

IN THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CIVIL DISTRICT COURT

NUMBER:

DIVISION:

SECTION:

ORLEANS PUBLIC DEFENDER'S OFFICE

VERSUS

MARLIN GUSMAN,
in his official capacity as Sheriff for the Parish of Orleans.

FILED: _____
DEPUTY CLERK

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY
JUDGMENT, INJUNCTION, AND WRIT OF MANDAMUS

NOW THROUGH COUNSEL COMES the Petitioner, the Orleans Public Defender office ("OPD"), which files this Memorandum of Law in Support of its Petition for Declaratory Judgment, Injunction, and Writ of Mandamus.

Law

1. Defendant Gusman Has a Clear Duty to Provide Facilities That Ensure Privacy for Attorney-Client Meetings.

Both Louisiana state law and the U.S. Constitution require the Sheriff to provide attorneys and their detained clients meeting areas that will permit privacy in attorney-client conversations. Article 511 of the Code of Criminal Procedure plainly requires that counsel for the accused must be permitted a private place in which to meet his or her client:

The accused in every instance has the right to defend himself and to have the assistance of counsel. **His counsel shall have free access to him, in private, at reasonable hours.**

C. Cr. P. Art. 511 (emphasis added.).

The Sixth and Fourteenth Amendments of the United States Constitution also guarantee that detainees and their counsel can speak in private. Numerous courts have recognized the right to privacy in attorney-client communications. In *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052 (8th Cir. 1989), for example, the Court considered pre-trial detainees' claim that they were forced to meet with their attorneys in public spaces where guards or other people might overhear.

The Court found that this practice violated the clearly established constitutional right to counsel and due process:

Detainees' right to counsel and due process can also be compromised by a lack of privacy in consultations with counsel. Forcing prisoners to conduct their meetings with their attorneys in the open or to yell over the phone obviously compromises the consultation. Detainees might be hesitant to disclose names and information relevant to the attorney's investigation and necessary to the advice sought. Often pleas are changed in the months before trial based on counsel's assessment of the strength of each side's case. The right to an attorney would mean little if it did not effectively attach until the hushed whispers at the defense table the morning of trial, after counsel has selected her strategy and witnesses. **Thus, as we already stated, it is clear that an accused does not enjoy the effective aid of counsel if he is denied the right of private consultation with him.**

Johnson-El, 878 F.2d at 1052 (emphasis added, citations and quotations omitted).

Similarly, in *Ching v. Lewis*, 895 F.2d 608, 609-10 (9th Cir. 1990), the Ninth Circuit declared unconstitutional conditions that prevented an inmate from conferring with his attorney in private. In reaching that conclusion, the Court held that the "opportunity to communicate privately with an attorney is an important part of . . . meaningful access [to the courts]." *Id.* All other federal courts to address this issue have held the same. *See Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980) (right to counsel and access to courts includes right to private meetings); *Mastrian v. McManus*, 554 F.2d 813, 820-21 (8th Cir. 1977) (holding that Sixth Amendment encompasses a right to private consultation with attorney); *United States v. Rosner*, 485 F.2d 1213, 1224 (2nd Cir. 1973), *cert. denied*, 417 U.S. 950 (1974) ("the essence of the Sixth Amendment right is... privacy of communication with counsel."); *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) ("The right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems."); *Coplon v. United States*, 89 U.S. App. D.C. 103, 191 F.2d 749, 757 (1951) (same); *Jones v. City and County of San Francisco*, 976 F.Supp. 896, 913-14 (N.D.Cal. 1997) (holding that lack of privacy for attorney-client conferences violated both Sixth and Fourteenth Amendments).

2. **Defendant Gusman has a Clear Duty to Reduce Unreasonable Attorney Wait Times and Increase Visitation Hours.**

Article 511 also guarantees that counsel for the accused "**shall have free access to him . . . at reasonable hours.**" The evidence in this case shows that the attorney wait times and restricted visitation hours at some OPP facilities, most notably the HOD, are unreasonable and

consequently violate Article 511.

The unreasonable attorney wait times and restricted visitation times at OPP also violate detainees' constitutional right to counsel and due process. In *Procunier v. Martinez*, 416 U.S. 396, 419-20 (1974), the U.S. Supreme Court established that "Regulations and practices [at detention facilities] that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Id.* at 419. Furthermore, "inmates must have a reasonable opportunity to seek and receive the assistance of attorneys." *Id.* Forcing an attorney to wait two hours or longer to see his or her client is simply an unreasonable burden on the right to counsel.

In *Benjamin v. Fraser*, 264 F.3d 175, 179-181 (2d Cir. 2001), the federal Second Circuit upheld a district court's factual finding that delays at the New York City jail ranging from 45 minutes to two hours, and sometimes even longer, substantially impinged on the attorney-client relationship by discouraging attorneys from going to visit their clients. These delays were not due to any institutional security needs, but rather seemed to result from poor management and planning. As a remedy for the violation, the district court ordered the jail to implement new regulations that would reduce wait times to 45 minutes or less. *Id.* at 180-81.

Similarly, this Court should find that the unpredictable and unreasonable wait times and restricted visitation hours at OPP facilities violate Article 511 and detainees' constitutional right to free access to counsel.

3. **The Sheriff Has a Clear Duty to Provide Facilities Where Attorneys and Clients Can Review Documents Together.**

Courts have also held that the right to counsel and due process encompass a right to "contact visits" with counsel, meaning private visits where client and counsel are not separated by plexiglass or other impediment. In *Ching v. Lewis*, for example, the Ninth Circuit held that "a prisoner's right of access to the courts includes contact visitation with his counsel." 895 F.2d at 610. Similarly, in *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995), the Tenth Circuit invalidated prison regulations that denied prisoners contact visits with their attorneys because the regulations burdened a fundamental right and were unsupported by legitimate institutional needs.

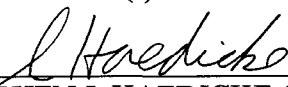
WHEREFORE, Petitioner, the Orleans Public Defender's Office, respectfully prays that this Court grant it the relief requested in its Petition for Declaratory Judgment, Injunction, and Writ of Mandamus.

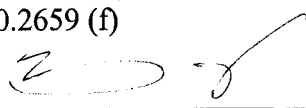
Respectfully submitted, this 4 day of OCTOBER, 2011.

Respectfully submitted,

PASCAL F. CALOGERO (# 03802)
Ajubita, Leftwich and Salzer, L.L.C.
1100 Poydras Street
New Orleans, LA 70163
504-582-2300 (o)
504-582-2310 (f)

PHILIP WITTMANN (# 13625)
Stone, Pigman, Walther, Wittmann, LLC
546 Carondelet Street
New Orleans, LA 70130
504-581-3200 (o)
504-581-3361 (f)


STEPHEN J. HAEDICKE (#30537)
The Law Offices of Stephen J. Haedicke, LLC
639 Loyola Ave., # 1820
New Orleans, LA 70113
504-525-1328 (o)
504.910.2659 (f)


ELIZABETH CUMMING (#31685)
Attorney at Law
316 S. Dorgenois St.
New Orleans, LA 70119
504.822.4455 (o)
504.822.4458 (f)

Attorneys for Orleans Public Defenders

SHERIFF PLEASE SERVE:

Sheriff Marlin N. Gusman
819 S. Broad St.
New Orleans, LA 70119