certain privacy and liberty rights, it is well established that people in prison retain First Amendment rights and, in particular, the right to counsel. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987).

59. The need for confidentiality of attorney-client communications is particularly acute in the prison setting. *See, e.g., Lanza v. New York*, 370 U.S. 139 (1962) (“[Even] in a jail, or perhaps especially there, the relationships which the

law has endowed with particularized confidentiality must continue to receive unceasing protection . . .” (citation omitted)).

60. The U.S. Supreme Court has ruled that the only way to ensure the confidentiality of legal mail to incarcerated people is to require that prison officials open legal mail only in the presence of the individual to whom it is addressed. *Wolfe v. McDonnell*, 418 U.S. 539, 576-77 (1974). To that end, the Sixth Circuit has found that CPP 16.2 requires privileged mail to be opened in the presence of the recipient, inspected for contraband only, and delivered to the recipient, and that this conforms to the minimum protection required by the Constitution. *Renner v. Sewell*, 975 F.2d 258, 260 (6th Cir. 1992).

61. Petitioner organizations and their attorneys, as well as the individual attorney Plaintiffs, have a protected First Amendment right to free speech. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979). Implicit in this right is the right of Plaintiff attorneys and those employed by Plaintiff organizations to communicate with their clients, including those that are incarcerated. *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (those who wish to communicate with prisoners “have a First Amendment interest in access to prisoners”); *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974), abrogated by *Thornburgh* (both incarcerated people and those with whom they correspond have First Amendment rights that should not be infringed by unjustified government interference).

62. Further, attorneys, including all those who appear as members of Petitioner organizations, have a duty to communicate with their clients and to

protect the confidentiality of materials protected by attorney-client confidentiality. See SCR 3.130, Rules 1.4 (Communication), 1.6 (Confidentiality of Information). DOC's new practices have not been reduced to writing in a binding policy, so attorneys have nothing on which to rely to ensure confidentiality. As such, DOC's new practices interfere with an attorney's duty to communicate with their clients, her duty to protect the confidentiality of client communications, and her duty to advocate zealously on behalf of their clients currently incarcerated in DOC facilities. This in turn adversely affects incarcerated individuals' Sixth Amendment and Fourteenth Amendment rights to counsel where the representation at issue is related to a criminal case.

63. People who are incarcerated "do not forfeit their First Amendment right to use of the mails." *Jones v. Brown*, 461 F.3d 353, 358 (3rd Cir. 2006).

64. A pattern and practice of opening legal mail outside the presence of the addressee interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the incarcerated individual's right to freedom of speech. *Jones, supra* at 359. Any such practice "deprives the expression of confidentiality and chills the inmates' protected expression, *regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications.*" *Id.* (emphasis added). "[T]he only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed." *Id.* (relying on *Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974)).

65. DOC's new practices do not ensure that the incarcerated recipient is capable of observing their privileged mail throughout the process from opening to destruction, that copies of the mail are not retained, or that an accurate copy of the mail is provided to the inmate.

66. DOC's new practices are an excessive response to the problem they are purportedly intended to solve. There is no allegation that licensed attorneys have been attempting to smuggle drugs into prisons through the mail, nor are there any documented incidents of this occurring. To the extent that third parties are attempting to use items appearing to be legal mail, the problem can be addressed merely by adopting procedures for law offices to follow, and requiring verification of the incoming legal mail, therefore allowing attorneys and their clients to confidentially correspond while maintaining security within prison facilities. This practice has been adopted in a number of jurisdictions. See, e.g., See, e.g., MI DOC Policy Directive 05.03.118 at EE-KK (eff. 3/1/2018)(Requiring staff to confirm the sender if it appears the item "may have been mailed from someone other than the identified sender"); Pa. Dep't of Corr., DC-ADM 803, §1.D. (eff. 8/10/2020) (requiring privileged senders to obtain a control number, and to send mail using that number for verification purposes).

67. DOC's new practices are not rationally related to a legitimate penological interest, and are therefore void on their face. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

68. Unless injunctive relief is granted, the First Amendment rights of the Plaintiffs, including those of the employees and members of Petitioner

organizations, will continue to be infringed upon and chilled, and attorney-client communications will lose their confidential, privileged character.

69. This Court should grant an injunction prohibiting DOC from adopting any practice or policy which permits the confiscation of incoming privileged mail, the photocopying of such mail, or the delivery of only a photocopy to the incarcerated recipient. The injunction should require DOC to continue to open privileged mail in the presence of the recipient, inspect the mail for contraband only, without reading it, and deliver the original documents to the recipient unless contraband is found.

**III. This Court Should Find that the Practice of Confiscating and Copying Incoming Legal Mail from Non-Attorney Sources Violates the First and Fourteenth Amendment Rights of Inmates, and Grant Declaratory and Injunctive Relief Prohibiting the Defendants from Copying the Legal Mail.**

70. Plaintiffs incorporate all prior paragraphs, as if fully set forth herein.

71. It is well established that “a prisoner has a fundamental interest in preserving the confidentiality of his legal mail.” *Bell-Bey v. Williams*, 87 F.3d 832, 837 (6th Cir. 1996). Interference in confidential legal mail could violate his or her right to access to the courts under the Fourteenth Amendment, and his right not to have his correspondence censored or chilled under the First and Fourteenth Amendments. *Nordstrom v. Ryan*, 856 F.3d 1265, 1271 (9th Cir. 2017). Inmates have similar rights under Kentucky Constitution §§ 1, 2 and 11.

72. In general, courts have “define[d] ‘legal mail’ to include delivery of legal materials to a prisoner, properly and clearly marked as legal materials, via



the U.S. Postal Service or alternative private courier services, and hand delivery.” *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996). In this context “legal materials” are not limited to pleadings and cases, they can include information related to investigations in the case, and even “correspondence from elected officials and government agencies, including the offices of prosecuting officials such as state attorneys general.” *Muhammad v. Pitcher*, 35 F.3d 1081, 1083 (6th Cir. 1994).

73. CPP 16.2 presently<sup>4</sup> provides that “privileged mail” means “correspondence received or sent from or to a licensed attorney, a government official, state or federal courts, rape crisis centers, officials of Corrections, or the Department of Public Advocacy. Mail shall not be considered privileged mail if it does not concern a challenge to the legality of either the inmate’s criminal conviction or the conditions of his incarceration. Information, forms, and the like shall not be considered privileged mail.” This definition does not encompass all areas where Courts have generally required prisons to permit confidential correspondence. For example, issues involving divorce or child support, or tax matters, are not challenges to the inmates’ conviction or conditions of incarceration, but are nevertheless legal matters where privacy is essential to ensure accurate communication.

74. In addition, even if the documents are not confidential, an original of the document may be required. For example, a person who is attempting to resolve the estate of a recently deceased loved one will need originals of the death

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<sup>4</sup> This portion of CPP 16.2 has been modified since it was last incorporated into a regulation, in violation of KRS 13A.130. See Claim I, above.

certificates to close accounts, resolve insurance claims, etc. In such a situation, there is no system for DOC to ensure that originals can be provided where needed.

75. The new legal mail practices adopted by the DOC do not ensure that the incarcerated recipient is able to view the mail throughout the process, nor is there any system to ensure that mail is properly disposed of. Unlike correspondence from attorneys, correspondence from Government agencies generally cannot be returned to sender, thus, it will need to be destroyed on site. The incarcerated recipient is not often able to supervise the destruction process.

76. The new mail practices adopted by DOC do not allow for private correspondence with Government officials, courts, or others, because upon information and belief a copy of the image may be retained by DOC's copiers.

77. The effect of this policy will chill expression by incarcerated individuals and outside senders, in violation of the First Amendment. Individuals cannot communicate honestly where, as here, there is no privacy in communication.

78. The effect of this policy will inhibit the incarcerated individual's right of access to the Courts. Individuals may choose not to make claims they would be entitled to, or to try to manage private affairs through a third party, out of concern that their private business will not be handled privately by the prison.

79. There is no allegation that government agencies, the courts, or the Department of Corrections itself, which is included in the list of privileged legal mail senders per CPP 16.2, is attempting to smuggle contraband into prisons through the U.S. Mail. To the extent that private citizens are attempting to

smuggle contraband into prison through mail that resembles mail from government agencies, courts or other protected senders, a mail verification system is available.

80. DOC's new practices are not rationally related to a legitimate interest, and are therefore void on their face.

81. This Court should grant injunctive relief prohibiting DOC from confiscating incoming legal mail from government offices, courts, and other traditionally recognized legal senders, and providing only a photocopy. The injunction should require DOC to continue to open the mail in the presence of the inmate, inspect the mail for contraband only, without reading it, and deliver the original documents to the inmate unless contraband is found.

### **E. Demand for Relief**

WHEREFORE, Plaintiffs demand that the court issue an injunctive order granting Plaintiffs the following relief, wherein the Court:

- I. Declares that the practice of confiscating privileged legal mail, photocopying it, and delivering the photocopy to the incarcerated recipient, violates CPP 16.2, the First Amendment rights of attorneys, and the First and/or Fourteenth Amendment rights of incarcerated individuals.
- II. Grants injunctive relief in the form of an order directing the Department of Corrections and all agents, including Wardens and DOC employees, to require that the Department of Corrections adhere to a policy that permits staff to open privileged legal mail in the presence of

the incarcerated recipient, inspect the mail for contraband only, and deliver the original document to the recipient.

- III. Grants all other relief to which the Plaintiffs have requested herein, or to which they are entitled, including their costs and expenses incurred herein.

Respectfully Submitted,  
COUNSEL FOR PLAINTIFFS

/s/ Timothy G. Arnold  
Timothy G. Arnold, KBA #86500  
Department of Public Advocacy  
5 Mill Creek Park  
Frankfort, KY 40601  
Phone (502) 564-8006  
Fax (502) 695-6769  
[Tim.Arnold@ky.gov](mailto:Tim.Arnold@ky.gov)

/s/ Heather Gatnarek  
Corey Shapiro, KBA #96897  
Heather Gatnarek, KBA#95113  
American Civil Liberties Union of  
Kentucky Foundation  
325 W. Main Street, Suite 2210  
Louisville, KY 40202  
Phone: (502) 581-9746  
[corey@aclu-ky.org](mailto:corey@aclu-ky.org)  
[heather@aclu-ky.org](mailto:heather@aclu-ky.org)

**VERIFICATION**

I, Timothy G. Arnold, swear that the allegations in this Complaint are true and correct to the best of my ability, based on due investigation.



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Subscribed and sworn to before me on this the 21<sup>st</sup> of October, 2021.



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Notary Public #KYNP10865

Commission Expires: 9-10-2024

### **NOTICE OF SERVICE**

Upon filing, true and accurate copies of this Complaint and summons will be served upon the following via certified mail:

- Cookie Crews, Commissioner Kentucky Department of Corrections, Health Services Building, 275 East Main Street, P.O. Box 2400, Frankfort, KY 40602-2400;
- Hon. Kerry Harvey, Secretary, Kentucky Justice and Public Safety Cabinet, 125 Holmes Street, Frankfort, KY 40601-2108
- Hon. Daniel Cameron, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601.
- Brandy Harm, Warden, Bell County Forestry Camp, 560 Correctional Drive, Pineville, KY 40977;
- Abby McIntire, Warden, Blackburn Correctional Complex, 3111 Spurr Road, Lexington, KY 40511;
- James David Green, Warden, Eastern Kentucky Correctional Complex, 200 Road to Justice, West Liberty, KY 41472;
- Kevin Mazza, Warden, Green River Correctional Complex, 1200 River Road. P.O. Box 9300, Central City, KY 42330;
- Vanessa Kennedy, Warden, Kentucky Correctional Institution For Women, 3000 Ash Ave., Pewee Valley, Kentucky 40056;
- Scott Jordan, Warden, Kentucky State Penitentiary, 266 Water Street, Eddyville, Kentucky 42038;
- Anna Valentine, Warden, Kentucky State Reformatory, 3001 W Hwy 146
- LaGrange, Kentucky 40032;
- Daniel Akers, Warden, Lee Adjustment Center, 168 Lee Adjustment Center Drive, Beattyville, KY 41311;
- Larry Chandler, Warden, Little Sandy Correctional Complex, In His Official Capacity Only, 505 Prison Connector, Sandy Hook, Kentucky 41171;
- Amy Robey, Warden, Luther Lockett Correctional Complex, Dawkins Road, Box 6, LaGrange, Kentucky 40031;

- Brad Adams, Warden, Northpoint Training Center, P.O. Box 479, Hwy 33 710 Walter Reed Rd., Burgin, Kentucky 40310;
- Jessie Ferguson, Warden, Roederer Correctional Complex, P.O. Box 69, LaGrange, Kentucky 40031;
- Belinda Sanchez, Acting Warden, Southeast State Correctional Complex, 327 Correctional Drive, P.O. Box 1600, Wheelwright, KY 41669; and
- Bobbi Jo Butts, Warden, Western Kentucky Correctional Complex, 374 New Bethel Church Road, Fredonia, KY 42411

s/Timothy G. Arnold

COMMISSIONER'S REVIEW

REVIEW AND DECISION

DATE OF DECISION

3/12/2021

Christopher Koterak #255779  
Lee Adjustment Center  
168 Lee Adjustment Center Drive  
Beattyville KY 41311

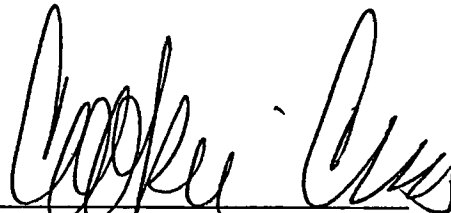
RE: Grievance #: 21-025

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Below, you will find the Commissioner's decision in regard to your grievance(s). A copy of the Commissioner's decision has been sent to Warden, Daniel Akers, Grievance Coordinator, Marcia Fugate and the Inmate Grievance Aide for their information.

I have reviewed your grievance. As stated at all levels of the grievance, all incoming mail, to include legal mail, is copied and a copy given to the inmate. The legal mail is opened and copied while the inmate is present. This is standard throughout the Department. It is to prevent the introduction of dangerous contraband into the facility. In addition, inmate's rights are not being violated since they receive copies of all legal work or items that come into the mail. Therefore, I concur with the facility on this matter.

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COMMISSIONER'S SIGNATURE



**COMMISSIONER'S REVIEW**

**REVIEW AND DECISION**

**DATE OF DECISION**

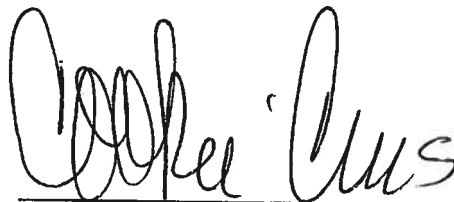
**4/7/2021**

**Michael Fugate #099185  
Lee Adjustment Center  
168 Lee Adjustment Center Drive  
Beattyville KY 41311**

**RE: Grievance # 21-077**

**Below, you will find the Commissioner's decision in regard to your grievance(s). A copy of the Commissioner's decision has been sent to Warden, Daniel Akers, Grievance Coordinator, Marcia Fugate and the Inmate Grievance Aide for their information.**

**I have reviewed your grievance. As I stated in a previous decision on this matter, all incoming mail, to include legal mail, is copied and given to the inmate. The legal mail is opened and copied while the inmate is present. This is standard throughout the Department. This is to prevent the introduction of dangerous contraband into the facility. Inmate's rights are not being violated since they receive copies of all legal work that come into the mail. Finally, policy is being revised to reflect these changes. Therefore, I concur with the facility on this issue.**



**COMMISSIONER'S SIGNATURE**

**COMMISSIONER'S REVIEW**

**REVIEW AND DECISION**

**DATE OF DECISION**

**5/20/2021**

**James Huffman #296645  
Luther Lockett Correctional Complex  
Dawkins Road Box 6  
LaGrange, KY 40031**

**RE: Grievance # 21-163**

**Below, you will find the Commissioner's decision in regard to your grievance(s). A copy of the Commissioner's decision has been sent to Warden Amy Robey, Dagon Moon, Grievance Coordinator and the Inmate Grievance Aide for their information.**

**I have reviewed your grievance. As stated at all levels of the grievance, all mail to include privileged mail is copied and given to the inmate. This is due to inmates attempting to introduce dangerous contraband into the facility. Due to the serious security issues this matter raises, this office has the authority to authorize this action. This process is now standard throughout the Department and policy is being revised to address it. Since you do receive a copy of your mail, there should be no issue with this matter. Finally, there is no evidence that staff are reading your legal mail or that staff are printing copies of your legal mail for future reading. Therefore, I concur with the facility on this matter.**

  
**COMMISSIONER'S SIGNATURE**

**COMMISSIONER'S REVIEW**

**REVIEW AND DECISION**

**DATE OF DECISION**

9/21/2021

Derwin Nickelberry #188973  
Kentucky State Reformatory  
3001 W Highway 146  
LaGrange, KY 40032

RE: Grievance # 21-638

Below, you will find the Commissioner's decision in regard to your grievance(s). A copy of the Commissioner's decision has been sent to Warden Anna Valentine, Grievance Coordinator, James Holcomb and the Inmate Grievance Aide for their information.

I have reviewed your grievance. As stated at all levels of the grievance, legal mail is opened in front of the inmate and the mail is copied and given to the inmate. The inmate may inspect the copies for accuracy. The originals are then shredded in front of the inmate. Since you received copies of all of your legal documents, there is no denial of legal mail. In addition, confidentiality is maintained just as in the past concerning legal mail. None of the participants have outlined in specific instances of how their confidentiality has been breached by using this method. Due to dangerous contraband being introduced in the facility through both regular and legal mail, this procedure has been adopted throughout the Department. Therefore, I concur with the facility on this matter.

  
COMMISSIONER'S SIGNATURE

**COPY**