No. 18-9359

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

BRIEF OF *AMICI CURIAE* LEGAL AID SOCIETY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF *AMICI CURIAE*[1]

The Legal Aid Society, America's first and largest public defender, represents a majority of the indigent criminal defendants in New York City. It has often advocated before this Court for the Constitutional rights of criminal defendants, *Fay v. Noia*, 372 U.S. 391 (1963), *overruled in part by Wainwright v. Sykes*, 433 U.S. 72 (1977); *Baldwin v. New York*, 399 U.S. 66 (1970); *Cruz v. New York*, 481 U.S. 186 (1987), and for fair and equal treatment of the indigent, *United States v. Kras*, 409 U.S. 434 (1973); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Blum v. Stenson*, 465 U.S. 886 (1984). The case of Petitioner Emmanuel Diaz, an indigent defendant who was in pretrial detention at Rikers Island ("Rikers") in New York City for eight months, lies at the intersection of these concerns, and at the heart of the organization's mission.

SUMMARY OF ARGUMENT

Rikers is a prison in New York that houses thousands of pretrial detainees. The prison is difficult to reach. It is located on an actual island in the middle of one of the most densely populated cities in the world. Due to its geography, it can take an attorney or a family member an entire day to visit a detainee there. As a result, detainees have no choice but to use the prison's monitored telephones in order to communicate with friends and family to discuss

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[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file.

not only personal matters, but also to enlist their assistance in marshaling the financial resources necessary for the detainee to exercise their right to post pretrial bail, to help the detainee identify and retain counsel, or to provide other assistance to the detainee in matters related to their defense.

The prison informs detainees that calls are recorded and monitored through a pre-recorded message played at the outset of each phone call. That message, however, is materially incomplete—so much so that the prison gives detainees false comfort about the purpose and use of the recordings. Detainees are told that calls are recorded and monitored for "security" reasons. Nowhere does the message inform detainees that their calls are regularly turned over wholesale to prosecutors who scour them for evidence to use against the detainees in their pending case. The obvious result is that Rikers' detainees have frequent unguarded conversations on prison telephones with friends and family the contents of which—unbeknownst to them—may be used against them as evidence in their pending cases.

The experience of petitioner, a teenager arrested and housed as a pretrial detainee at Rikers, highlights the serious constitutional issues engendered by this practice. Petitioner was detained at Rikers for nearly a year before his trial. During his pretrial detention, Petitioner made more than 1,000 phone calls to friends and family. In a handful of those conversations, he made incriminating statements to his father. Those statements were handed over to the prosecutor and offered against him at trial over his objection that the prosecution's review and use of that evidence violated the Fourth Amendment. Subsequent to his conviction, he appealed the trial court ruling to New York's

Appellate Division, and then to the New York Court of Appeals.

The New York courts upheld the prosecution's review and use of monitored phone calls under the "third party doctrine." That doctrine states that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2019). In that instance, "the [g]overnment is typically free to obtain such information from the recipient without triggering Fourth Amendment protections." *Id.* In petitioner's case, the New York Court of Appeals held that a pretrial detainee's knowing use of a recorded telephone line is an act of "sharing" that "assumes the risk" of disclosure to the prosecution and extinguishes any reasonable expectation of privacy. An essential factor driving the court's determination was Rikers' misleading disclosure to its detainees that their phone calls were being monitored and recorded for security reasons.

The New York Court of Appeals misapplied the third-party doctrine here. In *Carpenter*, this Court significantly modified the third-party doctrine by finding it inapplicable to law enforcement's use of commercial records of cell-site data that reveals the user's physical location. Even though a cell phone user knows and implicitly agrees that his or her movements are shared with and recorded by the cellular provider, this Court held that the user nevertheless retains a privacy interest in his or her physical movements. The Court emphasized that the "all-encompassing record of the holder's whereabouts," provides an "intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual asso-

ciations.'" *Id.* at 2217 (citation omitted). The Court held: "[I]n no meaningful sense does the user voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements." *Id.* at 2220 (quoting *Smith v. Maryland*, 442 U.S. 735, 745 (1979)); *see People v. Diaz*, 122 N.E.3d 61, 77 (N.Y. 2019) (Wilson, J., dissenting).

The institutional telephone at Rikers is as much a "pervasive and insistent part of his daily life" as a free person's cellular phone. A detainee depends on the monitored line to maintain any connection to the outside world while he awaits trial at the isolated Rikers facility. And although pretrial detainees may have a diminished expectation of privacy by virtue of their incarceration, this Court has repeatedly underscored that pretrial detainees retain certain Fourth Amendment rights. Under this Court's reasoning in *Carpenter*, petitioner had an expectation of privacy in the "all-encompassing record" of his more than 1,000 recorded phone calls to his family and friends, compiled over the course of eight months. Without warrant or individualized suspicion, petitioner's prosecutors obtained a "detailed, encyclopedic, and effortlessly compiled" chronicle of every word that he said to friends and family—information that is far more revealing, and an even more "intimate window" into his "familial, political, professional, religious, and sexual associations" than the chronicle of a cell phone user's movements at issue in *Carpenter*. 138 S. Ct. at 2217. Just as cell-site data is deserving of Constitutional protection from law enforcement even though the cell service company collects and stores that data to administer its phone service, a detainee's pretrial telephone conversations are deserving of protection from his prosecutor, even though New

York's Department of Correction ("DOC") has the recordings for security purposes.

Likewise, Rikers' systematic collection and review of pretrial detainees' phone records for prosecution purposes cannot be justified as consensual. It is fundamental that the scope of a warrantless search is limited by its object and the authorization given. Rikers expressly told petitioner and other detainees that phone recordings are made for the sole purpose of security. The Rikers' recorded message does *not* state that all telephone calls will be transferred to city prosecutors to aid in the detainees' prosecution. Thus, when a detainee like petitioner calls family and friends, at most, any implicit consent would be limited to the narrow purpose and use disclosed in the pre-recorded message—for the DOC to listen to ensure safety and security, not for use against him in prosecution. Even if that implicit consent were voluntary (which is dubious under the circumstances), the limited scope of that consent does not permit the prosecution's collection and use of petitioner's recorded calls as evidence against him.

Whether a government intrusion is reasonable depends in part on the legitimacy of the government's interest in the information sought. The New York Court of Appeals in *Diaz* said nothing about the prosecutor's interest in examining every word a defendant utters over the telephone. It seems obvious that prison officials and prosecutors should refrain from exploiting detainees' communications to enhance prosecutions, except as authorized by court order and upon a proper showing of probable cause.

As a dissenting judge on New York's Appellate Division in *Diaz* remarked, "[w]hile the DOC has a legitimate interest in maintaining the safety and

security of its detention facilities, it has no legitimate interest in harvesting evidence for the prosecution." 53 N.Y.S.3d 94, 99 (N.Y. App. Div. 2017) (Hall, J., dissenting). The dissenting judges from the New York Court of Appeals' decision in *Diaz* concluded: "We come back around, then, to whether we, as a society, want to prosecute crime by jailing suspects for lengthy periods of time in relatively inaccessible locations and monitoring their calls for statements that might be used against them. We might obtain a higher conviction rate with rubber hoses or waterboards, but that is not the civilization we want. Our society is committed to safeguarding the right against self-incrimination and the right to counsel." 122 N.E.3d at 75.

Criminal defendants held for lengthy periods of pretrial detention have a compelling need and no practical alternative to using the monitored telephones in order to maintain contact with family and friends to discuss personal matters and matters relevant to the defense. Routine disclosure of the most intimate aspects of their lives to prosecutors cannot be justified under any Fourth Amendment rationale. Thus, for reasons similar to those outlined by this Court in *Carpenter*, detainees have a reasonable expectation of privacy in their pretrial telephone calls protected by the Fourth Amendment.

ARGUMENT

I. RIKERS IS AN ISOLATED PRISON THAT LEAVES PRETRIAL DETAINEES WITH NO CHOICE BUT TO USE ITS MONITORED PHONE LINES

Rikers is a notorious prison located on an isolated island in the East River of New York City. Like all prisons, Rikers is, by design, inaccessible to the public. Rikers, however, is unusually inaccessible because of its remote location in Queens, New York, behind LaGuardia Airport. It is a 40-minute bus ride from the nearest subway. Family visits are subject to limited schedules, long waits, and intense and invasive searches. An independent report led by former Chief Judge Jonathan Lippman of the New York Court of Appeals concluded that the "physical isolation" and "psychological[] isolat[ion]" at Rikers is a significant problem and encourages "an 'out-of-sight, out-of-mind' dynamic." Indep. Comm'n on N.Y. City Criminal Justice & Incarceration Reform, *A More Just New York City* 2-3, https://tinyurl.com/RikersReport ("*Rikers Report*"). These issues contribute to Rikers "essentially function[ing] as an expensive penal colony." *Id.* at 2.

And indeed, many indigent defendants are put out-of-sight and out-of-mind for months and years in pretrial detention, simply because they cannot post bail. During this difficult time, access to family and friends is crucial but severely limited because a visit to a Rikers detainee is an onerous, all-day affair.

> Rikers Island is located far from the City's courthouses and neighborhoods. It is accessible only by a narrow bridge. The Department of Correction spends $31 million

> annually transporting defendants back and forth to courthouses and appointments off the Island. Visiting a loved one on Rikers can take an entire day, forcing people to miss work and make costly arrangements for child care.

Id. at 14. As a result, pretrial detainees are forced to communicate extensively with family and friends on monitored institutional telephones for a wide variety of important personal reasons, including trial-related matters. A detainee's dependency on these monitored telephones is virtually complete and unavoidable.

The case of petitioner, a teenager with no prior arrests awaiting trial for burglary, is emblematic of a detainee's plight. He made more than 1,000 recorded calls to his father and friends during eight months of pretrial detention, mainly in an effort to raise bail and commissary money. Four of those calls contained unguarded admissions that placed him at the scene of the crime. Had petitioner been free on bail, those telephone calls could not have been recorded without a warrant.

Judge Pigott of the New York Court of Appeals has acknowledged the enormous imposition on pretrial detainees, "[who] left without options available to those able to make bail . . . out of necessity, makes statements during telephone conversations that are detrimental to the defense." *See People v. Johnson*, 51 N.E.3d 547, 550 (N.Y. 2016) (Pigott, J., concurring). Judge Pigott thus recognized the enormous potential for abuse where prosecutorial access to a detainee's communications is routine: "The current arrangement between the Department of Correction and the District Attorney's office creates a serious potential for abuse and may undermine the constitutional rights of

defendants who are financially unable to make bail." *Id.* at 551.

Pretrial detainees often rely on their friends and family to help them secure bail, identify and retain counsel, or assist their attorneys in marshaling evidence and witnesses in support of their defense. But friends, family, and attorneys cannot quickly reach Rikers—it can be a whole day affair to reach the isolated "penal colony" on an island. *Rikers Report* 73. Rikers leaves pretrial detainees with no other practical choice but to communicate with family and friends over the recorded lines in order to seek timely bail, to garner assistance in their own defense, or to have any personal contact with the outside world. A reasonable expectation of privacy should attach to those calls.

Indeed, the phone calls of pretrial detainees from Rikers have proven to be a fertile source of unguarded admissions, confessions, and general impeachment since routine recording began in 2008. New York City prosecutors regularly enlist student interns to listen to every word that detainees say to their friends and family over the course of months and years of incarceration. Prosecutors have sought to introduce excerpts of recorded telephone conversations in approximately half of Legal Aid's felony trials.

Based upon its interpretation of this Court's Fourth Amendment doctrine, the New York Court of Appeals in *Diaz* held that every recorded telephone call that prisoners make to their family and friends over the institutional telephones may be released to their prosecutors for use at trial—without advance judicial approval or even a clear warning to the detainee that this will occur. Making matters worse, petitioner was informed that his calls were being "monitored" for

reasons concerning institutional security—but not that those recordings would be made available to his prosecutor on request. In fact, prison officials and the prosecutor were working to mount a case against him by scouring those conversations for evidence. This Court should reject that practice as inconsistent with the Fourth Amendment.

II. RIKERS' PRACTICE OF HARVESTING ALL PRETRIAL DETAINEE PHONE CALLS AND GIVING THEM WHOLESALE TO PROSECUTORS IS UNCONSTITUTIONAL

A. Petitioner Had a Reasonable Expectation of Privacy in His Phone Calls

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Indeed that right is so basic and important that securing it "was in fact one of the driving forces behind the Revolution itself." *Riley v. California*, 573 U.S. 373, 403 (2014).

That guarantee requires the government to obtain a search warrant to search any place or thing where a person has a reasonable expectation of privacy. *Carpenter*, 138 S. Ct. at 2213. The "application of 'traditional standards of reasonableness' requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *Maryland v. King*, 569 U.S. 435, 448 (2013) (alterations in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

To be sure, this Court has recognized in *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Maryland v. King* that individuals who are detained upon a finding of probable cause have a diminished expectation of privacy. But this Court has repeatedly recognized that pretrial detainees "retain some Fourth Amendment rights upon commitment to a corrections facility." *See id.* at 558. This Court evaluates intrusions into pretrial detainees' privacy as a matter of Fourth Amendment reasonableness. "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Id*. at 559. Courts must consider the scope of the particular intrusion, the manner and place in which it is conducted, and the justification for initiating it. Thus, "[s]ome searches . . . involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must 'balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable,' the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *King*, 569 U.S. at 463 (quoting *Illinois v. McArthur*, 531 U.S. 326, 331 (2001)).

In *King*, the Court upheld a buccal DNA swab of arrestees because the intrusion was "brief" and "minimal" and did not "increase the indignity already attendant to normal incidents of arrest." *Id.* at 463-64. Here, by contrast, the balance tips far in favor of a detainees' privacy interest. In petitioner's case, more than 1,000 of his pretrial phone calls with his friends and family were recorded and provided to the

prosecutor without a warrant. This systematic review by prosecutors of every inmate phone contact with friends and family over eight months is highly intrusive. A detainee has far more significant privacy interests in his or her intimate conversations with friends and family during an extended period of pretrial incarceration than an arrestee's limited interest in preventing DNA-test results from being entered into a database used "for the sole purpose of generating a unique identifying number against which future samples may be matched." *Id.* at 464.

The government's interest in having prosecutors review detainee's calls does not justify the substantial intrusion into their privacy. Review by prosecutors of prison phone calls is an attempt to gather proof of alleged past offenses; it does not address any present governmental interest in security or safety. It is therefore unlike the significant security concerns that permitted suspicionless searches of prisoner's cells and bodily cavities in *Bell*, or "the significant government interest at stake in the identification of arrestees" that was involved in *King*. It is well-established that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995); *see also Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 617, 619 (1989). At minimum, prosecutors' monitoring of intimate phone calls by pretrial detainees must be justified by some individualized suspicion. Rikers' policy of warrant-less, suspicionless review of all detainee phone calls, without any court oversight, plainly violates any notion of Fourth Amendment reasonableness.

The Federal Bureau of Prisons ("BOP") and the Criminal Division of the U.S. Department of Justice ("DOJ") recognize that pretrial detainees retain an expectation of privacy in their phone calls from prison. The DOJ has noted that "the practice of profiling specific groups of inmates for monitoring raises concerns when it requires or causes the BOP to alter its established monitoring procedures for purposes unrelated to prison security or administration." *Bureau of Prisons Disclosure of Recorded Inmate Telephone Conversations*, 21 Op. O.L.C. 11, 18 (1997), https://www.justice.gov/file/19876/download. The BOP has similarly recognized that "maintaining pro-social/legal contact with family and community ties is a valuable tool in the overall correctional process. With this objective in mind, the Bureau provides inmates with several means of maintaining such contacts. Primary among these is written correspondence, supplemented by telephone and visiting privileges." BOP, *Inmate Telephone Regulations*, Program Statement No. 5264.08, § 540.100, at 1 (corrected Feb. 11, 2008), https://www.bop.gov/policy/progstat/5264_008.pdf.

This Court's precedents make clear that petitioner had an expectation of privacy in his calls to family and friends while at Rikers. The question is whether the third-party doctrine negates that expectation. It does not.

B. Petitioner's Detention Did Not Strip Petitioner of His Reasonable Expectation of Privacy, Even Under the Third-Party Doctrine

The New York Court of Appeals held that petitioner was stripped of his reasonable expectation of privacy based on the "third-party doctrine" because he knew

prison officials were listening to his calls. *See Diaz*, 122 N.E.3d at 62. Under the third-party doctrine, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith,* 442 U.S. at 743-44. Under this doctrine, "the [g]overnment is typically free to obtain such information from the [third party] recipient without triggering Fourth Amendment protections." *Carpenter*, 138 S. Ct. at 2216. The third-party doctrine "partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another." *Id.* at 2219. By sharing information with a third party, such as a bank—*see United States v. Miller*, 425 U.S. 435 (1976)—or a telephone company—*see Smith*, 442 U.S. 735—an individual is said to have "assumed the risk that the company would reveal to police" the information at issue, *id.* at 744. Applying this doctrine, the New York Court of Appeals held that a pretrial detainee's knowing use of a recorded telephone line is an act of "sharing" that "assumes the risk" of disclosure to the prosecution, and thus extinguishes any reasonable expectation of privacy. That analysis is incorrect.

In *Carpenter*, this Court significantly restructured the third-party doctrine by declining to apply it to commercial records of the physical location of cell phone users. Of necessity, cell phone users constantly disclose their location to their service providers simply by carrying their phone from place to place. Even though cell phone users know and implicitly agree that their movements may be traced and recorded by the cellular carrier, this Court held that cell phone users nevertheless retain a privacy interest in the physical movements as captured in the cell-site data. The Court held that allowing warrantless access to

cell-site records contravenes a reasonable expectation of privacy. The Court reasoned that the scope of the data collected "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Carpenter*, 138 S. Ct. at 2217 (citation omitted). The Court further remarked that "in no meaningful sense does the user voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements.'" *Id.* at 2220 (alteration in original).

Similarly, petitioner and other pretrial detainees at Rikers are forced to provide an "all-encompassing record" of the "intimate" details of their life through the wholesale monitoring of their pretrial conversations with friends and family. Indeed, petitioner himself, a teenager at the time of his arrest, made more than 1,000 recorded phone calls to his family and friends, which were compiled over the course of eight months and shared with prosecutors. Without warrant or subpoena, petitioner's prosecutors obtained a "detailed, encyclopedic, and effortlessly compiled" chronicle of every word that he said to friends and family—information that is far more revealing, a more "intimate window" into his "familial, political, professional, religious, and sexual associations" than any chronicle of a cell phone user's movements. Moreover, the institutional telephone at Rikers is as much a "pervasive and insistent part of his daily life" as a person's cell phone. A detainee's dependency on a monitored line is no less "indispensable to participation in modern society." *See id.* (citing *Riley*, 573 U.S. at 385). Indeed, the conditions at Rikers leave most detainees with no choice but to use those phone lines to maintain contact with the outside world.

The dissenting opinion in *Diaz* emphasized the analogy between prison landlines and cellular phones:

> Although in [petitioner's] case the intrusion stems from good, old-fashioned landline surveillance, it too involves modern technology that made it possible for DOC to record and store massive amounts of data and deliver more than a thousand voice recordings to the District Attorney with the click of a mouse. The intrusion is also distinguishable in a more odious way: the third party obtaining and sharing the information is not a private party but is instead an arm of government. It is exactly such governmental intrusions from which the Fourth Amendment shields us." . . . [Petitioner's] ability to avoid use of the prison phone for the eight months of his incarceration is far less realistic than Mr. Carpenter's ability to avoid carrying his cellphone during his hours-long crime spree.

122 N.E.3d at 77-79 (Wilson, J., dissenting). The dissent concluded: "Fourth Amendment law, and privacy law more generally, must adapt to times in which we, like [petitioner], have no realistic choice but to divulge information to third parties for a specific purpose, yet retain our rights against the warrantless seizure of that information by the [g]overnment. Sadly, today's decision [in *Diaz*] is another *Olmstead*." *Id.* at 79.

The history of this Court's 1928 opinion in *Olmstead v. United States*, 277 U.S. 438 (1928), and its abrogation by *Katz v. United States*, 389 U.S. 347 (1967), presents a very apt parallel to the issue presented here. In *Olmstead*, the Court initially underestimated the inevitable and pervasive role of

the telephone as a medium for communicating private matters. But in *Katz* this Court recognized that what an individual "seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id.* at 351-52 (emphasis added). Following that reasoning, Congress passed Title III to authorize government interception of wire communications only "under carefully subscribed circumstances." S. Rep. No. 541, 99th Cong., 2d Sess., at 2 (1986); *see* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, codified at 18 U.S.C. §§ 2510-22. In *Carpenter*, this Court wisely anticipated that the American people expect the courts to oversee disclosure of their cell-site data to the government because of its extensiveness, the intimately private information it contains, and the ease with which that extensive trove of private information can be captured.

So, too, here. The privacy interests implicated by the personal conversations of a defendant who is detained while awaiting trial are even greater than those implicated in cell-site data. If cell-site data is deserving of Constitutional protection from law enforcement, even though the cell service company captures it, a detainee's pretrial telephone conversations are deserving of protection from his prosecutor, even though prison officials record them for security purposes.

C. Even if the Third-Party Doctrine Applies, Petitioner's Consent Was Limited to DOC Review for Security Purposes of the Prison—Not by the District Attorneys for Prosecution

Even if the third-party doctrine limited petitioner's expectation of privacy in some way, it could only do so

to the extent of the consent given.[2] "Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its *scope* and manner of execution." *King*, 569 U.S. at 448 (emphasis added). And the "scope" of that search "is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Moreover, "[w]hen an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization." *Walter v. United States*, 447 U.S. 649, 656 (1980).

The pre-recorded phone messages leave no mistake that Rikers was monitoring and recording calls for security purposes only. Any "authorization" by petitioner through implied consent could be no broader than that express objective. First, detainees at Rikers receive and sign a handbook that states "all calls . . . may be monitored and/or recorded by the Department *for security purposes*." *Diaz*, 122 N.E.3d at 71 (emphasis added). Signs are then posted next to telephones that state: "inmate telephone conversations are subject to electronic monitoring and/or recording *in accordance with DOC policy*. An inmate's use of institutional telephones constitutes consent to this monitoring and/or recording." *Id.* (capitalization altered). Finally, a recording message at the start of each call states that calls "may be recorded

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[2] Given the conditions and circumstances at Rikers, it is dubious whether petitioner's consent was in fact voluntary. *See Diaz*, 122 N.E.3d at 70-71 (Wilson, J., dissenting) (citing cases); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) ("[V]oluntariness of consent to a search must be determined from the totality of all the circumstances.") (internal quotation marks and citation omitted).

and monitored." *Id.* The first notice unequivocally states the purpose of the monitoring—for "security purposes"—the second incorporates it, and the third offers no further information. As a result, the scope of consent was limited to the DOC's review of telephone calls for security purposes—not the wholesale transfer of all calls to the prosecutor for a general search. *See Walter*, 447 U.S. at 657 ("indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment") (citation omitted); *Diaz*, 122 N.E.3d at 72 (Wilson, J., dissenting) ([Petitioner]'s consent to a search by DOC, a non-law enforcement governmental entity, for its own security purposes cannot reasonably be construed to include consent for the District Attorney—a law enforcement entity—to search that information for prosecutorial purposes."); *Johnson*, 51 N.E.3d at 551 (Pigott, J., concurring) ("The Department's purpose in recording and monitoring these conversations is limited to ensuring the safety and security of its facilities, not harvesting evidence for the prosecution.").

Narrowly construing the scope of consent is even more important considering the nature of pretrial detention. Importantly, "[p]retrial detainees like defendant are presumed innocent until proved guilty." *Johnson*, 51 N.E.3d at 551 (Pigott, J., concurring). As a result, "the State's only legitimate purpose for detaining them is to assure their presence at trial, and their liberty may not be restrained more than necessary to accomplish that result." *Id*.

Indeed, that conclusion is consistent with this Court's long-standing recognition that the purpose of pretrial detention is to keep the community safe. *See*

United States v. Salerno, 481 U.S. 739, 741 (1987). As a result, this Court has held that pretrial detainees "retain[] those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Turner v. Safley*, 482 U.S. 78, 95 (1987) (second set of brackets in original) (citation omitted). Accordingly, when a prison practice, such as the warrantless dissemination of recorded phone calls to government prosecutors, "offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id*. at 84 (citation omitted).

To that end, the Second Circuit has held that pretrial detainees could not be subjected to prison cell searches not done for legitimate security reasons. *United States v. Cohen*, 796 F.2d 20 (2d Cir. 1986). In *Cohen*, a search of the detainee's prison cell was initiated by the prosecution, not the prison officials, to search for evidence in support of a superseding indictment. *Id*. at 23. While acknowledging the limited privacy interest as it relates to security purposes, the court held that this did not mean that a pretrial detainee "retains no Fourth Amendment rights, regardless of the circumstances underlying the search." *Id*. Indeed, the court held that because the search was initiated by the *prosecutors*—rather than the prison officials—there was no legitimate security reason for the search. Accordingly, the court held that "[the pretrial detainee] retain[ed] an expectation of privacy within his cell sufficient to challenge the investigatory search ordered by the prosecutor." *Id.* at 24. Particularly relevant here, the Second Circuit held that "[a]n individual's mere presence in a prison cell does not totally strip away every garment cloaking his

Fourth Amendment rights, even though the covering that remains is but a small remnant." *Id*.

The same is true here. While the corrections system is allowed to collect and monitor the telephone calls of its detainees with consent, the purpose of such collection and consent of such detainee should be narrowly limited to the safety and security of the institution. Any connection between the stated purpose of the collection and the subsequent dissemination of these telephone calls to prosecutors, without a warrant, is tenuous at best. In fact, the routine production of these telephone calls at the behest of prosecutors unconstitutionally transforms the corrections system into an extension of the prosecutor's office. The only purpose for such production is to bolster the prosecutor's case against his defendant. A detainee's privacy right while diminished, is not eliminated by his narrow consent to searches for security purposes. A prison may monitor calls to secure the safety of the facility but may not collect telephone calls for purely prosecutorial purposes.

The telephone conversations of pretrial detainees should not be disclosed to their prosecutors without a warrant that is based on an individualized suspicion, and detainees should be clearly warned that their words may be used against them at trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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