

## 2. Facilitate Defendant's Communication with Counsel

Note: This motion is directed solely to the court because the prosecution should not be allowed standing. Discuss how the current conditions of confinement will hinder communications during trial.

TO THE COURT, PLEASE TAKE NOTICE that Defendant moves the Court for orders as described herein to protect his right to consult with counsel.

This motion will be made on the grounds that the orders are necessary so for counsel to consult with Defendant and without such orders Defendant will be deprived of the right to counsel under Article I, §15 of the California Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

Date:

\_\_\_\_\_  
Attorney for Defendant

### POINTS, AUTHORITIES, AND ARGUMENT

#### Summary of Relief Sought

By this motion, Defendant requests the following orders, which are necessary to safeguard his rights as discussed herein:

1. Defendant shall be allowed unpaid, unmonitored telephone calls to his attorney and other persons designated by counsel to assist in the defense.
2. Defendant shall be allowed unlimited postage-paid correspondence to his attorney.
3. Defendant's attorney and other persons designated by counsel to assist in the defense shall be allowed to bring a laptop computer to the jail and make use of it during confidential visits with Defendant.

#### Defendant has the Right to Consult with Counsel and Support Personnel

The right of access to counsel is an essential component of the right of access to the courts. (*Bounds v. Smith* (1977) 430 U.S. 817).

In *Procunier v. Martinez* (1974) 416 U.S. 396, 419 (overruled by *Thornburgh v. Abbott* (1989) 490 U.S. 401) the United States Supreme Court declared that this right of access requires that inmates be given a "reasonable opportunity to seek and receive the assistance of attorneys," and "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid."

It is well established that "the right to effective counsel also includes the right to ancillary services necessary in the preparation of a defense" (*Keenan v. Superior Court* (1982) 31 Cal 3<sup>rd</sup> 424, 428). "A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney...is obviously entitled to the aid of such expert assistance as he may need...in preparing the defense." (*Re Ketchel* (1968) 68 Cal 2<sup>nd</sup> 397, 399-400).

Paralegals are included as necessary assistance for attorneys (*Corenevsky v. Superior Court* (1984) 36 Cal.

3<sup>rd</sup> 307; *Missouri v. Jenkins* (1989) 491 U.S. 274; *Trustees of Const. v. Redland Ins. Co.* (9<sup>th</sup> Cir. 2006) 460 F. 3<sup>rd</sup> 1253). Visiting and confidentiality rules apply not only to the attorney, but also to private investigators, paralegals, attorney employees, and other persons assisting in the defense (15 CCR §3178).

#### Defendant has the Right to Communicate with Counsel by Telephone

Starting “from the premise that telephone communication is essential for inmate contact with attorneys,” the Court of Appeal upheld a trial court order that the local jail must provide inmates a cost-free telephone line to the County Public Defender office. The court reasoned that the use of a collect-calls only system “unreasonably restricts communications between inmates at the jail and their attorneys.” (*In re Grimes* (1989) 208 Cal. App. 3<sup>rd</sup> 1175).

The jail call system used in in the county jail has a minimum rate far beyond that charged by telephone providers for persons who are out of custody, and the system does not allow collect calls to any of defense counsel’s phones in that the jail call system does not allow collect calls to Internet based phone systems or any cell phones.

### Defendant has the Right to Communicate with Counsel by Mail

*Penal Code §2601(b)* guarantees inmates the right “to correspond, confidentially, with any member of the State Bar or holder of public office, provided that the prison authorities may open and inspect incoming mail to search for contraband.” Although an institution may check for contraband, it may not under any circumstances read the correspondence (*In re Jordan* (1972) 7 Cal. 3<sup>rd</sup> 930). This right is also guaranteed by the federal Constitution (*Wolff v. McDonnell* (1974) 418 U.S. 539).

### Effective Representation Requires the Use of Electronics

The Prosecution regularly provides discovery in electronic formats, including audio and video recordings, photographs, gang packets, police reports, and other records. This discovery cannot be reviewed with the Defendant without the use of a computer.

Regulations acknowledge that review of some inmate records “may necessitate the use of a computer” (15 CCR §3370); however, during some visits staff allows the use of laptop computers, and during other visits such use is denied. There appears to be no reasons behind the grant or denial of laptop use, but rather it appears to simply be unclear policy at the jail. Nonetheless, jail procedures and regulations must be implemented so as not to invalidate a constitutional right.

### This Court has Authority to Grant the Relief Sought

Jail regulations restricting pretrial detainees’ access to counsel are unconstitutional where they “unjustifiably obstruct the availability of professional representation.” (*Benjamin v. Fraser* (2<sup>nd</sup> Cir. 2001) 264 F. 3<sup>rd</sup> 175, 178). In *In re Grimes*, supra, the court acknowledged that “[c]ourts are properly reluctant to interfere with prison administration, given the manifold factual difficulties inherent in that task. The function of a court is limited to determining whether a constitutional violation has occurred, and to fashioning a remedy that does no more and no less than correct that particular constitutional violation. But the deference to which prison administrators are ordinarily entitled has never been construed as requiring judicial abstention. [P]rison administrators are in the best position to control inmates but this control cannot violate statutory or constitutional right. Thus, the courts’ traditional deference to administrative expertise in prison matters does not foreclose judicial intervention to remedy statutory or constitutional violations.” (citations omitted)

### Conclusion

Defendant is allowed telephone calls now. There is no penological interest in requiring collect calls, charging an exorbitant rate for those calls, or in having those calls monitored. Defendant is allowed to send out mail now. Defendant cannot deliver documents and other items to counsel, so he must rely on the postal service to do so. There is no penological interest in monitoring mail to counsel, and Defendant cannot pay the cost of postage when he has no money on his books at the jail. Those assisting Defendant are often allowed to bring a laptop computer to the jail and make use of it during confidential visits with Defendant, so there can be no penological interest in the sporadic denials.