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FILED
03 JUN -2 AM 11:46
THE SUPERIOR COURT
COUNTY OF STANISLAUS
BY Johnson
DEPUTY

FILED BY FAX
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

SCOTT LEE PETERSON, et al.,

Defendant.

Case No. 1056770
MOTION FOR HEARING ON
SANCTIONS RE EAVESDROPPING
DATE: June 6, 2003
TIME: 8:30 a.m.
PLACE: Dept 2 / 8

TO: STANISLAUS COUNTY DISTRICT ATTORNEY; and


TO: CLERK OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on June 6, 2003 at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard, Defendant Scott Lee Peterson ("Peterson"), through counsel Mark J. Geragos, will move this Court for a hearing regarding sanctions over the government's improper eavesdropping on totally privileged communications between Mr. Peterson and his attorney Kirk McAllister ("Attorney McAllister") and the investigator for Mr. McAllister. The Motion will be based upon the grounds that: (1) the attorney-client communications between Mr. Peterson and Attorney McAllister were

1 totally privileged under well-established California law and the crime-fraud exception is
2 inapplicable; (2) the prosecution orchestrated the eavesdropping in knowing violation of
3 California law, and; (3) the prosecution's grave misconduct warrants sanctions. The
4 Motion will be based on this Notice, the attached memorandum of points and authorities,
5 the previously submitted declaration of Kirk McAllister, the pleadings and records on file
6 herein, and upon such other and further argument as may be presented to the Court at the
7 hearing of this matter.

8
9 Dated: May 30, 2003

Respectfully submitted,
GERAGOS & GERAGOS

11
12 By: 
13 MARK J. GERAGOS
14 Attorney for Defendant
SCOTT LEE PETERSON

15 MOTION

16 Scott Lee Peterson, by and through counsel, hereby moves the Court for an
17 order(s) imposing one or more of the following sanctions as a result of the improper
18 monitoring of privileged communications between Peterson and Attorney McAllister:

- 19 1. Recusal of the Office of the District Attorney of Stanislaus County and the
20 total screening of the new prosecutor from any communications with the Office of the
21 District Attorney of Stanislaus County and its agents or the investigators involved in the
22 eavesdropping;
23 2. Exclusion of the testimony of any investigators or attorneys involved in the
24 eavesdropping if called by the prosecution;
25 3. Exclusion of any evidence that the government cannot demonstrate was not
26 the fruit of the eavesdropping;
27 4. Setting an in camera hearing during which Investigator Jacobson, DDA
28 Distaso, among others, may be questioned as to the circumstances surrounding the


1 improper monitoring and intrusion into the defense camp. Counsel for Mr. Peterson also
 2 plan to address who initially told Mr. Distaso that the conversations were not recorded
 3 (See Declaration of Kirk McAllister at paragraphs 3 and 4), and when Distaso received
 4 information that apparently directly contradicted his previous statements to Mr.
 5 McAllister. In addition, the defense respectfully requests that the investigators who
 6 conducted the improper monitoring be placed under oath so that they may be thoroughly
 7 examined as to the nature and scope of the privileged communications overheard by them.
 8 The defense further submits that in the event the Court does not dismiss the case or grant
 9 the relief set forth in 1 through 4, inclusive, such a hearing will be necessary so that the
 10 defense can make an offer of proof as to the degree of prejudice the eavesdropping has
 11 caused so the Court may properly determine the appropriate sanction(s), and;

12 5. Granting whatever other relief the Court may deem necessary to further the
 13 ends of justice.

14
 15 Dated: May 30, 2003

Respectfully submitted,
 GERAGOS & GERAGOS

16
 17
 18 By: _____


 MARK J. GERAGOS
 Attorney for Defendant
 SCOTT LEE PETERSON

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1 PROLOGUE

2 Thirty years ago the California Supreme Court wisely noted,

3 The function of [law] enforcement officials is to investigate,
4 not instigate, crime; to discover, not to promote, crime.

5 (*Patty v. Board of Medical Examiners* (1973) 9 Cal.3d 356, 364.)

6 In this matter, law enforcement officials have violated the laws of California that
7 govern attorney-client communications.

8 I.

9 INTRODUCTION

10 The prosecution has admitted it knew that Scott Peterson had retained Attorney
11 Kirk McAllister as of the first week of January 2003. (Jacobson Affidavit at paragraph
12 8.^{1/2}) Consequently, the prosecution also knew that all communications between Peterson
13 and McAllister were totally privileged under California law. (See *State Farm Fire and*
14 *Casualty Company v. Superior Court* (2nd Dist. 1997) 54 Cal.App.4th 625, 644, *rehearing*
15 *denied, review denied.*) Thereafter, on January 10, 2003, Deputy District Attorney Rick
16 Distaso ("DDA Distaso") prepared "wiretap instructions" and discussed them with all
17 potential monitors and supervisors who would be conducting the monitoring. (Jacobson
18 Affidavit at paragraph 9.)

19 Rather than instructing the monitors that all communications between Peterson and
20 McAllister were totally privileged, the monitors were (improperly) instructed to
21 intermittently listen in on the attorney-client communications, purportedly in reliance on
22 Penal Code 629.80. This illegal eavesdropping is in and of itself disturbing and clearly
23 constitutes grave prosecutorial misconduct. Unfortunately, matters were further
24 compounded by the monitors' failure to heed DDA Distaso's instructions, choosing
25 instead to rely on a purported federal "golden rule" that permits the eavesdropper to

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28 ¹All references herein to the "Jacobson Affidavit" are to the affidavit filed with the People's
request for "Release of Audio Recordings from Stanislaus County Wiretap No. 2 and 3 Records".

1 monitor the conversation four (4) times as frequently as Section 629.80.^{2/} Standing
2 alone, either the grave prosecutorial misconduct orchestrated by prosecution or the gross
3 misconduct by the monitors would warrant severe sanctions against the prosecution.
4 However, when such conduct occurs in the same prosecution, the Court must tailor
5 sanctions after a hearing on the scope of the taint and prejudice, if any, involved.

6 II.

7 THE PROSECUTION ORCHESTRATED THE EAVESDROPPING IN
8 KNOWING VIOLATION OF CALIFORNIA LAW

9 In this case, the prosecution knew at least a week before the District Attorney gave
10 his "wiretap instructions" that Mr. Peterson had retained McAllister. (Jacobson Affidavit
11 at paragraph 8.) Thus it is inconceivable that DDA Distaso, a California attorney since
12 1992, did not know that his "wiretap instructions" were in violation of California law.
13 Additionally, agent Jacobson has expressly stated he knows the California law,

14 [I am] certified by the California State Attorney General's
15 Office in the practical, technical, and legal aspects of
16 California State court ordered wiretaps. (California Penal
17 Code Section 629 et seq.)

18 (Jacobson Affidavit at paragraph 3.)

19 * * *

20 [I am] familiar with the legal, practical and technical aspects
21 of such intercepts.

22 (Jacobson Affidavit at paragraph 4.)

23 In light of the fact that the communications between Mr. Peterson and his attorney
24 were clearly and totally privileged under California law, this Court is respectfully urged to
25 allow the defense the opportunity to question the parties as to who made what

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27
28 ^{2/}As discussed in greater detail in Peterson's May 27, 2003 Opposition at Sections II(A) and II(B), Section 629.80 does not authorize monitoring when, as here, there is no possibility that the communication is not privileged.

1 representations.

2 III.

3 THE PROSECUTION'S GRAVE MISCONDUCT WARRANTS APPROPRIATE
4 SANCTIONS

5 The United States Supreme Court and the courts of California have frowned upon
6 the type of grave prosecutorial misconduct that has occurred herein. Specifically, the
7 United States Supreme Court has recognized that in cases of egregious prosecutorial
8 misconduct resulting in prejudice to a criminal defendant, dismissal of a case, with
9 prejudice, is appropriate. (See *United States v. Morrison* (1981) 449 U.S. 361, 101 S.Ct.
10 665.) Expanding on this proposition, the California Supreme Court has found that,

11 The intrusion, through trickery, of the law enforcement agent
12 in the confidential attorney-client conferences of [criminal
13 defendants] cannot be condoned. The right to confer privately
14 with one's attorney is one of the fundamental rights
15 guaranteed by the American criminal law a right that no
16 legislature or court can ignore or violate. *The only effective*
17 *remedy is the dismissal of the underlying charges.*
18 (emphasis added, internal citation and quotation marks
19 omitted) (*Barber v. Municipal Court* (1979) 24 Cal.3d 742,
20 759-760.)

21 The opinion in *Barber* is also instructive as to the appropriate remedy where the
22 sanction of exclusion is inadequate to protect a defendant's rights and to deter future
23 prosecutorial misconduct,

24 Next, this court must determine what relief should be given.
25 Petitioners contend that an exclusionary remedy such as the
26 trial court applied in this case [citation] is inadequate to
27 protect their rights and will not deter the state from such
28 unlawful intrusions in the future. This court agrees.

1 Whether or not the prosecution has directly gained any
2 confidential information which may be subject to suppression,
3 the prosecution in this case has been aided by its agent's
4 conduct. Petitioners have been prejudiced in their ability to
5 prepare their defense. They no longer feel they can freely,
6 candidly, and with complete confidence discuss their case
7 with their attorney.

8 (*Barber* at 756.)

9 * * *

10 Furthermore, the enforcement of an exclusionary rule
11 would involve exceedingly difficult problems of proof for the
12 aggrieved client. Subtle forms of prejudice are nearly
13 impossible to isolate. Consider the prosecution witnesses
14 who learn some of the illegally obtained information. Even if
15 the witnesses do not divulge the information to the prosecutor,
16 the witnesses will be in a position to formulate in advance
17 answers to anticipated questions, and even to shade their
18 testimony to meet expected defenses.

19 (internal citation and quotation marks omitted) (*Barber* at 757.)

20 * * *

21 Finally, enforcement of an exclusionary remedy would place
22 an accused in a Catch-22 situation, because in order to protect
23 his confidences, the client would have to permit them to be re-
24 violated. For a trial court to intelligently pass upon the
25 question whether the prosecution has met its burden of
26 showing that certain proffered evidence is not a fruit of or
27 tainted by the illegally obtained information, the court would
28 have to be advised by competent evidence on the record as to

1 the illegally obtained information. It would be unreasonable
2 for a judge to rule on whether the tendered evidence is a fruit
3 of illegally obtained information without knowing the
4 substance of the illegal information, i.e., what [the
5 eavesdropper overheard]. Yet, advising the court on the
6 record of the nature of the conversation or the illegally
7 obtained information requires a re-disclosure of the
8 confidential communication. That re-disclosure must be
9 made not only to the trial court, but also to the prosecutor who
10 would thereby learn the defense strategy, if he had not learned
11 it earlier. *Clearly, an exclusionary remedy would be illusory,*
12 *since the client could not be assured that he has been*
13 *insulated from harm without requiring him to reopen the*
14 *wound his adversary inflicted upon him in the first place.*
15 (emphasis added) (*Barber* at 758.)

16 * * *

17 The exclusionary remedy is also inadequate since there would
18 be no incentive for state agents to refrain from such
19 violations. Even where the illegality is discovered, the state
20 would merely prove its case by the use of other, untainted
21 evidence. The prosecution would proceed as if the unlawful
22 conduct had not occurred.

23 (*Barber* at 759.)

24 Additionally, more recently the Court of Appeal for the Second Appellate district
25 found,

26 Where, as here, the prosecutor orchestrates an eavesdropping
27 upon a privileged attorney-client communication in the
28 courtroom and acquires confidential information, the court's

1 conscience is shocked and dismissal is the appropriate
2 remedy. Even when the issue is narrowed to a Sixth
3 Amendment violation, dismissal is still appropriate because
4 here there is a 'substantial threat of demonstrable prejudice'
5 as a matter of law.

6 (*Morrow v. Superior Court* (2nd Dist. 1994) 30 Cal.App.4th
7 1252, 1261, citing *United States v. Morrison* (1981) 449 U.S.
8 361, 365.)

9 As noted above, Peterson has requested, inter alia, the setting of a hearing during
10 which prosecutors and investigators who participated in the monitoring can be
11 questioned. Additionally, Peterson notes that the following offer of proof will necessarily
12 require the defense to have had an opportunity to fully review and analyze the recorded
13 attorney-client communications. Although the defense anticipates this review and
14 analysis will have been completed by the June 6, 2003 hearing date, the defense has not
15 had sufficient time to incorporate same into this Motion.

16 In addition, as this Court knows there is no distinction between the monitoring of
17 the conversations between Mr. McAllister's investigator and Mr. Peterson. The
18 California Supreme Court has held that the attorney-client privilege applies to an
19 investigator retained by a criminal defense attorney,

20 Although prior cases do not consider whether section 912,
21 subdivision (d) applies to an attorney's investigator, the
22 language of that subdivision covers the circumstances of
23 the instant case. An investigator is as "reasonably
24 necessary" as a physician or psychiatrist (*People v. Lines*
25 (*1975*) 13 Cal.3d 500 [119 Cal.Rptr. 225, 531 P.2d 793]),
26 or a legal secretary, paralegal or receptionist. (See
27 *Anderson v. State* (Fla. App. 1974) 297 So.2d 871; *City*
28 *& County of S.F. v. Superior Court* (1951) 37 Cal.2d 227

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[36 P. 1034].) Because the investigator, then, is a person encompassed by the privilege, he stands in the same position as the attorney for purposes of the analysis and operation of the privilege; the investigator cannot then disclose that which the attorney could not have disclosed.

(City and County of S. F. v. Superior Court, *supra*, 37 Cal.2d at p. 236, see also Evid. Code section 952 and Law Revision Com. comment thereto.) Thus, the discussion in this opinion of the conduct of defense counsel, and of counsel's right to invoke the attorney-client privilege to avoid testifying, applies also to a defense investigator.

(People v. Meredith (1981) 29 Cal.3d 682, 690 (footnote 3).)

As we will present to the Court *in camera*, there are many more than three "attorney client" calls that were intercepted and monitored by the prosecution. Conservatively, under the authority cited above more than 50 privileged calls were monitored.

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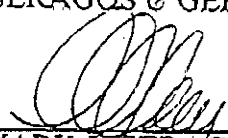
IV.

CONCLUSION

WHEREFORE, in light of the foregoing, Peterson respectfully requests that the foregoing relief sought herein be granted.

Dated: May 30, 2003

Respectfully submitted,
GERAGOS & GERAGOS

By: 
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

TRANSMISSION VERIFICATION REPORT

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SER.# : BRDL2J854125

DATE, TIME FAX NO./NAME DURATION PAGE(S) RESULT MODE	05/30 15:33 12095255545 00:01:40 12 OK STANDARD ECM
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FAX COVER SHEET

From: Mark J. Geragos
Client/Matter: Peterson
Date: May 30, 2003
Pages: 12 (INCLUDING COVER)

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