

NEW YORK COURT OF APPEALS ROUNDUP

DETAINEE CALL RECORDINGS MAY BE USED IN PROSECUTIONS: *'PEOPLE V. DIAZ'*

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The Court of Appeals issued a decision last month with important implications for the privacy concerns of individuals in pretrial detention. In *People v. Diaz*, the court held that as long as detainees are informed that their phone calls are being monitored and recorded, the government may use those recordings in the detainees' criminal prosecutions without violating the detainees' Fourth Amendment rights. A correctional facility therefore may monitor and record detainees' calls and then share the recordings with a district attorney's office to use in the detainees' prosecutions. The case was decided over a vigorous dissent, which argued that, particularly in light of the way information is shared in modern society, a person's consent that data may be used for a particular purpose or by a particular party cannot be taken as a complete waiver of that person's privacy expectations in the data.

The case arose out of the trial of defendant Diaz for burglary and robbery. Diaz was held in pre-trial detention for eight months in one of the Rikers Island Correctional Facilities during which time he made approximately 1,100 phone calls. At trial, the prosecution sought to introduce excerpts from four phone calls that incriminated Diaz. The trial court admitted the recordings into evidence over Diaz's objection. A divided Appellate Division, Second Department, affirmed. The dissenting justice granted Diaz leave to appeal.

The majority affirmed in an opinion written by Judge Paul G. Feinman. The court noted that the New York City Department of Correction (DOC) has been monitoring inmate phone calls since 2008, with the exception of phone calls with counsel, clergy, and doctors. Inmates at Rikers are notified that their phone calls will be monitored and recorded by (1) signs posted near the telephones stating that calls are monitored and recorded and that use of the phone constitutes consent to such monitoring and recording; (2) a notice in the inmate handbook that calls can be monitored and recorded; and (3) a recording that plays when the inmate picks up the phone stating that the call may be monitored and recorded. Diaz did not dispute that DOC was permitted to monitor and record his calls. Rather he argued that DOC's release of the recordings to the prosecution was an additional search without a warrant, which violated his Fourth Amendment right to privacy.

The majority noted that a person only has a legitimate expectation of privacy under the Fourth Amendment where the person demonstrates an actual (subjective) expectation of privacy and that expectation is one that society recognizes as reasonable. The court held that because Diaz was aware that his phone calls were being

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monitored and recorded, he had no reasonable expectation of privacy in those calls and therefore the Fourth Amendment did not prevent DOC from providing the recordings of the calls to the district attorney's office.

The court noted that the signs posted near the telephones stated that calls are monitored in "accordance with DOC policy," and that the operative DOC operations order provides that recordings of inmate calls will be provided to the district attorney's office upon approval by DOC. Further, while the inmate handbook said that calls may be monitored "for purposes of security," it did not restrict the ways in which recordings could be used or disseminated. Finally, the court noted that while Diaz had challenged the "voluntariness" of any findings of consent to the monitoring and recording of his phone calls, this argument was not preserved for review.

Judge Rowan D. Wilson dissented in a detailed, scholarly opinion joined by Judge Jenny Rivera. Judge Wilson noted that it was undisputed that Diaz had a protectable privacy interest in his calls. While the majority found Diaz had waived his expectation of privacy by consenting to the monitoring and recording, Judge Wilson questioned the voluntariness of any such consent because Diaz did not provide affirmative consent and had no realistic alternative to using the monitored phones. Judge Wilson, however, assumed that consent was voluntary and instead departed from the majority by finding that Diaz's consent to the monitoring and recording by the DOC for security purposes "cannot reasonably be construed to include consent for the District Attorney—a law enforcement entity—to search that information for prosecutorial purposes."

Judge Wilson emphasized that the none of the notices provided to Diaz indicated that the recordings could be turned over to the prosecution, and he rejected application of the "third-party" doctrine: that by voluntarily consenting to the disclosure of the calls to DOC for prison security, Diaz waived all privacy interest in the calls. Judge Wilson found that in recent decisions, the U.S. Supreme Court has moved away from "blind application" of the third-party doctrine, citing, among other authorities, *Carpenter v. United States*, 138 S.Ct. 2206 (2018), where the Supreme Court found that the government needed a warrant in order to obtain information about a person's physical movements from wireless carriers. More generally, Judge Wilson noted that in modern society, people deposit "mountains of data with third parties who preserve it indefinitely," such as Internet service providers, social media websites, wireless phone carriers, credit card companies, and medical insurers. Application of the third-party doctrine would mean that the government could obtain all such information without a warrant because it has been voluntarily disclosed in some way to third parties. Judge Wilson argued that the Fourth Amendment and privacy law must keep pace with modern society and technology by recognizing privacy rights in data voluntarily disclosed to third parties.

Judge Wilson emphasized also that Diaz could not leave Rikers Island and so, for eight months, had no viable means of everyday communication with the outside world except for DOC telephones. Defendants awaiting trial who are out on bail, in contrast, cannot be subjected to government monitoring or recording of their phone calls without a warrant. Judge Wilson reasoned that as a society, we should not prosecute crime by jailing suspects in inaccessible locations for long periods of time and then monitoring their phone calls for incriminating statements to use against them. His proposed solution is for the district attorney to seek a search warrant for the recordings and demonstrate its need for the material.

Judge Wilson distinguished the case from *People v. Cisse*, a decision issued by the court on the same day as *Diaz*. *Cisse* also concerned the prosecution's use of recordings of an inmate's calls, but the issue before the court was whether the use violated New York or federal wiretapping statutes. No Fourth Amendment claim was made. In a memorandum opinion, the court affirmed defendant's conviction on the basis that *Cisse* had impliedly consented to the monitoring and recording of the phone calls. In his dissent in *Diaz*, Judge Wilson

explained that the consent to monitoring and recording renders the interception of the calls compliant with wiretapping statutes, but does not equate to consent for all uses of the intercepted communications.

For the majority of the court, consent to the monitoring and recording of the calls was sufficient to waive any expectation of privacy under the Fourth Amendment. The majority did, however, leave open the possibility that an inmate may challenge whether under the circumstances consent is voluntary. Nonetheless, until such issue is decided, inmates in pretrial detention should assume that anything they say on the prison telephone may be used against them at trial.

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