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April 17, 1974

FILE NO. S-736

CRIMINAL LAW:
Use of a monitoring system
in a county jail

Honorable Jack Hoogasian
State's Attorney
Lake County
County Building
Waukegan, Illinois 60085

Dear Mr. Hoogasian:

This is to acknowledge your letter wherein you state:

> "I have been asked to seek the following opinion:
>
> > Whether a listening device in the common jail of the county, when used for monitoring, is against the Constitutional Rights of a prisoner.
>
> The purpose of the monitoring device, which was previously installed in the common jail of Lake County, is for the health and safety of the persons incarcerated."

In recent years, the courts have shown an increasing interest in protecting the civil rights of the confined.

This has been particularly true in the case of unconvicted citizens who are being detained for trial in lieu of bail. Since your question involves a county jail rather than a state prison, I must, therefore, assume that a significant percentage of the inmate population of the Lake County jail are pre-trial detainees held in lieu of bail bond.

Lawful incarceration brings with it a necessary withdrawal or limitation on many privileges and rights. (Brown v. Wainwright, 419 F. 2d 1376, (5th Cir. 1970), cert. den., 397 U.S. 1010.) The regulation of the internal affairs of state detention facilities is primarily a state matter. (Johnson v. Avery, 393 U.S. 483 (1969).) Although jail officials have wide discretion in matters of discipline, this discretion is not unlimited. (Hudson v. Hardy, 420 F. 2d 607, (D. C. Cir. 1969).) To be valid, as applied even to convicts, the regulation of the internal jail affairs must be consistent with constitutional safeguards and relevant to the lawful function of the detention facility. (Tyler v. Ciccone, 299 F. Supp. 684, (W. D. Mo., 1969).) While the constitution authorizes the forfeiture of some rights of convicts, it does not authorize the treatment of unconvicted

detainees, whom the law presumes innocent, as convicts. Jones v. Wittenberg, 323 F. Supp. 93, (N. D. Ohio 1971), aff'd. 456 F. 2d 854 (1972); Tyler v. Ciccone, 299 F. Supp. 684, (W. D. Mo. 1969).

Unlike the imprisonment of a convicted person, the state's only legitimate interest in confining the unconvicted pre-trial detainees is to ensure their appearance attrial. Any limitation on the rights of the unconvicted detainee must find justification in the legitimate advancement of this interest. (Seale v. Manson, 326 F. Supp. 1375, (D. Conn. 1971).) Individuals who have not been convicted of a crime retain all the rights retained by arrestees who have been released on bail except for the curtailment of mobility deemed necessary to secure their attendance at trial and the limitations necessary to protect the security of the institution in which they are detained. Included in this concept of security are measures designed to maintain reasonable order, safety, and acceptable living conditions within the detention facility. Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157 (E. D. Wis. 1973).

The right to be free from unreasonable searches and seizures is guaranteed all citizens under both the fourth amendment of

the United States Constitution and section 6 of article I of the 1970 Illinois Constitution. This protection is one of the rights retained by the unconvicted detainee. But, by the necessity of confinement, the full sweep of this protection cannot apply in the jail context. It must be subject to such curtailment as may be necessary to hold the detainee safely until trial and by what is required to maintain the security of the jail. (Palmigiano v. Travisono, 317 F. Supp. 776, (D. R.I. 1970).) Any restrictions placed on the pre-trial detainees must be rationally related to the purpose of holding them safely until trial and should be accomplished by means that are no more restrictive than are necessary to accomplish this limited purpose. Smith v. Sampson, 349 F. Supp. 268, (D. N.H. 1972).

Although there are several cases that indicate the use of a monitoring device in a jail violates no constitutional right, (see, Chrisman v. Skinner, 468 F. 2d 723, (2nd Cir. 1972); People v. Ross, 236 Cal. App. 2d 364, 46 Cal. Rptr. 41 (1965); People v. Lopez, 384 P. 2d 16, 32 Cal. Rptr. 424 (1963)), the trend of cases indicates that a court examining use of a monitoring system in a county jail would balance

the state's need to maintain safety and security of the jail against the detained individual's rights. Use of such a system that is rationally related to the needs of safety and security of the jail and not unduly restrictive of the inmates rights would probably be upheld. See, Smith v. Sampson, 349 F. Supp. 268 (D. N.H. 1972); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971).

It is my opinion that for a monitoring system to meet these standards, its presence and use would have to be apparent to the inmates and disclosed to them before they are placed in cells. The system would have to be used to maintain safety and order within the jail and not as a means of gathering information against the detainees. The use of such a system would be especially justified if the inmates are held in multi-person cells or wards where the possibility of inmates assaulting inmates is great and where jail personnel cannot always be present. Access to the monitoring station should be restricted to jail personnel rather than placing it in a location where casual visitors to the sheriff's office could overhear activities within the jail. Care would have to be taken to set aside unmonitored areas for privileged communications such as the inmate's right to confer with counsel in private.

As I ruled in my opinion S-414, issued March 13, 1972, a balance must be struck between the power of a sheriff to regulate his jail to provide for the safeguarding of his prisoners, and the rights of the individuals confined. This balance should be determined on a case by case basis. The initial determination of whether a particular monitoring system meets constitutional safeguards, is rationally related to the goal of safe confinement of prisoners and is not unduly restrictive of inmates rights involves a determination of each factual situation. This initial determination should be left to competent local legal authorities, such as the State's Attorney's office in the case of a county jail, since these authorities would have access to the information necessary to make such a decision.

Although your question is directed to whether the use of a monitoring system in a county jail violates the constitutional rights of inmates, I feel it is also necessary to consider the effect of article 14 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, pars 14-1 et seq.) on such a system. Section 14-1 of the Code defines eavesdropper and eavesdropping device as:

> "§ 14-1. Definition.] (a) Eavesdropping device.
>
> An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.
>
> (b) Eavesdropper.
>
> An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article. * * * "

Section 14-2 defines the offense of eavesdropping as:

> "§ 14-2. Elements of the Offense.] A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so with the consent of any one party to such conversation and at the request of a State's Attorney; or
>
> (b) Uses or divulges, except in a criminal proceeding, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device."

Although the language of article 14 is extremely broad, it is my opinion that the statute would not be construed to cover situations where devices used to monitor or record conversations where all parties have knowledge of the device's presence and use and consent to its operation.

In construing a statute the primary purpose is to ascertain and give effect to the legislative intention. (People ex rel. Cason v. Ring, 41 Ill. 2d 305.) In determining this intent, it is proper to look not only at the language used, but also at the reason and necessity for the law, the evils to be remedied and the objects to be obtained. (People ex rel. Moss v. Pate, 30 Ill. 2d 271.) It appears that in 1957 when the General Assembly enacted the predecessor to article 14, it was reacting to the increased ability of science to provide means of monitoring and recording private conversations. It enacted a comprehensive statute so as to protect the individual's right to private conversation. The Criminal Code of 1961 retained the language of the 1957 statute. (See, Committee Comments, S.H.A., ch. 38, par. 14-1.) Although section 14-2 was amended in 1969, the legislative intention appears to have remained unchanged.

In examining this comprehensive protection to the right of privacy, it should be noted that the term eavesdropping is used throughout article 14. In the absence of a statutory definition indicating a different legislative intention, words used in a statute are presumed to have their ordinary and popular understood

meaning. (Farand Coal Co. v. Halpin, 10 Ill. 2d 507.) Eavesdropping is defined as to listen secretly to what is said in private. (Webster's Third New International Dictionary.) From the continued use of the term eavesdropping, it appears that the General Assembly intended article 14 of the Criminal Code of 1961 to protect individuals only from secret or unknown monitoring of their conversations.

A contrary interpretation would call into question generally accepted uses of tape recorders and other common electrical devices. Under a broad interpretation of the Act, for example, a businessman who recorded meetings with the knowledge and consent of all present would be guilty of eavesdropping. A statute must receive a sensible construction even though such construction limits the universality of its language. (City of E. St. Louis v. Union Electric Company, 37 Ill. 2d 537, cert. den., 390 U.S. 948.) Where the language of a statute admits to two constructions, one which would make the statute absurd, if not mischievous, while the other would render it reasonable and wholesome, the construction which would lead to an absurd result should be rejected. Chegin v. Ill. Nat. Bank, 35 Ill. 2d 375.

It could be argued that although the inmates of a county jail might be aware of the use of a monitoring system in the jail, they do not consent to its use. But in People v. Ardellia, 49 Ill. 2d 517, the Supreme Court ruled that continued response to police questioning by a defendant held in custody, after the defendant had been informed of his constitutional rights and that his remarks were being recorded, constituted consent to the recording. (See, also, People v. Faneon, 14 Ill. App. 3d. 622.) It would appear that this type of implied consent could be attributed to prisoners who, after being informed of the use of a monitoring system in the county jail and having been given a Miranda warning at the time of their arrest, continue normal communications.

In conclusion, it is my opinion that the use of a monitoring system as a safety measure in a county jail would violate neither the constitutional rights of inmates of the jail nor article 14 of the Criminal Code of 1961. But, to be upheld, the use of such a system would have to be open, apparent and disclosed to the inmates, rationally related to the security needs of the jail and used in a manner that is not unduly restrictive

of the inmate's rights.

Very truly yours,

A T T O R N E Y G E N E R A L