ACLU
AMERICAN CIVIL LIBERTIES UNION of KANSAS
FOUNDATION

June 21, 2017

Sheriff Randy Henderson
Reno County Sheriff's Dept.
210 W. First Ave.
Hutchinson, KS 67501

Re: Definition of Privileged Legal Mail in Jail Handbook

Dear Sheriff Henderson:

Over the past couple of months, I have received several letters that detainees at the Reno County Correctional Facility ("the jail") addressed to the ACLU of Kansas with a notation on the envelope that the letter was "Legal Mail." The detainees have advised me that jail policies required them to leave those envelopes unsealed because they were not addressed to an "attorney of record" and thus did not constitute legal mail under the jail's policies. The purpose of this letter is to advise you that the jail's mail policy defines legal mail too narrowly and that, as one consequence of that narrow definition, some outgoing legal mail is subject to unconstitutional inspections.

According to the Reno County Correctional Facility Handbook available on your website, the jail's mail policy defines "privileged/attorney mail" as "All incoming and outgoing mail from or to an *inmate's attorney of record*, including their staff, *on active criminal and civil cases*." Jail Handbook, p. 17 (emphasis added). The jail's policies further provide that "[a]n officer will open incoming mail *from the inmate's attorney of record*, clearly identified as legal, in the inmate's presence. The mail will be inspected for contraband." *Id.*, p. 18. Finally, the jail's policy provides that "[o]utgoing mail must be left unsealed when given to deputies" although the policy seems to permit inmates to seal legal mail from an attorney of record. *Id.*, p. 19.

The jail's definition of privileged mail focuses too narrowly on the detainees' attorneys of record in pending criminal and civil cases. As written, for example, this policy would mean that letters to or from me regarding alleged civil liberties violations that are not yet in litigation would not qualify as privileged. Nearly forty years ago, the Tenth Circuit held that such a narrow focus on mail related to attorneys of record violates the constitutional rights of inmates and their lawyers. *Ramos v. Lamm*, 639 F.2d 559, 582, *aff'g* 485 F. Supp. 122, 164 (D. Colo. 1979). In order to pass muster, a jail mail policy must treat as privileged any mail to or from a licensed attorney who is representing an inmate in a criminal, civil, or administrative matter, who is being contacted to advise an inmate in such a matter, or who is contemplating representing or advising an inmate in any such matter. *Ramos v. Lamm*, 485 F. Supp. at 165. In order to remedy this problem, the jail should amend the definition of privileged mail to include any correspondence to or from any licensed attorney regarding any legal issue, whether or not that issue is related to pending criminal or civil litigation.

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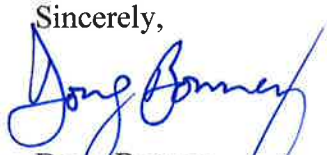
The jail's definition of privileged mail is also inconsistent with policies adopted by other corrections officials and approved by the courts. *See Ramos v. Lamm*, 639 F.2d 559, 582 (10th Cir. 1980) (approving and applying Colorado prison regulation broadly defining "legal mail"); *Davidson v. Scully* 694 F.2d 50 (2d Cir. 1982) (ACLU correspondence is privileged); *Faulkner v. McLocklin* 727 F. Supp 486, 490 (N.D. Ind. 1989) (privileged legal mail includes mail to or from a legal service organizations including the ACLU because detainees predominantly write to the ACLU seeking legal help). The regulations of the Kansas Department of Corrections provide a particularly good model: "'Legal mail' means the mail affecting the inmate's right of access to the courts or legal counsel. This term shall be limited to letters between the inmate and any lawyer, a judge, a clerk of a court or any intern or employee of a lawyer or law firm, legal clinic, or legal services organization, including legal services for prisoners." K.A.R. 44-12-601(1)(A).

In addition, requiring inmates to leave unsealed outgoing mail addressed to a lawyer or legal services organization that is not currently the detainee's "attorney of record" is inconsistent with well-established Tenth Circuit precedent. "Outgoing privileged mail cannot be opened at all, except on reasonable and specific cause to believe that contraband or improper communication is involved. General, undifferentiated suspicion is not sufficient cause, and such determination of cause and the interception of privileged mail will be subject to the same procedural safeguards as those regarding general correspondence." *Ramos v. Lamm*, 485 F. Supp. at 164 (D. Colo. 1979), *aff'd*, 639 F.2d at 582 (10th Cir. Colo. 1980). Even if the jail has reasonable and specific cause to open outgoing privileged mail, the jail must do so in the presence of the inmate or detainee. *Hinderliter v. Hungerford*, 814 F. Supp. 66, 68 (D. Kan. 1993). If the jail is requiring detainees to leave unsealed mail addressed to the ACLU and other legal service organizations or individual lawyers that are not currently "attorneys of record," that policy or practice is unconstitutional.

For these reasons, I ask you to modify the jail's current mail policy so as to recognize that correspondence between an inmate and a lawyer (including a legal services organization, such as the ACLU, Kansas Legal Services, MALDEF, and the NAACP Legal Defense Fund) is privileged mail whether or not the legal services organization or individual lawyer or law firm is currently the detainee's "attorney of record" in a civil or criminal case. I look forward to hearing from you about this matter.

Sincerely,



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