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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FREDERICK SCOTT SALYER Defendant.	CASE NO. 2:10-CR-61 LKK NOTICE OF MOTION

TO FREDERICK SCOTT SALYER, THROUGH HIS ATTORNEY, MALCOLM SEGAL, ESQ:

Please take notice that on August 3, 2010 at 9:15 a.m., or as soon thereafter as the Court may hear the matter, in the Courtroom of the Honorable Lawrence K. Karlton, the United States, through its undersigned counsel, will move for Court Determination That Privilege Does Not Apply to Calls That Were Overtly and Automatically Recorded by the Jail. This motion shall be based on the attached papers, the

file in this case, and such argument and evidence as the Court may receive at the hearing.

BENJAMIN B. WAGNER
United States Attorney

Date: July 7, 2010

By: /s/ Matt Segal
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. FREDERICK SCOTT SALYER Defendant.	CASE NO. 2:10-CR-61 LKK MOTION FOR COURT DETERMINATION THAT PRIVILEGE DOES NOT APPLY TO CALLS THAT WERE OVERTLY AND AUTOMATICALLY RECORDED BY THE JAIL

I. INTRODUCTION

The Jail has procedures in place for inmates to make telephone calls to attorneys without being recorded. The Defendant did not follow this procedure when calling a woman who identified herself as Cyndi Longoria. In those cases, the Defendant simply dialed out, a woman answered, the automated system announced that the call was being recorded, and the woman claimed that her name was Cynthia Longoria and that the call was an attorney-client call. Salyer and the woman then proceeded to discuss whatever they discussed. Under

these circumstances, the Defendant cannot carry his burden to show that these calls were privileged. The United States disclosed these recordings to the Defendant on June 8, 2010 and now out of an abundance of caution seeks Court approval to listen to them.

Cynthia Longoria has not made an appearance in this criminal case, and it is not known whether any of these calls relate to this case. The calls merit further investigation because (1) the Defendant has a history of using other people to do suspicious things, both concerning the matters in the Superseding Indictment and also acts related to the concealment of assets; (2) the Defendant has often been sloppy in calls, emails, and text messages; and (3) a person dealing with the Defendant has already falsely used the label "attorney/client" to try to keep secret something that had nothing to do with legal representation.

However, the situation is not urgent and the Government prefers to wait for the Court to make a determination in due course. Government personnel have been instructed not to listen to any Defendant call that was made before this filing and in which the call is, at the beginning, claimed to be of an attorney-client nature. This motion is filed before the District Judge because it raises issues similar to those that would be raised in a motion to suppress. Cf Crim. Loc. R. 430.1(b).

II. FACTS

The jail records inmate calls and warns inmates that their calls are recorded. Morrissey Dec. ¶ 2. The jail warns inmates in writing and by an automated message played on each recorded call. Id. The jail has a system for unmonitored calls to attorneys, and does not record calls in which the system is properly followed. Id. ¶ 4;

see also 15 Cal. Adm. C. § 3282(g) (setting forth procedures for attorneys to follow to except their calls from automatic monitoring in California facilities); compare 28 C.F.R. § 540.102 (prohibiting federal Bureau of Prisons monitoring of "properly placed" inmate calls).[1] On July 6, 2010, there were 1,206 privileged numbers on file with the Jail. Morrissey Dec. ¶ 4.

In this case, FBI Analyst Kathryn Lux has been reviewing recorded calls received from the jail and making summaries for the prosecution team. Lux Dec. ¶ 2. Some of these calls have proven useful. For example, in the calls, the Defendant has indicated that he has a million dollars somewhere only he can reach and also stated that he would rather his mansion go to the government than his ex-wife. C.R. 72 at 4-5. However, in each instance when Lux heard the female voice on the phone claim that the call was attorney-client, Lux stopped listening to the call. Lux Dec. ¶ 2. On June 4, 2010, the Defendant requested recordings of his jail calls and on June 8, 2010, the prosecution team produced all of the Defendant's jail calls with a warning about the monitoring. See June 4, 2010 Malcolm Segal Ltr.; June 8, 2010 Matthew Segal Ltr. The Defendant has made no motions, but criminal defense counsel on June 30, 2010 informed the undersigned that criminal defense counsel and Larry L. were recorded on one of the calls.[2]

This is not the first dispute over a claim of attorney-client

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[1]Local facilities' standards are set by the California Corrections Standards Authority. 18 Cal. P.C. § 6030. As a Type II facility, Sacramento County Jail follows the same procedures as a CDCR facility in many regards. 15 Cal. Admin. C. § 1010.

[2]Inmates are told that it is a violation of jail rules to conduct a three-way call. Inmate Handbook ¶ IX(G)(2).

secrecy. On May 5, 2010, a paralegal for the Defendant's criminal defense attorney brought the Defendant an envelope that was marked "attorney client." C.R. 99 at 1-2. A deputy inspected it, and it actually contained contraband and personal correspondence from one of the Defendant's girlfriends. Id.

In this criminal case, the Defendant is represented by Malcolm Segal and James Mayo. In making their appearance on July 1, 2010, counsel stated in substance that they were the only lawyers on the criminal case. No Cynthia Longoria has made an appearance in this case. She may not be the Defendant's lawyer at all.

The Defendant's associates have continued to do things for him that are legitimately interesting to law enforcement. For example, the Defendant's accountant admitted to a banker that last fall, he had used his own account and the now-familiar shell corporation Fast Falcon, LLC to transfer Salyer's funds to Liechtenstein, Australia, the United Kingdom, and New Zealand. March 2, 2010 Larrick FD-302 at 1-2. The accountant admitted that he created Fast Falcon, LLC as an offshore entity to disguise and conceal the role that Salyer wanted to play in the affairs of Cedenco, an Australian entity in receivership and barred from dealing with Salyer. Id. at 2.

III. ARGUMENT

Out of an abundance of caution, the United States now seeks the Court's approval to listen to the calls in which the Defendant did not follow jail procedures for unmonitored calls and in which he spoke with a woman who claimed she was an attorney. This is not a case in which an attorney followed procedure to authenticate that she actually was an attorney and was told that the calls would be unmonitored. See 15 Cal. Admin. C. § 3282(g). Rather, the persons

on these calls were told that their calls were monitored. If law enforcement could not listen to calls made under these circumstances, it would mean that the entire monitoring system could be defeated by easy, false claims that the calls were attorney calls.

The dispositive fact is that on these calls, the jail warned that the conversations may be monitored and were not private. According to Ninth Circuit law, a telephone conversation within the overt hearing of a third party is not "in confidence" and thus is not privileged. United States v. Gann, 732 F.2d 714, 723 (9th Cir. 1984). In Gann, the defendant held a telephone conversation with his attorney while in presence of a detective. Id. The Ninth Circuit rejected his claims that the Sixth and Fourth Amendments had been violated. The detective was overtly and lawfully present to hear Gann when he made the call. Therefore, Gann could not establish that his statements were "in confidence," a prerequisite for a claim of attorney-client privilege. Id.[3] But there can be no reasonable expectation of privacy in a jail call unless it is a "properly placed" call between a defendant and his attorney. See United States v. Van Poyck, 77 F.3d 285, 291-292 n.9 (9th Cir. 1996) (quotations in original). There is just no difference between talking on an overtly recorded jail telephone line and talking in the presence of a police

[3]The Ninth Circuit follows the Wigmore formulation of the privilege: "(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived." United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978). The burden is on the claimed privilege holder to prove each element.

officer or, even, shouting across a crowded room. If the Defendant uses the overtly monitored line to make a call to an attorney, a law enforcement officer "ha[s] no duty to deafen himself to [the Defendant's] words." See Gann, 732 F.2d at 723.

Other courts reach the same conclusion – overtly monitored jail calls are not in confidence. See United States v. Hatcher, 323 F.3d 666, 674 (8th Cir. 2003) (calls to attorneys made on jail recorded phone not privileged); United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (overtly recorded jail calls not confidential martial communications); United States v. Harrelson, 754 F.2d 1153, 1169-1170 (5th Cir. 1985) (same); United States v. Lentz, 419 F.Supp.2d 820, 828 (E.D. Va. 2005) (attorney jail calls), aff'd United States v. Lentz, 524 F.3d 501, 524-525 (4th Cir. 2008) (crime-fraud basis).

As in Gann, there is no Sixth Amendment issue because of the automatic, overt nature of the monitoring. This case does not involve a government informant acting affirmatively to insinuate himself into a criminal defense relationship and elicit statements from a represented defendant. Compare United States v. Danielson, 325 F.3d 1054, 1071 (9th Cir. 2003). The jail recordings are overt and automatic. Further, the dicta in United States v. Novak, 531 F.3d 99, 525 (1st Cir. 2008), are inapplicable. Novak held that there was no Fourth Amendment violation when law enforcement listened to a prisoner's overtly recorded jail call to his criminal defense attorney. Id. Novak criticized the practice, but did not decide "whether or to what extent, calls between attorneys and clients made from prison can be monitored consistently with the requirements of the Sixth Amendment." Id. at 104. In this case, the female voice apparently identifies herself as Cyndi Longoria. Lux Dec. ¶ 3. No

such lawyer has appeared in this criminal case. The conversations, even if they really are related to some civil matter, do not implicate the Sixth Amendment at all. Moreover, any Sixth Amendment claim here would run afoul of the Ninth Circuit's teaching in Gann. 732 F.2d at 722.

Because the Defendant did not observe jail procedures for properly placed, unmonitored calls with an authenticated attorney, all one really knows is that a female voice claims to be an attorney. The reason this cannot be sufficient is clear from the facts of this very case. In this case, at least one female friend of the Defendant has already falsely used the label "attorney-client" to maintain secrecy over contraband things that had nothing to do with legal services. (Notice Regarding Jail Incident.) Law enforcement has no duty to take this unauthenticated voice on the phone at her word and the Government makes this motion only out of an abundance of caution. The calls were not "properly placed," the system passively recorded them, there was therefore no reasonable expectation of privacy, no "confidential communication," and therefore no privilege. Van Poyck, 291 n.9, quoting 28 C.F.R. § 540.102; Gann, 732 F.2d at 723.

IV. CONCLUSION

Ninth Circuit law is clear that the attorney-client privilege does not cover a conversation to which law enforcement is an overt audience. Id. The fact that the conversation appeared to be between an attorney and client is insufficient to make out each necessary element of the privilege. Id.

Still, out of an abundance of caution, the United States seeks Court approval to listen to these overtly recorded calls. No filter team procedure is proposed, because, under Gann, the calls are not

privileged no matter what was discussed. Id. Alternatively, the United States requests that the Court order the Defendant to identify any call in which his criminal defense attorney speaks about trial strategy, allow the prosecution team to listen to all other conversations, and also approve the creation of a filter team to transcribe the identified conversation(s), redact the portion(s) related to trial strategy, and turn over the rest to the prosecution team. In any case, the Defendant should be instructed that in the future, only properly placed confidential calls will be unmonitored.

Respectfully Submitted,

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United States Attorney

Date: July 7, 2010

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