UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-61182-Civ-MARRA/JOHNSON

JOSEPH SAWCHUCK and
RICHARD SPENCER,
individually and on behalf
of all others similarly situated

Plaintiffs

vs.

KEN JENNE, in his official and
individual capacity as SHERIFF
OF BROWARD COUNTY,
BROWARD COUNTY, FLORIDA,
a political subdivision, BROWARD
COUNTY SHERIFF'S OFFICE, and
T-NETIX TELECOMMUNICATIONS
SERVICES, INC.

Defendants.
_____/

OPINION AND ORDER

This cause is before the Court upon Defendants Ken Jenne, Sheriff of Broward County and the Broward Sheriff's Office Motion For Summary Judgment [DE 21]. The Court has carefully considered the motion, response, reply, entire court file, and is otherwise fully advised in the premises.

Introduction

Plaintiffs filed their Class Action Complaint for Deprivation of Civil Rights ("Complaint") pursuant to 42 U.S.C. § 1983 against the Sheriff of Broward County, Kenneth Jenne ("Jenne"), Broward County, Florida ("Broward County"), the Broward

County Sheriff's Office ("BSO"), and T-Netix Telecommunications Services, Inc.[1] (collectively, "Defendants"). Plaintiffs were pretrial detainees in detention facilities operated by Defendant Broward County. Plaintiffs argue that a taping policy adopted by the BSO and implemented for a few weeks in the summer of 2006, violated inmates' constitutional rights. Plaintiffs allege that the BSO policy of electronically recording, or threatening to electronically record, all telephone calls between the inmates and third parties, including privileged telephone conversations between inmates and their lawyers, violates Plaintiffs' rights and privileges guaranteed to them under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United Constitution. Compl. ¶¶ 1, 36, 43, 50-51. Specifically, the Complaint alleges that the BSO taping policy constitutes: (1) an unreasonable search and seizure of the persons and/or property of the Plaintiffs and class members; (2) denied the Plaintiffs' and the class members' right to consult with and obtain effective assistance of counsel by preventing or hindering them from speaking candidly and confidentially with their lawyers; and (3) denies Plaintiffs and members of the class due process of law.

Undisputed Facts

Many of the material facts in this action are undisputed. Defendants operate detention facilities in Broward County including the North Broward Bureau where Plaintiffs Joseph Sawchuck ("Sawchuck") and Richard Spencer ("Spencer") have resided as pretrial detainees. From approximately June 29, 2006, until July 26, 2006, Defendants monitored all inmate collect telephone calls made from BSO's detention

[1] Defendant T-Netix Telecommunications Services, Inc. was voluntarily dismissed with prejudice. *See* DE 41.

facilities.[2] Sawchuck Decl. ¶ 5. Anyone, including attorneys, who wished to accept collect calls from inmates being held at the Defendants' facilities were required to press "0" to accept the call after being advised by a pre-recorded message that the conversation would be electronically recorded. Compl. ¶¶ 12-13.

On July 19, 2006, Sawchuck made a collect call to his attorney, Brian Simon ("Simon"), from BSO's North Broward Bureau. Sawchuck Decl. ¶ 6. Sawchuck intended to speak to his attorney about thoughts he had been having about taking his own life, of which Simon was aware. *Id.* Simon heard the message, pressed "0", and spoke with Sawchuck. Compl. ¶ 12. If Simon had refused to accept the condition that the conversation would be recorded, the call would have been disconnected. Sawchuck Decl. ¶ 7; Simon Decl. ¶ 18. Sawchuck claims to have exchanged unspecified confidential and privileged information with Simon which was recorded. Sawchuck Decl. ¶ 7.

Between July 14, 2006, and July 21, 2006, Plaintiff Spencer made a collect call to his attorney. Compl. ¶ 22. When Spencer became aware that his conversation with his attorney would be recorded, Spencer decided not proceed with the telephone call. Compl. ¶ 23.

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[2] Prior to the enactment of the BSO taping policy, all telephone calls initiated by inmates were subject to being recorded except those made by inmates to their attorney. Compl. ¶¶ 14-15. During the pendency of these proceedings, the parties entered into a stipulation concerning the electronic recordings which was approved by the Court. The BSO Defendants agreed not to disclose, listen to, or use in any manner, conversations between inmates detained at any BSO detention facility and their attorneys. *See* DE 46.

Plaintiffs allege that BSO's policy of recording all calls, including calls made to their attorneys, violates clearly established constitutional law. Plaintiffs state that on July 20, 2006, a complaint was made to BSO that its taping policy violated the attorney-client privilege, that it had a demonstrable "chilling effect" on the ability of attorneys and inmates to speak freely with each other, and that it severed a major artery for attorneys seeking to communicate with their clients. Compl. ¶ 17. Following this complaint, BSO discontinued its taping policy. Compl. ¶ 19. Whatever electronically recorded attorney-client telephone conversations exist remain in Defendants' possession.

Inmates in the BSO jails and their attorneys do have the opportunity to meet personally at the jail. Wimberly Unsworn[3] Decl. ¶ 3. A Broward County criminal defense lawyer may visit a BSO inmate in the late afternoons or early evenings during the week. Simon Decl. ¶ 15.

"'Legal' or 'privileged' mail is subject to inspection only for contraband, and only in the presence of the inmate unless waived by the inmate in writing. When such inspection takes place, the contents are inspected for contraband, but the contents of the communications are not read by staff." Wimberly Unsworn Decl. ¶ 4.

[3] The Court does not understand why Defendants would submit an unsworn declaration in support of their motion. In any event, the few facts set forth in the declaration upon which the Court has relied in this Order are not disputed by the Plaintiffs, i.e., that attorneys can visit their clients at the Broward County jail and that they can communicate via mail with their clients. *See* Simon Declaration. The key issue is whether the availability and practicality of using these means of attorney-client access are sufficient to provide Plaintiffs effective assistance of counsel required by the Sixth Amendment.

Standard of Review

Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn from it in the light most favorable to the non-movant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

Discussion

In the Complaint, Plaintiffs allege violations of their Fourth, Fifth, Sixth and Fourteenth Amendment constitutional rights as cognizable through 42 U.S.C. § 1983. Plaintiffs contend that the telephonic recordings of conversation between them and their attorneys constitute an unconstitutional search in violation of their Fourth Amendment rights, a violation of their Sixth Amendment right to counsel and a violation of their Fifth and Fourteenth Amendment rights to due process.[4]

[4] Count III of the Complaint alleges the violation of Plaintiffs' Fifth and Fourteenth Amendment rights to due process. Plaintiffs claim the act of recording their confidential telephone conversations with counsel essentially denies them the opportunity to consult with, and obtain, effective assistance of counsel. The Fourteenth Amendment guarantees prisoners meaningful access to the courts, and the opportunity to communicate privately with an attorney is an important part of that meaningful access. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir.1980). The analysis here of whether a genuine issue of material

The action challenged herein is an admitted BSO policy of electronically recording, or threatening to electronically record, all telephone conversations between inmates and third parties, including privileged telephone conversations between inmates and their lawyers. When reviewing a policy implemented by a penal institution, Courts are advised to give prison administrators great deference in adopting and executing policies and practices. *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996). Such great deference is important because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). In particular, prison officials exercise "wide discretion" in determining the manner and method that inmates will be allowed to access the court system and their attorneys, and prisoners are not entitled to any particular method of access to the courts or to their lawyers. *Bounds v. Smith*, 430 U.S. 817, 833 (1977). Absent substantial evidence in the record indicating that officials exaggerated their response to considerations of order, discipline, and security, courts ordinarily should defer to their judgment. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *see also McCorkle v. Johnson*, 881 F.2d 993 (11th Cir. 1989).

In *Turner v. Safley*, 482 U.S. 78, 84 (1987), the Supreme Court formulated a "unitary deferential" standard for reviewing prisoners' constitutional claims that strikes a balance between the policy of judicial restraint regarding prisoner complaints and the

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fact exists regarding a violation of Plaintiffs' right to effective assistance of counsel under the Sixth Amendment is equally applicable under the Fifth and Fourteenth Amendments and a separate analysis, based on the facts of this case, is not necessary. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 257-58 (2d Cir. 1986) ("[t]he Due Process clause of the Fifth and Fourteenth Amendment requires the same opportunity, as the Sixth Amendment").

need to protect constitutional rights. 482 U.S. at 85; *Shaw v. Murphy*, 532 U.S. 223, 229 (2001). The *Turner* Court held that when a prison regulation impinges upon on inmate's constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. 482 U.S. at 89; *id.* The Supreme Court considered this deferential standard necessary if "prison administrators ... and not the courts, [are] to make the difficult judgments concerning institutional operations." *Id.* (quoting *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119, 128 (1977)).

The *Turner* Court identified several factors that serve to focus the reasonableness inquiry: (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an "exaggerated response" to prison concerns. *Turner*, 482 U.S. at 89-91; *Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996) (applying this standard and concluding that restrictions upon phone usage by inmates is reasonably related to the legitimate government interest in reducing criminal activity and harassment). Thus, "[a] prison regulation, even though it infringes the inmate's constitutional rights, is an actionable constitutional violation only if the regulation is unreasonable." *Hakim v. Hicks*, 223 F.3d 1244, 1247 (11th Cir. 2000), *cert. denied*, 532 U.S. 932 (2001).

Prior to considering *Turner*'s requirements, the Court must determine whether there has been an infringement in the first place. *Wilson v. Moore*, 270 F. Supp. 2d 1328, 1348 (N.D. Fla. 2003). Plaintiffs assert that the BSO's policy of tape recording all outgoing calls, including telephone calls with their attorneys, constitutes a denial of their right to counsel, since the monitoring effectively prevented them from conferring confidentially with their lawyers.

The essential purpose of the Sixth Amendment is to ensure that criminal defendants have the requisite assistance of counsel thought to be necessary to a fair trial. *Nichols v. United States*, 511 U.S. 738, 754-55 (1994); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) (holding that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial"); *Nix v. Whiteside,* 475 U.S. 157, 175 (1986). Jails and penal institutions need only provide access to counsel that is adequate, effective, and meaningful when viewed as a whole and prisoners do not have a right to any particular means of access. *Bounds v. Smith,* 430 U.S. 817, 823, 832 (1977); *Morris v. Slappy* 461 U.S. 1, 11 (1983) (not every restriction on counsel's opportunity to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel).[5] A prisoner's right to telephone access

[5] *See also U.S. v. Lentz*, 419 F. Supp. 2d 820, 836 (E.D. Va. 2005) (prison policy of recording and monitoring all inmate telephone calls did not infringe Plaintiff's Sixth Amendment rights because Plaintiff had at least two effective avenues of communicating confidentially with counsel - mail and in-person conferences); *Bellamy v. McMickens*, 692 F.Supp. 205, 214 (S.D.N.Y. 1988) ("States have no obligation to provide the best manner of access to counsel. Rather, restrictions on inmates' access to counsel via the telephone may be permitted as long as prisoners have some manner of access to counsel"); *Aswegan v. Henry,* 981 F.2d 313, 314 (8th Cir. 1992) ("[a]lthough prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited

is "subject to rational limitations in the face of legitimate security interests of the penal institution." *Strandberg v. City of Helena,* 791 F.2d 744, 747 (9th Cir.1986); *see also United States v. Noriega,* 917 F.2d 1543, 1551 n.10 (11th Cir. 1990) ("[i]t is not unusual or unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with maintaining the security of the penal facility"); *Feeley v. Sampson*, 570 F.2d 364, 373-374 (1st Cir. 1978) (suggesting that striking an appropriate balance between the interests of prison authorities and prisoners could be achieved by conditioning prisoners' access to telephones on their recognition that prison guards have authority to monitor telephone conversations).

Plaintiffs claim that attorney-client contact within the Broward County detention facilities by mail or personal visits does not provide meaningful access. Plaintiffs state that "[t]he BSO taping policy at issue here is alleged to have violated the Sixth Amendment rights of all inmates by forcing them to make a Hobson's choice between either waiving their attorney-client privilege or ***completely foregoing*** their right to communicate with counsel in the best manner practicable." DE 42 at 12 (emphasis in original). Plaintiffs proffer the affidavit of attorney Simon in support of the contention that personal visits and correspondence do not provide reasonable or meaningful access to counsel. Simon declares that the BSO Defendants "ignore the realities of the difficulties that a criminal defense lawyer in Broward County, such as myself, faces in attempting to communicate meaningfully, effectively and regularly with clients who are

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telephone use"); *Pino v. Dalsheim*, 558 F.Supp. 673, 675 (S.D.N.Y. 1983) (noting that the government is not required to provide inmates the best manner of access to counsel).

being held in a detention facility." Simon Decl. ¶ 12. As a result, Plaintiffs assert that unrecorded telephone communications with counsel are required in order for Broward County inmates to have effective legal representation. DE 42 at 3, Simon Decl. ¶¶ 12-20. In the absence of other viable and effective means of communication between an attorney and his client, recording of communications between that attorney and client would appear to be an infringement of a defendant's Sixth Amendment right.

Defendants claim, on the other hand, that other meaningful and effective means of communication are available between counsel and the inmates, including unlimited access to the mails and personal visits. DE 21 at 4, Wimberly Unsworn Decl. ¶¶ 3-4. Thus, while the Court is not prepared to rule that the recording in question constitutes a per se violation of Plaintiffs' Fifth, Sixth and Fourteenth Amendment rights, questions of fact are presented by Plaintiffs' Complaint and Defendants' motion as to whether Broward County detention facilities provide viable and effective means of communication or access between inmates and their attorney, without regard to the use of telephone communications. The sparse record in this case illustrates the existence of genuine issues of material fact regarding whether Plaintiffs' constitutional rights have been infringed. Furthermore, if it is determined that Plaintiffs' constitutional rights have been infringed, the Court must then consider the *Turner* factors - which again create questions of fact. Under the present record, summary judgment is inappropriate.

Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures. *Katz v. United States*, 389 U.S. 347, 511 (1967). Conversation is within the Fourth Amendment's protection, and use of electronic devices to capture it is a "search" within

the meaning of the Amendment. *Berger v. New York,* 388 U.S. 41, 51 (1967). The Fourth Amendment protection against unreasonable searches of the person provides a clearly established right to be free from invasion of privacy. *Id.*

Society recognizes the importance of privacy in communications with an attorney. The "attorney-client privilege is one of the oldest recognized privileges for confidential communications. The privilege is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote broader public interests.'" *Swindler & Berlin v. United States,* 524 U.S. 399, 403 (1998) (citations omitted). Thus, it is reasonable to expect that a conversation with attorney would be private. *See Lanza v. New York,* 370 U.S. 139, 143-44 (1962) ("even in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection").

On the other hand, "[i]t is not unusual or unreasonable to condition the use of telephones by penal inmates on monitoring of the telephone calls by the authorities charged with maintaining the security of the penal facility." *United States v. Noriega,* 917 F.2d 1543, 1551 n.10 (11th Cir. 1990). Moreover, Florida courts have recognized the propriety and legality of recording inmates' telephone conversations. *See Pires v. Wainwright,* 419 So.2d 358, 359 (Fla. Dist. Ct. App. 1982) ("[w]e find that societal interests of maintaining custody over prisoners significantly outweighs the individual prisoner's interests in the privacy of his telephonic communications. Accordingly, we hold there is an exception to the Security of Communications Act permitting prison officials to wiretap telephone calls from prisoners incarcerated in our prisons").

A defendant cannot invoke the Fourth Amendment's protections unless he has a legitimate expectation of privacy against the government's intrusion. *See United States v. Chadwick,* 433 U.S. 1, 7 (1977); *Minnesota v. Carter,* 525 U.S. 83 (1998); *United States v. Cooper,* 133 F.3d 1394, 1398 (11th Cir. 1998). A defendant who claims the protections of the Fourth Amendment has the burden of establishing his legitimate expectation of privacy in the place invaded. *Rakas v. Illinois,* 439 U.S. 128, 130 n.1 (1978); *United States v. Meyer,* 656 F.2d 979 (5th Cir. 1981). The test for determining what constitutes a "legitimate expectation of privacy" is: 1) whether a subjective expectation was exhibited; and 2) whether the expectation is one that society will recognize as reasonable. *Smith v. Maryland,* 442 U.S. 735, 740 (1979). Defendants argue that Plaintiffs did not have a subjective expectation of privacy necessary to support a Fourth Amendment claim with regard to their telephone conversations made from the prison and that summary judgment on this claim should be granted. The Court agrees.

There can be no doubt that Sawchuck had no reasonable expectation of confidentiality in the July 19th conversation with attorney Simon because, as he has acknowledged, he knew his call was subject to monitoring and recording. Indeed, both Plaintiffs cannot claim even a subjective expectation of confidentiality, especially Spencer who refused to use the telephone because he did not want to be recorded. Application of the Fourth Amendment depends on whether the person invoking its protection can claim a "legitimate expectation of privacy" that has been invaded by the State's action. The Fourth Amendment is simply inapplicable to the circumstances of

this case. *U.S. v. Noriega*, 764 F.Supp. 1480, 1492 (S.D. Fla. 1991).

Sawchuck attempts to get around this hurdle by arguing that because he was speaking with his attorney, he had a legitimate expectation of privacy with respect to this "privileged telephone conversation." DE 42 at 18. Plaintiffs go so far as to equate the requirement that they consent to being recorded to the hypothetical situation where a homeowner is forced at gunpoint by a police officer to consent to a search of his home. Sawchuck claims his consent was involuntary because it was not a result of a free and unconstrained choice.

The law on the Fourth Amendment right to be free from unreasonable searches and the right of privacy is well established. So long as a prisoner is provided notice that his communications will be recorded, and he is in fact aware of the monitoring program but nevertheless uses the telephones, by that use he impliedly consents to be monitored. *United States v. Workman*, 80 F.3d 688, 693 (2d Cir. 1996). The Fourth Amendment cannot attach under these undisputed material facts and the Plaintiffs do not have a cognizable claim for unconstitutional search.

Conclusion

Defendants request the Court to grant them summary judgment on all of Plaintiffs' constitutional claims. As to the Sixth Amendment claim, the motion will be denied as explained above. As to the Fourth Amendment claim, the motion for summary judgment will be granted as explained above. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion For Summary Judgment [DE 21] is **GRANTED IN PART AND DENIED IN PART.**

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 20th day of September, 2007.

KENNETH A. MARRA
United States District Judge

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