

ELECTRONIC SURVEILLANCE
IN
CUSTODIAL FACILITIES

California Edition

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FORWARD

This document is intended to provide an overview of the rules that govern electronic surveillance in California custodial facilities. The goal of the material is to assist investigators and prosecutors in their efforts to obtain and use relevant evidence. Opinions and conclusions expressed represent the view of the author. It is always best to consult with the attorney assigned to an investigation or to an agency to determine his/her view of the applicable law.

Last, it is important to emphasize that there is relatively little case law in this area. This is true of both federal and state case law. In many situations there will be little binding precedent on a critical issue.

I.

INTRODUCTION

Custodial electronic surveillance issues are shaped by the federal and state constitutions; federal, state, and local statutory and/or regulatory provisions; and state and federal judicial rulings. Each of these influences and its impact must be considered when adopting policies governing surveillance and using the results of surveillance as evidence.

There are essentially four types of electronic surveillance that can be employed to further legitimate penological interests such as facility security, detecting criminal activity in a facility, detecting criminal activity involving persons in a facility, and/or gathering evidence pertaining to persons incarcerated in a facility. These are: (1) monitoring and recording telephonic communications; (2) use of eavesdropping devices; (3) videotaping of activities (either covert or overt) and (4) use of tracking devices.

Each surveillance technique may have applicability to inmates (both persons arrested and persons convicted), inmate visitors, sworn and unsworn staff of a facility and persons outside a facility who receive telephonic communications from persons inside a facility.

The legal rules which govern each type of surveillance vary depending on the type of surveillance and the persons involved. The single universal aspect is that all of the rules grow out of the concept of privacy.

II. PRIVACY

For many years the state and federal rule was that there was no expectation of privacy in a correctional facility. (See *Lanza v. New York* (1962) 370 U.S. 139; *People v. David* (2005) 36 Cal.4th. 510, 525-527; *People v. Von Villas* (1992) 11 Cal.App.4th 175, 213; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1193.) This rule was consistent with the broad rule that an expectation of privacy was judged by the nature of the place in which the person was located. This concept that privacy was limited to “protected areas” was rejected as the general rule in *Katz v. United States* (1967) 389 U.S. 347.

Katz established the new rule that privacy was a personal right attached to the individual regardless whether he/she was in a “protected area.”¹ *Katz* did not create privacy rights but did, insofar as electronic surveillance through use of an eavesdropping device (“bug”) is concerned, focus the inquiry that must be made on the following:

- (1) does the person asserting the violation of privacy have a subjective expectation of privacy;
- (2) is this subjective expectation one which society is prepared to recognize as objectively reasonable; and
- (3) is the person asserting the violation asserting that a personal privacy interest was affected.

(See *People v. Henderson* (1990) 220 Cal.App.3d 1632,1643-1644.)

¹*Katz* involved the use of a “spike mike” in a public telephone booth as part of a bookmaking investigation. No search warrant had been obtained.

Fortunately one exception to *Katz* was the retention of the *Lanza* rule that there was no privacy in a correctional facility. (See *Von Villas, supra.*²; *Ahmad A. v. Superior Court* (1989) 215 Cal.App.3d 528, 533-536; *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1479.) Thus, for many years following the *Katz* decision California cases dealing with electronic surveillance in correctional facilities reached similar results to those decided under federal law unless the interpretation of a state statute was involved. (See e.g. *People v. Hill* (1974) 12 Cal.3d 731; see also *People v. Chavez* (1996) 44 Cal.App.4th 1144, 1158 fn. 7.)

However, for a period of time, California courts, most significantly the California Supreme Court began to rely on California's state constitutional privacy provision to determine matters on "independent state grounds." In the area of custodial electronic surveillance, this approach resulted in the interpretation of state statutes (former Pen. Code §§ 2600-2601) as creating significant privacy rights for persons in custodial settings.(See *DeLancie v. Superior Court* (1982)31Cal.3d 865.) The reaction to this judicial use of "independent state constitutional grounds" to create more restrictive rules regarding what might be used as evidence in California courts was the passage of an amendment to the state constitution. This "truth in evidence" provision (Calif. Const., art I, § 28(d)) mandated that California's courts could no longer preclude the introduction of evidence which was admissible under federal constitutional standards. Specifically, the section provides, in pertinent part:

"Except as provided by statute hereinafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence should not be excluded in any criminal proceeding including pretrial and post-conviction motions and hearings. . . . (Calif. Const., *supra.*)

²As *Von Villas* pointed out, the "*Lanza* rule" was actually dictum (at 213).

Elimination of use of the state constitution to establish different evidentiary rules by the judiciary did not restrict the right of the state legislature to adopt statutory standards that granted greater privacy protections than federal statutes dealing with electronic surveillance. (See *Chavez, supra*, at pp.1158-1159; *People v. Plyler* (1993) 18 Cal.App.4th 535, 544; *U.S. v. Marion* (1976) 535 F.2d 697, 701-702; *U.S. v. Charles* (1st.Cir. 2000) 213 F3d 10,20-21;*People v. Davis* (2005) 36 Cal.4th 510,526-527; *Bunnell v. Superior Court* (1994) 21 Cal.App.4th 1811, 1818-1819.) Put another way, the federal standards, whether established by statute or by a United States Supreme Court ruling (lower federal court rulings may be persuasive, but are not binding; *Henderson, supra.*, at p. 1641, fn. 3), establish the minimum level of protection which the state laws must provide but do not prevent the states from adopting laws that provide greater levels of protection. (*People v. Jackson* (2005) 127 Cal.App.4th 129,146-147; *U.S. v. Capra* (2nd Cir. 1974) 501 F.2d 267, 276; *Marion, supra*; *U.S. v. McKinnon* (1st Cir. 1983) 721 F.2d 19, 21; *People v. Otto* (1992) 2 Cal.4th.1088, 1092 fn. 2.)

The California Legislature has taken two significant steps bearing on electronic surveillance in custodial settings that conform to the "super majority" necessary to enact more stringent rules than would apply under federal constitutional standards.

First, in 1990, the Legislature re-enacted the California Invasion of Privacy law (Pen. Code§630,et.seq) by the necessary two-thirds majority in each house of the state legislature. (See *People v. Chavez, supra*. at p.1157, fn. 6.) Insofar as custodial facilities are concerned, the impact of this legislative action was to restore the more stringent two-party consent rule of Penal Code sections 631 and 632. (See and compare *People v. Ratekin* (1989) 212 Cal.App.3d 1165,1168-1169 and *Jackson, supra*. at 152-153.)

Second, when the Legislature did finally authorize an exception to the Invasion of Privacy law permitting wiretapping only (see Pen.Code 629.50, et seq.; see also *Zepeda,*

supra, at 1195 and *Quon v. Arch Wireless Operating Co., Inc.* (C.D. Ca 2004) 309 F.Supp. 2d. 1204,1208) , it limited the offenses for which authorization could be sought more than the federal limits. (Compare Pen.Code, §629.52 and Title 18 U.S.C., §2511.)

Most important, however, is the fact that these legislative actions either restored (*Chavez*) or imposed (*Jackson, supra*) a suppression remedy regardless whether federal law would have required suppression. This means that evidence obtained in violation of Penal Code sections 630 et seq., (*Chavez, supra*) or Penal Code sections 629.50 et. seq. (*Jackson, supra; People v. Alvarez* (2002) 27 Cal.4th 1161, 1165) *may not* be introduced under the Truth-In-Evidence provision. (*Jackson, supra*)

Another significant aspect is the distinction between "eavesdropping" and "wiretapping". (See *U.S. v. Salemme* (D. Mass. 1999) 91 F.Supp.2d 141, 385; *Ratekin supra.*, at p. 1168; *People v. Suttle* (1979) 90 Cal.App.3d 572, 578-579; *People v. Sirapongs* (1988) 45 Cal. 3d 548, 564.)³ The federal cases that have addressed the use of electronic devices to "eavesdrop" (California addresses such surveillance under Pen. Code, § 632) have done so by applying the *Katz* analysis. (See e.g., *U.S. v. McIntyre* (9th Cir. 1978) 582 F.2d 1221, 1223; *Matter of John Doe Trader Number One* (7th Cir. 1990) 894 F.2d 240, 242-243)⁴ California has adopted this approach in "bugging" situations. (See *Williamson v. National Broadcasting Co.* (1994) 71 Cal.App.4th 1066,1078-1780; *Sanders v. American Broadcasting Company* (1999) 20 Cal.4th 907, 914-917.) In these cases, both state and

³*Sirapongs supra.*and the federal review of the same case (see *Sirapongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1320) both stand for the rule that speaking a foreign language will not create a legally cognizable expectation of privacy.

⁴It is important to reemphasize that *Katz* did not involve a connection to or "tap" of the telephone line, thus it was an eavesdropping case. In *Katz* the telephone call was made from a "glassed-in" telephone which enabled the law enforcement personnel to see the call being made; however it could not be overheard without the use of a "bug". The United States argued that because the caller was in a public place he had no expectation of privacy. The court concluded that the fact that something could be seen did not mean that any means could be used to overhear what the person seen was saying. This distinction will be meaningful in the area of videotaping.

federal, the legal analysis focuses on the expectation of the person(s) and the reasonableness of those expectations.

When there is an actual connection or “tap” (California addresses such surveillance under Pen. Code, § 631) privacy is presumed and an exception must be established. (*Chavez, supra*, at 1150; *PBA Local No. 38 v. Woodbridge Police Department* (D. N.J. 1993) 832 F.Supp,808, 818-819.) There is no *Katz* analysis instead the issues are whether the statute applies and whether the facts at issue are within an exception provided by the statute. In this connection there is a significant difference between state and federal law. Under federal law there are two separate exemptions: (1) consent and (2) the ordinary course of duties. (See *Amati v. City of Woodstock* (7th Cir. 1999) 176 F.3d 952, 955.)

California’s statute is more stringent in the author’s opinion because it offers only consent as an exception. (See sections 631(a) and 632(a).) Penal Code sections 630 and 633 incorporate California’s so-called “law enforcement exception.” *Bunnell, supra*. is instructive on the question whether section 633 may be treated as an analog of the federal ordinary course of duties/law enforcement exception.

After pointing out that federal law contained “no specific exception for wiretapping at a prison,” *Bunnell* concluded that ordinary course of duties is not synonymous with a law enforcement purpose (at p. 1820-1823). However, as *Bunnell* pointed out, the federal ordinary course of duties exception will be satisfied when there is routine monitoring of institution telephones. (See also *U.S. v. Lewis* (1st Cir. 2005) 406 F.3d 11, 18-19) *Bunnell* concluded:

“... a law enforcement purpose is not in and of itself sufficient to meet the law enforcement exception; at a minimum, the *wiretap use* must also be within the ordinary purpose of the officer’s duties. In the context of this case, the law enforcement exception applies only if the wiretap activity was routine monitoring of inmate calls. (at 1823).⁵

⁵Penal Code section 633 further limits the “exception” to those things which could

Although the *Lanza* rule operates to preclude any expectation of privacy as to inmate communications within a custodial facility, it does not extend to communications which involve persons outside a facility. (See *U.S. v. Hammond* (4th Cir, 2002) 286 F.3d 189, 192-193.) Thus, proper analysis of custodial surveillance issues will have as its threshold inquiry whatever the communication occurred solely within the custodial facility or whether it occurred between persons inside and outside of a custodial facility.

Next will be the question whether there is an applicable constitutional or statutory federal standard and whether that standard has been met. (See e.g., *People v. Otto* (1992) 2 Cal.4th 1088, 1098-1099 and 1107-1109) If the federal standard is satisfied, one then turns to the question whether there is an applicable state standard, statutory or regulatory, to be met. And, finally, if the state standard has been satisfied, is there any local standard—city, county, or city and county—which must be considered.

This document does not address the city, county, or city and county rules. These standards should be explored by consultation with the appropriate city attorney or county counsel.

lawfully be done before the 1967 enactment of sections 630 et seq. *Berger v. New York* (1966) 388 U.S. 41, 48 fn. 5 noted that prior to 1967 California did not authorize routine “tapping” of telephone calls. However, in the recent case of *People v. Windham* (2006) 145 Cal.App. 4th 881, 892-893, the appellate court which decided that case concluded that pre-1967 California law did authorize “tapping” under section 633 when one party to the conversation consented to law enforcement officers monitoring the conversation.. *Windham* is discussed in detail at pages 19-20 *infra*.¹

III. TELEPHONIC COMMUNICATIONS

A. The Federal Rules

These are the type of communications to which the term “wiretap” is traditionally applied (*Berger v. New York* (1966) 388 U.S. 41, 46-49, including fns.1-5) The reported cases construing the federal wiretap statute focus on calls which allow communication outside the institution.

Insofar as staff telephones are concerned, the focus of the federal cases is the staff’s knowledge—either actual or implied—of the practice at the particular facility. Visitors’ use of a particular telephone while on the premises will dictate the privacy expectations to which they will be entitled.

1. Inmate Calls

The initial point to be made is that a prisoner has no *per se* federal constitutional right to use the telephone. (*U.S. v. Footman* (1st Cir. 2000) 215 F.3d 145, 155)

This rule does not, of course, preclude a prisoner from using a telephone to communicate privately with his/her legal counsel.

As to all telephonic communications other than those with a legal representative, the federal rule is that *routine monitoring* of calls to persons outside the custodial facility can legally be conducted without judicial approval. (*U.S. v. VanPoyck* (9th Cir.1996) 77 F.3d 285, 291) The legal bases for such routine monitoring are two under federal law: (1) notice and consent; and/or (2) monitoring in the ordinary course of the duties

of the monitoring agency staff. Most cases are decided on the basis of notice and consent.

a) The Notice And Consent Exception

Fundamental to finding consent in the federal context is an analysis of the notice given to the inmate.⁶ Notice can take several forms according to federal case law.⁷ The safest approach is to incorporate notice in any orientation materials given to inmates, post notice at the telephone location and have a “brand” (recording) that advises the inmate his/her call is being monitored and recorded. (*VanPoyck, supra*, at pp. 291-292; *U.S. v. Horr* (9th Cir. 1991) 963 F.2d 1124, 1126; *U.S. v. Avon* (2nd Cir. 1987) 831 F.2d 373, 378; *Lewis, supra*; cf. *U.S. v. Morin* (8th Cir. 2006) 437 F.3d 777, 780-781.)

Under federal law, only one party to a telephonic conversation must consent to monitoring and recording. (Title 18 U.S.C. § 2511(c) and (d); *VanPoyck, supra*; *Lewis, supra*) Because an inmate makes the call after notice of the monitoring, he/she is deemed to have *impliedly* consented. The party receiving the call may or may not receive notice of monitoring/recording without the consent being affected. (see *U.S. v. Willoughby* (2nd Cir. 1988) 860 F.2d 15, 21-22; *U.S. v. Faulkner* (10th Cir. 2006) 439 F.3d 1221, 1223-1225.) Even if consent of the recipient was an issue in the federal context, it is likely that the federal courts would find that acceptance of the call was consent. (see *U.S. v. Roy* (D. Mass. 2003) 349 F.Supp.2d 60, 63; *Willoughby, supra*.)

⁶In the event that there is neither notice nor routine taping of inmate calls, consent will not be available as a theory of admissibility. (*U.S. v. Shyrook* (9th Cir 2003) 342 F.3d 948.)

⁷One extreme is the theory of *U.S. v. Sababu* (7th Cir.1989) 591 F.2d 1308, 1329-1330 that publication of notice of monitoring and recording in the Code of Federal Regulations was sufficient notice to inmates and call recipients.

b) The Course Of Duties Exception

Under Title 18 U.S.C. § 2510(a)(ii), monitoring/recording undertaken as part of the ordinary duties of federal custodial officers is exempt from judicial approval (*Lewis, supra*, at 16.) *Lewis, supra*, also pointed out that routine monitoring/recording of inmate calls is within the ordinary duties of federal correctional officials. By contrast private custodial employees are not considered to be law enforcement officers (*Lewis, supra*.) When private custodial facilities are involved the focus will be on notice and the monitoring/recording can only be sustained on an implied consent theory if that notice is sufficient. (*Faulkner, supra*, at 1223-1224)

2. Staff Calls

Obviously, staff use of posted, “branded” telephones provided for inmate use would be subject to monitoring/recording on the single-party consent theory. If staff were to use staff telephones, the issue would be the policy at that particular facility, notice of that policy, and knowledge of the policy by the staff member. (See, e.g., *P.B.A. Local No. 38, supra*, 817; *Zaffuto v. City of Hammond*, (5th Cir. 2002) 308 F.3d 485, 489; *Adams v. City of Battle Creek*, (6th Cir. 2001) 250 F.3d 980, 984; *U.S. v. Friedman*, (2nd Cir. 2002) 300 F.3d 111, 123.)

Surveillance of a staff member’s telephone for purposes of a disciplinary investigation would likely be found to be within the scope of duties exception.

3. Visitor Calls

If a visitor was to use an inmate telephone in a situation where there was posted notice and a “brand”, he/she would be considered to have consented to the recording/monitoring. Any use of a staff telephone would not be consent because knowledge of the practice known to staff would not be imputed to the visitor. And, it is not part of the ordinary course of duty to monitor calls placed by non-inmates.

B. The California Rules

California limits inmate telephone usage by regulation (See Appendix 1: California Code of Regulations - C.C.R. - Title 15 §§ 3018 and 3282.) There are, according to the Department of Corrections regulations, three types of telephones at a facility. (See Appendix 1, California Code of Regulations⁸ hereinafter C.C.R.) Tit. 15, §§ 3018 and 3282(a) (3-5).) These are: intrafacility telephones, inmate telephones and prison telephones. In addition to “regular calls,” the regulation identifies two other types of calls: (1) “emergency calls” (§ 3282 (a)(1)) and (2) “confidential calls” (§ 3282(a)(2)). These calls will be discussed in context, *infra*. Each presents unique issues.

A separate regulatory provision, C.C.R. Title 15, section 4699 (Appendix 2), governs telephone use at California Youth Authority facilities. This section does not make the same distinctions by type of telephones as do the regulations pertaining to adult facility telephones, the C.Y.A. system will be discussed separately, *infra*.

⁸The regulations of adult facilities at the state and local levels are promulgated by the Corrections Standards Authority. (See Pen.Code §6030 (Appendix 5) for the authority to establish minimum standards) Juvenile facility standards are promulgated by the Board of Corrections. (See. Welfare & Inst. Code § 210 (Appendix 6)

1. “Intrafacility” Telephones

The regulation defines such telephones as those which are not capable of direct dial connections with telephones outside of the facility. (C.C.R., Tit. 15, §3282(a)(4).) An example would be visitor telephones which are often described as “intercom” systems.

Neither California’s statutory prohibitions against wiretap (Pen. Code, § 631(b)) nor eavesdropping (Pen. Code, § 632(e)) apply to such telephone systems (this would also be true if the intrafacility system was a cellular (Pen. Code, § 632.6(b)(3)) or cordless (Pen. Code, § 632.7(b)(3)) system unless a person covered by Penal Code section 636 is the visitor.⁹ C.C.R. Title 15, section 3282(e) allows monitoring of intrafacility telephones.

Any other type of intrafacility telephone is open to inmate use only with staff authorization (C.C.R. Title 15, § 3282(c)(1)) and is subject to monitoring and recording (C.C.R. Title 15, § 3282(e)).

Any evidence gathered by monitoring and recording intrafacility telephones should be admissible against both the visitor and the inmate provided the visitor is aware by posted signs or otherwise of the monitoring and non-confidential nature of the communication.¹⁰ (Cf. *Estes v. Rowland* (1993) 14 Cal.App.4th 518-519, 523)

⁹Even though Penal Code section 631(b)(3) and 632(e)(3) exempt intrafacility systems from wiretap and eavesdrop, Penal Code section 636 imposes separate prohibitions which in the author’s opinion are subject to the suppression provisions of sections 631(c) and 632(d). Penal Code section 636 prohibits eavesdropping on or recording conversations between persons in custody or on public property and that person’s attorney, religious advisor or licensed physician. Further, even though CCR Title 15, section 3282(g) implies that an “emergency call” could be monitored if the other person involved in the communication is one of those persons mentioned in 3282(g)(3), the Penal Code section 636 limits should be applied and no monitoring or recording should occur if the other person is one of those named in section 636.

¹⁰A failure to provide this sort of notice will lead to an argument that the visitor was “lulled” into a belief the conversation was confidential. (See *North v. Superior Court* (1972) 8 Cal.3d 301 and *People v. Suttle, supra*, at pp. 579-580; compare *Ahmad A., supra*, at pp. 535-536, fn. 5.) Note that the marital communication privilege will not apply. (*North, supra*; *United States v. Madoch* (7th Cir. 1998) 149 F.3d 596, 602)

Indeed, at least one federal case has held that the publication of information about the monitoring and recording of calls in the Code of Federal Regulations was sufficient to give notice to third party non-prisoners. (*Sababu, supra*) The author is of the opinion that this notice theory alone would be a tenuous basis for asserting consent in a state court; however, a posted notice and/or a document presented to and signed by the visitor will be an adequate consent to monitoring of an intrafacility system. (See *Estes, supra* at pp. 521, 522; cf. *United States v. Paul* (6th Cir. 1980) 614 F.2d 115, 116-117)¹¹ Notice will be critical: “The key question in such an inquiry obviously is whether the parties were given sufficient notice.” (*United States v. Lanoue* (1st Cir. 1995) 71 F.3d 966, 981)

In addition to visitors and inmates, facility staff may also use “intrafacility” telephones. While staff has greater expectations of privacy than inmates, they have reduced expectations in comparison to expectations they would enjoy outside the facility. (see *Sacramento County Deputy Sheriff’s Assn., supra*, at p. 1478; *McDonnell v. Hunter* (8th Cir. 1987) 809 F.2d 1302, 1306.) Thus, the issue becomes whether staff has any greater expectation of privacy in communications over an intrafacility telephone system used by inmates. The *McIntyre, supra*, case expressed the concept in the terms that: “Police officers retain their right to privacy subject to an 'established regulatory scheme or specific office practice.”(*Id.*, at p. 1224)¹² Title 15, section 3282(e) could, arguably be a basis for asserting

¹¹*Estes* was a case in which the issue was whether the posting was sufficient to give notice of the nature of the search to which the consent was to be implied (551-552). Although California Code of Regulations, Title 15, section 3170(b) (see Appendix 3) does mention privacy for prison visitors the limitations on this "right" are such that monitoring of posted intrafacility telephones will not be problematic.

¹²The ruling in *McIntyre*, an eavesdropping case, is the result of the fact that there was no court order as required by Title III. Regardless, the fact that intrafacility telephones are exempt from Title III and Penal Code section 631-632 coverage, it will be necessary to demonstrate that the officer knew it was an intrafacility telephone and was on notice that the specific telephones are monitored.

that a staff member who uses an intrafacility system used by inmates would have at least a subjective expectation of privacy. It is the author's opinion that a court faced with such an assertion would find there was no *objectively reasonable* expectation of privacy (see *Sacramento County Deputy Sheriffs Assn.*, *supra*, at pp. 1477-1478; *McDonell*, *supra*) and would permit use of the monitored and recorded conversations as evidence

If the system is truly an intrafacility system used only by staff, and the chief executive officer directs, (which likely requires at least a particularized reasonable suspicion) there may be monitoring and recording. (See *People v. Canard* (1967) 257 Cal.App.2d 444, 463-464; *McDonell*, *supra*.; compare *Bunnell v. Superior Court*, *supra* [where a different result was reached because the system *was not* limited to intrafacility communications].) As in the case of inmates, neither Penal Code section 631 or 632 will apply because intrafacility systems are exempt and federal law will not apply because no common carrier is involved. (See *Von Villas*, *supra*, at pp. 224-225) The evidence gathered would be admissible as to all parties to the communications.

If one wished to be very cautious and there was a sufficient basis (probable cause) a search warrant could be obtained for a true intrafacility system. (See *VonVillas*, *supra*, at p. 216) This is possible because such systems are exempt from both state and federal statutes regulating interception of electronic communications. Obviously a suppression remedy could be pursued under Penal Code section 1538.5. The only potential problem with obtaining a search warrant is to be certain that the basis for requesting the warrant is going to be viewed as "reasonably related to legitimate penological interests." (*People v. Harris* (2000) 83 Cal.App.4th 371, 373)¹³ Or, in the alternative, is authorized by an

¹³*Harris* was a mail intercept case. The important fact for this discussion is that the intercept was carried out because of an outside law enforcement agency request. The other factual aspect is that *Harris* involved narcotics smuggling which permitted the court to rely on *Estes* as authority for the fact that such smuggling is a grave penological problem. (*Id.*, at p. 376). See also *United States v. Workman* (2d Cir. 1996) 80 F.3d 688, which allowed use of calls

officer who has Penal Code section 633 standing. (See *Harris, supra; Bunnell, supra.*, at 1824-1825.)

2. “Inmate” Telephones

Such telephones are described by C.C.R. Title 15, section 3282(a)(3) as telephones designated to accommodate inmate-originated, non-confidential, collect personal calls. Subsections 3282 (b) and (c) make it clear these are collect calls upon which numerous limitations are placed.

According to the C.C.R., calls placed on “inmate” telephones “may be subject to monitoring and recording.” (C.C.R., Tit. 15, § 3282(e)) Inmates are alerted to this fact not only through their orientation materials but also by posted notices (C.C.R. Title 15, § 3282(f)) or, if other than an inmate telephone is used, oral notice by facility staff. (C.C.R., Tit. 15, § 3282(f)) The author understands that notice of this practice is included in the Rules and Regulations provided to all inmates (see, C.C.R., Tit. 15, § 3002 (a).) Under the authority of C.C.R. Title 15, section 3282(i), inmates are advised by a “brand” which is built into the automatic recording system that the call and all relevant data will be recorded. Third parties who receive these collect calls from inmates are notified by an initial announcement “brand” before they accept the call and at random intervals during the call. (C.C.R., Tit. 15, 3282(i).)¹⁴

to an outside party which were taped as evidence in a drug conspiracy run from the prison.

¹⁴This announcement (or “brand”) should be the same at all institutions. A prosecutor or investigator should ascertain whether and what announcement is given before listening to any recordings which have been made.

The first setup (“brand”) which both the inmate and the recipient should hear will say: “This is the MCI/GTE operator. I have a collect call from (name) an inmate at a California State Correction Facility. This call and your telephone number will be recorded. To deny charges, hang up now. To accept charges, press 5 now.”

The second random (“brand”) which both parties should hear will say: “This recorded call is from an inmate at a California State Correction Facility.”

The fact is that all inmate calls made over inmate telephones are routinely recorded. This system, then, simultaneously collects two types of data with respect to the calls placed. First, it collects information about the number called, the day of the call, the time of day and the duration of the call (pen register or “detail” information). Second, the system records the actual words spoken by the parties to the communication (wiretap information). This data is stored in a secure location and is accessible to a limited number of persons. The fact that a recording has not been listened to or may never be listened to *does not* mean there was no interception, interception occurs when the conversation is recorded. (*People v. Murtha* (1993) 14 Cal.App.4th 1112, 1118)

The threshold issue is the legal basis for collecting this information and the uses that may be made of the information collected.

The fact that such non-confidential calls are routinely recorded does not offend the Fourth Amendment:

“We hold that any expectation of privacy in outbound calls from prison is not objectively reasonable and the Fourth Amendment is therefore not triggered by the routine taping of such calls.” (*VanPoyck, supra.* at p. 291; *Zepeda, supra.*, at 1193; *People v. Kelley* (2002) 103 Cal.App.4th 853, 859-860; *People v. Windham* (2006) 145 Cal. App. 4th 881, 886-887.)

“Beep tones” cannot be relied on as sufficient notice because the legislature has limited their use to airport law enforcement on certain telephone lines. (See Pen. Code, § 633.1; see also *PBA Local 38, supra*, at pp. 817-818 which upheld use of beep tones on a consent theory because of the specific knowledge of the parties.) Also “beep” tones as notice of recordation of calls usually are limited by telephone company information to calls made to police, fire or other emergency agencies. (See *In Re State Police Litigation* (2d Cir. 1996) 88 F.3d 111, 116.) This would be insufficient notice to third parties receiving incoming calls.

The *VanPoyck* court also stated that even if the Fourth Amendment was implicated the result would be the same. (*Id.*, at p. 291) This was because there was a justifiable penalogical purpose (security) and a Title III exemption based either on consent or law enforcement personnel acting in the ordinary scope of their duties. (*Id.*, at pp. 291-292.)¹⁵

However, it is important to remember that *VanPoyck* is a federal case and that a state enabling statute may provide greater privacy protections. (See e.g. *Chavez, supra.*) While the routine nature of the surveillance will not trigger the Fourth Amendment by itself other aspects of California's enabling provisions complicate the analysis.

a) Two-party Consent

People v. Loyd (2002) 27 Cal.4th 997 concluded that the amendment to Penal Code section 2600 enlarging the provisions from “security” to “legitimate penalogical interests” was intended to include evidence gathering for prosecution (at 1009). However, *Loyd* expressly limited its holding to inside the facility communications rather than considering telephonic communications involving persons inside and outside of the facility. (See 999, fn. 2.)

Penal Code section 631, subdivision (a) requires that a wiretap must be done with *consent of both parties to the conversation*. *People v. Kelley, supra*; at p. 860, stated that Penal Code section 631 allowed wiretap with consent of one party. The *Kelley* court expressly refused to rely on the so-called “law enforcement exemption” embodied in Penal Code section 633.

¹⁵The status of correctional officers as peace officers is clear. However, their authority is more limited than that of peace officers whose duties are community-wide rather than limited to an institution. (See *Sababu, supra*, at pp. 1328-1329; *Bunnell, supra*) See, as an example *People v. Carbonie* (1975) 48 Cal.App.2d 679, 684-685.

Instead, *Kelley* relied on the fact that two of the justices who concurred in *Loyd* stated in dictum that the federal rule applied (At 858.) and, therefore, concluded that California followed a single party consent rule for custodial monitoring.

Windham, supra., at 885,fn.2 acknowledged that *Kelley* was incorrect in concluding that California was a single party consent rule state. Indeed, the court stated that it was publishing *Windham* to correct that erroneous *Kelley* finding.

Windham upheld the admission of the jail recordings using the Penal Code section 633 “law enforcement exemption” (see discussion at pages 890-893). While this result is better reasoned than the *Kelley* result, it presents some unique problems in the context of state prisons.

Two initial points are important. First, in both *Kelley* (see page 859) and *Windham* (see page 886), the telephone calls were “branded”. Neither decision focused on the “brands” or discussed the legal impact of the “brands”. Thus, unless the “brands” were inadequate, the most straight-forward answer to the challenge was, in the author’s opinion, that *both parties to the call gave consent as required by Penal Code section 631*. Second, both *Kelley* and *Windham* were cases involving calls from county custodial facilities, not state correctional facilities.

The difficulty grows out of the *Windham* court’s reliance on Penal Code section 633. In *Windham*, the court reasoned that law enforcement officers could “tap” prior to 1967 with the consent of a party cooperating with them (see footnote 6 at page 891). That court then analogized the consent of the inmate making the call to the act of a cooperating party and concluded that overhearing and recording was permitted prior to 1967. And, because it was permissible prior to 1967, it was exempt from any Penal Code section 631 prohibition (see 893). The *Windham* court did not discuss how it implied cooperation from an inmate from the language of section 633.

The language of section 633 that would have to be deemed to cover inmates is “...any person acting pursuant to the direction of one of these [enumerated] law enforcement officers...” The “acting at the direction of” factor must be implied because all of the cases on which the *Windham* court relied, were cases where the recording was done by cooperating persons acting at the direction of law enforcement. The author suggests that while *Windham* corrects the *Kelley* error it is preferable to rely on the consent generated by the “brand” in all cases where there is a “brand” given to the recipient of the call.

Of greater concern is the fact that *Windham* cannot be employed as authority in cases where the calls originate from a state custodial facility unless one of the Penal Code section 633 law enforcement officers directed the recording. This is because correctional peace officers are not included in section 633. Correctional peace officers recordings must be accomplished using proper “brands” and relying on the theory of two party consent.

The *Berger* footnotes cited *supra* suggested that, there is no authority for the proposition that law enforcement could lawfully engage in the routine “tapping” of all prison calls in California prior to 1967 (Pen. Code § 633). *Windham* avoids the *Berger* footnote’s correct statement by using the analogy discussed, *supra*. *Bunnell, supra.*, leaves open the question whether a person named in section 633 could have authorized the action taken in *Kelley* (see *Bunnell, supra.* at pp.1824-1825). *Bunnell* it makes very clear that neither the federal ordinary course of duties exception (*Bunnell, supra.*, at p.1869-1871) or a generalized law enforcement purpose theory (*Bunnell; supra.* at 1821-1824) were available to satisfy federal law in that case. *Windham* does not directly address the question but would be authority that would support an argument that an officer named in section 633 could authorize a correctional peace officer to monitor the calls of a specific inmate.

b) Pen Register Information

Pen registers are not subject to Title III, the federal laws governing wiretap and eavesdropping. (See *United States v. New York Telephone Co.* (1977) 434 U.S. 159, 166; *Smith v. Maryland* (1979) 443 U.S. 736, 741-743.) However, a later enacted federal statute now governs the collection of pen register information. Generally, federal law requires that pen registers may not be installed or used without a court order. (Title 18 U.S.C. § 3121)¹⁶

An exception exists for the provider of the service in cases where the user of the services has consented. (see § 3121(b)(3).) The Department of Corrections has obviously consented. (See *Amati, supra*, at 954 which noted but did not rely on a "subscriber consent" theory in a case involving recorded conversations; see also *Black v. City & County of Honolulu* (D. Hawaii 2000) 112 F.Supp.2d 1041, 1054; *Carbonie, supra*, at 685.)

Giday, supra., did favorably consider a system that captured both types of information simultaneously (see pp. 280-281 including fn. 5 and pp. 290-291) that was vendor installed but used established telephone provider services.

¹⁶The standard is that the information to be obtained is likely to be relevant to an ongoing criminal investigation. (See § 3122 (b).) Note that so-called "trap and trace" devices are covered by this statutory scheme. (See *United States v. Fregoso* (8th Cir. 1995) 60 F.3d 1314, 1320)

California has a higher standard with respect to obtaining pen register data. Rather than a sworn showing that the pen register will likely yield useful investigative information, California case law requires the reasonable cause showing necessary to obtain a search warrant. (see *People v. Larkin* (1987) 194 Cal.App.3d 650, 654) or, of course, consent.¹⁷ Because no warrant is obtained for each call, the theory on which the collection of the data must rest is consent.

Giday, supra, involved a Massachusetts enabling statute that, like California's statute required two party consent. (*Id.*, at pp. 288-289.) The prison system had installed an automatic system that worked like the California system in that it collected all data (wiretap and pen register) simultaneously. (*Id.*, at pp. 280-281). Further because the inmate calls were collect calls the pen register (or as *Giday* described it "detail") data obtained was the data of the person called. The “brand” employed by the Massachusetts system notified both parties that both the contents and the “details” were being obtained. (*Id.*, at p. 281) This was done because, as the court pointed out, the collection of both types of data was a greater

¹⁷Note that as to pen register data there is no federal suppression remedy so that pen register data on the telephone to which the device is attached would be admissible in a California criminal case regardless of full compliance with California law (*Larkin, supra*, at pp. 656-657). However, in the “inmate” telephone situation under California law the pen register data that is being collected is, in part, data that relates to the person who accepts the call. It is not clear that *Larkin* would apply in such a case absent compliance with the less stringent federal showing or consent. (See *Giday, supra*, pp. 288-289) In this context it is important to remember that a search warrant had been issued in *Larkin*, the issue was the time period for the warrant which was a greater time period than state law would have permitted.

intrusion than merely collecting the words spoken. (*Id.*, at p. 297) Because the “brand” was broad enough to give notice to the parties that both types of information were being gathered the court could (and did) imply that both parties had consented to the collection of the pen register data as well as the words spoken. (*Id.*, at pp. 289, 291, 296)

The critical factor will be making sure that the fact the “brands” were operating can be demonstrated. Test calls should be made on a shift or a daily basis to provide circumstantial evidence in the event that the tapes automatically made do not capture the “brand”.

3. Prison Telephones

These telephones should be almost exclusively used by staff. (Inmate use is by staff authorization, see C.C.R. Title 15, § 3282(a)(5), (c)(2) and (g)(1).) There is, however, a conflict between the confidential call provision of C.C.R. Title 15 section 3282, subdivision (g) and Penal Code section 636.

Section 636 protects religious advisor and licensed physician calls as well as attorney calls from recording or monitoring. While section 3282, subdivision (g) does establish the policy that confidential calls shall not be recorded or monitored section 3282, subdivision (a)(2) limits such calls to attorney calls. The better policy is not to record non-emergency calls between an inmate and his religious advisor or licensed physician or attorney.

Although staff has a reduced expectation of privacy while in the facility or on facility grounds this reduced expectation does not allow unnoticed, routine monitoring and recording of their conversations over “prison” telephones. (See *Bunnell, supra*; see also *In re State Police Litigation, supra*) Under California law the ability to obtain a court order authorizing monitoring and recording of the communication is limited to a small universe of

crimes. Remember, however, that if the staff telephones in question are intrafacility systems they are not subject to section 631 or 632 and could be subject to search warrant.

If the party receiving the telephone call has a good faith belief that the call from an inmate is evidence of a listed crime, he or she may record such calls without any authorization. (See Pen. Code, § 633.5) In the event that the matter being investigated isn't one of the types of calls covered by section 633.5, although a correctional peace officer cannot authorize monitoring and recording by a cooperative party (see *Carbonie, supra*) he/she can work through an agency that has ability to authorize under section 633. (See, for a discussion, *Bunnell, supra*, at pp. 1819-1820, 1823; see also *Harris, supra*.)

Pen register data will, of course, be available to be used against the parties to the conversation.

In the event that there is routine monitoring of prison telephones, the question of the notice to staff will be determinative of the extent to which evidence gained can be used against staff. (See, e.g., *Adams v. City of Battle Creek, supra*, at p. 984; *U.S. v. Hammond, supra*; *Zaffuto v. supra.*, at p. 489.)

4. Youth Authority Telephones

C.C.R. Title 15, section 4966 (Appendix 2) gives the superintendent of a facility control over the policies regarding telephone use by wards. Subsection (a) permits monitoring of all calls except attorney calls so long as notice is given to the ward. There are three problems with the literal language.

First, to the extent that it suggests single-party consent, it is in conflict with Penal Code section 631, subdivision (a). A regulation that does not exceed the scope of the authorizing statute or infringe on constitutional or statutory provision is generally deemed to have the force of the law. (*In re Gallego* (1982) 133 Cal.App.3d 75, 86-87; *In re Alcala*

(1990) 222 Cal.App.3d 345, 350-357; see also *Inmates of the Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850-861, fn.1.)¹⁸ Clearly, the Penal Code provision will control. Thus, the need for two-party consent means that a “brand” that is consistent with the “brand” used in adult facilities (C.C.R. Title 15, § 3282(i)) should be used.

Second, Penal Code section 636 again comes into play to protect calls made to clergy and licensed physicians as well as attorneys.

Third, the regulation has language which purports to limit monitoring to the “. . . purpose of maintaining institutional security. . . .” This was the language at the heart of the now discredited *Delancie, supra*, decision. It is the author’s view that the amendment to Penal Code section 2600 (see *Loyd, supra*) is evidence of legislative intent to permit monitoring/recording for broader purposes consistent with legitimate penological interests. Thus, a narrow reading would conflict with statutes and would be inappropriate.

¹⁸If the regulation does not exceed authority or conflict with constitutional or statutory provisions, its validity will be determined by applying the four-part test established in *Turner v. Safely* (1987) 482 U.S. 78. (*Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 130-131; *Snow v. Woodford* (2005) 128 Cal.App.4th 383, 393-394)

5. Discovery

The *Jackson, supra*, decision discussion held that all of the monitored/recorded conversations obtained by use of the search warrant had to be provided as part of discovery. The only exception permitted according to the *Jackson* court would be if a good cause showing could be made to protect recordings from discovery. (Pen. Code, § 1054.7.) Assuming for discussion purposes that *Jackson* applies in cases of routine monitoring, it will create some record keeping needs in order to comply with the discovery requested.

C. Local (City/County) Custodial Facilities

In addition to Penal Code sections 630et.seq.and 629.50et.seq., local facilities are subject to Penal Code sections 851.5 (see Appendix 4) 6030 (see Appendix 5) and Welfare and Institutions Code section 210 (Appendix 6.).

Section 851.5 deals with the three telephone calls which must be provided to an arrested person. While the section expressly provides that only one of these three calls—the attorney call—may not be monitored, eavesdropped upon, or recorded” (§ 851.5(b)), it must be read in conjunction with Penal code section 636. The practical problem is how to avoid difficulty if one wants to routinely monitor the non-section 636 calls. A logical solution would be to maintain a line for confidential calls and a line for all other calls; however, the potential number of interceptions will determine how effective this solution can be. Notice should be given by posting and a “brand” should be broadcast to both parties on intercepted calls.

Penal Code section 6030 imposes on the Corrections Standards Authority the duty to establish minimum standards for local adult custodial facilities (§ 6030(b)). Welfare and Institutions Code section 210 gives the Board of Corrections responsibility to establish minimum standards for local juvenile facilities. What is not clear is what the result would be

if electronic surveillance occurred in violation of these standards. The footnote in *Inmates of Riverside County Jail, supra*, pointed out the potential range of judicial responses. That case then went on to analyze non-compliance by the standard of whether a legitimate purpose excused the non-compliance (at 864).

1. Local Adult Facilities

Under C.C.R. Title 15, section 1005 (Appendix 7), a local facility may adopt more stringent, non-conflicting standards. A local facility administrator must develop written policies and procedures which deal with access to telephone and to legal counsel and make them available as public records. (C.C.R. Title 15, § 1045; Appendix 8)

Section 1067 of C.C.R. Title 15 (Appendix 9) delegates to the local facility administrator the authority to develop written policies ensuring “reasonable access . . . beyond those telephone calls. . . required by section 851.5. . . .”

Section 1068 (Appendix 9) imposes a confidential consultation requirement insofar as attorneys are concerned. This confidentiality requirement will prohibit monitoring/recording of not only attorney but also religious advisor and licensed physician conversations. (See Pen. Code, § 636(a))

2. Local Juvenile Facilities

As was the case with respect to local adult facilities, C.C.R. Title 15, section 1301 (Appendix 10) delegates authority to the local administrator subject to the “may exceed” but “cannot conflict” restraints. An orientation package which includes the rules regarding legal service access, visitation, and telephone use must be developed by the facility administrator for juveniles. (C.C.R. Title 15, § 1353; Appendix 11) Section 1376 of C.C.R. Title 15 (Appendix 12) essentially leaves the development of telephone access policies and procedures to the facility administrator. Telephone policies must be in writing. Section 1377 (Appendix 12) imposes a confidential consultation requirement for attorneys. Clearly, this will apply to attorneys, religious advisors, and licensed physicians under Penal Code section 636.

IV. EAVESDROPPING

As has been discussed generally, eavesdropping is that universe of overhearing all or part of a conversation through sense of hearing (see, e.g., *People v. Siripongs* (1988) 45 Cal.3d 548, 564) or the use of “bugs” (See *Suttle, supra*, at pp. 577-579.) Because, in the case of custodial facilities, eavesdropping will involve communications within the facility, privacy is not presumed.

Eavesdropping is governed by both federal and state statutory provisions. As was the case with monitoring and recording of telephonic communications, federal law is generally less restrictive than state law.

Issues connected with eavesdropping in certain respects go back to the pre-*Katz* question of location. In the author’s view, this is particularly true with respect to custodial facilities. The analysis which follows will examine six locations: (1) public areas connected with facilities (parking lots typically); (2) staff/public areas (visitor screening areas); (3) visitor/inmate meeting areas; (4) inmate/staff areas; (5) staff only areas; and (6) inmate only areas.

A. Federal Custodial Facilities

1. Connected Public Areas

There are no federal cases dealing with putting “bugs” in such areas. One argument would be that *Katz* would extend to such areas on the so-called “uninvited ear” (using technological means to overhear what could not otherwise be overheard) theory. The opposing theory would focus on the question whether it was objectively reasonable for one to expect such locations *would not* be bugged.

2. Staff/Public Areas

This is much easier in that when a person seeks admission to a facility, it is dramatically more difficult to assert privacy expectations. If notice is given that conversation in such areas is monitored/recorded, there should be no problem.

3. Visitor/Inmate Areas

With the exception of attorney consultations or some actions by staff which are found to create both objective and subjective privacy expectations, the *Larkin* “rule” applies. There will be no privacy. Title III will not be implicated and monitoring/recording may occur. This is because an officer circulating in these areas could overhear these conversations. (See *Matter of John Doe Trader, supra.*, at pp. 242-242)¹⁹

4. Inmate/Staff Areas

The general rule here appears to be that any location in which an inmate and staff members would converse is fair game for bugging. (See *Angel v. Williams*, (8th Cir. 1993) 12 F.3d 786, 790) This rule is consistent with the “sting” situation cases which have upheld audio monitoring/recording so long as the consenting informant/undercover is present. (See, e.g., *U.S. Nerber* (9th Cir. 2000) 222 F.3d 597, 600; see also *U.S. v. Corona-Chavez* (8th Cir. 2003) 328 F.3d 974, 980-981).

¹⁹It is clear that use of a language other than English will not provide the basis for an argument that the parties had a privacy expectation. (*U.S. v. Langoria*, (10th Cir. 1999) 177 F.3d 1179, 1183; *Sirapongs v. Calderon* (9th Cir. 1994) 35 F.3d 1308, 1320-1321; *U.S. v. Davis* (2nd Cir. 2003) 326 F.3d 361, 365.)

5. Staff Only Areas

Here, the rule will be the same as was the case with monitoring “prison telephones.” This means that local practice and the notice to and/ or the knowledge of staff of these practices will be the controlling factors.

6. Inmate Only Areas

Larkin, in its purest form, will be the rule. No expectation of privacy from bugging exists in these areas. There is federal authority which would allow inmates to be “wired” if that step was necessary. (See, e.g. *U.S. v. Harrelson*, (9th Cir. 1985) 754 F.2d 1153, 1169-1170.)

B. State Custodial Facilities

1. Connected Public Areas

As was true of federal law, there are no cases addressing the issue of “bugging” such areas. However, C.C.R. Title 15, section 3288(a) (Appendix 13) mandates notice be given at the entrance to such areas. If it was considered important enough to justify the cost and effort, then notice of audio monitoring/recording could be added.

2. Staff/Public Areas

The posting mandate of C.C.R. Title 15, section 3288(b) could include notice of audio monitoring/recording and would permit “bugging” of those areas if it was considered worthwhile.

3. Visitor/Inmate Areas

As was the case with respect to telephonic communications, there are differences between the rules which apply to adult facilities and juvenile facilities.

a) Adult Facilities

C.C.R. Title 15, section 3171(a) (Appendix 14) allows each institution head to “maintain visiting procedures” at his/her facility. All “local” procedures must comply with the general regulations. The point is that it is a good idea to check the “local” regulations.

The general visiting regulations are found in C.C.R. Title 15, section 3170 (Appendix 3). C.C.R. Title 15, section 3170(b) provides that “video recording devices may be utilized in visiting areas” Audio is not mentioned. However, the general language of section 3170(a) combined with the language of amended Penal Code section 2600 will support “bugging” those areas in the author’s opinion.

The key factor will be notice. So long as there is notice to the visitor and inmate, there should be no problem with “bugging” visiting areas. (*People v. Loyd* (2002) 27 Cal.4th 997, 1009, fn. 14; c.f. *Lieberman v. KCOP Television, Inc.*, (2003) 110 Cal.App.4th 156, 168-169; *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774-775.) The notice will serve to negate any argument of subjective or objective expectation of privacy.

Attorney visitation is covered by C.C.R. Title 15, section 3178. (Appendix 15.) As would be expected, no sound monitoring/recording of attorney visits is permitted. (See sections 3178 (b) and (m).) Note, however, that visual monitoring is permitted.

b) Juvenile Facilities

C.C.R. 15, section 4696(h) (Appendix 2) gives each superintendent authority to establish three levels of visiting supervision. Although there are only two subsections, it appears that the categories are (1) privileged visiting (attorneys only mentioned in the regulation); (2) general visiting; and (3) restricted visiting.

With respect to privileged visiting, remember section 636 requires that religious advisors and licensed physicians be read into the regulation in addition to attorneys, there is to be no “bugging” of privileged visits.

In the case of other types of visits, the regulation provides that visiting will occur in a room or area subject to supervision. It goes on to suggest that this supervision ought to usually be by sight, but that if sound monitoring is to occur, it should not be “close sound monitored,” an undefined term. The problem created here is not really a legal problem it is a policy problem. Clearly, posting notice would eliminate any issue of privacy however, it would appear to violate CYA policy to do such posting. Obviously, lack of posting will give rise to a privacy expectation argument. One could argue that because the CYA regulation pre-dates the amendment to section 2600, that it is in conflict with state law, and, therefore, the regulation is invalid, but even if this argument was to succeed the notice issue remains.

Based on the *Inmates of Riverside County Jail, supra*, case, it is the author’s view that when the local administrator can demonstrate “legitimate penological reasons” and notice is given “bugging” through “close sound monitoring” could be upheld against an assertion that the evidence should be suppressed. Further, because it is relevant evidence and there is no suppression remedy, it ought to be admissible regardless.

Because the regulation is silent on restricted visits, it would appear that notice

of “close sound monitoring” may be given and that bugging may occur.

4. Inmate/Staff Areas

These are areas into which inmates are permitted only for limited purposes and are, generally, accompanied by staff (fingerprint areas, interview rooms, office areas, etc.). With respect to inmates there is no expectation of privacy (unless a specific representation is made and a court finds the inmate was “lulled” into such an expectation) and these areas could be “bugged” without Fourth Amendment (or section 632) problems. (*Lanza, supra.*)

Monitoring and recording the activities of staff in such areas is more complicated. The cases suggest that so long as inmates are present in such areas staff could be monitored and recorded (see *Henderson, supra*, at p.1653 and *Sacramento County Deputy Sheriff’s Assn., supra*, at p.1482; *Angel, supra*)²⁰ provided it was the general practice, known to staff, to monitor and record when inmates are present. (Cf. *People v. Gibbons* (1989) 215 Cal.App.3d 1204, 1209)

If an inmate is not present then the situation is much less clear, California civil cases in this area have established the rule that conversation need not be privileged to be confidential for purpose of Penal Code section 632. (*Schulman v. Group W. Productions, Inc.*(1998) 18 Cal.4th 200, 234-235) Indeed the expectation of confidentiality need not be one of complete or absolute confidentiality. (*Sanders v. American Broadcasting Company*

²⁰*Henderson*, a criminal case, involved a videotape situation in which the audio portion of the videotape was activated only when the informant was present. Also, the *Henderson* court suggested (see p. 1646, fn. 6) that the entire tape could have come into evidence if a search warrant had been obtained.

The *Sacramento County Deputy Sheriff’s Assn.* case was a civil action that expressly did not address the issue of the admissibility of the videotape in a criminal case (see p. 1472, fn. 3). In addition there were three other factors: (1) there was no gathering of audio information (see 1472); (2) the monitoring was not routine in the areas and (3) the monitoring was done without a search warrant. (See p. 1471)

(1999) 20 Cal.4th 907, 911, 914-919)

While the California Supreme Court did caution that the *Sanders* analysis *might not* apply in criminal cases (see p. 919, fn. 3), it is the author's opinion that when the area is not a dedicated to staff only area eavesdropping might be supportable. The issue will be the expectation of privacy the staff would have.

The author believes that in a case in which the court was presented with specific evidence of wrongdoing by one or a small discrete group of staff who conversed in a particular area when others were not present it could uphold the “bugging” of that area during times when such conversations were likely occurring. The court’s reasoning would be based on the reduced expectation of privacy and the policies discussed in *Canard*.

The issue would be whether this activity could be justified as an "administrative search" or internal affairs investigation. *Estes* suggests this could occur if the search was: (1) necessary to a vital government interest; (2) an intrusion limited to that degree necessary to protect that interest; (3) reasonably effective in accomplishing its purpose; and (4) done for a purpose other than just gathering evidence for a criminal prosecution. (*Id.*, at pp. 516-517; see also *McMorris v. Alioto* (9th Cir. 1978) 567 F.2d 897, 899) Note also that in *Champion, supra*, the prosecution obtained an *ex parte* order permitting the eavesdrop.²¹

²¹While there is no direct authority for the court order in *Champion* there is also no authority that would preclude such an order. The reasoning would be that the use of a "bug" is not subject to Penal Code section 629 et seq. and, because there is no expectation of confidentiality under Penal Code section 632 or Title 18 U.S.C. § 2510(2) a court could order the surveillance in a custodial facility. Note, however, that the court to which such a request is addressed should be specifically asked to read and consider *McIntyre, supra*, at pp. 1223-1225 and should be satisfied that Title III *does not apply*.

5. Staff Only Areas

These are areas in which it is unlikely there will be inmate access. (In fact, there will be areas which are marked as “out of bounds” to inmates at all times or certain times, see Appendix 19, C.C.R. Title 15, § 3015.) There does not seem to be a consent theory that would apply to continuous monitoring of such areas unless there was continuous notice. (Cf. *McDonell, supra*, at p. 1310; see also *Abraham v. City of Greenville, S.C.* (4th Cir. 2001) 237 F.3d 386, 388-389; cf. *United States v. Taketa* (9th Cir. 1991) 923 F.2d 665, 672) The mere fact that the area is a staff only area will heighten the privacy expectation. (See e. g. *Henderson, supra*, at p.1653; *McIntyre, supra*.)

McIntyre is particularly instructive. The appeal in that case arose from a conviction of a chief of police and another officer who placed "bugs" in staff areas without the benefit of a court order. Because the reviewing court concluded that there was no administrative search or internal affairs investigation and therefore Title III applied, the conviction was proper. (*Id.*, at pp. 1223-1225) Because California cannot have a lower standard than Title III and these areas are still private (*McIntyre, supra*, at p. 1224), it is the author's view that unapproved "bugging" for the sole purpose of detecting criminal conduct would likely be illegal. (See also *Henderson*, and *Sacramento County Deputy Sheriff's Assn, supra*.) It is important to point out that an employer who controls the premises does not, by virtue of that control, have the authority to consent to a search of an area in which the employee has an expectation of privacy. (See *Taketa, supra*, at pp. 672-673)

6. Inmate Only Areas

In those areas dedicated to inmate use (cells, exercise areas, prison libraries, cafeteria, etc.) The rule is that there is no expectation of privacy. (See *People v. McCaslin* (1986) 178 Cal.App.3d 1, 6; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1454; *Ahmad A.*,

supra, at p. 214; *People v. Suttle* (1979) 90 Cal.App.3d 572, 577-578; *Willoughby, supra*, at pp. 18, 22-23.) The information gathered through audio monitoring and recording, whether overt or covert can be admitted against all parties unless the parties are protected by statute.²²

So long as no informant is involved, there are no Fifth or Sixth Amendment interrogation issues.

The temporary removal of an inmate from the jail or prison does not increase his/her expectation of privacy. In *People v. Champion* (1995) 9 Cal.4th 879 inmate conversations were recorded while they were being transported. The court found that a transportation vehicle was not subject to any greater expectation of privacy than the jail itself. (*Id.*, at pp. 911-912)

If a fact situation arose where staff was monitored in one of these areas, it is this author's opinion that the evidence would be admissible against the staff members. The argument would be that there is no objectively reasonable expectation of privacy on the part of staff in such areas. (Cf. *Sacramento County Deputy Sheriff's Assn., supra*, at p. 1482.) Clearly there is no issue where staff conversations with prisoners are recorded. (See *Angel v. Williams* (8th Cir. 1993) 23 F.3d 786, 790)

C. Local Custodial Facilities

²²The general rule is that with the exception of the attorney-client privilege the usual evidentiary privileges give way to the overriding interests of the institution. (See e.g., *North, supra*, husband/wife privilege doesn't apply); *People v. Harris* (2000) 83 Cal.App.4th 371, 375 which held inmates have no expectation of privacy in mail except for attorney-client mail.)

1. Connected Public Areas

Under C.C.R. 15, section 1062 (Appendix 16), the facility administrator is responsible for developing policies and procedures for inmate visiting, and making these policies known to inmates (see section 1069, Appendix 16). The rules here are the same as for state facilities.

2. Visitor/Staff Areas

The rules here are the same as for state facilities.

3. Visitor/Inmate Areas

The C.C.R. Title 15 regulations which apply to local facilities distinguish between adults, minors in temporary custody in adult facilities, and juvenile facilities.

a) Adult Facilities

There are no regulatory restrictions on “bugging” these areas. The only issue will be posting adequate notice for both visitors and inmates.

b) Minors In Adult Facilities

C.C.R. Title 15, section 1143(a)(4) (Appendix 17) requires that such minors be given privacy during “consultation with family, guardians, and/or lawyers.” Again, Penal Code section 636 must be read into the regulation “Consultation” is not defined in C.C.R. Title 15, section 1006. Given the authority of the local facility manager to establish policy (see Appendix 8, section 1005), it may be better policy to permit consultation without audio monitoring.

c) Juvenile Facilities

C.C.R. Title 15, section 1374 (Appendix 12) provides that juvenile visitation may be “supervised” but that conversations should not be monitored unless there is a “safety or security need.” However, section 1302 (Appendix 10) defines “direct visual supervision” or “direct visual observation” (supervision is not separately defined) as allowing audio/video monitoring as a supplement. The upshot would be that “bugging” should be an option.

4. Inmate/ Staff Areas

The rules in this situation are the same as they would be for state facilities.

5. Staff Only Areas

The rules would be the same as the rules for a state facility.

6. Inmate Only Areas

Again, the rules would be the same as those at state facilities.

V.

VIDEOTAPING

Because of the facts of *Katz* and the so called "plain view" doctrine a critical inquiry in videotape cases will be whether the videotape had or had and used audio capability. The federal and state rule is that video surveillance which does not capture sound is not covered by Title III, Penal Code sections 630, et seq. or Penal Code sections 629.50 et.seq. (See *Taketa, supra*, at p. 625; *People v. Drennen* (2000) 84 Cal.App.4th 1349, 1351; *U.S. v. Koyomejian* (9th Cir. 1992) 970 F.2d 536, 541-542) In other words, if there is no audio component, federal law does not establish a minimum standard. Thus, only state law and local provisions must be considered.

A. State Facilities

1. Connected Public Areas

Clearly, these areas may be videotaped as part of a "legitimate penalogical purpose."

2. Staff/Visitor Areas

Here, again, it would be appropriate to videotape.

3. Inmate/Visitor Areas

It is the author's opinion that a general videotaping of any visiting areas where guards could observe the interaction of the inmate and the visitor is appropriate. There would be a legitimate administrative purpose for this surveillance and any information gathered could clearly be used for all purposes. (Cf. *Evans v. Superior Court* (1999) 77 Cal.App.4th 320, 324-325) In order to ensure this result, posting of notice that the visiting area is being videotaped would be a good step to take.

a) Adult Facilities

Under C.C.R. Title 15, section 3170(b), video recording is authorized except in family visiting units or attorney consultation locations. Subsection 3178(m) allows staff to visually observe attorney consultations. The author would suggest that non-audio videotaping would also be appropriate. If such non-audio videotaping was done it should be done with a camera that has a fixed distance lens that would not permit the viewer to read confidential documents.

b) Juvenile Facilities

C.C.R. Title 15, section 4696(h)(2) precludes close sound monitoring of general visits with wards, but does not limit videotaping. Subsection (h)(1) of section 4696 prohibits sound monitoring but does not address video; hence, the author feels video monitoring is appropriate.

4. Staff/Inmate Areas

As noted in Part IV. C., *supra*, a complete (including audio) use of videotape in these areas when an inmate is present should be appropriate (*Sacramento County Deputy Sheriff's Assn., supra; Henderson, supra*). When an inmate is present and complete (audio as well as video) use is made there is an issue because of Penal Code section 632. It is the author's belief that use of the audio should be sustained. Notice to the staff of the practice of audio and video taping these areas when inmates are present should be of further assistance to use of the information gained.

If no inmate is present and only video capability is employed then the analysis may change. This is because although videotaping without audio is not covered by Penal Code section 632 (see *People v. Drennen* (2000) 84 Cal.App.4th 1349, 1353, fn. 4) or Title III (*Taketa, supra*, at p. 675) it may still constitute a search. This would mean that when a video is placed in non-inmate only areas a search warrant would be required (See *Taketa, supra*, Compare *Vega-Rodriguez, supra*, at pp. 180-181); see also *United States v. Nerber* (9th Cir. 2000) 222 F.3d 597, 603-604 and *Henderson, supra*.) Although *People v. Gibbons* (1989) 215 Cal.App.3d 1204, 1209 held that videotaping is subject to the two party consent rule of Penal Code section 632 it could be viewed as limited to its particular facts (complete videotaping of acts of sexual intercourse in a private dwelling). Assuming that a court accepted this limitation and one has, see *Drennen, supra*, at pp. 1354-1356, one would argue that *Henderson, supra*, at pp. 1646-1647 which applies “. . . Fourth Amendment common law. . . .” would control. Under these concepts it could be argued that a search warrant could be obtained to take pictures only. The key point would be the reduced expectation of privacy and the fact that there is no statutory control of videotape not capturing audio in California. (See *Henderson, supra*, at p. 1646; see also *United States v. Foster* (9th Cir. 1993) 985 F.2d 466 for the similar federal rule)

5. Staff Only Areas

Staff only areas will have potentially secured and personal privacy areas within the premises. The extent to which videotaping without audio can occur will depend on a number of factors: (1) known rules and regulations; (2) notice other than rules and regulations; and (3) purpose of the videotaping. The author believes that *McIntyre, supra*; *Drennen, supra*; *Dorris v. Asher* (M. Tenn. 1997) 959 F.Supp. 813, 815, 818-819; *Taketa, supra*; and *Vega-Rodriguez, supra*, should all be considered because there really is no general rule.

Note also that notice is not always going to overcome an expectation of privacy. (See *Vega-Rodriguez, supra*, at p. 180, fn. 4-6)

6. Inmate Only Areas

Lanza, supra, seems to make it clear that videotaping such areas on an ongoing basis is proper. (See also *Hudson v. Palmer* (1984) 468 U.S. 517) Staff has no greater expectations in such areas. These videotapes, including audio, should be admissible as to all parties.²³ This seems particularly proper where the video monitor is not hidden. (See *Siriprongs, supra*, at p.1320)

B. Local Facilities (Adult)

²³Before passage of the 1994 ECPA *United States v. Foster*, 985 F.2d 466 (9th Cir. 1993) held that video was not covered by Title III only the audio portion was covered. The author believes this is still the rule. (See *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 178-180) California does regulate video under Penal Code section 647(k), but this section would appear to have limited application in a custodial facility. Further, it would appear that there is no statutory suppression remedy for a violation of the section.

1. Connected Public Areas

Videotaping of these areas is appropriate.

2. Staff/Visitor Areas

Videotaping with notice is appropriate.

3. Visitor/Inmate Areas

Videotaping with notice is appropriate.

4. Inmate/Staff Areas

Videotaping of these areas when inmates are present is appropriate.

5. Staff Only Areas

Videotaping in these areas will be case-by-case. The threshold question is whether the desire to videotape is generated by an administrative inquiry or a criminal investigation. If the purpose is criminal investigation, it will generally be the case that a search warrant will be advisable.

6. Inmate Only Areas

Videotaping will be appropriate.

C. Local Facilities (Juvenile)

1. Connected Public Areas

Videotaping is proper.

2. Visitor /Staff Areas

Videotaping is proper with notice.

3. Visitor/Ward Areas

These areas may be videotaped with notice to both parties.

4. Staff/ Ward Areas

These areas may be videotaped. One unique provision is found in C.C.R. Title 15, section 1360(a) (Appendix 18.) This section allows visual observation of minor felons during intake showering. The section 1302 definition of “direct visual observation” would allow supplemental video.

5. Staff Only Areas

Case-by-case analysis as discussed for adult facilities, *supra*.

6. Ward Only Areas

Videotaping is appropriate.

D. Tracking Devices

California recognizes the lawful use of these devices by law enforcement by statute (Pen. Code, § 637.7(c)) If an installation is lawfully accomplished (compare *People v. Smith* (1977) 67 Cal.App.3d 638 with *People v. Salih* (1985) 173 Cal.App.3d 1009) and law enforcement is not given an enhancement that enables them to observe something they could not otherwise observe (compare *United States v. Karo* (1984) 468 U.S. 705, 713-715 with *United States v. Knotts* (1984) 460 U.S. 276, 282-283, 285) there is no federal constitutional issue. Also remember that when the item containing the tracking device is not lawfully obtained by the party being tracked there is no expectation of privacy regardless. (*Karo, supra*, see *People v. Erwin* (1997) 55 Cal.App.4th 15, 18-20)

The only caution here is that correctional facility personnel should work with other agencies when the use of such devices contemplates observation beyond the premises of the facility.

INDEX TO APPENDICES

<u>Appendix 1:</u>	Title 15, C.C.R., § 3018	Telephones: State Adult Facilities
	Title 15, C.C.R., § 3282	Use of telephones: State Adult Facilities
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<u>Appendix 3:</u>	Title 15, C.C.R., § 3170	Visiting: State Adult Facilities
<u>Appendix 4:</u>	Penal Code, § 851.5	Telephones: Local Facilities - Arrestees
<u>Appendix 5:</u>	Penal Code, § 6030	Regulatory Authority: Local Adult Facilities
<u>Appendix 6:</u>	Welfare & Insts. Code, 210	Regulatory Authority: Local Juvenile Facilities
<u>Appendix 7:</u>	Title 15, C.C.R., § 1005	Minimum Standards: Local Adult Facilities
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<u>Appendix 8:</u>	Title 15, C.C.R., § 1045	Public Information Plan: Local Adult Facilities
<u>Appendix 9:</u>	Title 15, C.C.R., § 1067	Telephones: Local Adult Facilities
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<u>Appendix 10:</u>	Title 15, C.C.R., § 1301	Minimum Standards: Local Juvenile Facilities
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Appendix 13: Title 15, C.C.R., § 3288

Appendix 14: Title 15, C.C.R., § 3171

Appendix 15: Title 15, C.C.R., § 3178

Appendix 16: Title 15, C.C.R., § 1062

Appendix 17: Title 15, C.C.R., § 1143
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Appendix 18: Title 15, C.C.R., § 1360

Appendix 19: Title 15, C.C.R., § 3015

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