

FILED
MAY 25 2016

CLERK OF THE SUPERIOR COURT
BY W. Hegen

1 BIRGIT FLADAGER
District Attorney
2 Stanislaus County
832 12th Street, Suite 300
3 P.O. Box 442
4 Modesto, CA 95353
5 Telephone: (209) 525-5550
Facsimile: (209) 558-4027

6 Attorney for the Plaintiff

7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF STANISLAUS

10 THE PEOPLE OF THE STATE OF CALIFORNIA,
11 Plaintiff,

12 vs.

13 FRANK CLIFFORD CARSON,
14 BALJIT ATWAL,
DALJIT ATWAL,
15 WALTER WESTLEY WELLS,
16 GEORGIA DEFILIPPO,
CHRISTINA DEFILIPPO,
17 EDUARDO QUINTANAR AND
SCOTT MCFARLANE,
18 Defendants.

CASE NO.: 1490969

OPPOSITION TO DEFENDANT'S
OBJECTION TO LAW OFFICE
TELEPHONE RECORDS BEING
REFERENCED, OR IN THE
ALTERNATIVE, DEFENDANT'S
MOTION TO QUASH SUBPOENA
FOR THOSE RECORDS

Date: TBD

Time: 9:30 a.m.

Dept. 26

The Honorable Barbara Zúñiga

19 Comes now the People of the State of California, by and through their attorney, BIRGIT
20 FLADAGER, Stanislaus County District Attorney, MARLISA A. FERREIRA, Chief Deputy
21 District Attorney, and respectfully submits the following opposition in response to the defendant's
22 objection to law office telephone records being referenced, or in the alternative, defendant's
23 motion to quash subpoena for those records.

24 ///

25 ///

26 ///

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I.

INTRODUCTION

The law is well settled regarding the communications between attorney and client. Identity of a client is not confidential. The telephone records of defendant Carson's law office do not depict content of telephone calls, but the existence of telephone calls, the identity of the numbers called and the numbers from which telephone calls were received and the length of these telephone calls. Defendant's objections to the introduction of this information and/or his motion to quash the subpoena to obtain this information is unsupported by the case law regarding attorney/client privilege and as this opposition will support, should be denied.

II. STATEMENT OF FACTS

During the investigation into the murder of Korey Kauffman, investigators subpoenaed the telephone records of defendant Carson's law office from the telephone company. The information obtained from the telephone company includes dates and times of incoming and outgoing telephone calls and the corresponding telephone phone numbers. This material confirms the multiple contacts between defendant and his co-defendants/co-conspirators during the ongoing conspiracy to obstruct justice and corroborates testimony of witnesses during the preliminary hearing.

II.

**THE PEOPLE REQUEST THE DEFENDANT'S OBJECTION/MOTION
BE STRICKEN, OR IN THE ALTERNATIVE, BE AMENDED**

A. The Form of Defendant's Objection/Motion Is Improper

Cal. Rules of Court, Rule 2.2 provides, "The Trial Court Rules apply to all cases in the superior courts unless otherwise specified by a rule or statute." Cal. Rules of Court, Rule 3.1112(a) provides a motion **must** include at least the following, "(a) A notice of hearing on the motion, (b) The motion itself; and (3) A memorandum in support of the motion or demurrer". Cal. Rules of Court, Rule 3.1113(b) states that a memorandum **must** include "a statement of facts, a concise

1 statement of the law, evidence and argument relied on, and a discussion of the statutes, cases, and
2 textbooks cited in support of the position advanced.” Civil rules regarding motion practice
3 applicability to criminal cases is supported by the California Criminal Law Procedure and Practice
4 Manual (2016) Section 18.5 and the case of the *People v. Williams* (1999) 20 Cal.4th 119, 129.

5 “Defendant’s Objection to Law Office Telephone Records Being Referenced, or in the
6 Alternative, Defendant’s Motion to Quash Subpoena for Those Records” does not include notice,
7 a motion, or within what appears to be the memorandum which was filed on May 18, 2016, a
8 statement of facts or in some sections I, III, and V, a lack of discussion of the cases to the applicable
9 facts. The People are unable to respond to these specific sections completely given this form and
10 request the court strike these sections for their lack of discussion to the matter before the court, or
11 in the alternative, order the defendant to amend his pleading to include a discussion of the facts as
12 applicable to the law.

13
14 **B. Defendant Fails to Provide Accurate Citations within his Motion**

15 Cal. Rules of Court, Rule 1.200 provides, “Citations to cases and other authorities in all
16 documents filed in the courts **must** be in the style established by either the California Style Manual
17 or The Bluebook: A Uniform System of Citation.” (Boldface added.) On page 4 of defendant’s
18 motion, lines 12-24 derive not from the defendant directly, but *word for word* from the *California*
19 *Judges Benchbook* regarding Search and Seizure, section 2.6 as evidenced in Exhibit A.
20 Defendant’s cite to “*People v. Sullivan* (1969) 271 CA 3d 531” on page 2 of his motion lines 13-
21 14, is also inaccurate and should reflect 271 Cal. App.2d 531. Furthermore, defendant’s citations
22 to cases are neither styled as to the requirements of the *California Style Manual* or *The Blue Blook*,
23 but appear to reflect direct cites from the *California Judges Benchbook* as evidenced in Exhibit A.
24 The People request defendant’s citations be stricken, or in the alternative, amended to conform to
25 the requirements of the California Rules of Court.

26 ///

27 ///

28 ///

1 III.

2 THE ATTORNEY CLIENT PRIVILEGE

3 Cal. Evid. Code § 917 provides in part,

4 (a) If a privilege is claimed on the ground that the matter sought to be disclosed is
5 a communication made in confidence in the course of the lawyer-client, lawyer
6 referral service-client, physician-patient, psychotherapist-patient, clergy-penitent,
7 husband-wife, sexual assault counselor-victim, domestic violence counselor-
8 victim, or human trafficking caseworker-victim relationship, the communication is
presumed to have been made in confidence and **the opponent of the claim of
privilege has the burden of proof to establish that the communication was not
confidential. ...**

9 (Boldface added.)

10 “[I]t is the duty of the party asserting the privilege to present evidence which establishes
11 the existence of a communication that falls within the privilege.” (*State Farm Fire & Casualty Co.*
12 *v. Superior Court (State Farm)* (1997) 54 Cal.App.4th 625, 640-641.)

13 In the case of *Coy v. Superior Court of Contra Costa County* (1962) 58 Cal.2d 210, 219-
14 220, the Court found,

15 “The question [an interrogatory] does not seek to elicit any communication or
16 conversation between the two [attorney and client]. It simply seeks to establish the
17 date on which the defendants met with Bebich, apparently for the purpose of
18 determining when the defendants first conceived the idea of filing an allegedly
19 improper action against the plaintiff. **Such date is not a matter “communicated”
by the client to his attorney in the course of the professional relationship, or at
all.**”

20 (Boldface added.)

21 Following the *Coy* decision, the *State Farm* court held similarly stating, “**Nor does the**
22 **attorney-client privilege protect independent facts related to a communication; that a**
23 **communication took place, and the time, date and participants of the communication.**” (*State*
24 *Farm, supra*, 54 Cal.App.4th at 640.) (Boldface added.)

25 The evidence subpoenaed includes date, times, and phone numbers of the law office for
26 the relevant period. Content of the communications is not included. As stated, the fact of the
27 communication per *Coy* and *State Farm* is not privileged. Therefore, defendant’s motion has failed
28 to meet his burden to establish privilege of the *fact of communication*.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. Identity of a Client

“Generally, the identity of an attorney’s client is not considered within the protection of the attorney-client privilege.” (*Hooser v. Superior Court* (2000) 84 Cal.App.4th 997 citing *People v. Chapman* (1984) 36 Cal.3d 98, 110; *Hays v. Wood* (1979) 25 Cal.3d 772, 785.)

Defendant supports his argument with the case of *People v. Sullivan* (1969) 271 Cal.App.2d 531, stating, “Even the name of a client is protected.” (Def. motion p. 2, lines 13-14.)

However, the *Sullivan* court held,

The opinion stated as the general rule that an attorney is not privileged to withhold disclosing by whom he has been employed. ¶ Under the circumstances existing in *Ex parte McDonough* 170 Cal.230 ..., it was held that the privilege extended to non-disclosure of the client’s name; **when to declare the name might subject the client to prosecution for a crime that had been committed before the relationship arose.**”

(*Sullivan, supra*, 271 Cal.App.2d 531, 545.) (Bold face added.)

The telephone numbers, dates and times of telephone calls between defendant Carson and his co-conspirators/co-defendants occurred prior to, during and after the murder of Korey Kauffman. The facts of the communications also support the existence of the conspiracy to obstruct justice which was continuing and ongoing. Defendants relationships with his co-conspirators/co-defendants existed prior to the crime and thus fall out of the exception presented within *Sullivan*.

B. Crime Fraud Exception

Cal. Evid. Code § 956 states, “There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.” “To invoke the Evidence Code section 956 exception to the attorney-client privilege, the proponent must make a prima facie showing that the services of the lawyer ‘were sought or obtained’ to enable or aid anyone to commit or plan to commit a crime or fraud.” (*State Farm, supra*, 54 Cal.App.4th 625, 643 citing *BP Alaska Exploration, Inc. v. Superior Court (BP Alaska)* (1988) 199 Cal.App.3d 1240, 1262.)

“Evidence Code section 956 does not require a completed crime or fraud. It applies to

1 attorney communications sought to enable the client to *plan to commit* a fraud, whether the fraud
2 is successful or not.” (*Ibid.*; see also *Travelers Ins. Companies v. Superior Court* (1983) 143
3 Cal.App.3d 436, 446 [communication must be “ ‘made in contemplation of crime’ ” for exception
4 to apply].) “[I]t is the intent of the client upon which attention must be focused and not that of the
5 lawyers.” (*State Farm & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645.) (*Favila*
6 *v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 220, *as modified on denial of reh'g*
7 (*Sept. 22, 2010.*)

8 The *State Farm* court noted in *BP Alaska, Nahama & Weagant Company* “made a prima
9 facie showing that BP [Alaska] sought its attorney’s services to assist in the commission or
10 planning of a fraud by making misrepresentations of fact aimed at discouraging [Nahama &
11 Weagant Company] from pursuing its claims.” (*Id.* at p. 644.)

12 Here, the People have established defendant Carson was active in soliciting others to “take
13 care of” those committing thefts on his property and was present when the thieves were dealt with,
14 i.e. Robert Jaquish and Korey Kauffman. Defendant Carson engaged his family, co-defendants G.
15 DeFilippo and C. DeFilippo, and friends, co-defendants B. Atwal and D. Atwal, to assist him with
16 his efforts to falsely imprison individuals who were stealing. Defendant Carson used his status as
17 a lawyer and sought assistance from his very own clients, Patrick Hampton and Robert Woody, to
18 assist with his problem with specific orders to Patrick Hampton to “fuck [Michael Cooley] up”.

19 Defendant Carson also instructed his co-defendants/co-conspirators on ways to obstruct
20 the investigation by law enforcement and engaged in his own obstruction with false calls to 911
21 and false filings filed with the court, while also encouraging his co-defendants/co-conspirators to
22 do the same. Defendant Carson’s co-conspirators/co-defendants assisted in the obstruction by
23 obtaining information from those they knew in law enforcement, misleading those individuals and
24 other members of law enforcement and disrupting the investigation with continued threats to
25 witnesses, i.e. Eula Keyes, Linda Burns, Michael Cooley, Patrick Hampton and T.J. Singh.

26 Should the court find the information obtained from the telephone company to be
27 privileged, these facts support the application of the crime-fraud exception to the attorney-client
28

1 privilege asserted by defendant Carson to the facts of the communication with the named co-
2 defendants/co-conspirators.

3
4 **C. Telephone Records Are Third Party Business Records**

5 Cal. Evid. Code §1271 provides,

6 Evidence of a writing made as a record of an act, condition, or event is not made
7 inadmissible by the hearsay rule when offered to prove the act, condition, or event
8 if:

- 9 (a) The writing was made in the regular course of a business;
10 (b) The writing was made at or near the time of the act, condition, or event;
11 (c) The custodian or other qualified witness testifies to its identity and the mode of
its preparation; and
(d) The sources of information and method and time of preparation were such as to
indicate its trustworthiness.

12 In *People v. Zavala* (4th Dist. 2013) 216 Cal.App.4th 242, 248, after reviewing application
13 in the federal courts and other states, the Court of Appeal found, “[A] printed compilation of call
14 data produced by human query for use at trial falls under the business records exception where the
15 underlying data is automatically recorded and stored by a reliable computer program in the regular
16 course of business.”

17 Defendant’s law office telephone records regarding the times, dates and phone numbers
18 connected to and/or received are the business records of the telephone company and are not
19 privileged.

20
21 **D. The Release of Defendant’s Telephone Records Complies with 18 U.S.C.A. § 2703**

22 Defendant refers to “Title 18 of the United States Codes’ “Telephone Records and Privacy
23 Protection Act of 2006”, but fails to notice a specific subsection as is consistent with the manner
24 of his pleading. The People submit the communication obtained from the telephone company
25 comports with requirements of 18 U.S.C.A. § 2703(c)(1)(E) and (c)(2) as stated below,

- 26 **(c) Records concerning electronic communication service or remote**
27 **computing service.-- (1) A governmental entity may require a provider of**
28 **electronic communication service or remote computing service to disclose a record**

1 or other information pertaining to a subscriber to or customer of such service (not
2 including the contents of communications) only when the governmental entity--

3 (A) obtains a warrant issued using the procedures described in the Federal
4 Rules of Criminal Procedure (or, in the case of a State court, issued using
5 State warrant procedures) by a court of competent jurisdiction;

6 (B) obtains a court order for such disclosure under subsection (d) of this
7 section;

8 (C) has the consent of the subscriber or customer to such disclosure;

9 (D) submits a formal written request relevant to a law enforcement
10 investigation concerning telemarketing fraud for the name, address, and
11 place of business of a subscriber or customer of such provider, which
12 subscriber or customer is engaged in telemarketing (as such term is defined
13 in section 2325 of this title); or

14 (E) seeks information under paragraph (2).

15 **(2) A provider of electronic communication service or remote computing
16 service shall disclose to a governmental entity the--**

17 (A) name;

18 (B) address;

19 (C) local and long distance telephone connection records, or records of
20 session times and durations;

21 (D) length of service (including start date) and types of service utilized;

22 (E) telephone or instrument number or other subscriber number or identity,
23 including any temporarily assigned network address; and

24 (F) means and source of payment for such service (including any credit card
25 or bank account number),

26 of a subscriber to or customer of such service **when the governmental entity
27 uses an administrative subpoena authorized by a Federal or State statute
28 or a Federal or State grand jury or trial subpoena or any means available
under paragraph (1).**

(3) A governmental entity receiving records or information under this subsection is
not required to provide notice to a subscriber or customer.

1 (Bold face added.)

2 **E. Defendant's Reference to *Riley v. California* Is Mistaken**

3 In *Riley v. California* (2014) 134 S.Ct. 2473, 2485, the United States Supreme Court
4 reviewed the issue of a seizure of a cell phone during a search incident to an arrest and the
5 manipulation of the cell phone by law enforcement without a search warrant. The Court found a
6 search incident to arrest did not support the search of a cell phone's contents when the cell phone
7 no longer posed a threat to the safety of detaining officers. *Id.* The Court's distinction of a cell
8 phone from other items located on a detained individual supports the lack of application to the set
9 of facts before this court. (*Id.* at p. 2489-2492.) Defendant's attempt to rely on *Riley v. California*,
10 is, therefore, misguided and undeveloped in its application within his argument as argued above
11 in the motion to strike.

12
13 **III.**

14 **THE PEOPLE REQUEST THE COURT STRIKE DEFENDANT**
15 **CARSON'S DECLARATION UNLESS DEFENDANT CARSON**
16 **TESTIFIES AT THE HEARING OF THIS MOTION**

17 "It is a commonly-known rule that no witness, even a defendant in a criminal case, will be
18 permitted to testify concerning a matter while refusing cross-examination as to the same matter.
19 In such situations the constitutional privilege against self-incrimination as to the subject matter of
20 his direct examination is deemed waived. (See *People v. Perez*, 65 Cal.2d 615, 621; *Unruh v.*
21 *Nelson*, 212 Cal. 130, 132—134; *People v. Freshour*, 55 Cal. 375; *People v. Wilson*, 254
22 Cal.App.2d 489, 491—492; *People v. Stone*, 239 Cal.App.2d 14, 19; *People v. De Georgio*, 185
23 Cal.App.2d 413, 420—421.) As said in *Brown v. United States*, 356 U.S. 148, 155—156, '(One)
24 cannot reasonably claim that the Fifth Amendment gives him not only this choice (of testifying to
25 his own version of the facts) but, if he elects to testify, an immunity from cross-examination on
26 the matters he has himself put in dispute. . .)' (*People v. Williams* (1973) 30 Cal.App.3d 502, 510.)

27 Defendant Carson's declaration attached to his objection/motion attests to facts under
28 penalty of perjury. Pursuant to the above case law, defendant shall be subject to cross-examination

1 when a declaration is submitted. The People request the court strike defendant's declaration unless
2 defendant is prepared to submit to cross examination in this matter.

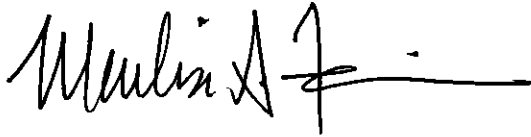
3
4 **IV.**
5 **CONCLUSION**

6 For the foregoing reasons, the People respectfully request the Court strike defendant's
7 objection to law office telephone records being referenced, or in the alternative, defendant's
8 motion to quash the subpoena for those records. Provided the court does not strike defendant's
9 objection/motion, the People request defendant be required to re-file an amended objection/motion
10 in compliance with the California Rules of Court. Should the court review defendant's
11 objection/motion on the merits, the People submit defendant has failed to meet his burden and
12 request the court deny defendant's motion.

13 Dated this 25th day of May 2016, at Modesto, California.

14
15 Respectfully submitted,

16 BIRGIT FLADAGER
17 District Attorney

18 

19 Marlisa A. Ferreira
20 Chief Deputy District Attorney

21 MAF/vav
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE BY ELECTRONIC MAIL

STATE OF CALIFORNIA)
COUNTY OF STANISLAUS)

I, the undersigned, declare as follows:

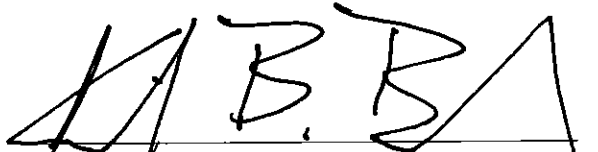
That I am over the age of 18 years and am not a party to this action and I am employed by the Stanislaus County District Attorney’s Office, 832 12th Street, Suite 300, Modesto, California.

That I served a copy of the Opposition to Defendant’s Objection to Law Office Telephone Records being Referenced or in the Alternative, Defendant’s Motion to Quash Subpoena for those Records to May 25, 2016 pursuant to Cal. Civ. Proc. Code § 1010.6(a)(6) by ~~electronically~~ **PERSONAL** sending a copy thereof to the offices of:

- Jesse Garcia at JesseJGARCIA@aol.com,
- Timothy Rien at rienlaw@sbcglobal.net,
- Martha Carlton-Magana at carltnm@hotmail.com,
- Preciliano Martinez at attymartinezp@yahoo.com,
- Hans Hjertonsson at Hans.hjertonsson@gmail.com,
- Alonzo Gradford at gradfordlaw@gmail.com,
- Lawrence Niermeyer at ltniermeyer@aol.com,
- Robert Lee Forkner at RLFCrimLaw@aol.com,
- Bruce Perry at brucerperry@msn.com and
- Stephanie Mitchell at stephanie.mitchell@stanct.org.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this ___ day of May 2016, at Modesto, California.



Declarant

Case No. 1490969
People v. Carson et al.