

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. _____

AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC., a Colorado not-for-profit
corporation and
TAYLOR PENDERGRASS,

Plaintiffs,

v.

LOU VALLARIO, in his official capacity as Sheriff of Garfield County, Colorado

Defendant.

COMPLAINT

INTRODUCTION

1. The ACLU of Colorado Legal Department has been investigating serious allegations of abusive and dangerous violations of prisoners' constitutional rights in the Garfield County Jail in Glenwood Springs, Colorado. Members of the ACLU Legal Department staff, including staff attorney Taylor Pendergrass, have been gathering information by corresponding with prisoners and former prisoners, reviewing jail documents obtained under the open records laws, and conducting face-to-face interviews with prisoners at the jail.

2. On Thursday, June 15, 2006, Defendant Sheriff Vallario prevented Mr. Pendergrass from conducting confidential attorney interviews with three prisoners who had previously contacted the ACLU. The Sheriff relied on what he described as his "policy." According to that "policy," which does not exist in writing, a deputy speaks to the prisoner whom the attorney

wants to interview. The deputy asks “Who is your attorney?” If the prisoner does not identify the attorney requesting the interview, then the interview is not permitted.

3. The three prisoners whom Mr. Pendergrass was forbidden to interview answered the “Who is your attorney?” question by providing the names of their criminal defense attorneys. They did not state that the ACLU or any ACLU attorneys represented them. They were not informed that an ACLU attorney was present and requesting a visit.

4. This lawsuit challenges the Sheriff’s policy as a violation of the First Amendment and Equal Protection rights of the Plaintiffs and a violation of the Due Process and First Amendment rights of the prisoners who wish to speak to ACLU attorneys.

5. The Plaintiffs seek emergency interim injunctive relief, a declaratory judgment, a permanent injunction, and nominal damages.

JURISDICTION AND VENUE

6. This action arises under the Constitution and laws of the United States, including 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

7. This Court has jurisdiction to issue the declaratory relief requested pursuant to the Declaratory Relief Act, 28 U.S.C. §§ 2201, 2202.

8. Venue is proper in the District of Colorado pursuant to 28 U.S.C. § 1391(b). All parties reside within the District of Colorado, and the events described in this Complaint occurred in the District of Colorado.

PARTIES

9. Defendant Lou Vallario is the Garfield County Sheriff and the custodian of prisoners in the Garfield County Jail. He is sued in his official capacity only. His actions and threatened actions described in this Complaint were carried out under color of state law.

10. Plaintiff American Civil Liberties Union Foundation of Colorado, Inc. (hereafter “ACLU”) is a not-for-profit corporation incorporated under the laws of Colorado. Its mission is to protect, defend, and extend the civil rights and civil liberties of all people in Colorado through litigation, education, and advocacy. To carry out its litigation program, the ACLU’s Legal Department includes a full-time Legal Director and a full-time staff attorney. It also relies on the assistance of numerous volunteer attorneys who donate their time, as well other volunteers, law students, and interns who work under the supervision of the ACLU Legal Director. Much of the ACLU of Colorado’s work is concerned with the rights of prisoners in Colorado’s jails and prisons, and the ACLU receives approximately one thousand written requests for legal assistance from prisoners each year. The ACLU regularly investigates allegations of serious violations of prisoners’ constitutional rights for the purpose of engaging in legal advocacy and/or litigation on behalf of prisoners. In this case, the ACLU sues for declaratory and injunctive relief and nominal damages only. It does not seek compensatory damages.

11. Plaintiff Taylor Pendergrass is a staff attorney working for the ACLU of Colorado. Mr. Pendergrass seeks declaratory and injunctive relief and nominal damages only. He does not seek compensatory damages.

FACTUAL BACKGROUND

12. Since March, 2006, the ACLU of Colorado Legal Department has been investigating serious allegations that numerous practices at the Garfield County Jail are violating prisoners’ constitutional rights.

13. To carry out that investigation, members of the ACLU Legal Department staff, including Legal Director Mark Silverstein and Staff Attorney Taylor Pendergrass, have corresponded with current and former prisoners; sought and reviewed documents obtained

through the open records laws, and conducted face-to-face interviews with prisoners currently housed at the Garfield County Jail.

14. On May 11, Mr. Pendergrass and Mr. Silverstein traveled to the Garfield County Jail and interviewed several prisoners. The ACLU lawyers were permitted to conduct the face-to-face interviews in a confidential setting. They interviewed two prisoners with whom they had corresponded previously. During these interviews, they learned the name of another prisoner who was interested in speaking with ACLU attorneys. Mr. Silverstein and Mr. Pendergrass also conducted an interview with this third prisoner, with whom the ACLU had not corresponded previously.

15. After submitting additional requests for documents, Mr. Pendergrass and Mr. Silverstein made plans to review those documents and conduct additional interviews with prisoners at the jail on June 14, 15, and 16.

16. Prior to traveling to the jail on June 14, the ACLU attorneys engaged in extensive communications with the Assistant County Attorney Denise Lynch about the document requests. They also communicated with jail officials about visiting with prisoners. The Plaintiffs supplied a list of seven prisoners that would be interviewed and received confirmation that additional prisoners could be added to the list after the ACLU began its review of documents and began interviewing prisoners.

17. On June 14, Mr. Pendergrass provided Jail Commander Scott Dawson with the names of several prisoners he intended to interview the following day.

18. On the morning of June 15, Commander Dawson told Mr. Pendergrass that he was forbidden to visit with three of the prisoners. Each of these three prisoners had previously supplied a written communication to the ACLU indicating an interest in ACLU legal assistance.

19. Commander Dawson said that the confidential attorney visits were denied on the basis of a jail policy. Pursuant to that policy, a deputy asked each of the three prisoners “Who is your attorney?” Because none of the prisoners’ responses mentioned Mr. Pendergrass or the ACLU, the visit was not permitted. Commander Dawson acknowledged that the prisoners were not told that an ACLU attorney was present and willing to talk with them.

20. Commander Dawson read Mr. Pendergrass the names that the three prisoners supplied as the names of their attorneys. Mr. Pendergrass recognized the names as those of the prisoners’ criminal defense attorneys.

21. If the prisoners had been asked if they wanted to speak with an ACLU attorney in a confidential setting, the answer would have been “yes.”

22. In a meeting held later on June 15, Sheriff Vallario confirmed that the visits were denied based on the Sheriff’s policy.

23. ACLU staff members explained to Sheriff Vallario that ACLU attorneys do not represent any of the prisoners at this point in time. Nevertheless, the prisoners have a constitutional right to meet with attorneys to seek legal advice or to discuss the possibility of representation, even when the attorneys have not been retained. ACLU staff members further explained that the three prisoners in question had each communicated with the ACLU in writing indicating an interest in seeking the services of ACLU attorneys.

24. Sheriff Vallario refused to make an exception to what he characterized as his “policy.”

25. When asked for a copy of the policy, Sheriff Vallario said it did not exist in written form.

26. The Sheriff said that his policy would be enforced in the future.

27. Mr. Pendergrass and other members of the ACLU Legal Department staff intend to travel to the Garfield County Jail again in the near future to conduct additional attorney visits with prisoners. Accordingly, it is nearly certain that the challenged policy will once again infringe and violate the rights of the Plaintiffs and the rights of the prisoners who are interested in visiting with them but do not supply a satisfactory answer to the deputy who asks “Who is your attorney?” Indeed, Mr. Pendergrass intends to return to the jail for additional interviews on Tuesday, June 27. Accordingly, Plaintiffs are filing with this Complaint a motion for emergency interim injunctive relief, along with a brief and an evidentiary declaration.

28. There is a substantial risk that even prisoners who know in advance that ACLU lawyers are coming and who wish to meet with the attorneys will nevertheless fail to supply the “magic words” in answer to the deputy’s question “Who is your attorney?”

29. For example, one jail prisoners with whom ACLU attorneys have corresponded extensively received a letter advising him that ACLU attorneys would visit with him on June 14, 15, or 16. When ACLU attorneys met with this prisoner, he confirmed that he had been asked “Who is your attorney?” He said that he had never been asked that question on any previous occasion of an attorney visit. Despite this prisoner’s knowledge that ACLU attorneys were coming to visit him, this prisoner responded to the “Who is your attorney?” question by providing only the name of his criminal defense attorney. It was only because a more savvy prisoner yelled out that he should also “say the ACLU” that this prisoner learned of the “magic words” the deputies were requiring before allowing a prisoner to visit with an ACLU attorney. Because this prisoner then said the “magic words,” the ACLU attorneys were permitted to interview him.

30. Similarly, ACLU attorneys were permitted to interview another prisoner who was brought to the same section of the jail and learned from another prisoner about the “magic words.” The three prisoners whom Mr. Pendergrass could not visit, however, were housed in a different section of the jail.

DECLARATORY RELIEF

31. An actual and immediate controversy exists between Plaintiffs and Defendant. Plaintiffs contend that the challenged policy and practice violates their statutory and constitutional rights and the constitutional rights of the prisoners who wish to communicate with the Plaintiffs. Defendant contends that the challenged policy and practice complies with the law.

32. Plaintiffs are therefore entitled to a declaration of rights with respect to this controversy. Without such a declaration, Plaintiffs will be uncertain of their rights and responsibilities under the law.

INJUNCTIVE RELIEF

33. Plaintiffs are entitled to injunctive relief. Defendant has enforced and threaten to continue enforcing the challenged policy and practice against the Plaintiffs. Defendant has acted and is threatening to act under color of state law to deprive Plaintiffs of their statutory and constitutional rights and the constitutional rights of the prisoners who wish to communicate with the Plaintiffs. Plaintiffs are suffering irreparable injury and will continue to suffer a real and immediate threat of irreparable injury as a result of the existence, operation, and implementation of the challenged policy and practice. Plaintiffs have no plain, adequate or speedy remedy at law.

FIRST CLAIM FOR RELIEF

(42 U.S.C. § 1983; Prisoners’ right of access to the courts)

34. Prisoners have a constitutional right of access to the courts to challenge the conditions of their confinement and the practices and policies of the facility in which they are confined.

35. This right is protected by the First Amendment, as well as the Due Process Clause of the Fourteenth Amendment.

36. The Constitution requires that prisoners be afford a reasonable opportunity to seek and received the assistance of attorneys.

37. Regulations and practices that unjustifiably obstruct the availability of professional representation violate prisoners' right of access to the courts.

38. The challenged policy unjustifiably violates prisoners' right of access to the courts.

39. The Plaintiffs have standing in this case to contest the challenged policy and to invoke the rights of prisoners who wish to communicate with the Plaintiffs in a confidential setting.

40. Wherefore, Plaintiffs request a declaratory judgment; interim and permanent injunctive relief; attorney's fees, and any other relief the Court deems just.

SECOND CLAIM FOR RELIEF

(42 U.S.C. § 1983; Plaintiffs' First Amendment claim)

41. The activities of the ACLU's Legal Department, including the investigation of requests for legal assistance, interviewing prisoners to discuss the possibility of legal representation, discussion of possible litigation, and the filing of litigation challenging alleged violations of prisoners' right, is activity that is protected by the First Amendment.

42. The challenged policy has unjustifiably infringed and threatens to continue unjustifiably infringing on the First Amendment right of the ACLU and its attorneys to

communicate with prisoners who wish to speak with ACLU attorneys and/or obtain legal advice and/or legal representation.

43. Wherefore, Plaintiffs request a declaratory judgment; interim and permanent injunctive relief; nominal damages for each Plaintiff; attorney's fees, and any other relief the Court deems just.

THIRD CLAIM FOR RELIEF

(42 U.S.C. § 1983; Equal Protection Clause)

44. On information and belief, the policy challenged in this case has not previously been enforced. It was not enforced when ACLU attorneys conducted interviews with jail prisoners on May 11, 2006.

45. Prisoners who have spent many months in the jail and have participated in attorney visits report that before June 14, they had never been asked "Who is your attorney" as a prerequisite to a legal visit.

46. Criminal defense attorneys with extensive experience practicing in Glenwood Springs and interviewing prisoners at the jail reported that they had never heard of the policy that prohibited Mr. Pendergrass from visiting the three prisoners on June 15.

47. Sheriff Vallario was unable to produce a written copy of the policy he said he relied on to forbid Mr. Pendergrass to visit the three prisoners.

48. Sheriff Vallario singled out the Plaintiffs and enforced, and threatens to enforce, the challenged policy against them only.

49. The enforcement of the challenged policy against the ACLU and against Mr. Pendergrass violates the Plaintiffs' right to Equal Protection of the laws.

PRAYER FOR RELIEF

50. Wherefore, the Plaintiffs request a declaratory judgment; interim and permanent injunctive relief; nominal damages for each Plaintiff; attorney's fees; and such other relief as the Court deems just.

Dated: June 21, 2006

Respectfully submitted,

s/Mark Silverstein

Mark Silverstein

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