IN THE NEW JERSEY SUPREME COURT
No. 083286 (A-18/19-19)

	:	CRIMINAL ACTION
STATE OF NEW JERSEY,	:	
Plaintiff-Respondent,	:	On Appeal from an Interlocutory
	:	Order of the Superior Court of
v.	:	New Jersey, Law Division,
	:	Middlesex County, Suppressing
MARK JACKSON,	:	Evidence and Dismissing a Count
	:	of the Indictment
and	:	
	:	Indictment No. 18-04-555-I
JAMIE MONROE, ET AL.	:	
Defendants-Petitioners.	:	Sat Below:
	:	Hon. Carmen H. Alvarez, P.J.A.D.,
	:	Hon. Susan L. Reisner, P.J.A.D.,
	:	and Hon. Hany A. Mawla, J.A.D.

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY

Alexander Shalom (021162004)
Jeanne LoCicero
The American Civil Liberties Union of New Jersey Foundation
PO Box 32159
Newark, NJ 07102
(973) 854-1714
ashalom@aclu-nj.org
Counsel for *Amici Curiae*, the American Civil Liberties Union and the American Civil Liberties Union of New Jersey

Sharon Bittner Kean (020601995)
Past President, Association of Criminal Defense Lawyers of New Jersey
244 Green Village Road
Madison, NJ 07940
(973) 236-9400
sharonkean@keanlaw.com
Counsel for *Amicus Curiae,* the Association of Criminal Defense Lawyers of New Jersey

Daniella Gordon (39362005)
Hyland Levin Shapiro LLP
6000 Sagemore Drive, Suite 6301
Marlton, NJ 08053
(856) 355-2915
gordon@hylandlevin.com
Counsel for *Amicus Curiae*, the National Association of Criminal Defense Lawyers

Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

Preliminary Statement

Jails record telephone calls to maintain institutional security, not to provide prosecutors with a vast repository of communications involving incarcerated people and their families and friends to later be mined for potential evidence in criminal prosecutions. Despite this, the Middlesex County Prosecutor's Office wishes to launder an unconstitutional search through the Essex County Correctional Facility's security protocols. Neither the Fourth Amendment nor article I, paragraph 7 of the New Jersey Constitution permit the State to sidestep judicial oversight by delegating an intermediary to do its bidding. These constitutional provisions require only that the State secure a warrant before obtaining access to recorded conversations between people in jail and their friends and family to comb for inculpatory information.

The State suggests that incarcerated people surrender all privacy rights in their calls because they must consent to monitoring by jail staff for institutional security reasons. But privacy is not dispensed or waived in gross. It is not an all-or-nothing right. It is a social expectation that resides with the information's owner or originator. Constitutionally, a person can reasonably expect to keep his information private from some onlookers but not others, and for some purposes but not others.

Mark Jackson could not have reasonably expected to keep his telephone calls private from his jailers in their open efforts to promote internal security. But he could—and did—reasonably expect to keep the calls private from his prosecutors in their surreptitious efforts to gather evidence against him.

The Court cannot shut its eyes to the plain distinctions between these expectations without shunning the Fourth Amendment and more than three decades of constitutional jurisprudence in New Jersey. The New Jersey Supreme Court has long recognized that individuals maintain a constitutional right to privacy vis-à-vis the government in information that they voluntarily expose to third parties for limited purposes. The United States Supreme Court has endorsed the same analysis, most recently when addressing cellphone location data. Jackson's case only comes out differently if pretrial detainees relinquish all privacy rights, in relation to everyone, when they walk through the jailhouse gates. Under the privacy analysis commanded by both the United States and New Jersey Constitutions, they do not.

Here, that analysis applies *a fortiori* because recorded phone calls do more than *imply* some underlying expressive or associational act, as cell phone location data, bank records, or Internet Service Provider subscription information might. They *are* expressive and associational acts themselves. Moreover, a pretrial detainee's calls to friends and family may contain

information about strategy and trial preparation protected by the Fifth and Sixth Amendments. And not only does capturing these conversations entail a high degree of intrusion, but the State's investigative interests supporting this intrusion are diminished. Uniquely, both the call and caller are captive. The calls are recorded and preserved, making them unlikely to disappear, degrade, or be destroyed before a warrant can be secured. The caller will not, but in the rarest cases, present an imminent threat to public safety while incarcerated. There is no reason to categorically dispense with the warrant requirement for access to jail calls. The trial court recognized this and the Court should affirm its conclusion.

Statement of Facts and Procedural History

Amici curiae the American Civil Liberties Union, the American Civil Liberties Union of New Jersey, the National Association of Criminal Defense Lawyers, and the Association of Criminal Defense Lawyers of New Jersey rely on the statement of facts and procedural history set forth by Defendant in his brief filed on January 31, 2019 and by the trial court in its opinion dated July 16, 2018. *Amici* add that the Appellate Division reversed the trial court in a published opinion. *State v. Jackson*, 460 N.J. Super. 258 (App. Div. 2019). This Court granted Defendants' motion for leave to appeal.

Argument

I. The State violates the Fourth Amendment and article I, paragraph 7 when it obtains access to an incarcerated person's recorded telephone conversations without a warrant.

Under the Fourth Amendment to the United States Constitution and article I, paragraph 7 of the New Jersey Constitution, a government search that infringes on a person's reasonable expectation of privacy is presumptively invalid absent a warrant issued upon probable cause. *See State v. Stott*, 171 N.J. 343, 354 (2002). When the government conducts a warrantless search, it bears the burden of proving that the search fell within one of the few narrowly drawn exceptions to the warrant requirement.[1] *State v. Patino*, 83 N.J. 1, 7 (1980). Jackson had a reasonable expectation of privacy in the calls he made to his family from jail, and that privacy interest commands the strictest protection.

[1] Any of the limited exceptions to the warrant requirement do not apply automatically upon invocation, but must remain "[]tether[ed]" to "the justifications underlying the . . . exception." *Arizona v. Gant*, 556 U.S. 332, 343 (2009). Time and time again, the Supreme Court has refused to "unmoor [warrant] exception[s] from [their] justifications . . . and transform what was meant to be an exception into a tool with far broader application." *Collins v. Virginia*, 138 S. Ct. 1663, 1672–73 (2018). Thus, the Supreme Court has chosen not to apply even well-recognized warrant exceptions where the underlying rationale for an exception is absent from a given fact pattern. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (rejecting reliance on "search incident to arrest" exception, based on officer safety, to search a cell phone obtained during an arrest without a warrant).

A. Jackson had a reasonable expectation of privacy in the calls he made to his mother from jail.

1. Jackson did not forfeit all privacy rights in his telephone conversations by exposing them to jail staff for security monitoring purposes.

The United States Supreme Court recently reaffirmed that "the fact that information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Rather, as this Court has long maintained, privacy rights must reflect lived experience. *See, e.g., State v. Hunt*, 91 N.J. 338, 344-45 (1982); *accord United States v. Jones*, 565 U.S. 400, 406 (2012) ("At bottom, we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'") (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)). Thus, "it is unrealistic to say that" exposing information to a third party sheds "the cloak of privacy" surrounding it. *Hunt*, 91 N.J.at 347; *see also Carpenter*, 138 S. Ct. at 2217 ("[W]hat [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (quoting *Katz v. United States*, 389 U.S. 347, 351–352 (1967)(internal quotation marks omitted)); *accord Stott*, 171 N.J. at 363.

That is why Fourth Amendment privacy rights in the content of phone calls survive the ability of phone operators to

eavesdrop on conversations at will. *See Katz*, 389 U.S. at 352. That is why privacy rights in hotel rooms and guest apartments survive the owner's right of access. *See Stoner v. California*, 376 U.S. 483 (1964); *Minnesota v. Olson*, 495 U.S. 91 (1990). That is why "unauthorized driver[s]", who violate rental agreements, maintain expectations of privacy in the vehicles. *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018). That is why privacy rights in cell phone location data survive the cell phone companies' collection and maintenance of the data. *Carpenter*, 138 S. Ct. at 2217. And that is why a government employee's privacy rights in his office survive his coworkers' access for business purposes. *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987). There is no reason that jail calls should be "exempted from the usual requirement of advance authorization by a magistrate upon probable cause." *Katz*, 389 U.S. at 358. The Fourth Amendment does not except jailhouse communications.

Even if the Fourth Amendment's protections did not apply to these calls, the protections of article I, paragraph 7 unambiguously do. New Jersey courts have consistently recognized that a person can reasonably expect to keep his information private from some onlookers but not others, and for some purposes but not others.

Thus, for example, New Jersey protects curbside garbage from police searches even though the contents are susceptible to

inspection by trash collectors. This Court explained that "a person's expectation of privacy can differ in regard to different classes of people." *State v. Hempele,* 120 N.J. 182, 205 (1990) (citing *Ortega*, 480 U.S. at 717). In addition, it is reasonable to expect that those who, by virtue of occupational mandate, may invade another's private materials will do so in a manner delimited by the purposes of their position. *Id.* at 209. Because a person should not anticipate that a garbage collector will rummage through his discarded trash for any reason extraneous to the duties associated with garbage collection, that person does not reasonably open himself to a law enforcement officer's warrantless search for evidence merely by putting his trash out for pick-up. The possibility of inspection by the garbage collector for one purpose does not prepare him for the possibility of inspection by police for another.

This Court reaffirmed these principles in *State v. Stott*, 171 N.J. at 363. The defendant in *Stott* was involuntarily committed to a state-run psychiatric hospital. *Id.* at 348. After his roommate died of an apparent drug overdose, a detective from the prosecutor's office conducted a warrantless search of the defendant's hospital room based on another patient's report that the defendant was selling drugs. *Id.* The Court held that the defendant maintained a reasonable expectation of privacy in the area of his room searched by the detective, even though his

roommate and hospital staff had effectively unfettered access to the space. “We would expect doctors, nurses, and other hospital personnel to inspect all areas of such a facility to ensure that patients are not in a position to harm either themselves or others,” the Court explained. *Id.* at 362. But the appeal presented the Court not with “[t]hat type of hospital-related action,” but rather “with police conduct . . . within the framework of a criminal investigation.” *Id.* at 362-63. Thus, “[t]he participation of law enforcement officers transformed this search from what might have been an objectively reasonable intrusion by hospital staff into the kind of warrantless police action prohibited by our federal and State Constitutions.” *Id.* at 363. The defendant may have surrendered his privacy rights as against hospital personnel for safety-related purposes; he did not thereby also surrender his privacy rights as against law enforcement agents for investigative purposes.

Stott is no outlier in its recognition that the fact that one government actor may collect sensitive information from a person for a specific reason does not mean that law enforcement can access that same information for criminal investigative purposes without a warrant. For example, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the United States Supreme Court found a reasonable expectation of privacy in diagnostic test results obtained and held by a state hospital. *Id.* at 78. The

Fourth Amendment constrained prosecutors' access to those records. *Id.* at 86. Although the case was ultimately decided under the special-needs doctrine, the predicate holding, that there is a reasonable expectation of privacy in the medical information held by the state hospital, illustrates the broader applicability of the logic of *Stott*.

Prescription drug monitoring program (PDMP) databases provide yet another context where information properly held by a state agency can be withheld from law enforcement, absent a warrant. PDMP databases record information about all controlled substance prescriptions filled by pharmacies in the state, and retain and use the records for public health and professional licensing reasons. The United States Supreme Court has held that, although PDMPs implicate serious privacy concerns, states may utilize them. *Whalen v. Roe*, 429 U.S. 589, 600, 605 (1977). That does not, however, give law enforcement free reign to obtain prescription records from those databases without a warrant; that is so notwithstanding that the databases are run by a state agency. *See State v. Brock*, 210 So. 3d 276, 277 (La. 2017) (per curiam) (warrant required for law enforcement access to state-run PDMP under state constitution) (*citing State v. Skinner*, 10 So. 3d 1212, 1215 (La. 2009)); *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 998 F. Supp. 2d 957, 963–67 (D. Or. 2014) (warrant required for law enforcement

access to state-run PDMP under Fourth Amendment), *rev'd on standing grounds*, 860 F.3d 1228 (9th Cir. 2017).

Indeed, outside of the medical context courts have recognized that people do not forfeit privacy interests vis-à-vis law enforcement simply because information is held by other government actors. For example, in *Grand Jury Subpoena v. Kitzhaber*, 828 F.3d 1083, 1091 (9th Cir. 2016), the Ninth Circuit quashed a grand jury subpoena that sought, among other things, copies of a former governor's personal emails that were archived on a state server. The court recognized the reasonable expectation of privacy in the emails, including because "some concern particularly private matters, including communications about medical issues and [the former governor's] children." *Id.* at 1090. And the Ninth Circuit explained that the state's "current possession of the emails does not vitiate that claim." *Id.*

Similarly, in *United States v. Hasbajrami*, the Second Circuit recognized that, even where the government legitimately obtains foreign intelligence information without a warrant, "querying that stored data does have important Fourth Amendment implications." ___ F.3d ___, 2019 U.S. App. LEXIS 37583, *67 (2d. Cir. 2019). The panel explained that "those implications counsel in favor of considering querying a separate Fourth Amendment event that, in itself, must be reasonable." *Id.* In

other words, where the government lawfully collects information for one purpose, the long-term retention, storage, and searching of that information is not necessarily lawful and requires its own Fourth Amendment analysis. As the Second Circuit explained: law enforcement "queries directed to a larger archive of millions of communications collected and stored by the [intelligence agencies] for foreign intelligence purposes, on the chance that something in those files might contain incriminating information about a person of interest to domestic law enforcement, raise different concerns." *Id.* at *73. Put differently, "[M]uch may depend on who is querying what database. . . ." *Id.* at 72.

The very same logic applies in jail settings, where the reasonableness of a search is bounded by legitimate concerns for institutional security. In *State v. Jackson*, the Law Division found that correctional staff had conducted an illegal, pretextual search of the defendant's jail dormitory at the prosecutor's behest in an attempt to recover incriminating letters and writings. 321 N.J. Super. 365, 367 (Law Div. 1999). Although the court acknowledged that jail surveillance is necessary and pervasive since "weapons, drugs and other contraband present a serious danger to institutional order," it held that "[t]he search of [defendant's] dormitory area . . . was not remotely connected to any institutional security

concerns." *Id.* at 373, 380. It was, instead, "a pretext designed to permit the prosecutor to invade defendant's limited zone of privacy in order to bolster its case against the defendant." *Id.* at 380. The search violated by the defendant's rights under both the Fourth Amendment and article 1, paragraph 7.

The court in *Jackson* drew from the Second Circuit's persuasive decision in *United States v. Cohen*, 796 F.2d 20, 24 (2d Cir. 1986), which held unconstitutional a search conducted by corrections officers at the direction of an assistant United States attorney seeking incriminating evidence. The defendant had a reasonable expectation of privacy in effects searched "at the instigation of non-prison officials for non-institutional security related reasons." *Id.* The court emphasized that "no iron curtain separates prisoners from the Constitution," and "the loss of such rights is occasioned only by the *legitimate* needs of institutional security." *Id.* at 23 (emphasis in original).

Courts in Florida, Georgia, and Nebraska have also echoed *Cohen*'s reasoning. In *McCoy v. State*, the Florida District Court of Appeals held that a person detained while awaiting trial had a legitimate expectation that he would be protected from a search of his cell for incriminating evidence because the search was "not initiated by institutional personnel and [was] not even colorably motivated by concerns about institutional security."

639 So. 2d 163, 166 (Fla. Dist. Ct. App. 1994). Likewise, in *Lowe v. State*, the Georgia Court of Appeals held that a warrant was required for a "prosecutor instituted search [the purpose of which] was not to maintain security and discipline in the prison, but to further the State's effort to obtain a conviction against a pre-trial detainee." 416 S.E.2d 750, 752 (Ga. Ct. App. 1992). And in *State v. Neely*, the Nebraska Supreme Court found that a woman detained pre-trial had a legitimate expectation of privacy in luggage removed from her impounded vehicle and stored in the jail's inventory. 462 N.W.2d 105, 112 (Neb. 1990).

Here, the State conducted a search for the explicit and exclusive purpose of obtaining evidence against Jackson. He may have shed his right to make phone calls free from monitoring by jail staff charged with maintaining safety, order, and discipline within the facility, but he did not give up his reasonable expectation of privacy from state law enforcement officers' uninvited ears. A prosecutor is not free to commandeer a jail's security practices to make an end run around the Constitution.

Contrary to the State's argument, Jackson did not and could not give up his privacy rights vis-à-vis county prosecutors by agreeing to call monitoring by jail staff. As an initial matter, Jackson was not on notice that a prosecutor might exploit his captivity by seizing and sifting through his recorded telephone

conversations for reasons unrelated to jailhouse security. While incarcerated, Jackson signed a form constituting "an agreement between MARK JACKSON and the ESSEX COUNTY CORRECTIONAL FACILITY." Pa 101 (capitalization in original).[2] The last line of the agreement states: "I understand and agree that telephone calls are subject to monitoring, recording, and may be intercepted or divulged." *Id.* The agreement implied, in light of its context and contents, that the Essex County Correctional Facility might monitor, record, intercept, or divulge conversations based on safety needs—that, at the most extreme, it might turn over recordings to law enforcement if it overheard a threat that it could not adequately address through internal measures. The agreement did not suggest that a prosecutor might, of his own initiative, seek access to recordings in bulk to attempt to extract incriminating evidence without ever having to demonstrate a justification to an independent magistrate. The form did nothing to undermine Jackson's reasonable expectation of privacy from that category of search.

[2] "Pa" refers to the appendix filed on behalf of the Plaintiff-Appellant State of New Jersey in this matter.

2. Jackson did not consent to the State accessing his calls for its use in his prosecution.

Neither does the agreement represent Jackson's consent to intrusion by any and all entities, for any and all purposes. Courts analyze consent searches in terms of waiver. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) ("voluntariness of consent to a search must be 'determined from the totality of all the circumstances'"); *State v. Johnson*, 68 N.J. 349, 353 (1975). And in New Jersey, courts must apply an "exacting" constitutional standard in examining consent to search. *State v. Ellis*, 246 N.J. Super. 72, 77 (Law. Div. 1990). "Courts will indulge every reasonable presumption against the waiver of fundamental constitutional rights and will not presume their loss by acquiescence." *State v. Guerin*, 208 N.J. Super. 527, 533 (App. Div. 1986). To be valid, consent to search must be "'unequivocal and specific' and 'freely and intelligently given.'" *State v. King*, 44 N.J. 346, 352 (1965) (quoting *Judd v. United States*, 190 F.2d 649, 651 (D.C. Circ. 1951)).

Jackson signed his name to a vague set of terms relating to the "Inmate Telephone System" for the chance to exercise his speech rights and make life-affirming contact with his loved ones. Pa 101. Jackson's purported consent cannot be considered unequivocal, specific, freely given, or intelligently given.

First, when law enforcement carries out a search based on consent, they are "limited by the scope, whether express or implied, of the consent." *State v. Younger*, 305 N.J. Super. 250, 256 (App. Div. 1997). The State bears the burden of proving that a person who gave consent had knowledge of the scope of the consent search, and the extent of that knowledge defines the outer limits of the search's scope. *See State v. Hampton*, 333 N.J. Super. 19, 29 (App. Div. 2000). If any consent is grounded in the agreement Jackson signed, it is the narrow consent he gave to the only other party to the agreement: "the ESSEX COUNTY CORRECTIONAL FACILITY." Pa 101. The ambiguous last word of the last paragraph of the form, "divulged," *id.*, unmoored from a clarifying indirect object, cannot possibly broaden the scope of the consent to include any other entity with whom the jail elects to share its recorded bounty, for any reason.

Moreover, even if Jackson gave specific, unequivocal, and intelligent consent to prosecutorial fishing expeditions by signing a form that made no mention of any agency other than the jail where he was being held nor any purpose beyond standard security monitoring, the consent was not given freely. Choosing between entering the agreement or giving up his opportunity to call his friends and family for as long as he remained incarcerated was really no choice at all. It was an unacceptable ultimatum, pitting his privacy rights against his core First

Amendment rights. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) (finding "it intolerable that one constitutional right should have to be surrendered in order to assert another"). The jail environment only compounds the coercion inherent in this constitutional tug-of-war. Pretrial detention can leave an accused especially vulnerable. There are "powerful psychological inducements to reach for aid when a person is in confinement. . . . [T]he mere fact of custody imposes pressures on the accused." *United States v. Henry*, 447 U.S. 264, 274 (1980) (citing *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). No choice a person makes is genuinely free in a setting designed to strip him of his freedom.

A practice that deters people in jail from connecting with their loved ones under threat of losing their privacy rights presents profound policy problems, in addition to constitutional ones. Family contact during incarceration reliably reduces recidivism. *See* Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. of Contemp. Crim. Just. 314, 316 (2005); Rebecca L. Naser & Christy A. Visher, *Family Members' Experiences with Incarceration and Reentry*, 7 W. Criminology Rev. 20, 21 (2006). The Federal Bureau of Prisons has recognized that "telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an

inmate's personal development." 28 C.F.R. § 540.100(a). And Congress, in reenacting the Second Chance Act of 2007, cited "evidence to suggest that inmates who are connected to their children and families are more likely to avoid negative incidents and have reduced sentences." 34 U.S.C. § 60501. Fortunately, the Constitution safeguards us against the world where a person must sacrifice familial ties to preserve his privacy.

B. Requiring prosecutors to secure warrants in order to access jail calls is the only adequate way to protect the constitutional and policy interests the calls implicate.

Once a court confirms that a privacy right exists, it considers the level of protection appropriate to safeguard that right. *State v. Lunsford*, 226 N.J. 129, 136 (2016). "As a general rule, the greater the degree of intrusion into one's private matters by the government, the greater the level of protection that should apply." *Id.* at 131. Phone conversations have commanded a warrant's protection for more than half a century under the federal constitutional law that comprises New Jersey's doctrinal floor. *See Katz*, 389 U.S. at 353. This Court need not look further than this long-standing precedent to extend the warrant requirement to recorded jail calls.

Should it harbor any doubt, however, the Court may look also to the momentous constitutional and policy interests that

envelope an incarcerated person's calls. The State's warrantless intrusion into Jackson's recorded conversations implicated Jackson's First, Fifth, and Sixth Amendment rights. Equally, the State's actions implicate the rights of every individual that is subject to pretrial detention in New Jersey – 8,669 individuals in 2018 alone[3] – for whom primary communications with the outside world are, by design and necessity, funneled through the jail telephone system.

The Fourth Amendment and article 1, paragraph 7 reflect the drafters' intent to safeguard free expression from unrestrained search and seizure powers. *See Marcus v. Search Warrants of Prop. at 104 E. Tenth St.*, 367 U.S. 717, 729 (1961). Courts must apply the warrant requirement with "scrupulous exactitude" when significant First Amendment rights are involved. *See Stanford v. Texas*, 379 U.S. 476, 485 (1965). The Court did so, for example, in *Carpenter*, casting aside the third-party doctrine to require a warrant for historical cell phone location records, which reveal not just "particular movements, but through them [one's] 'familial, political, professional, religious, and sexual associations.'" 138 S. Ct. at 2217 (quoting *United States v.*

[3] Criminal Justice Reform Statistics: Jan. 1 - Dec. 31, 2018, Criminal Justice Reform Information Center, *available at* https://www.njcourts.gov/courts/assets/criminal/cjrreport2018.pdf?c=QDt.

Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)); *accord State v. Earls*, 214 N.J. 564, 569 (2013).

Telephone conversations are quintessentially expressive and associational. That is why, for more than half a century, the United States Supreme Court has held that telephone calls are protected expression in which people hold reasonable expectations of privacy. *Katz,* 389 U.S. at 352. The fact that institutional personnel may monitor pretrial detainees' phone calls for jail security (just like phone company employees can monitor customers' phone calls for certain purposes, *see Smith v. Maryland*, 442 U.S. 735, 746-47 (1979) (Stewart, J., dissenting)) does not mean that incarcerated people (and their loved ones) lose their reasonable expectation of privacy in what they say. If the State must get a warrant to look through garbage because it contains "[c]lues to people's most private traits and affairs," *Hempele*, 120 N.J. at 201, surely the State must also get a warrant to go straight to the source. A conversation does not merely hint at social, political, and personal activities "of an indisputably private nature," *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) (quoting *People v. Weaver*, 909 N.E.2d 1196, 1999 (N.Y. 2009)), a conversation *is* such an activity. And because an incarcerated person has limited opportunity to speak with friends and family face-to-face—and because jails also monitor and place significant restrictions on

the mail—the telephone is his principal outlet for intimate communications. Because incarcerated people cannot meaningfully communicate without using the telephone, the opportunity to "opt out" of surveillance is as impractical as "disconnecting [one's] phone from the network" to avoid government access to location data. *Carpenter,* 138 S. Ct. at 2220.

Telephone calls are also a pre-trial detainee's primary means of directing and coordinating his defense. The Fifth Amendment's Due Process Clause, the Sixth Amendment, and article I, paragraph 10 of the New Jersey Constitution afford him the right to do so without a prosecutor's direct knowledge or interference. Once the Sixth Amendment has attached, for example, the accused has "the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton*, 474 U.S. 159, 176 (1985). Thereafter, "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by [it]." *Id.* at 171. And the New Jersey Supreme Court has held that our State Constitution affords "greater protection of the right to counsel." *State v. Sanchez*, 129 N.J. 261, 274 (1992).

Even seemingly innocuous, non-privileged details divulged in a phone call could, if exposed to the State, undermine an incarcerated person's right to counsel and right to prepare a defense. The United States Supreme Court has recognized that

"the most critical period of the proceedings [for an accused is] . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932). For example, during this time, an accused, working to assist in his defense, may wish to provide counsel with contact information regarding potential fact and character witnesses. For someone who is incarcerated with no access to their cell phone or social media account, they may need to communicate with family and friends to assist in obtaining this information. An eavesdropping prosecutor will be given access to the names and contact information for these individuals—and perhaps, too, the accused's social media accounts and passwords.

Privacy is not only valuable in and of itself; it is also the first line of defense against encroachment on other rights, including those guaranteed by the First, Fifth, and Sixth Amendments. Exposing incarcerated people's conversations to the government undermines their speech and associational rights and their right to prepare a defense through counsel. It also threatens the State's penological interests, because permitting incarcerated people to maintain relationships through private communications promotes institutional security and reduces recidivism.

The State cannot overcome Jackson's vital privacy interests in his recorded conversations by claiming any investigative exigency. *See Lunsford*, 226 N.J. at 282. Certainly, "to amass enough evidence to meet the [probable cause] standard inevitably slows down investigations in the early stages." *Id.* But expedience has never sufficed to justify curtailing privacy rights. Indeed, a core purpose of wiretap laws is to limit the use of intercepts so that they are not "routinely employed as the initial step in criminal investigation." *United States v. Giordano*, 416 U.S. 505, 515 (1974); *State v. Fornino*, 223 N.J. Super. 531, 544 (App. Div. 1988) (noting that the New Jersey act was modeled after the federal Wiretap Act but intended to be even more restrictive in some respects under *State v. Catania*, 85 N.J. 418, 436–439 (1981)).

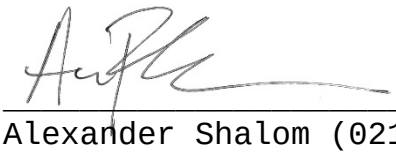
There is nothing in the facts of this case, nor any argument by the State, to suggest that the government should be held to a lower standard of proof for access to jail calls in order to prevent loss of evidence or meet any other investigative need. If, say, jail personnel overheard an incarcerated person coordinating an imminent assault on someone on the outside, a prosecutor might be able to request the person's calls without a warrant. This is not such a case. Jackson posed no public safety threat. Neither Jackson nor his recorded calls were going anywhere. Requiring the State to seek

a warrant before invading Jackson's substantial privacy rights would not have been unduly burdensome or time consuming and the Constitution demands nothing less.

Conclusion

Both the U.S. and New Jersey constitutions require the State to secure a warrant in order to access recorded conversations between incarcerated people and their friends and family on the outside. This Court should affirm the sound decision below.

Respectfully submitted,



Alexander Shalom (021162004)
Jeanne LoCicero
American Civil Liberties Union of New Jersey Foundation
PO Box 32159
Newark, NJ 07102
(973) 854-1714
ashalom@aclu-nj.org
Counsel for *Amici Curiae*, the American Civil Liberties Union and the American Civil Liberties Union of New Jersey

Daniella Gordon (39362005)
Hyland Levin Shapiro LLP
6000 Sagemore Drive, Suite 6301
Marlton, NJ 08053
(856) 355-2915
gordon@hylandlevin.com
Counsel for *Amicus Curiae*, the National Association of Criminal Defense Lawyers

Sharon Bittner Kean (020601995)
President, Association of Criminal Defense Lawyers of New Jersey
244 Green Village Road
Madison, NJ 07940
(973) 236-9400
sharonkean@keanlaw.com
Counsel for *Amicus Curiae,* the Association of Criminal Defense Lawyers of New Jersey

Dated: January 3, 2020