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SEPTEMBER 28, 2005

Stephen Kelly
Clerk/Administrator
Court of Appeal
Fourth Appellate District Division One
750 "B" St.
Suite 300
San Diego Calif. 92101

Re: People v.XXXXXX, Case No. YYYYYYY

Dear Mr. Kelly:

In response to the Court's telephone request that I serve the Attorney General a copy of the EX-PARTE APPLICATION FOR AUTHORIZATION OF INVESTIGATIVE FEES already received by the Court, it is requested that the Court accept the following Points and Authorities and Argument in support of IN CAMERA and CONFIDENTIAL handling of the previously filed EX-PARTE APPLICATION FOR AUTHORIZATION OF INVESTIGATIVE FEES. This would result in only the Court and Appellate Defenders receiving copies of the APPLICATION and there being no entries on the Court's webcite of confidential materials in the APPLICATION or its disposition.

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**APPELLANT HAS THE RIGHT TO IN CAMERA AND
CONFIDENTIAL TREATMENT OF HIS REQUEST FOR
INVESTIGATIVE FEES.**

Penal Code section 987.8, subd. (g)(1) states:

(g) As used in this section:

(1) "Legal assistance" means legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, investigative services, expert testimony, or any other form of services provided to assist the defendant in the preparation and presentation of the defendant's case.

Confidentiality in the request for funds for services to assist the defendant as set forth in section 987.8, subd. (g)(1) is assured by an *in camera* determination where the Attorney General is neither present nor noticed of such a determination. See *Corenevsky v. Superior Court* (1984) 36 Cal. 3d 307, 320, fn. 12. The text of that footnote is:

n12 We reject the People's suggestion that county counsel may be present at a hearing on such requests. As **both** *Corenevsky* and county counsel point out, such a procedure would create unnecessary conflicts of interest; in any event, county counsel's presence cannot be permitted because such petitions are entitled to be confidential. (*Keenan*, supra, 31 Cal.3d 424, 430; *Faxel*, supra, 91 Cal.App.3d 327, 330, fn. 1.)(emphasis added.)

To protect the confidentiality of the factual information contained in this application and the declarations submitted herewith, appellant requests that this application and declaration be heard without service upon the Attorney General and any other parties to this proceeding . Appellant further requests that all orders made, and all other documents produced or filed in connection with this application be served only upon counsel for appellant and upon APPELLATE DEFENDERS INC. with the exception of orders clearly containing no privileged information and no information which could lead to the discovery of privileged information, or otherwise lighten the burden of the prosecution in violation of petitioner's privilege against self-incrimination.

Additionally, the inclusion of the Attorney General's office in this decision re the Application for Investigative Fees puts that office in a potential ethical conflict of interest situation where it is receiving privileged information it is not entitled to receive and cannot use in any manner, including opposing the request for investigative fees.

As has already been pointed out in the previously filed Ex-Parte Application for Investigative Fees, both the California Supreme Court and the United States Supreme Court have recognized that indigent defendants have a due process right to "the basic tools of an adequate defense," including not only counsel, but expert and other services as needed. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 76-78; *Coronevsky*, *supra*, 36 Cal.3d at pp. 319-320.)

This due process right would be an empty one if it served to place the defendant in jeopardy of other prosecutions or to lighten the prosecution burden of proof.

This right of confidentiality to application for investigative funds is derivatively found in numerous statutory sources.

Under Penal Code section 987 subd. (c), financial information obtained from the defendant for the appointment of counsel shall be confidential and privileged. Under section 987 subd. (d), the defendant's affidavit filed in support of his application for counsel shall be confidential and privileged. Additionally, under Penal Code section 987.9 subd. (a), when a capital defendant applies for court funding to prepare his defense, "The fact that an application has been made shall be confidential and the contents of the application shall be confidential."

The Supreme Court of California held in *Keenan v. Superior Court* (1982) 31 Cal.3d 424, that under sections 987 and 987.9, a capital defendant has the right to a second appointed attorney and that the proceedings related to that appointment are to be confidential. Although this case is not a capital one, appellant should be protected by the same procedures used to protect defendants at trial seeking appointment of counsel and funding to prepare their defenses.

There are non-capital case precedents available to illustrate the necessity of an in-camera application for investigative funds. In *People v. Faxel* (1979) 91 Cal.App. 3d 327, 330 fn. 1, an indigent defendant seeking access to public funds to prepare his defense for a robbery charge was able to demonstrate his proposed strategy *in camera* to prevent improper prosecution discovery of the information. It should be noted that the California Supreme Court in *Coronevsky*, in its footnote 12 set forth above, cited the non-capital case of *Faxel*, *supra*, to support the *in camera* requirement of investigative fee applications.

In *United States v. Sutton* (5th Cir. 1972) 464 F.2d 552, the only issue

before the United States Court of Appeals was the failure of the trial judge to allow court appointed counsel an *in camera* hearing for his request for investigative fees. Defense counsel objected to the prosecutor's presence at the hearing and, although recognizing it was his burden to show the necessity of investigative assistance, declined to reveal, in the presence of the prosecution, the names of witnesses and the nature of the information that would be the object of that investigation. The application was denied, conviction followed and the Court of Appeals reversed on this sole issue of failing to exclude the prosecution from the hearing on request for defense funding after a defense objection to the prosecutor's presence.

CONCLUSION

Federal Due process and the statutory and case law of this state require that the application for investigative fees, when so requested by defense counsel, be both *ex-parte* and *in camera* and be treated as confidential by the appellate court.

Respectfully submitted,

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Attorney for appellant LEWIS