2009 WL 4563523 (D.Minn.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. Minnesota.

Kenneth E. ANDERSEN, and Dell D. Holm, on behalf of themselves and all others similarly situated, and William K. Bulmer, II, on behalf of himself and all others similarly situated, Plaintiffs,
v.
THE COUNTY OF BECKER, MINNESOTA, Tim Gordon, in his capacity as Sheriff of Becker County, and Joseph H. McArthur, in his capacity as Captain in the Becker County Sheriff's Department, Defendants.

No. 08-CV-5687 ADM/RLE.
June 30, 2009.

Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment

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INTRODUCTION

Plaintiffs Andersen and Holm allege Becker County Defendants improperly recorded and monitored their calls with their attorney.[1] Andersen was convicted of First Degree Murder. Holm pled guilty to Assault with a Dangerous Weapon. They claim calls with their attorneys (including Andersen's attorney Bulmer) were improperly monitored. Becker County has a policy not to monitor attorney/client calls. No calls of Plaintiffs were monitored or used against them in their prosecution. For the reasons set forth below, all of Plaintiffs' claims should be dismissed.

STATEMENT OF FACTS

1. BECKER COUNTY JAIL

Becker County contracts with Reliance Telephone, Inc., to install and operate inmate telephones. *Affidavit of Tim Gordon* ¶ 1;[2] *Affidavit of Brendan Gilmore* ¶ 2. Prior to December 31, 2008, posted in the jail by inmate phones are warnings indicating "All Phone Calls May be Monitored or Recorded." *Aff Gordon* ¶ 2, Ex. 1; *Affidavit of Susan Tindal*, Ex. I - *Hodgson Dep*. p. 39. The Inmate Handbook explained "[a]ny non-attorney/client privileged phone calls made from the Becker County Jail will be monitored and/or recorded." *Hodgson Dep*. Ex. 3, p. 9. All phone calls from cell blocks in the jail are recorded unless a request is made for a private attorney phone call. *Aff Gordon* ¶ 3; *Hodgson Dep*. p. 78.[3] During the booking process, jail procedures are explained to the detainee/inmate. Inmates are told all calls except calls to attorneys are recorded and monitored. *Hodgson Dep*. pp. 26-27. Jailers explain the detainee/inmate must make a request for a private telephone call to their attorney. *Aff. Gordon* ¶ 3. After the attorney's information is verified, they will be able to talk privately to an attorney. *Id*. ¶ 4. There may be some circumstances where the process for a private call is not explained at booking and is explained when the inmate wants to make a call. *Hodgson Dep*. pp. 53-54, 135.

If an inmate wants a private call with an attorney, he/she makes the request to a jailer who gives the request to a supervisor who reviews the private call list to see if the attorney is already a number that will not be recorded. *Hodgson Dep*. pp. 57-58; *Aff. Tindal*, Ex. L - *Soyring Dep*. pp. 28-29; *Aff. Tindal*, Ex. M - *Peterson Dep*. pp. 20, 29. If the number is not on the list, the supervisor gives the request to Reliance to verify it is an attorney's landline number. Then the number is placed on a Private List.[4] *Hodgson Dep*. p. 58.

Becker County records phone calls from detainees/inmates for security reasons. *Aff. Gordon* ¶ 6. These reasons include monitoring possible escape plans; attacks against law enforcement or court personnel or correctional staff; attacks against another inmate; and mental health issues including inmates harming themselves. *Id.*; *Hodgson Dep*. p. 116.

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Becker County Sheriff's Office Policies and Procedures Manual mandates inmates' conversations with their "attorney cannot be monitored." *Affidavit of Randy Hodgson*, Ex. B - *Becker County Sheriffs Office Policies and Procedures Manual; Hodgson Dep*. pp. 103, 138; *Aff. Tindal*, Ex. J - *Bauman Dep*. p. 133. Jailers and investigators are trained to terminate a call that is monitored when they become aware it is a call between an inmate and an attorney. *Aff. Tindal*, Ex. B - *Omnibus Hearing Transcript*, p. 126:8-15.

II. KENNETH ANDERSEN

Kenneth Andersen was in the Becker County Detention Facility from June 19, 2007 to June 13, 2008. *Aff. Hodgson* ¶ 6. On June 14, 2007, a Complaint was filed in Becker County District Court charging Andersen with Second Degree Murder. *Aff Tindal*, Ex. D - *Appellant's Brief* p. 1. On September 17, 2007, a Becker County Grand Jury indicted Andersen for First Degree (Premeditated) Murder. *Id*.

In December 2007, Andersen's attorneys complained they requested their numbers be placed on the Private List and it had not been done. *Affidavit of Joe McArthur*, Ex. 1 - *Letter to County Attorney Fritz*. In response, Joe McArthur, a Captain with the Becker County Sheriff's Office, investigated the issue and found in late November or early December, Andersen's attorney requested numbers be private. *Id*. Unbeknownst to some jailers, Reliance changed the procedure for listing private numbers, requiring the jailers to enter requested numbers into its system. *Id.; Peterson Dep*. pp. 20-21. Previously, jailers called Reliance with the requested number and Reliance would verify the number was an attorney number and place it on the Private List. *Id.*; *Peterson Dep*. pp. 20-21. Pursuant to the original procedure, without knowledge of the change, a jailer had called Reliance with Andersen's attorney's request. *Letter to County Attorney Fritz; Peterson Dep*. pp. 36-38. After Becker County learned of Reliance's change in procedure, only supervisors handled placing numbers in the system to be private. *Id; Peterson Dep*. pp. 37-38. Andersen's attorneys requested numbers that were landlines be added to the Private List in December 2007. *Id*. The cell numbers were not put on the Private List pursuant to the Jail's then-current policy because cell phones can be easily transferred to unauthorized persons which creates a security concern.[5]

At Andersen's contested Omnibus hearing, he requested dismissal of his charges claiming Becker County violated his constitutional and statutory rights by recording his conversations with attorneys. At this March 7, 2008 Omnibus hearing, Becker County Captain Joe McArthur testified no calls of Andersen to his attorneys were listened to. *Omnibus Hearing Transcript*, pp. 126:16-20; 138:7-9. (McArthur also testified correctional officers are trained to terminate a call that is monitored when they become aware it is a call between an inmate and an attorney.) *Id*. p. 126:8-15. Also, no investigation was initiated based on any information from a call between Andersen and his attorney. *Id*. p. 127:1; *Baumann Dep*. pp. 106, 140-141; *Affidavit of Daniel Baumann*, ¶ 2, Ex. A - *report summarizing follow-up investigation*.

At the hearing, Judge Irvine ordered any recording of Andersen's phone conversations with attorneys cease. Since that date, Becker County has not recorded any inmate phone conversations with their attorneys or attorneys' agents including calls to cell phones. *Hodgson Dep*. pp. 82, 132, 143-144.

On April 14, 2008, Judge Irvine issued an Order stating, "The State was not denying Defendant access to his attorney." *Aff. Tindal*, Ex. C - *Order and Memorandum*, p. 6. Judge Irvine found:

> On or about December 3, 2007, authorities at the Becker County Jail, where the Defendant was incarcerated pending trial, blocked [listed as private] - at Defendant's request - two land line numbers so that routine recording of Defendant's phone calls would not take place on those numbers. No request was made as to cell phone numbers belonging to Defendant's attorneys. As a result authorities would record those calls and one of the Sheriff's deputies, or one of the State's agents, would listen to all of those calls, but would cease listening to any call once that deputy or agent determined it was a call between the Defendant and his attorney. Both men testified that they had never heard anything about the case or related to the case. There was no evidence presented that the deputy or agent involved ever listened to any conversation between Defendant and his attorney once the call was determined to involve the Defendant's attorney. There was no evidence that anyone else ever overheard anything related to this case; in fact, there was testimony to the contrary. . . . Because there is no evidence of any prejudice to the right of the Defendant, and because the practice of recording for screening purposes has been stopped, there are no real grounds for dismissing the indictment.

Id., pp. 6-7.

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From May 12 through June 4, 2008, a jury trial was held before Judge Irvine. *Appellant's Brief*, p. 2. The jury found Andersen guilty of First Degree Murder. *Id*. At sentencing on June 12, 2008, Andersen requested a new trial. *Id*. His request for a new trial was denied and he was sentenced to life in prison. *Id*. On June 18, 2008, Andersen filed a motion for a new trial. Andersen's motion for a new trial was denied and on September 2, 2008, Andersen appealed his conviction. *Id*. On appeal, Andersen made several arguments including that "lead investigators violated [his] right to counsel by monitoring and recording [his] phone calls with his attorney." *Id*. p. 4. This issue was briefed by Andersen's attorney (*Id.*, pp. 53-59) and the State (*Aff. Tindal*, Ex. E - *Respondent's Brief*, pp. 47-49). The Minnesota Supreme Court had oral arguments on Andersen's appeal on May 7, 2009. *Aff. Tindal* ¶ 7. Andersen is currently serving his sentence for premeditated murder in Rush City. *Aff. Hodgson* ¶ 6.

III. DELL HOLM

Dell Holm was in the Becker County Detention Facility from May 7, 2008 to March 30, 2009. *Aff Hodgson* ¶ 5. On August 18, 2008, Holm pled guilty to Felony Assault with a Dangerous Weapon. *Aff. Tindal*, Ex. F - *Felony Criminal Judgment and Petition to Enter a Plea of Guilty*.[6] On October 31, 2008, Holm was sentenced to 36 months and to serve 365 days of his time at Becker County. *Aff. Tindal*, Ex. G - *Felony Criminal Judgment*. Holm is currently serving his sentence in Faribault Correctional Facility. *Aff. Hodgson* ¶ 5.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no dispute between the parties about any genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment should be awarded when, having reviewed the facts and inferences in a light most favorable to the nonmoving party, the court finds there is no triable issue. *See Eide v. Grey Fox Technical Servs. Corp.*, 329 F.3d 600, 604 (8th Cir. 2003). Summary judgment motions should be looked upon favorably by trial courts to accomplish a just, speedy and inexpensive resolution of civil litigation. *Matsushita Elec. Ind. Co., Ltd. v. Zenith Radio Corp.*, 474 U.S. 574 (1986).

LEGAL ARGUMENTS

I. COLLATERAL ESTOPPEL BARS ANDERSEN'S CLAIMS.

The collateral estoppel doctrine relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources and encourages reliance on adjudications by preventing inconsistent decisions. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine is not applied rigidly and the focus is on whether the application would work an injustice. *State ex rel Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 589 (Minn. App. 2008) (internal citations omitted).

Collateral estoppel is appropriate where: (1) the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Robinette v. Jones*, 476 F.3d 589 (8th Cir. 2007). A factor to consider in collateral estoppel is whether it will create an injustice to the party against whom estoppel is applied. *Odham v. Pritchett*, 599 F.2d 274, 279 (8th Cir. 1979). Under collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a **different cause of action** involving a party to the prior litigation." *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984) (emphasis added) (citing *Montana v. U.S.*, 440 U.S. 147, 153 (1979)).

All factors required for collateral estoppel are satisfied here; therefore, Andersen is barred from relitigating the constitutionality of telephone recordings at the jail. Andersen brought a Motion to Dismiss in his criminal case claiming his calls to his attorneys and investigators were monitored and recorded and therefore his right to a fair trial was polluted. The court found, "the State was not denying Defendant access to his attorney." There was no evidence any deputy or agent listened to any conversation between Andersen and his attorney once the call was determined to be between attorney and client and no evidence anyone overheard anything related to the case. *Order and Memorandum*, p. 6.

Andersen appealed his conviction and argued his constitutional right to counsel was violated by monitoring and recording his

phone calls with his attorney. *Appellant's Brief*, p. 5. Andersen's appeal is currently before the Minnesota Supreme Court. *Aff. Tindal*, ¶ 7. Andersen has had a full and fair opportunity to challenge the constitutionality of these issues and was represented by counsel. Clearly, Andersen's claim is barred by collateral estoppel.

II. PLAINTIFFS' CLAIMS ARE BARRED BY *HECK V. HUMPHREY*.

Plaintiffs' claims are also precluded by the Supreme Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the Supreme Court unanimously held that to recover damages for an unconstitutional conviction or sentence, "a § 1983 plaintiff must prove that the conviction or sentence has been reversed on appeal, expunged by executive order, [or] declared invalid by a state court or in a federal habeas corpus proceeding." 512 U.S. at 486-87. Until the conviction or sentence has been overturned, the claim is not cognizable under § 1983. *See id*. The Court reasoned, similar to malicious prosecution claims, a § 1983 attack upon the validity of the conviction cannot lie until the conviction has been overturned, thus avoiding collateral attacks upon convictions through civil actions. *Id*. at 483-87. This rule applies only to § 1983 claims that "necessarily" implicate the validity of the conviction or sentence. *Id*. at 2370-72.

In *Smith v. Menter*, Civ. No. 07-4536, 2008 U.S. Dist. LEXIS 26381 (D. Minn. March 31, 2008) (attached to *Aff. Tindal*, as Ex. O), Smith was convicted of a controlled substance offense. Following his conviction and appeal, Smith filed a civil rights action against three Minneapolis police officers. Among other things, Smith claimed he was strip searched at the police station in violation of his constitutional rights. The search revealed 7.22 grams of cocaine. The court dismissed the case finding Smith was essentially challenging his conviction stating:

The Supreme Court has held that habeas corpus is the exclusive remedy for a state prisoner challenging the fact or duration of his confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 488-90 (1973). A civil rights action for damages that "calls into question the lawfulness of [a] conviction or confinement" is not cognizable under § 1983. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) . . . The issue here is whether plaintiff's challenge to the legality of his arrest and strip search necessarily implies that his underlying conviction was unlawful. The Court finds that it does. Plaintiff was convicted of second-degree possession of cocaine, a controlled substance. A finding that plaintiff's initial arrest was unlawful because there was insufficient cause would undermine the validity of the subsequent strip search of the plaintiff, and would necessarily require the suppression of evidence of cocaine found on plaintiff's person as a 'fruit of the poisonous tree.'

Smith, 2008 U.S. Dist. LEXIS 26381, at *5-6. Similarly here, Plaintiffs are impermissibly challenging their convictions by claiming Defendants listened to their attorney/client privileged conversations and used information so obtained to successfully prosecute. Andersen challenged the constitutionality of Defendants' practices by raising the issue during his criminal trial and appealing his conviction to the Minnesota Supreme Court. He cannot also attack his conviction in civil court.

Holm's claims are also barred by *Heck v. Humphrey* because the doctrine applies to *Alford* pleas in the same manner as it does to convictions. *See Wilson v. Lawrence County*, 154 F.3d 757 (8th Cir. 1998) (finding *Heck* did not bar the § 1983 claim of a man who entered an *Alford plea*, but was later granted a pardon and expungement of his conviction); *Rice v. Barnes*, 966 F. Supp. 890 (W.D. Mo. 1997) (applying *Heck* to an *Alford* plea and finding no evidence plea had been reversed); *Tunnell v. City of Bella Villa*, No. 4:07CV77SNL, 2008 U.S. Dist. LEXIS 63640 (E.D. Mo. June 10, 2008) (attached to *Aff Tindal*, Ex. N) (barring § 1983 claim because plaintiff could not show the conviction or sentence resulting from his plea was reversed, expunged or declared invalid). Accordingly, the Amended Complaint is barred by *Heck v. Humphrey*.[7]

III. WILLIAM BULMER, II, LACKS STANDING.

"A party invoking federal jurisdiction must establish that he has met the requirements of both constitutional and prudential standing." *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004) (*citation omitted*). "The burden to show standing is not a mere pleading requirement, 'but rather an indispensable part of the plaintiff's case.' " *Id*. Constitutional standing requires the following: (1) the "plaintiff must demonstrate he has suffered an injury in fact which is actual, concrete, and particularized;" (2) "the plaintiff must show a causal connection between the conduct complained of and the injury;" and (3) "the plaintiff must establish that the injury will be redressed by a favorable decision." *Id*.

All of Bulmer's claims stem from his representation of Andersen. *Aff. Tindal*, Ex. K - *Bulmer Dep*. pp. 94, 40. Bulmer claims he is injured by "lost investigative time." *Id*. p. 56. He claims he was required to visit Andersen in person rather than over the

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phone. *Id*. Bulmer did not provide any records to support his lost time claim. *Id*. pp. 57-58. He also claims Becker County obtained information from listening to his calls with Andersen and used the information in the prosecution of Andersen. *Id*. p. 59.[8] Bulmer's claims were addressed in Andersen's criminal appeal. *Id*. p. 69. Furthermore, Bulmer cannot show he suffered an injury separate from Andersen's conviction or that his injury could be redressed by a favorable decision.[9] Accordingly, Bulmer's claims should be dismissed.[10]

IV. THERE WAS NO VIOLATION OF 18 USC § 2510 ET SEQ.

Plaintiffs claim Defendants "intercepted" attorney/client telephone calls without the consent or knowledge of any participant in violation of Plaintiffs' rights under Title III of the *Omnibus Crime Control and Safe Streets Act. Amend. Compl*. ¶¶ 96-98. This Act prohibits the intentional "use of any electronic, mechanical, or other device to intercept any oral communication." 18 U.S.C. § 251l(1)(b). The Act further prohibits intentional disclosure or use of any information obtained through such interception. *Id*. at § 2511(1)(c-d). Excluded from the definition of "electronic, mechanical, or other device" is any equipment or facility being used by an investigative or law enforcement officer in the ordinary course of his duties. 18 U.S.C. § 2510(5)(a).

Plaintiffs' claim fails because surveillance is a standard law enforcement practice in the ordinary course of jail administrative duties. *See Lanza v. State of N.Y.*, 370 U.S. 139, 143 (1962) (noting in prison, official surveillance has traditionally been the order of the day). The surveillance practice of recording all non-Private List calls and monitoring only non-attorney/client calls is necessary to protect the safety of all personnel and inmates. Furthermore, there is no evidence Defendants used information from Plaintiffs' recorded phone calls in any way. Accordingly, there was no violation of the Act and Plaintiffs' claim must be dismissed because there was no improper use of information, and the surveillance was performed in the ordinary course of jail administration.

V. THERE WAS NO VIOLATION OF FEDERAL COMMON LAW.

Plaintiffs claim Defendants' practices regarding attorney/client phone calls violated "the federal common law right of Andersen, Holm and the members of the detainee/inmate putative class to receive any evidence in defendants' or the prosecution's possession that is favorable or material to their defense, and/or is exculpatory." *Amend. Compl*. ¶ 105. "In *Brady*, the Supreme Court held that due process requires the government to disclose to the defense all evidence favorable to the accused." *United States v. Vieth*, 397 F.3d 615, 619 (8th Cir. 2005) (citing *Brady v. Maryland*, 373 U.S. 83, 87, (1963)). "To find a *Brady* violation, evidence must be material and exculpatory and have been suppressed by the government." *Id*. Violations under *Brady* are cause for reversal or § 1983 due process claims if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*; *Reasonover v. St. Louis County*, 447 F.3d 569, 574 and 581 (8th Cir. 2006). "A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial." *Brady*, 373 U.S. at 87. *Brady's* protection for criminal defendants applies to prosecutors and law enforcement officers. *White v. McKinley*, 514 F.3d 807, 815 (8th Cir. 2008). "However, an investigating officer's failure to preserve evidence potentially useful to the accused or their failure to disclose such evidence does not constitute a denial of due process in the absence of bad faith." *Id*. (citing *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004)). "[T]he recovery of § 1983 damages requires proof that a law enforcement officer other than the prosecutor intended to deprive the defendant of a fair trial." *Id*.

All recordings of Andersen's and Holm's telephone calls with friends and family were not exculpatory evidence. They were fully aware of their conversations and could have repeated anything said during the phone calls to their attorneys or to the court. First, all of Holm's calls to his attorneys were private and he pled guilty; his case was never tried.[11] Second, Andersen has no evidence there is a reasonable probability his criminal trials would have been different had the recordings been disclosed. Bulmer admitted he did not know what Andersen said in calls to his family/friends. *Bulmer Dep*. pp. 33-34. There is no evidence Defendants intentionally failed to disclose the recordings in bad faith with the intent to deprive Andersen of a fair trial. Andersen claimed discovery violations in his criminal case and the judge found no violations: "[t]he prosecution has continued to disclose as required. There are no facts or circumstances in this case that reveal any intent on the prosecution's part not to disclose in accordance with the rules and the relevant law." *Order and Memorandum* p. 5. Thus, Plaintiffs failed to state and support a claim for not disclosing exculpatory evidence.

VI. THERE IS NO CONSTITUTIONAL VIOLATION.

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Plaintiffs allege numerous violations of the U.S. Constitution. Although Plaintiffs' claims are barred by collateral estoppel and *Heck*, to the extent the Court analyzes this case further, their constitutional claims fail as a matter of law.

A. No First Amendment Violation.

Plaintiffs claim the knowledge jail personnel are monitoring and/or recording their attorney/client privileged telephone conversations has resulted in a serious chilling effect upon their ability to communicate with their attorneys via telephone. *Amend. Compl*. ¶ 77. This result has allegedly violated Plaintiffs' freedom of speech. *Id*. ¶ 78. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)) (other citation omitted). "In the *First Amendment* context a corollary of this principle is that a prison inmate retains those *First Amendment* rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Id*. "Prisoners' *First Amendment* rights may be circumscribed if legitimate penological objectives outweigh preservation of their rights." *Davis v. Norris*, 249 F.3d 800, 801 (8th Cir. 2001).

Plaintiffs' fear jail personnel monitor their attorney/client phone calls is misplaced. If an inmate does not request a private attorney/client phone call, their call will be recorded. However, the inmate suffers no harm because jail personnel are trained to cease listening to attorney/client phone calls the moment they discover the participants of the call. The recording is then destroyed. Plaintiffs have no evidence individual Defendants used any information gleaned from an attorney/client phone call. Thus, Plaintiffs' allegations regarding the recording of their attorney/client phone calls are unfounded.

Furthermore, safety of both staff and inmates is a strong penological interest. Recording telephone calls placed by detainees is crucial for the protection of eyewitnesses to crimes, protection of victims, jail security, and national security, among other concerns. *See United States v. Hyles*, 521 F.3d 946, 951-52 (8th Cir. 2008) (upholding conviction for conspiracy to use interstate facilities to commit murder for hire after conspiring with detainee to murder witness); *United States v. Hammond*, 286 F.3d 189 (4th Cir. 2002) (upholding denial of motion to suppress tapes of detainee tampering with a witness); *United States v. Salameh*, 152 F.3d 88, 108 (2d Cir. 1998) (monitoring detainee who was member of terrorist organization who spoke in code regarding bomb plot); *United States v. Sababu*, 891 F.2d 1308, 1328 (7th Cir. 1989) (discussing taped phone calls of detainee regarding elaborate prison escape conspiracy which also involved a detainee's attorney); *State v. Kennedy*, 2008 Minn. App. Unpub. LEXIS 817, *12-16 (Minn. App. July 8, 2008) (attached to *Aff. Tindal*, Ex. P) (discussing detainee appellant's use of other inmates' identification numbers to place calls to friends and family members asking them to "get to" rape victim to prevent her from testifying).

In this case, the jail's legitimate penological concern for the safety and security of the staff and inmates is rationally related to the practice of recording all calls and randomly monitoring non-attorney/client phone calls. Accordingly, Plaintiffs' First Amendment claim must be dismissed.

B. No Fourth Amendment Violation.

Through the alleged practice of recording and monitoring attorney/client telephone calls, Plaintiffs claim Defendants directly violated their right against unreasonable searches. *Amend. Compl*. ¶¶ 79-83. The Fourth Amendment prohibits only unreasonable searches. *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979) (finding visible body cavity searches of all pretrial detainees reasonable when balancing the need for the particular search against the invasion of personal rights when considering 1) the justification for initiating the search and 2) the scope, manner and place of the search). Prison administrators are accorded "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, at 547; *Hudson v. Palmer*, 468 U.S. 517, 529-30 (1984).

In *United States v. Novak*, 531 F.3d 99 (1st Cir. 2008), Holyoke was a prisoner in Massachusetts; Novak was his attorney. "Novak's number was erroneously excluded from the list prison officials used to screen calls, and so the calls that Holyoke made to Novak were recorded." *Id*. at 101. A police officer assigned to investigate Holyoke requested copies of recordings and listened to all calls made by Holyoke. *Id*. The officer realized he was listening to a privileged attorney-client communication, but did not stop listening to the recording. *Id*. The officer continued to monitor the calls between Holyoke and Novak. *Id*. The officer learned Holyoke wanted Novak to file a false affidavit. *Id*. Novak agreed to launder proceeds from drug trafficking, and to accept $60,000 in payment. *Id*. Officers asked Holyoke for his cooperation in an investigation into

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Novak and Holyoke agreed to further recordings of his phone conversations. *Id*. Novak was indicted on several federal crimes. *Id*. Novak filed a motion to suppress the recordings. *Id*. The First Circuit Court of Appeals reversed the district court's suppression of the calls finding no Fourth Amendment violation occurred, even for the calls made prior to Holyoke's consent to the recording. *Id*. at 104.

Here, Plaintiffs were made aware of the Defendants' telephone call policy through the inmate handbook and telephone signage. If detainees or inmates wanted to make a private call, they informed jail staff of their attorney's contact information. All calls to or from a number not on the Private List are recorded pursuant to penological interests because inmates do not have a legitimate expectation of privacy in those calls. If an attorney/client call is recorded, it is not monitored. Recording these calls alone does not constitute an unreasonable search in violation of the Fourth Amendment. The Jail has a very strong interest in preserving the safety and security of those in it; an equally efficient and less intrusive means of achieving this goal does not exist. Therefore, Plaintiffs' Fourth Amendment claim should be dismissed.

C. No Fifth or Sixth Amendment Violations.

Plaintiffs claim information obtained from monitored or recorded attorney/client jail phone calls has been utilized for the purpose of prosecuting the detainees and inmates. *Amend. Compl*. ¶ 88. This practice has allegedly violated the Plaintiffs' Fifth Amendment right against self incrimination. *Id*. ¶ 89. They also allege this practice violated their right to the effective assistance of counsel protected by the Sixth Amendment. *Amend. Compl*. ¶ 93.

These claims fail because no one listened to any calls between Andersen and his attorney. *Baumann Dep*. pp. 68-69, 106, 139; *Omnibus Hearing Transcript*, pp. 126, 138; *Peterson Dep*. p. 32; *Soyring Dep*. pp. 26, 33, 36. No investigation was initiated based on any information from a call between Andersen and his attorney. *Omnibus Hearing Transcript*, p. 127:1; *Baumann Dep*. pp. 106, 140-141; *Aff. Baumann* ¶ 2, *report summarizing follow-up investigation*. It is the jail's policy not to monitor attorney/client calls. *Becker County Sheriff's Office Policies and Procedures Manual; Hodgson Dep*. pp. 103, 138; *Bauman Dep*. p. 133.

D. No Due Process Violation.

Plaintiffs also allege a due process violation. *Amend. Compl*. ¶ 95. For a substantive due process violation, the government's conduct somehow "must shock the conscience or otherwise offend our judicial notions of fairness, or must be offensive to human dignity." See *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998).

Here, there is no shocking conduct. It is standard for jails to record inmate calls. Once the County realized Andersen's calls were mistakenly not put on the Private List, this was corrected. No calls between Andersen and Holm and their attorneys were monitored. In inadvertently listening to the preliminary part of any of Andersen's phone calls to his attorney or investigator, Baumann and McArthur never overheard any information about the case or about any potential witnesses and never initiated any investigation based upon what they heard in those telephone calls. *Omnibus Hearing Transcript*, pp. 129, 141-142. Accordingly, there is no due process violation.

VII. OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

Qualified immunity shields officers from suit "if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hassan v. City of Minneapolis*, 489 F.3d 914, 919 (8th Cir. 2007) (citing *Sanders v. City of Minneapolis*, 474 F.3d 523, 526 (8th Cir. 2007)). "Qualified immunity is not just a defense to liability, it constitutes immunity from suit." *Saucier v. Katz*, 533 U.S. 194, 200, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). "In addressing an officer's claimed entitlement to qualified immunity, the court must first determine whether the allegations amount to a constitutional violation, and then, whether that right was clearly established." *Sanders*, 474 F.3d at 526.

A. No Violation Of A Clearly Established Constitutional Right.

In order to conclude the individual Defendants violated a clearly established constitutional right, the Court must first determine whether Plaintiffs asserted a constitutional violation at all. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Even if a constitutional right was alleged and violated, the right must have been clearly established at the time of the violation. "This

inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. As the Supreme Court determined in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002):

[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.' *Saucier v. Katz*, [533 U.S. at 206]. ***For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right***.

(*emphasis added*). It is Plaintiff's burden to show the asserted right was clearly established. *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

The determination of clearly established law is a "purely legal question" in which the courts examine the specific conduct complained of, statutory and case precedent, and well-established general principles of law. *Robinette v. Jones*, 476 F.3d 585, 591 (8th Cir. 2007). This is because "[w]hether an official is entitled to qualified immunity depends upon the 'objective legal reasonableness' of the official's actions 'assessed in light of the legal rules that were 'clearly established' at the time of the actions in question." *Kenyon v. Edwards*, 503 F.3d 722, 724 (8th Cir. 2007).

In this case, Plaintiffs failed to show a violation of a clearly established constitutional right. Defendants did not monitor Andersen's and Holm's calls with their attorneys. There is no clearly established case law requiring specific jail procedures for inmate private calls with attorneys be in writing. Captain McArthur and Sheriff Gordon were not aware the procedure for placing numbers on a Private List changed on Reliance's system prior to Andersen raising the issue. They were not aware calling Reliance was not sufficient to put a number on the Private List. Accordingly, there was no violation of a clearly established right.

B. Officers' Actions Were Objectively Reasonable.

Even if this Court determines there was a violation of a clearly established right, the officers are entitled to qualified immunity because their actions were objectively reasonable. Qualified immunity is not analyzed based on hindsight, but rather from the perspective of a reasonable officer under the circumstances. *Foster v. Metro. Air. Com.*, 914 F.2d 1076, 1083 (8th Cir. 1990). Officers are entitled to qualified immunity even if they were mistaken as to their understanding of the circumstances. *Saucier v. Katz*, 533 U.S. 194, 205-206 (2001). In *Malley v. Briggs*, 475 U.S. 335, 343 (1986), the Supreme Court explained:

> [Officers] will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have [acted similarly] . . . but if officers of reasonable competence can disagree on this issue, immunity should be recognized.

Id. at 353. Here, there is no evidence any other reasonably competent official would not have acted in the same fashion. No attorney/client calls are monitored. Once the County realized there was a change in procedure with how to place attorney numbers on the Private List, they corrected their internal procedures.[12] Accordingly, Sheriff Gordon and Captain McArthur are entitled to qualified immunity.

VIII. PLAINTIFFS FAIL TO ESTABLISH A VIABLE *MONELL* CLAIM.

"Under 42 U.S.C. § 1983, a municipality may not be held vicariously liable for the unconstitutional acts of employees." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). "A municipality may be held liable under Section 1983 only if a municipal custom or policy caused the deprivation of the right protected by the constitution or federal law." *Angarita v. St. Louis County*, 981 F.2d 1537, 1547 (8th Cir. 1992). "For a municipality to be liable, a plaintiff must prove that municipal policy or custom was the 'moving force [behind] the constitutional violation.' " *Mettler*, 165 F.3d at 1204.

A. No Unconstitutional Policy.

A municipal policy is not unconstitutional if it might permit unconstitutional conduct in some circumstances; it is unconstitutional only if it requires its officers to act unconstitutionally. *See Handle v. City of Little Rock*, 772 F.Supp. 434, 438 (E.D.Ark. 1991). The lack of a pattern of unconstitutional misconduct effectively ends the court's inquiry. *See Thelma D.*

ex rel. Delores A. v. Board of Education, 934 F.2d 929, 933 (8th Cir. 1991). "[A] 'policy' is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." *Id*.

It is the County's policy not to monitor attorney/client calls. There was no violation of the policy. Furthermore, an isolated incident does not amount to a pattern of unconstitutional conduct.

Bulmer claims the County has a constitutional obligation to inform inmates in writing, in at least seven languages, how to make a request for a private call to an attorney. *Bulmer Dep*. pp. 42, 54. There is no constitutional requirement the County explain this procedure in writing to inmates, much less in several languages. There is no constitutional requirement for what the County's policy or posting should state. Simply because Plaintiffs do not like the language of these policies does not amount to a constitutional violation.

Additionally, there is no constitutional requirement for inmates to have access to attorney's cell phones. It is a security risk to allow placement of a cell phone number on the Private List. *Hodgson Dep*. p. 85. Cell phones can get lost and the jail cannot verify who is in control of the cell phone. *Id*. Attorneys have also abused Reliance's "free" system (Becker County contracts with Reliance to provide inmates free calls to their attorneys) by allowing an inmate's family member to talk at length to the inmate. *Gilmore Aff*. ¶ 2.[13]

B. No Evidence of Unconstitutional Custom.

To establish the existence of a municipal custom, Plaintiffs must satisfy three requirements: 1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; 2) deliberate indifference to, or tacit authorization of, such conduct by the governmental entity's policymaking officials after notice to the officials of the misconduct; and 3) th[e] plaintiff['s] injur[y] by acts pursuant to the governmental entity's custom, i.e. [proof] that the custom was the moving force behind the constitutional violation. *Mettler*, 165 F.3d at 1204 (quoting *Ware v. Jackson County*, 150 F.3d 873, 880 (8th Cir. 1998)).

Under *Mettler's* first requirement, Plaintiffs must present a "continuing widespread, persistent pattern of unconstitutional misconduct." 165 F.3d at 1204. Plaintiffs cannot meet this requirement. The County believed Andersen's calls to his attorney's landline numbers were private. When they learned Reliance's procedure for making a call private changed, they changed their procedure. None of Andersen's calls with his attorney were monitored or used against him. There is no evidence Holm's calls to his attorneys were not private. Isolated incidents cannot, as a matter of law, be said to establish a persistent widespread pattern of unconstitutional misconduct. *See Thelma D. Ex. Rel. Delores A. v. Board of Education*, 934 F.2d 929, 933 (8th Cir. 1991). The County's reasonable mistake in Andersen's case does not establish the pattern required. Therefore, Plaintiffs are unable to present a "continuing widespread, persistent pattern of unconstitutional misconduct."

Under *Mettler's* second prong, Plaintiffs cannot provide any evidence the County was deliberately indifferent to, or tacitly authorized the alleged unconstitutional behavior. The County corrected its own procedure for putting numbers on the Private List when it realized Reliance's system had changed. There is no evidence of other inmate's requests for private calls not being added to the Private List.

Furthermore, even if this Court finds there was prior unconstitutional behavior, which there clearly was not, Plaintiffs must present evidence the County was deliberately indifferent to complaints received prior to Plaintiffs' alleged constitutional violations. *See Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (affirming summary judgment where there was no evidence the municipality had been deliberately indifferent to complaints received prior to the constitutional violations alleged in plaintiff's complaint). Because Plaintiffs cannot show there were previous unconstitutional violations, or the County was deliberately indifferent to the prior alleged violations, their *Monell* claim cannot succeed.

Third, Plaintiffs must prove the County's alleged custom of violating the constitutional rights of individuals caused his injuries. *See Board of County Comm'rs v. Brown*, 117 S.Ct. 1382, 1388 (1997) ("The plaintiff must ... demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged.") Since Plaintiffs are unable to show the County has an unconstitutional custom, practice or policy, they are also unable to show "the custom was the moving force behind the constitutional violation." Additionally, as explained above, Holm's calls with attorneys were not recorded and the state court correctly found Andersen was not injured by any alleged recording of his calls with attorneys.

It is clear phone calls are monitored and/or recorded unless the request is made for a private phone call to an attorney. Then

verification is needed to ensure the call is placed to an attorney. There is no constitutional violation when detainees/inmates can have a private telephone conference with their attorney. Plaintiffs have not met their burden of showing Becker County's policies are unconstitutional. Accordingly, Plaintiffs' *Monell* claim should be dismissed

IX. THERE WAS NO VIOLATION OF THE MINNESOTA CONSTITUTION.

Plaintiffs allege violations of Article I Sections 6, 7 and 10 of the Minnesota Constitution. *Amend. Compl*. ¶¶ 79-83 & 90-95. Plaintiffs' allegations are fundamentally flawed because there is no private cause of action for violation of the Minnesota Constitution. *Quite v. Wright*, 976 F.Supp. 866, 871 (D. Minn. 1997). "Minnesota courts have yet to recognize a civil cause of action for an unreasonable seizure." *Goldberg v. Hennepin County*, No. 03-3110, 2004 U.S. Dist. LEXIS 11404, *9 (D. Minn. June 18, 2004) (attached to *Aff. Tindal*, Ex. Q); *see also Luckes v. Hennepin County*, No. 03-31111, 2004 U.S. Dist. LEXIS 14385 (D. Minn. July 28, 2004) (attached to *Aff. Tindal*, Ex. R). Additionally, "Minnesota courts have consistently held that there is no private right to monetary damages for deprivation of due process rights under the Minnesota Constitution." *Honan v. County of Cottonwood*, A04-1636, 2005 Minn. App. LEXIS 235, * 11 (Minn. App. Aug. 30, 2005) (attached to *Aff. Tindal*, Ex. S); *N. Star Legal Found. v. Honeywell Project*, 355 N.W.2d 186, 188 (Minn. App. 1984), *review denied* (Minn. Jan. 2, 1985).

Additionally, Article I, Sections 6, 7, and 10 of the Minnesota Constitution cannot be violated without a violation of the corresponding federal civil rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. *State v. Carter*, 596 N.W.2d 654, 656 (Minn. 1999) (finding the right to challenge any search under the Minnesota Constitution coextensive with and not greater than the same right under the U.S. Constitution); *Yanke v. City of Delano*, 393 F. Supp. 2d 874, 879 (D. Minn. 2005) (holding due process protection provided under the Minnesota and U.S. Constitutions identical). As discussed above, Plaintiffs cannot show any of their federal civil rights were violated. Thus, Plaintiffs' claims under the Minnesota Constitution should be dismissed for failure to state a claim upon which relief can be granted.

X. THERE WAS NO VIOLATION OF MINNESOTA STATUTES § 481.10, SUBDIVISION 2.

Plaintiffs allege Becker County deprived them of their right to private and confidential phone calls with attorneys in violation of Minn. Stat. § 481.10. *See Amended Compl*. Minn. Stat. § 481.10, Subd. 2 states:

> [O]fficers or persons having in their custody a person restrained of liberty whether or not the person restrained has been charged, tried, or convicted, shall provide private telephone access to any attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult at no charge to the attorney or to the person restrained. Reasonable telephone access under this subdivision shall be provided following the request of the person restrained and before other proceedings shall be had regarding the alleged offense causing custody.

The Minnesota Supreme Court held, when a defendant is in custody, any conversations between the accused and his counsel, which are overheard by police officers, are excluded from evidence. *See State v. Held*, 246 N.W.2d 863, 864 (Minn. 1976). This evidentiary standard satisfies the privacy requirements of Minn. Stat. § 481.10. *Id.; Shovein v. Commissioner of Public Safety*, 357 N.W.2d 386, 388 (Minn. App. 1984). There is no indication any statement between Plaintiffs and their attorney were used against them in a criminal manner. To the contrary, the criminal district court found Andersen was given reasonable access to his attorneys.

Additionally, the law only requires reasonable access to an attorney. *See Mullins v. Churchill*, 616 N.W.2d 764 (Minn. App. 2000) (court rejected inmates' objection to requirement they request to call attorney in writing finding statute only requires reasonable access). Becker County puts very little limitation on the ability of a detainee/inmate to contact their attorney. *Aff Gordon* ¶ 7. After a request for a private attorney call and verification, Becker County allows detainees/inmates in the jail to contact their attorneys from 7:00 a.m. to 11:00 p.m., seven days a week, at no charge. *Id*. The telephone calls made by the detainees/inmates must be to their attorneys on an approved landline so the Jail can verify exactly who is receiving the telephone call. The Jail cannot verify who the receiver of a call is on a cell phone. *Id*. Plaintiffs have provided no support for the assertion cell phones of attorneys should be placed on the Private List. Providing Plaintiffs private calls to their attorneys' landline numbers is reasonable. Andersen had private access to his attorneys on at least three landline numbers. Holm also had private access to his attorneys on landline numbers. Accordingly, Plaintiffs were given reasonable access to their attorneys.

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XI. THERE WAS NO VIOLATION OF MINNESOTA STATUTES § 626A.02.

Plaintiffs allege Defendants' policies and practices regarding telephone calls violated Plaintiffs' right to be free from illegal wiretaps under Minnesota Statutes § 626A.02. *Amend. Compl*. ¶¶ 110-11. Minn. Stat. § 626A.02 is Minnesota's version of Title III of the *Federal Omnibus Crime Control and Safe Streets Act* discussed above. A person who intentionally uses any electronic, mechanical, or other device to intercept any communication or intentionally uses the contents of such communication is subject to suit. Minn. Stat. § 626A.02 subd. 1. Excluded however from the definition of "electronic, mechanical or other device" is a telephone instrument used by law enforcement in the ordinary course of duties. Minn. Stat. § 626A.01, subd. 6.

For the same reasons Plaintiffs' claim fails under the Crime Control Act above, Plaintiffs' claim under Minn. Stat. §626A.01 also fails. *State v. Pendleton*, 759 N.W.2d 900, 906 (Minn. 2009) (referencing a recorded jail phone call made by a detainee/inmate); *see also State v. Stoltz*, A03-748, 2004 Minn. App. LEXIS 396, *4 (Minn. App. April, 27, 2004) (attached to *Aff. Tindal*, Ex. T); *State v. King*, C5-99-1710, 2000 Minn. App. LEXIS 878 (Minn. App. Aug. 15, 2000) (attached to *Aff. Tindal*, Ex. U); *State v. Page*, 386 N.W.2d 330 (Minn. App. 1986) (holding the officer's eavesdropping while investigating a crime was an ordinary law enforcement tool and consistent with public policy). Thus, there was no violation of Minn. Stat. § 626A.02 because the recording of Plaintiffs' phone calls was conducted in the ordinary course of jail administration, and there is no evidence information from the attorney/client phone calls was used in any way.

XII. THERE WAS NO VIOLATION OF MINNESOTA COMMON LAW.

Plaintiffs claim the Defendants' policies and practices of communicating the procedure for requesting a call not be recorded "are a gross intrusion upon the attorney/client privilege and the fundamental right to privacy and seclusion of plaintiffs ... guaranteed by Minnesota law ... Defendants' actions shock the conscience, are patently offensive to reasonable members of society and are actionable pursuant to Minn. Stat. § 466.02." *Amend. Compl*. ¶¶ 117-18. Minnesota Statutes § 466.02 states "every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." Minnesota's common law guarantees a right to privacy and allows for causes of action in tort for intrusion upon seclusion. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998). "Intrusion upon seclusion occurs when one 'intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person." *Id*. at 233. The tort "has three elements: (a) an intrusion; (b) that is highly offensive; and (c) into some matter in which a person has a legitimate expectation of privacy." *Swarthout v. Mut. Serv. Life Ins. Co.*, 632 N.W.2d 741, 744 (Minn. App. 2001). To establish liability for intrusion upon seclusion, the defendant's interference with the plaintiff's seclusion must be substantial, must be of a kind that would be highly offensive to a reasonable person, and must be a result of conduct to which a reasonable person would strongly object. *Id*. at 745.

In this case, Defendants did not use Plaintiffs' recorded telephone calls in any way. County employees ceased listening and immediately destroyed any attorney/client telephone call recordings. Plaintiffs do not have any evidence to the contrary. Additionally, the fact detainee/inmate attorney/client conversations are recorded, but not monitored, is not a substantial interference with the inmate/detainee's seclusion that would be highly offensive to a reasonable person. A reasonable person would expect all phone calls to and from a jail to be recorded for jail safety until arrangements can be made to put an attorney's phone number on the Private List. A reasonable person would not find recording of an attorney/client conversation alone, without monitoring, highly offensive. Therefore, Plaintiffs' claim for intrusion upon seclusion must be dismissed.

XIII. THERE WAS NO VIOLATION OF MINNESOTA COMMON LAW REGARDING MISAPPROPRIATION OF ATTORNEY WORK PRODUCT.

In their Amended Complaint, Plaintiffs allege telephone communications between the attorney plaintiffs and their clients contained trade secret attorney work product which had independent economic value. *Amend. Compl*. ¶¶ 120-121. The value of this attorney work product was severely diminished as a result of Defendants' improper monitoring and/or recording of such attorney/client phone calls. *Id*. ¶ 123-126. To be a "trade secret," information must have "independent economic value" as a result of not being generally known or readily ascertainable by persons who can make use of the information. Minn. Stat. § 325C.01, subd. 5(i); *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 306 (Minn. App. 1987).

Plaintiffs have not demonstrated the independent economic value of their attorney work product. No information was gained

or investigation initiated as a result of Andersen's calls with his attorneys. Therefore, this claim also fails.

XIV. DEFENDANTS ARE ENTITLED TO OFFICIAL IMMUNITY.

"Official immunity is a common law doctrine that protects government officials from suit for discretionary actions taken by them in the course of their official duties." *Hyatt v. Anoka Police Dep't*, 700 N.W.2d 502, 507 (Minn. App. 2005). The broad doctrine of official immunity "protect[s] all but the plainly incompetent or those who knowingly violate the law." *Dokman v. County of Hennepin*, 637 N.W.2d 286, 292 (Minn. App. 2001). If an individual public official is found to be immune, the government employer will enjoy vicarious official immunity from a suit arising from the employee's conduct. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006). Official immunity protects discretionary and not ministerial functions. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). Determining whether official immunity is available in a given context requires a two-step inquiry: "(1) whether the challenged conduct was discretionary or ministerial; and (2) whether the challenged conduct, even though of the type normally subject to official immunity, was malicious or willful and therefore not subject to the protection of official immunity." *Bailey v. City of St. Paul*, 678 N.W.2d 697, 701 (Minn. App. 2004).

A. The Defendants' Actions Were Discretionary.

Ministerial duties are "absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." *Schroeder*, 708 N.W.2d 497, 506 (Minn. 2006). "A ministerial duty is simple and definite, leaving nothing to the discretion of the official." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 664 (Minn. 1999). Discretionary duties involve independent professional judgment reflecting the professional goals and factors of a situation. *Id*. The Sheriff and McArthur exercised their professional judgment to not place attorney cell phones on the Private List.[14] County officials also exercised judgment in promulgating the County's written policies and postings. There is no question their actions were discretionary.

B. The Defendants' Did Not Act Willfully or Maliciously.

A public official has no immunity from suit if he commits a willful or malicious wrong. *Janklow v. Minn. Bd. Of Examiners*, 552 N.W.2d 711, 716 (Minn. 1996). Malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (citations omitted). Plaintiffs are required to present "specific facts evidencing bad faith" rather than "bare allegations of malice." *Reuter v. City of New Hope*, 449 N.W.2d 745, 751 (Minn. App. 1990). Plaintiffs can present no evidence the Sheriff or McArthur acted in bad faith. Accordingly, they are entitled to official immunity.

C. Becker County is Entitled to Vicarious Official Immunity.

A court determines whether vicarious official immunity protects a governmental entity from liability after it determines if official immunity applies to an individual's challenged behavior. *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). "[I]t would be anomalous" to impose liability on the government employer for the very same acts for which the employee receives immunity. *Id*. "The purpose of official immunity is to avoid judicial scrutiny where public officials must exercise independent judgment." *S.L.D. v. Kranz*, 498 N.W.2d 47, 51 (Minn. App. 1993). The failure to extend the immunity to Becker County could deter Becker County employees from exercising their independent judgment in the future. *Id*. Accordingly, because the individual Defendants are entitled to official immunity, Becker County is also entitled to the protection of vicarious official immunity.

CONCLUSION

In summary, Defendants respectfully request this Court grant their motion for summary judgment and dismiss Plaintiffs' claims in their entirety with prejudice.

Dated: June 30, 2009

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Footnotes

1 Plaintiffs have alleged, but not brought, a Rule 23 motion. Defendants dispute Plaintiffs' claims meet the criteria in Federal Rule 23(a).

2 The Affidavit of Tim Gordon was previously filed as Docket No. 25.

3 In December 2008, the Inmate Handbook was revised to add a written explanation for how an inmate is to request a private call with his/her attorney. *Hodgson Dep*. p. 41, Ex. 2, p. 9. The postings in the jail and by inmate phones were also amended to provide this procedure to inmates in writing. *Id*. at p. 51, Ex. 4.

4 The list of non-recorded numbers has been referred to as the "attorney list," "private list," "blocked" numbers, or "Do Not Record List." For the purposes of this Memorandum, it is referred to as "Private List."

5 Judge Irvine ordered Becker County to put attorney cell phones on the private list. Becker County complied with this request. *Aff. Gordon* ¶ 11 *(filed Dec. 11, 2008)*; *Hodgson Dep*. pp. 82, 132, 143-144.

6 At Holm's plea hearing, he and his attorney indicated a jury would find him guilty. *Aff. Tindal*, Ex. H - *August 18, 2008 transcript of hearing*, p. 11.

7 Bulmer's claims should also be dismissed because they are tied to his representation of Andersen and the issues were litigated in Andersen's criminal case.

8 Bulmer claims Becker County would not have interviewed Dan Clark if they had not listened to his conversations with Andersen. *Bulmer Dep*. p. 60. McArthur interviewed Clark on April 27, 2007. *Aff. McArthur*, Ex. 2 - *investigative report*. This was before Andersen was in the jail and two months before Bulmer began representing Andersen. *Bulmer Dep*. p. 9. Bulmer acknowledges he does not know whether Andersen told other individuals the same information he told his attorneys. *Id*. pp. 33-34.

9 The attorney/client privilege is personal and cannot be asserted by anyone other than the client. *See United States v. Escobar*, 50 F.3d 1414, 1422 (8th Cir. 1995).

10 Bulmer has not represented any other inmate in the jail besides Andersen. *Bulmer Dep*. p. 40. Andersen's other attorneys, including Durkin who represented him at trial, declined to be Plaintiffs in this lawsuit. *Bulmer Dep*. p. 38.

11 Dell Holm was represented by Darlene Rivera from May 2008 to October 2008. *Aff. Tindal*, Ex. A - *Plaintiffs' Answers to Defendants' Interrogatories*, p. 25. Ms. Rivera's 218-779-5300 number shows no call history from the jail. *Aff. Hodgson*, Ex. A *Digital Informant Search*. Ms. Rivera's 218-844-0800 number shows the first private call was placed on 5/20/08 and the last private call was on 9/30/08. *Aff. Gilmore*, Ex. 1 - *Becker County MN Private Number Summary*. Bruce Ringstrom represented Dell Holm from September 2008 to March 2009. *Plaintiffs' Answers to Defendants' Interrogatories*, p. 25. Mr. Ringstrom's 218-236-4606 number was private beginning 9/18/08. *Becker County MN Private Number Summary*. Mr. Ringstrom's prior number, 218-846-9344, was private from May 2007 through July 2008. *Id*. Mr. Ringstrom's 218-236-0849 number is disconnected and no calls from the Jail to this number have been connected. *Aff. Gilmore* ¶ 6, Ex. 4 - *notes regarding conversations with Hodgson*. Accordingly, the records indicate there were no calls Mr. Holm made to his attorneys that were recorded.

12 To the County's knowledge, Andersen made the first request for private calls with an attorney after Reliance's procedures changed. *Aff. of McArthur*, Exh. 1 - *Letter to County Attorney Fritz*.

13 To the extent Plaintiffs' Complaint is interpreted as a failure to train claim against Sheriff Gordon, their claim fails. The Supreme Court has held there is a limited cause of action against a municipal corporation for failure to train its employees where the failure to train reflects *deliberate indifference* to the constitutional rights of the municipal corporation's inhabitants and proximately causes the plaintiff's constitutional deprivation. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989). The court was careful to limit this holding to require specific proof of such a *de facto* policy and stated the mere proof of an isolated incident or a negligently administered program is not enough. *Id*. at 390-91 (citations omitted). To survive summary judgment on this claim, Plaintiffs must provide evidence the County was on notice its training procedures were inadequate and likely to result in a violation of constitutional rights. *Larkin v. St. Louis*, 355 F.3d 1114, 1117 (8th Cir. 2004). Plaintiffs failed to produce any evidence to support a claim of inadequate training. There is no evidence the County was deliberately indifferent to complaints received prior to Andersen's alleged constitutional violations; indeed because there are none. *See Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (affirming a district court's grant of summary judgment where there was no evidence the municipality had been deliberately indifferent to complaints received prior to the constitutional violations alleged in plaintiff's complaint). Once the County realized the procedure for placing attorney numbers on a private list changed, they took steps to remedy the issue and change the way requests for private calls were handled. There is simply no evidentiary support for the allegation the County was on notice of the alleged constitutional violation and was deliberately indifferent or tacitly authorized alleged constitutional violations.

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However, the Jail currently complies with this Court's Order and allows attorney cell phones on the Private List.