No. 15-17292

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALAN MAPUATULI, *et al.*,

Plaintiffs-Appellants,

vs.

ERIC HOLDER, JR., in his official capacity as United States Attorney General, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT court
FOR THE DISTRICT OF HAWAII
(Judge Leslie E. Kobayashi)

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

I. STATEMENT OF JURISDICTION..... 1

II. STATEMENT OF ISSUES FOR REVIEW..... 1

III. STATEMENT OF THE CASE..... 2

A. Nature of the Case..... 2

B. Proceedings Below..... 2

IV. STATEMENT OF FACTS..... 3

A. The TRULINCS Electronic Message Program..... 3

B. Available Means of Attorney-Client Communication..... 6

C. Mapuatuli and Medina's Lack of Participation in the Administrative Remedy Process..... 7

V. SUMMARY OF ARGUMENT..... 9

VI. STANDARD OF REVIEW..... 9

VII. ARGUMENT..... 10

A. The District Court Correctly Granted Summary Judgment Because Plaintiffs' Allegations Are Barred by the Doctrine Expressed in Heck v. Humphrey..... 10

B. The District Court Properly Granted Summary Judgment Because Plaintiffs Unquestionably Waived the Attorney-Client Privilege When Using the TRULINCS System..... 12

C. The District Court Properly Concluded that Mr. Medina and Mr. Mapuatuli's Claims Are Barred Because Both Failed to Exhaust the Administrative Remedies Available at FDC Honolulu, as Required by the PLRA..... 20

(1) Plaintiffs' claims challenge a prison condition..... 22

(2) Plaintiffs' claim that there are no administrative remedies available is not supported by the record..... 24

(3) The Sixth Amendment is a federal law..... 25

D. The District Court Correctly Determined That Plaintiff Dubin Lacked Standing to Assert a Claim Under the Sixth Amendment..... 26

E. Matters Raised in Plaintiffs' Opening Brief for the First Time..... 27

VIII. CONCLUSION 29

TABLE OF AUTHORITIES

CASES PAGE(S)

Albino v. Baca,
747 F.3d 1162 (9th Cir. 2014) 21-22

Beaver v. Tarsadia Hotels,
816 F.3d 1170 (9th Cir. 2016) 9

Bivens v. Six Unknown Named Agents
of Federal Bureau of Narcotics,
403 U.S. 388 (1971) 25

Booth v. Churner,
532 U.S. 731 (2001) 24-25

Evans v. Inmate Calling Solutions,
No. 3:08-CV-00353-GMN, 2011 WL 7470336
(D. Nev. July 29, 2011) 23

Evans v. Skolnik,
No. 3:08-CV-00353-GMN, 2012 WL 760902
(D. Nev. Mar. 7, 2012) 23

F.T.C. v. Nat'l Urological Grp., Inc.,
No. 1:04-CV-3294-CAP, 2012 WL 171621
N.D. Ga. Jan. 20, 2012) 17

Faretta v. California,
422 U.S. 806 (1975) 26-27

Forbush v. J.C. Penney Co.,
98 F.3d 817 (5th Cir. 1996) 28-29

Groenow v. Williams,
No. 13 CIV. 3961 PAC JLC, 2014 WL 941276
(S.D.N.Y. Mar. 11, 2014) 19-20

Hayes v. Radford,
No. 1:09-CV-00555-BLW, 2012 WL 4481213
(D. Idaho Sept. 28, 2012) 23

CASES PAGE(S)

Heck v. Humphrey,
512 U.S. 477 (1994) 10, 11, 28

Kinoy v. Mitchell,
851 F.2d 591 (2d Cir. 1988) 26

Matter of Fischel,
557 F.2d 209 (9th Cir. 1977) 13

Pena v. Deyott,
No. CV08-28H-DWM-RKS, 2008 WL 5416382
(D. Mont. June 11, 2008) 23-24

Porter v. Nussle,
534 U.S. 516 (2002) 24, 25-26

Portman v. Cty. of Santa Clara,
995 F.2d 898 (9th Cir. 1993) 26, 27

Riggs v. Prober & Raphael,
681 F.3d 1097 (9th Cir. 2012) 27

Roles v. Maddox,
439 F.3d 1016 (9th Cir. 2006) 23

Scott v. Albino,
135 S. Ct. 403, 190 L. Ed. 2d 307 (2014) 22

Trimble v. City of Santa Rosa,
49 F.3d 583 (9th Cir. 1995) 11

U.S. ex rel. Robinson Rancheria Citizens
Council v. Borneo, Inc.,
971 F.2d 244 (9th Cir. 1992) 12

United States v. Ahmed
14-0027 DLI (E.D.N.Y. 2014) 16

United States v. Bauer,
132 F.3d 504 (9th Cir. 1997) 13

CASES PAGE(S)

United States v. Chaiban,
2007 WL 437704 (D. Nev. Feb. 2, 2007) 17

United States v. Chaiban
2007 WL 923585 (D. Nev. Mar. 23, 2007) 17

United States v. Erskine,
355 F.3d 1161 (9th Cir. 2004) 15

United States v. Flores,
628 F.2d 521 (9th Cir. 1980) 13

United States v. Gann,
732 F.2d 714 (9th Cir. 1984) 15

United States v. Hatcher,
323 F.3d 666 (8th Cir. 2003) 18

United States v. Hayes,
231 F.3d 1132 (9th Cir. 2000) 15

United States v. Landof,
591 F.2d 36 (9th Cir. 1978) 15

United States v. Lentz,
419 F. Supp. 2d 820 (E.D. Va. 2005) 18

United States v. Madoch,
149 F.3d 596 (7th Cir. 1998) 17-18

United States v. Martin,
278 F.3d 988 (9th Cir. 2002) 13

United States v. Mejia,
655 F.3d 126 (2d Cir. 2011) 17

United States v. Partin,
601 F.2d 1000 (9th Cir. 1979) 27

United States v. Rewald
889 F.2d 836 (9th Cir. 1989) 27

CASES PAGE(S)

United States v. Van Poyck,
77 F.3d 285 (9th Cir. 1996) 18

United States v. Walia,
Cr. No. 14-00213 MKB, 2014 WL 3734522
(E.D.N.Y. Jul. 25, 2014) 17, 19-20

Valdez v. Rosenbaum,
302 F.3d 1039 (9th Cir. 2002) 11

Vincent v. Trend W. Tech. Corp.,
828 F.2d 563 (9th Cir. 1987) 27

Warth v. Seldin,
422 U.S. 490 (1975) 26

Weil v. Inv./Indicators, Research & Mgmt., Inc.,
647 F.2d 18 (9th Cir. 1981) 15-16

Wilkinson v. Dotson,
544 U.S. 74 (2005) 11

Woodford v. Ngo,
548 U.S. 81 (2006) 21, 26

STATUTES

18 U.S.C. § 3626(g)(2) 20-21, 22

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 11

42 U.S.C. § 1997e(a) 20

REGULATIONS

28 C.F.R. § 542.14 8

28 C.F.R. § 542.15 8

I. STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. § 1331.

This Court has jurisdiction over this appeal of the final district court order and judgment entered September 30, 2015, pursuant to 28 U.S.C. § 1291. Appellants filed a timely Notice of Appeal on November 19, 2015. (CR 45) ER 01-04.

II. STATEMENT OF ISSUES FOR REVIEW

Whether the district court properly granted summary judgment to the Defendants on the following alternative bases:

A. That Plaintiffs' claims are barred by the doctrine expressed in Heck v. Humphrey, that a criminal defendant may not bring a civil action challenging the validity of a criminal conviction unless he or she can show that the conviction has been overturned;

B. That Plaintiffs' claims fail because the plaintiffs waived any attorney-client privilege that existed;

C. That Plaintiffs failed to exhaust the administrative remedies available to them, as required by the Prison Litigation Reform Act ("PLRA");

D. That Plaintiff Dubin lacks standing to assert a claim under the Sixth Amendment.

III. STATEMENT OF THE CASE

A. Nature of the Case

Alan Mapuatuli and Gilbert Medina, with their criminal defense lawyer, Gary Dubin (collectively, "Plaintiffs") challenge a service offered by the Federal Bureau of Prisons ("BOP") commonly referred to as TRULINCS, through which federal inmates can exchange electronic messages with a preapproved list of recipients. The TRULINCs program repeatedly warns participants that all communications may be monitored by federal authorities and that the program cannot be used for confidential communications. Plaintiffs allege that such monitoring of a communication between an inmate and the inmate's lawyer violates the Sixth Amendment of the United States Constitution.

B. Proceedings Below

Plaintiffs filed the complaint in the United States District Court, District of Hawaii on November 10, 2014. CR 1, ER (2) 134-52. Defendants Eric Holder, Jr., Charles E. Samuels, Jr., J. Ray Ormond, and Florence T. Nakakuni (collectively, the "Defendants") filed their answer on March 27, 2015. CR 15, ER (2) 153-64.

On May 8, 2015, the Defendants filed a Motion for Judgment on the Pleadings Or In the Alternative, Summary Judgment (CR 20, SER 1-3), and its accompanying Concise Statement of Facts (CR

21, SER 30-38). In support of the motion, the Defendants filed the Declaration of Kathleen Jenkins, the Declaration of Melissa Harris Arnold, and Exhibits "A" through "G" (CR 20-2 through 20-10, SER 4-29). Plaintiffs filed their Memorandum in Opposition (CR 38) and Concise Statement in Opposition (CR 39, SER 39-47) on August 28, 2015. In support of their opposition, Plaintiffs filed the Declaration of Gary Dubin and Exhibits "1" through "10". CR 38-2, ER (2) 126-33. The Defendants filed a Reply on September 3, 2015. CR 40. The district court heard oral argument on September 14, 2015. CR 42, ER (2) 24-51.

On September 30, 2015, the district court granted summary judgment in favor of the Defendants. CR 43, ER (1) 1-21. The Clerk entered judgment on October 21, 2015. CR 44, ER (1) 22-23. Plaintiffs filed a timely Notice of Appeal on November 19, 2015. CR 45, ER (2) 1-4.

IV. STATEMENT OF FACTS

A. The TRULINCS Electronic Message Program

In 2005, the BOP launched a series of pilot projects which afforded BOP inmates the opportunity to send electronic messages to persons in the community through a system known as the TRULINCS. Declaration of Kathleen Jenkins ("Jenkins Declaration") at ¶ 2 (CR 20-2, SER 5). The recipient of a TRULINCS message must sign in through a portal called, "CorrLinks" in order to access TRULINCS messages. Id.

Beginning in October 2010, every time an inmate accesses the TRULINCS program in order to send or receive an electronic message, TRULINCS displays a page listing certain conditions of use (the "Inmate Acknowledgement Page"). Id. at ¶ 6 (CR 20-2, SER 7); Exhibit "A" (CR 20-3, SER 11-12).

The Inmate Acknowledgement Page has the heading, "TRULINCS and ELECTRONIC MESSAGING: WARNING/RESPONSIBILITY/ACKNOWLEDGMENT" in bold letters. Id. at ¶ 7 (CR 20-2, SER 7). Immediately under this heading, the Inmate Acknowledgement Page contains the following text:

> Warning: This computer system is the property of the United States Department of Justice. The Department may monitor any activity on the system and search and retrieve any information stored within the system. By accessing and using this computer, I am consenting to such monitoring and information retrieval for law enforcement and other purposes. I have no expectation of privacy as to any communication on or information stored within the system.
>
> Responsibility: I must abide by all terms prescribed in Bureau of Prisons' policy regarding my use of TRULINCS and electronic messaging systems, which I acknowledge having read and understood. I understand and consent to having my electronic messages and system activity monitored, read, and retained by authorized personnel. I understand and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privileged communications, and that I have alternative methods of conducting privileged legal communication…

Id. at ¶ 8 (CR 20-2, SER 7) (emphasis added).

In order to access the TRULINCS program, the inmate must click "I Accept" below the list of conditions on the Inmate Acknowledgement Page. Id. at ¶ 9 (CR 20-2, SER 7). If the inmate clicks on "I Do Not Accept", the inmate cannot access the TRULINCS program. Id.

In order for the non-inmate correspondent to send and receive messages using Corrlinks, that person must agree to Corrlinks' Terms and Conditions of Service. Id. at ¶ 10 (CR 20-2, SER 7-8). The terms are available on-line at their website https://www.corrlinks.com/Login.aspx. Id.; Exhibit "B" (CR 20-4, SER 13-15). Under the heading, "Monitoring", the Corrlinks Terms and Conditions include the following paragraph:

> All information and content about messages sent and received using CorrLinks are accessible for review and/or download by Agency or their assignees responsible for the particular inmate. By using CorrLinks services you are at least eighteen years old, and expressly agree to the monitoring and review of all messages sent and received via this service by CorrLinks staff, and the applicable correctional agency and its staff, contractors, and agents.

Exhibit "B" (CR 20-4, SER 13-15) (emphasis added).

In addition, when an inmate requests to send a message to a particular recipient for the first time, the recipient receives a message from CorrLinks stating in pertinent part, "By approving electronic correspondence with federal prisoners, you consent to have the Bureau of Prisons staff monitor the content of all electronic messages exchanged." Id. at ¶ 13 (CR 20-2,

SER 9); Exhibit "C" (CR 20-5, SER 16-17).

Finally, each time a CorrLinks user receives a message from a federal inmate, the screen containing the inmate message also contains the statement, "By utilizing CorrLinks to send or receive messages you consent to have Bureau of Prisons staff monitor the informational content of all electronic messages exchanged and to comply with all Program rules and procedures." Id. at ¶ 15 (CR 20-2, SER 9-10); Exhibit "D" (CR 20-6, SER 18-19).

B. Available Means of Attorney-Client Communication

BOP and Federal Detention Center Honolulu ("FDC Honolulu") permit confidential attorney-client communication through several different methods. Declaration of Melissa Harris Arnold ("Arnold Declaration") at ¶ 2 (CR 20-7, SER 20).

First, an inmate may send and receive confidential attorney-client communications via traditional U.S. mail. Id. at ¶ 3 (CR 20-7, SER 20-21). Inmates may place appropriately marked outgoing special mail in the appropriate depository, sealed, and this mail will only be opened for cause. Id. Incoming properly marked special mail will be logged and hand delivered to the inmate by unit team staff, who will then open the item in the presence of the inmate and inspect for contraband, but will not read the content of the communication. Id.

Second, an inmate may communicate with his or her attorney through a confidential telephone conversation. Id. at ¶ 4 (CR 20-7, SER 21-22). Inmates can initiate a confidential telephone communication by sending a request to their unit team. Id. Confidential telephone conversations set up pursuant to this process are not monitored by BOP or the DOJ. Id.

Third, an inmate may communicate confidentially with his or her attorney by in-person attorney visits. Id. at ¶ 5 (CR 20-7, SER 22). Pretrial facilities, like FDC Honolulu, have legal visiting available seven days a week. Id. FDC Honolulu authorizes attorney visits with inmates without an appointment during regular visiting hours, which are from 6:30 a.m. to 8:00 p.m., seven days a week, specifically reserving Fridays exclusively for legal visits. Id.

All three of these methods were available to inmates at FDC Honolulu, including Mapuatuli and Medina, at all times relevant to the Complaint. Id. at ¶ 6 (CR 20-7, SER 22).

C. Mapuatuli and Medina's Lack of Participation in the Administrative Remedy Process

The BOP makes available to its inmates a three-level administrative remedy process. Arnold Declaration, ¶ 7 (CR 20-7, SER 22-23). Prior to the formal grievance process being initiated, inmates must attempt informal resolution of their concern through their unit team. Id. If informal resolution is

not achieved, an inmate must file an administrative remedy request with the warden of the inmate's confining institution. 28 C.F.R. § 542.14. An inmate unsatisfied with the warden's determination may appeal the decision by submitting an appeal "to the Regional Director for the region where the inmate is currently located." Id. at § 542.14. For an inmate at FDC Honolulu, this appeal would be filed with the Western Regional Office of the Federal Bureau of Prisons in Stockton, California. Arnold Declaration, ¶ 7 (CR 20-7, SER 22-23). If the inmate's appeal is denied, the inmate may appeal to the BOP's Office of General Counsel. 28 C.F.R. § 542.15. The determination of the Office of General Counsel constitutes the final agency action on the issue and exhaustion is not achieved unless final agency review is completed. Id.

The BOP's three-tiered administrative exhaustion process was available to Mapuatuli and Medina at FDC Honolulu during the time periods in which they were incarcerated there. Arnold Declaration, ¶ 8 (CR 20-7, SER 23). As of the date the Arnold Declaration was executed, Mapuatuli and Medina had not filed any administrative grievances, and therefore had not initiated, much less exhausted, the administrative remedies available at FDC Honolulu with regard to their complaint regarding the TRULINCS system. Id. at ¶¶ 11-12 (CR 20-7, SER 24-25); Exhibits "F" - "G" (CR 20-9, SER 26-27; CR 20-10, SER 28-29).

V. SUMMARY OF ARGUMENT

The district court's decision should be affirmed on all four alternative grounds cited by the court.

First, Plaintiffs' claims challenge the validity of Mr. Mapuatuali and Mr. Medina's criminal convictions; as such, the United States Supreme Court, in Heck v. Humphrey and its progeny, requires that prior to bringing a civil suit seeking injunctive relief, the Plaintiffs demonstrate that the challenged convictions have been set aside or overturned on appeal. Because Plaintiffs have not done so, their claims are barred.

Second, Plaintiffs' claims fail because the Plaintiffs unquestionably waived any confidentiality by participating in the TRULINCS system despite repeated and clear warnings that the system was monitored and non-confidential.

Third, Plaintiffs' claims are barred because Mr. Mapuatuli and Mr. Medina failed to participate in the BOP's administrative remedy process, as required by the PLRA.

Fourth, Mr. Dubin, as a criminal defense attorney, has no standing to assert a Sixth Amendment claim on his own behalf.

VI. STANDARD OF REVIEW

This Court reviews a district court grant of summary judgment under a *de novo* standard. Beaver v. Tarsadia Hotels, 816 F.3d 1170, 1177 (9th Cir. 2016).

VII. ARGUMENT

A. The District Court Correctly Granted Summary Judgment Because Plaintiffs' Allegations Are Barred by the Doctrine Expressed in Heck v. Humphrey

One of the alternative grounds for summary judgment reached by the district court was that Plaintiffs' claims were barred by Heck v. Humphrey, because "a judgment in favor of [Plaintiffs] would necessarily imply the invalidity of [their] conviction or sentence." CR 43 ER (1) 6. While Plaintiffs fail to address this ground at all in the Opening Brief, the district court's decision regarding Heck exists as an independent ground on which Plaintiffs appeal should be denied, and the lower decision affirmed.

In Heck v. Humphrey, the U.S. Supreme Court held that:

> in order to recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a S 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the

> plaintiff can demonstrate that the conviction or sentence has already been invalidated.

512 U.S. 477, 486-87 (1994). While the Heck decision was limited to claims brought for money damages pursuant to 42 U.S.C. § 1983, the holding was subsequently expanded to apply to cases seeking injunctive relief. Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005). Similarly, this Court has held that the Heck doctrine applies to cases seeking relief for violations of the Sixth Amendment. See e.g. Valdez v. Rosenbaum, 302 F.3d 1039, 1043 (9th Cir. 2002) (applying the Heck bar to a claim of a Sixth Amendment violation by a federal detainee against his federal prosecutor and state jail officials); Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9th Cir. 1995) (applying the Heck bar to plaintiff's Fifth and Sixth Amendment allegations).

Both at the district court level and in his Opening Brief, Plaintiffs have failed to suggest, much less demonstrate, that the criminal convictions of Mr. Mapuatuli and Mr. Medina have been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Mr. Mapuatuli was convicted of three counts related to drug trafficking on January 30, 2015 (United States v. Mapuatuli, Cr. No. 12-01301 DKW (D. Haw.) at Dkt. No. 274) and Mr. Mapuatuli's appeal is pending

before this Court (United States v. Mapuatuli, Court of Appeals Docket 15-10312). Mr. Medina was convicted of three counts related to drug trafficking on December 18, 2015 (United States v. Medina, Cr. No. 13-01039 HG (D. Haw.) at Dkt. No. 186) and Mr. Medina's appeal is also pending before this Court (United States v. Medina, Court of Appeals Docket 16-10159).[1] By failing to demonstrate that the convictions have been overturned, Plaintiffs are barred from bringing any civil case for monetary or injunctive relief that implies the invalidity of those convictions.

B. The District Court Properly Granted Summary Judgment Because Plaintiffs Unquestionably Waived the Attorney-Client Privilege When Using the TRULINCS System.

The district court held that Plaintiffs' claims failed because they waived the attorney-client privilege by consenting to using TRULINCS and CorrLinks, which they knew or should have known to be monitored by the government. CR 43 ER (1) 10.

The attorney-client privilege is an evidentiary privilege which applies to a communication where the following eight criteria are satisfied:

[1]The Court of Appeals "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue." U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992) (citations omitted).

(1) Where legal advice of any kind is sought;

(2) from a professional legal adviser in his capacity as such;

(3) the communications relating to that purpose;

(4) made in confidence;

(5) by the client;

(6) are at his instance permanently protected;

(7) from disclosure by himself or by the legal adviser,

(8) unless the protection be waived.

Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977) (quoting 8 Wigmore Evidence § 2292 at 554 (McNaughton rev. 1961)); see also United States v. Flores, 628 F.2d 521, 526 (9th Cir. 1980). The proponent of the privilege (in this case, Plaintiffs) bears the burden of demonstrating its existence. United States v. Martin, 278 F.3d 988, 1000 (9th Cir. 2002) as amended on denial of reh'g (Mar. 13, 2002) ("A party claiming the privilege must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted."); United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997) ("[T]he party asserting attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication.")(citation omitted).

In the instant case, the potential attorney-client privilege covering the communications between Mr. Mapuatuli and Mr. Medina and their attorney, Mr. Dubin, was waived when all three plaintiffs conducted the conversations despite repeated and clear warnings that the BOP monitored the TRULINCS system. The record does not support Plaintiffs' characterizations that the warnings to TRULINCS users are "inconspicuous, [] printed in very small type, [or] buried within voluminous additional information…." Opening Brief, p. 15. As the district court correctly found in its decision:

> …[T]he Inmate Acknowledgement[] consists of only three sections; warns inmates in the first paragraph that their communications are being monitored; informs the inmate that even correspondence with his or her attorney will not be treated as privileged; and must be accepted by an inmate **each time** (original emphasis) he or she uses TRULINCS. Furthermore, CorrLinks users receive a letter when they are added to an inmate's contact list, and the letter informs the recipient that any communication with an inmate will be monitored; the two-page Terms and Conditions include a section titled "Monitoring"; and each and every time a person gets an email from an inmate, a disclaimer at the bottom of the screen reminds that person that they have consented to BOP monitoring.

CR 43, ER (1) 11-12. Based upon these warnings, the district court correctly held that the inmates and their attorney unequivocally waived the attorney-client privilege when they agreed to using a monitored system.

Plaintiffs do not challenge the facts that the BOP warns the inmates and the non-inmate correspondents that the messages

are monitored by BOP in the manner described in section IV.A., *supra*. Opening Brief, pp. 15-16. Plaintiffs instead argue that such plain language warnings are legally insufficient because Mr. Mapuatuli and Mr. Medina did not have understanding of the waiver. In support of their contention that understanding of the waiver of the attorney-client privilege is required for the waiver to be effective, Plaintiffs cite United States v. Hayes, 231 F.3d 1132 (9th Cir. 2000) and United States v. Erskine, 355 F.3d 1161 (2004). Both cases discuss a criminal defendant's waiver of his right to the assistance of counsel in its entirety, rather than waiver of the attorney-client privilege with regard to any specific communication. See Hayes, 231 F.3d at 1136; Erskine, 355 F.3d at 1167. Accordingly, Plaintiffs' citation to Hayes and Erskine is inapposite.

It is well-settled that an individual may waive the attorney-client privilege with respect to a specific communication if the individual makes the communication in the known presence of a third party. United States v. Gann, 732 F.2d 714, 723 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); United States v. Landof, 591 F.2d 36, 39 (9th Cir. 1978) (holding that presence by third party who was not acting as attorney or agent of attorney destroyed the attorney-client privilege); Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 24 (9th Cir. 1981) (holding that the attorney-client

privilege may be waived even if the disclosure to the third party was inadvertent). Where courts have construed such a waiver, no specific language or demonstration of comprehension was required; the presence of a third party within earshot of the conversation is sufficient to constitute the waiver. Moreover, it is inexplicable that a criminal attorney would read the Corrlinks warning each time he sent or received an electronic message and continue to believe that the TRULINCS system could be used for confidential communications.

Plaintiff cites one case, United States v. Ahmed, Cr. No. 14-00277 DLI (E.D.N.Y. 2014), in which the district court made a case-specific ruling that the prosecution team could not look at any of the email communications between the criminal defendant and his attorney. CR 38-4, ER (2) 25. That case holds limited persuasive value for this Court. First, the district court did not make a formal determination that the monitoring program violated the Sixth Amendment; rather, the Court only instructed the prosecutors not to gain access to the monitored electronic messages for that defendant in that case. In the case at bar, Plaintiffs have put forward no evidence that any member of prosecution team from the trials of Mr. Mapuatuli and Mr. Medina accessed their allegedly privileged electronic messages. Second, as the district court noted, the order in Ahmed is contradicted in a second case from the same district, United

States v. Walia, Cr. No. 14-00213 MKB, 2014 WL 3734522 (E.D.N.Y. Jul. 25, 2014), in which the court reached the opposite conclusion, that the TRULINCS messages were "fair game" because the client had waived the attorney-client privileged. Id. at *16. The only other district court to reach the issue in a formal decision agreed with Walia that the attorney-client privilege had been waived by an inmate and his attorney's consent to the TRULINCs system. See Federal Trade Commission v. National Urological Group, Inc., Civ. No. 04-03294 CAP, 2012 WL 171621 at *1-2 (N.D. Ga. Jan. 20, 2012).

Moreover, Walia and Federal Trade Commission, build upon a larger body of case law holding that an inmate waived the attorney-client privilege when he or she knowingly used a monitored phone system within the prison facility to communicate with an attorney. See e.g. U.S. v. Chaiban, Cr. No. 06-00091-RLH-PAL, 2007 WL 437704, at *19 (D. Nev. Feb. 2, 2007) report and recommendation adopted, No. 206-CR-0091-RLH-PAL, 2007 WL 923585 (D. Nev. Mar. 23, 2007) (finding that a waiver of the attorney-client privilege where an inmate used a monitored prison phone system to communicate with his attorney.); United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011) (holding that because defendant was aware that his phone calls were monitored by BOP, his decision to communicate telephonically constituted a waiver of the attorney-client privilege); United States v.

Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (holding that marital communications privilege was waived when an inmate-husband and wife communicated via a monitored telephone system); U.S. v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003) ("Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private. The presence of the recording device was the functional equivalent of the presence of a third party."); United States v. Lentz, 419 F. Supp. 2d 820, 828-29 (E.D. Va. 2005) (holding that inmates waive any privilege protection for telephone conversations when they proceed with conversations in the face of notice the calls are being recorded and subject to monitoring); see also United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (holding in the Fourth Amendment context that, "no prisoner should reasonably expect privacy in his outbound telephone calls"; however, noting that when an inmate utilizes the procedures set up in the prison for a confidential attorney-client communication, there is an expectation of privacy).

Finally, the district court appropriately found it significant that there was no actual or constructive denial of right to counsel in this case, because Mr. Dubin had sufficient alternative avenues of confidential communication with his clients at FDC Honolulu. First, the Plaintiffs could have

engaged in privileged communications through legal mail. See Arnold Declaration, ¶ 3 (CR 20-7, SER 20-21). Second, the Plaintiffs could have utilized an unmonitored phone call upon request. Id. at ¶ 4 (CR 20-7, SER 21-22). Third, Plaintiffs could have engaged in protected attorney-client communication through an in-person legal visit, which are available seven days a week from 6:30 am to 8:00 pm. Id. at ¶ 5 (CR 20-7, SER 22). All of these avenues were open to the Mr. Medina and Mr. Mapuatuli during the time that they were confined at FDC Honolulu. Arnold Declaration, ¶ 6 (CR 20-7, SER 22).

Plaintiffs do not dispute that these avenues of communication existed, but argue that communication through TRULINCS would have been more efficient or more convenient. See Opening Brief, pp. 13-14.[2] This argument was specifically rejected in Walia (2014 WL 3734522 at *16), which noted that "Defendant has many secure ways to communicate with counsel, including unmonitored telephone calls, mail and in person visits, and although they may be burdensome, they do provide Defendant with access to his counsel." See also Groenow v.

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[2] Plaintiffs' contentions in this regard come in the form of unsupported, conclusory statements in the Declaration of Gary Dubin. Opening Brief, pp. 13-14. Moreover, while describing difficulties in communicating with incarcerated clients generally, Mr. Dubin fails to describe any difficulties in communicating with Mr. Mapuatuli or Mr. Medina specifically.

Williams, Civ. No. 13-CV-3961, 2014 WL 941276, at *6 (S.D.N.Y. Mar. 11, 2014) (recognizing that "district courts have found that a prisoner's right to counsel is not unreasonably burdened where a plaintiff has alternate means of communication with counsel") (collecting cases) (cited in Walia). Plaintiffs suggest no authority which requires FDC Honolulu to make available the most efficient or most convenient means of communication between an inmate and his attorney.

C. The District Court Properly Concluded that Mr. Medina and Mr. Mapuatuli's Claims Are Barred Because Both Failed to Exhaust the Administrative Remedies Available at FDC Honolulu, as Required by the PLRA

The district court held that, according to the PLRA, "Plaintiffs Mapuatuli and Medina must exhaust administrative remedies before bringing an action in federal court." CR 43 ER (1) 18.

The PLRA provides that, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The administrative exhaustion requirement applies to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison,

but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison." 18 U.S.C. § 3626(g)(2). The Supreme Court has recognized that administrative exhaustion in the prisoner litigation context serves two important purposes:

> First, exhaustion protects administrative agency authority. Exhaustion gives an agency an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court, and it discourages disregard of [the agency's] procedures.
>
> Second, exhaustion promotes efficiency. Claims generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court. In some cases, claims are settled at the administrative level, and in others, the proceedings before the agency convince the losing party not to pursue the matter in federal court. And even where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration.

Woodford v. Ngo, 548 U.S. 81, 89 (2006) (internal citations and quotations omitted).

Once the defendant comes forward with evidence that the process existed, the burden shifts to the plaintiffs "to come forward with evidence showing that there is something in [their] particular [cases] that made the existing and generally available administrative remedies effectively unavailable to him." Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014), *cert.*

denied sub nom. Scott v. Albino, 135 S. Ct. 403, 190 L. Ed. 2d 307 (2014).

There is no genuine dispute that Mr. Mapuatuli and Mr. Medina failed to initiate the administrative remedies described IV.C., *supra*. See Arnold Declaration, ¶¶ 11-12 (CR 20-7, SER 24-25); Exhibit "F" - "G" (CR 20-9, SER 26-27; CR 20-10, SER 28-29). Rather, in the Opening Brief, Plaintiffs respond to the district court's exhaustion holding in three ways: (i) Plaintiffs' argue that "their claims go not to conditions of confinement but to an invasion of their attorney-client right to effective assistance of counsel requiring confidentiality in the attorney-client relationship", (ii) Plaintiffs state that "there are no such administrative remedies available", and (iii) Plaintiffs argue that their claims are "brought not pursuant to any federal law, but pursuant to the Sixth Amendment." Opening Brief, pp. 20-21.

(1) Plaintiffs' claims challenge a prison condition

The district court rejected Plaintiffs' first argument, holding, "BOP's electronic communication policy is clearly a prison condition." CR 43, ER (1) 18. Indeed, the plain language of the PLRA refutes this position. 18 U.S.C. § 3626(g)(2) states that the administrative exhaustion requirement applies to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of

actions by government officials on the lives of persons confined in prison…." Moreover, "conditions of confinement" has been broadly construed by this Court. See Roles v. Maddox, 439 F.3d 1016, 1018 (9th Cir. 2006) ("Our court and others have treated various prisoner claims as challenges to prison conditions requiring exhaustion, ranging from claims of harassment by prison officials to complaints about the availability of Spanish language interpreters.") (internal citations omitted) (quoted in CR 43, ER (1) 17).

Federal courts have repeatedly applied the administrative exhaustion requirements of the PLRA in cases in which the plaintiff has complained of a violation of the attorney-client privilege by prison authorities. See e.g. Evans v. Inmate Calling Solutions, No. 3:08-CV-00353-GMN, 2011 WL 7470336, at *9 (D. Nev. July 29, 2011) report and recommendation adopted sub nom. Evans v. Skolnik, No. 3:08-CV-00353-GMN, 2012 WL 760902 (D. Nev. Mar. 7, 2012) (holding that PLRA exhaustion requirement applied in case in which an inmate alleged improper eavesdropping of attorney-client phone conversations); Hayes v. Radford, No. 1:09-CV-00555-BLW, 2012 WL 4481213, at *5 (D. Idaho Sept. 28, 2012) aff'd, 584 F. App'x 633 (9th Cir. 2014) (holding that PLRA exhaustion requirement applied in case in which inmate alleged that prison officials opened legal mail); Pena v. Deyott, No. CV08-28H-DWM-RKS, 2008 WL 5416382, at *3 (D. Mont.

June 11, 2008) (holding that the PLRA exhaustion requirement applied in case in which inmate alleged denial of access to counsel). Plaintiffs' argument that they do not challenge "conditions of confinement" is not supported by the language of the PLRA or any authority.

(2) Plaintiffs' claim that there are no administrative remedies available is not supported by the record

Without citing a case or the district court record, Plaintiffs state that "there are no such administrative remedies available." Opening Brief, pp. 20-21. What Plaintiffs likely mean by this statement is that the remedies sought by Plaintiffs, a change in the TRULINCS policies and a nullification of the prosecutions against Mr. Mapuatuli and Mr. Medina, were not reasonably available from the BOP's administrative grievance process. Id., see also Plaintiffs' Concise Counterstatement of Material Facts in Opposition to Defendants' Motion for Judgment on the Pleadings, Or In the Alternative, Summary Judgment, at p. 4, (CR 39, SER 39-47) ("Where there is no allowed remedy there is no right….").

The Supreme Court has rejected this argument. "Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." Porter v. Nussle, 534 U.S. 516, 524 (2002) (citing Booth v. Churner, 532 U.S. 731, 741 (2001) ("[W]e think that

Congress has mandated exhaustion clearly enough, regardless of the relief offered through administrative procedures."). Thus, Plaintiffs were required to complete the administrative remedy process even if the relief sought by Plaintiffs was unavailable through that process.

(3) The Sixth Amendment is a federal law

Plaintiffs seek to avoid the exhaustion requirement of the PLRA by arguing without citation to authority that the Sixth Amendment to the United States Constitution is not federal law. Opening Brief, pp. 20-21. Plaintiffs implicitly argue that the phrase "Federal Law" (capitalization in original) in § 1997e only refers to federal statutes and not the provisions of the United States Constitution.

Plaintiffs' argument holds no merit. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), the Supreme Court established that a plaintiff could bring a case against a federal agent for a violation of the Fourth Amendment. Notwithstanding the fact that such a case was not brought pursuant to a federal statute, but under the Constitution itself, the Supreme Court later held that federal prisoners suing under Bivens "must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative process prior to instituting a § 1983 suit." Porter, 534 U.S. at 524. Thus, in cases brought directly under

the Constitution, the exhaustion requirement applied. Id.; see also Woodford at 85 (holding that, "exhaustion of available administrative remedies is required for any suit challenging prison conditions, not just for suits under § 1983") (emphasis added).

Here, Plaintiffs' claims are brought under the Sixth Amendment. The PLRA requires that Mr. Mapuatuli and Mr. Medina first exhaust the administrative remedies available at FDC Honolulu. They did not do so here, and the district court correctly granted summary judgment on this ground.

D. The District Court Correctly Determined That Plaintiff Dubin Lacked Standing to Assert a Claim Under the Sixth Amendment.

Last, the district court properly held that Mr. Dubin cannot bring a Sixth Amendment claim on his own behalf.

"It is well-settled that a litigant may invoke only his or her own legal rights or interest, and cannot rest his [or her] claim to relief on the legal rights or interests of third parties." Portman v. County of Santa Clara, 995 F.2d 898, 902 (9th Cir. 1993) (citing Warth v. Seldin, 422 U.S. 490, 499 (1975)). "No court, however, has ever held that the Sixth Amendment protects the rights of anyone other than criminal defendants." Portman, 995 F.2d at 902 (citing Kinoy v. Mitchell, 851 F.2d 591, 594 (2d Cir. 1988); Faretta v. California, 422 U.S. 806, 819 (1975) (holding that the right to

effective assistance of counsel is held by the individual defendant); United States v. Partin, 601 F.2d 1000, 1006 (9th Cir. 1979), abrogated on other grounds as recognized in United States v. Rewald, 889 F.2d 836, 858 n. 16 (9th Cir. 1989) amended, 902 F.2d 18 (9th Cir. 1990).

Plaintiffs' Opening Brief fails to address the district court's holding that Mr. Dubin lacked standing to assert a Sixth Amendment claim on behalf of a client. In light of this failure, and the binding precedent expressed in Portman, the holding of the district court should be affirmed on this ground.

E. Matters Raised in Plaintiffs' Opening Brief for the First Time

Without explanation, Plaintiffs argue that the government's conduct violates Plaintiffs' First Amendment, Fourth Amendment, and Fifth Amendment rights, and the Rules of Professional Responsibility governing attorneys. Opening Brief, 18-19.

"A plaintiff may not try to amend her complaint through her arguments on appeal." Riggs v. Prober & Raphael, 681 F.3d 1097, 1104 (9th Cir. 2012) (citing Vincent v. Trend W. Technical Corp., 828 F.2d 563, 570 (9th Cir.1987) (plaintiff may not present a new theory for the first time on appeal, particularly where he could have presented it to the district court by seeking to amend his complaint); also Forbush v. J.C. Penney Co., 98 F.3d 817, 822 (5th Cir.1996) ("[T]he Court will not

allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory." (citation omitted)).

While Plaintiffs' Complaint mentions these interests in passing in the Complaint (CR 1, ER (2) 145), the Complaint does not allege that the TRULINCS policy violates any amendment other than the Sixth Amendment. CR 1, ER (2) 136 ("This Verified Complaint is brought directly pursuant to and based upon the Sixth Amendment to the United States Constitution…"). Consequently, to the extent that Plaintiffs attempt to assert these claims in their Opening Brief, these are new claims that were not raised before the district court and not addressed in the motion for summary judgment. Accordingly, this Court should decline to consider these new claims. Furthermore, the district court's holdings with regard to Heck and administrative exhaustion (Sections VI.A and VI.C, *supra*) would apply to bar any constitutional claim, including those raised in the Opening Brief for the first time.

VIII. CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court on each of the alternative grounds.

DATED: June 10, 2016, at Honolulu, Hawaii.

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STATEMENT OF RELATED CASES

Counsel for the United States of America is not aware of any related cases.

DATED: June 10, 2016, at Honolulu, Hawaii.

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