County Technical Assistance Service

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Monitoring Inmate Telephone Conversations

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Sincerely,

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The monitoring of inmate telephone calls is common in jails in Tennessee. Noting that the Fourth Amendment to the United States Constitution protects persons from unreasonable searches and seizures in places in which they have a reasonable expectation of privacy, the Tennessee Court of Criminal Appeals has held that a person does not have a reasonable expectation of privacy on a jailhouse telephone. *State v. Erwin*, 2001 WL 314340, *6 (Tenn. Crim. App. 2001), *citing State v. Hutchison*, 1987 WL 14331, at *5-6 (Tenn. Crim. App. 1987); *State v. Rudolph Munn*, 1999 WL 177341, at *12 (Tenn. Crim. App. 1999), *perm. app. granted*, (Tenn. 1999).

Inmates have no constitutional privacy right to unmonitored nonprivileged telephone calls from a correctional facility.*Washington v. Meachum*, 680 A.2d 262, 275 (Conn. 1996). “No such right has previously been found to exist in any jurisdiction in the country under either the federal constitution or any state constitution....” *Id*.

> The courts applying the federal constitution have consistently concluded that whatever limited privacy rights inmates retain do not include a right to make unmonitored, non-privileged telephone calls. United States v. Workman, 80 F.3d 688, 694 (2d Cir. 1996) ("[o]nly a single participant in a conversation need agree to the monitoring in order to satisfy the requirements of the Fourth Amendment" and inmate use of prison telephone with knowledge of monitoring practice constitutes such agreement); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir. 1989) (outsider who telephones inmate has no reasonable expectation that conversation will be private because "'[i]n prison, official surveillance has traditionally been the order of the day'"); United States v. Willoughby, 860 F.2d 15, 20-21 (2d Cir. 1988); United States v. Amen, 831 F.2d 373, 379-80 (2d Cir. 1987), cert. denied sub nom, Abbamonte v. United States, 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988); United States v. Paul, 614 F.2d 115 (6th Cir. 1980); United States v. Clark, 651 F.Supp. 76, 81 (M.D. Pa. 1986) (distinguishing monitoring of public telephone booth from monitoring of jailhouse telephone on grounds that there is no reasonable expectation of privacy in jailhouse conversation); Teat v. State, 636 So.2d 697, 699 (Ala. Crim. App. 1993) ("there is no reasonable expectation of privacy in the telephone conversations of inmates at penal institutions"); State v. Fox, 493 N.W.2d 829, 832 (Iowa 1992) (no fourth amendment violation even though inmate not specifically notified of monitoring).
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> In cases in which other state courts have applied the independent provisions of their state constitutions to privacy claims pertaining specifically to prison telephone conversations, those courts unanimously have found that the monitoring or taping of such conversations does not violate the implicit or explicit privacy protections of their respective state constitutions. People v. Myles, 62 Ill.App.3d 931, 936, 20 Ill.Dec. 64, 379 N.E.2d 897 (1978) (no reasonable expectation of privacy in jailhouse conversations, despite explicit privacy provision in state constitution, because "[a] phone maintained in a jail for prisoner use shares none of the attributes of privacy of a home or automobile or even a public phone booth"); State v. Fischer, 270 N.W.2d 345, 354 (N. Dak. 1978) ("parties to a jailhouse conversation usually have no reasonable expectation of privacy due to the security needs of maintaining order and of limiting the introduction of contraband, such as drugs, into the jail" unless deceptive actions of law enforcement officials provide such reasonable expectation).

Id. at 276. *See also United States v. Balon*, 384 F.3d 38, 44 (2d Cir. 2004) (“[M]onitoring of telephone communications does not offend the Fourth Amendment because prisoners have ‘no reasonable expectation of privacy.’”) (citations omitted); *United States v. Gangi*, 57 Fed.Appx. 809, 815 (10th Cir. 2003) (“We agree with the Ninth Circuit that ‘any expectation of privacy in outbound calls from prison is not objectively reasonable and that the Fourth Amendment is therefore not triggered by the routine taping of such calls.’”) (citations omitted); *United States v. Workman*, 80 F.3d 688, 694 (2d Cir. 1996) ("[T]he interception of calls from inmates to noninmates does not violate the privacy rights of the noninmates.") (citations omitted).

Monitoring and recording inmate telephone conversations does not, generally, violate the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-22. Title III generally forbids the intentional interception of telephone calls when done without court-ordered authorization. Under the “consent” exception, 18 U.S.C. § 2511(2)(c), law enforcement personnel may lawfully intercept

telephone calls where one of the parties to the communication has given prior consent to such interception. Courts have held that consent may be either express or implied. Additionally, courts have held that under certain circumstances, prisoners are deemed to have given their consent for purposes of Title III to the interception of their calls on institutional telephones.

In *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987), *cert. denied,* 485 U.S. 1021, 108 S.Ct. 1573, 99 L.Ed.2d 889 (1988), the Second Circuit Court of Appeals held that inmates impliedly consented to have their telephone conversations monitored where they had received notice of the surveillance and nevertheless used the prison telephones. *Id*. at 378-379. In *Amen*, the notice consisted of federal prison regulations clearly indicating that inmate telephone calls were subject to monitoring, an orientation lecture in which the monitoring and taping system was discussed, an informational handbook received by every inmate describing the system, and signs near the telephones notifying inmates of the monitoring.

In *United States v. Workman*, 80 F.3d 688 (2d Cir. 1996), prior to trial, the defendants moved to suppress recordings made by prison officials of defendant Green's incriminating conversations on the prison telephone system. The defendants contended that these recordings were made in violation of Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-22 ("Title III"). *Id*. at 692. The court held that the combination of signs, written in English and Spanish, near each telephone in the prison notifying inmates of the monitoring program, an orientation handbook that provided further notice of the telephone monitoring program, and state regulations that provided public notice that prisoner calls were subject to monitoring and recording were sufficient to find that Green impliedly consented to the surveillance. *Id*. at 693-694. *See also United States v. Corona-Chavez,* 328 F.3d 974, 978 (8th Cir. 2003) (finding implied consent where an inmate chose to proceed with a phone call after receiving notice of recording); *United States v. Hammond,* 286 F.3d 189, 192 (4th Cir. 2002) (same); *United States v. Footman,* 215 F.3d 145, 155 (1st Cir. 2000) (same); *United States v. Van Poyck,* 77 F.3d 285, 292 (9th Cir. 1996) (same).

Under the "law enforcement" exception, 18 U.S.C. § 2510(5)(a), oral communications may be intercepted by investigative and law enforcement officers acting in the ordinary course of their duties. *United States v. Van Poyck*, 77 F.3d 285, 291-292 (9th Cir. 1996). Finding that the law enforcement exception applied to the Los Angeles Metropolitan Detention Center's routine taping policy, the court noted that the "MDC is a law enforcement agency whose employees tape all outbound inmate telephone calls; interception of these calls would appear to be in the ordinary course of their duties." *Id*. *See also United States v. Hammond*, 286 F.3d 189, 192 (4th Cir. 2002) (The law enforcement exception rendered the recording of prisoner's telephone conversations permissible where the facility was acting pursuant to its well-known policies in the ordinary course of its duties in taping the calls.); *United States v. Feekes*, 879 F.2d 1562, 1565-1566 (7th Cir.1989) (finding law enforcement exception was clearly satisfied where federal prison regulations authorized the tape recording of all prisoner calls, except to prisoners' lawyers, and inmate's calls were recorded in accordance with routine practice, which was the "ordinary course" for the officers who supervised the monitoring system); *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (finding that the law enforcement exception applied where the monitoring took place within the ordinary course of the correctional officers' duties).
