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ONE MINUTE BRIEF

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NUMBER: 2020-07 **DATE:** 03-09-20 **BY:** Devallis Rutledge **TOPIC:** Pretext Calls

ISSUE: What are the legal principles that may apply to pretext calls?

One investigative technique that may sometimes yield admissions from a perpetrator is the use of a “pretext call,” in which a crime victim or other informant places a police-monitored/recorded telephone call to the suspect to discuss the crime. Such calls may be especially important in unwitnessed one-on-one crimes, such as sexual offenses and acts of domestic violence. The following legal principles may be implicated.

- **Statutory provisions.** Both state and federal statutes restrict the interception and recording of some telephone communications. PC §§ 632-632.7; 18 USC §§ 2510-2515. However, both sets of laws contain **exceptions** for monitoring/recording by designated law enforcement officers and those acting **under their direction**. PC §§ 633-633.1; 18 USC § 2511(2)(c). Pretext calls under these exceptions are not unlawful. *People v. Clark* (2016) 63 Cal.4th 522, 595-96. (See 1MB 2016-09.)

- **Fourth Amendment.** A party to a telephone conversation assumes the risk that the other party may reveal the conversation to authorities, so **no legitimate expectation of privacy** is violated when police monitor/record a pretext call. *Lopez v. US* (1963) 373 US 427, 439; *People v. Loyd* (2002) 27 Cal.4th 997, 1013, fn. 2, Moreno, conc. (“Where authorities have the right to monitor, they also have the right to record.”)

- **Fifth Amendment/Miranda.** If the suspect is not in custody, *Miranda* does not apply. *People v. Caravella* (1970) 5 Cal.App.3d 931, 934. If the suspect is in custody, *Miranda* warnings/waivers are not required where the suspect is **unaware** he is talking to a police agent. *People v. Plyler* (1993) 18 Cal.App.4th 535, 545. This is true, even though the suspect

may already have invoked his *Miranda* right to silence or to counsel before the pretext call occurs. *People v. Guilmette* (1991) 1 Cal.App.4th 1534, 1541-42; *People v. Orozco* (2019) 32 Cal.App.5th 802, 812-13. (See 1MBs 2012-01, 2019-20.)

- **Sixth Amendment/*Massiah*.** Once the Sixth Amendment right to counsel has attached (indictment or first court appearance), agents may no longer make a pretext call **about the charged offense**. *Maine v. Moulton* (1985) 474 US 159, 175. Since the Sixth Amendment is “offense-specific,” pretext calls may be made about **other**, uncharged offenses without violating this right. *Texas v. Cobb* (2001) 532 US 162, 165. (See 1MB 2017-20.) Pretext calls may be made **before** the Sixth Amendment attaches—even if an attorney has been retained. *People v. Riskin* (2006) 143 Cal.App.4th 234, 243; *Moran v. Burbine* (1986) 475 US 412, 429, fn. 3. (See 1MB 2012-07.)

- **Fourteenth Amendment/voluntariness.** Involuntary statements **coerced** by a government agent by means of mistreatment, threats or promises of leniency are inadmissible **for any purpose**. *Arizona v. Fulminante* (1991) 499 US 279, 287. Officers should admonish the caller **not** to threaten the suspect with police involvement, **nor** to promise not to make a complaint if the suspect apologizes and accepts responsibility. (See 1MB 2010-08.)

- **POBRA.** In the rare case where a law enforcement agency is conducting a **purely criminal** investigation of one of its own officers or of an officer from another agency, a pretext call need not be preceded by the advisement specified in Government Code § 3303(g) and *Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 829. The Peace Officers Procedural Bill of Rights Act, Govt. Code § 3300, *et. seq.*, contains an **exception** for questioning “concerned solely and directly with criminal activities.” Govt. Code § 3303(i); *Van Winkle v. County of Ventura* (2007) 158 Cal.App.4th 492, 499-501.

- **Disclosure. All statements** obtained from a defendant by pretext call (inculpatory, exculpatory or otherwise) **must be disclosed** to the defense as required by *Brady v. Maryland* (1963) 373 US 83 and PC § 1054.1. (See 1MB 2015-13.)

BOTTOM LINE: Admissible statements may properly be obtained by pretext calls under relevant statutory and constitutional provisions.

This information was current as of publication date. It is not intended as legal advice. It is recommended that readers check for subsequent developments, and consult legal advisors to ensure currency after publication. Local policies and procedures regarding application should be observed.