No. 18-9359

IN THE

SUPREME COURT OF THE UNITED STATES

EMMANUEL DIAZ,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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September 5, 2019

QUESTION PRESENTED

Whether Emmanuel Diaz's petition for certiorari should be denied because:

(1) the holding of the New York Court of Appeals in this case -- that a pretrial detainee, who has been notified by the correctional institution that his non-privileged telephone calls may be recorded and monitored, has no reasonable expectation of privacy in those telephone calls for purposes of the Fourth Amendment -- does not conflict with decisions of federal courts of appeals or of state courts of last resort;

(2) the decision of the New York Court of Appeals is correct under well-established principles of law; and

(3) an independent and adequate state ground bars review of any claim by Diaz (a) that his consent to the recording and monitoring of his telephone calls was involuntary, or (b) that the practice of recording and monitoring telephone calls of pretrial detainees improperly discriminates against defendants who lack the financial means to post bail.

PARTIES TO THE PROCEEDING

The petitioner in this Court is Emmanuel Diaz, who was convicted after trial in a New York state court of robbery and burglary. The respondent is the State of New York, which is represented in this case by Eric Gonzalez, the District Attorney of Kings County, New York.

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The State of New York requests that this Court deny Emmanuel Diaz's petition for a writ of certiorari, in which he seeks review of an order of the New York Court of Appeals. That order affirmed an order of the New York Supreme Court, Appellate Division, Second Judicial Department, that affirmed Diaz's judgment of conviction for robbery and burglary.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 33 N.Y.3d 92, 98 N.Y.S.3d 544 (2019). The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 149 A.D.3d 974, 53 N.Y.S.3d 94 (App. Div. 2017). Each of those opinions is reproduced in the appendix to the petition for certiorari.

JURISDICTIONAL STATEMENT

The order of the New York Court of Appeals was entered on February 21, 2019. The petition for certiorari was timely filed in this Court on May 15, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> 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.

United States Constitution, Fourteenth Amendment:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Defendant's Indictment, Arraignment, and Bail Status

On August 30, 2012, a New York state grand jury filed an indictment that charged nineteen-year-old Emmanuel Diaz ("defendant") with two counts of Burglary in the First Degree (N.Y. Penal Law § 140.30[4]), two counts of Robbery in the First Degree (N.Y. Penal Law § 160.15[4]), and other related counts (A7).[1] On September 21, 2012, the New York Supreme Court, Kings County, arraigned defendant on the indictment and set bail (A8).

Sometime before trial, defendant posted bail and was released from custody (A8, A13, A15). On January 29, 2014, defendant's trial commenced with jury selection (A11).

The Trial

The Ruling on the Admissibility of the Recordings of Defendant's Telephone Calls

Prior to opening statements, in a colloquy outside the presence of the jury, the prosecutor informed the court and defense counsel that she intended to introduce into evidence recordings of telephone calls that defendant had made during his pretrial detention at one

[1] Numbers in parentheses followed by the letter "a" refer to pages of the appendix filed in this Court. Numbers in parentheses preceded by the letter "A" refer to pages of the appendix filed in the New York Court of Appeals.

of the New York City correctional facilities at Rikers Island (A17-19). Defense counsel objected to the admission of the recordings of defendant's telephone calls, on the ground that those recordings constituted a warrantless search under the Fourth Amendment of the United States Constitution and its counterpart in the New York State Constitution (A20-21). Defense counsel also asserted that defendant did not explicitly consent either to the recording of his telephone calls at Rikers Island or to the dissemination of those recordings to the district attorney (A21).

The trial judge ruled that, in light of the case law on this subject, the People could introduce the recorded telephone calls into evidence (A19, A21). The judge noted that, on his last visit to Rikers Island six weeks earlier, he had seen "signs all over the place that the electronic surveillance of those calls is being made and being recorded" (A19-20). The judge also noted that before using the telephone, the detainee is advised that the calls are being recorded (A20).

The Evidence

The Crime and the Police Investigation

The evidence at trial showed that on July 15, 2012, at approximately 2:15 a.m., two men climbed through a first-floor bathroom window of a home in Brooklyn, New York (A167, A250-51,

A261, A267). Each of the intruders was wearing a mask and was carrying a handgun (A69-71, A80-83, A85, A87, A94, A253-56, A263-64). The gunmen woke up the residents and stole cash, jewelry, and other items (A69, A71, A75, A77-79, A94, A99, A253, A257, A260).

After the gunmen fled, the police were called (A77, A260). Near the open bathroom window, the police found four prints, one of which matched defendant's left palm print, and another of which matched his left index fingerprint (A125-26, A132, A167-69, A189-91, A195-98, A209).

On July 24, 2012, defendant surrendered to the police (A169, A174-75).

Defendant's Telephone Calls

Defendant made telephone calls while he was detained at Rikers Island (78a-79a). The procedure for a detainee to make a telephone call at Rikers Island is as follows: The inmate goes to the area where the telephones are located (72a). The inmate picks up the receiver, enters his or her unique ten-digit book-and-case number, enters a six-digit personal identification number, and dials the number he or she wants to call (72a-73a).

Since 2008, the New York City Department of Correction ("DOC") has been recording all of the telephone calls of inmates, except telephone calls to attorneys, members of the clergy, and treating

physicians (73a).[2] The DOC notifies inmates in three ways that their non-privileged telephone calls are subject to monitoring and/or recording (73a-74a). First, the inmate handbook, which the inmate signs during the intake process, states that all inmate telephone calls, except for privileged calls, may be recorded for security purposes (74a). Second, in the telephone area, there are signs in English and Spanish, which state:

> INMATE TELEPHONE RECORDING NOTICE
> "INMATE TELEPHONE CONVERSATIONS ARE SUBJECT TO ELECTRONIC MONITORING AND/OR RECORDING IN ACCORDANCE WITH DEPARTMENT POLICY." AN INMATE'S USE OF INSTITUTIONAL TELEPHONES CONSTITUTES CONSENT TO THIS MONITORING AND/OR RECORDING.

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[2] According to DOC Operations Order Number 384-395, the DOC also does not record an inmate's telephone calls to certain telephone numbers at the New York City Board of Correction, the New York City Department of Investigation, and the New York State Commission of Correction (87a).

DOC Operations Order Number 384-395 further provides that the telephone recordings should be treated as confidential material, which should not be released to the public, but provides that copies of these recordings may be given to the New York City District Attorneys' Offices or other law enforcement agencies, with the approval of the DOC (92a-93a). District Attorneys' Offices and other law enforcement agencies that receive these recordings are directed to notify the DOC immediately if the monitoring of these recordings reveals any information that may be "of interest to" the DOC, including "escape plans, drug smuggling, sexual abuse, bullying, and talk of or plans for suicide" (93a, 98a).

(41a [People's Exhibit 7], 74a-76a). Third, each time an inmate places a call, he or she hears a recorded message, which states that the call may be recorded and monitored (74a).

The prosecution introduced into evidence four excerpts from defendant's telephone calls (78a-83a; People's Exhibit 10). In those excerpts, defendant said that his face was covered, that he did not beat up anyone, and that he did not have a gun (People's Exhibit 10). Defendant also expressed reluctance to talk about the crime over the telephone (id.).

The Verdict and the Sentence

On February 14, 2014, defendant was convicted of one count each of first-degree robbery and first-degree burglary. On February 24, 2014, he was sentenced to concurrent prison terms of fifteen years, plus five years of post-release supervision, on each count.

The Appeal to the Appellate Division

Defendant appealed from his judgment of conviction to an intermediate appellate court, the New York Supreme Court, Appellate Division, Second Judicial Department. On that appeal, defendant claimed, in relevant part, that the admission into evidence of excerpts from his recorded telephone calls at Rikers Island violated his right to counsel under the Sixth Amendment of the United States

Constitution and under the New York State Constitution. In support of that claim, defendant argued, in part, that he had not consented to the DOC sharing with the prosecution the recordings of his telephone conversations.

While defendant's appeal was pending before the Appellate Division, the New York Court of Appeals decided an appeal in the case of People v. Johnson, 27 N.Y.3d 199, 32 N.Y.S.3d 34 (2016). In Johnson, the New York Court of Appeals held that the introduction into evidence of recorded telephone calls made by a pretrial detainee at Rikers Island did not violate his right to counsel under the Sixth Amendment. 27 N.Y.3d at 205-06, 32 N.Y.S.3d at 38-39.

On April 19, 2017, the Appellate Division, by a 3-to-1 vote, affirmed defendant's judgment of conviction (36a-40a). People v. Diaz, 149 A.D.3d 974, 53 N.Y.S.3d 94 (App. Div. 2017). The Appellate Division rejected defendant's right-to-counsel claim, citing People v. Johnson, 27 N.Y.3d 199, 32 N.Y.S.3d 34 (2016) (37a). See 149 A.D.3d at 975, 53 N.Y.S.3d at 96.

The Appellate Division separately addressed defendant's contention that he did not consent to the DOC providing his recorded telephone calls to the prosecution. The Appellate Division found that defendant had "impliedly consented to the monitoring and recording of his telephone conversations by using the prison

telephones despite being notified that such calls were being monitored" (37a). 149 A.D.3d at 975, 53 N.Y.S.3d at 96 (citations omitted). The Appellate Division held that, in light of the notifications that defendant had received, "'it was no longer reasonable for [the defendant] to presume an expectation of privacy as to the content of those telephone conversations'" (37a). 149 A.D.3d at 976, 53 N.Y.S.3d at 96 (quoting United States v. Busch, No. 09CR331A, 2013 U.S. Dist. LEXIS 188419, at *165 [W.D.N.Y. July 15, 2013]). The Appellate Division stated that "the notifications, as a whole, did not limit the scope of the defendant's consent to the monitoring and recording of his telephone calls solely for security purposes" (37a). 149 A.D.3d at 976, 53 N.Y.S.3d at 97 (citations omitted). The Appellate Division therefore concluded that there was no statutory or constitutional bar to the introduction of the recordings of those telephone calls into evidence (37a). 149 A.D.3d at 975-76, 53 N.Y.S.3d at 96. But the Appellate Division observed that "the better practice going forward may be" for the DOC to include in the notice given to inmates "an express notification that the recorded calls may be turned over to

the District Attorney" (38a).[3] 149 A.D.3d at 976, 53 N.Y.S.3d at 97.

The dissenting justice in the Appellate Division agreed with the majority that defendant had "impliedly consented to the monitoring and recording of his telephone conversations by using the telephones at Rikers" (39a). 149 A.D.3d at 978, 53 N.Y.S.3d at 98 (Hall, J., dissenting). The dissenting justice also agreed with the majority that defendant "'had no reason to expect privacy in his calls'" (39a). 149 A.D.3d at 978, 53 N.Y.S.3d at 98 (citation omitted). Nonetheless, the dissenting justice concluded that the recorded telephone calls of pretrial detainees should not be introduced into evidence unless the pretrial detainee was expressly notified that his or her recorded telephone calls might be turned

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[3] Sometime after defendant's pretrial detention in this case, the DOC added language to the recorded message that an inmate hears when placing a telephone call. The recorded message now states: "This call is subject to recording and/or monitoring. An inmate's use of institutional telephones constitutes consent and your calls may be provided to law enforcement agencies."

over to the prosecution (40a).[4] 149 A.D.3d at 979, 53 N.Y.S.3d at 99.

The Appeal to the New York Court of Appeals

On his appeal to the New York Court of Appeals, defendant abandoned his right-to-counsel claim (9a). People v. Diaz, 33 N.Y.3d 92, 101 n.7, 98 N.Y.S.3d 544, 549 n.7 (2019). Instead, defendant challenged the introduction into evidence of his telephone calls on the following grounds: (1) the prosecution violated the Fourth Amendment, by seizing and searching defendant's recorded telephone calls without a warrant and without defendant's consent; (2) even if defendant was deemed to have consented to the seizure and search of the recorded telephone calls, that consent was not voluntary, because defendant was in a vulnerable emotional state at the time he made the telephone calls and because it is difficult for pretrial detainees to communicate with people outside Rikers Island except by telephone; and (3) the prosecution's access to

[4] The dissenting justice's conclusion appears to be based on state evidentiary law, not constitutional law. In her opinion, the dissenting justice applied New York's non-constitutional harmless error standard to the alleged error in this case and cited to case law describing New York's non-constitutional harmless error rule (40a). 149 A.D.3d at 979, 53 N.Y.S.3d at 99 (citing People v. Johnson, 57 N.Y.2d 969, 970, 457 N.Y.S.2d 230, 230-31 [1982]; People v. Crimmins, 36 N.Y.2d 230, 241-42, 367 N.Y.S.2d 213, 221-22 [1975]).

telephone conversations of pretrial detainees presented "due process and equal protection issues" (Defendant's Reply Brief to N.Y. Court of Appeals at 22-23) because that access disproportionately burdens those defendants who lack the financial means to post bail.

On February 21, 2019, the New York Court of Appeals, by a 5-to-2 vote, affirmed the order of the Appellate Division (1a-40a). 33 N.Y.3d at 95-101, 98 N.Y.S.3d at 545-49. The Court of Appeals concluded that defendant's Fourth Amendment claim was meritless (5a-9a). 33 N.Y.3d at 95, 98-100, 98 N.Y.S.3d at 545, 547-49. The Court of Appeals noted that, in order to be entitled to Fourth Amendment protection, a defendant must demonstrate "an actual (subjective) expectation of privacy," and that expectation must be "one that society is prepared to recognize as reasonable" (5a-6a). 33 N.Y.3d at 98, 98 N.Y.S.3d at 547. The Court of Appeals held that, "[e]ven if defendant subjectively believed that his calls were private -- a notion that is largely belied by the record -- that expectation was not objectively reasonable" (6a). 33 N.Y.3d at 98, 98 N.Y.S.3d at 547. The Court of Appeals observed that "federal and state courts across the country have long held that detainees provided with prior notice of the government's monitoring and recording of their phone calls have no reasonable expectation of privacy in the content of the communications" (7a). 33 N.Y.3d at

99, 98 N.Y.S.3d at 548 (citing cases). The Court of Appeals concluded that because "all reasonable expectation of privacy in the content of those phone calls is lost, . . . 'there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible'" (8a). 33 N.Y.3d at 99-100, 98 N.Y.S.3d at 548 (citations omitted).

The Court of Appeals also observed that nothing in the inmate handbook or recorded notice heard by the inmate making a telephone call restricted the use or dissemination of the recordings (9a). 33 N.Y.3d at 100, 98 N.Y.S.3d at 548-49. Consequently, "there were no additional Fourth Amendment protections that would prevent DOC from releasing the recording to the District Attorney's Office absent a warrant" (9a). 33 N.Y.3d at 100, 98 N.Y.S.3d at 549.

Because of defendant's failure to comply with New York's contemporaneous objection rule, the Court of Appeals rejected defendant's other claims regarding his telephone calls. The Court of Appeals said:

> Defendant's remaining arguments, challenging the "voluntariness" of any findings of consent to the monitoring and recording of his phone calls, and claiming that his due process and equal protection rights were violated, are unpreserved for our review.

(9a). 33 N.Y.3d at 100-01, 98 N.Y.S.3d at 549.

The two dissenting judges asserted that pretrial detainees have a reasonable expectation of privacy in their telephone calls from jail, and that, even assuming that defendant had impliedly consented to the monitoring and recording of his telephone calls by the DOC, that implied consent did not authorize the DOC to share the recordings with the prosecution, in the absence of a warrant (10a-35a). 33 N.Y.3d at 101-19, 98 N.Y.S.3d at 549-62 (Wilson, J., dissenting).

REASONS WHY THE PETITION SHOULD BE DENIED

In his petition for certiorari, defendant challenges the holding of the New York Court of Appeals that a pretrial detainee, who has been notified that his non-privileged telephone calls might be recorded and monitored, has no reasonable expectation of privacy in the content of those calls for purposes of the Fourth Amendment, and that consequently the Fourth Amendment does not prohibit the prosecution from introducing into evidence at trial the content of those calls.

Defendant's petition for certiorari should be denied for three reasons. First, defendant has not identified any decision by a federal court of appeals or a state court of last resort that conflicts with the holding of the New York Court of Appeals in this case. Second, the holding of the New York Court of Appeals in this case was correct under well-established principles of Fourth Amendment law. Third, insofar as defendant may be asserting either a claim that his consent to the recording and monitoring of his telephone calls was involuntary, or a claim that the practice of allowing warrantless access by prosecutors to recorded telephone calls of pretrial detainees improperly discriminates against defendants who lack the financial means to post bail, review of those claims is barred by an independent and adequate state ground.

I. The Decision of the New York Court of Appeals in this Case Does Not Conflict with Decisions of the Federal Courts of Appeals or with Decisions of Other State Courts of Last Resort.

Defendant's petition for certiorari should be denied because there appears to be no decision of any federal court of appeals or of any state court of last resort that is in conflict with the decision of the New York Court of Appeals in this case. See Sup. Ct. R. 10(b). As the New York Court of Appeals observed in its decision, "federal and state courts across the country have long held that detainees provided with prior notice of the government's monitoring and recording of their phone calls have no reasonable expectation of privacy in the content of the communications" (7a). People v. Diaz, 33 N.Y.3d 92, 99, 98 N.Y.S.3d 544, 548 (2019). See United States v. Gangi, 57 Fed. Appx. 809, 815 (10th Cir. 2003); United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002); United States v. Eggleston, 165 F.3d 624, 626 (8th Cir. 1999); United States v. Van Poyck, 77 F.3d 285, 290-91 (9th Cir. 1996); Decay v. State, 2009 Ark. 566, at 4-7, 352 S.W.3d 319, 325-26 (2009); Jackson v. State, 18 So. 3d 1016, 1030 (Fla. 2009); Preston v. State, 282 Ga. 210, 213-14, 647 S.E.2d 260, 263-64 (2007); State v. Gilliland, 294 Kan. 519, 532-34, 276 P.3d 165, 177-78 (2012); In re Grand Jury Subpoena, 454 Mass. 685, 688-89, 912 N.E.2d 970, 973-74 (2009); State v. Jackson, Nos. A-0022-18T2, A-2586-18T2,

2019 N.J. Super. LEXIS 116, at *16-*19 (Super. Ct. App. Div. July 19, 2019); State v. Johnson, 148 N.M. 50, 57, 229 P.3d 523, 530 (2010); State v. Smith, 117 Ohio App. 3d 656, 661, 691 N.E.2d 324, 327 (Ct. App. 1997); State v. Hill, 333 S.W.3d 106, 124-26 (Tenn. Crim. App. 2010); see also United States v. Novak, 531 F.3d 99, 101-03 (1st Cir. 2008) (O'Connor, J.) (monitoring and recording of inmate's telephone calls did not violate Fourth Amendment, because inmate was deemed to have consented to monitoring and recording of his calls); United States v. Sababu, 891 F.2d 1308, 1329-30 (7th Cir. 1989) (person called by inmate had no reasonable expectation of privacy in their telephone conversation).

In his petition, defendant contends that three federal court decisions are in conflict with the decision of the New York Court of Appeals in this case (Petition at 12–13). But that contention does not withstand scrutiny.

In the first of those cases -- United States v. Cohen, 796 F.2d 20 (2d Cir. 1986) -- the Second Circuit held that a pretrial detainee had a reasonable expectation of privacy in his jail cell that was sufficient to challenge an investigatory search, where the search was instigated by a prosecutor and was completely unrelated to the prison's interest in institutional security. Id. at 21-24. But the Second Circuit also stated that, "[w]ere it a

prison official that initiated the search of [the defendant's] cell, established decisional law holds that the search would not be subject to constitutional challenge, regardless of whether security needs could justify it." Id. at 24.

In this case, the prosecutor did not initiate the recording of defendant's telephone calls. On the contrary, starting in 2008, the DOC routinely recorded the non-privileged telephone calls of inmates for security purposes (73a). Therefore, the holding of Cohen has no relevance to this case. See United States v. Graham, No. 12-10266-NMG, 2013 U.S. Dist. LEXIS 146824, at *5-*6 (D. Mass. Oct. 8, 2013) (holding that Cohen was inapplicable where the search [i.e., the recording] of inmate's telephone calls was initiated and executed by Department of Correction officials).

The second case upon which defendant relies is United States v. Noriega, 917 F.2d 1543 (11th Cir. 1990). In Noriega, the Eleventh Circuit denied a television network's application for a writ of mandamus to overturn a district court decision that temporarily restrained the network from broadcasting telephone conversations between the defendant and his attorneys that were recorded by the government while the defendant was in prison. The Eleventh Circuit, after noting that "[i]t is not unusual or unreasonable to condition the use of telephones by penal inmates

on monitoring of the telephone calls by the authorities charged with maintaining the security of the penal facility," remarked, "[m]oreover, possession of such communications by one element of the government does not necessarily implicate another element." Id. at 1551 n.10. This comment, which is dictum, was made in the context of a decision that did not address a Fourth Amendment issue, and therefore does not conflict with the holding of the New York Court of Appeals in this case.

The third case upon which defendant relies is United States v. Mitan, Nos. 08-760-1, 08-760-2, 2009 U.S. Dist. LEXIS 88886 (E.D. Pa. Sept. 25, 2009). In Mitan, the government reviewed recordings of telephone calls of a pretrial detainee who had been granted permission to represent himself. The question of whether a correctional facility may provide the prosecution with the recorded telephone conversations of a pretrial detainee who is acting as his own attorney is significantly different from the question presented in this case, in which defendant had an attorney, and in which defendant's telephone conversations with his attorney were not recorded or monitored.

Thus, defendant has failed to identify a single court decision that conflicts with the decision of the New York Court of Appeals

in this case. In the absence of any such conflict, this case does not warrant review by this Court.

II. Defendant's Fourth Amendment Claim Is Meritless Under Well-Established Principles of Law.

Defendant's petition for certiorari should also be denied because his Fourth Amendment claim is meritless under well-established principles of law. For the contents of a telephone call to be subject to Fourth Amendment protection, a person's expectation of privacy in the contents of that telephone call must be "the kind of expectation that 'society is prepared to recognize as "reasonable."'" See Hudson v. Palmer, 468 U.S. 517, 525 (1984) (quoting Katz v. United States, 389 U.S. 347, 361 [1967] [concurring opinion]). In this case, defendant did not have a reasonable expectation of privacy in his non-privileged telephone calls, in light of two circumstances.

First, defendant's privacy interests were limited because of the "government's weighty interest in ensuring institutional security and order" at a correctional facility (6a). Diaz, 33 N.Y.3d at 98, 98 N.Y.S.3d at 547. "Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests." Palmer, 468 U.S. at 527. In Hudson v. Palmer, 468 U.S. 517 (1984), this Court held that, in

balancing the expectation of privacy of an inmate against the needs of prison security, an inmate's expectation of privacy must "always yield to what must be considered the paramount interest in institutional security," and that "it is accepted by our society that '[l]oss of freedom of choice and privacy are inherent incidents of confinement.'" Id. at 528 (quoting Bell v. Wolfish, 441 U.S. 520, 537 [1979]). This Court held that, therefore, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[5] Id. at 526; see also id. at 527-28 ("[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order").

The practice of recording and monitoring inmate telephone calls "is considered by prison officials to be an extremely

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[5] Although Hudson v. Palmer, 468 U.S. 517 (1984), involved a convicted prisoner, not a pretrial detainee, that distinction does not make a constitutional difference. In Bell v. Wolfish, 441 U.S. 520 (1979), this Court stated that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." Id. at 546 & n.28. Indeed, this Court suggested that pretrial detainees may raise greater security concerns than convicted inmates because pretrial detainees "may pose a greater risk of escape than convicted inmates." Id. at 546 n.28.

effective tool in helping to maintain internal security." United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988). At the New York Metropolitan Correctional Center, the recording and monitoring of inmate telephone calls "have assisted, for example, in the detection of escape plans, of schemes to smuggle controlled substances into the facility, and of inmate identification of another inmate as an informant in the government's Witness Protection Program." Id. Because the DOC had a legitimate security interest in recording and monitoring the non-privileged telephone calls of inmates, any expectation of privacy that defendant may have had in his non-privileged telephone calls had to yield to the interests of institutional security. See Palmer, 468 U.S. at 525-28 (because of legitimate security needs, inmate had no reasonable expectation of privacy in his prison cell); Wolfish, 441 U.S. at 558-60 (because of the legitimate security interests of the facility, correction officials may conduct visual body cavity searches of pretrial detainees, without probable cause); United States v. Hearst, 563 F.2d 1331, 1346 (9th Cir. 1977) ("once the government establishes that its intrusion is for a justifiable purpose of imprisonment or prison security, the Fourth Amendment question is essentially resolved in its favor" [citations, quotation marks, and brackets omitted]).

Indeed, this Court has relied on similar reasoning in rejecting an inmate's Fourth Amendment claim. In Stroud v. United States, 251 U.S. 15 (1919), the prosecution introduced into evidence at trial letters written by the defendant while he was incarcerated in a federal penitentiary. The letters contained "expressions tending to establish [his] guilt" of the crime with which he was then charged, the killing of a prison guard. Id. at 21. The letters came into the possession of the warden "under established practice, reasonably designed to promote the discipline of the institution." Id. The warden, in turn, gave the letters to the district attorney. Id. This Court concluded that there was no "unreasonable search and seizure, in violation of [the defendant's] constitutional rights." Id. at 22.

The second circumstance that shows that defendant did not have a reasonable expectation of privacy in his non-privileged telephone calls is that he was notified that the content of those telephone calls was not private. At Rikers Island, every time an inmate picks up an institutional telephone receiver, a recorded message informs the inmate that the telephone calls may be recorded and monitored (74a). Signs in the telephone area state that inmate telephone conversations may be monitored and/or recorded (41a, 74a-76a). In addition, the inmate handbook, which the inmate signs

during the intake process, states that all non-privileged telephone calls may be recorded for security purposes (74a).

Because defendant knew that his non-privileged telephone calls were not private, defendant did not have a reasonable expectation of privacy in the content of those telephone calls; and that conclusion is consistent with the holding of numerous federal and state appellate courts. See Gangi, 57 Fed. Appx. at 815; Friedman, 300 F.3d at 123; Eggleston, 165 F.3d at 626; Van Poyck, 77 F.3d at 290-91; Sababu, 891 F.2d at 1329-30; Decay, 2009 Ark. 566, at 4-7, 352 S.W.3d at 325-26; Jackson, 18 So. 3d at 1030; Preston, 282 Ga. at 213-14, 647 S.E.2d at 263-64; Gilliland, 294 Kan. at 532-34, 276 P.3d at 177-78; In re Grand Jury Subpoena, 454 Mass. at 688-89, 912 N.E.2d at 973-74; Jackson, 2019 N.J. Super. LEXIS 116, at *16-*19; Johnson, 148 N.M. at 57, 229 P.3d at 530; Smith, 117 Ohio App. 3d at 661, 691 N.E.2d at 327; Hill, 333 S.W.3d at 124-26.

Federal and state appellate courts have also rejected Fourth Amendment claims in analogous circumstances. Appellate courts have held that an arrestee does not have a reasonable expectation of privacy in statements that the arrestee makes on a telephone in a police station, where the arrestee's telephone conversation occurs in the presence of a police officer. See Sherbrooke v.

City of Pelican Rapids, 513 F.3d 809, 815 (8th Cir. 2008) (arrestee had no reasonable expectation of privacy in the statements she made on the telephone in the police station, where "the presence of police officers was open and obvious"); People v. Smith, 716 P.2d 1115, 1118-19 (Colo. 1986); People v. Liberg, 138 Ill. App. 3d 986, 992-93, 486 N.E.2d 973, 977-78 (App. Ct. 1985); Holt v. State, 481 N.E.2d 1324 (Ind. 1985); State v. McKercher, 332 N.W.2d 286, 287 (S.D. 1983); see also United States v. Gann, 732 F.2d 714, 723 (9th Cir. 1984) (defendant had no reasonable expectation of privacy in statements he made on the telephone in the presence of police, during execution of search warrant at his home).

Similarly, here, because defendant knew that the DOC might be recording and monitoring his non-privileged telephone calls -- and because of the legitimate security interest of the DOC in recording and monitoring those calls -- defendant had no reasonable expectation of privacy in the content of those calls.

In his petition, defendant expressly states that he "is not taking issue with" the recording of inmate telephone calls by correctional facilities for security reasons (Petition at 1-2); but he claims that, even if he did not have a reasonable expectation of privacy in the content of his non-privileged telephone calls in relation to the DOC, he still had a reasonable

expectation of privacy in the content of those telephone calls insofar as the District Attorney's Office was concerned (id. at 1-2, 20-21). Defendant asserts that the District Attorney's Office should not have been able to obtain his recorded telephone calls from the DOC without a warrant.

That claim should be rejected for three reasons. First, that claim is meritless in light of this Court's holding in Stroud v. United States, 251 U.S. 15 (1919), in which this Court concluded that there was no Fourth Amendment violation where the warden provided an inmate's letters to the district attorney. Id. at 21-22. There is no constitutional difference between the disclosure to the prosecution of an inmate's letters and the disclosure to the prosecution of an inmate's non-privileged telephone calls. See State v. Archie, 148 Wash. App. 198, 204, 199 P.3d 1005, 1009 (2009) (rejecting pretrial detainee's Fourth Amendment claim regarding his inmate communications, because institutional security concerns "do not depend upon whether the inmate is pre- or posttrial, or whether the communication is by mail or telephone").

Second, there was no reasonable basis for defendant to believe that the DOC would not share the contents of his non-privileged telephone calls with the prosecution. As the New York Court of

Appeals observed (8a-9a), 33 N.Y.3d at 100, 98 N.Y.S.3d at 548-49, neither the inmate handbook, nor the signs in the telephone area, nor the recorded message on the telephone restricted the DOC's use or dissemination of the recorded telephone calls in any way.[6]

Third, society would not find reasonable the notion that correction officials cannot share lawfully obtained evidence with the District Attorney's Office. It would be absurd to conclude that correction officials would be constitutionally prohibited from informing the District Attorney's Office that correction officials had learned from non-privileged telephone calls by an inmate -- who had been informed that his calls might be recorded and monitored -- that the inmate was arranging for the murder of a prosecution witness, or was running a criminal business from jail, or was disclosing some information relating to a past crime. See In re Grand Jury Subpoena, 454 Mass. at 689, 912 N.E.2d at

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[6] In addition, insofar as defendant's claim is based on the fact that he was not specifically advised that his recorded telephone calls might be shared with the prosecution (see Petition at 2), that alleged deficiency in the notice has already been addressed by the DOC and thus does not warrant review by this Court. The DOC has changed the recorded message that inmates hear upon picking up the telephone receiver, so that the inmates are now specifically told that their recorded telephone calls may be provided to law enforcement agencies. See supra at 10 n.3.

973-74 ("Nor do we think that society would be prepared to recognize as reasonable an expectation of privacy held by a detainee or inmate that recordings of his telephone calls, which were made by the sheriff with notice given to all parties to the calls, might not be shared with law enforcement authorities"); Jackson, 2019 N.J. Super. LEXIS 116, at *17-*18 (if inmate knows that phone calls are being monitored and recorded, "it is unreasonable to conclude . . . that the inmate's loss of privacy should be limited to the one law enforcement agency -- the correctional facility -- that is recording the conversation" or "to limit the ability to divulge the information to prosecutors to crimes related to prison security"); see also Davenport v. Rodgers, 626 Fed. Appx. 636, 637 (7th Cir. 2015) (mail clerk did not violate the Fourth Amendment by intercepting and forwarding to prosecutors the letters of a pretrial detainee); Bryant v. Thompson, No. 6:16-2905-TLW-KFM, 2017 U.S. Dist. LEXIS 116981, at *13-*15 (D.S.C. July 6, 2017) ("prison officials do not commit a constitutional violation by reading prisoners' outgoing nonlegal mail and forwarding matters of concern to police or prosecutors" [citations, quotation marks, and brackets omitted]).

Indeed, numerous federal and state appellate courts that have held that an inmate had no reasonable expectation of privacy in

his or her telephone calls have also held that recordings of those calls were admissible at trial. Consequently, those courts have necessarily held that correction officials did not violate the Fourth Amendment by providing those recordings to the prosecution. See Gangi, 57 Fed. Appx. at 812-15; Friedman, 300 F.3d at 115, 120-23; Eggleston, 165 F.3d at 626; Van Poyck, 77 F.3d at 288, 290-91; Sababu, 891 F.2d at 1328-30; Decay, 2009 Ark. 566, at 4-7, 352 S.W.3d at 325-26; Jackson, 18 So. 3d at 1029-30; Preston, 282 Ga. at 213-14, 647 S.E.2d at 263-64; Gilliland, 294 Kan. at 532-34, 276 P.3d at 177-78; Jackson, 2019 N.J. Super. LEXIS 116, at *17-*18; Johnson, 148 N.M. at 55-57, 229 P.3d at 528-30; Smith, 117 Ohio App. 3d at 659-61, 691 N.E.2d at 326-27; Hill, 333 S.W.3d at 124-26; see also Novak, 531 F.3d at 103 (recordings of inmate's telephone calls could be introduced into evidence "consistently with the requirements of the Fourth Amendment," because inmate was deemed to have consented to monitoring of his calls).

In his petition, defendant acknowledges that the DOC can provide law enforcement officials with the recordings of the non-privileged telephone calls of pretrial detainees under some circumstances, specifically, when those telephone calls contain statements relating to "safety and security within the facility" and that may constitute evidence of "'new' crimes" (Petition at

15). But if pretrial detainees have no reasonable expectation of privacy in their non-privileged telephone calls when they are discussing certain "new crimes," then there is no basis to conclude that they nevertheless have a reasonable expectation of privacy in their non-privileged telephone calls when they are discussing other subjects, including past crimes.

Defendant asserts that the prosecution's knowledge of the statements that he made in the recorded telephone conversations "did not result from the DOC's recording and/or monitoring regime but was based entirely on the prosecutor listening to [defendant's] conversations," and he further asserts that the prosecution "request[ed] the recordings and examin[ed] them for inculpatory evidence" (Petition at 13-14). Those assertions are not supported by the record, which is silent on the question of whether anyone at the DOC listened to defendant's telephone conversations before the recordings were provided to the District Attorney's Office. In any event, it is inconsequential, for Fourth Amendment purposes, whether anyone at the DOC listened to the conversations before they were provided to the District Attorney's Office, because defendant had no reasonable expectation of privacy in those recorded conversations. Defendant thus could not reasonably have expected either that the recordings of his conversations would not

be provided to the District Attorney's Office at all, or that those recordings would be provided to the District Attorney's Office only if the DOC had listened to them first.

In support of his petition, defendant cites this Court's decision in Carpenter v. United States, 138 S. Ct. 2206 (2018), but that reliance is misplaced. In Carpenter, this Court held that prosecutors needed a warrant in order to obtain a defendant's historical cell-site location information from a wireless carrier.

Carpenter is inapplicable here. The holding in Carpenter was "narrow" and was based on the "unique nature of cell phone location records." Id. at 2217, 2220. Furthermore, the circumstances presented in Carpenter are significantly different from the circumstances presented by this case. In Carpenter, the prosecutor obtained from a private company information in which a defendant had a reasonable expectation of privacy. In this case, by contrast, a District Attorney's Office obtained from the Department of Correction -- a law enforcement agency with which the District Attorney's Office is closely associated -- recordings

of telephone calls in which defendant did not have a reasonable expectation of privacy.[7]

Thus, for all of these reasons, defendant's claim is meritless under well-established principles of law and does not warrant review by this Court.

III. Review of Defendant's Other Claims Is Barred Because the New York Court of Appeals Rejected Those Claims on an Independent and Adequate State Ground.

In his petition, defendant argues: (1) that any consent he gave to the recording and monitoring of his telephone conversations was involuntary, because of his "'vulnerable' emotional state" when he made the telephone calls and his lack of a "'viable alternative'" for communicating with family and friends (Petition at 19-22); and (2) that the prosecution's warrantless access to the non-privileged telephone calls of pretrial detainees improperly discriminates against defendants who lack the financial means to post bail (id.

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[7] Although the dissenting opinion in the New York Court of Appeals describes the DOC as a "non-law enforcement government entity" (21a), 33 N.Y.3d at 108, 98 N.Y.S.3d at 555 (Wilson, J., dissenting), New York state appellate court decisions refer to the DOC as a law enforcement agency and to correction officers as law enforcement officers. See People v. Masselli, 13 N.Y.2d 1, 4, 240 N.Y.S.2d 976, 978 (1963); Guynup v. County of Clinton, 90 A.D.3d 1390, 1391, 935 N.Y.S.2d 681, 683 (App. Div. 2011); Laudico v. Netzel, 254 A.D.2d 811, 812, 679 N.Y.S.2d 487, 488 (App. Div. 1998); Welch v. Constantine, 194 A.D.2d 1008, 1011, 599 N.Y.S.2d 683, 685 (App. Div. 1993).

at 22). Those claims are beyond the scope of this Court's jurisdiction because the New York Court of Appeals rejected those claims on the basis of an independent and adequate state ground.

In his briefs to the New York Court of Appeals, defendant challenged the introduction of excerpts from the recordings of his telephone conversations on the following grounds: (1) the prosecution violated the Fourth Amendment by seizing and searching defendant's recorded telephone calls without a warrant and without defendant's consent; (2) even if defendant was deemed to have consented to the seizure and search of his recorded telephone calls, that consent was not voluntary; and (3) the prosecution's access to defendant's recorded telephone conversations presented "due process and equal protection issues" (Defendant's Reply Brief to N.Y. Court of Appeals at 22-23), because the prosecution's access to such telephone calls disproportionately burdens those inmates who lack the financial means to post bail.

In its decision, the New York Court of Appeals addressed on the merits only the question of whether, for purposes of the Fourth Amendment, defendant, who had been notified that his non-privileged telephone calls might be recorded and monitored, had a reasonable expectation of privacy in those telephone calls. The New York Court of Appeals rejected defendant's other claims regarding the

admissibility of the recordings of his telephone calls on the basis of defendant's failure to comply with New York's contemporaneous objection rule. The Court of Appeals stated:

> Defendant's remaining arguments, challenging the "voluntariness" of any findings of consent to the monitoring and recording of his phone calls, and claiming that his due process and equal protection rights were violated, are unpreserved for our review.

(9a). 33 N.Y.3d at 100-01, 98 N.Y.S.3d at 549.

This Court lacks jurisdiction to review "'a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" Lambrix v. Singletary, 520 U.S. 518, 522-23 (1997) (quoting Coleman v. Thompson, 501 U.S. 722, 729 [1991]); see also Herb v. Pitcairn, 324 U.S. 117, 125 (1945). New York's contemporaneous objection rule, which is codified in New York Criminal Procedure Law § 470.05(2), is a state procedural rule that is independent of the merits of a federal constitutional question. See Whitley v. Ercole, 642 F.3d 278, 286 (2d Cir. 2011); Richardson v. Greene, 497 F.3d 212, 217 (2d Cir. 2007). Furthermore, the reliance by the New York Court of Appeals on the contemporaneous objection rule was adequate to support the judgment, because "New York's contemporaneous objection rule is . . . a 'firmly established and regularly followed' rule." Whitley, 642 F.3d at 286-87

(citations omitted); see also Richardson, 497 F.3d at 217-20; Garvey v. Duncan, 485 F.3d 709, 713-20 (2d Cir. 2007). See generally Beard v. Kindler, 558 U.S. 53, 60 (2009) (state procedural rule is adequate ground to bar federal habeas review if state rule was "firmly established and regularly followed" [citations and quotation marks omitted]).

Therefore, this Court cannot review defendant's claims regarding the voluntariness of any consent to the use of his recorded telephone calls or the disparate impact of the prosecution's access to the recorded calls upon inmates who are unable to post bail. Accordingly, those claims provide no basis for granting the petition for certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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September 5, 2019