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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA

CASE NO.: 2:10-CR-0061-LKK

15 Plaintiff,

16 v.

17 FREDERICK SCOTT SALYER

18 Defendant.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
GOVERNMENT'S MOTION FOR AN
ORDER DIRECTING THE
DEFENDANT TO CONTRIBUTE
TOWARDS OPERATION OF THE
LINEUP ROOM**

19 Date: August 3, 2010
20 Time: 9:15 a.m.
21 Judge: Lawrence K. Karlton

22 **I. INTRODUCTION**

23 In a motion containing allegations unsupported by declaration, the government
24 seeks a court ordered defense contribution towards operation of the Main Jail Lineup
25 Room and proposes that the defendant pay half the cost as "a fair amount." This
26 attempt to bill the defendant for "Custodial Arrangements . . . That Will Enable Salyer
27 to Meaningfully Interact With His Defense Team on a Regular Basis" is contrary to
28 the promises made by the government, in response to the Court's expressed
concerns about due process and the defendant's ability to prepare for trial during

1 continued pretrial incarceration.¹

2 The bill is also a quick back peddle from the position the government took in a
3 letter to counsel just two weeks ago. On July 1, 2010, as counsel was leaving
4 Magistrate Judge Hollows' courtroom after a lengthy and extensive discovery
5 hearing, the prosecutor personally served counsel with a letter demanding payment
6 of the sum of \$12,050.53 for the "overtime expenses associated with the special
7 accommodations that the Defendant has received in the jail." *Exhibit A*. The letter
8 threatened to ask for an order from this Court if the defendant refused to pay the
9 entire bill. The government has now abandoned that position in favor of a lesser
10 amount. Both positions are untenable.

11 The invoice from the Sacramento County Sheriff's Department accompanying
12 the letter was not to the defendant or to the United States Attorney, but instead was
13 sent to the United States Marshal's Service for "guard service" provided during
14 counsel's visits to the defendant in the Main jail lineup room. Remarkably, it
15 contains charges for services identified as "processing (Mr. Salyer's) mail and
16 requests." *Exhibit B*. Whether these charges were for copying the defendant's mail
17 or copying his intercepted telephone calls for the government, is not clear from the
18 documents attached to the invoice.² These documents, the time cards for the
19 officers and descriptions of their work assignments, are vague enough to include that
20 conduct.³

21 Some facts are clear – the government's terms for use of the lineup room by
22 the defense include a Sheriff's deputy watching everything that goes on in the room

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25 ¹ See, United States' Memorandum Concerning Defendant's Custody filed March 23, 2010.

26 ² See Government's Motion for Court Determination regarding attorney client
27 privilege and Defendant's Opposition and Motion to Suppress recorded Jail calls.

28 ³ The defendant has not appended the time cards to this motion in deference to
protecting the identities of the Sheriff's officers and their work schedules.

1 through a large window and via a video camera and monitor over his desk. The
2 officer also controls the microphone on his side of the window and is supposed to
3 announce when he is listening. The room is used by others, including for its purpose
4 as a lineup room. For that reason, and because the records stored in boxes in the
5 room are often found out of order, the defense has chosen not to leave very much in
6 the room in order to protect the attorney-client privilege from further intrusion.

7 The defense has used the room as it was intended, despite this adversity.
8 Counsel is most willing to discuss defense activities in the lineup room with the Court
9 if the Court determines that such is necessary. Counsel believes that the forum for
10 such disclosures should be *in camera* and outside the presence of the prosecution.

11 In the interim, even cursory research at the jail would have revealed to the
12 prosecutors that their motion is ill-advised⁴.

13 II. ARGUMENT

14 Meetings with the defendant which deal with civil litigation or criminal defense
15 matters which do not require review of a vast amount of materials are often
16 conducted in the visiting booths provided by the Main Jail for attorney-client
17 communications.

18 Attorneys are required to present a California Bar card on each visit and are
19 logged into the jail computer whenever the visiting pass-through attorney booths are
20 utilized. Had the prosecutor looked into the matter, he would have ascertained that
21 undersigned counsel has used the booths to discuss attorney-client privileged
22 litigation matters on the same day when his associate and/or investigator have spent

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24 ⁴ The government's motion was voluntarily filed and unilaterally scheduled by the
25 government to require a response by the defendant on the same day the defense is
26 required to file its Fourth Amendment suppression motions. As the government well
27 knew, evident from the first page of its own motion, the defendant has scheduled an
28 emergency motion to be heard this same day to try to stay the trustee's bankruptcy
discovery in order to try to prepare for the defense of this case. While the defense could
have applied for more time to respond, it believes that given the anticipated motion
practice ahead, the matter should be resolved now, along with the issue concerning the
government's recording of the attorney phone calls.

1 time with the defendant reviewing discovery in the lineup room. Those meetings
2 have occurred both before and after the lineup room was utilized, sometimes later in
3 the evening. In fact, counsel has visited the defendant in one of the booths when he
4 himself has utilized the lineup room to review discovery with the defendant. On
5 more than one occasion, counsel has come to the Jail and told the deputy on duty
6 that he would be willing to meet with the defendant in the attorney visiting booths
7 immediately after the lineup room meeting was concluded with an associate but
8 instead was authorized to use the room for the last scheduled half hour or so rather
9 than go through the process of ending that session in order to have the defendant
10 moved to the attorney booth for a second meeting. Counsel believes that the reason
11 for those separate meetings is appropriately addressed *in camera*.

12 Moreover, the government's claim that counsel and other "non-designated"
13 persons in the criminal case, whatever that term means, are meeting with the
14 defendant in the lineup room is wrong in two respects. First, counsel need not be an
15 attorney of record to assist or be part of the defense team. For example, Ms.
16 Longoria is not an attorney of record, and need not be, because she does not make
17 court appearances for the defense. She has consulted with this defense counsel
18 since early 2009.⁵ Second, the main jail does not permit experts, including attorneys
19 and accountants to use the lineup room, even if they are assisting in the defense of
20 the criminal case.⁶ (This determination by the Main Jail authorities is contrary to
21 that earlier taken by the government in its March 23, 2010 filing where the

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23 ⁵ The government claims not to have known that she is an attorney and
24 intercepted and copied phone calls to her from the jail despite the fact that she
25 presented her California Bar card to the Main Jail and is registered as an active
attorney on the California State Bar public website.

26 ⁶ As the Main Jail records will reveal, some attorneys met with the defendant in
27 the lineup room once a few months ago, when the undersigned was present, as did the
28 accountant working with the defense. They did so for a total of perhaps three hours.
The officer in charge of the Sheriff's detail said that they would not be permitted to
return, the accountant because he was not an attorney and the attorneys because their
primary responsibility did not include reviewing the criminal discovery.

1 prosecutor stated: "Any member of the 'defense team' will be permitted access.
2 That includes attorneys, investigators, and experts employed by the defendant."
3 United States' Memorandum Concerning Defendant's Custody, March 23, 2010, at
4 page 3, line 21 to page 4, line 1).

5 The lineup room is being used correctly under difficult circumstances. The
6 government's claim for payment is an affront to due process.

7 **III. CONCLUSION**

8 Based on the foregoing, the government's motion should be denied.

9 Respectfully submitted,

10 Dated: July 20, 2010

SEGAL & KIRBY LLP

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12 BY: /s/ Malcolm S. Segal
13 MALCOLM S. SEGAL
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