

Nebraska Prison Telephone Lawsuit

The following is the actual complaint filed in the Nebraska Courts on August 20, 1997.

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

NEBRASKA DEPARTMENT OF)
CORRECTIONAL SERVICE INMATES)
BARRY McCROY, THOMAS NESBITT,)
STEVEN JACOB, DAVID DITTER,)
KENNETH KEEVER, GARY POPE,)
AND DONALD DREDGE, on behalf)
of all similarly situated)
individuals, now and in the)
future,)
)
Petitioners,)
)
vs.)
)
SPRINT COMMUNICATIONS CO.,)
LIMITED PARTNERS & C.E.O's)
(Unknown); LAURIE SMITH-CAMP,)
Nebraska Deputy Attorney)
General; HAROLD CLARK, Director,)
Nebraska Department of)
Correctional Services, GEORGE)
GREEN, General Counsel,)
Nebraska Department of)
Correctional Services, TERRY)
EWING, Security Coordinator,)
Nebraska Department of)
Correctional Services, KAREN)
SHORTRIDGE, Deputy Director,)
Nebraska Department of)
Correctional Services, FRANCIS)
BRITTEN, Deputy Warden of)
Nebraska State Penitentiary;)
LAWRENCE PRIMEAU and KAREN)
KILGARIN, former Directors, and)
LORI McCLURG, current Director,)
Nebraska Department of)
Administrative Services;)
NEBRASKA DEPARTMENT OF)
CORRECTIONAL SERVICES, and the)
NEBRASKA DEPARTMENT OF)
ADMINISTRATIVE SERVICES, State)
Agencies; and all other)
Employees acting in concert)
Therewith, in their respective)
Official, individual, and)
Private capacities,)
)
Respondents.)

Docket 559, Page 261

FOURTH AMENDED PETITION

FOR CIVIL RIGHTS

DECLARATORY, INJUNCTIVE

AND OTHER RELIEF

(With Supporting Affidavit)

COMES NOW Barry McCroy, Thomas Nesbitt, Steven Jacob, David Ditter, Kenneth Keever, Gary Pope, and Donald Dredge, Nebraska Department of Correctional Service Inmates on behalf of all similarly situated individuals, now and in the future, and hereby bring this Civil Rights Action seeking a Temporary Injunction, a Declaratory Judgment with a Permanent Injunction, and such Monetary Damages as law and justice requires, plus all fees and such other associated litigation costs against the Respondents.

JURISDICTION

- 1).** The above-named Petitioners, on behalf of all other similarly situated individuals, now and in the further, hereinafter referred to as the "Plaintiffs", invoke the Court's statutory jurisdiction pursuant to N.R.S. §§ 24-302, 84-911 (1) & (2), 86-707.02 (1) & (2), and 86-811, in conjunction with 25-2224 and such other relevant enabling laws described herein.
- 2).** That Constitutional jurisdiction is invoked pursuant to the Court's inherent powers vested by the Nebraska Constitution under Article V, Section 9, and Article I, Section 13.
- 3).** The Court's jurisdiction is also invoked pursuant to N.R.S. § 20-148, and Title 42, U.S.C., Sections 1983 and 1985 in accordance with Title 28, U.S.C., Section 1343, regarding the First, Fourth, Fifth, Sixth, Seventh, Ninth and Fourteenth Amendments plus Article IV, Section 1 and Article VI of the Constitution of the United States, and in regards to Article I, Sections 1, 3, 4, 5, 6, 7, 11, 12, 13, 19, and 26 plus Article II, Section 1 of the Nebraska Constitution; along with jurisdiction for Declaratory relief pursuant to N.R.S. § 25-21,149 et seq., and injunctive relief pursuant to N.R.S. § 25-1062 et seq..
- 4).** That the Petition herein presents questions of law and claims of both common and general interests to the members plaintiffs, arising out of the same type and serial manner of unlawful telecommunication transactions, occurrences, and policy practices created and committed against the member plaintiffs by the Respondents, hereinafter referred to as the "**Defendants**". Such common and general interests, transactions, occurrences, policy practices, and defenses thereof, warrant the joinder of the member plaintiffs, defendants, and causes of action claims described herein, pursuant to the provisions of N.R.S. §§ 25-311, 25-320, 25-701, 25-705, and 25-21,159 (Cum. Supp. 1998).
- 5).** That jurisdiction is also being sought under the provisions of N.R.S. § 25-319 in accordance with the class action criteria of *Hoiengs v. County of Adams*, 245 Neb 877 (1994), and *Cullen v. New York State Civil Serv. Comn.*, 435 FS 546 (E.D. NY 1977) (appropriate class certification for 42 USC §§ 1983 & 1985 actions upon 1st Amendment claims involving conspiratorial coercion between public and private entities). There are numerous nonmember parties and telecommunication interests which would be affected herein by the beneficial relief being sought. That these interests are consistent with the plaintiff members though it is impractical to bring all such parties to this action desiring the same outcome. That at the appropriate time in a prudent and frugal manner, notice will properly be given to allow such members of the class or that of a sub/hybrid class to opt out of this action.

PARTIES

- 6).** That the individual plaintiff members are Barry McCroy, Thomas Nesbitt, Steven Jacob, David Ditter, Kenneth Keever, Gary Pope, and Donald Dredge, who are inmates committed to and confined

at the Nebraska State Penitentiary (NSP) in Lincoln, Nebraska, and the Omaha Correction Center (OCC) in Omaha, Nebraska. That they are supervised under the custody of the Nebraska Department of Correctional Service defendants as a State agency, hereinafter referred to as the NDCS. They and all similarly situated individuals, now and in the future, have claims and causes of action that are set forth in this Fourth Amended Petition.

7). That the co-defendants Sprint Communication Co., Limited Partners & C.E.O.'s (unknown), are companies licensed to transact business in this State. Sprint's authorized Limited Partnership subcontractors acting in concert under the direction and control of Sprint, include: Magnasync Corporation & C.E.O. (unknown); Smart Data Connections, Inc., & C.E.O. (unknown); Huntel Systems, Inc. & C.E.O. (unknown); and Talton Invision Telecom Co. & C.E.O. (unknown). That they have contracted with the NDCS defendants by way of the Nebraska Department of Administrative Service (NDAS) defendants, to install, operate and maintain as the owner-provider in their respective private capacities under color of state law or otherwise, a new Inmate Calling Telephone System in all of Nebraska's State correctional Facilities, hereinafter referred to as the "ICS". The ICS permits the limiting, restricting, monitoring, recording, and eavesdropping of oral telephone conversations between the aforementioned inmates and other similarly situated inmates, and the respective oral conversations of those of the general public who are unincarcerated.

8). That the state co-defendant, Laurie Smith-Camp, (former NDCS General Counsel), is a deputy Attorney General of the State of Nebraska, authorized in absence or delegation of the Attorney General, Donald Stenberg, to conduct and do all legal business of the State, and for the ascertainment of justice, to appear for the State and prosecute or defend in any judicial or quasi judicial proceeding, civil or criminal, the interests of the State.

9). That the state co-defendant, Harold Clarke, is the Director of the NDCS agency, and within the scope of his authority consistent with law, are the creating and enforcing of NDCS policies, regulations and practices concerning the limiting, restricting, monitoring and recording of inmate oral wire telecommunications at the various state correctional facilities regarding both the ICS and the State telecommunication system.

10). That the state co-defendant, George Green, is the successor and current NDCS General Counsel, and within the scope of his authority consistent with law, is responsible for providing all legal advise to the NDCS, including the framing of policies, regulations, and practices concerning the limiting, restricting, monitoring, recording and eavesdropping of all inmate oral wire telecommunications throughout the various correctional facilities under the NDCS control regarding both the ICS and the State telecommunication system.

11). That the state co-defendant, Terry Ewing, is the Security Coordinator of the NDCS, and within the scope of his authority consistent with the law, is responsible for the creation and implementation of NDCS policies, regulations, and practices concerning the limiting, restricting, monitoring, recording and eavesdropping of all inmate oral wire telecommunications at the various correctional facilities under the NDCS control, regarding the ICS and the State telecommunications system.

12). That state co-defendant, Karen Shortridge, is one of the Deputy Directors of the NDCS along with being the Assistant Director of all NDCS Adult facilities, and within the scope of her authority consistent with law, is responsible for the creation and implementation of NDCS policies, regulations, and practices concerning the limiting, restricting, monitoring, recording and eavesdropping of all inmate oral wire telecommunications at the various state adult correctional facilities under the NDCS

control regarding both the ICS and the State telecommunications system.

13). That state co-defendant, Francis Britten, is the current NSP Deputy warden and past liaison and assistant to the foregoing NDCS administrative defendants. Within the scope of his current authority consistent with law, Britten is responsible to the C.E.O. (warden) of the NSP charged with the same duties, powers, and security matters delegated therein, or by the NDCS director, that includes the creation and implementation of NSP policies, regulations, and practices concerning the limiting, restricting, monitoring, recording and eavesdropping of all inmate oral wire telecommunications residing throughout the two facilities (NSP-MSU) comprising the NSP institution regarding both the ICS and the State telecommunication system.

14). That the state co-defendants Lawrence Primeau, prior to the time of filing the original petition, along with Karen Kilgarin, during the interim period of the filing of this 4th Amended Petition, plus the current Lori McClurg, are the former and present Directors of the Nebraska Department of Administrative Services (hereinafter referred to as the NDAS), and as such directors, were and are charged within the scope of their authority consistent with law, for the centralized direction of all state services and service agencies as created and intended by the Nebraska Legislature. N.R.S. § 81-1101 (3). The duties of the NDAS director include and have included, the supervision and management of a State centralized telephone system for the sole purpose of conducting state business. N.R.S. § 81-1107 (6). Within the scope of these particular duties is to appoint an administrator to head the Material and Communications divisions under the control of the NDAS for the day-to-day administering and coordination of the State's centralized telephone system utilized by the various state entities and respective employees for conducting all government business, including the NDCS. N.R.S. §§ 81-1108 & 81-1120.17. These duties include the coordination and approval consistent with law, of all state purchases, contracts, leases, and uses of the State's centralized telecommunications system, including those private line services, for ensuring that such facilities and services are utilized to conduct only such state business as intended and mandated by the Nebraska Legislature. N.R.S. §§ 81-1120.01, 81-1120.03, 81-1120.17 to 81-1120.20, 81-1120.27, and 81-1120.28. The NDAS co-defendants have also coordinated and approved the current ICS contracts between the NDCS co-defendants and co-defendants Sprint and its subcontracting partners, for the limiting, restricting, monitoring, recording and eavesdropping of all inmate oral wire telecommunications throughout the various state correctional facilities under the NDCS control.

15). That the Nebraska Department of Correctional Services (NDCS) and all its state employees acting in concert therewith, is an agency of the State of Nebraska, and pursuant to N.R.S. §§ 81-112, 83-171, 83-4,109 to 83-4,123, and such other enabling statutes, is responsible for the operation and maintenance of the state correctional facilities, including but not limited to, the two penal facilities (NSP & OCC) that houses the named member plaintiffs in this law suit.

16). That the Nebraska Department of Administrative Services (NDAS) and all its state employees acting in concert therewith, is also an agency of the State of Nebraska, and pursuant to N.R.S. §§ 81-112, 81-1101, and such other enabling statutes, is responsible for providing the general overall administrative development and such necessary operational services to all other state agencies and departments within the state government, including that of the NDCS agency.

17). That each of the foregoing defendants herein, are acting in concert and/or aiding & abetting each other by way of an arbitrary and capricious ongoing conspiracy under color of state law or otherwise in their respective official, individual, and private capacities regarding plaintiffs' causes of action claims described in this petition.

INTRODUCTORY STATEMENTS

18). That the following legal and factual basis for the plaintiffs' claims and causes of action herein, has been drafted by plaintiffs in propria persona without the aide of learned counsel, and hence, they should be liberally construed in the light most favorable to the plaintiffs. *Haines v. Kerner*, 404 US 519, 520-521 (1972). Also, any unincorporated allegations of apparent facts or law ought to be treated as part of these following claims and causes of action for the purposes of determining whether additional issues of law or fact should be further investigated or included. Cf., *Williams v. Griswald*, 743 F2d 1533, 1542-1543 (11th Cir. 1984).

19). That the State of Nebraska is unique in that the Legislature has retained control over the NDCS, by delegating only the day-to-day administration of its penal facilities to the Executive Department of Government. However, the Legislature still retains its constitutionally mandated power to Manage, Control, and Govern all penal facilities in the State of Nebraska. Neb. Const., Article IV, Section 19.

20). That, pursuant to N.R.S. § 81-112, all Executive Department heads of the various state agencies, are not empowered to prescribe any rules or regulations that are inconsistent with law.

21). That, pursuant to N.R.S. § 83-4,111(1), the NDCS is required by law to adopt and promulgate in accordance with the provisions of the Nebraska Administrative Procedure Act, N.R.S. § 84-901 et seq, any rule or regulation which would infringe, diminish, forfeit, or penalize any right, privilege, or private interest of the inmate residents and/or his or her community relations of the general public, that he or she does not otherwise retain or is entitled to under other provisions of law. N.R.S. § 83-4,111(3).

22). That the plaintiffs, as convicted felons in the State of Nebraska, have lost only certain delineated rights as set forth in N.R.S. § 29-112 and the Nebraska Constitution. That all other rights, privileges and private interests of the plaintiffs are retained by Article I, Section 26 of the Nebraska Constitution, the Ninth Amendment of the United State Constitution, and such other provisions of law referenced herein, as mandated by § 83-4,111(3) above. That the defendants must afford by law the plaintiffs' rights, privileges, and private interests guaranteed them through various state statutes, the Constitutions of the United States and the State of Nebraska, and applicable or controlling State and Federal case law. That among those rights retained by the plaintiffs under both Constitutions, are the freedoms of speech and association, along with other constitutional rights referenced herein. That among these guaranteed retained rights secured by both Constitutions is the right to communicate with persons outside the prison facilities by means of telecommunications and in a private confidential manner. *Meier-Malek et al. v. Shortridge-Gunter et al.*, CV86-L-378 (1988).

23). That telephonic communication with NDCS inmates and the member plaintiffs, is the only viable form of communications for most of the family members and community relations of the persons committed to the NDCS, thereby implicating a strong and direct substantial public interest.

TITLE 42, U.S.C., SECTION 1997e EXHAUSTION OF ADEQUATE ADMINISTRATIVE REMEDIES

24). That it is the contention of the plaintiffs, that the exhaustion provisions of 42 USC § 1997e, do not apply to this lawsuit under state court jurisdiction. Further, declaratory judgement pursuant to N.R.S §§ 84-911 and 86-707.02, along with 42 USC §§ 1983 & 1985, are totally intertwined and identical in nature, and therefore under controlling state law, **does not require any** administrative exhaustion of

so-called remedies. It is also the contention of plaintiffs in accordance with the "inadequacy" provisions of N.R.S. §§ 83-4,135 & 83-4,137 (Reissue 1994), plus the further "inadequacy" provision of the NDCS A.P.A. promulgated Rule & Regulation, Title 68, Rule 2.005 ("Other Remedies not Precluded - having the force & effect of law), there exists no "adequate" NDCS Administrative remedies concerning the merits of this law suit, because, all the NDCS Administrative grievance personnel recognized under the NDCS A.P.A. promulgated Grievance Procedures, Rule 2 for resolving such grievances, are the same administrative personnel acting in concert, that are directly participating in and responsible for violating the plaintiffs' rights, privileges and private interests involved in this litigation. (See, Title 42, U.S.C., § 1985 (administrative exhaustion not required where the one-in-the-same administrator defendants are acting in concert against party litigants seeking relief).). Further, an allegation of lack of exhaustion, is an affirmative defense which requires an evidentiary consideration. Plaintiffs will readily establish the existence of both an "inadequate" and "futile" grievance system in these matters upon various previously submitted exhausted grievance resolutions by the plaintiffs already utilizing the NDCS system, and by way of the overwhelming grievance exhaustion evidence of record existing in this case. Cf., *Allen v. Amalgamated Transit Union Local 788*, 554 F2d 876, 882-883 & (footnote #9) (8th Cir. 1997). In addition, there exists no administrative remedies to exhaust when concerning the Court's jurisdiction pursuant to the provisions of N.R.S. §§ 20-148 and 86-811 (cf., *Goolsby v. Anderson*, 250 Neb 306, 312 (1996); and for 42 USC §§ 1983 & 1985, involving monetary damages.

CLAIM AND CAUSES OF ACTION

That the preceding paragraphs are incorporated by reference to the following Claims and Causes of Action described herein.

I - NDCS and NDAS UNLAWFUL CONSTRUCTUAL CLAIMS & CAUSES OF ACTION.

I-25). That in contracting with co-defendants Sprint and its Subcontractor Partners to install, operate, and maintain as the owner-provider of the ICS within the facilities operated and controlled by the NDCS defendants, the NDCS and the NDAS defendants have acted unlawfully and outside of their respective powers conferred upon them, to wit:

I-25A). By expressed statutory declaration, the NDCS defendants and those acting in concert therewith, maintain custodial jurisdiction in accordance with the law, only over those persons who have been lawfully committed to the NDCS, and are conferred no authority over any private sector individuals of the general public in this or any other State outside of any facility operated by the NDCS. N.R.S. & 83-171. Also by expressed statutory mandate, the NDCS defendants are required by law to submit said agency's budgetary requirements to the Nebraska Legislature for its approval and funding concerning any necessary security upgrades or additions to the NDCS facilities pursuant to N.R.S. § 83-908.

I-25B). That the NDAS and the NDCS defendants and those acting in concert therewith, are only authorized by statutory law to contract for and lawfully operate a telecommunication system for use by governmental entities and their respective employees in conducting State business. N.R.S. § 81-1120.27.

I-25C). That in contracting with co-defendants Sprint and its Subcontracting partners to establish, implement, and operate as the owner-provider, the ICS telecommunication system to be used solely by

the NDCS inmates and their respective community relations in the private sector as described in this petition, the NDCS and the NDAS co-defendants have acted outside of their lawful authority in both their individual and official capacities, and as executive state agencies, in violation of Article II, Section 1 of the Nebraska Constitution and associated laws. The ICS is totally unrelated to the conducting of state business by state employees.

I-25D). That the NDAS and the NDCS co-defendants have also illegally contracted with co-defendants Sprint and its Subcontracting partners to further establish, implement, and operate in a coercive manner, the ICS to unlawfully limit, restrict, monitor, and record the oral wire telecommunications of the NDCS inmate plaintiff members and their respective community relations, in violation of Nebraska's telecommunication laws as described in this petition.

II-CONSTITUTIONAL ACCESS INFRINGEMENT CLAIMS & CAUSES OF ACTION

II-26). That prior to the signing of the contract between the co-defendants Sprint and its Subcontracting partners and the NDCS, the inmate legal telephone policies and practices were derived from litigation in the federal district court case of *Meier-Malek et al. v. Shortridge-Gunter et al.*, CV86-L-378 (1988). Federal district Judge Strom ordered that a "proposal" be fashioned for the Court's approval that allowed **"inmates routine access to prison phone calls regarding legal matters"** and that **"legal phone calls shall be allowed between the hours of 9 a.m. and noon and 1:30 p.m. and 4:30 p.m."**. The NDCS appealed to the Eighth Circuit Court of Appeals, *Meier et al. v. Shortridge*, 855 F2d 858 (8th Cir. 1988), which held the District Court's order was not appealable. *Meier et al. v. Shortridge*, supra, is a current standing court ordered injunction against the NDCS co-defendants. No other court order has taken its place, except for the complementary 10-7-97 Temporary Injunction Counterpart order issued in this present case. The Meier injunction superseded *State v. Weikle*, 233 Neb 81 (1986), and is controlling herein under the Full Faith and Credit Clause of the United State Constitution, Article IV, Section 1.

II-27). That on March 13, 1996, pursuant to a Memorandum Directive issued by defendant Harold Clarke, there was a change regarding the state telephone system involving access to inmates for attorney-client communications and access to the courts, contrary to the mandate of the court ordered Meier plan. That change required there be a **"verified matter pending that needs immediate attention, or within two weeks"** of a prescheduled hearing. That the aforesaid policy went into effect since the date of the memorandum directive. That the aforementioned policy has caused irreparable harm to the inmate plaintiff members. Plaintiff Thomas Nesbitt states that he became aware of a false and misleading statement of fact made by Mr. Kirk Brown, a member of the Nebraska Attorney General's office, during the oral argument phase of his ongoing Habeas Corpus appeal at the Eighth Circuit Court of Appeals; that at the time he became aware of this substantial and egregious misrepresentation of the facts in his case, Nesbitt could neither adequately nor meaningfully contact his attorney or the court so he could rectify the error. Following the new NDCS telephone procedures, Nesbitt made numerous written requests throughout the NDCS-NSP administration to contact his attorney or the court, which were all denied by the NDCS defendants; and that the text of the Eighth Circuit Opinion, which denied Nesbitt to any relief, plainly relied on this false and misleading statement of fact to affirm his conviction and sentence. The plaintiff Nesbitt is serving a life sentence without the possibility of parole. The NDCS defendants' policies and practices emanating from the March 13, 1996 Memorandum Directive, prevented Nesbitt from correcting the record before this irrevocable prejudice accrued, resulting in his appeal being erroneously denied. Such

telecommunication access denials to the courts and attorneys, continue to this day in his ongoing criminal litigation and the present civil case herein, substantially prejudicing his lawful and constitutional access interests.

II-28). That on July 24, 1996, Administrative Regulation 116.1 was also revised by defendant Harold Clarke regarding the use of the defendants State Telephone System. That portion of the regulation dealing with attorney-client and court phone calls, was deleted and suspended as follows:

Staff assisted phone calls may be provided to inmates to Contact attorneys and/or courts if there is a verified matter pending that needs immediate attention, or attention within two weeks [of a pre scheduled hearing]. (Page 3, paragraph J-1-b; but compare page 6, at Reference IV, Meier v. Shortridge.)

II-29). That the new Inmate Telephone Regulations' (A/R 205.3) involving both the State and ICS telephone systems, is scheduled to go into effect unless restrained and enjoined. A/R 205.3 and all similar NDCS policies and regulations further infringes upon those Constitutional protections underpinning the court ordered plan announced after the *Meier v. Shortridge* litigation. Specific regulations that are inconsistent with this constitutional mandate, are:

a. Attorney/Client Calls, telephone calls between an Inmate and attorney of record, which are eligible for confidential status and are not recorded or monitored (business telephone numbers only). To qualify for confidential status the attorney must be a bona fide member of the Bar and communication must be in the scope of the attorney client relationship. (Regulation 205.3 Page 2-3);

b. Legal Call, a call to an attorney of record, bailiffs and clerks of the court which can be conducted through the ICS or staff assisted over the facility telephone system. Legal calls involve situations where a hearing is pending within (two weeks) and time is of the essence requiring approval by staff for an inmate to use additional time blocks. (Regulation 205.3 Page 3.);

c. Legal calls may be approved by designated staff when an inmate can demonstrate that time is of the essence requiring them to make extra calls for the purpose of communicating with their attorney of record, a bailiff or clerk of the court. Legal calls will not be authorized merely for the purpose of setting a date for a hearing or a motion. A hearing must be pending within two (2) weeks of the request. Generally, inmates are expected to use privileged mail or visitation procedures to communicate with these entities. Such calls may be made through the ICS or staff assisted using the facility telephone system. Upon a request for a legal call, staff must verify the circumstances and approve the call before it takes place. Calls to bailiffs or clerk of the court through ICS are not eligible for confidential status. Staff assisted calls to court administrative personnel will be directly supervised by DCS staff. Legal calls are strictly limited to the entities specified in this regulation. A record of legal calls will be kept by the facility. (Regulation 205.3 Page 4.);

d. Each inmate may submit up to twenty (20) telephone numbers representing social, attorney/client, and legal calls.....(Regulation 205.3 Page 5.);

e. That the Regulation stating that an exception be carved out if "time is of the essence, approval by staff for an inmate to use additional time blocks" can be utilized violates the attorney/client privilege; telephonic communications between attorney and client should not be conditioned on pre-approval in order to avoid recording or monitoring. (Regulation 205.3 Page 4.);

f. That the Regulation that "Legal calls will not be authorized merely for the purpose of setting a date for a hearing or a motion" is untenable as a call for this sole purpose can escalate into a call where matters of a more sensitive nature are discussed. Just as important, timeliness is a major concern for complying with procedures and affording due process. That there are no circumstances when legitimate legal calls to inmates that monitoring or recording should be allowed. (Regulation 205.3, Page 4.);

g. That the requirement that "upon a request for a legal call, staff must verify the circumstances and approve the call before it takes place" violates the privilege as the word "circumstances" is so vague, that staff could require an Inmate to divulge information that is privileged before the call would be approved. (Regulation 205.3, Page 4);

h. That the Regulation that "Each inmate may submit up to twenty (20) telephone numbers representing social, attorney/client, and legal calls..." is restrictive in that an inmate may find himself in a situation where because of newly discovered evidence, a new appellate decision, or where he became a party to a civil suit and does not have an attorney under retainer on the list may need to make phone calls to retain an attorney. Calls of those nature are privileged and should not be subjected to monitoring or recording. (Regulation 205.3, Page 5);

i. That the Regulation that "Attorney business telephone numbers will be clearly identified on the ICS Registration Form. Unit staff will verify Attorney business telephone numbers to submitting the ICS Registration Form to the CSA" has impediments similar to those discussed in subparagraph (b) herein. (Regulation 205.3, Page 5). Consequently many numbers are never properly verified by the untrained, uncertified state employees due to a complete lack of any actual penalties for such failure, and due to a lack of confidentiality between the attorney and the prospective client when first attempting to establish the privileged relation;

j. That the Regulation that "Inmates are not permitted to participate in three-way, call forward, or conference call services. Use of the custom calling features may result in electronic call termination and disciplinary action" is untenable. On numerous occasions, if the attorney is out of the office, his support staff would contact him at the number he can be reached. If it is necessary to speak to an inmate, sometimes that is the only way contact can be arranged. Many attorneys in smaller offices have a "call waiting" feature on their phones. Consequently, if another call comes in during the communication to an inmate, it will be necessary to put the inmate on hold to retrieve the call. Conversely, if the attorney is on the other line and a call comes in from an inmate, then if counsel temporarily left the incoming call to end the previous conversation, this Regulation would be violated and the inmate would be subject to possible disciplinary actions. That setting up a conference call during the course of a communication with an inmate is not uncommon. If an inmate has co-counsel or if an inmate has different counsel on his trial than he now has on appeal or in his post conviction action, the necessity for a conference call can frequently occur. Those occasions can't always be anticipated.(Regulation 205.3 Page 7);

k. RATES AND CHARGES. The costs of a local call is \$1.00 per call. (Regulation 205.3, Page 13). The cost charged is a significant and unjustified overcharge. There has also been substantial overcharging and double-billing concerning local and long distance calls as described herein, subject to further verifications through discovery of existing evidence. (205.3, p. 13)

II-30). That in regard to Pro Se Litigants, the standing federal court injunction of Judge Strom in *Meier v. Shortridge, supra*, provides that "inmates can make telephone calls to any attorney and the courts".

However, Regulation 205.3 specifically denies all pro se inmates the opportunity of calling court officials, who do not accept collect calls, and without being subjected to limitations, restrictions, monitoring, recording, and eavesdropping by the defendants and/or any passer-by during such calls. This includes for the setting of hearings, obtaining information, and for teleconference calls. E.g., see N.R.S. § 25-910.

II-31). That the defendants ICS telephones denies all telecommunication access to the courts because Nebraska's courts and other jurisdictions, simply do not accept collect calls from anyone, whether being station-to-station, person-to-person, local or long distance. The ICS therefore denies to the plaintiffs, all timely and otherwise access to petition the courts for the conducting of legal state business. Among countless others, said access was denied to plaintiff Nesbitt when attempting to contact the court bailiff of Lancaster District Court Judge Steven Burns, for the setting of several hearing dates, including on February 17, 1998, February 18, 1998, February 24, 1998, and several more during the months of January through June of 1999, for the resolution of certain pending litigation matters in the present case.

II-32). That plaintiff Nesbitt, along with plaintiff Ditter, were also denied both actual and constructive access to the court in the present case regarding their respective forma pauper status. First, these plaintiffs were obstructed from calling the clerk's office to check the pleading/information docket data to ascertain if their respective certified account sheets for forma pauper consideration had been automatically sent and filed with the court by the NDCS defendants after requesting copies of the same in February of 1999, pursuant to the Court's 1-27-99 order. Thereafter, both Nesbitt and Ditter were also barred constructive access when they were prohibited in their propria persona status from calling opposing counsel to find out if their February requests had indeed been received by the NDCS defendants acting in concert, and if so, why said requests had not been honored and complied with in a prompt manner. As a result, both Nesbitt and Ditter incurred substantial prejudice to their property interests by way of the court on 4-8-99, subsequently penalizing each plaintiff \$140.00 in unwarranted costs, while having their respective credibility erroneously tarnished and damaged in the eyes of the presiding Judge for this involuntary failure on their part to provide such documentation to the court, that Nesbitt and Ditter had no control or access to.

II-33). That since February 1999, plaintiff Jacob has been trying to get the record in his criminal case brought down to the law library at the NSP, so that he can prepare his postconviction relief petition. He has sent numerous kites to the NSP records manager and several letters to the Lancaster District Court Clerk concerning this matter, and has still not received the documents he requested. Jacob can't call the clerk by way of the state or ICS telephone systems to find out why not, because he has no hearing pending within two (2) weeks, as required by A/R 205.3 & A/R 116.1. The NSP records manager, Frank Delgado, acting in concert with the NDCS defendants simply pleads ignorance of the matter, and keeps saying he will pass Jacob's written requests on to the clerk. Without being able to talk directly to the clerk while she has these records in front of her, plaintiff Jacob has no way of obtaining the records he needs in order to prepare the factual pleadings in his postconviction cause of action. (*State v. Jacob*, Doc. 676, Page 298, Lancaster District Court, S-95-0885 Neb. S.Ct. Docket.). The defendants' policy regulations and practices are obstructing and denying Jacob his Constitutional access rights to petition the courts for redress of his state conviction, now actionable by way of 42 USC § 1983. Further, in certain civil suits, co-plaintiff Jacob is also awaiting the bill of exceptions that the court reporter has given to the Clerk of the District Court, but the Clerk has not yet forwarded these documents on to the Clerk of the Nebraska Supreme Court. Jacob has no way of finding out why because of the defendants' restrictive telephone policies and practices. Even the clerk of the Supreme Court has written to the District Court Clerk and asked and received no response to date, substantially

prejudicing the timely preparation of Jacob's appellate briefing. (*Shuck v. Jacob*, Doc 443 Pg. 103, Lancaster County; Doc S-99-117. Neb. S.Ct.).

II-34). That the defendants' limiting, restricting, and warrantless or judicially unauthorized monitoring and recording policies and practices of telecommunications between the nonconsensual plaintiff members and the unincarcerated individuals in the private sector of the general public, infringes and abridges state and federal constitutional rights, remedies, procedures and prohibitions concerning the freedoms of speech, association, religion, with the right to privacy thereof, and access to petition the government for redress of injuries and grievances. U.S. Const., First Amendment; and Neb. Const., Article I, Section 4 & 5; along with the rights, privileges, and private interests secured by the Fifth, Sixth, Ninth, and Fourteenth Amendments of the United States constitution, and Article I, Section 1, 3, 11, 13, and 19 retained by Section 26 of the Nebraska Constitution and N.R.S § 83-4,111(3), in accordance with the Separation of the Powers doctrine of Article II, Section 1 of the Nebraska Constitution.

II-35). That warrantless or judicially unauthorized monitoring, recording, and pen-registering of oral wire communications of unincarcerated citizens in the private sector of the general public, for use in crime prevention/detection/prosecution, and the further providing of such involuntary nonconsensual intercepted telecommunication and pen-registering to law enforcement personnel or other state or federal employees acting in concert or aiding or abetting each other without judicial authorization issued upon probable cause for those specific reasons delineated in N.R.S. § 86-703, violates Constitutional and statutory prohibitions against unreasonable searches and seizures. United States Constitution, Fourth Amendment, Nebraska Constitution, Article I, Section 7; and N.R.S. §§ 86-304 (under 28-519 [2]), 86-702, 86-707, and 86-707.3

III - OBSTRUCTION OF JUSTICE ACCESS CLAIMS & CAUSES OF ACTION

III-36). That in conjunction with plaintiffs' forgoing Constitutional Claims and Causes of Action, the current Nebraska Deputy Attorney General, Laurie Smith-Camp, (former NDCS General Counsel), in return for the State of Nebraska realizing tens-of-millions of dollars in federal funds, did unlawfully conspire with the NDCS defendants to impede, hinder, obstruct and defeat plaintiffs' actual and constructive constitutional telecommunication access rights, and the equal protection thereof, as said rights, privileges, and private interests pertain to and are necessary for the adequate and meaningful due course of law judicial litigation.

III-37). That in 1995, the co-defendant Camp participated with the Federal Civil Justice Reform Act committee in formulating the federal Prison Litigation Reform Act. (P.L.R.A. of 1996). Several statutory provisions of said Act, grant substantial federal funds to the NDCS co-defendants, conditioned upon these defendants' ability to increase the average amount of prison time actually served by the plaintiff members for violent and nonviolent offenses alike. Title 42, U.S.C., Sections 13701 to 13708. The receipt of these federal funds are specifically mandated for the expansion and building of new correctional facilities, ensuring the defendants' gainful employment and job related security. The P.L.R.A. became effective in April of 1996, the same time the NDCS defendants commenced to limit and restrict all of the plaintiffs' telecommunication access rights and privileges to attorneys and the courts by way of co-defendant Clarke's department-wide March 13, 1996 Memorandum Directive. This obstruction of justice conspiracy implemented through the NDCS defendant's various policy regulations and practices, today utilizes and encompassed Sprint's ICS telephones, along with the State's telecommunication system for the same unlawful purposes.

III-38). That this ongoing obstruction of justice conspiracy against the plaintiffs involving their foregoing Constitutional telecommunication access right and privileges to the courts and attorneys, has also infringed upon plaintiffs' further statutory access rights involving the protective provisions of N.R.S. §§ 28-901 (obstruction of justice), and 28-919 (tampering & interference with witnesses & evidence), through violating plaintiffs' telecommunication access rights under § 28-1311, § 86-304 (pursuant to 28-519 [2]) and 86-707 (2) & (3) (prohibiting telecommunication interference's), contrary to the statutory prohibitions of § 28-924 (official misconduct) and §28-926 (Oppression under color of office). (See person & public servant defined under § 28-109 [16] & [18], along with 28-916.01 [16] waiving defendants' sovereign & qualified immunities in their official capacities.) These acts and unlawful conduct of the defendants also violate Nebraska's conspiracy and aiding & abetting laws of § 28-202 and §28-206. Since the 1996 commencement of this telecommunication conspiracy perpetrated by the defendants, plaintiffs have incurred substantial and irrevocable prejudice upon their actual and constructive fundamental rights of access to petition the government, with the equal protection thereof, involving their respective litigation injuries and grievances as described throughout this 4th Amended Petition. These telecommunication infringements have resulted in plaintiffs serving longer incarceration sentences. This ongoing conspiracy against the plaintiffs by the defendants is actionable pursuant to the provisions of Title 28 USC § 1343, and Title 42 USC § 1985 (2) & (3).

III-39). That defendants' ongoing telecommunication obstruction of justice conspiracy has also impeded, hindered, obstructed, and defeated the presentation in this law suit, of additional NDCS co-plaintiff party litigants from joining this action with their common and respective causes of action claims. Such further joinder of causes and claims would also have included the respective community relation members of the named plaintiffs, along with those of the additional non-member co-plaintiff litigants concerning these meritorious claims and associated causes of action presented in this petition.

IV - STATUTORY ACCESS-PRIVACY INFRINGEMENT CLAIMS & CAUSES OF ACTIONS

(A - Administrative Procedure Act Infringements)

IV-A40). That NDCS Regulation 205.3 and A/R 116.1 including all similar institutional regulations or memorandums that have been or already are scheduled for implementation, are subject to and govern by the Administrative Procedures Act (A.P.A.) pursuant to the Legislative mandate of N.R.S. § 83-4,111 to 83-4,112.

IV-A41). That NDCS Regulation 205.3 and 116.1, including all similar institutional telephone regulations, policies, memorandums, or practices, must adhere, consistent with law. (§§ 81-112 & 83-171), to the promulgation procedures set forth in the Administrative Procedures Act, N.R.S. §§ 84-901 et seq., as to the plaintiffs and their public community relations. The following are A.P.A. provisions not complied with in implementing A/R 205.3 & 116.1:

i. "...For purposes of the act, every rule and regulation which prescribes a penalty shall be presumed to have general applicability or to affect private rights or interests." N.R.S. § 84-901(2) See A/R 205.3 at pages 5, 6, 9, and 11;

ii. "No rule or regulation of any agency shall be valid as against any person until five days after rule or regulation has been filed with the Secretary of State. No rule or regulation required under the Administrative Procedure Act to be filed with the Secretary of State shall remain valid as against any person until the certified copy of the rule or regulation has been so filled on the date designated and in the form prescribed by the Secretary of State. The filing of any rule or regulation shall give rise to a

rebuttal presumption that it was duly and legally adopted. N.R.S. § 84-906(1);

iii. "A rule or regulation adopted after August 1, 1994, shall be invalid unless adopted in substantial compliance with the provisions of the Act..." N.R.S. §84-906.01(2);

iv. "An agency shall maintain an official rule making or regulation making record for each rule or regulation it adopts or proposes by publication of notice..." N.R.S. § 84-906.01(1); (Emphasis Added.)

v. "The record shall contain copies of all publications with respect to the rule or regulation; copies of any portion of the public rulemaking or regulation making docket containing entries relating to the rule or regulation; all written petitions, requests, submissions, and comments received by the agency and all other written material prepared by the agency in connection with the proposal or adoption of the rule or regulation. An official transcript of oral presentations made in a proceeding about the proposed rule or regulation or, if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by the hearing officer summarizing the contents of those presentations; A copy of the rule or regulation and the concise explanatory statement filed with the Secretary of State; A copy of any comments on the rule or regulation filed by a legislative committee, and a description ...of the fiscal impact on state agencies, political subdivision, and regulated persons." N.R.S. 84-906.01(2)(a)-(h); (Emphasis added) and

vi. "No rule or regulation shall be adopted, amended, or repealed by any agency except after public hearing on the question of adopting, amending, or repealing such rule or regulation. Notice of such hearing shall be given at least thirty days prior thereto to the Secretary of State and by publication in a newspaper having general circulation in the state. All such hearings shall be open to the public..." N.R.S. § 84-907.

IV-A42). That this total failure by the state defendants and defendant Sprint under color of law to comply with the foregoing A.P.A. procedures and legislative mandates, renders Regulation 205.3, 116.1, and all other similar inmate telephone memorandums, policies and practices invalid and void pursuant to the provisions vested under N.R.S. § 84-911(2). That all NDCS Inmate Telecommunication Rules and Regulations have been adopted and placed into practice without any compliance of the A.P.A., violating plaintiffs' constitutional and statutory telecommunications rights, privileges and private interests.

(B - WIRE INTERCEPT ACT INFRINGEMENTS)

IV-B43). That Regulation 205.3 is unlawful as the aforesaid regulation is in violation of the State's Wire Intercept Statutes, N.R.S §§ 86-701 et seq.. That the plaintiff members still retain their statutory and constitutional rights and privileges to privacy when using oral wire telecommunications. That persons of the general public from the private sector who will be party to any such intercepted telephone communications, they also fall under the umbrella of protections afforded by the aforementioned Statutes. That the inmate plaintiffs and their unincarcerated community relations of the general public, can not legally consent when they are "required to comply" with the telephonic regulations. Countless violations of the aforesaid statutory law currently applies to all the defendants. And any person or persons acting in concert or aiding & abetting who violates those sections of the statutes are guilty of a Class IV Felony for each violation. N.R.S §§ 86-702, 86-707, and 86-707.03.

IV-B44). That neither the State co-defendants or other NDCS employees acting in concert or aiding & abetting co-defendants Sprint and its Subcontractor Partners, are authorized by law to engage in any law enforcement activities involving the prevention or detection of crime or the enforcement of penal

laws governing this State, as specifically mandated by the Nebraska Legislature pursuant to N.R.S. § 81-1401 (4a & 4b (Cum. Supp. 1998)); as defined in the Nebraska Wire Intercept statute of § 86-701(10) and other related subsections.

IV-B45). That Nebraska's statutory law specifies that any judicially authorized intercepted telecommunications are legislatively mandated to "**be conducted in such a way as to avoid and prevent interception of confidential communication TO or FROM persons of the classes described in sections 20-146 and 27-503 to 27-506 unless there exists probable cause to believe such persons have committed, are committing, or are conspiring to commit offenses specified in 86-703.**" N.R.S § 86-705(6). (Emphasis added) Under penalty of law, any **unauthorized oral** wire communication intercepts, whether involving the **general privacy** or the following **specific confidentiality** as interpreted and adopted by the Nebraska Supreme Court by way of its 1973 Proposed Rules of Evidence, such intercepts are unlawful and prohibited. N.R.S. §§ 86-304, 86-702, 86-707, and 86-707.03, plus 28-1311.

(a - Attorney-Client Confidentiality Privileges)

IV-B45a). That pursuant to N.R.S. § 27-503 (1) to (4), communications between a lawyer and client shall remain confidential. That under § 27-503 (1d), a "communication" is deemed "...confidential if not intended to be disclosed to third persons other than those to whom disclosure is in the furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Such "**third persons**" contemplated and not son includes one's spouse, parent, business associate and co-client, among others. (See Neb.S.Ct. Adoption of such "**third persons**" in Nebraska's 1973 Proposed Rules of Evidence, pg. 65, Rule 503.) That the privilege of confidentiality and the prevention of disclosure pursuant to § 27-503 (2a) to (2e), also extends to communications between a person/client (see § 27-503 (1a)- client defined) and the following pertinent relationships: i. the client and his representative and his lawyer or his lawyers representative;(§ 27-503 [2a]); and, ii. between the client and representatives of the client. § 27-503 [2e]).

(b - Physician-Patient Privacy Privileges)

IV-B45b). That pursuant to N.R.S. § 27-504 (1) to (4), communications between a physician and patient shall remain confidential; the statutory definition of a physician includes a person licensed or certified as a psychologist under the laws of any state ... who devotes all or part of his time to the practice of clinical psychology, including a professional counselor. N.R.S. §27-504(1b & 1d). Any **third persons** who are participating in the treatment or are involved in the communications, including family members, are also included within the privilege. N.R.S. § 27-504(1e). The manner of confidentiality is also the same as that afforded the attorney-client privilege.

(c - Husband-Wife Privacy Privileges)

IV-B45c). That pursuant to N.R.S. § 27-505 (1) to (3), communications between husband and wife shall remain confidential. Under section (1a) of this statute, a "confidential communication" is defined to mean a communication which is made privately by any person to his or her spouse with no intention that such communication be disclosed to any other person.

(d - Clergy-Practitioner Privacy Privileges)

IV-B45d). That pursuant to N.R.S. § 27-506 (1) to (3), communications to clergypersons is privileged

if made privately and not intended for disclosure. The manner of confidentiality is also the same as that afforded the attorney-client privilege.

(e - Media-Source Privacy Privileges)

IV-B45e). That in order to establish and protect the free flow of information to the public concerning governmental functions, the Nebraska Legislature created the Free Flow of Information Act for safeguarding the confidential gathering of such information both to and from members of the media. N.R.S. § 20-144 et seq..

IV-B46). That on October 14, 1997, plaintiff Thomas Nesbitt requested access to the state telephone system for a legal call to attorney Donald Fiedler involving this present case, from the housing-unit (HU) -2 manager, Melvin Rouf, and/or any NDCS-NSP staff personnel on duty. (See Meier plan). After waiting a couple of hours, Nesbitt finally received approval from Rouf; that Nesbitt was then taken by HU-2 case worker Copeland acting in concert, to 'D' gallery staff office where Copeland placed the call to Fiedler through the NSP switchboard employee, also acting in concert on the state telephone system. Earlier, Copeland had been on duty but was not authorized to make such calls. Nesbitt's call was accomplished using a one-time new cordless telephone (Vitech, VT1900, Digital 900 mhz phone) that had just been temporarily hooked-up in the 'D' gallery office for testing purposes, apparently at the behest of co-defendant Ewing. Nesbitt was handed the cordless receiver/transmitter by Copeland and instructed to leave the office and go out on the gallery to talk with Mr. Fiedler where all of the inmates on the gallery could readily eavesdrop upon Nesbitt's and Fiedler's attorney-client conversation. In the B/D control station, staff personnel could also listen in on said conversation by way of the 'D' gallery intercom speaker system (model K-C-4906 [6 channel] 'Chief Master Station', Talk-A-Phone Co.). At the beginning of Nesbitt's privileged conversation, Nesbitt was again interrupted by way of Copeland further instructing Nesbitt over the intercom, to take the phone to his cell because Copeland could easily overhear Nesbitt's conversation over the gallery intercom system. Nesbitt did as instructed, but when he got inside his cell, the communication transmission began breaking up. Approximately a minute or two later, Copeland entered Nesbitt's cell and terminated his attorney call even though he had just began. Nesbitt gave the cordless phone to Copeland and told her to explain to attorney Fiedler why his call was being terminated. Copeland did so for 15 seconds then walked away with the phone. Around 3:00 p.m. later that day, Nesbitt witnessed HU-2 mgr. Rouf removing this phone from the HU taking it to the NSP admin. Building. Plaintiff never got to discuss his legal concerns with attorney Fiedler, which eventually led this attorney to withdraw his representation from this case. (See the 11-4-97 affidavit of record of plaintiff Nesbitt, filed as Exhibit #42.)

IV-B47). That in the course of seeking to regain his freedom through Nebraska's system of justice, it became necessary for co-plaintiff Gary Pope to place certain legal calls through his mother, Dolly Lyons, his brother Terry Pope, and his sisters, Cheryl and Carol, in order to obtain and relay vital confidential information to several attorneys, one of which was Mr. James Stanton. In the furtherance of the rendition of such legal services through these third parties dealing with his criminal case, and certain other matters regarding the Board of Parole for commutation purposes, the intended recording, monitoring, limiting and restricting of all such inmate telecommunications, has basically foreclosed and prejudiced these attempted legal service communication and expected relief. (See Exhibit J, filed with the original petition in this case.)

IV-B48). That co-plaintiff David Ditter is currently treating with a clinical psychologist, Dr. Chris Walker, who is licensed in the State of Colorado to practice psychology. Mr. Ditter filed an informal Grievance Resolution request to maintain his Physician-Patient privileges for confidential

communications, which Ditter pays for by way of sending Dr. Walker sufficient funds to pay for the consultation and telephone calls. In response to this grievance request, Warden Hopkins acting in concert with the defendants, stated the following: "Telephone conversations between an inmate and a mental health staff person in the community are not exempt from recording and monitoring in the new inmate calling system policy. No change in the policy is being considered at this time. As you are aware, the Penitentiary offers mental health care services housed at the facility. In addition, should your psychologist decide to visit you, the conversation between you and the psychologist would not be monitored or recorded."

IV-B49). That although the defendants offer some form of medical and mental health care services, there are wanting circumstances when an inmate desires to retain a private physician or psychologist to attend to their treatment. The reasons may vary from the quality of care and simple access and availability to the caregiver. However, no matter what the reason, telecommunication are to remain confidential consistent with law and not be subject to monitoring, recording, limiting, nor restricting such treatment, especially since no security interests are indicated should a one-on-one visit occur.

IV-B50). That co-plaintiff Barry McCroy in his affidavit filed with the original petition, set forth his substantial concerns about the defendants' telephone policies and practices that manifestly forms the confidentiality matters of this petition. McCroy stated: "I am married and had maintained a strong family relationship with my wife, Brigette McCroy, through our telecommunication to the Omaha area where she resides. Sometimes our husband-wife telephone conversation, which occur almost daily, become very intimate and personal in nature when dealing with a wide range of one's spousal relations and responsibilities. I have recently been informed by a memorandum that the NDCS now intends to eavesdrop on all our confidential telephonic conversations by recording and monitoring all such phone calls. Both my wife and myself strongly object to such eavesdropping by the State and its employees into our private affairs and marital interests which only promote an adverse effect of further straining our relationship beyond that of what my current incarceration already imposes." (See Exhibit H)

IV-B51). That the plaintiffs also maintain well founded concerns about defendants' new telephone policies and practices that forms the subject matter basis of this petition because all phone calls, including those involving any calls to a priest, rabbi or minister, are simply going to be recorded by the defendants acting in concert, which is an affront and violation to the freedom of religion rights prohibited by the separation of the Church and State under Article I, Section 4 of the Nebraska Constitution and the First Amendment of the United States Constitution guaranteeing such freedoms.

IV-B52). That also, members of the clergy are frequently unavailable for prison visits, as their own congregations require them to attend to pastoral duties. Occasions arise frequently when inmates need to confide in members of the clergy. Those confidences are not meant, consistent with law, to be subjected to eavesdropping by the defendants acting in concert, or anybody else. Currently, the NDCS defendants, have now during the course of this law suit, or since November 19, 1998, done away with all formal religion services by way of precedent policy since plaintiffs raised the issue in their original petition about the lack of the formal services for those of the Judaism persuasion.

IV-B53). That on February 16, 1998, a twelve minute telephone call was placed by the co-plaintiff Thomas Nesbitt utilizing the defendants' ICS telephone to Mr. Butch Mabin, a reporter of the Lincoln Journal Star. Neither Nesbitt nor Mr. Mabin consented to having their private conversation monitored and recorded by the defendants. The defendants monitored and recorded this oral wire telecommunication in violation of N.R.S. §§ 86-702, 86-707, and 86-707.03. (See § 86-705 (6) listing §20-146 communications to & from the media as prohibited from wire interception.)

IV-B54). That Regulation 205.3 does not bestow any options upon the plaintiffs. Either an inmate agrees to having their private telephonic communication monitored and recorded or they simply don't have access to a phone. Regulation 205.3 makes it clear that the aggrieved parties (the inmates and their unincarcerated community relations of the general public sector) consent is coercive, not voluntarily obtained, in violation of N.R.S. § 27-512 as adopted and interpreted by the Nebraska Supreme Court through its 1973 Proposed Rules of Evidence, at pgs. 85-86, Rule 512. The language in the following provisions of the regulation are pertinent:

i. Telephonic usage by inmates is a privilege that may be restricted or withheld to protect the public, to ensure the safety, security, or good order of the department's rules and statutes (Reg. 205.3, Purpose);

ii. Operational procedures shall be developed to ensure that the use of telephones by inmates are controlled and supervised. Protection of the public, institutional safety and security, crime prevention/detection/prosecution and inmate access are the order of priorities ...Inmates shall have access to this regulation and **are required to comply with its provisions.** (Reg. 205.3, General) (Emphasis added to Bold only);

iii. All inmates telephone calls utilizing the ICS and not eligible for confidential status shall be electronically recorded and may be monitored by authorized department staff barring equipment failure. (Reg. 205.3, pg. 8); and,

iv. Use of the ICS by the inmate, and acceptance of the call by the called party, constitutes consent to record and monitor the conversation by Department Staff. (Reg. 205.3, pg. 9). (Emphasis Added.)

IV-B55). That some of the plaintiff members, including co-plaintiff Nesbitt, have refused to waive their confidentiality rights and privileges accorded them by State law by refusing to sign any NDCS Information "consent" form for recording and monitoring purposes, as indicated by the nonconsensual petition filed with the court as Exhibit 34. By not signing the form, those inmate plaintiffs, in addition to the other penalties imposed by A/R 205.3, have not been allowed since September of 1997, to use the State or the ICS telephones for any community relation purposes, thereby resulting in substantial irreparable harm to those plaintiff members and their respective family and community relationships so affected, in violation of N.R.S. §§ 86-304 and 86-707.

IV-B56). That, the defendants warrantless and unauthorized interception of closed wire oral telecommunications along with pen-registering to be provided to law enforcement personnel or other state or federal employees acting in concert or in aiding & abetting each other, for the use in some unknown criminal investigations, prosecutions, or for any other type or proceedings, (see N.R.S. § 86-712), usurps the vested function and authority of the Nebraska Judiciary in violation of the Nebraska Constitution, Article II, Section 1, regarding the distribution of governmental powers in the State of Nebraska.

C - CONFIDENTIAL COMMUNICATIONS TO OR FROM MEMBERS OF THE LEGISLATURE - STAFF & STATE OMBUDSMAN INFRINGEMENTS)

IV-C57). That, while also protected under the general privacy prohibitions of Nebraska's foregoing Wire Intercept laws, in accordance with N.R.S. § 81-1120.27 (3), **"no calls made to or by a member of the Legislature which are sensitive or confidential in nature shall be required to be disclosed"**, and that **"communications transmitted on or through the communication system shall be the privileged information of the sender and receiver."** N.R.S. § 81-1120.28. That the statute defines

'sensitive or confidential in nature' to mean: "Either the member of the Legislature **or the caller** would reasonably expect the nature or the content of the call would not be disclosed to another person **without the consent of the member and caller.**" (§ 81-1120.27). This privilege also encompasses the Legislature's staff and the its investigatory arm of the State Ombudsman pursuant to the confidentiality provisions of N.R.S §§ 27-509, 27-510, 81-8,253, and 81-8,254. Such confidentiality includes any form of pen-registering and the dissemination thereof, outside of the exception provision afforded the actual telephone provider-owner for billing purposes under N.R.S. § 86-707.03.

IV-C58). That the very nature of telecommunications between members of the Legislature, engaging in legislative business and inmates would more likely than not deal with institutional controls or grievances that if divulged could result in repercussions for the inmate.

IV-C59). That during a legislative session, it is very difficult for a state senator with their workload to communicate with an inmate by any other means than through a telephone. That the defendants' policy and practices in question would violate the privileged communications that is afforded members of the legislature and the inmates' fundamental rights to petition the government for redress of grievances.

IV-C60). That while involved in official state investigations for the Legislature, several telecommunications between Mr. Davis (Mr. Lux's assistant Ombudsman for the NDCS) and the co-plaintiff Nesbitt since February 16, 1998, have been monitored and recorded by the defendants through the use of their ICS telephone apparatus and by way of the NSP staff defendants acting in concert, eavesdropping upon said conversations using the HU-2D gallery intercom system. Neither Mr. Davis nor Mr. Nesbitt voluntarily consented to having these private and confidential conversations monitored, recorded, or eavesdropped on by the defendants or anyone else. Also, the collect-only billing for the ICS calls by Mr. Nesbitt to Mr. Davis, were overcharged by the co-defendants Sprint to the State Ombudsman's office, instead of providing Mr. Nesbitt with the use of the reduced or free state 'CENTREX' telecommunication system for placing all such business calls from one state entity to another. While involved in official state investigations for the legislature, several previous telecommunications between Mr. Davis and Mr. Nesbitt were also afforded no confidentiality when using the NDCS State Telephone System located in staff offices. Instead of HU-2 Case Mgr. Richardson and again Case mgr. Duncan stepping outside their respective offices for confidentiality purposes and viewing Mr. Nesbitt through the window in the office door for whatever security reasons, both of these defendants acting in concert, simply refused to step outside their offices. These calls not only had to be terminated by the parties for a lack of confidentiality; but said calls could only be conducted at the time if Mr. Nesbitt had a court hearing pending within two weeks somewhere in the country as required by A/R 205.3 and similar telephone rules and regulations of the NDCS defendants.

IV-C61). That in placing several ICS telephone calls to Senator Ernie Chambers by Mr. Nesbitt since February 16, 1998, said calls were also monitored, recorded, and eavesdropped on without the voluntary consent of these parties, exactly like those above telephone calls placed to Mr. Davis by Mr. Nesbitt in the proceeding paragraph. Also the same type of overcharging occurred by co-defendants Sprint to Senator Chambers office, regardless of whether a hearing was pending in some courtroom within two weeks.

(D - TELEPHONE STATION CONFIDENTIALITY DEVICE VIOLATIONS)

IV-D62). That under penalty of State law, the ICS telephone stations installed throughout the NDCS by co-defendants Sprint and it's Subcontracting partners, allows for the NDCS co-defendants acting in

concert, to eavesdrop and monitor plaintiffs confidential and private telecommunications by failing to comply on a weekly basis since September of 1997, with the necessarily required confidentiality devices per telephone station mandated pursuant to the statutory provisions of N.R.S. §§ 86-201 and 86-202. The aforesaid violation constitute a Class III Misdemeanor with a \$500.00 fine and/or 3 months incarceration per telephone station each week Sprint and its Partners fail to comply with this Nebraska code.

V - GENERAL ICS TELECOMMUNICATION CLAIMS & CAUSES OF ACTION

V-63). That the new ICS phone systems of the defendants contains built in mechanical or electronical safeguards that are causing the plaintiffs rights, privileges and private interests enumerated throughout this petition, to be further infringed, including that of incorrect rate charging. That the aforesaid problems include, but are not limited to the following:

- i.** Connection failures due to rotary dial telephone equipment, and party line disconnects;
- ii.** Connection failures due to station-to-station format; instead of person-to-person and station-to-station formats;
- iii.** Connection failures due to privileged telephone conferencing disconnects;
- iv.** Connection failures due to privileged telephone calls placed on call waiting;
- v.** Connection failures due to privileged telephone calls placed on call holding.
- vi.** Connection failures due to privileged telephone calls to answering machines and pagers;
- vii.** Unlawful overcharging and double-billing practices by the telephone provider; and,
- viii.** Unlawful monopolizing practices by telephone provider.

V-64). That co-plaintiff Donald Dredge originates from Plainview, Nebraska, where telephone party lines and rotary dial phones are in common usage by the local community and telephone provider. Prior to co-defendant Sprint's ICS telephones going into operation in 1997 throughout the NDCS, Mr. Dredge was able to communicate on a weekly basis with his family members and community relations of the general public sector by way of the then existing NDCS Aliant telephone provider of Lincoln, Nebraska. However, after the ICS went into operation, Mr. Dredge has had to endure one problem after another, including multiple telephone blocking, disconnects, and various other interruptions when attempting to contact his family and community relations. Mr. Dredge had made written complaint after complaint to the defendant, which have fallen on deaf ears, leaving him with no telecommunications. In 1998, plaintiff wrote his local community telephone provider, Plainview Telephone, who verified for him that these telecommunication obstruction and interferences originate with Sprint, the telephone provider who initiates his calls. These telecommunication obstructions and interference's has now strained his family and community ties, in violation of N.R.S. § 86-304 and 86-707(2) & (3). Apparently such telecommunication obstruction and interference practices are being unlawfully utilized by Sprint in a monopolizing practice and manner to force the affected parties to switch to Sprint Communication Co. as their sole telephone provider, in violation of State and Federal law. (See N.R.S. § 86-803 [5]). Compounding these obstruction injuries, the few times Mr. Dredge was

successful in obtaining telephone contacts with his family and community relations over the last 20 months, neither Mr. Dredge nor his family and community relations have ever voluntarily consented to have their respective oral wire telecommunications limited, restricted, monitored, recorded, or eavesdropped on by anyone.

V-65). That *Meier v. Shortridge*, ante. Indicates that in the event the inmate's attorney is located in the same community as the prison facility, calls to counsel shall be free. Regulation 205.3, as written, imposes an unlawful charge of \$1.00 per call for all local calls, even when the average local call is usually no more than \$.35.

V-66). That the NDCS and NDAS defendants have failed to make available the State 'CENTREX' telecommunication system to the plaintiff members for placing reduced or free and confidential state business calls to and from members of the Legislature and officers of the court. Like the State Courts, almost every member and office of the Legislature, plus other vital departments of government, accept no collect calls, local or long distance, station-to-station, or person-to-person, whether from a pre-taped ICS machine or from a live individual.

V-67). That co-plaintiff Kenneth Keever, has been maintaining strong family ties with his wife and sons and other family and community relations from the general public sector by way of telecommunications each week. That Mr. Keever, on a monthly basis, sends home to his wife a portion of his state earnings, specifically earmarked for paying his family bills, including those for his telecommunications. That since the defendants' ICS took over service from Aliant Telephone Co. of Lincoln, Nebraska in September of 1997, Mr. Keever and his wife have been continuously experiencing substantial amount of overcharging and double-billing service charges by defendant Sprint through their local telephone provider. These overcharges and double-billing has now accrued in the several hundreds of dollars with no relief insight upon the Keever's limited resources. Such unlawful rate and charging services are actionable pursuant to N.R.S. § 86-811. Further, Mr. Keever, nor his wife and family, or his other community relations who he communicates with by telephone, have ever voluntarily consented to having their respective oral wire telecommunications limited, restricted, monitored, recorded, or eavesdropped on by the defendants, resulting in increasing the incarceration strains already imposed upon his family and community ties.

RELIEF

68). That the Plaintiffs are seeking immediate relief pursuant to N.R.S. § 25-1063(2), as its necessary to restrain the actions of the Defendants because if Regulation 205.3 and A/R 116.1 takes effect, it will infringe upon and cause irreparable injuries to plaintiffs' Constitutional and Statutory rights, privileges and private interests described throughout this Petition. Therefore, the plaintiffs are seeking a Temporary Restraining Order as the aforementioned Policy and practices has been scheduled to go into effect since before and after June 1, 1997, and may continue in effect during the pendency of this action if said Temporary Restraining Order is not issued.

69). That the Plaintiffs are entitled to the relief sought. Further, that statutes set forth in this Petition authorizes a Temporary Restraining Order, a Temporary Injunction, and a Declaratory Judgment with

a Permanent Injunction thereof, and Damages including those of Statutory and Compensatory, plus all fees and other litigation costs.

70). That the Plaintiffs are seeking an Order for a Temporary Injunction after a hearing is held until such time as a jury trial can be held for purpose of granting a Declaratory Judgment and Injunction, permanently enjoining the implementation of the Regulation 205.3, A/R 116.1 and all similar telephone regulations and memorandums.

71). That pursuant to N.R.S. §§ 25-21,149 et seq., 86-707.02 (2a), and 86-811, Plaintiffs are entitled to any and all preliminary and such other Declaratory and Injunctive relief as may be appropriate through both civil and criminal sanctions against the Defendants.

72). That pursuant to N.R.S. §§ 86-707.02 (2b & 3b), and 86-811, Plaintiffs are entitled to all Actual and General Compensatory Damages as provided by law, including those of overcharging and double-billing. Further, such Damages are being sought in treble the amount as provided for by N.R.S. § 28-926, whether the Defendants are or were acting in their respective official, individual, or private capacities under color of law or office.

73). That pursuant to N.R.S. § 84-911 (1 & 2), the Plaintiffs are entitled to Declaratory Judgments concerning their respective Constitutional and Statutory rights, privileges, and private interests described in this Petition, and to the invalidation of all NDCS telephone Rules & Regulations in violation of those rights, privileges, and private interests of the Plaintiffs and their community relations of the private public sector.

74). That pursuant to the provisions of N.R.S. § 20-148, and Title 42, U.S.C., Sections 1983 and 1985, the Plaintiffs are also entitled to any and all preliminary and such other Declaratory, Injunctive, and Compensatory relief as appropriate by law and justice through both civil and criminal sanctions against the State Defendants in their individual capacities, and Sprint and its Subcontracting Partners in their respective private and corporate capacities.

75). That in addition to such other relief described herein, Plaintiff Nesbitt is entitled to Actual Compensatory Damages in the amount of \$1,000,000.00 for litigation access injuries, plus, \$250,000.00 in General Compensatory Damages for loss of all telecommunication with his family members since September, 1997.

76). That all of the incarcerated Plaintiffs are indigent and therefore, pursuant to affidavits of indigency, are proceeding in forma pauperis status filed and granted with the previous and current Petitions during the course of this action, resulting in the waiver of all fees, litigation costs, and such other expenses in connection with the prosecution of this law suit.

WHEREFORE, the Plaintiffs, who are Nebraska Department of Correctional Service Inmates **BARRY McCROY, THOMAS NESBITT, STEVEN JACOB, DAVID DITTER, KENNETH KEEVER, GARY POPE, and DONALD DREDGE**, on behalf of all similarly situated individuals, now and in the future, pray that the Relief set forth in the Fourth Amended Petition be granted together with all other relief which may be just as afforded by law.

RESPECTFULLY SUBMITTED

By the Below-Named Plaintiffs

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICE INMATES:

**BARRY McCROY, THOMAS NESBITT, STEVEN JACOB, DAVID DITTER, KENNETH
KEEVER, GARY POPE, and DONALD DREDGE**