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SUPERIOR COURT
COUNTY OF STANISLAUS
BY Cindy Curtis DEPUTY

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

9 PEOPLE OF THE STATE OF CALIFORNIA, : Case No. 1056770
10 :
11 Plaintiff, :
12 v. : PENAL CODE § 629.80 VIOLATES THE
: SEPARATION OF POWERS DOCTRINE
13 SCOTT LEE PETERSON, : Date: September 9, 2003
: Time: 8:30 a.m.
14 Defendant. : Dept: 2

15
16 In the instant case wiretapping was conducted under the authority of Penal Code
17 sections 629.50 et seq. The procedures sanctioned by Chapter 1.4 of the Penal Code
18 actually allow the interception of privileged communications. This authority is found in
19 Penal Code section 629.80, which authorizes peace officers to intermittently intercept
20 privileged information and then resume interception after a hiatus of at least two minutes
21 until the communication ends.

22
23 No otherwise privileged communication intercepted in accordance with,
24 or in violation of, the provisions of this chapter shall lose its privileged
25 character. When a peace officer or federal law enforcement officer,
26 while engaged in intercepting wire, electronic pager, or electronic
27 cellular telephone communications in the manner authorized by this
28 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

1 seconds during which time the officer shall determine if the nature of the
2 communication is still privileged. If still of a privileged nature, the
3 officer shall again cease interception for at least two minutes, after which
4 the officer may again resume interception for up to 30 seconds to
5 redetermine the nature of the communication. The officer shall continue
6 to go online and offline in this manner until the time that the
7 communication is no longer privileged or the communication ends. The
8 recording device shall be metered so as to authenticate upon review that
9 interruptions occurred as set forth in this chapter. Added Stats 1995 ch
10 971 § 10 (SB 1016). Amended Stats 2002 ch 605 § 18 (AB 74).

7 Penal Code section 629.80.

8 As written, Penal Code section 629.80 violates the separation of powers doctrine
9 of the California Constitution.

11 A.

12 THE ATTORNEY-CLIENT PRIVILEGE

13 The attorney-client privilege is a cornerstone of our judicial system.

14 “The attorney-client privilege has been a hallmark of Anglo-American
15 jurisprudence for almost 400 years. The privilege authorizes a client to
16 refuse to disclose, and to prevent others from disclosing, confidential
17 communications between attorney and client. (Evid. Code, § 950 et seq.)
18 Clearly, the fundamental purpose behind the privilege is to safeguard the
19 confidential relationship between clients and their attorneys so as to
20 promote full and open discussion of the facts and tactics surrounding
21 individual legal matters. In other words, the public policy fostered by
22 the privilege seeks to insure ‘the right of every person to freely and fully
23 confer and confide in one having knowledge of the law, and skilled in its
24 practice, in order that the former may have adequate advice and a proper
25 defense.’ [Citation.]

26 “Although exercise of the privilege may occasionally result in the
27 suppression of relevant evidence, the Legislature of this state has
28 determined that these concerns are outweighed by the importance of
preserving confidentiality in the attorney-client relationship. As this
court has stated: ‘The privilege is given on grounds of public policy in
the belief that the benefits derived therefrom justify the risk that unjust
decisions may sometimes result from the suppression of relevant
evidence.’ [Citations.]

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1 "... While it is perhaps somewhat of a hyperbole to refer to the attorney-
2 client privilege as 'sacred,' it is clearly one which our judicial system has
3 carefully safeguarded with only a few specific exceptions." (Mitchell v.
4 Superior Court (1984) 37 Cal.3d 591, 599-600 [208 Cal.Rptr. 886, 691
5 P.2d 624], fns. omitted.)

6 PSC Geothermal Services Company v. Superior Court (1994) 25 Cal.App.4th 1697, 1709.

7 The lawyer-client privilege is vital to the justice system.

8 The attorney-client privilege, however, also has a strong basis in
9 public policy and the administration of justice. The attorney-client
10 privilege has a venerable pedigree that can be traced back 400 years.
11 "[T]he privilege seeks to insure 'the right of every person to freely
12 and fully confer and confide in one having knowledge of the law, and
13 skilled in its practice, in order that the former may have adequate
14 advice . . .'" (Mitchell v. Superior Court (1984) 37 Cal.3d 591, 599
15 [208 Cal.Rptr. 886, 691 P.2d 642]; see also Southern Cal. Gas Co. v.
16 Public Utilities Com., supra, 50 Cal.3d at p. 37.) It is no mere
17 peripheral evidentiary rule, but is held vital to the effective
18 administration of justice. (See Welfare Rights Organization v. Crisan
19 (1983) 33 Cal.3d 766, 770-771 [190 Cal.Rptr. 919, 661 P.2d 1073, 31
20 A.L.R.4th 1214].) The privilege promotes forthright legal advice and
21 thus screens out meritless litigation that could occupy the courts at the
22 public's expense. (See City & County of San Francisco v. Superior
23 Court, supra, 37 Cal.2d at p. 235.) The privilege serves to "encourage
24 full and frank communication between attorneys and their clients and
25 thereby promote broader public interests in the observance of law and
26 administration of justice." (Upjohn v. United States (1981) 449 U.S.
27 383, 389 [66 L.Ed.2d 584, 591, 101 S.Ct. 677].)

28 Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 380

 Evidence Code section 952 defines a confidential communication.

 As used in this article, 'confidential communication between client
 and lawyer' means information 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, and
 includes a legal opinion formed and the advice given by the lawyer in
 the course of that relationship.

 Evidence Code section 952

1 The attorney-client privilege is not limited to “litigation-related communications”.

2 We are not persuaded that the attorney-client privilege is limited to
3 litigation-related communication. Evidence Code sections 912 and
4 952 do not use the terms “litigation” or “legal communications” in
5 their descriptions of privileged disclosures, but specifically refer to
6 “the accomplishment of the purpose” for which the lawyer was
7 consulted. Attorneys are consulted for a myriad of reasons besides
8 litigation.

9 STI Outdoor v. Superior Court (2001) 91 Cal.App.4th 334, 340-341

10 “The term ‘confidential communication’ is broadly construed, and
11 communications between a lawyer and his client are presumed confidential, with the
12 burden on the party seeking disclosure to show otherwise. (Evid. Code, section 917;
13 Estate of Kime (1983) 144 Cal.App.3d 246, 256.)” Gordon v. Superior Court (1997) 55
14 Cal.App.4th 1546, 1557.

15 “Assuming the requisite relationship and confidential communication, the
16 privilege is absolute and disclosure may not be ordered, without regard to relevance,
17 necessity or any particular circumstances peculiar to the case. (Shannon v. Superior
18 Court (1990) 217 Cal.App.3d 986, 995.)” Gordon v. Superior Court, Ibid.

19 The vitality of the attorney-client privilege is not dependent on whether or not
20 there is a pending criminal case. People v. Superior Court (Laff) (2001) 25 Cal.4th 703,
21 716.

22 The aegis of the attorney-client privilege also covers a defense investigator.

23 Although prior cases do not consider whether section 912, subdivision
24 (d) applies to an attorney’s investigator, the language of that subdivision
25 covers the circumstances of the instant case. An investigator is as
26 ‘reasonably necessary’ as a physician or psychiatrist (People v. Lines
27 (1975) 13 Cal.3d 500 [119 Cal.Rptr. 225, 531 P.2d 793]), or a legal
28 secretary, paralegal or receptionist. (See Anderson v. State (Fla. App.
1974) 297 So.2d 871; City & County of S.F. v. Superior Court (1951) 37
Cal.2d 227 [36 P. 1034].) Because the investigator, then, is a person
encompassed by the privilege, he stands in the same position as the

1 attorney for purposes of the analysis and operation of the privilege; the
2 investigator cannot then disclose that which the attorney could not have
3 disclosed. (City & County of S.F. v. Superior Court, supra, 37 Cal.2d at
4 p. 236, see also Evid. Code, § 952 and Law Revision Com. comment
5 thereto.) Thus, the discussion in this opinion of the conduct of defense
6 counsel, and of counsel's right to invoke the attorney-client privilege to
7 avoid testifying, applies also to a defense investigator.

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

9 Courts recognize that "special care" must be exercised to protect attorney-client
10 communication. "A lawyer's office may be searched for evidence of a client's crime, but
11 special care must be taken to avoid unnecessary intrusion on attorney-client
12 communications. (Andresen v. Maryland (1976) 427 U.S. 463, 482, footnote 11 [49
13 L.Ed.2d 627, 643, 96 S.Ct. 2737; U.S. v. Mittelman 999 F.2d 440, 445 (9th Cir. 1993)."
14 Fenwick & West v. Superior Court (1996) 43 Cal.App.4th 1272, 1279.

15 B.

16 THE SEPARATION OF POWERS DOCTRINE

17 Unlike its federal counterpart, the Constitution of the State of California
18 makes express provision for the separation of powers.

19 The powers of state government are legislative, executive and
20 judicial. Persons charged with the exercise of one power may not
21 exercise either of the others except as permitted by this Constitution.

22 Constitution of the State of California, Article III, section 3.

23 The separation of powers doctrine stands as a bulwark protecting the
24 constitutional rights of individuals.

25 The separation of powers doctrine articulates a basic philosophy of
26 our constitutional system of government; it establishes a system of
27 checks and balances to protect any one branch against the
28 overreaching of any other branch. (See Cal. Const., arts. IV, V and
29 VI; The Federalist, Nos. 47, 48 (1788).)

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1 Of such protections, probably the most fundamental lies in the power
2 of the courts to test legislative and executive acts by the light of
3 constitutional mandate and in particular to preserve constitutional
4 rights, whether of individual or minority, from obliteration by the
5 majority. (Marbury v. Madison (1803) 5 U.S. (1 Cranch) 137, 175-
6 178 [2 L.Ed. 60]; People v. Wells (1852) 2 Cal. 198, 213-214; see
7 Myers v. United States (1926) 272 U.S. 52, 293 [71 L.Ed. 160, 242,
8 47 S.Ct. 21] (dissenting opn. of Brandeis, J.); Rostow, The
9 Democratic Character of Judicial Review (1952) 66 Harv.L.Rev. 193,
10 199, 202-204.) Because of its independence and long tenure, the
11 judiciary probably can exert a more enduring and equitable influence
12 in safeguarding fundamental constitutional rights than the other two
13 branches of government, which remain subject to the will of a
14 contemporaneous and fluid majority. (See Cardozo, The Nature of the
15 Judicial Process (1921) 92-94; Hand, The Contribution of an
16 Independent Judiciary to Civilization in The Spirit of Liberty (1959)
17 118-126).

18 Bixby v. Pierno (1971) 4 Cal.3d 130, 141

19 “The California Constitution imposes limitations upon the powers of nonjudicial
20 officers to exercise judicial functions. ‘The judicial power of this state is vested in the
21 Supreme Court, courts of appeal, superior courts, and municipal court.’ (California
22 Constitution, Article VI, section 1.)” People v. Superior Court (Laff) (2001) 25 Cal.4th 703,
23 721.

24 Vigilance in preserving the judiciary’s role is a constant duty imposed by the
25 separation of powers doctrine.

26 Concern with the danger in granting arbitrary power to a person who
27 acts as an advocate, not as an impartial adjudicator, was the
28 underpinning of this court’s decision in the leading case on separation
of powers, People v. Tenorio (1970) 3 Cal.3d 89.

Manduley v. Superior Court (2002) 27 Cal.4th 537, 594 (dissenting opinion of
Justice Kennard).

The California Supreme Court in People v. Tenorio, supra, 3 Cal.3d 89,
held that the separation of powers doctrine was violated by Health and Safety
Code section 11718 which required the prior approval of the prosecutor before a

1 prior conviction could be dismissed. The same court shortly thereafter held that a
2 statutory requirement of prosecutorial consent before a charge could be reduced to
3 a misdemeanor pursuant to Penal Code section 17 was unconstitutional because it
4 violated the doctrine of separation of powers doctrine.

5 Under our system of separation of powers, we cannot tolerate
6 permitting such an advocate to possess the power to prevent the
7 exercise of judicial discretion as a bargaining tool to obtain guilty
8 pleas.

9 A defendant is entitled to have an independent determination of
10 whether he should be held to answer on a felony or a misdemeanor,
11 and this is not possible when the exercise of judicial discretion
12 depends on the "pleasure of the executive." (Tenorio, supra, at p. 93.)

13 Esteybar v. Municipal Court (1971) 5 Cal.3d 119, 126

14 The question before the court in People v. Superior Court (On Tai Ho) (1974) 11
15 Cal.3d 59 was whether the separation of powers provision was violated by a statutory
16 requirement that required the consent of the prosecutor before a defendant was declared
17 eligible for the diversion program. In finding that this statute violated the separation of
18 powers mandate, the court stated "Our decision in Esteybar [Esteybar v. Municipal Court
19 (1971) 5 Cal.3d 119] teaches that the issue of whether a power is judicial in nature depends
20 not on the procedural posture of the case but on the substance of the power and effect of its
21 exercise." People v. Superior Court (On Tai Ho) (1974) 11 Cal.3d 59, 68.

22 CONCLUSION

23 Penal Code section 629.80 is unconstitutional on its face since it allows the
24 interception of communications between lawyer and client.

25 Penal Code section 629.80 is doubly defective. First, it allows the law enforcement
26 authorities to listen in on a privileged conversation. Second, it empowers a police officer to
27 decide what is privileged and what is not. It contains no prophylactic device as is found in
28

1 Penal Code section 1524, wherein a special master acts as the gatekeeper, deciding initially
2 whether or not documents or other items are covered by the attorney-client privilege.

3 To allow the police to intercept such communications and then decide what is or is
4 not privileged is in fact to allow the police to become the judge in depriving a citizen of a
5 right recognized as fundamental by the constitution.

6 Article III, section 3 of the California Constitution enunciates the separation of
7 powers doctrine.

8 Judicial power is vested in the courts. Article VI, section 1.


9 Ruling on a claim of privilege is a strictly judicial function. "Examining seized
10 documents, a ruling upon claims of privilege, and precluding disclosure of privileged
11 materials in the constructive custody of the superior courts are will within the scope of the
12 court's statutory and inherent authority." (emphasis added) People v. Superior Court (Laff)
13 (2001) 25 Cal.4th 703, 714.

14 Penal Code section 629.80 violates the separation of powers doctrine by investing a
15 police officer with strictly judicial duties. Freed from interference by the constitutional
16 decision-maker, that officer is thus empowered to himself make judicial decisions, like a
17 modern day vigilante.

18 Since the statute suffers from this fatal constitutional flaw, its use in the gathering of
19 the information must be ruled unlawful.

20 McALLISTER & McALLISTER, INC.

21 Dated: 8/1/03

22 By: 
23 Kirk W. McAllister

1 **PROOF OF SERVICE**

2 I am a citizen of the United States and am employed in Stanislaus County; I am over the
3 age of eighteen (18) years and not a party to the within action; my business address is 1012 -
4 11th Street, Suite 100, Modesto, California, 95354.

5 On August 1, 2003, I served the following document(s):

6 **PENAL CODE SECTION 629.80 VIOLATES THE SEPARATION OF POWERS
7 DOCTRINE**

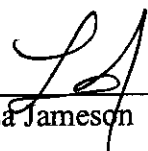
8 by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or
9 manners described below to each of the parties herein and addressed as follows:

10 Stanislaus County District Attorney
11 1100 I Street, Room 200
12 Modesto, CA 95354

- 13 **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business
14 address, addressed to the addressee(s) designated. I am readily familiar with McAllister
15 & McAllister's practice for collection and processing of correspondence and pleadings
16 for mailing. It is deposited with the United States Postal Service on that same day in the
17 ordinary course of business.
- 18 **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the
19 address(es) designated.
- 20 **EXPRESS SERVICE CARRIER:** I caused such envelope(s) to be delivered by an
21 authorized courier or driver authorized by **XXX**, an express service carrier to receive
22 documents, with delivery fees paid or provided for, to the addressee(s) designated.
- 23 **OVERNIGHT COURIER SERVICE:** I caused such envelope(s) to be delivered by
24 overnight courier service, with delivery fees paid or provided for, to the addressee(s)
25 designated.
- 26 **BY FACSIMILE:** I caused said document(s) to be transmitted to the telephone
27 number(s) of the addressee(s) designated.

28 I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct.

Executed at Modesto, California on August 31, 2003.



Lisa Jameson