2009 WL 4563526 (D.Minn.) (Trial Motion, Memorandum and Affidavit)
United States District Court, D. Minnesota.
Fourth Division

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.
July 27, 2009.

Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment

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INTRODUCTION

There is no dispute that when Plaintiffs were in custody, it was the jail's policy to record and monitor all telephone calls made by inmates at the jail. The recordings of these calls were stored on the computer system at the jail, and no security measures were in place to protect the confidentiality of the calls. Virtually anyone at the jail with access to the computer system could listen to the recordings. The jail did not maintain any log of who accessed these recordings, but circumstantial evidence strongly supports the inference that jail personnel routinely listened to these recordings and listened to the substance of the telephone calls.

One of Defendants' primary purposes for recording and monitoring inmate calls is to gather evidence to be used in the prosecution of criminal cases. Accordingly, these recordings were all forwarded to the appropriate law enforcement personnel -- *i.e.*, the Becker County Attorney's office or a Minnesota Bureau of Criminal Apprehension investigator -- involved in the investigation and prosecution of the relevant inmate's criminal matter. Accordingly, the law enforcement official in charge of the investigation against the inmate was given the recordings. The investigators deposed in this action admitted that they often had to listen to these recordings for some time -- in a number of instances, even hearing some substance of the conversation -- before they could determine that the calls were attorney-client phone calls.

The only exception to this recording and monitoring relates to the "Do Not Record" or "Private Number" list (hereinafter, "List"). This List contains numbers that are not to be recorded -- such as attorney numbers. But it was not until after this litigation was initiated that the jail actually informed persons in custody about the List.

Moreover, the language in the Inmate Handbook and the signs posted by the phones in the jail stated that attorney-client phone calls were not recorded, which was patently untrue, and provided no notice about the List. Plaintiffs in this action were not aware of the List until many of their privileged calls had been recorded.

There is no written policy at the jail regarding how inmates are informed about the List, and no unwritten policy either -- at least not one that anyone followed. Even after jail personnel and investigators recorded telephone calls between one of the Plaintiffs and his attorneys for nearly four months -- and handed all of those recordings to the prosecution's investigator as they were preparing for trial -- no one bothered to tell the Plaintiff or his attorneys that his privileged calls were being recorded, or how to have his attorneys' numbers placed on the List.

Defendants have also created numerous fact issues with their own inconsistent and contradictory testimony relating to the Jail's telephone policies. Specifically, whether telephone calls between inmates and investigators hired by the inmate's attorneys were treated as privileged. The Captain in charge of administering the jail when the Plaintiffs were in custody

testified that the jail never considered such calls privileged, and therefore recorded and monitored investigator calls. The current jail administrator contradicted this testimony and believes that such calls were treated as privileged in the past.

Coupled with their destruction of recordings that Plaintiffs' counsel specifically asked the Defendants to preserve, the facts and law preclude summary judgment in favor of Defendants.

STATEMENT OF FACTS

I. Defendants' Policies and Procedures Regarding Attorney-Client Telephone Calls at the Jail

The Jail's policy is to automatically record the telephone calls of all inmates -- unless the number called by the inmate has been placed on the List by Jail personnel. (Omnibus Hr'g. pp. 120-22; Hodgson Dep. pp.78-79).[1] All inmate telephone calls to numbers that are not on the List may be listened to or "monitored" by Becker County Jail staff ("Jail staff") and Becker County law enforcement personnel ("Law Enforcement"). (Hodgson Dep. pp.61-64; 139-40). This is true for any inmate telephone calls to attorneys or to agents of attorneys such as private investigators. (Id. p.79-80).

The Jail's policy does not lallow the cellular numbers of Attorneys to be placed on the List, (Omnibus Hr'g. pp. 132-35; Abrahamson Decl. Ex. B and C), nor are landline or cellular numbers of private investigators allowed on the List. (Abrahamson Decl. Ex. B and D; Omnibus Hr'g. pp. 133-34; 137).

Accordingly, Plaintiffs' telephone calls to their attorneys' cellular numbers -- and to any of the investigators' numbers -- were being recorded and monitored. (Hodgson Dep. pp.79-80). At this same time, however, the Jail was allowing some inmates to make attorney-client privileged telephone calls to the cellular telephones of at least two attorneys at the Tribal Defenders' Office -- which undermines Defendants' argument that private calls are not allowed to cellular telephones due to safety and security risks. (Id. pp.86-87).

Moreover, Reliance informed Andersen's attorneys that their cellular numbers could be placed on the List. (Abrahamson Decl. Ex. E.)

Jail staff have unlimited and unrestricted access to the recorded inmate telephone calls. (Hodgson Dep. pp.98-101; 131). Accordingly, there is nothing to stop either Defendants, Law Enforcement personnel, or Jail staff from listening to inmate telephone calls at any time -- even attorney-client telephone calls. (Omnibus Hr'g. pp. 136-37; Hodgson Dep. pp.78-81). Similarly, the Jail does not maintain records of who accesses the telephone system and listens to inmate telephone calls -- thus, there is no way to determine if Defendants or Jail staff listened to Plaintiffs' attorney-client telephone calls. (Hodgson Dep. pp. 139-40).

Importantly, the Jail has *never implemented a written policy* forbidding Jail staff and Law Enforcement personnel from listening to or monitoring telephone calls between inmates and their attorneys, or between inmates and agents of their attorneys. (Id. pp.109; 113).

Similarly, there is *no written policy* requiring that Jail staff and Law Enforcement personnel inform inmates about the Jail's policies and procedures regarding inmate telephone calls to attorneys. (Id. 48-50). Under the Jail's policies in effect until December 31, 2008, neither the Inmate Handbook nor the signs posted near the inmate telephones at the Jail contained any information regarding how an inmate could request or arrange a private telephone call with an attorney. (First Am. Compl. Ex. 1 and 2; Hodgson Dep. pp.45-46, 51-53).

Inmates are not provided with a copy of the Inmate Handbook unless they request one, and Jail staff generally do not inform inmates of the procedure to request a private, confidential call with an attorney unless an inmate specifically asks. (Hodgson Dep. pp. 135, 152-53). Instead, inmates at the Jail either never find out that they need to, or how to, arrange a private call with their attorney, or they learn about how to arrange a private call from other inmates. (Soyring Dep. p. 19).

The Inmate Handbook and signs posted near the inmate telephones when Plaintiffs were inmates at the Jail did not include any language regarding private telephone calls to investigators or other agents of an inmate's attorney. (First Am. Compl. Ex. 1 and 2; Hodgson Dep. pp.45-56). Instead, the Inmate Handbook stated: "Any *non-attorney/client privileged phone calls* made from Becker County Jail will be monitored and/or recorded." (First Am. Compl. Ex. 1, p.9) (*emphasis added*).

Likewise, the signs posted by the inmate telephones stated: "All phone calls and messages to and from the Becker County Jail are monitored and/or recorded. This includes the visiting booths. *Exceptions are phone calls made to an attorney*." (First Am. Compl. Ex. 2) (*emphasis added*).

Additionally, Andersen provided Jail staff with his attorneys' business cards, and the business card of the investigator hired by his attorneys -- which included office and cellular numbers for his attorneys and the investigator. (Andersen Decl. ¶¶20-22). This reinforced Andersen's belief that his telephone calls to his attorneys and the investigator were private. (Id. ¶16).

Accordingly, Andersen and his attorneys believed their telephone calls were confidential. (Andersen Decl. ¶16; Bulmer Dep. p.78).

II. Defendants' Control Over the Jail's Telephone System

a. Jail Staff and Law Enforcement Personnel have Access to the Recordings of Inmate Telephone Calls

The audio recordings of inmate telephone calls are physically stored on the computer system at the Jail. (Hodgson Dep. p.92). The computer system allows Jail staff and Law Enforcement personnel to search the audio recordings of inmate telephone calls a number of different ways. (Id. pp.76-77).

As noted above, Law Enforcement personnel and Jail staff have unfettered access to the computer system, unsupervised, any time of the day or night -- and they routinely search and listen to recordings of inmate telephone calls. (Hodgson Dep. pp. 139-40).

The primary purpose of recording and monitoring inmate telephone calls is to assist law enforcement in investigating and prosecuting the inmate's criminal case. (Baumann Dep. p.41).

Importantly, all Jail staff and Becker County criminal investigators -- including Defendant Joe McArthur ("McArthur") -- have access to the computer system and recordings of inmates' telephone calls. (Hodgson Dep. pp.98-101). The criminal investigators can access the computer system and listen to the recordings of inmate calls directly from the computers in their offices. (Id. pp. 130-31).

b. Defendants Control the Physical Computer System that Records and Stores Inmate Telephone Calls

The computer system that records inmate telephone calls is physically located at the Jail. (Id. p.92). This includes the computer hard drives that store the recordings of the inmate calls. (Id.). The Jail controls the amount of computer storage space the system has to store and maintain the recorded inmate telephone calls. (Id. pp.91-93).

From at least September of 2006 to early May 2009, the system had the capacity to store approximately 244 days worth of audio recordings of inmate calls at the Jail. (Id. pp.93-96). Once the computer system reached its 244 day capacity, the system would begin over-writing the oldest recordings. (Id. pp.93-95). At the time this suit was filed on October 15, 2008, the computer system at the Jail would have held approximately 244 days worth of recordings of inmate calls -- dating back to approximately February 15, 2008. (Id. pp.96-98). As further set forth below, Defendants have destroyed virtually all, if not all, of these recordings.

III. Defendants Monitored Inmates' Attorney-Client Privileged Telephone Calls

The Jail *does not have any written policy* prohibiting Jail staff or Law Enforcement personnel from monitoring recordings of inmates' calls. (Id. p. 109). This is true for attorney-client telephone calls that are recorded on the Jail's system as well. (Id. pp. 101-04). Absent such a policy, any attorney-client calls recorded on the Jail's system are subject to indiscriminate monitoring by Jail staff and Law Enforcement personnel. (Id. pp.97-106, 113-14).

McArthur monitored Andersen's attorney-client privileged calls (Baumann dep. pp.47, 52-54); Becker County criminal investigator John Seiling ("Selling") monitored Andersen's attorney-client privileged calls (Id.); and Minnesota Bureau of Criminal Apprehension Special Agent Daniel Baumann ("Baumann") monitored Andersen's attorney-client calls. (Id. pp.47;

661-66).

Importantly, Baumann testified that he had to listen to the substance of the telephone call long enough to determine if the call was a privileged attorney-client call -- noting that in a number of instances he had to listen for more than a minute to make the determination. (Id.).

The circumstantial evidence in the record also indicates that Jail staff were listening to the substance of Plaintiffs' attorney-client calls as well. (Bulmer Dep. pp.61-64; 86-91).

Currently, the Jail's policy allows any attorney-client calls recorded on the Jail's computer system to be monitored by Jail staff and other law enforcement personnel. (Omnibus Hr'g. p. 120-22; Hodgson Dep. pp. 78-79). In fact, -- McArthur and Seiling -- can access and listen to inmate calls from the comfort of their own offices. (Hodgson Dep. pp. 130-31).

IV. Defendants Knew that Plaintiffs' Attorney-Client Privileged Telephone Calls Were Being Recorded, But Did Nothing

Early in Andersen's criminal case, McArthur provided copies of Andersen's inmate calls to Baumann for review. (Baumann Dep. p.34). During this review, Baumann encountered recordings of Andersen's calls to attorneys. (Id. pp.46-49; Abrahamson Decl. Ex. F). In his first report regarding Andersen's calls, Baumann identified calls to *nine different numbers that he verified belonged to attorneys*. (Abrahamson Decl. Ex. F).

Included in the list of numbers were two that belonged to Andersen's defense counsel: (1) 763-421-1441 -- Giancola Law Office ("Giancola Law Office") land line; and (2) 612-384-7003 -- Cellular number of William K. Bulmer, II ("Bulmer"). (Id.).

Baumann distributed the report showing that the Jail was recording Andersen's attorney-client calls -- and providing recordings of those calls to him for review -- to Becker County law enforcement John Seiling and John McArthur, Becker County Attorney Joe Evans and Al Zdrazil of the Minnesota Attorney General's Office. (Id.).

Baumann specifically addressed his concerns about Andersen's attorney-client calls being recorded with McArthur and the Becker County Attorney's Office. (Baumann Dep. pp.64-66; 125-26).

Defendants continued to record Andersen's attorney-client and investigator calls -- and continued to provide them to Baumann for review -- *from June of 2007 until at least March 7, 2008*. (Baumann Dep. pp.75-78).

No one informed the Jail administrator or other Jail staff that Andersen's attorney-client calls were being recorded so that the attorneys' numbers could be placed on the List. (Hodgson Dep. pp. 106-08; Baumann Dep. pp.81-88). No one informed Andersen or his attorneys either. (Omnibus Hr'g. pp. 134-37).

The office numbers of Andersen's attorneys were not placed on the List until early December 2007 (Gilmore Aff Ex. 1) and *the cellular numbers were not permanently placed on the List until March 7, 2008*. (Abrahamson Decl. Ex. B and G; Baumann Dep. pp.75-78).

V. Plaintiffs' Interactions and Experiences with the Jail

a. *Kenneth E. Andersen*

1. Jail Staff

On or about June 19, 2007, Andersen was "booked" into the Jail. (Andersen Decl. ¶2). During the booking process, Jail staff told Andersen that he could call an attorney. (Id. ¶4). However, Jail staff did not inform Andersen that his telephone calls to an attorney would be monitored and recorded unless the attorney's number was on the List. (Id. ¶¶5-8). In fact, Jail staff did not even tell Andersen that a List existed. (Id.). Nor did Jail staff tell Andersen that he could request a private, confidential call to an attorney, or that the Jail had an unwritten policy that inmates had to follow to make such a request. (Id.).

2. Inmate Handbook

During booking, Jail staff provided Andersen with an "Inmate Handbook." (Id. ¶9). The Inmate Handbook stated that "*Any non-attorney/client privileged phone calls* made from Becker County Jail will be monitored and/or recorded." (Id. ¶¶11-13). Nothing in the Inmate Handbook indicated that attorney-client privileged calls could be monitored or recorded. (Id.; Omnibus Hr'g. pp.118, 134). Similarly, the Inmate Handbook said nothing about an inmate being required to make a special request to arrange an attorney-client call, or the procedure that an inmate was required to follow to make such a request. (Id.). There was no mention of a List either. (Andersen Decl. ¶13; Hodgson Dep. pp.52-54).

3. Postings By Inmate Telephones

At the Jail, Andersen observed signs posted near the inmate telephones that stated "All phone calls and messages to and from the Becker County Jail are monitored/or recorded. This includes the visiting booths. *Exceptions are phone calls made to an attorney*." (Andersen Decl. ¶14). The signs posted by the inmate telephones didn't say anything about a List. (Id. ¶15).

Moreover, as discussed below, Andersen provided Jail staff with his attorneys' and the investigators' business cards which included their numbers. (Id. ¶¶21-22).

Based on the Inmate Handbook, the signs posted near the inmate telephones and the fact that Jail staff knew who Andersen's attorneys were -- and their numbers -- Andersen reasonably believed that any telephone calls he made to an attorney would be confidential. (Id. ¶16).

4. Andersen's Attorneys Believed Their Telephone Calls with Andersen Were Private and Confidential

Shortly after being admitted to the Jail, Andersen hired the Giancola Law Firm to represent him. (Id. ¶18). The Giancola Law Firm is located in Anoka, Minnesota which is approximately 200 hundred miles from the Jail. (Bulmer Decl. ¶3). Mark Giancola ("Giancola"), Rory Durkin ("Durkin") and William Bulmer, II ("Bulmer") of the Giancola Law Firm represented Andersen in his criminal case. (Andersen Decl. ¶19).

Durkin and Bulmer first visited Andersen in late June or early July 2007. (Id. ¶20). During this first meeting, Durkin and Bulmer provided business cards to Andersen for themselves and Giancola which included office numbers and cellular numbers of each of the three attorneys. (Id. ¶20). Andersen provided the business cards to Jail staff so that Jail staff and Law Enforcement officers would know that they were his attorneys. (Id. ¶21). Jail staff made copies of the business cards and returned them to Andersen. (Id.).

Even after Andersen provided the business cards to Jail staff, his attorneys' numbers were not placed on the List, nor was he even informed about the List. (Id. ¶¶23-28). Likewise, Jail staff never informed Andersen's attorneys that their attorney-client telephone calls were being recorded, or of the existence of the List. (Omnibus Hr'g. pp. 134-37).

Since Andersen had provided Jail staff with their business cards and numbers, Andersen's attorneys believed that their calls with Andersen were private and confidential. (Bulmer Dep. p.78).

5. Andersen and His Attorneys Believed Andersen's Telephone Calls to Investigator Fladmark Were Private and Confidential

The Giancola Law Firm hired private investigator Glen Fladmark ("Fladmark") to assist with the investigation of Andersen's criminal case. (Andersen Decl. ¶¶22). Andersen provided Jail staff with Fladmark's business card which included his name, and his office and cellular numbers so that Jail staff and Law Enforcement personnel were aware that Fladmark was the investigator working on his case. (Id.).

Jail staff copied Fladmark's business card, but didn't tell Andersen or his attorneys about the *Jail's unwritten policy that investigator calls were not considered confidential*. (Andersen Decl. ¶¶23-28; Bulmer Dep. p.78). Accordingly, Andersen and his attorneys believed Andersen's telephone calls with Fladmark were confidential. (Id.).

During the summer and fall of 2007, Andersen made hundreds of telephone calls to the office and cellular numbers of his

attorneys and Fladmark. (Andersen Decl. ¶¶29; Hodgson Aff Ex. A). During these calls, Andersen and his attorneys, and Fladmark discussed every aspect of Andersen's criminal case including the names of potential witnesses -- and what those potential witnesses would know -- and detailed information about Andersen's defenses. (Id.).

6. Andersen and His Attorneys Begin to Suspect that Jail Staff and Law Enforcement Were Listening to Their Attorney-Client Telephone Calls

In the fall of 2007, Durkin, Bulmer and Andersen began to suspect that their telephone calls and the telephone calls between Fladmark and Andersen were being listened to by Jail staff or members of Law Enforcement. (Id. ¶¶31).

Durkin and Bulmer attempted to test their theory that Jail staff were listening to their attorney-client calls. (Id. ¶¶32; Bulmer Dep. pp.61-64; 86-91). During telephone conversations with Andersen, Bulmer, Durkin and Fladmark told Andersen that they knew it was hard being locked up in the Jail and that they felt bad for Andersen. (Id.). The attorneys and Fladmark informed Andersen that they had access to illegal narcotics through other clients and would bring them to Andersen the next time they visited him. (Id.).

Within several days of these telephone conversations, Jail staff began asking Andersen when his attorneys were coming to visit him. (Andersen Decl. ¶32). Jail staff had never asked Andersen about his attorneys' plans to visit him before this. (Id.). Jail staff also did more random "flips" or inspections of Andersen's cell after the telephone calls about the pretend illegal narcotics. (Id. ¶34). During these flips, Jail staff searched Andersen's cell more thoroughly than they had ever done during previous flips, and even searched through documents in Andersen's cell marked "attorney-client privileged." (Id.).

Bulmer was the first attorney to visit Andersen after the telephone calls about the pretend illegal narcotics. (Id. ¶35). When Bulmer arrived at the Jail, he was thoroughly searched -- both his person and all of his papers and briefcase. (Bulmer Dep. 61-64; 86-91). Bulmer had never been searched during any of his other visits to Andersen at the Jail. (Id.).

Andersen and his attorneys did not talk about the test with anyone at the Jail or anyone over the telephone other than each other. (Andersen Decl. ¶36; Bulmer Dep. pp.90-91). Andersen and his attorney are not aware of any way Jail staff could have known about the pretend illegal narcotics test unless Jail staff or Law Enforcement officers were listening to their attorney-client calls. (Id.).

7. Andersen and His Attorneys Raise Their Concerns with the Becker County Attorney's Office and Jail Staff

After the startling results of the test, Andersen and his attorneys raised the issue several times with the Becker County Attorney's Office. (Bulmer Decl. pp.90-91). Each time, their complaints were summarily dismissed. (Id.).

Andersen and his attorneys also raised the issue with Jail staff. (Andersen Decl. ¶39; Bulmer Dep. pp. 91-92). Only then were they told about the Jail's unwritten policy about arranging confidential calls between inmates and attorneys. (Andersen Decl. ¶¶39-40). Jail staff also told them about the List, and that if an attorney's number was not on the list, the inmate's calls to that number would automatically be recorded. (Id.).

This was the first time that Jail staff or Law Enforcement personnel informed Andersen, his attorneys, or Fladmark about the Jail's policy for arranging attorney-client calls, or about the List. (Id.).

8. Jail Staff Never Informed Andersen or His Attorneys that the Jail Did Not Allow Private Calls to Attorneys' Cellular Telephones or to Investigators

After Jail staff told Andersen and his attorneys about the Jail's policy for requesting private calls, they again gave Jail staff their office and cellular numbers, and Fladmark's numbers, and requested that the numbers be placed on the List. (Andersen Decl. ¶42). Andersen and his attorneys gave Jail staff the numbers in early December 2007. (Id.). They also provided their office and cellular numbers, and the office and cellular numbers of Fladmark, to Reliance Telephone on December 3, 2007. (Abrahamson Decl. Ex. H).

Jail staff didn't tell Andersen or his attorneys that the Jail's policy did not allow confidential calls to cellular telephones -- not even for attorneys. (Andersen Decl. ¶43). Jail staff also didn't tell Andersen or his attorneys that the Jail's policy did not

allow confidential calls to investigators. (Id.).[2]

9. Defendants Removed the Cellular Numbers of Andersen's Attorneys from the List, But Didn't Tell Andersen or His Attorneys

In early March 2008, Jail staff and Law Enforcement informed Andersen and his attorneys that the attorneys' cellular numbers that had been placed on the List on or about December 3, 2007, *had been removed from the list on December 5, 2007*. (Andersen Decl. ¶¶46-48).

Defendant McArthur ordered Jail staff to remove the cellular numbers of Andersen's attorneys pursuant to the *Jail's unwritten internal policy* forbidding cellular numbers from being placed on the List -- even if the numbers are attorney cellular numbers. (Omnibus Hr'g. p. 132-35; Abrahamson Decl. Ex. B, C and D).

Because the cellular numbers were removed from the List, Andersen's telephone calls to his attorneys' cellular telephones after December 5, 2008 were recorded by the Jail. (Id.). Neither Jail staff nor Law Enforcement personnel told Andersen or his attorneys that the cellular numbers had been removed from the List, and were being recorded. (Id; Andersen Decl. ¶47).

10. Fladmark's Numbers Were Not Placed on the List, But Jail Staff Did Not Inform Andersen or His Attorneys

Around this same time, Jail staff and Law Enforcement informed Andersen and his attorneys that the cellular number of Fladmark had not been placed on the List due to *another unwritten internal Jail policy* that inmate telephone calls to investigators are not considered confidential. (Andersen Decl. ¶50; Omnibus Hr'g. p. 132-35).

All of Andersen's calls to Fladmark's cellular number were recorded and subject to monitoring by Defendants.

11. The Court Orders Defendants to Place the Cellular Numbers of Andresen's Attorneys on the List, But Fladmark's Cellular Number Was Never Placed on the List

On March 7, 2008, pursuant to Judge Irvine's Order, Defendants finally placed the cellular numbers of Andersen's attorneys on the List. (Abrahamson Decl. Ex. I). Per Jail policy, however, Fladmark's cellular number was never placed on the List. (Abrahamson Decl. Ex. D; Gilmore Aff. Ex. 1).

From Andersen's admission to the Jail on June 19, 2007 until March 7, 2008, Andersen's calls to his attorneys' and the Fladmark were being recorded by Defendants. (Omnibus Hr'g. p. 132-35). The Giancola Law Office number, (763) 421-1441, was not placed on the List until December 6, 2007. (Gilmore Aff. Ex. 1).

Attorney Durkin's cellular number, (612) 272-0885, was not placed on the list until March 7, 2008. (Id.).

Attorney Bulmer's cellular number, (612) 384-7003, was initially placed on the list on December 4, 2007 (Id.), but was removed from the list by Jail staff on December 5, 2007 (Abrahamson Decl. Ex. 3). Bulmer's cellular number was not placed back on the List until March 7, 2008. (Abrahamson Decl. Ex. I).

Attorney Giancola's cellular number, (612) 6362576, does not even appear on the list. (Gilmore Aff. Ex. 1).

Private Investigator Fladmark's office numbers, (218) 842-5494 and (218) 998-2951, were not placed on the list until December 13, 2007 and March 5, 2008 respectively. (Id.). *Fladmark's cellular number, (218) 731-4027, was never placed on the list*. (Id.; Abrahamson Decl. Ex. I).

Andersen's calls to his attorneys and Fladmark, during the time periods the numbers were not on the List, were recorded by the Jail, and from the record evidence, apparently monitored by Jail staff and Law Enforcement personnel. (Hodgson Dep. pp.78-80; Bulmer Dep. pp.61-64; 86-91).

Because the Jail's policy was that investigator calls were not privileged, it is reasonable to infer that all of Andersen's telephone calls to Fladmark's cellular telephone were recorded and the substance of those calls was monitored. (Id.; Gilmore Aff. Ex. 1).

b. *Dell D. Holm*

1. Jail Staff

On May 3, 2008, Dell D. Holm ("Holm") was arrested and brought to the Jail. (Holm Decl. ¶2). Neither Jail staff nor Law Enforcement provided Holm with any written materials or documents informing him of the Jail's policy regarding arranging a confidential call with an attorney. (Id. ¶3). Similarly, during the booking process, Holm was never told about the procedure to arrange a confidential call with an attorney. (Id. ¶4). None of the Jail staff or the Law Enforcement personnel told Holm about a List. (Id.).

2. Inmate Handbook

Holm was not given an Inmate Handbook during booking, nor did any Jail staff or Law Enforcement tell Holm about the Inmate Handbook, or what the Inmate Handbook said. (Holm Decl. ¶3-5). Holm learned about the Inmate Handbook from other inmates and requested a copy from Jail staff. (Id. ¶5-6). Jail staff told Holm that there weren't any copies available at that time, and that he would be given one when the Jail printed more copies. (Id. ¶6). Holm was never given a copy of the Inmate Handbook. (Id. ¶7).

3. Postings By Inmate Telephones

Holm also observed signs posted by the inmate telephones stating that all telephone calls would be monitored -- *except telephone calls made to an attorney*. (Id. ¶8) (*emphasis added*).

4. Holm Believed His Telephone Calls to His Attorneys Were Private and Confidential

Based on the signs posted by the inmate telephones -- and because Jail staff never told him anything different -- Holm believed that any calls he made to an attorney would be confidential. (Holm Decl. ¶11).

After Holm arrived at the Jail, Darlene Rivera ("Rivera") was appointed as his public defender. (Id. ¶9). Holm used the inmate telephones at the Jail to speak with Rivera about his criminal case. (Id. ¶10). During these calls, Rivera and Holm discussed private and confidential information relating to his criminal case and defense strategy. (Id.).

5. Jail Staff Tells Holm All Telephone Calls Are Recorded -- Even Calls to Attorneys

After being told by other inmates that Jail staff listened to telephone calls between inmates and attorney, Holm requested confidential calls to Rivera and any other attorneys from the Public Defenders' office that were working on his case. (Holm Decl. ¶¶12-13). Jail staff informed Holm that all inmate calls were recorded -- even calls to inmates' attorneys. (Id. ¶14).

6. Holm Overhears Jail Staff Talking About Information He Discussed With His Attorneys Over the Telephone

Holm overheard Jail staff talking about his criminal case. (Holm Decl. ¶16). The information that Holm overheard Jail staff discussing was information that he had shared over the telephone with Rivera relating to his criminal case. (Id.). Holm does not know if any of his telephone calls from the Jail to his attorneys were confidential. (Id. ¶17).

c. *William K. Bulmer, II*

1. Bulmer's Representation of Andersen

Bulmer represented Andersen in his criminal case in Becker County. (Bulmer Decl. ¶2). During the representation, Bulmer worked for The Giancola Law Firm, PLLC ("Giancola Law Firm") until January, 2008. (Id. ¶3). In January 2008, Bulmer left the Giancola Law Firm and opened his own firm -- the Law Offices of William K. Bulmer, II. (Id.). Bulmer continues to

represent Andersen. (Bulmer Dep. pp. 10-11).

In Bulmer's legal practice, his primary method of communication with clients in custody is via telephone -- especially for clients such as Andersen who are not in close physical proximity to his office. (Bulmer Decl. ¶5).

2. Bulmer's Compensation During His Representation of Andersen

Like many criminal defense attorneys, Bulmer's compensation was highly incentivized. (Bulmer Decl. ¶4). His compensation consisted of a fairly small base salary and a fifteen percent (15%) commission on all business that he personally brought into the firm. (Id.). The 15% commission constituted a significant portion of his income. (Id.).

3. Bulmer's Suspicions That His Attorney-Client Telephone Calls With Andersen are Being Listened To

In the summer of 2007, Bulmer and other attorneys at the Giancola Law Firm began to suspect that their calls with Andersen were being listened to by Jail staff and Law Enforcement personnel. (Bulmer Decl. ¶6). Due to these concerns, Bulmer informed Andersen that they could no longer discuss substantive information about Andersen's case and defense strategy over the telephone. (Id. ¶7).

4. Bulmer Required to Drive to Becker County to Meet With Andersen to Discuss Confidential Case Information

Because Andersen's attorneys felt their calls with Andersen weren't private, any time they needed to discuss confidential case related information with Andersen, they had to travel to Becker County to visit him in person. (Bulmer Decl. ¶7). This resulted in numerous trips to Becker County that would have been unnecessary if Andersen's attorneys were certain that their calls to Andersen were confidential. (Bulmer Decl. ¶¶7-8; Bulmer Dep. pp.56-60).

Bulmer was the primary attorney in charge of communicating and working with Andersen to gather pertinent facts and evidence, and to develop the Andersen's defense strategy. (Bulmer Decl. ¶8). Accordingly, the responsibility to make the additional trips to Becker County fell to Bulmer. (Id.).

5. The Jail's Physical Location From The Giancola Law Office and Bulmer's Home

The Jail is located in Detroit Lakes, Minnesota; approximately a four hour drive from the Giancola Law Office in Anoka, Minnesota, and approximately a four and one-half hour drive Bulmer's home in St. Louis Park, Minnesota. (Bulmer Decl. ¶9; Bulmer Dep. pp.56-60).

6. Hardship's Caused by Not Being Able to Discuss Confidential Information with Andersen Over the Telephone

The additional trips that Bulmer was required to make to Becker County to visit Andersen in person significantly increased the time and costs involved in representing Andersen. (Bulmer Decl. ¶10).

Importantly, the additional trips severely limited the amount of time that Bulmer was able to devote to work on other matters. (Id. ¶11). The additional trips also severely limited Bulmer's opportunities and ability to personally generate new business for the firm -- which had a negative impact on Bulmer's income and harmed his earning ability. (Id.).

In a number of instances, Bulmer traveled to Becker County on Friday evenings and on weekends so that he would not be out of the office during the work week, and so he could meet with Andersen for extended periods of time. (Id. ¶12). This precluded Bulmer from being able to attend a number of personal engagements and activities. (Id.).

VI. Defendants Destroyed Crucial Evidence Relating to the Recording and Monitoring of Plaintiffs' Attorney-Client Telephone Calls

By letter dated October 31, 2008, counsel for Plaintiffs notified Defendants' counsel not to destroy certain documents because plaintiffs would seek those documents in discovery. (Abrahamson Decl. Ex. A). Counsel's letter specifically notified

Defendants' counsel to preserve the recordings between Plaintiffs and their attorneys as relevant evidence:

> Any existing recordings of conversations between Mr. Andersen or Mr. Holm and their attorneys or their attorney's agents must be preserved. Any other recordings of conversations between inmates/detainees and their attorneys or attorney's agents must also be preserved... Any routine deletion or destruction of the above information or any other relevant information must cease immediately...

(Abrahamson Dec, Ex. A).

At the initiation of this litigation and when Defendants' counsel received the document preservation letter from Plaintiff's counsel, the telephone system at the jail could preserved all inmate telephone recordings for approximately 244 days. (Hodgson Dep. pp.93-98). Thus, the system contained recordings dating back to approximately February 15, 2008.

Both Andersen and Holm were in custody at the jail during this time period. (Def. Br. pp.4; 7). Any telephone calls from Plaintiffs to any of their attorneys' numbers not on the List would have been recorded. (Hodgson Dep. pp.78-80).

The phone recording system also provides a simple process for downloading materials onto a CD -- a process used routinely to provide the BCA or other investigators with copies of the recorded telephone conversations. (Id. pp.96). Thus, it would have been easy for defendants to preserve these documents.

The defendants made no effort, however, to preserve the documents identified in Mr. Bryden's letter. (Hodgson Dep. pp.97-99; Baumann Dep. pp. 123-27). Instead, Defendants continued their routine destruction of the recordings of inmate telephone calls. (Hodgson Dep. pp. 91-99). Nor did defendants instruct others, such as Mr. Baumann who was specifically identified in Mr. Bryden's letter, to preserve the recordings. (Id.). Defendants' 30(b)(6) witness admitted at his deposition that no steps were taken to preserve the recordings. (Hodgson Dep. pp.97-99).

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). When considering a motion for summary judgment, the role of a court is not to weigh the evidence but instead to determine whether -- as a matter of law -- a genuine factual conflict exists. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987).

Moreover, "[t]he court must view the evidence, and the inferences that may be reasonably be drawn from it, in the light most favorable to the nonmoving party." *Koscielski v. City of Minneapolis*, 393 F.Supp.2d 811, 814 (D. Minn. 2005) (citing *Graves v. Arkansas Dep't of Fin. & Admin.*, 229 F.3d 721, 723 (8th Cir. 2000)).

ARGUMENT

I. Numerous Factual Disputes in the Record Necessarily Preclude Summary Judgment

a. *Genuine Issues of Material Fact Exist in the Record*

1. The Jail Does Not Inform Inmates of the Jail's Policies and Procedures Regarding Requesting an Attorney-Client Telephone Call During the Booking Procedure

First, Defendants assert that the Jail has an *unwritten* policy in place that requires Jail staff to verbally inform inmates during the booking process about the Jail's policy for arranging a private attorney-client telephone call -- including that Jail policy requires inmates to request private calls to their attorneys. (Gordon Aff. ¶3;[3] Hodgson Dep. pp.105-08[4]).

Jail Administrator Hodgson, however, testified that inmates are only informed of the Jail's policy regarding the procedure for an inmate to request a confidential call with an attorney *when an inmate asks Jail personnel about making a call to an attorney*. (Hodgson Dep. pp.135, 152-53).

Jennifer Soyring, a Becker County Correctional Officer for five years, stated that inmates help one another more with determining how to make private calls to attorneys than Jail staff does. (Soyring Dep. p. 19). Paula Peterson, a Becker County Correctional Officer for nine years, learned how to assist inmates with requesting a private call to an attorney by observing others at the Jail -- rather than through formal training. (Peterson Dep. pp.25-26). Accordingly, the facts undercut the Defendants' assertion of an unwritten policy requiring Jail staff to inform inmates about the List.

2. The Jail's Policy Regarding Inmate Telephone Calls to Investigators

McArthur testified that, pursuant to Jail policy, inmates' telephone calls to investigators are *not considered private, and thus, are recorded and monitored*. (Omnibus Hr'g. pp.133, 137). McArthur also testified that when Fladmark's number was placed on the List, it was an anomaly and was only done because the Becker County Attorneys Office instructed the Jail to do so. (Id.).

Given this testimony and the results of the "test" conducted by Andersen's attorneys, it is reasonable to infer that -- per the Jail's policy -- Jail staff and Law Enforcement personnel recorded and listened to inmates' telephone calls with their investigators -- including the substance of the calls.

3. Jail Staff and Law Enforcement Personnel Listened to Andersen's Attorney-Client Telephone Calls

Defendants repeatedly *deny* that Andersen's attorney-client telephone calls were listened to. (Omnibus Hr'g. p. 138; Def Br. pp. 13, 17). This is blatantly false as Special Agent Baumann repeatedly admitted that he had to listen to at least a portion of Andersen's calls to his attorneys and Fladmark -- at times more than a minute -- to determine that Andersen was speaking to his attorneys or the investigator. (Baumann Dep. pp.61-74).

Baumann also testified that Defendant Joe McArthur and investigator John Seiling monitored or screened the recordings of Andersen's telephone calls. (Baumann Dep. p.52). And, according to Hodgson, anyone who monitored or screened the recordings of an inmate's telephone calls would necessarily have to "listen to it long enough to determine what the conversation was about" to determine if the inmate was talking to his attorney. (Hodgson Dep. p. 105). Moreover, the "test" conducted by Andersen's attorneys demonstrates that Jail staff listened to the substance of Andersen's privileged calls.

4. Defendants' Assertion that the Numbers of Andersen's Attorneys Were Inadvertently Omitted from the List is False

Defendants allege that the telephone numbers of Andersen's attorneys were inadvertently omitted from the List because of a one-time change in Reliance Telephone's procedures -- in other words, a "mistake." (Def Br. p.4; McArthur Aff. Ex. 1).

The factual record, however, shows that this is not the case. Jail administrator Hodgson, testified that there have been *no changes to how attorney numbers are added to the List since at least October of 2004*. (Hodgson Dep. pp.58-63, 129). Hodgson even confirmed this with prior Becker County Chief Jailer Rollie Oelfke. (Hodgson Dep. p. 129). Moreover, Andersen gave Jail staff the business cards and telephone numbers of his attorneys within a few weeks of being booked into the Jail. Finally, in regard to the cellular numbers of Andersen's attorneys, McArthur testified that he ordered the removal of the cellular numbers of Andersen's attorneys from the List -- *per Jail policy* -- and *never informed Andersen's attorneys that the numbers had been removed.* (Omnibus Hr'g. pp. 130-36). This can hardly be called a one-time "mistake."

From these facts, it can reasonably be inferred that Defendants' policy was simply to not place the Andersen's attorney numbers on the List, or in the very least, to be completely indifferent to whether the attorney numbers were placed on the List. Accordingly, it can also be inferred that Jail staff and Law Enforcement recorded and listened to the calls between Andersen and his attorneys during the time their numbers were not on the List -- including the substance of those telephone calls.

5. Defendants' Assertion that No Inmate Conversations with Their Attorneys or Their Attorneys' Agents Have Been Recorded at the Jail Since March 7, 2008 Order is also False

Defendants assert that they did not record any of Andersen's attorney-client privileged telephone calls after Judge Irvine's

March 7, 2008 Order requiring the cellular numbers of Andersen's attorneys be placed on the List. (Def. Br. p.5). Yet, Fladmark's cellular number, (218) 731-4027, was never placed on the list, thus, any calls Andersen placed to Fladmark's cellular telephone after Judge Irvine's March 7, 2008 Order were recorded. (Gilmore Aff Ex. 1; Abrahamson Decl. Ex. B, C and D).

II. Defendants' Policies Regarding Monitoring and Recording Attorney-Client Telephone Calls Violated Plaintiffs' Constitutional Rights

a. First Amendment

Imprisonment does not automatically deprive a prisoner of his or her First Amendment right to the freedom of speech. *Beard v. Banks*, 548 U.S. 521 (2006); *Turner v. Safley*, 482 U.S. 78 (1987); *Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008). Because this matter is before the Court on Defendants' motion for summary judgment, "[i]nferences about disputed facts must be drawn in [Plaintiffs'] favor . . . ." *Beard*, 548 U.S. at 524. Instead, prison regulations restricting constitutional guarantees are valid only if the regulations are "reasonably related to legitimate penological interests." *Turner v. Safely*, 482 U.S. at 89; *Roe v. Crawford*, 514 F.3d 789, 793 (8th Cir. 2008). Here, the Jail's policy of recording and monitoring inmates' *attorney-client telephone calls* has no legitimate link to penological interests.

First, Defendants assert that no information from the recorded calls was used against Plaintiffs in their criminal cases, so Plaintiffs' First Amendment rights have not been harmed. Whether Defendants utilized any information gained from Plaintiffs' attorney-client communications against them is irrelevant -- the very fact that the Jail records these privileged communications restricted Plaintiffs' First Amendment rights because they could not openly and freely communicate with their attorney.

Second, Defendants allege that recording inmates' telephone calls is reasonably related to the penological interests of safety and security at the Jail. Again, Defendants' argument misses the entire point of Plaintiffs' claim -- Plaintiffs' do not object to the Jail recording inmate telephone calls to friends and family. Instead, Plaintiffs' complaint is limited to the recording of *attorney-client privileged telephone calls*. Defendants have failed to even provide a modicum of evidence to show any safety or security concerns related to Plaintiffs' telephone calls to their attorneys. Accordingly, the Jail has no legitimate penological interest in recording these privilege communications.

b. Fourth Amendment

Defendants argue that no Fourth Amendment violation exists, relying entirely on *United States v. Novak*, 531 F.3d 99 (1st Cir. 2008) (O'Connor). Not only is *Novak* clearly distinguishable from the case at bar, but the First Circuit's opinion actually supports Plaintiffs' Fourth Amendment claim.

First, in *Novak*, the Court held that inmate Holyoke knew that his calls to his attorney Novak were being recorded and monitored because he was properly informed by prison staff, and because an automated message at the beginning of each call informed him that the call was being recorded.[5] *Novak*, 531 F.3d at 102. Here, Plaintiffs were never properly informed that their attorney-client calls were being monitored or recorded -- *even after Jail staff knew their private calls were being recorded*.

Second, the *Novak* Court based its holding on the fact that *Holyoke -- by continuing to speak to his attorney after he was aware the calls were being recorded and monitored -- impliedly consented to the recording*. *Id*. at 102-03.

Most importantly, the Court specifically found that "there is no evidence . . . that [the inmate] believed his consent to monitoring of phone calls was limited only to non-attorney-client phone calls." *Id*.

Here, the signs posted by the inmate telephones led Plaintiffs to believe -- and in fact they did believe -- that their telephone calls to their attorneys were confidential. Moreover, Andersen gave Jail staff the business cards of his attorneys and investigator Fladmark, thus, Jail staff knew who his attorneys were and had their telephone numbers. Under these circumstances, Plaintiffs' belief that their calls to their attorneys were private was certainly reasonable.

Additionally, Andersen's attorneys also believed that their calls with Andersen were private, and Jail staff and Law

Enforcement did not tell them any different -- even though they knew Andersen's attorney-client calls were being recorded.

Not only was Plaintiffs' expectation reasonable, it is well-recognized by the courts. *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."); *United States v. Hatcher*, 323 F.3d 666, 675 (8th Cir. 2003). Accordingly, rather than supporting Defendants' motion for summary judgment, *Novak* supports Plaintiffs' Fourth Amendment claims.

Although the Sixth Amendment was not addressed in *Novak* because it was not before the Court, Justice O'Connor noted that "[n]o doubt, the monitoring of [the inmate's] calls to his attorney presents a significant Sixth Amendment issue." *Novak*, 531 F.3d at 102. Justice O'Connor reiterated this as she closed the opinion:

> [w]e recognize that there are Constitutional dimensions to the monitoring that occurred we do not discuss in this opinion. *The monitoring of these calls, made between an attorney and a client who is seeking legal advice, is troubling. We thus reiterate that in holding as we do, we do not express approval of the practice of monitoring calls between attorneys and clients in prisons and jails*. We have not found a Fourth Amendment problem in this *particular instance*. Because Novak chose not to raise the question, we do not decide whether, or to what extent, calls between attorneys and clients made from prison can be monitored consistently with the requirements of the Sixth Amendment.

Id. at 103-04 (*emphasis added*).

c. Fifth and Sixth Amendment

Again, Defendants claim there are no constitutional violations because -- allegedly -- Defendants' never listened to any of the recordings of attorney-client telephone calls. This argument is equally as erroneous here as it was in the First Amendment context.

In regard to the Fifth Amendment, Defendants conveniently destroyed the recordings of the telephone calls so it is virtually impossible for Plaintiffs to prove that Defendants listened to any attorney-client calls. This alone creates a fact issue precluding summary judgment for Defendants.

In regard to the Sixth Amendment, courts have consistently held that the practice of law enforcement surreptitiously recording attorney-client privileged telephone calls offends even the most basic constitutional principles.

High courts across the country have uniformly and dramatically condemned such practices. *See State v. Sugar*, 417 A.2d 474, 479-480 (N.J. 1980) ("We are outraged .... Such an invasion is unconscionable."); *Matter of Kozak*, 256 N.W.2d 717, 725 (S.D. 1977) ("[W]e cannot express strongly enough our condemnation of the practice of the sheriff and his deputy."); *Fajeriak v. State*, 520 P.2d 795, 799 (Alaska 1974) ("The spectacle of the state spying on attorney-client communications of persons placed in its custody offends even the least refined notions of fundamental fairness and due process of law, and if it took place we find it reprehensible.").

Federal Courts have been equally outraged about law enforcement's invasion into the attorney-client privilege. *Coplon v. United States*, 191 F.2d 749, 758 (D.C. Cir. 1951) ("The sanctity of the constitutional right of an accused privately to consult with counsel is generally recognized and zealously enforced by state as well as federal courts.").

In a directly analogous body of caselaw, the Eighth Circuit recognized the sanctity of the attorney-client privilege with respect to inmates' legal mail. In *Cody v. Weber*, prison officials opened legal mail outside the presence of the inmate. 256 F.3d 764 (8th Cir. 2001). The Court reversed a summary judgment ruling in favor of prison officials finding that the inmate had asserted a viable 42 U.S.C. § 1983 claim. *Id*. at 768 (citing *Powells v. Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712 (8th Cir. 1999) (holding allegation that prison officials opened legal mail outside of inmate's presence is sufficient to state a constitutional claim)).

In reaching this decision, the Court reaffirmed that an alleged security interest cannot justify such an invasion of the attorney-client privilege. *Cody*, 256 F.3d at 768 (citing *Thongvanh v. Thalacker*, 17 F.3d 256, 258-59 (8th Cir. 1994)).

Here, there is no question that Defendants recorded Plaintiffs' attorney-client telephone calls and listened to those calls. The only inference that can be drawn from the "test" performed by Andresen's attorneys is that Jail staff listened to the substance of Andersen's privileged calls. Baumann testified that he had to listen to the calls -- including some substance -- to determine whether it was an attorney-client call. Moreover, the Jail's policy was that inmate calls to investigators were not even considered privileged. Accordingly, it is reasonable to infer from the Jail's policy that inmates' calls to investigators were also listened to by Jail staff.

As Justice O'Connor noted in the *Novak* opinion, it is clear that "the monitoring of [the inmate's] calls to his attorney presents a significant Sixth Amendment issue." *Novak*, 531 F.3d at 102-03.

c. Due Process

Defendants assert that their conduct does not "shock the conscience or otherwise offend our judicial notions of fairness, or ... offen[d] human dignity." (Def. Br. p.20). As set forth above, however, courts across the nation disagree and express "outrage" at such practices and "condemn" such unconstitutional policies.

Defendants likely conclude that their conduct is not shocking based on their own innocuous version of their conduct. When one views Defendants' conduct through the extensive factual record presented herein, however, it is hard not conclude that Defendants' conduct is shocking and offensive to judicial notions of fairness.

III. Defendants raise a series of legal defenses that are wholly inapplicable or without merit.

a. Collateral Estoppel Does Not Apply to the Case at Bar

In asserting collateral estoppel,[6] Defendants ignore well-established Supreme Court precedent holding that violation of a criminal defendant's Sixth Amendment rights does not necessarily compel the dismissal of an indictment unless the criminal defendant can show prejudice flowing from the violation. *United States v. Morrison*, 449 U.S. 361, 367 (1981). The Supreme Court held that if dismissal of the indictment is not appropriate, then the Sixth Amendment right may be vindicated through other judicial proceedings. *Id*. at 367.

In other words, the fact that the trial court did not dismiss Andersen's indictment does not mean that he does not have an actionable claim. Instead, Andersen is vindicating his rights in the exact manner set forth by the Supreme Court in *Morrison*.

Accordingly, collateral estoppel does not bar Andersen's claims because the issue in this case is not the same issue resolved by the trial court in Andersen's criminal trial. During Andersen's criminal trial, he brought a motion to dismiss the indictment on account of the monitoring of attorney-client privileged communications. In order to understand what issue was resolved by the trial court, it is imperative to look to the substantive law governing Andersen's motion to dismiss the indictment:

> To establish a Sixth Amendment violation, a criminal defendant must how that the government knowingly intruded on the attorney-client relationship. *However, the identification of a Sixth Amendment violation alone does not require dismissal of an indictment.* Even where a violation is deliberate, dismissal is an appropriate remedy only where the defendant shows that the violation resulted in prejudice or a substantial threat of prejudice.

United States v. Elzahabi, No. 04-CR-282, 2007 U.S. Dist. LEXIS 33325, *2-3 (D. Minn. May 7, 2007) (*emphasis added*) (citing *United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986); *Morrison*, 449 U.S. at 365-66.

The trial court's brief analysis of Andersen's motion to dismiss focused on whether Andersen was prejudiced by the recording. In the concluding paragraph of the Order, the trial court stated "[b]ecause there is no evidence of prejudice to the rights of the Defendant, and because the practice of recording for screening purposes has been stopped, there are no real grounds for dismissing the indictment." (Judge Irvine *Order and Memorandum*, p. 11). The rule of law regarding dismissal of the indictment clearly contemplates a step-by-step analysis. *See United States v. Singer*, 785 F.2d 228, 234 (8th Cir. 1986). In this step-by-step analysis, the trial court only engages in the prejudice analysis *after finding a Sixth Amendment violation*. *Singer*, 785 F.2d at 234. Since the trial court reached the issue of prejudice, it must have necessarily concluded that the

government violated Andersen's Sixth Amendment rights by recording his attorney-client telephone calls. Defendants' argument that Andersen's claims are collaterally estopped ignores the law applicable to Andersen's motion and the trial court's analysis under that law.

The trial court's finding regarding prejudice has no impact on the case at bar. In *Morrison*, the Supreme Court held that prejudice is necessary to warrant dismissal of the indictment. 449 U.S. at 365-66. In reaching that conclusion, however, the Supreme Court warned "we do not condone the egregious behavior of the Government agents. Nor do we suggest that in cases such as this, a Sixth Amendment violation may not be remedied in other proceedings." *Id*. at 367.

A civil lawsuit must be the "other proceeding" contemplated by the Supreme Court in *Morrison*. Accordingly, Andersen is *not estopped* from bringing his Sixth Amendment claims here, but instead, is following the Supreme Court's guidance to ensure his rights are upheld.

b. *Heck v. Humphrey* is Inapplicable Because Plaintiffs' Claims Do Not Challenge Their Criminal Convictions

Defendants' mischaracterize Plaintiffs' claims and allege that Andersen and Holm are challenging the validity of their criminal convictions through this action. Even a cursory review of Plaintiffs' Complaint and the record, however, show this to be patently false. Nothing in the Complaint sets forth such a claim.

Instead, Plaintiffs' Complaint asserts that Defendants policy of recording and monitoring their attorney-client telephone calls violated their constitutional and statutory rights. Such claims *are not barred* under *Heck v. Humphrey*. To the contrary, *Heck v. Humphrey* explicitly provides that -- in circumstances such as those here -- a convicted criminal defendant may bring a civil action for violations of his rights:

> ...if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Humphrey, 512 U.S. at 487. This holding is squarely on point here, where the legitimacy of Plaintiffs criminal convictions would not be undermined by their success in this action. *Cf. Morrison*, 449 U.S. at 367.

As discussed above, Andersen (but not Holm) sought dismissal of the indictment based on the recording of his attorney-client privileged conversations. The Court denied Andersen's motion, however, "[b]ecause there is no evidence of any prejudice to the rights of the Defendant, and because the practice of recording for screening purposes has been stopped, there are no real grounds for dismissing the indictment." (Judge Irvine *Order and Memorandum*, p. 11). Accordingly, Andersen's failure to demonstrate prejudice was the basis for denying his motion to dismiss the indictment.

In regard to Holm, Defendants cite a series of inapposite cases where the Plaintiff's § 1983 action alleged constitutional violations that resulted in the collection of evidence which was used to support an *Alford* plea.[7]

These cases are not remotely on point with the claims Holm has asserted in this action. Holm's claim here is simply that the recording and monitoring of his privileged calls violated certain constitutional and statutory rights. He does not have to show that law enforcement used information from his privileged communications to support the Alford plea to prove his claims under 42 USC § 1983.

Accordingly, Plaintiffs can prove their claims without demonstrating the invalidity of their convictions. This is exactly what *Heck* case provides for.

c. Plaintiffs Have Established a Viable *Monell* Claim.

Under *Monell*, municipal liability under § 1983: "(1) where a particular municipal policy or custom itself violates federal law, or directs an employee to do so; and (2) where a facially lawful municipal policy or custom was adopted with 'deliberate indifference' to its known or obvious consequences." *Moyle v. Anderson*, No. 08-3730, 2009 U.S. App. LEXIS 15120, at *7 (8th Cir. July 9, 2009) (citing *Seymour v. City of Des Moines*, 519 F.3d 790, 800 (8th Cir. 2008)).

First, Defendants assert that there are no unconstitutional policies at the Jail. This is demonstrably false. First, Defendants'

policy of recording and monitoring inmate telephone calls to attorneys' numbers that are not on the List is unconstitutional.

Second, Defendants' policy of recording inmates' attorney-client telephone calls, and not informing either the inmate or the attorneys that their private calls are being recorded is unconstitutional.

Third, Defendants' policy of not informing inmates during the booking procedure of how to arrange a confidential attorney-client call is unconstitutional.

Fourth, Defendants' policy or requiring inmates to request a private attorney-client call -- when the inmates have not been informed that they must make such a request -- is unconstitutional.

Fifth, Defendants' policy of not informing inmates that calls to their attorneys' cellular telephones are recorded and monitored is unconstitutional.

Sixth, Defendants' policy of not informing inmates that their calls to investigators are recorded and monitored is unconstitutional.

Seventh, Defendants' policy of allowing all Jail staff unlimited access to recordings of inmate calls -- including attorney-client calls -- is unconstitutional.

Eighth, Defendants' policy of providing recordings of inmates' telephone calls to their attorneys to Law Enforcement personnel involved with the prosecution of the inmate is unconstitutional.

In the event that the Court were to find any of these policies facially lawful, it is clear that Defendants adopted the policies with deliberate indifference to the obvious consequences of the policies. For example, Defendants assert that the policy to record inmates' telephone calls is a facially lawful policy. However, when one looks at the way Defendants have implemented this policy -- allowing inmates' attorney-client calls to be recorded and monitored -- the record evidence paints a clear picture of Defendants' deliberate indifference to inmates' constitutional rights.

d. The Defense of Qualified Immunity is Not Applicable to the Case at Bar

Defendants' qualified immunity defense is wholly inapplicable. Plaintiffs have not sued Defendants Gordon and McArthur in their individual capacity, and accordingly, they are not entitled to qualified immunity. "Qualified immunity only applies to claims against public officials in their individual capacities." *Serna v. Goodno*, 567 F.3d 944, 952 (8th Cir. 2009) (citing *Kentucky v. Graham*, 473 U.S. 159, 166-67 (1985)).

Plaintiffs have never brought individual claims against either Gordon or McArthur; instead Plaintiffs have always maintained claims against them in their official capacity. Even Defendants' caption for their Motion for Summary Judgment lists Gordon and McArthur in their official capacities. Simply stated, Defendants' qualified immunity argument is not applicable to this case.

e. Defendants are Not Entitled to Summary Judgment Pursuant to Official Immunity

Public officials are not entitled to immunity when they willfully violate a known right. *Mattson v. Becker County*, No. 07-1788, 2008 U.S. Dist. LEXIS 61510, at *30 (D. Minn. August 12, 2008) (citing *Samuelson v. City of New Ulm*, 455 F.3d 871, 878 (8th Cir. 2006)). A genuine issue of material fact exists as to whether Defendants have violated a known right in this case. Specifically, Plaintiffs' rights emanating from the attorney-client privilege.

Defendants are acutely aware -- and have admitted as much -- that Plaintiffs' have a right to private calls with their attorneys. In fact, Defendants revised the Inmate Handbook and the signs posted by the inmate telephones at the Jail specifically to clarify this right for both inmates and Jail staff.

However, despite full knowledge of Plaintiffs' right to private calls with their attorneys and investigators -- and full knowledge that Plaintiffs' attorney-client calls were being recorded -- *Defendants continued to record and listen to Plaintiffs' calls with their attorneys and investigators*. Specifically, Baumann testified that he had to listen to both attorney and investigator calls before he was able to determine that they were attorney-client calls. Yet, when he raised the issue with

McArthur, Seiling and the Becker County Attorney's Office, nothing was done.

Additionally, the only reasonable inference that can be drawn from the "test" performed by Andersen's attorneys is that Jail staff listened to the substance of Andersen's attorney-client calls.

Clearly a genuine issue of material facts exists as to whether the individual Defendants violated a known right. Moreover, since the individual Defendants are not entitled to official immunity, the County Defendant is not protected by vicarious official immunity. *Mattson*, 2008 U.S. Dist. LEXIS 61510, at *30 (citing *Mumm v. Morrison*, 708 N.W.2d 475, 493 (Minn. 2006)). Defendants' motion must be denied.

f. Bulmer Has Standing

Defendants' assertion that Bulmer lacks standing is simply wrong. Contrary to Defendants' assertions, an attorney's advice does, of course, have "independent economic value, actual or potential," Minn. Stat. § 325C.01, subd. 5(i), as does the confidential information provided by the client to help shape that advice. The very livelihood of an attorney depends on his or her ability to sell those very commodities -- his or her time and advice. If these two attorney-generated "products" have no independent economic value, then attorneys will be forced to close up their practices and take up new professions to provide for themselves and their families.

Similarly, Bulmer's work product was diminished because Jail staff and Law Enforcement personnel had access to his private, confidential information -- regardless of how much of the telephone calls Defendants listened to.

Finally, Bulmer lost valuable work and personal time and opportunities because he was required to travel to Becker County to meet with Andersen a number of times that would have been unnecessary if he had been able to discuss confidential matters with Andersen over the telephone.

IV. Plaintiffs have stated viable statutory and common law claims

a. Minnesota Statutory Claim

Pursuant to Minnesota law, Defendants are required to provide all "person[s] restrained of liberty" with "*private* telephone access" to their attorneys. Minn. Stat. § 481.10, subd. 2 (*emphasis added*). Defendants' assertion that Plaintiffs were provided "private" telephone access is laughable. First, contrary to Defendants' assertions, Special Agent Baumann testified that he did, in fact, listen to at least portions of recordings of telephone calls between Andersen and his attorneys and investigator Fladmark. The record also contains evidence that McArthur and John Seiling listened to Andersen's attorney-client telephone calls as well.

Defendants next assert that they provided Plaintiffs with "reasonable" access to private telephone calls with attorneys. Again, this too is false -- no telephone access that is recorded and subject to monitoring can "reasonably" be private. Moreover, the law requires "private telephone access" *and* "[Reasonable telephone access." Minn. Stat. § 481.10, subd. 2.

Defendants assert that Andersen had access to his attorneys via "at least three landline numbers." (Def. Br. pp.30-31). This is false as well. The landline number of the Giancola Law Firm was not placed on the List *until December 6, 2007*, and the landline number of Fladmark was not placed on the list until *December 13, 2007 -- both approximately six months after Andersen was admitted to the Jail*.

The third number Defendants refer to must be Bulmer's cellular number which was placed on the List on December 4, 2007. However, *Defendants neglect to inform the Court that McArthur ordered the cellular numbers of Andersen's attorneys -- including Bulmer's -- removed from the list on December 5, 2007, and the cellular numbers were not placed back on the List until after Judge Irvine's March 7, 2008 Order*.

Defendants' policy of recording and monitoring *all* inmate telephone calls to numbers not on the List ensured that Andersen's access to private calls to his attorneys and Fladmark was neither "private" nor "reasonable." Moreover, all Jail staff and Law Enforcement had unlimited access to listen to the recordings of inmate telephone calls.

The cases cited by Defendants miss the point. *State v. Held*, for example, addressed the right to counsel of a driver suspected of DWI. 246 N.W.2d 863, 863-64 (Minn. 1976). After being taken to police headquarters, the driver was allowed to call his attorney before being administered a breath or blood test, but was not permitted to make the call from a private room. *Id*. at 864.

The court found that the police's actions did not deprive the driver of his right to private consultation with his attorney because it was unreasonable to expect police departments to have suitable private rooms or booths available at all times. *Id*. Here, it is not at all unreasonable to expect the Jail to provide inmates with private attorney-client telephone calls. In fact, Minnesota law demands it.

b. State and Federal Wiretapping Statute

The federal and Minnesota anti-wiretapping statutes are substantially similar, and accordingly, the same analysis applies to both claims.

Citing *Lanza v. New York*, Defendants assert that official surveillance of telephone calls is common and accepted in prisons. 370 U.S. 139, 143 (1962). Defendants then take a tremendous leap in their analysis and assert that intercepting *attorney-client calls at the Jail*, therefore, falls within the "ordinary course of. . . duties" of an "investigative or law enforcement officer" and is exempted from the prohibition on wiretapping under both federal and Minnesota law.

As has been the recurring pattern, Defendants' ignore facts and caselaw that is not favorable to their position. First, Defendants fail to mention that the conversation that was recorded in *Lanza was a conversation between an inmate and his brother in a prison meeting room* -- not between an inmate and his attorney, and not even a telephone call.

Second, Defendants apparently didn't bother to finish reading the very paragraph of the *Lanza* opinion that they cite to. If they had, they would have realized that the *Lanza* Court went on to state that "even in a jail, or perhaps especially there, *the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection . . .*" 370 U.S. at 143-44 (*emphasis added*).

Contrary to Defendants assertion, it is not the "ordinary course of. . . duties" of an "investigative or law enforcement officer" to record and monitor attorney-client telephone calls.

c. Intrusion Upon Seclusion

Under Minnesota law, the tort of intrusion upon seclusion has three elements: (1) there must be an intrusion; (2) that intrusion must be "highly offensive"; and (3) the intrusion must be "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. Ct. App. 2001). The offensiveness of the intrusion and the legitimacy of the expectation of privacy are measured by the standards of a "reasonable person." *Id*. at 745.

"[Q]uestions about the reasonable person standard are ordinarily questions of fact, but they become questions of law if reasonable persons can draw only one conclusion from the evidence." *Id*. (citation omitted).

Here, it is the Plaintiffs that should be moving for summary judgment, not Defendants. The record is rife with evidence showing that Defendants' recording and monitoring of Plaintiffs' attorney-client calls was not only an intrusion, but was a highly offensive intrusion. The record also clearly shows that Plaintiffs had a legitimate expectation of privacy in their telephone calls with their attorneys.

g. Defendants' Summary Judgment Motion Must be Denied in its Entirety Because Defendants Destroyed Evidence Crucial to the Case.

As set forth above, notwithstanding a letter from Plaintiffs' counsel specifically identifying documents that would be sought in discovery, Defendants destroyed these documents. This violation of basic discovery principles can only be remedied by taking an adverse inference with respect to this evidence -- *i.e.*, that if the evidence were not destroyed, it would support Plaintiffs' claims.

Addressing this very issue, the Eight Circuit held that an adverse inference instruction was appropriate "even absent an explicit bad faith finding" where defendant had destroyed relevant documents pursuant to a routine policy because the destruction took place after the commencement of litigation. *Stevenson v. Union Pac. R.R.*, 354 F.3d 739, 749-50 (8th Cir. 2004). The Court further held that the defendant's claim of innocence was not credible because the defendant had "specific knowledge of and participation in" the litigation, and because opposing counsel had filed a request for the documents prior to their destruction. *Id*. Accordingly, Defendants "cannot rely on [their] routine document retention policy as a shield." *Id*. This adverse inference necessarily precludes summary judgment in favor of Defendants.

CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment.

DATED: July 27, 2009

Footnotes

1 To prevent an overload of paper on the Court, citations other than those to Plaintiffs' declarations and the declarations of Plaintiffs' counsel, are to the Exhibits attached to the Affidavit of Susan M. Tindal, Docket No. 45.

2 Fladmark's cellular number was never placed on the List. (Gilmore Aff Ex. 1).

3 Previously filed by Defendants as Docket No. 25.

4 Defendants state that "[t]here 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." (Def. Br. p.3; Hodgson Dep. pp.53-54, 135). Defendants fail to ever explain what "circumstances" would prevent Jail staff from following the Jail's *unwritten policy of verbally informing inmates* of the procedure for requesting a private attorney-client telephone call -- possibly the most important thing an inmate needs to know upon being booked into the Jail.

5 The Court also noted that Novak also heard this automated warning every time he spoke with Holyoke, and thus, he also knew the calls were being recorded. *Novak*, 531 F.3d at 102, FN 1.

6 Defendants only assert collateral estoppel with respect to Plaintiff Andersen.

7 "With an *Alford* plea, the defendant pleads guilty and consents to the imposition of a sentence while still proclaiming his innocence of the charged offense. The court is obliged to find 'strong evidence of actual guilt' before accepting such a plea." *Wilson v. Lawrence County*, 154 F.3d 757, 758 n. 1 (8th Cir. 1998) (citing *North Carolina v. Alford*, 400 U.S. 25, 37 (1970)).