Intercepting Prisoner Communications

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

It is no secret that jails and prisons monitor and record prisoners' telephone calls and visitor conversations. Although the wires, microphones, and recorders 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.*
- *You watch enough TV to know what happens to snitches.*
- *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 might be overheard? There are several possibilities.

Some think that even though they have been warned that their conversations may be monitored, it's really just a scare tactic, an obvious attempt to impede their plotting and scheming. Besides, even if somebody listens in, he probably won't understand the significance of what they are saying.

There are also inmates who think they can outwit any eavesdroppers by speaking in code. An example of such cleverness is found in *U.S.* v. *Willoughby* where a jail inmate was certain 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 value of acquiring gems such as these depends on whether the recordings will be admissible in court. This, in turn, depends on whether officers complied with certain restrictions that are imposed on prisoner surveillance. What are those restrictions? That is the question we will examine in this article.

Before we begin, however, there are four things that should be noted.

ATTORNEY CONVERSATIONS: An prisoner's conversations with his attorney may *never* be monitored.[5]

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

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

TIME-SERVERS VS. PRE-TRIAL DETAINEES: It does not matter that the prisoner was a pre-trial detainee, as

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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 Cervantes, *Don Quixote* (1615)]. ALSO SEE *Lanza* v. *New York* (1962) 370 U.S. 139, 143 ["(I)t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."].

[3] See *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 531; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 18; *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. ALSO SEE *U.S.* v. *Daniels* (7th Cir. 1990) 902 F.2d 1238, 1245 ["(Daniels) thought that by the use of a simple code he could prevent the eavesdroppers from understanding what he was doing. He thought wrong."].

[5] See Penal Code § 636. **NOTE**: Inmates are aware of this restriction and sometimes attempt to exploit it. For example, in *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373 the defendants, who were selling heroin in prison, utilized a code in which a "lawyer" was code for "heroin seller" and "going to court" meant a "heroin transaction."

[6] See *Thornburgh* v. *Abbott* (1989) 490 U.S. 401, 410, fn.9 ["(A)ny attempt to forge separate standards for cases implicating the rights of outsiders is out of step with the intervening decisions in [our cases]." Citations omitted.]; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 22 ["(T)he interception of calls from inmates to noninmates does not violate the privacy rights of the noninmates."]; *U.S.* v. *Vasta* (S.D. New York 1986) 649 F.Supp. 974, 991 ["It is difficult to believe that the considerations that justify monitoring and recording of a prisoner's utterances could somehow not apply at the other end of the telephone line."].

[7] See *United States* v. *White* (1971) 401 U.S. 745, 751; *U.S.* v. *Cheely* (1992 D. Alaska) 814 F.Supp. 1430, 1441.

opposed to a time-server or sentenced prisoner. Although the U.S. Supreme Court has ruled that restrictions on pre-trial detainees must not be punitive in nature,[8] this limitation has no bearing on the interception of their communications because the objective is institutional security and public safety, not punishment.[9]

WHEN MONITORING IS PERMITTED

The "Legitimate Penological Interest" Test

In the past, jail and prison inmates in California had a legal right to speak privately with their friends and associates on the outside.[10] In fact, unless officers had a wiretap order, they could monitor a prisoner's conversation only if they could prove the monitoring was "necessary in order to provide for the reasonable security of the institution."[11] This meant that officers could not intercept a prisoner's conversation if their objective was to obtain evidence pertaining to a crime that occurred outside the facility.

In 2002, however, the California Supreme Court, in *People* v. *Loyd,* ruled that because of changes in California law, prisoners no longer enjoy a right to have private conversations.[12] Specifically, the court adopted the federal standard that monitoring is permitted whenever it is reasonably related to a *legitimate penological interest*.[13]

The term "legitimate penological interest" is important because it is so broad. It covers, to be sure, any monitoring for the purpose of gathering information about criminal activities inside the facility; e.g., plans to assault or murder inmates or guards; plans to carry out gang activities, smuggle drugs or weapons; directing criminal activities in other jails and prisons.[14]

Legitimate penological interests are not, however, limited to lawbreaking that occurs within an institution's walls. 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.

Accordingly, the *Loyd* court, after pointing out that jail and prison administrators have a legitimate interest in "ferreting out and solving crimes,"[15] announced that "California law now permits law enforcement officers to monitor and record unprivileged communications between inmates and their visitors *to gather evidence of crime*."[16]

Still, there are certain restrictions with which officers must comply. As we will explain, the nature of the restrictions depends on whether officers want to monitor visitor conversations that occur inside the facility, or telephone conversations with people on the outside.

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[8] See *Bell* v. *Wolfish* (1979) 441 U.S. 520, 535. ALSO SEE *People* v. *McCaslin* (1986) 178 Cal.App.3d 1, 6; *Laza* v. *Reish* (2nd Cir. 1996) 84 F.3d 578, 580 [pretrial detainee must prove "that his detention was punitive rather than administrative."].

[9] See *Bell* v. *Wolfish* (1979) 441 U.S. 520, 546; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 21; *U.S.* v. *Van Poyck* (9th Cir. 1996) 77 F.3d 285, 291, fn.10 ["The extent of curtailment [of privacy rights] for pretrial detainees is the same as for convicted inmates."]; *Block* v. *Rutherford* (1984) 468 U.S. 576, 583 ["(T)he ease with which [pre-trial detainees] can obtain release on bail or personal recognizance" tends to show that those who remain incarcerated pose a significant threat].

[10] See *De Lancie* v. *Superior Court* (1982) 31 Cal.3d 865, 870.

[11] See *De Lancie* v. *Superior Court* (1982) 31 Cal.3d 865, 870-1; *People* v. *Loyd* (2002) 27 Cal.4th 997, 1007.

[12] **NOTE**: The prohibition against monitoring was based primarily on *De Lancie* v. *Superior Court* (1982) 31 Cal.3d 865 in which a deeply divided California Supreme Court interpreted the so-called Prisoner's Bill of Rights (Penal Code § 2600) as expressing a legislative policy that jail and prison inmates had a right to privacy except to the extent that restrictions were necessary for the purpose of institutional security or the protection of the public. In *Loyd*, the court ruled that the legal authority upon which *De Lancie* was based had been stripped from it when, in 1994, the Legislature amended § 2600 to permit infringement on an inmate's privacy if the infringement was "reasonably related to legitimate penological interests." Consequently, *De Lancie* had been abrogated.

[13] See *People* v. *Loyd* (2002) 27 Cal.4th 997, 1008-9.

[14] See *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 699 ["The investigation and prevention of ongoing illegal inmate activity constitute legitimate penological objectives."]; *Procunier* v. *Martinez* (1974) 416 U.S. 396, 413; *Turner* v. *Safley* (1987) 482 U.S. 78, 91; *Thornburgh* v. *Abbott* (1989) 490 U.S. 401, 411-12.

[15] See *People* v. *Loyd* (2002) 27 Cal.4th 997, 1004.

[16] At p. 1009 [emphasis added]. ALSO SEE *People* v. *Von Villas* (1992) 11 Cal.App.4th 175, 216 ["Whether the taping was performed by LAPD or those in charge of jail security, the sheriff's department, in our view, has no bearing on the Fourth Amendment issues"]; *People* v. *Riel* (2000) 22 Cal.4th 1153, 1184 ["Defendant argues the purpose of the recording was to gather evidence, not to protect institutional security. Whether he is correct makes no difference."]; *Thompson* v. *Dept. of Corrections* (2001) 25 Cal.4th 117, 130.

CONVERSATIONS WITH VISITORS

Conversations between prisoners and visitors that occur in jails and prisons may ordinarily be monitored without court authorization or consent. This is because it would be unreasonable for the parties to expect privacy in such a setting.[17] As the court observed in *U.S.* v. *Harrelson*,[18] "It is unnecessary to consult the case law to conclude that one who expects privacy under the circumstances of prison visiting is, if not acting foolish, exceptionally naive."

It is, however, possible that officers might say or do something that gives rise to a reasonable expectation of privacy. As the Court of Appeal explained:

> [A]n expectation of privacy can arise under circumstances where the arrested person and a person with whom he was conversing were lulled into believing their conversation would be confidential.[19]

Whether "lulling" will result in the suppression of a statement depends on whether the representation of privacy was express or merely implied. Express lulling occurs if officers said or did something—intentionally or inadvertently—that carried the explicit message that the conversation would be private. This occurred, for instance, in *People* v. *Hammons* when an officer told two prisoners they could have a "private conversation between just the two of you" in an interview room.[20]

If a court finds that a representation of privacy was explicit, a subsequent statement will be suppressed. As the court in *Hammons* explained, "When the police make an express representation that a conversation will be private, they create a legitimate and reasonable expectation of privacy and the surreptitious monitoring and recording of that conversation is violative of the Fourth Amendment."[21]

On the other hand, if officers merely implied the conversation would be private, a monitored statement may be suppressed only if the conversation was privileged; e.g., conversation between spouses.[22] This occurred in *North* v. *Superior Court* in which the California Supreme Court ruled an officer's act of permitting a prisoner and his wife to speak alone in a private office with the door shut constituted an implied representation of privacy. Said the court, "The foregoing circumstances, coupled with the statutory presumption that a conversation between spouses is presumed to have been made in confidence, constituted a sufficient showing by petitioner to establish a reasonable expectation of privacy."[23]

In contrast, in *People* v. *Finchum*[24] a Los Angeles County sheriff's deputy put two burglary suspects in an interview room and asked if they thought they might be able to get their stories straight if he "left them together for ten or fifteen minutes." They assured him they would try, so he left them alone. Their attempt to agree on a story was recorded and resulted in the discovery of incriminating evidence. On appeal, the court ruled that even if the deputy's words constituted an implied representation of privacy, the monitoring was lawful because "the defendant and his companion did not occupy a privileged status."

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[17] See *People* v. *Santos* (1972) 26 Cal.App.3d 397, 402 ["(E)lectronic surveillance of a conversation between jail inmates and their visitors does not transgress the constitutional prohibition against unreasonable searches and seizures."]; *People* v. *Estrada* (1979) 93 Cal.App.3d 76 ["(I)t is well settled and understood that incarcerated persons have no reasonable expectation of privacy with respect to their conversations."]; *U.S.* v. *Paul* (6th Cir. 1980) 614 F.2d 115, 116 ["(S)o far as the Fourth Amendment is concerned, jail officials are free to intercept conversations between a prisoner and a visitor."]; *People* v. *Case* (1980) 105 Cal.App.3d 826, 835.

[18] (5th Cir. 1985) 754 F.2d 1153, 1169.

[19] *People* v. *Hammons* (1991) 235 Cal.App.3d 1710, 1715. ALSO SEE *North* v. *Superior Court* (1972) 8 Cal.3d 301, 311; *People* v. *Plyler* (1993) 18 Cal.App.4th 535, 541.

[20] (1991) 235 Cal.App.3d 1710.

[21] (1991) 235 Cal.App.3d 1710, 1716-7.

[22] See *Donaldson* v. *Superior Court* (1983) 35 Cal.3d 24, 32 ["Absent the privileged relationship from the *North* case, as we read that case, there would have been no reasonable expectation of privacy."].

[23] (1972) 8 Cal.3d 301, 312. ALSO SEE *Donaldson* v. *Superior Court* (1983) 35 Cal.3d 24, 31.

[24] (1973) 33 Cal.App.3d 787. ALSO SEE *In re Joseph A.* (1973) 30 Cal.App.3d 880, 885-6 [privacy merely implied when an officer granted a request by the defendant's uncle to see the defendant "by himself" in an interrogation room]; *People* v. *Von Villas* (1992) 11 Cal.App.4th 175, 222 ["The fact that the room was emptied of other visitors does not match the deliberate lulling attempts made by the officers in *North*."]; *Ahmad A.* v. *Superior Court* (1989) 215 Cal.App.3d 528, 534-5 [neither an express nor an implied representation of privacy merely because a minor and his mother were permitted to speak alone in a police interrogation room].

TELEPHONE CONVERSATIONS

While inmates cannot ordinarily expect privacy when they speak with visitors, they can never expect privacy when they speak on jail or prison phones with people on the outside.[25] Nevertheless, the monitoring of these calls is technically a "wiretap," which means it must be conducted in accordance with federal and state wiretap laws.[26]

As a practical matter, however, a wiretap order is seldom necessary because, as we will now explain, there are two exceptions to the wiretap laws that cover most calls by prisoners: (1) consent, and (2) routine monitoring.

Consent

Officers may intercept an inmate's phone calls if *either* of the parties to the conversation consented to the monitoring.[27] Although such consent is occasionally given expressly (as when an inmate signs an interception consent form) most consent is implied.[28]

Implied consent occurs when an inmate chooses to speak on the phone after having been given "meaningful" notice that his calls may be monitored.[29] As the court observed in *People* v. *Kelley*, "[E]very federal circuit court to address the question has concluded that a prisoner who, while on notice that his telephone conversation is subject to taping, proceeds with the conversation, has given implied consent to that taping."[30] 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].[31]

The question, then, is what type of notice is sufficient? Although many jails and prisons give two or more types (which is recommended), it appears that any one of the following will suffice.

WARNING SIGNS: The most common method of giving notice is to post warning signs on the telephones or on the walls of the phone rooms. For example, in *U.S.* v. *Amen*[32] 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:

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[25] See *People* v. *Riel* (2000) 22 Cal.4th 1153, 1184 ["(U)nder settled federal precedent, the secret monitoring and recording of unprivileged conversations in prisons, jails, and police stations did not constitute an unlawful search."]; *U.S.* v. *Van Poyck* (9th Cir. 1996) 77 F.3d 285, 290-1 ["Even if Van Poyck believed that his calls were private, no prisoner should reasonably expect privacy in his outbound telephone calls."]; *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373, 379 ["As the Supreme Court construes the Fourth Amendment, prison inmates have no reasonable expectation of privacy."]; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 694.

[26] See *U.S.* v. *Van Poyck* (9th Cir. 1996) 77 F.3d 285, 291; *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373, 378.

[27] See 18 USC §§ 2511(2)(c), 2511(2)(d); Penal Code § 633; *U.S.* v. *Van Poyck* (9th Cir. 1996) 77 F.3d 285, 292 ["When one party consents to a tape, Title III is not violated."]; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 19 ["The prohibition against interception does not apply when one of the parties to the communication has given prior consent to such interception."]; *U.S.* v. *Footman* (1st Cir. 2000) 215 F.3d 145, 154 ["It is settled law that only one party need consent to the interception of the calls."]; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 694 fn.3 ["Title III clearly specifies that only '*one* of the parties to the communication' must consent."]. **NOTE**: California's Invasion of Privacy Act (Penal Code § 630 *et seq*.) technically applies to the monitoring of inmate phone conversations. But the Act states that law enforcement officers are not required to obtain a wiretap order if an order was not required prior to 1967. No such requirement existed. See *People* v. *Carbonie* (1975) 48 Cal.App.3d 679, 685 ["(A)ppellant's interpretation of pre-1967 case law is incorrect. Law enforcement officers were not required to obtain the telephone company's consent when one of the parties to a conversation permitted the officers to record it."]; *People* v. *Elwood* (1988) 199 Cal.App.3d 1365, 1372.

[28] See *People* v. *Kelley* (2002) 103 Cal.App.4th 853, *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 19; *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373, 378. **NOTE**: An inmate's refusal to sign a consent form does not mean the monitoring is not consensual. See *U.S.* v. *Footman* (1st Cir. 2000) 215 F.3d 145, 154-5; *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373, 379.

[29] See *People* v. *Kelley* (2002) 103 Cal.App.4th 853, 858 ["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"]; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 20 [signs were "prominently posted"].

[30] (2002) 103 Cal.App.4th 853, 858. ALSO SEE *U.S.* v. *Footman* (1st Cir. 2000) 215 F.3d 145, 155; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 693 ["(W)e inferred consent from circumstances indicating that the prisoner used the telephone with awareness of the possible surveillance."].

[31] *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 19-20.

[32] (2nd Cir. 1987) 831 F.2d 373, 379. ALSO SEE *U.S.* v. *Footman* (1st Cir. 2000) 215 F.3d 145, 154 ["Large stickers on the phones remind inmates that their calls are being monitored."]; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 20.

The Bureau of Prisons reserves the 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.

Note that signs need not warn prisoners that their calls *will* be monitored. It is sufficient to say that they *may* or *might* be monitored, or that they are *subject to* monitoring.[33] Nor must the signs say that monitored calls may be recorded or that the recordings may be used against the prisoners in court. As the Fifth Circuit observed, "Mistaking the degree of intrusion of which probable eavesdroppers are capable is not at all the same thing as believing there are no eavesdroppers."[34]

ORIENTATION BRIEFINGS AND HANDOUTS: Notice is also commonly given during prisoner orientation and in inmate information sheets.[35] For example, the following notice is contained in the "Rules and Information" handout for prisoners in facilities operated by the Alameda County Sheriff's Department:

The Alameda County Sheriff's Department reserves the authority to monitor (this includes recording) conversations on any telephone located within its facilities for the purpose of preserving the security and orderly management of the facility, and to protect the public. An inmate's use of the telephone constitutes consent to this monitoring. Telephone calls to attorneys are not monitored.

RECORDED MESSAGES: Notice may also be given by means of a recorded message that is played automatically when a prisoner makes a call.[36] For example, prisoners in Alameda County jails hear the following message after they dial a number: *"At the tone state your name. Please wait while your call is being processed. This call may be monitored or recorded."*

In addition, the person who receives the call hears the following message when he picks up the phone:

This is a collect call from [name] at Santa Rita Jail. This call is subject to being monitored or recorded. If you do not wish to accept this call, please hang up now. To accept this call, press 0."

INMATE KNOWS OF MONITORING: It is not uncommon for one of the parties to say something during a conversation that reveals their awareness that the call might be monitored. 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.*
- *Careful, they've got these phones bugged.*
- *[They] got this phone tapped so I gotta be careful.*[37]

Inmates who are a little more cagey might use code or speak in a cryptic manner.[38] For example, in *People* v. *Edelbacher* the court noted that an inmate who was instructing a visitor to kill a prosecution witness

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[33] See *People* v. *Kelley* (2002) 103 Cal.App.4th 853, 859; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 693.

[34] *U.S.* v. *Harrelson* (5th Cir. 1985) 754 F.2d 1153, 1170. ALSO SEE *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 694 ["The prison need no more have provided notice that it would record the intercepted conversations than that it might maintain shorthand notes."].

[35] See *U.S.* v. *Amen* (2nd Cir. 1987) 831 F.2d 373, 379; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 693.

[36] See *People* v. *Kelley* (2002) 103 Cal.App.4th 853, 859 ["Meaningful notice includes . . . a recording warning that is heard by the inmate through the telephone receive, prior to his or her making the outbound telephone call."]; *U.S.* v. *Faulkner* (D. Kansas 2004) 323 F.Supp.2d 1111, 1117; *U.S.* v. *Footman* (1st Cir. 2000) 215 F.3d 145, 154 ["A third notice comes at the start of each call, when a pre-recorded message tells both parties to the call that 'all call detail and conversation, excluding approved attorney calls, will be recorded.'"].

[37] See *U.S.* v. *Faulkner* (D. Kansas 2004) 323 F.Supp.2d 1111, 1117; *U.S.* v. *Willoughby* (2nd Cir. 1988) 860 F.2d 15, 22; *U.S.* v. *Daniels* (7th Cir. 1990) 902 F.2d 1238, 1245; *People* v. *Miranda* (1987) 44 Cal.3d 57, 84; *People* v. *Santos* (1972) 26 Cal.App.3d 397, 400; *People* v. *Owens* (1980) 112 Cal.App.3d 441, 447. ALSO SEE *People* v. *Von Villas* (1992) 11 Cal.App.4th 175, 211 ["(Defendant's wife) confirmed her knowledge about the taping of their visits by writing 'Hello, IAD (Internal Affairs Division) on her visitor's pass"]. Some quotes paraphrased.

[38] See *People* v. *Estrada* (1979) 93 Cal.App.3d 76, 99 ["(Defendant) spoke to [his sister] in a manner which was not common between them, and therefore demonstrated that circumstances were such that others could easily overhear—which is a strong indication that the communication was not intended to be confidential."]; *U.S.* v. *Friedman* (2nd Cir. 2002) 300 F.3d 111, 123 ["Kenneth used cryptic language, evincing his understanding of the possibility that his calls would be monitored."]; *U.S.* v. *Rivera* (E.D. Virginia 2003) 292 F.Supp.2d 838, 844.

"used veiled allusions and awkward circumlocutions to refer to the intended murder and the manner in which he wanted it carried out."[39]

In any event, no matter how the parties reveal their awareness that their conversation may be monitored, their act of conversing despite this possibility will usually constitute implied consent.

Routine monitoring

Officers may also intercept an inmate's conversations if the monitoring was conducted "by an investigative or law enforcement officer in the ordinary course of his duties."[40] As a practical matter, this exception is seldom relied upon by investigators because the term "ordinary course" has been interpreted to mean the monitoring must have taken place as a matter of established routine—not in conjunction with a criminal investigation or otherwise because the prisoner was singled out.[41]

This exception would, however, apply if all prisoners' phone calls were recorded as a matter of policy.[42] Thus, the U.S. Court of Appeals upheld the interception of a prisoner's phone calls at the Metropolitan Detention Center in Los Angeles under the "ordinary course" exception because, said the court, "MDC is a law enforcement agency whose employees tape *all* outbound inmate telephone calls."[43]

READING PRISONER MAIL

The rules pertaining to the monitoring of inmate telephone conversations also apply to the reading of mail to or from people other than attorneys. Specifically, reading non-attorney mail is permitted if it furthers a legitimate penological purpose.[44] And, for the reasons discussed earlier, it is apparent that reading inmate mail serves this purpose.

For example, the United States Supreme Court has pointed out that correctional institutions have a legitimate interest in knowing whether inmates are sending encoded letters or correspondence concerning escape plans or criminal activity inside or outside the facility.[45] Accordingly, the Court of Appeal has noted, "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."[46]

For example, in *Turner* v. *Safley*[47] the United States Supreme Court, in upholding a restriction on inmate-to-inmate correspondence in Missouri, noted the following:

> Prison officials testified that mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts. Witnesses stated that the Missouri Division of Corrections had a growing problem with prison gangs, and that restricting communications among gang members . . . by restricting their correspondence, was an important element in combating the problem.

In another case, *People* v. *McCaslin,*[48] the court upheld the policy of the Contra Costa County Sheriff's Department that all correspondence between jail inmates be read. The court reasoned that the policy was reasonably necessary to discover threats against inmates, determine whether inmates had been given "snitch jackets," and to detect escape plans.

Note that mail from an attorney may be opened for the limited purpose of making sure it does not contain contraband, but the correspondence may not be read.[45] Furthermore, the inmate must be present when the mail is opened and inspected. Outgoing mail to an attorney may be inspected for cause only.[49] POV

[39] (1989) 47 Cal.3d 983, 1004

[40] See 18 USC § 2510(5)(a)(ii).

[41] See *Bunnell* v. *Superior Court* (1994) 21 Cal.App.4th 1811, 1821-2; *U.S. Van Poyck* (9th Cir. 1996) 77 F.3d 285, 292; *U.S.* v. *Feekes* (7th Cir. 1989) 879 F.2d 1562, 1566.

[42] See *Bunnell* v. *Superior Court* (1994) 21 Cal.App.4th 1811, 1823; *U.S.* v. *Feekes* (7th Cir. 1989) 879 F.2d 1562, 1566; *U.S.* v. *Paul* (6th Cir. 1980) 614 F.2d 115, 117; *U.S.* v. *Sababu* (7th Cir. 1989) 891 F.2d 1308, 1329.

[43] *U.S.* v. *Van Poyck* (9th Cir. 1996) 77 F.3d 285, 292. Emphasis added.

[44] See *Turner* v. *Safley* (1987) 482 U.S. 78, 89; *Thornburgh* v. *Abbott* (1989) 490 U.S. 401, 409; *People* v. *McCaslin* (1986) 178 Cal.App.3d 1, 7; *U.S.* v. *Workman* (2nd Cir. 1996) 80 F.3d 688, 699. ALSO SEE 15 Cal. Code of Regs. 3138.

[45] *Procunier* v. *Martinez* (1974) 416 U.S. 396, 413.

[46] *People* v. *Harris* (2000) 83 Cal.App.4th 371, 374 [quoting *People* v. *Garvey* (1979) 99 Cal.App.3d 320, 323].

[47] (1987) 482 U.S. 78, 91.

[48] (1986) 178 Cal.App.3d 1, 7.

[49] See 15 Cal. Admin. Code § 3144. ALSO SEE Penal Code § 2601(b); *People* v. *Poe* (1983) 145 Cal.App.3d 574, 577-8.