No.

IN THE

Supreme Court of the United States

EMMANUEL DIAZ,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

PAUL SKIP LAISURE
APPELLATE ADVOCATES
111 John Street - 9th Floor
New York, NY 10038
(212) 693-0085

DINA ZLOCZOWER
Of Counsel

May 15, 2019

QUESTION PRESENTED

Whether absent a warrant, notice, or suspicion the Fourth Amendment permits the government to obtain recordings of telephone conversations from pretrial detainees to family and friends that had been automatically generated solely for prison security purposes.

PARTIES TO THE PROCEEDING

All the parties to the proceedings below are parties in this Court. The petitioner is Emmanuel Diaz. The respondents are the People of the State of New York.

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The opinion of the New York Court of Appeals is as yet unpublished, but available at 2019 WL 722345 (Pet. App. A at 1a-35a). The Appellate Division, Second Judicial Department opinion is reported at 149 A.D.3d 974 (2d Dept. 2017) (Pet. App. B at 36a-40a).

JURISDICTION

The New York Court of Appeals issued its opinion on February 21, 2019. This Court has federal question jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case presents the urgent question of whether the Fourth Amendment protects against the government's warrantless acquisition from prison authorities of pretrial detainees' telephone conversations absent their consent or a penological purpose. Petitioner is not taking issue with the

recording of inmate telephone calls by correctional facilities to maintain safety and security within prison walls. Rather, he asserts that pretrial detainees retain privacy interests in the content of their calls vis-à-vis law enforcement and prosecutors.

Without a warrant, the prosecution obtained over a 1,000 recordings of petitioner's telephone conversations with friends and family members while he was being held at Rikers Island Correctional Facility ("Rikers Island") unable to make bail on the charges in this case. There was no evidence prison authorities had listened to petitioner's calls, or that he was suspected of any criminal activity within the correctional facility, and no evidence of any exigency preventing the district attorney from securing a warrant. While petitioner was notified by the facility that his calls were subject to monitoring and/or recording to ensure institutional security, he was not informed that his telephone conversations would be shared with law enforcement for prosecutorial purposes in a pending case.

Petitioner challenged the warrantless search and seizure of the recordings as contrary to the Fourth Amendment, but a divided New York Court of Appeals found no constitutional violation. The majority held that a correctional facility may share recordings with law enforcement and prosecutors, without violating the Fourth Amendment because, informed that their calls were subject to recording and/or monitoring by the facility, pretrial detainees retain no constitutionally protected expectation of privacy. Two

dissenting justices rejected that premise, relying upon this Court's jurisprudence that prisoners retain at least those privacy rights not inconsistent with maintaining safety and security within the correctional facility.

The New York court's division reflects a larger controversy. The majority of state and federal courts have held that, based on notice provided to them about the recording of their telephone conversations for institutional purposes, inmates impliedly consent to use of the recordings by prosecutors. Other courts, however, have invalidated searches initiated by the prosecution looking for inculpatory evidence in a pending case absent consent or any institutional safety and security purpose.

This case, therefore, represents an ideal opportunity for the Court to resolve an important constitutional question: can law enforcement avoid the warrant requirement when seeking to obtain recordings of inmate telephone conversations made by corrections personnel under the implied consent or third-party doctrines.

FACTUAL BACKGROUND

In 2008, the New York City Department of Correction ("DOC") began recording telephone calls placed by pretrial detainees at Rikers Island pursuant to the Rules of the City of New York. Subject to those rules and the DOC's Operations Order, all inmate telephone calls, except those with

attorneys, doctors and clergy are recorded and retained (Pet. App. F at 87a-88a, § II(A)). DOC staff members listen or monitor to recordings on a "need" basis only (Pet. App. F at 89a, § III(B)(1)). Situations that "trigger" monitoring include DOC staff becoming aware of the introduction of "contraband," plans to "escape," a "disturbance," and "criminal activity or corruption by staff" (Pet. App. F at 89a, § III(B)(1)(a)-(e)).

Inmates at Rikers Island receive three forms of notice of that policy. First, all inmates must sign a handbook upon entry, which provides, in relevant part, that "[a]ll calls, except for calls with your attorney or other privileged calls, may be monitored and/or recorded by the Department for security purposes" (Pet. App. A at 19a) (emphasis in original). Second, notices posted in English and Spanish next to the telephones state that "inmate telephone conversations are subject to monitoring and/or recording in accordance with Department policy" and that an "inmate's use of institutional telephones constitutes consent to this monitoring and/or recording." (Pet. App. C at 41a; App. E at 76a) (emphasis added). Third, a recorded message when an inmate picks up the receiver states that the conversation "may be recorded and monitored" (Pet. App. E at 74a; Pet. App. F at 94a-95a, § III(E)(1), (2)).

Following his arrest in July of 2012, petitioner was charged with multiple counts of burglary and robbery, and detained at Rikers Island for eight months unable to make bail. During that time, the DOC recorded

roughly 1,000 of his telephone conversations and, absent a warrant, disclosed them to the Kings County District Attorney (Pet. App. D at 42a-69a). At trial, the prosecution sought to introduce excerpts from four separate telephone calls containing inculpatory statements that placed petitioner at the crime scene during the incident. Over defense counsel's objection on Fourth Amendment grounds, the trial court admitted the excerpts into evidence and the prosecutor repeatedly played them to the jury. The statements played at trial were excised from conversations petitioner had with his father and a friend in the days immediately after his arrest; they focused on the family's financial inability to both retain counsel and to post bail. In the coming months, while detained at Rikers Island, petitioner was recorded discussing his private life in great detail, with his mother, for example, who asked him to confirm he was brushing his teeth, and with his girlfriend, who he planned a date with upon his release.

The jury convicted petitioner of robbery in the first degree and burglary in the first degree. He was sentenced to an aggregate prison term of 15 years followed by a five-year term of post-release supervision.

PROCEDURAL BACKGROUND

On appeal, New York's Appellate Division, Second Department, affirmed the judgment, with one Justice dissenting (Pet. App. B at 36a-40a). Upholding admission of the calls, the majority concluded that it was not reasonable for petitioner to presume an expectation of privacy in the

dissemination of his recorded telephone conversations even though the "better practice going forward" would be to notify inmates that their calls might be turned over to the prosecution (Pet. App. B at 38a). The dissent would have held that the calls were inadmissible because petitioner was never notified that their recordings would be turned over to the prosecution for use at trial (Pet. App. B at 38a-40a). The dissenting Justice granted petitioner leave to appeal.

The New York Court of Appeals decided petitioner's case in a 5-2 opinion. The majority held that because pretrial detainees, "informed of the monitoring and recording of their calls, have no objectively reasonable constitutional expectation of privacy in the content of those calls," a correctional facility may "share the recordings with law enforcement officials and prosecutors, without violating the Fourth Amendment" (Pet. App. A at 2a). While it acknowledged that "an incarcerated individual's expectation of privacy must always yield to what must be considered the paramount interest in institutional security," the majority found no fault in the release of the recordings by the DOC to the District Attorney's office (Pet. App. A at 6a) (internal quotation omitted). According to the majority, by using the telephones after receiving notice of DOC's recording policy, petitioner impliedly consented to a search by law enforcement. (Pet. App. A at 8a-9a).

The dissent disagreed. It emphasized that petitioner, who was at Rikers Island because he could not make bail, was never told that his calls

would be disclosed to the prosecution, while others accused of crimes who are out on bail are not subject to this type of warrantless governmental surveillance (Pet. App. A at 11a). The dissent asserted that the notices provided to petitioner by DOC - a non-law-enforcement entity - seeking his implied consent only for its own security purpose could not reasonably be construed to include consent for the prosecution – a law-enforcement entity – to search petitioner's telephone conversations for prosecutorial purposes (Pet. App. A at 21a). Additionally, relying upon Carpenter v. United States, -- U.S. --, 138 S.Ct. 2206 (2018), Judge Wilson maintained that by equating petitioner's consent to recording and/or monitoring of his telephone conversations by DOC for security purposes with consent to "third-party" disclosure, the majority enabled "the government to circumvent the Fourth Amendment by collecting private information without a warrant for one ostensible purpose and then deeming it non-private for a purpose as to which a warrant would have been required" (Pet. App. A at 25a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question on the scope of a pretrial detainees' privacy rights in the digital age. The lower courts resolved the case by concluding that defendants charged with a crime but unable to make bail retain no privacy expectation while in prison awaiting trial vis-à-vis the prosecution in a pending case, a viewpoint irreconcilable with the Fourth Amendment interpretations in the Court's recent

jurisprudence. See, e.g. Carpenter v. United States, -- U.S. --, 138 S.Ct. 2206 (2018); Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 566 U.S. 318 (2012). Contrary to the view of the majority below, because inmates retain privacy expectations not inconsistent with safety and security within the facility, law enforcement officials and prosecutors are not permitted to mine telephone recordings made by corrections officials for inculpatory evidence in a pending case absent consent or penological need.

I. There Exists Confusion In The Lower Courts About the Question Presented.

The central question of this case – whether pretrial detainees have a reasonable expectation of privacy under the Fourth Amendment in the content of their recorded telephone conversations vis-à-vis the prosecution requires resolution by this Court. Lower court judges addressing the issue have expressed discomfort about the disclosure of private information by prison official for non-penological purposes. Only this Court can provide the necessary guidance on whether law enforcement officials and prosecutors can lawfully access private telephone conversations recorded by prison officials to maintain institutional order without a warrant.

The New York Court of Appeals held in sweeping terms in this case that where pretrial detainees were told their telephone calls were being recorded, all expectation of privacy in the content of their conversations was lost. The implications are profound, for under that decision law enforcement

officials and prosecutors are not constrained by the Fourth Amendment from using recorded telephone conversations against detained defenants at trial regardless of whether the conversation had any connection to prison safety and security.

The Court has long held that prisoners only retain those privacy rights not inconsistent with the legitimate penological needs that incarceration entails so as to afford correctional officials wide latitude in implementing the necessary security measures to maintain order in a correctional facility. Florence, 566 U.S. at 326; Turner v. Safely, 482 U.S. 78, 89 (1987) Hudson v. Palmer, 468 U.S. 517, 527-528 (1984); Bell v. Wolfish, 441 U.S. 520, 546-547 (1979).

On this basis, courts across the country have held that, provided with prior notice, detainees' expectations of privacy in their telephone calls are superseded by the facility's security objectives. See, e.g. United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002), cert. denied 538 U.S. 981 (2003) ("where a facility provides some notice to inmates that calls may be monitored, the facility's practice of automatically taping and randomly monitoring telephone calls on inmates in the interest of institutional security is not an unreasonable invasion of privacy rights of pretrial detainees") (internal citation omitted); United States v. Horr, 963 F.2d 1124, 1126, n.3 (8th Cir.1992), cert. denied 506 U.S. 84 (1992) (given defendant's "admitted knowledge of the Bureau of Prisons' policy of recording inmate telephone

conversations [. . .] he had no expectation of privacy concerning the content of his telephone conversations. Consequently, the taping did not violate his Fourth Amendment rights"); United States v. Sababu, 891 F.2d 1308, 1329 (7th Cir.1989) (where inmate received notice regarding recording of telephone calls, "reduced expectation of privacy, when balanced against the legitimate governmental interests in the safe and secure operation of a penal institution, yields the inevitable conclusion that the conversations in question were not protected by the fourth amendment") (internal citation omitted); United States v. Amen, 831 F.2d 373, 379-380 (2d Cir. 1987), cert. denied 485 U.S. 1021 (1988) ("If security concerns can justify strip and body-cavity searches, and wholly random cell searches, then surely it is reasonable to monitor prisoners' telephone conversations, particularly where they are told that the conversations are being monitored") (internal citations omitted); Kansas v. Gilliland, 294 Kan. 519, 534, 539 (Kan. 2012), cert. denied 568 U.S. 1176 (2013) (given warning that telephone conversations would be recorded, inmate not only knowingly consented but "reduced expectation of privacy in a jail or prison setting necessarily defeats an inmate's claim of a reasonable expectation that his or her calls are private under the Fourth Amendment"); Jackson v. Florida, 18 So.3d 1016, 1030 (Fl. 2009), cert. denied 558 U.S. 1151 (2010) (defendant did "not have a legitimate, reasonable expectation of privacy in a recorded phone call that was placed while incarcerated after

receiving warning that the call was being recorded; and [] the interest in institutional security allows jailhouse conversations to be monitored").

Absent the justification of routine prison security, however, there exists considerable confusion about inmate privacy rights vis-à-vis the prosecution. A number of courts have adopted the majority's position in this case that when correctional officials record inmate telephone conversations, no expectation of privacy exists, or is lost entirely. See, e.g. United States v. Van Poyck, 77 F.3d 285, 291 (9th Cir. 1996), cert. denied 519 U.S. 912 (1996) ("any expectation of privacy in outbound calls from prison is not objectively reasonable and the Fourth Amendment is therefore not triggered by the routine taping of such calls"); In re Grand Jury Subpoena, 454 Mass. 685, 688 (Mass. 2009) ("We conclude that, where the sheriff's policy of monitoring and recording detainees' and inmates' telephone calls is preceded by notice to all parties and, further, where the recording and monitoring is justified by legitimate penological interests, no privacy interest exists in the recorded conversations such that they cannot be obtained by a grand jury subpoena"); Decay v. Arkansas, 2009 Ark. 566, *5-6 (Ark. 2009) (inmate "aware that his telephone calls were monitored and recorded [] had no reasonable expectation of privacy"); Preston v. Georgia, 282 Ga. 210, 214 (Ga. 2007) (defendant "had no reasonable expectation of privacy in the calls he placed to his mother from jail").

Other courts have expressed concerns about the implications of such a sweeping doctrine. In United States v. Cohen, 796 F.2d 20, 23 (2d Cir. 1986), cert. denied, 479 U.S. 854 (1986) and cert. denied sub. nom. Barr v. United States, 479 U.S. 1055 (1987), for example, the Second Circuit held that the search of a pretrial detainee's cell at the behest of an Assistant United States Attorney for prosecutorial purposes violated the Fourth Amendment. In Cohen, a federal prosecutor instructed prison officials to search an inmate's cell to look for evidence in support of a superseding indictment. 796 F.2d at 22. Based on a survey of this Court's prison cases, the Second Circuit explained "that when a prison restriction infringes upon a specific constitutional guarantee, it should be evaluated in light of institutional security." Id. However, rejecting the government's argument that a pretrial detainee retains no Fourth Amendment rights, the Second Circuit concluded that the search was subject to Fourth Amendment scrutiny because it "was initiated by the prosecution, not prison officials" and was not "even colorably motivated by institutional security concerns," but "intended solely to bolster the prosecution's case." Id. at 23 (emphasis added).

The Eleventh Circuit, moreover, has noted that while monitoring of inmate telephone calls by prison authorities is not "unusual or unreasonable," the "possession of such communications by one element of the government does not necessarily implicate another element." United States v. Noriega, 917 F.2d 1543, 1551, n.10 (11th Cir. 1990), cert. denied, 498 U.S.

976 (1990). See also United States v. Mitan, 2009 WL 3081727, *4, 2009 U.S. Dist LEXIS 88886, *11 (E.D.Pa., Sept. 25, 2009) (recognizing a "major distinction between prison authorities having access to prisoners' phone calls for purposes of prison security and discipline, and the prosecutors of that pretrial prisoner having the same access for purposes of gaining advance knowledge of the pretrial prisoner's trial strategy and potential witnesses").

In this case, the DOC recorded all non-privileged telephone calls placed by pretrial detainees at Rikers Island, but it was the prosecution who initiated the search by requesting the recordings and examining them for inculpatory evidence. That harvesting of private information was not related to institutional security at Rikers Island (the record is devoid of any evidence that the DOC had listened to petitioner's calls or that it had otherwise suspected him of criminal activity within the correctional facility), and was, thus, constitutionally unjustified. See Wayne R. LaFave, Search and Seizure § 10.9(a), 407-408 (4th Ed. 2004) ("if a pretrial detainee was subjected to a cell search not 'even colorably motivated by institutional security concerns," then surely Hudson should not be treated as foreclosing challenge of that search").

Absent a security risk, which petitioner did not represent, the DOC would have been unaware of petitioner's discussions with his father and a friend in which he discussed his role in the charged incident. Because knowledge of petitioner's statements did not result from the DOC's recording

and/or monitoring regime but was based entirely on the prosecutor listening to petitioner's conversations, the court should have precluded petitioner's statements as the tainted "fruit" of unlawful governmental conduct. See Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920) (holding that the exclusionary rule applies not only to the illegally obtained evidence itself, but also to incriminating evidence derived from the primary evidence). Because personnel of the district attorney's office seized petitioner's recorded telephone conversations without knowing in advance what they were looking for, petitioner, like all inmates unable to afford bail was caught in an inescapable dragnet (post § III). See William Glaberson, Abuse Suspect, Your Calls Are Taped. Speak Up, The N.Y. Times, February 25, 2011 (starting in 2010 prosecutors "have been mining the trove [of recordings] in all kinds of cases" and "asked for copies of the recordings 8,200 times" that year alone).

Even assuming arguendo the prosecution lawfully seized the recordings, it does not follow that searching them without a warrant was lawful. The Court has long-recognized that the right to seize does not include the right to conduct a warrantless search. Horton v. California, 496 U.S. 128, 133 (1990); United States v. Jacobsen, 466 U.S. 109, 113-114 (1984); United States v. Chadwick, 433 U.S. 1 (1977), abrogated on other grounds by California v. Acevedo, 500 U.S. 565 (1991); Arkansas v. Sanders, 442 U.S. 753, 763 (1979). Accordingly, even if petitioner had only a limited possessory interest in the recordings when they were seized by the district attorney, he

nonetheless retained his privacy interests in them. Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (explaining that the exceptions to the warrant requirement to seize an item do not automatically extend to a search of the item, which requires a separate justification).

The prosecutor's anticipation of finding inculpatory statements on petitioner's telephone calls, besides being wholly speculative, did not legitimize a warrantless search. See Robbins v. California, 453 U.S. 420, 427-428, 442 (1981), overruled on other grounds by United States v. Ross, 456 U.S. 798, 824 (1982) (warrantless search of two "plastic wrapped green blocks" containing marijuana seized from the trunk of defendant's car was improper, notwithstanding that the police smelled and saw marijuana and drug paraphernalia in the passenger compartment, had prior experience with this type of evidence, and defendant "stated: '[w]hat you are looking for is in the back'").

While, consistent with the security needs of correctional officials, petitioner may have had reason to believe that statements concerning safety and security within the facility could be shared with law enforcement officials investigating "new" crimes, such an expectation did not give the government carte blanche to mine recordings on their own initiative, looking for inculpatory evidence in a pending case. See Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652-653 (1995) ("[w]here a search is undertaken by law

enforcement officials to discover evidence of criminal wrongdoing, [. . .] reasonableness generally requires the obtaining of a judicial warrant").

II. The Ruling Below Conflicts With This Court's Fourth Amendment Jurisprudence.

Certiorari is warranted because the decision below is not compatible with the Court's precedent. By sanctioning law enforcement officials listening to thousands of inmate telephone conversations not related to any penological interest, the New York Court of Appeals (and others like it) deprived pretrial detainees of their most basic personal privacy – expressing their thoughts and emotions in speech with friends and family. Such an invasion of personal privacy directly implicates the Fourth Amendment's guarantee against "unreasonable" searches.

The New York Court of Appeals' decision concluded that because petitioner's telephone conversations were recorded by prison officials, all of his constitutional rights protected by the Fourth Amendment were vitiated, authorizing law enforcement to intrude in what is unquestionably a fundamental constitutional right to privacy. Even if institutional security concerns outweigh a detainee's privacy rights and permit recording of a detainee's telephone calls by prison officials, a "detailed chronicle" of a person's life, "compiled every day" over an extended period of time, such as was contained in petitioner's telephone conversations, implicates privacy

concerns vis-à-vis the district attorney's office that survive their initial lawful collection by a third-party. Carpenter, 138 S.Ct. at 2220.

That petitioner, as a pretrial detainee, had diminished privacy interests does not

> mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee."

Riley, 134 S.Ct. at 2488, quoting Maryland v. King, 569 U.S. --, 133 S.Ct. 1958, 1979 (2013) (emphasis added).

In light of the DOC's policy to record all non-privileged telephone conversations, its collection of this inherently private information is – like cell-site location information – "inescapable" with "no way" for inmates to avoid "leaving behind a trail." Carpenter, 138 S.Ct. at 2220. Going beyond even what cell-site data can reveal, telephone conversations "provid[e] an intimate window" into a detainee's life and capture his or her "familial, political, professional, religious, and sexual associations." Carpenter, 138 S.Ct. at 2217 (quoting United States v. Jones, 565 U.S. 400, 415-416 (2012) (Sotomayor, J. concurring). By seizing the recordings, the government, thus, gained "access to a category of information otherwise unknowable" that implicates "privacy concerns far beyond those considered" in traditional third-party cases and involved the very "privacies of life" that the federal

constitution seeks to protect. Carpenter, 138 S.Ct. at 2214, 2218, 2220 (citing Riley v. California, 573 U.S. --, 134 S.Ct. 2473, 2494-2495 (2014).

In Carpenter, the wireless carrier recorded CSLI for its own business purposes, not to aid the government in prosecuting the defendant in a pending case. Here, likewise, the correctional facility recorded petitioner's telephone calls for its own security purposes, not to aid the government in prosecuting him. Importantly, petitioner had no choice but to use the prison telephones for the eight months he was incarcerated at Rikers Island. Like cellphones in modern society, institutional telephones are indispensable in prison, representing a "pervasive and insistent part of daily life." Carpenter, 138 S.Ct. at 2220; Prepared Remarks of FCC Comm'r Mignon Clyburn, Annual Inst. on Telecomms. Policy & Regulation Practicing Law Inst., 2012 WL 6468868 (F.C.C.) (December 13, 2002), at *2 (telephones are the "primary communications option" for inmates); American Bar Association, Criminal Justice Section, Report to the House of Delegates Regarding Telephone Services in the Correctional Setting 2 ("Telecommunications services are integral to human interaction in today's society. Accessing these services is especially important to people who are incarcerated, separated from family, friends and legal counsel by the fact of incarceration").

If the government must obtain a warrant to seize cell-site location data from a wireless carrier, information that, unlike petitioner's telephone conversations, does not involve a person's inner-most thoughts and

communications with loved ones, all the more compelling is a requirement that it do so when such private communications are involved.

"In no meaningful sense" did petitioner, therefore, "voluntarily assum[e] the risk of turning over a comprehensive dossier of his" private life to the prosecution. Carpenter, 138 S.Ct. at 2220 (internal quotation omitted). Because he was "longing for prompt release," Howes v. Fields, 565 U.S. 499, 511 (2012), petitioner had no "viable alternative" but to use the institutional telephones. See United States v. Cheely, 814 F. Supp 1430, 1443 (D. Alaska 1992), aff'd, 21 F.3d 914 (9th Cir. 1994), opinion amended and superseded, 36 F.3d 1439 (9th Cir. 1994), and aff'd, 36 F.3d 1439 (9th Cir. 1994) ("prisoner either uses institutional phones or is cut off from the outside world"); Blackburn v. Snow, 771 F.2d 556, 560-561, 567-568 (1st Cir. 1985) (notwithstanding that visitors did not have a constitutional right to prison access, strip search of visitors unreasonable regardless of notice that they would be "skin searched" because, inter alia, "government may not condition access to even a gratuitous benefit or privilege it bestows upon sacrifice of a constitutional right") (citing Frost v. Railroad Comm'n,, 271 U.S. 583, 593-594 (1925)); Jeffrey M. Heggelund, Comment, Prisoner Interception: A Costly Turnover?, 7 Loy. J. Pub. Int'l. L. 57, 83 (2005) ("choice between unattractive options cannot equal free and voluntary consent because prisoners are arguably only 'acquiescing to a claim of lawful authority,' which is not . . . consent") (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968)).

More so than elsewhere, in prison, "knowledge and consent are not synonymous. Taking a risk is not the same thing as consenting to the consequences if the risk materializes." United States v. Daniels, 902 F.2d 1238, 1245 (7th Cir. 1990) (Posner, J.), cert. denied, 498 U.S. 981 (1990); see also United States v. Feekes, 879 F.2d 1562, 1565 (7th Cir. 1989) ("[t]o take a risk is not the same as to consent"); LaFave, supra, § 8.2(l) (acknowledging that notice does not equal consent "in any meaningful sense" because otherwise "the police could utilize [an] implied consent theory to subject everyone on the streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken"). Nor is assuming the risk that personal information will be shared by others – a risk inherent in all social interactions – is obviously not a blanket concession of personal privacy to law enforcement agents. United States v. Karo, 468 U.S. 705, 716, n.4 (1984) ("A homeowner takes the risk that his guest will cooperate with the Government but not the risk that a trustworthy friend has been bugged by the Government without his knowledge or consent").

Because, moreover, petitioner's limited consent to surveillance of his telephone calls by DOC while he was detained at Rikers Island was expressly bound to ensuring the facility's safety and security, his "implied consent" to prosecutorial use against him cannot be considered constitutional. Florida v. Jardines, 569 U.S. 1, 9 (2013) (consent "express or implied - is limited not

only to a particular area but also to a specific purpose"); Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("[t]he scope of a search is generally defined by its expressed object"). The mere use of institutional telephones by petitioner absent notice of prosecutorial access is not a manifestation of actual consent. Petitioner was not asked to agree to the prosecution accessing his conversation, or apprised of the consequences of discussing his pending case with family and friends in telephone calls from Rikers Island.

Petitioner was in a particularly "vulnerable" emotional state when he used the Rikers Island telephones. United States v. Sanchez, 635 F.2d 47, 58 (2d Cir. 1980). He was only 19 years old and had never before been to Rikers Island, where he was exposed to multiple severe stressors, when his father told him that the family would be unable to post bail or even supplement his commissary account with $100. See New York State Commission of Correction, The Worst Offenders, Report: The Most Problematic Local Correctional Facilities of New York State, 1, 3, February 2018 (ranking the correctional facility at Rikers Island as the "worst" in the state due to systematic violence, among other factors), available at www.scoc.ny.gov/pdfdocs/Problematic-Jails-Report-2-2018.pdf (last visited May 13, 2019); see also See Hon. Jonathan Lippman, A More Just New York City, Independent Commission on New York City Criminal Justice and Incarceration Reform, Executive Summary, 13-14, 19 (2017), available at https://www.morejustnyc.org (last visited May 13, 2019) ("Lippman

Commission 2017") (recommending that Rikers Island be permanently closed due to "mistreatment" of inmates, "deep seated violence," "shocking brutality," and egregious "physical isolation," among other factors. Thus, the teenaged petitioner's use of the institutional telephones to maintain indispensable contact with family and friends did not amount to implied consent to use the resulting recordings against him at trial, but was "instead no more than a choice between unattractive options – a limited choice imposed on" him by this pretrial detention. Langton v. Hogan, 71 F.3d 930, 936 (1st Cir. 1995).

III. This Case Presents the Ideal Vehicle In Which To Resolve This Important Question.

Prosecutors in a large number of cases across the country rely upon the warrantless access to recordings of inmate telephone conversations to negotiate plea deals and at trial. This practice has created two classes of defendants defined primarily by financial means and race. See Lippman Commission 2017, supra, at 13, 15, 24; Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U.J. Legis. & Pub. Pol'y 919 (2013); Report of the New York State Judicial Commission on Minorities, 19 Fordham Urb. L. J. 181, 219-226 (1992). Those who manage to post bail are beyond the government's reach absent a warrant merely because their finances exceed those of most pretrial detainees, while those that await trial incarcerated are exposed to warrantless governmental surveillance.

For these reasons alone, the question presented is an important one for this Court to address. If it does not, pretrial detainees will continue to be subject to a practice that allows for the use of the their private conversations for prosecutorial purposes without a warrant, without exigency, and without their consent.

Petitioner is not challenging DOC recording and monitoring of telephone conversations by inmates it suspects of criminal wrongdoing within a correctional facility. Rather, petitioner seeks review of the district attorney's warrantless access to the recordings to search them for inculpatory evidence in the absence of any indication of penological need, much less probable cause. If, as petitioner maintains, such searches are unconstitutional, then pretrial detainees (a majority of which cannot make bail) are being subjected to systematic Fourth Amendment violations, regardless of the crimes of which they have been accused, and absent any particularized suspicion of any kind of criminal conduct, but based only on their indispensable need to use institutional telephones. That situation merits the Court's attention.

Certiorari should be granted in this case for the further reason that the underlying facts, including the scope and application of the prison's policies and practices, were part of the record in the lower courts, which wrote substantive opinions.

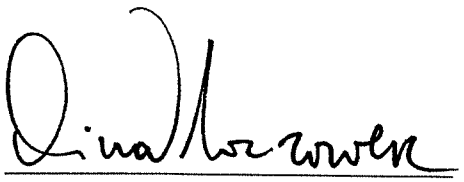
CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, the petition should be held in abeyance awaiting the resolution of Mitchell v. Wisconsin, 139 S.Ct. 915 (2019).

Respectfully submitted,

PAUL SKIP LAISURE

Appellate Advocates
111 John Street, 9th Floor
New York, New York 10038
(212) 693-0085



By: Dina Zloczower
Of Counsel

Date: May 16, 2019