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MVC BOARD OF CORRECTION

May 2, 2007

Richard Wolf, Executive Director, and
Members of the New York City Board of Correction
51 Chambers St., Room 923
N.Y., N.Y. 10007

RE: Proposed revision of minimum standards
for New York City jails

Dear Mr. Wolf and Members of the Board:

The Legal Aid Society's Criminal Defense Division acts as "primary defender," under a contract with the City, in Manhattan, Brooklyn, Queens and the Bronx. As such, we represent the majority of indigent criminal defendants in the City, and the majority of all pre-trial detainees housed at the Rikers Island and White Street jails. This experience provides us with a unique perspective on the way in which jail operations and standards affect the day-in, day-out representation of detainees facing charges in the criminal courts.

Although we fully endorse the comprehensive testimony and written comments presented by Legal Aid's Prisoners' Rights Project at your recent hearing, we would like to add our own comments directed toward three proposed revisions of the standards that would have particular impact on the representation of our clients in the courts. These three proposals relate to expanded telephone surveillance, expanded mail surveillance, and the suggested rule that pretrial detainees must wear "institutional clothing" to court appearances.

Monitoring of phone calls

Given the caseloads of Legal Aid and other attorneys defending indigent prisoners, timely and unimpeded attorney-client communication is essential to effective representation. The existing Standards recognize this by stating that attorneys should be able to contact their detained clients by telephone. In practice, attorneys are generally unable to do so: the client must initiate

the call, and then it is limited to six minutes, which may or may not be adequate time to discuss critical matters of plea negotiation and defense strategy.

Instead of facilitating attorney-client communication, the proposal goes in the opposite direction, adding to the reasons why detainees, who may be mistrustful of their attorneys, will be reluctant to be open and truthful during telephone interviews. Detainees, understandably lacking faith in the Department's good intentions and in the effectiveness of its systems ostensibly designed to safeguard "confidential" attorney-client calls, will be still more likely to "hold back" in conversations with their lawyers. This would be damaging to the fair administration of justice, as well as to attorneys' ability to do the job they are assigned to do.

Furthermore, it is often necessary that the jailed client actively assist his attorney in contacting and marshaling witnesses who can help in the client's defense. Many witnesses, no matter how honest and truthful, may be mistrustful of strangers, reluctant to "get involved" in judicial proceedings, or simply be unreachable during normal business hours. These witnesses will be less likely to co-operate in the defense if they know that their privacy is potentially being invaded by the government each time the defendant telephones them from jail to discuss the case. In view of this concern, the Department should be required to make a clear and strong factual showing of the necessity for warrantless eavesdropping, before the Board permits this significant change in policy.

To be sure, giving the Department a free hand to eavesdrop may have some marginal benefit in deterring witness-tampering, but there are other means to protect witnesses that do not jeopardize a detainee's ability to mount a defense. For instance, prosecutors have discussed the danger that defendants in "domestic violence" cases will call victims and ask them to drop charges. In many of these cases, prosecutors can arrange with co-operative victims to have the prosecutor monitor the victim's phone, to detect calls from jail, by or on behalf of the defendant. This type of case-specific, victim-directed monitoring will often lead to additional charges against the detainee for violating Orders of Protection issued by the criminal court. Alternatively, calls to victims from the jails may simply be blocked at the victim's request. If there is reason to believe that a particular detainee is using the telephones to harass multiple witnesses, that detainee's telephone use can be blocked. Either of these approaches would be much more effective than a random or standardless surveillance regime that will impair detainees' and their attorneys' ability to obtain valuable truthful testimony because of detainees' and their potential witnesses' fears that even casual, inadvertent remarks will be heard by the government, distorted, and used against them.

Finally, as others have noted, you concede that there will be no monitoring of certain privileged conversations, including attorney-client conversations, but you have failed to specify the means by which the Department of Correction will ensure that attorney-client conversations are not inadvertently overheard or recorded. It is essential both that the means of protecting these conversations are clarified and that the means be clearly explained to detainees. At the very least, the revision of this standard should be postponed until the Department has settled on the means by which eavesdropping on privileged attorney-client phone communications will be avoided, and until all concerned parties agree that the proposed method will be practical and effective.

Reading of mail

Our concern about the proposal to allow warrantless reading of prisoners' incoming and outgoing mail is similar to our concern about telephone monitoring. In some instances, detainees are unable to use the telephone to contact potential witnesses, but must use the mail. This is particularly likely when the inmate is indigent, because in those cases, the detainee's family and friends may lack the funds to maintain a working telephone number. In other cases, the potential witness has a schedule that makes him or her difficult to reach by telephone, especially given detainees' limited opportunity to make phone calls.

In these cases, the detainee's or witnesses' fear of governmental intrusion on private communications will interfere with the defense attorney's ability to gather critical evidence in support of her client. This risk is not quantifiable, but it is real. The Board should not risk compromising the judicial process in this way without a much clearer showing that current rules are inadequate to protect legitimate security interests.

Moreover, the proposed standard lengthens from 24 hours, to 48 hours, the allowable time for delivery of mail to a prisoner after it reaches the detention facility. This difference can be critical, when attorneys are trying to convey important information, such as a plea offer, to a client who will have just a day or two to make a life-changing decision before his scheduled trial. The Department has not put forth any justification for this easing of the Board's requirements.

Clothing requirements

Besides infringing on the dignity and personal autonomy of detainees who are "presumed innocent," the proposed standard authorizing the Department to require all detainees to wear "facility clothing," except at trial, risks exacerbating the disadvantages detainees already face, compared to non-detained defendants, as their cases move through the judicial process.

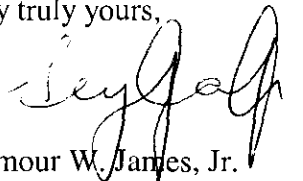
Even if one accepts the dubious proposition that the Department can actually meet its goals for a greatly expanded and efficient system of laundering, storing and transferring clothing, a requirement that detainees wear institutional clothing at the great majority of their court appearances, which are not trials, will mark them in the eyes of judges as detainees. While we have confidence that most judges will not treat detainees less fairly on this account, human perceptions and prejudices are subtle. Even the most well-intentioned, judges included, react differently to a well-groomed, well-dressed defendant appearing before them, than they react to a down-at-the-heels defendant wearing a prison jumpsuit.

The effects of the change will be less alarming if the required facility clothing consists of clean and modest civilian clothing, such as a non-detainee might also wear, rather than consisting of readily identifiable, color-coded jail "uniforms." Even in that case, however, current practices should not be altered just because certain other correctional systems follow more restrictive practices. Respect for detainees' rights to personal autonomy should require the Department to demonstrate a clear need for a change in rules, before any compromise in detainees' right to wear their personal clothing is implemented. The Board should not simply give the Department a "free

hand” in this sensitive area. No urgency has been shown. The Department should circulate and seek approval for the specific clothing rules it seeks to implement, as well as demonstrate the adequacy of its laundry and clothing-transfer arrangements, before the Board permits any alteration to current standards.

We join our colleagues in asking the Board to withdraw the revisions currently proposed, and to initiate a new, more inclusive review process in which all interested parties, not just the Department, may participate.

Very truly yours,



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