STATE OF CALIFORNIA COURT OF APPEAL

FIFTH APPELLATE DISTRICT

[NAME DELETED,] Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR FRESNO COUNTY, Respondent	Fifth Appellate District Court Case No. Fresno County Superior Court Case Nos. [CASE NUMBERS DELETED]
THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE ATTORNEY, ELIZABETH EGAN, DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO, Real Party in Interest	

PETITION FOR PEREMPTORY WRIT OF MANDATE AND REQUEST FOR IMMEDIATE STAY

RICK HOROWITZ, #248684
2115 Kern Street, Suite 101
Fresno, California 93721
Tel: (559) 233-8886
Fax: (559) 233-8887

Attorney for Petitioner,
[NAME DELETED]

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STATE OF CALIFORNIA COURT OF APPEAL

FIFTH APPELLATE DISTRICT

[NAME DELETED], Petitioner, vs. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR FRESNO COUNTY, Respondent	Fifth Appellate District Court Case No. Fresno County Superior Court Case Nos. [CASE NUMBERS DELETED]
THE PEOPLE OF THE STATE OF CALIFORNIA, BY THE ATTORNEY, ELIZABETH EGAN, DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO, Real Party in Interest	

PETITION FOR PEREMPTORY WRIT OF MANDATE/PROHIBITION

AND REQUEST FOR IMMEDIATE STAY

TO THE HONORABLE JAMES A. ARDAIZ, PRESIDING JUSTICE OF THE FIFTH APPELLATE DISTRICT COURT OF THE STATE OF CALIFORNIA:

Petitioner, [NAME DELETED] by and through his attorney, RICK HOROWITZ, petitions for a peremptory writ of mandate and prohibition directed to the Respondent Court to grant the *Ex Parte* Motion for Order to Require the

Fresno County Sheriff's Department to Allow Unmonitored Contact Visits for Defense Team, which was denied by Respondent Court on May 23, 2006.

In support of the requested writ of mandate, Petitioner, by this verified petition, alleges as follows:

I

Petitioner [NAME DELETED] has five separate cases currently pending a preliminary hearing before the Fresno County Superior Court, Department 31.[1] The hearing is currently scheduled for May 14, 2008, on the morning calendar.

II

On March 7, 2008, an *Ex Parte* Motion for Order to Require the Fresno County Sheriff's Department to Allow Unmonitored Contact Visits for Defense Team (hereinafter, "Motion for Visits") was filed in Department 31 of the Fresno County Superior Court of the State of California after service on County Counsel for the County of Fresno, 2220 Tulare Street, Fifth Floor, Fresno, California 93721. (Exhibit A.) The proposed hearing date was March 20, 2008. (*Ibid*.)

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[1] Why all five cases are being heard together is a puzzle to defense counsel. The only relationship between the cases is that they have the same defendant (but differing and otherwise *unconnected* co-defendants), the same defense counsel and the same prosecutor. Allegedly, these are together "for resolution purposes," but to counsel's knowledge, no offers have been made. As noted, there is no other connection – temporally, logically, or otherwise – between the cases.

III

No response to the Motion for Visits was ever properly served. However, without any prior agreement to the acceptance of FAX service, a Declaration of Captain Marilyn Weldon in Opposition to Ex Parte Motion for Order to Require the Fresno County Sheriff's Department to Allow Unmonitored Contact Visits for Defense Team (hereinafter, "Opposition Declaration") was received by defense counsel via FAX on March 19, 2008. (Exhibit B.) The expected date of the hearing, March 20,2008, at 1:30 p.m., was noted on the face sheet of the Opposition Declaration. (*Ibid.*)

IV

A further continuance due to scheduling conflict was agreed upon by the parties and the Motion for Visits was ultimately heard on April 1, 2008. No response brief other than the Opposition Declaration via FAX was ever received by defense counsel, nor was any other brief filed with the Superior Court. Oral argument proceeded and the court took the matter under submission to further review cases cited by the defense brief.

V

On April 15, 2008, the Motion for Visits was denied on the grounds that there was no proof that officers were actually using the intercom – which contains

no light or other indication of when or when it is not in use – to listen to conversations between attorney and client.

VI

No other petition for writ of mandate or prohibition has been made by or on behalf of petitioner relating to this issue.

VII

Petitioner has no plain, speedy, or adequate remedy at law other than this petition. Accordingly, a petition for a writ of mandate/prohibition is the appropriate remedy. (Code Civ. Proc. § 1086.) Unless this Court issues the requested writ, petitioner will be placed in the position of having to decide between communicating freely with his attorney while staring at an intercom approximately two feet from his face and hoping it is not being monitored, or being less than forthcoming with his attorney.

VIII

Petitioner is the party beneficially interested in these proceedings and the aggrieved party to the denial of the motion by the respondent court. Other interested parties are the respondent court, the Superior Court of Fresno County, Central Division, and the People of the State of California, by and through their attorney, Elizabeth Egan, District Attorney, County of Fresno, State of California.

All actions complained of in this petition occurred within the territorial jurisdiction of the Respondent court.

WHEREFORE, Petitioner prays that:

1. A writ of mandate issue, directing Respondent court to grant Petitioner's Motion for Visits; or
2. A writ of prohibition issue, directing the Sheriff's Department to provide visitation for attorney and petitioner in a room without an intercom system, such as has already been done once before; and
3. An immediate stay of proceedings be granted in the Fresno County Superior Court, Central Division, with respect to Case Nos. [CASE NUMBERS DELETED] currently pending against Petitioner; and,
4. This Court grant such other and further relief as it deems appropriate in the interests of justice.

Dated: May 13, 2008 Respectfully submitted,

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RICK HOROWITZ
Attorney at Law
2115 Kern Street, Suite 101
Fresno, CA 93721
Tel: (559) 233-8886
Fax: (559) 233-8887

Attorney for Petitioner,
[NAME DELETED]

VERIFICATION

I, RICK HOROWITZ, declare as follows:

I am an attorney admitted to practice in the State of California. I was appointed to represent petitioner herein.

In my capacity as attorney for petitioner, I am making this verification on his behalf.

I wrote and have read and considered the foregoing Petition for Writ of Mandate/Prohibition and Request for Immediate Stay and the Memorandum of Points and Authorities in support of that Petition attached hereto, and declare that the contents of the Petition for Mandate and Request for Immediate Stay and the Memorandum of Points and Authorities are within my knowledge, except as to those matters which are alleged therein on information and belief and as to those matters, I believe them to be true.

Executed this thirteenth day of May 2008, at Fresno, California.

____

RICK HOROWITZ
Attorney at Law
2115 Kern Street, Suite 101
Fresno, CA 93721
Tel: (559) 233-8886
Fax: (559) 233-8887

Attorney for Petitioner,
[NAME DELETED]

MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

WHETHER THE MOTION FOR VISITS WAS RIGHTLY DENIED BY THE TRIAL COURT WHERE PETITIONER HAS NO ASSURANCES THAT INTERCOM SYSTEM INSTALLED FOR THE PURPOSES OF ALLOWING THE SHERIFF'S DEPARTMENT TO LISTEN IN TO THE INTERVIEW ROOMS IS, IN FACT, BEING MONITORED, RESULTING IN A VIOLATION OF HIS SIXTH AMENDMENT REPRESENTATION RIGHTS AND HIS STATUTORY AND DUE PROCESS RIGHTS TO THE PRESERVATION OF ATTORNEY-CLIENT PRIVILEGE.

SUMMARY OF ARGUMENT

The trial court abused its discretion when it failed to grant petitioner's Motion for Visits. The Motion for Visits was improperly denied by the trial court. Petitioner's brief constituted an accurate statement of the facts, an accurate statement of relevant state and federal law and a proper application of the relevant state and federal law to the facts of this case. The court's stated reason for denial was that petitioner could not prove that the State was actually listening to his conversations on a listening device which was installed for that purpose. A brief was filed prior to the hearing by the petitioner, but not by County Counsel. County Counsel's arguments that attorney-client privilege is not a "fundamental" right was therefore not only an incorrect statement of law, but was not supported

by any law due to the absence of briefing.[2] County Counsel's other allegations, such as that the Sheriff has "a purpose" for having installed the intercom system and this makes it okay, was likely unsupported by law.

County Counsel's Opposition Declaration did not state any law, which is probably good, since the Declaration is not the Declaration of an attorney licensed to practice within the State of California. The Opposition Declaration does show that the *essential* facts relating to the visit are undisputed with the notable exception of paragraph 4(j). This paragraph was stated on information and belief of the declarant, as were all the others comments concerning the essential facts of the visit. Petitioner is therefore required to accept and believe that no officer would ever prevaricate and that these representations based upon Captain Weldon's beliefs therefore represent reality.

Under the law of the State of California and the United States Constitution, this is unacceptable because attorney-client privilege is not only "fundamental"; it is "sacred." No less an authority than the Fifth District Court of Appeal itself has stated that the basic policy behind the privilege is to promote the attorney-client relationship by safeguarding the confidential disclosures of the client and the advice given by the attorney. This is to be supported, the Court said, by a "liberal construction in favor of the exercise of the privilege."

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[2] At the time of this writing, no transcript of the oral argument is available. Counsel intends to obtain one and can file that with this Court if this Court deems that necessary.

PROCEDURAL HISTORY

The procedural history of this case is set forth in full in the foregoing Petition.

FACTUAL HISTORY

The factual history of this case is essentially set forth in the foregoing Petition. Furthermore, petitioner agrees that the *essential* facts surrounding counsel's aborted visits to him as outlined in the Opposition Declaration are undisputed, with the exception that petitioner believes deputies sometimes use the listening devices installed in the interview rooms for the purposes to which they lend themselves; i.e., listening to conversations taking place within those rooms.

Furthermore, as noted in the Declaration of Rick Horowitz, the Sheriff has shown itself capable of safely permitting meetings on the fifth floor of the facility, where no such listening devices are apparent.

Petitioner seeks a Writ of Mandate directing Respondent court to grant the Motion for Visits, or a Writ of Prohibition against maintaining listening devices in interview rooms of the jail, and directing the Superior Court, Central Division, to stay any and all proceedings in the pending cases captioned above.

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DISCUSSION

I

THE APPROPRIATE STANDARD OF REVIEW FOR THIS PETITION IS ABUSE OF DISCRETION

This Petition challenges the Respondent court's denial of the Motion for Visits. The appropriate standard of review is abuse of discretion. "[A]buse of discretion occurs when in its exercise a court exceeds the bounds of reason, all of the facts and circumstances before it being considered." (*Muller v. Tanner* (1969) 2 Cal. App. 3d 445, 457 [82 Cal.Rptr. 738].)

II

NO WAIVER OF ARGUMENTS IN TRIAL COURT INTENDED

Petitioner intends no waiver of issues raised or arguments made at the trial court level by not expressly reiterating them herein. Petitioner's original Motion for Visits comprises Exhibit A of this Petition and all arguments made below are hereby incorporated in this Petition. A transcript of the oral argument below is not currently available and is requested; petitioner does not desire waiver of legal arguments made in response to County Counsel and to the trial court below.

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III

THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO APPLY THE "STRICT SCRUTINY" TEST TO THE QUESTION OF WHETHER THE STATE'S ACTION IN THE CONTEXT OF A FUNDAMENTAL RIGHT WAS PERMISSIBLE UNDER THE UNITED STATES CONSTITUTION

The attorney-client privilege is the oldest privilege protecting confidential communications under common law. (*Upjohn Co. v. United States* (1981) 449 U.S. 383, 389 [101 S.Ct. 677; 66 L.Ed.2d 584], citing J. Wigmore, *Evidence* § 2290 (McNaughton rev. 1961).) The California Supreme Court notes that the privilege has been "a hallmark of Anglo-American jurisprudence for almost 400 years." (*Mitchell v. Superior Court of Fresno County (Shell Oil)* (1984) 37 Cal.3d 591, 599 [208 Cal.Rptr. 886].)

California has long recognized that the attorney-client privilege is a *fundamental* right. (*People v. Kor* (1954) 129 Cal. App. 2d 436, 447 [277 P.2d 94].) In fact, one Justice of the California Supreme Court referred to the right as "sacred." (*Id*. at 447 (conc. opn. of SHINN, P.J.) Justice Broussard, while considering it "hyperbole" to call it a "sacred," nevertheless said, "it is clearly [a privilege] which our judicial system has carefully safeguarded with only a few specific exceptions." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 600 [208 Cal.Rptr. 886].) Nevertheless, California's Supreme Court still considers the right fundamental: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system." (*People v. Superior Court (Laff)*

(2001) 25 Cal.4th 703, 715 [107 Cal.Rptr.2d 323], quoting *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1146 [86 Cal. Rptr. 2d 816, 980 P.2d 371].)

While *California's* Supreme Court has characterized the attorney-client privilege to confidential communications fundamental, the United States Supreme Court has not so explicitly protected the right.

> The Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor. Its purpose, rather, is to assure that in any "criminal [prosecution]," U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the "'prosecutorial forces of organized society.'"

(*Moran v. Burbine* (1986) 475 U.S. 412, 430 [106 S.Ct. 1135; 89 L.Ed.2d 410], quoting *Maine v. Moulton* (1985) 474 U.S. 159, 170 [106 S.Ct.477; 88 L.Ed.2d 481], quoting *United States v. Gouveia* (1984) 467 U.S. 180, 189 [104 S.Ct. 2292; 81 L.Ed.2d 146], quoting *Kirby v. Illinois* (1972) 406 U.S. 682, 689 [92 S.Ct. 1877; 32 L.Ed.2d 411].)

It would appear to be a well-supported point.

The United States Supreme Court, referring to *Maine v. Moulton, supra,* has held that: "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." (*Patterson v. Illinois* (1988) 487 U.S. 285, 290 [108 S.Ct. 2389; 101 L.Ed.2d 261].) The Ninth Circuit Court of Appeal for the United States has noted whatever the appropriate level of constitutional protection the attorney-client

privilege enjoys may be, the privilege certainly has import for the Sixth Amendment right to *effective* assistance of counsel. (*Bittaker v. Woodford* (9th Cir. 2003) 331 F.3d 715, 724.) And in at least one recent case, the federal court noted that there are times when balancing the attorney-client privilege against so revered a constitutional right as the Sixth Amendment might result in upholding the privilege (though probably not very often). (*Murdoch v. Castro* (9th Cir. 2004) 365 F.3d 699, 703.)

Even if federal law currently holds – as it appears it does – that the attorney-client privilege is somehow "constitutionally protected," but not necessarily *inherently* fundamental itself, it is still so in California. (*Kor, supra,* 129 Cal.App.2d at 447; *People v. Superior Court (Laff), supra,* 25 Cal.4th at 715; see *In re Grand Jury Subpoena Duces Tecum* (8th Cir. Ark. 1997) 112 F.3d 910, 938 ["a violation of…attorney-client privilege may also violate…constitutional rights"].)

The right should therefore be carefully scrutinized. In cases involving fundamental rights, the standard is sometimes called "strict scrutiny." (*People v. Ramos* (2004) 34 Cal.4th 494, 512 [21 Cal.Rptr.3d 575]; *People v. Wilkinson* (2004) 33 Cal.4th 821, 836 [16 Cal.Rptr.3d 420].) Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas have noted that fundamental rights, which they designate as "rights which are 'deeply rooted in this Nation's history and tradition," have been repeatedly held to "heightened scrutiny." (*Lawrence v.*

Texas (2003) 539 U.S. 558, 593 [123 S.Ct. 2472; 156 L.Ed.2d 508] (dis. opn. of Scalia, J.).) "Heightened scrutiny" is also known as "strict scrutiny." (*Id*. at 586.)

The trial court in this case gave no indication that it was applying strict scrutiny to the governmental action here. Instead, because the *petitioner* could not prove anyone was actually listening, the trial court denied relief.

IV

EVEN IF STRICT SCRUTINY WERE NOT APPLICABLE TO THE STATE ACTION, THE COURT IMPROPERLY CONSIDERED THE BURDEN TO BE ON THE PETITIONER BECAUSE CALIFORNIA LAW REQUIRES THE PROSECUTION TO REBUT A PRIMA FACIE CASE OF EAVESDROPPING BY CLEAR AND CONVINCING EVIDENCE

In California, eavesdropping is a felony. (Pen. Code § 636; *People v. Jordan* (1990) 217 Cal.App.3d 640, 646 [266 Cal.Rptr. 86].)

The *Jordan* case involved eavesdropping within a prison – where arguably less rights *might* belong to prisoners than in a jail where petitioner resided, charged, but not yet convicted. In that case, the State put on not less than fourteen witnesses who denied knowledge that the equipment had ever been used to overhear conversations between attorneys and their clients. (*Jordan, supra,* 217 Cal.App.3d at 643-644.) The main issue in the case concerned questions of production and burden of proof.

The burden of production, the Court held, is on a defendant to bring evidence supporting a claim that his Sixth Amendment right is being violated. (*Jordan, supra,* 217 Cal.App.3d at 645.) Once a prima facie case for the violation

is made, the burden shifts to the government to prove the legality of its conduct. (*Ibid*.)

> The prosecution cannot be expected to negate all possible improprieties; the burden must be on the defendant to bring forward evidence supporting the claim of a Sixth Amendment violation. But when the defendant has made a showing *from which a violation may reasonably be inferred*, it is consistent with the procedure followed in Fourth Amendment cases to place on the prosecution the burden of proving the legality of its conduct.

(*Jordan, supra,* 217 Cal.App.3d at 645.)

Here, petitioner and his attorney have made a *prima facie* case for eavesdropping: there is an intercom sitting right there in the room and there is no way to know if anyone is listening on the other end, but the purpose of the device is to allow people to do just that. And while the prosecution cannot be expected to negate all possible improprieties, putting forth "evidence supporting the claim" – i.e., making a showing from which a violation may reasonably be inferred – cannot mean that petitioner must first *prove* that someone is actually listening, as the trial court apparently required.

> Eavesdropping is a felony under California law. By denying participation in eavesdropping, [jail] officials may be merely shielding themselves from criminal prosecution. Since [jail] eavesdropping occurs in a complex bureaucratic sphere that is difficult to investigate, defense counsel cannot easily devise effective strategies for impeachment of suspect testimony, and…faces formidable problems in proving eavesdropping by circumstantial evidence.

(*Jordan, supra,* 217 Cal.App.3d at 646.)

The burden of proving legality of the act of having installed listening devices (i.e., the intercoms) rests with the State. (*Jordan, supra,* 217 Cal.App.3d at 645, 646.) The appropriate level of review is clear and convincing evidence. (*Ibid.* .)

The standard of review applied in this case was not that of clear and convincing evidence. The trial court denied petitioner's Motion for Visits because the petitioner was unable to prove that anyone was actually listening to the conversation between him and his attorney.

IV

THE PRESENCE OF THE INTERCOM SYSTEM HAS A CHILLING IMPACT ON ATTORNEY-CLIENT PRIVILEGE BECAUSE THERE IS NO WAY OF KNOWING THAT NO ONE IS LISTENING AT THE OTHER END; LAW ENFORCEMENT *DOES* SOMETIMES ACT IMPROPERLY

The trial court at the hearing also noted that counsel could never know that someone was not listening. The fact that the intercom is gone would not preclude the State from placing a bugging device within the interview rooms. While this statement is true, it overlooks the facts. Here, attorney and client have a clear indication that someone could listen to their conversations. All that is required is the flip of a switch by one deputy – even a deputy who disregarded the policy alleged in the Opposition Declaration.

In making decisions, fact finders may rely upon common knowledge. (*Levy-Zentner Co. v. Southern Pac. Transportation Company* (1977) 74

Cal.App.3d 762, 778 [142 Cal.Rptr. 1].) "Courts must be guided by considerations of common sense, justice and fair play when making public policy determinations." (*Youst v. Longo* (1987) 43 Cal.3d 64, 77 [233 Cal. Rptr. 294].) Petitioner neither needs *nor intends* to cast aspersions upon all law enforcement officers to point out that some law enforcement officers do occasionally do things they should not do. Human beings are sometimes too curious for their own good. Not very long ago, as was pointed out at the hearing on petitioner's Motion for Visits, several human beings improperly viewed confidential data from passport files on three leading presidential candidates. (Hosenball, "Passports and Presidential Candidates" (March 21, 2008) Newsweek Web Exclusive found at http://www.newsweek.com/id/124566 (last visited May 13, 2008) (Exhibit C).)

Petitioner is also a human being. Petitioner is aware of this tendency in human beings to do things they should not do. When petitioner views an intercom panel in the interview room where he is to have a confidential visit with his attorney, he cannot help but wonder if the deputies at the other end will be listening.

The United States Supreme Court says the attorney-client privilege is "rooted in the imperative need for confidence and trust." (*Jaffee v. Redmond* 1996) 518 U.S. 1, 10 [116 S.Ct. 1923; 135 L.Ed.2d 337].)

> The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

(*Trammel v. United States* (1980) 445 U.S. 40, 51 [100 S.Ct. 906; 63 L.Ed.2d 186].)

The U.S. Supreme Court compared the fulfillment of this mission – a mission sanctioned by the Sixth Amendment – to that of the doctor-patient privilege, noting that "barriers to full disclosure would impair diagnosis and treatment." (*Trammel, supra,* 445 U.S. at 51.) Barriers to the Sixth Amendment right to representation of counsel undermine the effective representation of counsel. (And, here, the presence of an intercom system known to have law enforcement officers at the other end is a distinct barrier.)

As this Court itself – the Fifth District Court of Appeal – has noted,

> The basic policy behind the attorney-client privilege is to promote the relationship between attorney and client by safeguarding the confidential disclosures of the client and the advice given by the attorney. *This policy supports a liberal construction in favor of the exercise of the privilege.*

(*Benge v. Superior Court of Tulare County* (1982) 131 Cal.App.3d 336, 344 [182 Cal.Rptr. 275], emphasis added.)

"The often-expressed purpose of the privilege is to induce or encourage a client to disclose to his counsel fully, freely, and openly, the facts of a case." (*American Mutual Liability Insurance Company v. Superior Court of Sacramento County* (1974) 38 Cal.App.3d 579, 593 [113 Cal.Rptr. 561].) The public policies at stake here are of "paramount importance." (*In Re Jordan* (1974) 12 Cal.3d 575, 580 [116 Cal.Rptr. 371].)

Furthermore both the Business and Professions Code and the Rules of Professional Conduct for attorneys in California require attorneys "[t]o *maintain* inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." (Bus & Prof Code § 6068(e)(1); Rules of Professional Conduct, Rule 3-100; *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 752 [157 Cal.Rptr. 658].) Although there are exceptions, the privilege extends even to the situation where an attorney believes his client will commit perjury. (*People v. Johnson* (1998) 62 Cal.App.4th 608, 623 [72 Cal.Rptr.2d 805].)

The attorney in [NAME DELETED]'S case, seeing an intercom in the interview room, but being unable to determine whether or not anyone is listening on the other end, cannot be sure [NAME DELETED]'S confidences are being maintained inviolate, or that [NAME DELETED]'S secrets are being preserved.

V

THE STATE'S PROPOSED PURPOSE IN PLACING INTERCOM SYSTEMS INTO THE ROOM IS NOT NARROWLY TAILORED SO AS TO PRESERVE AS MUCH RIGHT AS POSSIBLE WHILE STILL MEETING THE PURPORTED NEEDS OF THE STATE

The Opposition Declaration puts forth at least two reasons for the presence of intercoms in the interview rooms. The first is to allow the attorney to alert staff when the interview is over so that inmates may be escorted back to their pods.

The second is for the safety and security of the department staff, inmates and visitors to the sixth floor. (Exhibit B at 4.)

California Courts have regularly rejected arguments based on these reasons. (*Barber, supra,* 24 Cal.3d at 752, citing and quoting *In re Snyder* (1923) 62 Cal.App. 697, 701-702 [217 P. 777] and *In re Jordan, supra,* 7 Cal. 3d at 939.)

Furthermore, there are other means for achieving these goals. The jail *already* has in place "panic buttons" for the safety and security of persons visiting the prisoners in the interview rooms – these buttons are present in interview rooms throughout the jail.[3] And if the technology exists to create buttons which can alert staff to panic situations, there is every likelihood that it is equally possible to install a separate button that will like up in the control booth when the privilege-protected visit is concluded.

It is worth noting the internal contradiction to the Opposition Declaration. *Windows* have been installed in interview rooms, as well as the gymnasium and multi-purpose rooms, so that deputies may see inside. "[E]ach of these rooms has glass windows which allows [sic] staff to respond if an inmate poses a threat to the safety and security of a visiting attorney or legal assistant." (Exhibit B at 3.) The windows cannot serve these purposes if no one is looking through them. If someone *is* looking through them, they can be signaled when the meeting is over,

[3] To counsel's knowledge, only the sixth floor has both intercoms *and* panic buttons. There may be an equal protection argument here, but this was not made before the trial court and counsel believes that makes it not cognizable in this petition.

so that they can escort prisoners back to their pods. However, the inconsistency proceeds even farther: the small interview rooms have intercoms, according to the Opposition Declaration, so that attorneys can notify the officers that the interview is completed and the client can be returned to his pod. Yet there are no locks on the doors. Attorneys can walk out of the room to notify the deputies when the interview is complete.

> We fully appreciate the difficult task of the officers in their efforts to discharge their duty in [ensuring security and safety within the jail], and it is not the desire of this [petitioner] to interfere or hamper them in this commendable work. At the same time…that official duty, grave and important as it is, must be performed in subordination to the constitutional rights of others. We are fully persuaded that some plan can be provided by the authorities which will adequately protect the county jail…and at the same time not entrench upon the right of those confined therein to every privilege accorded them by the laws of our state.

(*Snyder, supra,* 62 Cal.App. at 701-702 (alterations added).)

CONCLUSION

For the reasons given above, the court erroneously denied petitioner's Motion for Visits. Accordingly, it is respectfully requested that the Fifth Appellate District Court of the State of California issue the requested Writ of Mandate/Prohibition as prayed for, either for the Superior Court to grant the requested Motion for Visits, or, in the alternative that the Fresno County Sheriff's Department be ordered to provide an interview room without intercoms for an attorney-client-privileged visit between [NAME DELETED] and his attorney, and

to order stayed the proceedings in the Fresno County Superior Court, Central Division Courthouse, until such time as the Writ of Mandate has been executed.

Dated: May 13, 2008

Respectfully Submitted,

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RICK HOROWITZ

DECLARATION OF RICK HOROWITZ

I declare that:

1. I am an attorney licensed to practice law in the State of California.
2. I currently represent [NAME DELETED] in Fresno Superior Court Case Nos. [CASE NUMBERS DELETED]. I am a private attorney, not normally part of the panel for appointments, and Judge Pena asked me to take the appointment on these cases because all available counsel for appointments apparently had to "conflict out."
3. When attempting to visit [NAME DELETED] in the Fresno County Jail, I discovered that the floor he is on has no meeting rooms which do not contain intercom systems.
4. The intercom has no indicator (not, frankly, that as a defense attorney that would make me feel better anyway) to indicate whether or not someone is listening to the conversation taking place in the room.
5. I inquired of the jail personnel how I was to have a confidential attorney-client-privileged and -protected conversation with my client and was told that my only option was to meet in a room with an intercom.
6. After my initial refusal to utilize a larger room on a visit on March 6, 2008, [NAME DELETED] and I were escorted to a smaller room. A guard was posted outside the door. This guard supplemented the guard already standing approximately 30 feet away at a computer terminal. The smaller room also had an intercom and the officer in charge refused my request to move us to the fifth floor interview rooms, where there are no intercoms.
7. On another date, which I failed to record, but which the jail records could be obtained to validate, I made another visit to test whether I

would be granted an interview in a room without an intercom. (I did this because although I had been told no such visit would be allowed, past experiences in other jails have indicated to me that such "policies" are often "ad hoc" and adjusted depending on who is in charge that day.) On that date, [NAME DELETED] was sent down to the fifth floor to meet me in an interview room with no intercom system. When this was mentioned at the hearing on the Motion for Visits, County Counsel informed the court that this would not be done again in that it was in violation of the policy.

8. A transcript of the hearing of the Motion for Visits is not currently available to me, although as soon as the expenditure is approved I intend to obtain a copy and can file it with the Fifth Appellate District Court.
9. In accordance with Rule 3, subsection (3), subsection (i) of the Local Rules on the website for the Fifth Appellate District, I note that the transcript of the hearing is not currently available because (a) I did not decide until recently to file a Petition for a Writ and (b) this is my first appointed case and I have been told I will need to obtain prior approval from the Superior Court before ordering the transcript.
10. In accordance with Rule 3, subsection (3), subsection (ii) of the Local Rules for the Fifth Appellate District, the argument by defense counsel was essentially as outlined in the brief which is attached as Exhibit A to this Petition. County Counsel filed no brief in response to the brief I filed on [NAME DELETED]'S behalf. To the best of my recollection, knowledge and belief, the argument from County Counsel was basically that "the intercoms serve a purpose." The purpose outlined was that set forth in the Declaration of Captain Marilyn Weldon in Opposition to Ex Parte Motion for Order to Require the Fresno County Sheriff's Department to Allow Unmonitored Contact Visits for Defense Team

which was faxed to me on March 19, 2008, the day before the motion was originally scheduled to be heard. County Counsel further objected to my representation that the Attorney-Client Privilege is a fundamental right. I made an offer to provide the trial court with further briefing on that issue, but it is my recollection that was not deemed necessary. I recall that I made further response that because the installation of the intercom system was an affirmative act of the government, the burden was on the government to show not just that there was "a purpose," but that there was a compelling reason and that the government's action was narrowly-tailored so as to impact my client's right as minimally as possible. I recall making an objection that County Counsel was arguing law, but had provided no citations to the law. In essence, County Counsel was making unsupported assertions. County Counsel attempted to differentiate the case law I cited from the instant case on the basis of *In re Jordan* (cited in the original Motion and in the Petition to which this Declaration is attached) being a case concerning prison mail and thus inapplicable. I responded that the underlying *principles* were the same and attempted to draw attention to the public policy, the intent of the law and it is my recollection that I attempted to specifically to note this Court's specific endorsement of that policy, which was highlighted in my brief when I deliberately pointed out some passages were from Fifth Appellate District cases. It is my recollection that the trial court stated that the matter would be taken under advisement and the cases cited by the defense brief would be reviewed. On April 15, 2008, the court denied the motion on the grounds that [NAME DELETED] did not prove that anyone was actually listening to the intercom system – something which, frankly, is virtually unprovable for

reasons noted to the trial court and argued in the Petition for Review to which this Declaration is attached.

11. I am uncertain how to comply with Rule 3-100 of the Rules of Professional Conduct promulgated by the State Bar of California and with Business and Professions Code 6068(e) and therefore decided, after consultation with my client in the courtroom, to file the Petition for Writ of Mandate/Prohibition and Request for Immediate Stay.
12. On May 7, 2008, a preliminary hearing was scheduled over my objection. The preliminary hearing is set for May 14, 2008, on the morning calendar. I indicated to the trial court that I did not know if that gave me enough time to properly research and submit a writ, but have managed to complete this sentence, which I believe will be the last thing typed, at 9 p.m. on May 13, 2008.

I declare under penalty of perjury that the above is true and correct to the best of my knowledge and belief.

Dated: May 13, 2008

Respectfully Submitted,

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RICK HOROWITZ