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IN THE UNITED STATES DISTRICT COURT

OF THE STATE OF HAWAII

RICHARD KAPELA DAVIS, MICHAEL HUGHES, DAMIEN KAAHU, ROBERT A. HOLBRON, JAMES KANE, III, and ELLINGTON KEAWE,

Plaintiffs,

v.

NEIL ABERCROMBIE, in his official capacity as the Governor of the State of Hawaii; TED SAKAI, in his official capacity as Director of the Hawaii Department of Public Safety; CORRECTIONS CORPORATION OF AMERICA,

Defendants.

CIV. NO. 11-00144 LEK/BMK

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER UNDER FED. R. CIV. P. 23(D) AND THE ALL WRITS ACT FOR COURT-ORDERED CONFIDENTIAL CALLS FILED SEPTEMBER 20, 2012; DECLARATION OF DANIEL M. GLUCK AND EXHIBIT 1

Hearing on Plaintiffs' Motion:
Date: November 8, 2012
Time: 9:30 a.m.
Judge: Hon. Barry M. Kurren

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF HAWAII FOUNDATION IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER UNDER FEDERAL RULE OF CIVIL PROCEDURE 23(D) AND THE ALL WRITS ACT FOR COURT-ORDERED CONFIDENTIAL CALLS FILED SEPTEMBER 20, 2012

I. INTRODUCTION

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") respectfully requests that the Court grant Plaintiffs' motion, ensuring that Plaintiffs (and potential class members) may speak with their attorneys in confidence.

For years, the Corrections Corporation of America ("CCA") has had a policy at its Saguaro Correctional Center ("Saguaro") whereby prisoners who wish to have a confidential conversation with their attorneys over the telephone may *only* do so with a CCA employee standing right next to them, able to hear every word the prisoners say to their attorneys. There is no dispute that this is CCA's long-standing practice: in 2009, then-Deputy Director for Corrections Tommy Johnson acknowledged this practice in writing, but justified it on the basis that the CCA employee could only hear one side of the conversation. Declaration of Daniel M. Gluck (hereinafter, Gluck Decl.), Ex. 1.

Courts have routinely concluded that this kind of interference with attorney-client communications is unconstitutional, unethical, and untenable. Indeed, this practice appears to violate the prison industry's own standards for professionalism. *See* Reginald A. Wilkinson (Director, Ohio Department of Rehabilitation and

Correction) and Tessa Unwin (Public Affairs, Ohio Department of Rehabilitation and Correction), "Visiting in Prison" (1999) ("The Standards for Adult Correctional Institutions, published by the American Correctional Association (ACA), require that provisions be made to ensure attorney-client confidentiality. Special arrangements for such communication encompass telephone communications, uncensored correspondence, and visits[.]" (footnote omitted) (citing American Correctional Association, Standards for Adult Correctional Institutions, 3rd ed. (Lanham, MD: 1990), Standard 3-4263)), available at http://www.drc.ohio.gov/web/Articles/Visiting%20in%20Prison.pdf.

Defendants' other proffered alternative – that prisoners may make their confidential phone calls in the "pod" next to other prisoners – is equally unacceptable, and violates American Bar Association standards on attorney-client confidentiality. *See* American Bar Association, Standards on Treatment of Prisoners, Standard 23-5.2, "Prevention and investigation of violence" ("(a) Correctional and governmental authorities should take all practicable actions to reduce violence and the potential for violence in correctional facilities and during transport, including: . . . (vi) preventing opportunities for prisoners to exercise coercive authority or control over other prisoners, including through access to another prisoner's confidential information[.]"), available at

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html.

As such, *amicus* respectfully requests that the Court grant Plaintiffs' Motion.

II. FACTUAL BACKGROUND

As early as 2009, the ACLU of Hawaii complained to the Hawaii Department of Public Safety about CCA's practice of listening to attorney-client telephone calls. In a letter dated April 7, 2009, then-Deputy Director for Corrections Tommy Johnson admitted to this practice; however, he justified these actions by saying that the intrusions on attorney-client communications were not serious because CCA employees could only hear one side of the conversation: "[I]t is CCA's policy to have a Case Manager present [in the room during prisoners' legal calls], but the staff member cannot hear what the Attorney is saying to his client, and has no knowledge of what the inmate is verbally responding to when speaking with their Attorney."[1] Gluck Decl., Ex. 1 at 1-2.

[1] The letter goes on to state that "this only applies to inmates housed in segregation as a safety and security measure." Gluck Decl., Ex. 1 at 2. As an initial matter, the ACLU is unaware as to whether this policy is, in fact, limited to segregation prisoners or whether it applies facility-wide. If it is limited to segregation prisoners only, it demonstrates that CCA has the infrastructure to allow for confidential phone calls – it simply denies access to a group of prisoners (those in segregation) who may be most in need of outside legal assistance. *See* Complaint, *Nunuha-Tachera v. State of Hawaii*, Civ. 12-147 JMS-RLP (prisoner murdered in the Special Housing Incentive Program ("SHIP") – a form of segregation – at CCA (continued)

The ACLU of Hawaii has received complaints about this practice – both from prisoners and attorneys – for years. Gluck Decl., ¶ 5. The ACLU of Hawaii has also received complaints (again, from prisoners, attorneys, and others) that prisoners are threatened and/or retaliated against for things they have said to their attorneys over the telephone. *Id.*

Indeed, CCA – or possibly just its lawyers – seem to have little regard for the confidentiality of attorney-client communications. When the undersigned counsel visited CCA in person in 2009 to interview prisoners – interviews that were expressly confidential – CCA's attorney attempted to listen to and observe these interviews. Gluck Decl. ¶¶ 7-8. Before this visit, CCA's attorney stated via e-mail that she would be "in attendance," *id.* ¶ 6; when the undersigned counsel arrived at the Saguaro Correctional Center for the visit, the attorney stated that she intended to sit at a table, approximately three to four feet away from counsel and the interviewee, while the interviews took place. *Id.* ¶¶ 7-8. Had she done so, she would have been able to see and hear everything that took place during the confidential meetings. *Id.* ¶ 8. The undersigned counsel, of course, refused to allow this to happen, *id.* ¶ 8; however, the fact that CCA's attorney even suggested that such a course of action would be proper is baffling.

Saguaro); First Amended Complaint, *Medeiros v. State of Hawaii*, Civ. 12-340 JMS-RLP (prisoner murdered in segregation at CCA Saguaro).

III. DISCUSSION

a. The First and Fourteenth Amendments Protect the Right of Prisoners and Their Attorneys to Communicate in Confidence

When prison officials deprive inmates of the means to communicate confidentially with their lawyers, they interfere not only with the prisoners' constitutional right of access to the courts, but also with their First and Fourteenth Amendment rights pertaining to free speech and privacy. As the Ninth Circuit explained in *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) (*per curiam*), in the context of a prisoner's § 1983 action against prison officials:

> The fourteenth amendment guarantees prisoners meaningful access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 822 [(1977).] The Seventh Circuit discussed attorney visitation in light of this right of meaningful access to the courts in *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir.1980). . . . The appellate court recognized that while prison administrators are given deference in developing policies to preserve internal order, these policies will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. *Id.* at 1143, 1146. *The opportunity to communicate privately with an attorney is an important part of that meaningful access*. *Id.* at 1143.

(Emphasis added.) *See also id.* at 610 ("This apparently arbitrary policy of denying a prisoner contact visits with his attorney prohibits effective attorney-client communication and unnecessarily abridges the prisoner's right to meaningful access to the courts."); *McWright v. Gerald*, 2004 WL 768641, *3 (E.D. Mich. Mar. 26, 2004) (acknowledging that confidential attorney-client communications

implicate a right to privacy); *Williams v. Price*, 25 F. Supp. 2d 623 (W.D. Pa. 1998) (granting summary judgment to prisoners on First and Fourteenth Amendment claims challenging non-confidential attorney-client visit booths). *Cf. Bogle v. Raines*, Report and Recommendation (unpublished order), Case 1:09-cv-01046-JTN-ESC (Document #59) (W.D. Mich. Feb. 27, 2012) at 5 ("While prison officials are under no affirmative obligation to provide inmates with access to telephones, such does not authorize prison officials who do afford such access to listen to prisoner's telephone conversations for any reason or no reason.").

The right to confidential communication with one's attorney is protected in both the criminal and civil contexts. In *Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000), the court stated:

> [T]he state cannot impede an individual's ability to consult with counsel on legal matters. . . . Furthermore, the right to obtain legal advice does not depend on the purpose for which the advice was sought. . . . In sum, the First Amendment protects the right of an individual or group to consult with an attorney on *any legal matter*.

Denius, 209 F.3d at 954 (emphasis added). The "'right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition.'" *Mothershed v. Justices of Supreme Court*, 410 F.3d 602, 611 (9th Cir. 2005) (quoting *Denius*, 209 F.3d at 953), and individuals have a First Amendment right to communicate with attorneys, in confidence, without interference or retaliation by government agents. *See*, *e.g.*, *Denius*, 209 F.3d at

953-55 (holding that a public employee cannot be required to waive attorney-client privilege as a condition of employment); *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001), *overruled in part on other grounds*, *Hartman v. Moore*, 547 U.S. 250 (2006) (holding that the First Amendment protects individuals from government retaliation for consulting with an attorney: "First Amendment rights of association and free speech extend to the right to retain and consult with an attorney."); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult with an attorney, however, implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech." (citations omitted)), *cert. denied*, 502 U.S. 814 (1991). *See also Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

Unreasonable restrictions on confidential attorney-client communications also impinge upon the attorney's First Amendment rights. *Sturm v. Clark*, 835 F.2d 1009, 1014-16 (3d Cir. 1987) (reversing district court's grant of motion to dismiss and holding that attorney had alleged a cognizable First Amendment claim against prison officials for prohibiting the attorney from meeting with prisoners).

b. Prison Officials May Not Interfere with Confidential Communications Between Prisoners and Attorneys

As an initial matter, Defendants' apparent position that they have not interfered with the attorney-client relationship – because they only listen to the

prisoner's half of the conversation – is absurd. The privilege protects the attorney's, as well as the client's, words. As the Ninth Circuit has explained, "it is important to recognize that the attorney-client privilege is a two-way street: 'The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, . . . as well as an attorney's advice in response to such disclosures.'" *United States v. Bauer*, 132 F.3d 504, 507-08 (9th Cir. 1997) (quoting *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir.1996), *cert. denied*, 520 U.S. 1167 (1997)) (ellipsis in original) (emphasis removed from original). *See also Denius*, 209 F.3d at 954 ("Because the maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal advice.").

Reasonable telephone access is an important component of a prisoner's access to court and counsel. *Divers v. Dep't of Corrs.*, 921 F.2d 191, 194 (8th Cir. 1990) (holding, in the context of a prisoner's § 1983 suit for prison conditions, that district court erred in dismissing inmate's challenge to prison regulation that prevented inmates from phoning attorneys unless they could prove they had a court date set within the next 30 days). *See also Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052 (8th Cir. 1989) (allowing pre-trial detainees only one attorney call

every two weeks, and counting calls as made when the attorney was not reached, is "patently inadequate").

In *Williams v. Price*, 25 F. Supp. 2d 623 (W.D. Pa. 1998), the court analyzed the failure of defendant prison officials to provide a location that permitted inmates to speak privately with their counsel (against a defense that the prisoners had no constitutionally protected right to those confidential communications). *Id*. at 624. The court ruled that the First Amendment did indeed protect "confidential oral communications between prisoners and their attorneys." *Id.* at 630. It ruled that "[p]laintiffs have shown that the ability of other persons to overhear their conversations with their attorneys prevents them from being able to discuss private matters with their attorneys and results in limiting their discussions with their attorneys." *Id*. at 630. Finding a likely chilling effect, the court determined that plaintiffs showed actual injury, and granted their summary judgment motion. *Id*. (distinguishing *Laird v. Tatum*, 408 U.S. 1 (1972)).

c. Defendants Cannot Force Plaintiffs to Waive the Privilege

Confidentiality depends largely on whether reasonable steps were taken to preserve privacy. The Ninth Circuit, citing 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961), has stated that the privilege applies:

> (1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's

> instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived.

United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir. 2002) (citations omitted); *accord United States v. Plache*, 913 F.2d 1375, 1379 n.1 (9th Cir. 1990).

The attorney-client privilege requires only that the client take reasonable steps to maintain the confidentiality of communications. Plaintiffs have not waived the privilege by speaking with their attorneys in the presence of a CCA guard, where they have no other choice but to do so. Indeed, the Ninth Circuit addressed the question of the attorney-client privilege in a custodial setting in *Gomez v. Vernon*, 255 F.3d 1118, 1132-33 (9th Cir. 2001), *cert. denied*, 534 U.S. 1066. In *Gomez*, state prisoners alleged that guards and government lawyers had violated the attorney-client privilege by reading correspondence from the inmates' lawyers, in violation of prison rules. The court discussed the issue of waiver and held that inmates who had taken reasonable steps, in light of the conditions of their incarceration, to protect their legal files from the state's scrutiny had thereby preserved the confidentiality of those files, even though prison officials had read and copied those files. *Id*. at 1133.

The courts addressing the prosecution of Manuel Noriega took a functionally similar approach in examining government monitoring of a detainee's attorney calls. *See United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) ("*Noriega I*"),

cert. denied, 498 U.S. 976; *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) ("*Noriega II*"). *Noriega I* held that a detainee's telephone call to his attorney was protected by the privilege if it was, as a factual matter, "(1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential." 917 F.2d at 1551 (citations and internal quotation signals omitted). Other courts have similarly held that the privilege applies when a client reasonably intends or expects that the conversation will remain private. *See United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("The assertor of the privilege must have a reasonable expectation of confidentiality, either that the information disclosed is intrinsically confidential, or by showing that he had a subjective intent of confidentiality."), *cert. denied*, 522 U.S. 1065 (1998); *accord United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989).

In our society, no form of communication is completely safe from illegal monitoring by the government or by private persons: mail may be stolen and read,[2] and offices burglarized[3] and bugged.[4] However, the possibility or fact of

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[2] *See Resolution Trust Corp. v. Dean*, 813 F.Supp. 1426, 1428-30 (D. Ariz. 1993) (privilege not waived); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 79 illust. 1 (privilege not waived).

[3] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §79 illust. 4 (privilege not waived).

illegal interception does not destroy a privilege. *See Resolution Trust Corp. v. Dean*, 813 F. Supp. 1426, 1428-30 (D. Ariz. 1993). The general rule – that in order to establish and maintain a privilege it is only necessary to take reasonable steps to preserve confidentiality – is particularly necessary in the custodial context, when the state controls all attorney-client access. *See Gomez*, 255 F.3d at 1133. As the Restatement notes:

> A jailer requires Client, an incarcerated person, and Lawyer to confer only in a conference area that, as Client and Lawyer know, is sometimes secretly subjected to recorded video surveillance by the jailer. If Client and Lawyer take reasonable precautions to avoid being overheard, the fact that the jailer secretly records their conversation does not deprive it of its confidential character.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §71 (2012) illust. 3.

Talking on a telephone with a CCA employee listening to the conversation (where the prisoner has no other choice) does not constitute waiver. *See Brewer v. Williams*, 430 U.S. 387, 403-04 (1977) (in the Sixth Amendment context, the government must "prove an intentional relinquishment or abandonment of a known right or privilege") (citation and quotation signals omitted). Indeed, the Supreme Court has declined to find a waiver even when a defendant agreed to speak with a uniformed, investigating police officer about the facts of his case. *Id.* at 404-05;

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[4] *See id.* § 71 illust. 1.

see also Shillinger v. Haworth, 70 F.3d 1132 (10th Cir. 1995) (in Sixth Amendment context, no suggestion of waiver where conversation occurred in front of sheriff).

Moreover, under the "unconstitutional conditions" doctrine, the government may not condition a detainee's use of the telephone to call his attorney on a waiver of his rights to confer privately with his attorney. *See United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) (government may not condition pre-trial release on detainee's waiver of Fourth Amendment rights in connection with suspicionless drug testing); *Vignolo v. Miller*, 120 F.3d 1075, 1077-78 (9th Cir. 1997) (applying unconstitutional conditions doctrine in prison context). Even an explicit waiver of constitutional rights is void when it violates this principle. *See Scott*, 450 F.3d at 866 (suppressing evidence despite written Fourth Amendment waiver). The same principle applies in the context of the First Amendment rights discussed herein.

d. Without Confidential Phone Calls, Hawaii Prisoners and Their Attorneys Face Substantial Obstacles in Litigating their Cases

Hawaii is not unique in spending tens of millions of dollars to send its prisoners to for-profit corporations. *See* Corrections Corporation of America, "About CCA," http://www.cca.com/about/ (CCA has contracts with sixteen states); Hawaii State Auditor, "Management Audit of the Department of Public Safety's Contracting for Prison Beds and Services," Report #10-10, p. 18 (December 2010) (available at http://hawaii.gov/auditor/Reports/2010/10-10.pdf) (providing

financial figures for CCA contracts for Fiscal Years 2007-09). Nevertheless, Hawaii is an outlier in terms of the geographic distance between its prisoners and its courts.[5] This distance presents very real, practical problems for attorneys and their clients. As just one example, Local Rule 7.4 requires a litigant to submit a Reply Brief seven calendar days after receiving an Opposition Brief. It is quite common that an attorney will need to question a client upon receiving an Opposition Brief. In this kind of situation, written correspondence is not practical, given the amount of time it takes to send correspondence to Arizona and then back to Honolulu; as such, attorneys must decide whether to have a conversation that will be overheard by CCA guards, or take the time to file a motion with the Court asking for an extension to file the reply brief (taking up the Court's time to rule on the motion), which request may or may not be granted. (If granted, of course, such an extension takes away from the Court's limited window to review the briefs prior to a hearing on the motion.)

Furthermore, as discussed *supra*, attorneys and their prisoner clients have a constitutional rights to conduct confidential, in-person meetings. *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) (*per curiam*). Telephone calls are undoubtedly

[5] No other state comes close to Hawaii (which sends its prisoners roughly 3,000 miles away) in terms of the distance between its courts and its prisoners. *See* Corrections Corporation of America, "Facilities Locations," available at http://www.cca.com/facilities/ (listing each CCA facility and its customer base).

less burdensome on the Saguaro Correctional Center's staff than an in-person meeting, insofar as routine prison practices require a search of the visiting attorney, an escort of the attorney to the meeting room, and observation of the meeting (from afar) by prison staff.

IV. CONCLUSION

Defendants should not be permitted to listen to Plaintiffs' conversations with their attorneys, nor should their attorneys have to choose between zealous advocacy and confidentiality. *Amicus* respectfully requests that the Court grant Plaintiffs' Motion.

DATED: Honolulu, Hawaii, October 22, 2012.

Respectfully submitted,

/s/ Daniel M. Gluck
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