September 18, 2018

BY E-MAIL: tperez@pa.gov

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RE: New policy on legal-mail.

Dear Theron:

We write to express our grave concerns regarding the Department of Corrections' new policy on legal mail. As we understand it, DOC staff will, as before, open legal mail in the prisoner's presence, but instead of just searching the mail to ensure it contains no contraband, staff will now copy each page and provide the prisoner with the copy. Precisely which DOC staff will perform the copying function, and where and how it will be done, will vary by institution. The original letter and documents will be placed in a sealed envelope and maintained in a separate locked container, overseen by an unidentified third-party vendor, until destroyed after somewhere between 15 days and a month. When necessary, the DOC can retrieve the stored copy before the vendor destroys it.

Incarcerated persons retain their First Amendment right to mail, particularly confidential communications with their attorneys. *Bieregu v. Reno*, 59 F.3d 1446, 1452 (3d Cir. 1995). Policies that "interfere[] with protected communications [or] strip[] those protected communications of their confidentiality … impinge upon the inmate's right to freedom of speech." *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006). Further, as you are undoubtedly aware, attorneys have an ethical duty to ensure confidential communications with their clients. 204 Pa. Code § 1.6. This includes an obligation "to safeguard information relating to the representation of a client against unauthorized access by third parties." Comment 25 to Pennsylvania Rules of Professional Conduct.

Experts in professional ethics have advised us that the DOC's new process for handling legal mail raises sufficient confidentiality concerns that we should not continue to communicate privileged information with clients incarcerated in state prisons via mail. The three undersigned organizations send a large number of privileged and confidential letters to prisoners housed throughout the DOC. We simply do not have the staff and resources to enlist an alternative communication method, such as in-person visits. Additionally, countless lawyers, including federal and county public defenders, have contacted us to express alarm at the new procedures and disquietude at the prospect of sending privileged communications that will be subject to the new screening process.

We appreciate the time you spent last Friday answering our questions regarding the new policy; however, your answers did not allay our concerns. The procedures you describe simply do not reasonably protect the rights of the men and women incarcerated within DOC. *See Jones*, 461 F.3d at 359 (finding that a legal mail policy "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."). Our inability to identify another state prison system in the country that employs a similar screening process that copies the prisoners' mail and stores the original letter and documents strongly suggests the practice is an unnecessary, exaggerated and indefensible security precaution. *See Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction") (citing *Procunier v. Martinez*, 416 U.S. 396, 414, n. 14 (1974)).

Moreover, while the DOC certainly has a legitimate interest in preventing contraband from entering its facilities, you were unable to provide a single example of contraband being introduced into a DOC facility via legal mail actually sent from an attorney. The two security breaches involving "legal mail" that you identified involved "compromised" attorney-control numbers, which you believe were mis-used by non-attorneys. Such a tenuous relationship between the DOC's interests and the substantial intrusion on prisoners' rights does not pass the balancing test of *Turner*, but rather evidences the exaggerated response that courts caution against. *See Turner v. Safley*, 482 U.S. 78, 90-91 (1987) ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns."). An obvious, more narrowly tailored solution to the problem of "compromised" control numbers is for the DOC to pay more careful attention to the control-number system—by removing the numbers before providing legal mail to prisoners and possibly periodically re-issuing control numbers, as some of us have had the same number for over a decade.

We respectfully request that the DOC immediately reinstate the previous policies governing the handling of legal mail. The DOC may have a problem with drugs entering its prisons, but the evidence indicates that legal mail is not a source of introduction. Given the obvious and more narrowly targeted alternative of securing the attorney-control-number process, we believe the DOC's new policy is an overbroad and unjustifiably intrusive overreaction that infringes on attorneys' and their clients' First Amendment rights. We would appreciate a response to this letter by the close of business this Friday, September 21. Given the significant impact of the DOC's new legal-mail policy on thousands of attorney-client communications, we are preparing a federal court challenge. We hope that will not be necessary.

Respectfully,

/s/ *Bret Grote*	/s/ *Alex Morgan Kurtz*	/s/ *Witold J. Walczak*
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