From: (b)(6); (b)(7)(C)
To: EOUSA b6, b7C (USACAS)
Subject: BOP inmate phone and email policies
Date: Monday, August 26, 2019 5:48:43 PM
Attachments: BOP national phone policy.pdf
Arciero decision.pdf
FDC Hon local email policy.pdf

Hi EOUSA b6, b7C

(b)(5); (b)(6); (b)(7)(C); (b)(7)(F)

Let me know if this does the job.

Thanks,

(b)(6);
(b)(7)(C)

(b)(6); (b)(7)(C)
US Department of Justice | Federal Bureau of Prisons
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U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI: CPD/CPB
NUMBER: P5264.08
DATE: 1/24/2008
SUBJECT: Inmate Telephone Regulations

"CORRECTED COPY 2/11/2008"

Boxed Bold - Federal Regulation

Regular Type - Implementing Information

1. **PURPOSE AND SCOPE**

§ 540.100 Purpose and Scope.

a. The Bureau of Prisons extends telephone privileges to inmates as part of its overall correctional management. Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development. An inmate may request to call a person of his or her choice outside the institution on a telephone provided for that purpose. However, limitations and conditions may be imposed upon an inmate's telephone privileges to ensure that these are consistent with other aspects of the Bureau's correctional management responsibilities. In addition to the procedures set forth in this subpart, inmate telephone use is subject to those limitations which the Warden determines are necessary to ensure the security or good order, including discipline, of the institution or to protect the public. Restrictions on inmate telephone use may also be imposed as a disciplinary sanction (see 28 CFR part 541).

This Program Statement provides national policy and procedure regarding inmate telephone privileges within Bureau of Prisons (BOP) institutions and contract facilities.

Maintaining pro-social/legal contact with family and community ties is a valuable tool in the overall correctional process. With this objective in mind, the Bureau provides inmates with several means of maintaining such contacts. Primary among these

is written correspondence, supplemented by telephone and visiting privileges.

Although there is no constitutional right for inmates to have unrestricted telephone communication, particularly when alternate methods of communication are readily available, the Bureau provides inmates with telephone access consistent with sound correctional management.

2. **SUMMARY OF CHANGES.** This Program Statement incorporates the following changes:

- References to the Washington v. Reno settlement agreement have been deleted;
- The provision allowing a special extended time frame of 120 days for inmates to file Administrative Remedies related to the telephone charges or credits has been deleted;
- The number of times inmates are allowed to submit proposed changes to their telephone list has been changed from three times per month to once per calendar month; and,
- The requirement that staff forward copies of Institution Supplements to the Central Office, Office of the General Counsel, Litigation Branch has been deleted.
- Adds guidance for inmate use of non-ITS telephones.
- Removes the language requiring Unit staff to approve inmates telephone number request form.
- Provides guidance for inmates administering their own phone lists via TRULINCS.

3. **PROGRAM OBJECTIVES.** The expected results of this program are:

a. All inmates will be afforded the opportunity to maintain family and community contact via the telephone consistent with institution and community safety;

b. Inmates will be responsible for the expense of telephone use; and,

c. All institutions will establish monitoring procedures to preserve the institution's security, orderly management and safety of the community.

4. **DIRECTIVES AFFECTED**

a. **Directive Rescinded**

P5264.07 Telephone Regulations for Inmates (1/31/02)

b. **Directives Referenced**

P1315.07 Inmate Legal Activities (11/5/99)
P1330.16 Administrative Remedy Program (12/31/07)
P1480.05 News Media Contacts (9/21/00)
P4500.05 Trust Fund/Deposit Fund Manual (1/22/07)
P5100.08 Security Designation and Custody Classification Manual (9/12/06)
P5265.11 Correspondence (7/9/99)
P5267.08 Visiting Regulations (5/11/06)
P5270.07 Inmate Discipline and Special Housing Units (12/29/87)
P5360.09 Religious Beliefs and Practices (12/31/04)
P5380.08 Inmate Financial Responsibility Program (8/15/05)
P7331.04 Pretrial Inmates (1/31/03)

c. Rules cited and/or referenced in this Program Statement are contained in 28 CFR part 540, subparts A-B, D, E, and I; 28 CFR part 541, subparts A-B; 28 CFR part 542, subpart B; 28 CFR part 543, subpart B, 28 CFR part 545, subpart B, 28 CFR part 548, and 28 CFR part 551, subpart J.

5. **STANDARDS REFERENCED**

a. American Correctional Association 4th Edition Standards for Adult Correctional Institutions: 4-4497, 4-4271, 4-4272, and 4-4273

b. American Correctional Association 4th Edition Standards for Adult Local Detention Facilities: 4-ALDF-6A-02, 4-ALDF-6A-05, 4-ALDF-2A-65, 4-ALDF-2A-66, 4-ALDF-5B-11, and 4-ALDF-5B-12

c. American Correctional Association 2nd Edition Standards for the Administration of Correctional Agencies: 2-CO-5D-01

6. **INSTITUTION SUPPLEMENT.** A local Institution Supplement is required and must include the following information:

a. The maximum length of telephone calls, ordinarily 15 minutes;

b. The minimum time frames between completed calls and the maximum number of incomplete call attempts per day;

c. Telephone access procedures for inmates on "days off" or "evening shift," workers;

d. Establish procedures for those inmates who exhaust the 300 minutes per calendar month limitation to receive additional minutes for good cause;

e. Establish procedures when a staff assisted call may be made for good cause, including procedures for Pretrial and Holdover inmates.

The institution will involve the Regional Correctional Programs Administrator in developing the Institution Supplement.

7. **PRETRIAL, HOLDOVER, AND/OR DETAINEE PROCEDURES.** The procedures contained in this Program Statement apply only to institutions where individual Phone Access Codes (PAC) are utilized.

a. **Pretrial Inmates.** The Public Safety Factor (PSF) Serious Telephone Abuse applies to sentenced inmates and therefore, does not apply to pretrial inmates. However, if institution staff receive information about a pretrial inmate that may jeopardize the security and safety of the institution or community, staff will follow the procedures outlined in Section 13 of this Program Statement.

b. **Holdover Inmates.** Inmates with the PSF Serious Telephone Abuse will not be permitted access to the Inmate Telephone System (ITS), except as provided in § 540.101(e) or § 540.105©.

c. **Detainee Inmates.** A detainee of the Immigration and Customs Enforcement (ICE), denoted by the Admission/Release Status (ARS) code of A-INS, who has completed a federal sentence, may have a PSF of Serious Telephone Abuse. The detainee will not be permitted access to ITS, except as provided in § 540.101(e) or § 540.105(c). If institution staff receive information about an immigration detainee that may jeopardize the security and safety of the institution or community, staff will follow the procedures outlined in Section 13 of this Program Statement.

8. **PROCEDURES.** The Bureau's Inmate Telephone System is a calling system that is available in all institutions operated by the BOP.

To ensure the safety and security of the institution and community, inmates must place all personal telephone calls through the ITS and must not circumvent it via call forwarding, including automatic electronic forwarding or any similar telephone function. Additionally toll-free or credit card calls are not authorized, examples include telephone calls to 1-800, 1-888, 1-877, 1-866, 1-900, 1-976, or to credit card access numbers.

a. **Warden's Authority.**

b. Except as provided in this rule, the Warden shall permit an inmate who has not been restricted from telephone use as the result of a specific institutional disciplinary sanction to make at least one telephone call each month.

Wardens are responsible for implementing and maintaining an inmate telephone program within their institution. In establishing an institution telephone program, Wardens should consider such variables as the size and complexity of the institution. The Warden has the authority to restrict or suspend temporarily an inmate's regular telephone privilege when there is reasonable suspicion that the inmate has acted in a way that would indicate a threat to the institution's good order or security. Wardens may restrict telephone privileges only in accordance with Section 13 of this Program Statement.

Reasonable suspicion exists when facts and circumstances indicate that the inmate is engaged in, or attempting to engage in, criminal or other prohibited behavior using the telephone. The Warden has the authority to restrict or suspend temporarily an inmate's regular telephone privilege when there is a reasonable suspicion that the inmate has acted in a way that threatens the safety, security, or good order of the institution, or the protection of the public. Reasonable suspicion may be based on reliable, confidential information gathered through intelligence that identifies the inmate in question. In determining reasonable suspicion, the available information should reasonably lead a person with correctional experience to suspect the inmate is engaged in criminal or other prohibited behavior using the telephone system.

b. **Telephone List Preparation and Submission.**

§ 540.101. Procedures.

a. Telephone List Preparation. An inmate telephone call shall ordinarily be made to a number identified on the inmate's official telephone list. This list ordinarily may contain up to 30 numbers. The Associate Warden may authorize the placement of additional numbers on an inmate's telephone list based on the inmate's individual situation, e.g., size of family.

(1) During the admission and orientation process, an inmate who chooses to have telephone privileges shall prepare a proposed telephone list. At the time of submission, the inmate shall acknowledge that, to the best of the inmate's knowledge, the person or persons on the list are agreeable to receiving the inmate's telephone call and that the proposed calls are to be made for a purpose allowable under Bureau policy or institution guidelines.

(2) Except as provided in paragraph (a)(3) of this section, telephone numbers requested by an inmate ordinarily will be placed on the inmate's telephone list. When an inmate requests the placement of numbers for persons other than for immediate family or those persons already approved for the inmate's visiting list, staff ordinarily will notify those persons in writing that their numbers have been placed on the inmate's telephone list. The notice advises the recipient that the recipient's number will be removed from the list if the recipient makes a written request to the institution, or upon the written request of the inmate, or as provided in paragraph (a)(3) of this section.

(3) The Associate Warden may deny placement of a telephone number on an inmate's telephone list if the Associate Warden determines that there is a threat to institution security or good order, or a threat to the public. Any disapproval must be documented in writing to both the inmate and the proposed recipient. As with concerns about any correctional issue, including any portion of these telephone regulations, an inmate may appeal the denial through the administrative remedy procedure (see 28 CFR part 542). The Associate Warden will notify the denied recipient that he or she may appeal the denial by writing to the Warden within 15 days of the receipt of the denial.

Inmates with access to TRULINCS workstations which provide access to telephone list updates shall generate and maintain their lists using TRULINCS. These inmates will not be required to submit a Telephone Number request form (BP-505). All other inmates shall follow the process below.

An inmate who wishes to have telephone privileges must submit a Telephone Number Request form (BP-505) to unit staff. Their telephone list ordinarily may contain up to 30 telephone numbers.

Inmates may submit telephone numbers for any person they choose, including numbers for courts, elected officials and members of the news media. Attorneys may be included on an inmate's telephone list with the understanding that such calls are subject to monitoring.

Unit staff shall sign the Telephone Number Request form verifying the identity of the inmate that has hand delivered the form to the staff member. Once an inmate submits a list, it will be processed within seven calendar days.

Once unit staff sign the BP-505, it must be forwarded to ITS staff in a secure manner and within the time frames established by this Program Statement. At no time will the BP-505 be returned to the inmate or handled by another inmate.

This time frame may be extended if the total number of changes is so large that unit staff or ITS staff cannot process them and still perform their normal duties.

c. **Telephone List Modifications.**

b. <u>Telephone List Update</u>. Each Warden shall establish procedures to allow an inmate the opportunity to submit telephone list changes on at least a quarterly basis.

An inmate may submit proposed changes to his or her telephone list once per calendar month, unless staff determine that the inmate has a demonstrated need for more prompt communication.

In determining if a more frequent change is to be permitted due to a demonstrated need for prompt communication, staff must rely on their professional judgment and evaluate each request on a case-by-case basis.

Placing additional numbers (above 30) on an inmate's telephone list is within the Associate Warden's discretion. While 30 numbers should meet the need of most inmates, there may be isolated situations when additional numbers may be warranted.

For example, an inmate who has a large family may wish to place additional family members on the telephone list. Additional numbers may also be warranted for an inmate who wishes to place both work and home telephone numbers for his or her spouse and children.

c. Telephone Access Codes. An inmate may not possess another inmate's telephone access code number. An inmate may not give his or her telephone access code number to another inmate, and is to report a compromised telephone access code number immediately to unit staff.

d. **Call Blocking.** The Associate Warden has authority to block a number on an inmate account in a case-by-case determination. In such cases, the Associate Warden or designee must notify the inmate of an administrative block, ordinarily within five calendar days following the denial or removal of the number.

For security reasons, the Associate Warden also has the authority to block telephone numbers from being called by all inmates at their institution. Examples of numbers blocked institution wide include, but are not limited to gambling lines, etc.

Requests for BOP-wide blocking of telephone numbers shall be approved by the Chief, Intelligence Section or his/her designee.

Telephone numbers for Victims and Witnesses (as defined in 28 C.F.R. § 151-151 a. & b.) that have requested notification regarding an inmate at a Bureau facility will be blocked at the facility where the inmate is housed.

e. **Call Blocking by Recipient.** In ITS, the call recipient has the capability through his or her home telephone to deny and/or block further telephone calls from the inmate. A voice prompt will direct the called party through the process. This capability is available for direct-dial and collect calls from an inmate.

Once the recipient blocks a telephone number, the recipient can unblock the number only when he or she sends a written request for reinstatement. To ensure the called party's identity, the request for reinstatement must include a copy of a recent telephone bill. Trust Fund staff will process this request expeditiously.

In the event that staff receive a telephonic request from a call recipient to have his/her telephone number blocked from an inmate's telephone list, unit staff may request that the ITS

technician place a temporary suspension, not to exceed 20 calendar days, on an inmate calling that specific telephone number. Unit staff should take reasonable steps to verify the identity of the person making the request (e.g., by calling the number to be blocked). The call recipient should be informed that the blocking of the number is temporary, and that he or she must submit a prompt written request to make it permanent.

Copies of written documentation, blocking or unblocking a telephone number (at the recipient's request or the Associate Warden's discretion) must be forwarded to Trust Fund staff in the Financial Management office.

f. **Limitations on Inmate Telephone Calls.**

d. <u>Placement and Duration of Telephone Call</u>. The placement and duration of any telephone call is subject to availability of inmate funds. Ordinarily, an inmate who has sufficient funds is allowed at least three minutes for a telephone call. The Warden may limit the maximum length of telephone calling based on the situation at that institution (e.g., institution population or usage demand).

e. <u>Exception</u>. The Warden may allow the placement of collect calls for good cause. Examples of good cause include, but are not limited to, inmates who are new arrivals to the institution, including new commitments and transfers; inmates confined at Metropolitan Correctional Centers, Metropolitan Detention Centers, or Federal Detention Centers; pretrial inmates; inmates in holdover status; inmates who are without funds (see § 540.105(b)); and in cases of family emergencies.

The Warden will establish the maximum length of telephone calls, ordinarily 15 minutes. A warning tone ordinarily will be provided approximately one minute before the call is disconnected. This applies to both debit and collect telephone calls. The Warden determines the interval waiting period between completed telephone calls.

Inmates with ITS accounts are limited to 300 minutes per calendar month. This applies to all inmates with an ITS account in Bureau institutions, and may be used for any combination of collect or direct-dial calls at the inmate's discretion. Ordinarily, the inmates will be allowed an extra 100 minutes per month in November and December.

Inmates who exhaust their 300 minute limitation may be provided additional minutes, at the Warden's discretion, for good cause.

The 300 minutes per calendar month limitation does not apply to an inmate's ability to place unmonitored legal telephone calls.

g. **Hours of Telephone Operation.** The hours of telephone operation begin at 6:00 AM and end no later than 11:30 PM. Inmate telephones will not be available from at least 11:30 PM to 6:00 AM. Inmate access to telephones will normally be limited during the following times, Monday through Friday, not including holidays:

7:30 am until 10:30 am; and,
12:30 pm until after 4:00 pm count.

Inmates are expected to be at their work assignments and must not use the telephone during their work hours. For inmates who work varied work shifts, at local discretion, institutions may leave one telephone per unit available for inmates on "days off," or "evening shift" such as food service workers, UNICOR workers, etc. Staff are encouraged to take disciplinary action if an inmate leaves his or her work assignment to place a telephone call(s) without the appropriate institution staff member's prior approval.

These restrictions should not be imposed in Pretrial/Holdover institutions or Pretrial/Holdover Units where inmates are not required to work and generally have more need for telephone access during the day to prepare for trial.

h. **Complaints.** As with any complaint regarding any correctional issue, an inmate may use procedures outlined in the Program Statement on the Administrative Remedy Program to resolve disputes concerning their telephone privileges, e.g. lists, access, accounts, and services.

9. **MONITORING OF INMATE TELEPHONE CALLS.**

§ 540.102 Monitoring of Inmate Telephone Calls.

The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public. The Warden must provide notice to the inmate of the potential for monitoring. Staff may not monitor an inmate's properly placed call to an attorney. The Warden shall notify an inmate of the proper procedures to have an unmonitored telephone conversation with an attorney.

As part of the admission and orientation process, inmates will be advised of the procedures for placing monitored and unmonitored telephone calls.

The notification to inmates will be documented on the Acknowledgment of Inmate form (BP-408) and then filed in the inmate Central File.

In addition, a notice will be placed, in both Spanish and English, at all monitored telephone locations within the institution advising the user that all conversations from that telephone are subject to monitoring and that using the telephone constitutes consent to this monitoring. A notice will advise inmates to contact their unit team to request an unmonitored attorney telephone call. The SIS must ensure that the notice(s) is placed at all monitored telephone locations within the institution.

Requests for information (e.g., subpoenas) on monitored calls should be processed in accordance with the Program Statement Recorded Inmate Telephone Conversations, Requests for Production. The Bureau does not allow inmates to send or receive facsimile communications.

10. **INMATE TELEPHONE CALLS TO ATTORNEYS.**

§ 540.103 Inmate Telephone Calls to Attorneys.

The Warden may not apply frequency limitations on inmate telephone calls to attorneys when the inmate demonstrates that communication with attorneys by correspondence, visiting, or normal telephone use is not adequate.

The Bureau provides each inmate with several methods to maintain confidential contact with his or her attorney. For example:

- inmate-attorney correspondence is covered under the special mail provisions;
- private inmate-attorney visits are provided; and,
- the inmate is afforded the opportunity to place an occasional unmonitored call to his or her attorney.

Based on these provisions, frequent confidential inmate-attorney calls should be allowed only when an inmate demonstrates that communication with his or her attorney by other means is not adequate. For example, when the inmate or the inmate's attorney can demonstrate an imminent court deadline (see the Program Statements Inmate Correspondence or Inmate Legal Activities).

Staff are to make reasonable efforts to verify unmonitored calls placed on an inmate's behalf are to an attorney's office. Inmates are responsible for the expense of unmonitored attorney telephone calls. When possible, it is preferred that inmates place unmonitored legal calls collect. Third-party or three-way calls are not authorized.

11. **INMATE USE OF NON-ITS TELEPHONES (Non-attorney calls).** On rare occasion, during times of crisis, staff designated by the Warden may find the need to allow inmates to place telephone calls outside the Inmate Telephone System. These calls should be placed on telephones that are set to record the conversation and shall follow the guidelines detailed below.

a. **Additional monitored non-ITS telephones must be operated as follows:**

(1) Inmates using the telephones must have read and signed the Acknowledgment of Inmate form (BP-408) indicating their understanding that telephone calls on that device are subject to monitoring;

(2) A notice must be placed, in both English and Spanish, above or near the telephone indicating that all calls are subject to monitoring, and that using the telephone constitutes consent to such monitoring. The notice should also indicate that the telephone is for inmate use only. Staff are not permitted to use the telephone because staff telephone calls may not be monitored;

(3) The telephone must be placed in a secure area (e.g., a locked office);

(4) The telephone must be set to record telephone calls;

(5) Staff coordinating the call shall notify the SIS staff in writing via email that telephone call was placed and shall include the following; and

- The date/time, telephone number, and name of the person being called
- The name and register number of the inmate placing the call
- A brief reason for the call.

(6) SIS staff shall be responsible for inputting this data into the recording system to ensure the call recording can identify the inmate on the telephone. This data must be entered within seven calendar days.

b. **Institutional Authorization Procedures for Additional Monitored Non-ITS Telephones (Non-ITS)**

PS 5360, expressly provides for an additional monitored inmate telephone located in the Chapel area. As such, the procedures in this document for authorizing that single telephone do not apply. These procedures apply, rather, to additional monitored inmate telephones beyond the single additional telephone permitted by the religious policy (e.g., telephones located in the Lieutenant's office, the Unit Team office).

The following procedures must be followed when requesting additional monitored inmate telephones:

(1) The Warden shall send a request to the Regional Director for consideration and identify the extraordinary reasons justifying the need for additional telephones; and

(2) If approved by the Regional Director, written notification of approval shall be provided to the Warden and the Administration Division's Trust Fund Branch (TFB) staff for processing.

12. **RESPONSIBILITY FOR INMATE MISUSE OF TELEPHONES.**

§ 540.104 Responsibility for inmate misuse of telephones.

The inmate is responsible for any misuse of the telephone. The Warden shall refer incidents of unlawful inmate telephone use to law enforcement authorities. The Warden shall advise an inmate that violation of the institution's telephone regulations may result in institutional disciplinary action (See part 541, subpart B)

Inmates violating this policy may be subject to disciplinary action pursuant to 28 CFR part 541, subpart B, and the policy on Inmate Discipline.

§540.105 Expenses of Inmate Telephone Use.

a. An inmate is responsible for the expenses of inmate telephone use. Such expenses may include a fee for replacement of an inmate's telephone access code that is used in an institution which has implemented debit billing for inmate calls. Each inmate is responsible for staying aware of his or her account balance through the automated process provided by the system. Third party billing and electronic transfer of a call to a third party are prohibited.

b. The Warden shall provide at least one collect call each month for an inmate who is without funds. An inmate without funds is defined as an inmate who has not had a trust fund account balance of $6.00 for the past 30 days. The Warden may increase the number of collect calls based upon local institution conditions (e.g., institution population, staff resources, and usage demand). To prevent abuses of this provision (e.g., inmate shows a pattern of depleting his or her commissary funds prior to placing collect calls), the Warden may impose restrictions on the provisions of this paragraph b.

**c. The Warden may direct the government to bear the expense of inmate telephone use or allow a call to be made collect under
compelling circumstances such as when an inmate has lost contact with his family or has a family emergency.**

13. **TELEPHONE RESTRICTIONS IMPOSED BY THE WARDEN.** Inmates may be subject to telephone restrictions imposed by the Warden to protect the safety, security, and good order of the institution, as well as to protect the public. Telephone restrictions imposed under the authority of this section are separate and apart from telephone restrictions imposed by the UDC or DHO following formal and completed inmate discipline proceedings.

Inmates with telephone restrictions are still entitled to place at least one telephone call per month, unless also under a sanction of telephone restriction the UDC or DHO imposed.

a. **Authorized Circumstances.** Inmates may be subject to telephone restrictions under this section in the following two circumstances:

(1) Public Safety Factor (PSF). An inmate whose current offense, prior history, or threat characteristics indicate a propensity to abuse telephone privileges will be assigned the PSF - Serious Telephone Abuse. If an inmate is assigned the PSF for Serious Telephone Abuse (see the Security Designation and Custody Classification Manual), a telephone restriction is authorized. Telephone restrictions imposed under these circumstances are discretionary and necessary to ensure the institution's safety, security, good order and/or to protect the public. When deemed necessary, the inmate's Unit Manager will ordinarily recommend this type of restriction to the Warden for final decision making.

Upon his/her initial commitment or redesignation, an inmate with a PSF for Serious Telephone Abuse will not be authorized use of the ITS until classified by the unit team. Inmates identified at their initial classification as requiring telephone restrictions will not be permitted access to the ITS until after the final review by the Warden.

(2) Pending Investigation or Disciplinary Action for Possible Telephone Abuse. If an inmate is pending an investigation or disciplinary action for possible telephone abuse, a partial or total telephone restriction is authorized. Telephone restrictions imposed under these circumstances are discretionary and necessary to ensure the institution's safety, security, or good order, and/or to protect the public. When deemed necessary, the Special Investigative Supervisor's office will ordinarily recommend this type of restriction. Any telephone restriction recommended by the SIS office may only be imposed with the Warden's approval, in accordance with the procedures outlined in this section.

b. **Procedures for Imposing or Removing Telephone Restrictions.** The following procedures must be followed when imposing, removing, or renewing, a telephone restriction under this section:

(1) The appropriate staff member recommends a telephone restriction to the Warden by completing the Request for Telephone Restriction form (BP-740.052). The recommending staff member should describe briefly the reason for recommending a telephone restriction, as well as the extent of the proposed restriction.

For example, staff may recommend reducing an inmate's telephone use to 100 minutes per month rather than a total restriction, if such a restriction would sufficiently protect the safety, security, or good order of the institution, or protect the public;

(2) The Warden will review the recommendation and either approve, modify, or deny the restriction. If the Warden approves a restriction, such decision must be based on the conclusion that it is necessary to protect the institution's safety, security, or good order, or to protect the public;

(3) If the Warden approves a telephone restriction, a copy of the completed form should be provided to the inmate, the Trust Fund Office, and placed in Section 3 of the inmate's Central File;

(4) Telephone restrictions imposed by the Warden due to a PSF for Serious Telephone Abuse must be reviewed at least every six months, ordinarily in conjunction with the inmate's Program Review, to determine if the restriction should continue or be modified. A decision to continue a current telephone restriction imposed under this section requires no further action, but must be documented in the Program Review Report.

Any proposed change to a current telephone restriction must be made according to these procedures, and requires the Warden's approval. If appropriate, an inmate's telephone privileges can be gradually restored, based on demonstrated responsibility documented by the inmate's Unit Team or other staff;

(5) Telephone restrictions imposed pending an investigation or pending disciplinary action for possible telephone abuse are limited to a period of 30 days. If an additional 30 day period is required to complete either the investigation or disciplinary process, the Warden must re-authorize the restriction using these procedures. Specifically, the Warden's approval must be obtained on another Request for Telephone Restriction form (BP-740.052). Unless re-authorized in this manner, Trust Fund staff will obtain the Warden's approval for reinstatement or continued restrictions every 30 days.

Each subsequent restriction period is limited to 30 days. Staff should make every effort to complete investigations and disciplinary proceedings for possible telephone abuse within the first 30 day period of the telephone restriction;

(6) Inmates with telephone restrictions under this section are still entitled to place at least one telephone call per month, unless also under a sanction of telephone restriction the UDC or DHO imposed following formal, and completed, inmate discipline proceedings. Ordinarily, such telephone calls are placed through the inmate telephone system, not by staff; and,

(7) Inmates may challenge telephone restrictions imposed under this section through the Administrative Remedy Program.

/s/
Harley G. Lappin
Director

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MALIA ARCIERO, ET AL. ,	)	CIVIL 14-00506 LEK-BMK
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
ERIC HOLDER, JR., ET AL.,	)	
	)	
Defendants.	)	
_____	)	

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT

On May 8, 2015, Defendants Eric Holder, Jr., in his 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 Hawai`i (collectively "Defendants") filed Defendants' Motion for Judgment on the Pleadings, or in the Alternative, Summary Judgment ("Motion"). [Dkt. no. 20.] On August 28, 2015, Plaintiffs Malia Arciero,[1] Alan Mapuatuli, Gilbert Medina, and Gary Victor Dubin (collectively "Plaintiffs") filed a memorandum in opposition. [Dkt. no. 38.] Defendants filed a reply on September 3, 2015. [Dkt. no. 40.] This matter

[1] On August 13, 2015, this Court approved the parties' Stipulation to Dismiss Plaintiff Malia Arciero as a Party to this Action, dismissing Plaintiff Arciero's claims. [Dkt. no. 25.]

came on for hearing on September 15, 2015. After careful consideration of the Motion, supporting and opposing memoranda, arguments of counsel, and relevant legal authority, Defendants' Motion is HEREBY GRANTED for the reasons set forth below.

BACKGROUND

In 2005, the Bureau of Prisons ("BOP") started a project called Trust Fund Limited Inmate Computer System ("TRULINCS"), that allows inmates to communicate with the public via email. [Motion, Decl. of Kathleen D. Jenkins, Chief, Trust Fund Branch ("Jenkins Decl.") at ¶¶ 2-3.[2]] Emails from TRULINCS can only be retrieved through a program called "CorrLinks." [Id. at ¶ 2.] Since 2010, every time an inmate uses TRULINCS, he or she is met with the "TRULINCS Inmate Acknowledgment" page ("Inmate Acknowledgment"). [Id. at ¶ 6, Exh. A.] The first two paragraphs of the Inmate Acknowledgment inform the user, in relevant part:

> Warning: This computer system is the property of the United States Department of Justice. The Department may monitor any activity on the system and search and retrieve any information stored within the system. By accessing and using this computer, I am consenting to such monitoring and information retrieval for

[2] Kathleen D. Jenkins is the Chief of the Trust Fund Branch of the Administration Division of BOP. The Trust Fund Branch "implements and manages" TRULINCS. [Jenkins Decl. at ¶ 1.]

> law enforcement and other purposes. I have no expectation of privacy as to any communication on or information stored within the system.
>
> Responsibility: I must abide by all terms prescribed in Bureau of Prisons' policy regarding my use of TRULINCS and electronic messaging systems, which I acknowledge having read and understood. I understand and consent to having my electronic messages and system activity monitored, read, and retained by authorized personnel. I understand and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privileged communications, and that I have alternative methods of conducting privileged legal communication. . . .

[Id., Exh. A.] An inmate must click "I Accept" to get past this screen and gain access to TRULINCS. [Id. at ¶ 9.]

Similar to TRULINCS, CorrLinks requires users to agree to Terms and Conditions of Service ("Terms and Conditions"). [Id. at ¶ 10, Exh. B.] The Terms and Conditions state that the program "is a way for family and friends to communicate with their loved ones incarcerated in prison." [Id., Exh. B. at 1.] In a section titled "Monitoring," states:

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

[Id. at 2.]

Inmates may only correspond with approved contacts. [Jenkins Decl. at ¶ 11.] Once approved, contacts are notified that, "[b]y approving electronic correspondence with federal prisoners, you consent to have the Bureau of Prisons staff monitor the content of all electronic messages exchanged." [Id. at ¶¶ 13-14, Exh. C.] Finally, every time an approved contact reads an email in CorrLinks, text below the inmate's message reminds the reader that, "[b]y utilizing CorrLinks to send or receive messages you consent to have Bureau of Prisons staff monitor the informational content of all electronic messages exchanged and to comply with all Program rules and procedures." [Id. at ¶ 15, Exh. D.]

The Complaint alleges that Plaintiff Dubin discovered the "eavesdropping" a few weeks before filing the Complaint, and Plaintiffs Mapuatuli and Medina were never aware of BOP's policy before Plaintiff Dubin brought it to their attention. [Verified Complaint for Injunctive and Other Relief Pursuant to the Sixth

Amendment to the United States Constitution ("Complaint"), filed 11/10/14 (dkt. no. 1), at ¶¶ 23-24.] Plaintiffs argue that BOP's electronic correspondence policies violate the Sixth Amendment of the United States Constitution, and seek "a temporary restraining order, a preliminary injunction, and a permanent injunction prohibiting" Defendants from "reading and reviewing" their electronic correspondence ("Count I"). [Complaint at ¶¶ 31-31b.] Plaintiffs also assert that the email monitoring policy amounts to prosecutorial misconduct and a denial of effective assistance of counsel. [Id. at ¶ 34.] They seek the dismissal of Plaintiffs Mapuatuli and Medina's criminal cases, as well as the dismissal of all criminal cases against Federal Detention Center ("FDC") inmates who have communicated with their counsel via email ("Count II"). [Id.] Plaintiffs argue this dismissal should be automatic as "a matter of right" or, alternatively, "a matter of discretion," with the court issuing an order to show cause requiring Defendants to prove that no "invasion of the attorney-client privilege" occurred. [Id. at ¶¶ 34a-34b.]

Plaintiffs argue that any discretionary dismissal should apply to FDC inmates whose email correspondence with their attorneys was "read and reviewed" by Defendants, and who have already been convicted. [Id. at ¶ 34c.] Plaintiffs seek attorneys' fees and court costs related to both counts. [Id. at ¶¶ 32, 35.]

Defendants argue that they are entitled to judgment on the pleadings, or in the alternative, summary judgment because: (a) "Plaintiffs' claims are barred by Heck v. Humphrey," 512 U.S. 477 (1994); (b) Plaintiffs' Sixth Amendment rights were not violated; (c) Plaintiffs Mapuatuli and Medina did not exhaust their administrative remedies as required by the Prison Litigation Reform Act ("PLRA"); and (d) Plaintiff Dubin does not have "standing to bring a Sixth Amendment claim on his own behalf." [Mem. in Supp. of Motion at 2.]

DISCUSSION

I. Heck v. Humphrey

Plaintiffs' claims are barred by Heck v. Humphrey, as "a judgment in favor of [Plaintiffs] would necessarily imply the invalidity of [their] conviction or sentence." See 512 U.S. at 487. Plaintiffs argue that Heck does not apply in the instant case because they are federal inmates, they seek only declaratory and injunctive relief, and they are challenging a violation of the Sixth Amendment. [Mem. in Opp. at 14-15.] Each of these arguments fail as a matter of law.

On June 9, 2015, Plaintiff Mapuatuli was found guilty in this district of three counts related to drug trafficking. [United States v. Mapuatuli, CR 12-01301 DKW, Verdict Form as to Counts 1-3 of the Indictment, filed 1/30/15 (dkt. no. 274).] Plaintiff Mapuatuli's case is currently on appeal. See id.,

Notice of Appeal, filed 6/15/15 (dkt. no. 298). The trial in Plaintiff Medina's criminal case is scheduled to begin on November 3, 2015. [United States v. Medina, CR 13-01039 HG, Minutes: Continued Hearing on Def.'s Motion to Suppress (ECF No. 61), filed 4/13/15 (dkt. no. 100) at 2.]

In Heck v. Humphrey, the United States Supreme Court held that:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has **not** been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

512 U.S. at 486-87 (emphasis in Heck) (footnote omitted). In Heck, the Supreme Court intended to "deny the existence of a cause of action" where the case would undermine a valid conviction. Id. at 489.

The Supreme Court subsequently held that Heck applies equally to monetary judgment, as well as declaratory and

injunctive relief:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation) – no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) – **if** success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (emphasis in Wilkinson). The Ninth Circuit concluded that Dotson "erases any doubt that Heck applies both to actions for money damages and to those, like this one, for injunctive relief." Osborne v. Dist. Attorney's Office for Third Judicial Dist., 423 F.3d 1050, 1053 (9th Cir. 2005).

The instant case is brought pursuant to neither § 1983 nor its counterpart for federal officials, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiffs seek injunctive relief under for a constitutional violation. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 498 (1954). Nevertheless, the Heck bar clearly applies to allegations of violations of the Sixth Amendment. See, e.g., Valdez v. Rosenbaum, 302 F.3d 1039, 1043, 1049 (9th Cir. 2002) (finding that, where a federal detainee challenged the requirement that he obtain permission to call counsel in a state pretrial facility in Alaska (as the result of an arrangement between the federal officials and the state) as a violation of the Sixth Amendment, his claim was "not cognizable under Heck v.

Humphrey" because it "would necessarily imply the invalidity of Valdez's subsequent conviction" (some citations omitted) (citing Heck, 512 U.S. at 486-87, 114 S. Ct. 2364)); see also Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9th Cir. 1995) ("Because Trimble's Fifth and Sixth Amendment allegations necessarily imply the invalidity of his conviction and because he did not show that his conviction has been invalidated, Trimble's Fifth and Sixth Amendment claims have not accrued at this time." (citation omitted)). Similarly, this Court has found that Heck bars a constitutional challenge to restrictions placed on a pretrial inmate's phone calls with his attorney "because a successful ruling on [the] claim would necessarily imply the invalidity of Plaintiff's ongoing criminal proceedings." Adkins v. Shinn, Civil No. 14-00156 LEK/KSC, 2014 WL 2738531, at *7 (D. Hawai`i June 16, 2014) (citation omitted).

At the hearing, Plaintiffs represented that they were not seeking to reverse a criminal conviction, but this is contradicted by their own Complaint: "Arciero, Mapuatuli, and Medina and all criminal defendants being federally prosecuted in this District at the time of the filing of this Complaint . . . are entitled to have their criminal cases hereby dismissed based on prosecutorial misconduct." [Complaint at ¶ 34.] This Court FINDS that there are no genuine issues of material fact and CONCLUDES that Defendants are entitled to judgment as a matter of

law as to both counts because the claims are barred by Heck. See Fed. R. Civ. P. 56(a).

Although these rulings are sufficient grounds to grant Defendants' Motion, for the sake of completeness, this Court will address the other issues raised in the Motion.

II. Attorney-Client Privilege

This Court also concludes that Plaintiffs' claims fail because they have waived the attorney-client privilege by choosing to use TRULINCS and CorrLinks. Information is covered by the attorney-client privilege if it meets an eight-part test:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) (citations omitted). "[T]he party asserting attorney-client privilege has the burden of establishing the relationship and the privileged nature of the communication." United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997) (citation omitted).

This Court takes seriously the fact that, in criminal cases, the ability of a defendant to "communicate candidly and confidentially with his lawyer is essential to his defense." Nordstrom v. Ryan, 762 F.3d 903, 910 (9th Cir. 2014). Plaintiff

Dubin explains that "when attorney-client matters were included in my emails I put various 'attorney-client privileged and protected confidential communication' notices on the subject line." [Mem. in Opp., Decl. Gary Victor Dubin ("Dubin Decl.") at ¶ 7.] Furthermore, Plaintiffs argue that the TRULINCS Inmate Acknowledgment[3] is "inconspicious, 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." [Id. at ¶ 25.] Similarly, Plaintiffs contend that the CorrLinks Terms and Conditions are "of a general nature, [are] even less conspicuous, [do] not define 'Agency,' nowhere mention[] the attorney-client privilege, and [are] not repeated when an attorney subsequently accesses the system." [Id. at ¶ 26.]

The record does not support these characterizations. As noted above and provided to this Court by Defendants, the Inmate Acknowledgment: consists of only three sections; warns inmates in the first paragraph that their communications are being monitored; informs the inmate that even correspondence with his or her attorney will not be treated as privileged; and must

[3] Plaintiffs attribute this notice to the "prison email system known as CorrLinks being used at the Honolulu FDC." [Complaint at ¶ 25.] It is clear to the Court that Plaintiffs are referencing the Inmate Acknowledgment from TRULINCS. Compare id., with Jenkins Decl., Exh. A.

be accepted by an inmate **each time** he or she uses TRULINCS.[4] [Jenkins Decl., Exh. A.] Furthermore, CorrLinks users receive a letter when they are added to an inmate's contact list, and the letter informs the recipient that any communication with an inmate will be monitored; [id., Exh. C;] the two-page Terms and Conditions include a section titled "Monitoring"; [id., Exh. B; Dubin Decl., Exh. 7;] and each and every time a person gets an email from an inmate, a disclaimer at the bottom of the screen reminds that person that they have consented to BOP monitoring [Jenkins Decl., Exh. D]. Contrary to Plaintiffs' assertion, see Complaint at ¶ 26, the term "Agency" is defined as "correctional agencies" in the second paragraph of the Terms and Conditions. [Jenkins Decl., Exh. B.] Plaintiff Dubin, a licensed attorney in the State of Hawai`i, does not dispute that he agreed to these Terms and Conditions and used this interface when reading mail from his clients at FDC.

It is worth noting that there are other available forms of confidential communication at FDC. BOP's confidential mail

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[4] Plaintiff Medina asserts that he "did not waive any rights in order to use the Corrlinks [sic] system." [Submission of Original Signed Decl. of Gilbert Medina ("Medina Decl."), filed 9/14/15 (dkt. no. 41), at ¶ 5.] It is clear to the Court that Plaintiff Medina is referencing TRULINCS, as he is an FDC inmate. See id. at ¶ 3. This declaration directly contradicts Plantiffs' Complaint, see Complaint at ¶ 25, and memorandum in opposition. See Mem. in Opp. at 12, 18. Furthermore, former Plaintiff Arciero sent Plaintiff Dubin a handwritten copy of the Inmate Acknowledgment. [Id., Exh. 6.]

system allows inmates to "place appropriately marked outgoing special mail in the appropriate depository," and the mail "will only be opened for cause." [Motion, Decl. of Melissa Harris Arnold, Case Management Coordinator ("Arnold Decl.") at ¶ 3.[5]] "[P]roperly marked special mail," such as confidential mail from an inmate's attorney, "will be logged and hand delivered to the inmate by Unit Team staff, who will then open the item in the presence of the inmate and inspect for contraband, but will not read the content of the communication." [Id.] Inmates may also "send a request to their unit team" for a confidential phone conversation, which will not be "auditorily monitored by BOP." [Id. at ¶ 4.] Inmates represented by a Federal Public Defender "have an unmonitored phone in the housing unit." [Id.] Finally, inmates may have confidential, in-person meetings with their attorneys. [Id. at ¶ 5.] Attorneys may meet with their clients seven days a week from 6:30 a.m. to 8:00 p.m, and do not need an appointment. [Id.]

The cases that Plaintiffs cite to support their positions are unconvincing. In the Complaint and at the hearing, Plaintiffs repeatedly referred to United States v. Ahmed, 14-CR-00277 (DLI), a criminal case in the Eastern District of New York where the district judge ruled that United States Attorneys in

[5] Melissa Harris Arnold is the Case Management Coordinator and the Administrative Remedy Coordinator at FDC. [Arnold Decl. at ¶ 1.]

the case could not read emails between defense counsel the and defendant. [Complaint at ¶¶ 19-21; Dubin Decl., Exhs. 2-5.[6]] However, as Plaintiffs themselves point out, another district judge in the Eastern District of New York has stated:

> While the Court may not agree with the position of the United States Attorney's Office to review non-privileged email communications between inmates and their attorneys communicated over a monitored system, the Court has no legal basis to find that the fundamental right of access to effective assistance of counsel established in Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), is compromised by the review of communication that both Defendant and his counsel knew to be monitored and thus not privileged.

United States v. Walia, No. 14-CR-213 (MKB), 2014 WL 3734522, at *16 (E.D.N.Y. July 25, 2014). The only other court to rule on the validity of BOP's monitoring of electronic correspondence reached the same conclusion. See F.T.C. v. Nat'l Urological Grp., Inc., Civil Action No. 1:04-CV-3294-CAP, 2012 WL 171621, at *1 (N.D. Ga. Jan. 20, 2012) ("[The defendant's] constitutional rights were not violated because he consented to the monitoring and thus had no reasonable expectation of privacy.").

This Court shares many of the same concerns as Plaintiffs and the Eastern District of New York in Walia. Email is the primary and preferred method of communication in the legal profession, and has been for decades. Treating email attorney communications differently from attorney communications mailed

[6] Exhibits 2-5 are from Ahmed.

through the post "snail mail" makes no sense. It is a distinction without cause. That BOP cannot implement, or simply has not implemented, procedures to allow privileged attorney-client email communication is troubling, to say the least. This, however, does not change the fact that, here, Plaintiffs have waived the attorney-client privilege. This court FINDS that there are no genuine issues of material fact and CONCLUDES that Defendants are entitled to judgement as a matter of law as to both counts.

III. Exhaustion Under the PLRA

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prison confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e. In Woodford v. Ngo, where the Supreme Court held that the PLRA requires "proper exhaustion," it explained that the statute,

> [G]ives prisoners an effective incentive to make full use of the prison grievance process and accordingly provides prisons with a fair opportunity to correct their own errors. . . . Proper exhaustion reduces the quantity of prisoner suits because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court. Finally, proper exhaustion improves the quality of those prisoner suits that are eventually filed because proper exhaustion often results in the creation of an administrative record that is helpful to the court. When a grievance is filed shortly after the event giving

> rise to the grievance, witnesses can be identified and questioned while memories are still fresh, and evidence can be gathered and preserved.

548 U.S. 81, 93, 94-95 (2006) (footnote omitted).

This district court has observed:

> "The Prison Litigation Reform Act ['PLRA'] requires that a prisoner exhaust available administrative remedies before bringing a federal action concerning prison conditions." Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing 42 U.S.C. § 1997e(a)); Brown v. Valoff, 422 F.3d 926, 934 (9th Cir. 2005) (quoting Porter v. Nussle, 534 U.S. 516, 525 n.4, 122 S.Ct. 983, 152 L. Ed. 2d 12 (2002)). "'[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.'" Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002) (quoting Porter, 534 U.S. at 532). Exhaustion is mandatory, and "unexhausted claims cannot be brought in court." Jones v. Bock, 549 U.S. 199, 211, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002) (per curiam). Even if the prisoner seeks monetary or other relief that is unavailable through the grievance system in question, the prisoner must still exhaust all available administrative remedies. See Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 149 L. Ed. 2d 958 (2001).

Benitez v. United States, Civ. No. 13-00668 SOM/RLP, 2014 WL 2881452, at *1 (D. Hawai`i June 24, 2014) (alterations in Benitez). The definition of "prison conditions" in the PLRA has been "broadly construed":

> Our court and others have treated various prisoner claims as challenges to prison conditions requiring exhaustion, ranging from claims of harassment by prison officials, Bennett v. King, 293 F.3d 1096 (9th Cir. 2002), to complaints about

> the availability of Spanish language interpreters, Castano v. Neb. Dep't of Corr., 201 F.3d 1023 (8th Cir. 2000). See also Preiser v. Rodriguez, 411 U.S. 475, 498-99, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1983) (characterizing the confiscation of prisoner's legal materials as a "condition[] of . . . prison life"); Gibson v. Goord, 280 F.3d 221 (2d Cir. 2002) (requiring exhaustion for a challenge to accumulation of water in cell and exposure to second-hand smoke); Hartsfield v. Vidor, 199 F.3d 305 (6th Cir. 1999) (holding an allegation that prison officials violated the prisoner's equal protection rights by treating him more roughly than they treated a white inmate was one concerning a prison condition). In light of the broad interpretation of the term, we conclude that Roles' claim [- that the seizure of magazines in a private correctional facility violated the Constitution and Idaho law -] is one concerning a prison condition that is properly subject to § 1997(e)(a)'s exhaustion requirement.

Roles v. Maddox, 439 F.3d 1016, 1018 (9th Cir. 2006) (some alterations in Roles) (footnote omitted).

BOP has a detailed administrative appeal process through which inmates may express grievances. This process requires an inmate to seek "informal resolution of their concern through their unit team" before starting the formal, three-level process. [Arnold Decl. at ¶ 7.] If the parties cannot reach an informal resolution, the first level of the formal process requires an inmate to file a "Request for Administrative Remedy" form with their correctional facility. [Id.] If the inmate's request is denied, the second level requires an inmate to file a "Regional Administrative Remedy Appeal" with the relevant BOP Regional Office - in this case, the BOP Western Regional Office

in Stockton, California. [Id.] If the Regional Office denies the inmate's appeal, the third level requires the inmate to file a "Central Office Administrative Remedy Appeal" form with the Office of the General Counsel. [Id.] BOP logs all administrative grievances, including all appeals, in a program called SENTRY. [Id. at ¶ 9.] Defendants report that, according to SENTRY, Plaintiffs Mapuatuli and Medina have not filed any administrative grievances. [Id. at ¶¶ 11-12; Exhs. F, G (screenshots of the SENTRY database for Plaintiffs Mapuatuli and Medina, showing that Plaintiffs have not filed any administrative grievances).]

While Plaintiffs assert that "their claims go not to conditions of confinement [but] to an invasion of their attorney-client rights," [Mem. in Opp. at 20,] BOP's electronic communication policy is clearly a prison condition. Pursuant to the PLRA, Plaintiffs Mapuatuli and Medina must exhaust administrative remedies before bringing an action in federal court. It is undisputed that Plaintiffs Mapuatuli and Medina have not exhausted administrative remedies. This court FINDS that there are no genuine issues of material fact and CONCLUDES that Defendants are entitled to judgment as a matter of law as to both counts.

V. Plaintiff Dubin's Standing

Finally, this Court notes that Plaintiffs assert that BOP's electronic communication policies violate Plaintiff Dubin's attorney work product privilege. [Complaint at ¶ 28a.] In Hickman v. Taylor, the Supreme Court observed that, "it is essential that a lawyer work with a certain degree of privacy," that is "reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." 329 U.S. 495, 510-11 (1947). However,

> [T]he Supreme Court developed the work product doctrine to shield counsel's private memoranda from the liberal discovery permitted by the Federal Rules of Civil Procedure. The Court grounded the doctrine not in the Constitution, but on the assumption that the drafters of the Federal Rules did not seek to alter "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests." Hickman, 329 U.S. at 511.

Varghese v. Uribe, 736 F.3d 817, 826 (9th Cir. 2013) (some citations omitted). Thus, claims of attorney work product violations are not cognizable under the Sixth Amendment.

Plaintiff Dubin also lacks standing to challenge violations of his clients' Sixth Amendment rights. In Portman v. County of Santa Clara, a public defender was discharged and filed suit, alleging, *inter alia*, that the statute that made the Santa Clara County Public Defender an at-will position violated the

Sixth Amendment. 995 F.2d 898, 901 (9th Cir. 1993). The Ninth Circuit held that, "in order to have direct standing to claim that the statute violates the Sixth Amendment, Portman must show that the Sixth Amendment confers rights upon him directly." Id. at 902. The Ninth Circuit noted that "[n]o court . . . has ever held that the Sixth Amendment protects the rights of anyone other than criminal defendants." Id. (citations omitted). Plaintiff Dubin does not have standing, and Defendants are entitled to summary judgment on this issue.

CONCLUSION

In accordance with the foregoing, Defendants' Motion for Judgment on the Pleadings, or in the Alternative, Summary Judgment, filed May 8, 2015, is HEREBY GRANTED insofar as the Court GRANTS summary judgment in favor of Defendants as to Counts I and II. The portion of the Motion seeking judgment on the pleadings is HEREBY DENIED AS MOOT.

There being no remaining claims in this case, this Court DIRECTS the Clerk's Office to enter final judgment and close the case on **October 21, 2015**, unless Plaintiffs file a motion for reconsideration of this Order by **October 19, 2015**.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, September 30, 2015.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

MALIA ARCIERO, ET AL. VS. ERIC HOLDER, JR., ETC., ET AL; CIVIL 14-00506 LEK-BMK; ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT

Federal Detention Center
Honolulu, Hawaii 96820

Number: HON 4500.11TRLa
Date: October 14, 2015
Subject: Trust Fund Limited Inmate Computer System (TRULINCS)

Institution Supplement

1. **PURPOSE:** To establish local procedures and guidelines at the Federal Detention Center (FDC), Honolulu, Hawaii, for inmate access to the Trust Fund Limited Computer System.

2. **DIRECTIVES AFFECTED:**

   a. **Directives Rescinded:**

   HON 5265.13B Trust Fund Limited Inmate Computer System (TRULINCS) (5/14/14)

   b. **Directives Referenced:**

   PS 1237.13 Information Security Programs (3/31/06)

   PS 1315.07 Legal Activities, Inmate (11/5/99)

   PS 1330.18 Administrative Remedy Program (1/6/14)

   PS 4500.11 Trust Fund/Deposit Fund Manual (4/9/15)

   PS 5264.08 Inmate Telephone Regulations (1/24/08)

   PS 5265.14 Correspondence (4/5/11)

   PS 5267.08 Visiting Regulations (5/11/06)

   PS 5270.09 Inmate Discipline (7/8/11)

   PS 5270.10 Special Housing Units (7/29/11)

3. **RESPONSIBILITIES FOR FUNCTIONS:** The following staff offices are responsible for the following functions:

   a. Central Office Trust Fund Staff - Oversee TRULINCS

   b. Institution Trust Fund Supervisor - Administer and maintain the TRULINCS Program; provide TRULINCS overview to inmates during Admission and Orientation (A&O); supervise inmate workers assigned as TRULINCS tutors; and respond to inmate inquiries regarding the TRULINCS Program.

   c. Supervisor of Education - Provides training to inmates and education staff on the usage of the Electronic Law Library (ELL).

d. Computer Services Staff - Identify, in conjunction with Unit Management Staff, inmates who are prohibited from using TRULINCS Program: paid services, public messaging application (Computer No Use).

e. Special Investigation Staff (SIS) - Identify, create, monitor, approve/reject messages and contacts for targeted inmates, and establish random monitoring procedures.

f. Unit Management Staff - Identify, in conjunction with Computer Services Staff, inmates who are prohibited from using TRULINCS (Computer No Use), and monitoring messages as determined locally by the Warden or SIS.

4. **PROCEDURES:** Inmates will have access to TRULINCS work stations on each housing unit excluding the Special Housing Unit (SHU). Inmates may participate during authorized time frames, as established by the institution. Inmate must agree to the Electronic Inmate Agreement to Participate in Public Messaging by clicking the "Agree Button". This is to ensure the inmate has demonstrated his or her understanding of the program rules and procedures.

TRULINCS Program is designed for inmates to exchange electronic messages with individuals in the community in the following manner:

a. An inmate may request to exchange electronic messages with a person in the community by placing the individual on their electronic message contact list. Once the inmate's request to exchange electronic messages with a person in the community is approved, the system will generate a message to the person.

b. Upon receipt of the system generated message, the person in the community will be notified that the identified inmate seeks to add them to his/her approved electronic message contact list. The person in the community may approve the inmate for electronic message exchanges, refuse the request for electronic message exchange, or refuse current and all future Federal inmates request for electronic message exchanges.

c. If the person in the community consents, they will be added to the inmate's electronic message contact list. The person in the community will be informed that Bureau of Prisons (BOP) staff monitor the content of all electronic messages, and agree to comply with all program rules and procedures.

d. Every subsequent electronic message to a person in the community on the inmate's electronic message contact list requires no further action. The person in the community will remain on the inmate's electronic message contact list; until they remove themselves from all Federal inmates electronic message contact lists for all future exchanges. The person in the community will also be notified that if he/she sends an attachment with an electronic message to an inmate, the attachment will be stripped from the message and will not be delivered to the inmate.

e. Inmate to Inmate Communication:

- An inmate may be permitted to correspond via electronic messaging with an inmate confined in any BOP facility if the other inmate is either a member of the immediate family, or is a party or witness in a legal action in which both inmates are involved. The following additional limitations apply:

- The appropriate Unit Manager at each institution must approve in writing the correspondence if both inmates are members of the same immediate family or are a party or witness in a legal action in which both inmates are involved.

- The Warden will be informed of any unusual circumstances pertaining to a request to correspond electronically for members of the same immediately family or for inmates who are a party or witness in the same legal action. When denying an inmate's request to correspond electronically, the Unit Manager documents the reason(s) for the denial. The approval of such electronic correspondence privileges for both inmates ordinarily remains in effect if either inmate is transferred.

- Such electronic correspondence may be approved in other exceptional circumstances, with particular regard to the security level of the institution, the nature of the relationship between the two inmates, and whether the inmate has other regular correspondence.

- Inmate tutors or helpers will be assigned by the Trust Fund Supervisor, Unit Team, and the Supervisor of Education. Those tutors will be assigned to each TRULINCS terminal location, only to act as tutors for

the general inmate population. The inmate tutors will assist TRULINCS users with issues such as account set-up, system usage, and account maintenance. Inmate tutors are **NOT** allowed to sit at, type, or otherwise directly or indirectly use any of the TRULINCS equipment while an inmate is logged onto their account. Inmates will be responsible for entering their own account information.

5. **INMATE PARTICIPATION:**

a. Voluntary Participation:

TRULINCS Public Messaging Application is a voluntary electronic message application, in which an inmate may participate for a monetary fee. By participating in the program, the inmate consents to the Bureau withdrawing program fees directly from his/her deposit fund account. An inmate may withdraw from the program at anytime without penalty or cost, except those costs that have already incurred as a result of their participation.

Inmates choosing not to participate in the program may still maintain contact with persons in the community through written general correspondence, telephone, and visiting, as permitted by policy.

b. Many of the TRULINCS services are available at no charge to the inmate population. These services include; Account Transactions, BP-199's (Request for Withdrawal of Inmate's Personal Funds), Electronic Bulletin Board, Contact List Maintenance, Electronic Law Library, Inmate Request to Staff (Staff Messages), and Surveys. Services that have no fee are regulated by session use time.

c. User Fee:

Inmates will be required to purchase units of session time using TRULINCS in unit increments of 40, 100, 200, 300, and 600. Inmates will be limited to a maximum of 600 units per month. Inmates will be charged five cents per unit in fees for using TRULINCS service. An electronic message is billed as one TRU-Unit per minute of session time, and printing is billed as three TRU-Units per page. There will be no charge to check for new messages received. The TRULINCS program will not be available to inmates without funds to purchase the minimum increment of units.

d. Printing Fees:

Inmates may elect to print their messages using the designated stations. Inmates will be charged three units (15 cents) per printed page. A multiple page message will be printed front and back (duplexed) and will count as two pages per sheet of paper.

Example: A two-page message will be printed on the front and back of one sheet of paper and cost six units (30 cents.)

e. Funds Returned to TRUFACS:

Funds shall be returned to an inmate's TRUFACS account only in the following circumstances:

- Inmate is released.
- An inmate on messaging restriction for more than sixty (60) days may request, in writing, that their balance be returned to their commissary account. In these circumstances, trust fund staff will be provided written documentation to support the transfer. This is a one-time transaction for the entire balance.
- As a result of system malfunctions which have been documented using the approved trouble ticket management system, when granted by the Trust Fund Supervisor.
- Refunds due to a printer malfunctions shall be granted in the form of a reprint.
- Or, the inmate can do it yourself option, available within the system.

f. Hours of Operations:

The use of TRULINCS shall not interfere with institution schedules, programs, work assignment, or counts.

- Upon announcement of a count, all inmates shall terminate their TRULINCS session immediately.
- During institution emergencies, the use of TRULINCS may be restricted or terminated.

- Inmates will be responsible for their TRULINCS account and are expected to conduct themselves in a responsible manner.

- Each inmate is responsible for the content of the electronic messages they send.

g. Consent of Monitoring:

Inmates must consent to have all incoming and outgoing electronic messages monitored, read, and retained by Bureau staff.

h. Warden's Authority:

The Warden may limit the number of contacts an inmate may have on his/her electronic message contact list. The Warden may discontinue an inmate's participation in the program, and/or reject incoming/outgoing electronic messages; whenever it is determined that it jeopardizes the safety, security, or orderly operation of the correctional facility, or for the protection of the public. Also, participation in the program may be limited or discontinued at any time due to system maintenance, modification, or other reasons unrelated to inmate conduct.

i. Computer Use Category:

If an inmate is identified as CUC "Computer No Use", a partial or total messaging restriction is authorized. A messaging restriction in this situation is discretionary to ensure the institution's safety, security, and orderly operations are not compromised, and for the protection of the public.

j. Pending Investigation or Disciplinary Action for Possible Messaging (TRULINCS) Abuse:

If an inmate is pending either investigation or disciplinary action for possible abuse, a partial or total TRULINCS restriction is authorized. A messaging restriction in this situation is discretionary, to ensure the institution's safety, security, or orderly operation, or for the protection of the public. Ordinarily, the SIS office recommends this type of restriction.

k. Inmate Discipline/Criminal Prosecution:

Inmates who abuse, circumvent, tamper with the TRULINCS

program (i.e., equipment, application, or furniture) or violate the program procedures may receive disciplinary action and/or criminal prosecution.

Staff authorized to restrict, limit, or deny inmate use of the TRULINCS must provide written notification to the Trust Fund Supervisor. This includes expunged sanctions imposed by granted authorities.

l. Contact List:

An inmate may exchange electronic messages with persons in the community who are on the inmate's approved electronic message contact list. Through use of the computers provided by the Bureau, the inmate may request message addresses be added to his/her electronic message contact list.

m. Attorney or Other Legal Representative:

Inmates may place their attorney or other legal representatives on their electronic message contact list, with the understanding that electronic message exchanges with such individuals will not be treated as privileged communications, and will be subject to monitoring.

n. Electronic addresses which jeopardize the safety, security, or orderly operation of the institution, or the protection of the public, are prohibited and will be removed.

Examples of such addresses include, but are not limited to, victims, witnesses, or other persons connected with the inmate's criminal history.

o. Consent:

Members of the community may consent to the exchange if electronic messages with inmates. As a result, they must agree to comply with all established program rules and procedures.

p. Appeal:

- If the sender of the rejected electronic message is a person in the community:

  He or she will be notified that the rejection may be appealed within 15 days of the date of the electronic message rejection notice by submitting a written appeal request to the Warden of the institution where the inmate is located with a copy of the rejection notice.

- If the sender of the rejected electronic message is an inmate:

  He or she will be notified of the rejection and may appeal the decision through the Administrative Remedy Program.

6. **SYSTEM/MESSAGE CONTROLS:**

   a. The maximum number of consecutive minutes an inmate may use for public messaging (session time) is 60 minutes.

   b. Inmates may have 100 active contacts on their contact list, 30 active phone numbers and 30 active email addresses.

   c. Messages may not contain attachments.

   d. Messages may not exceed 13,000 characters.

   e. Inmate-to-inmate communication may be allowed after the appropriate approval has been granted.

   f. After three consecutive failed attempts to access the system, the inmate's account will be locked and the System Administrator must unlock the account. Inmates must request, in writing to the Trust Fund Supervisor, that their account be unlocked.

7. **INMATE IN THE SPECIAL HOUSING UNIT:** Inmates in Administrative Detention or Disciplinary Segregation status will not be authorized access to the electronic messaging system. Inmates will be allowed to access the TRULINCS terminals for the electronic law library, and for legal proceedings.

8. **PROHIBITED ACTS:** A violation of any of the rules regarding the use of TRULINCS will be cause for disciplinary action and the possible revocation or restriction of the electronic message program. Electronic messages about illegal activities either inside or outside the institution may lead to criminal prosecution and/or processing under the P.S. 5270.09 Inmate Discipline Program and P.S. 5270.10 Special Housing Units.

9. **LAW ENFORCEMENT REQUEST FOR ELECTRONIC MESSAGES:** The Bureau TRULINCS Systems of Record, and the Privacy Act of 1974, allow disclosure of TRULINCS transactional data and message content for law enforcement purposes, as defined therein.

   Subpoenas for those are not required, as compared to recorded telephone conversations. Upon receipt of a properly submitted written request from a law enforcement agency, Bureau of Prisons'

staff are authorized to release both transactional date (e.g., date, time, electronic message address, electronic message recipient and sender, and length of the message) and copies of the electronic messages.

Any inquiries can be referred to the FOIA Office, or the Regional Counsel.

10. **TRULINCS MEDIA (MUSIC) SERVICE:** The TRULINCS Media service provides the inmate population the opportunity to purchase an MP3 player from the institution Commissary. Purchased MP3 players must be connected to a TRULINCS workstation for activation. Inmates owning an activated MP3 player may browse the Music Library in the TRULINCS media service and purchase music using TRU-Units. Inmates will be limited to four 15 minute media sessions for a maximum of 60 minutes per day. Inmates will be required to revalidate their MP3 players every 14 days or the player will become de-activated. Charging stations for the MP3 players are located in each of the Housing Units. Instructions for the use of both the MP3 players and TRULINCS media service are located on the TRULINCS electronic bulletin board. Upon release from custody inmates will have opportunity to de-institutionalize the MP3 player and access their music.

11. **MANAGING DEPARTMENT:** Trust Fund

Approved by: _____
J. Ray Ormond, Warden