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**

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# REPLY BRIEF

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## Introduction

Appellants in their Opening Brief challenge the constitutionality of the written policy of the Department of Justice permitting its prison email system to be used to violate the Sixth Amendment right of federal inmates to the assistance of counsel and their related First, Fourth, and Fifth Amendment rights as criminal defendants, and the companion Sixth Amendment right of defense counsel to communicate in confidence with inmate clients protecting their attorney work product.

In response, in their Answering Brief, the Federal Appellees argue (1) that the decision of the United States Supreme Court in Heck v. Humphrey, 512 U.S. 477 (1994), controls and prohibits all such inmate civil actions unless their convictions have been overturned, (2) that Plaintiff/Appellees waived their attorney-client, work-product privileges, (3) that Plaintiffs/Appellants failed to exhaust their Prison Litigation Reform Act administrative remedies, (4) that Appellee Dubin lacked standing to assert a Sixth Amendment claim, and (5) that Appellants have improperly raised for the first time in their Opening Brief violations of the First, Fourth, and Fifth Amendments as well as the Rules of Professional Responsibility governing attorneys.

**1. Does the Decision in Heck Bar this Appeal?**

The answer is no. Heck not only does not apply to the facts of this case, but the two opinions cited in the Answering Brief at 11, Valdez v. Rosenbaum, 302 F.3d 1039 (9th Cir. 2002), and Trimble v. City of Santa Rosa, 49 F.3d 583 (9th Cir. 1995), are both inapposite.

Heck, first of all, has no application to the facts here. Appellants Mapuatuli and Medina were not state prisoners, Appellants Mapuatuli and Medina were not convicted of a crime when this case was filed in the District Court, and Appellants Mapuatuli and Medina were and are not seeking damages.

All of the Appellants, moreover, filed suit directly under the Sixth Amendment, not Section 1983 nor any other federal statute.

Similarly, Heck does not apply to Appellant Dubin who is not an inmate, but defense counsel whose Sixth Amendment access to his clients in the delivery of constitutionally protected assistance of counsel both pretrial, during trial, and now on appeal was and still is respectively being restricted. *Cf.* Dible v. Scholl, 410 F. Supp. 2d 807, 814-817 (N.D. Iowa 2006), analyzing the history and limitations of Heck.

The inapplicability of Heck, for example, to the facts here was clearly recognized in Simpson v. Maine, 231 F. Supp. 2d 341, 347 (D. Me. 2002), where the constitutional challenge to interference with an inmate's preparation of his defense due to telephone restrictions was distinguished from Heck, seen as not undermining the validity of the imposition of challenged disciplinary sanctions for admitted wrongful conduct in that case "unlike that of a convicted inmate . . . [who] had his day in court," remembering that the restrictions and invasions of the attorney-client and work-product privileges here began occurring during pretrial proceedings where assistance of counsel was especially important and constitutionally necessary:

> Simpson is not arguing that he did not violate the Jail's rules so as to justify the imposition of some disciplinary sanction. His is not in the nature of a Due Process challenge to his disciplinary proceedings. Rather, he is arguing that the nature of the sanction imposed violated his constitutional right to pursue bail and prepare his defense while a pretrial detainee. Therefore, a court determination that it was impermissible to block Simpson's access to the phone and the mail during his segregation would not undermine the validity of the underlying disciplinary determination. Thus, the principals of Heck are inapposite.

Similarly, neither Valdez nor Trimble assists the Federal Appellees in this case.

In Valdez, telephone detention privileges were suspended at the request of the federal prosecutor until five new defendants could be apprehended, clearly an overriding law enforcement security concern. Appellants have no argument with the decision in Valdez, a situation not present here where the Justice Department policy of allowing ease dropping on all prison emails unrelated to any pretense of security concerns is being challenged by these Appellants.

Moreover, Valdez's application to infringements on the Sixth Amendment has been applied only in cases where no actual prejudice has been shown; *see, e.g.*, Silva v. King County, 2008 WL 4534362 *8 (W.D. Wash. 2008) ("plaintiff does not allege that the content of his calls was revealed to any law enforcement officer . . . [which would otherwise be] a violation of his right to counsel [and] plaintiff's trial and sentencing were both concluded").

That was not the case here, as law enforcement was discovered admittedly reviewing during pretrial proceedings confidential attorney-client emails pertaining to at least Medina more than one year prior to his conviction, even scanning the prison emails of other inmates

surreptitiously for the name Medina at the Honolulu Detention Center (ER, Vol. 1, pp. 13, 39-40).

Moreover, in U.S. v. Villegas, 2015 U.S. Dist. LEXIS 75797 *8, 15 (D. Nev. 2015), telephone restrictions sought by prosecutors against Villegas calling his attorney because he had used other inmates telephone I.D.s to call persons on his no-call list in violation of Southern Nevada Detention Center polices (which required a court order to restrict inmates from telephoning their attorneys) were denied, applying and quoting Valdez, 302 F.3d at 1045 ("Pretrial detainees have a substantive due process right against restrictions that amount to punishment") (citations omitted).

In Trimble, the inmate was a California state prisoner complaining that he was not given his Miranda warnings and that his attorneys had provided ineffective assistance of counsel. Thus, Trimble had nothing to do with a challenge to a Government policy as here, but instead challenged a violation of Government policy with respect to Miranda warnings; and no Government misconduct was involved in Trimble's claimed violations of his right to counsel unlike here.

**2. Was There a Waiver of Attorney-Client, Work-Product Privileges?**

The answer is no. This mixed factual and legal issue pertaining to the lack of sophistication of Appellant inmates, the lack of conspicuousness of the disclaimers, the ambiguity of the disclaimers, the placement and type size of the disclaimers, and the general ineffectiveness of any claimed waiver have already been fully addressed in the Opening Brief at 11-16 and 19-20.

The Answering Brief at 13 attempts to place the burden of proof upon Appellants, when this Court has specifically held that the burden of proof in Sixth Amendment cases is on the Government to prove a lack of prejudice; see U.S. v. Danielson, 325 F.3d 1054, 1072 (9th Cir. 2003), discussed and relevant portions quoted in the Opening Brief at 21-23.

**3. Was There a Failure To Exhaust Administrative Remedies?**

The answer is no. As already explained in the Opening Brief at 20-21, the Prison Litigation Reform Act pertains to "conditions of confinement" where there is an administrative remedy available upon petition to the facility and the Bureau of Prisons, and is limited to complaints "under section 1093 of this title, or any other Federal law," 42 USC § 19973(a).

Here, what is being challenged directly under the United States Constitution instead is an admitted Justice Department established operating policy over which the Honolulu Detention Center and the Bureau of Prisons have absolutely no jurisdiction and are institutionally incapable of granting the relief requested here.

Otherwise, Appellants would be seeking to have the Honolulu Detention Center and the Bureau of Prisons overrule Justice Department policy, which would be a meaningless act.

Only this Court has that capability as a matter of law, as already fully explained historically and to the present day in the Opening Brief, at 7-11, being a Department of Justice policy (and not an individual inmate condition of confinement) championed by Attorney General Lynch herself when a federal prosecutor (ER Vol. 2, pp. 37-41, 52-53).

The two cases cited by the Government in its Answering Brief at 24, Porter v. Nussle, 534 U.S. 516 (2002), and Booth v. Churner, 532 U.S. 731 (2001), are inapposite. The types of cases required to go through the administrative grievance procedures of an inmate facility discussed in those two cases, although that statute was enlarged by Congressional amendment to include claims for damages even though

damages are not awardable in that administrative process since the administrative process could still rule on the factual foundation of such damage claims, have nevertheless no relevance to this Appeal.

To the contrary, once again what is being challenged here, first of all, is a Department of Justice policy over which the Honolulu Detention Center and the Bureau of Prisons have no control, and second, that distinction is further illustrated by the fact there are no disputed facts here requiring even a scintilla of administrative review first, unlike the measure of damage examples discussed in Porter and Booth where there nevertheless remained to be adjudicated by prison review officials, apart from any damage remedy, the substance of prisoner complaints.

For, *whether there was a waiver or not by the Appellants*, the Sixth Amendment deprivation would still be present, consisting of delays due to lockdowns, long waits in visiting rooms, conflicting inmate and defense counsel schedules, long distances between inmates and defense counsel especially when inmates are frequently moved temporarily even out of state, delays in telephone and mail communications – all indisputably hindering if not at times completely preventing effective assistance of counsel, Opening Brief at 13-14.

It would be tragic and nonsensical to suggest that the safeguarding of constitutional rights affecting the right to the effective assistance of counsel of more than one hundred thousand inmates in federal detention and incarceration facilities must await meaningless administrative processes lacking in any remedy whatsoever.

**4. Does Defense Counsel Lack Sixth Amendment Standing?**

The Answer is no. The Government misconstrues Appellants' defense counsel's claim, which is based principally on a violation of his work-product privilege affecting the assistance rendered to inmates.

An extensive analysis of the work-product privilege is found in In re Grand Jury Investigation, 599 F.2d 1224 (3rd Cir. 1979).

As argued here, the prison email system due to its inadequate disclaimers allowed the Government the opportunity to directly secure defense counsel's work product in advance of trial, his having represented both Mapuatuli and Medina in their felony cases, thus compromising indirectly the assistance being rendered to each, and thereby implicating the Sixth Amendment's right to the assistance of counsel in their defense.

**5. Have Appellants Raised New Theories for the First Time on Appeal?**

The answer is no. The Federal Appellees in their Answering Brief at 27-28 claim that Appellants have presented First, Fourth and Fifth Amendment arguments for the first time in their Opening Brief, thus supposedly attempting improperly to amend their Verified Complaint.

The Federal Appellees are mistaken. Those arguments are contained in the Verified Complaint filed on November 10, 2014 (ER Vol. 2, pp. 134-152; see especially p. 146); the manner in which all of those constitutional guarantees are interwoven in this context is explained in the American Bar Association Report referenced in the Opening Brief at 23 n.1 (ER Vol. 2, pp. 176-177):

> Prison polices that impact inmates' constitutional rights, such as the Sixth Amendment right to counsel, "must be evaluated in light of the central objective of prison administration, safeguarding institutional security."[1] Providing a confidential Legal Email system would enhance prison security by reducing the opportunities for drugs and contraband to be smuggled into BOP facilities with outside mail and would also ease the burden on prison staff by relieving them of the responsibility of coordinating unmonitored attorney calls and in-person visits. Thus, the BOP cannot justify its Legal Email monitoring policy, or the lack of a confidential email system, as reasonably necessary to safeguard prison security.

[1] Bell v. Wolfish, 441 U.S. 520, 547 (1979).

In *Turner v. Safley,*[2] the Supreme Court enunciated the standard that generally governs in cases assessing the constitutionality of prison policies that implicate inmates' constitutional rights. In *Turner,* the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[3] The Court held that four factors are particularly relevant in determining the reasonableness of prison regulations: (1) a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) consideration of alternative forms of expression available to the inmate; (3) the burden on guards, prison officials, and other inmates if the prison is required to provide the freedom claimed by the inmate; and (4) consideration of the existence of less restrictive alternatives that might satisfy the governmental interest.[4] The Court further held that, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."[5]

*Turner*, however, is inapplicable to claims challenging prison policies that implicate the constitutional rights of pretrial detainees, and specifically to claims that implicate pretrial detainees' Sixth Amendment right to adequate defense counsel.[6]

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[2] 482 U.S. 78 (1987).

[3] *Id.* at 89.

[4] *Id.* at 89–90.

[5] Turner v. Safley, 482 U.S. 78, 91 (1987).

[6] Brandon P. Ruben, Note, *Should the Medium Affect The Message? Legal and Ethical Implications of Prosecutors Reading Inmate-Attorney Email*, 83 Fordham L. Rev. 2131, 2150 fn 164 (2015).

As explained in *Bell v. Wolfish*, the Fourteenth Amendment prohibits any "punishment" of pretrial detainees,[7] and thus prison policies restricting a specific constitutional right of pretrial detainees are held to a stricter standard than those affecting only the rights of convicted prisoners.[8] Under *Bell*, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment," and thus unconstitutional.[9] Additionally, under *Bell*, even if a condition is not punitive, it may be unconstitutional if a court finds that it "appears excessive in relation" to the government's proffered alternative purpose.[10] In contrast, prison regulations restricting convicts' access to counsel must be "reasonably related to legitimate penological interests"[11] and are unconstitutional if they "unjustifiably obstruct the availability of professional representation."[12]

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[7] *Bell*, 441 U.S. at 538 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."); Demery v. Arpaio, 378 F.3d 1020, 1028–29 (9th Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005).

[8] *See, e.g.,* Benjamin v. Frasier, 264 F.3d 175, 178 n. 10 (2d. Cir 2001) ("We need not decide this issue, however, as we believe the policies and practices at issue here would not survive scrutiny under *Turner,* if in fact that standard is applicable.").

[9] *Bell*, 441 U.S. at 539.

[10] *Id.* at 538–39.

[11] *Turner*, 482 U.S. at 91; *see also Benjamin*, 264 F.3d at 178 n. 10 (explaining that Turner only applies in the case of convicts, not pretrial detainees, because "the standard [Turner] promulgated depends on 'penological interests.' Penological interests are interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc... of persons convicted of crimes.").

[12] Procunier v. Martinez, 416 U.S. 396, 419 (1974), *overruled in part on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

> The BOP's Legal Email monitoring policy affects both convicted prisoners' right of access to the courts and pretrial detainees' Sixth Amendment right to counsel. As explained below, that policy raises serious constitutional concerns and is vulnerable to challenge under the four-factor *Turner* test, and therefore even more vulnerable under the more demanding *Bell* formulation as applied to pretrial detainees.

All that is needed today to cavalierly invade the attorney-client and work-product privileges of federal inmates is a law enforcement badge and the filling out of Bureau of Prisons Form BP-AO655 (Appellants ER Supp., p. 1).

## Conclusion

For each and for all of the above reasons set forth in the Opening and Reply Briefs, 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 to be unconstitutional.

And Mapuatuli and Medina should have their subsequent convictions reversed as a result of the invasion of their attorney-client privilege, Homeland Security having admitted under seal committing

such improper undisclosed unconstitutional investigations during their pretrial detention in Malia Arciero's criminal case, Cr. No. 13-01036 SOM (ER, Vol. 1, pp. 13, 39-40), who was originally a Plaintiff in this lawsuit, pressured however into withdrawing by prosecutors as a part of her subsequent plea bargain and change of plea.

DATED: Honolulu, Hawaii; July 31, 2016.

*/s/ Gary Victor Dubin*

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this *Reply Brief*, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure is proportionately spaced, double-spaced, using a Century Typeface, 14-point size, with a total word count of **2,779 words** as determined by the Windows XP word processing operating system used to prepare said document.

DATED: Honolulu, Hawaii; July 31, 2016.

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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 *Reply 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)