Case No.: 18-17233

IN THE

United States Court of Appeals for the Ninth Circuit

JOHN WITHEROW,
Plaintiff-Appellant,

v.

HOWARD SKOLNIK, et al.,
Defendant-Appellees.

On Appeal from the United States District Court for the District of Nevada
No. 3:08-cv-00353-RCJ-CBC
District Judge Robert C. Jones

REPLY BRIEF OF PLAINTIFF-APPELLANT

UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
APPELLATE CLINIC

Zuzana Menzlová
Anne St. Amant
Certified Law Student Representatives

Gregory C. Sisk
Supervising Attorney

1000 LaSalle Ave., MSL 400
Minneapolis, MN 55403-2015
651-962-4923

Pro Bono Counsel for Plaintiff-Appellant John Witherow

Table of Contents

Table of Authorities

Cases

Constitutional Provision

Statutes

Regulations

Court Rules

Federal Rules of Appellate Procedure:

Other Sources

Introduction to Reply

John Witherow, while a prisoner at the Nevada State Prison, discovered that correctional officers were eavesdropping on his confidential telephone calls to attorneys representing him in prison condition litigation. Only after this lawsuit was filed, a correctional officer admitted that she listened to the substance of these conversations to make an untrained evaluation of its legal content based on "legal terminology that you might hear on television." ER190.

By the second page of their Answering Brief (at 2), defendants concede the heart of the plaintiff's factual case and thereby confirm the constitutional violation. Defendants acknowledge that prison officers intercepted confidential attorney-client calls — and not merely to verify the recipient was an attorney (for which non-intrusive alternatives were available). Defendants assumed the judicial role to decide whether the conversation "concern[ed] a legal issue that is entitled to confidentiality under the attorney-client privilege." Answering Brief at 2.

Defendants claim the power to evaluate whether the call "involve[d] pertinent legal matters." Answering Brief at 2. That those "pertinent legal matters" were allegations of constitutional wrongdoing against their own colleagues, ER141, 201-02, 218-19, 225, apparently does not give defendants pause. *See Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1210 (9th Cir. 2017) ("[P]risoners'

communications with civil attorneys often relate to lawsuits challenging the conditions of confinement in the prison or wrongful conduct of prison employees.").

In sum, defendants admit that they did indeed engage in a " 'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate,' " *ACLU Fund of Michigan v. Livingston Cty.*, 796 F.3d 636, 648 (6th Cir. 2015), and presumed to "unilaterally determ[ine] that [they] had a right to access" privileged information, *United States v. Carter*, No. 16-20032-02-JAR, 2019 WL 3798142, at *3 (D. Kan. Aug. 13, 2019).

Defendants fail to acknowledge this Court's ruling a quarter-century ago in *United States v. Van Poyck*, 77 F.3d 285 (9th Cir. 1996), that permission to listen to prisoner calls does not extend to " 'properly placed' telephone calls between a defendant [prisoner] and his attorney." *Id.* at 291 n.9. Defendants overlook this Court's admonition in *Nordstrom v. Ryan*, 856 F.3d 1265 (9th Cir. 2017), that prison officials may not access the actual "words" of attorney-client communications to evaluate whether they are legal or non-legal in nature. *Id.* at 1272.

This Court has spoken reverently of a prisoner's right to speak confidentially with his attorney as "nearly sacrosanct." *Nordstrom v. Ryan*, 762 F.3d. 903, 910 (9th Cir. 2014). The Supreme Court recently emphasized that "the need for confidence" is an essential element of the constitutionally-protected attorney-client relationship. *Luis v. United States*, 136 S. Ct. 1083, 1089 (2016) (plurality).

But defendants rather flippantly dismiss the concerns raised by Witherow and the public interest and professional organization amici about prison officer interception of confidential attorney-client communications as "the legal equivalent of political fearmongering." Answering Brief at 3.

When prison officers covertly listen to a prisoner's telephone calls with his lawyers representing him in suits against other prison officers, even to the point of arrogating the power to adjudicate its legal content and whether it is "pertinent," the attorney-client privilege has been eviscerated. *See In re Search Warrant*, 942 F.3d 159, 176 (4th Cir. 2019) ("[A]n adverse party's review of privileged materials seriously injures the privilege holder."). We ***should*** be alarmed.

Argument in Reply

I. Prison officials violated the Fourth Amendment through a secret monitoring protocol, presuming to evaluate the content of prisoner calls to attorneys to conduct an illegitimate and untrained privilege review, rather than applying non-intrusive and readily-available means to verify the calls were to a pre-approved lawyer

At more than one point in their Answering Brief (at 19, 26), defendants contend the District Court on remand properly conducted a "normative inquiry" in ruling that a prisoner does not have a Fourth Amendment right to make a telephone call to an attorney without monitoring by correctional officers. Defendants say this

"normative inquiry" allowed the District Court to decide "whether a constitutional right existed." Answering Brief at 26. Defendants thereby justify the District Court's resistance to this Court's two prior rulings (and to Ninth Circuit precedent as well, see ER8-9), instead making its own assessment about the constitutional right to attorney-client confidentiality. But defendants get it backwards.

This Court has ***already*** conducted the "normative inquiry" and did not invite the District Court to second-guess that ruling. Through the "normative inquiry," this Court concluded that Witherow maintained a well-recognized constitutional right to confidential attorney-client communications, notwithstanding that he had become "subjectively" aware of the monitoring. ER28-29. This Court made the judgment that Witherow's Fourth Amendment rights were "implicated" by the prison practice of monitoring. ER 28-30.

The only question that this Court reserved for remand was whether the Fourth Amendment right to confidential communications might be overcome by the prison's legitimate penological interest or whether, instead, "alternative prison policies" could satisfy that security objective. ER29.

In addition, this Court set aside the dismissal of the constitutional claims against higher level prison officials. ER29-30. In their Answering Brief (at 1), defendants cite to these dismissals by the District Court and contend that only "one correctional officer's practice" remains at issue. But defendants fail to mention

this Court's ruling that supervisory officials — not only a solitary correctional officer who was implementing their instructions — may also be responsible for the constitutional violation. ER30.

Because both the District Court and defendants presume to reconsider this Court's ruling that the Fourth Amendment right was triggered, we begin by confirming the soundness of this Court's ruling, as we did in the Opening Brief (at 30-44). We then address the feasibility of alternative measures for a legitimate penological interest, as we did in the Opening Brief (at 44-52). We outline both practical non-technical means and technological measures that make eavesdropping on a confidential attorney-client telephone call an " 'exaggerated response' to prison concerns." *See Turner v. Safely*, 482 U.S. 78, 90 (1987).

A. This Court and other circuits have repeatedly prohibited prison officer access to attorney-client and particularly have condemned prison official review of legal content, decisions that defendants mostly ignore

In our Opening Brief (at 33-38), we discussed a long line of decisions in this and other circuits that condemn review by prison officials of confidential attorney-client communications and repudiate attempts to evaluate legal subject matter. *See, e.g.*, *Nordstrom*, 856 F.3d at 1268, 1272 (prohibiting prison officials from engaging in a "content review of inmates' confidential outgoing legal mail," including evaluating the legal subject matter); *ACLU Fund of Michigan*, 796 F.3d

at 648 (enjoining jail from making a "'subjective' and inexpert determination as to whether a particular legal matter is 'legitimate' " for attorney correspondence to a prisoner); *Al-Amin v. Smith*, 511 F.3d 1317, 1333 (11th Cir. 2008) (ruling prisoner confidential communications with his attorneys are consistent with "legitimate penological objectives"): *Sallier v. Brooks*, 343 F.3d 868, 877 (6th Cir. 2003) (upholding a prisoner's right to "unimpaired, confidential communications with an attorney"); *Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001) (regarding prisoner's receipt of "privileged communications from counsel" as "critical" to court access); *Van Poyck*, 77 F.3d at 291 n.9 (clarifying that denial of Fourth Amendment protection to prisoner personal phone calls does not extend to " 'properly placed' telephone calls between a defendant [prisoner] and his attorney"); *see also In re Jordan*, 500 P.2d 873, 876 (Cal. 1972) (ruling that to allow prison staff to "inspect" legal mail for its "subject matter" would "emasculate[] the confidentiality").

With two partial exceptions, defendants in their Answering Brief do not respond to these (and other) decisions. And defendants cite to no authority for the proposition that, when communicating with a pre-approved lawyer about prison condition litigation, a prisoner's attorney-client privilege depends on whether a correctional officer hears words that sound like the script for a television legal drama. Indeed, in their Answering Brief, defendants never acknowledge the

startling admission by a correctional officer that she conducted a legal privilege assessment by listening for words heard on television. ER190.

As one partial exception, defendants do cite to this Court's decision in *Nordstrom*, which protected the confidentiality of prisoner attorney-client communications by mail. Defendants suggest an analogy between their listening to telephone calls to attorneys and what the Ninth Circuit in *Nordstrom* approved as a "cursory visual inspection" of outgoing legal mail for contraband. Answering Brief at 29-31 (citing *Nordstrom*, 762 F.3d at 909).

The analogy between a physical mailing and a voice transmission over telephone lines quickly breaks down. The *Nordstrom I* court emphasized the "cursory" nature of the inspection of legal mail for such obvious abuses as contraband or a map of the prison. *Nordstrom*, 762 F.3d at 910. While a physical envelope could conceal inappropriate objects, a telephone call cannot transfer contraband or a map of the prison.

More importantly, defendants ignore the Ninth Circuit's directive that the limited inspection of outgoing legal mail must be conducted "without reading the words on a page." *Nordstrom*, 856 F.3d at 1272. In *Nordstrom II*, this Court firmly rejected the prison's attempt to extend that inspection to a "content review," *id.* at 1268, or to evaluate the legal versus non-legal substance of the communication, *id.* at 1272. That, of course, is precisely what defendants now say they were

doing. In their Answering Brief (at 2), they admit they were listening to the content of the telephone call to determine whether it "concern[s] a legal issue that is entitled to confidentiality under the attorney-client privilege."

Defendants neglect altogether this Court's most directly pertinent ruling in *Van Poyck* against monitoring of prisoner telephone calls to attorneys. As a second partial exception to their silence in face of contrary precedent, defendants cite once to *Van Poyck* for the proposition that prisoners "do not enjoy a reasonable expectation of privacy in outbound calls made from detention facilities." Answering Brief at 27 & n.98 (citing *Van Poyck*, 77 F.3d at 291). However, defendants omit the caveat made by the Ninth Circuit on that same page of the decision, which explains that the Fourth Amendment permission for monitoring does not cover calls placed by prisoners to attorneys. *Id.* at 290-91 n.9.

Quite recently, the Fourth Circuit pointedly reminded government agents that they must respect the confidentiality of an adversary's attorney-client communications and refrain from arrogating to themselves the judicial power to evaluate the privileged nature. *In re Search Warrant*, 942 F.3d at 164. Even with probable cause to conduct a search, the government was forbidden to conduct their own privilege content review of attorney-client documents. *Id.*

The interception of Witherow's attorney-client communications by defendants here was on far weaker ground than that condemned by the Fourth

Circuit in *In re Search Warrant*. As the warden here admitted, there was no investigation of Witherow and thus no probable cause to search his attorney-client communications. ER233. Defendants also failed to set up any filter or taint team, either by the correctional officers who listened to attorney-client discussions about pending prison condition litigation, see ER141, 190, 201-02, 218-20, or by defendants' attorneys who sought in discovery copies of the full case files about those then-still pending lawsuits, see ER265, 382-85.

And while the Fourth Circuit found it unacceptable for "trained lawyers" to review privileged materials by an adversary in litigation, the court observed that "[t]o compound the error, the Privilege Assessment delegated judicial functions to ***non-lawyer*** members of the Filter Team." *In re Search Warrant*, 942 F.3d at 177 (emphasis in original). Here the prison employed non-lawyers without training, who used an amateurish comparison to television law shows, ER190, for determining whether the communication was "entitled to confidentiality under the attorney-client privilege," Answering Brief at 2.

B. Witherow presented both circumstantial and eyewitness evidence that defendants engaged in extended monitoring of calls to attorneys, which defendants deny without citation to the record or engagement with the evidence

Listening by prison officials to a prisoner's confidential telephone call to his attorney to evaluate the legal content was independently wrongful, regardless of its duration, as discussed above.

The harm was worsened by the extended nature of the monitoring and thus the greater depth of the intrusion into confidentiality. Sidestepping the summary judgment standard that the evidence is to be taken in the light most favorable to plaintiff Witherow as the non-moving party, defendants ask this Court to simply accept their insistence that they did not eavesdrop at length on legal conversations. Answering Brief at 11.

After uncritically reciting a correctional officer's denial of extended monitoring, ER194-96, defendants wrongly contend that "Witherow presented no evidence beyond his own hypothetical reasoning to show otherwise." Answering Brief at 31. As with so many other factual assertions in their brief, defendants assert the absence of the plaintiff's evidence without any citation to the record.

In fact, as we outlined in the Opening Brief (at 41-44), Witherow offered multiple reasons, including his own eyewitness account, to believe that the eavesdropping was quite extensive, going well beyond a brief verification.

To begin with, Officer Baker herself testified that she periodically resumed listening at later points in an attorney call and did so for the very purpose of determining whether the prisoner "was still making a legal call." ER198. Indeed, in their own Answering Brief (at 2), defendants explain the monitoring protocol as including "subsequent periodic monitoring of a call to ensure that the call at issue is continuing to involve pertinent legal matters."

Witherow also had observed an apparent cause-and-effect, in which the strategic planning in a call to an attorney was followed with actions by the prison litigation adversaries to counter that strategy. ER139-40, 341-43. More directly, Witherow frequently heard "beeping" in calls with his attorneys, which he later learned from legal research indicated monitoring. ER139, 143, 151, 301-02.

In responding to the motion for summary judgment, Witherow provided ample evidence giving rise to reasonable inferences when considered in the light most favorable to him as the non-moving party. By instead choosing to adopt one side of a conflicting narrative, the District Court and defendants engage in improper weighing of evidence on summary judgment. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

And Witherow offered more than circumstantial evidence. On one occasion, when the speaker in the correctional officer bubble had been turned up very loud,

Witherow from his cell personally heard everything in the conversation by another prisoner with his lawyer. ER315.

Moreover, as discussed next, the very secrecy of the monitoring protocol strengthened the inference of extended monitoring.

C. Defendants secretly eavesdropped on prisoner attorney-client calls, which defendants now surprisingly deny but without citation to or analysis of the record

The illegitimacy of defendants' constitutional invasion is heightened by its furtive nature. The very fact that defendants conducted the eavesdropping in a surreptitious manner contradicts their post hoc reconstruction of these episodes as minimal, unobtrusive, and harmless to privileged communications.

In *Hayes*, this Court prohibited a prison from opening legal mail outside of the presence of the inmate. *Hayes*, 849 F.3d at 1209-10. This Court explained that the practice of opening legal mail behind-the-scenes "interferes with protected communications" and "strips those protected communications of their confidentiality." *Id.* at 1209 (quoting *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006)). Instead, "the only way to ensure that mail is not read when opened is to require that it be done in the presence of the inmate to whom it is addressed." *Id.* at 1210.

Likewise, the only way to ensure that a legal call is not overheard is to prevent the correctional officer from secretly eavesdropping.

In their Answering Brief (at 42-43), defendants surprisingly deny that their listening was secret, notwithstanding that the District Court itself had characterized it as "surreptitious," ER22. Defendants even assert that "Witherow admits, and the evidence provided that inmates were given notice and advised that a correctional officer would be listening to the phone call until verification occurred." Answering Brief at 42-43. Without any citation to the record to support this revisionist narrative, defendants suggest a transparency about their conduct that bears no resemblance to the reality.

In our Opening Brief (at 11-14), with scrupulous citations to the record, we outlined the intrepid efforts and close observations by which Withrow discovered over the course of months that correctional officers were listening to confidential conversations by prisoners with their attorneys.[1] See ER139-40, 157, 315-18, 335-345. Eventually, his lawyer provoked a correctional officer by a profane remark to whoever might be listening — which prompted her to terminate the call, chastise Witherow, and file a report. ER208-09. That episode confirmed for Witherow that his suspicions were "[m]ost definitely" correct. ER157.

[1] More than a decade earlier than the episodes in Unit 13, when housed in other locations of the prison system, Witherow previously had suspected but did not obtain definite proof that his legal calls were intercepted. ER332-34.

Only after Witherow filed a written grievance, based on growing suspicions over months, did the prison admit vaguely to even initial "monitoring" of legal calls.[2] FER1-2. And only after this litigation was commenced did defendants reveal that they were reviewing the legal content of conversations with lawyers, ER190, 213, and that the monitoring was resumed periodically throughout the call, ER198, 246. The secret and unsigned post order that supposedly justified monitoring in Unit 13 also came to light only during the litigation. ER350-51.

For the period in question in Unit 13, Witherow testified without contradiction that when he placed a call to an attorney, there was a prompt to the recipient about a collect call, "but there was no warning given or information given that the phone call might be recorded or monitored." ER298.

In sum, defendants cite to nothing in the record suggesting that they forth-rightly informed Witherow or other prisoners that they were listening to attorney calls, that they were evaluating the legal content of those conversations, or that prisoners could do anything to avoid or abbreviate the intrusion.

---

[2] Although defendants fail to cite to the record, we have reviewed the record again for anything they could have misconstrued as providing advance notice of listening to attorney calls. In the interest of candor to the Court, we have filed Further Excerpts of Record to include the grievance documents, which defendants quote elsewhere in the Answering Brief (at 18 n.68).

D. By either simple observation of the prisoner making a legal call (as required by regulation) or through prison telephone technology that detected abuse, defendants had alternative means to protect prison security without eavesdropping on the content of calls to attorneys

If defendants had truly wished to merely ensure that the call was placed to an attorney, they need only have placed the call themselves and watched the prisoner. By dialing the registered attorney's phone number and observing to ensure the prisoner did not dial a new number, the legitimate security needs of the prison would have been satisfied without any need to listen, much less conduct an untrained and intrusive evaluation of the legal content of the call.

Not only would this approach have served the security purpose, even without special telephone technology, it would have had the considerable virtue of being exactly what the state statute and published regulation prescribed.

The Nevada Revised Statutes governing prison telephone communications directed the NODC to establish "an alternate method of communication for those communications by offenders which are confidential," which specifically includes calls to an attorney. Nev. Rev. Stat. § 209.419(3) and (4). Nowhere in defendants' Answering Brief is this statute acknowledged.

The regulation, in place at the pertinent time and adopted pursuant to this statute to protect the confidentiality of attorney calls, provided that the prison staff

member was to determine whether the call "is legal in nature" by "dial[ing] the number to ensure the number is to a legal representative." Nev. Admin. Reg. 722.07(1.2), ER57. The regulation anticipated the possibility of abuse by the prisoner, such as hanging up and dialing another number. It said this "staff member shall observe the inmate throughout the entire duration of the call." *Id.*

Another iron-clad security measure, which simultaneously guarantees confidentiality for a legal call and prevents abuse, was available through telephone technology. Defendants appear to accept that the prison's security concerns would be resolved by "modern technology" that detects call forwarding (and also has the ability to interrupt unauthorized calls). See Answering Brief at 18.

But defendants twice suggest that, for the 2007 to 2008 period, the prison relied on "obscure" technology, Answering Brief at 36, 43, by which we think they mean "obsolete" technology. Yet at another point in the Answering Brief (at 37), defendants acknowledge the telephone technology in place at the time could, in fact, detect call forwarding. Defendants' inconsistent factual assertions about telephone technology are not accompanied by a citation to the record.

In our Opening Brief (at 8, 50-52), we discussed the technology provided by the prison's telephone vendor in 2007 — the very period in question. This then-existing telephone technology had the capabilities of pre-configuring attorney numbers, ensuring confidentiality of attorney calls, preventing abuse or security

risks by detecting call-forwarding and call-conferencing, and terminating unauthorized calls. ER102-03.

This was not cutting-edge technology — even in 2007. For more than a decade previously, prisons had used this technology to simultaneously block improper monitoring of confidential calls to attorney numbers and enable "a security feature that automatically cuts off" inmate attempts to transfer or connect to a third party. *Carter v. O'Sullivan*, 924 F. Supp. 903, 906-07 (C.D. Ill. 1996).

Nor did the use of portable telephones in Unit 13 provide any obstacle to the operation of this telephone security system. If needed, the vendor promised additional portable telephones for this system, at no additional cost. ER99.

Instead, the problem in Unit 13 was the rogue telephone system, by which the telephone security protections were deliberately bypassed. ER237-38. Deviating from regular protocol, the prison tapped into the phone line in Unit 13 with special wiring so that correctional officers could listen in on a speaker. ER137, 348-49, 358-59, 364. In their Answering Brief (at 16-17), defendants acknowledge the prison telephone system configurations "did not, however, have any effect on the speakers in Unit 13."

What the available prison telephone technology would not permit, of course, was for prison officials to covertly listen for the content of the prisoner's call to the attorney. Now defendants also claim the right to listen for any "change in the other

person on the line." Answering Brief at 37. But prison personnel and adversaries in litigation have no legitimate power to police how a lawyer allocates responsibilities inside the walls of his own office, including whether another attorney, a paralegal, or a mitigation specialist might speak to the prisoner. The audacity of defendants' demand to control the inner workings of a law office further confirms the extraordinary intrusiveness of their monitoring and disregard for attorney-client confidentiality.

And, again, defendants presented no evidence that any prisoner call placed to an attorney's office had ever raised a security concern. ER229-31, 353. *See Nordstrom*, 856 F.3d at 1273 (finding "no evidence that outgoing legal mail addressed to a licensed attorney has ever posed the security threats").

On remand, the District Court never mentioned this telephone technology to securely prevent abuse of legal calls to connect to unauthorized numbers. Now on appeal, defendants cite to nothing in the record raising any doubt that such technology was available and effective.

E. Defendants' distracting arguments about Witherow's extended relationship with an attorney and the outcome of the trial on non-constitutional claims are without merit

1. Witherow maintained a professional relationship with three attorneys, who were pre-approved by the prison and whom he called about his own legal matters

During his confinement in Unit 13, Witherow made 112 telephone calls to three registered attorneys about his ***own*** legal matters. ER153-54, 307-08. Two of those attorneys, Mark Picker and Bob Hager, testified about their representation of Witherow in prison condition litigation and their professional and privileged telephone conversations with him. ER201-02, 218-19, 225. Defendants fail to mention either attorney Picker or attorney Hager in their Answering Brief.

As Witherow has forthrightly acknowledged, and as we briefly noted in our Opening Brief (at 11), Witherow regarded attorney Don Evans as not only his attorney but a friend and an ally for prisoner rights. At every stage of this litigation, defendants have made much of the friendly and extended professional relationship between Witherow and Evans. On the two prior appeals and on both the remands, this Court and the District Court paid no attention to this distraction from the central issues. Defendants now devote two pages of their Answering Brief (at 14-15) to questioning this relationship, although without any citation to the Excerpts of Record for this appeal.

We understand that prison administrators may be frustrated when a prisoner diligently teaches himself the law and then applies that knowledge to challenge questionable prison practices. In addition to representing Witherow in multiple legal matters, attorney Evans so respected Witherow's self-taught legal skills, ER123, that he occasionally used him as a paralegal to perform legal research from his cell and communicate with other prisoners about their legal rights, ER325-27. There was nothing nefarious about this — indeed, it supplemented scarce legal resources for prisoners — and it raised no security concerns that would justify eavesdropping on confidential telephone calls.

Again, there was no probable cause to investigate Witherow for wrongdoing. ER233. Defendants presented no evidence that a call placed to an attorney's office had ever been used to facilitate a crime or pose any security risk. ER229-32, 353.

2. Witherow's challenge to summary judgment on the Fourth Amendment claim stands independent of the outcome of the trial of the non-constitutional claims subject to restricted evidence and jury instructions

At more than one point in their Answering Brief (at 41-42, 48), defendants vaguely assert that Witherow is somehow evading the supposed contrary findings of the jury at the trial on the non-constitutional claims. Rather than accepting the evidence "in the light most favorable to the non-moving party," *Scott v. Harris*, 550 U.S. 372, 377 (2007), defendants object to Witherow's "rel[iance] upon his

allegations in this round of briefing in remand rather than what was actually set forth and accepted at said trial." Answering Brief at 48. In this way, defendants attempt to evade the summary judgment standard.

As we explained in our Opening Brief (at 20-21), for the non-constitutional claim trial, defendants successfully moved in limine to exclude any evidence "relating only to alleged constitutional violations, attorney-client privilege, and NDOC policies and procedures." ER260. At defendants' request, the judge repeatedly instructed the jury that monitoring of attorney-client phone calls was not a violation of the wiretapping statute for law enforcement officers. ER117, 149, 250-51. In direct contradiction to this Court's later ruling on the Fourth Amendment claim, ER28-29, the judge also instructed the jury that Witherow could be regarded as implicitly consenting to the monitoring because he had become aware of it, ER252. None of this is so much as hinted at in defendants' Answering Brief. With these evidentiary limitations and the judge's instructions favorable to defendants, the jury's verdict was almost inevitable (and the jury made no findings that bind the parties, but rather rendered a general verdict of "no" on the specific federal statutory claims, ER253-54).

Given that they worked aggressively to ensure that the trial on the non-constitutional claims was narrowly focused, defendants cannot fairly complain about additional evidence that is directly relevant to the Fourth Amendment claim. And

they especially should not be heard to object to this Court's direction that alternative measures to monitoring be fully examined on remand. ER16, 29.

Only with this Court's reversal of summary judgment on the Fourth Amendment claim was Witherow given the full opportunity to explore the telephone technology that answers the prison's legitimate security concerns. As we explained in our Opening Brief (at 19), defendants successfully blocked discovery of the prison telephone system and its elements. ER390-92. Then both the District Court's summary judgment against the Fourth Amendment claim, ER33-34, and the evidentiary restrictions at the trial, as discussed above, took questions about feasible alternatives to monitoring off the table. The District Court's *sua sponte* reinstatement of summary judgment on the first remand, ER24, further stymied Witherow's right to be heard on these issues.

With the second remand, and full briefing, Witherow was finally able to present the evidence he had uncovered from public sources that the prison's vendor had indeed offered comprehensive telephone technology that ensures confidentiality of attorney-client calls while also detecting and interrupting call-forwarding or conferencing. ER92-109. As noted earlier in this reply, the District Court ignored that evidence and defendants dispute it but without citation to the record.

II. Defendants fail to respond to (1) the clearly-established directive in the Ninth Circuit's *Van Poyck* decision, (2) the specific warning by the Nevada Federal Court in *Browning*, or (3) the Nevada statute, which all bar prison officials from monitoring prisoner calls to attorneys

A. In *Van Poyck*, the Ninth Circuit drew the constitutional line for permissible telephone call monitoring by prison officials to exclude prisoner calls to attorneys (to which defendants offer no response)

In our Opening Brief (at 54-56), we addressed this Court's ruling in *Van Poyck* that while personal telephone calls by prisoners may be monitored under the Fourth Amendment, calls "properly placed" to a lawyer may not be. *Van Poyck*, 77 F.3d at 290-91 n.9. In light of the clear teaching of *Van Poyck*, a district court has concluded that "any reasonable official should have known that listening to [a prisoner's] calls to [his attorney] would violate the Fourth Amendment." *Jayne v. Bosenko*, No. 2:08-cv-02767, 2014 WL 2801198, at *20 (E.D. Cal. June 19, 2014) (denying qualified immunity).

In their Answering Brief (at 27 n.98), defendants cite *Van Poyck* but once and only for the proposition that prison officials may listen to personal prisoner calls. Defendants neglect to mention the constitutional line that this Court drew in *Van Poyck* between personal calls (that may be monitored) and attorney calls (that may not be). As for *Jayne*, defendants offer no response.

B. The Federal District Court in *Browning* directly warned Nevada prison officials not to monitor prisoner calls to attorneys (to which defendants offer no response)

The typical qualified immunity case turns on whether judicial precedents provide sufficient legal notice to government officials about their constitutional duties or limits. This present case is exceptional because of the targeted notice provided directly to Nevada prison officials, including the warden who is also a defendant in Witherow's case. The Nevada federal court specifically warned Nevada prison officials against monitoring prisoner telephone calls to attorneys and denied qualified immunity to prison personnel engaged in such behavior.

In our Opening Brief (at 57-58), we presented the ruling by the U.S. District Court for the District of Nevada in *Browning v. MCI Worldcom, Inc.*, No. 3:00-cv-0633 (D. Nev. July 10, 2006), that interception by Nevada prison officers of prisoner telephone calls with attorneys violated the Fourth Amendment. *Id.* at 14-15, 17. Because of its importance, and as a courtesy to this Court and the parties, we included the *Browning* decision in the addendum to our Opening Brief (at Addendum-4).

Defendants never mention *Browning* in their Answering Brief.

C. The Nevada legislature by statute established confidentiality for prisoner calls to attorneys, with the corrections director's promise there would be no listening to review the privilege (to which defendants offer no response)

Defendants likewise ignore the governing Nevada statute which expressly provides that, without a court order, "a communication made by an offender is confidential if it is made to . . . [a]n attorney who has been admitted to practice law in any state . . . ." Nev. Rev. St. § 209.419(4)(d).[3] We also included this statute in the Addendum to our Opening Brief (at Addendum-1).

As we explained in our Opening Brief (at 58-60), this statute was adopted after the Director of the Nevada Department of Corrections promised there would be no monitoring of confidential attorney calls. Minutes of Nev. St. Leg., Senate Comm. on Jud., 166, 494 (1983). *See also id.* at 493 (assuring that prisoner calls to attorneys are "not monitored at all" and "[t]he warden doesn't listen until he determines the call is within the privilege").

[3] In the Answering Brief (at 7-8), defendants mistakenly state that Nevada state law allowed "brief pre-monitoring of inmate legal calls," which defendants support by quoting language that supposedly authorizes "monitoring" "to determine validity." But this language is absent from either the governing statute or regulation, which both preclude monitoring of legal calls. Instead, this passage is found in the dubious secret post order that was disclosed only during litigation. ER350-51.

Unmentioned in defendants' Answering Brief is the corrections director's promise to the legislature that attorney calls would not be listened to and that there would be no self-interested evaluation of the privilege.

Defendants do include a few citations in their Answering Brief (at 36, 40, 41 n.128) to the administrative regulation that implements the Nevada statute. *See* Nev. Admin. Reg. 722.07 (included in the Addendum to our Opening Brief at Addendum-2).[4] In only one footnote do defendants actually quote any part of this regulation, taking out of context the phrase that says "[a]fter the staff member determines the call is legal in nature the staff member will not listen to the call." Answering Brief at 41 n.128 (quoting Nev. Admin. Reg. 722.07(1.3)).

Unfortunately, Defendants omit the preceding language in this regulation, which explains that the prison staff member will determine that the call is legal by "dial[ing] the number to ensure the number is to a legal representative." Nev. Admin. Reg. 722.07(1.2 to 1.3). Defendants also glide past the prefatory regula-

[4] Defendants say that "[t]he Administrative Regulations have since been updated but were never part of the record or related to the causes of action in the litigation." Answering Brief at 2 n.2. The administrative regulations in effect at the time were introduced into the record at several points and are included both in the Excerpts of Record at ER57 and in the Addendum to the Opening Brief. The 2019 version of the regulation is to the same effect: "Legal calls placed for inmates on institutional phones by staff should have the number dialed by the staff member to insure it is a legal call; observe the inmate throughout the call, but not listen to the call." Nev. Admin. Reg. 722.11(4) (2019).

tion explicitly removing attorney calls from the authorized monitoring of prisoner telephone calls. Nev. Admin. Reg. 718.01(3) ("Telephone calls, except calls between an inmate and his attorney, must be monitored and/or recorded.").

D. Having been released from prison only to take up work on legal teams representing Nevada prisoners, Witherow maintains a live concern in confidentiality of prisoner telephone calls (to which defendants offer no response)

As to the continued availability of declaratory relief, which is not subject to qualified immunity, defendants do make the unremarkable argument that the release of a prisoner from custody ordinarily would moot claims for prospective relief. Answering Brief at 44-46.

However, defendants neither acknowledge nor refute the specific argument we made in the Opening Brief (at 64-65) that this case is different because (1) defendants still do not disavow the practice of surreptitious interception of prisoner calls, and (2) Witherow continues to be affected, now from the other side of the conversation, as a paralegal on legal teams representing prisoners in clemency and civil rights claims. ER123.

For Witherow, attorney-client confidentiality in the prison setting is a live and vitally important matter.

Conclusion

For the foregoing reasons and those in our Opening Brief, plaintiff-appellant John Witherow asks this Court to reverse the District Court's grant of summary judgment on the Fourth Amendment claims and remand the case for trial on the merits.

Date: January 17, 2020 Respectfully submitted,

UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
APPELLATE CLINIC

Zuzana Menzlová
Anne St. Amant
Certified Law Student Representatives

s/ Gregory C. Sisk
Supervising Attorney

1000 LaSalle Ave., MSL 400
Minneapolis, MN 55403-2015
651-962-4923

Pro Bono Counsel for Plaintiff-Appellant John Witherow

CERTIFICATE OF COMPLIANCE WITH RULE 32 TYPE-VOLUME, TYPEFACE AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,966 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using a proportionally spaced typeface in 14 point Times New Roman.

Date: January 17, 2020

s/ Gregory C. Sisk

Proof of Service

I, Gregory C. Sisk, hereby declare: I am employed in Minneapolis, State of Minnesota. I am over the age of 18 years, and not a party to the within action. My business address is University of St. Thomas School of Law, 1000 LaSalle Ave., MSL 400, Minneapolis, MN 55403-2015.

I hereby certify that on January 17, 2020, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System:

REPLY BRIEF OF PLAINTIFF-APPELLANT

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on January 17, 2020 at Minneapolis, Minnesota.

s/ Gregory C. Sisk