Supreme Court of New Jersey

DOCKET NO. 084564

STATE OF NEW JERSEY,	:	Criminal Action
Plaintiff-Appellant,	:	On Leave to Appeal from an Interlocutory Order of the Superior Court of New Jersey, Appellate Division.
v.	:	
RASHEEM W. McQUEEN and MYSHIRA T. ALLEN-BREWER,	:	Sat Below: Hon. Carmen H. Alvarez, P.J.A.D. Hon. Karen L. Suter, J.A.D.
Defendants-Respondents.	:	Hon. Patrick DeAlmeida, J.A.D. (dissenting)

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY
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PRELIMINARY STATEMENT

As the Honorable Patrick DeAlmeida, J.A.D., recognized in his cogent and thoughtful dissenting opinion, individuals do not have a reasonable expectation of privacy in calls they place on a police department's routinely recorded phone lines. The Appellate Division majority was wrong to conclude otherwise, and its decision to that effect should be reversed.

As federal courts have consistently recognized, it is no secret that police departments have the capacity to record all incoming and outgoing calls — the practice of recording such calls is universal and well-known. Thus, any reasonable person using a stationhouse phone should realize that the call is at least subject to recordation or monitoring. And any subjective expectation to the contrary is not one that society is prepared to recognize as reasonable and is not protected by the state or federal constitution.

Police stations are not private homes. They are not friends' homes, they are not businesses, and they are not public phone booths. They are law-enforcement buildings, staffed by law-enforcement officers, and replete with security and monitoring equipment and devices that may be active at any time.

And understandably so. Public safety generally, the safety of officers and citizens in a stationhouse at any given moment, and the public's interest in well-trained, effective, and informed law enforcement demand nothing less. This includes the routine recording of stationhouse phone lines to ensure that the

information received and provided over those lines is capable of monitoring and review.

While a police station is not a county jail — though it too temporarily houses arrestees and detainees — many of the same institutional security concerns that apply to a jail apply within stationhouse walls. Thus, in addition to the concerns unique to a stationhouse, the institutional concerns applicable to a jail apply equally to a stationhouse and similarly warrant the routine recording of stationhouse phone lines.

Just as this Court, the Appellate Division, and federal courts have all recognized that the routine recording of jail and prison phone lines does not implicate any reasonable expectation of privacy, so too should this Court recognize that the routine recording of stationhouse phone lines does not implicate any constitutionally protected privacy right.

This is particularly so where, as here, the caller is under arrest, awaiting transport to the county jail, and under the supervision of a police officer. No reasonable person under these circumstances would expect privacy in a phone call placed over a stationhouse phone line.

And the circumstances in this case demonstrate exactly why that is so. Allowing an arrestee unfettered and unmonitored access to call the outside world is an invitation for malfeasance — for permitting illicit calls to tamper or destroy evidence, to intimidate or eliminate potential witnesses, to hinder a cohort's apprehension, the prosecution of the arrestee,

or the cohort's prosecution, or to interfere with the movements of law enforcement while transporting the arrestee to jail. By concluding that individuals have a reasonable expectation of privacy in calls placed over recorded stationhouse phone lines, the Appellate Division majority failed to appreciate those concerns, the true interests at stake on both sides, and the well-accepted understanding that police departments routinely record all ingoing and outgoing calls.

Just as the person placing the call has no reasonable expectation of privacy, nor does a recipient who knows the call is over a stationhouse phone line. Indeed, even without that knowledge, the recipient has no protected privacy interest in the conversation because the caller has made it available to law enforcement. After all, there is no constitutional protection for misplaced trust or bad judgment when committing a crime.

Finally, while the Appellate Division majority stated it did not reach the question of whether the routine recording of stationhouse phone lines violates the state or federal wiretap acts, it later suggested that, had it done so, its answer would have been yes. As federal precedent makes clear, this suggestion, like the majority's conclusion on the constitutional question, was erroneous and should be disavowed by this Court.

In sum, the Attorney General urges this Court to reverse the Appellate Division majority's decision to the extent that it affirmed the suppression of the call made between defendants over a routinely recorded stationhouse phone line.

STATEMENTS OF PROCEDURAL HISTORY AND FACTS[1]

The Attorney General relies on the Statement of Procedural History and Statement of Facts in the State's supplemental brief.

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[1] "Pa" refers to the State's appendix.
"Db" refers to defendant Myshira Allen-Brewer's Appellate Division brief.
"1T" refers to grand-jury transcript, Oct. 30, 2018.
"2T" refers to grand-jury transcript, Feb. 8, 2019.
"3T" refers to motion-to-suppress transcript, Feb. 25, 2019.
"4T" refers to motion-to-suppress transcript, Mar. 25, 2019.
"5T" refers to motion-to-suppress transcript, May 3, 2019.
"6T" refers to motion transcript, June 3, 2019.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION ERRED IN AFFIRMING THE SUPPRESSION OF THE RECORDED CALL FROM THE POLICE STATION, AS DEFENDANTS HAD NO REASONABLE EXPECTATION OF PRIVACY IN THEIR CALL MADE OVER ROUTINELY RECORDED STATIONHOUSE PHONE LINES AND THE RECORDING DID NOT VIOLATE THE STATE OR FEDERAL WIRETAP ACT.

Relying largely on his written decision that was reversed in State v. Jackson, 241 N.J. 547 (2020), the motion judge suppressed the recordings of two sets of phone calls between defendants — the call Rasheem McQueen made to Myshira Allen-Brewer while he was in post-arrest custody at the Piscataway police station (the stationhouse call), and the several calls McQueen made after being lodged in the Middlesex County Correctional Center (the jail calls). (5T12-1 to 20-13; Pa23; Pa24).

But as the Appellate Division and this Court already concluded, the motion judge's written decision in Jackson was based on his mistaken conclusions that the prosecutor obtained the recordings of jail calls in violation of the New Jersey Wiretapping and Electronic Surveillance Control Act (the Wiretap Act), N.J.S.A. 2A:156A-1 to -37, Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, and Article I, Paragraph 7 of the New Jersey Constitution. State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019), aff'd o.b., 241 N.J. 547 (2020). The judge's conclusions

in this case were similarly flawed, and his order and decision suppressing those calls was similarly mistaken. As the Honorable Patrick DeAlmeida, J.A.D., recognized in his thorough and cogent dissenting opinion, the Appellate Division erred in concluding otherwise with respect to the stationhouse call.

Consistent with the Appellate Division's decision in Jackson, which this Court affirmed as written, the Appellate Division here appropriately held that jails calls were lawfully recorded and provided to the prosecutor. State v. McQueen, Nos. A-4391-18T1, A-4910-18T1 (App. Div. May, 19, 2020) (slip op. at 6-8). But the majority then mistakenly held that the recording of the stationhouse call from McQueen to Allen-Brewer was properly suppressed, concluding that defendants had a reasonable expectation of privacy in the phone call made using a recorded stationhouse phone line. Id. at 8-13.

In the majority's view, the absence of notice that the conversation would be recorded was dispositive of the question of whether defendants had a reasonable expectation of privacy. See id. at 8. According to the majority, McQueen — despite being under arrest and awaiting transport to jail, in the presence of an officer at police headquarters, and using a stationhouse phone line — "had no reason to doubt his call was as private and secure as if he was using a phone in a friend's apartment." Id. at 12. And Allen-Brewer — despite being told by McQueen that he was "locked up," (Pra4) — "was similarly situated and . . . had every reason to assume her conversation

was private and secure." Ibid. Indeed, in the majority's view, the record did not establish any reason "to distinguish between McQueen's use of the phone and the use by a civilian." Ibid.

But as Judge DeAlmeida correctly recognized, notice is not dispositive, McQueen was not just any civilian, and any expectation he may have had that his conversation on a stationhouse phone line was private "was 'not one that society is prepared to recognize as reasonable.'" McQueen, slip op. at 2-3) (DeAlmeida, J., dissenting). Having considered the totality of the circumstances, as the majority should have, Judge DeAlmeida appropriately concluded that no person in McQueen's circumstances — having just confessed to criminal activity, under arrest, awaiting transport to the county jail, in the presence of an officer at police headquarters, and using a stationhouse phone line — would reasonably expect his conversation to be private, nor would any person in Allen-Brewer's — on the receiving end of a call from someone known to be in police custody. McQueen, slip op. at 1-3, 5-7 (DeAlmeida, J., dissenting). And even if Allen-Brewer was not aware that McQueen was in police custody and using a recorded phone line, her misplaced reliance on his poor judgment is not a constitutionally protected privacy interest. Id. at 7.

And as Judge DeAlmeida concluded, even if McQueen were just any civilian, the answer would be the same. Id. at 4. No civilian could reasonably expect that his or her use of stationhouse phone lines would be private because the general

public is fully aware of police departments' routine, standard practice of recording all ingoing and outgoing calls on their general phone lines. Id. at 3. And because of this general knowledge that stationhouse phone lines are recorded, notice is implied. Id. at 3-4.

Finally, Judge DeAlmeida reached the statutory question the majority declined to reach, though later suggested it would answer affirmatively — whether the police department's recording of stationhouse phone lines or provision of the recording of defendants' call to the prosecutor violated the Wiretap Act or Title III. Id. at 8-11. Relying on federal precedent, Judge DeAlmeida correctly concluded that the Wiretap Act and Title III do not apply to the recording of stationhouse phone lines because such recording is not an interception, and thus that neither act limits the police department's authority to disclose those recordings to the prosecutor. Id. at 10-11.

As Judge DeAlmeida correctly concluded, having lawfully recorded McQueen's call on the recorded stationhouse phone line, the Piscataway Police Department was permitted to share that recording with the Middlesex County Prosecutor's Office. Since the prosecutor's receipt and replaying of that recordings was not an interception under the Wiretap Act or Title III, a wiretap order was not required. The motion judge thus erred in concluding, as he did with the jail calls, that the State violated the Wiretap Act and Title III by obtaining the recording of McQueen's stationhouse call to Allen-Brewer without

a wiretap order.

And because there is no reasonable expectation of privacy in a call made on a stationhouse's recorded phone line, the prosecutor's receipt of that recording here was not a search requiring a warrant. The judge thus also erred in concluding that the prosecutor violated Article I, Paragraph 7, by obtaining the recording of the stationhouse call by way of a grand-jury subpoena.

As the prosecutor did not obtain the recording of the stationhouse call in violation of the Wiretap Act, Title III, or the state or federal constitutions, the judge legally erred in suppressing those recordings and the Appellate Division majority erred in affirming the order. Those decisions should be reversed. This Court reviews de novo the questions of law presented. See In re State for Commc'ns Data Warrants to Obtain the Contents of Stored Commc'ns from Twitter, Inc. (In re State for CDW), 448 N.J. Super. 471, 479 (App. Div. 2017) (citing State v. Goodwin, 224 N.J. 102, 110 (2016)).

A. Because there is no reasonable expectation of privacy in calls on routinely recorded stationhouse phone lines, the prosecutor lawfully obtained the recording of defendants' call through a grand-jury subpoena.

Neither defendant had a reasonable expectation of privacy in the call McQueen placed to Allen-Brewer using the recorded stationhouse phone line. And because there was no reasonable expectation of privacy in the phone call, there was no search and therefore no requirement that law enforcement get a warrant

to obtain the recording of the call. The Appellate Division majority erred in concluding otherwise.

"To invoke the protections of the Fourth Amendment and its New Jersey counterpart, Article I, Paragraph 7, [a] defendant must show that a reasonable or legitimate expectation of privacy was trammeled by government authorities." State v. Evers, 175 N.J. 355, 368-69 (2003). To meet this burden under the New Jersey Constitution, a defendant must establish that he has a reasonable expectation of privacy — that is, "one that society is prepared to recognize as reasonable.'" Id. at 369 (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); see also State v. Hempele, 120 N.J. 182, 198 (1990). Only if this test is satisfied do the protections of Article I, Paragraph 7 apply. And in the context of stationhouse calls — like in the context of jail calls — this test is clearly left unsatisfied.

"In determining the reasonableness of an expectation of privacy . . . , we start from the premise that '[e]xpectations of privacy are established by general social norms.'" Hempele, 120 N.J. at 200 (quoting Robbins v. California, 453 U.S. 420, 428 (1981) (plurality opinion), overruled on other grounds, United States v. Ross, 456 U.S. 798 (1982)). This inquiry "necessarily entails a balancing of interests." Hudson v. Palmer, 468 U.S. 517, 527 (1984). And while this balancing may generally tip in favor of people having a reasonable expectation of privacy in their phone conversations under most

circumstances, the circumstances presented in a stationhouse setting — especially where the caller is an arrestee — bear little resemblance to the average citizen using the average private phone line or public phone booth.

As this Court recognized in its affirmance of the Appellate Division's decision in Jackson, common sense and the legitimate public and institutional interests in maintaining order, security, and public safety outweigh an inmate's right to privacy in the correctional setting. 460 N.J. Super. at 276. These same interests apply equally in the context of a police station. Just as "a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room," neither does a police station. Lanza v. New York, 370 U.S. 139, 143 (1962). And just as a jail or prison inmate's privacy interest will almost "always yield to what must be considered the paramount interest in institutional security," so too must an individual's privacy interest yield to the public and institutional interests applicable in a police station. Hudson, 468 U.S. at 527-28; see also In re Rules Adoption Regarding Inmate Mail to Attys, 120 N.J. 137, 146-47 (1990) ("[I]nternal order, discipline, security, and rehabilitation are legitimate goals that must be accommodated."); State v. Ryan, 145 N.J. Super. 330, 335 (Law Div. 1976) ("Lack of privacy must be balanced against reasonable security in the jail. In the end, the scales must be tipped in favor of security.").

To be sure, a police station is not a county jail. But it

does house arrestees, and the broader purpose served by a police station weighs heavily in favor of the public and institutional concerns outweighing an individual's privacy interest in calls placed over stationhouse phone lines. Police stations are places where members of the public, law enforcement officers, suspects, and arrestees all come together in a chaotic environment over which law enforcement must — and does — maintain control and security.

Stationhouse phone lines are no less chaotic. Over these lines, police departments receive a wide variety of information ranging from the mundane to information regarding past, present, and future criminal activity. This is information the police have a legitimate interest in capturing and preserving for a number of reasons, including for future reference and confirmation, training purposes, and quality assurance. See Amati v. City of Woodstock, 176 F.3d 952, 954 (7th Cir.), cert. denied, 528 U.S. 985 (1999) (noting that calls to and from police stations "may constitute vital evidence or leads to evidence, and monitoring them is also necessary for evaluating the speed and adequacy of the response of the police to tips, complaints, and calls for emergency assistance").

Indeed, public safety would be difficult to protect and maintain if the police were limited to a single, fleeting listening of calls they receive. What of those calls where information about a crime is quickly rattled off before the caller hangs up? It is in nobody's interest that the police be

forced to rely on a single, live listen with the din of a busy police station potentially hindering the listener's accurate and meaningful understanding of the information provided.[2] And it is in nobody's reasonable expectation that a police phone line in a police station offers privacy or is in any way similar to using a public phone booth owned and operated by the phone company, or a phone belonging to a friend, business, or even non-law-enforcement stranger on the street.

To be sure, under the New Jersey Constitution, "individuals do not lose their right to privacy simply because they have to give information to a third-party provider, like a phone company or bank, to get service." State v. Earls, 214 N.J. 564, 568 (2013) (recognizing reasonable expectation of privacy in cellphone location information); see also State v. Lunsford, 226 N.J. 129 (2016) (phone billing records); State v. Reid, 194 N.J. 386, 399 (2008) (subscriber information provided to internet-service provider); State v. McAllister, 184 N.J. 17 (2005) (bank records); Hempele, 120 N.J. 182 (contents of opaque garbage bags left curbside); State v. Hunt, 91 N.J. 338 (1982) (toll billing records).

And in a related vein, this Court has recognized that "a person's expectation of privacy can differ in regard to different classes of people." Hempele, 120 N.J. at 205. But these principles do not dictate the conclusion reached by the

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[2] To be clear, even the possibility of one fleeting live listen would obliterate the caller's expectation of privacy.

Appellate Division that individuals, including arrestees, maintain a reasonable expectation of privacy in calls on a stationhouse's recorded and monitored phone lines. Surely, any reasonable person using a stationhouse phone should realize that the call is at least subject to recordation or monitoring.

In the cases addressing the third-party doctrine, the third parties were private entities entrusted with individuals' personal information or effects for a narrow and definitively non-law-enforcement purpose. Under those circumstances, an individual's expectation of privacy from government intrusion remained reasonable despite the disclosure to a third party. But the circumstances at issue here are entirely different.

The interests implicated and their extent are far more similar to the context of a county jail or a police vehicle than they are to a psychiatric patient's room or a public phone booth — both of which the Appellate Division majority mistakenly likened to stationhouse lines. Unlike a patient's long-term living space or a public phone booth, a police station is not a "temporar[y] private space." State v. Stott, 171 N.J. 343, 354 (2002) (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring). And it most certainly is not a neutral location. It is a law-enforcement building teeming with law-enforcement officers and all of the security and monitoring equipment that those functions entail.

As federal courts have and Judge DeAlmeida here recognized, the recording of police-department phone lines is "routine,

standard, [and] ordinary." Amati, 176 F.3d at 954. This "routine and almost universal" practice is "well known in the industry and in the general public." Adams v. City of Battle Creek, 250 F.3d 980, 984-85 (6th Cir. 2001); Walden v. City of Providence, 596 F.3d 38, 54-55 (1st Cir. 2010); Bohach v. City of Reno, 932 F. Supp. 1232 (D. Nev. 1996) ("[W]e note that police stations often record all outgoing and incoming phone calls, 'for a variety of reasons: to make sure that their dispatches are accurate, to verify information, and to keep a log of emergency and nonemergency calls.'" (citation omitted)). And with the recording of all stationhouse lines known to the average person, there is no reasonable expectation of privacy in calls made using those lines. After all, "what is ordinary is apt to be known; it imports implicit notice." Amati, 176 F.3d at 955.

Indeed, common sense informs the average person that police departments record their own phone lines and that one therefore does not enjoy the same privacy afforded calls made on a personal phone line when using a police department's phone line. And although few courts have directly addressed whether an individual maintains a reasonable expectation of privacy in calls made on stationhouse phone lines, the "sparsity of case law on the question suggests not that the principle is dubious but that it is too obvious to have incited many challenges." Ibid.; see Scott v. Romero, 153 F. App'x 495, 497 (10th Cir. 2005) (concluding it was not an unreasonable application of

federal law for district court to hold that defendant had no reasonable expectation of privacy in phone call made using stationhouse line); United States v. Correa, 154 F. Supp. 2d 117, 123 (D. Mass. 2001) (concluding defendant, who was under arrest, had no reasonable expectation of privacy in call he made on stationhouse phone line while under watch of an officer).

Thus, law enforcement obtaining the contents of calls made using its own phone lines certainly is not an "intrusion that a reasonable person would not anticipate." Earls, 214 N.J. at 586. Rather, it is an outcome that any reasonable person would expect – indeed, one that is unreasonable not to expect. While people ordinarily have a privacy interest in their phone conversations, that privacy interest is not unlimited and surely does not exist where the calls are made over stationhouse phone lines that are known by the general public to be recorded and monitored by law enforcement. See Hunt, 91 N.J. at 346.

And where, as here, the party making the call from the police station has been arrested and is awaiting transfer to the county jail, the absence of any reasonable expectation of privacy in calls made using law-enforcement phone lines is even more apparent. See State v. Legette, 227 N.J. 460, 469 (2017) (recognizing that "the privacy rights of an individual who is placed under lawful arrest are diminished" (quoting State v. Bruzzese, 94 N.J. 210, 232 (1983))). Not only is an arrestee under the full custody and control of law enforcement, such that he cannot reasonably expect the same degree of privacy as the

average person, but the balance of interests weighs even more heavily in favor of the need for institutional security and order, as it does in the jail context.

Allowing arrestees unfettered access to phones to communicate with the outside world is an invitation for danger and wrongdoing. Not only would it allow an arrestee to request the destruction of evidence on his behalf, as occurred in this case, but it also would allow the arrestee to communicate the movements of law enforcement as he is transported to jail and request interference, to intimidate potential witnesses, or to eliminate them altogether. This is potentially dangerous and cannot be tolerated. And the absurdity of this result undoubtedly informs the public's knowledge that police departments monitor their phone lines and expectation that, when using a stationhouse phone line, individuals do not enjoy the same privacy they do when using a private or public phone line.

It would also be nonsensical to recognize that an arrestee has no reasonable expectation of privacy in his jail calls or in his conversations in the police van on the way to jail, but that his expectation of privacy is somehow reasonable despite already being in custody — or, in McQueen's words, "locked up" — at the stationhouse, a temporary jail. This would give arrestees who already know they are going to jail one last chance to make any illicit call they may need for self-preservation before getting to jail where they know their communications will be monitored. No reasonable person, and certainly no reasonable arrestee,

would anticipate being afforded privacy to use a law-enforcement phone line to call cohorts and request the destruction of evidence. And society certainly is not prepared to recognize as reasonable any such expectation.

Thus, while any individual’s expectation of privacy in calls made using stationhouse phone lines would be decidedly unreasonable, any expectation of privacy on the part of an arrestee would be even more unreasonable and is clearly outweighed by compelling countervailing government interests.

Here, McQueen was under arrest and awaiting transfer to the jail when he insisted on making a phone call. He thus bore no misconception that he was free to move or communicate freely. But still, he chose to use the police department’s phone — within earshot of an officer — to call Allen-Brewer and ask her to retrieve the gun he had discarded in an innocent person’s backyard before the police could find it.

Likewise, because McQueen told Allen-Brewer he was “locked up,” she too lacked any reasonable expectation of privacy in their phone call. In short, both parties to the call knew it was being made on a stationhouse phone line. And for the same reason it is unreasonable for anyone, especially for an arrestee, placing a call on stationhouse lines to expect privacy in the communication, it is also unreasonable for the recipient of that call to expect such privacy. As neither party had any reasonable expectation of privacy in the phone call, the police retrieving the recording was not a search and did not require a

warrant.

But regardless of whether Allen-Brewer maintained a reasonable expectation of privacy in the phone call, McQueen plainly did not. By knowingly using a stationhouse phone line to call Allen-Brewer, McQueen made their conversation available to law enforcement, thereby consenting to their recording of the call. Indeed, when "one party makes [a] conversation available to others, such as through the use of a speaker phone or by permitting someone else to hear, . . . the [participants'] privacy interest does not remain the same." Hunt, 91 N.J. at 346.

Thus, even if Allen-Brewer did not know their conversation was being made available to police by McQueen's voluntary use of a stationhouse phone line — a claim belied by the fact that McQueen warned her that he was "locked up" — she had no constitutionally protected interest in that call. After all, no matter how "strongly a defendant may trust an apparent colleague, [her] expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague" is making their communications available to the government. United States v. White, 401 U.S. 745, 749 (1971). "In these circumstances, 'no interest legitimately protected by the Fourth Amendment is involved,' for that amendment affords no protection to 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'" Ibid. (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)); see

also Evers, 175 N.J. at 370 ("Defendant transmitted the forbidden e-mail at peril that one of the recipients would disclose his wrongdoing. There is no constitutional protection for misplaced confidence or bad judgment when committing a crime."); Hunt, 91 N.J. at 346; State v. Anepete, 145 N.J. Super. 22, 25-26 (App. Div. 1976). The circumstances here are no different than if McQueen had placed the call on speakerphone and allowed the police to record it.

Once the recording was lawfully retrieved by police, they were free to share that recording with the prosecutor. As this Court recognized in affirming Jackson, the prosecutor's receipt of lawfully obtained evidence from the police is not, and has never been, a search.

In sum, there is no reasonable expectation of privacy in calls made from a police station over recorded phone lines, especially where, as here, the caller is an arrestee and both parties know the call is being made using stationhouse lines. The State thus obtained the stationhouse calls in keeping with both the federal and state constitutions, and the motion judge and the Appellate Division majority erred in concluding otherwise.

B. Neither the Wiretap Act nor Title III requires a wiretap order for police or the prosecutor to obtain recordings of stationhouse calls.

Though the Appellate Division claimed not to reach the question of whether the recording of the stationhouse calls

violates the state or federal wiretap acts, it later suggested that federal law would not "support the ready availability to law enforcement of the station house tape in the absence of notice." See McQueen, slip op. at 8, 13. This suggestion, like the panel's conclusion on the constitutional issue, is flawed and should be rejected.

As this Court recognized in Jackson, law enforcement's routine recording of jail calls is not an interception under the Wiretap Act or Title III because it falls within the law-enforcement exception. 460 N.J. Super. at 273. For the same reason, law enforcement's routine recording of calls made on stationhouse lines is not an interception. And because the recordings of stationhouse calls, like those of jail calls, are wholly beyond the scope of either act, neither the Wiretap Act nor Title III restricts the right of one law-enforcement agency to disclose those recordings to another such agency.

Enacted in 1968, Title III "established minimum standards for federal and state law-enforcement officials to follow when seeking to intercept wire, oral, and electronic communications." State v. Ates, 217 N.J. 253, 266 (2014); see also State v. Feliciano, 224 N.J. 351, 367-68 (2016). Within the year, the New Jersey Legislature enacted equivalent legislation in the Wiretap Act, which it modeled after Title III. Ates, 217 N.J. at 266.

Title III and the Wiretap Act generally prohibit the interception of wire communications, including telephone calls,

as well as the disclosure or use of the contents of any intercepted wire communication. 18 U.S.C. §§ 2511, 2516, 2517; N.J.S.A. 2A:156A-3, -8; State v. Worthy, 273 N.J. Super. 147, 150 (App. Div. 1994) (acknowledging well-established proposition that telephone conversations are wire communications), aff'd, 141 N.J. 368 (1995).

While the congruity of Title III and the Wiretap Act has waxed and waned in the half-century since the two were enacted, where they differ it is because the Wiretap Act is more restrictive. See In re State for CDW, 448 N.J. Super. at 479. And where the Wiretap Act provides greater protection than its federal counterpart, the state law controls. See State v. Catania, 85 N.J. 418, 436 (1981). But where the language of the two Acts remains "substantially similar . . . , it is appropriate to conclude that our Legislature's 'intent in enacting the sections of the [state act] was simply to follow the federal act.'" In re State for CDW, 448 N.J. Super. at 479-80 (quoting State v. Diaz, 308 N.J. Super. 504, 510 (App. Div. 1998)). Interpretations of Title III thus "provide additional guidance in construing similar provisions of the [Wiretap] Act." Id. at 480; see also Jackson, 460 N.J. Super. at 272.

Under both the Wiretap Act and Title III, "[i]ntercept means the aural or other acquisition of the contents of any wire . . . communication through the use of any electronic, mechanical, or other device." N.J.S.A. 2A:156A-2(c); 18 U.S.C. § 2510(4). Though an "electronic mechanical, or other device"

(intercepting device) is broadly defined as "any device or apparatus which can be used to intercept a wire, oral, or electronic communication," both Acts exclude certain devices from this definition. N.J.S.A. 2A:156A-2(d); 18 U.S.C. § 2510(5). And because an interception occurs only when an intercepting device is used, the use of an excluded device is not an interception at all. See State v. Fornino, 223 N.J. Super. 531, 544-45 (App. Div.), certif. denied, 111 N.J. 570, cert. denied, 488 U.S. 859 (1988).

One such excluded device is "any telephone or telegraph instrument, equipment or facility, or any component thereof . . . being used . . . by an investigative or law enforcement officer in the ordinary course of his duties." N.J.S.A. 2A:156A-2(d)(1); 18 U.S.C. § 2510(5)(a)(2). This exception, known as the law-enforcement exception, "appl[ies] to telephone equipment used by law-enforcement officers in the ordinary course of their duties, regardless of whether the monitoring on a particular occasion is random or is done by an officer who regularly performs that duty." Fornino, 223 N.J. Super. at 545. It also applies regardless of whether the particular instance of monitoring was conducted randomly or in response to specific information provided to law enforcement. Ibid.

As our courts and the majority of federal circuit courts have repeatedly concluded, the law-enforcement exception applies to correctional facilities' routine recording and monitoring of inmates' telephone calls for the purpose of maintaining

institutional security. See, e.g., United States v. Lewis, 406 F.3d 11, 16 (1st Cir. 2005), cert. denied, 548 U.S. 917 (2006); United States v. Friedman, 300 F.3d 111, 123 (2d Cir. 2002), cert. denied, 538 U.S. 981 (2003); United States v. Hammond, 286 F.3d 189, 192 (4th Cir.), cert. denied, 537 U.S. 900 (2002); Smith v. Dep't of Justice, 251 F.3d 1047, 1049 (D.C. Cir. 2001); United States v. Van Poyck, 77 F.3d 285, 292 (9th Cir.), cert. denied, 519 U.S. 912 (1996); United States v. Feekes, 879 F.2d 1562, 1565-66 (7th Cir. 1989); United States v. Paul, 614 F.2d 115, 117 (6th Cir.), cert. denied, 446 U.S. 941 (1980); Jackson, 460 N.J. Super. at 272-73; Fornino, 223 N.J. Super. at 544-45.

And as Judge DeAlmeida and federal courts have concluded — and Allen-Brewer conceded in the Appellate Division (Db23) — the routine recording of stationhouse telephone lines similarly falls within the law-enforcement exception. See, e.g., Walden, 596 F.3d at 54-55; Adams, 250 F.3d at 984-85; Amati, 176 F.3d at 954; Jandak v. Village of Brookfield, 520 F. Supp. 815, 824 (N.D. Ill. 1981).

Given this federal precedent, the Appellate Division majority's suggestion that "federal law would [not] support the ready availability to law enforcement of the station house tape in the absence of notice" was mistaken. See McQueen, slip op. at 13-14 (citing Amati, 176 F.3d at 955; In re State Police Litig., 888 F. Supp. 1235, 1265-66 (D. Conn. 1995); Bohach, 932 F. Supp. at 1235; George v. Carusone, 849 F. Supp. 159, 164 (D.

Conn. 1994)). Indeed, the federal precedent relied on by the majority is either contrary to the conclusion the majority suggests or unpersuasive.

In Amati, the Seventh Circuit considered whether Title III prohibited the routine recording of stationhouse phone lines and concluded that the law-enforcement exception applies to the "routine noninvestigative recording of telephone conversations." 176 F.3d at 955. Indeed, the court was particularly emphatic about recording stationhouse calls:

> To record all calls to and from a police department is . . . a routine police practice. If 'ordinary course' of law enforcement includes anything, it includes that. Jandak v. Village of Brookfield, 520 F. Supp. 815, 821-25 (N.D. Ill. 1981); cf. United States v. Daniels, [902 F.2d 1238,] 1245 [(7th Cir. 1990)]. The sparsity of case law on the question suggests not that the principle is dubious but that it is too obvious to have incited many challenges.
>
> [Id. at 955-56.]

So while the Seventh Circuit did, as the Appellate Division's parenthetical suggests, decline to read "ordinary" to include recording only for investigative purposes, it nevertheless concluded that the recording of all calls to and from a police station was permissible under Title III. And in reaching its conclusion, the Seventh Circuit also expressly rejected the plaintiffs' argument that the exception requires "express notice to the people whose conversations are being recorded," noting that "[t]he statute does not say this, and it

cannot be right." Id. at 955.

As the Seventh Circuit recognized, if the "ordinary course" exclusion required proof of notice, it would have no function in the statute because there is a separate statutory exclusion for cases in which one party to the communication has consented to the interception. Ibid. The Appellate Division majority's reliance on Amati was thus misplaced.

And in Bohach, while the Nevada District Court did note that the recording of all ingoing and outgoing calls from a police station "may or may not" violate Title III, it recognized that the outcome of that inquiry would "depend[] upon how it is done." 932 F. Supp. at 1235. The court then noted that "the practice is part of the 'ordinary course of business' for police departments" — a recognition that places the routine recording of all calls to and from a police station squarely within the law-enforcement exception. Ibid. Thus, it does not violate Title III and, for the same reason, does not violate the Wiretap Act. Thus, like its reliance on Amati, the Appellate Division's reliance on Bohach was also misplaced.

Finally, the two Connecticut District Court cases relied on by the Appellate Division are unpersuasive. Both cases, like the Appellate Division majority, incorrectly injected a notice-and-consent requirement into the law-enforcement exception. See In re State Police Litig., 888 F. Supp. at 1265-66; George, 849 F. Supp. at 164-65. There are several flaws with this. As the Seventh Circuit noted in Amati, the plain language of Title III

does not require notice or consent, and such a requirement would render the exception superfluous in light of the consent exclusion. See Amati, 176 F.3d at 955.

And where the recording is in the ordinary course of law-enforcement duties — as it must be for the law-enforcement exception to apply — there is notice and consent because "what is ordinary is apt to be known; it imports implicit notice," and thus implicit consent. Ibid. It is also noteworthy that In re State Police Litigation and George were both decided years before the circuit-level precedents that have concluded that the routine recording of stationhouse calls falls under the law-enforcement exception.

Even if express notice is a requirement in the District of Connecticut, it is not a requirement in New Jersey. In Fornino, which was relied on by the Appellate Division in Jackson, the Appellate Division concluded that the recording of a prison phone line fell within the law-enforcement exception even where the caller was not given express notice that the line was recorded. Fornino, 223 N.J. Super. at 546. And in Jackson, which this Court affirmed as written, the court's conclusion that the law-enforcement exception applied was in no way premised on the notice provided in that case. Jackson, 460 N.J. Super. at 272-73.

Thus, the Appellate Division majority erred in suggesting that federal law would not permit the routine recording of stationhouse phone lines without notice. And because a police

department's routine recording of stationhouse lines — like a jail's recording of inmate calls — falls within the law-enforcement exception, it is not an interception and is beyond the scope of the restrictions in both the Wiretap Act and Title III. See Walden, 596 F.3d at 54-55; Adams, 250 F.3d at 984-85; Amati, 176 F.3d at 954; Jandak, 520 F. Supp. at 824; see also Lewis, 406 F.3d at 16; Friedman, 300 F.3d at 123; Hammond, 286 F.3d at 192; Smith, 251 F.3d at 1049; Van Poyck, 77 F.3d at 292; Feekes, 879 F.2d at 1565-66; Paul, 614 F.2d at 117; Jackson, 460 N.J. Super. at 273. Having lawfully recorded defendants' stationhouse call, the police department lawfully provided the recording of that call to the prosecutor. See Jackson, 460 N.J. Super. at 273-74.

To the extent that the Appellate Division majority suggested that the police unlawfully intercepted defendants' phone call, this Court should disavow that notion. Indeed, this Court should make clear, as Judge DeAlmeida and federal courts have, that a police department's routine recording of non-privileged incoming and outgoing calls on stationhouse lines is lawful under the law-enforcement exception to the Wiretap Act and Title III.

In sum, because defendants had no reasonable expectation of privacy in the call made using a routinely recorded stationhouse phone line and because that routine recording does not violate the state or federal wiretap act, the Appellate Division erred in affirming the motion judge's suppression of the stationhouse

call. The Attorney General thus urges this Court to reverse that aspect of the Appellate Division’s decision.

CONCLUSION

For the foregoing reasons, and for the reasons discussed in the State's brief and the dissenting opinion of the Honorable Patrick DeAlmeida, J.A.D., the Attorney General urges this Court to reverse the Appellate Division's affirmance of the motion court's order suppressing the recorded call from the police station.

Respectfully submitted,

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