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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO – CENTRAL DIVISION

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| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br><br>vs.<br><br>CLIENT NAME DELETED,<br>Defendant. | **Case No.: CASE NUM. DELETED**<br><br>*EX PARTE* MOTION FOR ORDER TO REQUIRE THE FRESNO COUNTY SHERIFF'S DEPARTMENT TO ALLOW UNMONITORED CONTACT VISITS FOR DEFENSE TEAM<br><br>Date: March 20, 2008<br>Time: 1:30 P.M.<br>Place: D31 |

## INTRODUCTION

Counsel for NAME DELETED has been refused unmonitored contact visits by jail personnel at the new Fresno County Jail facility in Fresno. (See attached Declaration of Rick Horowitz.) For reasons set forth below, the NAME DELETED requests this court order the Fresno County Sheriff's Department to permit unmonitored contact visits by NAME DELETED'S defense team.

The defense team has prepared and attached a copy of an ORDER for this purpose, should the court grant this request.

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## ARGUMENTS

### I

### AN *EX PARTE* REQUEST IS THE PROPER APPROACH TO THIS PROBLEM BECAUSE THE DISTRICT ATTORNEY IS (HOPEFULLY) NOT A PARTY TO THE DENIAL OF MR. NAME DELETED'S CONSTITUTIONALLY-PROTECTED RIGHT TO CONFER PRIVATELY WITH THE DEFENSE TEAM

The defense is unable to find any case law which directly addresses the issue it now brings before the court. However, in *United Farm Workers v. Superior Court of Santa Cruz County* (1975) 14 Cal.3d 902, 908-909 [122 Cal.Rptr. 877], the California Supreme Court discussed the "[t]wo basic defects…typical of ex parte proceedings." The first was a potential shortage of factual and legal contentions that accompanies an adversarial hearing. The second was a potential that any order issued consequent to the proceeding would be too broadly drafted. (*Ibid.*)

Neither instance is likely to present itself here.

The District Attorney is (hopefully) not a party to the situation about which the defense complains here and therefore can add nothing to the facts surrounding the complained-of circumstances. Also, the District Attorney does not represent the Sheriff's Department – a third party – and therefore is not entitled to participate in any proceedings deciding questions between the Sheriff's Department and the defense. (See *Smith v. Superior Court* (2007) 152 Cal.App.4th 205, 213 [60 Cal.Rptr.3d 841] (People's rights unaffected by third party action, so prosecution has no right to participate in hearing); *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1045 [130 Cal.Rptr.2d 672] (prosecution not able to argue against defense *Pitchess* motion because they had no stake in the outcome).)

The requested Order will simply allow MR. NAME DELETED to exercise his "right to consult with his attorney in absolute privacy, which right is not abrogated by the legitimate interests of…authorities in the administration of the institution." (*In re Jordan* (1972) 7 Cal.3d 930, 938, note 3 [103 Cal.Rptr. 849].) The order is not likely to be too broadly drafted because

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the right, required by fundamental fairness, is simply met by providing what used to be provided at the Fresno jail facility and is still available on some floors therein: a separate room where direct contact visits may be had by the defense team with MR. NAME DELETED, the defendant. (*Id*. at 940.)[1]

Since the prosecution has no right to participate in any hearing on this issue, this request for an order is therefore properly brought *ex parte*.

## II

## A PRISONER HAS A RIGHT TO CONSULT HIS ATTORNEY IN ABSOLUTE PRIVACY UNFETTERED BY FEAR OTHERS WILL BE INFORMED WHICH IS NOT SATISFIED BY JAILORS' PROMISES NOT TO LISTEN

Evidence Code sections 950-962 statutorily enshrine a right of confidential communications between a client and his attorney. The Attorney-Client privilege is one upon which society places a high value. (*Glade v. Superior Court of Placer County* (1978) 76 Cal.App.3d 738, 743 [143 Cal.Rptr. 119].) So highly valued is this privilege that where a court is aware that a witness is entitled to claim it, but is without the advice of counsel and uninformed about the privilege, it is the court's duty to inform the witness of his right to assert the privilege on the court's own motion, if necessary. (Evidence Code §§ 954, 916.)

As the Fifth District Court of Appeal has noted,

> The basic policy behind the attorney-client privilege is to promote the relationship between attorney and client by safeguarding the confidential disclosures of the client and the advice given by the attorney. *This policy supports a liberal construction in favor of the exercise of the privilege.*

(*Benge v. Superior Court of Tulare County* (1982) 131 Cal.App.3d 336, 344 [182 Cal.Rptr. 275], emphasis added.)

"The often-expressed purpose of the privilege is to induce or encourage a client to disclose to his counsel fully, freely, and openly, the facts of a case." (*American Mutual Liability*

[1] Such rooms do exist in the facility. Defense counsel has already had *numerous* such contact visits with other clients at the jail. (See attached Declaration of Rick Horowitz.)

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*Insurance Company v. Superior Court of Sacramento County* (1974) 38 Cal.App.3d 579, 593 [113 Cal.Rptr. 561].) In *American Mutual*, the Court refused to allow discovery which would reveal matter subject to attorney-client privilege because such an order would inhibit and chill "full, free, and objective evaluation" of the case by the attorney. (*Id*. at 597.) As that Court noted, "the underlying objective of the attorney-client privilege [is] to encourage full and free interchange of confidential information between a client and his attorney." (*Id*. at 746.) If a client was concerned about the possibility that his confidence would be breached, he "would be disinclined freely to divulge confidential information." (*Ibid*.)

This is a well-established policy supported by numerous rules. The Third Appellate District has noted:

> The objective is to enhance the value which society places upon legal representation by *assuring* the client full disclosure to the attorney *unfettered by fear* that others will be informed. [Citations.] The privilege serves a policy *assuring private consultation*. If client and counsel must confer in public view and hearing, both privilege and policy *are stripped of value*.

(*Sacramento Newspaper Guild, Local 92 of The American Newspaper Guilde, AFL-CIO v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.3d 41, 53-54 [69 Cal.Rptr. 480], internal citations omitted; emphasis added.)

In MR. NAME DELETED'S case, the attorney was told that they may not have a contact visits with the defendant in a room without intercom monitoring capabilities. A deputy offered to request that "they stop listening." This implies that listening sometimes happens.

Promises from the Sheriff's Department that they will not listen in to privileged communications do not resolve the issue for two reasons.

The presence of the intercom violates the spirit and aims of the long-established policies regarding attorney-client privilege. The Fifth Appellate District Court states that the privilege does not apply unless the information is communicated,

> in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.

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(*Benge, supra,* 131 Cal.App.3d at 346.)

Second, the Courts repeatedly use language such as "*absolute* privacy" (*In re Jordan, supra,* 7 Cal.3d at 941), "*safeguarding* the confidential disclosures" (*Benge, supra,* 131 Cal.App.3d at 344) and they talk about "*assuring* the client" and allowing him to be "*unfettered by fear*" (*Glade, supra,* 76 Cal.App.3d at 743; *People v. Superior Court* (1995) 37 Cal.App.4th 1757, 1766 [44 Cal.Rptr.2d 734]; *Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at 53; emphasis added.).

Here, MR. NAME DELETED is not assured of confidentiality when his defense team is forced to meet in a room with obvious listening devices as a result of which his conversations might be recorded. MR. NAME DELETED is "disinclined freely to divulge confidential information" to the defense team, "inhibiting and chilling that full, free, and objective evaluation" of material matters in his case. (*Glade, supra,* 76 Cal.App.3d at 746; *American Mutual Liberty, supra,* 38 Cal.App.3d at 597.)

Nor should MR. NAME DELETED be satisfied by promises not to eavesdrop. (Which, incidentally, would is forbidden Penal Code § 636 – so why are there listening devices present in the first place?). In the case of *In re Jordan, supra,* 7 Cal.3d at 933, the California Supreme Court was not swayed by the promise of the Legislature that information breached when confidential mail was opened for inspection would be kept in "strict confidence by the inspecting official." The Court required "*sealed* letters" be allowed. (*Id.* at 939.) Why sealed? Why could not correctional officers just promise not to look? The answer is obvious: such a promise is insufficient to "serve[] a policy of assuring private consultation." (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at 54.) The promise, where the equipment is obviously in place to allow listening and recording conversations between prisoners and members of the defense team, cannot assure the attorney that he is "maintain[ing] inviolate the confidence, and at every peril to himself [preserving] the secrets, of his client." (*In re Jordan, supra,* 7 Cal.3d at 941.) It does not assure MR. NAME DELETED that he may fully disclose to his defense team, "unfettered by fear that others will be informed." (*Sacramento Newspaper Guild, supra,* 263 Cal.App.2d at 53.)

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## CONCLUSION

For the above reasons, NAME DELETED respectfully requests this court order the Fresno County Sheriff's Department and other parties responsible for the administration of the Fresno County Jail Facility in Fresno to permit unmonitored contact visits between the defense team and himself. Not only does California state law support this, but the ability to communicate confidentially with the defense team is a matter of fundamental fairness. (*In re Jordan, supra,* 7 Cal.3d at 941.) Fundamental *un*fairness would impact MR. NAME DELETED'S Sixth Amendment right to counsel and Fourteenth Amendment due process rights.

DATED: March 7, 2008

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