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Case dismissal sought over recorded jail calls

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A defense lawyer representing a man facing the death penalty will seek to get the case dismissed because the Sheriff's Department recorded at least one and perhaps dozens of phone calls he had from his client in jail.

Lawyer Christopher Plourd said yesterday that he will file a motion in court today seeking the dismissal of the charges against Mark Jeffrey Brown, who is accused of killing two San Diego women and is awaiting trial.

It was the latest fallout in the growing controversy surrounding a system that recorded an unknown number of calls between lawyers and jailed defendants.

The system was shut off last week by the Sheriff's Department after a defense lawyer in another case filed a similar motion objecting to the recording.

The defense lawyers say the recording violates the attorney-client privilege – which says communications between a lawyer and a client are confidential – and a state law that makes it a felony to eavesdrop on jail calls from inmates to lawyers.

Authorities can record calls from inmates to others such as family or friends. The law bans recordings of lawyers, doctors or religious advisers.

The Sheriff's Department has said the system was not supposed to record calls to lawyers whose numbers were entered into a database for the system. However, that database was incomplete and did not contain all the numbers for all lawyers – leading to an untold number of calls being recorded.

Prosecutors could access the recordings from their computers, which has alarmed defense lawyers.

District Attorney Bonnie Dumanis was adamant yesterday that no prosecutors had illegally listened to any of the recordings.

Dumanis said that when an inmate calls from jail, a prerecorded voice announces to the other party that the call is subject to recording. She said continuing to speak after that point amounts to consent to the recording by both sides.

The state law banning attorney-client recordings says eavesdropping occurs when a call is recorded “without permission from all parties.”

“I believe they have given permission by way of continuing to talk once they were told it was recorded,” Dumanis said.

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That is an interpretation vigorously disputed by defense lawyers. Plourd said he did not give permission for the recording and never waived the privilege.

Public Defender Steve Carroll said several of his lawyers – who represent the majority of defendants in the county jails – have said they never heard the taped message at the beginning of a call.

Others have said that after hearing the message they said into the phone that it was a protected call to a lawyer and that they specifically did not give consent for it to be recorded.

Carroll also said his office will be asking the sheriff and Dumanis' office to determine the number of cases where recordings were made.

With that list, he said, defense lawyers then will go through their case files to try to determine if any information from the calls was used improperly by prosecutors.

Private criminal defense lawyers are also upset and want Dumanis to conduct a larger investigation, said Michael Crowley, the head of the Criminal Defense Bar Association in San Diego.

He said Dumanis should determine how many cases are involved and prosecute anyone who intentionally violated the law.

Dumanis said she was willing to meet with defense lawyers and discuss the issue but did not embrace the idea of a widespread investigation. She said she has set up a committee to deal with the issue and asserted that no one in her office acted improperly.

“I'm not aware of anyone in our office who has listened to an attorney-client call that has been recorded,” she said.

Although prosecutors had access to the system and were trained how to use it, they were also told to stop listening to any call when they realize it is an attorney-client matter, Dumanis said.

That does not satisfy Plourd. He said he learned in February that a phone call with Brown had been recorded and he alerted prosecutor Tracy Prior. Plourd said Prior told him it was a mistake and should not have happened.

Prior then filed the disc containing the phone recordings with the judge in the case and said in court papers that she did not listen to any calls. She also said she was not aware that attorney calls had been recorded until told by the defense. Similar statements were filed by the paralegal and an investigator on the case.

Plourd said he asked in April for any documents describing any policies and protocols for prosecutors to access inmate communications but was told no such information exists.

“I want to know who knew about this, what they've been doing and how long it's been going on,” he said.

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