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FILED  
NOV 19 2015

CLERK OF SUPERIOR COURT  
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DEPUTY

10  
11 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12  
13 IN AND FOR THE COUNTY OF STANISLAUS

14 THE PEOPLE OF THE STATE OF  
15 CALIFORNIA,

16 Plaintiffs,

17 v.

18 FRANK CARSON, et al.,

19 Defendant.

) Case No.: 1490969

) NOTICE OF MOTION TO DISMISS FOR  
) INTERFERENCE WITH RIGHT TO  
) COUNSEL

) DATE: TBA  
) TIME: TBA  
) DEPT.: 26

20 TO THE DISTRICT ATTORNEY OF STANISLAUS COUNTY AND/OR HER

21 REPRESENTATIVE:

22 PLEASE TAKE NOTICE that on \_\_\_\_\_, at \_\_\_\_\_, or as

23 soon thereafter as the matter may be heard in the courtroom of department 26 of the above-  
24 entitled court, the defendant will move for an order dismissing all charges in this action.

25 This motion will be made on the ground that the actions of the prosecution and/or its  
26 agents have prevented the defendant from preparing and presenting a meaningful defense and  
27 deprived her of the effective assistance of counsel contrary to the provisions of the Sixth and  
28

1 Fourteenth Amendments to the United States Constitution and Article I, § 15 of the California  
2 Constitution.

3           The motion will be based on this notice of motion, on the attached declaration and  
4 memorandum of points and authorities served and filed herewith, on such supplemental  
5 declarations and memoranda of points and authorities as may hereafter be filed with the court, on  
6 all the papers and records on file in this action, and on such oral and documentary evidence as  
7 may be presented at the hearing of the motion.  
8

9  
10 DATED: 11/19/15



11  
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13 Attorney for the Defendant,  
14 CHRISTINA DEFILIPPO  
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9 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 IN AND FOR THE COUNTY OF STANISLAUS

11 THE PEOPLE OF THE STATE OF  
12 CALIFORNIA,

13 Plaintiffs,

14 v.

15 FRANK CARSON, et al.,

16 Defendant.  
17

) Case No.: 1490969

) POINTS AND AUTHORITIES IN SUPPORT  
) OF MOTION TO DISMISS FOR  
) INTERFERENCE WITH COUNSEL

18  
19 Defendant submits the following points and authorities in support of the motion to  
20 dismiss:

21 **I.**  
22 **THE RIGHT TO COUNSEL EMBODIES THE RIGHT TO**  
23 **CONFIDENTIAL COMMUNICATION WITH COUNSEL**

24 The right to counsel is guaranteed to a defendant in a criminal case by both the Sixth  
25 Amendment to the United States Constitution and Article I, §15 of the California Constitution.

26 This right is a "fundamental constitutional right, which has been carefully guarded by the courts  
27 of this state." (Ex parte James, 38 Cal. 2d 302, 310, 240 P.2d 596 (1952)).  
28

1 The courts have recognized "that the right to counsel guaranteed by the California  
2 Constitution embodies the right to communicate in absolute privacy with one's attorney." (Barber  
3 v. Municipal Court, 24 Cal. 3d 742, 751, 157 Cal. Rptr. 658, 598 P.2d 818 (1979)).

4  
5 A prosecutor's deliberate attempt to obtain confidential information from the defense is  
6 an invasion of the "defense camp" which compromises the defendant's right to a fair trial and  
7 may justify dismissal of the case. Morrow v. Superior Court, 30 Cal. App. 4th 1252, 36 Cal.  
8 Rptr. 2d 210 (2d Dist. 1994).

9  
10 **II.**  
11 **THE RIGHT TO COUNSEL IS VIOLATED WHEN THE STATE IMPROPERLY**  
12 **INTERCEPTS A CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION**

13 The right to counsel, which embodies the right to private consultation with counsel, is  
14 violated when state agents improperly intercept a confidential attorney-client communication.

15 In Barber v. Municipal Court, 24 Cal. 3d 742, 756, 157 Cal. Rptr. 658, 598 P.2d 818  
16 (1979), one of the codefendants was an undercover police officer who participated in  
17 confidential attorney-client meetings. The court clearly held that "[t]he right under California law  
18 to communicate privately with counsel was violated when a government agent in an undercover  
19 capacity was present at confidential attorney-client meetings."

20 In Wilson v. Superior Court, 70 Cal. App. 3d 751, 758, 139 Cal. Rptr. 61 (2d Dist. 1977),  
21 the court labeled the governmental tape recording of a confidential attorney-client conversation  
22 as "an outrageous violation of petitioner's most fundamental constitutional rights."  
23

24 **III.**  
25 **DISMISSAL OF THE CHARGES IS THE ONLY APPROPRIATE**  
26 **REMEDY FOR SUCH A CONSTITUTIONAL VIOLATION**

27 The California Supreme Court has held that the only effective remedy for the intentional  
28 interception of a confidential attorney-client communication is dismissal of the underlying

1 charges. In Barber v. Municipal Court, 24 Cal. 3d 742, 759-760, 157 Cal. Rptr. 658, 598 P.2d  
2 818 (1979), the court held:

3 The intrusion, through trickery, of the law enforcement agent in the confidential  
4 attorney-client conferences of petitioners cannot be condoned. The right to confer  
5 privately with one's attorney is "one of the fundamental rights guaranteed by the  
6 American criminal law--a right that no legislature or court can ignore or violate."  
7 [Citation omitted.] The only effective remedy is the dismissal of the underlying  
8 charges.

9 The court reasoned that a remedy that would only exclude evidence gained from the  
10 intrusion was wholly inadequate because of: (1) the damage done to the attorney-client  
11 relationship and counsel's ability to prepare a defense; (2) the problems of enforcement because  
12 of the difficulty in identifying the advantage the prosecution gained by this information; and (3)  
13 the limitations of the exclusionary rule as a real deterrent.

14 Based on this reasoning, the court in Barber specifically found the exclusion remedy  
15 adopted in Wilson v. Superior Court, 70 Cal. App. 3d 751, 756-759, 139 Cal. Rptr. 61 (2d Dist.  
16 1977) to be "inadequate." (Barber v. Municipal Court, 24 Cal. 3d 742, 759, 157 Cal. Rptr. 658,  
17 598 P.2d 818 (1979)).

18 The interception of confidential attorney-client communications can result in the  
19 "invasion of the defense camp," which compromises the defendant's right to a fair trial and may  
20 justify dismissal of the case. (Morrow v. Superior Court, 30 Cal. App. 4th 1252, 36 Cal. Rptr. 2d  
21 210 (2d Dist. 1994)). See attached Exhibit A.

22  
23 DATED:

11 / 19 / 15

Respectfully submitted,

24  
25  
26 

27 ROBERT L. FORKNER  
28 Attorney for Christina Defilippo

LOCAL / CALIFORNIA POLITICS

# U.S. judges see 'epidemic' of prosecutorial misconduct in state



By Maura Dolan · Contact Reporter

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Federal judges accuse California bar of turning a blind eye to an 'epidemic' of prosecutorial misconduct

JANUARY 31, 2015, 7:20 PM

**T**he hearing seemed largely routine until a state prosecutor approached the lectern. Deputy Atty. Gen. Kevin R. Vienna was there to urge three judges on the U.S. 9th Circuit Court of Appeals to uphold murder convictions against Johnny Baca for two 1995 killings in Riverside County. Other courts had already determined that prosecutors had presented false evidence in Baca's trial but upheld the verdicts anyway.

Vienna had barely started his argument when the pummeling began.

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*Article continues below* ↓

Judge Alex Kozinski asked Vienna if his boss, Atty. Gen. Kamala D. Harris, wanted to defend a conviction "obtained by lying prosecutors." If Harris did not back off the case, Kozinski warned, the court would "name names" in a ruling that would not be "very pretty."

*Article continues below* ↓

Judge Kim Wardlaw wanted to know why Riverside County prosecutors presented a murder-for-hire case against the killer but did not charge the man they said had arranged the killings.

"It looks terrible," said Judge William Fletcher.

<http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html>

11/13/2015

EXHIBIT A

The January hearing in Pasadena, posted online under new 9th Circuit policies, provided a rare and critical examination of a murder case in which prosecutors presented false evidence but were never investigated or disciplined.

The low-profile case probably would have gone unnoticed if not for the video, which attorneys emailed to other attorneys and debated on blogs.

In a series of searing questions, the three judges expressed frustration and anger that California state judges were not cracking down on prosecutorial misconduct. By law, federal judges are supposed to defer to the decisions of state court judges.

Prosecutors "got caught this time but they are going to keep doing it because they have state judges who are willing to look the other way," Kozinski said.

Santa Clara University law professor Gerald Uelmen said the judges' questions and tone showed they had lost patience with California courts. State judges are supposed to refer errant lawyers, including prosecutors, to the state bar for discipline, but they rarely do, Uelmen said.

"It is a cumulative type thing," Uelmen said. "The 9th Circuit keeps seeing this misconduct over and over again. This is one way they can really call attention to it."

A 2010 report by the Northern California Innocence Project cited 707 cases in which state courts found prosecutorial misconduct over 11 years. Only six of the prosecutors were disciplined, and the courts upheld 80% of the convictions in spite of the improprieties, the study found.

The case that sparked the court's recent outrage involved the killing of John Adair and his live-in partner, John Mix, two decades ago. Baca, a friend of Adair's adopted son, was working as a houseboy for the couple.

A jailhouse informant testified that Baca had confided the son planned the killing. The two were going to split Adair's inheritance, the informant said. Other witnesses testified that Adair was planning to disinherit his son, who was never charged in the case.

Baca was tried twice and found guilty both times. A state appeals court overturned the first verdict. The second withstood an appeal, even though the state court found the informant and a Riverside County prosecutor had given false testimony.

The informant falsely testified he had asked for and received no favors. The prosecutor falsely corroborated that on the stand, according to court records. Baca was sentenced to 70 years to life.

Patrick J. Hennessey Jr., who has represented Baca on appeal for nearly two decades, said he had never seen such an "egregious" case of prosecutorial misconduct.

"That is what bothered me," Hennessey said. "There was never a fair discussion of how serious the issue was."

A U.S. magistrate who next examined the case said Baca might not have been convicted of first-degree murder but for the false testimony. He said the federal court nevertheless was supposed to defer to the state courts.

"Sadly, this informant's lies were bolstered by a Deputy District Attorney, who also lied," wrote Magistrate Judge Patrick J. Walsh. "What is obvious ... is that the Riverside County District Attorney's Office turned a blind eye to fundamental principles of justice to obtain a conviction."

Armed with the magistrate's report, the three judges on the 9th Circuit panel appeared incredulous about the facts of the case.

Wardlaw, a Clinton appointee, complained that California's courts were "condoning" prosecutorial misconduct by upholding verdicts, a rare public criticism of her fellow judges. She suggested that state judges, who must be approved by voters, fear inciting the public's wrath. Federal judges are appointed for life.

"I understand why they do that," Wardlaw said. "They are elected judges. They are not going to be reversing these things."

Fletcher, another Clinton appointee, observed that the state's attorney general had fought "tooth and nail" more than a decade ago to prevent a court from seeing a transcript that revealed the false evidence.

"It would look terrible in an opinion when we write it up and name names," Kozinski, a Reagan appointee, told the government lawyer. "Would your name be on?"

Vienna said he was not involved in the case at the time, but named others in the office.



Kozinski demanded to know why the informant and the testifying prosecutor were not charged with perjury. He suggested the state bar should pull the law license of the prosecutor who presented the evidence.

Retired Deputy Dist. Atty. Paul Vinegrad, who prosecuted Baca in both trials, said in an interview that he did not suspect deceit. He said he has since learned that his colleague who falsely testified — former Deputy Dist. Atty. Robert Spira — had memory problems and may have been confused. Spira, who no longer practices law, could not be reached for comment.

Vinegrad also said he believed in the murder-for-hire case he presented, but that there was not enough evidence to charge the son. The informant's testimony against the son would not have been admissible under legal rules at the time, Vinegrad said.

Kozinski, who in the past has spoken out about an "epidemic" of prosecutorial misconduct, asked Vienna whether Harris was aware of the case. Vienna indicated she probably was not. Kozinski told him to get her attention within 48 hours. Harris would need to take action if her office wanted to avoid an embarrassing ruling, Kozinski said.

"Make sure she understands the gravity of the situation," Kozinski said, adding that the case "speaks very poorly for the attorney general's office."

Harris, a candidate for U.S. Senate, changed course. Her office decided last week not to oppose Baca's challenge.

Mike Hestrin, Riverside County's newly elected district attorney, did not concede that the prosecutors' "misconduct" was intentional, but said his office would investigate the prosecutors' actions and retry Baca.

It will be Baca's third trial.

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1 **PROOF OF SERVICE**

2 **SUPERIOR COURT OF THE**

3 **STATE OF CALIFORNIA**

4 I am a resident of or employed in the County of Stanislaus,  
5 State of California at 722 Thirteenth St., Modesto, where the  
6 service took place. I am over the age of 18 and not a party to the  
7 within action.

8 On 11/19/15 I served the document(s) described as:  
9 (DATE)

10 **NOTICE OF MOTION AND MOTION TO DISMISS FOR INTERFERENCE WITH**  
11 **RIGHT TO COUNSEL; POINTS AND AUTHORITIES.**

12 on the interested parties in this action by providing a copy  
13 thereof to:

14 **STANISLAUS COUNTY DISTRICT ATTORNEY'S OFFICE**

15 (BY MAIL) I am readily familiar with this business's  
16 practice for collection and processing of correspondence  
17 for mailing, and that correspondence, with postage  
18 thereon fully prepaid, will be deposited with the U.S.  
19 Postal Service on the date herein above in the ordinary  
20 course of business, at Modesto, California.

21 X (BY PERSONAL SERVICE) I caused such envelope to be  
22 delivered by hand to the offices of the addressee(s).

23 (BY OVERNIGHT COURIER) I caused the above-referenced  
24 envelope(s) to be delivered to an overnight courier  
25 service for delivery to the addressee(s).

26 (BY FACSIMILE/E-MAIL) I caused the above-referenced  
27 document(s) to be faxed to the offices of the  
28 addressee(s).

**Executed on \_\_\_\_\_ at MODESTO, California.**

29 X (STATE) I declare under penalty of perjury under the laws  
30 of the State of California that the foregoing is true and  
31 correct.

32 (FEDERAL) I declare that I am employed in the office of  
33 a member of the bar of this court at whose direction the  
34 service was made.

35   
36 ROBERT L. FORKNER

1 Case No.: 1490969

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