SUPREME COURT OF NEW JERSEY

DOCKET NO. 84564

STATE OF NEW JERSEY, Plaintiff-Appellant, v. RASHEEN W. McQUEEN and MYSHIRA T. ALLEN-BREWER, Defendants-Respondents.	CRIMINAL ACTION On Certification From: 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.

BRIEF OF AMICUS CURIAE
SETON HALL UNIVERSITY SCHOOL OF LAW CENTER FOR SOCIAL JUSTICE
In Support of Defendants-Respondents

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STATEMENT OF INTEREST OF AMICUS CURIAE

Seton Hall University School of Law's Center for Social Justice ("CSJ") respectfully submits this amicus brief urging this Court to affirm the Appellate Division's decision upholding the trial court's suppression of recorded phone conversations in the above-captioned matter. Article I, Paragraph 7 of the New Jersey Constitution, building on the protections of the Fourth Amendment, protects privacy interests in phone conversations. This case demonstrates the need for careful judicial monitoring of warrantless searches of phone calls made from police stations.

Seton Hall University School of Law is dedicated to providing a quality legal education while fostering personal and social values of integrity, loyalty, and engagement with the needs of its community. Its commitment to service and to aiding the public interest is demonstrated most notably through its support of the CSJ, which houses the law school's clinical programs.[1] The CSJ is both a state-certified legal services program and a clinical legal education program in which law students and professors work together on issues of public interest affecting the indigent, minority groups, criminal

[1] The CSJ expresses its gratitude to law students Mikayla Berliner and Christopher Dernbach, students enrolled in the CSJ's Impact Litigation Clinic. Berliner and Dernbach drafted this amicus brief under Professor Romberg's supervision.

defendants, and other disempowered members of society, including those who may have been subject to governmental intrusions on privacy.

The CSJ has filed numerous amicus briefs defending the Constitutional rights of criminal defendants and has a particular interest in protecting the privacy rights of New Jersey citizens.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For the purposes of this proceeding, amicus accepts the facts and procedural history as recounted in the filings of Defendant-Respondent Myshira Allen-Brewer in the Appellate Division and in this Court, and the consistent statements of the Appellate Division, State v. McQueen, Nos. A-4391-18, A-4910-18 (App. Div. May 19, 2020) ("McQueen").

LEGAL ARGUMENT

POINT I

ARRESTEES ENJOY A CONSTITUTIONALLY PROTECTED, OBJECTIVELY REASONABLE EXPECTATION OF PRIVACY IN PHONE CALLS PLACED FROM A POLICE STATION, ABSENT NOTICE THAT THE CONVERSATION MAY BE MONITORED OR RECORDED.

Arrestees who make a phone call from a New Jersey police station, in the absence of notice that the call may be monitored or recorded, have a reasonable expectation of privacy entitled to protection under Article I, Paragraph 7 of the New Jersey

Constitution. In this case, Defendant-Respondent Rasheem McQueen had an objectively reasonable expectation of privacy in his phone call to Defendant-Respondent Myshira Allen-Brewer placed from the Piscataway police station, and Allen-Brewer had an even more objectively reasonable expectation of privacy in that call. The reasonableness of their expectations entitled McQueen and Allen-Brewer to protection from a warrantless police search and seizure of the content of their conversation and to suppression of its content.

First, Point I.A. explains how McQueen's reasonable expectation of privacy is informed by the strong protection of privacy provided by Article I, Paragraph 7 of New Jersey's Constitution, an interest this Court has found particularly heightened, beyond the protections of the Fourth Amendment, as to the content of phone calls.

Point I.B. then demonstrates that McQueen had a reasonable expectation of privacy in the phone call he placed from the police station in this case, given: the general societal expectation that notice will be provided whenever a call is recorded, Point I.B.1; the absence of any societal expectation that every phone call from a police station is recorded without notice, Point I.B.2; the societal expectation that one is entitled to "one call" from a police station to handle private personal matters, including contacting a lawyer, that will not

be monitored or used for prosecutorial purposes, Point I.B.3.; and the fact that the police officers did not ask McQueen if he was calling an attorney and thus could reasonably be presumed to have intended to afford him the degree of privacy required for such a call, Point I.B.4.

Next, Point I.C. documents why this case is sharply distinguishable from prior cases finding no reasonable expectation of privacy in calls placed from correctional facilities, given that such calls: implicate heightened concerns for institutional security not present here, Point I.C.1; and, most saliently, the institutions in Jackson provide conspicuous notice of monitoring and recording, also lacking here, Point I.C.2.

Point I.D. then explains that the reasonableness of the expectation of privacy and the ultimate assessment of constitutional protection balances the individual's privacy interest and the government's ability to protect its legitimate interests without undermining privacy. Here, police could have furthered governmental interests in security and law enforcement with little burden by obtaining a warrant, or, at the very least, providing McQueen with notice that his call might be recorded and used for prosecutorial purposes if a warrant were obtained. Without pursuing these avenues, police violated

McQueen's privacy rights under Article I, Paragraph 7, and the Appellate Division's decision should be affirmed.

Finally, Point I.E. demonstrates that the objective reasonableness of Allen-Brewer's expectation of privacy is not controlled by McQueen's expectation of privacy and, as the State's own authority demonstrates, must be analyzed separately. Thus, because Allen-Brewer's expectation of privacy was even more objectively reasonable than McQueen's, even assuming that the content of the call could be used against McQueen, it should nonetheless have been suppressed as to Allen-Brewer.

A. Article I, Paragraph 7 of New Jersey's Constitution Provides a Heightened Expectation of Privacy for Phone Calls, Buttressing the Reasonableness of McQueen's Privacy Expectations in this Case.

McQueen and Allen-Brewer's reasonable expectation of privacy in the phone call that McQueen made from the Piscataway police station is protected under Article I, Paragraph 7 of the New Jersey Constitution, which embodies New Jersey's heightened protection of privacy interests, particularly as to telephone calls.

Article I, Paragraph 7 of the New Jersey Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." N.J. Const. art. I, ¶ 7. This Court has interpreted that provision to grant even greater protections for

individual rights and liberties than those granted under the Fourth Amendment. State v. Hempele, 120 N.J. 182, 195 (1990).

This Court has "construe[d our] own constitution[] as imposing more stringent constraints on police conduct than does the Federal Constitution." Id. at 197 (citations omitted). In particular, "[d]espite the similarity between the text of article I, paragraph 7 of the New Jersey Constitution and the text of the fourth amendment, [this Court has] found on several occasions that the former 'affords our citizens greater protection against unreasonable searches and seizures than does the fourth amendment.'" Ibid. (citing, inter alia, State v. Novembrino, 105 N.J. 95, 145 (1987); State v. Hunt, 91 N.J. 338 (1982); State v. Alston, 88 N.J. 211 (1981); State v. Johnson, 68 N.J. 349 (1975)).

"In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties." Hunt, 91 N.J. at 346 (quoting The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1367 (1982)); see also William J. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 495 (1977) ("[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection that the federal provisions, even those identically phrased.");

Hempele, 120 N.J. at 196 ("For most of our country's history, the primary source of protection of individual rights has been state constitutions.")

For example, this Court held in Hempele that curbside garbage, when concealed from plain view, is protected from warrantless search under the New Jersey Constitution, even though it is not so protected under the Fourth Amendment. Hempele, 120 N.J. at 223 (rejecting California v. Greenwood, 486 U.S. 35 (1988)). Similarly, this Court departed from federal law to hold that, "under the New Jersey Constitution, individuals have a reasonable expectation of privacy in information they provide to phone companies, banks, and Internet service providers." State v. Lunsford, 226 N.J. 129, 131 (2016); see also Hunt, 91 N.J. at 353 (rejecting federal caselaw holding that there is no privacy in phone billing information turned over to third-party phone companies); cf. State v. Nyhammer, 197 N.J. 383, 401 n.9 (2009) ("Under state law . . . the prosecution bears the burden of proving beyond a reasonable doubt that a defendant's waiver [of his constitutional right against self-incrimination] was made knowingly, voluntarily, and intelligently, whereas under federal law, the government must 'prove waiver only by a preponderance of the evidence.'") (citations omitted).

This Court's careful protection of privacy rights is particularly stringent as to intercepted telephone calls. "Increased protection for the privacy of those using the telephone is particularly necessary in New Jersey," thus "[t]he greatest possible protection, consistent with legitimate law enforcement, is needed . . . ." State v. Catania, 85 N.J. 418, 440, 442 (1981).

Since 1930, "New Jersey has had an established policy of providing the utmost protection for telephonic communications," Hunt, 91 N.J. at 345, and this Court has long interpreted Article I, Paragraph 7 as strongly protecting an individual's right of privacy in phone calls, id. at 345-47 (deviating from federal caselaw to find an objectively reasonable privacy interest in telephone billing records). This Court broadly construed billing records entitled to privacy protection to include the phone numbers dialed out from the phone, the phone numbers dialed into the phone, and the date, time, and duration of calls. Lunsford, 226 N.J. at 133.

Because Article I, Paragraph 7 protects such telephone billing data as private, it necessarily follows that even stronger privacy protection applies to the substantive contents of conversations such as McQueen and Allen-Brewer's phone call in this case, a much more personal and intrusive invasion of

privacy than reviewing the more general and opaque content of billing records.

Because it did not secure a warrant, "the State bears the burden of demonstrating by a preponderance of the evidence that an exception to the warrant requirement applies." State v. Manning, 240 N.J. 308, 328-29 (2020); accord McQueen, slip op. at 12-13. The dispositive, threshold question in this case is whether McQueen (or Allen-Brewer, see Part I.E., below) had an objectively reasonable expectation of privacy in the phone call. Hempele, 120 N.J. at 199-201; see also State v. Stott, 171 N.J. 343, 354 (2002) (looking to whether defendant had an expectation of privacy that "society is prepared to recognize as reasonable") (quoting Minnesota v. Olson, 495 U.S. 91, 95-96 (1990)).

The reasonableness of an individual's expectation of privacy is established by "general social norms." Hempele, 120 N.J. at 200 (quoting Robbins v. California, 453 U.S. 420, 428 (1981) (plurality opinion)). Based on those societal norms, as explained in Point I.B., below, it was objectively reasonable for McQueen to expect privacy in his phone call from the Piscataway police station. Thus, recording and listening to that phone call without consent or a warrant was a violation of McQueen's and Allen-Brewer's constitutional rights.

Those who make phone calls in New Jersey are entitled to assume that the contents of their phone calls are private, and the "words [they] utter[] into the mouthpiece will not be broadcast to the world." Hunt, 91 N.J. at 346-47 (quoting Katz v. United States, 389 U.S. 347, 352 (1967)). The contents of a phone conversation are entitled to privacy under the New Jersey Constitution unless at least one party to the conversation voluntarily waives that right by taking affirmative action that discloses the contents of the call to a third party, undermining the otherwise-applicable expectation of privacy. Id. at 346.

Thus, if one party "speaks loudly enough to be overheard" by police or another third-party, "his expectation of privacy vanishes." State v. Constantino, 254 N.J. Super. 259, 265 (Law Div. 1991). "Conversations carried on anywhere in a tone of voice audible to the unaided ear of a person located in a place where that person has a right to be, and where a person can be expected to be, are conversations knowingly exposed to the public and are not afforded Fourth Amendment protection." Ibid.

So, too, no "unreasonable search or seizure" occurs when the government "eavesdrop[s] on a conversation, with the connivance of one of the parties . . . ." United States v. White, 401 U.S. 745, 750 (1971). The privacy interest in the call is protected, however, when, as here, the parties neither willfully disclose the contents of the call, nor act in a way

that allows the call to be overheard absent clandestine surveillance. See McQueen, slip op. at 3 (McQueen, when placing the phone call, deliberately lowered his voice such that no one could listen in or hear the contents of the call).

This privacy protection is not limited to calls placed from private areas; it extends to areas accessible to the public, or even owned by the State, so long as the expectation of privacy is reasonable under the circumstances. For example, in Katz, 389 U.S. at 352, the United States Supreme Court recognized that "telephone conversations within [a public telephone booth] [a]re constitutionally protected." That is because "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Stott, 171 N.J. at 354 (holding that the defendant had an objectively reasonable expectation of privacy in a curtain owned by the state, located in a hospital room owned by the state, and that was accessible to his roommate) (quoting Katz, 389 U.S. at 351). "The place where [a telephone] call is made does not matter, be it home, office, hotel, or even public phone booth. [A] constitution's search and seizure limitation 'protects people, not places.'" State v. Mollica, 114 N.J. 329, 344 (1989) (citing and quoting Katz, 389 U.S. at 351-52).

Thus, as explained in Point I.B., below, the fact that McQueen spoke on a phone owned by the police rather than from his own phone (or office phone or hotel phone or phone booth) does not defeat his reasonable expectation of privacy; what matters is McQueen's objectively reasonable expectation of privacy, not who owns the telephone.

This Court has expanded its recognition of the right to privacy in calls placed outside one's home or office phone to reach searches of property owned by the state itself, Stott, 171 N.J. at 354-57, and to calls made from cell phones, State v. Earls, 214 N.J. 564 (2013), and from hotel room phones owned by a third-party, Mollica, 114 N.J. at 334. "It is not the ownership or possessory right to the telephone, nor even its location, as such, that creates the expectation of and entitlement to privacy; rather, it is the use of the telephone to engage in private and personal conversations that implicates the privacy protection." Mollica, 114 N.J. at 342. New Jersey's strong protection of privacy interests in phone calls thus extends to McQueen and Allen-Brewer's private and personal phone call in this case.

B. Societal Norms Demonstrate McQueen's Reasonable Expectation of Privacy in His Call from the Police Station, Absent Notice that it Was Subject to Monitoring or Recording.

Under the stringent protection of privacy under Article I, Paragraph 7 set forth in Point I.A., above, societal norms and practices provided McQueen with a reasonable expectation of privacy in his phone call from the Piscataway police station, absent any notice defeating that expectation. "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 (citation omitted).

As explained below, societal norms demonstrate that phone calls that cannot be overheard are presumptively private, absent notice that the call may be monitored or recorded. See Point I.B.1. Moreover, the context of a call from a police station does not alter that presumption. See Point I.B.2. Indeed, the societal understanding that arrestees are entitled to place one call from a police station to handle personal affairs, and that the call may well be to a lawyer, buttresses the reasonable expectation of privacy in a phone call placed from a police station to an unknown caller, absent clear notice that the call is subject to monitoring or recording. See Points I.B.3., I.B.4.

1. Societal norms support a reasonable expectation of privacy in the content of phone calls, absent notice that a call will be monitored or recorded.

First, general social norms and practices demonstrate that people expect the contents of their phone calls to be private absent clear notice that a call is being monitored or recorded--notice that is so easily and regularly provided that the absence of such notice speaks loudly. Perhaps most obviously, as explained in depth in Point I.C.2, below, correctional facilities in New Jersey often provide inmates with multiple forms of clear notice that their calls are subject to monitoring and recording; that notice is provided in writing, often with the inmate signing an acknowledgment, and the notice is also provided during the phone calls themselves. See State v. Jackson, 460 N.J. Super. 258, 266 (App. Div. 2019) (reviewing institutions that provided such clear notice), aff'd o.b., 241 N.J. 547 (2020)). That is so even though inmates would more reasonably expect a lack of privacy in their calls than would people permitted to place a call from a police station, particularly those who make such calls in a lowered voice so as not to be overheard.

Moreover, corporations as a matter of course affirmatively give consumers notice that their phone calls to customer service lines may be recorded (e.g., for training or "quality assurance" purposes), even though such recording has become the norm. See,

e.g, Mark Huffman, Consumer Affairs, How to Tape Customer Service Calls, https://www.consumeraffairs.com/news04/2010/01/taping_calls.html. Indeed, companies provide this notice to consumers even in one-party consent states where the consent of the corporation's own customer service representative would be legally sufficient to record. As Consumer Affairs advises consumers who wish to record the phone calls they place to corporations, "[t]o keep yourself within the law, begin your call exactly the way the company does, by informing the party to whom you are speaking that they are being recorded." Ibid.

Similarly, the FCC requires telephone companies in interstate commerce, when recording a telephone conversation with a consumer, to either obtain "verbal or oral consent of all parties," provide notice of the recording in the form of "verbal notification . . . recorded at the beginning . . . of the call," or "use . . . an automatic tone warning device . . . produc[ing] a distinct signal that is repeated at regular intervals during the course of the telephone conversation . . . ." 47 C.F.R. § 64.501.

The general societal expectation demonstrated by these regulations and governmental and corporate practices is that phone calls are presumptively private, and if there is any doubt, people can expect that their calls will not be recorded in the absence of notice. That is true even when one of the

parties to the call is the recording party, and that party's consent is all that is legally required. The expectation of privacy is far stronger when, as here, both McQueen and Allen-Brewer knew that neither party to the phone call had consented to the call's being monitored or recorded.

A relevant provision of New Jersey's Wiretap Act, N.J.S.A. 2A:156A-4(c), also reflects the views of the State and of its people that private conversations will not be intercepted by law enforcement without knowing consent from at least one of the parties to the call.[2] For example, an informant working with state authorities can voluntarily consent to wear a wire to record a conversation. See State v. Martinez, 461 N.J. Super. 249, 255 (App. Div. 2019) (holding that informant's secret taping of a private conversation in which he participated did not violate New Jersey's Wiretap Act, and holding that despite

[2] "It shall not be unlawful for . . . [a]ny person acting at the direction of an investigative or law enforcement officer to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception . . . ." N.J.S.A. 2A:156A-4.

The fact that the "consent" must be "prior" demonstrates that when law enforcement is engaged in intentional interception or recording, absent a warrant, it must do so pursuant to a party's knowing decision to consent, prior to the communication, not simply consent inferred from a purportedly objectively unreasonable failure to realize that law enforcement might be intercepting the communication.

compliance with the Act, the recording was nonetheless unconstitutional).[3]

Parties to a phone call in New Jersey share the societal expectation that the substance of a telephone conversation is not subject to interception absent notice or a willful disclosure by one of the parties. Here, neither McQueen nor Allen-Brewer was given notice that their conversation would not be private, neither of them willfully disclosed the conversation to the State, and neither took affirmative action allowing their conversation to be overheard. In such circumstances, societal norms recognize that McQueen and Allen-Brewer's expectation of privacy in the substance of their call was objectively reasonable.

2. Society recognizes a reasonable expectation of privacy in phone calls placed from police stations.

Even beyond general societal norms giving rise to the presumption that phone calls are private absent notice

[3] Because the Appellate Division did not address the lawfulness of the interception at the police station under the Wiretap Act, this Court should not address that issue in the first instance and should instead remand to the Appellate Division, if relevant to resolution of the case. Remand is particularly warranted given that the issue was not addressed below, has not been briefed before this Court, and there are many important reasons why interception--absent notice and consent--is not exempted from scrutiny under some version of a law-enforcement exception, N.J.S.A. 2A:156A-2(d)(1) (and that issue deserves, at the very least, full briefing before it is decided).

otherwise, specific societal expectations concerning calls from police stations, in particular, share that same presumption. Despite the unsupported ipse dixit of the dissent in the Appellate Division (and of the similarly bald pronouncements of a few federal judges cited by the dissent, such as Judge Posner's rumination in Amati v. City of Woodstock, 176 F.3d 952, 954 (7th Cir. 1999)), there is no evidence or reason to believe that the public has a "general knowledge that police department telephones are recorded." McQueen, (DeAlmeida, J., dissenting), slip op. at 3.

In fact, both case law and popular understanding demonstrate quite the opposite. In People v. Tebo, 194 N.W.2d 517, 519-20 (Mich. Ct. App. 1971), for example, a criminal defendant made a phone call from a police station after being arrested. An officer surreptitiously listened in to the phone call and overheard incriminating statements. Id. at 520. The court suppressed evidence of the phone call, concluding that "[t]here is nothing in the record which indicates that the defendant should have known someone was listening in. The fact that he was using a phone in a police station should not alter a person's expected privacy in a phone conversation." Id. at 521.

The court looked to a statute that was "based on Fourth Amendment case law which protects people, not places." Id. It suppressed evidence of the phone call, id. at 522, concluding

that, though the call was placed from a police station, there was "nothing [to indicate] that the defendant should have known someone was listening in," id. at 521.

The Tenth Circuit embraced Tebo's reasoning as to the expectation of privacy in an arrestee's call from a police station. United States v. Harpel, 493 F.2d 346, 351-52 (10th Cir. 1974). Harpel "h[e]ld as a matter of law that a [police station] telephone extension used without authorization or consent to surreptitiously record a private telephone conversation is not used in the ordinary course of business." Id. at 351. The court explained, "[t]his conclusion comports with the basic purpose of the [federal wire communication] statute, the protection of privacy, and is in line with the reasoning of the court in People v. Tebo" which it described as involving a "conversation [that] was surreptitiously overheard by a policeman when the defendant placed his one permitted telephone call at the police station." Id. at 351-52.

McQueen, in making a phone call from the Piscataway police department, likewise possessed a reasonable expectation of privacy in the contents of that call. His presence in and call from a police station did not defeat his reasonable expectation of privacy. He was given no notice that the call might be monitored or recorded. Thus, pursuant to the broad protection given telephonic communications in New Jersey, and the absence

of any notice that his reasonable baseline expectations would not apply, McQueen reasonably believed that his phone call was private and would not be monitored or recorded by the government without notice, or used as evidence against him absent a warrant.

There is simply no basis to accept as true the dissent's unsupported ipse dixit that the general public has widespread knowledge that calls from police stations are always monitored and recorded, and thus that the public lacks any expectation of privacy in such calls. While prosecutors, defense attorneys, or judges may become aware of such a practice through deep familiarity with the criminal justice system, there is no reason to believe the general public has any such experience or knowledge. The cases on which the State relies in an attempt to document this purportedly widespread belief simply announce its existence, as the Appellate Division dissent does, without providing any evidentiary support. See State's brief at 19-21.

Most of the cases cited by the State, however, do not simply fail to support the point but actually undermine it because they are sharply distinguishable, involving circumstances at a police station (or prison) in which courts relied on the fact that notice was provided, or that the particular circumstances otherwise precluded any reasonable expectation of privacy because the call could obviously be

overheard. The State and dissent point to language in a Sixth Circuit case, Adams v. City of Battle Creek, 250 F.3d 980, 984-85 (6th Cir. 2001), which mentions a purported "routine and almost universal recording of phone lines by police departments and prisons . . . well known in the industry and in the general public . . . ."

But the State and dissent fail to quote the rest of that sentence in Adams, which continues, "and the courts have ruled that even prisoners are entitled to some form of notice that such conversations may be monitored or recorded." Ibid.; see also id. at 984 ("[W]e do hold that monitoring in the ordinary course of business requires notice to the person or persons being monitored."). Once again, even assuming for the sake of argument the questionable proposition that calls from police stations are almost universally recorded, the courts cited by the State and dissent that have so assumed have not held that the practice eliminates the public's reasonable expectation of privacy absent notice.

Those courts still require that some form of notice be provided that such conversations are not private, either overtly or because it was obvious from the circumstances that the conversation could be overheard. And those courts have done so under the Fourth Amendment, which is far less protective of privacy interests in phone calls than is Article I, Paragraph 7

of New Jersey's Constitution. See Siripongs v. Calderon, 35 F.3d 1308, 1320 (9th Cir. 1994) ("Siripongs placed the call while a police officer was standing three feet away. A television camera was suspended from the ceiling about eight feet from the telephone and pointed toward the phone. These facts compel the district court's conclusion that Siripongs could not reasonably expect any privacy during his conversation."); United States v. Van Poyck, 77 F.3d 285, 290-91 (9th Cir. 1996) (holding no reasonable expectation of privacy in a call from prison, given that the inmate "knew of [the correctional facility's] policy" to record calls because he "(1) signed a form warning him of monitoring and taping; (2) read signs above the phones warning of taping; and (3) read a prisoner's manual warning of the recordings."); United States v. Correa, 154 F. Supp. 2d 117, 121, 123 (D. Mass. 2001) (finding no reasonable expectation of privacy in a phone call from a police station overheard by police and "placed . . . with an officer standing nearby, in full view of the defendant"). Though officers were apparently at times somewhere in the room with McQueen, he lowered his voice with both the intent and the effect of precluding his conversation from being overheard by those officers.

Moreover, the hollowness of the dissent's unsupported assertion of widespread societal awareness that all calls from police stations are recorded, even if no notice is given, is

belied by the numerous cases in which police station employees have brought breach of privacy claims against the monitoring and recording of such calls, asserting that they were unaware of the practice. These cases provide compelling evidence that there is simply no society-wide understanding that such calls are automatically recorded: Given that police station employees including police officers and at least some supervisors are unaware of the practice, it is far from self-evident that there is any society-wide understanding.

For example, in a class action suit, the Connecticut State Police Union, several Troopers, and members of the public sued the State for recording all phone calls to and from the police barracks. In re State Police Litig., 888 F. Supp. 1235, 1247 (D. Conn. 1995). The defendants argued, unsuccessfully, that "plaintiffs' expectation of privacy was unreasonable" because "it is common knowledge that special security precautions must be taken in police departments; those using the lines could reasonably expect that it could take the form of monitoring calls." Id. at 1256 (citations omitted).

The court specifically rejected that argument, holding that the case that defendants had quoted to support the purported common knowledge of call monitoring "involved the recording of calls with the consent of one of the participants, however, and the other cases on which defendants rel[ied] similarly depend on

a finding of express or implied consent." Ibid. For example, the court explained, "consent could be implied where prisoners received four forms of notification of recording on institutional telephones, and thus prisoners had no reasonable expectation of privacy in conversations on those phones." Ibid.

Furthermore, the court undercut the plausibility of the purported common knowledge of automatic call monitoring at police stations by noting that two of the defendant police supervisors "disavowed any knowledge of the extent of the recording practices of the State Police," recognizing that if the very people "in charge of the State Police can claim no subjective knowledge of the recording of outgoing calls, it must be expected that plaintiffs do likewise." Ibid. The court held, "[u]ltimately, therefore, the determination of whether the plaintiffs' expectations of privacy were reasonable depends on proof of the absence of notice." Ibid.

Of particular note to the reasonable expectation of privacy in calls from police stations in New Jersey is PBA Local No. 38 v. Woodbridge Police Dep't, 832 F. Supp. 808 (D.N.J. 1993). In PBA Local No. 38, the court once again recognized a reasonable expectation of privacy in calls from police stations, absent notice of monitoring or recording. Police officers sued the Woodbridge Police Department for breach of privacy in recording multiple phone lines at the station. Some of those lines

provided notice of recording in the form of prominent beeps and others did not. Id. at 817-18. As to the lines with prominent, repeated beeps, the court concluded there "was general knowledge among police officers that the beep on the phone lines signified that the lines were being recorded." Id. Thus, the court held, the officers "did not have a reasonable expectation of privacy in conversations which took place over the beeped telephone lines" given the notice of recording provided by those beeps. Ibid.

In contrast, the court acknowledged--and recognized that even the Defendants acknowledged--that the officers did have a reasonable expectation of privacy on "unbeeped" lines. Id. at 819-20 ("Defendants' arguments in support of their motions for summary judgment on plaintiffs' claims arising out of the alleged interception of conversations on 'unbeeped' phone lines do not, understandably, focus on the lack of an expectation of privacy."). The case makes plain that, absent notice of recording, through prominent beeps or otherwise, calls from police stations enjoy a reasonable expectation of privacy. Ibid. This case is of particular note in that it was brought by New Jersey police officers and arose in and was decided by the District of New Jersey, buttressing the objective reasonableness of an expectation of privacy in calls from New Jersey police stations absent notice to the contrary.

The Fifth Circuit has similarly recognized police station employees' reasonable understanding that police station calls are private and not uniformly subject to recording, absent notice otherwise, again belying any society-wide belief to the contrary. In Zaffuto v. City of Hammond, the Fifth Circuit concluded that a police officer who made a call to his wife from a police station line had an objectively reasonable expectation of privacy. Zaffuto, 308 F.3d 485, 489 (5th Cir. 2002). Even though "[a]ll calls on certain phone lines in the Hammond, Louisiana police department are automatically recorded onto a central taping system," id. at 486, and defendants pointed to "a department policy that calls would be taped," id. at 489, the court credited the plaintiff's testimony that he thought the policy applied to incoming rather than outgoing calls, holding that a "reasonable juror could conclude . . . that [the plaintiff] expected that his call to his wife [from the police station] would be private, and that that expectation was objectively reasonable." Id. at 489.

If police department employees, such as the plaintiffs in these cases (and, indeed, many of the police department supervisor defendants) do not have a general understanding that outgoing phone calls in police facilities are automatically recorded, then there is simply no basis to assume such an understanding among the general public. As the cases

demonstrate, in the absence of notice that calls from police stations are subject to monitoring and recording, neither police officers nor other police station employees, let alone the general public, know that there is universal monitoring and recording of such calls (if, in fact, there is such a practice, a questionable assumption).

3. The general societal belief that an arrestee is entitled to place one private phone call from a police station strongly supports the objective reasonableness of an expectation of privacy here.

As explained above, cases such as Harpel and Tebo recognize that an arrestee's beliefs concerning the privacy of his call from a police station arise in the context of a societal expectation that one is entitled--or at least almost always permitted--to make "one free call," and that this call may well be placed to an attorney. See, e.g., Tebo, 194 N.W.2d at 519-20 (explaining that the defendant was "arrested and taken to the police station" where he "requested the right to make a phone call. [A police officer] agreed to this and listened" in on the call); Harpel, 493 F.2d at 352 (describing Tebo as addressing the expectation of privacy "when the defendant placed his one permitted telephone call at the police station").

Examination of the top internet search results for phone calls placed from police stations further demonstrates the widespread cultural belief that an arrestee is entitled to (or

at least will ordinarily be permitted to) place "one phone call" from the police station after arrest, and even attorneys' advice about such calls reflects no suggestion or belief that the call is subject to monitoring or recording absent notice to the contrary.

Legal advice websites from defense attorneys provide a window into the minds of arrestees and of criminal defense attorneys alike, reflecting a widely held belief that arrestees will generally be allowed to place a private phone call after arrest; there is no awareness or warning that the call is subject to monitoring and recording unless the police provide notice that this may occur.

For example, on Avvo.com, in response to a citizen asking, "Can the police use the conversation of a phone call made at the station to convict a suspect," four attorneys respond, the first of whom answers, "Not out of the question if a notice was posted saying calls were subject to monitoring"; the second answers, "The police would have to warn you that the call was being recorded and that it could be used in court. I have heard of this happening with calls from the prison but not from the police station"; the third answers, "If it was 911 they are taped, normally in Philly if it was a regular phone number to the police district they are not recorded"; and the fourth answers, "If the police are recording, they would have to advise

you or have a 'beep' sound every so often to warn you." See Avvo, Does the police record the conversation of a phone call at the station/present?, (Aug. 13, 2015), https://www.avvo.com/legal-answers/does-the-police-record-the-conversation-of-a-phone-2307803.html; see also Gabriel Quinnan, Busting The "One Phone Call From Jail" Myth, (Oct. 2, 2018), https://quinnanlaw.com/criminal-defense/one-phone-call-from-jail-myth/ (describing potential for arrestees to make phone calls from both police stations and from jails, explaining that such calls are not legally guaranteed, and stating that "Every phone call a defendant makes from jail is recorded," but stating nothing about the possibility of calls from police stations being recorded).

Other lawyers discussing phone calls from police stations omit any mention of the possibility, let alone universal practice, that such calls will be monitored or recorded. See, e.g., What Happens In the First 24 Hours After An Arrest, http://www.clackamaslawoffice.com/happens-first-24-hours-arrest/ (last visited Dec. 14, 2020); Karl Smallwood, Are You Really Entitled to a Phone Call When Arrested, (May 9, 2014), http://www.todayifoundout.com/index.php/2014/05/really-entitled-phonecall-arrested/.

4. The police officers' failure to ask McQueen whether he would be placing his call to an attorney greatly buttresses the reasonableness of his expectation that his call would be private.

There is widespread societal recognition that arrestees' phone calls from police stations are often placed to attorneys, and that such legal calls are private, not subject to monitoring or recording by the police. The State so concedes. McQueen, (DeAlmeida, J., dissenting), slip op. at 5 ("the State concedes" a "telephone . . . call [to McQueen's] attorney . . . would have been a protected communication"). Here, McQueen's reasonable expectation of privacy is greatly buttressed by the fact that the police did not ask McQueen (or otherwise know) whether the call they permitted him to place would be made to his lawyer.

The police, when directing McQueen to use a particular phone line, did not know whether the call was a protected communication with his attorney not subject to being monitored or recorded. Because, for all the police knew, McQueen's call would be to his lawyer, and because the police made no effort to determine if the call therefore required use of a different line, it was eminently reasonable for McQueen to assume that the call would not be monitored or recorded.

The Appellate Division dissent seems to suggest that McQueen's call would only be entitled to an expectation of privacy if it in fact had been made to an attorney. McQueen,

slip op. at 5. That reasoning is unsound. The question is not whether McQueen was in fact making a call to his attorney; the question is what an objectively reasonable person in McQueen's place would expect as to the privacy of the call he did make, given that the police had made no effort to determine if that call could lawfully be monitored or recorded.

Given the police officers' failure to ask whether he was calling his attorney, McQueen was objectively reasonable in believing that the police were not trying to distinguish between legal calls and other calls, and thus all calls would be accorded the heightened privacy that must be afforded to legal calls.[4]

This conclusion is reinforced by the fact that an objectively reasonable person knows that phone calls to an attorney, even when placed from prison rather than a police station, and thus with a lowered expectation of privacy, are nonetheless not subject to being monitored and recorded. Indeed, the Middlesex County Correction Center Inmate Guidelines in the record give notice to inmates that "[t]elephone calls [from the

[4] Police cannot, of course, later listen to a phone call to retroactively determine whether it is a legal call that is private and cannot have been listened to; the very act of making that assessment would intrude on the privacy interest. It was thus entirely reasonable for McQueen to believe that, having been given access to call anyone, lawyer or otherwise, his call would be private, regardless of whom he actually called.

facility] may be monitored and recorded except calls to the Internal Affairs Unit and legal telephone calls." McQueen, slip op. at 4; Jackson, 460 N.J. Super. at 266; see also ibid. (same as to Essex County Correctional Facility).

The facilities in Jackson provided clear notice that inmate calls are generally subject to monitoring and recording, whereas legal calls are private and are not subject to such monitoring and recording. Ibid. Police here made no effort to determine whether McQueen would be making a legal call that would be exempted from such monitoring and recording and whether they should therefore direct him to a different, non-recorded line to place his call. He therefore could reasonably expect the broadest degree of privacy that such a call might warrant.

A further reason why society would recognize an expectation of privacy in a stationhouse call in a context like McQueen's, without any notice or attempt to determine if he was calling an attorney, is that he made his call shortly after he had been arrested and read his constitutional rights under Miranda v. Arizona, 384 U.S. 436 (1966). These widely recognized rights, so "embedded in routine police practice [that] the warnings have become part of our national culture,'" Nyhammer, 197 N.J. at 400 n.8, informed him that that anything he said to police could be used against him in a court of law, but that he had the right to talk to a lawyer before the police asked him

any questions. It would be highly unexpected and entirely unreasonable for McQueen to be permitted to make a call that, for all police knew, would be to his attorney to help him decide if and how to respond to police questioning, but that the call would be secretly intercepted and used against him in a court of law.

"The Miranda warnings inform a suspect not only of the basic right against self-incrimination, but of other rights designed to effectuate that basic right." State v. Reed, 133 N.J. 237, 251 (1993); see also id. at 256 (the Miranda "right is meant 'to forestall involuntary and incriminating disclosures.'"). McQueen had no reason to believe that the careful warnings he received about how he could protect himself under the Constitution would fail to warn him that he had no privacy interest in the phone call he was permitted to make.

C. Jackson Does Not Control Because There is a Stronger Expectation of Privacy in a Call from a Police Station, Absent Notice of Monitoring, than in a Call from a Jail or Prison Following such Notice.

The State suggests that the result here is controlled by Jackson, 460 N.J. Super. at 276-77, aff'd o.b. State v. Jackson, 241 N.J. 547, 548 (2020) (affirming "substantially for the reasons expressed in Judge Alvarez's opinion"). Jackson, however, is readily distinguishable.

Jackson held that an inmate was not entitled to a reasonable expectation of privacy in a phone call he placed from the correctional facility, grounding that conclusion on two factors: (1) the heightened interest in institutional security as to calls placed from those facilities, and (2) the inmate's greatly diminished reasonable expectation of privacy in such calls given the multiple forms of clear notice that the inmate had received in those institutions that his calls were subject to being monitored and recorded. Id. at 276 ("In the balance, the correctional facilities' interest in maintaining institutional security and public safety outweighs the right to privacy asserted here. Furthermore, if an inmate knows he or she is being monitored and recorded when speaking on the phone [given the written notice and notice provided at the beginning of each phone call], it is unreasonable to conclude . . . that the inmate retains a reasonable expectation of privacy . . . .").

Jackson's holding is limited and readily distinguishable from this case; neither the factor of correctional facilities' heightened institutional security concerns, nor of the clear and repeated notice that calls from those correctional facilities are subject to monitoring and recording, applies in this case. Yet both were crucial to the panel's conclusion. Ibid.

While caselaw from New Jersey and other states has held that inmates generally have no reasonable expectation of privacy in non-legal calls from jails or prisons if they have clear notice of monitoring, these cases--like Jackson--have grounded their decisions on the two factors mentioned above: (1) the heightened need for institutional safety within the closed correctional facility environment, and (2) the abundant and clear notice that the prisons and jails in those cases provided to inmates, warning them that phone calls (other than legal calls) are generally subject to monitoring and recording. Neither factor is present here.

1. Calls from jails and prisons implicate heightened concerns for institutional security not present in calls from police stations.

First, Jackson relied heavily on the necessity of "maintaining institutional security" in concluding that inmates lack an objectively reasonable privacy interest in phone calls placed from a jail or prison. Ibid. As Jackson explained, "[a]n inmate's privacy entitlements must yield to the institution's responsibility to preserve the health and safety of the prison population, [the] need for such facilities to maintain a safe and orderly environment," and the "legitimate security interest in preventing inmates from planning or participating in crimes that will take place outside the facilities' walls." Ibid.

Arrestees' confinement in the closed environment of a jail or prison (unlike arrestees' transiently passing through a police station) warrants a degree of heightened security to keep contraband outside the prison's walls and inmates within. "The curtailment of certain rights in prisons is necessary to ensure the safety of staff, visitors, and inmates," thus "prison staff 'must be ever alert to attempts to introduce drugs and other contraband' into prisons; [and] 'they must be vigilant to detect escape plots . . . .'" United States v. Williams, 15 F. Supp. 3d 821, 829-30 (N.D. Ill. 2014) (citation omitted) (finding a reasonable expectation of privacy in statements made in a squadrol, i.e., a combined police squad car and ambulance, vehicles that lack the security needs of prisons, and differ from squad cars in that statements cannot obviously be overheard by police or intercepted by obvious electronic surveillance equipment).

None of these interests carries any appreciable weight in a police station, which is generally within a municipal building at least in part open to the public, and an office space for many police officers and public servant employees, where drug smuggling, escape plans, and riots are of very limited concern.

While "correctional facilities' interest in maintaining institutional security and public safety" may have outweighed the prisoner's right to privacy, after clear notice had been

provided, in the controlled environment of a correctional institution in Jackson, any governmental interest in safely operating a police station here does not require a similar intrusion on an arrestee's right to privacy in his phone calls. See State v. Tirelli, 208 N.J. Super. 628, 637, 632 (App. Div. 1986) (distinguishing between the expectation of privacy in cases involving "the constitutional rights of prisoners and the resulting diminished expectation of privacy in prison" as opposed to the greater privacy interests of someone who "was arrested at his home . . . advised of his rights [and then] [a]t the station . . . was interrogated"). Thus, the institutional security rationale does not justify the police intruding on McQueen's privacy rights by recording his phone call from the police station.

The Appellate Division dissent notes that "the privacy rights of an individual who is placed under lawful arrest are diminished," McQueen, (DeAlmeida, J., dissenting), slip op. at 5 (quoting State v. Legette, 227 N.J. 460, 469 (2017)). This statement is true in the abstract, and applies in some circumstances, but its use here to imply that McQueen's arrest meant he had a diminished privacy interest in his phone call following that arrest simply does not follow.

While it is true that the fact of arrest thereby diminishes an arrestee's privacy interests in limited ways directly

implicated by that arrest, the intrusion on those privacy interests still "must be 'objectively reasonable'" under the circumstances, including those that have been altered because of the arrest. Legette, 227 N.J. at 469 (citation omitted). Thus, while the fact of arrest justifies police officers in "monitor[ing] the movements of an arrested person following the individual's arrest," that interest only applies, e.g., to protect the officers' interest in their own safety and to ensure that the arrestee does not escape.[5] Ibid.

The circumstances here involve no State interest meaningfully heightened by McQueen's arrest that undercuts his expectation of privacy in his phone call. Police only had a garden-variety interest in gathering evidence of his guilt, an interest that did not change upon his arrest and did not in any way lessen McQueen's interest in privacy. McQueen's status as an arrestee therefore does not undercut, let alone eliminate, his privacy interest in the context of this case. See State v. Jackson, 321 N.J. Super. 365, 379 (Law Div. 1999) (recognizing that "Fourth Amendment protections" are more limited for pre-

[5] These heightened state interests, situationally justifying a somewhat greater intrusion on an arrestee's privacy, are similar to the basis for and scope of a Terry frisk when officers have reasonable suspicion warranting an investigatory stop. See Terry v. Ohio, 392 U.S. 1, 30-31 (1968). Such searches are permitted for weapons that might undermine officer safety, but are impermissible to search for evidence of any suspected crime.

trial detainees than for those outside jail, given the fact of their incarceration, but there is no lessened interest "where no institutional [security] need is served by the search"). The "'loss of [an inmate's privacy] rights is occasioned only by the legitimate needs of institutional security,'" but there is no diminished expectation of privacy when "no institutional security need was served by the search." Id. at 376 (quoting United States v. Cohen, 796 F.2d 20 (2d Cir. 1986)); id. at 379 ("find[ing] the rationale [of Cohen] persuasive). In this case, due to the lack of heightened institutional safety interests at the police station, police needed to obtain a warrant to listen to any recording of McQueen and Allen-Brewer's private phone call.

2. Unlike calls from police stations, Jackson addressed calls from jail or prison involving multiple forms of clear notice that such calls are monitored and recorded.

Even more fundamentally distinct from Jackson than the minimal security interest in a police station as compared to that in a correctional facility is the vital factual distinction of notice: The inmates in Jackson (one held in Middlesex County and one in Essex County) were provided multiple forms of clear notice that their calls, other than those to lawyers or Internal Affairs, were subject to monitoring and recording. Without notice, the inmates would retain an expectation of privacy.

The inmate held in Middlesex County received a written "pamphlet" informing him that "telephone calls may be monitored and recorded except . . . legal telephone calls," and "[a]t the beginning of each monitored call, the inmate hear[d]: '[t]his call may be recorded or monitored.'" Jackson, 460 N.J. Super at 266. Similarly, Essex County "permit[ted] inmates to make unmonitored and unrecorded telephone calls only to legal counsel and Internal Affairs"; for other calls, "[i]nmates [were] informed at the beginning of each phone call that the call may be recorded or monitored," and the Essex County inmate was given a form stating that "I understand and agree that telephone calls are subject to monitoring, recording, and may be intercepted or divulged," and, moreover, he "signed that form." Ibid. As Jackson held, given this ample notice, "if an inmate knows he or she is being monitored or recorded when speaking on the phone, it is unreasonable to conclude . . . that the inmate retains a reasonable expectation of privacy." Id. at 276.

In Jackson, where institutional security interests provided a stronger justification for state intrusion on privacy rights than here, the state nonetheless provided the inmate with multiple forms of clear notice to defeat any possible privacy expectation in his phone call. Moreover, the state informed the inmates of the availability of unmonitored, unrecorded lines if the call they wished to place was to an attorney. And the

Jackson court relied heavily on the fact that notice was provided in concluding that the inmates lacked a reasonable expectation of privacy. Ibid.

Indeed, the reasonable expectation of privacy in calls from a police station, absent notice to the contrary, is greatly bolstered by the fact that most prisons and jails provide clear notice to inmates that their non-legal phone calls are subject to monitoring and recording; they do so because courts have found that such clear notice is essential to overcoming inmates' expectation of privacy. Inmates confined to correctional institutions are entitled to--and must actually be provided--clear notice in order to overcome their expectation of privacy in their phone calls. See, e.g., Adams, 250 F.3d at 984-85("[T]he courts have ruled that even prisoners are entitled to some form of notice that such [telephone] conversations may be monitored or recorded"). Then surely an arrestee like McQueen, at a police station--a place where the governmental interest in institutional security is far more modest--must similarly receive notice in order to overcome his reasonable expectation of privacy in a phone call (particularly when that call may be to his attorney).[6]

[6] Jackson's grounding its decision on notice is consistent with decisions from other courts about calls from prison. See United States v. Paul, 614 F.2d 115, 117 (6th Cir. 1980) (holding that

The government here has conceded that McQueen was given no notice that his phone call from the police station might be monitored or recorded. While officers were, at times, in the room, the record shows that "McQueen lowered his voice to prevent a nearby officer from listening in," McQueen, slip op. at 3, and there is no indication that they were able to hear McQueen's intentionally hushed voice, or that he reasonably believed them able to do so.

Because McQueen was not making his call from an area with meaningfully heightened institutional safety interests, and was not given clear notice that his call was subject to being monitored or recorded--through writings, prominent signage,

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a policy of monitoring prison calls was lawful under the Wiretap Act because prisoners were given adequate notice of the policy); Campiti v. Walonis, 611 F.2d 387 (1st Cir. 1979) (holding that recording prison phone calls was unlawful because it was not done pursuant to a posted prison regulation providing notice).

Courts recognize that adequate notice must be given to prisoners through audible warning, visible signage, prominent beeps, or other clear indications that a conversation will be recorded or intercepted. See People v. Diaz, 33 N.Y.3d 92, 99 (2019) (holding that, under the Fourth Amendment, the nature of the prison environment and the provision of three "prominent, unavoidable warnings that his calls were subject to electronic monitoring and recording" defeated a prisoner's expectation of privacy); United States v. Shavers, 693 F.3d 363, 390 (3d Cir. 2012) (holding that a handbook and posted signs gave adequate notice to prisoners that their calls might be monitored and recorded); PBA Local No. 38, 832 F. Supp. at 817-18 (holding that an audible beep every five seconds, and general knowledge of the meaning of those beeps, provided notice that the call was being recorded).

aural notice during the phone call, or otherwise--he maintained his objectively reasonable expectation of privacy in that call.[7]

[7] If notice were provided, that may overcome the reasonable expectation of privacy in recording (though not listening to) at least some phone calls from police stations. Amicus respectfully suggests, however, that this Court make plain that such notice would not be sufficient in all instances, a question it need not resolve in this case.

For instance, an arrestee should be able to make a private call arranging for childcare, work responsibilities, and other deeply personal matters by contacting a family member or intimate partner. Police can provide notice that the call may be recorded, then if they have a reasonable concern about the substance of such a call, they can seek a warrant.

Most notably, an arrestee has an objectively reasonable expectation that he be able to place a private phone call to a lawyer. Notice of recording would not defeat his objectively reasonable expectation of privacy in that legal call, even if his subjective expectation of privacy were thereby overcome. See Hempele, 120 N.J. at 199-200 (concluding that Article I, Paragraph 7 does not have a subjective prong, and instead only requires that the expectation of privacy be reasonable as established by "general social norms," in part to preclude the possibility that notice could be provided to undermine a subjective expectation of privacy in a matter objectively reasonably entitled to such protection).

Particularly when arrestees call an attorney, or have no other means of contacting family on urgent personal matters than using the police station phone, notice is insufficient to overcome an objectively reasonable expectation of privacy in such a call. See, e.g., State v. Ferrell, 463 A.2d 573, 575 (Conn. 1983) (holding that the constitutional right of privacy was violated for a suspect at a "police barracks" whom "the police permitted . . . to use a telephone in the report room where his conversation could be overheard by police officers in the room"); id. at 577-78 ("[T]he right to consult a lawyer before being interrogated is meaningless if the accused cannot privately and freely discuss the case with that attorney. Such discussion is only possible under conditions free from eavesdropping by the authorities.")

D. The Reasonableness of McQueen's Expectation of Privacy is Greatly Buttressed by the Ease with which the Government Could Protect his Privacy Without Undermining its Legitimate Governmental Interests.

To the extent this Court assesses McQueen's reasonable expectation of privacy by taking into account the balance of that privacy interest against the State's countervailing interest in security and law enforcement, McQueen's phone call from the police station should be protected because of the ease with which the government could have protected its own interests without undermining McQueen's. If the police simply provided clear notice that non-legal calls from the police station are subject to recording, and if it had simply sought a warrant before listening to any calls that might automatically have been recorded, both the State's and McQueen's interests could have been fully protected.

"The touchstone of the Fourth Amendment and Article I, Paragraph 7 of the New Jersey Constitution is reasonableness." State v. Watts, 223 N.J. 503, 514 (2015) (quoting State v. Hathaway, 222 N.J. 453, 476 (2015)). "In assessing the reasonableness of police conduct, we must consider the circumstances facing the officers who had to make on-the-spot decisions in a fluid situation." Id. When determining the reasonableness of a search under the Constitution, courts balance the governmental need for the search at issue against

the severity of the invasion of a citizen's constitutional right to privacy. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

In McQueen's case, the governmental need to listen to McQueen's phone call without notice or a warrant was non-existent; the police were not faced with an on-the-spot decision during a time-pressured, fluid or potentially dangerous situation. Rather, they could easily have provided notice of recording, and they had ample time to secure a warrant before listening to any recording. Conducting a search by listening to the phone call without notice and a warrant was entirely unreasonable.

In re State Police Litig., 888 F. Supp. at 1256, explains that "[t]he determination of reasonableness" concerning an expectation of privacy in calls from a police station "requires a balancing of the need for the search against the severity of the invasion of personal rights, and courts must weigh 'the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'"

The court applied that test by weighing the expectation of privacy in calls from a police station, without notice that those calls might be monitored, as against the government's argument that "it is common knowledge that special security precautions must be taken in police departments; those using the

lines could reasonably expect that it could take the form of monitoring calls." Ibid. (citation omitted). The court rejected the government's argument that any common knowledge of recording of police station calls defeats an expectation of privacy, resolving that question by holding that the "surreptitious recording of private but unprivileged calls [from a police station], if proven, involves an invasion of privacy [under the Fourth Amendment] that far outweighs defendants' proffered justifications." Ibid.

Similarly, here, in balancing the government's need to record and listen to McQueen's call without notice and a warrant as against the intrusion on McQueen's reasonable expectation of privacy, this Court should take account of 1) McQueen's significant privacy interest in a phone call shortly following his arrest, and 2) the ease with which McQueen's privacy rights could have been protected by simply providing him with clear notice that his call might be recorded and that it could be listened to pursuant to warrant.

First, when arrested, people are generally in a state of shock, emotional distress, and fear; they often need to reach out to an intimate partner or family member to secure an attorney, arrange for childcare, cover work responsibilities, or otherwise get their deeply personal affairs in order. They almost undoubtedly have no other way to accomplish these things

than to use a phone at the police station. For the police to intrude into these conversations without notice and a warrant is a severe invasion of citizens' privacy rights that society is not prepared to recognize as reasonable.

With proper notice, police would be on a much stronger footing as to recording. They could easily provide notice that non-legal calls are generally subject to recording, and that those recordings are subject to search through a warrant based on probable cause as to any particular call. (There would almost always be time to procure a warrant, and if not, police could argue that exigent circumstances exist, or other warrant exceptions apply.) Without such notice and without a warrant, however, calls from police stations should remain private and free from police invasion.

The police can fully protect their legitimate governmental interest by providing notice that they will be recording an arrestee's phone call, and by securing a warrant before listening to such a recording. Notice of recording is already provided, unproblematically, in the jail and prison context, where this Court has concluded that the heightened institutional

security concerns and lowered expectation of privacy do not, as a general matter, require a warrant.[8]

Even in jail or prison, where the constitutional rights of inmates may be limited by Turner v. Safley, 482 U.S. 78 (1987) in a manner not relevant here, "the existence of readily-available, obvious alternatives is evidence" that governmental regulation or conduct impinging on an inmate's constitutional interests is unlawful." In re Rules Adoption Regarding Inmate Mail to Attys., 120 N.J. 137, 149 (1990) (citation omitted). "[I]f an alternative 'fully accommodates the prisoner's rights at de minimis cost to valid penological interests,' it may demonstrate that the [challenged action] is unreasonable." Ibid. Here, as to the greater rights of an arrestee as compared to an inmate, the ease with which the police department could have provided unmonitored legal calls, and provided notice that other calls are subject to recording and review pursuant to a warrant, coupled with its failure to do so, demonstrates that the significant intrusion on McQueen's privacy was unreasonable.

In sum, this Court should find that the search of McQueen's police station phone call was unreasonable because the police

[8] Indeed, providing clear notice that calls are being recorded could advance the law enforcement interest of preventing station house phones from being used for nefarious or illegitimate purposes by dissuading some from using the phone for anything other than personal or legal communications.

were not motivated by any meaningful institutional security concern beyond garden-variety law enforcement, did not provide readily available notice to McQueen that his call would be recorded, and did not secure a warrant based on probable cause (or proceed under any warrant exception) to listen to that recording. Thus, McQueen had a reasonable expectation of privacy protected by Article I, Paragraph 7 of the New Jersey Constitution.

E. Allen-Brewer's Objectively Reasonable Expectation of Privacy Is Greater than McQueen's, thus, Even Assuming McQueen Had No Such Expectation, Allen-Brewer's Privacy Interest Requires Suppression.

Finally, even if this Court were to conclude that McQueen had no reasonable expectation of privacy in his phone call with Allen-Brewer, a further question remains: Would such a conclusion necessarily dictate that Allen-Brewer could not possibly have any reasonable expectation of privacy in that call because her expectations of privacy are controlled by McQueen's? The State so contends, but its arguments are misplaced. Allen-Brewer's rights and expectations as a free person in the privacy of her phone call are not dictated by the rights and expectations of the person on the other end of the line. Thus, her rights require a distinct analysis to determine if her expectation of privacy was objectively reasonable.

The State relies on United States v. Sababu, 891 F.2d 1308, 1329-30 (7th Cir. 1989), to argue otherwise, contending that Allen-Brewer's privacy interests under the Constitution in receiving a call are controlled by McQueen's expectation of privacy in placing that call, or that somehow the plain hearing doctrine would make Allen-Brewer's privacy expectations irrelevant. State bf. at 27-28. But Sababu in fact demonstrates quite the opposite. Sababu considered the privacy interests of defendant "Garcia, who conspired with [incarcerated defendants] Lopez and Sababu from outside the prison," id. at 1312, through "telephone conversations between her and Lopez," id. at 1328. The court analyzed Garcia's expectation of privacy; it did not hold that Lopez lacked an expectation of privacy in his calls because he was an inmate, and therefore Garcia likewise had no expectation of privacy in her calls with Lopez.

Instead, the court separately analyzed "Garcia[']s reasonable expectation of privacy in her telephone conversations with Lopez, an inmate in [Leavenworth] federal prison." Id. at 1329. The court then specifically analyzed factors relevant to Garcia's expectations, distinct from Lopez's, in concluding that Garcia did not have an objectively reasonable expectation of privacy in those calls. The court first observed that "Garcia was a frequent visitor to Leavenworth and was well aware of the strict security measures in place." Ibid. "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."[9] Ibid. The court's focus was on Garcia's reasonable expectations under the circumstances.

The court continued, using the language on which the State relies, stating that "it is difficult to imagine that the considerations that justify monitoring and recording of a prisoner's utterances could somehow not apply at the other end of the telephone. The rights of free persons may well at times be implicated and stand or fall with the rights of prisoners." Id. at 1329-30 (quoting United States v. Vasta, 649 F. Supp. 974, 991 (S.D.N.Y. 1986)) (emphasis added).

But that language simply reflects the court's quite reasonable recognition that the fact that Garcia knew she was speaking to an inmate in a high-security institution she had

[9] The court also stated that Garcia "was put on notice through the Code of Federal Regulations that prison officials were authorized to monitor inmates' telephone calls." Sababu, 891 F.2d at 1329. This conclusion is highly suspect: One wonders whether it is objectively reasonable to assume that the general public is familiar with the contents of the more than 180,000 pages in the Code, see Total Pages Published in the Code of Federal Regulations, https://regulatorystudies.columbian.gwu.edu/reg-stats (last visited Dec. 14, 2020). But in any event, no such constructive notice was afforded Allen-Brewer about monitoring of calls from police stations.

repeatedly visited was relevant to analyzing her expectation of privacy in that call, and that considerations germane to inmates' expectations of privacy are relevant to, and at times might be dispositive of, the privacy expectations of those outside prison who speak on the phone with those inmates. But Sababu surely did not hold, as the State urges here, that Allen-Brewer's rights and expectations as a free person in the privacy of her call are dictated by the rights and expectations of the person on the other end of the line.

Here, unlike in Sababu, Allen-Brewer had not visited McQueen in the police station from which he placed the call;[10] she (like McQueen) was not aware of the monitoring of phone calls in place at that location, from frequent visits or any other form of actual or even constructive notice--indeed, there is no proof that she was even aware that McQueen was calling from a police station; she did not speak in coded language; she was eighteen and unfamiliar with the criminal justice system;

[10] The Appellate Division dissent and State suggest, equivocally, that it might be proper to take into account that a police officer testified that the recorded call (no transcript of which was introduced into evidence) showed that McQueen had told Allen-Brewer he was "locked up." Even assuming that to be true, which is by no means established (especially because it was untrue, thus it is far more plausible that McQueen said he was going to be locked up), it is irrelevant. It is impermissible for the State to use the substance of the call to justify having listened to the substance of the call in the first place (just as the fact that a search uncovered contraband cannot thereby retroactively justify the basis for the search).

and, as the police officers in the room testified, McQueen spoke in a lowered voice to avoid being overheard, suggesting to Allen-Brewer that McQueen believed doing so would ensure their conversation was private.

Thus, under Sababu, on which the State itself relies, and even under the less stringent protections of the Fourth Amendment, Allen-Brewer's privacy interest must be analyzed separately from McQueen's. McQueen has a compelling expectation of privacy in the call, absent notice of monitoring or recording. Moreover, because Allen-Brewer has an even more powerful basis than McQueen to argue that her expectation of privacy in the call was objectively reasonable, she has an even stronger argument that the substance of the call should be suppressed as to her.

CONCLUSION

For the foregoing reasons, amicus curiae the Seton Hall Law School Center for Social Justice respectfully requests that this Court (1) find that the police intruded on McQueen and Allen-Brewer's reasonable expectation of privacy in their call, therefore (2) suppress its content, (3) recognize that legal phone calls from police stations are protected as private, and (4) conclude that non-legal calls from police stations may not be recorded absent clear notice, and such recordings may not be listened to absent a warrant or recognized exception to the warrant requirement under Article I, Paragraph 7 of the Constitution.

Respectfully submitted,

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