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Lawyer wants murder charges dismissed over taped jail calls

By Greg Moran

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SAN DIEGO – 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 Tuesday that he will file a motion in court Wednesday 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 Monday 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 made 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, a fact that has alarmed defense lawyers.

But Tuesday, District Attorney Bonie Dumanis was adamant that no prosecutors had illegally listened to any of the recordings.

Dumanis also pointed out that when an inmate calls from jail, a prerecorded voice announces to the other party that the call is subject to being recorded. 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,” she said.

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

Carroll also said that his office will be asking the sheriff and Dumanis' office to determine in how many cases recording of attorney-client calls were made.

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

Private criminal defense lawyers are also upset and want Dumanis to conduct a larger probe, 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 she believes 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.

Though prosecutors had access to the system and got training in how to use it, she said they are also told to stop listening to any call when they realize it is an attorney-client matter.

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

Prior then filed the disc with 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 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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