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May 3, 2020

VIA ELECTRONIC MAIL

Justice Mary C. Noble  
Secretary, Kentucky Justice & Public Safety Cabinet  
125 Holmes Street  
Frankfort, KY 40601  
[Mary.Noble@ky.gov](mailto:Mary.Noble@ky.gov)

Randy White  
Acting Commissioner, Kentucky Department of Corrections  
275 E. Main St.  
Frankfort, KY 40621  
[Randy.White@ky.gov](mailto:Randy.White@ky.gov)

**Re: Access to Counsel Rights in Department of Corrections Facilities**

Dear Secretary Noble and Commissioner White:

We write regarding the access to counsel rights of people incarcerated in Department of Corrections facilities, hoping you will be able to help resolve the serious concerns we identify below. Over the past month, officials in Kentucky prisons have repeatedly hindered our efforts to communicate with incarcerated people who have sought out legal advice from the ACLU of Kentucky. This state of affairs is unacceptable and likely unconstitutional. We respectfully ask that you take immediate action to ensure that DOC staff do not deny incarcerated people telephonic access to counsel during this ongoing crisis and do not retaliate against any incarcerated person who chooses to speak with an attorney.

We have faced a variety of roadblocks to communicating with people held in Kentucky's prisons during the COVID-19 pandemic, particularly at Little Sandy Correctional Complex and Green River Correctional Complex. Prison officials have required us to schedule calls for weeks in the future or refused altogether to schedule calls with certain people. On some occasions, we have scheduled a call, only to have prison staff refuse to connect us with the person at the predetermined time. The few people we have managed to talk with fear retaliation, and we have heard stories that correctional officers did retaliate against one person who spoke with us.



This situation is likely unconstitutional and cannot continue. Incarcerated people have a well-established right under the First Amendment to access the courts. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996); *McWright v. Gerald*, 2004 U.S. Dist. LEXIS 6044 (E.D. Mich. 2004). This includes the right to meaningful access to legal counsel for direct appeals, habeas petitions, and civil rights claims. *See Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). The importance of this right cannot be overstated:

The right to file for legal redress in the courts is as valuable to a prisoner as to any other citizen. Indeed, for the prisoner it is more valuable. Inasmuch as one convicted of a serious crime and imprisoned usually is divested of the franchise, the right to file a court action stands . . . as his most "fundamental political right, because preservative of all rights."

*Hudson v. McMillian*, 503 U.S. 1, 15 (1992) (Blackmun, J., concurring in the judgment).

Courts have been clear that prison officials must provide incarcerated people a "reasonably adequate opportunity" to challenge their sentence or conditions of confinement; even if one means of communication with counsel is unavailable, the prison must ensure other, adequate means of communication are available. *Cesal v. Bureau of Prisons*, 2006 U.S. Dist. LEXIS 71899 at \*17 (E.D. Ky. 2006).

Further, prison officials cannot retaliate against a prisoner for engaging in protected conduct, such as speaking with an attorney regarding a direct appeal, habeas petition, or civil rights claim. *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999). Such action on the part of prison officials not only unconstitutionally penalizes prisoners who exercise their right of access to the courts, but deters other prisoners from exercising their same constitutionally-protected rights. *Id.*; *Herron v. Harrison*, 203 F.3d 410 (6th Cir. 2000).

The current public health crisis cannot be used as a justification for curtailing the access of incarcerated people to their lawyers. Particularly in a quickly changing situation where time is of the essence, the Constitution does not allow the government to prevent or inhibit an incarcerated person from discussing their circumstances and rights with counsel. We are not at this time seeking access to in-person attorney-client visitation, as we understand that may be unsafe due to the COVID-19 emergency.



Nor is written correspondence a reasonable or efficient alternative means of communication, because, under the circumstances, facts are in constant flux, and a delay of even a few days may permanently impede a person's ability to pursue certain claims. Therefore, confidential telephonic communication remains the only method available; fortunately, it is an easy and safe alternative for which prisons are already equipped.

We ask, therefore, that you act quickly to ensure that DOC officials stop blocking access to confidential, telephonic communications with counsel. Beyond a reasonable period of advance notice to schedule a call, which should not exceed one business day, there is no reason for prison officials to act as gatekeepers screening attorney calls. Going forward, we expect that:

- (1) DOC staff will schedule confidential legal calls within one (1) business day of receiving a request from an attorney to schedule a call;
- (2) DOC staff will not prevent the incarcerated person and attorney from speaking at the scheduled time; and,
- (3) DOC staff will not retaliate against the incarcerated person for speaking with their attorney.

Please respond to us no later than Tuesday, May 5 via email, providing information on how you think we can resolve these concerns and any assurances that DOC staff will not impede incarcerated individuals' access to the courts and counsel. If you wish to discuss via a telephone conference, please let me know the best time and way to reach you. We look forward to your response as soon as possible.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Shapiro". The signature is fluid and cursive, with a long horizontal line extending to the right.

Corey Shapiro  
Legal Director

Cc: Travis Mayo, Chief Deputy General Counsel, Office of the Governor ([Travis.Mayo@ky.gov](mailto:Travis.Mayo@ky.gov))  
Robyn Bender, General Counsel, Kentucky Justice & Public Safety Cabinet ([Robyn.Bender@ky.gov](mailto:Robyn.Bender@ky.gov))