

# County of Santa Clara

Office of the District Attorney

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**Jeffrey Rosen**  
District Attorney

January 8, 2019

Sheriff Laurie Smith  
Santa Clara County Sheriff's Office  
55 W. Younger Avenue  
San José, CA 95110

Dear Sheriff Smith,

Approximately two months ago your office changed the long-standing manner in which outside law enforcement agencies obtain jail calls from a written request to a subpoena, search warrant or court order. My hope is that this letter will outline for you the challenges that your new policy creates in achieving our mutual goal to expeditiously foster justice and public safety. In addition, I hope it charts a reasonable way forward to an outcome where both of our concerns are addressed. Our shared commitment is to make sure that the defendants of this county are fairly charged and tried; and that the residents of this county and their properties are vigorously protected. Unfortunately, this new policy puts both at serious risk. Please consider this letter as my personal promise to work closely with you and your staff to seek a shared solution.

## **A Short History**

Late in October, we were notified through our support staff personnel that we would no longer be provided jail recordings without a subpoena, court order or search warrant. Several pending requests for jail recordings were rejected. There were no attempts at communicating this change nor the reasons for the change to representatives in my office or to County Counsel prior to the change being made. Essentially, your office will no longer provide jail recordings to any "outside agencies" without a subpoena, search warrant or court order. The only exception is for **uncharged** investigations being done by my office, which comprises a very small number of jail communication requests. The vast majority of our requests for jail recordings are on cases where criminal charges have already been filed and the suspect has been arrested as a result. Your memorandum reflects that you will be requiring a subpoena for these recordings. This creates a legally insurmountable obstacle in most situations.

## **Jail Recordings Cannot Be Subpoenaed**

Jail recordings are electronic communications under Penal Code sections 1546 and 1546.1 (the law outlining the California Electronic Communication Privacy Act; commonly known as CalECPA) and, therefore, require that we obtain a search warrant unless you voluntarily provide the recordings to us and other "outside agencies." If you continue to refuse to voluntarily provide these communications, we will need to satisfy the requirements of CalECPA including providing notification to the inmate that we are seeking a search warrant for their jail calls. This obviously defeats the purpose of obtaining these calls to discover evidence of the current crime, other

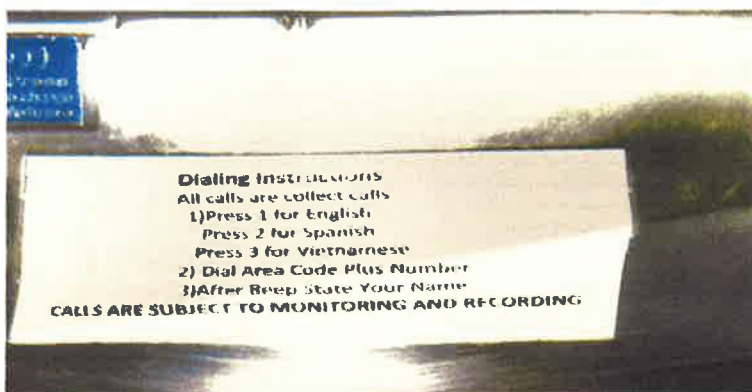
crimes, threats to witnesses or victims or to expose an error in charging. Your change in policy effectively confers upon inmates an expectation of privacy to which they are not legally entitled and needless hurdles to your law enforcement colleagues.

### **Inmates Do Not have a Right to Privacy Requiring a Search Warrant**

Inmates do not have a reasonable expectation of privacy in these communications. The law is well settled on the issue of collection and use of jail recording in criminal cases. Simply put, inmates have “no expectation of privacy” in calls they make from jail (See *U.S. v. Amen* (2<sup>nd</sup> Cir. 1987) 831 F.2d 373, 378). Moreover, because an inmate is given notice that the call may be recorded, the law states that any collection and use of that recording is done with the “implied consent” of the inmate, and as such there is no requirement for a court order, subpoena or search warrant. (See *People v. Kelly* (2002) 103 Cal.App.4<sup>th</sup> 853; *United States v. Faulkner* (2006) 439 F.3<sup>rd</sup> 1221.)

The Sheriff’s Office and the District Attorney’s Office have had safeguards at every step of the process, beginning with filters to prevent the recording of privileged communications, as well as protocols for the very rare instance when an attorney-client conversation is inadvertently recorded due to the failure of defense counsel to register his or her number with the DOC. The right of defendants to confer with counsel privately is never violated.

As you know, inmates receive several clear warnings orally and in writing that they do not have an expectation of privacy in their jail calls, including the following written admonition at each telephone provided to inmates in Santa Clara County’s custodial facilities:



### **Efficacy of Timely Access to Jail Calls**

When inmates do transmit vital incriminating or exculpatory information, all of us in law enforcement must know as quickly as possible. Timely access to unprivileged jail calls is essential, not only to the effective prosecution of criminals, but also to the safety of victims and witnesses.

### **Guilty Pleas Save Taxpayer Money**

The Civil Grand Jury has issued several pointed reports in the last few years addressing the delays in the resolution of criminal cases in our county. Arguments have been made that these delays have contributed to overcrowding issues at the jail. Early resolution of a criminal case through a negotiated disposition is favorable for many reasons. The cost of trial is far greater than the entry of a plea to the taxpayers of this community. Jurors need to appear and listen to often lengthy evidence when a case proceeds to trial. Law enforcement and

civilian witnesses need to be subpoenaed and appear to testify. The courtroom must be staffed with a reporter, clerk and at least one bailiff – sometimes more. Our criminal court is impacted by cases that have aged resulting in a delay of all trial ready cases being assigned to an available trial department. This delay often results in the lengthy confinement of defendants in our county jail.

An incriminating jail call can often lead to the early resolution of a case without a trial. Recently, jail calls were the crucial piece of evidence influencing Efrén Cervantes to accept a guilty plea to first degree murder saving the taxpayers tens of thousands of dollars. In *People v. Noe Mejia*, the defendant testified in his domestic violence trial. On cross examination he was asked for the alleged victim's phone number and had to answer. A request was made **over the lunch hour** to obtain defendant's calls to this number. The jail was able to provide these calls to the prosecutor over the lunch hour and they were extremely compelling and disturbing. The defendant showed no remorse for the injuries he had inflicted on the victim. He actively sought to have the victim fabricate a story to get him out of trouble. When the victim said, "I can't eat, I can't hear" his response was, "So it's fuck me then? You're just going to let me sit in here? You gotta get me outta here." The prosecutor played the recordings for the judge and counsel the following morning and the defendant decided to plead guilty.

In *People v. Cody*, jail calls were used to defeat the defense in a very serious DUI causing Great Bodily Injury case. The defense was that the victim (who lost both their legs due to being hit by the defendant) was the cause of the accident. The defendant called his parents from jail immediately after his arrest:

Mother: You drunk right now?"

Defendant: "I sobered up."

Defendant to mother: "I hit the person pretty hard."

Defendant to mother, "I said no to blood. They smelled it on my breath."

Defendant to mother, "I drove 65, when I hit the exit I went/was 50 to 45." (Defendant's expert witness was prepared to testify that defendant was going 15 mph at the time of the collision.)

Defendant to mother, "I am such a horrible kid."

Defendant to Dad, "I was going the speed limit, going off the exit, I slammed into the person, I hit his legs pretty hard."

Defendant to Dad, "If I was sober, it would have still happened."

Defendant to Dad, "I didn't take any drinks since 10:30 PM at night."

Defendant to Dad, "I didn't do a blood test. My pot smoking from days ago will be in my blood. So I took a breath test. That's all they found. That's all they have."

Defendant ultimately **plead no contest** negating the need for a lengthy and expensive jury trial.

### **From Exonerations to Guilty Pleas: Examples of the Criminal Justice Value of Jail Calls**

Below are examples of how access to this vital intelligence has benefitted the administration of criminal justice in Santa Clara County:

### **Exoneration of Wrongly Accused**

Jail calls have even been the source by which we have exonerated wrongly accused individuals and identified the true perpetrator of a crime as in the high-profile case known as the “La Victoria Murder”. Khalil Owens was arrested and charged for the murder of Marvin Jackson Jr. Owens’ defense attorney approached my office to indicate that Owens was innocent and had not committed the murder of Marvin Jackson Jr. Our office along with SJPD undertook an extensive examination of the evidence. Video and eyewitness evidence pointed to Gregory Thompson being the killer – not Owens. A jail call between Thompson and Thompson’s brother confirmed that Owens was not the killer and that Gregory Thompson had committed the murder. In the recorded jail call, Gregory Thompson admitted to being at the scene and admitted to lifting his shirt while arguing with the victim’s brother. Both of these admissions proved important – the victim’s brother had misidentified Khalil Owens but was certain that the killer had been the one to lift his shirt in the alleyway next to La Victoria to display a gun to him in a threatening manner. Once Gregory Thompson admitted on the jail call to being the person who lifted his shirt, it was clear that Owens was not guilty and that Thompson was the killer.

### **Protecting Witnesses and Victims**

In *People v. Gordon*, the defendant was charged with carjacking. Defendant’s jail calls and visits showed that, over a long period of time, the defendant was using jail calls to contact family and friends and arrange for someone to kill or disable the carjacking victim so that he would not be convicted at his upcoming Three Strikes trial. The defendant provided the name and location of the victim and tried to obtain a gun from one family member for another associate to use. He also used the jail calls to dissuade his aunt, a material witness, from coming to court and testifying, suggesting that she leave town or not remember anything if asked. This evidence was presented to a grand jury and defendant was indicted for two counts of Attempting to Dissuade a Witness or Victim from Testifying in violation of Penal Code section 136.1(a) (2). At the consolidated jury trial approximately 57 clips from the jail calls and visits were played for the jury, which added up to maybe 4 hours of evidence. The defendant received consecutive life sentences for the carjacking and for each of the PC 136.1(a)(2) convictions.

During the murder case of *People v. George Thompson*, jail calls revealed the defendant discussing gang activities as well as his active dissuasion of witnesses. His brother admitted chasing a witness from court and threatening him not to come back. Several other victims were identified solely because of these jail calls which were the crucial evidence in convictions for the attempted dissuasion of witnesses.

### **Protecting Jurors and the Process**

In *People v. Hart*, the defendant was facing a life sentence at the time of jury trial for residential burglary, dissuading a victim/witness, and possession/sale of stolen property under the Three Strikes Law. The defendant was convicted. After the jury trial, but before sentencing, jail calls were obtained which included a call the defendant had made to a friend or associate as the jury trial got underway. In the call the defendant described how jury selection was going, and he identified a certain juror by her race and where she worked. He then encouraged his associate to show up (or have someone show up) to the trial. The obvious inference from listening to the recording is that the defendant wanted the associate (or someone encouraged by the associate) to make inappropriate contact with the juror. The jail call shed light on an incident that had happened during jury selection on Monday, September 24, 2012, the day after the jail call described above. The incident was reported on Tuesday, September 25, 2012 by the potential juror described in the jail call. She described a man in the audience on Monday who made her uncomfortable, followed her into the elevator, laughed at her conversation, etc. The incident ended with the judge not being able to connect the man to the defendant but removing him

from the courtroom. The recorded jail call became relevant for sentencing as evidence that the defendant had tried to use jail calls to impede the fair and impartial process.

### **Impeaching Recanting Victims**

In *People v. Guerra* defendant was arrested after getting drunk at his birthday party and attacking his wife, sister and brother-in-law. Police tasered him and almost shot him when he assaulted them with a broken bottle. He was charged under the Three Strikes law. Most of the family witnesses succumbed to pressure and recanted their original statements to law enforcement but we were able to prove the charges using jail calls and jail visit recordings. These recordings included the defendant threatening to kill his brother-in-law and stating when confronted by his wife about beating her and giving her a black eye, "What happened to you?" She responded, "You fucking happened to me." Jose Guerra was convicted and sentenced to a lengthy sentence in large part due to jail recordings.

### **Proving Additional Crimes and Protecting our Most Vulnerable Victims**

In *People v Noble and Cabanayan*, Noble was a retired cop who had been molesting his girlfriend's teenage daughter. We had an admission on a pretext call, but no other evidence besides the victim's statement. At preliminary hearing, the victim showed up with an attorney and refused to testify. Without her testimony we would not be able to prove the case at trial and the defendant would walk free despite his admission to the crime. Approximately 200 hours of jail calls between the defendant and the victim's mother (Cabanayan) were reviewed by the prosecuting attorney and investigators in order to establish probable cause for search warrants hoping to find evidence of dissuasion of the minor victim. The calls also established probable cause for the arrest of Cabanayan which was executed simultaneously with the search warrants on the day of trial. With the mother in custody the victim went to live with her father who gave permission for the prosecutor to speak with her. The prosecutor was able to convince the victim to testify. Noble eventually plead guilty to various felony sex charges, witness dissuasion, and conspiracy to dissuade. Cabanayan also plead guilty to felony witness dissuasion of her own daughter. Without the jail calls we would have been unable to prosecute this case where we had a recorded admission from the defendant that he had molested the victim. With the calls we were able to resolve the case without trial and charge and convict the mother for her dissuasion of her own daughter.

### **Proving Our Cases**

*People v. Beireis* was an arson case where the defense was identification. There was a video of how the fire started but it was too dark to conclusively identify the perpetrator. In a jail call to his mother, the defendant asked her about the video of how the fire started (which he hadn't seen, but she had): "Does it show me with the gas can? Does it show me with the lighter?" The defendant was convicted.

*People v. Cervantes* involved defendant assaulting and threatening his roommate. At trial, the defendant claimed self-defense. Defendant's mother (who was a witness to the event) also testified that her son acted in self-defense. In jail calls between defendant and his mother, the mother railed at him for grabbing a knife and threatening to kill the victim without provocation. In a second call from defendant to his adult son, the defendant told his son that he had attacked the victim because the victim had stolen his tools. Not only did defendant's son not believe that the victim had stolen his father's tools, he proceeded to explain to his father that it's not OK to beat up people because they take your tools. The jury agreed with defendant's son.

*In People v. Chambers* a brother was accused of raping his sister because she believed rumors he was gay were possibly true. He made a jail call saying: "I let her know . . . I'm not fucking gay . . . bitch . . . I'm a hardcore Zulu mother fuckin' warrior." This admission was very persuasive evidence.

### **Time and Expense**

Often inmates with pending cases will attempt to influence witnesses by appealing to their sympathy or through threats. This criminal dynamic is often found in domestic violence cases, which involve a unique dynamic between the defendant and victim. It is also common in violent criminal enterprises like human trafficking, gang assaults and the distribution of narcotics. Inmates can dissuade witnesses through direct threats, or by plotting with people on the outside who might carry out actual assaults.

Monitoring these communications in the appropriate cases is essential to preserving the integrity of the system, holding criminals accountable, and maintaining public safety.

The current policy requiring a search warrant for the production of jail calls is inefficient and compromises public safety by delaying access to time-sensitive evidence. It also wastes taxpayer dollars by unnecessarily engaging the criminal justice on several levels:

Law Enforcement: The onerous process of obtaining jail calls by way of a search warrant (SW) involves a police officer or a DA Investigator writing a statement of probable cause, bringing it to a judge for review, and serving it on the DOC, which then requires a DOC employee to comply with the SW by identifying the specific recordings and copying them onto a disc for production to the DA.

Courts: As explained above, when presented with a search warrant, judges must take time to review the affidavit and meet with the officers before deciding whether to sign the warrant.

### **District Attorneys have Direct Access in other California Counties**

In several other California counties, the District Attorney's Office has direct access to jail recordings. In 2014, the Sheriff's Office notified our office and other law enforcement agencies that they were going to begin to require a court order or search warrant to obtain jail recordings. The reasoning was that pulling jail recordings for "outside agencies" was a stress on the Sheriff's Office resources. In 2014, the District Attorney's Office proposed that the Sheriff's Office provide remote access to our office like other counties have done in order to alleviate the stress on their resources. This could be accomplished by granting access to a small number of trained District Attorney Investigators with specific guidelines through an MOU. In support of this proposal we contacted other counties and learned that the following District Attorney offices have remote access to jail recordings and can download them without tasking the personnel of the jail: Colusa, Contra Costa, El Dorado, Fresno, Humboldt, King, Lake, Marin, Monterey, Napa, Placer, Sacramento, San Diego, San Mateo, Santa Cruz, Stanislaus, Sutter and Yolo. When this same proposal was recently broached with the Sheriff's Office it was again summarily dismissed.

### **Jail Call Recordings Are Records That Belong To The County**

Jail call recordings are records that belong to the County, not the Sheriff's Department. Given this fact, and with the aim of reaching a shared solution, we are again asking to collaborate with the Sheriff's Office, the vendor who administers jail recordings, and County Counsel to establish a terminal at the District Attorney's Office which would allow direct access to those recordings. The District Attorney's Office terminal would

Sheriff Laurie Smith

Page 7 of 7

January 8, 2019

have all the safeguards which currently exist at the DOC terminal. Such a set-up would relieve the Sheriff's Office of the time and expense of staffing a terminal. The District Attorney's Office would pay for the purchase and maintenance of any new equipment and would supply the staff to administer it. In the alternative, we ask that you provide jail communication recordings to "outside agencies" through a written request as has been done previously.

I hope you agree that by doing so, we can directly face the residents, businesspeople, law enforcement and community leaders of this county in the knowledge that we are doing everything we professionally can as a team to keep this county safe and sound.

Thank you again for your consideration of this important law enforcement issue.

Sincerely,



Jeffrey F. Rosen  
District Attorney  
Santa Clara County

c: Supervisor Joe Simitian  
Supervisor Mike Wasserman  
Supervisor Dave Cortese  
Supervisor Cindy Chavez  
Supervisor Susan Ellenberg  
County Executive Dr. Jeff Smith  
County Chief Operating Officer Miguel Marquez  
County Counsel James Williams  
County Police Chiefs President Max Bosel  
SJPD Chief Edgardo Garcia

JFR/dm