

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

Kenneth E. Andersen and Dell D. Holm, On behalf of themselves and all others similarly situated,)	
)	Case No. 08-CV-5687
and)	
)	
William K. Bulmer, II, On behalf of himself and all others similarly situated,)	
)	FIRST AMENDED
)	CLASS ACTION
<i>Plaintiffs</i>)	COMPLAINT
)	
vs.)	JURY TRIAL DEMANDED
)	
The County of Becker, Minnesota, Tim Gordon, in his capacity as Sheriff of Becker County, and Joseph H. McArthur, in his capacity as Captain in the Becker County Sheriff's Department,)	
)	
<i>Defendants.</i>)	

Plaintiffs Kenneth E. Andersen, Dell D. Holm and William K. Bulmer, II bring this class action on behalf of themselves and all others similarly situated, and state as follows:

I. INTRODUCTION

1. This class action for damages and injunctive relief is brought pursuant to 42 U.S.C. § 1983 for violations of the plaintiffs' rights, and those of the classes the plaintiffs represent (collectively, "Plaintiffs"), under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution; under Article I, Sections 6, 7

and 10 of the Minnesota Constitution; pursuant to 18 U.S.C. § 2510, *et seq.*, for 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 Detention Facility ("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 Detention Facility from June 2007 to June 2008.

4. Plaintiff Dell. D. Holm (“Holm”) is an inmate currently incarcerated in the Becker County Detention Facility located in Detroit Lakes, Minnesota. Holm has been in custody in the Jail since May 3, 2008.

5. 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 Detention Facility from June 2007 to January 2008. During Andersen’s incarceration at the Becker County Detention Facility, Bulmer contacted Andersen via telephone to discuss privileged and confidential aspects of his/her case on a number of occasions.

6. 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 Detention Facility.

7. 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 Amended Complaint. All causes of action brought against Gordon are brought in his official capacity as the sheriff of Becker County.

8. 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 Amended 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

9. 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.*

10. 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.

11. 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 Detention Facility

12. On June 11, 2007, Andersen was arrested and detained in the Becker County Detention Facility. 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.

13. 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 Detention Facility will be monitored and/or recorded." *See* Exhibit 1, p. 9 (*emphasis added*).

14. 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.

15. 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.

16. 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.

17. 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 Detention Facility 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*).

18. 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 Detention Facility.

19. 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 Detention Facility by telephone regularly to discuss key aspects of the case – including potential witnesses and exculpatory evidence – and to prepare Andersen's defense.

20. 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 Detention Facility 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.

21. 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.

22. 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.

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

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

25. 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.

26. 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 Detention Facility personnel – but not disclosed to detainees/inmates or attorneys.

27. 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 Detention Facility telephone systems – Reliance Telephone Systems, Inc. (“Reliance”).

28. 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 Detention Facility personnel make the final determination regarding whether a telephone number is placed on and/or remains on the “Do Not Record” list.

29. 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.

30. 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.

31. 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.

32. 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.¹

33. Although Durkin’s, Bulmer’s and their attorney colleagues’ cellular telephone numbers had been removed from the “Do Not Record” list, Becker County Detention Facility personnel failed to inform Durkin, Bulmer or Andersen of this until approximately three months later. During that entire period, Durkin, Bulmer and their

¹ Fladmark’s telephone number was not removed from the “Do Not Record” list because the Becker County Attorney had informed Becker County Detention Facility personnel that Fladmark’s telephone number could be placed on the “Do Not Record” list. This was an exception to Becker County Detention Facility’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.

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.

34. All of these cellular telephone attorney/client telephone calls were monitored and/or recorded by the Becker County Detention Facility.

35. 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.

36. 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.*

37. 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.*

38. 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.

39. McArthur further admitted that all Becker County Detention Facility 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*).

40. 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.

41. 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.

42. 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 Detention Facility since December 5, 2007. *Id.* at p. 136-37.

43. 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 Detention Facility. Exhibit 3, p. 139-40.

44. 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.

45. At the conclusion of the testimony regarding Becker County Detention Facility'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.

46. Upon information and belief, the monitoring and/or recording of all Andersen's privileged attorney/client telephone calls, the failure of Becker County Detention Facility 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 Detention Facility.

47. As admitted by Becker County law enforcement officer Joe McArthur, it is the policy of the Becker County Detention Facility 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.

48. Upon information and belief, defendants continue to follow and abide by these unlawful and unconstitutional policies, customs and/or practices at the Becker County Detention Facility.²

B. Dell Holm's Interaction with the Becker County Detention Facility

49. On May 3, 2008, Holm was arrested and detained in the Becker County Detention Facility. Shortly after arriving at the Jail, Holm became aware that other detainees/inmates had been provided with an "Inmate Handbook" for the facility. Holm requested a copy of the Inmate Handbook, but was informed that there were no copies

² 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 Detention Facility.

available at that time and that he would be provided with one when additional copies were printed. Holm has still not been provided with an Inmate Handbook.

50. Becker County Detention Facility personnel never informed Holm – in writing or verbally – that a process existed whereby he could arrange for a private, privileged attorney/client telephone call, nor was he ever informed of the existence of a “Do Not Record” list.

51. In addition, Holm observed signs posted near the Jail telephones indicating that all telephone calls were subject to monitoring – with the exception of telephone calls made to an attorney.

52. After a short time in the Jail, Darlene Rivera (“Rivera”) from the Public Defender’s office was appointed as Holm’s attorney. Holm communicated with Rivera regarding privileged aspects of his case and his defense via telephones located in the Becker County facility. Based on the signs posted by the Jail’s telephones, Holm believed that his attorney/client telephone calls were private and confidential.

53. During the time he was communicating with Rivera via the Jail’s telephones, Holm was informed by other inmates/detainees that Becker County Detention Facility personnel listen to attorney/client telephone calls. Holm then requested private, confidential telephone calls with his attorney and others involved with his case. Becker County Detention Facility personnel again failed to inform Holm of the process and procedure for arranging a privileged attorney/client telephone call, failed to inform Holm of the “Do Not Record” list, and instead, informed Holm that all inmate/detainee

telephone calls are recorded – regardless of whether or not the telephone calls are made to an attorney.

54. Holm later overheard Jail personnel discussing aspects of his case that he disclosed to his attorney during attorney/client telephone calls.

55. A conflict later arose between Holm and Rivera and Holm requested that another attorney from the Public Defender's office be appointed to assist with his case. Attorney Bruce Ringstrom ("Ringstrom") was then assigned to Holm's case.

56. Upon meeting with Holm, Ringstrom informed him that if they needed to discuss confidential information regarding Holm's case, Ringstrom would arrange an attorney/client visit at the Jail facility instead of discussing the privileged information over the Jail's telephones. Even then, Ringstrom would many times request that he be allowed to meet with Holm in the Jail's library rather than in the designated attorney/client meeting rooms due to concerns regarding the privacy of his and Holm's attorney/client discussions.

57. Upon information and belief, pursuant to the customs, practices and/or procedures of the Becker County Detention Facility, personnel at the Becker County Detention Facility monitored and recorded Holm's attorney/client privileged communications and failed to inform Holm of the internal process and/or procedure to arrange private, confidential attorney/client telephone calls as well as of the existence of the "Do Not Record" list. .

58. Upon information and belief, defendants continue to abide by and follow these unlawful and unconstitutional policies, customs and/or practices at the Becker County Detention Facility.

C. William K. Bulmer, II's Interaction with the Becker County Detention Facility

59. 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 Detention Facility.

60. 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.

61. 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 Detention Facility.

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

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

³ 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 Detention Facility. Later, a jail employee confirmed to Andersen that the Jail was indeed monitoring and/or recording attorney/client privileged telephone calls.

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

65. At no time during Andersen's incarceration in the Becker County Detention Facility 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.

66. At no time during Andersen's incarceration in the Becker County Detention Facility did Jail personnel inform Bulmer or Andersen that a "Do Not Record" list even existed.

V. CLASS ALLEGATIONS

67. 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 Detention 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 from October 15, 2004 (four years prior to the filing of the Complaint in this matter) 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 Detention 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

from October 15, 2004 (four years prior to the filing of the Complaint in this matter) 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.

68. *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.

69. *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.

70. *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.

71. *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.

72. *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.

73. *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.

74. *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

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

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

77. When detainees/inmates, including Andersen and Holm, have come to believe that Becker County Detention Facility 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 Detention Facility personnel – and ultimately law enforcement personnel and the prosecution – will be privy to their attorney/client privileged communications.

78. 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

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

80. 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.

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

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

83. 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

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

85. 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.

86. 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.

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

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

89. As a direct and proximate result of defendants' policies, customs and/or practices, Andersen, Holm 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. § 1983.⁴

CAUSE OF ACTION IV

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

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

91. Based on the Inmate handbook provisions and the signs posted in the Jail regarding attorney/client telephone calls, the failure of Becker County Detention Facility 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.

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

⁴ 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.

93. As a direct and proximate result of defendants' policies, customs and/or practices, Andersen, Holm 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 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

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

95. Defendants' policies, customs and/or practices set forth in this Amended Complaint, including in Counts I through IV above, have deprived Andersen, Holm 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.*

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

97. Defendants, acting under the color of law, intercepted telephone calls of detainees/inmates at the Becker County Detention Facility 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.

98. 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

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

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

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

102. 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.

103. 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.

104. 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.

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

CAUSE OF ACTION VIII

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

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

107. Defendants' policies, customs and/or practices, as set forth in this Amended Complaint, including in Counts I through IV above, have deprived Anderson, Holm 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.

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

CAUSE OF ACTION IX

Violation of Minn. Stat. § 626A.02.

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

110. Defendants, acting under the color of law, intercepted telephone calls of detainees/inmates at the Becker County Detention Facility 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.

111. 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

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

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

114. 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.

115. Upon information and belief, Becker County Detention Facility 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.

116. 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 Detention Facility would not be monitored and/or recorded, at least until they would have become aware that such monitoring and or/recording was occurring.

117. Defendants' policies, customs and/or practices, as set forth in this Amended 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.

118. 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

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

120. Telephone communications between the attorney plaintiffs and their clients held in custody or incarcerated in the Becker County Detention Facility 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.

121. 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.

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

123. 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.

124. 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 Detention Facility 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.

125. Defendants' policies, customs and/or practices, as set forth in this Amended 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.

126. 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 Amended 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,

SPRENGER & LANG, PLLC

s/ Jeffrey A. Abrahamson
Mara R. Thompson (MN No. 196125)
Dan Bryden (MN No. 302284)
Jeffrey A. Abrahamson (MN No. 338187)
SPRENGER & LANG, PLLC
310 Fourth Avenue S.
Suite 600
Minneapolis, MN 55403
Telephone: (612) 871-8910
Fax: (612) 871-9270

Attorneys' for Plaintiffs

BECKER COUNTY DETENTION FACILITY

INMATE HANDBOOK

Exhibit 1

INTRODUCTION

You have either been sentenced to the Becker County Jail, are here for a pretrial detention or you were brought here to be housed by another law enforcement facility.

During the booking process, the Correctional Officer gave you this handbook. This handbook is to guide and benefit you during your stay. This handbook contains the basic information you need to know while you are here.

The rules adopted by the Becker County Jail are meant to insure a safe, secure and clean environment within the detention area. This handbook will help you to understand what is expected of you and what will happen if you fail to obey the rules. If you have any questions about the contents of this handbook, ask a Correctional Officer.

THESE HANDBOOKS ARE JAIL PROPERTY
DO NOT DEFACE

(LEAVE ON DAYROOM TABLE
WHEN NOT IN USE)

(1)
INMATE RULES OF CONDUCT:

Violation of the following inmate rules of conduct will result in disciplinary action.

1. You will at all times show respect for the well-being of all persons and property in the jail, and conduct yourself in an orderly manner.
2. You will use moderate voice tones at all times and refrain from loud talking, singing, unnecessary noise, or disruptive behavior in all living and program areas and visiting.
3. You will resolve all differences and conflicts in a peaceful, orderly and non-aggressive manner.
4. You will obey all direct orders given by the jail staff.
5. You will not enter office areas or personnel living areas, or use jail or other inmate's property only with the permission of the occupant, owner, or staff.
6. Each inmate is required to clean his/her cell or sleeping area at the scheduled times and keep it clean.
7. **All** inmates of a cell-block area will help the cleaning of the day room and shower areas of their cell block.
8. All bedding & mattresses will remain in the sleeping area and beds will be made each morning. **(ALL BEDDING TUCKED INTO BUNK.)** You are responsible for your bedding and required to turn in the same amount upon your release.

(2)

9. You will not throw candy wrappers or other trash into the toilets, floor drains or on the floors in any areas of the jail.
10. You will be issued jail clothing and are required to wear them. You will be dressed at all times when you are not sleeping. The sweatshirt, when worn, will be under the orange top.
11. When entering the jail, you will be assigned a bed. You will not change beds unless you have been given permission to do so. You may be changed due to classification.
12. You will not hang or attach anything to the walls (except in the designated area), beds, doors or lighting fixtures. You will not obstruct the view of the cells in any way.
13. If you damage or destroy jail issue items, you will pay for them or be charged with destroying county property. You will not be issued new items until the ruined ones are paid for.
14. Inmates will at no time be disrespectful when addressing Correctional Officers.
15. Inmates will keep cell doors open at all times when not in lockdown, except when dressing and using the toilet.
16. Intercom – for **emergency use only**. All other inquiries will be addressed directly with staff when at the time of cell checks.

(3)
PERSONAL PROPERTY:

You will not be permitted to keep cash on your person, unless you are a work release inmate. (Work release inmates will keep their money in their Huber locker) Your money will be kept in an account for you. Personal property brought into the jail will be kept in a locker assigned to you. If you accumulate personal property in your jail cell exceeding what the jail feels you should have in your possession, the property will be taken and put in your locker. The inmate will be allowed to retain the following items:

1. All legal papers.
2. Approved snapshots/personal photos (no Polaroids). Pictures must fit in the approved 3' X 3' 'black square' in your jail cell.
3. Prescription glasses and contact lenses/case.
4. Medical alert bracelet or necklace, watch, wedding band.
5. Soft cover address book.
6. Study materials – Educational Huber Release, religious reading material, (after inspection)
7. Dentures.
8. Items sold on the canteen.
9. Hygienic items.
10. Mail

(4)

11. Items approved by the Chief of Corrections or the Assistant Chief of Corrections. Inmates will be responsible for their personal property retained in the jail.

All reading material brought in to an inmate's jail cell from outside the jail, becomes property of the jail. Religious material is excluded.

Any property left upon your release will be disposed of within 30 (thirty) days.

INMATE ISSUED PROPERTY:

All inmates are issued the following facility property:

1. One (1) uniform top
2. One (1) uniform bottom
3. One (1) pair underwear
4. One (1) pair of socks
5. One (1) pair of sandals
6. One (1) pillow and case
7. Two (2) sheets
8. Two (2) blankets
9. One (1) towel
10. One (1) sweatshirt

Each cell is furnished with a mattress.

You are held liable for all damaged to or loss of items assigned to you.

In instances where safety and security of the facility are threatened, the Jail Staff may remove inmates' clothing, bedding and or linen if deemed necessary.

(5)
Clothing, bedding and or linen will be returned to the inmate as soon as it is reasonable to believe that the behavior that caused the action will not be continued.

LAUNDRY SCHEDULE:

A Correctional Officer will bring the laundry cart to each cell-block area. The clothing exchange will take place sometime after the evening meal, when it is convenient for the Correctional Officer. The schedule is as follows:

<u>AREAS</u>	<u>LINEN/PERSONAL</u>	<u>PERSONAL</u>
Dorms 1 & 2	Sunday	Thursday
Blocks A, B, G, H & Max 1	Monday	Friday
Blocks C, D, E, F & Max 2	Tuesday	Saturday

NO EXCHANGE ON WEDNESDAY

PERSONAL CLEANLINESS:

1. All inmates are required to shower at least once per day.
2. Clothing and bedding are to be kept as clean as possible.
3. Initial toilet articles will be issued when you enter the jail, (1 each toothpaste, toothbrush, soap, and comb). Shampoo and other personal items are available on the canteen cart. Indigent inmates may request personal hygiene items from the canteen cart.

- (6)
4. The Correctional Officer will issue shaving supplies each morning at the morning med. round. When inmates are finished with the shaving supplies they are to place them on the food port. The Correctional Officer puts shaving supplies away by 9:00 each morning. You may request a new razor when you feel you need one.
5. A finger nail and toe nail clipper will be available in each cell block during morning meds only when the razors are out. An electric hair clipper available also upon request.
6. Inmate cells and dayrooms will be kept free of any writing on the walls. There will be no defacement of county property. Formal charges may result if property is defaced.
7. Toilet paper will be given out as needed at one of the four daily med. times (inmates must turn in empty roll)
8. Feminine hygiene items are available upon request, and at the regular med. times.

SCHEDULED ROUTINE:

1. At 6:00 A.M. – 6:15 A.M., a formal count of all inmates will be taken. Cells will be unlocked at this time.
2. At 6:30 A.M. all lights will be turned on high, inmates shall arise at this time and make their beds.
3. At 7:00 A.M. breakfast will be served. Inmates will be up and dressed when breakfast trays arrive. Each inmate will pick up his/her own tray unless the

(7)

Correctional Officer has given prior approval. All meals will be eaten in the dayroom.

4. The medication cart will go around after trays have been collected from each meal of the day.

07:30 12:30 17:30 22:30

5. Inmate's recreation and library will be available between 10:00 A.M. and 10:00 P.M. daily. Times will be posted in each dayroom of the cell-block.

6. Lunch will be served at 11:45 A.M. Inmates will be dressed when the trays arrive.

7. Supper will be served at 4:30 P.M. Inmates will be dressed when trays arrive.

8. Lock down at night will be at 11:00 P.M. daily. Cell areas and tables will be cleaned before lock down.

9. Cleaning supplies will be brought around on Mondays, Wednesdays and Fridays in the afternoon. All inmates are expected to clean their cells, and should help with the cleaning of the dayroom.

JAIL PROGRAMS

A. TELEVISIONS:

Televisions will be furnished in each cell-block. Each cell-block is responsible for the television assigned to them. Any misuse of or damage to the television will cause it to be removed. The televisions are subject to the following rules:

(8)

1. The volume will be kept at a reasonable level.

2. There will be no fighting over the channel selections, majority rules.

3. The television will be shut off at 11:00 P.M. at lock down at night and turned on in the morning at 6:30 A.M. **THIS INCLUDES DORMS 1 & 2.**

4. The remote control for the television will be left on the dayroom table when not in use.

5. Any violations will be cause for suspension of the television privileges, (24 hours for the first offense, one week for the second offense, and one month for the third offense.) Remember, you are not the only one in the cell-block area. Your abuse will cause the loss of the television for everyone in that cell-block area.

6. The Correctional Officer may restrict the hours of the television viewing time based upon the compliance with the rules by the inmates.

B. LIGHTS:

1. Lights will be turned on at 6:30 A.M. every morning and will be turned off at 11:00 P.M. daily.

2. Security lights will remain on 24 hours a day.

3. Covering any of the lights or blocking any of the air vents with any sort of material will be considered a minor jail offense.

(9)

C. CANTEEN:

1. Inmate's money will be kept in a jail account upon entering the jail.
2. Inmates with money on account will be offered the privilege to purchase items from the canteen. **MONEY MUST BE IN YOUR ACCOUNT ON THE DAY PRIOR TO INSURE CANTEEN PURCHASES.**
3. There will be absolutely **NO CREDIT.**
4. The canteen slips will be given out on the afternoon shift, on Monday, Wednesday, and Friday and orders filled and delivered after the evening meal.
5. Money **WILL NOT** be transferred from one inmate's account to another.

D. TELEPHONES:

1. Telephones will be located in each cell-block dayroom.
2. Telephone calls will be allowed daily during unlocked status.
3. Any non-attorney/client privileged phone calls made from the Becker County Jail will be monitored and/or recorded.
4. All phone calls are outgoing only and will be made collect, or with a phone card purchased in the jail.
5. Inmates will limit phone calls to a reasonable length of time, there by allowing other inmates access to the phone.

(10)

6. No yelling or profanity will be allowed while on the phone.

7. NO INCOMING MESSAGES OR CALLS WILL BE ACCEPTED. There is voice mail set up within the system for you to use and check messages. Messages may be left for you at this number:
847-9914

8. Abuse of the phone or failing to follow the listed rules will result in the loss of telephone privileges.
9. Telephones are turned on at 6:30 A.M. in the morning and shut off at 11:00 P.M. at lockup.
10. Inmates **WILL NOT** be allowed access to the booking phone except in emergencies with prior approval from the Chief of Corrections, Assistant Chief of Corrections.
11. Phone cards may be purchased for \$10.00 at any time a Correction Officer has the time; or may be purchased on the canteen cart.

E. MAIL:

1. Inmates will be allowed to receive and send out mail Monday thru Friday. **THERE IS NO MAIL PICK UP OR DELIVERY ON WEEKENDS OR HOLIDAYS.**
2. You can send and receive as many letters as you want.
3. All incoming mail will be opened and inspected for contraband, but not read. If you object to this rule, your

(11)

mail will be put in your locker with your personal property until you are released from jail.

4. Any cash will be removed and credited to your account. **(NO PERSONAL CHECKS WILL BE ACCEPTED; THESE WILL BE LISTED ON YOUR PERSONAL PROPERTY AND PUT IN YOUR LOCKER)** Money orders will be given to the inmate to sign before applying it to their account.

5. Letters from attorneys and public news media will be delivered unopened. If contraband is suspected, these letters will be opened in the presence of the inmate and inspected.

6. Stamps, envelopes, and paper are sold on the canteen cart.

7. If you have no money, you will be provided with the **sufficient paper and postage (*)** to maintain reasonable contact with:

1. Attorneys
2. Government officials
3. Court officials

(*) one stamp on Sunday, one stamp on Thursday during canteen for personal mailings

8. After your release, your mail will be returned to the sender.

9. Incoming mail will be distributed within 8 hours of receipt by the jail staff.

(12)

10. Your address here is:

INMATE'S NAME
P.O. BOX 702
DETROIT LAKES, MN 56502

(You must list your first and last name on all outgoing mail or it will not be delivered)

F. VISITING:

Visiting hours are:

MALE:

Wednesday – 7:00 P.M. to 9:30 P.M.
Saturday/Sunday/Holidays – 1:30 P.M. to 4:30 P.M.

FEMALE:

Tuesday/Thursday – 7:00 P.M. to 9:30 P.M.
Sunday/Holidays – 8:30 A.M. to 11:30 A.M.

1. Visits with attorneys, ministers, counselors, police officials, court services are unrestricted within reason in a non-monitored room.

2. All visitors under the age of 18 must be accompanied by a parent, legal guardian, or responsible adult. **VISITORS MUST PRODUCE A PICTURE ID (LIKE STATE ISSUED DRIVERS LICENSE) UPON REQUEST. (NO W.E. I.D. ACCEPTED)**

3. Length of visit will be restricted to 30 minutes. If no other inmates are visiting, length of visit may be extended.

4. No person under the influence of alcohol or drugs will be allowed to visit.

(13)

5. Becker County reserves the right to revoke or refuse admittance to any individual.

6. When a holiday falls on a regular visiting day, the holiday visiting schedule will be used.

7. Upon arrival at the jail you will be given a visitor request list. Your list will consist of up to three names* and their birth dates*. Those named will be the only people allowed to visit you. *(Your children under age 18 do not need to be on the list and will be allowed to visit accompanied by one of the three names you list)* You will be allowed to make changes to your list on the first Monday of every month.

*Each visitor listed must have correct full name and date of birth, to avoid any delay in approving the visitor.

G. HUBER (WORK RELEASE) and STS:

1. All Huber or S.T.S. must be approved by the Courts, Jail Programmer, Assistant Chief of Corrections, Chief of Corrections.

2. Your employment, work hours, and workdays will be approved by the Jail Programmer, Assistant Chief of Corrections, Chief of Corrections.

3. There is a \$90.00 work release deposit due before you go out on work release. This will be returned to you at the end of your sentence, providing your work release is paid in full. Your will be charged a fee of \$15.00 for each day you are out on work release. All of the balance must be paid before you are released from jail. (All of this money must be cash)

(14)

4. You will take a urine test (U.A.) and pass it before going out on W/R or STS. You will be randomly U.A.'d at your expense of \$15.00 per test.

5. Before leaving the jail for work each day, you must clean your area and make your bed.

6. Bag lunches are available if requested at no cost to the inmate.

H. RELIGIOUS SERVICES:

1. There are church services each Sunday at 10:00 A.M. - Males, 09:00 A.M. - Females

2. Bibles and other religious material shall be made available to inmates who request them.

3. You may request to see a minister, priest or chaplain through the jail administration. You may request to see one in private.

I. RECREATION and LIBRARY:

1. The jail has indoor and outdoor recreation areas. (a Library)

2. There will be an assortment of reading material in the library.

3. Provided you are under no restrictions, you will be allowed to spend one hour daily in the recreation areas.

(15)

4. The scheduled program times for each area are as follows:

8:00 A.M. to 9:00 A.M. / All Females
9:00 A.M. to 10:00 A.M. / Blocks C & D Males
10:00 A.M. to 11:00 A.M. / Blocks E, F, A, & B Males
1:00 P.M. to 2:00 P.M. / Dorm Males
2:00 P.M. to 3:00 P.M. / Max 1 & Max 2 Males
3:00 P.M. to 4:00 P.M. / Blocks G & H Males

5. The recreation area will be straightened up before returning to your cell area.

6. You will not sit on any chairs that are stacked.

J. EDUCATION:

1. G.E.D. is no longer available.

2. School release for AVTI or college is possible.

3. For details on any schooling, write to the Jail Programmer.

K. PERSONAL PROBLEMS & COUNSELING:

If you are having problems adjusting to the jail routine, or if you are having problems on the job or with a family member, contact the Correctional Officer. He/She is available to help you the best he/she can be of assistance to you. If the problem is within the jail, ask to see the Assistant Chief of Corrections or Jail Programmer. If they cannot solve your problem, you can request to see the Chief of Corrections or you can write to him. Your letter will be delivered unopened. The staff will help you any way they can.

(16)

L. IN HOUSE WORKERS:

The Becker County Jail allows certain inmates to work under the direction of the staff. To become an in house worker, certain guidelines have been set. You may not have to meet all of these guidelines. The final decision is up to the Chief of Corrections, Assistant Chief of Corrections, Jail Programmer.

1. You must be sentenced with no outstanding warrants or charges pending.

3. No record of previous escapes attempts or attempted suicide.

4. No disciplinary reports or history of severe drug use.

5. Medical approval.

6. Desire to work hard and cooperate respectfully with staff.

7. If you would like to be a trustee, send a written request to the Chief of Corrections, Assistant Chief of Corrections, Jail Programmer.

M. MEDICAL and DENTAL SERVICES:

Any inmate of the Becker County Detention Facility will be charged a co-payment for over the counter medication; and medical, dental and mental health care services that the inmate initiated. No inmate will be denied medical care services because of an inability to pay, but a debt will be entered against the inmate's account. If the inmate receives any funds, it will automatically be deducted from his/her account to pay the outstanding co-payment assessment.

(17)

The jail will use any legal means possible to collect medical debts incurred by the inmate. There will be NO charge for staff initiated visits, or TB screening assessments.

Exception: Work release inmates are responsible for all medication and health care services.

1. The jail nurse will usually be in the jail on Tuesday and Friday.
2. Any inmate desiring medical attention is required to notify the jail promptly. The inmate will fill out a medical request form before seeing the nurse (a \$5.00 fee). No inmate will see a doctor without seeing the jail nurse first, unless there is an emergency. Nurse request forms are available on the medication cart.
3. The Correction Officer will dispense all medication.
4. All medication dispensed will be taken immediately with water in plain view of the Correctional Officer.

DISCIPLINARY PLAN:

Inmates of the Becker County Detention Facility have the right to know what behavior is expected of them and the penalties for misbehavior. The disciplinary process is fair and systematic so that no person, staff or inmate may plead ignorance of the rules or bias in the procedure. This disciplinary plan is to insure a safe and secure environment.

A copy of the rules and regulations is also posted in the dayroom of each area and should be read by each inmate upon arrival. If the inmate is illiterate, the Jail

(18)

Programmer will go over the regulations with that inmate.

DUE PROCESS:

The following is a summary of your rights under due process:

1. A published list of charges and penalties will be made available to each inmate.
2. Notice will be given to each resident within twenty-four (24) hours, excluding weekends and holidays, upon determination of a violation. The notice will contain the nature of the alleged violation and penalty determination. The inmate may agree with the penalty and sign the violation form. If the inmate signs the violation form he/she gives up the right to a hearing. If the inmate would like a hearing, he/she will sign the form in the appropriate section. Hearings for major violations will be scheduled to occur within one (1) week of notice of being served; however, rescheduling for good cause within 24 hours notice given to the inmate counsel.
3. Hearing appeals will not be scheduled sooner than four (4) days from notice given with the exception of the inmate waiving this provision or residing in detention.
4. An opportunity to appear in person before the disciplinary board and to be heard.
5. The right to bring evidence and to request witnesses, up to three (3), in addition to adverse witnesses and to confront and cross examine adverse witnesses.
6. The right to request continuance of hearing for cause.

(19)

7. An impartial hearing board, which will not include the reporting officer, a witness, an investigation officer or anyone who will review the proceedings for an appeal.
8. A right to counsel or counsel substitute throughout the process.
9. A review of the need for detention prior to the hearing.
10. Stay or postponement of penalty, pending appeal at board of discretion.
11. Case findings including reasons and disposition in writing.
12. The summary of hearing proceedings, for review and appeal will be available to the inmate.

GRIEVANCE PROCEDURE:

- A. A grievance procedure shall exist for inmates to file written complaints concerning personal health and welfare or the operations and services of the Jail Facility. The following procedure shall be used.
 1. Present your grievance, in writing, to the on-duty Correctional Officer, he/she will attempt to rectify the situation.
 2. If you are not satisfied with Correctional Officer response, direct a written grievance to the Assistant Chief of Corrections or Chief of Corrections.
 3. If you are not satisfied with this response, you can send a written grievance to the Sheriff.

(20)

- B. All responses to grievances will be in writing and returned to you within five (5) days, excluding weekends and holidays.
- C. The use of the grievance process does not prevent you from seeking legal remedies.
- D. You must sign any grievance that is submitted.
- E. Use of the grievance process will not be held against you. Grievance information will not be put in your file.
- F. Disciplinary actions are not grievable. You must appeal these decisions.
- G. The following shall never be imposed as punishment:
 1. Limits on food.
 2. Restrictions on religion.
 3. Access to lawyers, and other officials involved in the inmate's legal dealings.
 4. Medical care.
 5. Basic hygiene care.
 6. Mechanical restraints or chemical agents.
 7. Removal of clothing or jail bedding.
 8. Limits on mail correspondence.

(21)
DISCIPLINE
PROCEDURE

The Jail Administrator or the Sheriff of the Becker County Sheriffs Office may issue amendments and/or supplements to this code at any time. Notice of any amendments and/or supplements to this code shall be provided to inmates in a manner determined by the Jail Administrator. No amendments and/or supplements will become effective until fifteen days after publication and notice to the inmates.

All inmates in the custody of the Becker county Jail shall be subject to this code. All violations of this code shall be punishable as disciplinary violations. In addition to being punishable by this code, all inmates in the custody of the Becker County Jail are subject to all federal, state and local laws of the United States. If a violation of this code occurs, an inmate shall be subject to provisions of this code as well as to the applicable law. When an inmate allegedly commits an act covered by criminal law, the case will be referred to the Becker County District Court for consideration of prosecution.

VIOLATIONS/DISCIPLINE PLAN:

Violations are classified as minor or major according to the following descriptions:

Minor Violations:

A Minor violation is an infraction committed by the inmate. It can be resolved without a formal hearing and

(22)
 sanctions imposed. Minor violations include acts, which do not constitute a present and immediate threat to the security of the facility, its staff, inmates, visitors, or the inmate who committed the violation. Violation of minor offenses may lead to disciplinary action following the filing of a violation report by any staff member.

Minor Violation Penalties:

1. Loss of recreation privileges. (See below)
2. Loss of canteen privileges. (See below)
3. Loss of visiting privileges. (See below)
4. Loss of TV privileges. (See below)
5. Loss of 'good time'.

*First offense: Up to three days

*Second Offense: Up to five days

DEFINITIONS OF MINOR VIOLATIONS:

1. **Unauthorized Use of Property:** No prisoner shall be in possession of another's personal property or the Becker county property without permission of the rightful owner or authorization of staff. This regulation differs from the possession of contraband and deals with the question of rightful use of property.

2. **Unauthorized Use of Telephone:** No prisoner shall use a telephone outside of his cell-block without specific authorization from staff on duty.

3. **Verbal Abuse:** No prisoner shall express profanity or obscenity directed at another nor make disrespectful remarks against the character of another person, insult or direct insults to another person, or make efforts to

(23)
intimidate anyone with remarks that have a threatening implication.

4. Creating a Disturbance: No prisoner shall create a disturbance by yelling, banging utensils, using obscenities or in any other manner create loud disturbing noises.

5. Use of Intoxicants: No prisoner shall inject or inhale any substance, which has intoxicating effects. Any inmate found to behave in any manner, which demonstrates being under the influence of an intoxicating substance shall be in violation thereof.

6. Vandalism: No prisoner shall destroy or deface the jail, public or personal property.

7. Gambling: No prisoner shall engage in lottery, betting or chance contracting.

8. Late Return from Release: Any prisoner participating in any release program shall return at the designated time period.

9. Conspiracy: Any prisoner who conspires with another to commit a violation of jail rules is guilty of conspiracy.

10. Accessory: Any prisoner who assists another or joins with another in the commission of a prohibited act either during or after the initiation of the act may be found guilty of being an accessory of the fact.

11. Operating Security Devices: No prisoner shall operate, impede, sabotage or render ineffective jail security devices. This includes but is not limited to key slots, cell doors, or other locking mechanisms.

(24)
12. Misuse of Program Areas: This includes the library, kitchen, interview room, visitor's room, and any other functional areas of the jail including any equipment in those areas.

MAJOR VIOLATIONS:

Major Violations include repeated minor rule infractions for a case where a determination is made that the remedy for a minor rule infraction serves no deterrent effect. In addition, rule violations are considered major when the act presents an immediate threat to the security of the facility, its staff, inmates, visitors, or the inmate committing the violations. Such violation will result in informal and formal disciplinary actions. Major offenses may result in administrative segregation in maximum security preceding any charges filed for hearing or formal action, not to exceed seventy-two hours without notice of hearing.

Major Violation Penalties:

1. Filing of formal charges.
2. Lockup, maximum limit of fifteen days. A full review every seven days if problematic.
3. Loss of all release privileges including work release and recreation release.
4. Loss of all earned 'good time'.
5. Loss of recreation privileges; maximum limit of thirty days.

(25)

Major Violation Definitions:

1. **Homicide:** No prisoner shall kill or contribute in any way to the death of another person.
2. **Assault:** No prisoner shall assault another by an act, attempted act, or threat of an act which if carried out, would cause pain, injury, or bodily harm, or fear of pain, injury or bodily harm. No prisoner shall force another to engage in prohibited sexual behavior such as intercourse, sodomy, masturbation of others, forced masturbation or any homosexual behavior.
3. **Holding Hostage:** No prisoner shall take or hold another person and/or subject other persons to control for any purpose whatsoever.
4. **Theft:** No prisoner shall steal anything from another or steal any property whatsoever, including removing property out of an assigned area without permission.
5. **Smuggling:** No prisoner shall transport any contraband item around, into or out of the jail.
6. **Arson:** No prisoner shall by means of fire or explosives intentionally destroy or damage property of this jail or risk danger to another person whether he be a prisoner, staff or civilian.
7. **Escape or attempted escape:** No prisoner shall attempt to escape. Any efforts, which suggest an attempt to leave the jail and its premises without the custody of a supervising person and without legal authorization to do so, shall be considered as an attempted escape. This includes failure to return following any release program.

(26)

8. **Riot or Inciting a Riot:** No prisoner shall act in a manner which will likely lead to the arousal of emotions on the part of other inmates so as to create the probability of their acting beyond the control of the staff member in charge.
9. **Threatening bodily harm:** No prisoner shall behave in any manner that is threatening to others; behavior such as brandishing a weapon, a menacing posture, crowding around or gathering during a dispute, making a threat, veiled or direct or other intimidating remarks. No prisoner being moved between or within any units of the jail shall resist such movement by any threat of physical resistance or passive refusal to move or any intimidating remarks.
10. **Possession of contraband:** No inmate shall possess illicit and /or unauthorized items considered contraband. Weapons are defined as guns, clubs, knives or other pointed/sharpened or cutting instruments; items not normally considered or controlled in such a manner that use as a weapon can be inferred. Liquor or drugs are defined as any nonprescription chemical agent including alcoholic beverages or their ingredients, prescribed medication in excess of that allowed, any other substance which may be inhaled, injected, or ingested for intoxicating or depressant effect or drug paraphernalia. Escape paraphernalia is defined as rope, keys, tools, clothing, disguises or any other materials, which by nature of location suggest use for escape.
11. **Misrepresentation:** no prisoner shall falsify a report, or give a false statement to misrepresent a fact as to misappropriate money, services, or instrument to aid such personal property. This includes destruction rendering security devices inoperative.

(27)

12. Destruction of Property: No prisoner shall destroy Becker County Jail public or personal property. This includes destruction rendering security devices inoperative.

(28)

FOLLOWING ITEMS INMATES ARE ALLOWED TO TAKE TO PRISON:

STATUTE #642.08

POLICY: THE INSPECTION AND ENFORCEMENT UNIT OF THE DEPARTMENT OF CORRECTIONS.

The inspection and enforcement unit of the Department of Corrections will interpret MCAR 2.175 E 5 to permit the use of female staff in the supervision of male prisoners. Security has many facets, including but not limited to making security rounds and doing counts in living units and cell halls that can be performed equally well by correctional counselors of either gender. Except in emergency situations, correctional counselors of the opposite gender shall not be assigned to the doing of strip searches or pat down searches.

Inmates do not have a right to Legal Counsel for disciplinary proceedings. *Baxter v. Palmigiano*, 425 U.S. 308 (Supreme Court 1974) No right to counsel in disciplinary proceedings. Rights to present evidence and to cross-examine may be limited by institution's need for security and order.

16. **Becker County jail no longer accepts stamps*, envelopes*, paper*, or magazines of any kind to be brought in from the outside.** As always, inmates will be able to purchase them* on the canteen. Magazines have been purchased for inmates to read. Should any of these items be sent or brought in, they will be refused or placed in the inmate's property.
17. You will not throw candy wrappers or other trash into the toilets, floor drains or on the floors in any areas of the jail.
18. Meals will be announced and served by staff. Residents must pick up their own tray, or they will not receive the meal.
19. Televisions will be furnished in each block as a privilege. Residents in that block are responsible for the TV. Any damage or misuse of this privilege will cause it to be removed. Television hours are 06:30 A.M. to 11:00 P.M. only. This includes Dorms 1 & 2. The volume will be kept at a reasonable level. There will be NO fighting over the channel selections, majority rules! The remote control for the TV will be left on the dayroom table when not in use.
20. 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.
21. All incoming and outgoing mail is subject to search, except for attorney-client mail. Leave all other envelopes unsealed.
22. Inmates will put their first and last names on all out-going mail, or it will not be processed. Jail address is: **P.O. Box 702 Detroit Lakes, MN 56502**
23. IF YOU ATTEND ANY OF THE FOLLOWING PROGRAMS:
CHURCH SERVICES - BIBLE STUDY - G.E.D. - C.D. - A.A.
**YOU WILL BE EXPECTED TO PAY ATTENTION, AND NOT BE DISRUPTIVE IN ANY WAY;
OR YOU WILL NOT BE ALLOWED TO ATTEND.**

INMATE CO-PAYMENT FOR HEALTH CARE

Any inmate of the Becker County Detention facility will be charged a co-pay for over-the-counter medication, medical, dental and mental health care services that are inmate initiated. No inmate will be denied medical care services because of inability to pay, but a dept will be entered against the inmate's account. If the inmate receives any funds, it will automatically be deducted from his/her account to pay for the outstanding co-pay assessment. The co-pay fees are:

Inmate request for care (nurse request): \$5.00

Refusing to go to scheduled or requested appointments: \$5.00

Over-the-counter medications: (See Canteen List for amounts)

There will be NO charge for staff initiated visits, prescription medication, TB screening assessments and regulated health care services. A grievance regarding questions disputing a co-pay charge will be presented to the Facility Administrator in writing.

1 STATE OF MINNESOTA

IN DISTRICT COURT

2 COUNTY OF BECKER

SEVENTH JUDICIAL DISTRICT

3 State of Minnesota,)

4 Plaintiff,)

5 vs.)

OMNIBUS HEARING

FILE NO. CR-07-171

6 Kenneth Eugene Andersen,)

7 Defendant.)

8 TRANSCRIPT OF PROCEEDING

9 The above-entitled matter came on for hearing
10 before the Honorable Peter M. Irvine, Judge of the
11 District Court, in the Courthouse, in the City of
12 Detroit Lakes, County of Becker and State of Minnesota,
13 on the 7th day of March, 2008.
14

15 A P P E A R A N C E S

16 Mr. Al Zdrazil
17 Assistant Attorney General
18 Bremer Tower, Suite 1800
19 445 Minnesota Street
20 St. Paul, MN 55101-21343
21 and

FOR THE STATE

Mr. Michael Fritz
Becker County Attorney
P.O. Box 749
Detroit Lakes, MN 56502-0749

FOR THE DEFENDANT

22 Rory P. Durkin
23 Attorney at Law
24 403 Jackson St., Suite 305
25 Anoka, MN 55303

REPORTED BY LAVONNE J. RICHARDS - RMR, CRR, CPE

I N D E X

WITNESS PAGE

DANIEL BAUMANN

Direct Examination by Mr. Durkin	8
Cross-Examination by Mr. Zdrazil	41
Redirect Examination by Mr. Durkin	55
Recross-Examination by Mr. Zdrazil	60
Direct Examination by Mr. Durkin	62
Cross-Examination by Mr. Zdrazil	82

GLEN FLADMARK

Direct Examination by Mr. Durkin	86
Cross-Examination by Mr. Zdrazil	90

JOSH BOGATZ

Direct Examination by Mr. Durkin	97
Cross-Examination by Mr. Zdrazil	98

JOSEPH MCARTHUR

Direct Examination by Mr. Durkin	114
Cross-Examination by Mr. Zdrazil	124
Redirect Examination by Mr. Durkin	134
Recross-Examination by Mr. Zdrazil	138

DANIEL BAUMANN

Direct Examination by Mr. Zdrazil	139
Cross-Examination by Mr. Durkin	143

EXHIBIT NO.	DESCRIPTION	MK'D	OFF'D	REC'D
-------------	-------------	------	-------	-------

1	Mike Ladue's Affidavit	95	95	95
2	Jail handbook	139	139	139

1 The following proceedings occurred,
2 to-wit:

3 **THE COURT:** This is the case of State of
4 Minnesota versus Kenneth Eugene Andersen. Defendant is
5 present, and with him is?

6 **MR. DURKIN:** Good afternoon, Your Honor.
7 Rory Durkin, D-U-R-K-I-N, representing Mr. Andersen who
8 stands present -- or sits presently before you.

9 **THE COURT:** You pronounce your last name
10 Durkin?

11 **MR. DURKIN:** Durkin.

12 **MR. ZDRAZIL:** Good afternoon, Your
13 Honor. Al Zdrazil from the Minnesota Attorney General's
14 Office representing the State of Minnesota.

15 **THE COURT:** And your name is pronounced
16 Zdrazil?

17 **MR. ZDRAZIL:** Zdrazil, yes, Your Honor,
18 just like the country Brazil but with a D sound.

19 **THE COURT:** All right. Thank you.

20 And Mr. Fritz is present, as well, from
21 the County Attorney's Office.

22 This is the time and place for an
23 omnibus hearing. There have been a number of motions
24 filed by the Defendant, and I have reviewed those
25 motions and documents attached. And for purposes of

1 any other sort of discovery that is appropriate when it
2 is requested. At this point in time we will let you see
3 what you have and we will address it down the road.

4 Anything else?

5 **MR. DURKIN:** I do. I have --. Your
6 Honor, I have another motion. I believe I -- you should
7 have a copy of it in your file. I think it is motion to
8 dismiss or to ROR Mr. Andersen or significantly reduce
9 the bail by virtue of Minnesota United States
10 constitution violations, as well as a violation of
11 Minnesota Statute 481.10, and I believe I sent a -- I
12 sent a quick basically statement of facts and a quick
13 little memo. It could have been a little more thorough
14 but I was pretty pressed for time when I discovered the
15 crux of what was happening.

16 The bottom line, Your Honor, is I
17 received -- I received --. You know, what is funny is
18 Mr. Andersen and I and our team have felt for a long
19 time that our attorney/client privilege has been broken
20 and violated by the State. You know, we just knew
21 because it seems like everything that we did and have
22 done, the State has been there like one step ahead of
23 us. We talk on the phone and we talk about witnesses
24 that we're going to go see. The State will have
25 interviewed that witness like an hour beforehand. Just

1 a lot of little things. And at one point it was so bad
2 that I said you know what? Let's do something here.
3 Let's see if they are listening in on our attorney phone
4 calls, or if they are listening on the private, you
5 know, Mr. Fladmark is a necessary third party,
6 attorney/client privilege clearly the case law rule the
7 attorney/client privilege goes with him. Yet I knew
8 that they were listening in on the conversations that he
9 was having. So I said you know what? I said, Glen, why
10 don't you tell Kenny -- and I had never come up and met
11 him in jail and I hadn't really seen him in jail. My
12 associate, Mr. Bulmer, did most of that. So I said to
13 him, I said you know what? Why don't you tell Kenny
14 that I feel bad for him that he has been jailed for so
15 long. The next time he comes up I am going to bring him
16 some drugs, sneak him in some drugs. And I tell you,
17 Your Honor, the very next day deputies started coming up
18 to Mr. Andersen and asking him, hey, when is other
19 lawyer, Rory Durkin, coming up to you? Very suspicious.
20 Can't prove anything, but it is still super suspicious.

21 So I am preparing for this hearing, la,
22 la, la, and I get this memo which I attached to my
23 motion, oh, and also there was some significant problems
24 back in December with respect to the phone company that
25 is used by the jail and getting the right numbers on.

1 That is why we thought there was a problem as well, but
2 then I get this letter, and it is Exhibit No. 1 attached
3 to my motion, and I look at the last page and I am just
4 absolutely dumfounded. I mean I am so dumfounded that I
5 don't know what to do because it says cell number
6 612-384-7003, 612-272-0885, and 612-636-2576 were
7 removed from the no record list, meaning that they are
8 subject to monitoring and recording from the jail.
9 384-7003, attorney William Bulmer. 612-272-0885, Rory
10 Patrick Durkin. 612-636-2576, Mark Gabriel Giancola, my
11 partner. Since December 5th. And Mr. Andersen has
12 called on weekends. We have spoke for hours on the
13 weekends and at nights and on my cell phone because we,
14 you know, as attorneys you travel around and are always
15 on the road. That is probably a vast majority of our
16 communications. And I get this motion and I am
17 dumfounded. Now everything makes sense. It is not in
18 the jail handbook. In fact, what is in the jail
19 handbook is that that information is specifically
20 protected, and it has not been. There is absolutely no
21 way that he can participate in his defense, that I can
22 speak with him, and that I can plan a defense and we can
23 have a fair trial because the jail has been and is
24 listening to our phone calls and monitoring our
25 meetings. And I'll tell you something else, Your Honor.

1 If you go up into that jail and you go into those
2 interview room, the little joke between the inmates is,
3 hey, attorney, bring up some duct tape because they
4 monitor us. And you go look at those little monitors
5 and those intercoms and there is little tiny square
6 pieces where people have put duct tape, ripped off, duct
7 tape, ripped it off, duct tape, ripped it off because we
8 all know. Can I prove it? No. But I do have this in
9 writing -- in writing that supports my motion. And, if
10 necessary, I mean I believe I subpoenaed Mr. McArthur
11 with respect to that issue, and I think I requested that
12 he bring the jail handbook, the little slip of paper
13 that is above the jail phone and something else that my
14 brain is not remembering right now, but I will remember
15 it in a moment. So I guess maybe I could call him to
16 the stand right now.

17 **THE COURT:** All right.

18 Is Officer McArthur out there?

19 **JOSEPH MCARTHUR**, a witness, called by the
20 Defendant, being first duly sworn, testified on his
21 oath, as follows:

22 **THE COURT:** State your name and spell
23 your last name, please.

24 **THE WITNESS:** Joseph Henry McArthur,
25 M-C-A-R-T-H-U-R.

1 THE COURT: Mr. Durkin.

2 BY MR. DURKIN DIRECT EXAMINATION

3 Q. You are Joe McArthur; correct?

4 A. Yes.

5 Q. My name is Rory Durkin. I represent
6 Mr. Andersen. I don't believe we have ever met; is that
7 fair?

8 A. Yes.

9 Q. But we have spoke on the phone a couple
10 times; is that correct?

11 A. Yes.

12 Q. What -- and I want to be as respectful
13 as I can, so I am wondering what would you -- is
14 Captain -- Captain probably the best title for you?
15 Should I just call you Captain McArthur; is that okay?

16 A. That would be fine.

17 Q. All right. Captain McArthur, you are in
18 charge of the jail calls, is that correct, or the jail
19 phone system and right now monitoring the jail calls and
20 what numbers get put into the system; is that correct?

21 A. Yes. Well, yeah.

22 Q. Can you explain, and maybe to me,
23 Mr. Zdrazil, and the Court how that process works?

24 A. The process for putting --. Could you
25 be more, I guess, specific on? Do you mean

1 attorney/client calls?

2 Q. I go to jail for whatever 'cuz I am bad
3 in court and I have to spend a couple weeks in jail.
4 There is some phone calls that I want to make and some
5 numbers that I want to call out. Do you understand
6 that?

7 A. Yes.

8 Q. Now, some of those numbers might be
9 protected by the attorney/client privilege, my
10 attorney's phone number; is that a fair statement?

11 A. Yes.

12 Q. And then others might be subject to
13 recording, the phone calls to my brother or my girl; is
14 that a fair statement?

15 A. Yes.

16 Q. Okay. Now, how --? You tell the
17 inmates at the beginning and give them a handbook;
18 correct? A jail handbook?

19 A. Yes, we do.

20 Q. And that jail handbook explains the
21 phone call procedure; correct?

22 A. It explains the phone call procedure,
23 yes.

24 Q. And it tells them that phone calls to
25 their attorney are protected by the attorney/client

1 privilege and are not subject to recording; correct?

2 A. No.

3 Q. It doesn't say that?

4 A. No, it doesn't.

5 Q. Do you have --? May I have just a
6 second, please?

7 A. Yes.

8 Q. In fact, I requested in my subpoena that
9 you bring that. Do you have a copy of that handbook?

10 A. Yes, I do.

11 Q. Would you mind grabbing it? In fact,
12 would you mind grabbing --? I think I --. I am sorry.
13 I'll have it in a second. Here we go. Any and all
14 records and/or information related to jail calls of
15 Kenneth Andersen, any and all calls made by Kenneth
16 Andersen that were monitor recorded, copy of the inmate
17 handbook and copy of inmate phone call phone use sign
18 posted in the jail. Did you bring those things?

19 A. Yes, I did.

20 Q. Can you grab them and it would make it
21 easier for you so you don't keep going back and forth in
22 getting them?

23 MR. DURKIN: Is that all right, Your
24 Honor? The judge said yeah.

25 THE COURT: Who has them?

1 **THE WITNESS:** I have them -- I have them
2 out in the hallway. Can I go get them?

3 Q. (Mr. Durkin continuing) Do you need a
4 second?

5 A. Okay. And what specifically are you
6 requesting?

7 Q. Can you go to jail handbook where it
8 talks about attorney phone calls, or the inmate
9 handbook? I am sorry.

10 A. Okay.

11 **MR. DURKIN:** May I approach?

12 **THE COURT:** You may.

13 Q. (Mr. Durkin continuing) Can you read
14 No. 3?

15 A. Yes. It says, "Any non-attorney/client
16 privilege phone calls made from Becker County Jail will
17 be monitored and/or recorded."

18 Q. Basically what you tell the inmates is
19 that their attorney/client privilege phone calls won't
20 be recorded; is that correct?

21 A. It doesn't say anything about that.

22 Q. But that is what you tell them; is that
23 correct?

24 A. Not to my knowledge, no.

25 Q. So you don't tell them --? So do you

1 tell them that you are going to record their attorney
2 calls?

3 A. I don't book people into the jail.

4 Q. Okay. Well, you are in charge of the
5 jail telephone policy; correct?

6 A. I am in charge of the jail, yes, but
7 I --

8 Q. And the telephone policy? Yes or no,
9 please.

10 A. Yes.

11 Q. Now, do you tell the inmates that you
12 are going to record their attorney calls?

13 A. I cannot answer that question.

14 Q. Is it in -- is it in that inmate
15 handbook?

16 A. No. No.

17 Q. Okay. It just says all
18 non-attorney/client privileged calls will be recorded;
19 correct?

20 A. Yes.

21 Q. Okay. Do you make it a habit to
22 record --? I take that back. Strike that. Now, do you
23 have a copy of that sheet that hangs over the phone?

24 A. I am not quite sure what you are talking
25 about, a sheet.

1 Q. Yeah. There is a piece of paper in the
2 jail area inmate phone?

3 A. Like this one (indicating)?

4 Q. Yeah. Is that it? May I have it for a
5 second?

6 A. There is actually two.

7 Q. I don't need that. That's all right.
8 Forget about that for right now. I am showing you a
9 letter. On the bottom of it is marked 2830. It is just
10 what is called a Bates number, 2830 and 2831. Do you
11 remember that letter?

12 A. Yes.

13 Q. And you wrote that to Mr. Fritz; is that
14 correct?

15 A. Yes.

16 Q. And he is the county attorney right now
17 up here in Becker; right?

18 A. Yes.

19 Q. Now, if I could take you to 2831 of that
20 letter, you indicated on No. 3, can you read that for
21 me?

22 A. It says, "Cell phone numbers of
23 612-384-7003, 612-272-0885, and 612-636-2576 were
24 removed from the no record list on December 5th, 2007."

25 Q. Thank you. Now, what that means is that

1 means that those numbers are subject to monitoring
2 and/or recording; is that correct?

3 A. They are subject to recording.

4 Q. But not monitoring?

5 A. Yes and no.

6 Q. Okay. Can you explain that for me?

7 A. They -- those calls would be subject to
8 random monitoring by jail staff in the usual course of
9 their duties when they randomly look through jail calls.

10 Q. Because I mean it is fair to say that at
11 some point you guys were ordered or requested or
12 suggested that you monitor Mr. Andersen's phone calls
13 and record them all; isn't that fair?

14 A. No.

15 Q. It is not fair to say that?

16 A. That's correct.

17 Q. So then I don't have from you --. So is
18 it your testimony right now on the stand that I have not
19 received months and hours and hours and hours of
20 recorded telephone conversations made by Mr. Andersen?
21 Is that your testimony?

22 A. I believe your question is that we were
23 asked to do it. We were not asked to do it. It is a
24 matter of standard policy and procedure that the
25 recording is done. No one has asked us to record them.

1 It is just a normal course of what happens up there.

2 Q. perfect. So it is a normal course of
3 what happens up there. His phone calls get recorded;
4 right?

5 A. Yes, every inmate.

6 Q. Okay. But his, too, Mr. Andersen's?

7 A. Yes.

8 Q. Okay. When they are not on the no
9 record list, they get recorded pretty much?

10 A. Yes.

11 Q. Okay. And the three numbers were taken
12 off the no record list on December 5th, 2007; is that
13 correct?

14 A. Yes.

15 Q. Okay.

16 MR. DURKIN: May I have just a second,
17 Your Honor, please?

18 Q. (Mr. Durkin continuing) Now, when you
19 make a recording of these calls you generate a report
20 with the -- with the recording; is that correct?

21 A. Could you clarify that a little more?

22 Q. Sure. You record a --. Let's say you
23 record a phone call; okay? Are you with me?

24 A. A little bit.

25 Q. And then --. Well, you just told me you

1 record every inmate's phone; right?

2 A. Recording is done automatically.

3 Q. Okay. It is done automatically. Oh, so
4 if it is not on the no record list, it is recorded
5 automatically; is that --? I am sorry. I misunderstood
6 that. Is that how that goes then?

7 A. I don't know how to answer that. I
8 don't know what the --. Every inmate -- every inmate's
9 calls are subject to recording unless they are on the no
10 record list.

11 Q. Well, now -- and don't get mad or swear.

12 A. No, I am not mad.

13 Q. I am not trying to give you a hard time.
14 I am just trying to understand.

15 A. Yup.

16 Q. Because you just said --. And I'll
17 speak slower. And they just -- sorry. And they just
18 said -- you just said that they were automatically
19 recorded, but then you also said that they were subject
20 to recording. And that is two very different things.
21 'Cuz if they are automatically recorded, there is no
22 subject to. They are just automatically recorded;
23 right?

24 A. I don't remember saying subject to, but
25 they are automatically recorded.

1 Q. Perfect. So you get a phone call that
2 has been automatically recorded and you are going to
3 send that recording to Mr. Zdrazil or Mr. Fritz. You
4 don't just send them a CD; right?

5 A. No.

6 Q. You will put a time and a date and who
7 the phone call was to and roughly maybe -- maybe how
8 long the phone call is; fair enough? Sometimes?

9 A. If I completed a report it would be
10 information subject to that, yes.

11 Q. Perfect. And sometimes you will even --
12 you will get -- and I don't know, you will get somebody
13 to transcribe it; is that true?

14 A. They will be transcribed by officers,
15 yes.

16 Q. Okay. And then that -- okay. So they
17 will be recorded, a report generated, and sometimes a
18 transcript generated as well; correct?

19 A. Certain calls that do get monitored,
20 yes.

21 Q. But still automatically recorded; right?

22 A. Yes.

23 MR. DURKIN: I don't have any further
24 questions. Thank you very much.

25 THE COURT: Mr. Zdrazil.

1 **MR. ZDRAZIL:** Thank you, Your Honor.

2 **BY MR. ZDRAZIL**

CROSS-EXAMINATION

3 Q. Captain McArthur, the phone system at
4 the jail -- let's clarify. The jail is here in Detroit
5 Lakes; is that correct?

6 A. Yes, it is.

7 Q. Is the phone system operated by a
8 private contractor contracted with the county?

9 A. The --. Yeah, the phone -- the phone
10 system is put in by a private contractor, and they are
11 the ones that keep it up and running, recording the
12 calls, different things like that; yes.

13 Q. And they maintain the equipment?

14 A. Yes.

15 Q. And where are those recordings then
16 kept? Where is the hard drive or the tape player?

17 A. Is up in the jail control.

18 Q. So the recording is actually kept here
19 in Becker County?

20 A. Yes, that's correct.

21 Q. Now, you talked about deputies randomly
22 monitoring phone calls.

23 A. Yes.

24 Q. Tell us about that.

25 A. As part of jail security to make

1 sure --. There are several, a few different reasons why
2 the jail phone calls are monitored. And, you know, the
3 main ones are for safety and security of the jail.
4 Sometimes we have inmates that have personal problems
5 and they may be thinking about hurting themselves, and
6 the correctional officers listen to those type
7 conversations to -- to discover anything like that that
8 might be happening, or any plan for escape or anything
9 like that. There is basically two different ways that
10 they listen. There is either a random sampling. There
11 is no scientific method used to that, to my knowledge,
12 what I have been told. It is just that the correctional
13 officer will go in from time to time. They will just go
14 into different cell block recordings and they will just
15 click on different things to see if they would run
16 across a conversation where somebody is talking about
17 those type of things. And then the second type is where
18 if they get specific information about an inmate who is
19 planning to harm themselves, or may be making plans for
20 escape, or to hurt another correctional officer or
21 something like that, then they will start specifically
22 singling out that inmate's cell block and they will
23 start listening to the majority of the calls from it.
24 And those are the correctional officers' duties in
25 listening to jail phone calls.

1 Q. And the correctional officers are people
2 other than deputies; is that correct?

3 A. Yes, that's correct.

4 Q. They are people who run the jail and
5 maintain the jail, move the inmates in and out of the
6 jail and around the jail?

7 A. Yes, that's correct.

8 Q. Now, if --. Is there any policy in the
9 Sheriff's Department governing those correctional
10 officers as to what they should do if they are listening
11 to a phone call and they become aware that it is a phone
12 call between an inmate and the inmate's attorney?

13 A. Yes. They are aware and are told that
14 they are to terminate that call and not listen any
15 further.

16 Q. With regard to this case, have you
17 become aware at any time during this case of any
18 correctional officer who has listened to a phone call
19 between the Defendant and his attorney?

20 A. No.

21 Q. Have you heard any information or
22 observed anybody doing any investigation that you have
23 in any way thought might have been initiated because
24 somebody had overheard a conversation between Ken
25 Andersen and his attorneys?

1 A. No, I have not.

2 Q. Now, you mentioned that there has also
3 been specific monitoring of Ken Andersen's phone; is
4 that correct?

5 A. Yes, that's correct.

6 Q. And who has specifically been monitoring
7 his phone calls?

8 A. It would be myself and Agent Baumann.

9 Q. Are you the only two people who have
10 been specifically listening to Ken Andersen's phone
11 calls?

12 A. Yes and no. Yes, we are the main ones
13 involved in it, and then on occasion when Agent
14 Baumann --. Everything that was heard would be
15 channeled to him. Initially he took all the calls and
16 he went through them. At one point through this I was
17 filtering out some of the calls. If I heard some, I
18 would give them to him and then --. Well, let me
19 restate that 'cuz that is not correct. Initially he
20 took all the calls, and then around the beginning of
21 July it was becoming too much for him to do, so I
22 actually started going through some of the calls then
23 and just filtering out some of the missed calls and
24 other inmates that are in the cell and filtered them
25 out, and then I would --. He would stop by the office.

1 I would give them those calls, and then he would take
2 them and continue to go through them and monitor them,
3 until about August 16th or August 17th. I would have to
4 refresh my memory in looking at it again. At that time
5 he was advised -- he told me he was advised he didn't
6 have to do any more constant monitoring of the calls.
7 And so then at that time I agreed to -- I would go
8 through them, listen to the ones where he was talking to
9 other citizens and family members and stuff like that,
10 and then I would report to him then if I heard anything
11 that -- if I thought it was evidentiary value or
12 something like that. And that was starting around the
13 17th of August.

14 Q. And then, Captain McArthur, has anybody
15 besides you and Dan Baumann done this initial screening
16 of the Defendant's calls, clearly once you found the
17 call of interest somebody else might listen to it, and
18 it may have been disclosed to defense, but the initial
19 screening has anybody besides you and Dan Baumann done
20 that?

21 A. No.

22 Q. If you become aware that a phone call is
23 between Kenneth Andersen and his attorneys, what do you
24 do?

25 A. I terminate that call. I stop listening

1 immediately, and then I delete that call from the system
2 or from --

3 Q. Now, in the process of doing this, have
4 you heard anything in any phone calls between the
5 Defendant and his attorneys, or for that matter, --.
6 Well, let me ask. What if you find out it is a call
7 between the Defendant and investigator hired by the
8 attorneys, what do you do?

9 A. I don't listen to those either.

10 Q. In the process of this, have you heard
11 anything in those calls, maybe before you realize it is
12 to an attorney or to the investigator? Have you heard
13 anything that is of any relationship to this case, any
14 information about this case, about the facts of the
15 case, witnesses?

16 A. No.

17 Q. Have you initiated any sort of
18 investigation because of anything you have heard in
19 those calls?

20 A. No.

21 Q. Now, if an inmate or an attorney wants
22 their number blocked, and let's clarified what blocked
23 means. If a number is blocked, am I correct that that
24 is entered into the computer system that records the
25 calls? And if those numbers are dialed, there is just

1 no recording made?

2 A. That's my understanding, yes, is that
3 that number is --. I don't do the process of putting
4 those numbers in, but the jail staff does, and then that
5 number is no longer recorded is my understanding.

6 Q. How does an inmate or an attorney get a
7 number blocked?

8 A. In order for an inmate to get a number
9 blocked they have to make a request for that number to
10 be blocked.

11 Q. Do they do that in writing or verbally?

12 A. Well, that has changed from the time
13 that this has started to the time since he has been in.
14 And I had talked with the old jail administrator who had
15 retired in November. The usual way to do it was for the
16 inmate to actually -- what they would have them do is
17 have the inmate call Reliance to request it, the number.
18 Reliance would do the investigation into assuring that
19 that number is an inmate number, and then -- or excuse
20 me -- is an attorney number, and then once they confirm
21 that, then that number would be put in, I think an
22 attorney in good standing, that it was actually a law
23 firm's number, and then that number would be put in as a
24 blocked number.

25 Q. And Reliance is the private company that

1 manages the phone system?

2 A. Yes.

3 Q. How and when did that procedure get
4 changed?

5 A. Sometime in 2007, and I don't know the
6 exact date they did a software upgrade to the Reliance
7 system. And then what has been explained to me, in
8 talking to a Reliance representative, is that when that
9 happened, they changed the way that those numbers were
10 blocked. And at that time Reliance still took the --
11 can take the initial call for the request for the
12 blocking, and then they still do the investigation into
13 it, to make sure it is that proper number and stuff, and
14 then they put that into --. Once they confirm it is
15 attorney's number, they put it into a blocked status
16 then at that time, well, a free status, and then I think
17 it is automatically blocked. And then at that time the
18 jail staff has to go in and make the final
19 determination, or the jail itself, as to if that number
20 will remain blocked or not blocked.

21 Q. So that is an additional step over what
22 there was before?

23 A. Yes.

24 Q. Do you know when the request was put in,
25 and specifically I won't list them all again, but the

1 numbers that Mr. Durkin recited to you on the record?

2 A. Yes, I do.

3 Q. Do you know when the request was made to
4 block those numbers?

5 A. To my knowledge a request wasn't made
6 to --. That request to block those numbers, to my
7 knowledge, was made on December 3rd.

8 Q. And on December 5th they were unblocked?

9 A. Yes. It is my understanding in talking
10 to the jail staff on this, when that request come in, it
11 was by phone to a member of the jail staff who wrote the
12 numbers down. And then that jail staff person then
13 called Reliance and gave them those numbers. And then
14 at that time they were still under the impression that
15 that's just what they did. And they called Reliance
16 with the numbers and then Reliance did the stuff behind
17 it. But what Reliance did is Reliance did that initial
18 check, but then they told the jail it is up to you to
19 decide if you are going to permanently block that number
20 or not. And they had to make the decision at that time
21 to do the final blocking or unblocking of those calls.

22 Q. And because they were cell phones they
23 unblocked them?

24 A. Yes. Sergeant Rostad came to my office
25 with the question, and he told me about the change and

1 how things are done. And then I said to him, well,
2 what's the policy of what you do with these types of
3 phone calls? And he says we block -- we block
4 attorney/client office numbers but we don't block -- we
5 don't block cell phone numbers.

6 Q. Why not cell phone numbers?

7 A. Of anybody.

8 Q. Why not cell phone numbers?

9 A. I asked him that, and he said the reason
10 is it is again back to a jail security risk, and those
11 numbers have the potential to be used in ways they
12 shouldn't be used and so they still want those numbers
13 not blocked for jail security reasons.

14 Q. Were there also then on December 5th and
15 6th two phone numbers, specifically 763-421-1441 and
16 763-684-0627, that were blocked?

17 A. I don't remember the numbers
18 specifically, but I remember telling them that, to block
19 the office numbers and to block the private investigator
20 number because I had been told that even though normally
21 the private investigator's number is not subject to be
22 blocked, in this case the County Attorney had allowed
23 that to happen and so that private investigator's office
24 number and the two attorneys' firm numbers were put in
25 there as blocked.

1 Q. And are those numbers still being
2 blocked?

3 A. Yes. To my knowledge they haven't been
4 changed.

5 MR. ZDRAZIL: I have no further
6 questions, Your Honor.

7 THE COURT: Mr. Durkin.

8 BY MR. DURKIN

REDIRECT EXAMINATION

9 Q. Captain McArthur, does it say anywhere
10 in the jail handbook that you record some attorney calls
11 and not others?

12 A. Not to my knowledge, no.

13 Q. Did you ever tell Kenneth Andersen
14 or --? Did you ever tell Kenneth Andersen you were
15 recording his attorney calls?

16 A. No.

17 Q. Did you ever tell us you were recording
18 our attorney calls?

19 A. No.

20 Q. You ever call my office and tell us you
21 were recording our attorney calls?

22 A. No.

23 Q. So you guys just made a random decision
24 to record my calls, my associate's calls, and my
25 partner's calls with Kenneth Andersen; correct?

1 A. I made a decision based on policy of the
2 jail.

3 Q. Is that policy in the handbook?

4 A. No.

5 Q. In fact, it says all non-attorney/client
6 privileged calls will be recorded; correct?

7 A. Yes.

8 Q. That's all it says; right?

9 A. That's correct.

10 Q. So basically --. And if I can refer
11 Mr. Zdrazil and maybe Your Honor to No. 5 in my initial
12 Notice of Motion and motions, the big thick one we were
13 dealing with on the search warrant issue, page --
14 number --. The first item in that is the actual motion
15 itself. The second item in that is Affidavit of William
16 K. Bulmer, Esquire. No. 5. And then I'll just speak to
17 you, if I may, Captain McArthur. So basically our
18 office called you guys up, basically gave you the
19 numbers, the cell phone numbers, correct, and the office
20 numbers; correct?

21 A. Yes. It was --. And I believe the
22 investigator's number was on that slip, too, I think.
23 Yes.

24 Q. Perfect. And we were told that those
25 numbers were on the block list; right?

1 A. I have no idea if you were told that.

2 Q. Okay. That's fine. But then you made
3 the decision, without informing anybody involved, to
4 record the three numbers; correct? Put them on the no
5 record list?

6 A. That's not correct.

7 Q. You made the decision to put the three
8 attorney cell numbers on the no record list based on
9 policy; correct?

10 A. Yes.

11 Q. All right. So every single call that
12 Mr. Andersen has made in the past, I don't know, three
13 or four months, my math isn't that good, I am sorry, I
14 am not a mathematician, but for whatever those months
15 are, those phone calls have been recorded; correct?

16 A. If it was a cell phone, yes.

17 Q. My cell phone, every conversation,
18 whether we're talking about the rain, the weather, the
19 case or your testimony tomorrow or a trial, that's
20 recorded; correct?

21 A. Yes.

22 Q. Okay. Same with William Bulmer's;
23 correct?

24 A. Yes.

25 Q. And the same with Mark Giancola;

1 correct?

2 A. If that was his cell phone number, I am
3 not sure.

4 Q. Well, can I --?

5 A. Those three numbers, yup.

6 Q. Perfect. And the same with --. Oh, and
7 it was your testimony that you decided that you would do
8 us a favor, or Kenneth Andersen a favor, for lack of a
9 better term, you put his investigator's number in the no
10 block -- or the block list; right?

11 A. No, that wasn't what I said.

12 Q. Well, did you --? You blocked
13 Mr. Fladmark's, the private investigator, you blocked
14 his number; correct?

15 A. Yes, I did.

16 Q. But you generally said -- as a general
17 matter, the Becker County jail doesn't do that because
18 they don't believe those communications are privileged;
19 correct?

20 A. Yes.

21 **MR. DURKIN:** No further questions.

22 **THE COURT:** Mr. Zdrazil?

23 **BY MR. ZDRAZIL**

RE CROSS-EXAMINATION

24 Q. Captain McArthur, and that's because you
25 were told by the prosecutors to block that number; is

1 that correct?

2 A. That's correct.

3 Q. And just to clarify, Mr. Durkin asked
4 you if every call to a cell phone number of his attorney
5 has been recorded, and you said yes.

6 A. Yes.

7 Q. Has any call of Mr. Andersen to his
8 attorney's cell phone been listened to?

9 A. No.

10 **MR. ZDRAZIL:** No further questions.

11 **MR. DURKIN:** Not right now, Your Honor.

12 **THE COURT:** Thank you. You can step
13 down, sir.

14 **MR. DURKIN:** Oh, may I have that copy of
15 the jail handbook or do you need it? Could we enter
16 that into evidence?

17 **MR. ZDRAZIL:** Your Honor, I have
18 actually never seen the jail handbook, so I have no
19 objection as long as after I have a chance to look it.

20 **MR. DURKIN:** Of course.

21 **MR. ZDRAZIL:** I can file an objection if
22 I think there is anything in there.

23 **THE WITNESS:** I made two of them.

24 **THE COURT:** Let's mark one of them as
25 Exhibit 2, and we will receive that for purposes of this

1 hearing.

2 Are we now done with this witness?

3 **MR. ZDRAZIL:** Yes.

4 (Exhibit No. 2 was marked for
5 identification.)

6 **THE CLERK:** Exhibit 2 marked.

7 **THE COURT:** Counsel, approach, please.

8 (Discussion held at the bench off the
9 record)

10 **THE COURT:** You are done with your
11 position on the phone calls.

12 Mr. Zdrazil.

13 **MR. ZDRAZIL:** Your Honor, I will call
14 Dan Baumann.

15 **THE COURT:** All right. Just have a
16 seat, sir. I just remind you that you are still under
17 oath.

18 **THE WITNESS:** Yes, sir.

19 **BY MR. ZDRAZIL**

DIRECT EXAMINATION

20 Q. Hello again, Special Agent Baumann.

21 A. Hello.

22 Q. You --. Is it correct, Special Agent
23 Baumann, that you have been specifically listening to
24 phone calls, off and on, between you and Captain
25 McArthur have been listening to phone calls made by

1 Kenneth Andersen from the jail here in Becker County and
2 prior to him being in Becker County in I believe it was
3 Mahnomen and one other county?

4 A. In Roseau County; correct.

5 Q. And to the extent that you have been
6 listening to those phone calls, have you occasionally
7 heard a call, or more than one call, have you heard
8 calls where it becomes apparent that the Defendant is
9 talking to one of his attorneys or the investigator
10 hired by his attorneys?

11 A. Yes.

12 Q. What do you do when it becomes apparent
13 to you that he is talking to an attorney or the
14 investigator?

15 A. I immediately terminated listening to
16 those calls and then looked through the remainder of the
17 calls that I have on that CD. CDs are provided to me to
18 review and identify the other names that are the same
19 and delete those from the --. So I -- ordinarily I take
20 them from the CD, download them onto my computer and
21 then delete the calls that are consistent with attorney
22 calls.

23 Q. So the same number?

24 A. Same number.

25 Q. I am sorry?

1 A. The same number.

2 Q. Okay. And has that been true ever since
3 you started listening to phone calls made by the
4 Defendant?

5 A. Yes.

6 Q. Have you ever in the process of
7 listening to a call before it became apparent to you
8 that this was a call to one of Mr. Andersen's attorneys
9 or to the investigator, have you ever heard any
10 discussions of any information concerning this case,
11 concerning witnesses, concerning trial strategy,
12 anything that would involve the facts or the procedure
13 in this case?

14 A. No, sir.

15 Q. Have you ever as a result of anything
16 you have heard in a call between the Defendant and one
17 of his attorneys or the investigator initiated an
18 investigation or asked somebody to look into something
19 or done any investigation on your own?

20 A. No, sir.

21 Q. Have you ever, as you have been looking
22 at this case, and perhaps let me clarify. Is it fair to
23 say that all reports generated either by you or other
24 people in this case at some point would be routed to you
25 so you would, in fact, not only read your own reports

1 but read reports by other investigators in this case?

2 A. Yes.

3 Q. Have you ever in the process of reading
4 those reports ever suspected that a report or that a
5 witness was interviewed or that somebody took an
6 initiative because of something that was heard between
7 the Defendant and one of his attorneys or an
8 investigator?

9 A. No.

10 Q. On the other hand, have you in listening
11 to phone calls between the Defendant and say his mother,
12 his sister, Mike Ladue, who is not an attorney, his
13 brother, have you heard things that have prompted you to
14 initiate investigations?

15 A. Yes.

16 Q. Have you occasionally heard the
17 Defendant say things along the line when he is talking
18 to, say, his mother, or his brother, my attorney is
19 going to do such and such or is going to talk to so and
20 so?

21 A. Yes, they talk about the attorneys.

22 Q. Okay. And when he says that the
23 attorney is going to talk to so and so, do you then go
24 talk to so and so yourself?

25 A. Ordinarily, yes.

1 bunch of disks from you guys and it will say Andersen
2 jail calls, November 14th through November 22nd. And
3 they will be, as I am sure you have listened, brutally
4 long, tedious hours of jail calls; fair enough?

5 A. Those are the same calls, yes.

6 Q. Yeah. And then you down --. So you
7 don't -- you don't just listen to them on the disk, you
8 download that disk onto your hard drive and create a
9 file?

10 A. Yes.

11 Q. So you don't need the disk to access
12 those calls at some point; correct?

13 A. That's correct. And then I can delete
14 the calls that don't need to be on or reviewed.

15 Q. So basically then you take the disk, you
16 pop it into your laptop, create a file. So then
17 basically you are walking around with your laptop and
18 those attorney/client privileged calls until you listen
19 to that call and delete it; fair enough?

20 A. Yes.

21 Q. So those calls could be in your car when
22 your laptop is in your car; fair enough?

23 A. Yes.

24 Q. Could be down at the BCA; fair enough?

25 A. Yes.

1 Q. Sheriff's office?

2 A. Sure.

3 Q. Heck, I mean it is theoretically
4 possible if you had your laptop here today, you could
5 have some of them here right now?

6 A. Yes.

7 Q. So basically you have those
8 attorney/client privileged calls sitting in your laptop,
9 right, until you have erased them?

10 A. Correct.

11 Q. Wherever those laptop is, those sacred
12 private calls are; right?

13 A. Yes.

14 Q. Okay. Now, next question. What about
15 the disk? Do you destroy the entire disk?

16 A. Yes.

17 Q. Well, now let me ask you this. How can
18 that possibly be true? If you have a disk jail call,
19 Kenneth Andersen, November 15th, November 22nd. Call
20 November 23rd at 8 o'clock at night is from Kenny
21 driving me crazy on a Friday night for two hours wanting
22 to talk about his case when I just want to do nothing
23 more than have Vodka Red Bull, now --

24 A. I -- I don't maintain those calls.

25 Q. Right. But they are on the disk; right?

1 They are on a disk. That is how they get to your hard
2 drive.

3 A. On a disk that is provided to me by
4 Becker County.

5 Q. Right. So you listen to the one phone
6 call on your hard drive or you download it to your hard
7 drive. Where is the disk then? There is disk of two
8 weeks worth of calls; right?

9 A. Right.

10 Q. Some of those calls are attorney/client
11 privileged calls; right?

12 A. Right.

13 Q. Some of those calls aren't; right?

14 A. Right.

15 Q. You can't download from -- or you can't
16 erase a disk -- you can't erase an item from a disk?

17 A. No.

18 Q. What happens to the disk? Where are
19 those sacred private calls now then?

20 A. I break them.

21 Q. So you break the entire disk after you
22 download --? You telling me that you break the entire
23 disk? You download it into your computer and then you
24 break it?

25 A. Download it, make sure it is downloaded,

1 and then once I have gone through the information, then
2 that disk is no longer -- it is no longer important to
3 us, and I break that disk because it contains your
4 calls.

5 Q. Oh, because it contains my calls? Okay.

6 A. Well, it contains all the calls.

7 Q. And then what? Then how does
8 Mr. Zdrazil get that disk?

9 A. Mr. Zdrazil should get the disk that
10 contains the Kenneth Andersen calls.

11 Q. How is that disk made?

12 A. The edited calls.

13 Q. How does that get made?

14 A. I make it.

15 Q. You make it?

16 MR. DURKIN: Okay. I don't have any
17 further questions.

18 THE COURT: Mr. Zdrazil.

19 MR. ZDRAZIL: No questions, Your Honor.

20 THE COURT: Thank you, sir. You can
21 step down.

22 MR. ZDRAZIL: The State has no further
23 witnesses, Your Honor.

24 MR. DURKIN: If I can just --. Just if
25 I can just briefly say something on that issue.

1 They can't record my calls. They can't
2 record his calls. He can't put on a defense knowing
3 that every single phone call made to his attorney is
4 being recorded. That's -- that is beyond outrageous,
5 beyond outrageous. And then they sit here and they tell
6 you, well, first they told us, well, we don't fail to
7 disclose information, and we don't lie to get a search
8 warrant. Now we don't listen to your phone calls. Come
9 on. They are recording every single phone call to
10 myself, my partner, and my associate. That is so
11 violative of statute, per se, hundred dollar -- under
12 the statute a hundred dollar violation per incident.
13 That alone, this violation is egregious and so
14 fundamental that I don't even know what to say. I have
15 never heard of such a thing. I never have. I am
16 absolutely dumfounded that they have a policy, No. 1, of
17 recording all attorney calls that are on a cell phone
18 even though they know they are attorneys. It is not in
19 the handbook. And we are absolutely prejudiced by that
20 and we cannot -- he cannot get a fair trial, and we
21 cannot defend this case and he cannot have a meaningful
22 relationship and meeting with his attorneys. He
23 simply --. And if I can have just half a second, Your
24 Honor. You know, we can't prepare for trial. We can't
25 plan our defense. We can't speak -- we can't speak to

1 each other in private. Every time he calls me now I
2 say, Kenny, I can't talk to you right now. I am afraid,
3 because I know they are recording these calls. This is
4 not -- this is not a jaywalking case. This is a murder
5 case where the rest of his life is at stake, the rest of
6 his life. And they are recording everything he says.
7 That is shameful and outrageous and violative of every
8 Sixth Amendment principle I can think of.

9 That's all.

10 **THE COURT:** Mr. Durkin, I can tell you
11 that no call will be recorded again on any of those cell
12 phone numbers or land lines to his attorneys, regardless
13 of what happens here. The jail will stop doing that
14 immediately. So whatever happens from now on, you can
15 feel very comfortable that those calls will not be
16 recorded.

17 Is that Clear, gentlemen?

18 **MR. ZDRAZIL:** It is, Your Honor.

19 **THE COURT:** Any response you want to
20 make, Mr. Zdrazil?

21 **MR. ZDRAZIL:** Only, Your Honor, and I
22 assume you are going to want a brief on this.

23 **THE COURT:** I am.

24 **MR. ZDRAZIL:** I am not going to spend a
25 lot of time, but I think I have to say that Mr. Durkin

1 didn't even feel this was important enough to ask that
2 the numbers be blocked until December, and it is
3 disingenuous to now be as self-righteous as he is.

4 **MR. DURKIN:** Because never in my
5 life --. Because we just assumed that attorney/client
6 calls weren't recorded because that's how it pretty much
7 goes in every county. And if they are subject to
8 recording, they will tell you that they are subject to
9 recording. They will let you know. Nobody ever told us
10 and we have been battling with Reliance. So it is a
11 little disingenuous to sit here and say, oh, it means
12 nothing to me because I didn't ask for it. I asked for
13 it and went crazy as soon as we found out. And then, as
14 the Affidavit in my motion indicates, we were told that
15 it was a done deal when we submitted those numbers.

16 And I respectfully request that his bail
17 be reduced to maybe 100 or \$200,000 so we can prepare a
18 defense and so he can have a fair trial. For that
19 reason alone, coupled with everything else, I think that
20 everything is so cumulative at this point that there is
21 really no other alternative, and I know that we are
22 going to have to brief that issue, but I just want to
23 make that right now, Your Honor.

24 **THE COURT:** You have one issue left?

25 **MR. DURKIN:** We do. It is the change of