

# DCA Slams Alameda DA's Taping

■ An Oakland woman's rights were violated when her jailhouse phone calls were recorded, but her murder convictions will stand.

**By Peter Blumberg**  
Daily Journal Staff Writer

A sharply divided state appellate court has affirmed two murder convictions against an Oakland woman, but harshly criticized the Alameda County District Attorney's office for secretly taping the defendant's jailhouse phone calls to build a case against her.

All three justices on the 1st District Court of Appeal panel condemned Alameda prosecutors for defying a California Supreme Court holding that protects inmates' telephone privacy when they recorded some 85 jailhouse calls placed by Christine Loyd to gather evidence that she murdered her mother and another woman. *People v. Loyd*, A080542

Friday's 50-page majority opinion by Justice Patricia Sepulveda denounced the taping as a "deliberate invasion of defendant's rights," but concluded that conflicting laws provide no obvious remedy and that the misconduct did not affect the outcome of Loyd's 1997 trial.

Sepulveda found that the state high court opinion was overridden by a voter-approved initiative that allowed the admission of such evidence.

Fourth Division Presiding Justice Daniel Hanlon "reluctantly" agreed to uphold the convictions in a one-paragraph concurring opinion.

And in a strongly worded dissent, Justice Marc Poche said the defendant should get a new trial at the district attorney's expense — instead of the state's — because the taping violated both state and federal law and helped secure a guilty verdict.

"It is an affront not only to the rights of this defendant but to the long tradition of integrity of the office of the Alameda County District Attorney for a prosecutor to willfully ignore the dictates of the law on the basis that he or she can ignore it with impunity to gain a conviction," Poche wrote.

Attorneys on both sides said Friday the case will likely go to the state Supreme Court for review.

Nancy O'Malley, chief deputy to Alameda DA Thomas Orloff, defended the legality of secretly recording Loyd's jailhouse phone calls to her brother and a friend during a two-month period she was incarcerated in Santa Rita Jail in 1996.

"Everything that was done here was done in compliance with federal law. Monitoring recordings of

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unprivileged conversations does not constitute an unlawful search," O'Malley said. "(The appellate court) does not find that the prosecutor deliberately or even indirectly infringed on her Fourth or Sixth Amendment rights."

O'Malley refused, however, to discuss the extent to which the practice has been used in the past or will be used in the future.

Attorneys at the Alameda County Public Defender's office said that secret jailhouse taping is commonplace and has become an issue in the ongoing death penalty trial of Samuel Johnson, who is accused of two murders.

But in almost all cases where the practice has been challenged, including the Johnson case, superior court judges have refused to condemn it, said Kim Kupferer, an assistant public defender.

"Until local judges acknowledge there's a problem with this procedure, it's not going to change," she said.

Loyd is serving a 55-years-to-life sentence for the 1991 murder of her 76-year-old mother, Myrtle, and the 1994 murder of a 59-year-old family friend, Virginia Bailey.

Prosecutors contended that Loyd concealed her motive, financial gain, by making the deaths look accidental. Her mother's body was found in a bathtub and Bailey's body was found on her dining room floor after her house mysteriously burned down. Loyd's jury convicted her of arson in addition to the two homicides.

California law prohibits taping phone conversations unless both parties consent. However, law enforcement authorities routinely obtain permission from judges to wiretap conversations involving criminal suspects.

In Loyd's case, the DA's office on its own initiative and without a warrant ordered jail officers to surreptitiously record Loyd's outgoing phone calls after she was arrested for the Bailey murder.

The prosecution acknowledged that the taping was not done for security purposes, a practice allowed by courts, but to gather evidence for the prosecution of Myrtle Loyd's murder. None of the 31 cassette tapes later introduced as evidence and turned over to the defense contained conversations between Loyd and her attorney.

The practice of secretly recording jailhouse contacts to gather evidence for trials was explicitly outlawed by a divided California Supreme Court in 1982 in a decision stemming from a civil complaint by San Mateo County jail inmates and defense attorneys. *De Lancie v. Superior Court*, 31 Cal.3d. 865

The high court's majority concluded that the practice violated state statutes under which "prisoners retain the rights of free persons, including the right of privacy," except when security and public safety is threatened.

But in Friday's majority opinion, Sepulveda found that although prosecutors were wrong to stray from *De Lancie*, Loyd does not deserve a new trial because there is no federal constitutional protection against secret jailhouse taping.

She noted that California courts have consistently rejected defense efforts to quash evidence obtained in violation of *De*

*Lancie* because of Proposition 8, a 1982 voter-approved ballot initiative that prohibits the suppression of evidence except where it is compelled by federal authority.

Finally, Sepulveda dismissed the defense contention that the Loyd tapes prejudiced her trial, noting that all the tapes were made available to the defense but that no argument was offered to show that the tapes hurt Loyd's case.

"We conclude that neither recusal of the district attorney nor dismissal of the charges was warranted as a result of the defendant's unprivileged jail conversations," she wrote.

By contrast, Poche concluded that the "illegal tapes" denied Loyd's due process rights.

Poche cited the federal Omnibus Crime Control and Safe Streets Act of 1968, which prohibits interception of phone conversations, to justify excluding the tapes of Loyd's calls from evidence.

He also argued that the portions of the tapes that were used at trial damaged the credibility of key defense witnesses.

"The prejudice to the defense from the illicit jailhouse tapes was considerable," Poche wrote. "The tapes permitted the prosecutor to play conversations between defendant and her brother in which they seemed to be concocting patently false scenarios to explain away the defendant's opportunity to commit the crime."

Besides the secret taping, Loyd's appeal raised several issues — that the two murders were improperly consolidated in one trial, that the prosecution improperly made an issue of the defendant's religious beliefs, and that the prosecution committed misconduct by impugning the integrity of defense counsel. The appellate panel rejected all those claims in the unpublished portion of Friday's opinion.

Loyd's appellate attorney, Jo Anne Keller of Berkeley, could not be reached for comment Friday.

Deputy Attorney General Bridget Billeter, representing the prosecution on appeal, said her office is weighing whether to petition for Supreme Court review or depublishation of the 1st DCA's opinion.

"We think it's likely that the defense will petition for review, although we can't guarantee that," she said. "Either way, it seems likely the Supreme Court might see this as something to address."

Loyd's trial attorney, Kimberlee Candela, a former Alameda deputy public defender, expressed disappointment Friday that the appellate court did not overturn Loyd's convictions.

"It is disturbing to note that the prosecutor in this case is a very senior member of the Alameda County DA's office," she said. "He admitted he conducted this taping to gather evidence, yet never admitted he was wrong to do this. Quite the contrary, the Alameda County DA's office continues this illicit activity even after all of our trial court litigation."

Tom Rogers, the lead prosecutor in the Loyd case, could not be reached for comment Friday.