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STANISLAUS COUNTY SUPERIOR COURT

STATE OF CALIFORNIA

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D.A. No.1056770

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	No.1056770 OPPOSITION TO MOTION FOR SANCTIONS AND OPPOSITION TO MOTION TO SUPPRESS WIRETAP AUDIO RECORDINGS Hrg: 6-06-03 Time: 8:30 a.m. Dept: 2 /8

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Comes now the People of the State of California in opposition to the defense motions concerning audio recordings authorized by Stanislaus County Wiretap Nos. 2 and 3.

In order to ensure that any ruling is based on a sound and thorough appreciation of the true facts, the People request that the court independently review all audio recordings at issue prior to the hearing on this motion.

I. BACKGROUND INFORMATION

Stanislaus County Wiretap No. 2 was authorized by the Stanislaus County Superior Court on January 10, 2003. Stanislaus County Wiretap No. 3 was authorized by the court on April 15, 2003. The original audio recordings are in the possession of the

court. A copy is in the possession of District Attorney Criminal Investigator Steve Jacobson at the Stanislaus County Drug Enforcement Unit.

The prosecuting attorneys have not listened to any audio recording from either wiretap, preferring to have the court sanction the release of the audio recordings. They were also not involved in the actual monitoring of any wire intercepts since monitoring requires peace officer status and certification through the Attorney General's Office (See Penal Code Section 629.94).

Investigator (Inv.) Steve Jacobson is a certified wireroom operator and was the wireroom supervisor for Wiretap Nos. 2 and 3. He has listened to, and is familiar with, all calls made during both wiretaps.

II. LAW OF WIRETAPS

The conduct of state run wiretaps is provided for in Penal Code Sections 629.50 to 629.98. The procedure is outlined at length in the chapter and includes a number of steps that must be undertaken before a state wiretap is authorized. *People v. Zepeda* (2000) 87 Cal.App.4th 1183 is the **only** California case that discusses the wiretapping statute. *Zepeda*, supra, at 1195-1196, summarizes the requirements of Penal Code Sec. 629.50, et seq., in the context of a murder investigation:

> "In general, California law prohibits wiretapping. (Sec. 631.) However, under section 629.50 et seq., a judge may issue an order approving a wiretap. A district attorney may present a wiretap application to a judge. (Sec. 629.50.) The judge may authorize a wiretap only if he or she makes the following determinations based on the district attorney's application. First, that there is probable cause to believe that an individual has committed a specified

offense, such as murder. (Sec. 629.52, subd. (a)(2).) Second, that there is probable cause to believe that communications regarding the offense will be obtained through the wiretap. (Sec. 629.52, subd. (b).) Third, that there is probable cause to believe that the particular facility where the wiretap is to be installed will be used by the person whose communications are to be intercepted. (Sec. 629.52, subd. (c).) Finally, there is a "necessity" requirement: that "[n]ormal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous." (Sec. 629.52, subd. (d).)

Prior to the enactment of section 629.50 et seq., the California wiretapping statutes (former Sec. 629 et seq) did not permit the interception of oral or electronic communications, and permitted wiretapping only during the investigation into certain offenses involving controlled substances. The Legislature enacted section 629.50 et seq. in 1995 in order "to expand California wiretap law to conform to the federal law." (Sen. Com. on Crim. Proc., Rep. on Assem. Bill No. 1016 (1995-1996 Reg. Sess.) As amended Apr. 3, 1995.) *Zepeda*, supra, at 1196.

As stated above, Stanislaus County Wiretap No. 2 was authorized by the Stanislaus County Superior Court on January 10, 2003. Stanislaus County Wiretap No. 3 was authorized by the Court on April 15, 2003. Both wiretaps were tightly controlled by the court and were conducted in accordance with the law.

(A) Periodic Reports to Court

Penal Code Sec. 629.60 mandates that periodic reports be presented to the court regarding the conduct of the authorized wiretap. This is to ensure that the court's oversight function is not compromised. Sec. 629.60 states that:

"Whenever an order authorizing an interception is entered, the order shall require reports in writing or otherwise to be made to the judge who issued the order

showing the number of communications intercepted pursuant to the original order, and a statement setting forth what progress has been made toward achievement of the authorized objective, or a satisfactory explanation for its lack, and the need for continued interception. If the judge finds that progress has not been made, that the explanation for its lack is not satisfactory, or that no need exists for continued interception, he or she shall order that the interception immediately terminate. The reports shall be filed with the court at the intervals that the judge may require, but not less than one for each period of six days, and shall be made by any reasonable and reliable means, as determined by the judge."

For Stanislaus County Wiretap No. 2, the court required that Inv. Jacobson, and a District Attorney representative (this writer), personally meet with the court every three days to file the required reports. This imposed a much tighter level of control than required by the statute. The statute only requires reports every six days; and it does not require face to face meetings with the judge. Thus, throughout the duration of Wiretap No. 2, the court was not only kept fully informed as to its status, but was provided periodic reports every three days, twice as often as the required six day reports. The People ask the court to take judicial notice of all periodic reports currently sealed in the court's possession.

(B) Termination of Wiretap No. 2

Termination of a wiretap is governed by Penal Code Sec. 629.60..."If the judge finds that progress has not been made, that the explanation for its lack is not satisfactory, or that no need exists for continued interception, he or she shall order that the interception immediately terminate." The People instigated the early termination of Wiretap No. 2 because the People believed that further progress in the investigation would

not be gained through additional interception.

The People clearly acted in good faith in this regard and informed the court as soon as it became clear that the wiretap would no longer produce useful information. The People ask the court to take judicial notice of the final periodic report and termination of Wiretap No. 2 currently sealed in the court's possession.

III. DEFENSE ALLEGATIONS AND PEOPLE'S RESPONSE

The defense asks for a number of "sanctions" as a result of what they complain is a violation of attorney-client privileged communications. The defense contends that "more than 50 privileged calls were monitored." (Defendant's brief, page 10.) The People vigorously dispute that characterization and can only surmise that the defendant's complaint involves the initial monitoring of many calls to determine the identity of the parties involved. Such conduct is clearly permitted under the wiretapping statutes.

For purposes of this opposition, a brief description of wireroom operations is important. Inv. Jacobson will be available for detailed testimony at the hearing on this motion regarding the conduct of Wiretap Nos. 2 and 3, and any facts stated in this motion.

When a call is received to, or from, a target telephone, the monitoring agents are notified. Monitoring agents can then monitor the call to determine the identities of the parties speaking, the nature of the call, and whether or not the call should be monitored. Not all calls are monitored.

Agents must make subjective judgements as to whether or not a call involves material that is pertinent to the investigation, i.e., is it related to the subject matter of the investigation? If so, and the call is not otherwise privileged, agents may monitor the call. If it is not, agents must "minimize" the call, or stop monitoring, regardless of who is speaking. Agents may then return to the call at 30-second intervals to determine if a call has become pertinent.

Minimization of non-pertinent calls is required (Penal Code Sec. 629.58). However, the procedure for minimization of non-pertinent calls is not specified in the statute. For guidelines, the court must look to federal law. [See discussion below; *Zepeda*, supra, 1204; See also, *United States v. Charles* (2000) 213 F.3d 10, 21. "Since there appears to be no Massachusetts case directly on point, this court must be guided by federal law."] The general rule stated in federal guidelines (as explained by Inv. Jacobson in his declaration) is a 30-second minimization procedure for non-pertinent calls.

Minimization requirements for privileged calls are specified in the wiretap statute (Penal Code Sec. 629.80).

Many non-privileged calls contain elements of both pertinent and non-pertinent information and agents must make subjective judgements regarding when to minimize throughout the duration of the call. Monitoring agents are human beings, who must constantly make quick, subjective judgments regarding the information contained in each call. No special software or investigative tricks exist to allow agents to make perfect decisions at all

times. Nor does the law require such perfection. (See, *United States v. Charles*, 213 F.3d 10, 22 [regarding the reasonableness standard for minimization];

> "...Equally important, "[t]he government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required.")

The standard to be applied is whether or not the agents acted reasonably in their attempts at minimization. See also discussion below).

The standard does not change for privileged calls. Nor does the fact that agents must make subjective judgements regarding whether or not calls are privileged. There are numerous privileges that agents must be aware of, and make judgements about (i.e., attorney-client, clergyman-parishioner, doctor-patient, husband-wife, etc.; See Evid. Code Secs. 900 et. seq.) In order to make those judgments agents must identify the parties speaking and determine that the call is privileged. The Legislature recognized that fact when it promulgated Penal Code Sec. 629.80 regarding the proper monitoring of privileged communications.

(A) There Was No Prosecutorial Misconduct

The defense refers to "grave prosecutorial misconduct" throughout their brief (even stating that the prosecution "orchestrated the eavesdropping...".) [defense brief of May 30, pages 5-6.] While the defense apparently desires to influence the court with inflammatory language, noticeably lacking from their submission is any case relating to the conduct of wiretaps.

The defense also states that the People have applied the wrong standard in referring to federal law in the conduct of California wiretaps (defense brief of May 27, at page 12.) The defense is wrong on all counts. Federal law controls the bulk of the conduct of California wiretaps, including minimization requirements (See below discussion).

Instead of citing case law concerning the conduct of wiretaps, the defense relies instead on three cases that only discuss misconduct involving law enforcement personnel and attorney-client communications. None of the cited cases are applicable to the setting of the case here.

The defense first cites *United States v. Morrison* (1981) 49 U.S. 361, in support of their claim of prosecutorial misconduct. In that case, two Drug Enforcement Agency Agents met a criminal defendant without her counsel's knowledge and sought to obtain her cooperation in a related investigation. They did so even though they knew that she had been previously indicted in another case and had retained counsel.

The *Morrison* court strongly reprimanded the actions of the two agents. However, the court reversed a dismissal order by the Court of Appeal, stating "More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violations may have been deliberate." *Morrison*, supra, at 365.

Morrison has no applicability to this case. *Morrison* does not discuss wiretap law, or procedure, and it involves actions against an indicted defendant. There, charges had been filed,

and the 6th Amendment right to counsel has plainly attached. (See *Kirby v. Illinois* (1972) 406 U.S. 682, 688.) Further, it involves arguably intentional misconduct on the part of law enforcement. Here, no misconduct occurred. Finally, the Court plainly noted that the defense must show "demonstrable prejudice, or substantial threat thereof" before dismissal as a remedy is appropriate.

The defense has not been able to make any showing of prejudice in this case. The People have not listened to the actual recordings involving attorney-client communication. Thus, that information is unknown to the People. Further, the court will see that what little information was provided in the wiretap log is of no consequence.

The defendant next cites *Barber v. Municipal Court* (1979) 24 Cal.3d 742 in support of his motion. In *Barber*, an undercover agent participated in confidential attorney-client meetings between a number of defendants and their attorneys. The undercover agent had infiltrated a group of people who conducted a sit-in near the sight of the Pacific Gas and Electric Company's Diablo Canyon nuclear facility.

Again, the People note that *Barber* does not address wiretap law, or procedure, nor does it address the issues presented in this case. In *Barber*, a divided State Supreme Court, dismissed a charge of unlawful assembly against a group of defendants due to the intrusion of the undercover officer in the attorney-client discussions.

In the case at bar, nothing even close to those facts occurred. As Inv. Jacobson will testify, and the court can independently confirm from the actual recordings, only two attorney phone calls are at issue. In each case, the call was monitored for only a brief amount of time.

Further, based on the summary log the People dispute that the call from Mr. Ermoian involved privileged information. However, even if the court finds that it does, it was only a brief call and did not involve any substantive information. Thus, the defendant cannot show any prejudice.

Finally, the defense cites *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252. Again, the People note that *Morrow* does not address wiretap law, or procedure, nor does it address the issues presented in this case.

There, the prosecutor was accused of having an investigator listen to a confidential communication between the defendant and his attorney in a burglary prosecution. Said conduct allegedly occurred in a courtroom holding area. When the facts were investigated, both the investigator and the prosecutor invoked the 5th Amendment privilege not to incriminate themselves.

The court held that dismissal was an appropriate remedy because "the respondent court could not have made a reliable finding as to what the investigator overheard." Reliable findings could not be made because the investigator refused to testify, the prosecutor gave conflicting statements and refused to testify, and the court wouldn't listen to the defense in camera. (*Morrow*, supra, at 1258). Thus, the appellate court

felt that the prosecution could not show that no prejudice occurred because the facts couldn't be determined.

Again, the People state that no misconduct occurred in this case. Nothing even close to the facts in *Morrow* occurred here. However, even if the court were to find a problem with the way the wiretap was conducted, the holding in *Morrow* does not compel dismissal. In fact, it comes to the opposite conclusion.

Here, the court can review exactly what happened for all attorney calls. Both by questioning the agents involved, and reviewing the actual recordings of the calls. Upon such a review the court will find that no misconduct occurred, and no prejudice resulted to the defendant.

(B) The Wiretap Instructions Were Proper

The defense states that "[T]he prosecution orchestrated the eavesdropping in knowing violation of California Law," and "[t]hus, it is inconceivable that DDA Distaso, a California attorney since 1992, did not know his wiretap instructions were in violation of California law." (Defense brief of May 30, at page 5). The defense makes that claim for the sole purpose of trying to influence the court with inflammatory language.

The wiretap instructions given for both Wiretap Nos. 2 and 3 were in full accord with California and federal law regarding the conduct of wiretaps. The defense allegation is especially disturbing in light of the fact that the defense did not have a copy of the instructions in their possession at the time of their filing. Thus, the defense did not know what instructions were given to the wiretap monitors. The defense did not have a copy of

the instructions because the original instructions are sealed with the court and the court has not yet sanctioned their release.

The People have a copy of the instructions and, in response to the defense contention, will quote from the applicable sections below. The People request that the court take judicial notice of all documents regarding Wiretap Nos. 2 and 3, including all wiretap instructions.

All wireroom monitors were given detailed instructions regarding the conduct of the wiretap. The instructions included information regarding privileged communications. That information was provided in accordance with Penal Code Section 629.80, Privileged Communications. Said portion of the instructions are reprinted below in their entirety (all emphasis in the original):

"Privileged Communications: There are special restrictions relating to any and all conversations which fall under the legal privilege. Privileges exist within attorney-client, clergyman-parishioner, doctor-patient, and husband-wife relationships. You must strictly comply with minimization requirements as it relates to privileged communications. You must cease monitoring for at least 2 minutes once you determine a communication is privileged; you may then monitor up to 30 seconds to determine if the call continues to be privileged. You are required under the law to remain off the line for at least 2 minutes before going on line for only 30 seconds to determine if a call remains privileged. Abstracts should be prepared concerning every monitored phone call, regardless of whether or not it was a "pertinent" call.

Attorney-Client Privilege (handwritten-cease monitoring-stop recording). Any time that you determine an attorney is participating in an intercepted conversation, immediately notify the supervising agent and/or attorney. If the conversation involves legal consultation of any kind, or any sort of discussion of legal strategy, immediately turn off the monitor and stop recording. Whatever you have heard of the conversation up to that point, you should summarize, not in the log, but on a separate piece of paper titled, "Attorney Communication." After recording your notes, place the paper in a sealed envelope and

give it to the supervising agent who, in turn, is to give to the assigned Deputy District Attorney. If you are able to learn the name of any attorney who participates in the conversations on the lines, post that name and identification No. in a prominent location in the wire room. Become familiar with all phone numbers regarding any attorney consulted by the Target Subject, including, criminal defense attorney Kirk McAllister.

All conversations involving any attorney shall be minimized unless the services of the attorney are being sought or obtained to enable or aid anyone to commit or plan to commit a crime of fraud. **Unless it is absolutely clear the conversation is part of a crime's commission or planning, the call shall be minimized.** Failure to minimize phone calls involving an attorney or their telephone number may result in suppression of all pertinent phone calls seized during the establishment of the wiretap, and any evidence obtained as a result of information gathered during the wiretap.

A client is anyone who seeks advice from a lawyer, whether or not the lawyer is actually assigned to, paid by, or appointed for, the person seeking advice."

The defense states that "the monitors were (improperly) instructed to intermittently listen in on the attorney-client communications, purportedly in reliance on Penal Code 629.80" (Defense brief of May 30, page 4.) As the above instructions amply prove, that is not true. It is clear that the monitors were instructed in full accordance with the law, and were cautioned in every respect regarding attorney-client communications.

The defense tries to make a case of prosecutorial misconduct out of the fact that the monitors were instructed in accordance with Penal Code Sec. 629.80. The fact that the defense has a quarrel with the provisions of the statute does not mean that the agents were improperly instructed. While prosecutors are frequently subject to unfair and frivolous allegations, it is a rare day when a prosecutor is accused of misconduct for advising law enforcement officers to follow the law. Such an attack was

improper and should not be tolerated by the court.

(C) Penal Code Sec. 629.80. Privileged Communications

The defense either misreads, or ignores, the plain language of Penal Code 629.80. Penal Code Section 629.80 states in its entirety:

> "No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character. When a peace officer or federal law enforcement officer, while engaged in intercepting wire, electronic pager, or electronic cellular telephone communications in the manner authorized by this chapter, intercepts wire, electronic pager, or electronic cellular telephone communications that are of a privileged nature he or she shall immediately cease the interception for at least two minutes.
>
> After a period of at least two minutes, interception may be resumed for up to 30 seconds during which time the officer shall determine if the nature of the communication is still privileged. If still of a privileged nature, the officer shall again cease interception for at least two minutes, after which the officer may again resume interception for up to 30 seconds to redetermine the nature of the communication. The officer shall continue to go online and offline in this manner until the time that the communication is no longer privileged or the communication ends. The recording device shall be metered so as to authenticate upon review that interruptions occurred as set forth in this chapter."

The defense states that the procedure outlined in the statute "expressly permits monitoring only to determine if the nature of the communications is still privileged (defense brief of May 27, page 8). That is true. However, the defense next states that "when there is no possibility that the communication is not privileged no monitoring is permitted (Defense brief of May 27, page 8). The defense makes this claim under the statement that in the context of this case a call made to or from an attorney telephone could never involve non-privileged information. The law does not require the agents to make such

broad, subjective determinations.

The defense also tries to make this a personal issue regarding Mr. McAllister. ["This statement clearly indicates the prosecution also, unbelievable as it may seem, intends to rely at least in part on the crime-fraud exception to justify the improper monitoring. Such a reliance is not only disingenuous and utterly without merit, but insulting to this Court and Counsel." Defense brief of May 27, page 6]. Such a claim is not based on any cited law [other than *State Farm Fire and Casualty Company v. Superior Court* (1997) 54 Cal.App.4th 625; which simply states that it is the proponent's burden to demonstrate the crime-fraud exception.]

The identity of each particular defendant, or their counsel, involved in a wiretap is not the issue. Nor should it be. The agents cannot be expected to make subjective judgments about an individual defendant, or counsel during the conduct of each individual wiretap. Procedures are promulgated so that the agents act appropriately regardless of the individual defendant or counsel involved.

The defense claims that in this case there was no chance that a communication between the defendant and his attorney did not involve privileged information. That might be true in this particular case. However, the court can not look at each individual case in a vacuum. As stated above, it would be wholly incorrect to force the monitoring agents to make immediate subjective judgments regarding an individual attorney, or defendant, that every call made between those parties was

privileged.

The law does not require such a standard. The Legislature recognized this when it promulgated the procedure to be followed regarding privileged communications in Penal Code Sec. 629.80. As the statute plainly states:

> "The officer shall continue to go online and offline in this manner until the time that the communication is no longer privileged or the communication ends." Penal Code Sec. 629.80)

The defense claim that agents are not permitted to even enter the call to determine the identity of the parties is simply not credible. It is hard to imagine how the agents are supposed to comply with the requirements of the statute under the defense reading of it.

IV. FEDERAL SEARCH WARRANT PRINCIPLES ARE APPLICABLE TO WIRETAP LITIGATION

Although it should be noted that there has not yet been a challenge made to the wiretap applications in this case, the defense has asked for evidence exclusion as a possible sanction. Thus, it is important to discuss federal search warrant principles as they relate to wiretap litigation.

A wiretap order is a judicial order that authorizes an officer to conduct an investigation that would otherwise be prohibited by the Fourth Amendment. Accordingly, it is similar in nature to a search warrant. Federal search warrant principles apply, and the determination of probable cause is the same for a wiretap as it is for a search warrant. *Berger v. New York* (1967) 388 U.S. 41, 55; *United States v. Fury* (2nd Cir. 1978) 554 F.2d 522, 530; *People v. Zepeda*, supra, at 1195, Penal Code Sec.

629.52 subd (a)(2) and 629.52 subd (b).

In making a motion to quash or traverse a wiretap, traditional search warrant principles apply. *United States v. Scibellie* (1st Cir. 1877) 549 F.2d 222, 226. In *Illinois v. Gates* (1983) 462 U.S. 213, the United States Supreme Court set forth the standard for issuing a search warrant. In *Gates*, the Court held that:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him...there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for...concluding" that probable cause existed. *Illinois v. Gates*, supra, at 238-239.

Thus, the standard upon review is even less than the standard for the original issuance of the warrant. In *Gates*, the court went on to note that even apparently innocent behavior may provide the basis for a showing of probable cause, depending on the circumstances. Id. at 244, fn. 13. A trial court reviewing a wiretap does so in a "practical and common sense manner." *United States v. Castillo-Garcia* (10th Cir. 1997) 117 F.3d 1179, 1187; *United States v. Ashley* (1st Cir. 189) 876 F.2d 1069, 1075; *United States v. Scibelli* 549 F.2d 222, 226. [An appellate court reviewing a trial court's determination of a wiretap does so for "an abuse of discretion." *United States v. Ramierez-Encarnacion* (10th Cir. 2002); 291 F.3d 1219, 1222].

Like a search warrant, a wiretap is presumed to be validly issued "and a defendant carries the burden of overcoming this presumption." *United States v. Castillo-Garcia* 117 F.3d 1179, 1186 (citing *United States v. Quintana* (10th Cir. 1995) 70 F.3d

1167, 1169.) The standards announced in *Gates, supra*, are of course applicable to state determinations, since the passage of Proposition 8 and the addition of California Constitution Article I, Sec. 28(d); *see also, People v. Sandlin* (1991) 230 Cal.App. 3d 1310, 1315. Thus, it is clear that federal search warrant principles apply to the conduct of state wiretaps.

The federal good faith doctrine for search warrants also applies to the conduct of state wiretaps. As stated above, a wiretap order is similar to a search warrant. Motions to suppress a wiretap are governed by the law applicable to search warrants. Accordingly, courts have held that the "good faith" doctrine expressed by the United States Supreme Court in the case of *United States v. Leon* (1984) 468 U.S. 897, applies to the suppression of a wiretap.

In *United States v. Moore* (8th Cir. 1994) 41 F.3d 370, the Court of Appeal applied the United States Supreme Court's holding in *Leon*, supra, to an otherwise facially deficient wiretap order, and reversed the decision of the district court granting the motion to suppress, holding that "*Leon* requires that suppression be denied." *Moore*, supra, at 377. Similarly, in *United States v. Gambino* (S.D.N.Y. 1990) 741 F.Supp. 412, 415, the Court held that a good faith reliance on an authorized wiretap order would be grounds for the denial of suppression, citing *Leon*, supra.

While there is a split of authority among the courts as to the applicability of the good faith doctrine expressed in *Leon* to wiretaps, the court in *United States v. Ambrosio* (S.D.N.Y. 1995) 898 F.Supp. 177, 187, noted that "most courts apply *Leon's* good

faith exception to wiretaps,: Id. Accord: *United States v. Bellmom* (S.D.N.Y. 1997) 954 F.Supp. 630, 638 ("Although *Leon* does not directly address electronic surveillance, numerous courts have extended its holding to such evidence [citations omitted].")

Ambrosio sets forth a compelling argument for the application of the good faith rule to wiretaps, noting that in all other respects, search warrant analysis is applicable to wiretaps. Id. *Ambrosio* goes on to distinguish the cases that refuse to apply good faith, noting that in 1986, Congress amended the federal wiretap law, 18 U.S.C. Sec. 2518(1), to require that "the court involved in a subsequent trial will apply the existing Constitutional law with respect to the exclusionary rule." Id. *Ambrosio* notes that this amendment was enacted "in an effort to keep the [federal] wiretap statute in line with the new developments in Fourth Amendment law..." These new developments included the Supreme Court's pronunciations in *Franks v. Delaware* (1978) 438 U.S. 154; *Illinois v. Gates* (1983) 462 U.S. 213; and *United States v. Leon* (1984) 468 U.S. 897. As noted above, there is no question as to the applicability of *Franks* and *Gates* as the standards to be met with regard to wiretap suppression. The inclusion of the doctrine expressed in *Leon* is accordingly appropriate.

In California, Penal Code Section 629.72 mandates that a motion to suppress a wiretap may be made "...only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter." The clear intent of the California legislature, like

that of the Congress in drafting the 1986 revision to 18 U.S.C. Section 2518(10), was to mandate the application of federal constitutional standards in evaluating motions to suppress wiretaps.

Thus, in California, as in *Ambrosio*, supra, "when wiretap evidence is challenged because it was obtained pursuant to a warrant that lacked probable cause, a reviewing court is not limited to the statute's suppression remedy, but may also look to *Leon's* good faith exception to the exclusionary rule." *Ambrosio*, supra, at 188. Thus, it is clear that when analyzing issues regarding California wiretaps, federal search warrant standards apply.

V. FEDERAL WIRETAP MINIMIZATION RULES APPLY

Federal wiretap rules concerning minimization also apply to California wiretaps.

People v. Zepeda, supra, 87 Cal.App.4th 1183, states that when no California case has addressed an issue regarding wiretaps (in *Zepeda*, the "necessity" requirement) the court should turn to the federal case law for direction. "As no published case has yet to address the "necessity" requirement of section 629.52, subdivision (d), **we turn to the federal case law for direction.**" (Emphasis added). *Zepeda*, supra, at 1204.

Since, *Zepeda*, is the only California case to have addressed the wiretapping statute at all, we must turn to the federal case law for direction regarding the inadvertent monitoring of attorney-client phone calls. [See also, *United States v. Charles* (2000) 213 F.3d 10, 21 citing *Commonwealth v. Charles*, slip op.

at 7, for a similar state court determination.]

That federal law applies to California wiretaps is further supported by the fact that the Legislature enacted section 629.50 et seq. in 1995, in order "to expand California wiretap law to conform to the federal law." (Sen. Com. on Crim. Proc., Rep. on Assem. Bill No. 1016 (1995-1996 Reg. Sess.) As amended Apr. 3, 1995.) *Zepeda*, at 1195-1196.

This is further supported by the fact that the only basis for suppression of evidence obtained through a wiretap is that the evidence was obtained in violation of the 4th Amendment of the United States Constitution, or of the wiretap chapter.(Penal Code Sec. 629.72).

This is further supported by the passage of Proposition 8 and the addition of California Constitution Article I, Sec. 28(d); see also, *People v. Sandlin* (1991) 230 Cal.App. 3d 1310, 1315, which conformed California search and seizure provisions to federal law.

(A) Federal Standard Regarding Minimization is Reasonableness

The Federal standard regarding minimization of calls made during the course of a wiretap is one of reasonableness. In *Scott v. United States* (1978) 436 U.S. 128, 137-140, the Supreme Court adopted a standard of "objective reasonableness" for assessing minimization violations. Under *Scott*, the critical inquiry is whether the minimization effort was managed reasonably in light of the totality of the circumstances. *Scott*, supra, at 140; See *United States v. Hoffman*, 832 F.2d 1299, 1307 (1st Cir. 1987); see also *United States v. Uribe*, 890 F.2d 554, 557 (1st Cir.

1989) ("The touchstone in assessing minimization is the objective reasonableness of the interceptor's conduct.") *United States v. Charles*, (2000) 213 F.3d 10, 22.

Basically, the agents must have acted in good faith regarding minimization throughout the conduct of the wiretap. The touchstone of minimization is "reasonableness." *United States v. Abbit* 1999 WL 1074015 (D.Or.), citing *United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977). The reasonableness standard is determined from the facts of each case. *Abbit*, supra, at 14, citing *United States v. Chavez*, 533 F.2d 491 (9th Cir.), cert. denied, 426 U.S. 911 (1976).

As the court stated in *United States v. Hyde* (1978) 574 F.2d 856, at 869; "The minimization standard applies a test of reasonableness to the peculiar facts of each case."

The standard does not change for calls made to an attorney. "Interception of calls is permissible to allow for determination of whether the call should be minimized-even calls to or from an attorney; see *United States v. Hyde*, 574 F.2d 856, 870 (5th Cir. 1978). *Abbit*, supra, at 13. [In *Hyde*, supra, at 870 the court stated:

> "The defendants argue that calls between Mr. Hyde and his attorney and physician were monitored, and that these calls should have been privileged, another supposed violation of the minimization requirements. But the agents listened to these calls only long enough to determine that the doctor and lawyer were not participating in the conspiracy; no further intrusion was made. Indeed, several calls to the attorney were not monitored at all. It would be unreasonable to expect agents to ignore completely any call to an attorney or doctor; doctors and lawyers have been known to commit crimes. The agent's conduct was entirely correct."]

The California Legislature recognized this when it

promulgated Penal Code Sec. 629.80.

(B) The Appropriate Remedy for Violations of Minimization Rules

The standard to be applied when analyzing minimization violations is whether or not the agents acted in good faith.

This concept is embedded in the wiretap statute. Penal Code Sec. 629.86 reads; "...A good faith reliance on a court order is a complete defense to any civil or criminal action brought under this chapter, or under chapter 1.5 (commencing with Sec. 630) or any other law."

Assuming the agents acted in good faith, the appropriate remedy for a violation of minimization rules is that calls are suppressed on an individual basis. This rule does not change even for privileged attorney-client phone calls.

"Even if privileged attorney-client calls are intercepted, the proper remedy (if the government did not act in bad faith) is to suppress only the privileged conversations, not to punish the government by suppressing all wiretap evidence." *United States v. Abbit*, 1999 WL 1074015 (D.Or.), at 13.

Abbit, at 13, is particularly instructive in this regard. There, the defendant complained of 43 attorney-client calls that he stated were improperly monitored. The court categorized the calls as 16 calls that were messages being left and did not involve a conversation between Spears [the defendant] and an attorney, of the 27 calls remaining, the government conducted minimization in 26 of them [Thus, one call was not minimized at all.] Twelve of the 27 calls were under two minutes duration; of the 15 calls that were over two minutes long, three were from

private numbers to Spears, and would have required some monitoring to even determine that an attorney was calling, of the remaining 12 calls, one was from a person who did not identify himself as an attorney, and it was not otherwise obvious it was an attorney calling."

The *Abbit court, supra at 13,* continued, "Of the remaining 11 calls that defendant argues should have been minimized to a greater degree (out of the 8,487 calls that were intercepted over 90 days of wiretapping), *none will be offered as evidence by the government* [the situation we have here]. *Defendant fails to establish that the government intentionally and blatantly violated this court's orders pertaining to the minimizing of calls to such an extent that any of the calls should be suppressed.*" (Emphasis added).

This analysis is particularly relevant to the case at bar because after Agent Hoek recognized Mr. McAllister's voice on January 14, 2003, he minimized the remainder of the call. He then entered Mr. McAllister's home phone number, Turlock office phone number, and his secondary office phone number into the computer data base to further protect against improper monitoring. This clearly showed that once he recognized a problem, he took remedial action to help prevent it's reoccurrence.

In *United States v. Levine* (1988) F.Supp. 1165, 1180, the court stated:

> "Even acting in the utmost good faith, the monitors clearly could not prevent the interception of some privileged statements. The test is whether they established and made a conscientious effort to follow appropriate procedures to

minimize those interceptions, that is, "whether, realistically considered, there was a good faith attempt to affirmatively avoid" improper interceptions," citing *People v. Brenes*, (1977) 42 N.Y. 2d 41, 47.

As the court also stated in *United States v. Charles*, supra, at 23, when discussing what the appropriate remedy was for an improperly monitored attorney-client phone call "Accordingly, "there was no taint upon the investigation as a whole sufficient to warrant the sweeping relief [total suppression] which [the appellants] urge []." *Hoffman*, 832 F.2d at 1307. To the contrary, the district court correctly limited suppression to the July 29 Charles/Kelley [attorney-client] phone call."

United States v. Ozar, (1995) 50 F.3d 1440, at 1448, is also instructive on this point:

> "At the suppression hearing, defendants identified numerous intercepted conversations in which an attorney participated. For the most part, defendants failed to prove that each conversation was attorney-client privileged, and they also failed to prove *bad-faith interception of privileged communications emphasis added)*. The magistrate judge nonetheless recommended, and the district court agreed, that total suppression was warranted as punishment because the inadvertent interception of numerous attorney communications reflected a "pattern of unnecessary intrusion" into the privilege. This punitive use of the suppression remedy was error.
>
> "Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. Sec. 2518(10(a), but the conversations the warrant contemplated overhearing would be admitted." *United States v. Cox*, 462 F.2d 1293, 1301 (9th Cir.), Cert denied, 417 U.S. 918 (1972).
>
> Because there was no bad faith attempt to obtain privileged conversations, if privileged conversations were intercepted (and the government seems to concede that some inadvertently were), those conversations should be suppressed on an individual basis at or before trial." See *United States v. Shakur*, 560 F.Supp. 318, 326 (S.D.N.Y. 1983), aff'd sub nom.

United States v. Ferguson, 768 F.2d 843 (2nd Cir.), cert denied, 474 U.S. 1032 (1985)."

[See also, *United States v. Depalma*, 461 F. Supp 800, at 823. There, the court found that the government unreasonably intercepted three conversations between the defendant and his wife, four conversations between the defendant and his attorney, and two conversations between the defendant and his doctor, and yet, stated that total suppression of all wiretap evidence was not an appropriate remedy.

"Such a remedy would be drastic, and excessive, given the number of interceptions, the number of demonstrated violations, and the nature of human error."]

Thus, it is clear that the appropriate remedy in this case is suppression of the privileged calls only.

(C) The Three Specific Calls at Issue and the Appropriate Remedy

It should be made clear that the People do not intend to introduce information from any call between the defendant and Mr. McAllister, or the defendant and Mr. Gary Ermoian. Nonetheless. these calls will be individually addressed.

Inv. Jacobson's declaration states that during the conduct of Wiretap Nos. 2 and 3, segments of two phone calls between Mr. McAllister and the defendant were monitored and recorded. The monitoring involved short segments of only two calls, out of the total of sixty nine calls that were intercepted between the defendant and Mr. McAllister. The remainder of the intercepted calls were not monitored or were minimized after the initial greetings. Investigator Jacobson's declaration also states that during the conduct of Wiretap No. 2, one call between the

defendant and Mr. Ermoian was monitored and recorded.

(1) Agent Hoek's Call

According to Inv. Jacobson, on January 14, 2003, Agent Steve Hoek of the Stanislaus County Drug Enforcement Unit inadvertently monitored a brief conversation between Mr. McAllister and the defendant because he did not initially recognize Mr. McAllister's voice. Upon recognizing Mr. McAllister's voice he stopped monitoring. See declaration of Inv. Jacobson. Agent Hoek will also be available for testimony at the hearing on this motion. Neither prosecutor has been informed of the content of the call monitored, however, Inv. Jacobson reported that no substantive information was obtained as a result of that call being monitored.

While, the People concede the privileged nature of the call, there was no violation of any minimization rule. Agent Hoek did not know that the speaker of the call he was listening to was Mr. McAllister. In fact, as Inv. Jacobson's declaration states, he believed the call was business related, and performed regular minimization procedures. Upon re-entering the call, when he recognized Mr. McAllister's voice, he immediately minimized the remainder of the call. He also took affirmative steps, by entering additional attorney phone numbers into the data base, to lessen the chance that such inadvertent monitoring would occur in the future.

Thus, even if the court finds that this incursion was a violation of the minimization rules, Agent Hoek was acting in good faith during his monitoring of the call and none of the

defense "sanctions" would be appropriate. The court should not impose any of the sanctions requested by the defense as a result of this phone call. The only appropriate sanction is suppression of this particular call.

(2) Agent Tovar's Call

According to Inv. Jacobson's declaration, on January 15, 2003, Agent Jesse Tovar of the Stanislaus County Drug Enforcement Agency briefly monitored a conversation between Mr. McAllister and the defendant, pursuant to Penal Code Section 629.80. Agent Tovar will also be available for testimony at the hearing for this motion.

Agent Tovar listened to the initial portion of the call for six seconds. He did not wait to determine if the call was privileged but immediately minimized (stopped monitoring) the call for 36 seconds. Agent Tovar then conducted a spot check of the call of 6 seconds to ensure that the defendant and his attorney were still conversing. He again immediately minimized the call. Agent Tovar then waited one minute and seven seconds and conducted another spot check of 6 seconds. He then minimized for the remainder of the call. The total time that the call was monitored, including all spot checks, was 18 seconds. While the prosecutors have not been informed of the content of the monitored call, Inv. Jacobson reported that no substantive information was obtained as a result of that call being monitored.

Here, Agent Tovar did not monitor the call long enough to determine that the call was privileged, thus, no violation of the

minimization rules occurred. However, even if the court finds that the call was privileged and that Agent Tovar should have waited two minutes before re-entering the call to spot check pursuant to Penal Code Sec. 629.80, none of the defense "sanctions" are appropriate.

Agent Tovar was clearly acting in good faith when he monitored this particular phone call. He never entered the call for longer than 6 seconds, and upon confirming the identities of the parties conversing, immediately exited the call.

While Agent Tovar's conduct might reflect a misunderstanding of the requirements of 629.80, it does not reflect any bad faith. Also, when Agent Tovar's conduct is compared to the rules typically followed regarding the monitoring of non-pertinent calls, it is clear that Agent Tovar simply followed the wrong standard. The only appropriate sanction is suppression of this particular call.

(3) Mr. Gary Ermoian's Call

Finally, according to Inv. Jacobson, on January 29, 2003, a conversation was monitored between the defendant and Gary Ermoian. At the time of the interception, Inv. Jacobson did not know that Mr. Ermoian was a private investigator employed by Mr. McAllister. According to Inv. Jacobson's declaration, and the wiretap log, this call simply involved Mr. Ermoian warning the defendant about media being present outside of his house. While the prosecutors have not been informed of the content of the monitored call, Inv. Jacobson reported that no substantive information was obtained as a result of that call being

monitored.

Further, based on the information contained in the wiretap log, the People seriously question the privileged nature of this call. While the attorney-client privilege does apply to an investigator retained by an attorney, every conversation involving that person and the attorney's client is not automatically privileged (See discussion infra).

The attorney-client privilege is aptly summarized in *Admiral Ins. v. U.S. Dist. Court for Dist. of Ariz*, 881 F.2d 1486, 1492, (9th Cir. 1989) (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence' (5) by the client, (6) are at this instance permanently protected, (7) from disclosure by himself, or by the legal adviser, (8) unless the protection be waived; See also; *State Farm Fire and Casualty Company v. Superior Court* (1997) 54 Cal.App.4th 625, at 638-639.

At the heart of the matter regarding the attorney-client privilege is the fact that legal advice must be sought, or the communication must involve the attorney-client relationship. Here, if the log sheet is correct, the communication simply involved Mr. Ermoian informing the defendant that media personnel were outside his home. Such a communication clearly did not involve information related to the attorney-client relationship, and as such it is not privileged.

If the court does find that the communication was privileged, again, the agents acted in good faith. Inv. Jacobson

was not informed that Mr. Ermoian was an investigator employed by Mr. McAllister for the purpose of investigating this case. However, after reviewing some of the calls intercepted that referred to Mr. Ermoian, he figured it out. The only other call intercepted from Mr. Ermoian was not monitored. The court should not impose any of the sanctions requested by the defense as a result of this phone call. If the court finds that this was not a privileged call no sanction is necessary. If the court finds that it was a privileged call the only appropriate sanction is suppression of this particular call.

In the final analysis, when we are determining whether or not the agents acted reasonably in their minimization efforts the court need look no further than the actual conduct of the wiretaps. Agents were properly instructed regarding attorney-client phone calls. Before the wiretap started Agent Bill Pooley placed attorney Kirk McAllister's name and business telephone number into the interception computer. That information was also posted in the wireroom over the monitoring area. When Agent Hoek inadvertently monitored Mr. McAllister's communication on January 14, 2003, he immediately placed additional telephone numbers belonging to Mr. McAllister in the computer database. Further, after Judge Ladine ordered monitors to be more conservative than Penal Code Section 629.80 required, those orders were carried out.

Finally, over the course of approximately 30 days, through the conduct of two wiretaps, and 3,858 intercepted phone calls, the defense can only argue over three. That fact alone should

tell the court that the agents acted completely properly throughout the course of both wiretaps.

VI. THE REQUESTED DEFENSE SANCTIONS ARE NOT APPROPRIATE

Although the defense does not cite any law in support of his request for recusal, he still asks the court to impose such a sanction on the People. At the outset, the People have not received notice that the defense has served their motion for recusal on the California Attorney General's Office. Such service is required by Penal Code Section 1424. In any event, recusal is not an appropriate remedy.

Recusal of an entire prosecutorial office is a serious step, imposing a substantial burden on the People, and the Legislature and courts may reasonably insist upon a showing that such a step is necessary to assure a fair trial. *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 200-201. Further, the potential for prejudice to a defendant from a prosecutor's conflict of interest-the likelihood that the defendant will not receive a fair trial "Articulates a two part test (1) whether there is a conflict of interest; (2) whether the conflict is so severe as to disqualify the district attorney from acting." *Hambarain v. Superior Court* (2002) 27 Cal.4th 826, 833.

Here, there is certainly no conflict. The People have not reviewed the audio recordings of the calls at issue. Further, the People have not even reviewed the actual recordings of any calls from the wiretap. Clearly, there is no conflict, let alone one that is "so severe as to disqualify the district attorney from acting." As the court can see from the log entries, whatever

information is contained therein is of no evidentiary value. Nor did the People, or law enforcement, gain any knowledge as a result of that information.

If the defendant desires to file a motion pursuant to Penal Code Section 1538.5 excluding certain evidence as improperly obtained as a result of information gained during attorney-client phone calls he may certainly do so. However, recusal of the district attorney's office is not an appropriate remedy.

For the same reasons, exclusion of witness testimony is not appropriate. No misconduct occurred. Inv. Jacobson, Agent Hoek, and Agent Tovar were integral parts of both wiretaps. When information regarding inadvertent monitoring of attorney phone calls was brought to the People's attention, Inv. Jacobson was tasked to document those issues. He has not spoken to any of the prosecuting attorneys regarding the content of the actual recordings of the attorney calls. None of the prosecuting attorneys will ever direct Inv. Jacobson, Agent Hoek, or Agent Tovar to reveal those contents. The court can ensure compliance in that regard simply by so ordering all three agents. To exclude Inv. Jacobson as a witness would, in effect, suppress all evidence gained from Wiretap Nos. 2 and 3. Such an outcome is drastic and unnecessary, and clearly not an appropriate remedy.

Exclusion of evidence is also not appropriate. As stated above, the only appropriate remedy is individual suppression of improperly monitored calls. The People do not intend to introduce any evidence from any call made to, or from, the defendant and attorney Kirk McAllister, or private investigator

Gary Ermoian. As such, the appropriate remedy has already occurred. Exclusion of additional evidence is certainly not warranted as none of the agents acted in bad faith.

As stated at the outset of this motion the People request that the court review all of the calls at issue. The People request that such a review take place independently without either the People's or the defendant's input. After an independent review the People request an opportunity to be heard on this motion.

VII. CONCLUSION

For the foregoing reasons the People request that the defense motion be denied.

Dated: June 4, 2003

Respectfully submitted,

JAMES C. BRAZELTON
District Attorney

By: 

RICK DISTASO
Deputy District Attorney

DECLARATION OF Rick Distaso

STATE OF CALIFORNIA)
)SS
COUNTY OF STANISLAUS)

I, Rick Distaso, declare as follows:

I am a Deputy District Attorney, and I am licensed to practice in all courts of the State of California. As an attorney of record for the Plaintiff, I am familiar with the circumstances of the case.

During the conduct of Stanislaus County Wiretap Nos. 2 and 3, periodic reports were made to the court pursuant to Penal Code Section 629.60. Investigator (Inv.)Steve Jacobson was present during the presentation of all reports to the court.

Pursuant to Penal Code Section 629.68 notification was sent to individuals whose calls were intercepted in Stanislaus County Wiretap Nos. 2 and 3, in the middle of May, 2003.

Around that time I called defense attorney Kirk McAllister and told him that he would be receiving a letter informing him of intercepted communications [Mr. McAllister's declaration reference's May 11, 2003, a Sunday. While I know I did not call him on a Sunday, I did call him around that time]. I told Mr. McAllister that while his communications were intercepted by the wiretap, they were not monitored. That information was based on my recollection at the time of how the wiretap was conducted and not from any other source.

On or about May 14, 2003, I reviewed the summary call log of communications intercepted by Stanislaus County Wiretap Nos. 2

and 3. At that time I noticed the call log by Agent Steve Hoek referencing the call between the defendant and Mr. McAllister.

Obviously, in hindsight, I should have reviewed the call log before I spoke with Mr. McAllister.

Upon reviewing the call log, I directed Inv. Jacobson to document all calls intercepted between the defendant, Mr. McAllister, and Mr. Gary Ermoian. Inv. Jacobson did so in DA Supplemental Report No. 4.

I further directed Inv. Jacobson to seal the audio recordings of any monitored communications between the defendant, Mr. McAllister, and Mr. Ermoian and place that information in a secure location.

I further directed Inv. Jacobson to not discuss the content of those recordings with the prosecuting attorneys, and to direct Agent Hoek, and Agent Jesse Tovar to also not discuss the content of those recordings with the prosecuting attorneys.

No one has communicated the content of the audio recordings at issue to any member of the prosecution.

On May 23, 2003, I filed a motion with the court notifying the court, and the defense, of the monitored communications.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 4th day of June, 2003, at Modesto, California.

Rick Distaso
Deputy District Attorney