No. _____

In the
Supreme Court of the United States

ALAN MAPUATULI, GILBERT MEDINA,
and GARY VICTOR DUBIN, ESQ.

Petitioners,

vs.

JEFFERSON B. SESSIONS III, in his official capacity as United States Attorney General,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Resolving a conflict within federal courts, are the Sixth Amendment rights of federal inmates and detainees to the assistance of counsel violated when their prison emails with counsel, especially those labeled as "confidential attorney-client privileged communication," are nevertheless intercepted and allowed to be read as a matter of presently established Bureau of Prisons and Justice Department policy by their employees, including prosecutors?

2. Are federal inmates and detainees required to exhaust Congressional Prison Litigation Reform Act administrative procedures before being allowed to object in court to violations of their Sixth Amendment rights to the assistance of counsel when their prison emails with counsel, especially those labeled as "confidential attorney-client privileged communication," are nevertheless intercepted and allowed to be read as a matter of presently established Bureau of Prisons and Justice Department policy by their employees, including prosecutors?

3. Are the attorney work product privileges and ownership rights of criminal defense attorneys violated when their prison emails with inmate and detainee clients, especially those labeled as "confidential attorney-client privileged communication," are admittedly allowed to be read as a matter of Bureau of Prisons and Justice Department policy by their employees, including prosecutors?

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PETITION FOR WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail on July 30, 2018, to review the March 2, 2018 Memorandum decision of the Ninth Circuit Court of Appeals, pursuant to the timely extension granted by the Honorable Anthony M. Kennedy.

This Court has jurisdiction to review this *Petition* and the aforesaid Ninth Circuit Court of Appeals Memorandum, pursuant to Section 1254(1) of Title 28 and Supreme Court Rules 10(c) and 13(1).

II. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation and application of the Sixth Amendment to the United States Constitution, the text of which is set forth in the Appendix.

III. STATEMENT OF THE CASE

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, seeking to declare the official spying on inmate prison emails unconstitutional.

Mapuatuli (after his first trial ended in a hung jury) and Medina were each sentenced to life imprisonment, and Arciero meanwhile withdrew from this lawsuit pursuant to the requirements of a plea agreement she entered into with her prosecutor.

The Defendants below in their capacities as Federal Officials were the then 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. For purposes of this Petition, the current United States Attorney General is named as Respondent.

Briefly, 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 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 around 2006 morphed into current Justice Department Bureau of Prisons' regulations allowing and encouraging prosecutors to freely read prison emails between inmates and counsel when inmates are permitted access to such electronic communication systems.

Inmates and detainees are permitted to use such prison email systems nationwide, including those containing confidential communications with counsel even if so labeled, freely read by prosecutors and used as information and 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 confidential attorney-client and work-product privileges.

This invasion of the attorney-client privilege regarding prison emails has been openly admitted by

the Justice Department, *infra*.

The Justice Department, for instance, has conceded 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) filed below).

The Justice Department, led by former 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, on three grounds (May 6, 2015 Motion for Judgment on the Pleadings Or in the Alternative Summary Judgment, USDC Doc. No. 20), filed below:

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

Second, 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

Third, inmates and their counsel have other just as effective means of communication, such as visits and legal mail, the latter inconsistently protected.

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 prohibited from reading 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.*, filed below:

> 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.

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.

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: "Attorney-Client Work-Product Privileged Protected Confidential Communication;" Declaration of Dubin, filed below:

> 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. * * * *

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 given Dubin, no copies given 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 for general use, 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.

Nevertheless, the lower court granted summary judgment over objection, while no discovery, noticed, was permitted, ruled below as irrelevant.

A Ninth Circuit panel held that Mapuatuli and Medina, filing directly under the U.S. Constitution, had however failed to first exhaust administrative remedies in order to challenge conditions of confinement under the Prison Litigation Reform Act and Dubin lacked standing to object.

IV. LEGAL ARGUMENT SUPPORTING WRIT

This 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).

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).

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 this Court recognized in *Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4 (1977), that Sixth Amendment constitutional right would be threatened whenever the Government were to monitor attorney-client communications through electronic eavesdropping.

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

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).

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).

Rules of Professional Responsibility governing Members of the Bar protecting the confidentiality of client communications as also made applicable to all

Members of Federal District Court Bars, including federal prosecutors, ethical constraints also implicated by such ease dropping.

And even in situations 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.

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.").

Consider, for example, Miranda warnings, where it is universally understood that signing a waiver 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.

Circuit Courts of Appeals routinely reverse convictions, for example, where the Sixth

Amendment right to counsel has been violated because of an ineffective waiver; 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).

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, 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," 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.

V. CONCLUSION

First, the prison email eavesdropping policies of the Justice Department should be stricken in accordance with the formal resolution, Resolution A, passed by the American Bar Association House of Delegates at its 2016 mid-year meeting in San Diego, 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.

Second, Mapuatuli and Medina should have their subsequent convictions reversed pursuant to *Hayes*, *Erskine*, *Danielson*, *Upjohn*, *Gomez*, *Gideon*, *Geders*, *Moulton*, and *Rosner*, *supra*, as a result of the invasion of their attorney-client privilege, the Justice Department having admitted such improper unconstitutional investigation during their pretrial detention, *supra*, no matter the procedural context.

The intentional interference by the prosecution with the Sixth Amendment's right to confidentiality in the attorney-client relationship 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").

And the burden of proof involving Sixth Amendment violations is also on the Government to prove a lack of prejudice, 325 F.3d at 1072, not on a criminal defendant, nor to also file an administrative grievance against an already entombed, fixed policy.

Respectfully submitted,

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