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MEMORANDUM RE: Right to Counsel for in-custody public defense clients

To: Lane Borg, Executive Director, OPDS
Eric Deitrick, General Counsel, OPDS

From: Erica Herb, Deputy General Counsel, OPDS

Question: Do public defense clients who are incarcerated awaiting trial have the right to confer confidentially with their attorneys during the COVID-19 pandemic?

Answer: Yes. Both the Sixth Amendment to the United States Constitution and Article I, section 11, of the Oregon Constitution guarantee criminal defendants the right to counsel *and* the ability to communicate confidentially with that counsel. The legislature also codified the right for clients to confer confidentially with their attorneys during the 2019 session. When the state interferes in the confidential relationship between a criminal defendant and defense counsel, it violates the defendant's constitutional and statutory rights if the defendant is substantially prejudiced. For clients held in custody awaiting trial, that prejudice is the chilling effect that the interference has on the right. To avoid violating that right, county jails must allow public defense clients to confer privately with their attorneys, at least by telephone, if not in person, even during the current COVID-19 health crisis.

DISCUSSION

I. The Right to Counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence.” Article I, section 11, of the Oregon Constitution provides for the concomitant right: “[i]n all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel[.]” “The right to counsel is a fundamental component of our criminal justice system, and lawyers in criminal cases are necessities, not luxuries.” *Nordstrom v. Ryan*, 762 F3d 903, 909 (9th Cir 2014) (quoting *United States v. Cronin*, 466 US 648, 653, 104 S Ct 2089, L Ed 2d 657 (1984)). In 2019, the legislature codified the right in HB 3249, which provides in relevant part: “(2) A client has a right to privately communicate with the client’s lawyer and representatives of the lawyer.” Or Laws 2019, ch 169, § __.

The right to counsel includes the right to confer with one’s lawyer. *Geders v. United States*, 425 U.S. 80, 96 S Ct 1330, 47 L Ed 2d 592 (1976). “A criminal defendant’s ability to communicate candidly and confidentially with his lawyer is essential to his defense,” so much so, that the right to privately confer with counsel “is nearly sacrosanct.” *Nordstrom*, 762 F3d at 910; *State v. Penrod*, 133 Or App 454, 457, 892 P2d 729 (1995) (“confidentiality is inherent in the right to consult with counsel; to hold otherwise would effectively render the right meaningless”); *see also* HB 3249 Staff Measure Summary (explaining that the purpose of HB 3249 was to extend the attorney-client privilege to visits between in-custody clients and their

lawyers or their lawyers' representatives) available at

<https://olis.oregonlegislature.gov/liz/2019R1/Downloads/MeasureAnalysisDocument/50141> and *State v. Taylor*, 247 Or App 339, 346, 268 P3d 795 (2011) (noting

that the purpose of the attorney-client privilege in OEC 503 “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.”).

Thus, “[w]hen the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant.” *Nordstrom*, 762 F3d at 910 (internal quotations and citations omitted).

II. Remedies for the Violation of Right to Counsel.

Although the right to confer confidentially with counsel is clear, two questions arise when the state violates that right during the current health crisis: (1) how is a defendant held in custody, awaiting trial prejudiced by the violation of his or her right to communicate confidentially with his or her lawyer, and (2) what is the remedy for that violation?

For an in-custody defendant awaiting trial who is denied the ability to confer privately with his or her lawyer, the prejudice is the chilling effect that the violation has on the right to counsel. The remedy for that violation is a change in policy that permits the defendant to exercise the right. That is supported by both federal and state case law. For example, in *Nordstrom*, the plaintiff, a death row inmate in the Arizona State Prison, brought a 42 USC § 1983 lawsuit against Department of

Corrections officials for opening and reading letters that he wrote to his lawyer. 762 F3d at 906. The district court dismissed the plaintiff's complaint finding, *inter alia*, that it failed to state a claim for violation of his right to counsel. *Id.* at 908.

On appeal, the Ninth Circuit first found that it was "obvious" that the policy that allowed prison officials to read the plaintiff's letters to his attorney violated his right to counsel. *Id.* at 910. The court then addressed the remedy noting that were the plaintiff "challenging a conviction following an improper intrusion into the attorney-client relationship, [the court] would examine whether the violation caused prejudice requiring the reversal of the conviction." *Id.* at 911. However, because the case was a civil rights lawsuit that sought injunctive relief, the alleged harm was that the plaintiff's right to privately confer with counsel had been chilled. *Id.* The court concluded that the plaintiff had stated a Sixth Amendment claim based on the chilling of his right, and that his allegations supported injunctive relief. *Id.* at 911-12. *See also Merriweather v. Zamora*, 569 F3d 301, 317 (6th Cir 2009) ("[O]pening properly marked legal mail [outside the inmate's presence] * * * implicates both the First and Sixth Amendments because of the potential for a 'chilling effect.'"); *Altizer v. Deeds*, 191 F3d 540, 549 n 14 (4th Cir 1999) ("Inspecting an inmate's legal mail may implicate the inmate's Sixth Amendment right to communicate freely with his attorney in a criminal case."); *Lemon v. Dugger*, 931 F2d 1465, 1468 (11th Cir 1991) (inmate had "constitutional right not to have his mail read" and claim was sufficiently stated where prison official read a letter from the inmate's death penalty appellate lawyer in his presence).

Public defense clients who are currently incarcerated awaiting trial and denied their right to confer confidentially with their attorneys are in the same position as the plaintiff in *Nordstrom*. First, as in *Nordstrom*, their rights have clearly been violated when they are denied access to confidential communication with their lawyers. Second, also like *Nordstrom*, because those clients have not been convicted, the analysis of whether the violation caused prejudice requiring reversal of their convictions does not apply. However, the Ninth Circuit's analysis demonstrates that the proper remedy is to allow those defendants to exercise their right.

If county jails refuse to allow incarcerated public defense clients to speak with their attorneys, they are violating those clients' Sixth Amendment and Article I, section 11, right to counsel and their statutory right to confer confidentially with their attorneys. To avoid that violation, the jails must provide a way for public defense clients incarcerated during the current COVID-19 pandemic to speak privately with their attorneys, at least by telephone, if not in person. Private communication via letters is insufficient; when the government's response to the virus changes daily, information in letters quickly becomes outdated. The ever changing and evolving government policies surrounding COVID-19 could lead to new release or plea bargain opportunities that attorneys need to discuss with their clients. For those clients who are at a high risk of acquiring the virus, those opportunities and the need for those clients to know of them is imperative. Thus, it is vital for jails to honor public defense clients' right to confer with counsel during this health crisis.

The Oregon appellate courts decisions regarding the right to counsel reinforce the notion that the county jails must allow incarcerated public defense clients to

confer privately with counsel. In *State v. Rassum*, 256 Or App 103, 333 P3d 1191 (2014), the defendant appealed his convictions and argued that his motion to dismiss the indictment with prejudice should have been granted. *Id.* at 105. Before trial while the defendant was in custody, a detective inadvertently read part of a letter that the defendant had sent to his attorney, and jail staff had opened other letters to or from his attorney. *Id.* The defendant argued that the mishandling of his legal mail violated his right to counsel protected by Article I, section 11, of the Oregon Constitution. *Id.* at 110.

On appeal, the parties agreed that the state had infringed on the defendant's right to counsel, and the only issue was whether that violation warranted dismissal of the indictment with prejudice. *Id.* In analyzing whether the violation prejudiced the defendant, the court noted that, "tailoring an appropriate remedy [for a constitutional violation] depends on the right at issue and the wrong suffered." *Id.* at 113.

For guidance, the Court of Appeals looked to decisions in cases where drivers convicted of driving under the influence of intoxicants were not permitted to confer confidentially with an attorney before deciding whether to take a breath test. The court noted that the remedy in those cases was tailored to the violation through suppression of evidence of the refusal to take a breath test or the breath test results. *Id.* at 114. In *Rassum*, the defendant failed to identify any harm or prejudice that had not been cured by the trial court's actions in his case; therefore, he was not entitled to dismissal of the indictment. *Id.* at 121.

Taken together, the decisions of the federal and Oregon appellate courts demonstrate that violation of the right to confer confidentially with counsel requires a remedy that is tailored to the circumstances of the case. For jails denying public defense clients the right to speak privately with their attorneys during the current health crisis, that remedy is to allow those clients to meet and confer with their attorneys if not in person, at least by telephone. Moreover, to facilitate the exercise of that right, jails must allow attorneys to call their public defense clients with reasonable notice (*i.e.*, through scheduled calls) and at reasonable times for the attorneys (*i.e.*, during normal office hours). If jails refuse to schedule calls during normal business hours, they deny in-custody public defense clients a meaningful opportunity to confer privately with their attorneys. Without that adequate opportunity, the right is rendered worthless. And in the current health pandemic, the violation of the right to confer with counsel could be dire for some clients.

CONCLUSION

The right of criminal defendants to confer confidentially with their attorneys is protected by the Sixth Amendment to the United States Constitution, Article I, section 11, of the Oregon Constitution, and the statute enacted in 2019 by HB 3249. During the current COVID-19 pandemic, it is imperative that county jails honor that right and allow public defense clients who are incarcerated awaiting trial to confer privately with their attorneys through scheduled calls during normal business hours.