FILED, Clerk of the Supreme Court, 09 Dec 2020, **084564**

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4391-18T1;
A-4910-18T1

STATE OF NEW JERSEY,	:	CRIMINAL ACTION
Plaintiff-Appellant,	:	On Leave Granted from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
MYSHIRA T. ALLEN-BREWER & RASHEEM W. MCQUEEN,	:	Indictment No. 19-02-302-I
Defendants-Respondents.	:	Sat Below:
	:	Hon. Carmen J. Alvarez, P.J.A.D. Hon. Karen L. Suter, J.A.D. Hon. Patrick DeAlmeida, J.A.D.

SUPPLEMENTAL BRIEF ON BEHALF OF
DEFENDANT-RESPONDENT MYSHIRA T. ALLEN-BREWER

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PRELIMINARY STATEMENT

Early one morning, Myshira Allen-Brewer received a call from her boyfriend, Rasheem McQueen, after he had been arrested for a series of offenses she had absolutely nothing to do with. With no notice to Allen-Brewer (or McQueen), the call was recorded. Hours later, police listened to the call, without a warrant or any judicial authorization whatsoever, and without probable cause or exigent circumstances. On the call, McQueen asks Allen-Brewer to look for evidence of a crime he committed. Because of what they heard when they listened to the call, police began investigating eighteen-year-old Allen-Brewer.

The Appellate Division correctly held that the police unlawfully pierced both Allen-Brewer's and McQueen's reasonable expectations of privacy in their phone call. The State takes issue with the well-reasoned decision, asserting that although society recognizes phone calls as private, it is a matter of common knowledge to both recipients and callers that calls made from police stations are not private. The State provides no factual support for this claim, which flies in the face of decades of jurisprudence recognizing the private character of phone calls and the dangers of electronic eavesdropping.

As this case demonstrates, unfettered access to phone calls by the State violates not only the privacy of the person making the call, who is cloaked with the presumption of innocence, but

also violates the privacy of any friends and loved ones he calls. The Appellate Division correctly recognized that such suspicionless, unsupervised, dragnet searches violate the constitutional protections against unreasonable searches and seizures. The decision should be affirmed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

On August 27, 2018, Rasheem McQueen was arrested after a car chase with police. (1T 6-17 to 13-2)[2] Once arrested, McQueen was brought to police headquarters in Piscataway. (1T 12-22 to 13-2) McQueen made a statement. (1T 13- to 9) An officer testified before the grand jury that McQueen then "insisted" on making a call and was allowed to do so. (1T 14-9 to 21) He was taken to the "report writing room" to make that call. (1T 14-19)

According to the State at the suppression hearing, "[a]ll phone calls made on this line, regardless of who's making it, [are] recorded." (3T 12-11 to 12) The State did not explain the purpose of the recordation policy, who reviews the recordings under what circumstances, or how long recordings are maintained. The State represented that there was not "any notice provided at the police station that the calls are going to be recorded." (5T 11-5 to 16) McQueen called his eighteen-year-old girlfriend Myshira Allen-Brewer. (1T 28-21 to 23) Allen-Brewer has no prior convictions. (Dsa 1-2) At the grand jury, an officer testified that McQueen "mumbled" during this call, so the officer in the

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[1] Due to the interrelated nature of the procedural history and statement of facts in this case, the two sections have been combined for clarity to the reader.

[2] Defendant adopts the State's citations and adds "Ssa" for the State's supplemental brief before this Court and "Dsa" for the appendix to defendant's supplemental brief.

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room was not able to understand what he was saying. (1T 28-13 to 23)

McQueen was then transported to the Middlesex County Correction Center. The next day, officers received a call that a gun had been retrieved on the lawn of a residence near where McQueen had eluded police. (1T 20-15 to 21) Police retrieved the gun. (1T 21-16 to 18) After retrieving the gun, officers listened to the recording between McQueen and Allen-Brewer. (1T 27-17 to 28-23) Officers did not obtain any form of judicial authorization before retrieving the call.

The State has not made the call part of the record. According to an officer's testimony before the grand jury, during the call McQueen "told [Allen-Brewer] to locate . . . his blicky" and "gave her directions for where to go to find it." (1T 22-18 to 19) The officer opined that a "blicky" is a handgun. (1T 22-7 to 10)

On October 18, 2018, a grand jury subpoena was issued on the Correction Center for all "call records and recordings placed" to four different phone numbers during a certain time period. (Pa 19-22) There was no limitation in the subpoenas that the calls be made by McQueen. The account holders on the four numbers were Myshira Allen-Brewer, Shakirah Brewer (Myshira's mother), McQueen's grandfather, and McQueen's grandmother. (Pa 11, 16-18) There is no record of how many calls were received by

the Prosecutor's Office. It is unclear from the record how or when the Prosecutor's Office received the recording of the call McQueen made from police headquarters, but the State's briefing indicates that it has obtained the recording of that call as well.

As a result of what was learned on the recovered calls, a superseding indictment, Middlesex County Indictment No. 18-05-00834, was issued on May 31, 2018. (Pa 1-4) McQueen is charged with 11 counts, mostly stemming from his evasion of the police and a search of his car that followed. Allen-Brewer is charged with three offenses: second-degree conspiracy to possess a handgun, contrary to N.J.S.A. 2C:39-5 and 2C:5-2; third-degree attempted hindering, contrary to N.J.S.A. 2C:5-1 and 2C:29-3a(3); and third-degree attempted obstruction, contrary to N.J.S.A. 2C:5-1 and 2C:29-1a.

The Honorable Pedro J. Jimenez, J.S.C., suppressed all of the calls on May 3, 2019, relying on his written opinion in State v. Mark Jackson, Indictment No. 18-4-0555. (5T 19-14 to 17) Judge Jimenez dismissed the indictment against Allen-Brewer on June 3, 2019. (6T 6-5 to 19)

The State filed a motion for leave to appeal with the Appellate Division on May 23, 2019, which was granted on June 13, 2019. On May 19, 2020, the Appellate Division affirmed in part and reversed in part. It relied on State v. Jackson, 460

N.J. Super. 258 (App. Div. 2019), aff'd, 240 N.J. 36 (2020) to reverse the suppression of the calls made from the jail. State v. Rasheem McQueen, No. A-4391-18 (App. Div. May 19, 2020) (slip op. at 7-8). The court therefore reinstated the dismissed counts against Allen-Brewer. Id. at 14.

However, the Appellate Division affirmed the suppression of the calls made from the police station. The court held that McQueen's "expectation of privacy was reasonable in the absence of any warning by anyone, orally or in writing, regarding the recording of the call." Id. at 8. In coming to this conclusion, the court noted that "a police station is a different institutional environment than a prison or correctional center. It is not an agency such as a jail or prison, whose sole purpose is to house those either awaiting disposition of criminal charges, or who have already been convicted, and are awaiting or serving sentences." Id. at 11. "Ordinary citizens enter police stations for a variety of reasons," the court explained, and "[a]ll would reasonably assume in the absence of notice to the contrary, that use of the police station phone is as private as if on their own phone, and certainly not taped." Id. at 11-12. The court came to the same conclusion about Allen-Brewer: "she had every reason to assume her conversation was safe and secure." Id. at 12. The court rejected the assertion—unsupported by any facts—that the "general public" should know that all

calls from a police station are recorded. Id. at 13. Therefore, the court concluded "the 'seizure' of the conversation was a violation of McQueen and Allen-Brewer's right to be free of unlawful searches and seizures." Id. at 14.[3]

One judge dissented from the portion of the Appellate Division opinion affirming the suppression of the police station call. On June 11, 2020, the State filed a motion for leave to appeal and Allen-Brewer filed a cross-motion for leave to appeal. This Court granted the State's motion and denied Allen-Brewer's cross-motion on September 25, 2020.

[3] The Appellate Division declined to address the trial court's holding that the recording violated the Wiretap Act. If this Court reverses the decision of the Appellate Division, it should remand the matter to that court to address the Wiretap Act argument.

LEGAL ARGUMENT

RECORDING AND LISTENING TO THE CALL FROM THE POLICE STATION WAS UNLAWFUL. THEREFORE THE CALL WAS CORRECTLY SUPPRESSED.

Both Article I, Paragraph 7 of the New Jersey Constitution and the Fourth Amendment of the U.S. Constitution protect against unreasonable searches and seizures. These constitutional provisions "generally protect[] a person's reasonable expectation of privacy from untoward government intrusion." State v. Manning, 240 N.J. 308, 328 (2020). When an item is protected by a reasonable expectation of privacy, that expectation can only be pierced by a warrant or one of the "specifically established and well-delineated exceptions to the warrant requirement." Ibid. (internal quotation marks omitted). "Compliance with the warrant requirement is not a mere formality but -- as intended by the nation's founders -- an essential check on arbitrary government intrusions into the most private sanctums of people's lives." Ibid. Therefore, warrantless searches and seizures are presumptively unreasonable and the State bears the burden of proving their lawfulness. Id. at 329.

In this case, there is no dispute that the call made from the police station was both recorded and listened to without a warrant. Therefore, to get around the presumption of unreasonableness that attaches to these actions, the State argues that obtaining the call was not a "search" because

neither Allen-Brewer nor McQueen had a reasonable expectation of privacy in the call. The State's argument ignores the social norms and expectations that phone calls are private, as well as decades of jurisprudence, and must be rejected.

Because the constitution protects only what is rightfully private, a "search," for constitutional purposes, does not occur when the State does not intrude on a protected privacy interest. Under the New Jersey Constitution, an action is a "search" if it intrudes on an expectation of privacy that "society is prepared to recognize as reasonable." State v. Evers, 175 N.J. 355, 369, (2003) (internal quotation marks omitted). Under the federal constitution, a person needs both an actual, subjective expectation of privacy and one that society recognizes as reasonable in the thing or place searched. Ibid.

It has been recognized for decades that people have a reasonable expectation of privacy in phone calls. Katz v. United States, 389 U.S. 347, 353 (1967). In Katz, one of the foundational cases of modern Fourth Amendment jurisprudence, the Supreme Court of the United States rejected the government's argument that people do not have a reasonable expectation of privacy in phone conversations they make at a public payphone. The Court held that the defendant did not shed his right to privacy "simply because he made his calls from a place where he might be seen. No less than an individual in a business office,

in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." Id. at 352. "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." Ibid. This Court has gone further, protecting not only the contents of phone calls, but even the bare fact of the number that was called. State v. Hunt, 91 N.J. 338, 346 (1982). Our use of telephones is so pervasive and personal that "[w]hen a telephone call is made, it is as if two people are having a private conversation in the sanctity of their living room. It is generally understood to consist of a conversation between two persons, no third person being privy to it in the absence of consent." Ibid. In other words, this Court has recognized that society assumes that "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). "The place where such a call is made does not matter, be it home, office, hotel, or even public phone booth." Ibid. In short, courts have recognized that people share intimate details of their lives by making phone calls and that they can expect that these calls remain private, even when made in public or from someone else's phone.

The State now argues that McQueen and Allen-Brewer do not have a reasonable expectation of privacy in these specific phone

calls. But this Court conducts an analysis to determine whether a person has a reasonable expectation of privacy only when confronted with a "novel class of objects or category of places." State v. Randolph, 228 N.J. 566, 584 (2017) (emphasis added). Once this Court has decided that there is a reasonable expectation of privacy in a specific class of objects or category of places, the reasonable expectation of privacy analysis is not done anew in each case. Ibid.

There is nothing novel about phone calls. That people have a privacy interest in conversations they have over the phone is undisputed. Therefore the question of reasonable expectation of privacy is settled and does not need to be litigated here. This Court should resist the State's invitation to so finely slice a "class of objects or category of places" that no prior holding about a reasonable expectation of privacy would apply to a case with slightly different facts. The State's reasoning would lead, to different outcomes based on the status of people who used the same phone--a person who has been arrested would not have a reasonable expectation of privacy, according to the State, but what about someone who voluntarily came to the station for questioning? What about a witness? What about an employee? What about some other member of the public? The sounder approach is to respect the categorical approach and recognize that, absent notice, it is reasonable to presume that your phone

conversations are private. Since Katz, it has been clear that there is a reasonable expectation of privacy in phone calls. Where that phone is located is no more relevant than if it is a landline or a cellular phone or if a person owns that phone or borrowed it from a friend.

The lack of notice, of course, distinguishes this phone call from the ones at issue in Jackson. In Jackson, the detainees who made calls from correctional facilities were told both in writing and when the calls began that their calls were being recorded. Jackson, 460 N.J. Super. at 266. Moreover, the detainees were informed that not only were the calls recorded, but that they could be "divulged," on one case, and in the other that what is overheard in those calls "can lead to prosecution." Ibid. Thus, the detainees were informed that not only were the calls not private vis-à-vis the correctional facility that housed them, but they could be shared with third parties, including prosecutors.

The Appellate Division also recognized the special security interest that correctional facilities have as institutions with the sole purpose of maintaining control of people charged with crimes. Id. at 276-77. As the Appellate Division explained in this case, a police station does not have the same function as a jail or prison and therefore does not have the same blanket security concerns: "[a] police station is a different

institutional environment than a prison or correctional center," and many people who are not charged with crimes, and who are not going to be incarcerated, enter police stations and make calls in police stations. McQueen, slip op. at 11.

The Appellate Division concluded that a person who uses a phone under the conditions presented in Jackson maintains no reasonable expectation of privacy. To the contrary, it was "self-evident that the logical conclusion a person would reach after being repeatedly warned that calls are being recorded and monitored is that others will hear those calls." Jackson, 460 NJ. Super. at 277.[4] In this case, there was no such notice. And

[4] A significant shortcoming in the Appellate Division's opinion in Jackson is the lack of attention paid to the specific notice given in each case. The Jackson decision deals with two different inmates who made calls in two different correctional facilities, who were given different oral and written warnings. Because the decision in that case hinges on the notice given——as opposed to a holding that, as a category, there is no reasonable expectation of privacy in any calls made by pretrial detainees who are housed in correctional facilities——the specific notice must be critical to the analysis. This case presents this Court with an opportunity to clarify the kind of notice sufficient to remove any reasonable expectation of privacy in a phone call. Of course, mere warnings are not sufficient to nullify an expectation of privacy that society recognizes as reasonable unless society also recognizes the diminishment of that expectation of privacy as reasonable. See State v. Hempele, 120 N.J. 182, 198-99 (1990) (explaining that "if the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects," however the New Jersey constitution would still recognize a right of privacy in those items) (internal quotation marks omitted). Otherwise, a person's reasonable expectation of privacy can only be

while the State and the dissent would impute to all people some sort of awareness that all calls they make in police stations are not private, they do not present any support in the record or elsewhere for the assertion that this is a widely held belief, let alone an actual fact of how police stations operate. The burden to justify a warrantless search falls squarely on the State. In the absence of evidence about the societal norms or expectations at issue in this situation, the State's assertions cannot meet this burden.

If this Court does believe that calls made from police stations are a different class than other calls and therefore must determine if there is a reasonable expectation of privacy in these calls, it must "start from the premise that expectations of privacy are established by general social norms." Hempele, 120 N.J. at 200 (internal quotation marks omitted). Our courts have recognized that "[e]lectronic surveillance represents a greater threat to individual privacy than do traditional searches and seizures." State v. Catania, 85 N.J. 418, 440 (1981). Such surveillance "invades the privacy of both the person who is the target of the wiretap, and that of innocent callers . . . . Such pervasive intrusions were unknown under traditional search and seizure law, and the traditional

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diminished by the degree that they waive that expectation by consenting to the intrusion.

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safeguards provided by that law are inadequate in the context of a wiretap.” Ibid. (emphasis added). “All reasonable safeguards . . . consistent with legitimate law enforcement” are necessary to combat this threat to privacy. Id. at 440, 442. Although Catania was decided in the context of the Wiretap Act, the acute threat to privacy created by electronic eavesdropping, which prompted the creation of the Wiretap Act, exists in both the statutory and the constitutional context.

As with other categories that this Court has found a reasonable expectation of privacy in, it “is reasonable for a person to prefer” that the calls they make, and receive, from police stations “remain private.” Hempele, 120 N.J. at 202. And there was no reason for Allen-Brewer, or anyone in her position, to think it would not be private. Allen-Brewer received a call on her personal phone from her boyfriend late at night. She was at home. She was not charged with a crime and she had not been implicated in any of his wrongdoing up to that point. She was a free person and it was reasonable to believe her privacy was just as intact as the privacy of any other free person. Not only is it reasonable that she would prefer for this call to remain private, but it is reasonable for her to believe it was.

The dissent emphasized that Allen-Brewer knew McQueen was calling from a police station. McQueen, slip op., dissent at 7. But Allen-Brewer has no prior convictions and there is no

evidence that she has ever been arrested before. She was eighteen years old at the time. It is unreasonable to impute to her an awareness of what it means, procedurally, that her boyfriend was calling her after being arrested and that, substantively, her privacy rights in her phone call had been stripped from her, particularly when no notice was given. And it is unreasonable to impute to society as a whole the understanding that if they receive a call from a person in a police station, they should assume that the call, which they are conducting in a private space, on a private phone, is not cloaked with the same protections as any other call.

When determining whether there is a reasonable expectation of privacy in a new class of objects, the "ultimate question" is if unfettered police access to those objects is "permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Hempele, 120 N.J. at 202_(internal quotation marks omitted). Given how intimate phone calls are and the general expectation, both societally and jurisprudentially, that those intimate calls will remain private, the answer to that question is yes; if this Court were to hold that all calls made from police stations were not constitutionally protected, absent any notice, it would

intolerably diminish the privacy remaining to people in this state.

The State seeks to strip away Allen-Brewer's expectation of privacy by asserting that McQueen had no expectation of privacy and arguing that the privacy interest on the other end of phone is irrelevant. The State claims that this result is dictated by the so-called "plain hearing" exception to the warrant requirement. (Ssa 28-29) As the State acknowledges, the "plain hearing" doctrine has never been adopted by an appellate court in New Jersey. (Ssa 28) Moreover, a search of "plain hearing" reveals only 40 cases nationwide in which the phrase has ever been used. This Court has recognized that conversations overheard by police, without technological aids, who are located in public spaces, are admissible. See e.g., State v. Brown, 236 N.J. 497, 525 (2019) (reversing conviction, in part, because of trial court's erroneous exclusion of an officer's affidavit, which detailed a conversation the officer overheard while on the scene of a crime). There is no reason to expand this Court's commonsense recognition that such conversations are lawfully heard and admitted at trial. That preexisting recognition would not allow for the admission of the calls at issue, which were not inadvertently overheard, but which the police only heard by purposefully intruding on a conversation, by means of

technological enhancements, which they were not otherwise privy to.

But even if the "plain hearing" doctrine is imported into New Jersey law, under whichever form that doctrine takes shape, this search would not be justified by that doctrine. The State claims that the "plain hearing" doctrine is an analogue of the "plain view" doctrine. There are two requirements for the application of the plain-view exception to the warrant requirement: (1) "the police officer must be lawfully in the viewing area;" and (2) "it has to be 'immediately apparent' to the police that the items in plain view were evidence of a crime, contraband, or otherwise subject to seizure." State v. Gonzales, 227 N.J. 77, 91, 101 (2016). Even assuming that doctrine could provide some sort of analogy in the aural context, the State's assumption that it excuses this search begs the question of whether the first prong is met: were the police lawfully in the hearing area when they recorded and then listened to the phone call? Just as the "plain view" doctrine does not allow the State entry into a constitutionally protected space absent independent justification, the "plain hearing" doctrine could not. Because the police had no independent justification to pierce Allen-Brewer's reasonable expectation of privacy, the "plain hearing" doctrine would not justify the search in this case.

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While "plain view" has been "characterized . . . as an independent exception to the warrant requirement," the Supreme Court of the United States has explained that that characterization is "somewhat inaccurate" and often misleading. Texas v. Brown, 460 U.S. 730, 737-39 (1983). In order to further clarify how the plain-view doctrine operates, the Court contrasted two situations. In the first, "'objects such as weapons or contraband found in a public place may be seized by the police without a warrant'" based on the plain-view doctrine. Ibid. (quoting Payton v. New York, 445 U.S. 573, 587 (1980)). The reason for this rule is that in such a situation, the seizure "of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." Ibid. The Court took pains to distinguish this situation from one in which "the property in open view is situated on private premises to which access is not otherwise available for the seizing officer." Ibid. (quotation marks omitted). Entering a constitutionally protected space to seize that property is not justified by reliance on the plain view doctrine absent another exception to the warrant requirement that allows for the intrusion into that space. Ibid. Thus, the Court concluded that "'[p]lain view' is perhaps better understood, therefore, not as an independent 'exception' to the

Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' may be." Id. at 738-39.[5]

Therefore, the question is whether there is a prior justification for the State's access to the phone call. If Allen-Brewer has a reasonable expectation of privacy in that phone call, as she urges she does, and the State does not have an independent justification for accessing those calls, such as consent or any form of judicial authorization, then the officers were unlawfully in the listening area when they recorded and heard the calls.

The State is asking this Court to adopt its version of the "plain hearing" doctrine, in which if one party does not have a reasonable expectation of privacy in a call, police are automatically lawfully in the "listening area." The State seeks a backdoor to intrude on Allen-Brewer's reasonable expectation of privacy by claiming that it is irrelevant as long as McQueen

[5] The Supreme Court of the United States has never deviated from the principle that a plain-view sighting of contraband does not on its own justify a warrantless entry into a constitutionally protected space. Horton v. California, 496 U.S. 128, 136-37 (1990) ("[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."); Illinois v. Andreas, 463 U.S. 765, 771 (1983) (the plain-view doctrine "authorizes seizure of illegal or evidentiary items visible to a police officer" only if the officer's "access to the object" itself also has a "Fourth Amendment justification").

had no reasonable expectation of privacy. But that reasoning has never been and should not be accepted by this Court. Contrary to the State's assertions, McQueen did have a reasonable expectation of privacy, as is explained infra. However, his expectation of privacy is not dispositive. When two people are having a conversation, and one has a reasonable expectation of privacy and one does not, this Court has every right, and indeed, an obligation, to protect the privacy interest of the first party. Because of the well-established privacy interests people have in their calls, to hold that one party's lack of privacy interest swallows the other's would be an unconstitutional infringement on the citizenry's rights. The police should not be able to bootstrap one person's lack of expectation of privacy to purposefully invade a reasonable expectation of privacy that they are aware another person has.

This case is different than a police officer simply "overhearing" a conversation because the officers, and then the prosecutors, took affirmative steps to record and then listen to these calls.[6] As made clear by the cases laying out the plain-view doctrine, when a person blasts a call loudly on

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[6] See also Tracy Maclin, Informants And The Fourth Amendment: A Reconsideration, 74 Wash. U. L. Q. 573, 600 n. 141 (1996) ("As both history and current doctrine indicate, the Fourth Amendment was designed to control police discretion to search and seize, not simple happenstance.").

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speakerphone in a public street, the police are not invading any interest in privacy if they happen to overhear it. Access to such a call does not involve an intrusion into a constitutionally protected space any more than picking up contraband dropped in the street does. And constitutionally, it makes no difference if the contraband belongs to the person who dropped it or to another. The State does not infringe in any privacy interest by picking up what is left in public. The constitution does not protect against happenstance discovery of evidence of criminality; it protects only against state intrusion into privacy.[7]

But in this case, the call was not publicly available. In order to access it, first the police had to record it and then they had to listen to it. They weren't even able to listen to McQueen's end of the conversation without special access to it. See also Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (holding that exposing anything to view that is not already visible "produce[s] a new invasion of respondent's privacy," and thus

[7] Even the case that the State relies on for the existence of the plain-hearing doctrine, a law division case, involves an officer, who was "in a position where another individual would normally be expected to be," overhearing a conversation without the aid of "any type of electronic eavesdropping or listening device." State v. Constantino, 254 N.J. Super. 259, 266 (Law. Div. 1991). Of course, in this case the officers did not simply overhear the conversation from a lawful vantage point without the help of technological aids. Thus, even Constantino fails to provide support to the State's assertion that the search in this case was lawful.

amounts to a "search"). Rather than stumbling into incriminating evidence in plain sight, the police intruded into Allen-Brewer's reasonable expectation of privacy to access that evidence. That intrusion was illegal.

Moreover, there is a constitutional difference between things officers can see and hear without electronic enhancement and things that are not visible or audible to the naked eye or ear. See United States v. Jones, 565 U.S. 400, 406 (2012) (putting a GPS tracker on a car was a search under the Fourth Amendment, even if the car traveled "on the public roads, which were visible to all"); id. at 429-430 (Alito, J., concurring) (use of the GPS tracker violated reasonable expectation of privacy because "society's expectation has been that law enforcement agents and others would not--and indeed, in the main, simply could not secretly monitor and catalogue every single movement of an individual's car for a very long period."); Kyllo v. United States, 533 U.S. 27, 34 (2001) ("[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search.") (citation omitted). See also United States v. Agapito, 620 F.2d 324, 330 n. 7 (2d Cir. 1980) ("'There is a qualitative difference between electronic surveillance . . . and

conventional police stratagems such as eavesdropping . . . . The latter does not so seriously intrude upon the right of privacy . . . . Eavesdropping is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.'") (quoting Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting)) (alterations omitted); Marc Jonathan Blitz, The Fourth Amendment Future Of Public Surveillance: Remote Recording And Other Searches In Public Space, 63 Am. U.L. Rev. 21, 28 (2013) (technological enhancements that allow the state to "record events that they would otherwise not be able to see or hear" or allows officers to see "information that would not otherwise have been apparent" is a Fourth Amendment "search"). Police are welcome to take advantage of what is revealed to the public. They are not welcome to pry open something that is private in order to reveal it and then claim that the prying is not constitutionally cognizable.

This case is also different than when a person's reasonable expectation of privacy is pierced by the consent of another or by judicial authorization. Consent, exigency, or a warrant allow police lawful access to a private space, object, or conversation. If what they find there happens to incriminate

someone who was not the giver of consent or the target of the warrant, there is no constitutional infirmity because the privacy interests were legally pierced. Thus, for instance, when a person consents to the search of a home she shares with a spouse, that spouse has suffered no Fourth Amendment violation. United States v. Matlock, 415 U.S. 164, 171 n. 7 (1974). Or when officers armed with an arrest warrant for a target have an objectively reasonable basis for believing that the person named in the warrant both resides in the dwelling and is within the dwelling at the time, the third-party whose dwelling it is suffers no invasion of privacy when the police enter his home, despite not being the target of the warrant. State v. Miller, 342 N.J. Super. 474, 479 (App. Div. 2001). But of course, there was no consent in this case by Allen-Brewer or McQueen to the recordation or the listening, because they were not aware that either was occurring. Nor was there any judicial authority for the recording or the listening. Thus police were not already lawfully within the "listening area," insofar as that concept is relevant in this case.[8]

[8] The Legislature has adopted more stringent standards for what constitutes consent in the context of recording conversations than exist in home searches. N.J.S.A. 2A:156A-4c (requiring prior approval to intercept a conversation even with the consent of one of the participants). It also has limited what officers can overhear in "plain view" by requiring that officers "minimize or eliminate the interception of such communications not otherwise subject to interception . . . ." N.J.S.A. 2A:156A-

Nor is the second prong of the "plain-hearing doctrine" met: that it is immediately apparent that the conversation was evidence of a crime. The point of the "immediately apparent" requirement is that it minimizes the risk that the police interfere with someone's privacy interest by ensuring that there is good cause to believe the object seized is contraband or evidence of criminal activity, which no one has a reasonable expectation of privacy in. But such minimizing did not occur in this case. There is no evidence that it was "immediately apparent" to officers that there was discussion of criminal activity on the call. There is no evidence of how long the officers listened to a private conversation without hearing evidence of criminality. Unlike seizing a discrete item, listening to a conversation, by nature, exposes a range of different people's private moments over time. Without proof that the conversation was immediately and obviously evidence of a crime, the State was not entitled to hear it without a warrant.

Although the plain-view doctrine no longer requires the inadvertent discovery of evidence, that requirement would serve to properly protect the privacy interests of New Jerseyans under the "plain hearing" doctrine. Because there is a reasonable

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12. This extra layer of protection for the privacy of phone calls is strong support that society recognizes as reasonable a high level of privacy in calls.

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expectation of privacy in one's conversations, when police seek to use a conversation that is assumed to be private against a person at trial, the police must be required to have overheard that conversation by happenstance rather than be deliberate action. Unlike the gun left in the street, a person who is having a conversation that she reasonably believes is private, but is not aware that there is a police officer behind her listening to that conversation, has not purposefully let go of that reasonable expectation of privacy. Requiring inadvertence under the "plain hearing" doctrine would properly protect the privacy interests that people reasonably having in conversations they reasonably believe are private. See also Maclin at 600, n.131 ("Some may see no threat to Fourth Amendment values when a police officer overhears a private conversation between two persons. For example, imagine that an off-duty police officer overhears the incriminating conversation of Joe and Moe while sitting in the bleacher seats of Yankee Stadium. Surely, he is free to report his discovery without fear of violating the Constitution. If this is true, why should the constitutional result be different when the officer is deliberately positioned to hear the conversation? The difference turns on the fact that in the latter case the government has planned to intrude upon the privacy of Joe and Moe's conversation.").

In sum, Allen-Brewer had a reasonable expectation of privacy in a phone call she received in the middle of the night, from her boyfriend, on her personal cellphone, regardless of where he was calling from. Regardless of whether McQueen's expectation of privacy was reasonable, the police officers were not entitled to purposefully intrude on Allen-Brewer's expectation of privacy without a warrant or an applicable exception to the warrant requirement. The "plain hearing" doctrine does not change this bedrock legal principle because, whatever formulation such a doctrine would take, it requires the police to already be lawfully able to hear the conversation in the first place.

Not only did Allen-Brewer have a reasonable expectation of privacy in the call, but McQueen did as well. As the Appellate Division explained, people think their calls are private and that belief does not change just because they make that call from a police station. Other courts have held that people have a reasonable expectation of privacy in calls they make from police stations. See Walden v. City of Providence, 495 F. Supp. 2d 245, 254 (D.R.I. 2007) (when plaintiffs, employees or family members of employees of a municipality were not "put on notice that their calls" made from the Public Safety Complex "were being monitored or recorded . . . it cannot be said, as a matter of law, that Plaintiffs' expectation of privacy was unreasonable");

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In re State Police Litigation, 888 F. Supp. 1235, 1256 (D. Conn. 1995) (holding that, under the Fourth Amendment, in the absence of proof of notice, "surreptitious recording of unprivileged but private calls . . . involves an invasion of privacy that far outweighs" any justifications for recording outgoing phone calls from police stations). The bottom line is that society's expectation is that all calls are private unless notified otherwise. That expectation remains unchanged even if the calls are made from the police station, even by a person under arrest.[9]

Nor does the fact that McQueen had been given his Miranda[10] rights militate against his reasonable expectation of privacy. The Miranda rights inform a person who has been arrested that anything he says in the conversation with the police can be used against him. An ordinary person would not extrapolate from those

[9] The Appellate Division has used the standard set forth by the Fifth Circuit to determine whether a person has a subjective expectation of privacy in order to assess whether there is an objective expectation of privacy in a conversation, noting that "these factors seem as relevant to the question whether the expectation of privacy was reasonable as they are to the question whether there was a subjective expectation of privacy." Hornberger v. Am. Broad. Cos., Inc., 351 N.J. Super. 577, 623-35 (App. Div. 2002) (citing Kee v. City of Rowlett, 247 F.3d 206, 211 (5th Cir. 2001)). Many of the factors in Kee demonstrate that McQueen had a subjective expectation of privacy, which informs the inquiry into the objective expectation of privacy. McQueen's conversation was "hushed" in order to "protect [his] conversation[] from 'uninvited ears[;]'" McQueen specifically conducted his conversation "in a manner inaudible to others[;]" and the surveillance "was accomplished through the use of technological enhancement." Kee, 247 F.3d at 216-17.

[10] Miranda v. Arizona, 384 U.S. 436 (1966).

warnings that anything he said to his loved one outside of the earshot of the police could be used against him as well. To the contrary, that person would assume, as McQueen did, that the conversation is private, as opposed to the conversation with the police that he was warned could be used against him. Cf. State v. Maltese, 222 N.J. 525 (2015) (suppressing statements made by defendant to his uncle in a police station, after defendant had been given his Miranda rights and demanded to speak to his uncle and uncle agreed to the recording of the statement). And that expectation is one that society does view as reasonable because it comports with our general understanding of the privacy of phone calls, the lay understanding of Miranda, and the importance and intimacy of a call a person makes to inform a loved one he has been arrested.

In sum, the Appellate Division correctly concluded that Allen-Brewer and McQueen both had a reasonable expectation of privacy that the State violated in this case and that therefore the call from the police station must be suppressed. The recording was done without a warrant and the listening of the conversation was done without a warrant. The call was correctly suppressed by the Appellate Division.

Even if this Court concludes that the expectation of privacy in the calls held by either Allen-Brewer or McQueen was diminished, that does not validate the police action in this

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case. A reduced privacy expectation “cannot completely preclude the application of the protections of article I, paragraph 7” or of the Fourth Amendment. Hempele, 120 N.J. at 211. Thus, while a diminished expectation of privacy “might reduce the requisite cause for a search, it cannot prevent article I, paragraph 7 from applying at all.” Ibid. If this Court believes that the institutional requirements of police stations could allow for blanket, warrantless, unwarned recordings of all calls made from the stations—and that therefore society would recognize as reasonable such dragnet recordation—-a warrant must be required before those calls are listened to. See id. at 216-221 (holding that while neither cause nor judicial authority is necessary to seize garbage left on the curb, “[b]ecause we find no special state interest that makes the warrant requirement impracticable, we hold that the State must secure a warrant based on probable cause in order to search garbage bags left on the curb . . . .” (emphasis added)). People calling from police stations when they have just been arrested are calling in a moment of crisis, they are calling for a final opportunity to speak to a loved one for an indefinite amount of time, they are calling to break the news that may shatter their family, to arrange childcare. In other words, they are exercising First Amendment rights at a critical time in their lives. See e.g., Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994). The state should not be able to intrude on

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the expression of these rights without any level of suspicion and without authorization from a judicial officer.

The security concerns that the State uses to justify the recordation of the calls do not justify the warrantless listening to the calls. In this case, the police recordings were safely on file with the police. Nothing prevented the police securing a warrant prior to listening to the private phone calls. "Although the investigation of crime would always be simplified if warrants were unnecessary," the constitutional protections against unreasonable searches and seizures "may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." Hempele, 120 N.J. at 220 (internal quotation marks and alterations omitted). Requiring a warrant to access phone calls made in a police station protects society's privacy interests without unduly hampering any valid police interests.

The State violated the constitutional protections against unreasonable searches and seizures when it invaded the privacy of the call made from the police station. The Appellate Division decision affirming the suppression of those calls must be affirmed. Moreover, the prosecutor's office obtained the jail calls because of what was heard on the call from the station. Thus, the jail calls are the fruit of the poisonous tree and

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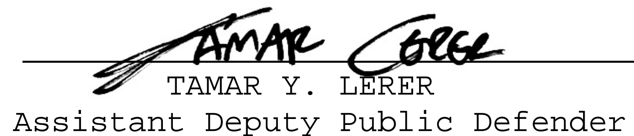
must be suppressed as well. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

Both the U.S. and New Jersey constitutions require the State to secure a warrant in order to access phone conversations, even those made from a police station. The judgment of the Appellate Division should be affirmed.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Respondent

BY: 
TAMAR Y. LERER
Assistant Deputy Public Defender

Date: December 8, 2020

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PRELIMINARY Public Safety Assessment (PSA)

Defendant: MYSHIRA T ALLEN-BREWER	DOB: 07/19/2000	SBI #: 947798G	FBI #:
Complaint Number: 2018 000565 1217		PSA Run Date: 11/08/2018 10:28 PM	

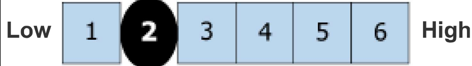
SUMMONS RECOMMENDED UNLESS SERIOUS UNCLASSIFIED CHARGES, SERIOUS OUT OF STATE CRIMINAL HISTORY, OR SERIOUS SUPPLEMENTAL INFORMATION EXISTS

Risk Scale: Failure to Appear

Low High

New Violent Criminal Activity Flag: No

Risk Scale: New Criminal Activity

Low  High

Out of State Criminal History: **Unknown at This Time**

Risk Factors:

1. Age at Current Arrest: **18**
2. Current Violent Offense: **No**
   2a. Current Violent Offense and 20 Years Old or Younger: **No**
3. Pending Charge at the Time of Offense: **No**
4. Prior Disorderly Persons (DP) Conviction: **No**
5. Prior Indictable Conviction: **No**
   5a. Prior Conviction: **No**
6. Prior Violent Conviction: **0**
7. Prior Failure to Appear Pretrial in Past 2 Years: **0**
8. Prior Failure to Appear Pretrial Older Than 2 Years: **No**
9. Prior Sentence to Incarceration (14 Days or More): **No**

Number of Current Charges: 2

Case ID	Offense Date	Arrest Date	Charge	Aux Charge	Degree	Violent Charge	NERA Charge	Specific Weapons Charge	DV Related	Source
2018 000565 1217	08/28/2018	11/08/2018	2C:29-3A(3) HINDERING-HIDE/SUPPRESS INFORMATION/EVIDENCE		3	NO	NO	NO	NO	ACS
2018 000565 1217	08/28/2018	11/08/2018	2C:5-1A(1) CRIMINAL ATTEMPT - PURPOSELY ENGAGES IN CONDUCT	2C:28-6(1) TAMPERING WITH PHYSICAL EVIDENCE-ALTER/DEST ROY OBJECT	4	NO	NO	NO	NO	ACS

Dsa001

Criminal and Court History

Defendant: MYSHIRA T ALLEN-BREWER **DOB: 07/19/2000** **SBI #: 947798G** **FBI #:**

Complaint Number: 2018 000565 1217 **PSA Run Date: 11/08/2018 10:28 PM**

Defendant Currently on Pretrial Monitoring: No

Pending Charge at the Time of Offense: No

Prior Disorderly Persons (DP) Conviction: No

Prior Indictable Conviction: No

Prior Violent Conviction: 0

Prior Failure to Appear Pretrial in Past 2 Years: 0

Prior Failure to Appear Pretrial Older Than 2 Years: No

Prior Sentence to Incarceration (14 Days or More): No

Supplemental Information (Not Included in PSA Calculation)

Defendant Currently on Probation (CAPS): No

Defendant Currently on Parole: Inconclusive

Parole information reflects latest status entered into OBCIS.

Final Domestic Violence (DV) Restraining Orders: No

Adjudicated Juvenile (FJ) Cases: No

System enhancements to include all Juvenile records are not complete. Please verify Juvenile records.

Data Removed From Risk Factors/Unclassifiable: No