

FILED
AUG 20 2012

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA

BY CBH/Hea

DEPUTY CLERK

Approved: _____

Superior Court Judge

Date: _____

AUG 20 2012

RESPONSE TO GRAND JURY REPORT FORM

Disclosing a Sonoma County Main Adult Detention Facility Inmate Recorded
Report Title: Telephone Conversation

Report Date: 06/27/12

Response by: Steve Freitas **Title:** Sheriff-Coroner

FINDINGS

- I (we) agree with the findings numbered: _____
- I (we) disagree wholly or partially with the findings numbered: F-1, F-2, F-3
(Attach a statement specifying any portions of the findings that are disputed;
include an explanation of the reasons therefor.)

RECOMMENDATIONS

- Recommendations numbered R-1 have been implemented.
(Attach a summary describing the implemented actions.)
- Recommendations numbered _____ have not yet been implemented, but will be implemented in the future.
(Attach a timeframe for the implementation.)
- Recommendations numbered _____ require further analysis.
(Attach an explanation and the scope and parameters of an analysis or study,
and a timeframe for the matter to be prepared for discussion by the officer or
director of the agency or department being investigated or reviewed, including
the governing body of the public agency when applicable. This timeframe
shall not exceed six months from the date of publication of the grand jury
report.)
- Recommendations numbered R-2, R-5 will not be implemented
because they are not warranted or are not reasonable.
(Attach an explanation.)

Date: 8/14/12 Signed: Steve Freitas

Number of pages attached 13

SONOMA COUNTY SHERIFF'S OFFICE
RESPONSE TO THE 2011-2012 GRAND JURY REPORT

**Disclosing a Sonoma County Main Adult Detention Facility
Inmate Recorded Telephone Conversation (Pages 24 - 29)**

FINDINGS, Page 27

F-1 Sheriff's Office personnel and District Attorney staff were unable to produce a relevant statute or a written policy when asked if the disclosure of recorded inmate conversations to third parties was legal.

RESPONSE: The respondent disagrees with this finding.

The Sheriff's Office does not have a written policy regarding the disclosure of recorded inmate conversations to third parties. Sheriff's Office deputies are required to be up to date on current case law and other statutes that affect their daily law enforcement practices. In the event that they are not up to date with certain penal statutes or case law interpretations, they have the opportunity to discuss their cases with Sheriff's Office supervisors or managers in order to locate a valid resource to assist them in understanding the law. Some of those resources include: County Counsel, the District Attorney's Office, and local law enforcement experts.

With regard to this particular case, according to the District Attorney's Office and the investigating detective they were in "constant contact" with one another because of the complex nature of this case. There were detailed discussions related to disclosure of the recorded information made by the inmate as they were concerned that one of the parties intimately involved with the suspect was potentially an additional victim. Furthermore, the third party that was allowed to listen to the recorded conversation was subsequently identified as an unwitting co-conspirator (suspect) involved in several attempts to smuggle illegal drugs into the Main Adult Detention Facility.

Penal Code Section 637, and the Grand Jury's report that referenced the private attorney's opinion, indicate that there needs to be "legitimate law enforcement concerns (e.g. to prevent the commission of a crime, dissuading a witness, etc.)," and "legitimate jail security concerns (e.g. smuggling contraband into the facility, escape plans, etc.)," in order to disclose recorded conversations to a third party. Both of these criteria were present in this case. Because of the detectives resourceful approach, the deputy district attorney and investigating detective in this case were able to identify additional victims, prevent a felony from being committed, and prevent an unwitting victim from being arrested for violation of Penal Code Section 4573.5. Therefore, the disclosure of the recorded inmate conversation to the third party in question was legal.

F-2 The citizen's complaint (CC) investigation done by Sheriff's Office personnel in this case was lacking in that only the detective involved was interviewed.

RESPONSE: The respondent disagrees with this finding.

After further review of the abovementioned citizen's complaint investigation, the Sheriff believes it is clearly documented in the citizen's complaint report that the Sheriff's Office investigator did contact an additional involved party who had relevant information related to this investigation. This information, combined with a review of the criminal investigation, all other documents and materials related to this case, and a thorough interview of the detective associated with this complaint, establishes that a comprehensive investigation was completed.

The focus of this citizen's complaint investigation was to determine if the complainant's civil rights were violated, and if the investigating detective, "unethically" defamed the complainant's character. Based on the findings that were a result of a thorough investigation, the statement "This case was lacking in that only the detective involved was interviewed" is incorrect. In fact, there was an additional involved party interviewed, and additional information that was reviewed to determine the validity of the complaint received.

F-3 There appears to be a lack of methodology (i.e. recorded documentation of discussions and results of discussions) when deputies seek advice from the deputy district attorneys.

RESPONSE: The respondent disagrees with this finding.

During the course of criminal investigations, the investigative process can often be complicated and very fluid. As law enforcement investigators develop new leads and/or evidence it is not uncommon to discover that suspects involved in certain cases are also identified or involved in other criminal activity. Many of those criminal acts involve similar crimes; however, some suspects are very sophisticated and can be involved in a multitude of criminal behaviors. Based on the complexity of these investigations, detectives, investigators, and law enforcement officers are constantly interviewing, contacting, and arresting additional suspects involved in various crimes. There are times when the investigative process does not include detective contact with individual deputy district attorneys until the case has actually been reviewed and/or filed. Once a case has been filed or reviewed, additional information or investigative requests may be made by a representative of the District Attorney's Office (such as a district attorney investigator) in order to assist with the prosecution of each case. Additionally, it is not uncommon for certain cases to be transferred from one deputy district attorney to another based on workload and/or assignment. Investigative follow-up may be documented in a supplemental report or discussed with the deputy district attorney to determine if there is any evidentiary value related to the case.

The most common method used by Sheriff's Office deputies and detectives to document any information they believe to be relevant to the case is by completing a written supplemental report or inner office memorandum. Based on the complexity of some cases, it would be inefficient, complicated, and unrealistic to record every telephone conversation that took place between the

district attorney's office and the investigating detectives or deputies. Based on training, experience, professional judgment, and consultation with peers and supervisors, Sheriff's deputies and detectives determine what details to document.

RECOMMENDATIONS (Pages 27, 28)

R-1 The Sheriff's Office consult with its counsel regarding the legal ramifications of disclosing recorded inmate conversations to third parties

RESPONSE: This recommendation has been implemented.

County Counsel has been consulted. They have reviewed the incident and have responded orally as well as in writing to the Sheriff (see attachment). In summary, County Counsel states in their conclusion as a response to R-1, "There are no legal ramifications implicated in the Sheriff's Office's disclosure of inmate recordings to a third party witness under the circumstances presented in the Grand Jury report."

R-2 The Sheriff's Office develop and implement a policy on disclosing recorded inmate telephone conversations to third parties (including informing the inmates – via inmate handbooks and postings near telephones – that telephone conversations could be recorded, monitored, AND disclosed, if legal to do so).

RESPONSE: The recommendation will not be implemented because it is not warranted.

The Sheriff's Office is a policy, law, and rules driven organization. As indicated in County Counsel's attached memorandum, Penal Code Section 637 does not prevent a deputy from disclosing a recorded inmate telephone call to a potential witness as part of a criminal investigation and prosecution. Providing information to witnesses in a criminal investigation to secure their cooperation and consent to testify at trial falls within a legitimate purpose and function of the Sheriff's Office. As a result, the Sheriff's Office may lawfully disclose inmate recordings to a third party witness for such purposes.

Based on there being no legal or practical requirement to develop or implement a policy on disclosing recorded inmate phone conversations to third parties, and in light of the discretion provided to law enforcement officers within constitutional and statutory limitations, as well as County Counsel's opinion that disclosure in this situation was lawful and making a policy change is not implicated by the issues presented in the Grand Jury report, the Sheriff will not develop or implement such a policy.

R-5 Sheriff's Office interview all parties involved in a CC.

RESPONSE: The recommendation will not be implemented because it is not reasonable.

Due to the variety of complaints and concerns that are brought to the attention of the Sheriff's Office throughout the year, it is impractical to require all parties involved in a citizen's complaint to be interviewed. Because of the nature of these investigations, many of the parties involved have already submitted written reports or it is determined that no valuable information relevant to the complaint being investigated will be produced from additional interviews. In order for the citizen's complaint process to be completed efficiently and thoroughly, it is imperative that the investigator have full autonomy related to the investigative process and the decision on who should be interviewed. The CC process is a multi-step process with several levels of review and scrutiny.

However, after review of this particular incident, the Sheriff's Office does agree that the deputy district attorney and an additional party in this case should have been interviewed in order to glean additional information that would have corroborated the written reports and statements that were involved in this case.

MEMORANDUM

*This Memorandum has been approved for public distribution;
however, it is not intended to be relied upon by any
person or entity other than its named recipient.*

DATE: July 25, 2012

TO: Sheriff Steve Freitas

FROM: Office of the Sonoma County Counsel

RE: Response to 2012 Grand Jury Report regarding Penal Code § 637

This is in response to your request for an opinion relating to the 2012 Grand Jury report entitled "Disclosing a Sonoma County Main Adult Detention Facility Inmate Recorded Telephone Conversation," and a proposed response to its first two Recommendations. This memorandum opinion addresses the legal and policy conclusions set out in that report; it does not address any factual statements contained therein.

As a general matter, it is the opinion of this office that the Grand Jury's conclusions regarding applicable law and Sheriff's Office policies surrounding release of recorded inmate telephone calls are incorrect: (a) Penal Code Section 637 does not prevent a deputy from disclosing a recorded inmate telephone call to a potential witness as part of a criminal investigation and prosecution; and (b) the Sheriff's Office's general policy precludes release of inmate recordings in response to requests initiated by third parties, but does not prevent release to the public pursuant to a legitimate law enforcement purpose. Providing information to witnesses in a criminal investigation to secure their cooperation and consent to testify at trial falls within a legitimate purpose and function of the Sheriff's Office; accordingly, the Sheriff's Office may lawfully disclose inmate recordings to a third party witness for such purposes.

A. Response to Recommendation 1 (*"The Sheriff's Office consult with its counsel regarding the legal ramifications of disclosing recorded inmate conversations to third parties."*)

Conclusion: There are no legal ramifications implicated in the Sheriff's Office's disclosure of inmate recordings to a third party witness under the circumstances presented in the Grand Jury report.

Discussion:

The Grand Jury's report concluded that a Sheriff's Deputy possibly violated Penal Code Section 637 ("Section 637") by sharing a pre-trial inmate's recorded telephone conversation with a potential witness in the criminal case to secure her cooperation with the investigation and

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prosecution. The Grand Jury's report stated that the recording contained a sexually explicit discussion not directly related to the criminal case, but recognized that both the inmate and the person he telephoned were provided with notification that the call was subject to monitoring and recording by the jail. Under these circumstances, both the recording and its disclosure were proper under state and federal law.

The current version of Section 637 provides as follows:

Every person not a party to a telegraphic or telephonic communication who willfully discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of that person, unless directed so to do by the lawful order of a court, is punishable by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars (\$5,000), or by both that fine and imprisonment.

(Pen. Code § 637.)

If read in a vacuum, Section 637 would prohibit the party recording a jail inmate's telephone conversation (in our case, PCS) from disclosing the recordings to the Sheriff's Office; it would preclude the Sheriff's Office from disclosing the recordings to anyone, including the District Attorney's Office; and it would preclude the District Attorney's Office from presenting the recordings as evidence to the jury in a criminal prosecution. This interpretation is contradicted by the history and Legislative intent behind Section 637, as well as relevant case law, which demonstrate that it does not apply to the use of inmate recordings by law enforcement.

1. Former Penal Code Section 619, Adopted 1872

Section 637 was originally adopted by the Legislature in 1872 as Penal Code Section 619 ("Former Section 619").¹ Former Section 619 was later amended twice – in 1880 and in 1905 –

¹As originally enacted in 1872, Former Section 619 provided as follows:

Every person who willfully discloses the contents of a telegraphic message, or any part thereof, addressed to another person, without the permission of such person, is punishable by imprisonment in the State Prison not exceeding five years, or in the County Jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

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and then remained unchanged for the next 62 years.²

In 1912, a California Appellate Court ruled that Former Section 619 applied only to people engaged in the dispatch, transmission, and delivery of telephone and telegraph communications – meaning telegraph and telephone operators, and others involved in the delivery process. (*People v. Earl* (1912) 19 Cal.App. 69, 70-71.)

In rendering its decision, the Court held that Former Section 619 could not be given its literal interpretation, as doing so would result in absurd consequences and would “have the effect of prohibiting otherwise necessary and useful acts.” (*Id.*, at 71-72.) The Court found that the intent of the Legislature was key to interpreting Former Section 619, which demonstrated that its application was very limited:

If section 619 is to be given the effect which its language literally imports, then the sender of the message who discloses its contents, either before or after sending, and every person to whom he so discloses it, might in turn be guilty and subject to punishment by fine or imprisonment, or both. Taking the three sections to which we have referred alone, and considering the sense of the expressions used by the legislature there in context, it appears very clear to us that **the intent was, by the enactment of section 619, to preserve secrecy as to telegraphic messages only among all those who have a duty to perform with respect to the dispatch, transmission or delivery thereof.** Any other interpretation placed upon the provisions of that section would cause it to embrace every person who might obtain knowledge of the contents of any message, no matter how such contents might have been learned, or through however so many persons such information may have been communicated, as well as to include the sender of the message and the persons whom he might have informed of its contents. To so

(Former Penal Code § 619, adopted 1872, repealed 1967).

²As amended in 1905, Former Section 619 provided as follows:

Every person who willfully discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment.

(Former Penal Code § 619, as amended 1905, repealed 1967).

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hold, in our opinion, would be to give to the statute an unreasonable and absurd meaning. The history of the legislation upon the subject, as well as other sections of the code, which we need not further refer to, support the view we have taken in our construction of the statute.

(*Id.*, at 73-74 (emphasis added).)

A search of statutory and case law has revealed that the *Earl* Court's interpretation of the Former Section 619 (applying it only to people who are engaged in the telephone or telegraph transmission process) has never been challenged or changed.³

2. Current Penal Code 637, Adopted as Part of the Invasion of Privacy Act of 1967

In 1967, Assembly Speaker Jesse Unruh authored Assembly Bill 860, otherwise known as the Invasion of Privacy Act of 1967 (Penal Code Sections 630, *et seq.*, the "Act"). The primary "purpose of the act was to protect the right of privacy by, among other things, requiring that all parties consent to a recording of their conversation." (*Flanagan v. Flanagan*, 27 Cal.4th 766, 769.)

Former Section 619 was incorporated into the Act unchanged as Section 637. (*Digest of Assembly Bill 860*, Assembly Committee on Criminal Procedure, April 25, 1967, at pp. 3-4 ("[Section 637] is adapted without change from the existing section 619," and section 619 is repealed).) The stated purpose in re-numbering the statute was to consolidate all statutes regarding invasions of privacy into a single chapter per the Act. (*Digest of Assembly Bill 860* (as amended April 20, 1967), by Assembly Speaker Jesse M. Unruh, April 25, 1967, at p. 7 ("The bill also recodifies the many widely separated sections of the Penal Code relating to invasions of privacy, and places them in a single chapter of the Code on that subject.")) The Act thus created

³A similar federal statute provides,

[With limited exceptions], a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(18 U.S.C. § 2511(3)(a).) Like its state counterpart, this statute does not apply to law enforcement's use of recordings.

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a “coherent statutory scheme ... [which] protects against intentional, nonconsensual recording of telephone conversations regardless of the content of the conversation....” (*Flanagan*, 27 Cal.4th at 776.)

Significantly, the Act was not intended to affect the pre-existing law regarding the actions of law enforcement officers in any way.⁴ The Legislature codified its intent to exclude law enforcement actions from the scope of the Act in its statutory findings:

The Legislature recognizes that law enforcement agencies have a legitimate need to employ modern listening devices and techniques in the investigation of criminal conduct and the apprehension of lawbreakers. Therefore, it is not the intent of the Legislature to place greater restraints on the use of listening devices and techniques by law enforcement agencies than existed prior to the effective date of this chapter.

(Pen. Code § 630; see also Pen. Code § 633.)⁵

In addition, a review of the Act and interpreting case law demonstrates that its provisions address eavesdropping or recording of conversations – not their dissemination. (*Knight v. Cashcall, Inc.* (2011) 200 Cal.App.4th 1377, 1390 (The focus of the Act is on “simultaneous dissemination,” not “secondhand repetition.”); see also *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 775-776 (The amendment to Section 632.6 “indicates ... that the Legislature’s ongoing concern is with eavesdropping or recording of conversations, not later dissemination.”); see also *Comment*, Cal. Law Review (1969) Vol. 57, p. 1182, at 1192 (“The California Privacy Act does not even mention the subject of police use of lawfully intercepted communications”).)

Accordingly, Section 637 has been in effect for 140 years, but has never been applied to actions taken by law enforcement officers in any fashion. The statute was originally enacted to affect only those persons who had a duty to transmit, receive or deliver telegraph messages and telephone calls – to ensure that the messages and calls reached only their intended audience. Neither the Act nor subsequent case law has altered such a purpose. For these reasons, Section

⁴As the author of AB 860 stated, “[t]he bill carries a section of legislative intent which clearly declares that ... there is no intention to change present law in this area as it relates to law enforcement agencies or officers, acting in the course of their employment.” (*Digest of Assembly Bill 860* (as amended June 5, 1967), by Speaker Jesse M. Unruh, June 8, 1967, at p. 7.)

⁵“The statement of purpose in § 630 indicates that § 633 was intended solely to permit law enforcement officers to continue to use electronic devices in criminal investigations.” (*Rattay v. City of National City* (9th Cir. 1994) 51 F.3d 793, 797.)

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637 does not proscribe the Sheriff's Office's use of inmate recordings in any way, since its actions do not fall within the scope of conduct Section 637 seeks to address.

3. Law Enforcement Use of Inmate Tape Recorded Conversations

A wealth of case law, both pre- and post- the 1967 Act, demonstrates that law enforcement may lawfully use and disclose inmate tape recorded conversations for any purpose related to their law enforcement or security functions. (See e.g., *People v. Loyd* (2002) 27 Cal.4th 997, 1003-1004.) As stated in the Act, the law applicable to law enforcement's use of listening devices and techniques that "existed prior to the effective date of this chapter" remained valid and enforceable after the effective date of the Act on November 8, 1967. (See Pen. Code § 630.)

Before 1967, jail staff could tape record conversations between inmates and outsiders without warning either party of the taping, disclose the recording to the District Attorney, and the District Attorney could disclose the recording to the jury – all of which was authorized by law so long as the communication was not privileged. (*People v. Apodaca* (1967) 252 Cal.App.2d 656, 658-659. (Tape recorded conversation properly admitted at trial even though neither defendant nor his visiting friend knew their visit at the jail was tape recorded).) In addition, a sheriff could lawfully record a conversation between an accused and outside parties even though the accused did not know the conversation was being recorded, and the District Attorney could disclose such recording to the jury at trial to secure a conviction. (See *People v. Hughes* (1962) 203 Cal.App.2d 598, 601 (Wife and daughter knew their conversation with the accused was being recorded, though accused did not know; recording and use by the District Attorney at trial was lawful.) The Act was not intended to change, nor did it change, the legality of this practice of recording and use of statements against an accused.

Likewise, state law in this area post-1967 remains virtually unchanged to date. (*People v. Loyd* (2002) 27 Cal.4th 997, 1003-1004.) However, for a short time, there was a shift in the law regarding the purpose for which inmate telephone recordings could be made and used. In 1982, the California Supreme Court held that jail officials could record and use inmate conversations only to preserve institutional security based on former Penal Code § 2600 (amended 1994). (*De Lancie v. Superior Court* (1982) 31 Cal.3d 865.) However, subsequent Legislative amendments and Supreme Court decisions now demonstrate that the particular purpose and use of inmate telephone recordings made by the jail – whether to protect institutional security or to gather evidence and otherwise assist the prosecution – makes no difference. (*People v. Loyd* (2002) 27 Cal.4th 997, 1003-1004, 1008-1009; see also *People v. Davis* (2005) 36 Cal.4th 510, (Inmate recordings made at request of a prosecutor "to gather information" are lawful; the purpose of the search is irrelevant because jail inmates have no expectation of privacy.)

The circumstances at hand are much more circumscribed than is generally permitted. Specifically, Sonoma County jail inmates are provided with both oral and written notification

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that their conversations are monitored and recorded, and the persons to whom they place telephone calls are provided with the same oral notification. Under such a scenario, neither party to the communication can have an expectation that their conversation will remain secret – as they have been informed that their conversation is both recorded and being monitored by the government. (*People v. Santos* (1972) 26 Cal.App.3d 397, 402 (When a jail inmate and the called party know their conversation was being overheard and recorded, “but choose to converse nonetheless,” neither party can have an expectation of privacy.); *People v. Canard* (1967) 257 Cal.App.2d 444, 464 (“The laws on eavesdropping and the recording of telephone communications do not apply where one of the parties to the conversation consents to or directs its overhearing or recording.”).)

Further, Courts have determined that under these types of circumstances, parties impliedly consent to the recording and use of their conversation, and cannot object to its dissemination for criminal investigatory or prosecution purposes.⁶ (*People v. Windham* (2006) 145 Cal.App.4th 881, 887 (An inmate who uses jail or prison telephones with knowledge that his conversation may be recorded and proceeds with his conversation impliedly consents to the monitoring and recording of these calls, and impliedly consents to the telephone company divulging the contents of the calls to jail officials.); see also *United States v. Van Poyck* (9th Cir. 1996) 77 F.3d 285, 291-92 (Rejecting Fourth Amendment claim because prisoner had no expectation of privacy in his outbound phone calls, and because he was deemed to have consented to the taping of his calls based on prior warnings of recording.).)

Similarly, a law enforcement officer’s disclosure of an inmate recording to a potential witness before trial is permissible under federal law. (See the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510, *et seq.* (“Title III”).) Under Title III, such an action is lawful for at least two reasons: (a) the routine taping of inmate calls is not an “interception” within the meaning of Title III (*Greenfield v. Kootenai County* (9th Cir. 1985) 752 F.2d 1387); and (b) the law enforcement exception in Title III provides an officer with the ability to take lawful recordings and “use such contents to the extent such use is appropriate to the proper performance of his official duties.” (18 U.S.C. § 2517(2).) Accordingly, Title III “clearly permits dissemination of wiretapped conversations to the public for certain purposes (*Liffiton v. Keuker* (W.D.N.Y. May 20, 1991) 1991 U.S. Dist. LEXIS 7546, 37-38)” including release of

⁶In addition, under such circumstances, the provisions of the Act do not apply, as the Act preserves the secrecy of telephone communications only where the parties have an expectation of privacy. (See *Steele v. County of San Bernadino* (Central Dist. Cal., 2009) 2009 U.S. Dist. LEXIS 125000, at 43-45 (Jail inmate fails to state a claim under Penal Code Sections 632(a) and 636 against jail officials for recording his telephone conversations with his attorney, because inmate had no expectation of privacy and the pre-recording clearly advised him that his conversation was being monitored and recorded.)

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contents of intercepted telephone calls to business associates of the accused (*Id.*); to establish probable cause to search or to arrest (*United States v. Donlan* (2d Cir. 1987) 825 F.2d 653, 655); to prepare witnesses for trial (*United States v. Ricco* (2d Cir. 1977) 566 F.2d 433, 435, *cert. denied*, 436 U.S. 926 (1978)); or to play the tapes to various persons for the purpose of obtaining voice identifications (*United States v. Rabstein* (5th Cir. 1977) 554 F.2d 190, 193). (See also *United States v. Canon*, 404 F. Supp. 841, 848-49 (N.D. Ala. 1975) (Congressional report on Title III expressly envisioned use of contents of wiretaps “to develop witnesses”).)

Thus, whether the issue is analyzed under state or federal law, the result is the same: nothing restricts the ability of the jail to record inmate conversations made with notice to inmates, nor to disseminate such recordings for purposes related to criminal investigation or prosecution – including disclosure to third party witnesses. (See e.g., *Windham*, 145 Cal.App.4th at 890-893.)⁷ Accordingly, the Sheriff Deputy’s act in disclosing the inmate recording to a witness, for the purpose of convincing her to cooperate with the investigation and securing her testimony for trial, was a lawful use of law enforcement powers.

B. Response to Recommendation 2 (“*The Sheriff’s Office develop and implement a policy on disclosing recorded inmate telephone conversations to third parties (including informing the inmates - via inmate handbooks and postings near telephones - that telephone conversations could be recorded, monitored, AND disclosed, if legal to do so).*”)

Conclusion: There is no legal or practical requirement to develop or implement a policy regarding the disclosure of recorded inmate conversations to third parties, nor modifying inmate handbooks and postings near telephones in the jail, though the Sheriff’s Office has the discretion to do so.

Discussion:

The mere act of incarcerating an inmate in jail “brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” (*Jones v. North Carolina Prisoners’ Labor Union, Inc.* (1977) 433 U.S. 119, 123 (citations omitted).) Although jail inmates may preserve confidentiality of their communications with counsel and certain other confidential advisors (e.g., religious advisors),

⁷The purpose in disseminating inmate jail recordings should be for legitimate governmental purposes, and not for personal vendettas or sensationalism. (See e.g., *Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 884 (“[T]he CHP and its officers must refrain from exploiting gruesome death images by disseminating them to friends and family members or others with no involvement in official CHP activities.”).)

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the general rule is that “[inmates and their visitors] can have no reasonable expectation that their jailhouse conversations will be private.” (*People v. Lloyd* (2002) 27 Cal.4th 997, 1003; see also *People v. Davis* (2005) 36 Cal.4th 510, 527 (Persons held pretrial in a jail have no general expectation of privacy when conversing with their visitors).)

To satisfy constitutional and statutory duties, the Sheriff is accorded wide deference in managing and administrating county jails. (*Jones*, 433 U.S. at p. 126; Government Code §26605 (“[T]he sheriff shall take charge of and be the sole and exclusive authority to keep the county jail and the prisoners in it.”).) Accordingly, whether to adopt policies relating to the recording and dissemination of inmate conversations rests in the sound discretion of the Office of the Sheriff.

Current policies and procedures of the Sheriff’s Office preclude release of inmate recordings in response to requests from third parties absent a compulsory process (such as a court order or subpoena). Such policies and procedures, however, do not address the use of inmate recordings by the Sheriff’s Office for law enforcement, prosecution, or security purposes. Investigators’ use of such recordings is proscribed by applicable state and federal laws – on which they are trained annually.

The recommendation provided by the Grand Jury to develop a policy on disclosure of inmate recordings appears based on the premise that the actions of the Sheriff’s Deputy in disclosing the inmate recording to a potential witness was unlawful. As that premise is incorrect, and in light of the discretion provided to law enforcement officers within constitutional and statutory limitations, it is not necessary to develop a policy addressing the issue.

Further, there is no legal authority which requires or even recommends giving inmates notice that their recordings may be disclosed in the course of a criminal investigation and can be used against them. Such dissemination is implicit in the warnings already provided. (See *Windham*, 145 Cal.App.4th at 892 (Court rejected defendant’s argument that, while he may have impliedly consented to the recording of his calls by AT&T, he did not consent to recording of his calls by jail officials, nor their release to the prosecutor).)

For these reasons, while the Sheriff has the authority to make policy and programmatic changes as recommended by the Grand Jury, such changes are neither required nor implicated by the issues presented in the report.

Anne L. Keck /s/

Anne L. Keck
Deputy County Counsel