ALAMEDA COUNTY
PUBLIC DEFENDERS

BRENDON D. WOODS
Public Defender

YOUSEEF J. ELIAS
Chief Assistant Public Defender

August 21, 2018

PRESS ADVISORY

The following pages contain a motion filed yesterday by the Alameda County Public Defender's Office. The case in which this motion was filed has nothing to do with the unauthorized recording of the conversation between a public defender and his juvenile client. The Public Defender chose this case as a vehicle to request the court issue a standing order barring the Alameda County Sheriff's Office from making further recordings of privileged conversations in all criminal cases.

If you have further questions, please call Jeff Chorney or Desiree Sellati at 510-272-6600.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

The People of the State of California,

Plaintiff,

v.

[redacted],

Defendant.
_____/

Dept. No. 112

No. [redacted]

Hearing Date: August 20, 2018

Time: 2:00 p.m.

NOTICE OF MOTION AND MOTION FOR A STANDING ORDER BARRING EAVESDROPPING AND ILLEGAL RECORDING OF PRIVILEGED COMMUNICATIONS

TO: NANCY O'MALLEY, DISTRICT ATTORNEY OF ALAMEDA COUNTY, AND THE ABOVE-ENTITLED COURT

PLEASE TAKE NOTICE that on August 20, 2018, 2018, the defense will request a standing order barring the Sheriff's Department from recording privileged attorney-client communications. This motion is made pursuant to Penal Code section 636(a) as well as the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 1, 7, 13 & 15, of the California Constitution.

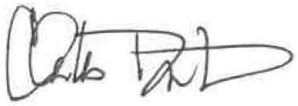
It is based upon this notice of motion, the attached memorandum of points and authorities, the exhibits documenting the Alameda County Sheriff Department's practice of

unlawfully recording privileged communication between defendants and defense counsel, and any evidence or arguments adduced at the hearing on the motion.

DATED: August 20, 2018

Respectfully submitted,

BRENDON D. WOODS
PUBLIC DEFENDER



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Plaintiff,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR A STANDING ORDER BARRING EAVESDROPPING AND ILLEGAL RECORDING OF PRIVILEGED COMMUNICATIONS

STATEMENT OF FACTS

The facts giving rise to this request came to light during our representation of a juvenile. We received in discovery body worn camera footage involving Sergeant Russell of the Alameda County Sheriff's Department and a recording by the Alameda County Sheriff's Department from an interview room at the Eden Township substation that captured a confidential interview between an Alameda County Public Defender and the juvenile client.

The body worn camera footage contained startling revelations. In it, Sergeant Russell appears to say that he has been recording all of the privileged conversations between attorneys and clients at the Eden Township substation since January when

Welfare and Institutions Code section 625.6 was amended.[1] (A portion of that video footage is attached hereto as *Exhibit A* and a transcript of the audio from the body worn camera [hereafter "TX"] is attached hereto as *Exhibit A-1*, 2:23-3:2.) In a conversation with Lieutenant Schellenberg, he admits recording a privileged conversation between an attorney and a juvenile arrestee.

When Lieutenant Schellenberg questions this practice, Russell explains that the recording is necessary because "what if he decides to molest them in there, then we are on the hook." (T.X. 1:6-8.)[2] Pressed further, he acknowledges that the attorney-client conversations are privileged but claims that this means only that they are not admissible in court. (T.X. 1:17-19; 2:7-11.)

At one point, Schellenberg asks Russell whether it is a "a problem" to record privileged conversations. Russell assures him that if the existence of the recordings came to light, they'll just "edit the tape." (T.X. 2:7-11.)

The most troubling exchange comes when the two officers discuss using the recorded conversations as an evidence gathering tool. Here's the colloquy:

> Q: (Lt. Schellenberg): Is there issues recording?
>
> A: (Sgt. Russell): Well, if we record, we just say that it was, uhm... it's just somethin' that they can't,.. it's not admissible; it's privileged, there. So, they'll edit the tape. And, like, the... from the time he was put in the room, 'til the time he lawyered-up, uh, it was, uh, whatever... it might've been recorded him talkin'. Whatever he might've said is just privileged, and it's not admissible in court.
>
> Q: *What if it led you to investigation* (inaudible)?

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[1] The amendment requires an attorney-client consultation with juvenile arrestees 15 years of age or younger prior to a custodial interrogation.

[2] It appears from the camera body footage that the interview rooms at the Eden Township Substation are equipped with video cameras.

A: Well, we will… what we…

Q: "Yeah, I put a gun in the fucking backyard." You went back there and found the fucking gun.

A: *Well, that's what I would… they would probably make that the inevitable discovery, cause we would've asked 'em.*

Q: The Russell Rule?

A: No, the in…

Q: The Russell Law?

A: … ine… *inevitable discovery, which is the… like, we the public safety statement we could ask 'em when, after they've already lawyered-up.* (T.X. 2:6-21; italics added.)

On July 30, 2018, the Public Defender sent a letter to Sheriff Ahern asking him to discontinue the practice of recording attorney-client conversations. In addition to the privacy concerns, he pointed out that intentionally recording a conversation between an attorney and a client is a felony, with a maximum of three years in state prison. To date, there has been no response from the Sheriff to the specific requests named in the letter.

Moreover, as numerous articles in the press attached to this motion confirm, the illegal recording of confidential communications is a widespread and pervasive problem. (*Exhibit B.*)

ARGUMENT

I.
A STANDING ORDER IS REQUIRED TO PREVENT FURTHER ILLEGAL RECORDING OF PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS

A.

Attorney client conversations are presumptively confidential and privileged under Evidence Code sections 950-955. (See *Jefferson's California Evidence Benchbook*, (4th Edition), §§ 42.10, 42.14, pp. 967-969.) "The lawyer-client privilege can be

asserted to prevent anyone from testifying to a confidential communication. Thus, clients are protected against the risk of disclosure by eavesdroppers and other wrongful interceptors of confidential communications between lawyer and client. . . ." (Law Revision Commission comments accompanying Evidence Code § 954; See *People v. Shrier,* (2010) 190 Cal.App.4th 400, 411-412; *Schaffer v. Superior Court* (2010) 185 Cal.App.4th 1235, 1245.)

The Legislature has criminalized, and the courts have uniformly condemned the practice of eavesdropping on attorney-client conversations. Penal Code section 636(a) states that: "Every person who, without permission from all parties to the conversation, eavesdrops on or records, by means of an electronic device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or any other public agency, and that person's attorney, religious advisor, or licensed physician, *is guilty of a felony* punishable by imprisonment [for 16 months, 2 or 3 years] pursuant to subdivision (h) of Section 1170." (Italics added.)

The court's intolerance for eavesdropping is exemplified by *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252. There, the prosecutor instructed her investigator to sit next to the courtroom holding cell and listen to a conversation between Morrow and his attorney. A bailiff observed the misconduct and reported it.

In a stinging rebuke, the Court of Appeal characterized the prosecutor's conduct as an "outrageous" interference with Morrow's right to counsel and ordered the charges against him dismissed. In reaching this decision, Justice Yegan explained that *"eavesdropping on an attorney-client conversation is inappropriate anywhere and cannot be tolerated. . . .* [I]f an accused is to derive the full benefits of his right to counsel, he must have the assurance of confidentiality and privacy of

communication with his attorney." (*Id.* at p. 1254; citing *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751.)

"We would be remiss in our oaths of office," the court concluded, "were we to discount or trivialize what occurred here. (Citation.) The judiciary should not tolerate conduct that strikes at the heart of the Constitution, due process of law, and basic fairness. What has happened here must not happen again." (*Morrow v. Superior Court, supra,* 30 Cal.App.4th 1252, 1263.) The use of the courtroom "to eavesdrop upon privileged attorney-client communications. . . shocked. . . the conscience of the court," and warranted dismissal of the charges, a sanction that, although "severe. . . pale[d] when compared to the conduct which compels this court to so hold." (*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1255.)[3]

The eavesdropping in *People v. Shrier, supra,* 190 Cal.App.4th 400 was at the behest of law enforcement rather than the prosecutor.[4] Shrier and his codefendants were charged with Medi-Cal fraud. They gathered with their attorneys in a "very large conference room" at the Attorney General's Burbank office to review the voluminous medical files seized in connection with that prosecution. (*Id.* at p. 406.) Three Department of Justice agents were stationed around the perimeter of the room, including a Russian speaking officer who sat within 10 feet of one of the Russian-born defendants and her attorney.[5] The lawyers attempted to communicate confidentially with their clients by "huddling together," "speaking in hushed tones"

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[3] Penal Code section 636(a) charges were ultimately filed against both the prosecutor and the investigator for eavesdropping upon a conversation between an in-custody defendant and his or her attorney. (*Morrow v. Superior Court, supra*, 30 Cal.App.4th at p. 1256.)

[4] See also *People v. Jordan* (1990) 217 Cal.App.3d 640 ["It is unquestionably a matter of grave concern whenever plausible charges of felonious monitoring of attorney-client communications are directed at the administration of a state prison"].)

[5] Unlike the other two agents, this officer had no prior connection to the case.

and conversing in Russian. (*Id.* at p. 406, 408.) But the agents were nonetheless able to overhear their conversations and relayed the confidential information they gathered to the prosecution.

The magistrate found that the agents were there to "insure the integrity of the evidence" and not to "monitor[]. . . the conversations between the clients and attorneys." (*Id.* at p. 406.) He also concluded that each of them – particularly the Russian speaking officer – had been deliberately placed in the room to eavesdrop on attorney-client communications. He ruled that this "misconduct was *outrageous* within the meaning of due process and other constitutional safeguards" and ordered the charges dismissed. (*Id.* at p. 409; italics added.)

The Court of Appeal upheld the finding of "outrageous" misconduct. "Like the magistrate, we deplore the conduct of these Department of Justice special agents. . . . No prosecutorial agents should position themselves so they can intentionally eavesdrop upon attorney-client conversations." (*Id.* at pp. 419, 408, fn. 2.)

After a comprehensive review of the testimony, it concluded that there was substantial evidence "that three special agents of the Department of Justice deliberately eavesdropped on communications" between the defendants and their lawyers and "'intentionally pierced' the confidentiality of the attorney-client relationship." (*Id.* at pp. 405-406, 416; italics added.)

Opting for a more flexible approach, the court declined to dismiss the charges. It instead remanded the case with the following instructions:

> The judiciary should not be a party to any exploitation of illegally obtained evidence at trial. If respondents are held to answer at the preliminary hearing, *the superior court shall exercise broad discretion in fashioning a remedial order*. At a minimum it shall bar the use of any information gleaned from the eavesdropping and any derivative evidence which may have flowed therefrom. The People shall have the burden to show that any People's evidence sought to be introduced has an

> independent origin from the eavesdropping. The burden of proof is beyond a reasonable doubt. *In addition, the superior court may make any other order or impose any other sanction which it deems appropriate.*" (*Id.* at p. 419; citing *Wilson v. Superior Court* (1977) 70 Cal.App.3d 751, 760; italics added.)

Although the prosecution was not involved in the eavesdropping, the court's opinion nonetheless ends with the admonition that "A prosecutor is the guardian of the constitutional rights of everyone, even criminal defendants. (Citation.) A prosecutor should supervise his or her agents. *They are not permitted to unilaterally eviscerate constitutional and statutory rights in their zeal to obtain incriminating evidence.*" (*Id.* at p. 419; italics added.)

B.

The recorded conversation between Sergeant Russell and Lieutenant Schellenberg plainly shows that the Sheriff's Department is engaged in an ongoing practice of recording privileged attorney-client conversations. This appears to be *felony* misconduct. (Penal Code section 636(a).) Equally troubling is that fact that at least some members of the sheriff's department believe that recording such conversations is permissible and can be used as an evidence gathering tool. The conduct of Sergeant Russell raises concerns that this practice may be more widespread than we know.

As we have noted, the practice of surreptitiously recording attorney-client interviews is not just illegal. It is also "intolerable." (*Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1254.) Such eavesdropping abridges the right to counsel (*Id.* at pp. 1252-1255) and is an "*outrageous*" violation of due process.[6] (*People v. Shrier,*

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[6] "Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . or are implicit in the concept of ordered liberty." (*Rochin v. California* (1952) 342 U.S 165, 172 (internal quotations and citations omitted).)

supra, 190 Cal.App.4th at p. 409; see also *People v. Loyd* (2002) 27 Cal.4th 997, 1000 [surreptitious taping of attorney-client conversations at jail violates the Fourth Amendment].)

Given the unequivocal state of the law, there can be little doubt that Sergeant Russell's eavesdropping is both unlawful and deeply disturbing. The only question is whether the court remains powerless to prevent it.

The answer is "no." As the First District recently pointed out, "'[a] court acts within its constitutional core function and does not violate the separation of powers doctrine when it interprets and applies existing laws and carries out the legislative purpose of statutes. [Citation.].'" (*In re Loveton* (2016) 244 Cal.App.4th 1025, 1039 quoting *People v. Brewer* (2015) 235 Cal.App.4th 122, 137.)

Quite clearly, the "legislative purpose" of section 636(a) is to prevent law enforcement from doing exactly what Sergeant Russell admits doing on a continuing basis: *record[ing], by means of an electronic device, conversation[s]. . . between a person who is in the physical custody of a law enforcement officer or. . . on the property of a law enforcement agency. . . and that person's attorney.*" (Penal Code § 636(a); italics added.)

As we have explained, this practice has also been condemned by our courts as an "*outrageous*" violation of the concept of ordered liberty and fundamental fairness that is at the heart of the Due Process Clause. After all, *"[i]n a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher.* For good or for ill, it teaches the whole people by its example." (*Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 435, quoting *Olmstead v. United States* (1928) 277 U.S. 438, 435.)

It is clear that courts have "*broad discretion in fashioning a remedial order*" to end the practice of eavesdropping upon attorney-client interviews. (*People v. Shrier,*

supra, 190 Cal.App.4th at p. 419.)[7] We believe that includes the power to issue a standing order barring the Sheriff's Department from recording confidential[8] communications between individuals in their custody and their attorneys. Such an order certainly falls within the court's inherent authority to "*make any other order or impose any other sanction which it deems appropriate*" to end this pernicious practice. (*Id.* at p. 419.)

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[7] Courts have recognized the difficulty in exposing surreptitious eavesdropping. "Since prison eavesdropping occurs in a complex bureaucratic sphere that is difficult to investigate, defense counsel cannot easily devise effective strategies for impeachment of suspect testimony, and, as the present case illustrates, faces formidable problems in proving eavesdropping by circumstantial evidence." (*People v. Jordan, supra,* 217 Cal.App.3d at p. 646.) As a result, once a defendant makes a "prima facie" showing of eavesdropping, the burden shifts to the prosecution to prove the legality of its conduct by "clear and convincing evidence." (*Id.* at pp. 644-645.)

[8] Evidence Code section 952 defines a "confidential" communication as one that is "transmitted between a client and his or her lawyer in the course of that relationship and 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. . . ."

CONCLUSION

Police officers are sworn to uphold the law and are entrusted with awesome powers to enforce it. A free society holds them to a high standard. Our judicial system serves as the oversight and, when necessary, a check upon that power. (See *Morrow v. Superior Court, supra,* 30 Cal. App. 4th at p. 1262; *U.S. v. Solario* (9th Cir. 1994) 37 F.3d 454, 461.)

The recordings disclosed by the prosecution reveal that the Sheriff's Department routinely violates one of the most basic elements of due process: the right to consult privately with an attorney. (*Morrow v. Superior Court, supra,* 30 Cal. App. 4th at p. 1257.) Were we to tolerate that practice, we would, in effect, become a "party" to the abuse. (*People v. Shrier, supra,* 190 Cal.App.4th at p. 419.)

In our view, the best way to end this pernicious and potentially endemic practice is to issue a standing order barring the Sheriff's Department from eavesdropping upon privileged communications between defendants and their attorneys.

For the reasons recited in this brief, we ask this court to issue that order.

DATED:

Respectfully submitted,

BRENDON D. WOODS
PUBLIC DEFENDER

Charles M. Denton
Attorney at Law

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

The People of the State of California,

Plaintiff,

v.

[redacted],

Defendant

_____/

Dept. No. 112

No. [redacted]

Hearing Date: August 20, 2018

Time: 2:00 p.m.

PROPOSED STANDING ORDER

TO: GREGORY J. AHERN, ALAMEDA COUNTY SHERIFF, OR HIS DESIGNATED REPRESENTATIVE

It appearing to this Court that there is GOOD CAUSE, IT IS HEREBY ORDERED that the Alameda County Sheriff's Office cease all further recording or eavesdropping of privileged attorney-client communications at Alameda County Sherriff's Office Eden Township Station and any other location operated and monitored by the Sheriff's office. This order is to be made applicable to each and every case appearing before this Court.

DATED:

_____

JUDGE OF THE SUPERIOR COURT

EXHIBIT A

EXHIBIT A-1

TRANSCRIPTION OF RECORDED STATEMENT

IN THE MATTER OF [redacted]

Docket No. [redacted]

Body Camera Footage of: Sergeant Russell

Location: Eden Township Station

Date of Recorded Statement: (Not Indicated)
Time of Record Statement: (Not Indicated)

Transcribed by: Public Defender's Office
Date Transcribed: August 1, 2018

A: (Sgt. Russell): So, PD's gonna go talk to him. They… a big knot found in the pock… jacket pocket of one of the girls. Like, a cell phone, Iphone 6. When they open up the screen, there's like a Asian family on there. So, we probably have other victims.

Q: (Lt. Schellenberg): Oh cool.

A: Uhm, I gotta bring the Public Defender back, first. So.

Q: I'm sure we need… do, do you record that, no?

A: It's not admissible, but I, I record it. What if he decides to molest him in there? Then, we're on the hook. So.

Q: Thank God.

A: Yeah. Hey, you know what would be a good idea that I've had talked to you about. I might've talked to… I think I talked to, it was either you, or Dave, maybe gettin' a phone line installed in there, so we could plug it in; so they could talk to 'em over the phone, instead of havin' to come down here. Cause, when we use our cell phones, they don't dial out.

Q: Why do we have to (inaudible).

A: We have to provide them the ability to talk to 'em. And that way, we don't have to take 'em out of the interview room.

Q: How is it, how is that not, how is that, how is it not privileged information?

A: Well, it is, but like it just doesn't get admissible. Like, when we record it, it's, it's just not admissible. We don't have to record the phone call; just, uh, we're record…

Q: Well, I mean, what?

A: Uh, you know what I mean? Like, uh, when we've tried to let them talk, call… when… like, we did it. Sometimes, a Public Defender won't come in. They will say, "Oh, I'm at home, already. So, can you just put 'em on the phone." And then the phone…

Q: Yeah.

A: Like, we have to make, like, 45 phone calls. But if we just had somethin' like a old desk phone, like that, and run a wire, and then they could just talk to 'em on the phone. And, we'd still record. But it's, it's, it's somethin'. It's not…

Q: Is there (Inaudible) issues, or issues with (inaudible) isn't that?

A: Is, that, with what?

Q: Is there issues recording?

A: Well, if we record, we just say that it was, uhm… it's just somethin' that they can't,.. it's not admissible; it's privileged, there. So, they'll edit the tape. And, like, the… from the time he was put in the room, 'til the time he lawyered-up, uh, it was, uh, whatever… it might've been recorded him talkin'. Whatever he might've said is just privileged, and it's not admissible in court.

Q: What if it led you to investigation (inaudible)?

A: Well, we will… what we…

Q: "Yeah, I put a gun in the fucking backyard." You went back there and found the fucking gun.

A: Well, that's what I would… they would probably make that the inevitable discovery, cause we would've asked 'em.

Q: The Russell Rule?

A: No, the in…

Q: The Russell Law?

A: … ine… inevitable discovery, which is the… like, we the public safety statement we could ask 'em when, after they've already lawyered-up.

Q: Right.

A: So. I didn't… what we've done is, like… well, we've, we've had this – these recordings. We have not yet listened to any of the recordings with what they said to the attorney. We just, uhm, start… go out to, to the part where we go in there and then they tell us to, "lawyer…" (Imitating client): "My lawyer says not to talk to you." And then we… and that's it. So.

Q: Alright. So you have a good (inaudible).

A:

[END OF RECORDING]

EXHIBIT B

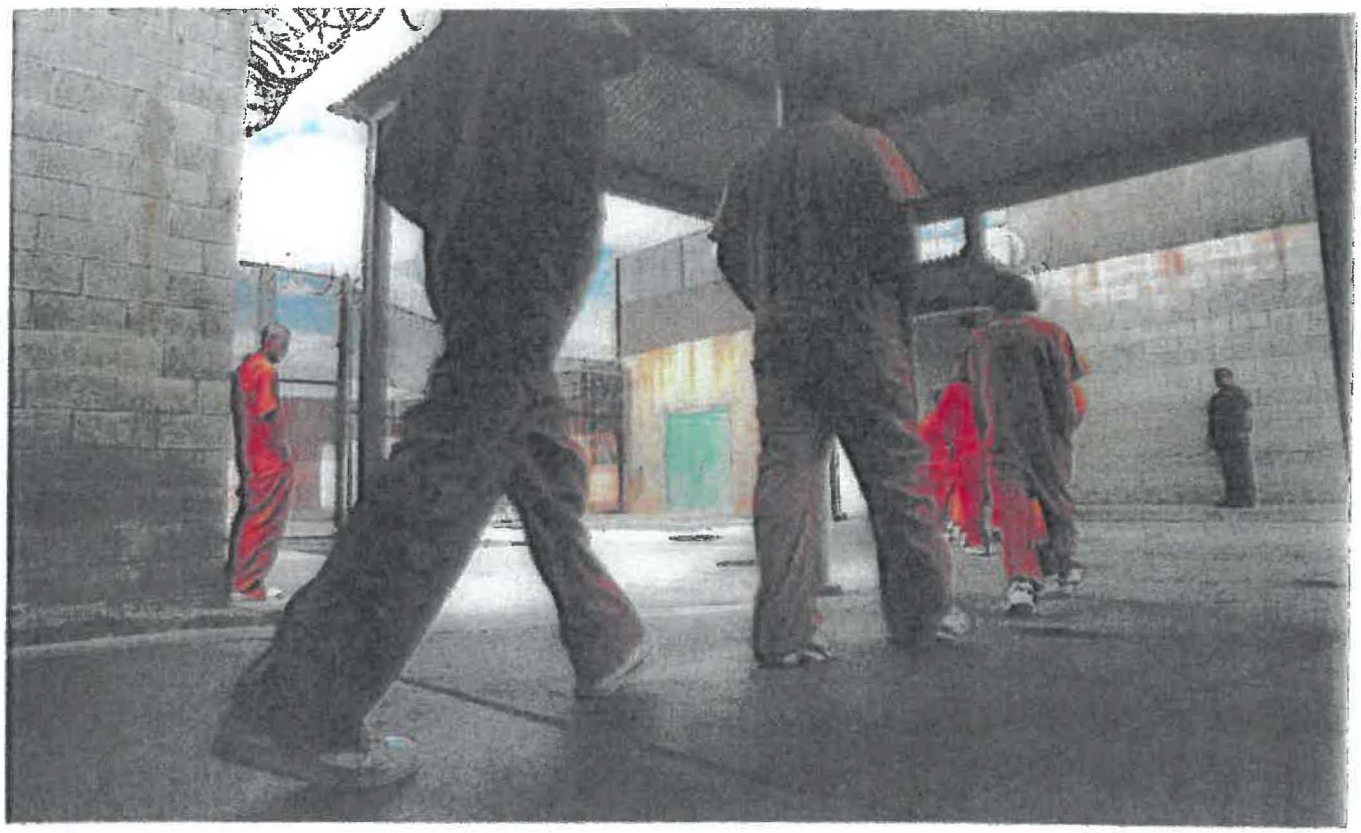
POLITICS 08/17/2018 08:10 pm ET

Confidential Inmate Calls With Lawyers Recorded Illegally In California Jail For Years

The recording of communication between defendants and their lawyers in Orange County is also occurring with a disturbing frequency around the nation.

By Matt Ferner

Inmate Calls With Lawyers 100



GAIL FISHER / GETTY IMAGES

An employee of the Orange County Sheriff's Department said it illegally recorded more than 1,000 confidential calls between inmates and their attorneys since 2015.

The Orange County Sheriff's Department illegally recorded more than 1,000 confidential calls between inmates and their attorneys since at least 2015 — a violation of attorney-client privilege, considered to be one of the most sacred aspects of criminal law — a department employee revealed in court testimony this week.

The revelation adds to the turmoil in a county that has for years been roiled by a scandal linked to the illegal use of jail informants by the sheriff's department and district attorney's office. That matter, which includes the use of illicit recordings of inmates by law enforcement, is believed to be the largest informant scandal in U.S. history.

"The law has been clear for decades that calls between prisoners and their lawyers are confidential and may not be listened to or recorded. But this kind of unlawful eavesdropping occurs with alarming frequency," said David C. Fathi, the director of the American Civil Liberty Union's National Prison Project. "Whether it's inadvertent or intentional, prisons and

The testimony from the sheriff's department employee came after a letter was presented in court from Global Tel Link Corp., the department's contractor for the jail phone system, that said a "technical error" led to the recording of 1,079 inmate calls from January 2015 to July 2018. The sheriff's department or GTL staff accessed 58 of those recorded calls 87 times, the letter states. The letter was sent to Orange County Sheriff Sandra Hutchens on July 27.

Joel Garson, the defense attorney who discovered the breaches, said that some of those recordings were shared with other law enforcement agencies.

During testimony, the sheriff's department employee said that the department had taken no action to notify any of the attorneys or defendants who were recorded but that it would begin to do so.

Garson represents Josh Waring, 29, who is charged with attempted murder in connection to a 2016 shooting in Costa Mesa and is one of the inmates whose calls were recorded. (He is also the son of a former "Real Housewives of Orange County" cast member.) Garson has argued that Waring's case should be dismissed because of outrageous government conduct.

"This could potentially unravel some convictions or pending cases," Garson said. "There's been a lot of cases in the United States that say attorney-client privilege is one of the most sacred of privileges, especially in the criminal realm, and there have been many cases dismissed where that has been breached one way or another."

Of the calls that were accessed, Garson said, almost all were to public defenders' phone numbers. "Having seen that list, I am expecting that the vast majority of the calls on the 1,079 list were to public defenders."

Garson said he's not convinced that the sheriff's department didn't know about this years ago. "In all those calls listened to by the sheriff's department or another law enforcement agency and you hear a defendant talking to their lawyer, someone should know the system isn't working and that they shouldn't be listening to this, yet no one was notified."

Orange County public defender Sharon Petrosino called the recordings and sharing of them with law enforcement agencies a clear breach of attorney-client privilege.

kept doing it but compounded it by sharing that with other agencies."

In a statement emailed to HuffPost, Hutchens said she learned of the glitch that apparently led to the recordings in June. Since then, she said, sheriff's department staffers "immediately" directed the phone contractor to correct the issue. Her statement did not reveal why she delayed disclosure of the unlawful recordings for two months.

"I am deeply disappointed that this technical glitch by GTL occurred and concerned about the serious consequences it may bring," Hutchens wrote. "The Sheriff's Department is looking to review the terms of our agreement with GTL, considering action for breach of contract and taking into serious consideration our options for providing inmate telephone services."

She added that she intends to request the county's Office of Independent Review to look into the issue.

The Orange County District Attorney's Office said that it learned of the issue this week after the court testimony and that it will review any cases affected by the recordings.

WALLY SKALIJ / GETTY IMAGES

A county already in crisis plunges deeper

The illegal recordings add to the criminal justice crisis that has plagued the county for years. The recordings raise further doubts about the purported yearslong probes by California Attorney General Xavier Becerra and U.S. Attorney General Jeff Sessions in the county. Both have said they are overseeing investigations into the Orange County District Attorney's Office and the Orange County Sheriff's Department over their roles in the jailhouse snitch scheme. The fact that the illegal recordings were made for many years — during which the state and federal governments said they were investigating county agencies plagued by a lack of disclosure of evidence — raises unsettling questions about the investigations.

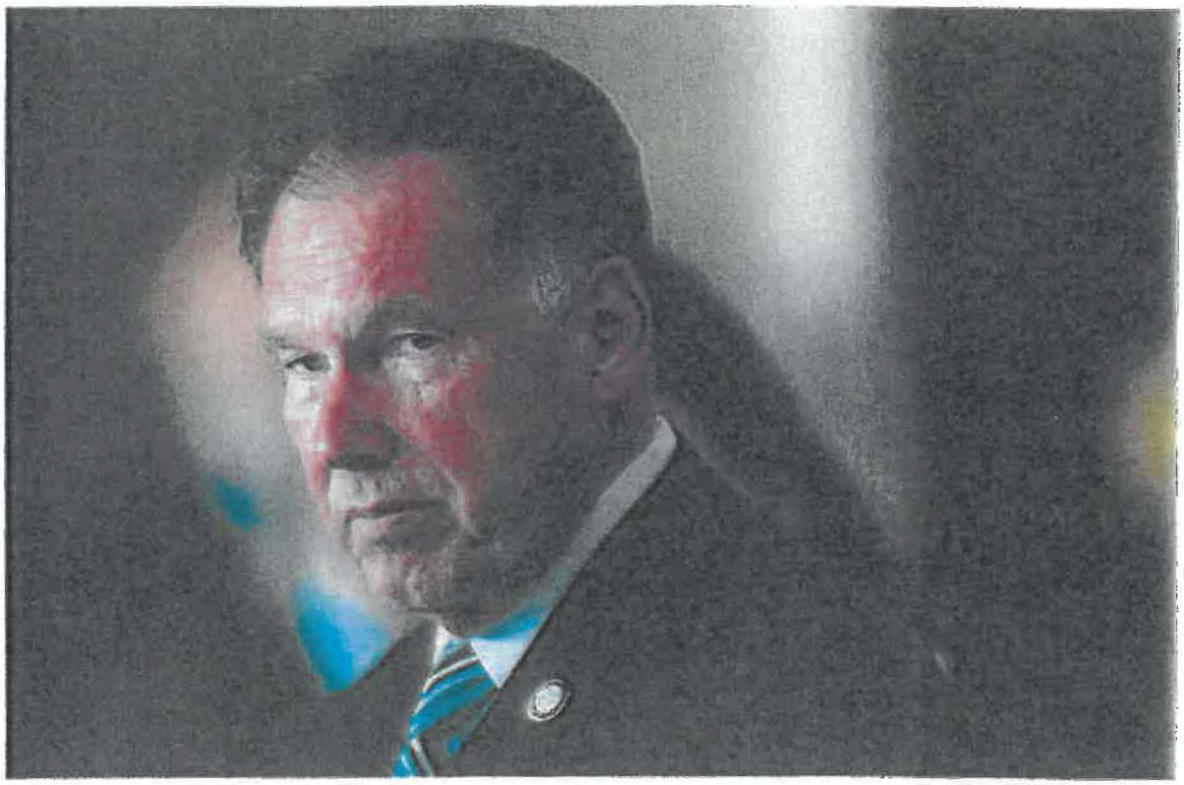
In 2014 an assistant public defender, Scott Sanders, alleged that prosecutors and law enforcement officers in Orange County for decades ran an illegal jailhouse informant program that violated inmates' rights — including those of his client, Scott Dekraai, a tugboat captain who killed eight people at a Seal Beach salon.

Sanders contended that in multiple cases, the district attorney's office and the sheriff's department colluded to plant informants in county jail cells in order to obtain damning information from defendants who were awaiting trial and were represented by lawyers — a violation of an inmate's right to counsel. According to Sanders, prosecutors then presented that evidence in court but withheld evidence that could have been beneficial to the defense — a violation of a defendant's right to due process.

misconduct. Dekraai was sentenced to multiple life sentences, rather than death, because of concerns his rights were violated during years of hearings that were marked by a disturbing lack of disclosure of evidence and false statements by law enforcement officials during testimony.

The scandal has led to the unraveling of nearly 20 cases in Orange County and threatens still more. Sanders recently discovered that at least 150 new cases are likely tainted by the jail informant scandal.

Rackauckas, who is running for his sixth term as DA, has maintained that none of his prosecutors intentionally behaved inappropriately, accused Goethals of bias and claimed the media have exaggerated the magnitude of the informant scandal. The sheriff's department has insisted it has made changes to inmate handling but continues to deny the existence of a jail informant program.



IRFAN KHAN / GETTY IMAGES

Orange County District Attorney Tony Rackauckas insists that none of his prosecutors intentionally behaved inappropriately and that the media have exaggerated the magnitude of the jailhouse informant scandal.

In jails and prisons across the U.S., it's typical for a third-party private company to contract with law enforcement to provide the facilities with phone services. Recording inmate calls is commonplace and easy. There are legitimate reasons for law enforcement to record some calls — for example, if a defendant is under investigation — but there are state statutes and the Sixth Amendment right to counsel that prohibit authorities from listening to conversations with their lawyers. But these protections are frequently not as robust as they might seem, nor are they uniform from state to state.

In Louisiana, for example, judges have held that incarcerated defendants have essentially waived their right to speak confidentially with their attorneys over the phone because at the beginning of every jail call is a recorded message that says the conversation may be monitored. More alarming is that authorities have been caught covertly recording communications between attorneys and their clients with disturbing frequency around the nation for years. Multiple incidents — in California jails and most recently in a Los Angeles courthouse last month — have surfaced, as well as in jail facilities in Texas, Pennsylvania, Florida, Kansas and others.

Peter Joy, a law professor at Washington University in St. Louis who has studied government surveillance of privileged attorney-client communications, said that in recent years, there is evidence of an increase in reports of secret recordings of calls between inmates and their lawyers.

"We do not know how extensive secret recordings are," he said, adding that the recordings usually come to light only when turned over by a prosecutor who is seeking to use the recordings as evidence or when a public defender office has asked a court to look into whether secret recordings are being made.

This sort of behavior from authorities is extremely damaging to the work of defense attorneys. If lawyers can't speak openly and candidly with their clients about their cases, it's impossible for defense attorneys to do what they are constitutionally required to do.

Criminal defense attorneys and public defenders often must rely on phone calls to incarcerated clients. Those defendants are, of course, unable to meet anywhere outside their facilities. And defense attorneys, who frequently carry large caseloads, are often

"The real problem is that people who are presumed innocent — but held in jail — are effectively stripped of all privacy," said Peter Santina, a former public defender who is now a private defense attorney in Oakland, California. "The denial of the right to a confidential legal consultation is only one symptom of this dehumanization. For those that the state insists on incarcerating, the state should still allow for some amount of privacy and dignity."

Thomas Frampton, formerly a public defender in New Orleans and now a lecturer at Harvard Law School, said he continues to hope it's rare that authorities are regularly recording and reviewing attorney-client calls but "with each new story like this, I'm beginning to wonder whether it's not much more widespread than we've all assumed."

He said that even if it is relatively rare, it can still have an enormously destructive impact.

"Even if this is only happening in a few jurisdictions, it can have a ripple effect that undermines the administration of justice anywhere defendants have to put their faith in the system to allow confidential communications," Frampton said.

Disturbingly, the only ones who know for sure whether law enforcement is or isn't recording communications between defendants and their attorneys are law enforcement agencies and the companies they contract to provide phone services.

"That's a serious problem," Frampton said.

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LAPD, other authorities arranged courthouse recording that prompted confidentiality concerns, court document shows

By NINA AGRAWAL
JUL 30, 2018 | 7:25 PM

The Clara Shortridge Foltz Criminal Justice Center, where Los Angeles police officers placed hidden recording devices on the inmates' side of an interview room in July, a court document says. (Al Seib / Los Angeles Times)

A courthouse recording that raised concerns about violations of attorney-client confidentiality was made by the Los Angeles Police Department at the request of a deputy district attorney and with the cooperation of the Sheriff's Department, according to a court document filed Monday.

Craig Kleffman, the prosecutor previously assigned to a case involving three people charged with kidnapping and assault, enlisted the support of LAPD officers and a sheriff's sergeant to place recording devices in a courthouse lockup, according to a declaration by Stephen Gunson, the prosecutor currently assigned to the case. The devices were ultimately placed in a courthouse interview room where attorneys meet with their clients.

No employee of the district attorney's office has listened to the recordings, Gunson said.

Interim Public Defender Nicole Davis Tinkham sent a confidential email to the county Board of Supervisors this month, informing the officials that her office was investigating the recording operation.

The deputy public defender who alleged that her conversations with a client had been recorded, Tiffiny Blacknell, asked the district attorney's office to hand over information related to the details of the operation.

Last week the LAPD submitted to the court two DVDs of the recordings, which will be held under seal.

On Monday, Gunson detailed some aspects of the recording operation, including names of those involved but did not specify whether it had captured attorney-client communications. A spokeswoman for the district attorney's office previously said attorney-client calls had "inadvertently" been recorded.

Between 5 and 6 a.m. on July 3, according to Gunson's declaration, a member of the LAPD placed two hidden recording devices "on the inmates' side" of the 14th-floor interview room at the Clara Shortridge Foltz Criminal Justice Center.

"The 14th-floor inmate interview room was apparently selected because it was the only custodial setting in which male inmates, such as Keith Stewart and

Johntae Jones, and female inmates, such as Amber Neal, could be in close proximity to one another such that they could engage in clear conversation," the filing said, referring to the defendants.

Kleffman had proposed the idea to LAPD investigators on the case and received approval from a sergeant with the Sheriff's Department but did not obtain a court order or warrant.
The three defendants, set to be arraigned later that day, were brought into the interview room about 6 a.m. and remained there until about 10:30 a.m., the declaration said. During that time no "live agents" engaged in conversation with the defendants to elicit incriminating statements.

"It was not the intent ... to record any portion of conversations between inmates and their attorneys," the declaration said.

The devices were removed between 11 a.m. and noon.

The filing asked the court to appoint a special master to review the recordings to determine whether they contained privileged attorney-client communications. It said the district attorney's office "does not object to the destruction of those portions."

Gunson asked for additional time to gather and organize emails and text messages that could be related to the operation, noting their "voluminous nature." The judge gave him until Aug. 9.

The LAPD said in a statement Monday, "As a result of a kidnap investigation LAPD Detectives placed recording devices in a holding cell of the court with the intention of recording a specific inmate to inmate conversation. The action was legal and was supported by the District Attorney's office."

The Sheriff's Department issued an apology to the public defender's office on July 20, saying that the recording had been "inadvertent" and that the

department was taking "immediate steps" to ensure it would not happen again, though it did not provide specifics.

"Please be assured that the Sheriff's Department will never intentionally conduct a recording operation that could capture privileged communications between your lawyers and their clients absent a court order," said the letter, which was signed by Maria Gutierrez, chief of the court services division. In an interview Monday, Blacknell said, "I do not take at face value that the intent was not to record attorney-client communications. It's too suspicious given the surrounding circumstances."

She said authorities could have chosen a different location to record the inmates, stopped the recording before attorneys entered the interview room or confirmed it once she raised her suspicions with the court.

A spokeswoman for the district attorney's office said the matter has been referred to its Justice System Integrity Division for review.

4:20 p.m. Aug. 1: This article was updated to clarify that prosecutor Craig Kleffman requested that the recording devices be placed in a courthouse lockup. They were ultimately placed in a courthouse interview room where lawyers talk to clients.

This article was originally published on July 30 at 7:25 p.m.

SFGATE

https://blog.sfgate.com/crime/2012/05/05/alameda-county-prosecutor-placed-on-leave-in-jail-recording-case/

Alameda County prosecutor placed on leave in jail-recording case

By Henry K. Lee on May 5, 2012 at 2:06 PM

A veteran Alameda County prosecutor has been placed on administrative leave for violating an accused murderer's attorney-client privilege by having a jailhouse conversation recorded, a district attorney's official said.

Deputy District Attorney Danielle London allegedly asked sheriff's deputies to record a conversation at Santa Rita Jail in Dublin on April 19 between murder defendant Marissa Manning and an expert hired by her defense team.

Several days later, London handed over a copy of the recording to Manning's attorney, Joann Kingston, who complained at a hearing before Judge Jon Rolefson.

Upon hearing about the recording, District Attorney Nancy O'Malley took "swift and appropriate action" by placing the prosecutor on administrative leave and assigning the case to a different prosecutor who had no knowledge of the contents of the tape, said Teresa Drenick, a spokeswoman for O'Malley.

Drenick declined to name London as the prosecutor involved, saying only that an internal investigation was underway. But sources confirmed that London has been placed on leave. California State Bar records show that London was admitted to the bar in 1998 after receiving her law degree from UC Hastings College of the Law in San

Francisco and that she has no record of disciplinary or administrative actions against her.

London did not respond to a request for comment.

London handled the case against Eric Mora, who was convicted of second-degree murder for killing his ex-girlfriend in 2004 even though her body hasn't been found. "I'm incredibly shocked," Mora's attorney, Colin Cooper said of the allegations against London.

Sheriff's deputies at the county's two jails, Santa Rita and the Glenn E. Dyer Detention Facility in downtown Oakland, can record the conversations between inmates and visitors as well as telephone calls. Information from those chats has been used against defendants in court. But conversations between inmates and their attorneys — or members of the defense team, such as legal experts or private investigators, cannot be recorded because of attorney-client privilege.

Manning, 24, an Oakland student, had been charged with murder in the fatal stabbing of her husband, Jonathan Bennett, 24, on the 2400 block of 89th Avenue on Jan. 12, 2010.

Manning has since agreed to a plea deal under which she would be sentenced to seven years in prison on June 6 after pleading no contest to voluntary manslaughter, Drenick said.

The deal was reached after a new prosecutor reviewed the case and found evidence suggesting that Manning suffered from "intimate partner violence," the new term for battered-wife syndrome, Drenick said.

In a statement, O'Malley said she believed the prosecutor in question had "trampled" on Manning's constitutional rights.

"I want to state loud and clear that I do not believe nor do I want the actions of a few to be representative of the ethical standards that each of us practice as members of this office," O'Malley said. "Any actions that impinge on a defendant's rights will never be tolerated by this office."