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December 14, 2020

Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: A-11-20, *State v. McQueen and Allen-Brewer*;
Supreme Court Docket No. 084564;
App. Div. Docket Nos. A-4391-18, A-4910-18

Honorable Chief Justice and Associate Justices:

Pursuant to *Rule* 2:6-2(b), please accept this letter brief in lieu of a more formal submission from *amicus curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ).

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PRELIMINARY STATEMENT

This case presents the first opportunity for the Court to apply the constitutional holding in *State v. Jackson*, which the Court affirmed without opinion earlier this year. The State seeks to read that holding expansively, arguing not only that it means all people in custody lose their expectation of privacy in telephone calls, but that they lose it even when no notice is provided that the State may be listening. Because such a reading contravenes not only the *Jackson* opinion but also more than a century of jurisprudence, the State's arguments must be rejected and the Appellate Division's decision suppressing the police station call affirmed.

Society has long recognized as reasonable an expectation of privacy in telephone calls. Without any notice from the police station that they should expect otherwise, McQueen and Allen-Brewer each retained a privacy interest in their phone call. In *Jackson*, the jails' detailed warnings not only that calls could be recorded and monitored, but also that they could be divulged or result in prosecution, were critical to the panel's conclusion that the state action was lawful. At a minimum, *Jackson* is inapposite here, where it is undisputed that neither McQueen nor Allen-Brewer received any notice. But if *Jackson* decides this case, it does so in favor of the defendants: absent notice, the long-recognized reasonable expectation of privacy remains in telephone calls, even in a custodial setting.

(Point I.A).

The absence of notice should mean that both McQueen and Allen-Brewer retained their privacy interests in the police station call, such that the recording, retrieving, and listening to it by the State constitutes an unlawful search. But even if this Court were to conclude McQueen somehow lost his expectation of privacy, Allen-Brewer's privacy interest does not automatically cede to his loss. The State failed to justify its intrusion into that privacy interest by obtaining a warrant or proving a well-recognized exception to the warrant requirement. It cannot now justify the intrusion with a contorted "plain hearing" argument, because Allen-Brewer plainly was not overheard. (Point I.B).

The Appellate Division reached the proper result in affirming the suppression of the police station call. But its reliance on *Jackson* to admit the jail calls, and the State's attempt to expand that holding to the police station call, risks creating confusion for future cases. The panel's opinion in this case is the first to rely on *Jackson*'s constitutional holding. Because litigants and lower courts do not have the guidance of this Court's analysis in *Jackson*, *amicus* urges the Court to clarify it here. Specifically, *Jackson* should be limited to the type of detailed notice provided by the two jails in that case, and should account for the call recipient as well as the caller in custody. Reframed as guidance, its constitutional holding should thus be understood to require the State to provide notice to all parties to a

call from a custodial setting that their conversation may be recorded, monitored, divulged and/or result in prosecution for the State's action not to constitute an unlawful search. (Point II).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus relies on the facts and procedural history set forth by Allen-Brewer in her Supplemental Brief to this Court filed on December 9, 2020. The ACLU-NJ filed a Motion for Leave to Appear as *Amicus Curiae* simultaneously with this brief. *R.* 1:13-9.

ARGUMENT

I. McQueen and Allen-Brewer had a reasonable expectation of privacy in the call from the police station.

A. Society recognizes as reasonable an expectation of privacy in phone calls; nothing in *State v. Jackson* suggests that disappears in custodial settings absent notice.

When the State invades a person's reasonable expectation of privacy, the Constitution labels that invasion a search. A search without a warrant is presumptively invalid, and the State bears the burden of proving one of the well-recognized exceptions to the warrant requirement applies. *State v. Johnson*, 193 N.J. 528, 552 (2008). Having failed to obtain a warrant before recording and subsequently listening to McQueen and Allen-Brewer's call from the police station, and unable to claim an exception, the State seeks to justify its action – and, apparently, to deny any constitutional limitation on its ability secretly to record and

play back such calls – by asserting the call falls entirely outside the scope of the Fourth Amendment and Article I, paragraph 7. That is an extraordinary assertion not supported by societal norms or the case law.

For the State to be correct, McQueen and Allen-Brewer each must have had no reasonable expectation of privacy in their telephone call. And, because New Jersey law asks only whether an expectation of privacy is one society recognizes as reasonable, for the State to be correct, any other person placing or receiving a call from that police station – without any notice of the recording – must not reasonably expect their call to be private. *See State v. Hinton*, 216 N.J. 211, 236 (2013) (defining New Jersey's constitutional standard as compared to the Fourth Amendment).

It is undisputed that, as a general rule, parties to a telephone call have a reasonable expectation of privacy in their call under both the Fourth Amendment and Article I, paragraph 7. More than a half century ago, the U.S. Supreme Court recognized that telephone conversations, even outside of the home, are protected by the warrant requirement. *Katz v. United States*, 389 U.S. 347, 353 (1967). Since then, the Court has clarified that a person's Fourth Amendment privacy rights in phone usage, specifically in cell phone location data, survive vis-à-vis the government even when such data is collected and maintained by third parties. *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). This Court has affirmed

the same principle under the New Jersey Constitution, which affords even greater protection than the federal constitutional floor, finding that society assumes "people and places one calls on a telephone" as well as "the resulting conversations, will be private." *State v. Mollica*, 114 N.J. 329, 344 (1989)); *see also State v. Hunt*, 91 N.J. 338, 346 (1982) (recognizing a telephone call "is generally understood to consist of a conversation between two persons, no third person being privy to it in the absence of consent."); *State v. Earls*, 214 N.J. 564, 569 (2013) (finding reasonable expectation of privacy in cell phone location data under the State Constitution)..

Presumably, if McQueen had called Allen-Brewer from his cell phone outside – or even inside – the police station, the State would concede they each had a reasonable expectation of privacy under the long line of federal and New Jersey case law. The State has failed to show why when that same conversation occurs on a landline in the police station, where neither McQueen nor Allen-Brewer were on notice that such lines are recorded, the call is transformed into a different category of constitutional analysis. Because, absent notice, a call from a police station is not "a novel class of objects or category of places," this Court can rely on the

reasonable expectation of privacy clearly established for telephone calls generally. *State v. Randolph*, 228 N.J. 566, 584 (2017); *see also* Rb11.[1]

State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019), *aff'd o.b.*, 241 N.J. 547 (2020), did not create a new "category of places" in calls from custodial settings – or even in calls from jails more narrowly – such that the State can claim *Jackson* controls this case. The State is wrong to construe *Jackson*'s constitutional holding to mean that as a category "neither pretrial detainees nor post-conviction inmates have a reasonable expectation of privacy" in calls they make from jail *absent notice.* Sb16. Rather, the *Jackson* panel concluded that two pretrial detainees did not have a reasonable expectation of privacy in their calls because of the particular notice provided by the two jails – including written agreements and "Inmate Guidelines" pamphlets, as well as oral warnings at the start of each call. 460 N.J. Super. at 266 (describing Essex and Middlesex jails' warnings in detail). Notice was critical to the analysis. *Id.* at 276 (concluding "if an inmate *knows* he or she is being monitored and recorded when speaking on the phone, it is unreasonable to conclude . . . that the inmate retains a reasonable expectation of privacy) (emphasis added).[2] To claim that *Jackson* therefore means all people in

[1] "Rb" refers to Respondent Allen-Brewer's Supplemental Brief to this Court filed on December 9, 2020. "Sb" refers to the State's Supplemental Brief filed on November 9, 2020.

[2] Certainly, the panel recognized that "[c]ommon sense limits those expectations [of privacy] in a jail setting" and that an "inmate's privacy entitlements must yield

jail categorically lose their expectation of privacy by virtue of being in custody – rather than, as the opinion holds, by virtue of the notice provided – is to read *Jackson* far too expansively.[3] And to claim by extension that the "same reasons," Sb18, that led the Appellate Division to find no reasonable expectation of privacy in jail calls *with notice* now require that people in police stations lose their expectation of privacy in calls *without notice* is simply to cite *Jackson* incorrectly.

At a minimum, *Jackson* is therefore inapposite here, where it is undisputed that no notice was provided at the police station; the question of whether a reasonable expectation of privacy exists, in a police station or a jail call, absent notice then remains for another day. But further, because notice was the key to overcoming defendants' reasonable expectation of privacy in *Jackson*, the absence

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to the institution's" health and safety responsibilities. 460 N.J. Super. at 276 (citing *Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984); *In re Rules Adoption Regarding Inmate Mail to Attorneys, Pub. Officials, & News Media Representatives*, 120 N.J. 137, 146-47 (1990)). But a diminished expectation of privacy is not the same as no expectation of privacy; although it "might reduce the requisite cause for a search, it cannot prevent article I, paragraph 7 from applying at all." *State v. Hempele*, 120 N.J. 182, 211 (1990). Indeed, the New Jersey case the *Jackson* panel relied upon recalls at that very citation: "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *In re Rules Adoption*, 120 N.J. 137 at 146-47 (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987) and ultimately concluding that a particular limitation on speech was constitutional, but not that speech rights were non-existent in prison setting).

[3] As *amicus* urges in Point II, because the panel in this case also seemed to read the opinion expansively, even as it concluded that a police station was different in kind, *State* v. *McQueen*, No. A-4391-18T1, 2020 WL 2529839, at *2, *4 (App. Div. May 19, 2020), the Court should take this opportunity to clarify the *Jackson* panel's limited holding and its affirmance thereof.

of notice could require the opposite analytical result: absent notice, a reasonable expectation of privacy necessarily remains in telephone calls, *Katz*, 389 U.S. at 353, even in a custodial setting.

The Appellate Division properly concluded that *Jackson* does not dispose of McQueen's reasonable expectation of privacy. In contrast to the written and oral warnings there, the "phone call McQueen placed at the police station presents a different quandary. McQueen had no notice. . . . His expectation of privacy was reasonable in the absence of any warning by anyone, orally or in writing, regarding the recording of the call." *State* v. *McQueen*, No. A-4391-18T1, 2020 WL 2529839, at *3 (App. Div. May 19, 2020). McQueen had a subjective expectation that his call was private, deliberately lowering his voice to avoid being overhead. *Id.* Allen-Brewer, eighteen years old, without experience in the criminal justice system, and receiving a hushed call from her boyfriend in the early morning, had no reason to expect otherwise either. Rb1, 15-16; *McQueen*, 2020 WL 2529839, at *4. "The codefendants' subjective expectation of privacy is also objectively reasonable, and entitled to constitutional protection under these facts." *McQueen*, 2020 WL 2529839, at *4. The State's cherry-picked citations to one Seventh Circuit case acknowledging the "sparsity of case law" on the question of whether police ordinarily record calls and one Sixth Circuit case claiming that practice is nonetheless "well known," Sb20-21, do not support a categorical conclusion that

such calls are unprotected under New Jersey law, which reaches far more under Article I, paragraph 7.

A final point in the State's brief requires this Court's caution. The State invokes the Criminal Justice Reform Act to make a disturbing policy argument, suggesting society ought not to recognize McQueen's expectation of privacy because he acted criminally:

> Given that one of the stated goals of the Criminal Justice Reform Act is to ensure "that the eligible defendant will not obstruct or attempt to obstruct the criminal justice process," N.J.S.A. 2A:162-15, and given that the goal of McQueen's call was to effectuate the concealment of evidence of his crimes, society is not prepared to accept that defendants had a reasonable expectation of privacy in their call under the circumstances presented here.
>
> [Sb18-19].

Society may not be prepared to accept McQueen's actions, but the result is that the Legislature has made those actions into crimes. Whether or not society likes certain actions, however, is not the standard for whether society recognizes an expectation of privacy in those actions as reasonable. People do not have a correspondingly lesser privacy interest depending on how guilty they are. By this logic, people would lose an expectation of privacy in their homes – such that the police could enter without a warrant – if they engaged in criminal activity inside. The Fourth Amendment and Article I, paragraph 7 do not protect only factually innocent defendants; it is because they also protect guilty ones that we have suppression

orders and the prophylactic exclusionary rule. In her supplemental brief, Allen-Brewer describes the intimate, personal details an arrestee may need to share on a call from the police station, in the "moment of crisis" following arrest. Rb31. A man just arrested may call his girlfriend to say he cannot pick up their child from daycare; that McQueen called instead to obstruct justice is no coincidence: the call about daycare would never make its way to this Court, but an expectation of privacy in that call is not more reasonable because it is innocent. The State's suggestion that this Court should find expectations of privacy reasonable only when they involve lawful actions not only contravenes the Court's jurisprudence, it also invites police intrusion into private spheres without limitation. The Court must reject such a dangerous argument.

B. The State cannot casually dispose of Allen-Brewer's reasonable expectation of privacy, which was not overcome by "plain hearing" or an exception to the warrant requirement.

This case presents the Court with an opportunity to clarify that when two people are parties to a telephone call, each of them has an expectation of privacy entitled to constitutional analysis. *Jackson*, of course, did not have occasion to examine the privacy interest on the other end of the line.[4] But whether a telephone

[4] As addressed in Point II, the fact that notice in *Jackson* and at the jail here included a warning "by way of an inmate handbook . . . that telephone calls are recorded, monitored, and may subject a detainee to discipline or even prosecution[,]" in addition to the automated message at the beginning of each call

call is initiated from a jail, a police station, or a home, absent notice of recording, the call recipient also has a reasonable expectation of privacy that the State must overcome in order to lawfully intrude upon it.

If, on these facts, McQueen retained a reasonable expectation of privacy in the police station call, because Allen-Brewer was at a minimum "similarly situated" as to notice, she too retained a reasonable expectation of privacy. *McQueen*, 2020 WL 2529839, at *4. But if McQueen somehow lost that expectation of privacy, Allen-Brewer's privacy interest does not automatically cede to his loss. Short of a warrant, the State would have two ways of overcoming Allen-Brewer's reasonable expectation of privacy: first, McQueen could expose their call such that she could be overheard or, second, the State could claim an exception to the warrant requirement, for example (for purposes of the constitutional analysis) through McQueen's consent. Yet what the State may not do is secretly record the conversation and then claim they overheard Allen-Brewer under a contorted "plain hearing" doctrine.

The State never defines the "plain hearing" doctrine that it asks this Court to adopt into its jurisprudence for the first time. The cases it cites seem simply to

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"reiterating that the call is monitored" is significant. *McQueen*, 2020 WL 2529839, at *2. *Amicus* suggests that it is not clear Allen-Brewer's notice was constitutionally sufficient – assuming she heard the automated recording, *id.* – if she did not get the full warning included in the inmate handbook. However, in light of the Court's denial of her cross-petition, *amicus* does not press that point further.

stand for the already established proposition that if McQueen put Allen-Brewer on speaker phone – in the police station or on the public street – her expectation of privacy would be vitiated by his placing it in plain hearing of anyone nearby. *See* Sb29 (citing three federal cases in which "plain hearing" involves overhearing or consent to listen). In fact, the single New Jersey case that the State invokes "where the doctrine was applied," Sb28, does not use the term "plain hearing" at all. *State v. Constantino*, 254 N.J. Super. 259 (Law. Div. 1991).

Constantino involved an officer overhearing defendant's side of the conversation when he spoke loudly into an unenclosed pay phone on a street corner. *Constantino* is the counter-factual to *Katz*: whereas Katz had a reasonable expectation of privacy because he was in an enclosed phone booth and the police had to use technological aids to hear him, by contrast Constantino had no reasonable expectation of privacy because he was in an open area speaking so loudly anyone else on the street corner could have overheard. The Law Division recognized this distinction in recalling, "the [U.S.] Supreme Court stated [in *Katz*] that what a person *knowingly* exposes to the public is not subject to Fourth Amendment protection." *Constantino*, 254 N.J. Super. at 264 (citing *Katz*, 389 U.S. at 351) (emphasis in *Constantino*); *see also id.* at 266 (emphasizing "the detective did not utilize any type of electronic eavesdropping or listening device as was the case in *Katz*."). The instant case is far more like *Katz* than *Constantino*.

Neither McQueen nor Allen-Brewer had any reason to believe the police would overhear their conversation based on where they understood the police to be positioned, unassisted by electronic eavesdropping or listening devices.

Moreover, that officers can lawfully overhear Constantino speaking into the phone does not mean they can access what the person on the other end of the line says if the officers cannot also hear that person.[5] Thus, if somehow McQueen did not have a reasonable expectation of privacy in the call, that does not automatically give the State lawful access to both sides of it. *Cf. State v. Gonzales*, 227 N.J. 77, 91 (2016) (requiring under the "plain view" doctrine that police be lawfully in the "viewing area"). All it means is that the State's recording, retrieving, and listening to the call did not unlawfully intrude on *his* privacy rights. But, without more, Allen-Brewer's expectation of privacy should remain reasonable under *Katz* until, for example, McQueen exposes their conversation by broadcasting it on speaker phone or inviting the officer to sit beside him with an ear to the handset – or, more plausibly, until the State obtains a warrant.[6]

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[5] Presumably, the person on the other end in *Costantino* still had a reasonable expectation of privacy in the portion of the call that was not overheard.

[6] Because the calls were recorded and preserved, it is not unduly burdensome to require the State to get a warrant before listening to them. Indeed, unfortunately for defendants in this case, so long as *Jackson* governs the jail calls, the State was allowed to retrieve and listen to those recordings. Based on the jail calls, the State likely would have been able to obtain a warrant for the police station call. The result would have been the same. But the Constitution requires the State to go this extra step; the warrant requirement is a check on law enforcement, and here it

As the State presents it, all that a "plain hearing" doctrine contributes is the simple proposition that officers may keep an ear out when they have a right to be where they are, and use what they lawfully overhear with their own ears. This is uncontroversial and commonplace. This Court has acknowledged as much, noting, under the framework of consent, "[i]f one party makes the conversation available to others, such as through the use of a speaker phone or by permitting someone else to hear, . . . the privacy interest does not remain the same." *Hunt*, 91 N.J. at 346.

It does not follow that the State is allowed to record all conversations whether or not its officers were in a position to overhear, and then go back, retrieve the recording, and listen to it for investigatory purposes. For these reasons, *amicus* suggests that this Court need not define the contours of a newly minted "plain hearing" doctrine with this case. But if the Court chooses to, such a doctrine should include the requirements of immediacy and inadvertency, which Allen-Brewer lays out in her brief and which the ACLU-NJ adopts accordingly. Rb26-27. These requirements would prevent the police from contriving a phishing expedition into calls to determine if they contain criminal admissions or to obtain intimate information about an arrestee's theory of defense.

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would have been nothing but an administrative burden that the Fourth Amendment and Article I, paragraph 7 expect the State to abide.

If the State had obtained a warrant to listen to the recorded calls, even if the application was supported only by information concerning McQueen, Allen-Brewer's voice certainly could have then been "overheard" – just as one person living in a home may have their expectation of privacy in those premises overcome when the police execute a search warrant based on the conduct of a co-habitant. *See State v. Lamb*, 218 N.J. 300, 314 (2014) (noting "standing to challenge a search . . . is independent of and unrelated to whether that defendant has a reasonable expectation of privacy in the place searched"). Similarly, for constitutional purposes, if McQueen consented to the officers' listening, Allen-Brewer might be lawfully overheard on a theory of third-party consent to shared space, *United States v. Matlock*, 415 U.S. 164, 171 (1974), separate from any issues regarding New Jersey's Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to -37, which *amicus* does not address. But the State did not obtain a warrant to listen to McQueen and thereby "overhear" Allen-Brewer, and McQueen did not take any action to expose their call to the officers' ears. Nothing in the inchoate "plain hearing" doctrine the State presents, nor in the case law surrounding plain view, suggests the State can surreptitiously gain access to a call – here, by secretly recording, retrieving, and listening to it after the fact – and then claim the content of that call was merely overheard.

II. This Court should clarify its affirmance of *State v. Jackson*, lest the Appellate Division opinion be read too broadly.

The Appellate Division's opinion in this case is the first time *State v. Jackson* has been cited for its constitutional holding. While the panel below correctly held *Jackson* does not govern the police station call, it still relied on that opinion to reverse the suppression of the jail calls. In so doing, it provided a passing summary of *Jackson* that is overbroad: "[a]s we have previously said, recordings made at correctional facilities are lawful." *McQueen*, 2020 WL 2529839, at *2. In the very next paragraph, the panel equated the notice provided to McQueen in jail to the notice provided in *Jackson*, seeming to imply that the notice was dispositive. Yet without correction, its overbroad summary may be taken at face value in future cases. Because this is the Court's first opportunity to define the contours of its affirmance without opinion, *amicus* urges the Court to clarify the limited holding in *Jackson*.

First, as examined in Point I.A, this Court should explain that the State's action in *Jackson* was permissible because of the particular warnings provided to the defendants by the two jails. In so doing, it should reject the State's suggestion that *Jackson* hinges on the fact of custodial setting, rather than on the fact of the notice provided. Sb16. Additionally, it should correct the suggestion by both the State and the panel below that *Jackson* means people in jail categorically do not have a reasonable expectation of privacy in their phone calls, even absent notice.

Sb16-17; *McQueen*, 2020 WL 2529839, at *2. Rather, *Jackson* stands for the limited proposition that when a person chooses to proceed with a telephone call after being warned that it may be recorded, monitored, divulged and/or result in prosecution, the State's intrusion on that call without a warrant is not an unlawful search. *See Jackson*, 460 N.J. Super. at 266, 276 (describing detailed warnings and finding knowledge of them means an expectation of privacy is not retained).

Second, as examined in Point I.B, this Court should clarify what the panel had no occasion to consider in *Jackson*: for the State's intrusion without a warrant to be permissible, both callers' privacy interests must be accounted for. In this case, the Appellate Division suggested that Allen-Brewer would also have heard the automated notice of recording when McQueen called her from jail, but it is unlikely she received the same information in the inmate handbook that the contents of the call could result in prosecution. *McQueen*, 2020 WL 2529839, at *2 (describing inmate handbook and automated warnings and noting "[n]othing in the record would cause us to doubt that the recording would have been played at the beginning of each call McQueen made to Allen-Brewer, or vice versa."). For notice to be sufficient to overcome both parties' privacy interests, the warnings the call *recipient* receives – not just the caller in custody – must include that the recording may be divulged or result in prosecution, as in *Jackson*, or similar notice that it may be used for purposes beyond what society might reasonably expect to

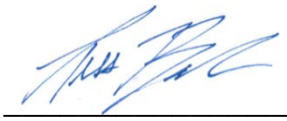
flow from a generic warning: in a call to customer service, quality and training purposes; in a call from a jail, perhaps, institutional security. *See* Rb13 n.4 (suggesting for warnings to be constitutionally sufficient society must also recognize as reasonable the diminishment of the expectation of privacy.)

Accordingly, if the State seeks to record phone calls for future investigatory and prosecutorial purposes, it must put parties to the call on notice so they can choose to proceed with a correspondingly diminished expectation of privacy – or else can elect not to place the call at all. If the Court chooses to permit monitoring for unlimited purposes, notice must be correspondingly detailed and, as a best practice, automated warnings should be repeated during the course of the call. *Amicus* submits that jails, police stations, and any other government entity permitted to record and monitor phone calls should provide notice to both parties that the State may listen to their call for any number of reasons not limited to institutional security: not only to divert plans of escape or acts of violence at a jail, but also potentially to learn details of their guilt, defense strategy, mitigation theory, or willingness to accept a plea deal – information that implicates First, Fifth and Sixth Amendment rights. Precisely because unlimited call monitoring carries such constitutional implications and because people in custody have few avenues for communication with their loved ones, *amicus* reiterates its request to the Court, as it urged in *Jackson*, not to dispose of their privacy interests too readily.

CONCLUSION

Because McQueen and Allen-Brewer each had a reasonable expectation of privacy in the call placed from the police station, this Court should affirm the decision of the Appellate Division suppressing the recording of that call. In so doing, the Court should clarify its affirmance of the Appellate Division in *State v. Jackson*, which the panel below relied on in reversing suppression of the jail calls and which the State seeks to expand by this case.

Respectfully submitted,



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