

May 28, 2021

Via mail and e-mail: cwells@oscsheriff.org



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

Kansas

PO Box 917
Mission, KS 66201
(913) 490-4100
aclukansas.org

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Sheriff Chris Wells
Osage County Sheriff's Office
131 W. 14th Street
Lyndon, KS 66451

Re: Attorney Client Privilege Violations at the Osage County Jail

Dear Sheriff Wells:

We write on behalf of the ACLU of Kansas to express concerns regarding how your jail is handling confidential attorney-client communications.

Current or former inmates at the Osage County Jail have contacted us with concerning allegations about the Jail's failure to provide private and confidential meeting spaces for inmates and their attorneys. According to these allegations, the Jail only provides meeting rooms with surveillance cameras that capture both audio and video. We have also reviewed some of the filings in *Perry v. Wells*, 5:21-CV-03072. Though dismissed by the Court in its screening process, the allegations—corroborated by other inmates and the Plaintiff's attorney—are troubling.¹

"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"² In order to access this right to assistance of counsel, litigants must be able to confer with their attorneys in private. The right to do so, and the attorney-client privilege itself, are fundamental to our civil and criminal justice system.

The United States Supreme Court has described it this way: "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."³ The Court went on to write, "The privilege recognizes that sound

¹ See *Perry v. Wells*, 21-3072-SAC, 2021 U.S. Dist. LEXIS 53116 (D. Kan. March 22, 2021).

² *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), citing *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

³ *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981).



legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client.”⁴

The Jail and its staff controls when and where inmates may visit with anyone, attorney or otherwise. If the Jail only provides public spaces or rooms with recording equipment, then the facility and its staff are interfering with inmates’ access to assistance of counsel. “The Sixth Amendment provides that an accused shall enjoy the right to have the Assistance of Counsel for his defense. This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process.”⁵ Importantly, “The Sixth Amendment right to effective assistance of counsel includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference.”⁶

Meeting rooms that are audio and video recorded impede clients’ ability to speak candidly and confidentially with their attorneys, and a jail’s deliberate interference with the confidential attorney-client relationship can violate the Sixth Amendment.⁷ Courts have found the Sixth Amendment was implicated when a jailor required officers to be present during meetings with attorneys or required the meetings to occur in public spaces.⁸ Similarly, Courts have entered injunctions prohibiting jails and prisons from monitoring attorney-client meetings with cameras and audio recordings.

Grubbs v. O’Neil is instructive.⁹ There, the Court found that the presence of surveillance cameras could potentially chill open and free communication between attorneys and clients.¹⁰ In fact, the jail in *Grubbs* did more to protect the privacy of these conversations than what is alleged about your jail in Osage County: the jail did not record audio and employed the use of masking technology to hide client faces in the video recordings. Even so, the Court still held that there could be a Sixth Amendment violation. The client’s

⁴ *Id.*

⁵ *United States v. Morrison*, 449 U.S. 361, 364 (1981) (internal citations omitted).

⁶ *United States v. Carter*, 429 F.Supp. 3d 788, 881 (D. Kas. 2019), *vacated in part*, *United States v. Carter*, 16-20032-02-JAR, 2020 U.S.Dist. LEXIS 13562 (D. Kans. Jan. 28, 2020).

⁷ *Id.* at 882.

⁸ *E.g. Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052-53 (8th Circuit 1989) (finding that Plaintiffs’ allegations that they could only meet with attorneys in public areas potentially interfered with right to counsel); *J.B. v. Onondaga Cty.*, 401 F. Supp. 3d 320, 334 (N.D.N.Y. Aug. 12, 2019) (entering preliminary injunction, prohibiting a “constant surveillance” during attorney meetings). “[B]y posting officers in Courthouse attorney-client meetings, the Sheriff places a substantial obstacle in the way of class members’ right to consult their attorneys and prepare a defense.” *Id.* at 340.

⁹ *E.g. Grubbs v. O’Neill*, 744 Fed. Appx. 20 (2nd Cir. 2018).

¹⁰ *Id.* at *23



subjective belief about the confidentiality of the conversation must be considered.¹¹

We were encouraged to see a response to one of the Plaintiff's grievances in the *Perry v. Wells* case. A Jail official appears to have written about the cameras that they were "unsure whether or not [the cameras] have been removed [b]ut are currently working on something so you can have contact with your attorney without being audio recorded."¹²

We ask that you confirm that those steps have been taken and that, in addition to audio recordings, the Jail has ended video recordings of confidential attorney-client meetings. We also request that you share steps you have taken to ensure that people can meet with their attorneys in a confidential space while incarcerated in your facility.

We are more than willing to discuss this matter with you further and can arrange a phone call or video conference if you would like. Please let us know if you think it would be helpful.

Thank you for your attention to this matter.

Regards,

A handwritten signature in black ink that reads "Sharon Brett". The signature is written in a cursive, flowing style.

Sharon Brett
Legal Director, ACLU of Kansas

¹¹ "The district court did not appropriately consider the chilling effect that the cameras' presence in the attorney-client booths could have on pre-arraignment detainees' willingness to communicate candidly with their attorneys." *Id.*, citing *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974).

¹² *Perry v. Wells*, 21-3072-SAC, Doc. 8 (Ex. Q to Amended Complaint (Doc. 6)).