Recording Staged Communications

"[That gun] sure did put a hole right through him. I could hear it go through the car after it went through him."
Murder suspect bragging to informant.[1]

Undercover officers, police informants, crime victims, and others will frequently engage suspects in staged conversations pertaining to a crime under investigation. These conversations may take place over the phone or face-to-face, and they are almost always recorded by microphones or miniaturized video cameras. The objective, of course, is to obtain a recording of an incriminating statement that prosecutors can use in court.

Recently, the recording of electronic communications became a hot topic in California as the result of the state's new Electronic Communications Privacy Act (CalECPA) which went into effect on January first.[2] Because CalECPA restricts how officers can obtain copies of electronic communications such as emails, voicemails, and text messages, there is some uncertainty as to whether it or other state laws, or maybe the Fourth Amendment, might restrict the recording of these staged conversations. A related question is whether the law affects the recording of inmate phone calls in jails and prisons, and the secret recording of conversations between officers and barricaded suspects.

As we will discuss, CalECPA should not affect any of these operations. There is, however, another state law that might, so we will discuss it as well. (We will not discuss *Miranda* because, even if the suspect was in custody, it does not apply when the person asking questions was an undercover agent.[3])

Secretly Recording Telephone Conversations With Suspects

CalECPA: CalECPA does not restrict these operations because its stated objective is to restrict when and how officers can compel an electronics communications provider to disclose private communications or data pertaining to such communications. Thus, while CalECPA clearly restricts access to electronic communications and metadata possessed by, for example, email and voicemail providers, it does not purport to restrict the recording, or the subsequent access to recordings, by law enforcement.

Invasion of Privacy Act: In addition to CalECPA, California has a so-called Invasion of Privacy Act (IPA) which generally prohibits people from intercepting or recording any telephone call or face-to-face communication unless *all* parties to the conversation consented.[4] At first glance, this rule would seem to restrict staged undercover operations because it is impossible to obtain a suspect's consent to "secretly" record his incriminating conversations. Fortunately, the IPA contains a law enforcement exception which states that such recordings may be made without court authorization if (1) *one* of the parties to the conversation consented (e.g., the undercover officer or informant), and (2) the purpose of the recording was to obtain evidence pertaining to extortion, bribery, or any other violent felony, including kidnapping.[5] It also allows the recording of annoying phone calls.

Although this exception is restricted to certain crimes, this should not ordinarily pressent a problem because the list includes most crimes for which such a sensitive operation would be undertaken. For example, while the statute does not expressly state that it covers drug trafficking, it plainly does so because of the close connection between trafficking and violent felonies.[6]

The Fourth Amendment: The Fourth Amendment does not restrict these undercover operations because a person who makes an incriminating state-

[1] *People v. Phillips* (1985) 41 Cal.3d 29, 52, fn.5. Edited.
[2] Pen. Code § 1546 et seq.
[3] See *Illinois v. Perkins* (1990) 496 U.S. 292.
[4] See Pen. Code §§ 632(a), 632.5(a) and 632.7. Also see 18 U.S.C. §§ 2510 and 2511.
[5] Pen. Code § 633.5.
[6] See *People v. Glaser* (1995) 11 Cal.4th 354, 367. Also see *People v. Thurman* (1989) 209 Cal.App.3d 817, 822.

ment to another (except an attorney) cannot reasonably expect that the other person will honor his stated or implied promise to keep it private. As the Supreme Court observed, "[I]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence."[7]

For example, in *Lopez v. United States*[8] the defendant offered a bribe to an IRS agent who was investigating him for failing to pay income taxes. The agent took the bribe but immediately reported it to his superiors. Lopez and the agent had agreed to meet three days later at Lopez's office, so the IRS sent the agent to the meeting with a hidden recording device. During the meeting, Lopez made several incriminating statements that were used against him at trial. He appealed his conviction to the Supreme Court, arguing that the recording constituted an unlawful search under the Fourth Amendment because he reasonably expected that a conversation in his private office would be private. But the Court ruled that such an expectation would have been unreasonable under the circumstances because the recording device merely recorded a conversation to which "the Government's own agent was a participant" and which the agent was "fully entitled to disclose" to prosecutors and jurors.

Intercepting Face-To-Face Conversations with Suspects

Instead of engaging the suspect in a telephone conversation, officers may be able to arrange a face-to-face meeting between him and an undercover officer or police agent who is wearing a hidden recording device. Or, if the meeting occurs in a private place that is controlled by officers (e.g., a motel room), they may be able to hide the device in the room itself.

CALECPA: CalECPA does not apply because, as noted, it restricts only the acquisition of electronic communications recordings made by cell phone, email, and other providers.

INVASION OF PRIVACY ACT: The IPA does not restrict these operations because, as noted, there is a law enforcement exception which permits warrantless recording if one party to the conversation consents. There is, however, one twist: If the bugging device was preinstalled or otherwise hidden in a room, and if the undercover officer or police agent temporarily left the room, the recording of any incriminating conversations between the remaining suspects in the room will likely be suppressed. This is because the police agent would no longer be a "party" to the conversation and therefore none of the remaining parties would have consented to the recording.[9]

THE FOURTH AMENDMENT: The Fourth Amendment is not an obstacle to these types of operations because, as noted, a suspect cannot reasonably expect that the person he is speaking with is not recording the conversation. For example, in *U.S. v. Thompson* the Seventh Circuit recently ruled that such an operation did not violate the Fourth Amendment because, as the court explained, "[O]nce Thompson invited the informant into the apartment, he forfeited his privacy interest in those activities that were exposed to the informant."[10]

Also note that a face-to-face conversation may also be recorded by video devices because cameras record "nothing more than what the informant could see with his naked eye."[11]

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[7] *U.S. v. White* (1971) 401 U.S. 745, 752. Also see *People v. Phillips* (1985) 41 Cal.3d 29, 52.
[8] (1963) 373 U.S. 427.
[9] See *U.S. v. Nerber* (9th Cir. 2000) 222 F.3d 597, 604 ["once the informants left the room, defendants' expectation to be free from hidden video surveillance was objectively reasonable"]; *U.S. v. Lee* (3rd Cir. 2004) 359 F.3d 194, 202; *U.S. v. Laetividal-Gonzalez* (11th Cir. 1991) 939 F.2d 1455, 1462 ["Any conversations recorded when [the informant] was absent from the office would not have been admissible evidence"].
[10] (7th Cir. 2016) __ F.3d __ [2016 WL 384860].
[11] *U.S. v. Thomspon* (7th Cir. 2016) __ F.3d __ [2016 WL 384860]. Also see *U.S. v. Wahchumwah* (9th Cir. 2013) 710 F.3d 862, 866-68.

Intercepting Conversations in Jails and Prisons

Jails and prisons routinely monitor and record telephone conversations between inmates and people on the outside (except attorneys). They also routinely monitor conversations between inmates and their visitors. As we will now explain, such a practice does not violate any law.

CALECPA: Although jail and prison conversations are intercepted by means of electronic recording equipment, they are not regulated by CalECPA because, as noted, it applies only when investigators attempt to compel the disclosure of communications from an electronic communications provider.

INVASION OF PRIVACY ACT: The recording of inmate telephone and visitor conversations in jails and prisons does not violate the IPA because it expressly exempts communications that are not "confidential." And such communications are not confidential because jails and prisons routinely post notices that they may be recorded. As the court observed in *People v. Kelley*, "So long as a prisoner is given meaningful notice that his telephone calls over prison phones are subject to monitoring, his decision to engage in conversations over those phones constitutes implied consent."[12] In other words, in jails and prisons "the age-old truism still obtains: 'Walls have ears.'"[13]

It appears the IPA also exempts recordings that are made in police stations because the California Supreme Court ruled in *People v. Loyd* that "[t]here is no longer a distinction" between the reasonable privacy expectations of people who communicate in jails and those who communicate in police cars (and thus, presumably, police stations).[14]

THE FOURTH AMENDMENT: As just discussed, jail and prison inmates, and suspects who are questioned in police stations, cannot reasonably expect that their conversations will be private (except attorney client conversations). Thus, the interception of such conversation does not constitute a "search" under federal law and, therefore, a court order is not required. As the Ninth Circuit observed in *U.S. v. Van Poyck,* "Even if Van Poyck believed that his calls were private, no prisoner should reasonably expect privacy in his outbound telephone calls."[15]

Recording Barricaded Suspects

When officers respond to barricaded suspect calls—with or without hostages—they will often want to utilize an electronic listening device that intercepts and transmits any conversations that occur in the building; e.g., conversations between the suspect and his accomplices or captives. In some cases, the device will be a cell phone—commonly known as a "throw phone"—that is tossed inside to encourage and enable him to talk with officers.

Although the suspect may be unaware that these devices are recording his conversations (e.g., throw phones usually contain a bugging device that stays on even when the phone is turned off), for many years no one seriously suggested that these operations interfered with anyone's privacy rights. After all, when a barricaded suspect is threatening to kill himself or others, the exigent circumstances exception to the warrant requirement says that court authorization is not required if immediate action is reasonably necessary—and it usually is.

Technically, however, these operations might violate the IPA because, assuming the conversation is deemed "confidential," the IPA says that law enforcement officers may not intercept such a communication unless *all* parties to the communication consented.[16] Because it would be impractical to obtain a suspect's consent under these circumstances, officers would theoretically risk criminal prosecution unless they obtained a court order. And yet it appears that no officer has ever been prosecuted for committing such a "crime," and that no hostage has ever attempted to sue an officer for invading his privacy while trying to save his life. So this has never presented a problem in real life.

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[12] (2002) 103 CA4 853, 858.
[13] *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528. 535-36. Also see Pen. Code § 632(c).
[14] (2002) 27 Cal.4th 997.
[15] (9th Cir. 1996) 77 F.3d 285, 290-91.
[16] See Pen. Code § 632(a).

Unfortunately, however, we cannot end the discussion at this point because the Legislature decided in 2011 that this situation needed "fixing" so it enacted an exigent circumstances exception to the IPA which became Penal Code section 633.8. As explained in the statute, "It is the intent of the Legislature in enacting this section to provide law enforcement with the ability to use electronic amplifying or recording devices to eavesdrop on and record the otherwise confidential oral communications of individuals within a location when responding to an emergency situation that involves the taking of a hostage or the barricading of a location."

Although this "fixed" the non-problem, it created an actual one. Specifically, while writing the statute, the Legislature decided that it needed to add a section that would protect the "privacy rights" of barricaded suspects. So it devised an excessively complex and burdensome procedure that officers must follow *after* the emergency had been defused. Specifically, within 48 hours they must apply for an eavesdropping warrant that must comply with all the myriad and onerous requirements for a California *wiretap* order.[17]

Apart from the dubious wisdom of this requirement, the question arises how a judge can order officers to do something they have already done. They might also ask, What happens if the judge refuses to sign the order? The answer is apparently "nothing" because the statute states that evidence obtained in violation of its procedure cannot be suppressed.[18]

As for the cumbersome wiretap procedure, the Legislature apparently believed it was justified by the need to protect the privacy rights of barricaded suspects and hostage takers. But this seems to have been unnecessary because there is already an effective mechanism by which barricaded suspects (and anyone else) can challenge the admissibility of evidence that they claim was obtained by officers as the result of an unreasonable interference with their reasonable expectations of privacy: It is known as a Motion to Suppress.[19] POV

Pinging 911 Hangups

When a person phones 911 on a cell phone, but hangs up before the call can be completed, 911 operators can "ping" the caller's telephone and thereby learn the caller's current location. This may enable 911 operators to send help to the location or at least enable officers to locate the caller to determine whether there was, in fact, an emergency.

Although it is apparent that CalECPA was not intended to restrict this practice, the wording of the statute might technically be interpreted to mean that a warrant is necessary because CalECPA states that a warrant is required to obtain "electronic device information" which it defines as information that reveals the "current and prior locations of the device."[20]

However, such an interpretation would be illogical for three reasons. First, as discussed earlier, CalECPA applies only when officers are trying to compel a provider to furnish electronic communications. Second, CalECPA states that a warrant is not required if the 911 operator "in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information."[21] This would apparently include 911 hangups because many of these calls are from people who are unable to complete the call due to illness, injury, or an imminent threat. Third, CalECPA says a warrant is not required if "the intended recipient"—which would be the 911 operator—voluntarily disclosed the information to a law enforcement agency.[22] POV

[17] See Pen. Code § 633.8(e).
[18] See Pen. Code § 633.8(l).
[19] **NOTE**: The statute states that it is intended to protect only "confidential oral communications." Accordingly, if the barricaded suspect was holding a hostage, nothing he said would be "confidential" so it would be unnecessary to comply with the statute.
[20] See Pen. Code § 1546(g).
[21] Pen. Code § 1546.1(c)(5).
[22] Pen. Code § 1546.1(a)(3).