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COUNTY OF STANISLAUS
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JUN - 5 2003

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

REPLY TO OPPOSITION TO MOTION FOR HEARING RE SANCTIONS AND REQUEST FOR DISCLOSURE OF THE AFFIDAVITS AND ALL INTERCEPTED COMMUNICATIONS

DATE: June 6, 2003
TIME: 8:30 a.m.
PLACE: Dept 2 /8

Defendant Scott Lee Peterson ("Peterson") hereby replies to the prosecution's "Opposition to Motion for Sanctions and Opposition to Motion to Suppress Wiretap Audio Recordings" ("Opposition"). On May 30, 2003 Peterson filed a Motion for Hearing on Sanctions re Eavesdropping ("Motion"). When we were last in Court on May 27, 2003, after the proceedings were concluded the Court modified the order for disclosure of items to the defense. Pursuant to the Court's order the defense returned two CD's or DVD's to Investigator Jacobson. It was represented to the defense that Investigator

Jacobson was to return these items to the Court pursuant to the Court's order. Subsequently, the defense requested that the prosecution produce the affidavits in support of the wiretaps. The prosecution has informed the defense that the affidavits in support of the wiretaps remain sealed with the Court. As such, until we receive and review the affidavits in support of the wiretaps we are unable to either proceed with the hearing or to legally challenge the wiretaps themselves. It would thus appear that we cannot proceed on any hearing on the wiretaps on June 6, 2003.

It is also the defense position that a hearing on the multiple media requests for "Orders Authorizing Inspection of Intercepted Communications" must also be held in abeyance until such time as the defense has received the affidavits in support of the wiretaps and reviewed all of the intercepted communications. Once we are in possession of the affidavits and all the interceptions, logs and summary sheets, then we can properly challenge the wiretaps as having been issued illegally and in violation of both statutory and Constitutional authority.[1] If the legal authorization for the wiretaps is faulty and the wiretaps were illegal, then suppression as one remedy would be futile if the content of vast amounts of this inadmissible material obtained illegally by wiretap was published in the media.

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[1]Mr. Peterson reiterates our request that at the appropriate time that the initial questioning be done in camera, of the prosecutors and investigators as requested in the Motion at 2:27 - 3:11.

I.

MEMORANDUM OF POINTS AND AUTHORITIES

Notwithstanding the above position, we nevertheless feel compelled to respond to the opposition filed by the prosecution. Nowhere in the opposition's obtuse 36-page filing does the prosecutor provide any relevant, let alone binding authority to justify its conduct. Rather, the opposition relies almost exclusively on non-binding and unpublished federal cases from far flung District Courts or Circuit Court opinions. In light of the convoluted structure of the prosecution's opposition, this Reply will address each prosecution point in sections corresponding to those in the prosecution's filing. However, a few preliminary facts must be set forth to put matters in proper context:

1. *People v. Zepeda* (6th Dist. 2001) 87 Cal.App.4th 1183 has no application to this matter.

The prosecution's Opposition relies heavily on *Zepeda*, a Sixth Appellate District case that is not binding on this Court. Even so, and more importantly, however, *Zepeda* has absolutely no application to this case. In *Zepeda* the defendant alleged violations of the Fourth and Fifth Amendments. Here, the prosecution's misconduct has violated Mr. Peterson's Sixth Amendment right to counsel as well has his due process rights under the United States and California Constitutions.

Moreover, there is no merit to the prosecution's claim that "[s]ince, *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."(sic) (Opposition at 20:23-26.) As the prosecution acknowledges, "the procedure outlined in [Penal Code section 629.80] '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.**" (emphasis added) (Opposition at 14:18-21.)

In this case the prosecution knew from the inception of the calls that they involved attorney-client communications that were totally privileged. Since Section 629.80 is clear on its face, there is no need to review non-binding federal authority. Additionally,

because Section 629.80 (when applicable) permits monitoring only one-fourth as frequently as the federal "golden rule" on which investigator Jacobson so heavily relies, this Court must infer that the legislature has provided the citizens of California with *greater* protection than is provided under federal law.

2. The prosecution's almost exclusive reliance on federal law is unfounded under the California Constitution.

As previously argued by Mr. Peterson, subsequent to the adoption of Proposition 8, decisions of United States courts (other than the United States Supreme Court) are not binding on this Court.[2/] Nevertheless, the prosecution repeatedly cites to federal decisions and actually relies heavily on an unpublished "Opinion and Order" from the United States District Court for the District of Oregon. (Opposition at 23-24 citing *United States v. Abbit*, (D. Or.) 1999 WL 1074015.)

3. The prosecution implicitly admits that the communications were totally privileged.

The prosecution states,

> 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.**
>
> (emphasis added) (Opposition at 15:20-22.)

As set forth in Peterson's previous filings all of the attorney-client communications at issue here were totally privileged. In light of the prosecution's acknowledgement that there was no chance otherwise, the prosecution's misconduct becomes even more apparent.

4. The prosecution's contention that the agents were acting in good faith

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[2]See also *People v. Camacho* (2000) 23 Cal.4th 824, 847 (noting that decisions rendered by lower federal courts are not binding) and *People v. Cleveland* (2001) 25 Cal.4th 466 (California Supreme court rejected a federal standard frequently applied by federal courts and chose to adhere to established California law).

is of no import.

The prosecution contends that,

> 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.

Mr. Peterson is herein seeking sanctions for prosecutorial conduct in a capital criminal case. His concern at this time is not with imposing civil or criminal penalties on the prosecution or its agents: rather his concern is for his life and liberty. The prosecution's reliance on Section 629.86 or any other good faith exception is at best misplaced.

5. The prosecution's repeatedly disclose privileged attorney-client communications.

As previously submitted to the Court, the opposition once again discloses the contents of privileged attorney-client communications. Specifically, see Opposition at 28:22-26.

6. The disclosure of sealed wiretap instructions is in violation of California Rules of Court rule 243.2.

Rule 243.2, subdivision (c) provides,

> [References to nonpublic material in public records] A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal.

Nevertheless, the Opposition provides,

> 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.' . . .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.*** (emphasis added) (Opposition at 11:14 - 12:3.)

However, despite the proscription of Rule 243.2, subdivision (c) and the fact that the wiretap instructions were under seal with this Court, the prosecution apparently quotes forty (40) lines of the sealed wiretap instructions. (See Opposition at 12:16 - 13:11.)

7. **DDA Distaso concedes he misled Mr. McAllister.**

DDA Distasto concedes that Mr. McAllister was told that his calls were not monitored. (See Declaration of Rick Distaso, page 35, lines 20-26 through page 36, lines 1-4.)

8. **The above seven points clearly indicate the need for a comprehensive, in camera hearing during which the Court may assess the gravity of the prosecution's misconduct.**

During such a hearing, the individuals involved in the above-described violations of California law and Rules of Court may be questioned under oath. Only after such a hearing can the Court (and the defense) properly assess the gravity of the prejudice suffered by Peterson and determine the appropriate remedial sanctions.

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II.

THE LAW OF WIRETAPS [3]

The prosecution correctly notes that "the conduct of state run wiretaps is provided for in Penal Code Sections 629.50 to 629.98." (Opposition at 2:16-17.) As previously argued herein and elsewhere, Section 629.80 does not permit any monitoring of totally privileged attorney-client communications. Indeed, Judge Ladine apparently was well aware of this fact when he ordered all monitoring of attorney-client communications to be halted.

As set forth above, the prosecution's reliance on the non-binding and distinguishable *Zepeda* case is unfounded and should be disregarded in its entirety. There simply is no authority for the proposition that any monitoring of privileged attorney-client communications is permitted.

(A) Periodic Reports to Court

The fact of the prosecution's making of periodic reports to the Court is of no import here. In fact, the only interesting thing about the reports is that Judge Ladine had to order investigator Jacobson to redo "72-hour report #2" because the report was deficient. (Jacobson Affidavit at paragraph 17.) This also displays the necessity for the defense to immediately gain possession of the affidavits.

(B) Termination of Wiretap No. 2

This section of the prosecution's opposition is wholly irrelevant to the issues at hand.

III.

DEFENSE ALLEGATIONS AND PEOPLE'S RESPONSE

The prosecution states, "[t]he defense asks for a number of 'sanctions' as a result of what they complain is a violation of attorney-client privileged communications." (Opposition at 5:9-11.) In actuality, as noted above, the defense's current immediate

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[3] As noted above, the remainder of this Reply will address the prosecution's Opposition in sections corresponding to those in the Opposition.

request is for immediate access to the affidavits as well as all intercepted communications and then a hearing (or hearings).

The prosecution's extended discussion of wireroom operations is both irrelevant and should be disregarded in its entirety in that the "discussion" is not properly before the Court in the form of an affidavit, declaration, or other manner bearing any indicia of reliability. Obviously, we join in the prosecution's repeated statements that the agents will be available to testify to these matters with the caveat that we first need the affidavits and all intercepts and sufficient time to review them.

Mr. Peterson also notes that the Opposition actually misrepresents the interval at which calls may be monitored.[4] The Opposition also incorrectly states that federal law is applicable to this case. As set forth above, California law is clear - - monitoring of privileged attorney-client communications simply is not permitted. Judge Ladine recognized this when he ended the prosecution's improper practice of monitoring Peterson's calls with his attorney.

1. Grave Prosecutorial Misconduct

The prosecution asserts,

> 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 prosecution is partially correct. The defense has cited cases involving (1) misconduct involving law enforcement personnel and (2) attorney-client communications. This is because in this case we have (1) a prosecutor who has apparently orchestrated eavesdropping on totally privileged (2) attorney-client communications. Hence, the cases cited by Peterson squarely address the key issue here - - the appropriate sanctions to be

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[4]See Opposition at 6:6-8 which sets forth a 30-second interval, whereas Section 629.80, when it is applicable, provides that agents must stay off the line for two (2) minutes.

imposed on the prosecution.

The government attempts to distinguish *United States v. Morrison* (1981) 49 U.S. 361, *inter alia*, on the grounds that "the defense has not been able to make any showing of prejudice in this case." (Opposition at 9:8-9.) This is accurate in that Mr. Peterson has requested a hearing for the purpose of determining the magnitude of the prejudice inflicted upon him. Unfortunately, in its frenzy to distract the Court from its own misconduct, the prosecution has entirely ignored the fact that Mr. Peterson has requested a hearing regarding prejudice, not the immediate imposition of sanctions.

The prosecution's attempt to distinguish *Barber v. Municipal Court* (1979) 24 Cal.3d 742 also fails. As the prosecution notes, *Barber* involved the infiltration by the government into privileged attorney-client communications - - exactly what has occurred in this matter.

The third case the prosecution attempts to distinguish is perhaps the most similar of the three cases. In *Morrow* the prosecutor orchestrated the eavesdropping into privileged attorney-client communications by instructing an investigator to listen in. This is exactly what happened here when prosecutors instructed investigators to monitor the totally privileged communications between Peterson and his attorney.

2. The Wiretap Instructions Given were Improper

As described above, this section of the Opposition constitutes prosecutorial misconduct in and of itself because of the apparent violation of a sealing order and California Rules of Court rule 243.2. Moreover, as previously argued at length, the purported wiretap instructions improperly authorized the investigators to monitor totally privileged attorney-client communications.

3. Penal Code Section 629.80 Does Not Authorize the Monitoring of Totally Privileged Attorney-Client Communications

The defense has previously established that Section 629.80, on its face, does not apply when there is no possibility that the communication is not privileged. In light of the clear law and the prosecution's implicit admission that there was no possibility the

communications were not privileged, Section 629.80 provides no refuge for the prosecution.

IV.

FEDERAL SEARCH WARRANT PRINCIPLES ARE PREMATURE AT THIS POINT

The prosecutor's 4-page dissertation on federal search warrant principles is premature. Until Mr. Peterson receives the affidavits he is not challenging the warrants so the prosecution's lengthy analysis is entirely premature.[5/]

V.

FEDERAL WIRETAP MINIMIZATION RULES ARE INAPPLICABLE TO THIS CASE

In a further attempt to subvert California law, the prosecution claims that federal wiretap rules are controlling. There is no basis for this contention in light of the well-established California law, recognized by Judge Ladine, that no monitoring of totally privileged attorney-client communications is permitted. As such, this Court need not, and in fact, must not, consider federal law in ruling on this matter.

1. Even Under an Objective Reasonableness Standard, the Monitoring Was Improper

The prosecution knew McAllister was Mr. Peterson's attorney at the time of the illegal monitoring. The prosecution knew Peterson's and McAllister's phone numbers at the time of the illegal monitoring. The prosecution knew California law at the time of the illegal monitoring. The prosecution knew, from the instant of interception of a call, the telephone numbers from which the monitored calls originated. In light of these facts, any contention that the repeated monitoring of totally privileged communications was

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[5] Mr. Peterson has not contested the warrants, in part, because the defense has yet to be provided with the underlying affidavits.

permissible is patently absurd.

2. The Appropriate Remedy for Violations of Minimization Rules

Mr. Peterson's Motion sets forth the law governing the appropriate remedy(ies) for the prosecution's orchestration of the eavesdropping. These remedies range from exclusion to recusal to dismissal. Mr. Peterson first however needs to examine the affidavits, conduct a hearing and then brief the imposition of any and all potential requests for sanctions. The prosecution's lengthy explication of various federal cases must be disregarded pursuant to Proposition 8, and because the United States Supreme Court and the courts of California have clearly and specifically addressed the range of sanctions for the type of prosecutorial misconduct which has occurred herein.

3. The Three Specific Calls

As Mr. Peterson has requested, the appropriate manner in which the Court should deal with the calls is to hold an in camera hearing during which the people who monitored the calls can be questioned under oath. However, as we previously noted, this hearing must be preceded by the release of the affidavits and all intercepts.

VI.

THE DEFENSE HAS HEREIN REQUESTED A HEARING ON SANCTIONS, NOT THE IMPOSITION OF SANCTIONS

As noted previously, Mr. Peterson has requested a hearing - - not the imposition of sanctions. Only after such a hearing can this Court properly evaluate the degree of prosecutorial misconduct and the magnitude of the prejudice inflicted upon Mr. Peterson. As such, the prosecution's argument as to appropriate sanctions is premature and should not be considered at this time.

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VII.

CONCLUSION

Counsel for Mr. Peterson respectfully requests that the Court order disclosure under seal of the affidavits and all intercepts pursuant to the wiretaps in this matter and set a date for an in camera hearing as well as an appropriate briefing schedule.

Dated: June 5, 2003

Respectfully submitted,

GERAGOS & GERAGOS

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

PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

REPLY TO OPPOSITION TO MOTION FOR HEARING RE SANCTIONS AND REQUEST FOR DISCLOSURE OF THE AFFIDAVITS AND ALL INTERCEPTED COMMUNICATIONS

____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

__X__ transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Hon. Al Girolami
Fax. No.: 209-525-6385

Rick Disatso, DDA
David P. Harris, DDA
Fax No.: 209-525-5545

Executed on June 5, 2003, at Los Angeles, California.

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

JOSLIN RUDD

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