No. 16-15277

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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SCOTT D. NORDSTROM,
Plaintiff-Appellant
v.
CHARLES L. RYAN,
Director, Arizona Department of Corrections, et al.,
Defendant-Appellees.

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

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BRIEF OF THE ETHICS BUREAU AT YALE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND IN FAVOR OF REVERSAL

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INTEREST OF AMICI CURIAE ETHICS BUREAU AT YALE[1]

The Ethics Bureau at Yale[2] ("the Bureau") is a clinic composed of sixteen law students supervised by an experienced practicing lawyer and lecturer in legal ethics. The Bureau has submitted amicus briefs in matters involving lawyer and judicial conduct and ethics to various adjudicative bodies, including this Court. The Bureau drafts amicus briefs in cases concerning professional responsibility; assists defense counsel with ineffective assistance of counsel claims relating to professional responsibility; and offers ethics advice and counsel on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Pursuant to Fed. R. App. P. 29(c)(5), no party has authored the brief, in whole or in part, and no person other than the Bureau's members or counsel have contributed money to fund preparing or submitting the brief.

The Bureau respectfully submits this brief as amicus curiae for two reasons. First, it has an abiding interest in ensuring that the Model Rules of Professional Conduct preserve the right of every criminal defendant to communicate confidentially with his or her lawyer. Second, it believes that when courts ignore policies that infringe upon the lawyer-client relationship, they not only damage the

[1] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this brief.

[2] The preparation and publication of this document by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

integrity of the proceedings at issue, but also undermine public confidence in the legal system.

INTRODUCTION

The U.S. Supreme Court has long mandated that prisoners have meaningful access to the courts to challenge the basis for their imprisonment. *See Bounds v. Smith*, 430 U.S. 817, 830 (1977). This Court also has recognized that "[a] criminal defendant's ability to communicate candidly and confidentially with his lawyer is ***essential*** to his defense," and held that a policy allowing prison officials and guards to read inmates' legal mail obstructed effective assistance of counsel by breaching confidentiality and impeding a lawyer from upholding duties to his client in violation of the Sixth Amendment. *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014) (*Nordstrom I*) (emphasis added).

In this appeal, Plaintiff-Appellant Scott D. Nordstrom again challenges the constitutionality of an Arizona Department of Corrections policy (the "ADC Policy") that interferes with inmates' ability to communicate candidly and confidentially with their lawyers by authorizing corrections officers to "scan" inmates' letters to their lawyers for keywords that indicate criminality.[3] As set

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[3] By published regulation, the ADC permits officers and prison guards to inspect inmates' outgoing mail "to verify that its contents qualify as legal mail and do not contain communications about illegal activities." Arizona Dep't of Corrections, Inmate Legal Access to the Courts (2013) [ER 386].

forth in Nordstrom's Opening Brief, allowing prison officials to "scan" inmates' legal mail inhibits prisoners' constitutional right to effective assistance of counsel.

The ADC Policy, however, also places the lawyers who represent inmates in the impossible position of having to choose between competing ethical and fiduciary duties to their clients. Under the Model Rules of Professional Conduct (which 49 states, including Arizona, the Virgin Islands, and Washington, D.C. have adopted),[4] a lawyer has ethical obligations to: (1) maintain client confidentiality; (2) communicate openly with clients; (3) respect clients' autonomy; and (4) provide competent and diligent representation.

To preserve the client's confidentiality, the lawyer must advise the client *not* to exchange communications with the lawyer that the lawyer knows will be "scanned" by prison officials. If the lawyer restricts communications with the client to avoid the breach of confidentiality, the lawyer cannot communicate effectively with the client, even in circumstances where the lawyer needs to obtain the client's instructions on how to carry out the objectives of the case or information from the client that is essential to the client's defense.

Allowing the ADC Policy to stand will result in either a breach of the client's confidentiality and the attorney-client privilege, or a severe limitation on

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[4] *See* State Adoption of the ABA Model Rules of Professional Conduct, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited June 22, 2016).

full and open communications between an attorney and client. The ADC Policy also likely will make lawyers hesitant to represent inmates because it places them in a Hobson's choice over which ethical and fiduciary obligations to prioritize and makes communication with inmate clients even more challenging than it would be otherwise. The ADC Policy, therefore, interferes with the rights and the interests of *both* the inmates and the lawyers who represent them and should be enjoined.

ARGUMENT

I. **The ADC Policy Forces Lawyers to Choose Between Competing Ethical Obligations to the Detriment of the Representation**.

All lawyers must comply with the applicable rules of professional conduct, which establish the minimum requirements for ethical and effective legal representation. These baseline standards reflect the necessity of full and open communications between lawyers and their clients by requiring lawyers to preserve their clients' confidences, keep the clients reasonably informed about the litigation, obtain and follow the clients' wishes regarding the objectives for the representation, and obtain sufficient information from the client to provide competent and diligent representation. When a lawyer represents an inmate subject to the ADC Policy,[5] however, the lawyer cannot satisfy both the obligation to preserve the clients' confidences and the obligations that require full and open

[5] The ADC Policy empowers a correctional officer with discretion to review the contents of legal mail for keywords for multiple purposes, reviewing each page of a letter for up to half a minute. [ER 221-223].

communications with the client. Instead, the lawyer must choose whether to restrict communications with his client, or to subject his client's confidential information to review by prison guards and officials.

A. If Lawyers Do Not Restrict Communications with Inmates, They Will Violate Their Duty of Confidentiality and Chill the Clients' Communications.

One of a lawyer's most fundamental duties to the client is that the "lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation…." Ariz. Rules of Prof'l Conduct R. 1.6 (2003). The lawyer-client privilege is a subset of a lawyer's professional obligation to maintain confidentiality within the lawyer-client relationship. *See* Ariz. Comm. on Ethics, Formal Op. 97-05 (1997) (describing the differences between the duty of confidentiality and lawyer-client privilege). The privilege protects confidential communications involving any information which a client tells his lawyer in confidence in order to obtain legal advice. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.").

To avoid potential breaches of their duty of confidentiality, lawyers "must take reasonable precautions to prevent [] information [relating to the representation of a client] from coming into the hands of unintended recipients." Model Rules of

Prof'l Conduct R. 1.6 cmt. 19. For example, if a lawyer is talking to his client in a separate room and a third party enters the room, the lawyer must caution his client against and prevent him from sharing confidential information in the presence of the third party. A lawyer representing a client subject to the ADC Policy, therefore, would have to instruct the client not to communicate with the lawyer in writing so as to avoid the risk that the clients' confidential information would get into the hands of prison officials. If lawyers do *not* so instruct their clients, the ADC Policy will lead to the disclosure of the clients' confidential and privileged information.

As the U.S. Supreme Court has recognized, clients' ability to communicate with their lawyers without fear of such disclosure is necessary to a meaningful attorney-client relationship:

> The rule which places the seal of secrecy upon communications between attorney and client is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences of the apprehension of disclosure.

Hunt v. Blackburn, 128 U.S. 464, 470 (1888). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (citations omitted). *See also Trammel v. United States*, 445 U.S. 40, 51 (1980) ("The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the

client's reasons for seeking representation if the professional mission is to be carried out.").

"Even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection." *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). In *Johnson-El v. Schoemehl,* for example, the Eighth Circuit held that requiring prisoners to meet with their lawyers in areas of the jail where their conversations could be overheard by guards "impede[s] the detainees' ability to prepare for trial, jeopardize[s] the confidentiality of their lawyer-client communications and invade[s] their right to privacy." 878 F.2d 1043, 1053 (8th Cir. 1989).

This Court also has recognized that confidentiality serves as the linchpin for the Sixth Amendment right to counsel:

> In American criminal law, the right to privately confer with counsel is nearly sacrosanct. It is obvious to us that a policy or practice permitting prison officials to not just inspect or scan, but to *read* an inmate's letters to his counsel is highly likely to inhibit the sort of candid communications that the right to counsel and the attorney-client privilege are meant to protect.

Nordstrom I, 762 F.3d at 910 (citation omitted).

Consistent with the conclusions of both the U.S. Supreme Court and this Court, the lawyer-client privilege is the most sacred of the universally recognized privileges. It is enshrined in every evidence code, including the Federal Rules of

Evidence (Fed. R. Evid. 502), and is recognized in the common law of every jurisdiction in which evidence codes have not been promulgated. *See Hunt*, 128 U.S. at 470; *Granger v. Wisner*, 656 P.2d 1238, 1240 (Ariz. 1982). Under Arizona law, the lawyer-client privilege is codified for both criminal and civil proceedings. *See* Ariz. Rev. Stat. Ann. § 13-4062(2) (criminal); § 12-2234 (civil).

When policies like the ADC Policy breach the confidentiality of lawyer-client communications, inmates become cautious in their communications with their attorneys, which impedes (if not precludes) the inmates' ability to receive effective assistance of counsel. Although the State claims that the revised policy allowing prison officials to scan legal mail comports with the law, the policy still permits "looking for keywords," and for "key components," ER 221-23, which triggers the same violations of the attorney-client privilege and the duty of confidentiality as reading legal mail in its entirety. If, as the District Court suggests, prison officials would be permitted to inspect outgoing legal mail for "evidence of illegal activity," *Nordstrom v. Ryan*, 128 F. Supp. 3d 1201, 1217 (D. Ariz. 2016), including evidence in the written words, it would eviscerate the confidentiality afforded to attorney-client communications: indeed, with respect to the issues at stake in this litigation, one cannot draw any distinction between officers' *scanning* the communication for words that evince illegal activity and *reading* the content of the communication.

This kind of search could prove particularly prejudicial to defendants in capital cases. The language authorizing searches of illegal activity, broadly defined, would presumably permit an officer to search for information about past criminal activity unrelated to the ADC's interest in security, where discovery of such information could have grave consequences for the inmates' defense.

B. If Lawyers Conduct Only Verbal Communications with Inmate Clients, the Lawyers Will Violate Several Ethical Obligations and Prevent the Client From Receiving Effective Assistance of Counsel, as the Constitution Requires.

1. Lawyers Must Communicate Regularly with Their Clients.

Lawyers have several ethical and fiduciary obligations that require regular communications with their clients. First, without requiring an inquiry from the client, a lawyer has a fiduciary duty to keep his client "reasonably informed" throughout the representation. Ariz. Rules of Prof'l Conduct R. 1.4(a)(3) (2003). The Restatement reaffirms Rule 1.4's bedrock principle. It provides that a "lawyer must keep a client reasonably informed about the matter and must consult with a client to a reasonable extent concerning decisions to be made by the lawyer." Restatement (Third) of the Law Governing Lawyers § 20 (2000). The comments to the Restatement illustrate the importance and scope of the rule. One comment emphasizes that "the representation often can attain its end only if client and lawyer share their information and their views about what should be done." *Id.* § 20 cmt. b. Another explains:

> [A] lawyer must keep a client reasonably informed about the status of a matter entrusted to the lawyer, including the progress, prospects, [and] problems . . . of the representation. The duty includes both informing the client of important developments in a timely fashion, as well as providing a summary of information to the client at reasonable intervals so the client may be apprised of progress in the matter.

Id. § 20 cmt. c (citation omitted). The Restatement also requires lawyers to make available to their clients documents relevant to the representation. *Id.* § 46(2)-(3).

Second, a lawyer must "abide by a client's decisions concerning the objectives of representation" and "consult with the client as to the means by which [the objectives of representation] are to be pursued." Ariz. Rules of Prof'l Conduct R. 1.2(a) (2003). Defining the objectives and consulting about the means will always require back-and-forth communication, which often is extended and time-consuming.

Third, lawyers must act with such thoroughness and preparation as is reasonably necessary for the representation, Ariz. Rules of Prof'l Conduct R. 1.1 (2003), and "act with reasonable diligence and promptness in representing a client," *id.* R. 1.3. To comply with these obligations, a lawyer must "(1) proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation," and "(2) act with reasonable competence and diligence." Restatement (Third) of Law Governing Lawyers § 16 (1)-(2) (2000).

It is axiomatic that lawyers must communicate with their clients regularly to keep their clients informed, obtain the clients' instructions on how to proceed, and obtain the information necessary to provide competent representation.

2. Lawyers Have a Limited Ability to Communicate Verbally with Clients Who Are Inmates.

Lawyers do not have unfettered access to clients who are inmates. While lawyers can request privileged calls with their inmate clients, it is the lawyer—not the inmate—who must initiate the call. The client can request a privileged call by letter, but this again raises confidentiality issues and, even without confidentiality concerns, the call cannot take place until the lawyer receives the letter and can schedule the call through the prison. While a client may also call his lawyer on a non-confidential line to request a privileged call, such non-confidential calls cost money, which the inmates may not have, and, during such calls, inmates may unwittingly reveal privileged information.

In-person visits also are restricted and require significant time commitments from the lawyers. In this case, for example, Nordstrom is represented by pro bono counsel in Minnesota who would have to travel to Arizona to meet in person. Eliminating written communications as a means of contact, therefore, significantly impacts lawyers' ability to communicate with their inmate clients.

3. Limiting Communications with Inmate Clients to Telephone Calls and In-Person Meetings Will Cause Lawyers to Violate Their Ethical and Fiduciary Obligations and Provide Ineffective Assistance to Their Clients.

When communications have to be planned and scheduled, are available only during certain time periods, and are limited in duration, a lawyer cannot, as a practical matter, keep the client fully informed about developments or obtain complete information from the client. Clients and lawyers are human. Clients often remember additional details or have new ideas after having some time to think about a conversation with counsel, lawyers often forget to ask a question and need to follow up, and lawyers often learn new information or revise their thinking after the conversation, requiring another communication. If barred from written correspondence, the inmate's lawyer would be forced to schedule a new call or repeat the travel process. If time is of the essence or the client or lawyer thinks (even mistakenly) that the information is not sufficiently critical to justify the effort, the follow up may never occur. As a result, the lawyer will not be able to keep the client adequately informed or obtain the information necessary to ensure that the client's objectives are well defined and that the lawyer is able to provide competent and diligent representation.

Not only do these logistical difficulties place the lawyer in an untenable situation, but they necessarily compromise the representation. *See Procunier v. Martinez*, 416 U.S. 396, 420 (1974), *overruled on other grounds by Thornburgh v.*

Abbott, 490 U.S. 401 (1989) (noting that a policy which effectively required lawyers to meet with their clients in person for any lawyer-client interview "imposed a substantial burden on the right of access to the courts").

The consequences are particularly dire in capital cases like Nordstrom's. In the sentencing phase of a capital trial, defense lawyers are called upon to present the case for mitigation. Every aspect of the person's life becomes potentially relevant in determining what might be considered mitigating. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (holding that the sentencing judge must "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death'" (citation omitted)). Mitigation evidence often includes information that is highly personal and confidential to a client—information the client does not want to subject to review by prison officials. If the lawyer and client cannot arrange for adequate time to discuss the evidence by telephone or in person, such information may never come to light at all.

The same is true in habeas cases. Capital defense lawyers' past failure to research and offer mitigation evidence have been found to fall below the standard of competent representation. *See e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395-99

(2000); *Silva v. Woodford*, 279 F.3d 825, 836-41 (9th Cir. 2002).[6] A competent habeas lawyer therefore re-investigates mitigation evidence in order to identify possible ineffectiveness of prior counsel. To do so, the lawyer must have a full and fair opportunity to communicate with the client effectively, including through protected written communications.

II. The Restrictions the ADC Policy Imposes on the Lawyer-Client Relationship Will Cause Some Lawyers Not to Represent Inmates.

The ADC Policy discourages lawyers from representing inmates in two ways. First, by requiring lawyers to choose between competing ethical obligations, the ADC Policy exposes lawyers to sanctions for misconduct. Under the Arizona Rules of Professional Conduct, it is a further professional transgression to knowingly violate the rules. Ariz. Rules of Prof'l Conduct R 8.4(a) (2003). Lawyers are *required* to withdraw from any representation that violates or will violate the Rules of Professional Conduct. Ariz. Rules of Prof'l Conduct R 1.16(a) (2003). That means that unless lawyers have sufficient time and access to the prison to conduct all of their business with inmate clients verbally and without the aid of written communications, the lawyers *must* withdraw from representing

[6] Even in non-capital cases, defense lawyers' duty of competence requires reasonable investigation and preparation. Defense lawyers have frequently been faulted for failures to collect available information relevant to the defense. *See, e.g.*, *People v. Boyle*, 942 P.2d 1199, 1200-01 (Colo. 1997); *People v. Felker*, 770 P.2d 402, 407 (Colo. 1989); *In re Guy*, 756 A.2d 875, 886-87 (Del. 2000).

inmates. Given that the policy presents a barrier to almost any lawyer who seeks to fulfill her duties as effective counsel, lawyers who learn about the ADC Policy after undertaking the representation would act in further violation of the Rules if they attempt to engage another lawyer in the case. *See* Ariz. Rules of Prof'l Conduct R 8.4(a) (2003) (a lawyer commits professional misconduct in knowingly assisting or inducing another lawyer to violate the Rules).

Second, the practical difficulties in representing inmates with whom the lawyer can communicate only verbally will discourage busy lawyers from committing to the representation, and likely make lawyers who otherwise would be willing to take such representation on a pro bono basis wary of the additional costs.

Thus, while Arizona mandates the appointment of competent counsel for capital habeas defendants, *see* Ariz. Rev. Stat. Ann. § 13-4041 (2013), this mandate likely will be impossible to fulfill as an ethical and a practical matter as long as the ADC Policy is in place. The ADC Policy, therefore, prevents inmates from obtaining their constitutional rights to meaningful access to the courts.

CONCLUSION

The U.S. Supreme Court has guaranteed prisoners meaningful access to the courts. For that guarantee to be fulfilled, this Court must protect prisoners' ability to seek and receive effective legal counsel. The ADC Policy hobbles this ability because it destroys the confidentiality of written lawyer-client communications, which is crucial to facilitating trust within the lawyer-client relationship. Without a guarantee of confidentiality, full and frank disclosure between clients and their lawyers is severely chilled. Preserving confidentiality under the ADC Policy will severely restrict communications between lawyers and clients, which will prevent lawyers from satisfying their ethical obligations and clients from receiving effective assistance of counsel. The ADC Policy must be abolished.

Date: June 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), 32(a)(7)(C), and Circuit Rule 32-1, I certify that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more, and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 3,623 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

June 22, 2016

/s/ Kelly A. Kszywienski
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CERTIFICATE OF SERVICE

I certify that on June 22, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants on record.

/s/ Kelly A. Kszywienski