

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PENNSYLVANIA INSTITUTIONAL	:	
LAW PROJECT, ABOLITIONIST	:	
LAW CENTER, AMISTAD LAW	:	
PROJECT, and AMERICAN	:	
CIVIL LIBERTIES UNION	:	
OF PENNSYLVANIA,	:	
	:	No. 1:18-cv-2100
Plaintiffs,	:	
	:	
v.	:	
	:	
JOHN E. WETZEL,	:	
Secretary of Department of Corrections,	:	
SHIRLEY MOORE SMEAL, Executive	:	
Deputy Secretary of Department of	:	
Corrections, and TABB BICKELL,	:	
Executive Deputy Secretary for	:	
Institutional Operations,	:	
	:	
Defendants.	:	

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into this ___ day of March 2019 by and between Plaintiffs (as defined below), Defendants (as defined below) and the Commonwealth of Pennsylvania Department of Corrections.

WHEREAS, on October 30, 2018, Plaintiffs filed the above-captioned lawsuit on behalf of themselves and their incarcerated clients alleging that the

Defendants were violating their First Amendment rights by copying their Privileged Correspondence and storing the originals outside of their presence.

WHEREAS, Defendants denied that they violated Plaintiffs' First Amendment rights.

WHEREAS, Defendants and the Commonwealth of Pennsylvania Department of Corrections ("Department") respect the confidentiality of attorney-client communications and support measures to preserve the confidentiality of those communications.

WHEREAS, Plaintiffs support the Department's efforts to prevent the introduction of drugs into Department facilities and wish to support those efforts in a manner consistent with preserving their First Amendments rights and the confidentiality of their privileged correspondence.

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties as follows:

DEFINITIONS

1. As used in this Agreement, the following terms have the following meanings:

- a. “**ACN**” means Attorney Control Number.
- b. “**ACN system**” means the Attorney Control Number system that was described on the Department’s website by which licensed attorneys apply to the DOC for a confidential number to be affixed to Privileged Correspondence so as to identify it as having been sent by an attorney.
- c. “**Copying**” means any type of duplication or reproduction, whether photocopying, scanning, photographing, video recording or any other means by which an identical or similar version of an original is created.
- d. “**Department**” or “**DOC**” refers to the Commonwealth of Pennsylvania, Department of Corrections.
- e. “**Defendants**” means John E. Wetzel, Secretary of the Department, Shirley Moore Smeal, Executive Deputy Secretary of the Department, Tabb Bickell, Executive Deputy Secretary of Institutional Operations for the Department and Jamey Luther, Superintendent of the Department’s State Correctional Institution at Smithfield.
- f. “**Organizational Plaintiffs**” means the Pennsylvania Institutional Law Project, the Abolitionist Law Center, the Amistad Law Project and the American Civil Liberties Union of Pennsylvania.
- g. “**Parties**” means the Defendants, the Organizational Plaintiffs and Davon Hayes.

h. **“Privileged Correspondence”** has the same meaning as set forth in DOC’s DC-ADM 803 (effective October 3, 2018) (“incoming inmate mail as described below: (a) mail from an inmate’s attorney that is either hand-delivered to the facility by the attorney or delivered through the mail system and identified with an attorney control number (ACN) issued to the sender by the Department; (b) Mail from a court; or (c) mail from an elected or appointed federal, state or local official who has sought and obtained an ACN issued by the Department”).

PROCESSING OF PRIVILEGED CORRESPONDENCE

2. Within 45 days of the Parties’ agreement in principle but no later than April 5, 2019, Defendants and the Department shall cease any Copying of Privileged Correspondence.

3. The Parties shall fulfill their respective responsibilities as set forth in paragraph 4 *infra* no later than April 5, 2019. Even if Defendants have not completed implementation of the new procedures contemplated in paragraph 4.b, the Copying of Privileged Correspondence will nevertheless cease as of that date. Furthermore, the timely delivery of Privileged Correspondence will be not be halted or delayed because of the lack of full implementation of paragraph 4.

4. The following procedures will govern the processing of incoming Privileged Correspondence commencing on and after April 6, 2019:

a. The Department will continue to utilize its ACN system as part of its overall process, as supplemented below.

i. The Department intends to reject mail from an attorney that does not include an accurate ACN, and return such mail to the sender without opening it or delivering it to the inmate. Organizational Plaintiffs agree to this procedure.

ii. Organizational Plaintiffs will use their best efforts to collaborate with the Defendants and the Department to encourage Pennsylvania's state courts and federal courts to agree to participate in the Department's ACN system. Organizational Plaintiffs will commence efforts immediately upon the Parties' agreement in principle.

b. The Department may adopt an additional verification system by which a code will be transmitted by email to individuals or organizations on a master distribution list. This code will change and be transmitted periodically, but not more often than weekly, and the Department anticipates that attorneys will include the active code on the envelope of Privileged Correspondence in addition to the ACN. Upon receipt of the Privileged Correspondence, Department personnel will confirm that the code on the envelope matches the code in effect on the date of the postmark, but will allow for a "grace period" of one week (in other

words, if the code on the envelope matches a code that was in effect within one week of the post-mark date, it will be considered accurate).

i. If a particular piece of Privileged Correspondence includes the correct ACN, but either an incorrect code or no code, DOC shall then contact the sending attorney, or his/her designee or agent, to confirm that the attorney sent the Privileged Correspondence. The Department will establish a procedure to ensure that reasonable attempts are made by phone and email to reach the sending attorney before rejecting the Privileged Correspondence.

ii. If the Department is not able to verify the Privileged Correspondence either through the active code or personal contact with the sending attorney, the Department will reject the correspondence and return it to the sender. If the Department is able to verify the Privileged Correspondence through either of these two methods, then the Privileged Correspondence will be processed in accordance with the other procedures outlined in this Agreement.

iii. The Department agrees to allow Organizational Plaintiffs to monitor this new procedure to assess its viability and the burden it imposes on attorneys, their clients and the courts. The Department will provide to Organizational Plaintiffs on a monthly basis data and other information regarding the implementation of this new system. This data will include, among other things, the number of Privileged Correspondence with no or incorrect ACNs, the number

of Privileged Correspondence with no or incorrect codes, a catalog of the attempts to contact sending attorneys, the number of Privileged Correspondence that is rejected under this new system broken down by reason for rejection (no or incorrect ACN, no or incorrect code, etc.), the total number of Privileged Correspondence in which contraband is found (noting type of drugs, weapons or other), and the total number of Privileged Correspondence. Each of the foregoing categories of data will be provided for the DOC system overall and broken down by institution.

iv. The Department and Organizational Plaintiffs will work together to identify issues and problems, and work proactively to address those issues and make adjustments to this system.

c. As a condition to use of the Privileged Correspondence procedures, all attorneys must agree not to use Privileged Correspondence to send original documents from third parties (documents generated from someone other than the attorney's office). If an attorney violates this condition, and the Department determines that the violation was intentional, the Department may terminate the attorney's right to use the Privileged Correspondence procedures. If an attorney violates this condition unintentionally, the attorney will receive a warning upon the first offense and the Department may terminate the attorney's

right to use privileged correspondence after the second offense. With respect to this requirement, the Department and Defendants agree to the following:

i. In all cases, the Department shall notify the attorney of the violation and shall have a procedure whereby the attorney can appeal the suspension or termination of his/her right to use the Privileged Correspondence procedures.

ii. The Department shall eliminate the requirement that prisoners use original documents at any level of appeal related to the exhaustion of administrative remedies, including but not limited to the procedures of DC-ADM 801 and DC-ADM 804.

iii. The Department will reasonably notify prisoners that attorneys will no longer be permitted to return original documents to them, and encourage them to make copies of any documents they send to their attorneys. Notice shall consist of (1) an announcement at each Department facility equipped with a prison-wide intercom on or before April 6, 2019; (2) regular audio and video announcements at each Department facility equipped with a CCTV system for a fourteen (14) day period beginning on or before April 6, 2019; (3) by mail for each Department facility that has neither a prison-wide intercom nor a CCTV system; (4) posting a copy of the notice in each library accessible to inmates for a

period of at least thirty (30) days beginning on or before April 6, 2019, and (5) written notification in the DOC Inmate Handbook.

iv. The Department shall publish this requirement on its website and make other reasonable efforts to notify attorneys of this new requirement.

v. The Department will increase the allowance for indigent prisoners to account for copying of documents as a result of this change.

vi. The Department will allow an exception to this provision allowing attorneys to contact Chief Counsel's office and/or the business office of a prison when there is a need to return original documents to a prisoner.

vii. The Department will also allow a grace period to those organizations that have collected original documents from clients and have not returned or provided them due to the legal mail policy announced in September 2018. In particular, attorneys shall be permitted to return original documents to prisoners on or before July 7, 2019.

viii. This paragraph does not impact the attorney's right to represent prisoners and to communicate with prisoners via personal visits, unmonitored telephone calls or the use of regular mail for non-confidential communications.

d. The Department may use K-9 “air scans” or other technologies on unopened Privileged Correspondence, provided such procedures do not delay delivery of such correspondence. The Department also may conduct random K-9 “air scans” on opened Privileged Correspondence as part of the Department’s typical inspection procedures. Such procedures shall be designed so as to preclude any opportunity for inadvertent or intentional reading or skimming of the correspondence.

e. In all other respects, the Department will utilize the procedures it had in place prior to September 2018 with respect to the inspection and delivery of Privileged Correspondence.

f. On and after April 6, 2019, there shall be no Copying of any Privileged Correspondence, including documents provided to an incarcerated individual during a legal visit.

g. With respect to all original Privileged Correspondence currently being retained by the Department, all such correspondence shall, at the option of the intended recipient of that correspondence, either be securely destroyed or returned to the sender at no cost to the prisoner. No later than April 6, 2019, the Department shall notify each affected prisoner of his/her options, and destroy or return all such Privileged Correspondence. The Department shall take reasonable

precautions to protect against inadvertent or intentional skimming or reading of the Privileged Correspondence throughout this process.

ASSESSMENT OF NEW PROCEDURES

5. Organizational Plaintiffs and the Department will work together for a trial period of nine (9) months, or longer if the parties agree, to collect data and evaluate the effectiveness of the new procedures for handling Privileged Correspondence. If, based on this evaluation, any parties believe additional steps need to be taken, the Parties will work together to identify appropriate solutions. During this trial period, the Department will share with Organizational Plaintiffs sufficient data and information to enable the Parties to evaluate the effectiveness of these procedures. This data and information will include (a) the number of Privileged Correspondence received; (b) the number of Privileged Correspondence deemed suspicious (and warranting further inspection); (c) the number of Privileged Correspondence that is subject to random K-9 searches; (d) the number of Privileged Correspondence that is received with an incorrect or no ACN; (e) the number of Privileged Correspondence from attorneys that is received with an incorrect or expired code; (f) the number of Privileged Correspondence that is rejected and returned to sender and the reason(s) therefore; (g) the number of

Privileged Correspondence in which contraband was found; (h) the number of compromised ACNs; (i) the number of Privileged Correspondence in which synthetic or other drugs are found; and (j) any other relevant data to which the Parties agree. The foregoing data will be presented monthly, both as a total for the Department and broken down by institution. For each instance where contraband is discovered, the Department will provide copies of the extraordinary occurrence report and any other investigative materials. The confidentiality order entered in this litigation shall apply to any investigative materials produced to Organizational Plaintiffs.

6. The Department agrees that it will not adopt any new procedures for Privileged Correspondence during this trial period and subsequent evaluation without court approval or the consent of the Organizational Plaintiffs.

7. The Department shall continue to provide the data and information described in paragraph 5, *supra*, for a period of two (2) years from the date of this Agreement.

8. Subsequent to the trial and evaluation period, the Department agrees to provide advance notice to Plaintiffs' counsel at least thirty (30) days before implementing any changes that impact the processing of Privileged Correspondence and allow Plaintiffs' counsel an opportunity to comment.

FEES AND COSTS

9. Plaintiffs will share time sheets and cost statements with Defendants' counsel in an attempt to reach agreement on attorneys' fees and costs. If the Parties are unable to reach an agreement, Plaintiffs will file a fee petition and the Court will determine a reasonable amount of fees under applicable Third Circuit and Middle District of Pennsylvania case law. The parties may, either before or after filing a fee petition, seek assistance from a third party mediator.

10. In addition, the Parties agree that Organizational Plaintiffs are entitled to fees for monitoring data and compliance with the provisions of this Agreement under the following terms:

a. Time spent monitoring data and compliance will be billed at rates not to exceed \$250/hour.

b. Plaintiffs agree not to seek payment for the first \$10,000 in monitoring fees each year, and agree that the monitoring fees shall be capped both at \$10,000 per month and at \$50,000 per year for the length of the Agreement.

c. An organizational plaintiff shall not have multiple people performing the same monitoring.

d. Plaintiffs will provide notification when they are approaching the initial \$10,000 threshold.

e. Fees for monitoring under this paragraph will commence on April 6, 2019.

11. The fee scale in paragraph 10, *supra*, does not apply to work by Organizational Plaintiffs for enforcement actions relating to this Agreement. If Plaintiffs seek court intervention to enforce this Agreement or to enjoin unconstitutional conduct related to this Agreement, Plaintiffs may apply their usual fee rates and the fee adjudication process shall be governed by paragraph 9, *supra*.

OTHER PROVISIONS

12. The Court will retain jurisdiction to enforce this Agreement, and address any violations thereof, for a period of two (2) years from the date of the Agreement, subject to the below provisions regarding extensions of that term.

13. If the Plaintiffs have a reasonable basis to believe that the Department is failing to comply with any material provision of this Agreement, Plaintiffs will notify the Department in writing of the specific issues. This notice will identify, with particularity, the basis of their noncompliance claim and the specific provisions of the Agreement that are implicated.

14. Within fifteen (15) days of receipt of the notification, the Department will provide a written response to the Plaintiffs' notification with a full factual explanation as to why the Department believes it is complying with the Agreement,

or an explanation of the Department's plans to achieve full compliance with the Agreement.

15. If the Parties are unable to resolve the dispute, the Plaintiffs may seek intervention from this Court by filing a motion for specific performance and for other appropriate relief, including an extension of the term of this Agreement.

16. Neither this Agreement nor anything in this Agreement shall be deemed an admission or concession of liability or evidence respecting any liability on the part of the Department or the Defendants.

17. The Department will not retaliate against any person because that person has provided information or assistance related to the above-captioned litigation.

18. Any notices under this Agreement will be sent by overnight mail and email to the following:

a. If to the Plaintiffs:

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American Civil Liberties Union of Pennsylvania
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srose@aclupa.org
vwalczak@aclupa.org

b. If to the Defendants:

Theron R. Perez, Esq.
Timothy A. Holmes, Esq.
Jamie B. Boyd, Esq.
Debra Sue Rand, Esq.
Chase M. Defelice, Esq.
Abby Trovinger, Esq.

Pennsylvania Department of Corrections
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tholmes@pa.gov
jaiboyd@pa.gov
drand@pa.gov
chdefelice@pa.gov
atrovinger@pa.gov

19. This Agreement contains the entire Agreement between the Parties with respect to the matters set forth herein, and there are no written or oral understandings or agreements, directly or indirectly connected with this Agreement that are not incorporated herein.

20. This Agreement is binding upon and insures to the benefit of the successors and assigns of each of the Parties throughout the duration of the Agreement.

21. The Parties may jointly agree to a modification of this Agreement, but only in a writing signed by all Parties. This Agreement may not be modified except upon written consent of all Parties.

22. This Agreement will be construed and interpreted in accordance with the law of the Commonwealth of Pennsylvania.

23. Each Party has cooperated and participated in the drafting of the Agreement, and in any construction to be made of this Agreement, each Party shall

be deemed to have cooperated and participated in the drafting and preparation of this Agreement.

24. Each of the Parties had the opportunity before signing this Agreement to make whatever investigations it deemed necessary and to obtain the advice of legal counsel of its own choosing, and each of the Parties has entered into this Agreement voluntarily.

25. If any provision or term of this agreement is held to be invalid, illegal, unenforceable or in conflict with the law in any jurisdiction, the validity and legality of the remaining provisions will not be affected or impaired thereby.

26. The Parties agree that within twenty (20) days of the approval of this Agreement, they will sign and submit a joint stipulation of dismissal without prejudice pursuant to Fed. R.C.P. 41(a). The Parties understand and agree that the Court will maintain jurisdiction of this action throughout the duration of this Agreement pursuant to paragraph 12 above. After the expiration of the Agreement's term (including any extension thereof), the Parties will sign and submit a joint stipulation of dismissal with prejudice.

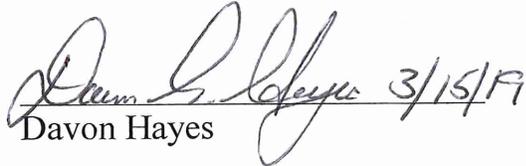
27. This Agreement may be executed in counterparts, and a facsimile or PDF signature shall be deemed to be, and have the same force and effect as, an original signature.

APPROVED by the Court on this ____ day of _____, 2019:

The Honorable John E. Jones, III
United States District Judge

APPROVED BY PLAINTIFFS:

APPROVED BY DEFENDANTS and
COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF CORRECTIONS

 3/15/19

Davon Hayes

John E. Wetzel
Secretary, Department of Corrections

Angus Love
Pennsylvania Institutional Law Project

Dustin McDaniel
Abolitionist Law Center

Sean Damon
Amistad Law Project

Reginald Shuford
American Civil Liberties Union of Pennsylvania

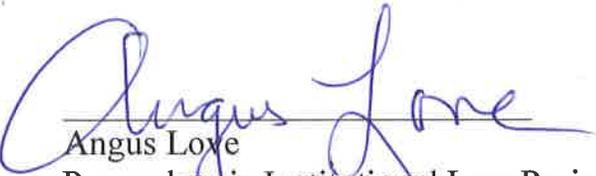
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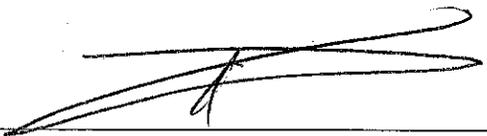
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By: /s/ Keith E. Whitson

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Theron R. Perez

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/s/ Deneekie Grant

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/s/ Witold J. Walczak

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