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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 9

EMMANUEL DIAZ,

Appellant.

Before:

20 Eagle Street
Albany, New York
January 10, 2019

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



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JUDGE RIVERA: Next case for today, People v. Emmanuel Diaz, number 9.

MS. ZLOCZOWER: May it please the Court. My name is Dina Zloczower, and I represent appellant, Mr. Emmanuel Diaz.

With Your Honor's permission, I'd like to reserve two minutes of rebuttal time.

JUDGE RIVERA: Yes, counsel.

MS. ZLOCZOWER: The People violated appellant's rights when they obtained recordings of his phone conversations from Rikers with family and friends, absent any consent, prison-related purpose, or a warrant.

JUDGE GARCIA: Counsel, as I understand it, your argument's grounded in the Fourth - - - you have a number of arguments here about Rikers. But your argument's grounded in the Fourth Amendment, right?

MS. ZLOCZOWER: Yes, Your Honor.

JUDGE GARCIA: So could you just explain for me, it's grounded in the Fourth Amendment on this is ineffective consent for Fourth Amendment purposes?

MS. ZLOCZOWER: Yes, Your Honor. For purposes of the dissemination of the calls, the - - -

JUDGE GARCIA: Could you give me any other situation in which consent, other than physical, you know,



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you can search my bedroom; you can't search my living room, consent to use of the tapes would be something that we would look at?

MS. ZLOCZOWER: Um - - -

JUDGE GARCIA: I mean, because generally, when I think of limitations on consent, I think: you can look in my trunk for a body or you can search my living room but not my garage. So how is this a limitation on: the prison can use this and - - - and no one else can?

MS. ZLOCZOWER: The prison or the - - - or the district attorney's office?

JUDGE GARCIA: No, the prison. I mean, I assume your argument is I'm only consenting to the extent the prison can monitor my calls for prison-related issues, security, et cetera.

MS. ZLOCZOWER: Well, a couple things. First is that the notice provided to the inmates at Rikers used the word "consent". It's the Department of Corrections that says that, you know, by using the telephones you are consenting to the - - -

JUDGE GARCIA: So if the NYPD asks me if I consent to search the house, and I say yes, then later I can say, but I only gave the NYPD consent to search my house; you gave it to the FBI?



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2 MS. ZLOCZOWER: No, that's not quite what is at
3 stake here. First of all, the Department of Corrections,
4 as this court has said in Johnson, is not an agent of the -
5 - - of the district attorney, whereas a police officer is
6 obviously part of law enforcement and so is the
7 prosecution.

8 JUDGE FEINMAN: Right, but the point, I think,
9 that Judge Garcia is asking you about is, once you have
10 given the consent to the search, you lose the right to
11 control, once that evidence is seized, how that seized
12 evidence is disposed of.

13 MS. ZLOCZOWER: Why? I beg to differ. When the
14 consent - - - when the notice provided is limited to you
15 are consenting to the use - - -

16 JUDGE FEINMAN: So give me - - - and I think
17 that's what Judge Garcia was asking you at the outset is:
18 so where are the cases that suggest that that's wrong, that
19 you lose control of the items seized?

20 MS. ZLOCZOWER: You don't lose control of the
21 items seized. You can use the items. We're not challeng -
22 - - I am not challenging the use of the items by the
23 Department of Corrections. What isn't permissible, what
24 the law doesn't provide for is that that is then turned
25 over, subject to no consent - - -

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JUDGE FEINMAN: But that's not a loss of your expectation of privacy once you've done that?

MS. ZLOCZOWER: No. No, Your Honor.

JUDGE STEIN: Are you familiar with our case in Bushey? It's a recent case where we held that information that a motorist gives to the Department of Motor Vehicles - -

MS. ZLOCZOWER: Um-hum.

JUDGE STEIN: - - - that there's no expectation of - - - that there's no expectation of privacy that would prevent the Depart - - - the police from accessing that information and using it to prosecute a motorist.

MS. ZLOCZOWER: And again, maybe the - - -

JUDGE STEIN: Why is that different?

MS. ZLOCZOWER: Maybe the relationship between the Department of Motor Vehicles and the police is different, but this court has said multiple times now that the Department of Corrections is not a law enforcement agency. You've said it in Johnson, you've said it in Kelly , you've said it in Howard. You've said it again and again. What is happening here goes well beyond what the purpose of the recording and monitoring - - -

JUDGE RIVERA: Well, counsel, at its essence - -

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MS. ZLOCZOWER: Yes.

JUDGE RIVERA: - - - what is consent? Doesn't one have to understand what one is consenting to?

MS. ZLOCZOWER: Yes, Your Honor, one has to - - -

JUDGE RIVERA: Could - - - could - - - let me ask you this: could the Department of Corrections have said we want to record and monitor because we want to take home the tapes and listen to them with our kids? Could they have done that?

MS. ZLOCZOWER: I think that that would not be permissible because every court in the country that reviews prison regulations reviews it under the safety and security purpose standard. And just for the - - -

JUDGE RIVERA: So the authority is based on the fact that DOCs runs a particular facility, and it's whatever supports the penological interest in that facility?

MS. ZLOCZOWER: Precisely. And so the recording and monitoring of those calls serves that purpose.

JUDGE WILSON: Well, suppose that a, that a call that's recorded has evidence that an inmate is planning and has a - - - has a concrete plan to bring a weapon in. In that circumstance, can the call be turned over to the



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police?

MS. ZLOCZOWER: The operations order that governs this recording and monitoring provides for an instance like that, bringing in contraband, planning for escapes. Those would all fall under that purpose, the - - -

JUDGE WILSON: How does the defendant know that?

JUDGE FEINMAN: And what if he just says, you know, I want you to go to the - - - the victim's house, who happens to be his girlfriend, and tell her this, that, and the other thing, you know, so that she doesn't testify?

MS. ZLOCZOWER: Witness tampering, sexual abuse are all examples of criminal activity that could be occurring within the facility that are new crimes that definitely are part of that umbrella - - -

JUDGE FEINMAN: But that's not going to - - - that doesn't affect the facility; it affects the DA's ability to prosecute the case. So that information is going to be turned over to police and the DA's office.

MS. ZLOCZOWER: Right, but that turning over to the police and the DA's office and what they do with it is subject to the Fourth Amendment and not just - - -

JUDGE FEINMAN: So in that hypothetical, where he's overheard to say, you know, go beat her up; tell her she better not testify, she better not cooperate, in that



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example they would have to get the warrant before they could turn that over to the DA and the police?

MS. ZLOCZOWER: So that's a great example, if I may use this example to illustrate my point. The operations order provides for monitoring when the prison authorities become aware of criminal activity, for example the ones that you just mentioned with the - - -

JUDGE FEINMAN: I'm a little less concerned about the operations order, but rather what the Fourth Amendment requires - - -

MS. ZLOCZOWER: Yes, so once that - - -

JUDGE FEINMAN: - - - in that hypothetical.

MS. ZLOCZOWER: - - - happens, they can monitor and listen to the calls. That's then a search. Then they are free, of course, to call law enforcement and to have that investigated, and where necessary - - -

JUDGE GARCIA: Is the defendant aware of the operations order? Do they know about that operations order? Is that somewhere in something they get?

MS. ZLOCZOWER: They get a handbook, and they are asked to sign page 43 of that handbook which explicitly limits the whole regime of recording and monitoring to security purposes. I'm not sure they're handed over the operations order.



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JUDGE GARCIA: Right, but they don't know they're going to hand that over to the DA. So I think, under your theory, it's only what they know they can consent to. So unless it tells them and this operations protocol we're going to hand this over to the district attorney and you're going to be prosecuted for it, how do they know that? They still only know it's being monitored for the prison and for prison reasons; they don't know what they are. So to take your informed consent view to its logical conclusion, under that situation, Judge Wilson and Judge Feinman's hypotheticals, they can't use the tapes. But - - -

MS. ZLOCZOWER: Let me just follow up and ask you: when we say they can't use the tapes - - -

JUDGE GARCIA: They can't turn them over to the district attorney's office.

MS. ZLOCZOWER: They - - -

JUDGE GARCIA: I mean, maybe they could use them internally for securities reasons like to prevent - - -

MS. ZLOCZOWER: Well, if we - - -

JUDGE GARCIA: - - - a riot, but under your scenario, the defendant doesn't know it's possible they could turn tapes over to the DA in that case; it doesn't say that.

MS. ZLOCZOWER: No, it doesn't - - - well, at



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least not in the notices, the three type of notices provided to them.

JUDGE GARCIA: And isn't that what you're relying on?

MS. ZLOCZOWER: That's - - -

JUDGE GARCIA: That's all they have notice of.

MS. ZLOCZOWER: That is what I'm relying on, but what I - - - what this - - -

JUDGE RIVERA: I'm a little confused. I thought you said the consent is based on the internal security - - -

MS. ZLOCZOWER: The - - -

JUDGE RIVERA: - - - in the facility. How is an attempt to use facility equipment to commit a crime not implicating the security in the facility?

MS. ZLOCZOWER: It absolutely is, and that's why the operations order in Johnson says that there is a need basis for monitoring; then the calls get recorded. It is separate and apart from a search that was done here. Here there was no indication of criminal activity whatsoever. There's no record basis that the - - - that the Department of Corrections listened to these calls. The district attorney asked for the calls at some point - - - we don't know when, based on no reasonable suspicion, on probable



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cause or reasonable suspicion that anything - - - that my client had said anything that would - - -

JUDGE GARCIA: So if - - -

MS. ZLOCZOWER: - - - trigger monitoring.

JUDGE GARCIA: So if the person is taking affirmative steps to obstruct justice in the case, you could turn the tapes over. But if the person is just talking about the case and making incriminating statements, you couldn't turn the tapes over.

MS. ZLOCZOWER: You - - - they're not - - - they weren't even aware of what my client was saying until these tapes were turned over - - -

JUDGE GARCIA: But that's kind of a - - -

MS. ZLOCZOWER: - - - and searched by the - - -

JUDGE GARCIA: - - - different issue, but let's go back to the hypothetical.

MS. ZLOCZOWER: It's the critical issue in this case.

JUDGE GARCIA: If I listen to the tapes and I'm in the prison and I hear the client talking about the case, the defendant, he's talking about his case and making highly incriminating statements, I can't turn those over. But if I hear him talking about somehow tampering with the witness, I can turn those over.



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MS. ZLOCZOWER: Well, the question's not what you can turn over or not. The question here is whether the consent, based on the notice provided to the inmate, limited to security purposes - - -

JUDGE GARCIA: Okay. So I'll rephrase my hypothetical.

MS. ZLOCZOWER: - - - extends to the prosecution.

JUDGE GARCIA: So now we have these two sets of tapes. And one is I'm talking about the case and I'm making - - - I'm a defendant, I'm talking the case, I'm making incriminating statements. I haven't consented. But if I'm on the phone and I'm talking about interfering with the witness, I have consented.

MS. ZLOCZOWER: You want to start the analysis at a - - - at a point that is the - - - is at the Department of Corrections. I'm asking that you look at it from the district attorney's office. May the district attorney - - - district attorney's office seize those recordings, absent any indication of criminal activity occurring within the facility involving that inmate?

JUDGE FEINMAN: But how can you not start it with the Department of Corrections because that's - - - you know, that's who - - - who is doing the recording, that's who've they've consented - - -



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MS. ZLOCZOWER: Yes.

JUDGE FEINMAN: - - - and that's when - - - you know, the question is what's the expectation of privacy and have you basically waived that expectation of privacy. And now they have the tapes because you've consented.

MS. ZLOCZOWER: But we don't wait - - -

JUDGE FEINMAN: I think we're all suffering a little bit with the Chief's - - -

JUDGE FAHEY: Let me ask this - - -

MS. ZLOCZOWER: We don't - - -

JUDGE FAHEY: Can I ask a question?

MS. ZLOCZOWER: Sure.

JUDGE RIVERA: Yes.

JUDGE FAHEY: There's been a change, I understand, at Rikers now, and now law enforcement agencies are - - - are part of the notice that's given; is that correct?

MS. ZLOCZOWER: Footnote 4 of the People's brief, on page 16, suggests that, and it says that it may turn over to law enforcement.

JUDGE FAHEY: All right. In the Appellate Division decision, they - - - they recommended that and said that that would be better practice.

MS. ZLOCZOWER: Yes, and in fact this court left



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that open in Johnson as well as to whether - - -

JUDGE FAHEY: Let me ask you this: does that meet the notice requirements necessary for the recordings to take place?

MS. ZLOCZOWER: I - - -

JUDGE FAHEY: In other words, that inmate then is on notice that this information can be turned over to law enforcement in Rikers Island now.

MS. ZLOCZOWER: I think that, from its inception, the absolute unfettered access to these recordings, absent probable cause or reasonable suspicion - - -

JUDGE FAHEY: I'm not talking about these recordings.

MS. ZLOCZOWER: - - - even with notice like this - - -

JUDGE FAHEY: Slow down. I'm not talking about these recordings because these recordings weren't - - - were made without that notice. I'm talking about if the notice included a reference to law enforcement, because there are other prisons in this state than Rikers, would that be sufficient to - - - to constitute consent for turning over those recordings to law enforcement agencies?

MS. ZLOCZOWER: I think that the phrase within the brief, if that's the phrase that's actually used, is



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too vague. I'm not a lawyer for the Department of
Corrections, but - - -

JUDGE FAHEY: All right. You're saying it's too
vague. But if you say - - - forgetting about the wording
of the phrase - - -

MS. ZLOCZOWER: Okay.

JUDGE FAHEY: - - - the concept is if they tell
you: if you're going to go use the phone, we can record
this and give this to the police, is that sufficient
consent?

MS. ZLOCZOWER: I think the only phrase that
would ameliorate the problems in this case would be a
phrase such as we are going to turn over your phone calls
with your family and friends, discussing your pending case,
whether you can make bail, which is what happened here,
whether you should hire an attorney, which is what happened
here, and then - - -

JUDGE FAHEY: Well, that's a great deal of detail
- - -

MS. ZLOCZOWER: Well - - -

JUDGE FAHEY: - - - that you're asking for on
consent on notice. But I - - - forget about the words for
a second.

MS. ZLOCZOWER: Um-hum.



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JUDGE FAHEY: The concept itself, though, that law enforcement - - - that an inmate is told that if you open your mouth on this telephone that this - - - this information will be given to law enforcement. And you're consenting to that by using this phone.

MS. ZLOCZOWER: I think the phrasing has to be a little more, as in Miranda - - -

JUDGE FAHEY: That's fair - - -

MS. ZLOCZOWER: Yes.

JUDGE FAHEY: - - - but as a concept, you're - - - you're not saying that that concept is, in and of itself, incorrect. That can constitute consent; is that fair?

MS. ZLOCZOWER: The Department of Corrections, itself, relied on notice and consent as an exception to privacy rights of the inmates, yes. If there were more specific notice, then - - -

JUDGE FAHEY: So if - - -

MS. ZLOCZOWER: - - - then we can say that there was knowledge - - -

JUDGE FAHEY: Keeping alive your - - -

MS. ZLOCZOWER: - - - and yes there was consent.

JUDGE FAHEY: - - - your question about the quality of the notice, the notice itself can be sufficient if you tell them - - - tell the inmate that this stuff can



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2 be turned over to law enforcement. Now, I'm not saying
3 you're committed to wording, but that concept itself. So
4 the question for us then should be what - - - if this type
5 of information is actually being done in Rikers, why isn't
6 it being done in every other jail throughout New York
7 State? Isn't that the question?

8 MS. ZLOCZOWER: That is one of the questions.

9 JUDGE FAHEY: Well, just on this question of
10 notice and consent - - -

11 MS. ZLOCZOWER: Yes.

12 JUDGE FAHEY: - - - because everything rises or
13 falls, it seems in your case, on that question.

14 MS. ZLOCZOWER: Yes, it rises and falls on the
15 limit - - - on the limitations of the - - - of the notice
16 provided to the - - -

17 JUDGE FAHEY: Well, the adequacy of the notice,
18 sure.

19 MS. ZLOCZOWER: Yes.

20 JUDGE FAHEY: Right. Thank you.

21 JUDGE RIVERA: Okay. Thank you. Thank you,
22 counsel. You have rebuttal.

23 MR. JOBLove: May it please the Court. My name
24 is Leonard Joblove for the respondent.

25 The recordings of the defendant's telephone



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conversations were properly admitted at trial because, given the three forms of notice that the defendant received before he picked up the phone and made the call, he impliedly consented to the recording and monitoring by the Department of Corrections.

JUDGE STEIN: Why isn't that consent limited to use by the facility for its own security purposes?

MR. JOBLove: The short answer, Your Honor, is because there was no such limitation stated in any of the notices given to the defendant. The defendant received three forms of notice. The only one that contains any language that provides even an argument to suggest that there's some limitation on the use is the notice that appears at page 43 of the inmate handbook which says that the - - - the calls, other than privileged calls to attorneys, physicians and clergy may be monitored by the Department for security purposes. And that language is being construed by the defendant as a limitation on the use of the evidence.

JUDGE RIVERA: Well, no, no, no, no. Someone who is able to read that, and they read that, how would they believe that that means, oh, if I'm talking about my case, that will be given to the person who's prosecuting me?

MR. JOBLove: It's - - -



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JUDGE RIVERA: How is that about the security purposes in that facility?

MR. JOBLove: Well, that - - - Your Honor, that's describing use or potential use of that information. But this notice is a notice of what's the nature of the intrusion here, and - - -

JUDGE RIVERA: No, the notice is saying it's going to be recorded and monitored for security purposes. That is DOCs defining what I believe, under the law, is the only basis by which you could record and monitor: for security purposes.

MR. JOBLove: Well, that's the - - -

JUDGE RIVERA: And that's what you've informed - - - these are pre-trial detainees; these are not people who are yet been found guilty. These are people who can't make bail so they can't be out where the DA would have to get a warrant. Okay. So how - - - how would one who gets this notice understand it to mean it's going to be used for something other than insuring the security of the facility?

MR. JOBLove: The point is that what they understand, through these notices, is that their conversations are going to be recorded and monitored. The statement that it's going to be for security purposes is providing some notice about the extent of the intrusion.



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And if I could give a hypothetical example to illustrate the difference between a statement of the - - -

JUDGE RIVERA: Well, the intrusion is everything is recorded.

MR. JOBLove: And that would be a different - - -

JUDGE RIVERA: There are no variations there, and there's no degrees. They're not recording, you know, the a.m. phone calls but not the p.m. phone calls, the first two minutes but not the rest, right?

MR. JOBLove: Yes, Your Honor, that would be a different way to say the same thing, which is all of the calls are being recorded and all of the calls are being monitored. That would be a different way of saying the same thing, as opposed to saying - - -

JUDGE RIVERA: For security purposes. It is circumscribing the action by the facility.

MR. JOBLove: Well, it's circumscribing what the facility is doing and what the nature of the intrusion is. If they said it would be monitored and recorded for purposes of making sure that the phone system is working, that might suggest some kind of intermittent check as opposed to saying: in fact, why is the Department recording this - - -



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JUDGE FEINMAN: Isn't another way of looking at it, so the "for purposes of" gives their rationale, but it's not really meant to limit, you know, either the scope of the intrusion or, once you've had the intrusion and you've seized the tape, it's not a limitation on how you dispose of what you've seized.

MR. JOBLove: Yes, Your Honor, I agree with that, and to give an example in a different context, if a police officer approaches someone and says I have some information, and based on that information I'd like to search your home for guns, do you consent, and the person says, sure, come on in and take a look in my home, if the police officer goes in there - - -

JUDGE FEINMAN: And finds a kilo of cocaine while looking for the guns, it's fine.

MR. JOBLove: As long as it was in a location where he - - - the officer was authorized to look for guns.

JUDGE RIVERA: Right, and of course the problem with this hypothetical that the People continue to use is, in that example, the person is completely in a different situation than a pre-trial detainee who can't make bail and is on Rikers, which is basically hell on earth. These are two different situations.

MR. JOBLove: Certainly, Your Honor.



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JUDGE RIVERA: Correct? All right. So what they are being informed at Rikers is not this is what we're doing, we're going to record and monitor for this purpose, and the individual, you argue, impliedly consents, not only to the recording and monitoring for security purposes, but that they can do anything they want; they can burn that CD and do whatever they want with it. Under your scenario, they could take it home and listen to it with their kids. You say there's no limitation on the use.

But that individual cannot, unlike the hypothetical you were using, turn around and say I have alternatives to make - - - to communicate, and I'm going to rely on those so I'm going to circumscribe my consent. It's just not - - - these are not the same people that you're referring to.

JUDGE FEINMAN: Was the argument about the fact that he was detained without bail actually preserved in this particular case?

MR. JOBLove: No, he - - -

JUDGE FEINMAN: I'm talking about the next one, in Diaz.

MR. JOBLove: The only argument that was preserved was a claim that it was a warrantless search, without consent, in violation of the Fourth Amendment. So



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to the extent that there is some language in the defendant's brief which at least suggests an equal protection and due process claim raised on issues about indigency versus wealth, that claim is not preserved because that was not - - -

JUDGE RIVERA: Counsel, I think you misunderstand me. My point was that the hypothetical does - - - the hypothetical you were using does not work here because you're trying to compare individuals in very different situations and very different expectations, and that was my point. And I - - -

MR. JOBLove: Yes.

JUDGE RIVERA: I wanted you to please respond to how, even with those differences, these differently positioned individuals, you think the rule is exactly the same.

MR. JOBLove: Well, no, Your Honor - - -

JUDGE RIVERA: That was the point of your hypothetical, the rule is exactly the same.

MR. JOBLove: Well, the situation is certainly different, but the notion of a difference between a notice about why - - - what the purpose of the search is, in defining and giving notice to the person who may or may not consent, what the extent of the intrusion is going to be,



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the intrusion here is the listening to and the recording of your phone calls, which is a different question from use that might be made of the information after we obtain these recordings.

JUDGE FAHEY: Could you - - -

MR. JOBLove: And so - - -

JUDGE RIVERA: You agree there's nothing in the notice that explains what will be done with the recordings and whether or not they will be shared with others, at - - - at the point that - - - that this case came up, not now, not now.

MR. JOBLove: Yes, I agree that there was no such notice, but no such notice is required in order to have - - - in order to have valid implied consent. And - - - and this really goes to the third-party doctrine which was addressed by the Supreme Court in Carpenter, and which the Supreme Court, in Carpenter, recognized is still the law, and that has been applied in the cases of I provide personal financial information to a bank, and even if the bank didn't tell me - - - and obviously now there are privacy notices given, but even if the bank didn't affirmatively tell me you realize if - - - if we find criminal evidence - - -

JUDGE RIVERA: It's hard to deal with that



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analogy when DOCs is not a bank. You don't get to choose what - - - what facility and whether or not you can or cannot do certain things in terms of what alternatives you have. You always have an alternative in your example.

MR. JOBLove: Well, that's correct, but we're talking about whether there has to be affirmative notice in order to have relinquished your expectation of privacy. And if I - - -

JUDGE WILSON: Well, let me ask that. Does there? That is, could you have tape recorded or monitored the calls without posting any notice whatsoever, for security purposes?

MR. JOBLove: No, Your Honor, because, for one thing, that might constitute a violation of the wiretap - - -

JUDGE WILSON: Let's leave the wiretapping out for a minute. For Fourth Amendment purposes.

MR. JOBLove: There would not be a valid waiver or consent if there's no knowledge on the part of the - - -

JUDGE FAHEY: So the consent, there's an expectation of privacy, therefore; if you're saying consent is required, then you must be saying that there's an expectation of privacy, right?



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MR. JOBLove: Oh, certainly, yes, Your Honor.

JUDGE FAHEY: Okay. So there is an expectation of privacy that the - - - that the prisoner has in the phone call and because - - - and you're saying consent. So really we're just down to the adequacy of the - - - of the notice required to give consent. Isn't that really what we're talking about here?

MR. JOBLove: Yes.

JUDGE FAHEY: Isn't - - - isn't this in some ways a much narrower issue than - - - than it's been briefed and argued about, even among us and our cases? At this particular moment, it seems that what we're really talking about is was the consent sufficient, and then we're down to the language on the consent form, whether or not that's sufficient. And - - -

MR. JOBLove: Well, yes, and - - -

JUDGE FAHEY: - - - it seems that your office has recognized we can go a little bit further than we had gone before, and you made note of that in your brief by making reference to law enforcement agencies.

MR. JOBLove: Certainly the Department of Correction has recognized that, and apparently that change was implemented subsequent to this court's decision in Johnson. So right, more - - - more notice is always better



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in terms of ensuring that the inmate defendant is as fully informed as possible.

JUDGE FAHEY: So let me ask you this. Notice that tells a prisoner that he could - - - he's being listened to and that information can be turned over to a law enforcement agency, would you say that's sufficient, that notice is sufficient to breach his expectation of privacy, eliminate it?

MR. JOBLove: Where there is expressed notice that - - -

JUDGE FAHEY: Right.

MR. JOBLove: - - - it can be turned over?

JUDGE FAHEY: Right.

MR. JOBLove: That's more than sufficient because here there was no express notice of that, but just like - - - and I take Your Honor's point that the person at liberty putting money in a bank is in a different situation than a pre-trial detainee at Rikers, but still the point is the same that there doesn't have to be explicit notice that, if you talk to any civilian and reveal information that's incriminating, they don't have to tell you, wait, before you talk to me I have to let you know that I might turn over incriminating admissions - - -

JUDGE FAHEY: You're saying - - - you're arguing



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the third-party doctrine basically, you know, you turned it over to them so I can do whatever I want with it then?

MR. JOBLove: Well, subject to other legal limitations.

JUDGE FAHEY: The problem - - - the problem with that, and this is why I think you've wisely and the Department has wisely required consent is - - - is that at Rikers you have a hodgepodge of population, but when you're dealing with someone who's a pre-trial detainee, then you're still dealing with the presumption of innocence, and in that context it isn't the same, and the barrier, I think, is much, much higher for you at that point than it would be, say, post-conviction. So - - -

MR. JOBLove: Yes, and there are - - -

JUDGE FAHEY: - - - there's a consent that's required.

MR. JOBLove: Yes, a pre-trial detainee - - -

JUDGE FAHEY: Right.

MR. JOBLove: - - - who is presumed innocent but under the law has been lawfully deprived of his or her liberty in certain incidents - - -

JUDGE FAHEY: Is there a really practical element here - - -

JUDGE FEINMAN: Are you agreeing that there's a



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distinction to be made about how you can consent between pre-trial and post-conviction detainees? I - - - I don't think that's what you meant to concede.

MR. JOBLove: No, no, I'm saying there's a difference - - -

JUDGE FEINMAN: I wouldn't see - - - I don't see the rationale for that.

MR. JOBLove: There's a difference in the status of the - - - of the convicted defendant as opposed to the pre-trial - - -

JUDGE FEINMAN: Well, sure there's a difference in status - - -

MR. JOBLove: - - - detainee.

JUDGE FEINMAN: - - - but either you consent or you don't consent.

MR. JOBLove: Well, this is a question of has there been adequate notice given to the fact that the call is going to be recorded.

JUDGE RIVERA: Counsel, the Chief Judge is going to try - - -

CHIEF JUDGE DIFIORE: I'm going to try to get a question out, and it might only be a curiosity. Was there a motion to suppress made in this case?

MR. JOBLove: Apparently not, Your Honor. And



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certainly - - -

CHIEF JUDGE DIFIORE: Is that the practice in Brooklyn?

MR. JOBLove: Ordinarily - - -

CHIEF JUDGE DIFIORE: You didn't object, right? You went forward?

MR. JOBLove: Correct. This - - - this appears to have been treated as a motion in limine regarding the admissibility of the recorded Rikers phone calls. It certainly appears that the better practice should have been - - - to the extent this was a motion to suppress based on Fourth Amendment grounds, it should have been done pursuant to Article 710 of the CPL.

CHIEF JUDGE DIFIORE: One more thing.

MR. JOBLove: Yes.

CHIEF JUDGE DIFIORE: Yes.

JUDGE RIVERA: Thank you, counsel. Thank you.

MR. JOBLove: Thank you.

JUDGE FEINMAN: So why doesn't it have to be a motion to suppress under CPL 710.30 or a motion to preclude because you didn't give notice within fifteen days of your intent to use this?

MS. ZLOCZOWER: The issue was fully before the court, in whatever format it came before the Court, the



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2 court ruled on it, counsel preserved this issue fully and
3 completely, and there was - - - if we - - - if we're just
4 limiting ourselves to - - - to what format is being used to
5 discuss whether or not these calls are admissible at trial,
6 then we're not giving the parties an opportunity, we're
7 just limiting the format, not - - - we're not really - - -

8 JUDGE FEINMAN: Well, so when did counsel learn
9 for the first time of the existence of these statements?

10 MS. ZLOCZOWER: I unfortunately don't know the
11 answer to that, but I do know that the practice in New York
12 in the city is that these are turned over relatively late,
13 towards the eve of the trial, so I don't think it was
14 turned over at the earliest stages of discovery.

15 JUDGE RIVERA: Counsel, can you address the
16 third-party doctrine - - -

17 MS. ZLOCZOWER: Absolutely, Your Honor.

18 JUDGE RIVERA: - - - argument?

19 MS. ZLOCZOWER: It's critically important in this
20 case, this idea that when you agree or consent to the
21 disclosure of personal, deeply personal information, such
22 as these recordings - - - and I don't think anyone
23 disagrees that these are deeply personal, private
24 conversations with his father, with his girlfriend, with
25 his mother. When you agree that these can be recorded and



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2 monitored when, you know, there's a need in the - - - in
3 the Department of Corrections, that - - - it doesn't mean,
4 ipso facto, you have now disclosed it to everyone,
5 including the prosecution, and that's exactly what the
6 Supreme Court said most recently in Carpenter. It's also
7 exactly what this court has said in Weaver in 2009 with GPS
8 - - -

9 CHIEF JUDGE DIFIORE: Counsel, you would agree,
10 though, if we were to find that the consent was legitimate,
11 which would make the interception of the conversation
12 lawful, that after the lawful interception, this is about
13 this defendant's reasonable expectation of privacy,
14 correct?

15 MS. ZLOCZOWER: Correct.

16 CHIEF JUDGE DIFIORE: Okay.

17 MS. ZLOCZOWER: Yes. If the interception was
18 lawful that doesn't mean, though, that he's now waived his
19 expectation of privacy to everyone else, just like if you
20 disclose your cell site information to the mobile carrier
21 in Carpenter, that does not mean that the government now
22 gets to obtain that information.

23 JUDGE STEIN: Well, Carpenter was a little
24 different because in Carpenter I think the court held that
25 - - - or commented that there was really - - - there was no



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2 notice and that there was nothing that - - - that, you
3 know, it wasn't an affirmative action on the part of the
4 user to actually use the phone. The - - - the collection
5 of information happened merely by having the phone.

6 MS. ZLOCZOWER: Actually, the court did not
7 decide this on - - - on the lack of notice or notice. The
8 Court decided on two factors. One is the breadth and depth
9 of information obtained. The - - - the quality of this
10 information was so private - - -

11 CHIEF JUDGE DIFIORE: Mr. Carpenter didn't have a
12 reduced expectation of privacy in his actions, correct?

13 MS. ZLOCZOWER: He had a reduced expectation of
14 privacy in the same sense this court considered - - -

15 CHIEF JUDGE DIFIORE: The same sense as a
16 prisoner?

17 MS. ZLOCZOWER: No, in the same sense as - - - as
18 we all do when we go out into the public, the courts have
19 always said that we have a reduced sense of - - - of
20 expectation. In Riley, the Supreme Court said yes, when
21 you are arrested you have a reduced sense of expectation,
22 but it doesn't mean that the police get to search your cell
23 phone. So you know, that's the holding in Riley. The
24 holding in Weaver, the 2009 decision by this court, also
25 says yes, you have a reduced expectation of - - - of

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privacy when you use the public roads. But it doesn't mean that the government gets to obtain your GPS information.

JUDGE FEINMAN: I just want - - - I know your red light's on, but I just want to clarify one point. In this case, Diaz, there was no argument made, and there's no argument being made under the state constitution, is there?

MS. ZLOCZOWER: No, it was raised both by the state and federal constitution by the defense counsel, yes.

JUDGE FEINMAN: Okay.

MS. ZLOCZOWER: Article - - - he specifically mentioned Article 1, Section 12.

JUDGE FEINMAN: So what would be the specific argument that the right here is broader - - -

MS. ZLOCZOWER: Well - - -

JUDGE FEINMAN: - - - under the state constitution - - -

MS. ZLOCZOWER: Well, the Court - - -

JUDGE FEINMAN: - - - than the federal right?

MS. ZLOCZOWER: The Court applies a more generous Fourth Amendment protection and has - - -

JUDGE STEIN: Under consent? What about Badalamenti? Didn't we - - - didn't we adopt, over my objection, a rule - - - a federal rule about vicarious consent that - - - that is broader?



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2 MS. ZLOCZOWER: I don't - - - I'm not familiar
3 with that case, but I - - - the bottom line here is that
4 the defendants didn't - - - the inmate didn't just read the
5 notice, they were asked to sign it. I refer to page A-236
6 of the - - - of my appendix. The - - - the staff member of
7 the USC comes and testifies and she says the following:
8 "The first means of notification is the inmate handbook
9 which they must sign for during the intake process."

10 On page 43 of the inmate handbook, the last
11 paragraph, it states that all calls may be recorded for
12 security purposes. It wasn't just reading; it was signing.
13 And then I and I just also want to - - -

14 JUDGE RIVERA: Counsel, thank you.

15 (Court is adjourned)
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of PEOPLE OF THE STATE OF NEW YORK v. EMMANUEL DIAZ, No. 9, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: _____

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