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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LLOYD JAMISON. Defendant.	Case No. CR-05-0553 VRW **BRIEF OF AMICUS CURIAE ACLU IN SUPPORT OF DEFENDANT LLOYD JAMISON** Date: n/a Time: n/a Hon. Vaughn R. Walker, Courtroom 6, 17th Floor

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the matter now before this Court, officials at the county jail where defendant Lloyd Jamison is held pending trial recorded at least some of the telephone calls Mr. Jamison had with his attorney, and then provided those recordings to the prosecution team. If this is true, it violated the attorney-client privilege and will violate Mr. Jamison's rights under the Sixth Amendment unless all persons with knowledge of the contents of the recordings are completely insulated from the prosecution.

The attorney-client privilege protects the privacy of communications between lawyers and their clients. "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403 (1976). In the case at bar, the only real question is whether the phone calls were "confidential" in light of notices that the jail provided that calls are subject to monitoring. Confidentiality depends largely on whether reasonable steps were taken to preserve privacy. In California, Penal Code §636 makes it a felony to record an inmate's calls to his attorney without the explicit permission of both the lawyer and the client; federal law also would prohibit the taping of such calls at a federal facility. Amicus believes that in light of these circumstances the facts will show that the calls at issue were confidential for the purposes of maintaining the privilege.

The Sixth Amendment also protects the integrity of the attorney-client relationship. Specifically, it prohibits the prosecution from gaining an "unfair advantage" by making use of any information gained by intruding into that relationship after charges have been filed. If state agents gather such information from the defendant or his lawyer, the Sixth Amendment does not allow the prosecution to use that knowledge in any way. The Sixth Amendment protects many attorney-client communications in situations where there is insufficient confidentiality to support the attorney-client privilege. The usual pre-trial remedy is to suppress any improperly acquired evidence and to completely insulate every person who has improper information from all aspects of the prosecution. Egregious or intentional cases call for dismissal.

II. THE RECORDING OF MR. JAMISON'S TELEPHONE CALLS WITH HIS ATTORNEY VIOLATED THE ATTORNEY-CLIENT PRIVILEGE

Privilege in federal criminal cases is governed by the common law. *See* F.R.E. 501; *Fisher v. United States,* 425 U.S. 391, 402 n.8 (1976).

"Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher*, 425 U.S. at 403 (citing 8 J. Wigmore, Evidence, §2292 (McNaughton rev. 1961)). The Ninth Circuit, also citing Wigmore, has stated that the privilege applies

> (1) When legal advice of any kind is sought (2) from a professional legal adviser in his or her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are, at the client's instance, permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection be waived.

United States v. Martin, 278 F.3d 988, 999-1000 (9th Cir. 2002) (citations omitted); *accord United States v. Plache*, 913 F.2d 1375, 1379 n.1 (9th Cir.1990). The privilege protects the attorney's, as well as the client's, words. *See United States v. Bauer*, 132 F.3d 504, 507 (9th Cir. 1997).

In the matter at bar, most of these elements are not in question.[1] Attorney Ian Loveseth represents Mr. Jamison in a pending criminal case (elements 2 & 5). Their communications are thus presumed to be related to obtaining legal advice regarding the case. (elements 1 & 3). *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996); *Diversified Indust., Inc., v. Meredith*, 572 F.2d 569, 610 (8th Cir. 1977) (en banc). Mr. Jamison is, through counsel, presently trying to protect the information. (elements 6 & 7). The only real questions are

[1] The court may resort to examining the communications to determine necessary facts. *See Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (1992).

whether the communications were "made in confidence" and the nearly identical question of waiver. *See Weil v. Investment/ Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 & n.11 (9th Cir. 1981) (noting close relationship between two concepts).

A. The Attorney-Client Privilege Requires Only that the Client Take Reasonable Steps to Maintain the Confidentiality of Communications.

The Ninth Circuit addressed the question of the attorney-client privilege in a custodial setting in *Gomez v. Vernon*, 255 F.3d 1118, 1132-33 (9th Cir. 2001). In *Gomez*, state prisoners alleged that guards and government lawyers had violated the attorney-client privilege by reading correspondence from the inmates' lawyers, in violation of prison rules. As in the case at bar, the intercepted communications were made in the course of an established attorney-client relationship. Thus, the court did not need to address each individual element of the privilege before holding that it applied because the "law recognizes a privilege for communications between client and attorney for the purpose of obtaining legal advice." *Id.* at 1131 (citation omitted). The court went on to discuss the issue of waiver and held that inmates who had taken reasonable steps, in light of the conditions of their incarceration, to protect their legal files from the state's scrutiny had thereby preserved the confidentiality of those files, even though prison officials had read and copied those files. *Id.* at 1133. Although the court addressed the issue in terms of waiver, rather than as a question of whether the requisite confidentiality had ever existed, as noted above, the two elements are closely related.

The courts addressing the prosecution of Manuel Noriega took a functionally similar approach in examining government monitoring of a detainee's attorney calls. *See United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990) ("*Noriega I*"); *United States v. Noriega*, 764 F.Supp. 1480 (S.D. Fla. 1991) ("*Noriega II*"). *Noriega I* held that a detainee's telephone call to his attorney was protected by the privilege if it was, as a factual matter, "(1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential." 917 F.2d at 1551 (citations omitted). Other courts have similarly held that the

privilege applies when a client reasonably intends or expects that the conversation will remain private. *See United States v. Robinson*, 121 F.3d 971, 976 (5th Cir. 1997) ("The assertor of the privilege must have a reasonable expectation of confidentiality, either that the information disclosed is intrinsically confidential, or by showing that he had a subjective intent of confidentiality.") (citation omitted); U*nited States v. Bay State Ambulance and Hosp. Rental Service, Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *Cobell v. Norton*, 377 F.Supp.2d 4 (D.D.C. 2005); *Griffith v. Davis*, 161 F.R.D. 687, 694-95 (C.D. Cal. 1995).

The question in this matter, then, whether analyzed in terms of establishment of the privilege or in terms of waiver, is the same that the district court in *Noriega II* faced on remand: whether the defendant reasonably expects calls to his lawyer from jail to be private. *See Noriega II*, 764 F.Supp. at 1485-88. Resolution of this question requires an examination of all the circumstances regarding exactly what Mr. Jamison knew or should have known regarding the confidentiality of attorney calls from the jail, and his rights to such confidentiality. *See id.*

B. Because it is Illegal to Record a California Inmate's Telephone Calls with his Attorney, Mr. Jamison would Reasonably have Believed that Such Calls were Private.

In California, prisoners in county jails can reasonably expect that their calls to their attorneys will remain confidential, regardless of signs declaring that calls may be monitored. California Penal Code §636(a) states that

> Every person who, without permission from all parties to the conversation, eavesdrops on or records, by means of an electronic device, a conversation, or any portion thereof, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and that person's attorney, religious adviser, or licensed physician, is guilty of a felony.

This provision prohibits jail personnel from monitoring or recording inmate-attorney calls even when there are explicit warnings that monitoring will occur. *See In re Arias*, 42 Cal.3d 667, 680-83 & n.11 (1986), *abrogated on other grounds as discussed in Thompson v. Department of Corrections*, 25 Cal.4th 117, 130 (2001). As the California Supreme Court has noted, the "privacy guarantee of section 636 would be hollow indeed if it could be effectively obliterated by posting signs proclaiming 'All Conversations Monitored.'" *Id.* at 680 n.11. The statute requires that jailers completely deactivate monitoring equipment during such conversations, unless both the lawyer and client affirmatively give permission to be recorded. *See id.* at 682-83 & n.14.[2] It is also unlawful for jailors who have recorded such phone calls to release the recordings to another person without a subpoena. *See* Cal. Penal Code §637.

California's prohibition against the monitoring of attorney-inmate calls means that a detainee who calls his lawyer from jail does not thereby void the attorney-client privilege, even if he is warned that his calls may be monitored or recorded. *Cf. Carlo v. City of Chino*, 105 F.3d 493, 496, 499-500 (9th Cir. 1997) (California statute guaranteeing arrestee confidential phone calls to attorney created liberty interest). Everybody is presumed to know the law. *See United States v. Hancock*, 231 F.3d 557, 561-62 (9th Cir. 2000); *People v. Hagedorn*, 127 Cal.App.4th 734, 747-48 (2005); *see also United States v. Amen*, 831 F.2d 373, 379 & n.2 (2d Cir. 1987) (federal regulations allowing monitoring give notice that such monitoring is allowed). The jail may, consistent with California law, monitor some non-confidential calls. *See People v. Loyd*, 27 Cal.4th 997 (2002); *cf. id.* 999 n.2 (declining to address federal law).[3] It is therefore proper for the jail to inform inmates, through manuals or posted notices, that phone monitoring may occur, although such notices must make it clear that attorney calls will not be monitored. *See People v. Torres*, 218 Cal.App.3d 700, 708 (1990) (jail had duty to tell detainee and attorney they could

[2] Although Mr. Jamison is in federal custody, local officials are nonetheless charged with his care. *See generally Logue v. United States*, 412 U.S. 521 (1973). Federal law would also prohibit the monitoring of attorney calls in a federal facility. *See* 28 C.F.R. § 540.102.

[3] If the court addresses the issue in the future, amicus would argue that §636 also means that taping attorney calls does not fall within the exceptions to the federal wiretap acts. *See Crooker v. United States Dept. of Justice*, 497 F.Supp. 500, 504 (D. Conn. 1980); *see also Abraham v. County of Greenville*, 237 F.3d 386, 390-91 (4th Cir. 2001).

close visiting room door to protect confidentiality). However, that an inmate knows that some of his calls may be lawfully monitored does not mean he knows, or even suspects, that the sheriff's department will feloniously monitor attorney-client calls. *Cf. Upland Police Officers Ass'n v. City of Upland*, 111 Cal.App.4th 1294, 1302 (2003). It is entirely reasonable for a detainee to believe that the sheriff's department will respect the law and will not monitor attorney calls. This distinguishes this case from *United States v. Lenz*, 419 F.Supp.2d 820 (E.D. Va. 2005), where there was apparently no such law; as the *Lenz* court noted, given the legal and factual circumstances in that particular jail, no reasonable inmate could believe that such calls were private. *See id.* at 828 & n.16.[4]

In our society, no form of communication is completely safe from illegal monitoring by the government or by private persons: mail may be stolen and read,[5] and offices burglarized[6] and bugged.[7] However, the possibility or fact of illegal interception does not destroy a privilege. *See Resolution Trust Corp. v. Dean*, 813 F.Supp. 1426 (D. Ariz. 1993). The general rule -- that in order to establish and maintain a privilege it is only necessary to take reasonable steps to preserve confidentiality -- is particularly necessary in the custodial context, when the state controls all attorney-client access. *See Gomez*, 255 F.3d at 1133. As the Restatement notes,

> A jailer requires Client, an incarcerated person, and Lawyer to confer only in a conference area that, as Client and Lawyer know, is sometimes secretly subjected to recorded video surveillance by the jailer. If Client and Lawyer take reasonable precautions to avoid being overheard, the fact that the jailer secretly records their conversation does not deprive it of its confidential character.
>
> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §71 (2000 and 2006 update).

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[4] Given that such recording is illegal, it seems unlikely that a California jail informs inmates that their attorney calls will be monitored. *See* San Francisco Sheriff's Department Policy and Procedure re: Prisoner Telephone Systems § IV (attached as Exhibit A). The nature of the advisements given to Mr. Jamison is, of course, a factual question, to be determined by this court.

[5] *See Resolution Trust Corp. v. Dean*, 813 F.Supp. 1426 (D. Ariz. 1993) (privilege not waived); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §79 illust. 1 (privilege not waived).

[6] *See* RESTATEMENT (Third) of The Law Governing Lawyers §79 illust. 4 (privilege not waived).

[7] *See id.* §71 illust. 1.

Similarly, California courts have recognized that the contours of the attorney-client privilege must accommodate the lack of privacy in our local jails. *See People v. Godlewski*, 17 Cal.App.4th 940, 944-46 & n.25 (1993) (privilege not waived where jail interview room not private). Pretrial detainees must speak with their attorneys, even though neither telephone calls nor for face-to-face meetings can ever be completely private in a jail. Neither the law in general, nor the attorney-client privilege in particular, demands the impossible. *See id.; see also Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996) ("The doctrine of waiver of the attorney-client privilege is rooted in notions of fundamental fairness.").

C. The Remedies for Violation of the Attorney-Client Privilege are Exclusion of Evidence and Sanctions.

The defendant's remedy for a violation of the attorney client privilege that does not rise to the level of a Sixth Amendment violation is exclusion of the tainted evidence. *See United States v. Haynes*, 216 F.3d 789, 796-97 (9th Cir. 2000); *United States v. Bauer*, 132 F.3d 504 (9th Cir. 1997). Furthermore, an attorney who examines materials that he knows to be protected by the privilege may face sanctions. *See Gomez*, 255 F.3d at 1132, 1133-34.

III. ALLOWING PROSECUTORS OR INVESTIGATORS WHO HAD ACCESS TO THE RECORDED CALLS TO PARTICIPATE IN THE PROSECUTION WOULD VIOLATE THE SIXTH AMENDMENT.

A related question is whether, regardless of the applicability of the attorney client privilege, the Sixth Amendment prohibits the jail from recording attorney calls or prohibits the prosecution from using such recordings.

A defendant's Sixth Amendment right to counsel attaches when the government charges him with a crime. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Danielson*,

325 F.3d 1054, 1066 (9th Cir. 2003). This right protects a defendant's ability to communicate with his attorney in preparation for trial from intrusion by the government. *See Weatherford v. Bursey*, 429 U.S. 545 (1977); *Shillinger v. Haworth*, 70 F.3d 1132, 1038-43 (10th Cir. 1996); *People v. Torres*, 218 Cal.App.3d 700, 705 (1990).[8] This type of impermissible intrusion may occur in several different ways. *See, e.g., Moulton*, 474 U.S. at 172-74 (confidential informant speaking with represented defendant); *Brewer v. Williams*, 430 U.S. 387 (1977) (officer speaking with defendant in patrol car). Most relevant to the case at bar, the Sixth Amendment prohibits the government from monitoring a defendant's conversations with his attorney and then using that information in the prosecution. Thus, in the case at bar the prosecution team's acquisition and examination of the recordings of attorney-client calls will violate the Sixth Amendment unless this court acts to completely isolate any person who has had access to those recordings from the prosecution.

A. The Sixth Amendment Requires Insulation from the Prosecution Team of All Persons who have had Access to the Recorded Attorney-Client Calls.

The leading case regarding the improper monitoring of attorney-defendant communications is *Weatherford v. Bursey*, 429 U.S. 545 (1977), a civil rights case that arose after a criminal trial. In *Weatherford*, a criminal defendant's (Bursey's) lawyer invited a government informant (Weatherford) to an attorney-client conference to discuss trial strategy; Weatherford agreed so as not to arouse suspicion. *See id.* "There was no indication that Weatherford initiated any topics of discussion or questioned Bursey regarding his trial strategy." *Danielson*, 325 F.3d at 1067 (discussing *Weatherford*). Weatherford neither told any members of the prosecution

[8] *See also Tucker v. Randall*, 948 F.2d 388 (11th Cir. 1991) (right of pretrial detainee to phone access); *Inmates of Allegheny County Jail v. Wecht*, 565 F.Supp. 1278, 1284 (E.D.Pa.1983) (same); *Jackson v. Koehler*, 1993 WL 96590 at *3, 1993 U.S. Dist. LEXIS 3915 (N.D. Cal. 1993) (same under First Amendment) (unreported); *Capaldi v. Plummer*, 1994 WL 398519 at *1, 1994 U.S. Dist. LEXIS 10475 (N.D. Cal. 1994) (same; Alameda County jail) (unreported); *cf. Benjamin v. Fraser*, 264 F.3d 175, 186-89 (2d Cir. 2001) (right of detainees to attorney visits).

team[9] nor testified about what he had heard at the meeting. 429 U.S. at 548. Because Weatherford had a legitimate reason to attend the meeting (refusing to do so would have blown his cover), because he did not intend to gain information about the defense, and because the government did not make any use of what Weatherford might have learned at the meeting, the Court held that there had been no Sixth Amendment violation. *See id.* at 558-59. However, the Court was careful to note that if the prosecution had received any information regarding the attorney-client meetings, the case for a Sixth Amendment violation would have been "much stronger." *See id.* at 554; *see also Danielson*, 325 F.3d at 1067-69.

Courts before and after *Weatherford* have consistently concluded that the government's monitoring of attorney-defendant conversations violates the Sixth Amendment when it in any way taints the prosecution; some of these cases are listed in the margin.[10] This result follows from the Sixth Amendment's right to the effective assistance of counsel, and the derivative right to confer with counsel in confidence. *See Jones v. City and County of San Francisco*, 976 F.Supp. 896, 913-14 & n.17 (N.D. Cal. 1997); *People v. Torres*, 218 Cal.App.3d 700, 705 (1990); *see also Gomez*, 255 F.3d at 1133 (right to privileged communications from counsel part of right to access courts). Contrary to the government's assertion, in this context, there is no need to show that the government took affirmative steps to encourage the defendant or his attorney to talk

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[9] The prosecution "team" includes prosecutors and their official investigators. *See Danielson*, 325 F.3d. at 1069.

[10] *See, e.g., Shillinge v. Hayworth*, 70 F.3d 1132, 1134, 1139-40 (10th Cir. 1996); *Bishop v. Rose*, 701 F.2d 1150, 1154-57 (6th Cir. 1983) (documents); *Caldwell v. United States*, 205 F.2d 879, 881 (D.C. Cir. 1953) ("interception of supposedly private telephone consultations between accused and counsel, before and during trial, denies the accused his constitutional right to effective assistance of counsel, under the Fifth and Sixth Amendments."); *Coplon v. United States*, 191 F.2d 749, 756-60 (D.C. Cir. 1951); *United States v. Peters*, 468 F.Supp. 364, 365-66 (S. D. Fla. 1979); *United States v. Orman*, 417 F.Supp. 1126 (D. Colo. 1976); *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000); *State v. Pecard*, 998 P.2d 453, 456-60 (Ariz. Ct. App. 1999); *Morrow v. Superior Court,* 30 Cal.App.4th 1252 (1994); *People v. Benally*, 209 Cal.App.3d 609 (1989); *State v Cory*, 382 P.2d 1019 (Wash. 1963); *Carter v. State*, 817 A.2d 277, 283-84 (Md. App 2003) (documents); *cf. Mastrian v. McManus*, 554 F.2d 813, 820-21 (8th Cir. 1977) (no prejudice shown); *United States v Sander*, 615 F2d 215 (5th Cir. 1980) (same).

about the case: an attorney-defendant conversation is presumed to involve matters relating to the pending charges. *See United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996). In *Weatherford* itself there was nothing to indicate that the informant in any way elicited information. *See Danielson*, 325 F.3d at 1067. As has long been recognized, "the essence of the Sixth Amendment right to counsel is, indeed, privacy of communication with counsel." *United States v. Rosner*, 485 F.2d 1213, 1224 (2d Cir.1973) (citation and punctuation omitted).

B. The Sixth Amendment's Protection Against Government Intrusion into the Attorney-Client Relationship Applies in this Case whether or not the Attorney-Client Privilege is Established.

The scope of the Sixth Amendment's protection of the attorney-defendant relationship is in some respects much more expansive than that of the attorney-client privilege. The Sixth Amendment requires that when the prosecution or its agents interact with a defendant regarding a charged offense they must do so through his attorney. *Moulton*, 474 U.S. at 176. A defendant does not waive this right by discussing the facts of his case, or his trial strategy, with his family associates; furthermore, as discussed below, a waiver of this constitutional right must be intentional, knowing, and intelligent. *See id.*

At the same time, the Sixth Amendment's protections are in some aspects more limited than the privilege. As discussed above, the privilege absolutely protects the confidentiality of attorney-client communications. In contrast, if the government has a legitimate reason to monitor a defendant – such as the investigation of crimes other than those already charged – it may do so without violating the Sixth Amendment. *See Maine v. Moulton*, 474 U.S. 159, 178-80 (1985); *Shillinger*, 70 F.3d at 1139-40 (legitimate reason is required). For example, the government may, consistent with the Sixth Amendment, use an undercover informant to speak with a charged defendant. *See Moulton,* 474 U.S. at 178-80. In this situation, the Sixth Amendment still requires that (1) the informant be instructed not to discuss anything concerning the pending charges; and, (2) if the informant learns anything about the *pending charges*, that information not

be given to the prosecution. *See id.* Similarly, although the state does not necessarily violate the Sixth Amendment by requiring that a guard be present during an attorney-client conference, the Sixth Amendment does not allow that guard to relay what he heard to the prosecution team. *See Shillinger*, 70 F.3d at 1134-35, 1142.

Thus, the attorney-client privilege and the Sixth Amendment protection are, although related, quite different in scope, even in the context of a pending criminal prosecution. The issue under the Sixth Amendment is not whether the defendant kept his communications with his lawyer hidden from the world, but whether state agents transmitted those communications from the defense camp to the prosecution team, either by eliciting them from the defendant or by intercepting his communications with his lawyer. Thus, in the case at bar, the jail officials' acts of recording Mr. Jamison's calls to Mr. Loveseth may not in themselves have violated his right to counsel. However, the prosecution team's acquisition and examination of the recordings do violate the Sixth Amendment, just as the informant's and guard's providing information about pending charges to the prosecution in *Moulton* and *Shillinger* did.

C. Mr. Jamison did not Waive His Sixth Amendment Right to Confidential Communications with his Lawyer.

The prosecution will not be able to show that Mr. Jamison waived his right to conduct all communications with the state through his lawyer. *See Brewer v. Williams*, 430 U.S. 387, 403-04 (1977) (burden is on prosecution); *see id.* at 404 (state must "prove an intentional relinquishment or abandonment of a known right or privilege") (citation and quotation marks omitted). Merely talking on a telephone that might be monitored by jail personnel does not constitute waiver – indeed, Supreme Court has declined to find a waiver even when a defendant agreed to speak with a uniformed, investigating police officer about the facts of his case. *See id.* at 404-05; *see also Shillinger*, 70 F.3d 1132 (no suggestion of waiver where conversation occurred in front of sheriff).

Moreover, under the "unconstitutional conditions" doctrine, the government may not condition a detainee's use of the telephone to call his attorney on a waiver of his Sixth Amendment rights to confer privately with his attorney. *See United States v. Scott*, 450 F.3d 863, 866 (2006); *Vignolo v. Miller*, 120 F.3d 1075, 1077-78 (1997) (applying rule in prison context). Even an explicit waiver of constitutional rights is void when it violates this principle. *See Scott*, 450 F.3d at 866 (suppressing evidence despite written Fourth Amendment waiver).

D. The Government Must Completely Insulate from the Prosecution Team All Persons who had Access to the Recordings and may have to Dismiss the Prosecution.

As noted above, prosecutorial intrusion into the defense camp violates the Sixth Amendment when it gives the government an "unfair advantage" in the criminal litigation. *Danielson*, 325 F.3d at 1069-70. In a pre-trial context, the prosecution team must insulate both the prosecutors and investigators who have had access to the privileged information from the prosecution. *See id.* at 1072-73. If the government's behavior in obtaining or using the information has been egregious or intentional, dismissal is appropriate. *See United States v. Haynes*, 216 F.3d 789, 796-97 (9th Cir. 2000); *Shillinger*, 70 F.3d at 1142-43; *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978); *State v. Quattlebaum*, 527 S.E.2d 105 (S. C. 2000); *Morrow v. Superior Court,* 30 Cal.App.4th 1252 (1994).

IV. CONCLUSION

Both the attorney-client privilege and a criminal defendant's constitutional right to speak privately with counsel are crucial components of our adversarial justice system. A criminal defendant who is held in custody pending trial is as entitled to these basic protections as one who is able to raise bail. Despite this, the government in this matter has taken the extreme position that its agents may take possession of illegally made recordings of attorney-client calls and then

continue to participate in the prosecution. For the reasons discussed above, this Court should reject that position.

Dated: August 11, 2006

Respectfully submitted,

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AMERICAN CIVIL LIBERTIES UNION
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PROOF OF SERVICE

I, Leah Cerri, declare that I am employed in the City and County of San Francisco, State of California; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, California 94111.

On August 11, 2006, I served a copy of the attached

BRIEF OF AMICUS CURIAE ACLU IN SUPPORT OF DEFENDANT LLOYD JAMISON

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this proof of service was executed on August 11, 2006 at San Francisco, California.

_____

Leah Cerri