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June 8, 2020

Honorable Chief Justice and
Associate Justices of the
Supreme Court of New Jersey
P.O. Box 970
Trenton, NJ 08625-0970

Re: State v. Myshira Allen-Brewer
Docket No.

Please accept this letter in lieu of a more formal opposition to the State's motion for leave to appeal and as a cross-motion for leave to appeal.

As an initial matter, defendant urges that there is no need for this Court to revisit the issue of recorded calls made by people who are in police custody, having just determined not to issue an opinion in State v. Jackson, __ N.J. __ (2020). As the State correctly notes, there is no right to be heard in the Supreme Court when there is a dissent in the Appellate Division on an interlocutory matter. This Court should deny the State's motion for leave.

However, if this Court grants the State's motion for leave to appeal, it should grant defendant's cross-motion for leave as

well. The Appellate Division decision in this case did not go far enough because it failed to recognize that the calls that it did not suppress are the fruit of the poisonous tree of the calls it did suppress.

On August 27, 2018, Myshira Allen-Brewer received a phone call from her boyfriend, Rasheem McQueen. There is no indication in the record that she knew her boyfriend had been arrested or where he was calling from. There was no electronic warning that the call between them was monitored. McQueen was not warned that his call was being recorded. McQueen, slip op. at 3 (Pa 134).[1] In fact, he tried to maintain the privacy of the call by lowering his voice to prevent a nearby officer from listening. Ibid. McQueen was then taken to the Middlesex County Correction Center.

Officers later listened to the call, in which McQueen asked Allen-Brewer to locate and dispose of his weapon. Ibid. Two months later, a grand jury subpoena was issued to the Correction Center for all "call records and recordings placed" to Allen-Brewer, Allen-Brewer's mother, McQueen's grandfather, and McQueen's grandmother. (Pa 11, 19-22) As a result of what was on those calls, Allen-Brewer was charged with second-degree conspiracy to possess a handgun, contrary to N.J.S.A. 2C:39-5 and 2C:5-2; third-degree attempted hindering,

[1] Pa – Appendix to State's motion for leave to appeal

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 Appellate Division correctly suppressed the calls made by McQueen in the police station. The Court held that McQueen "was under arrest in a police station, but in the absence of notice, he had no reason to doubt his call was as private and secure as if he was using a phone in a friend's apartment." McQueen, slip op. at 12 (Pa 143). Thus, the warrantless intrusion into this presumptively private call was illegal.

The Appellate Division recognized that the recordation of calls made at a police station with no warning to the person called, or the person being called, was an unlawful invasion of privacy. Therefore, the Court suppressed those calls. However, the Appellate Division failed to assess the taint that illegality had on the subsequent search of the jail calls. The Middlesex County 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 must be suppressed.

Moreover, if this Court does decided to hear any portion of this case, it should grant leave to appeal in its entirety, in order to address the shortcomings of the logical and legal shortcomings of the Appellate Division's decision in State v. Jackson, 460 N.J. Super. 258 (2019), which this Court recently

affirmed in a one-sentence per curiam opinion, State v. Jackson, __ N.J. __ (2020). This Court should grant leave to appeal and provide courts, detainees, law enforcement, and innocent people who may receive calls from people in jails with actual guidance on privacy in phone calls.

In Jackson, the Appellate Division reversed the suppression of phone calls obtained with only a grand jury subpoena because, in its opinion, pretrial detainees have no reasonable expectation of privacy whatsoever. State v. Jackson, 460 N.J. Super. 258, 277 (2019). However, this Court only conducts an analysis to determine whether a person has a reasonable expectation of privacy confronted with a "novel class of objects or category of places." State v. Randolph, 228 N.J. 566, 584 (2017). As the decision in McQueen recognizes, it is well-established that people have a reasonable expectation of privacy in phone calls, as a class of things. McQueen, slip op. at 8-10 (Pa 139-41). The decision also recognizes that this expectation of privacy remains even if the phone calls made after a person has been arrested, as a class of things. Id. at 11 (Pa 142). As the decision further recognizes, whether law enforcement can listen to a call without a warrant depends on what specific warnings a person receives about the possibility of that intrusion. Id. at 8 (Pa 139).

In other words, the reasonable expectation of privacy people have in their phone conversations is diminished by the extent to which a person agrees to that diminishment by making a call using equipment provided under certain conditions. That reasonable expectation is diminished by the scope of the consent given. The Appellate Division's blanket statement in Jackson—endorsed by this Court—that there is no reasonable expectation of privacy in any jails made from jails because people are warned that those calls are recorded overlooked critical facts: what the warnings are and what they mean to the person who hears them. It overlooked these facts because it did not conduct the correct analysis: a consent analysis. And it therefore leaves courts without guidance when confronted with cases in which people are given different warnings than the ones in Jackson, which is bound to happen in a state with 21 jails, 12 prisons, and 3 youth prisons.

A proper consent analysis would require suppression of the jail calls as well. The scope of consent to search must be limited strictly to the terms of the consent. State v. Younger, 305 N.J. Super. 250, 256-57 (App. Div. 1997) ("[W]hen police rely on a consent to search, the search that may be conducted pursuant thereto is limited by the scope, whether express or implied, of the consent."). Moreover, consent to search must be "unequivocal and specific," State v. King, 44 N.J. 346, 352

(1965), as well as "clear, knowing, voluntary, unequivocal, and express." State v. Sugar, 100 N.J. 214, 234 (1985). A search that exceeds that scope is invalid. There is nothing in this record about what warnings McQueen received.

In Jackson, the Court pointed to the specific warning the detainees received from the Middlesex County jail. The court noted that "Inmates at the Middlesex County Department of Adult Corrections are provided with a pamphlet titled 'Correction Center Inmate Guidelines' stating: '[t]elephone calls may be monitored and recorded except calls to the Internal Affairs Unit and legal telephone calls.'" Jackson, 460 N.J. Super. at 266. The Court also stated, "At the beginning of each monitored call, the inmate hears: '[t]his call may be recorded or monitored.'" Ibid.

Although the record is devoid of any information about what warnings McQueen received, assuming he received the same warnings as discussed in Jackson, McQueen at most consented to the monitoring and recording for the specific purpose of maintaining security in the Correctional Facility. The scope of consent given by McQueen does not include searches by the Middlesex County Prosecutor's Office for other purposes. McQueen's consent did not embrace an entirety separate entity obtaining his calls for reasons entirely separate from those that justify the recordation in the first place. Nor would

McQueen have understood that he was consenting to the ability of any law enforcement to obtain the contents of his calls at any time for any reason (or not reason at all) without any judicial oversight. State v. Hampton, 333 N.J. Super. 19, 29 (App. Div. 2000).

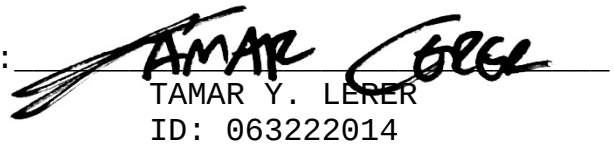
The Appellate Division in Jackson did not do any of the analysis required to understand to what degree a detainee's reasonable expectation of privacy is diminished when he uses the phone. As the decision in this case indicates, that lessened reasonable expectation of privacy depends on what exactly the detainee was told. This Court has the opportunity to clarify, refine, and fix the problems with the analysis in Jackson. In so doing, it would also come to the conclusion that the calls in this case made from the jail should be suppressed because McQueen did not consent to the Prosecutor's Office obtaining these calls without any judicial process.

In sum, this Court should deny the State's motion for leave to appeal. However, if the Court grants the State's motion for leave, the defendant's cross-motion for leave for appeal must be granted in order for this Court to actually provide guidance about the privacy interests in phone calls made in different circumstances by people who have been arrested and in order to correct the Appellate Division's failure to suppress the second

set of calls, which were a fruit of unlawful law enforcement action.

Respectfully submitted,

JOSEPH E. KRAKORA
Public Defender
Attorney for Defendant-Appellant

BY: 
TAMAR Y. LERER
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Assistant Deputy Public Defender

CERTIFICATION

I hereby certify that the foregoing motion presents a substantial issue of law and is filed in good faith and not for purposes of delay.

BY: 
TAMAR Y. LERER