# Intercepting Prisoner Communications

*"Careful, they've got these phones bugged."*[1]

Jails and prisons monitor and record prisoners' telephone calls and visitor conversations. That's not a secret. Although the wires, microphones, and recording equipment are not visible, they are there—and the prisoners know it. As the Court of Appeal observed, "[I]n the jailhouse the age-old truism still obtains: 'Walls have ears.'"[2]

Moreover, thanks to digital recording technology, jails and prisons can now record, store, and quickly retrieve virtually everything that is said over inmate telephones and in visiting rooms. Here are just some of the interesting tidbits that officers—and jurors—have overheard:

- I'm in for murder. Get rid of the gun.
- We did it, but I didn't pull the trigger.
- Hit Signe.
- Jump the accountant when he's alone and if one of you has a gun, so much the better.[3]

The question arises: Why do prisoners say such things when they know they are or might be overheard? Well, some think that even though they had been warned, it's just a scare tactic to impede their criminal activities. There are also inmates who think they can outwit officers by speaking in code. An example of such cunning is found in *U.S. v. Willoughby* where a jail inmate figured that his plot to murder a prosecution witness would go undetected if he simply omitted the witness's name: "We need somebody to kill *the person*. Cornel will have his man do it but Cornel's man don't know what *the person* looks like."[4]

The practical value of acquiring gems such as these often depends on whether the recordings will be admissible in court. And this, in turn, depends on whether the officers complied with certain restrictions on prisoner surveillance that are imposed by federal and state law. What are those restrictions? We will discuss them at length in this article, but first there are eight basic rules that should be noted:

**ATTORNEY CONVERSATIONS**: Conversations between a prisoner and his attorney may *never* be monitored.[5]

**VISITORS PRIVACY RIGHTS**: If the monitoring of a conversation did not violate the prisoner's privacy rights, it did not violate the other party's privacy rights.[6]

**RECORDING VS. MONITORING CONVERSATIONS**: If it is lawful to monitor a prisoner's conversation, it is lawful to record it.[7]

**TIME-SERVERS VS. PRETRIAL DETAINEES**: In jails, it does not matter that the prisoner was a pretrial detainee, as opposed to a time-server or sentenced prisoner.[8] Although the U.S. Supreme Court has ruled that restrictions on pre-trial detainees must not be punitive in nature,[9] this limitation has no bearing on the interception of their communications because the objective is institutional security and public safety, not punishment.

**NO "LEAST INTRUSIVE MEANS" REQUIREMENT**: Jail and prison officials are not required to implement the least intrusive means of intercepting communications.[10]

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[1] *People v. Santos* (1972) 26 Cal.App.3d 397, 400.
[2] *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 536 [quoting from *Don Quixote* by Cervantes, (1615)].
[3] Examples from *People v. Santos* (1972) 26 Cal.App.3d 397, 400; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1191; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 531; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1004; *People v. Phillips* (1985) 41 Cal.3d 29, 82, fn.32. Some quotes paraphrased.
[4] (2nd Cir. 1988) 860 F.2d 15, 18. Paraphrased. Emphasis added.
[5] See *Lanza v. New York* (1962) 370 U.S. 139, 144; Pen. Code § 636.
[6] See *Thornburgh v. Abbott* (1989) 490 U.S. 101, 110, fn.9; *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 22.
[7] See *United States v. White* (1971) 401 U.S. 745, 751; *United States v. Caceres* (1979) 440 U.S. 741, 750.
[8] See *Bell v. Wolfish* (1979) 441 U.S. 520, 546; *People v. Davis* (2005) 36 Cal.4th 510, 527.
[9] *Bell v. Wolfish* (1979) 441 U.S. 520, 535.
[10] See *Turner v. Safley* (1987) 482 U.S. 78, 89; *Thornburgh v. Abbott* (1989) 490 U.S. 401, 411.

**RECORDING REQUESTED BY PROSECUTOR**: If the interception served a legitimate penological interest (discussed below), it is immaterial that it was conducted at the request of a prosecutor.[11]

**MIRANDA DOES NOT APPLY**: *Miranda* does not apply if the prisoner was speaking with a friend, relative, or an undercover officer. As the Supreme Court explained, "Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*."[12]

## Conversations In Police Facilities

Officers may monitor conversations between prisoners and others (except attorneys) that occur in police interview rooms, police cars, and other places in which the prisoner cannot reasonably expect privacy.[13] In other words, prisoners do not have greater expectation of privacy in police facilities than they do in jails and prisons. As the Court of Appeal observed in *O'Laskey v. Sortino,* "[A] person under arrest, in police custody in a patrol car, whose statements to his cohort are recorded has no reasonable expectation of privacy where it was unlikely he thought he was being placed in the police car for a sight-seeing tour of the city."[14]

## Conversations In Jails and Prisons

Under Federal and California law, the interception of inmate conversations by means of wiretapping or bugging is permitted if it was "reasonably related to a legitimate penological interest."[15] Said the Supreme Court, "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[16] The term "legitimate penological interest" is significant because it is so broad. It covers, to be sure, any monitoring for the purpose of gathering information about criminal activities inside the facility, such as plans to assault or murder inmates or correctional officers, plans to carry out gang activities, smuggle drugs or weapons, and directing criminal activities in other jails and prisons.

Legitimate penological interests also include the prevention of crime outside the facility and the apprehension of the perpetrators. The idea that taxpayer-financed jails and prisons have no legitimate interest in protecting people on the outside from the criminal activities of their inmates might have been fashionable in the '60's and '70's, but not today. Thus, the California Supreme Court, after reviewing the checkered history of the law pertaining to the privacy rights of inmates, determined that the term "legitimate penological interest" covers both the security of the facility and the investigation of crimes that occur both inside and outside the facility.[17] As the court explained, "California law now permits law enforcement officers to monitor and record unprivileged communications between inmates and their visitors to gather evidence of crime."

### Conversations With Visitors

Conversations between prisoners and visitors that occur in jails and prisons may be monitored without court authorization or consent because, in addition to the institutional security objectives, the parties to such conversations cannot reasonably expect that their communications will be private.[18] As the Fifth Circuit put it, "[O]ne who expects privacy under the circumstances of prison visiting is, if not acting foolish, exceptionally naive."[19]

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[11] See *People v. Loyd* (2002) 27 Cal.4th 997; *People v. Kelly* (2002) 103 Cal.App.4th 853, 859.
[12] *Illinois v. Perkins* (1990) 496 U.S. 292, 296. Also see *Arizona v. Mauro* (1987) 481 U.S. 520, 526.
[13] See *People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn.14; *People v. Davis* (2005) 36 Cal.4th 510.
[14] (1990) 224 Cal.App.3d 241, 248.
[15] See *Thornburgh v. Abbott* (1989) 490 U.S. 401, 409; Pen. Code § 2600.
[16] *Turner v. Safley* (1987) 482 U.S. 78, 89.
[17] *People v. Loyd* (2002) 27 Cal.4th 997, 1009. Also see *People v. Riel* (2000) 22 Cal.4th 1153, 1184.
[18] See *Lanza v. New York* (1962) 370 U.S. 139, 143; Pen. Code §§ 631(b)(3), 632(e)(3), 632.7(b)(3).
[19] *U.S. v. Harrelson* (5th Cir. 1985) 754 F.2d 1153, 1169.

It should be noted, however, that there are some older California cases in which the courts had ruled that warrantless monitoring of visitor conversations would violate California's privacy law if officers expressly (or sometimes even impliedly) informed the parties that their conversation would be private.[20] Because these rulings were based on the concept of reasonable privacy expectations in jails and prisons—instead of the current standard of "legitimate penological interests"—it is questionable whether they are still valid. We say this because it seems to us that if officers had a legitimate penological interest in monitoring a prisoner's conversation with a visitor, such monitoring should be lawful regardless of any privacy expectations—reasonable or unreasonable—that the parties might have harbored. But even if there is some validity to these earlier cases, officers can simply avoid this issue by not saying anything that would cause the parties to believe that their conversation would not be monitored.

### Telephone conversations

For the same penological reasons that jails and prisons may monitor inmate-visitor conversations, they may monitor telephone conversations with people on the outside. Although such monitoring constitutes "wiretapping" under federal and California law, a wiretap order is not required because virtually all such wiretapping falls within one or both of these exceptions to the wiretap law: (1) routine monitoring, or (2) consent.

**ROUTINE MONITORING**: The "routine monitoring" exception applies if all conversations are monitored or, presumably, if the monitoring was conducted at random, meaning it was not conducted in conjunction with a particular criminal investigation or because the prisoner was singled out.[21]

**CONSENT**: Most wiretapping is based on consent by one or both of the parties.[22] Although such consent is sometimes given expressly (e.g., inmate signed a consent form), most consent is implied when an inmate chooses to speak on the phone after having been given notice that his calls may be monitored. As the Court of Appeal explained, "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."[23] Or, in the words of the Second Circuit:

> In the prison setting, when the institution has advised inmates that their telephone calls will be monitored and has prominently posted a notice that their use of institutional telephones constitutes consent to this monitoring, the inmates' use of those telephones constitutes implied consent to the monitoring within the meaning of [the federal wiretap statute].[24]

The question, then, is what type of notice is sufficient? The most common method is to post signs notifying prisoners that their calls may be monitored or that their act of speaking on the phone constitutes implied consent to listen in.[25] As the Court of Appeal explained, "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."[26] For example, in *U.S. v. Amen* the court ruled that a federal convict impliedly consented to having his telephone calls monitored because each phone used by prisoners contained the following notice*: "The Bureau of*

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[20] See, for example, *De Lancie v. Superior Court* (1982) 31 Cal.3d 865; *People v. Hammons* (1991) 235 Cal.App.3d3 1710.
[21] See *Bunnell v. Superior Court* (1994) 21 Cal.App.4th 1811, 1821-22. Also see *People v. Windham* 145 Cal.App.4th 881.
[22] See *People v. Kelley* (2002) 103 Cal.App.4th 853, 858; *People v. Windham* (2006) 145 Cal.App.4th 881, 886.
[23] See *People v. Kelly* (2002) 103 Cal.App.4th 853, 858; *People v. Windham* 145 Cal.App.4th 881, 886
[24] *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 19-20.
[25] See *People v. Windham* (2006) 145 Cal.App.4th 881, 886 ["Every federal circuit court to address the issue has concluded that [the federal wiretap statute] is not violated when a jail or prison routinely monitors and records outgoing calls placed by inmates on the institution's telephones and the inmates are put on notice of the recording policy."]; *U.S. v. Mejia* (2nd Cir. 2011) 655 F.3d 126, 133 ["where an inmate is aware that his or her calls are being recorded, those calls are not protected by a privilege"]; *U.S. v. Workman* (2nd Cir. 1996) 80 F.3d 688, 693.
[26] *People v. Kelley* (2002) 103 Cal.App.4th 853, 858

*Prisons reserves authority to monitor conversations on this telephone. Your use of institutional telephones constitutes consent to this monitoring. A properly placed telephone call to an attorney is not monitored."*[27] Notice may also be given by means of a recorded message that is played automatically when a prisoner makes a telephone call.

Although such notice is sufficient, it sometimes happens that inmates will say something over the phone that further demonstrates their knowledge of the monitoring, and can be used as additional proof that the inmate consented to the monitoring. Here are some examples:

- I can't hardly talk on this phone, 'cause you know they got it screened.
- I didn't want to mention the name on the phone or nothin'.
- Don't think this conversation ain't being recorded.
- [They] got this phone tapped so I gotta be careful.[28]

Such knowledge may also be demonstrated if the parties to the conversation used code or spoke in a cryptic manner. For example, in *People v. Edelbacher* the court noted that an inmate who was instructing a visitor to kill a prosecution witness "used veiled allusions and awkward circumlocutions to refer to the intended murder and the manner in which he wanted it carried out."[29]

Note that while some courts have questioned whether an inmate's act of speaking on the phone after being given notice of monitoring constitutes consent or is mere acquiescence,[30] to our knowledge no court has seriously considered this idea.[31]

## Searching Abandoned Phones

Although California's Electronic Communications Privacy Act ordinarily requires a search warrant to search the contents of cell phones,[32] there is an exception that applies to jails and prisons. Specifically, Penal Code section 1546.1(c)(7) states that a warrant is not required "if the device is seized from an inmate's possession or found in an area of a correctional facility or a secure area of a local detention facility where inmates have access, and the device is not in the possession of an individual," and the device is not known or believed to be the possession of an authorized visitor."

## Reading Prisoner Mail

Inmate mail to or from anyone who is not an attorney may be opened and read because it serves a legitimate penological interest.[33] For example, the Supreme Court has pointed out that correctional institutions "have a legitimate interest in knowing whether inmates are sending encoded letters or letters concerning escape plans or criminal activity inside or outside the facility."[34] Accordingly, the Court of Appeal noted in *People v. Harris,* "Except where the communication is a confidential one addressed to an attorney, court or public official, a prisoner has no expectation of privacy with respect to letters posted by him."[35] Note, however, that mail *from* an attorney may be opened for the limited purpose of making sure it does not contain contraband.[36] But the correspondence may not be read and the prisoner must have been present when the envelope was opened and the contents were inspected.[37] POV

[27] (2nd Cir. 1987) 831 F.2d 373, 379.
[28] See *People v. Miranda* (1987) 44 Cal.3d 57, 84; *People v. Leonard* (2007) 40 Cal.4th 1370, 1403.
[29] (1989) 47 Cal.3d 983, 1004.
[30] See, for example, *U.S. v. Daniels* (7C 1990) 902 F.2d 1238, 1245 ["But knowledge and consent are not synonyms."].
[31] See, for example, *U.S. v. Footman* (1st Cir. 2000) 215 F.3d 145, 154-55; *U.S. v. Amen* (2nd Cir. 1987) 831 F.2d 373, 379.
[32] See Pen. Code § 1546.1.
[33] See *Thornburgh v. Abbott* (1989) 490 U.S. 101.
[34] See *Turner v. Safely* (1987) 482 U.S. 78, 91; *People v. McCaslin* (1986) 178 Cal.App.3d 1, 7.
[35] (2000) 83 Cal.App.4th 371, 374.
[36] See Pen. Code § 2600(b); 15 Cal. Admin. Code § 3144.
[37] See 15 Cal. Admin. Code § 3144; *Procunier v. Martinez* (1974) 416 U.S. 396, 413.