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Via Email & Regular Mail
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Special Litigation Section, Chief
Office of the Assistant Attorney General, Civil Rights Division
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530
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Re: Open Letter Concerning Lack of Access to Counsel in Louisiana Jails

Dear Chief Rosenbaum:

During the summer of 2021, the ACLU of Louisiana ("ACLU-LA"), together with pro bono counsel Wilson Sonsini Goodrich & Rosati P.C., interviewed numerous public defenders and members of public defender offices serving incarcerated individuals in parishes throughout the state of Louisiana. The parishes represented in our interviews included Beauregard, Calcasieu, East Baton Rouge, Evangeline, Orleans, and Lafayette. These interviews revealed that jails throughout Louisiana are engaged in a widespread practice of violating incarcerated persons' constitutional right to counsel. As you know, the Civil Rights of Institutionalized Persons Act ("CRIPA") gives the Special Litigation Section of the U.S. Department of Justice ("DOJ") Civil Rights Division the federal statutory authority to investigate conditions and practices in state-run institutions that deprive individuals housed in those institutions of their constitutional rights.[1] As such, we write to urge the DOJ to take immediate action to investigate the practices detailed in this letter, and, if warranted, to pursue civil action.[2]

Incarcerated Individuals' Constitutional Right to Meaningful Access to Counsel

Indigent criminal defendants have the right to access court-appointed counsel under both the United States Constitution and the Louisiana State Constitution.[3] Louisiana state law further specifies that the "accused in every instance has the right to defend himself and to have the

[1] 42 U.S.C. § 1997 *et seq*.

[2] We understand that the DOJ is currently investigating practices within the Louisiana Department of Public Safety and Corrections related to the timely release of state prisoners in Louisiana Department of Corrections custody, including practices related to prisoners who are eligible for immediate release. An investigation into conditions and practices concerning access to counsel within Louisiana jails could potentially utilize the same personnel already familiar with the Louisiana Department of Public Safety and Corrections, thereby eliminating the need for new investigators to become familiar with the system in general.

[3] U.S. Const. amends. VI, XIV; La. Const. art. 1, § 13.

assistance of counsel. His counsel shall have free access to him, in private, at reasonable hours."[4] Included in the right to counsel is the right to the attorney-client privilege, the purpose of which "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."[5] These rights have been recognized and upheld in courts throughout the country, including those in Louisiana.[6]

In addition, the United States Constitution entitles incarcerated people to reasonable access to their attorneys without unnecessary interference by prison administrative practices.[7]

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[4] La. Code Crim. Proc. art. 511.

[5] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[6] *See, e.g.*, *State v. Peart*, 621 So. 2d 780, 789 (La. 1993) ("[R]easonably effective assistance of counsel" means "that the lawyer not only possesses adequate skill and knowledge, but also that *he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients*.") (emphasis added); *see also*, *Taylor v. Sterrett*, 532 F.2d 462, 472, 475 (5th Cir. 1976) (holding that "[a]ny infringement of the right to effective counsel by the reading of an inmate's correspondence with an attorney" violates the Sixth Amendment and noting "uninhibited communication" with attorneys and the courts is basic to society's interest in fair judicial proceedings); *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("[Incarcerated people] must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").

[7] *See, e.g.*, *Haze v. Harrison*, 961 F.3d 654, 658 (4th Cir. 2020) (recognizing the importance of protecting confidential communications concerning "privileged legal matters") (citation omitted); *Al-Amin v. Smith*, 511 F.3d 1317, 1331 (11th Cir. 2008) (acknowledging incarcerated peoples' "vital need" to communicate confidentially with their attorneys); *Kensu v. Haigh*, 87 F.3d 172, 174 (6th Cir. 1996) (recognizing the basic right of people who are imprisoned to receive confidential legal communications); *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir. 1990) (holding that an incarcerated person's right to access the courts includes private confidential contact visits with counsel); *Love v. Summit County*, 776 F.2d 908, 912 (10th Cir. 1985) (recognizing the "principle that the states may not deprive prisoners of access to the courts by denying them access to available sources of legal expertise"); *Dreher v. Sielfaf*, 636 F.2d 1141, 1143 (7th Cir. 1980) (noting that private contact with attorneys is encompassed in a defendant's right to access the courts); *Mastrian v. McManus*, 554 F.2d 813, 821 (8th Cir. 1977) ("It is clear 'that an accused does not enjoy the effective aid of counsel if he is denied the right to private consultation with him.'" (quoting *Coplon v. United States*, 191 F.2d 749, 757 (D.C. Cir. 1951))); *Sterrett*, 532 F.2d at 473 (asserting that the right to counsel encompasses an incarcerated person's right to engage in confidential communications with their attorney); *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) ("[T]he essence of the Sixth Amendment right is, indeed, privacy of communication with counsel."); *Via v. Cliff*, 470 F.2d 271, 275 (3d Cir. 1972) (finding that a detained person's right to counsel is at its height before trial, at which time "the 'regulation' of the right by prison officials should be more

The DOJ recognizes that incarcerated persons are constructively denied this right of reasonable access to counsel when, on a system-wide basis, (1) "lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices," and/or (2) "the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised."[8]

Findings of the ACLU-LA's Interviews

The interviews revealed that there is a systematic pattern and practice in Louisiana jails of violating incarcerated persons' constitutional right to counsel. Below is a non-exhaustive list of the types of egregious constitutional violations the interviewees witnessed firsthand.

Lack of Access to Counsel

- ***Discretionary bans from visiting clients in jail for an extended period of time***. One Public Defender investigator reported having been banned from visiting a jail in Beauregard Parish for approximately one year.
    - During that year, this investigator had no access to clients or client information. When the investigator asked why they were banned from the jail, the warden replied, "That's what you get for filing a complaint." At the time, the Beauregard Parish Public Defender's Office had a case pending against that Sheriff's Office.
- ***Limited visitation hours, long wait times, and geographic obstacles for public defenders***. Limited visitation hours preclude many public defenders (who also have very heavy caseloads) from visiting their clients as they are often in court and unable to get to jail during the small visitation window, especially when the jail is located hours away.
    - A Calcasieu Parish public defender had 19 clients housed at various facilities around the state. Only two of those 19 clients were incarcerated within Calcasieu Parish. The remaining 17 clients were housed outside Calcasieu Parish, with the nearest facility 182 miles away from the public defender's office. The other facilities are between 182 and 230 miles away. This public defender estimated it would take at least two weeks to visit each client once if the attorney was to travel to each facility.
    - A Calcasieu Parish public defender stated that their workload of 300 open felony cases was the smallest docket in the office.

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restrained"); *Nolan v. Scafati*, 430 F.2d 548, 551 (1st Cir. 1970) (stating that, in the absence of a countervailing penological interest, an incarcerated person's right of access to the court includes the right of unimpeded access to legal assistance).

[8] Statement of Interest of the United States, *Hurrell-Harring v. State of New York*, Case No. 8866-07, at 1 (N.Y. 2013).

- One Calcasieu Parish attorney working on life-without-parole ("LWOP") cases reported being turned away after visiting a jail, where they were told about a policy prohibiting in-person visits with clients. The attorney accordingly had to go over trial materials with the client over Zoom, a platform that supports video calling. However, reviewing trial materials, like video discovery, when preparing for trial with a client is nearly impossible to do effectively over Zoom—so the public defender was forced to prepare their client in a way they did not feel was effective for trial.

Lack of Ability to Communicate Confidentially with Counsel

- ***Certain jails blatantly sabotage the confidential settings of private meetings.*** An individual serving clients in Beauregard Parish reported that holes have been drilled into the walls in meeting rooms at the jail so that jail staff can listen in on privileged and confidential or otherwise private meetings. This person resorted to meeting a client in an interrogation room with a two-way mirror and could hear jail staff walking on the other side of the mirrored wall.
- ***Jails lack private meeting spaces for public defenders to meet with clients in-person***. Additionally, incarcerated people are denied private spaces to meet with their public defender on video; it is common for deputies and/or other imprisoned people to be in the room during client video calls with public defenders.
  - For example, one public defender stated that although one jail gave a client a headset for a Zoom meeting, four deputies remained in the room with the client during the meeting. The deputies claimed their supervision was necessary because they could not leave incarcerated people alone with laptops or tablets. This public defender was forced to conduct the meeting asking only yes or no questions so as to not waive the attorney-client privilege by disclosing privileged information in the presence of the deputies.
  - One public defender was denied a request for deputies to leave a meeting room in order to conduct a confidential video meeting with their client. The deputies responded that if the attorney wanted to conduct confidential meetings with clients, they were required to come in person. But this public defender had 90 clients in jail, many of whom were held in a facility that is a three-hour drive away. This public defender cannot spend six hours driving roundtrip to meet clients in person, while making other court-required appearances.
- ***Video calls and phone calls are not viable alternatives to physical meetings because in addition to lacking privacy, they are recorded***. Attorneys from Calcasieu Parish understood that calls to and from attorney phone numbers should not be recorded; however, several interviewees reported that jails blatantly disregard this policy.[9]

[9] Policy 604 "Offender Access to Courts and Counsel" of Calcasieu Parish Sheriff's Office instruct facilities to provide, at a minimum, telephones that enable attorney-client privilege. Violations of this policy also violate Louisiana's Administrative Code. La. Admin. Code tit. 22 § III-3101,

Attorneys in Orleans Parish must sign and notarize an affidavit before their calls are exempted from the default recording system. The policy only allows for landline numbers and does not apply to attorney mobile numbers. Furthermore, the affidavit requires that no third parties—even investigators, paralegals, or other professionals who would fall under attorney-client privilege—participate on any calls with clients. For video calls, jails insist on using their own Zoom accounts to set up video meetings, denying attorneys the right to use their own office accounts. This prevents attorneys from controlling whether the Zoom calls are recorded.

  - One Beauregard Parish investigator was told by a district judge's spouse that jail personnel were listening to attorney calls with clients.
  - A Beauregard Parish deputy told one person we spoke to that detectives are listening in on public defender conversations with incarcerated people.
  - One public defender reported having a conversation with their client in which they discussed how to peel crab. This discussion had nothing to do with the facts or legal issues in the case and was merely a side conversation. Later, at that client's hearing, the prosecution asked the client's family members whether the client knew how to peel a crab. The public defender stressed that there was no way for the prosecution to know the details of that conversation unless they had access to a recording of her call with the client or had otherwise listened to the privileged conversation.

- ***There is no realistic way for people who are imprisoned to confidentially call the Calcasieu Parish Public Defenders Office***. Incarcerated people must either use recorded phone lines, or the Calcasieu Parish Public Defenders Office must pay for the calls, which it cannot afford to do.
- ***Written communications from public defenders to their clients are regularly opened and reviewed***. Public defenders from the Baton Rouge Capitol Conflict Office and Calcasieu Parish reported that mail addressed to their clients is opened and scanned, with clients only receiving copies of their mail. Originals are allegedly destroyed or stored for the client to take when they leave the jail, and it is not clear who monitors or oversees this process.
  - For example, in June 2021, a deputy told an investigator from Beauregard Parish that they would open and look at attorney mail before giving it to the client. In addition, a different deputy told the same investigator that the deputy would deliver the attorney mail and open and read the mail before delivering it to the client.

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subsection B ("Inmate communications, with attorneys by telephone or personal visit shall be entirely confidential.").

Additional Issues Raised by Public Defenders

During our investigation, we became aware of other violations of incarcerated individuals' rights, as well as systematic practices that impair Louisiana public defenders' ability to ensure meaningful access to counsel.

- ***Clients are harmed by the deep-seeded bias against public defenders.*** The judicial system in Louisiana appears to suffer from a systemic bias against public defenders that prevents indigent people who are incarcerated from receiving effective representation.
    - For example, one public defender reported being referred to as a "block to justice" on the record by district attorneys, police officers, and judges.
    - In another example, after a client was acquitted, the judge asked the jury when the public defender was out of the courtroom whether the public defender had bought their verdict. The client's brother relayed that conversation to the public defender afterward.
- ***The absence of accountability allows for clear violations of the Sixth Amendment and Article I of the Louisiana Constitution to flourish.*** It was reported that deputies in Calcasieu Parish often approach indigent defendants at court and try to interview the defendants before they are assigned public defenders. Public defenders or investigators must intervene to stop the deputies. The deputies apparently only stop when confronted by public defenders or investigators.
- ***Jails take advantage of bureaucratic red tape.*** A Calcasieu Parish public defender reported that it is common for it to take seven to fourteen days for clients to be released from jail. This public defender had one client who was not released for twenty-two days. When asked about delays, the jail either gives no reason or says there was a paperwork delay.[10]
- ***Certain jails implement arbitrary dress codes that disproportionately prevent female attorneys from visiting their clients.*** Our investigation also revealed that some parish jails maintain dress codes that preclude an attorney from visiting with their clients if the attorney is coming directly from court wearing a skirt suit.
    - For example, one public defender reported that the warden in Lafayette Parish will kick attorneys out of the jail for supposed dress code violations, which include wearing open-toed shoes or a skirt suit. If an attorney is found in violation of the dress code, the warden prohibits the attorney from visiting the client entirely.

[10] This public defender may be open to discussing issues they have encountered, which may bear on the DOJ's existing investigation into release delays. We would be happy to facilitate an introduction.

Louisiana Parish Authorities Have Largely Failed to Comply with Our Lawful Public Records Requests

As part of our investigation, in early May 2022, we submitted Louisiana Public Records Act[11] requests to Beauregard, Calcasieu, East Baton Rouge, Jefferson, Lafayette, Orleans, Rapides, Richland, St. Tammany, and Vermilion Parishes, to better understand each parish's policies and practices and to assess the validity of the claims discussed elsewhere in this letter. Specifically, our requests sought documents reflecting each parish's policies and procedures regarding: (1) safeguarding incarcerated individuals' right to private and/or privileged communications with counsel; (2) in-person visits between incarcerated individuals and their counsel; (3) video visits between incarcerated individuals and their counsel, whether on Zoom or other video-conferencing platforms; and (4) telephone calls between incarcerated individuals and their counsel.

Under Louisiana law, a public entity is required to respond to a Public Records Act request within three (3) business days.[12] However, in the five months since we submitted our Public Records Act requests, we have only received records from East Baton Rouge, Calcasieu, Orleans, and St. Tammany Parishes, and partial records at that. None of the parishes have produced records that fully respond to our straightforward requests. Lafayette Parish has only confirmed receipt of our request but has yet to provide any records. Several parishes, including Beauregard, Jefferson, Rapides, Richland, and Vermillion, have not responded at all.

* * *

As explained above, both the United States Constitution and Louisiana law require that prison personnel allow incarcerated people reasonable access to private consultation with attorneys. Yet Louisiana prisons appear to have widespread practices that deny and/or gravely interfere with incarcerated persons' constitutional right to counsel, resulting in grievous harm. The flagrant and widespread practices of denying private meeting spaces to attorneys, housing incarcerated individuals many miles from their attorneys, listening to and/or recording confidential correspondence, and opening privileged mail—coupled with issues of underfunding, high caseloads, and a culture of bias against public defenders—erode confidence in the justice system and undermine the fundamental tenets of the attorney-client relationship.

The DOJ is uniquely positioned to remedy the widespread constitutional violations within Louisiana state prisons under CRIPA. Although courts have generally recognized remedies for violations of incarcerated individuals' right of access to counsel,[13] Louisiana courts have put in

[11] La. Rev. Stat. § 44:1 *et seq*.

[12] La. Rev. Stat. § 44:32(D).

[13] *See S. Poverty L. Ctr. v. U.S. Dep't of Homeland Sec.*, No. 18-760, 2020 U.S. Dist. LEXIS 106416, at *117-21 (D.D.C. June 17, 2020) (ordering detention centers to implement procedures to ensure individuals held in custody can have access to their legal representatives, including, among other procedures: providing access to functioning, confidential phone systems for attorney-client communications, developing procedures for confidential attorney-client document exchanges,

place procedural barriers that leave plaintiffs with little hope of redress through the state court system. Louisiana courts repeatedly have held that access to counsel claims must be analyzed on a case-by-case basis, and therefore they have rejected claims alleging large-scale rights deprivations that, by their nature, cannot be examined on an individual level.[14] While we dispute the wisdom of these rulings, their existence creates a high bar for public defenders in Louisiana who may wish to challenge systemic issues as a group. Fortunately, individuals hoping to challenge systemic access to counsel issues can obtain the necessary relief through CRIPA, which gives the DOJ the authority to investigate and pursue civil actions against state-run institutions in this context. Accordingly, due to the widespread nature of the access to counsel issues in Louisiana, as well as the legal uncertainty of systemwide challenges by public defenders in Louisiana courts, we believe that the rights deprivations highlighted herein could be remedied most effectively and systematically by the DOJ pursuant to its authority under CRIPA. We therefore urge you to investigate these matters promptly.

We are prepared to provide any assistance necessary to facilitate the DOJ's inquiry into the conditions and practices highlighted in this letter. If you have any questions, please contact Deno Himonas (dhimonas@wsgr.com), Luke Liss (lliss@wsgr.com), and Nora Ahmed (nahmed@laaclu.org).

Sincerely,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

Deno Himonas, Partner

/s/ Luke A. Liss

Luke Liss, Pro Bono Partner

and providing training to staff regarding legal visits and how to ensure attorney-client confidentiality).

[14] *Peart*, 621 So. 2d at 788-89 (explaining that ineffective assistance of counsel claims must be examined as to each individual defendant); *State v. Covington*, 318 So. 3d 21, 27 (La. 2020) (requiring ineffective assistance of counsel claims to be heard on a case-by-case basis); *Allen v. Edwards*, 322 So. 3d 800, 810-11 (La. App. 1st Cir. 2021) (rejecting class certification for a group of indigent defendants challenging structural limitations in the Louisiana public defense system).

ACLU OF LOUISIANA

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With Support From,

VOICE OF THE EXPERIENCED ("V.O.T.E.")

VOTERS ORGANIZED TO EDUCATE
PROMISE OF JUSTICE INITIATIVE
SOUTHERN POVERTY LAW CENTER
EAST BATON ROUGE PARISH PRISON REFORM COALITION
ORLEANS PUBLIC DEFENDERS
OPERATION RESTORATION

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