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FILED

JUL 17 2005
CLERK OF COURT
BY 

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10 DONALD YORK EVANS, and
11 JOHN WITHEROW

12 Plaintiffs,

CASE NO. CV-N-05-0327-ECR-RAM

13 v.

14 LENARD VARÉ, ROSEMARY
15 SEALS, KELLY BALENGER, and
16 DOES I-X,

17 Defendants.

18 **FIRST AMENDED PLAINTIFFS' COMPLAINT**

19 COMES NOW Plaintiffs above-named, by and through their undersigned counsel, ,
20 ROBERT R. HAGER, ESQ., and hereby complains and alleges against Defendants, and each
21 of them as follows:

22 **JURISDICTION**

23 1. Jurisdiction of this Court over the claims alleged in this action is found in the
24 provisions of 28 U.S.C. 1331, 1343, 1651, 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988.

25 **VENUE**

26 2. Venue lies properly in this Court pursuant to 28 U.S.C. § 1391.

27 **PARTIES**

28 3. Plaintiffs DONALD YORK EVANS (Plaintiff EVANS) is a citizen of the United
States and a resident of the State of Nevada, with a business mailing address of P.O. Box 864,
Reno, NV 89504, telephone number (775) 348-7400, and at all times relevant to the claims

1 alleged in this action he is an attorney duly authorized to practice law in the courts of the United
2 States and Nevada and he has a professional and personal association and friendship with
3 Plaintiff JOHN WITHEROW.

4 4. Plaintiff JOHN WITHEROW (Plaintiff WITHEROW) is a citizen of the United
5 States and is a prisoner confined by the Nevada Department of Corrections (NDOC) at
6 Lovelock Correctional Center (LCC).

7 5. Defendant LENARD VARÉ (Defendant VARÉ) is believed to be a citizen of the
8 United States and a resident of the State of Nevada, with a business mailing address of 1200
9 Prison Road, Lovelock, NV 89419, telephone number (775) 273-1300, and at all times relevant
10 to the claims alleged in this action he was acting under color of state law as the Warden of the
11 LCC for the NDOC.

12 6. Defendant ROSEMARY SEALS (Defendant SEALS) is believed to be a citizen
13 of the United States and a resident of the State of Nevada, with a business mailing address of
14 1200 Prison Road, Lovelock, NV 89419, telephone number (775) 273-1300, and at all times
15 relevant to the claims alleged in this action she was acting under color of state law as the
16 Associate Warden of Programs (AWP) at the LCC for the NDOC.

17 7. Defendant KELLY BALENGER (Defendant BALENGER) is believed to be a
18 citizen of the United States and a resident of the State of Nevada, with a business mailing
19 address of 1200 Prison Road, Lovelock, NV 89419, telephone number (775) 273-1300, and at
20 all times relevant to the claims alleged in this action she was acting under color of state law as
21 the Library Supervisor of the LCC for the NDOC.

22 8. Defendants DOES I-X, whose true identities are unknown to Plaintiffs at this
23 time, are believed to be citizens of the United States and residents of the State of Nevada and
24 are believed to be responsible in some manner for the events and occurrences that are the
25 subject of this Complaint. Plaintiffs will seek leave to amend this Complaint to insert the true
26 name(s) of these Defendants when the same has been ascertained, with appropriate allegations
27 pertaining to their capacities and conduct while acting under color of state law.

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9. Defendants, and each of them, are sued in both their official and individual capacities for their conduct while acting under color of state law.

FACTS

10. Plaintiff EVANS is a civil rights activist and he has engaged in various civil rights litigation on behalf of prisoners and other oppressed persons against various government officials for over 17 years.

11. Plaintiff WITHEROW is a layman, self and college trained as a paralegal/law clerk, and he is a civil rights activist engaged in various civil rights activities on his own behalf and on behalf of other prisoners and oppressed persons against government officials for over 25 years.

12. Plaintiff EVANS met Plaintiff WITHEROW over 20 years ago, he has represented Plaintiff WITHEROW in both criminal and civil matters during the past 20 years, he has retained the services of Plaintiff WITHEROW as a paralegal/law clerk in the past, he intends to retain the services of Plaintiff WITHEROW as a paralegal/law clerk in the future. Plaintiff EVANS has the utmost respect for the skills, abilities and knowledge of Plaintiff WITHEROW in both criminal and civil litigation, he has a common interest with Plaintiff WITHEROW in the civil rights of prisoners and other oppressed people, he has considered Plaintiff WITHEROW as a friend, colleague and contemporary civil rights activist for a substantial period of time and he is currently engaged with Plaintiff WITHEROW in various relationships, excluding a relationship relating to retention of his services as a paralegal/law clerk.

13. Plaintiffs discuss and consult frequently on various civil rights activities of mutual interest.

14. Defendants BALENGER and SEALS, jointly and together in concert, in conspiracy to hinder and impede civil rights activities, began engaging in repeated acts of censoring Plaintiff EVANS' correspondence to Plaintiff WITHEROW and refusing to deliver to Plaintiff WITHEROW various letters and public records.

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1 15. Plaintiff EVANS' attempted to resolve this matter informally with prison officials
2 and Deputy Attorney General Daniel Wong and, after several months, his censored and withheld
3 letters and the public records were delivered to Plaintiff WITHEROW. He assumed the matter
4 was resolved.

5 16. Defendant SEALS on November 8, 2004 met personally with Plaintiff
6 WITHEROW to resolve a grievance (No. GR-2004-19-7821) pertaining to claims involving
7 copy work and retaliation against him for exercising his constitutional rights. After reaching
8 an agreement regarding resolution of the grievance, Defendant SEALS informed Plaintiff
9 WITHEROW that she was prohibiting him from communicating with Plaintiff EVANS
10 regarding various civil rights litigation other than his own cases.

11 17. Defendant SEALS failed to provide Plaintiff EVANS with notice or an
12 opportunity to appeal her decision to censor, prohibit and restrict Plaintiff EVANS'
13 communications with Plaintiff WITHEROW involving civil rights litigation.

14 18. Plaintiff WITHEROW on November 10, 2004 wrote to NDOC Director
15 CRAWFORD regarding the decision of Defendant SEALS to restrict, prohibit and censor his
16 communications with Plaintiff EVANS regarding civil rights litigation other than his own.

17 19. Defendant VARÉ on November 23, 2004, after consultation and discussion with
18 Defendants BALENGER and SEALS, wrote Plaintiff WITHEROW a letter in response to
19 Plaintiff WITHEROW's communication to Director CRAWFORD advising Plaintiff
20 WITHEROW, among other things, that: "I find it very difficult to find your relationship with
21 Mr. Evans to be anything but professional and business in nature" and "I am therefore denying
22 future correspondence between yourself and Mr. Evans involving legal work and cases, other
23 than your own personal legal matters".

24 20. Defendant VARÉ failed to provide Plaintiff EVANS with notice or an opportunity
25 to appeal his decision to restrict, prohibit and censor Plaintiff EVANS' communications with
26 Plaintiff WITHEROW involving civil rights and other cases other than Plaintiff WITHEROW's
27 own personal legal matters.

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21. Plaintiff WITHEROW on November 30, 2004 submitted a grievance (No. GR-2004-19-7107) regarding the restrictions, prohibitions and censorship of his communications with Plaintiff EVANS regarding civil rights and other cases other than his own personal legal matters.

22. Plaintiff EVANS on or about February 9, 2005 caused to be mailed to Plaintiff WITHEROW a public record decision from a civil rights case pending in this Court of mutual interest to both of them for review.

23. Defendants BALENGER and SEALS, jointly and together in concert, after consultation and discussion, pursuant to Defendant VARÉ's restriction, prohibition and censorship imposed on Plaintiff EVANS' communication with Plaintiff WITHEROW regarding civil rights and other legal matters on February 11, 2005, refused to deliver Plaintiff EVANS' February 9, 2005 communication to Plaintiff WITHEROW and required Plaintiff WITHEROW to return the public record decision to Plaintiff EVANS without an opportunity to review the communication.

24. Defendants BALENGER, SEALS and VARÉ failed to provide Plaintiff EVANS with notice or an opportunity to appeal the February 11, 2005 decision to refuse to deliver Plaintiff EVANS' February 9, 2005 communication to Plaintiff WITHEROW and the censorship of that communication.

25. Defendants, and each of them, acted intentionally, or recklessly, with deliberate disregard for Plaintiffs' constitutional rights in their above-described conduct and Defendants, and each of them, engaged in the above-described conduct without legitimate or reasonable penological purpose or goal.

WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

FIRST CAUSE OF ACTION

42 U.S.C. § 1983

(Declaratory Relief)

Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs of this Complaint as though fully set forth here.

1 38. Defendants, and each of them, knew, or should have known, that their above-
2 described conduct denied and deprived Plaintiffs of the above-described right in violation of
3 42 U.S.C. § 1983.

4 39. Plaintiffs suffered, and continues to suffer, injuries and damages as a direct or
5 proximate result of the above-described conduct of Defendants, and each of them, as will more
6 fully appear at trial.

7 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

8 PUNITIVE DAMAGES

9 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
10 of this Complaint as though fully set forth here.

11 40. Plaintiffs allege that Defendants, and each of them, acted with deliberate
12 indifference to Plaintiffs' clearly established constitutional rights, violating those rights and
13 causing them to suffer injuries and damages, and therefore, punitive damages should be
14 awarded to punish these Defendants for their misconduct and to deter similar misconduct in the
15 future, with the amount of punitive damages to be determined by the trier of fact at trial.

16 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

17 JURY TRIAL DEMANDED

18 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
19 of this Complaint as though fully set forth here.

20 41. Plaintiffs demand a trial by jury on all of the facts which may be submitted to a
21 jury for determination in this action.

22 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

23 PREVIOUS LAWSUITS AND ADMINISTRATIVE REMEDIES

24 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
25 of this Complaint as though fully set forth here.

26 42. Plaintiffs have not filed any previous lawsuits pertaining to the claim alleged in
27 this action.

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1 26. Plaintiffs request declaratory relief pursuant to Fed.R.Civ.P. Rule 57 and 28
2 U.S.C. § 2201 determining that:

3 (a) They have a clearly established right to freedom of speech, to freedom of
4 association and to petition the government for redress of grievances under the First Amendment
5 of the U.S. Constitution and each of those rights are protected by the Due Process Clause of the
6 Fourteenth Amendment of the U.S. Constitution;

7 (b) Plaintiff EVANS has a clearly established right to communicate with
8 Plaintiff WITHEROW under the First Amendment of the U.S. Constitution regarding any civil
9 rights matters of interest to him and to receive communications from Plaintiff WITHEROW
10 expressing Plaintiff WITHEROW's views, opinions and comments regarding those civil rights
11 matters;

12 (c) Any written document filed in the record of any court of this country in a
13 criminal or civil case that is not subjected to a protective or sealing order is a public record;

14 (d) Defendants' restrictions and prohibitions imposed on Plaintiff EVANS'
15 communications with Plaintiff WITHEROW involving legal work and civil rights cases is
16 censorship and a violation of Plaintiffs' rights under the First Amendment of the U.S.
17 Constitution and the provisions of 42 U.S.C. § 1983; and

18 (e) Defendants' refusal to deliver Plaintiff EVANS' written communications
19 and/or public records sent to Plaintiff WITHEROW through the mail is censorship and a
20 violation of Plaintiff EVANS' rights under the First Amendment of the U.S. Constitution.

21 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

22 SECOND CAUSE OF ACTION

23 (Injunctive Relief)

24 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
25 of this Complaint as though fully set forth here.

26 27. Plaintiffs request preliminary and permanent injunctive relief pursuant to
27 Fed.R.Civ.P. Rule 65 and 28 U.S.C. § 1651 enjoining and prohibiting Defendants, and each of
28 them or their agents or employees from engaging in the following:

1 (a) Imposing restrictions or prohibitions on Plaintiff EVANS' communications
2 and/or public records to or from Plaintiff WITHEROW on any civil rights or other legal matter
3 Plaintiffs may decide to express their views, opinions or comments thereon to each other.

4 (b) Refusing to deliver within 24 hours of receipt by the NDOC Plaintiff
5 EVANS' written communications and/or public records sent to Plaintiff WITHEROW for
6 review on any civil rights or other legal matter he may deem of interest to Plaintiff
7 WITHEROW or upon which he desires the views, ideas or opinions of Plaintiff WITHEROW
8 thereon; and

9 (c) Reading Plaintiff EVANS' confidential legal communications to Plaintiff
10 WITHEROW regarding any legal matters he may be pursuing, or considering pursuing, on
11 behalf of Plaintiff WITHEROW or any other person.

12 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

13 THIRD CAUSE OF ACTION

14 42 U.S.C. § 1983

15 U.S. Constitution/Amendment

16 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
17 of this Complaint as though fully set forth here.

18 28. Plaintiffs were denied their right to freedom of speech, to freedom of association
19 and to petition the government for redress of grievances, as guaranteed by the First Amendment
20 of the United States Constitution, in violation of 42 U.S. C. § 1983, when Defendants VARÉ,
21 SEALS and BALENGER, acting jointly and together in concert, imposed restrictions and
22 prohibitions on Plaintiff EVANS' communications to and from Plaintiff WITHEROW
23 regarding civil rights and other legal matters.

24 29. Defendants, and each of them, knew, or should have known, that their above-
25 described conduct denied and deprived Plaintiffs of the above-described rights in violation of
26 42 U.S.C. § 1983.

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1 30. Plaintiffs suffered, and continue to suffer, injuries and damages as a direct or
2 proximate result of the above-described conduct of Defendants, and each of them, as will more
3 fully appear at trial.

4 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

5 FOURTH CAUSE OF ACTION

6 Violation of First Amendment Rights

7 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
8 of this Complaint as though fully set forth here.

9 31. Plaintiffs were denied their rights to freedom of speech, to freedom of association
10 and to petition the government for redress of grievances, as guaranteed by the First Amendment
11 of the U.S. Constitution in violation of 42 U.S.C. § 1983, when Defendants VARÉ, SEALS and
12 BALENGER, acting jointly and together, in concert, refused to deliver to Plaintiff WITHEROW
13 on February 11, 2005 the public record Plaintiff EVANS sent to Plaintiff WITHEROW for
14 review and required Plaintiff WITHEROW to return that public record to Plaintiff EVANS
15 without providing Plaintiff WITHEROW with an opportunity to review that public record.

16 32. Defendants, and each of them, knew, or should have known, that their above-
17 described conduct denied the deprived Plaintiffs of the above-described rights in violation of
18 42 U.S.C. § 1983.

19 33. Plaintiffs suffered, and continues to suffer, injuries and damages as a direct or
20 proximate result of the above-described conduct of Defendants, and each of them as will more
21 fully appear at trial.

22 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

23 FIFTH CAUSE OF ACTION

24 Violation of Fourteenth Amendment Rights

25 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
26 of this Complaint as though fully set forth here.

27 34. Plaintiffs were denied their right to due process of law, as guaranteed by the
28 Fourteenth Amendment of the U.S. Constitution, in violation of 42 U.S.C. § 1983, when

1 Defendants VARÉ, Seals and BALENGER, acting jointly and together, in concert, imposed
2 restrictions and prohibitions on Plaintiff EVANS' communication to and from Plaintiff
3 WITHEROW regarding civil rights and other legal matters without providing him with notice
4 of those restrictions and prohibitions and without providing him with an opportunity to appeal
5 those restrictions and prohibitions.

6 35. Defendants, and each of them, knew, or should have known, that their above-
7 described conduct denied and deprived Plaintiff EVANS of the above-described right in
8 violation of 42 U.S.C. § 1983.

9 36. Plaintiff EVANS suffered, and continues to suffer, injuries and damages as a
10 direct or proximate result of the above-described conduct of Defendants. and each of them, as
11 will more fully appear at trial.

12 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

13 SIXTH CAUSE OF ACTION

14 42 U.S.C. § 1983

15 Violation of Fourteenth Amendment Rights

16 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
17 of this Complaint as though fully set forth here.

18 37. Plaintiffs were denied their right to due process of law, as guaranteed by the
19 Fourteenth Amendment of the U.S. Constitution, in violation of 42 U.S.C. § 1983, when
20 Defendants VARÉ, SEALS and BALENGER, acting jointly and together, in concert, refused
21 to deliver Plaintiff EVANS' February 9, 2005 communication of a public record to Plaintiff
22 WITHEROW and required Plaintiff WITHEROW to return that public record to him, without
23 permitting Plaintiff WITHEROW with an opportunity to review that public record, without
24 providing Plaintiff EVANS with notice of the decision not to deliver that communication and
25 without providing him with an opportunity to appeal the decision to refuse to deliver that
26 communication.

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1 38. Defendants, and each of them, knew, or should have known, that their above-
2 described conduct denied and deprived Plaintiffs of the above-described right in violation of
3 42 U.S.C. § 1983.

4 39. Plaintiffs suffered, and continues to suffer, injuries and damages as a direct or
5 proximate result of the above-described conduct of Defendants, and each of them, as will more
6 fully appear at trial.

7 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

8 PUNITIVE DAMAGES

9 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
10 of this Complaint as though fully set forth here.

11 40. Plaintiffs allege that Defendants, and each of them, acted with deliberate
12 indifference to Plaintiffs' clearly established constitutional rights, violating those rights and
13 causing them to suffer injuries and damages, and therefore, punitive damages should be
14 awarded to punish these Defendants for their misconduct and to deter similar misconduct in the
15 future, with the amount of punitive damages to be determined by the trier of fact at trial.

16 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

17 JURY TRIAL DEMANDED

18 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
19 of this Complaint as though fully set forth here.

20 41. Plaintiffs demand a trial by jury on all of the facts which may be submitted to a
21 jury for determination in this action.

22 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

23 PREVIOUS LAWSUITS AND ADMINISTRATIVE REMEDIES

24 Plaintiffs incorporate by reference all allegations contained in all numbered paragraphs
25 of this Complaint as though fully set forth here.

26 42. Plaintiffs have not filed any previous lawsuits pertaining to the claim alleged in
27 this action.

28 //

1 43. Plaintiff EVANS has no administrative remedy available to them to resolve the
2 claims alleged in this action with the NDOC and therefore has no other adequate remedy at law
3 other than the relief requested herein.

4 44. Plaintiff WITHEROW has exhausted his Administrative Remedies with the
5 NDOC regarding these matters in Grievance Nos. GR-2004-19-7107 and GR-2005-19-1844.

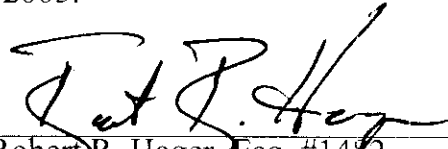
6 WHEREFORE, Plaintiffs pray for relief as is more fully enumerated below.

7 PRAYER FOR RELIEF

8 WHEREFORE, Plaintiffs pray for the following relief:

- 9 1. For the declaratory relief requested herein above;
10 2. For the injunctive relief requested herein above;
11 3. For nominal, compensatory and punitive damages for each of the Defendants in
12 an amount to be determined by the trier of fact;
13 4. For a trial by jury on all issues so triable;
14 5. For costs and attorney fees incurred by Plaintiffs in pursuit of the claims alleged
15 in this action to be paid by Defendants herein;
16 6. For leave to amend this Complaint should the same become necessary; and
17 7. For any other or further relief deemed just and proper in the interests of fairness
18 and justice.

19 DATED: This 14th day of June, 2005.

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21 
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