STATE OF NEW JERSEY, PLAINTIFF-APPELLANT, V. RASHEEN W. McQUEEN and MYSHIRA T. ALLEN-BREWER, DEFENDANTS-RESPONDENTS.	Supreme Court of New Jersey Docket No. 084564 Criminal Action On Certification from the Superior Court of New Jersey, Appellate Division Docket No.: A-4391-18T1 A-4910-18T1 Sat Below: Hon. Carmen H. Alvarez, P.J.A.D. Hon. Karen L. Suter, J.A.D. Hon. Patrick DeAlmeida, J.A.D.

AMICUS CURIAE BRIEF OF ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS OF NEW JERSEY

PASHMAN STEIN WALDER HAYDEN, PC
Court Plaza South
21 Main Street, Suite 200
Hackensack, New Jersey 07601
(201) 488-8200
DENISE ALVAREZ, ESQ. (319382020)
dalvarez@pashmanstein.com

Attorneys for Association of Criminal Defense Lawyers of New Jersey

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of Criminal Defense Lawyers of New Jersey ("ACDL-NJ") is a non-profit corporation organized under the laws of New Jersey to "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good." Founded in 1985, ACDL-NJ has over 500 members across New Jersey. Throughout the years, ACDL-NJ has participated as *amicus curiae* in numerous cases before this Court, as detailed in the attached Certification of Denise Alvarez, Esq.

PRELIMINARY STATEMENT

This case is about the constitutional rights of individuals in the State of New Jersey and the United States to be free from the government's unauthorized and unreasonable intrusion into their private telephone conversations. The State seeks to prosecute the defendant, Myshira T. Allen-Brewer, based on evidence obtained in a recording of a private telephone conversation she had with her boyfriend, Rasheen W. McQueen. The State concedes that it did not have a warrant or wiretap order authorizing the recording. The State relies on the fact that McQueen made the phone call from a telephone at the police station

after having been arrested, and that the police station records every phone call made from that facility. But Allen-Brewer, who received the call, was not in police custody. Nor did the police have any reason to suspect her of a crime. Further, neither McQueen nor Allen-Brewer were notified that the call would be, or could be, recorded. Nevertheless, the State contends that Allen-Brewer had no reasonable expectation that her call would remain private because (1) McQueen had no reasonable expectation of privacy after having been arrested; and (2) Allen-Brewer should have known that the call was being recorded, and even if she did not know, McQueen's actions somehow negated her reasonable expectation of privacy.

The Court should reject the State's arguments and affirm the trial court's and Appellate Division's decisions to suppress the unauthorized recording because Allen-Brewer had a reasonable expectation of privacy in her conversation over the telephone with her boyfriend. Whether or not she was aware that McQueen had been arrested, she had no reason to believe that the call - during which he spoke in a low voice - was being recorded. In addition, the call was not, as the State argues, in "plain hearing." The call was received at home and made quietly from a police station phone. In fact, the State does not seek to admit anything police officers overheard in the police station while McQueen was on the phone. Instead, the State concedes that the police learned of the evidence

incriminating Allen-Brewer only when they listened to the recording and seek to admit the recording itself as evidence against Allen-Brewer. Such an invasive intrusion into the private conversations of others is precisely what the United States Constitution, the New Jersey Constitution and New Jersey's Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A: 156A-1 et. seq., seek to prevent.

Almost anyone can be in the position to use a telephone from a police station. As the Appellate Division recognized, "[o]rdinary citizens enter police stations for a variety of reasons - not just because they have been arrested." State v. McQueen, 2020 WL 2529839, *4 (App. Div. May 19, 2020). Applicants for gun permits, crime victims, potential witnesses, someone with a question, may all use the station telephone. Secretly recording every call made from the police station does not diminish the privacy expectations these individuals, and those whom they call, have in their telephone conversations. The State should not be permitted to intrude on these privacy interests simply because these individuals stepped into a police station and used the phone. It is therefore paramount that this Court affirm the trial court's and Appellate Division's suppression of the recording to ensure that the government does not unilaterally intrude on private telephone conversations absent consent, notice or probable cause.

PROCEDURAL HISTORY & STATEMENT OF FACTS

Amicus relies upon the procedural history and statement of facts as set forth in the Myshira T. Allen-Brewer's Appellate Division brief and Supplemental Brief filed in this Court.

LEGAL ARGUMENT

I. ALLEN-BREWER'S CONSTITUTIONAL RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED WHEN HER PRIVATE TELEHONE CALL WAS RECORDED BY THE STATE WITHOUT NOTICE

The Fourth Amendment of the United States Constitution and Article I, paragraph 7 of the New Jersey Constitution protect our right to be free from unreasonable searches and seizures. These constitutional rights require that law enforcement obtain a judicial warrant prior to searching the property of a private individual or obtaining whatever an individual seeks to preserve as private, whether tangible or not. Katz v. U.S., 389 U.S. 347, 351-52 (1967). New Jersey's Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A: 156A-1 et. seq. (the "Wiretap Act"), provides further protection, expressly prohibiting the interception and attempted interception of electronic communications absent consent or an order of authorization based on probable cause.

A search infringes upon these rights when the individual whose area or property is searched had a "reasonable expectation of privacy" in the searched premises. This expectation of privacy does not exist solely in areas not accessible to the public, but

exists in whatever a person seeks to preserve as private. Katz, 389 U.S. at 351-52. In assessing whether a reasonable expectation of privacy exists for Fourth Amendment purposes, courts examine (1) whether the defendant had a subjective expectation of privacy; and (2) whether that subjective expectation of privacy is one that society is prepared to recognize as reasonable. State v. Evers, 175 N.J. 355, 369 (2003) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)). New Jersey's constitutional protection goes even further. New Jersey does not require a subjective expectation of privacy but only that it be reasonable. State v. Hinton, 216 N.J. 211, 235 (2013). *Amicus* submits that Allen-Brewer's constitutional rights were violated when the State recorded, without consent or notice, a private telephone call initiated by her boyfriend from a telephone located at the Piscataway police station.

A. Allen-Brewer Had a Reasonable Expectation of Privacy in the Telephone Call She Received From Her Boyfriend.

The trial court correctly suppressed the recording of the telephone call made by McQueen to Allen-Brewer from the Piscataway police station and the Appellate Division correctly affirmed that decision. In affirming the decision, the Appellate Division primarily focused its analysis on whether McQueen had a reasonable expectation that the phone call he made would remain private. See McQueen, 2020 WL 2529839, *3-*8. Similarly, the vast majority of

the briefs filed by the State in the Appellate Division and in this Court focus on whether McQueen's belief that his call would remain private is reasonable. (See Sb at 12-31; SA at 14-17).[1] Allen-Brewer's expectation of privacy is also important.

The State seeks to use evidence obtained without a warrant or wiretap order to prosecute Allen-Brewer, who was on the receiving end of the telephone call made by her boyfriend. Allen-Brewer received the call, late at night, while she was home in a private setting. The United States Supreme Court has recognized a reasonable expectation of privacy in private telephone conversations. Katz, 389 U.S. at 353 (holding that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment").

The New Jersey Supreme Court has gone even further, finding that "New Jersey has had an established policy of providing the utmost protection for telephonic communications." State v. Hunt, 91 N.J. 338, 345 (1982). In 1930, the New Jersey legislature made

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[1] "Sb" refers to the Supplemental Brief on Behalf of the State of New Jersey, dated November 9, 2020, filed in this Court. "SA" refers to the Letter Brief filed by the State of New Jersey in the Appellate Division, dated August 23, 2019. "Shb" refers to the brief filed by Amicus Curiae Seton Hall University School of Law Center in this Court.

it a misdemeanor to tap a telephone line, condemning the "tapping of wires as a method for achieving the detection and punishment of crime." Id. (quoting Morss v. Forbes, 24 N.J. 341, 363 (1957). This was over thirty years before the Supreme Court's decision in Katz. In Hunt, the Court discussed the reasonable privacy expectation one has in a telephone conversation, explaining that:

> When 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. It is well settled that telephone conversations carried on by people in their homes or offices are fully protected from governmental intrusion.
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> Hunt, 91 N.J. at 346.

The Court also recognized that "if one party makes the conversation available to others, such as through the use of a speaker phone or by permitting someone else to hear," then that conversation does not enjoy the same privacy expectation. Id. In the absence of evidence to the contrary, "[t]he telephone caller 'is entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.'" Id. at 346-47 (quoting Katz, 389 U.S. at 352).

Here, there is no evidence that McQueen or Allen-Brewer did anything to expose their private telephone conversation to others. McQueen spoke in a low voice and did not place the call on speaker

phone. There also is no evidence that Allen-Brewer had him on speaker phone, recorded the call herself, or even told anyone about the substance of the telephone call. Indeed, the evidence shows that she had every intention to keep the telephone call private.

This Court should reject the argument that Allen-Brewer's expectation that the telephone call would remain private was not reasonable simply because McQueen may have stated that he was "locked up." (See Sb at 14-15). Nowhere in the record is there any evidence that Allen-Brewer understood that McQueen had been arrested, was on a telephone belonging to the police station, or that the call was being recorded. To the contrary, neither McQueen nor Allen-Brewer were notified that the call would be recorded and they both expected that the call would remain private. Whether that expectation was reasonable is key to this analysis. *Amicus* submits that the trial court and Appellate Division were both correct when they concluded that it was reasonable. The evidence does not indicate that Allen-Brewer had any reason to doubt that a telephone call she received would be kept private. The fact that the State undertook a warrantless maneuver to obtain a recording of the call does not eradicate her reasonable expectation.

B. State v. Jackson Is Inapposite.

The Court should not apply the holding in State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019), aff'd o.b., 241 N.J. 547

(2020), to the instant case. The State relies on Jackson for the proposition that "neither pretrial detainees nor post-conviction inmates have a reasonable expectation of privacy in [jail calls], primarily because of the nature of the correctional facilities and the security concerns involved." (Sb at 16). This argument ignores the reality of Allen-Brewer's situation as well as the rationale of the Jackson court. At the time the telephone call was recorded, Allen-Brewer had not been arrested. In fact, the record does not show that the police had any reason to suspect Allen-Brewer of a crime. Thus, unlike the defendants in Jackson, Allen-Brewer was not a pre-trial detainee or a post-conviction inmate with a lower expectation of privacy. Further, the decision in Jackson hinged on the fact that the defendants were given notice that calls from their correctional facilities would be recorded. The court reasoned:

> Furthermore, if an inmate knows he or she is being monitored and recorded when speaking on the phone, it is unreasonable to conclude either that the inmate retains a reasonable expectation of privacy, or that the inmate's loss of privacy should be limited to the one law enforcement agency - the correctional facility - that is recording the conversation.

Jackson, 460 N.J. Super. at 277. Neither McQueen nor Allen-Brewer were notified that McQueen's call from the police station could be recorded. Other than conjecture, there is no evidence that it is "general knowledge that police department telephones are

recorded." Sb at 20 (quoting McQueen, Nos. A-4391-18, A-4910-18 (DeAlmeida, J., dissenting in part)); see also SHb at Point I.B.2. Indeed, McQueen lowered his voice during the call to keep the call private with the likely expectation that it would remain private. Allen-Brewer also had a reasonable privacy expectation in a private telephone call where there was no indication whatsoever that the call could be made public. The fact that McQueen had been arrested does not render Allen-Brewer's expectation of privacy automatically unreasonable.

C. McQueen's Unilateral Actions Do Not Negate Allen-Brewer's Privacy Interest

This Court should reject the State's argument that McQueen's actions somehow negated Allen-Brewer's privacy interest in her telephone conversation. The State cites United States v. Sababu, 891 F.2d 1308 (7th Cir. 1989) for the proposition that "the considerations that justify monitoring and recording of a prisoner's utterances" should also apply to "the other end of the telephone." Sb at 27-28. But Sababu was a very different case in that the person on "the other end of the telephone" was speaking to a post-conviction inmate and had complete knowledge that her calls with the inmate were being monitored. The court stated:

> We believe that Garcia did not have a reasonable expectation of privacy in her telephone conversations with Lopez, an inmate in a federal prison. Garcia was a frequent visitor to [the prison] and was well aware of the strict security measures in place. She was

> put on notice through the Code of Federal Regulations that prison officials were authorized to monitor inmates' telephone calls . . . Moreover, that Garcia frequently spoke in coded language demonstrated her awareness that there was no privacy to the conversations. We believe that it was unreasonable for her to expect that telephone calls she placed to an inmate in a high-security federal penitentiary would be private.
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> Sababu, 891 F.2d at 1329 (emphasis added).

In Sababu, there was no question that the defendant knew her calls with the inmate were being monitored. This, for obvious reasons, negated any possible expectation that the call would remain private.

Further, New Jersey's Corrections regulations require that prison inmates - who have been convicted of a crime - be notified of any "limitations and conditions" on their telephone privileges, including that telephone calls from correctional facilities may be "monitored and recorded." N.J.A.C. 10A:18-8.2 (Notice to inmates-telephone privileges) and 10A:18-8.3 (Monitoring of telephone calls). Such a notification may diminish any reasonable privacy expectation in such calls. Here, neither McQueen nor Allen-Brewer had been convicted of any crime and yet, they were provided less notice than an inmate in a State correctional facility.

There is no evidence that Allen-Brewer knew or should have known that (1) McQueen was calling her from a telephone belonging to the police station; or (2) that the telephone call from the

station would be monitored, recorded, or otherwise exposed to the public. Accordingly, Allen-Brewer had a reasonable expectation of privacy in that particular call and this Court should affirm the trial court's decision to suppress the recording.

II. THE PLAIN HEARING DOCTRINE SHOULD NOT APPLY WHERE THERE WAS NO ORDER PERMITTING THE INTERCEPTION OF THE CALL AND THE COMMUNICATION WAS NOT MADE OR HEARD IN A PUBLIC SETTING

In a further attempt to justify its infringement on Allen-Brewer's reasonable expectation of privacy, the State argues that its use of the recording of the call made from the police station is permissible under the plain hearing doctrine. The plain hearing doctrine, which is an extension of the plain view doctrine, has not yet been adopted by this Court. It is *Amicus'* position that even if the Court were to adopt the plain hearing doctrine, the doctrine should not apply under the circumstances present here, where there is no warrant or wiretap order permitting the recording and the telephone call was made or received in private. The rationale and foundation of the plain view doctrine has no bearing on a conversation had in private that is not overhead by the police in a public setting. The routine recording of private telephone calls without notice to the callers or receivers of the calls does not render all of those calls "in plain view." Under the State's rationale, each and every call made from the police station's telephone - whether by a detainee, witness or even a victim - is considered public and not subject to any constitutional

protection. That is not, and cannot be, the intended use of the plain view or plain hearing doctrines. The secret widespread violation of privacy does not justify the infringement of constitutional rights.

There are two basic requirements for the plain view doctrine to apply: (1) the police officer must be "lawfully in the area where he observed the evidence," and (2) it must be "immediately apparent" to the officer "that the item observed is evidence of a crime or contraband." State v. Gonzales, 227 N.J. 77, 81 (2016). The underlying premise of the plain view doctrine is that "a police officer lawfully in the viewing area" cannot be expected to "close his eyes to suspicious evidence in plain view." State v. Bruzzese, 94 N.J. 210, 237 (1983). This is consistent with the United States Supreme Court's rationale in Katz, where the Supreme Court found that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz, 389 U.S. at 351.

Courts that have extended the plain view doctrine to include the plain hearing doctrine have relied on a court order to ensure that constitutional protections remain in place. In U.S. v. Carey, 836 F.3d 1092 (9th Cir. 2016), relied upon by the State (Sb at 29), the Ninth Circuit held that evidence is admissible under the plain hearing doctrine when the police "overhear speakers unrelated to the target conspiracy while listening to a valid

wiretap, without having complied with the Wiretap Act requirements of probable cause and necessity as to those specific speakers." Id. at 1093-94. In Carey, the police had a wiretap order permitting them to listen to telephone conversations with respect to a particular conspiracy but discovered, at some point, that the conversations they heard concerned a different conspiracy. Id. at 1094. The court found that evidence regarding the untargeted conspiracy may still be admissible under the plain hearing doctrine because it was obtained pursuant to a valid wiretap order. Id. at 1098-99. The Ninth Circuit, however, was clear that any evidence obtained after the officers knew or should have known that the call involved a different conspiracy falls outside of the plain hearing doctrine and was therefore inadmissible. Id. This limitation is consistent with the Seventh Circuit's decision in U.S. v. Ramirez, 112 F.3d 849(7th Cir. 1997), where the court also held that "once the mistake is discovered, the government cannot use the authority of the warrant, or of the [wiretap] order, to conduct a search or interception that they know is unsupported by probable cause or is otherwise outside the scope of the [wiretap] statute or the Constitution." Id. at 852. The other cases relied upon by the State for the plain hearing doctrine similarly require that the evidence unexpectedly overhead be obtained pursuant to a valid order or have been heard by the police in public. See Sb at 29 (citing Carey, 836 F.3d 1092, Ramirez, 112 F.3d at 851, U.S. v.

Baranek, 903 F.2d 1068, (6th Cir. 1990)) (each involving a wiretap order) and Sb at 28 (citing State v. Constantino, 254 N.J. Super. 259 (Law Div. 1991)) (police overhead conversation defendant had on a public telephone)).

In contrast, the plain hearing doctrine has no applicability here where (1) there was no warrant or order authorizing the search; and (2) the conversation was held privately between Allen-Brewer and McQueen and never broadcast to the public. The State does not seek to rely upon statements overhead by the police at the station, but only upon the call recorded without notice. Indeed, the State admits that it first learned of the incriminating evidence only after listening to the recording. (See SA at 6) ("Suspecting McQueen may have discussed the handgun in his telephone call, Reilly listened to the recording of McQueen's telephone call and learned that the handgun belonged to McQueen.").

The New Jersey Legislature passed the Wiretap Act because it recognized "a strong interest in protecting the privacy of individuals and controlling intrusive police activity." State v. Minter, 116 N.J. 269, 276 (1989). Under the Wiretap Act, consent or an order based on probable cause is necessary to legally intercept a telephone call. N.J.S.A. 2A:156-10. Recording every call without notice does not render those calls public or available in "plain hearing." The Wiretap Act specifically requires law enforcement to set forth facts showing probable cause of criminal

activity, including (1) the identity of those "committing the offense and whose communications are to be intercepted," (2) the "details as to the particular offense," (3)the "particular type of communication to be intercepted," (4)the "particular place where the communication will be intercepted," and (5) "the period of time for which the interception is required to be maintained," as well a statement of other investigative activity that the officers have tried but either failed or reasonably appear to be unlikely to succeed. N.J.S.A. 2A:156-9. All of these requirements ensure that probable cause exists for the interception and that such a pervasive intrusion by the government is necessary and permissible.

The State's interpretation of the plain hearing doctrine would eradicate these protections and allow the systematic invasion of privacy of anyone who uses a telephone at the police station simply by recording every single call. *Amicus* submits that the State is incorrect - making a call from or receiving a call from a police station does not render that call - whether made by a detainee, police officer, witness or victim - in "plain hearing." Indeed, absent notice to both the caller and receiver that the call is being recorded, the government's interception of the call infringes upon the reasonable expectation of privacy of those on the telephone. This is consistent with the Ninth Circuit's decision in Carey and the Seventh Circuit's decision in

Ramirez, where the courts forbade the use of evidence obtained once the police knew it was not covered by the wiretap order. Such orders are necessary and required to ensure constitutional protections. The Court should reject the plain hearing doctrine as applied to this case.[2]

III. PERMITTING THE USE OF EVIDENCE OBTAINED WITHOUT CONSENT, NOTICE OR A COURT ORDER WOULD ERADICATE BASIC CONSTITUTIONAL RIGHTS

Under both the United States and New Jersey Constitutions, we each enjoy the right to be free from unreasonable searches by the government. We should be entitled to use a telephone at our local police station to speak to a loved one, a close relative, or anyone for that matter, with the expectation that the call will remain private. While that expectation may be unreasonable when any of the speakers speak loudly in a public place or setting, that is not the case when the call is made from a place where the conversation cannot be overheard.

The State's argument that it is well-known or expected that every call made from a police station is recorded is simply untrue and overbroad. The State's argument is not limited to detainees. Refusing to suppress the recording in this case would infringe upon not only the rights of detainees and inmates, but also the

[2] The Court should reject the doctrine in this case without deciding whether to adopt the doctrine and apply it to future cases. The plain hearing doctrine, if adopted by this Court, should be adopted in a matter where it is applicable.

constitutional rights of victims, witnesses, officers, or anyone else who happened to use the telephone at the police station, as well as anyone who receives a call from someone at the police station. As the Appellate Division acknowledged, "[o]rdinary citizens enter police stations for a variety of reasons - not just because they have been arrested." McQueen, 2020 WL 2529839, *4. This includes "applicants for gun permits, victims of crime and their friends and families, and families and friends of arrestees." Id. All of these individuals "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.

Simply put, we all have the right to use a telephone and expect that a private call will not be intercepted or recorded by the State. Permitting the State's use of the police station call would give the government free reign to intrude on the privacy interests of, *and prosecute*, non-detainees by listening in on every recorded call they may have with someone on a station phone. Tellingly, the State argued that the call was not made to an attorney and hence was not privileged, but the State would not know that without first infringing on that privilege and listening to the call. (SA at 13). Absent express notice, consent, or an order based on probable cause, such calls must remain free from government intrusion.

CONCLUSION

For all the reasons argued above, this Court should affirm the Appellate Division's decision below.

Respectfully Submitted,

/s Denise Alvarez
Denise Alvarez, Esq.

PASHMAN STEIN WALDER HAYDEN, P.C.
Court Plaza South
21 Main Street, Suite 100
Hackensack, New Jersey 07601
(201) 488-8200

Attorneys for *Amicus Curiae*