

Case No.: 16-15277

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT D. NORDSTROM,
Plaintiff-Appellant,

v.

CHARLES L. RYAN, Director of ADOC, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**BRIEF OF AMICUS CURIAE THE EQUAL JUSTICE INITIATIVE
IN SUPPORT OF PLAINTIFF-APPELLANT SCOTT D. NORDSTROM;
URGING REVERSAL**

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Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The Amicus does not have a parent corporation. No publicly held company owns more than 10% of stock in the Amicus.

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Casey Toner, *Violence and Murder Spike at St. Clair Prison Due to Poor Leadership, Unsafe Conditions, Lawsuit Claims*, AL.COM. 5

EJI Files Federal Lawsuit Against Alabama Department of Corrections Over Dangerous and Violent Conditions at St. Clair Prison, EQUAL JUSTICE INITIATIVE. 4, 5

Guards at Alabama’s Tutwiler Prison Accused of Sexual Contact With Inmates, WHNT NEWS 19 4

The Murder of Rocrast Mack, EQUAL JUSTICE INITIATIVE. 4

Tutwiler Prison for Women: Widespread Sexual Abuse by Male Guards, EQUAL JUSTICE INITIATIVE. 4

INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*¹

The Equal Justice Initiative (EJI) is a non-profit organization that provides legal assistance to death row prisoners, children sentenced to life without parole, people who have been wrongly convicted, and other incarcerated people challenging the legality of their convictions and sentences and the conditions of their confinement. We have handled scores of death penalty cases and hundreds of collateral challenges to criminal convictions and sentences across the United States. In order to identify the needs of prisoners and to litigate on their behalf, we correspond with hundreds of incarcerated people about their cases, families, backgrounds, and mental health challenges, as well as the conditions of their confinement and the conduct of correctional authorities. Without confidential legal correspondence, we could not effectively and efficiently represent the indigent prisoners throughout the country who rely on our services.

EJI's work on behalf of incarcerated people in the United States has grown dramatically over the last two decades. The exploding prison population, including over three thousand people on death row, and severely inadequate funding for legal

¹Pursuant to Fed. R. App. P. 29(a), counsel for amicus curiae certifies that all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(c)(5), counsel for amicus curiae states that no counsel for a party authored this brief in whole or in part, and no person - other than amicus curiae, its members, or its counsel - made a monetary contribution to its preparation or submission.

representation of indigent defendants and prisoners in collateral proceedings has created a huge demand for our services, which are provided at no cost to incarcerated people. We represent children across the United States sentenced to life without parole, many of whom rely on frequent communication to help manage difficult prison environments. Additionally, we receive scores of letters each month from inmates hoping to challenge the conditions of their confinement. In recent years, persistently overcrowded, underfunded, and poorly managed prisons have escalated our involvement in prison reform work.

Because confidential correspondence is essential to EJI's work, amicus supports Scott Nordstrom's claim that the Arizona Department of Corrections has violated his rights to free speech, access to the courts, assistance of counsel, and due process under the First, Sixth, and Fourteenth Amendments to the United States Constitution. In the view of amicus, the judgment of the District Court - dismissing Mr. Nordstrom's challenge to the Arizona Department of Corrections' policy and practice of reading the contents of a prisoner's outgoing legal mail - should be reversed. Both parties have consented to the filing of this brief.

ARGUMENT

When the District Court initially dismissed Scott Nordstrom's challenge at the pleading stage, EJI filed an amicus brief with this Court urging reversal of the District

Court's ruling. Brief for the Equal Justice Initiative as Amici Curiae Supporting Plaintiff-Appellant, Nordstrom v. Ryan, 762 F.3d 903 (9th Cir. 2014) (No. 12-15738). In our brief, we discussed the critical importance of confidential communication in an era of mass incarceration and extremely limited defense resources, and how confidential legal mail is particularly critical to our work with incarcerated people on death row, those challenging their convictions and sentences through collateral proceedings, and those challenging the conditions of their confinement. Id. We also touched on the impracticality of the policies and procedures approved by the District Court. Id. This Court reversed the District Court's decision, holding that "[w]hat the Constitution does *not* permit, however, is *reading* outgoing attorney-client correspondence." Nordstrom v. Ryan, 762 F.3d 903, 910-11 (9th Cir. 2014) (emphasis in original); see also id. at 906 ("But *inspecting* letters and *reading* them are two different things What prison officials don't have the right to do is read a confidential letter from an inmate to his lawyer." (emphasis in original)).

On remand, the District Court determined that the Arizona Department of Corrections' legal mail policies and practices do not violate Mr. Nordstrom's rights because "reading a few words while scanning a letter" is different than "reading the text of the letter line-by-line." Nordstrom v. Ryan, 128 F. Supp. 3d 1201, 1215 (D. Ariz. 2016). The District Court's decision implicates the same concerns raised in our

initial amicus brief. Brief for the Equal Justice Initiative, Nordstrom, 762 F.3d 903 (No. 12-15738). Reading while scanning does not provide any more meaningful protection for attorneys and clients sharing sensitive, confidential information than does reading line-by-line. In fact, the language that the District Court imagined prison officials reading while scanning legal correspondence, Nordstrom, 128 F. Supp. 3d at 1215 (“the southwest corner of the exercise yard”; “guard shift change”), is the type of language that incarcerated people have used to notify EJI about guards beating an incarcerated person to death,² guards raping incarcerated women,³ and prison officials ignoring the basic needs of those under their care.⁴ We could not

²EJI investigated and filed a complaint that led to a Justice Department prosecution of Ventress correctional staff who beat an inmate to death. *The Murder of Rocrast Mack*, THE EQUAL JUSTICE INITIATIVE, <http://www.eji.org/rocrastmack> (last visited Jun. 22, 2016); Associated Press, *Former Alabama Prison Supervisor Convicted in Inmate’s Death*, <http://www.foxnews.com/us/2013/06/25/former-ala-prison-supervisor-convicted-in-inmate-death.html> (last visited Jun. 22, 2016).

³EJI investigated and filed a complaint alleging widespread sexual abuse and assault of incarcerated women by Tutwiler prison staff. *Tutwiler Prison for Women: Widespread Sexual Abuse by Male Guards*, THE EQUAL JUSTICE INITIATIVE, <http://www.eji.org/prisons/tutwiler> (last visited Jun. 22, 2016); *Guards at Alabama’s Tutwiler Prison Accused of Sexual Contact With Inmates*, WHNT NEWS 19, <http://whnt.com/2012/05/23/guards-at-alabamas-tutwiler-prison-accused-of-sexual-contact-with-inmates/> (last updated May 23, 2012).

⁴EJI investigated and filed a class action lawsuit alleging that Alabama Department of Corrections officials failed to respond to violent and dangerous conditions at St. Clair Prison. *EJI Files Federal Lawsuit Against Alabama Department of Corrections Over Dangerous and Violent Conditions at St. Clair*

begin to manage the needs associated with communicating with these incarcerated people and others in similar situations without confidential correspondence.

Perhaps recognizing that reading while scanning eviscerates the confidentiality of legal correspondence, the District Court noted that “[i]nmates also have the ability to communicate with their counsel in greater privacy during meetings and telephone calls.”⁵ Nordstrom, 128 F. Supp. 3d at 1215. The District Court imagined a world where lawyers and legal staff assisting the incarcerated are so local that written correspondence is simply one of several options for communication, but that is not the case. Because the prison population has grown exponentially over the last half century while the resources available to that population have remained inadequate, there is a shortage of lawyers who are willing and able to represent incarcerated people. Brief for the Equal Justice Initiative, Nordstrom, 762 F.3d 903 (No.

Prison, THE EQUAL JUSTICE INITIATIVE, <http://www.eji.org/node/980> (last visited Jun. 22, 2016); Casey Toner, *Violence and Murder Spike at St. Clair Prison Due to Poor Leadership, Unsafe Conditions, Lawsuit Claims*, AL.COM, http://www.al.com/news/index.ssf/2014/10/violence_spikes_at_st_clair_pr.html (last updated Oct. 13, 2014).

⁵If the District Court’s ruling is allowed to stand, it is difficult to imagine how legal phone calls and visits will remain any more private than legal mail in Arizona. The Arizona Department of Corrections could argue that inmates have used calls or visits to further illegal activity and that inmates might discuss escape plans during legal calls and visits. In the District Court’s view, that is all that is required to justify the monitoring of attorney-client interactions. Nordstrom, 128 F. Supp. 3d at 1213-14.

12-15738). Even when an attorney is willing, that attorney is often based in a location that is hundreds of miles from the prison where their client is housed. For most incarcerated people, written correspondence is the only way they can communicate with lawyers, especially in the early stages of an attorney-client relationship.

EJI represents clients who are over two thousand miles from our office in Alabama. Our office can only spend the time and money to conduct an in-person meeting after we have collected enough information from the incarcerated person to determine that effective litigation can be pursued. Confidential correspondence provides an efficient, inexpensive, reliable way for us to communicate with incarcerated people about the myriad facts and details that are critical to effective representation. We could not begin to effectively identify and assist inmates in need of representation, including those on death row, in postconviction, and in unconstitutional conditions in jails and prisons across this country, without confidential written correspondence.

Furthermore, investigating and litigating claims requires lawyers and their incarcerated clients to review and discuss reports, statements, and records that include sensitive information about clients' backgrounds, histories of abuse, and disabilities. In many instances, confidential correspondence is the only practical way to allow

lawyers and their clients to carefully review these documents. In suggesting that the incarcerated and their lawyers rely on phone calls and visits, the District Court failed to appreciate that access to the courts cannot be secured without confidential written communication.

CONCLUSION

This Court should reverse the judgment of the District Court permitting Arizona Department of Corrections authorities to read the contents of Mr. Nordstrom's legal mail. In the view of amicus, the Department of Corrections' policy and practice constitutes a direct intrusion by the State of Arizona into the attorney-client relationship and violates Mr. Nordstrom's rights to free speech, access to the courts, assistance of counsel, and due process under the First, Sixth, and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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June 22, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the “Word Count” feature in my WordPerfect X5 for Windows software, this brief contains 1,608 words including the signature lines that follow the brief’s conclusion but not including the corporate disclosure statement, table of contents, and table of authorities.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 22, 2016, in Montgomery, Alabama.

s/ Bryan A. Stevenson
BRYAN A. STEVENSON

CERTIFICATE OF SERVICE

I, BRYAN STEVENSON, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 22, 2016.

BRIEF OF AMICUS CURIAE THE EQUAL JUSTICE INITIATIVE
IN SUPPORT OF PLAINTIFF-APPELLANT SCOTT D. NORDSTROM;
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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.

s/ Bryan A. Stevenson
BRYAN A. STEVENSON