



violations of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III); for violations of Minnesota Statutes §§ 481.10 and 626A; and for violations of Plaintiffs' rights under both federal and Minnesota common law.

2. Plaintiffs seek injunction of, and redress for, defendants' unlawful and unconstitutional policy, custom and/or practice of recording privileged and confidential telephone calls between attorneys and/or the attorneys' agents – including investigative agents – and their clients who have been and/or are detained and/or incarcerated in the Becker County Jail (“Jail”). Plaintiffs also seek injunction of, and redress for, defendants' unlawful and unconstitutional policy, custom and/or practice of affirmatively informing attorneys/attorneys' agents and detainees/inmates that attorney/client telephone calls are not recorded via the Jail's Inmate Handbook and via signs posted at the facility, when all such calls are recorded unless the attorney's telephone number is placed on the Jail's “Do Not Record” list. Finally, Plaintiffs seek injunction of, and redress for, defendants' failure to inform attorneys/attorneys' agents and detainees/inmates of either the Jail's internal procedure by which attorneys' landline telephone numbers may be placed on the “Do Not Record” list in order to arrange for privileged and confidential attorney/client telephone calls, or of the fact that it refuses to place the cellular phone numbers of attorneys or any phone numbers of attorneys' agents on the “Do Not Record” list.

## II. PARTIES

3. Plaintiff Kenneth E. Andersen (“Andersen”) is an inmate currently incarcerated in the Minnesota Correctional Facility located in Rush City, Minnesota. Andersen was a detainee/inmate at the Becker County Jail from June 2007 to June 2008.

4. Plaintiff William K. Bulmer, II (“Bulmer”) is an individual residing in St. Louis Park, Minnesota. Bulmer is an attorney currently licensed to practice in, and in good standing with, the State of Minnesota. Bulmer practices in the area of criminal defense and represented clients, including Andersen, who were detained/incarcerated in the Becker County Jail from June 2007 to January 2008. During Andersen’s incarceration at the Becker County Jail, Bulmer contacted Andersen via telephone to discuss privileged and confidential aspects of his/her case on a number of occasions.

5. Defendant Becker County is, and was at all relevant times herein, a political entity charged with the control and supervision of all personnel of the Becker County Sheriff’s Department and the Becker County Jail.

6. Defendant Tim Gordon (“Gordon”) is, and was at all relevant times herein, the duly appointed and acting sheriff of Becker County. As such, Gordon is, and was, a duly appointed agent of Becker County and was authorized to enforce the law, and was acting under the color of law at all times material to the allegations set forth in this Complaint. All causes of action brought against Gordon are brought in his official capacity as the sheriff of Becker County.

7. Defendant Joseph H. McArthur (“McArthur”) is, and was at all relevant times herein, a duly appointed and acting law enforcement officer in the Becker County Sheriff’s Department. As such, McArthur is, and was, a duly appointed agent of Becker County and was authorized to enforce the law, and was acting under the color of law at all times material to the allegations set forth in this Complaint. All causes of action brought against McArthur are brought in his official capacity as an officer of the Becker County Sheriff’s Department.

### **III. JURISDICTION**

8. This Court has original jurisdiction under 28 U.S.C. § 1331 to hear the claims arising under 42 U.S.C. § 1983 and 18 U.S.C. § 2510, *et seq.*

9. Because this Court has original jurisdiction over several of the claims and the claims arising under state law are so related to the federal claims as to form part of the same case or controversy, this Court has supplemental jurisdiction over those state law claims pursuant to 28 U.S.C. § 1367.

10. Venue in the District of Minnesota is proper because defendant Becker County is located in this District, the individually named defendants reside in and are employed in this District, and the unconstitutional and unlawful activities alleged herein occurred in this District.

### **IV. FACTUAL ALLEGATIONS**

#### **A. Kenneth Andersen’s Interaction with the Becker County Jail**

11. On June 11, 2007, Andersen was arrested and detained in the Becker County Jail. Upon arriving at the Jail, Andersen was provided with an “Inmate

Handbook” for the facility. A copy of the Inmate Handbook provided to Andersen is attached hereto as Exhibit 1.

12. The Inmate Handbook sets forth the Jail’s policy of monitoring and/or recording “all non-attorney/client privileged phone calls.” Specifically, Section D under the heading “Jail Programs” is entitled “Telephones,” and subsection D(3) states “Any non-attorney/client privileged phone calls made from Becker County Jail will be monitored and/or recorded.” See Exhibit 1, p. 9 (*emphasis added*).

13. The Inmate Handbook does not provide the detainee/inmate with any information regarding how the Jail distinguishes between standard telephone calls – which are subject to monitoring and/or recording – and attorney/client privileged and confidential calls which are not to be monitored and/or recorded.

14. Nor does the Inmate Handbook set forth – or even mention – the process by which an attorney and/or detainee/inmate is able to request and arrange for a private, privileged attorney/client telephone call.

15. Neither Andersen nor his attorneys, including Bulmer, were informed that a process existed whereby an attorney and/or detainee/inmate could request a privileged and confidential attorney/client telephone call.

16. In addition, after being admitted to the Jail, Andersen observed signs posted near the telephones reiterating the Jail’s telephone policy which was set forth in the Inmate Handbook: “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.” See Exhibit 2 attached hereto (*emphasis added*).

17. Shortly after being brought to the Jail, Andersen retained attorney Rory Durkin (“Durkin”) to represent him. Durkin’s law office is located in Anoka, Minnesota – approximately 200 miles from Detroit Lakes, Minnesota where Andersen was in custody in the Becker County Jail.

18. Durkin began to investigate Andersen’s case and hired investigator Glen Fladmark (“Fladmark”) to assist with the investigation. Throughout the summer and early fall of 2007, both Durkin and Fladmark contacted Andersen at the Becker County Jail by telephone regularly to discuss key aspects of the case – including potential witnesses and exculpatory evidence – and to prepare Andersen’s defense.

19. During this time, no one informed Durkin, Fladmark or Andersen that their privileged attorney/client telephone calls were being monitored and/or recorded. Nor did anyone inform them that the Becker County Jail had an internal policy whereby a request to the Jail was required to have a telephone number placed on the “Do Not Record” list in order to ensure the confidentiality of attorney/client telephone calls.

20. 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 members of Becker County law enforcement.

21. When Durkin and Andersen discussed their suspicions, Andersen informed Durkin that he learned that it was a “running joke” among the Becker County inmates that Becker County law enforcement listened to the inmates’ attorney/client telephone calls.

22. Based on the Inmate Handbook and the signs posted by the telephones in the Becker County Jail, Andersen and Durkin believed that their attorney/client telephone calls had been confidential.

23. After hearing this startling and disturbing “joke,” Andersen and Durkin investigated the issue and discovered an even more alarming reality – the Becker County Jail had in fact been monitoring and/or recording their attorney client telephone calls and the privileged calls between Andersen and Fladmark.

24. Only at this time, after Durkin, Bulmer, Fladmark and Andersen had been communicating via telephone for over four months, did they learn of the Jail’s internal policy regarding attorney/client telephone calls.

25. The Jail’s policy is to monitor and/or record all detainee/inmate telephone calls unless a detainee/inmate or attorney specifically requests that certain telephone numbers be placed on the “Do Not Record” list. This was the first time that Durkin, Bulmer, Fladmark or Andersen had heard of the “Do Not Record” list. This policy is not set forth anywhere in the Inmate Handbook nor is it displayed anywhere in the Jail. Instead, it is an “unwritten” policy followed by the Becker County Jail personnel – but not disclosed to detainees/inmates or attorneys.

26. Until mid-2007, to have a telephone number placed on the “Do Not Record” list, a detainee/inmate or attorney had to request that a specific number be added to the list. In mid-2007, the process changed slightly due to some software upgrades by the private company managing the Becker County Jail telephone systems – Reliance Telephone Systems, Inc. (“Reliance”).

27. Under the current procedures, a detainee/inmate or attorney generally must call either Reliance or the Jail to request that specific telephone numbers be placed in the “Do Not Record” list. Once a request is made, Reliance personnel investigate whether the telephone number is an attorney number. If the Reliance personnel are satisfied that the number is a proper attorney telephone number, it is placed on the “Do Not Record” list. Reliance then places the number in a “free status” in its computer system and the telephone number is blocked from being monitored or recorded. Becker County Jail personnel make the final determination regarding whether a telephone number is placed on and/or remains on the “Do Not Record” list.

28. After learning of the “Do Not Record” list policy and procedures, a telephone call was made to the Jail to request that the office and cellular telephone numbers of Durkin, Bulmer, Fladmark and several other attorneys in Durkin’s office be placed on the “Do Not Record” list at the beginning of December 2007.

29. The Jail initially complied with the request and placed all of the telephone numbers – even the cellular telephone numbers – on the “Do Not Record” list on December 3, 2007.

30. Approximately three months later, however, Durkin and Bulmer learned that many of the telephone numbers were no longer on the “Do Not Record” list – and had not been on the list since December 5, 2007.

31. Unbeknownst to Durkin, Bulmer, Fladmark or Andersen – because the Jail had failed to inform them of this anomaly – the Jail’s internal policy prevents cellular telephone numbers from being placed on the “Do Not Record” list, even when the

cellular number is that of a detainee's/inmate's attorney. Similarly, the telephone numbers of agents of an attorney – such as an investigator hired by an attorney – are not placed on the “Do Not Record” list. Accordingly, on December 5, 2007, the cellular telephone numbers of Durkin, Bulmer and their attorney colleagues were removed from the “Do Not Record” list.<sup>1</sup>

32. Although Durkin's, Bulmer's and their attorney colleagues' cellular telephone numbers had been removed from the “Do Not Record” list, Becker County Jail personnel failed to inform Durkin, Bulmer or Andersen of this until approximately three months later. During that entire period, Durkin, Bulmer and their colleagues contacted Andersen regularly from their cellular telephones and conversed with him at length and in detail regarding his case, the upcoming Omnibus hearing and his overall defense strategy.

33. All of these cellular telephone attorney/client telephone calls were monitored and/or recorded by the Becker County Jail.

34. Durkin raised the violations of attorney/client privilege at an April 14, 2008 Omnibus hearing (“Omnibus hearing”) in Andersen's case. At the Omnibus hearing, the facts concerning the Jail's unconstitutional and unlawful policy regarding the monitoring and/or recording of attorney/client telephone calls set forth above came to light.

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<sup>1</sup> Fladmark's telephone number was not removed from the “Do Not Record” list because the Becker County Attorney had informed Becker County Jail personnel that Fladmark's telephone number could be placed on the “Do Not Record” list. This was an exception to Becker County Jail's policy. April 14, 2008 Omnibus Hearing Transcript, p. 133, lns. 17-25. Relevant portions of the Omnibus Hearing Transcript are attached hereto as Exhibit 3.

35. During the Omnibus hearing, Durkin stated that it seemed that Becker County law enforcement was always “one step ahead of us” in the investigation regarding Andersen’s case. Exhibit 3, p. 110, lns. 16-25. “We talk on the phone and we talk about witnesses that we’re going to go see. The State will have interviewed that witness like an hour beforehand.” *Id.*

36. Durkin stated that he became so concerned with the possibility that Becker County law enforcement were listening to privileged attorney/client telephone calls that he arranged a “test.” This test consisted of Fladmark calling Andersen and informing him that the next time Durkin visited Andersen, Durkin would “sneak him some drugs.” *Id.* at p. 111, lns. 9-16. Durkin informed the Court of the results of the “test” after Fladmark had made the call: “And I tell you, Your Honor, the very next day deputies started coming up to Mr. Andersen and asking him, hey, when is [the] other lawyer, Rory Durkin, coming up to you?” *Id.* at p. 111, lns. 16-20. Durkin went on to admit that he couldn’t prove that the telephone calls were monitored and/or recorded and actually used against Andersen, but concluded that the results of the “test” were “very suspicious.” *Id.*

37. Later during the Omnibus hearing, Durkin’s concerns regarding the monitoring and/or recording of his and Andersen’s attorney/client privileged telephone calls were confirmed by Becker County law enforcement officer, Joe McArthur. McArthur stated that he was in charge of the Jail’s telephone system and admitted that the Inmate Handbook does not disclose that attorney/client telephone calls are monitored and/or recorded. *Id.* at pp. 118, 134.

38. McArthur further admitted that all Becker County Jail inmate calls are automatically recorded unless the telephone numbers of the calls are on the “Do Not Record” list. *Id.* at p. 122 (*emphasis added*).

39. McArthur also admitted that neither Andersen nor any of Andersen’s attorneys were ever informed by Becker County law enforcement personnel that attorney/client calls between Andersen and his attorneys were being monitored and recorded. *Id.* at p. 134.

40. McArthur further admitted that he was the individual who made the decision to remove Durkin’s and his attorney colleagues’ cellular telephone numbers from the “Do Not Record” list on December 5, 2007 – and that this decision was based on the “policy of the jail.” *Id.* at pp. 134-36.

41. McArthur admitted that due to this decision, attorney/client telephone calls between Andersen and his attorneys’ cellular telephones had been recorded by the Becker County Jail since December 5, 2007. *Id.* at p. 136-37.

42. It was also disclosed during the Omnibus hearing that Special Agent Dan Baumann (“Baumann”) of the Bureau of Criminal Apprehension – who was a lead investigator for the State in the prosecution of Andersen – was provided with audio copies of Andersen’s telephone calls by McArthur and the Becker County Jail. Exhibit 3, p. 139-40.

43. Baumann admitted that he listened to the recordings of Andersen’s telephone calls, and at times, heard at the very least, the initial portions of telephone calls between Andersen and his attorneys. *Id.* at p. 140. Baumann further admitted that he

downloaded copies of the telephone calls to the hard drive on his laptop computer, reviewed the calls, and then copied the non-privileged calls that were relevant to the Andersen investigation and provided those calls to the county attorney prosecuting Andersen – Mr. Zdrazil. *Id.* at 143-47.

44. At the conclusion of the testimony regarding Becker County Jail's monitoring and/or recording of Andersen's attorney/client privileged telephone calls, Judge Irvine castigated Becker County law enforcement for its unconstitutional and unlawful policy and issued a cease and desist order from the Bench: "Mr. Durkin, I can tell you that no call will be recorded again on any of those cell phone numbers or land lines to his attorneys, regardless of what happens here. The jail will stop doing that immediately." *Id.* at p. 149.

45. Upon information and belief, the monitoring and/or recording of all Andersen's privileged attorney/client telephone calls, the failure of Becker County Jail personnel to inform Andersen or his attorneys and their agents of the internal process and/or procedure to have an attorney's telephone number placed on the "Do Not Record" list, and the removal of the cellular telephone numbers of Andersen's attorneys from the "Do Not Record" list, were performed pursuant to the customs, practices and/or procedures of the Becker County Jail.

46. As admitted by Becker County law enforcement officer Joe McArthur, it is the policy of the Becker County Jail to refuse to place the telephone numbers of agents of attorneys – including investigators hired by attorneys to investigate the detainee's/inmate's case – on the "Do Not Record" list.

47. Upon information and belief, defendants continue to follow and abide by these unlawful and unconstitutional policies, customs and/or practices at the Becker County Jail.<sup>2</sup>

**B. William K. Bulmer, II's Interaction with the Becker County Jail**

48. Bulmer was a colleague of Durkin's and assisted in representing Andersen from June 2007 to January 2008 while Andersen was in custody in Becker County Jail.

49. During the time Andersen was in custody in the Jail, Bulmer contacted Andersen via telephone at the Jail on numerous occasions to discuss his case and defense strategy.

50. Upon information and belief, attorney/client privileged telephone calls between Bulmer and Andersen were monitored and/or recorded by law enforcement personnel at the Becker County Jail.

51. At no time during Andersen's incarceration in the Becker County Jail did Jail personnel inform Bulmer, Durkin or Andersen that their privileged attorney/client telephone calls were being monitored and/or recorded.<sup>3</sup>

52. At no time during Andersen's incarceration in the Becker County Jail did Jail personnel inform Bulmer or Andersen that the Jail's internal policy was to monitor and/or

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<sup>2</sup> With the possible exception of Andersen after Judge Irvine's reprimand from the bench during the Omnibus hearing. Andersen has since been transferred from the Becker County Jail.

<sup>3</sup> Durkin's and Andersen's suspicion that their attorney/client telephone calls were being monitored were initially corroborated by other inmates in the Becker County Jail. Later, a jail employee confirmed to Andersen that the Jail was indeed monitoring and/or recording attorney/client privileged telephone calls.

record all telephone calls – regardless of whether the calls constituted attorney/client privileged communications – unless the inmate or attorney requested that specific telephone numbers be placed on the “Do Not Record” list.

53. At no time during Andersen’s incarceration in the Becker County Jail did Jail personnel inform Bulmer or Andersen that telephone calls made using a cellular telephone were not protected under the attorney/client privilege.

54. At no time during Andersen’s incarceration in the Becker County Jail did Jail personnel inform Bulmer or Andersen that telephone calls between detainees/inmates and investigators hired by their attorneys were not protected by the attorney/client privilege.

55. At no time during Andersen’s incarceration in the Becker County Jail did Jail personnel inform Bulmer or Andersen that a “Do Not Record” list even existed.

## **V. CLASS ALLEGATIONS**

56. Plaintiffs seek to maintain this action as a class action pursuant to Fed. R. Civ. P. 23. Plaintiffs bring this action, on behalf of themselves and all others similarly situated, as the representative members of the following classes:

All detainees/inmates who were held in custody and/or incarcerated in the Becker County Jail located in Detroit Lakes, Minnesota, and who had their attorney/client communications monitored and/or recorded without their or their attorney’s knowledge, at any time in the four years prior to the filing of this Complaint through a date to be determined by the court, and all detainees/inmates who currently are or during the course of this litigation will be held in custody and/or incarcerated in that jail.

and

All attorneys who represented a detainee/inmate in custody or incarcerated in the Becker County Jail facility located in Detroit Lakes, Minnesota, and who had their attorney/client communications monitored and/or recorded

without their or their attorney's knowledge, at any time in the four years prior to the filing of this Complaint through a date to be determined by the court, and all attorneys who currently or during the course of this litigation will represent persons held in custody and/or incarcerated in that jail.

Plaintiffs reserve the right to narrow or expand these class definitions following the discovery period.

57. *Prerequisites to a Class Action – Fed. R. Civ. P. 23(a)*. The prerequisites to maintaining this action as a class action are satisfied as alleged in Paragraphs 58 through 63 below.

58. *Numerosity*. While the exact number of the members of the two proposed classes is unknown at this time, the telephone calls of all inmates are monitored and/or recorded – regardless of whether the calls are attorney/client privileged calls – unless an inmate or attorney specifically requests that a number be placed on the “Do Not Record” list. Based on this, the number of individuals in each of the two proposed classes is estimated to be in the hundreds, and may be in the thousands. It would be impracticable to bring all, or even a substantial percentage of such persons before the Court as individual plaintiffs through traditional joinder.

59. *Commonality*. There are questions of law or fact common to all members of each proposed class. The common overarching question of law and fact is whether defendants violated Plaintiffs' rights and the attorney/client privilege by monitoring and/or recording attorney/client privileged telephone calls without the knowledge of either the attorney or the client.

60. *Typicality.* The Plaintiffs' claims are typical of the claims of the members of their class because: (a) each had their right to the attorney/client privilege and their right to privacy violated; and (b) their claims are based on the same legal theory as other class members.

61. *Adequacy of Representation.* Plaintiffs are adequate representatives of the two classes because: (1) they are willing and able to represent their respective classes and have every incentive to pursue this action to a successful conclusion; (2) their interests are not in any way antagonistic to those of the other class members; and (3) they are represented by counsel experienced in litigating complex class actions in federal court.

62. *Class Actions Maintainable – Fed. R. Civ. P. 23(b)(2).* Class action status is appropriate in this case because defendants have acted and/or refused to act on grounds generally applicable to the classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the classes as a whole.

63. *Class Actions Maintainable – Fed. R. Civ. P. 23(b)(3).* Class action status also is appropriate because the common questions of law and fact identified above predominate over questions affecting only individual members. A class action is superior to other available methods for the fair and efficient adjudication of this litigation. Because of the relatively small monetary value of each class member's individual claim, few, if any, class members have an interest in individually controlling the prosecution of separate actions. To the knowledge of Plaintiffs and their counsel, no class members have commenced litigation against defendants based on the same or similar allegations as stated above. It is desirable to concentrate the litigation of the claims in this District because

defendants are located here. Plaintiffs and their counsel do not anticipate encountering any unique difficulties in the management of this action as a class action. Finally, requiring members of the two classes to pursue their claims individually would entail needless duplication and would waste the resources of all parties involved and the Court.

### **CAUSE OF ACTION I**

#### **Violation of the First Amendment of the United States Constitution**

64. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

65. Defendants, acting under the color of law, have monitored and/or recorded detainee/inmate telephone calls at the Becker County Jail with their attorneys and their attorneys' agents, pursuant to policies, customs and/or practices established by the Becker County Jail.

66. When detainees/inmates, including Andersen, have come to believe that Becker County Jail personnel are monitoring and/or recording their attorney/client privileged telephone conversations, it has produced a serious chilling effect upon what they are able to communicate to their attorneys via telephone for fear that Becker County Jail personnel – and ultimately law enforcement personnel and the prosecution – will be privy to their attorney/client privileged communications.

67. As a direct and proximate result of severely impeding detainees/inmates from fully and openly communicating with their attorneys, defendants directly and substantially have violated the First Amendment right of freedom of speech of plaintiffs and the members of both putative classes. This violation is actionable under 42 U.S.C. § 1983.

**CAUSE OF ACTION II**

**Violation of the Fourth Amendment of the United States Constitution and  
Article I, Section 10 of the Minnesota Constitution**

68. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

69. Based on the language in the Inmate Handbook, on the signs regarding telephone calls posted in the Jail, and the protections generally afforded attorney/client privilege, detainees/inmates have had reason to believe that telephone calls with their attorneys or their attorneys' agents would not be monitored and/or recorded, at least until they became aware that such monitoring and/or recording was occurring.

70. Plaintiffs have not consented to the monitoring and/or recording of their privileged attorney/client telephone calls.

71. Defendants, acting under the color of law, have monitored and/or recorded detainee/inmate telephone calls at the Becker County Jail with their attorneys and/or their attorneys' agents pursuant to defendants' policies, customs and/or practices.

72. Defendants thereby have directly and substantially violated the right against unreasonable searches of Anderson and the members of the detainee/inmate putative class protected by the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution. The former violation is actionable under 42 U.S.C. § 1983.

**CAUSE OF ACTION III**

**Violation of the Fifth Amendment of the United States Constitution**

73. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

74. Based on the language in the Inmate Handbook, on the signs regarding telephone calls posted in the Jail, and the protections generally afforded attorney/client privilege, detainees/inmates have had reason to believe that telephone calls with their attorneys or their attorneys' agents would not be monitored and/or recorded, at least until they have become aware that such monitoring and/or recording has been occurring.

75. Through these privileged attorney/client communications, detainees/inmates have discussed all aspects of their cases with their attorneys and/or their attorneys' agents, including evidentiary issues, potential witnesses and defense strategies.

76. Defendants, acting under the color of law, have monitored and/or recorded detainee/inmate telephone calls at the Becker County Jail with their attorneys and/or their attorneys' agents, pursuant to defendants' policies, customs and/or practices.

77. Upon information and belief, information obtained from these monitored and/or recorded privileged attorney/client telephone calls has been utilized by Becker County Jail personnel, or provided to Becker County law enforcement personnel, for the purpose of assisting in the prosecution of the detainees'/inmates' criminal cases.

78. As a direct and proximate result of defendants' policies, customs and/or practices, Andersen and the members of the detainee/inmate putative class have suffered

direct and substantial violations of their Fifth Amendment right against self-incrimination which is actionable under 42 U.S.C. § 1983.<sup>4</sup>

#### **CAUSE OF ACTION IV**

##### **Violation of the Sixth Amendment of the U.S. Constitution and Article I, Section 6 of the Minnesota Constitution**

79. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

80. Based on the Inmate handbook provisions and the signs posted in the Jail regarding attorney/client telephone calls, the failure of Becker County Jail personnel to provide detainees/inmates with any information regarding the "Do Not Record" list, and the basic precepts of American jurisprudence regarding attorney/client communications, the detainee/inmate plaintiffs had a reasonable expectation of privacy in their attorney/client telephone calls.

81. Defendants, acting under the color of law, monitored and/or recorded detainee/inmate telephone calls at the Becker County Jail with their attorneys and/or their attorneys' agents, pursuant to defendants' policies, customs and/or practices.

82. As a direct and proximate result of defendants' policies, customs and/or practices, Andersen and the members of the detainee/inmate putative class have suffered violations of the attorney/client privilege and their right to the effective assistance of counsel protected by the Sixth Amendment to the United States Constitution and Article

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<sup>4</sup> Defendants' policy, custom and/or practice also constitutes a violation of detainees'/inmates' right of due process of law under the Fifth Amendment. This claim will be addressed in the portion of the Complaint dealing with defendants' Fourteenth Amendment violations set forth below.

I, Section 6 of the Minnesota Constitution. The former violation is actionable under 42 U.S.C. § 1983.

### **CAUSE OF ACTION V**

#### **Due Process Violations under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Minnesota Constitution**

83. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

84. Defendants' policies, customs and/or practices set forth in this Complaint, including in Counts I through IV above, have deprived Andersen and the members of the detainee/inmate putative class of the ability to have their innocence or guilt fairly determined. This deprivation violates their privileges and immunities protected by the due process of law under the Fourteenth Amendment of the United States Constitution and their liberty interest under the Fourth, Fifth and Sixth Amendments of the United States Constitution protected by the Fifth Amendment of the United States Constitution. These violations of their due process rights are actionable under 42 U.S.C. § 1983. This deprivation also violates their due process rights protected by Article I, Section 7 of the Minnesota Constitution.

### **CAUSE OF ACTION VI**

#### **Violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 – 18 U.S.C. § 2510, et seq.**

85. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

86. Defendants, acting under the color of law, intercepted telephone calls of detainees/inmates at the Becker County Jail to their attorneys and/or their attorneys' agents, without the consent or knowledge of either participant to the calls and in violation of their reasonable expectations.

87. Defendants' actions violated the rights of plaintiffs and the members of both putative classes under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 – 18 U.S.C. § 2510, *et seq.*

### **CAUSE OF ACTION VII**

#### **Violation of Federal Common Law**

88. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

89. Defendants, acting under the color of law, automatically monitored and/or recorded a large number of detainee/inmate telephone calls at the Becker County Jail.

90. Upon information and belief, defendants listened to the recordings of detainees'/inmates' telephone calls.

91. Upon information and belief, a number of these recorded telephone calls included statements by either the detainees/inmates or the individuals with whom they were speaking that were favorable to the detainees'/inmates' criminal defense, were material to either the guilt or punishment of the detainee/inmate, were relevant to the credibility of a witness involved in the detainees'/inmates' criminal cases and/or contained exculpatory evidence.

92. Defendants provided recordings of relevant telephone calls to the prosecution in furtherance of the criminal cases against the detainees/inmates, except that they allegedly destroyed any recordings of telephone calls that were deemed to be attorney/client privileged telephone calls.

93. Neither defendants nor the prosecution in any of the detainees'/inmates' criminal cases provided copies of the relevant, non-privileged recorded calls to the detainees/inmates or their counsel.

94. As a direct and proximate result of defendants' policies, customs and/or practices, the federal common law right of Anderson and the members of the detainee/inmate putative class to receive any evidence in defendants' or the prosecution's possession that is favorable or material to their defense, and/or is exculpatory, has been violated.

### **CAUSE OF ACTION VIII**

#### **Violation of Minn. Stat. § 481.10, subd. 2.**

95. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

96. Defendants' policies, customs and/or practices, as set forth in this Complaint, including in Counts I through IV above, have deprived Anderson and the members of the detainee/inmate putative class of their right to private and confidential telephone calls with their attorneys and/or their attorneys' agents as guaranteed by Minnesota law.

97. Defendants' actions constitute a direct violation of Minn. Stat. § 481.10.

**CAUSE OF ACTION IX**

**Violation of Minn. Stat. § 626A.02.**

98. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

99. Defendants, acting under the color of law, intercepted telephone calls of detainees/inmates at the Becker County Jail to their attorneys and/or their attorneys' agents, without the consent or knowledge of either participant to the calls and in violation of their reasonable expectations.

100. Defendants' policies, customs and/or practices violated the right of plaintiffs and members of both putative classes to be free from illegal wiretaps, and violated Minn. Stat. § 626A.02.

**CAUSE OF ACTION X**

**Violation of Minnesota Common Law**

101. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

102. Defendants, acting under the color of law, monitored and/or recorded detainees'/inmates' attorney/client privileged telephone calls at the Becker County Jail with neither the knowledge nor the consent of the participants to the call.

103. Plaintiffs and other class members were not informed of the processes or procedures whereby attorney telephone numbers could be placed on the Jail's "Do Not Record" list, nor were they informed by Jail personnel that such a list existed.

104. Upon information and belief, Becker County Jail personnel do not inform plaintiffs and other class members of the processes or procedures – or even the existence of the “Do Not Record” list either in writing or verbally.

105. Based on the protections generally afforded attorney/client communications, and because defendants did not inform plaintiffs and other class members of the processes and procedures regarding the “Do Not Record” list, it was reasonable for attorneys and detainees/inmates to believe that their telephone calls with clients held in the Becker County Jail would not be monitored and/or recorded, at least until they would have become aware that such monitoring and or/recording was occurring.

106. Defendants’ policies, customs and/or practices, as set forth in this Complaint are a gross intrusion upon the attorney/client privilege and the fundamental right to privacy and seclusion of plaintiffs and the members of both putative classes guaranteed by Minnesota law.

107. Defendants’ actions shock the conscience, are patently offensive to reasonable members of society and are actionable pursuant to Minn. Stat. § 466.02.

#### **CAUSE OF ACTION XI**

#### **Violation of Minnesota Common Law – Misappropriation of Attorney Work Product**

108. Plaintiffs reallege and incorporate by reference all allegations contained in the Complaint as if set forth separately in this Cause of Action.

109. Telephone communications between the attorney plaintiffs and their clients held in custody or incarcerated in the Becker County Jail contained attorney work product information, including but not limited to, legal analysis and advice regarding evidence, testimony, potential witnesses and defense strategies relevant to detainees'/inmates' criminal cases.

110. This attorney work product information is trade secret information in that it had independent economic value and was not known or readily ascertainable by defendants, the prosecution in the detainees'/inmates' criminal cases, or anyone who was not privy to the telephone conversation.

111. Attorney plaintiffs and other members of their putative class made every effort to maintain the confidentiality of this attorney work product information.

112. Upon losing its confidential and privileged status, the value of attorney work product information is severely diminished. This is especially true in the criminal defense context when attorney work product information is disclosed to law enforcement personnel and/or the prosecution involved in the case.

113. Upon information and belief, attorney work product information obtained from defendants' improper policy of monitoring and/or recording privileged attorney/client telephone calls was utilized by Becker County Jail personnel, or provided to Becker County law enforcement personnel, for the purpose of assisting in the prosecution of criminal cases of detainees/inmates represented by the attorney plaintiffs.

114. Defendants' policies, customs and/or practices, as set forth in this Complaint caused the misappropriation of attorney plaintiffs' work product, severely

limited the attorney plaintiffs' ability to prepare a defense on behalf of their clients and substantially lessened the value of the attorney plaintiffs' efforts.

115. Defendants' actions have caused the wrongful acquisition, misappropriation and/or use of attorney work product information obtained from privileged attorney/client telephone calls, and have damaged plaintiff attorneys by devaluing their work product both substantively and economically.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiffs, individually and on behalf of the proposed classes, pray for judgment as follows:

A. That this Court certify the two proposed classes and appoint named plaintiffs as representatives of the two classes respectively, and that plaintiffs' counsel be designated as Class Counsel for both classes;

B. That defendants' policies, customs and/or practices, as set forth above, be determined and adjudged to be in violation of the Constitution of the United States and the Minnesota Constitution;

C. That defendants' policies, customs and/or practices, as set forth above, be determined and adjudged to be in violation of federal and Minnesota wiretap statutes;

D. That defendants' policies, customs and/or practices, as set forth above, be determined and adjudged to be in violation of Minnesota statutes regarding attorney/client communications with individuals in custody in Minnesota correctional facilities;

E. That defendants' policies, customs and/or practices, as set forth above, be determined and adjudged to be in violation of federal and Minnesota common law regarding invasion of an individual's right to privacy;

F. That this Court enter a temporary restraining order and preliminary and permanent injunctions ordering defendants to refrain from continuing the policy of improperly monitoring and/or recording attorney/client telephone calls as set forth in this Complaint;

G. That this Court also enter preliminary and permanent injunctions ordering defendants to revise the Inmate Handbook and the signage in the facility to properly inform detainee/inmates of the processes and procedures whereby attorneys' and attorneys' agents' telephone numbers are placed on the "Do Not Record" list, and ordering defendants to properly inform attorneys calling the Jail or entering the facility of these same processes and procedures verbally and in writing;

H. That the plaintiffs and members of the two classes be awarded such other and further legal and equitable relief as may be found appropriate and as the Court may deem just or equitable;

I. That the plaintiffs and members of the two classes be awarded monetary damages, including presumed, special and general damages to be determined at trial;

J. That the plaintiffs and members of the two classes be awarded all applicable pre-judgment and post-judgment interest;

K. That this Court award plaintiffs and the members of the two classes their class action contingency attorneys' fees, expenses and costs, or in the alternative, their attorneys' fees, expenses and costs pursuant to 42 U.S.C. § 1988; and

L. That this Court award plaintiffs and members of the two classes such other and further relief as the Court deems just and equitable.

DATED: October 15, 2008

Respectfully submitted,

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