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U.S. DISTRICT COURT
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Attorney for Defendant

**UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF IDAHO**

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DUSTIN HOLM,)
)
 Defendant.)
 _____)

Case No. 03-220-E-BLW

**MEMORANDUM IN SUPPORT OF
 MOTION TO MODIFY CONDITIONS
 OF DETENTION**

STATEMENT OF FACTS

The defendant, Dustin Holm, (hereinafter referred to as "Holm"), has appointed counsel, Kelly Kumm, pursuant to the Criminal Justice Act ("CJA"), who practices in Pocatello, Idaho. Holm is incarcerated in the Ada County Jail, in Boise, Idaho more than 200 miles away from Pocatello. Holm was indicted on September 24, 2003 for mailing threatening communications to government employees during June and July 2003. The pretrial conference has been set for August 19, 2004 in the United States District Courthouse in Pocatello, Idaho. Since the

appointment of new counsel, Holm has only been allowed sporadic contact with his attorney, Mr. Kumm, due to the distance between the defendant and his counsel.

ARGUMENT

The right of a criminal defendant to have effective representation is guaranteed by the 6th Amendment of the United States Constitution and Art. I, § 13 of the Idaho Constitution. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963); *Carter v. State*, 108 Idaho 788, 794(1985). “[I]n all criminal prosecutions, the accused shall enjoy the right... to have assistance of counsel for his defense.” U.S. Const. amend. VI; Art. I, § 13, Idaho Const.

“The Sixth Amendment constitutionally entitles one charged with a crime to the assistance of counsel. Compliance with the constitutional mandate is an essential jurisdictional pre-requisite to a federal court’s authority to deprive an accused of his life or liberty.” *Johnson v. Zerbest*, 304 U.S. at 458, 58 S.Ct. 1019. The court has given a “special value” to this right, “of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it effects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

Further, Justice Black has described the right to counsel as invested with “peculiar sacredness.” *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321 (1940). The court has held that the deprivation of the right to counsel is so inconsistent with the right to a fair trial that it can never be treated as harmless error. *Chapman v. California*, 368 U.S. 18, 87 S.Ct. 824 (1967) (*citing Gideon*, 327 U.S. 335, 83 S.Ct. 792). The right to counsel under the Sixth Amendment does more than just guarantee that an attorney will be physically present at all hearings, it declares that effectiveness of counsel hinges on the communication between a client and his attorney and

the lack thereof prevents an adequate defense. United States v. Rodgers, 796 F.2d 1418 (9th Cir. 1985).

In this case, if Holm is not transported to a correctional facility within a reasonable proximity of Pocatello, Idaho, he will be denied his Sixth Amendment right to effective counsel. The distance between Holm and his attorney at the present time impedes Holm from being able to have personal contact with his attorney. This lack of communication between Holm and his attorney hinders Holm's counsel from preparing an adequate defense.

In U.S. v. Parker- Tamaroma, the court recognized the importance of counsel having significant access to his client in preparing a defense.

Further, criminal defendants have the right to meaningful access to the courts, which is guaranteed by the 14th Amendment, of the U.S. Constitution and in Art. I, § 18 of the Idaho Constitution.

"A prisoner's right of access to the courts includes contact visitation with his counsel." Ching v. Lewis, 895 F.2d 608 (1990); *citing* Dreher v. Sielaff, 636 F.2d. 1141 (7th Cir. 1980).

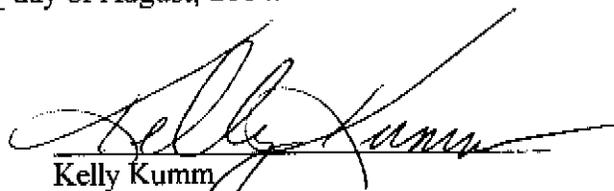
"It has been established beyond doubt that prisoners have a constitutional right of access to the court. This right has been recognized since 1941." Bounds v. Smith, 430 U.S. 817 (1977); *citing ex parte Hull*, 312 U.S. 546 (1941). Since Hull, courts have expanded this right to include contact visitation with counsel and other access to counsel and legal advice in order to prepare a defense. Ching, 895 F.2d. 608, Derher, 636 F.2d 1141.

In the case at bar, in order to protect Holm's constitutional right of access to the courts he must be given the opportunity of visitation with his counsel. The only reasonable way of protecting Holm's Fourteenth Amendment right of access to the courts is by transferring Holm to a correctional facility within the reasonable proximity of his counsel.

CONCLUSION

The court should order that the defendant be incarcerated in a correctional facility that has a reasonable proximity to the United States District Courthouse in Pocatello, Idaho. His current detention in the Ada County jail is not a reasonable proximity.

RESPECTFULLY submitted this 17th day of August, 2004.


Kelly Kumm
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of August, 2004, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO MODIFY CONDITIONS OF DETENTION** to be delivered to the party named below, as follows:

Jack B. Haycock
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- By U. S. Mail
- By Facsimile
- By Hand Delivery


Kelly Kumm