No. 13-17361

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DONALD YORK EVANS and JOHN WITHEROW

Plaintiffs-Appellants,

v.

INMATE CALLING SOLUTIONS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Nevada

No. 3:08-cv-00353-RCJ-VPC

Hon. Robert Clive Jones

APPELLANT WITHEROW'S REPLY BRIEF

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I.

INTRODUCTION

Appellant Witherow ("Witherow") has set forth an Introduction. (*Opening Brief [#13], p. 1*). Appellees Embarq, Skolnik, Helling, Donat, Henley, Baker and Connelly do not set forth an Introduction. (Answering Briefs [#39 and #50]). Inmate Calling Solutions ("ICS") and Global Tel Link ("Global") have set forth an Introduction. (*Answering Briefs [#49-1 and #51], pp. 1-2 and 1, respectively*).

II.

STATEMENT OF JURISDICTION

Witherow has sets forth his Statement of Jurisdiction. (*Opening Brief [#13], pp. 2-3*). Embarq does not dispute that Statement and Skolnik, Helling, Donat, Henley, Baker and Connally ("NDOC[1] Appellees", collectively) concur with that Statement. (*Answering Briefs [#39 and #50], p. 1 and 3, respectively*). ICS and Global do not set forth a Statement of Jurisdiction. (*Answering Briefs [#49-1 and #51]*).

III.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Witherow has set forth a Statement of Issues Presented for Review consisting of eight (8) issues. (*Opening Brief [#13], pp. 2-4*). Embarq and Global

[1] Nevada Department of Corrections herein.

have responded to the first two (2) issues, ICS has responded to the first two (2) issues with three (3) issues[2]. (*Answering Briefs [#39, #49-1 and #51], pp. 1, 2 and 2-4, respectively*). NDOC Appellees[3] have responded to five (5) of the eight (8) arguments presented by Witherow, lettered C, D and G-H, with five (5) arguments lettered A-E. (*Answering Brief [#50], pp. 1-2*).

IV.

STANDARD OF REIVEW

Witherow has set forth a Standard of Review. (*Answering Brief [#13] p. 4*). Embarq has sets forth a Statutory Framework and a Standard of Review. (*Answering Brief [#39], pp. 1-2 and 7*). ICS indicates the Embarq Statutory Framework is applicable and provides a Standard of Review. (*Answering Brief [#49-1], pp. 4 and 15-16*). NDOC Appellees provide a Standard of Review. (*Answering Brief [#50], pp. 9-14*). Global provides a Standard of Review. (*Answering Brief [#51], p. 3*).

Appellees fail to set forth relevant provisions of 18 U.S.C. §2511 in their Answering Briefs. (*Answering Briefs [#39, #49-1, 50 and 51]*). That statute should

[2] ISC breaks one (1) issue into two (2) parts.

[3] Witherow notes that NDOC Appellees have listed seven (7) Questions Presented, numbered 1-7, but only present arguments on five (5) issues, lettered A-E. NDOC Appellees failed to address their Question #3 and appear to have combined their argument regarding Questions #6-7 into an argument lettered E. Very confusing, which may be the intent of NDOC Appellees.

be analyzed in considering the answers of Embarq, ICS and Global. The relevant provisions of 18 U.S.C. §2511 are as follows:

> (1) Except as otherwise provided in this chapter any person who –
>
> > (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
> >
> > (b) intentionally uses, endeavors to use, or procures any other person to use or endeavors to use any electronic, mechanical, or other devise to intercept any oral communication when –
> >
> > > (i) such devise is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication;
> >
> > * * * * *
>
> "* * * shall be subject to suit * * *".

V.

STATEMENT OF THE CASE

Witherow has set forth a Statement of the Case. (*Opening Brief [#13], pp. 5-14*). Embarq does not dispute Witherow's procedural history of the case insofar as it describes events in which Embarq was not involved and identifies two (2) typographical errors. (*Answering Brief [#39], p. 2*). Witherow apologizes for those errors. ICS and NDOC Appellees have set forth their own Statements of the Case. (*Answering Briefs [#49-1 and #50], pp. 4-12 and 3-9, respectively*). Global does not provide a Statement of the Case. (*Answering Brief [#51]*).

. . .

VI.

STATEMENT OF FACTS

Witherow has provided a Statement of Facts. (*Opening Brief [#13], pp. 12-24*). Company Appellees and NDOC Appellees have provided a Statement of Facts. (*Answering Briefs [#39, #49-1, #50 and 51], pp. 3-7, p. 12, pp. 14-26 and pp. 2-3, respectively*). Witherow disputes portions of the facts set forth by Embarq, Global and NDOC Appellees and will address those disputes below.

Embarq sets forth facts pertaining to Witherow's allegations concerning the contract between the Nevada Department of Corrections ("NDOC") and Embarq to provide telephone services to prisoners. (*Answering Brief [#39], p. 3, l. 17 - p. 4, l. 3*). Embarq fails to include Witherow's allegations that Embarq maintained and operated the telephone equipment used by NDOC employees in various remote locations to intercept and monitor properly placed legal calls by prisoners to their attorneys. (*Opening Brief [#13], p. 14, ll. 12-17 and Answering Brief [#39]*). Embarq also fails to address the issue of whether the contract with the NDOC prohibits or authorizes NDOC employees to use telephone equipment maintained and operated by Embarq in remote locations to intercept and monitor properly placed prisoner telecommunication with their attorneys. (*Answering Brief [#39]*).

Embarq claims that "Witherow does not allege that any of his attorney calls were intercepted, monitored, or eavesdropped on by Embarq or that Embarq had

any role in the NDOC policies and procedures. (*Answering Brief [#39], p. 4, ll. 7-11*). Witherow does allege that Appellees, who include Embarq, violated Witherow's statutory and constitutional rights when Appellees Baker and Connally intercepted and monitored his properly placed telecommunications with his attorneys on telephone equipment maintained and operated by Embarq. (*Opening Brief [#13], p. 14, l. 18 - p. 15, l. 16*). Embarq ignores the fact that Embarq maintained and operated the telephone equipment in remote locations used by NDOC employees to intercept and monitor prisoner telecommunications with their attorneys; Embarq knew the telephone equipment was to be used for the interception and monitoring of prisoner telecommunications with their attorneys; and Embarq was responsible for the use of that telephone equipment for the purpose for which the equipment was intended, i.e., the interception and monitoring of prisoner telecommunications with any person, including attorneys. (*Answering Brief (#39]*).

Embarq claims their motion for summary judgment was based on facts, supported by declarations, establishing Embarq (i) did not intercept, eavesdrop on, or record any of the calls that Witherow placed to his attorneys; (ii) did not assist or authorize any party to engage in any such interception, eavesdropping, or recording; and (iii) did not know of any alleged interception, eavesdropping, or recording of Witherow's calls to attorneys. (*Answering Brief [#39], p. 4, ll. 13-*

19). That motion was denied by the Court (*EOR Vol. I, pp. 100-101*) and Embarq fails to recognize and refuses to acknowledge the fact that Embarq was responsible for (i) maintaining and operating the telephone equipment used by NDOC employees to intercept and monitor Witherow's telecommunications with his attorneys; (ii) facilitating the interception and monitoring of Witherow's telecommunications with his attorneys by maintaining and operating the telephone equipment used for the purpose for which the equipment was intended; and, (iii) knew the telephone equipment Embarq maintained and operated would be used by NDOC employees for the purpose for which the equipment was intended. (*Opening Brief [#13], p. 14, ll. 12-17, and p. 14, l. 18, - p. 15, l. 16; and Answering Brief [#39]*).

Embarq claims the facts alleged in the Proposed Third Amended Complaint ("PTAC") (*EOR XV, pp. 3806-3852*) remain essentially unchanged from the facts alleged in the Second Amended Complaint ("SAC") (*EOR XVI, pp. 4082-4114; and Answering Brief [#39], p. 5, ll. 11-12*). A review of the facts alleged in the SAC (*Id.*, ¶¶*5-7, 16, 18-22, 25-29, 3rd -114th Causes of Action*), Motion for Leave to Amend (*EOR XV, pp. 3806-3852 p. 4, l. 13 - p. 5, l. 18*); and PTAC (*EOR XV, pp. 3806-3852, ¶¶5-7, 18-28, 33-37 and 3rd-114th Causes of Action*), clearly show additional facts establishing the liability of Embarq for the interception and monitoring of Witherow's telecommunications with his attorneys.

Global maintains that the "passive provision of goods and services does not rise to the level of willful participation in "joint action" with the state * * *". (*Answering Brief [#51], p. 3, l. 17*). The Company Appellees did far more than "merely" provide goods and services to the state. NDOC employees could not have intercepted and monitored Witherow's attorney telecommunications without the willful participation of the Company Appellees in maintaining and operating the telephone equipment and the Company Appellees had full knowledge and understanding of the purposes for which that telephone interception and monitoring equipment would be used, i.e., to intercept and monitor Witherow's telecommunications with his attorneys. This was joint action based on the fact that NDOC employees could not have intercepted and monitored Witherow's telephone calls with his attorneys without the willful cooperation of the Company Appellees.

NDOC Appellees repeatedly state Witherow challenges the interception and monitoring of 111 of his attorney telecommunications. (*Answering Brief [#50], p. 14, l. 10, and p. 15, ll. 13-15*). The figure is not correct. Witherow claims 112 of his attorney telecommunications were intercepted. (*EOR XVI, pp. 4082-4114, p. 15 - p. 28, 3rd-114th Causes of Action*). Simple mathematics establishes that there are 112 causes of action – not 111.

NDOC Appellees claim Witherow claims only 5 specific instances wherein privileged information was heard. (*Answering Brief [#50], p. 14, ll. 14-16 and p.*

15, ll. 13-15). That is misdirected. All 112 of Witherow's attorney telecommunications were confidential, as all of the telephone calls were to an attorney's office and the content of the conversation is not relevant to the issue of whether the conversation was regarding a legal matter or whether there was an attorney-client relationship. *See*, NRS 209.419(4)(d) (See also, *EOR III, pp. 367*).

NDOC Appellees admit that all of Witherow's telecommunications with his attorneys were intercepted and monitored and claim that once Evans or his office identified themselves the monitoring would cease. (*Answering Brief [#50], p. 18, ll. 4-7*). Again, this is misdirected. Witherow's telecommunications with his attorneys or their offices were confidential and could not be intercepted or monitored by statute and NDOC regulations.

NDOC Appellees set forth a litany of facts justifying their interception and monitoring of Witherow's attorney telecommunications. (*Answering Brief [#50], pp. 14-24*). These Appellees ignore and fail to reference the fact that, by Nevada statute and NDOC regulations, all of Witherow's telecommunications with his attorney or their offices are "confidential"; the NDOC, even when mandated by statute, failed to provide prisoners with an alternate method of communication for confidential communications; and NDOC regulations "prohibit" the interception and monitoring of prisoner telecommunications to attorney offices. *See*, NRS 209.419(3) and (4)(d), Administrative Regulation ("AR") 718 and AR 722.

NDOC Appellees also set forth a section titled Allegations of Wrongdoing. (*Answering Brief [#50], pp. 24-26*). This is yet another attempt by NDOC Appellees to misdirect attention from the facts for the following reasons:

1. There is no "statute or regulation" authorizing the "initial" interception and monitoring of prisoner attorney telecommunications. This was a "legal fiction" argued by NDOC Appellees in summary judgment proceedings, adopted by the Magistrate and adopted by the District Court. Witherow is not required to demonstrate a practical alternative to an illegal activity.
2. "Extended" monitoring of Witherow's attorney telecommunications is a legal fiction, existing nowhere in law, created by NDOC Appellees in summary judgment proceedings, adopted by the Magistrate and adopted by the District Court.
3. Witherow's expectation of privacy in telecommunications with his attorneys is created by the 4th Amendment of the U.S. Constitution, common law, Nevada statutes and NDOC regulations, his liberty interests are created by those laws. He was not required to prove a genuine attorney-client privilege because statutes mandated that calls to his attorney's office number were confidential. He was not required to prove the "legal nature" of his telecommunications with his

attorneys, only that the telecommunications were to an attorney's office, which rendered the telecommunications confidential. However, during the relevant time period, he did prove an attorney-client relationship with Attorneys Evans, Picker and Hager.

4. Witherow has proven he exhausted the grievance process and no appeal was taken therefrom. That is not an issue in this appeal. The issue is whether the grievance responders, Appellees Henley, Donat and Helling, are liable for the ongoing violation of Witherow's constitutional and statutory rights by their failure to intervene to stop the ongoing violation of those rights when the ongoing violations were brought to their attention in the grievance process, rendering each of them liable for each attorney telecommunication intercepted and monitored after the ongoing violations were brought to their attention in the grievance process.

5. NDOC Appellees misrepresent the sanction Imposed on Attorney Donald York Evans for his failure to cooperate in the discovery process. The sanction imposed on Evans was that he "is prohibited from introducing the subject matter of Mr. Henley's interrogatories to "**support his claims or to oppose defendants**" and the court deems established the facts that Mr. Henley sought to establish by these

interrogatories." (emphasis added). (*EOR I, pp. 70-84*). The Order does not establish the claims made by NDOC Appellees regarding matters sought to be established by defendants in the discovery process. Additionally, Evans' claims were dismissed before trial, Evans was not a plaintiff at trial and, when Witherow attempted to question Evans at trial in support of **Witherow's** claims, Evans was precluded from testifying, even though Evans was not offering evidence in support of **Evans'** claims or a defense to those claims.

6. NDOC Appellees argue reversal based on jury instructions is appropriate only if the error was not harmless or misleading or if they misstate the law or facts. NDOC Appellees fail to address the fact that the jury was not instructed on the statutes and regulations governing and controlling the duties of NDOC employees while acting in the "ordinary course of business" relating to prisoner telecommunications with attorneys and, without those instructions, the jury was unable to determine whether NDOC Appellees were acting in the ordinary course of their duties imposed by Nevada statutes and regulations.

The facts, not Appellees' assertions, tell the story.

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VII.

ARGUMENT

A. INTRODUCTION

Witherow presented Arguments on eight (8) issues lettered A-H for consideration on appeal. (*Opening Brief [#13], pp. 24-56*). Embarq, ICS and Global answered the two (2) arguments on issues lettered A and B, with Appellee ICS making three (3) arguments on the two (2) arguments. (*Answering Briefs [#39, #49-1 and #51], pp. 7-14, 16-36 and 4-11*). NDOC Appellees answered five (5) arguments lettered A-E on Witherow's issues lettered C-H. Witherow will reply on his eight (8) lettered arguments lettered A-H by him, combining the additional argument by ICS into the appropriate argument and addressing NDOC Appellees arguments lettered A-E under his lettered arguments C, D and E-H.

B. SUMMARY OF ARGUMENTS

Witherow does not provide a Summary of Arguments. (*Opening Brief [#13]*). Company Appellees and NDOC Appellees do provide a Summary of Arguments. (*Answering Briefs [#39, #49-1, #51 and #50, respectively], pp. 6-7, 13-15, 3-4 and 26-28, respectively*). Company Appellees basically argue Witherow failed to allege sufficient facts to establish Company Appellees were not acting under color of state law and allowing amendment of his SAC (*EOR XVI, pp. 4082-4114*) would have been futile. NDOC Appellees basically argue: the District Court

correctly determined that initial monitoring of Witherow's attorney telecommunications was correct and did not violate statutory or constitutional rights; the ordinary course of business exception to the Omnibus Crime Control and Safe Streets Act ("Wire Tap Act") precluded liability for any alleged violations of rights; Witherow has not stated any claim against grievance responders; Evans' proffered testimony was properly excluded; and there was no error attributable to the jury instructions. Appellees assertions are without merit and are addressed in Witherow's arguments.

C. THE DISTRICT COURT ERRED IN DISMISSING WITHEROW'S CIVIL RIGHTS CLAIMS AGAINST APPELLEES ICS, EMBARQ AND GLOBAL BASED ON A FINDING THESE APPELLEES WERE NOT ACTING UNDER COLOR OF STATE LAW.

Witherow's argument regarding this issue is set forth at pages 24-27 of his Opening Brief [*#30*]. Company Appellees' arguments are set forth at pages 7-10, 16-28 and 4-8, respectively, of their Answering Briefs [*#39, #49-1 and #51*].

Company Appellees argue that, in determining whether a private party was acting under color of state law in a USC §1983 action, a four (4) part test must be used to determine whether the acts of a private party are considered state action; the District Court determined Witherow failed to argue which test should be

applied[4] and determined Witherow has not plead sufficient facts that could satisfy any of the tests; Witherow failed to present any facts that would satisfy the four (4) part test; Witherow mistakenly relies on three (3) cases for the general proposition that a §1983 case may lie against a private party that engages in willful participation in joint action with the state; and Witherow has not plead sufficient facts to satisfy the state action requirement to impose liability on a private actor. (*Answering Briefs [#39, #49-1 and #51], p. 10, l. 16 - p. 14, l. 11; p. 17, l. 10 - p. 24, l. 2; and p. 5, l. 4 - p. 8, l. 15*). Company Appellees are mistaken.

Under the four (4) part test relied upon by Company Appellees articulated in George v. S. Pac.-CSC Work Furlough, 91 F.3d 1227, 1230-1232 (9th Cir. 1996), Company Appellees were state actors.

First, the public function test. Company Appellees did engage in a traditionally exclusive government function. Traditionally, prisoners were not permitted to make telephone calls. It is only within the past forty (40) years that prisoners have been permitted to make telephone calls to people in the community by and through the authorization of governmental prison officials and on telephone equipment installed, maintained and operated by private telephone companies pursuant to specific contracts with prison officials. The private telephone company acting under contract with the government officials is the only telephone company

[4] Witherow did not argue this four (4) part test because, as a *pro se* litigant, he was unaware of this test or of any decision articulating these tests.

permitted to maintain and operate the telephone equipment used by prisoners to make those calls. Prisoners are not permitted to engage the services of a private telephone system provider. This is a joint action by state and private actors and the private actors are only acting pursuant to state law authorizing their conduct. Company Appellees, during the time period relevant to the claims each of them, were state authorized private actors.

Second, the state compulsion test. State law, NRS 209.419, requires prison officials to provide telephone services to prisoners. Since prison officials do not own, maintain and operate prisoner telephone systems, prison officials are required to contract with private telephone service providers to maintain and operate prisoner telephone services. This was state compulsion to provide telephone services to prisoners. Company Appellees, under the terms and conditions of a contract, were state actors under compulsion to provide telephone services to prisoners.

Third, the close nexus test. Company Appellees could not provide telephone services to prisoners without the consent and authorization of prison officials. Company Appellees agreed to provide telephone services to prisoners under the terms and conditions of a contract with the NDOC. That contract formed the basis for the close nexus between Company Appellees and the NDOC in providing telephone services to prisoners.

Fourth, the joint action test. Company Appellees provided telephone services to prisoners only because they were authorized by the contract with the NDOC to provide those services to prisoners. Under the terms and conditions of the contract, providing telephone services to prisoners was a joint business venture by Company Appellees and the NDOC to secure financial benefits for both by providing telephone services to prisoners. Company Appellees and the NDOC were engaged in joint action when Company Appellee and the NDOC entered into a for-profit contract, pursuant to state laws, to provide telephone services to prisoners.

Company Appellees became state actors when (i) they entered into a for profit contract with the NDOC to provide telephone services to prisoners; (ii) agreed, as parts of that contract, to maintain and keep operational the telephone equipment used by prisoners for telecommunications with people in the community; (iii) attached to the telephone lines and made an integral part of those telephone system the equipment that enabled NDOC employees to intercept and monitor all outgoing prisoner telephone calls, including telephone calls to attorneys; (iv) and, knew the interception and monitoring equipment attached to the telephone lines would be used by NDOC employees to intercept and monitor prisoner telecommunications with their attorneys. These actions by Company Appellees made Company Appellees state actors acting under color of state law, Dennis v. Sparks, 449 U.S. 24, 27-28, (1980), and Kirtley v. Rainey, 326 F.3d

1088, 1092 (9th Cir. 2003), and made Company Appellees liable for damages for the violation of Witherow's constitutional and statutory rights - even though Company Appellees did not personally intercept, monitor, or listen to Witherow's telecommunications with his attorneys. Jacobson v. Rose, 592 F.2d 515, 522 (9th Cir. 1978) (establishing liability). Company Appellees made the interception and monitoring of Witherow's telecommunications with his attorneys possible, predictable and easy to accomplish.

Any claim by Company Appellees that Company Appellees did not knowingly and willingly participate in the interception and monitoring of Witherow's telecommunications with his attorneys is belied by the facts alleged in the record. (*EOR XVI, pp. 4082-4114, ¶¶6, 16, 18-22, 25-29, and 3rd -114th Causes of Action EOR XV, pp. 3806-3852, ¶¶6, 18-28, 33-37 and 3rd-114th Causes of Action*). Company Appellees knew the interception and monitoring telephone equipment Company Appellees attached to the telephone lines used by prisoners to make telephone calls to people in the community would be used by NDOC employees to intercept and monitor all outgoing prisoner telephone calls, including telephone calls to attorneys; and, Company Appellees knew that NDOC employees would use the interception and monitoring equipment that Company Appellees maintained and operated for the purpose for which the equipment was intended. Company Appellees, had they wanted to prevent NDOC employees from

intercepting and monitoring prisoner telecommunications with attorneys, would have demanded a provision be included in their contract with the NDOC prohibiting NDOC employees from using that equipment to intercept and monitor prisoner telecommunications with their attorneys and/or designed that equipment to prevent NDOC employees from intercepting and monitoring prisoner telecommunications with their attorneys, just as was done with recording capabilities.

Witherow submits that his SAC (*EOR XVI, pp. 4082-4114*) alleged sufficient facts to state a claim against Company Appellees. He alleged Company Appellees were defendants; were acting under color of state law; were responsible for maintaining and operating the telephone system used by prisoners to make telephone calls to people in the community, including attorneys, that had the capability to intercept and eavesdrop on all prisoner telecommunications from various remote locations; the NDOC adopted, approved and implemented policies and procedures authorizing NDOC employees to use the referenced telephone system equipment to intercept and eavesdrop on all prisoner telecommunication, including telecommunications with attorneys; Company Appellees violated Witherow's constitutional and statutory rights on 112 separate occasions when Appellees Baker, Connally and Does XXI-XXX intercepted and eavesdropped on 112 of Witherow's telecommunications with his attorneys; Company Appellees

knew, or should have known, their described conduct violated Witherow's rights; and Company Appellees caused Witherow to suffer injuries and damages as a direct or proximate cause of their action. (*Id.*). Those allegations are sufficient to state a claim against Company Appellees for the violation of Witherow's constitutional and statutory rights and the District Court erred in determining that Witherow had failed to state a claim against Company Appellees for the violation of his rights while acting under color of state law.

The Court simply failed to liberally construe Witherow's pleadings or to afford him the benefit of any doubts regarding Company Appellees acting under color of state law and the knowledge and willful participation of Company Appellees in the interception and monitoring of his telecommunications with his attorneys by NDOC employees on the telephone equipment maintained and operated by Company Appellees. Haines v. Kerner, 404 U.S. 519, 520 (1972) and Bretz v. Kelman, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985) (en banc).

Based upon the foregoing, Company Appellees were acting under color of state law[5] when Company Appellees acted jointly with the NDOC in allowing NDOC employees to intercept and monitor Witherow's telecommunications with his attorneys and Witherow did set forth sufficient facts in his SAC (*EOR XVI, pp. 4082-4114*) to state a claim against Company Appellees for the violation of his

[5] In the event this Court was to determine Embarq was not acting under color of state law, Witherow's federal statutory claim against Embarq would remain viable.

constitutional and statutory rights; and the District Court erred in determining Company Appellees were not acting under color of state law and in dismissing Witherow's SAC (*Id.*) for failure to allege sufficient facts to state a claim against Company Appellees for the violation of his constitutional and statutory rights.

D. THE DISTRICT COURT ERRED IN REFUSING WITHEROW LEAVE TO AMEND HIS SECOND AMENDED COMPLAINT TO ALLEGE SUFFICIENT FACTS TO STATE A CLAIM AGAINST APPELLEES ICS, EMBARQ AND GLOBAL FOR VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS INVOLVED IN THE INTERCEPTION AND MONITORING OF HIS PRIVILEGED TELECOMMUNICATIONS WITH HIS ATTORNEYS.

Witherow's argument regarding this issue is set forth at pages 28-30 of his Opening Brief [*#13*]. Company Appellees' arguments on this issue are set forth at pages 10-14, 24-36 and 8-11, respectively, of their Answering Briefs *[#39, #49-1 and #51*].

Company Appellees argue that Witherow is mistaken regarding the law since the passage of the Prison Litigation Reform Act ("PLRA") and the District Court did not abuse its discretion when it denied Witherow leave to amend his claims a third time. (*Answering Briefs [#39, #49-1 and #51], p. 10, l. 16 - p. 14, l. 11; p. 24, l. 3 - p. 36, l. 6; and p. 8, l. 16 - p. 12, l. 2*). Company Appellees are mistaken.

Company Appellees are mistaken regarding the laws concerning amendment of pleading since the enactment of the PLRA; and Embarq's reliance on the decision in Lopez v. Smith, 203 F.3d 1122 (9th Cir. 2000) (en banc), for the

contention the district court may not grant leave to amend a complaint that fails to state a claim. (*Answering Brief, p. 10, l. 19 - p. 11, l. 8*). This Court in Smith decided that it is not clear whether §1915(e) precludes a district court from dismissing a complaint that fails to state a claim with leave to amend; dismissal with leave to amend has been the standard in cases stretching back nearly 50 years; and a clear expression of congressional intent was required before 50 years of case law would be discarded. Smith, 203 F.3d at 1127. The laws regarding leave to amend under FRCP Rule 12(b)(6) and Rule 15 have remained the same since passage of the PLRA.

Embarq, presumably because of its mistaken reading of the Smith decision, fails to address the facts concerning the laws relevant to leave to amend for a *pro se* litigant. (*Answering Brief, p. 10, l. 16 - p. 14, l. 11*). Witherow was a *pro se* litigant when he prepared and filed his SAC (*EOR XVI, pp. 4082-4114*) and Motion for Leave to Amend, with attached PTAC (*EOR XV, pp. 3806-3852; and EOR XVII, pp. 4222-4268, Clerk's Record #60-#195*). Therefore, the laws governing the interpretation of pleadings and motions for leave to amend for *pro* se litigants must be analyzed in determining whether Witherow stated a claim in his SAC (*EOR XVI, pp. 4082-4114*) and whether his Motion for Leave to Amend (*EOR XV, pp. 3806-3852*) was improperly denied. Smith, 203 F.3d at 1127. Those laws are reflected in the decisions in Bretz v. Kelman, 773 F.2d 1026 (9th Cir.

1985) (en banc), Noll v. Carlson, 809 F.2d 1446 (9th Cir. 1987), Eldridge v. Block, 832 F.2d 1132 (9th Cir. 1987), Karim-Panahi v. LAPD, 839 F.2d 621 (9th Cir. 1988), and Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984), and cited by Witherow at pages 29-30 of his Opening Brief. Under those laws, Witherow was entitled to a liberal construction of his pleadings, he was required to be afforded the benefit of any doubts, he must be provided leave to amend his complaint unless it is absolutely clear the deficiencies in the complaint could not be cured by amendment and the District Court must provide him with a statement of the complaint's deficiencies in conjunction with the dismissal for failure to state a claim. Bretz, 773 F.2d at 1027 n. 1, Noll, 1446 at 1448-1449, Eldridge, 832 F.2d at 1135-1136, Karim-Panahi, 839 F.2d at 623-624, and Franklin, 745 F.2d at 1228 n. 9. These decisions are relevant to Witherow's claims based on the fact he was a *pro se* litigant and an analysis of Witherow's issues on appeal under those decisions will establish the errors of the District Court mandating reversal.

Embarq argues that: (i) neither justice nor the merits required the district court to grant Witherow a fourth attempt at stating a claim; (ii) four of the five factors used to assess a motion for leave to amend[6] weigh heavily against Witherow; (iii) granting Witherow leave to file a third amended complaint would

[6] Embarq identifies five (5) factors to be considered in determining whether leave to amend complaint is appropriate. (*Answering Brief, p. 11 footnote 5*). Embarq only addresses three (3) of those factors, i.e. prejudice, futility and whether plaintiff had previously amended his complaint.(*Id., p. 11, l. 12 - p. 14, l. 11*).

be futile; (iv) the facts in the PTAC (*EOR XV, pp. 3806-3852*) remain essentially unchanged; (v) no facts were alleged that supported a conclusion Embarq was a state actor; (vi) and no facts were alleged that Embarq "intentionally engaged in the interception of Witherow's attorney calls. (*Answering Brief, p. 11, l. 9 - p. 13, l. 5; and Answering Briefs [#49-1 and #51], p. 24, l. 3 - p. 36, l. 6, and p. 8, l. 16 - p. 12, l. 2, respectively*). Appellees ICS and Global assert essentially the same claims as Embarq and Appellant's argument regarding this issue are applicable to their arguments. Company Appellees' arguments regarding this matter are without merit.

Justice and fairness demanded that Witherow be granted leave to file a third amended complaint. Embarq fails to identify the four factors allegedly weighing heavily against Witherow. (*Answering Brief, p. 11, l. 9 - p. 13, l. 5; and Answering Briefs [#49-1 and #51], p. 24, l. 3 - p. 36, l. 6; and p. 8, l. 16 - p. 12, l. 2, respectively*). The factors relevant to Witherow's request for leave to amend were addressed by him. (*EOR XV, pp. 3806-3852*). The District Court failed to address those factors or to make a decision that Witherow had not met the requirements of those factors. (*EOR I, pp. 97*). This was reversible error.

The filing of a third amended complaint would not have been futile. As was shown in the preceding issue argument, Witherow did allege sufficient facts in his SAC (*EOR XVI, pp. 4082-4114*) that, given a liberal construction and giving

Witherow the benefit of any doubts, were sufficient to state a claim against Company Appellees for the violation of his constitutional and statutory rights while acting under color of state law. However, because the Court did not afford Witherow a liberal construction or the benefit of any doubts, he prepared a PTAC (*EOR XV, pp. 3806-3852*) for consideration.

That PTAC (*Id.*) contained all of the facts relevant to Company Appellees contained in his SAC (*EOR XVI, pp. 4082-4114*) and added factual allegations that: (i) NDOC prisoners were prevented by law from possessing telecommunication devices and from contracting for telecommunication devices without the consent of the NDOC Director; (ii) Company Appellees were unable to provide NDOC prisoners with telecommunication services without the consent and approval of the State of Nevada and the NDOC and without compliance with the laws, regulations, policies and contractual terms and conditions; (iii) Company Appellees entered into a business agreement with the State of Nevada and the NDOC, with the majority of the profits from the business agreement being paid to the NDOC for providing telephone calling services to NDOC prisoners; (iv) Company Appellees, pursuant to contract, were required to maintain and operate as part of their telephone calling services telephone equipment intended to enable and allow NDOC employees from various remote locations to intercept and eavesdrop upon all prisoner telephone calls made using their telephone calling system; (v)

Company Appellees were under contract during the relevant time periods from 05/07/2008 through 08/01/2008 with the State of Nevada and the NDOC to provide telephone calling services to NDOC prisoners; (vi) the NDOC adopted, approved and implemented policies, procedures and regulations governing and controlling the use of the prisoner telephone system maintained and operated by Company Appellees providing that all telephone calls made by NDOC prisoners using the telephone system maintained and operated by Company Appellees would be intercepted and eavesdropped upon by NDOC employees using telephone equipment maintained and operated by Company Appellees for that purpose and requiring NDOC prisoners to use the telephone system/equipment maintained and operated by Company Appellees to make confidential attorney/client telephone calls; (vii) Company Appellees knew the telephone equipment maintained and operated by them for the purpose of intercepting and eavesdropping on all prisoners would be used for the purpose for which the equipment was intended; (viii) Company Appellees knew, or should have known, of the published policies, procedures and regulations of the NDOC governing and controlling NDOC prisoners' use of the telephone calling services provided by them on the telephone equipment maintained and operated by them; and (ix) Company Appellees knew, or should have known, that the telephone equipment maintained and operated by them for the purpose of enabling and allowing NDOC employees to intercept and

eavesdrop on all NDOC prisoner telephone calls made using that equipment would be used by NDOC employees to intercept and eavesdrop on NDOC prisoners' confidential attorney/client telephone calls made using that equipment. (*EOR XV, pp. 3806-3852, ¶¶18-28*). Additional relevant facts are contained in PTAC (*Id., ¶¶6, 16, 31, 33-37 and 40; and 3rd-112th Causes of Action*). Witherow submits that the facts alleged in the PTAC are more than sufficient for a *pro se* litigant to state a claim against a private telephone company for the violation of his constitutional and statutory rights while acting under color of state law. Bretz, 773 F.2d at 1027 n. 1, Noll, 1446 at 1448-1449, Eldridge, 832 F.2d at 1135-1136, Karim-Panahi, 839 F.2d at 623-624, George, 91 F.3d at 1230-1232, and Jacobson, 592 F.2d at 522. Company Appellees' arguments regarding this matter are simply without merit.

The District Court dismissed Witherow's claims against Company Appellees for failure to state a claim without providing Witherow with an opportunity to amend his complaint in an attempt to correct the alleged deficiencies in his SAC (*EOR XVI, pp. 4082-4114; and EOR I, pp. 100-101*). The Court clarified that its Order (*EOR I, pp. 100-101*) did not provide Witherow with leave to amend. (*EOR I, pp. 98-99*). The Court then denied Witherow's Motion for Leave to Amend (*EOR XV, pp. 3806-3852*) as moot. (*EOR I, pp. 97*). Finally, the Court denied Witherow's Motion for Reconsideration of Motion for Leave to Amend (*EOR XV,*

pp. 3778-3781) without addressing the merits of the Motion. Order (*EOR I, pp. 94-96*). Under the provisions of FRCP Rule 15 and decisions in Noll, 1446 at 1448-1449, Eldridge, 832 F.2d at 1135-1136, Karim-Panahi, 839 F.2d at 623-624, and Franklin, 745 F.2d at 1228 n. 9, the Court abused its discretion by failing to provide Witherow, a *pro se* litigant, with an opportunity to file an amended complaint correcting the alleged deficiencies in his operative complaint and by denying Witherow leave to file an amended complaint.

Based upon the foregoing, the decisions of the District Court should be **reversed** and the case **remanded** to allow Witherow to file an amended complaint and to pursue his claims.

E. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES ON WITHEROW'S FOURTH AND FOURTEENTH AMENDMENT CLAIMS BASED ON A FINDING WITHEROW DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN HIS PRIVILEGED TELECOMMUNICATIONS WITH HIS ATTORNEYS AND HE CONSENTED TO THE MONITORING ON OCCASIONS.

Witherow's argument regarding this issue is set forth at pages 30-34 of his Opening Brief [*#13*]. NDOC Appellees' argument on this issue, lettered A, is set forth at pages 28-42 of their Answering Brief [*#50*].

NDOC Appellees contend that interception and monitoring Witherow's telecommunications with his attorneys under the 4th and 14th Amendments was permissible because prisoners abused the use of the telephone system, monitoring is required to determine whether a prisoner telephone call is personal or legal, the attorney–client privilege is not a constitutional right, Witherow's 4th and 14th Amendment rights were not violated because Witherow has no expectation of privacy in his telecommunications with his attorneys, Witherow has no expectation of privacy in his 106 personal telecommunications with his attorneys, Witherow failed to prove that actual attorney-client conversations occurred and Witherow filed to prove that extended monitoring of his attorney telecommunications occurred, and Witherow overlooked the fact that no liberty or property interest is at stake in the interception and monitoring of his telecommunications with his attorneys. (*Answering Brief [#50], p. 28, l.4 - p. 31, l. 10*). NDOC Appellees ignore the facts and misdirect the attention from the relevant matters.

First, prisoner abuse of the segregation telephone system is not relevant to Witherow's claim. NRS 209.419(3) requires that the NDOC Director "shall adopt regulations providing for an alternate method of communications for those communications by offender which are confidential". Witherow's telecommunications with his attorney are "confidential". NRS 209.419(4)(d). The

Director failed to adopt regulations for an alternative method of communications for confidential offender communications. NDOC Appellees ignore this fact.

Instead, the NDOC Director adopted AR 722.07 (09/06/2003) and 722.11 (02/08/2008), which established alternate procedures for confidential offender communications with their attorneys that eliminated the problem with segregation prisoner abuse of the telephone system and AR 718.01(1.3) (05/08/2008), which prohibited the monitoring of prisoner telecommunications with their attorneys. Rather than comply with that statute and those regulations NDOP employees required prisoners to use the institution telephones for telecommunications with their attorneys and intercepted and monitored those telecommunications. These facts negate NDOC Appellees arguments regarding these matters.

Second, under the system devised by the Nevada Board of Prison Commissioners when adopting the foregoing regulations, an NDOC employee would determine a prisoner telecommunications was to a law office before handing the telephone to a prisoner. This complied with the mandates of the statute and eliminated the need for an NDOC employee to intercept and listen to a prisoner telecommunication to an attorney to determine whether the telecommunication was to a legal number[7].

[7] No attorney-client privilege is needed for a "confidential" communication with an attorney. All that is required is that the telecommunication is to the telephone number of an attorney. NRS 209.419(4)(d).

Third, Witherow has made no claim that the attorney-client privilege is a constitutional right. His claim is that, under the 14th Amendment of the U.S. Constitution, he has a right to privacy, Whalen v. Roe, 429 U.S. 589, 599 (1977), and, under NRS 49.055 and NRS 209.419(4)(d), he has a state created right to confidential (private) telecommunications with his attorney, and his state created right to confidential telecommunications with his attorney, under Wolff v. McDonnell, 418 U.S. 539, 556-557 (1974), is protected by the Due Process Clause of the 14th Amendment to the U.S. Constitution. This means that, when NDOC Appellees intercepted and monitored his confidential telecommunications to his attorneys, NDOC Appellees violated, not only his 4th Amendment right to be free from unreasonable search and seizures, but also his due process rights under the 14th Amendment to confidential telecommunications with his attorneys. NDOC Appellees totally ignore and fail to address this issue.

Fourth, NDOC Appellees claim that Witherow made 106 personal telephone calls to his attorneys is totally refuted by the record. Each of those 106 telephone calls, plus the other 6 telephone calls Witherow made to his attorneys, were "confidential" telecommunications to an attorneys' number. (*EOR IV, pp. 662-663 and 739-740; EOR III, pp. 374 and 506; EOR II, pp. 124-125*). NDOC Appellees make claims without supporting facts.

Fifth, Witherow was not required to prove his telecommunications with his attorneys were legal calls involving the attorney-client privilege or that the calls were intercepted and monitored for an "extended" period of time. All that was required by statute to classify a telecommunication as "legal" was the fact that the telecommunication was to an attorney, regardless of what was discussed or how long the interception and monitoring lasted. *See*, NRS 209.419(4)(d).

Sixth, Witherow's state created rights to confidential telecommunications with his attorneys is a "liberty" interest that is protected from infringement by the Due Process Clause of the 14th Amendment to the U.S. Constitution.

NDOC Appellees then conduct an analysis of five (5) specific telecommunications with attorneys wherein Witherow believes confidential information was disclosed to third parties and adamantly denies those telecommunications were overheard or the information disclosed. (*Answering Brief [#50], p. 31, l. 12 - p. 36, l. 16*). The question of whether any of Appellees overheard or disclosed information regarding those telecommunications is simply not relevant to Witherow's actual claims that his telecommunications were intercepted and monitored. NDOC Appellees have already admitted, at trial and in their pleadings, that all of Witherow's telecommunications with his attorneys were intercepted and monitored. The relevant question is whether NDOC Appellees

interception and monitoring of those calls was a violation of Witherow's statutory and constitutional rights.

NDOC Appellees' claim that the interception and monitoring of Witherow's telecommunications with his attorneys did not violate Witherow's statutory or constitutional rights because Witherow had no expectation of privacy in those telecommunications and, even if he had an expectation of privacy, he consented to the monitoring. (*Answering Brief [#50], p. 36, l. 17 - p. 42, l. 15*). As was shown above, Witherow did have a state created right to confidential telecommunications with his attorneys under NRS 49.055, NRS 209.419(4)(d). NDOC Appellees ignore those facts and conduct an analysis of Witherow's claims under the analysis of personal telephone calls by this Court in United States v. Van Poyck, 77 F.3d 285 (9th Cir. 1996). NDOC Appellees, as they have done in the past, ignore footnote 9, at page 291, that the analysis provided in that case regarding personal telephone calls does not apply to properly placed telecommunications with an attorney.

The bottom line is that Witherow does have a reasonable expectation of privacy in his telecommunications from prison to his attorneys, he never "consented" to the interception and monitoring of his telecommunications with his attorneys and the interception and monitoring of those telecommunications by NDOC Appellees did violate his 4th and 14th Amendment and 18 USC §2511

rights. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), In re State Police Litigation, 888 F. Supp. 1235, 1255-1256 and 1258 (D.Conn. 1995), affirmed 88 F.3d 111 (2nd Cir. 1996), Lonnegan v. Hasty, 436 F, Supp. 2d 429, 426-440 (E.D.N.Y. 2006), and Browning v. MCI WORLDCOM, pp. 4214, ln. 25 – pp. 4220, ln. 25; NRS 49.055 and NRS 209.419(4)(d). NDOC Appellees failed to argue the relevant facts.

F. THE DISTRICT COURT ERRED IN DETERMINING APPELLEES WERE ACTING PURSUANT TO AN "ORDINARY COURSE OF BUSINESS" EXEMPTION TO THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT ("WIRE TAP ACT") WHEN INITIALLY INTERCEPTING AND MONITORING WITHEROW'S TELECOMMUNICATIONS WITH HIS ATTORNEYS AND THE RE-MONITORING OF ATTORNEY-CLIENT TELEPHONE CONVERSATIONS TO DETERMINE THE NATURE OF THE COMMUNICATIONS.

Witherow's argument regarding this issue is set forth at pages 34-41 of his Opening Brief [*#13*]. NDOC Appellees' argument on this issue, lettered B, is set forth at pages 42-45 of their Answering Brief [*#50*].

NDOC Appellees, again relying on the Van Poyck analysis of prisoner personal telecommunications, claim that intercepting and monitoring of all prisoner telecommunications was a function of an NSP officer working in the control room of Unit 13, and that Witherow "consented" to the interception and monitoring of his telecommunications with his attorneys by using the telephone system knowing his telecommunications would be intercepted and monitored. (*Answering Brief [#50], p. 42, l 16 - p. 45, l. 2*). NDOC Appellees ignore the fact

that: the analysis of prisoner personal telecommunication provided in Van Poyck is not to be used for conducting an analysis of properly placed prisoner telecommunications with attorneys; state statutes governing and controlling the ordinary course of business for NDOC employees with regard to prisoner telecommunications with attorneys mandate that those telecommunications are confidential and may not be intercepted and monitored by NDOC employees; and Witherow cannot "consent" to allow NDOC employees to engage in illegal conduct prohibited by statutes and regulations. The facts are that the interception and monitoring of prisoner telecommunications with their attorneys is prohibited by statute and regulations, NDOC employees intercepting and monitoring prisoner telecommunications with their attorneys is not a duty performed in the "ordinary course of business" and the interception and monitoring of prisoner telecommunications with their attorneys is an illegal activity.

G. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES ON WITHEROW'S FOURTEENTH AMENDMENT CLAIMS BASED ON AN INADEQUATE ANALYSIS OF THOSE CLAIMS.

Witherow's argument regarding this issue is set forth at pages 41-43 of his Opening Brief [#13]. NDOC Appellees do not address this argument in their Answering Brief [#50]. It appears NDOC Appellees ignore the fact that Witherow has a right to privacy embodied in the 14th Amendment of the United State Constitution, a "state created right", protected by the Due Process Clause of the

14th Amendment of the United States Constitution, to "confidential" communications with an attorney and/or an attorney's office. Whalen v. Roe, 429 U.S. 589, 599 (1977) (right to privacy), Wolff v. McDonnell, 418 U.S. 539, 556-557 (1974)(state created rights protected by due process), NRS 49.055 (right to confidential communications with attorney), and NRS 209.419(4)(d) (right to confidential telecommunications with attorney or attorney office). By ignoring this argument, NDOC Appellees admit to the validity of this argument and negate their previous arguments that Witherow does not have an expectation of privacy in his communications with his attorneys and their offices.

H. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES HENLEY, DONAT AND HELLING FOR THEIR CONDUCT IN THE GRIEVANCE PROCESS.

Witherow's argument regarding this issue is set forth at pages 43-45 of his Opening Brief [*#13*]. NDOC Appellees' argument on this issue, lettered C, is set forth at pages 45-47 of their Answering Brief [*#50*].

NDOC Appellees claim that Witherow filed to exhaust his claims in the grievance process, he makes sweeping allegations regarding the investigation of his claims in the grievance process and he has no rights in the grievance process. (*Answering Brief [#50], p. 45, l. 3 - p. 47, l. 10*). NDOC Appellees ignore the fact that the District Court previously determined Witherow had exhausted his claims in the grievance process and Appellees have not appealed that decision. (*EOR I,*

pp. 45-47 and pp. 33; and EOR XVII, pp. 4222-4268). NDOC Appellees also fail to address the fact that, in denying Witherow relief in the grievance, Appellees Henley, Donat and Helling implicitly conducted an investigation of Witherow's claims and made a determination that he was not entitled to any relief for the ongoing violation of his statutory and constitutional rights alleged in the grievance process. NDOC Appellees do not address the fact that Witherow's claims against Appellees Henley, Donat and Helling are for their "personal participation" in the ongoing violation of Witherow's statutory and constitutional rights established by their personal knowledge of the ongoing nature of the violation of those rights by NDOC employees and their failure to intervene to stop those ongoing violations. Witherow's claims against Appellees Henley, Donat and Helling are for their violation of Witherow's statutory and constitutional rights and not for the violation of any "rights" in the grievance process.

The Magistrate, District Judge and NDOC Appellees' counsel appear to focus on Witherow's claims in the 116th Cause of Action of the SAC (*EOR XVI, pp. 4082-4114*) rather that Witherow's claims against Appellees Henley, Donat and Helling contained in the 3rd through 114th Causes of Action in the SAC (*Id.*). Appellees Henley, Donat and Helling had a duty to intervene and stop the ongoing violation of Witherow's statutory and constitutional rights when those ongoing violations were brought to their attention in the grievance process and each of them

should have been on trial with Appellees Baker and Connally at trial. Summary judgment on all of Witherow's claims against Appellees Henley, Donat and Helling should not have been granted.

I. THE DISTRICT COURT ERRED IN IMPOSING EVANS' SANCTIONS FOR FAILURE TO COOPERATE IN THE DISCOVERY PROCESS ON WITHEROW.

Witherow's argument regarding this issue is set forth at pages 46-49 of his Opening Brief [*#13*]. NDOC Appellees' argument on this issue, lettered D, is set forth at pages 47-50 of their Answering Brief [*#50*].

NDOC Appellees claim that the District Court properly excluded the testimony of Attorney Don Evans based on a claim that Attorney Evans was invoking the attorney-client privilege, Witherow was permitted to have a member of Evans' staff testify at trial and Witherow suffered no prejudice by the refusal of the Court to allow Evans to testify regarding his confidential communication with Witherow at trial. (*Answering Brief [#50], p. 47, l. 11 - p. 50, l. 16*). As Witherow indicates in his Opening Brief [*#13*], supported by the record, the sanction imposed on Evans was imposed on Evans and not on Witherow. Evans and Appellees Skolnik and Henley were no longer parties in the trial proceedings. Witherow, in his deposition, did not invoke the attorney-client privilege regarding his communications with Evans; therefore, there was no attorney-client privilege to invoke. Witherow was prejudiced by the loss of the testimony of Evans regarding the nature of Witherow's confidential communications with Evans, the interception

of monitoring of those telecommunications and the evidence available from a tape recording made by Evans of several of those telecommunications.

J. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY REGARDING STATE LAW AND REGULATIONS GOVERNING THE "DUTIES" OF NDOC EMPLOYEES REGARDING THE INTERCEPTION AND MONITORING OF PRISONER TELECOMMUNICATIONS WITH THEIR ATTORNEYS AND IN INSTRUCTING THE JURY THAT INTERCEPTING, MONITORING AND RE-MONITORING PRISONER TELECOMMUNICATIONS WITH THEIR ATTORNEYS WAS PERMISSIBLE IN THE ORDINARY COURSE OF APPELLEES' DUTIES.

Witherow's argument regarding this issue is set forth at pages 49-56 of his Opening Brief [*#13*]. NDOC Appellees' argument on this issue, lettered E, is set forth at pages 50-55 of their Answering Brief [*#50*].

NDOC Appellees contend that the instructions given to the jury were an accurate statement of the law and "incorporated the intent of Nevada's statutes regarding confidentiality and merged this statutory intent with the need to allow for prison officials to stop unauthorized and improper attempts to circumvent very necessary restrictions on the use of phones". (*Answering Brief [#50], p. 50, l. 17 - p. 55, l. 16*). NDOC Appellees' argument is totally devoid of merit. What NDOC Appellees are saying is that, regardless of state statutes and state law, NDOC employees may intercept and monitor prisoner telecommunications with their attorneys until those employees make an uninformed determination that the telecommunication is of a "legal nature" – rather than comply with state laws and regulations, particularly AR 722.07 (09/06/2003) and AR 722.11 (02/02/2008), and

that state laws and state regulation governing and controlling telecommunications between a prisoner and his attorney are simply not relevant for a jury to consider in determining whether NDOC Appellees were "acting in accordance with their duties and responsibilities". If NDOC Appellees are right in their contention, the citizens of Nevada do not need state laws or regulations, as state employees may make up their own laws and regulations as those employees deem appropriate.

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VIII.

CONCLUSION

Based upon all of the foregoing, this Court should reverse the District Court's Orders dismissing all of Witherow's claims against Appellees, denying Witherow's Motion for Leave to File Third Amended Complaint, granting Defendants' summary judgment on Appellant's Fourth and Fourteenth Amendment claims; refusing to permit Evans to testify regarding Witherow's claims; and the verdict of the jury.

DATED this 10th day of July, 2014.

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IX.

CERTIFICATE OF COMPLIANCE

This brief is accompanied by a Motion for Leave to File an Oversize Brief Pursuant to Circuit Rule 32-2 and is 8,775 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), if applicable.

DATED this 10th day of July, 2014.

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X.

STATEMENT OF RELATED CASES

Appellant certifies that the case Evans v. Skolnik, No. 13-17360 is a related action.[8]

DATED this 10th day of July, 2014.

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[8] Appellant, attorney Donald York Evans ("Evans") had a separate appeal pending, Appeal No. 13-17360, which has since been dismissed. Evans was not a party at the time of trial.

XI.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of July, 2014, I electronically filed the foregoing **APPELLANT WITHEROW'S REPLY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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