No. 15-17292

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALAN MAPUATULI, GILBERT MEDINA, and GARY VICTOR DUBIN, a Member of the Hawaii Bar, doing business as THE DUBIN LAW OFFICES, for themselves and for all others similarly situated,

Appellants,

vs.

ERIK HOLDER, JR., in his official capacity as United States Attorney General, CHARLES E. SAMUELS, JR., in his official capacity as Director of the United States Bureau of Prisons, J. RAY ORMOND, in his official capacity as Warden of the Honolulu Federal Detention Center, and FLORENCE T. NAKAKUNI, in her official capacity as United States Attorney for the District of Hawaii,

Appellees.

On Appeal From The United States District Court For The District Of Hawaii

♦♦♦♦♦

OPENING BRIEF

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A. JURISDICTIONAL STATEMENT

The Verified Complaint in this case (ER Vol. 2, pp. 134-152) was filed in the District Court for the District of Hawaii on November 10, 2014, pursuant to the Sixth Amendment to the United States Constitution commanding that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

This court has appellate jurisdiction pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure, a separate Rule 58 Judgment having been entered on October 21, 2015 (ER Vol. 1, pp. 22-23) and a Notice of Appeal having been entered within thirty days thereafter on November 19, 2015 (ER Vol. 2, pp. 1-4, exhibits omitted).

This Appeal is from a final judgment that disposes of all claims of all parties.

B. STATEMENT OF ISSUES

1. Sixth Amendment Issues

Is the Sixth Amendment right of inmates in federal prisons to the assistance of counsel and their attorneys' work product privileges violated when prison emails, especially those labeled such as "confidential attorney-client privileged communication," are admittedly allowed to be and are read as a matter of Bureau

of Prison and Justice Department policy by prison employees and prosecutors, notwithstanding accompanying general warning notices?

The Federal Officials moved for judgment on the pleadings or for summary judgment. District Court held in favor of the Federal Officials and granted summary judgment (ER Vol. 1, pp. 1-21) over objection (ER Vol. 1, pp. 4-5; August 28, 2015 Memorandum in Opposition, USDC Doc. No. 38; August 28, 2015 Concise Statement in Opposition, USDC Doc. No. 39).

2. Appellate Evidentiary Reviewing Standards

Rule 12(c) of the Federal Rules of Civil Procedure provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings."

"Although [Ashcroft v.] Iqbal[, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009),] establishes the standard for deciding a Rule 12(b)(6) motion, we have said that Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and that 'the same standard of review' applies to motions brought under either rule." Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n. 4 (9th Cir. 2011) (citations omitted and internal quotation marks omitted).

On a motion for judgment on the pleadings, a District Court must "accept as true all allegations in [the plaintiff's] complaint and treat as false those allegations

in the answer that contradict [the plaintiff's] allegations." Cell Therapeutics, Inc. v. Lash Grp., Inc., 586 F.3d 1204, 1206 n. 2 (9th Cir. 2009) (citation omitted).

"[J]udgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law[.]" Jackson v. Barnes, 749 F.3d 755, 763 (9th Cir. 2014) (citation and internal quotation marks omitted).

That standard therefore is virtually identical to the governing federal standard by which FRCP Rule 56 summary judgment motions are to be resolved, and thus the inquiry here is whether there were any material facts in genuine dispute requiring trial.

Moreover, "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order," FRCP Rule 56(d).

Furthermore, FRCP Rule 56(f)(1) explains that "a District Court may "grant summary judgment for a nonmovant" as well, after reviewing the proven material facts.

The Committee Notes to the 2010 Amendment to Rule 56(e)(3) additionally "recognizes that the court may grant summary judgment only if the motion and

supporting materials — including the facts considered undisputed under subdivision (e)(2) — show that the movant is entitled to it. Considering some facts undisputed does not of itself allow summary judgment. If there is a proper response or reply as to some facts, the court cannot grant summary judgment without determining whether those facts can be genuinely disputed. Once the court has determined the set of facts — both those it has chosen to consider undisputed for want of a proper response or reply and any that cannot be genuinely disputed despite a procedurally proper response or reply — it must determine the legal consequences of these facts and permissible inferences from them."

3. Appellate Constitutional Reviewing Standards

This lawsuit was filed (a) for the purpose of protecting the Sixth Amendment right to counsel of all federal inmates and their resulting right to the protection of their attorney-client privilege regarding their use of the prison email system, and (b) for the protection of the companion obligation of counsel to provide effective assistance of counsel by being able to adequately and effectively communicating with federal inmates without the invasion of the attorney-client privilege and their work product privilege while using the prison email system.

The United States Supreme Court in Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981), recognized that the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law and must be zealously

safeguarded employing the strictest standard of appellate review, dating back to at least 1654, whose purpose has always been to encourage full and frank communications between attorneys and their clients, challenges to which are to be strictly construed in favor of upholding that constitutional guaranty.

Consistent with the fundamental importance of the attorney-client privilege in our justice system, in protection of Sixth Amendment rights of inmates, federal courts have always zealously protected the confidentiality of privileged communications between federal prisoners and their attorneys, Gomez v. Vernon, 255 F.3d 1118, 1135 (9th Cir.), *cert denied*, 534 U.S. 1066 (2001) (affirming imposition of monetary sanctions on assistant attorneys general who acquired and read privileged communications from prisoners' attorneys).

Criminal defendants facing trial are protected under the Sixth Amendment in having the assistance of counsel for their defense, Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963), which right includes the ability to have ready access to and to confidentially confer with counsel, Geders v. U.S., 425 U.S. 80-91 (1976), which if deprived of, is considered potentially more damaging than denial of counsel during the trial itself, Maine v. Moulton, 474 U.S. 159, 170 (1985).

The essence of that Sixth Amendment right is the privacy of communications with counsel, U.S. v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), and as the United States Supreme Court recognized in Weatherford v. Bursey, 429

U.S. 545, 554 n. 4 (1977), that Sixth Amendment effective assistance of counsel constitutional right would be threatened, for example, whenever the Government were to monitor attorney-client communications through electronic eavesdropping.

C. STATEMENT OF THE CASE

1. Parties to the Lawsuit

This lawsuit began with four Plaintiffs, including three Plaintiffs being charged with felonies in the District of Hawaii and the Fourth Plaintiff their criminal defense attorney, Gary Victor Dubin of the Dubin Law Offices in Honolulu, Hawaii, brought on their own behalf and on behalf of all others similar situated, seeking to declare the official invasion of inmate prison emails unconstitutional.

At this time, Plaintiff-Appellant Mapuatuli has been sentenced to life imprisonment now being separately appealed following a deadlocked jury at his first trial, Plaintiff-Appellant Medina has just recently been sentenced to life imprisonment, and Plaintiff Arciero meanwhile withdrew from this lawsuit pursuant to the requirements of a plea agreement she entered into with her prosecutor.

The Defendants-Appellees in their capacities as Federal Officials are the United States Attorney General, the Director of the United States Bureau of

Prisons, the Warden of the Honolulu Federal Detention Center and the United States Attorney for the District of Hawaii.

2. History of Admitted Attorney-Client Prison Email Violations

As a result of the September 11, 2001 terrorist attack on the World Trade Center, the United States Attorney General on October 31, 2001 promulgated an amendment to 28 C.F.R., Parts 500 and 501 (ER Vol. 2, pp. 32-35) allowing unlimited and unreviewable agency discretion to eavesdrop on confidential attorney-client conversations of persons in custody without judicial oversight upon reasonable suspicion that acts of terrorism were being facilitated.

Subsequently, those procedures morphed around 2006 into current Justice Department Bureau of Prisons' regulations allowing and encouraging prosecutors to freely read prison emails between inmates and their counsel when inmates are permitted access to such electronic communication systems known variously as the Trust Fund Limited Inmate Computer System ("Trulincs") and as "CorrLinks" in Hawaii which is a service of the advanced Technology Group, Inc. ("prison inmate system").

Inmates are permitted to use such prison email systems nationwide, such as at the Honolulu Federal Detention Center, and all such emails, including those containing confidential attorney-client communications even if labeled as such, are permitted to be freely read by prosecutors and used as information and as evidence

in criminal cases, usually just prior to trial, predicated upon a written disclaimer appearing electronically thereon that by using such systems both inmate and attorney alike supposedly have thereby waived any Sixth Amendment confidential attorney-client and work-product privileges.

This history and the invasion of the attorney-client privilege regarding prison emails has been openly admitted by the Justice Department, *infra*, and not denied by the Federal Officials below.

The Justice Department, for instance, had earlier freely admitted in Mainland federal district court proceedings, upon its email prison procedures being challenged in criminal cases, that it does indeed have a nationwide agency policy of aggressively reading confidential prison emails between inmates and their attorneys, *see, e.g.,* U.S. v. Ahmed, 14-00277 DLI (E.D.N.Y., June 27, 2014) (Transcript of Criminal Cause for Status Conference before the Honorable Dora L. Irizarry, page 11, ER Vol. 2, pp. 5-31) of which this Court may take judicial notice).

The Justice Department, led by now Attorney General Loretta Lynch, then U.S. attorney for the Eastern District of New York, attempted in Ahmed in 2014 to defend that invasion of the attorney-client privilege in the Eastern District of New York, based on three alleged premises which are the exact premises relied upon

and repeated by the Federal Officials below (May 6, 2015 Motion for Judgment on the Pleadings Or in the Alternative Summary Judgment, USDC Doc. No. 20):

a. that both the inmates and their counsel have been provided with written warnings that the attorney-client privilege would be considered waived when using the prison email system;

b. that it would be too burdensome otherwise for the Government to have to sort through prison emails to determine what was privileged and what was not; and

c. that inmates and their counsel have other just as effective means of communication, such as visits and legal mail.

The United States District Court for the Eastern District of New York, however, joined the United States District Court for the Southern District of New York in Ahmed in 2014 in rejecting the Government's argument, the Honorable Dora L. Irizarry ordering that the prosecution and anyone else from the U.S. Attorney's Office is forthwith henceforth prohibited from reading or reviewing communications between the inmate and his or her attorneys in that case, simply by the defense supplying their email addresses to the prosecution, Transcript, *supra*, page 11 and pages 13 and 14, *et seq*. (ER Vol. 2, pp. 15, 17-18).

> THE COURT: You know what, I'm not buying that. We are in the 21st century. The technology that we have now is incredible. And even I, with my simple knowledge of computers and e-mails, am aware that in G-mail, for example, if you have a G-mail account, a G-mail user may very simply program the G-

> mail account so that the e-mails that are coming from Mr. Buford [Prosecutor] to me can automatically be put in a segregated file.
>
> And I find it very hard to believe that the Department of Justice, with all of the resources that it has, with the access to the Department of Homeland Security and NSA, cannot come up with a simple program that segregates identified e-mail addresses.
>
> * * * *
>
> MS. GREALIS [Defense Counsel]: Your Honor, I would just like to say at the outset I think that we have the same reaction that this Court has and other courts have had when faced with this issue. This is not the first time this has been litigated.
>
> Judge Buchwald out of the Southern District of New York, her reaction was, and I quote: "You don't have the right to eavesdrop on an attorney-client meeting in prison or out of prison and it seems to me that you don't have the right to open up mail between counsel and an inmate or inmate and counsel. . . . I don't see why it should make a difference whether the mode of communication is more modern or more traditional."

The Court will find it instructive to read the correspondence to that District Court in Ahmed from Ms. Lynch and from defense counsel that lead to District Judge Irizarry's adamant banning of the invasion of the attorney-client privilege in her District Court (ER, Vol, pp. 37-53).

No one contends, nor did District Judge Irizarry, that the Bureau of Prisons cannot enforce reasonable measures to protect, for instance, national security or institutional discipline, *see* Benjamin v. Fraser, 264 F.3d 175, 187 (2nd Cir. 2001), but those were not the rationales used there or used here in this case below to

support and defend the Justice Department's admittedly broad nationwide policy of freely invading the attorney-client privilege with respect to prison emails here.

3. Evidence of Sixth Amendment Violations Below

Dubin testified providing, for instance, legal advice and receiving confidential information respectively *via* the prison email system at various times to and from Mapuatuli and Medina, including Arciero, as well as other inmates held in custody in Hawaii and on the United States Mainland, some Hawaii inmates temporarily transported to Mainland Federal Detention Centers from Honolulu, while only just before this lawsuit was filed learning for the first time of the Justice Department's nationwide policy of eavesdropping on such attorney-client communications, even though where appropriate Dubin marked in the subject line of such email communications heretofore: "Attorney-Client Work-Product Privileged Protected Confidential Communication." See Declaration of Dubin (ER Vol. 2, pp. 126-133):

> 2. I have represented and continue to represent Defendants Mapuatuli and Medina as stated in the attached Memorandum in Opposition and have in that capacity exchanged email correspondence with them beginning in 2014, not learning that the Government had a policy of and was freely invading the confidentiality of prison emails throughout the United States.
>
> 3. When I discovered that intrusion in the integrity of my criminal defense practice just before filing this lawsuit, I checked with colleagues of mine practicing criminal defense in Hawaii and learned that none of those questioned knew of the Government's policy either and were shocked.

4. I then researched the issue and learned that an occasional protest had appeared in various newspapers and professional publications on the Mainland, principally due to the Honorable Dora Lizette Irizarry's blistering attack in the United States District Court for the Eastern District of New York in mid-2014 in which she banned that practice in her District Court as explained in the accompanying Memorandum in Opposition.

5. Meanwhile, for the most of 2014 I had been having email correspondence with the Plaintiffs when all of them were inmates at the Honolulu Federal Detention Center awaiting trial, sharing similar trial strategies with each of them and preparing them for trial jointly as earlier on thought had been given to have each testify at the other's trial, since their situation and defenses concerning Government misconduct were virtually identical, the Government's prosecution witnesses for the most part being almost identical in all of their cases.

6. I was aware that the prison email system posted a warning about lack of confidentiality, but I never thought that those words buried in a complex disclaimer would apply to attorneys, for with regard to the use of the federal prison telephone system's warnings like that are commonplace but never applied to attorney-client communications even though from time to time telephone calls may be interrupted with a recorded announcement to that effect.

7. And when checking with my clients, Plaintiffs in this action, I learned that none of them had realized until later that their emails were available to the Government or that the prosecution had access to their email correspondence with me prior to trial, in part because when attorney-client matters were included in my emails I put various "attorney-client privileged and protected confidential communication" notices on the subject line each time.

8. Learning of the Government's policy I immediately protested to the U.S. Attorney's Office in Honolulu by email, but never received a response until later receiving a formal denial.

9. But then, just prior to the Arciero trial I received a disclosure that a Homeland Security agent had in fact reviewed Arciero's prison emails at the Honolulu Federal Detention Center

which even has a special printed form for that purpose available to all Government agents, and I was informed that that Agent had requested in writing that Arciero's prison emails be searched for the name "Medina."

10. When thereafter I protested to the Assistant United States Attorney representing the Government in the Arciero case, I was told that the Homeland Security Agent when he saw my name on one email immediately looked the other way.

11. I immediately went to retrieve the evidence of violation of the attorney-client privilege by securing copies of my written email correspondence with each of my inmate clients in 2014, including others not Plaintiffs herein, only to discover that emails are deleted periodically from being viewed by others although the FDC has them on file making them available at any time to Government agents and prosecutors, hence hindering my efforts to prepare evidence of attorney-client content should that be deemed necessary, which production is one of the discovery items now being sought.

12. It is highly cumbersome to communicate with clients who are inmates at the FDC other than through emails as Judge Irizarry summarized in the accompanying transcript in the Ahmed case, in addition to the time and thus extra cost driving there.

a. Sometimes the FDC is in lockdown or administrative closure, frequently without notice, understandably for security purposes, producing however wasted trips or long delays;

b. Sometimes there is a long wait to have the inmate appear at the visiting room, in which the facilities are problematical and uncomfortable, with echoes in each visiting room's accostics, making it difficult to hear;

c. Sometimes due to intermittent court schedules visits are only possible in the evening, lengthening the work day unnecessarily;

d. On one occasion another inmate client of mine was moved to a Mainland FDC where I was therefore unable to have a confidential visit with him due to distances;

e. Many times problems with scheduling legal calls at the prison cause long delays in scheduling telephone communications with inmates as well;

f. Many times the use of the post has resulted in violations of the attorney-client and work-product privileges due to documented violations of confidentiality as I have sent letters to the Plaintiffs marked "Attorney-Client Privileged Legal Mail. Open in Presence of Inmate Only," the standard prescribed language, only to learn from inmate clients that when handed to them it was at the regular mail call rather than in private with the envelope already opened or the contents placed in another envelope provided by the FDC. * * * *

14. Set forth in Exhibit 6 [ER Vol. 2, pp. 54-55] is a true and correct copy of a handwritten record prepared by Arciero at my request in November 2014 as to what is contained on the screen at the beginning menu of the prison email system and given to me personally by Arciero.

15. Set forth in Exhibit 7 [ER Vol. 2, p. 56] is a true and correct copy of what is contained on the screen at the beginning menu of the prison email system on my end.

16. Set forth in Exhibit 8 [ER Vol. 2, p. 77; see Declaration of Gilbert Medina, ER Vol. 2, pp. 58-62] is a true and correct copy of an email received by me from Medina explaining that he never realized that there was a waiver clause affecting the confidentiality of our attorney-client communications. I also discovered that Mapuatuli is in the process of being transported to a facility on the Mainland and therefore has been unavailable to me at this time.

17. Set forth in Exhibit 9 [ER Vol. 2, pp. 125] are true and correct copies of eight discovery requests served on Defendants' counsel on August 20, 2015, detailing the specific discovery needed absent a narrowing of the issues at the September 14, 2015 hearing, together with eight filed Certificates of Service.

At no time previously was Dubin or Mapuatuli or Medina, including Arciero, aware of said eavesdropping, nor was any attempt made to so inform

Dubin notwithstanding having labeled same "Attorney-Client Work-Product Privileged Protected Confidential Communication."

While it appears true that the prison email system known as CorrLinks being used at the Honolulu FDC does contain under the footnoted heading "Terms and Conditions" a notice to inmates using the system that "electronic messages to and from my attorney or other legal representation . . . will not be treated as privileged legal communication, and that I have alternative methods of conducting privileged legal communication," that notice is inconspicuous, is printed in very small type, is buried within voluminous additional information, and is controlled merely by two bottom buttons labeled "I accept" and "I do not accept," selection of the latter denying use of the prison email system entirely for any purpose.

Moreover, that notice is never seen by defense counsel, which therefore has no opportunity to explain its wording or its significant to their inmate clients, and it was only after Dubin discovered that invasion of the attorney-client and work-product privilege did his clients understand the warnings, Arciero penning for Dubin thereafter what appeared on her prison computer screen as set forth in her handwriting (ER Vol. 2, pp. 54-55) given to Dubin, no copies given to inmates.

And, while there is also a notice to attorneys using the CorrLinks prison email system at the Honolulu FDC within a similarly voluminous small-print "Terms and Conditions" when first applying only and pressing that link,

cryptically stating that "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 CorrLinks staff, and the applicable agency and its staff, contractors, and agents," that notice is of a general nature, is even less conspicuous, does not define "Agency," nowhere mentions the attorney-client privilege, and is not repeated when an attorney subsequently accesses the system (ER. Vol. 2, p. 56).

4. Over Objection the District Court Granted Summary Judgment

Nevertheless, the lower court granted summary judgment (ER Vol. 1, pp. 1-21) over objection (ER Vol. 1, pp. 4-5; August 28, 2015 Memorandum in Opposition, USDC Doc. No. 38; August 28, 2015 Concise Statement in Opposition, USDC Doc. No. 39), while no discovery was permitted, although noticed (ER Vol. 2, pp. 63-125), considered to be irrelevant.

The issues in the case are found in the pleadings as there were no pretrial orders below pertaining to the issues for adjudication (Verified Complaint, ER Vol. 2, pp. 134-152; Answer, ER Vol. 2, pp. 153-164).

D. SUMMARY OF ARGUMENT

The prison email admitted ease dropping policies of the United State Bureau of Prisons and the United States Department of Justice violate the Sixth Amendment, not only invading the attorney-client privilege without any blanket

prison security justification, thereby denying effective assistance of counsel to inmates, but also abridge in the process the First, Fourth, and Fifth Amendments to the United States Constitution as well, which no disclaimer advance warnings no matter how clear can remedy, for those polices are not only comparatively inconsistent with the Government's treatment of legal U.S. mail, but deny to inmates modern access to legal counsel that no other alternative means of communication given time and distance differences can substitute for and can cure.

E. ARGUMENT

1. The United States Supreme Court in Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981), recognized that the attorney-client privilege is the oldest of the privileges for confidential communications known to the common law and must be zealously safeguarded employing the strictest standard of appellate review, dating back to at least 1654, whose purpose has always been to encourage full and frank communications between attorneys and their clients, challenges to which are to be strictly construed in favor of upholding that constitutional guaranty.

2. Consistent with the fundamental importance of the attorney-client privilege in our justice system, in protection of Sixth Amendment rights of inmates, federal courts have always zealously protected the confidentiality of privileged communications between federal prisoners and their attorneys, Gomez v. Vernon, 255 F.3d 1118, 1135 (9th Cir.), *cert denied*, 534 U.S. 1066 (2001)

(affirming imposition of monetary sanctions on assistant attorneys general who acquired and read privileged communications from prisoners' attorneys).

3. Inmates are protected under the Sixth Amendment in having the assistance of counsel for their defense, Gideon v. Wainwright, 372 U.S. 335, 339-340 (1963), which right includes the ability to have ready access to and to confidentially confer with counsel, Geders v. U.S., 425 U.S. 80-91 (1976), which if deprived of, is considered potentially more damaging than denial of counsel during the trial itself, Maine v. Moulton, 474 U.S. 159, 170 (1985).

4. The essence of that Sixth Amendment right is the privacy of communications with counsel, U.S. v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973), and as the United States Supreme Court recognized in Weatherford v. Bursey, 429 U.S. 545, 554 n. 4 (1977), that Sixth Amendment effective assistance of counsel constitutional right would be threatened whenever the Government were to monitor attorney-client communications through electronic eavesdropping.

5. First Amendment rights of free speech against the chilling effect of prior restraints on free communications with defense counsel are also implicated by such ease dropping.

6. Fourth Amendment rights against warrantless searches are also constitutionally implicated by such ease dropping; *see* Bell v. Wolfish, 441 U.S. 520, 559 (1979); McDonald v. U.S., 335 U.S. 451, 455-456 (1948).

7. Fifth Amendment rights against administrative decision making and its application of vague standards and the accompanying lack otherwise of any judicial oversight are also constitutionally implicated, plus the unequal treatment of legal mail and email transmissions; *see* Adams v. Carlson, 488 F.2d 619, 631-632 (7th Cir. 1973).

8. Rules of Professional Responsibility governing Members of the Bar protecting the confidentiality of client communications as also made applicable to all Members of District Court Bars, including federal prosecutors, ethical constraints also implicated by such ease dropping.

9. And even in situations in the law where an advance disclaimer is considered to be an effective remedy, such disclaimers in much less sensitive, consumer areas, such as in Truth-in-Lending, in warranty disputes, and in malpractice claims to name but a few, are throughout American law treated with strict scrutiny for informed consent even when bedrock constitutional rights, such as liberty issues, are not in any way implicated, whereas surely the Sixth Amendment deserves nothing less.

10. Inmates, such as Mapuatuli and Medina, for instance, are clearly not sophisticated enough to appreciate the meaning of such warnings; compare, for example, Sierra Diesel Injection Service, Inc. v. Burroughs Corporation, Inc., 890 F.2d 108, 114 (9th Cir. 1989) ("Whether a disclaimer is conspicuous is not simply

a matter of measuring the type size or looking at the placement of the disclaimer . . . . A factor to consider is the sophistication of the parties."); Keahole Point Fish LLC v. Skretting Canada Inc., 971 F. Supp. 2d 1017, 1039 (D. Haw. 2013) ("Accordingly, considering the physical appearance of the disclaimer, the sophistication of the parties . . . the Court declines to find that Defendant disclaimed the implied warranty of fitness.").

11. Consider, for example, Miranda warnings, where it is universally understood that signing a waiver of that constitutional right is not enough, requiring also that it must be read and explained first line by line before being admitted into evidence in a criminal proceeding.

12. This Court of Appeals routinely reverses convictions, for example, where the Sixth Amendment right to counsel has been violated because of an ineffective waiver, directly applicable by analogy here; see, *e.g.*, U.S. v. Hayes, 231 F.3d 1132 (9th Cir. 2000) (conviction reversed, as more than words of waiver are required, but explanation and understanding); U.S. v. Erskine, 355 F.3d 1161 (2004) (conviction reversed, as more than words of waiver are required, but explanation and understanding).

13. Contrary to the Government's counter-argument below that Mapuatuli and Medina had not exhausted their alleged administrative remedies pursuant to the Prison Litigation Reform Act pertaining to conditions of confinement (ER Vol.

2, pp. 165-168), 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, and in any event the Act, 42 U.S.C. Section 1997e(a), by express words limits its coverage as follows: "[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" (ER Vol. 2, p. 165), whereas there are no such administrative remedies available and in any event this lawsuit is brought not pursuant to any federal law, but pursuant to the Sixth Amendment.

14. Moreover, this Court has already held that the mere intentional interference by the prosecution with the Sixth Amendment's right to confidentiality in the attorney-client relationship where the defense's trial strategy is improperly acquired triggers a *per se* rule requiring reversal of a conviction without more; *see, e.g.*, U.S. v. Danielson, 325 F.3d 1054, 1069 (9th Cir. 2003) ("[prejudice] is largely a matter of semantics, but in this circuit we fold the prejudice analysis into the analysis of the Sixth Amendment right itself when the prosecution has improperly interfered with the attorney-client relationship and thereby obtained information about trial strategy.").

15. And this Court has further held in Danielson, 325 F.3d at 1072, that the burden of proof involving Sixth Amendment violations is also on the Government to prove a lack of prejudice to avoid reversal and not the criminal defendant:

> *Kastigar* [Kastigar v. U.S., 406 U.S. 441 (1972)] thus established a burden-shifting analysis that protects a criminal defendant against a violation of the Fifth Amendment by putting the burden of proof on the government that it did not use the privileged information. In the analogous context of protecting a defendant against a violation of the Sixth Amendment, we believe that the *Kastigar* analysis should also apply. The particular proof that will satisfy the government's "heavy burden," *Kastigar*, 406 U.S. at 462, 92 S.Ct. 1653, will vary from case to case, and we therefore cannot be specific as to precisely what evidence the government must bring forward. The general nature of the government's burden, however, is clear. As the Court stated in *Kastigar*, the mere assertion by the government of "the integrity and good faith of the prosecuting authorities" is not enough. *Id.* at 460, 92 S.Ct. 1653. Rather, the government must present evidence, and must show by a preponderance of that evidence, that "all of the evidence it proposes to use," and all of its trial strategy, were "derived from legitimate independent sources." *Id.* In the absence of such an evidentiary showing by the government, the defendant has suffered prejudice.
>
> We do not believe that adopting the *Mastroianni/ Kastigar* approach imposes an unreasonable burden on the prosecution. It is true that once the government has improperly interfered with the attorney-client relationship and thereby obtained privileged trial strategy information, the prosecutor has the "heavy burden" of showing non-use. But the prosecution team can avoid this burden either by not improperly intruding into the attorney-client relationship in the first place, or by

insulating itself from privileged trial strategy information that might thereby be obtained.

F. CONCLUSION

For each and for all of the above reasons, it is respectfully submitted that the decision of the lower court should be reversed and that this Court should declare the prison email policies of the United States Bureau of Prisons and the United States Department of Justice invading the right to counsel protections of the Sixth Amendment unconstitutional.

And Mapuatuli and Medina should have their subsequent convictions reversed pursuant to Hayes, Erskine, Danielson, Upjohn, Gomez, Gideon, Geders. Moulton, Rosner, Bursey, *supra*, as a result of the invasion of their attorney-client privilege, Homeland Security having admitted committing such improper unconstitutional investigation during their pretrial detention, *supra*.[1]

DATED: Honolulu, Hawaii; May 13, 2016.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
FREDERICK ARENSMEYER
Attorneys for Appellants

[1] This Court should take judicial notice that the American Bar Association House of Delegates at its 2016 mid-year meeting in San Diego passed a formal resolution, *Resolution A* (ER Vol. 2, pp. 169-187), sponsored by the New York County Lawyers Association, requesting the Department of Justice and the Bureau of Prisons to amend its policies regarding monitoring prison emails to protect confidentiality in the maintenance of the attorney-client privilege by recognizing how lawyers do business in the 21st Century.

CERTIFICATE OF COMPLIANCE

I hereby certify that this *Opening Brief*, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure is proportionately spaced, double-spaced, using a Times New Roman Typeface, 14-point size, with a total word count of **5,588 words** as determined by the Windows XP word processing operating system used to prepare said document.

DATED: Honolulu, Hawaii; May 13, 2016.

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
FREDERICK ARENSMEYER
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CERTIFICATE OF SERVICE

I hereby certify that on the date first written below a true and correct copy of the aforementioned *Opening Brief* was duly filed by electronic transmission, thereby served upon the following attorney representing the Appellees in this Appeal:

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STATEMENT OF RELATED CASES

(None Known)