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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 10

ALI CISSE,

Appellant.

20 Eagle Street
Albany, New York
January 10, 2019

Before:

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

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1 JUDGE RIVERA: Number 10, People v. Ali Cisse.

2 MR. BOVA: Matthew Bova for Mr. Cisse. I'd like
3 to reserve two minutes for rebuttal.

4 JUDGE RIVERA: Yes, of course.

5 MR. BOVA: I'd like to switch gears and focus on
6 a narrower issue which is the 60.45 voluntariness
7 instructional issue. And then I'd like to cover the De
8 Bour issue.

9 In this case counsel expressly requested an
10 instruction quoting the text of 60.45(2)(a) on
11 voluntariness --

12 CHIEF JUDGE DIFIORE: Counsel, what was the
13 evidence of involuntariness that was adduced at the trial?

14 MR. BOVA: Mr. Cisse is a seventeen-year-old - -
15 - at the time - - - at the time of his incarceration, a
16 seventeen-year-old boy. He's incarcerated on an isolated
17 island, cut off from friends and family.

18 CHIEF JUDGE DIFIORE: I get all that. Was that
19 what was produced? Was that the evidence that was produced
20 at trial, that he didn't have any visitors, he didn't have
21 any phone calls? Is that what you're telling me?

22 MR. BOVA: No, there were - - - there were phone
23 calls. But it's the isolation that creates - - - and I
24 want to focus very closely - - -

25 JUDGE FEINMAN: But I guess, traditional



1 voluntariness, right, to use the most extreme example, is
2 you beat the confession out with a rubber hose, right?

3 And - - - and I think what the Chief is getting
4 at is what evidence was introduced at the trial by which a
5 jury could find that this was involuntary in the
6 traditional sense?

7 MR. BOVA: Well - - -

8 JUDGE FEINMAN: I mean, it's not a Miranda issue.
9 It's a - - - you know, it's - - - it's that kind of 60.45
10 traditional involuntariness.

11 MR. BOVA: Well, a rational jury could find
12 involuntariness under the statutory text. And that is the
13 dispositive issue. And I want to just focus on the plain
14 meaning. The plain meaning of this court - - -

15 JUDGE FEINMAN: So is it your position, then,
16 that every time you make a request for a voluntariness
17 charge under 60.45 to be submitted to the jury, you must
18 give it?

19 MR. BOVA: When the - - - when there's incarcer -
20 - -

21 JUDGE FEINMAN: Just read the statute? I mean -
22 - -

23 MR. BOVA: When - - - when - - -

24 JUDGE FEINMAN: - - - I don't think that's what
25 you're saying?



1 MR. BOVA: Well, when there's incarceration at
2 Rikers Island, and counsel expressly requests, it's yes,
3 because there is an issue of fact.

4 The statute says that a statement is
5 involuntarily made when it is tain - - - obtained from him
6 by any person by means of undue pressure, which impaired
7 his mental condition to the extent of undermining his
8 ability to make a choice whether or not to make a
9 statement.

10 JUDGE GARCIA: I just want to be sure I - - -

11 CHIEF JUDGE DIFIORE: What about interrogation?
12 Doesn't this impact interrogation, 60.45, or no?

13 MR. BOVA: No, the 60.45(2)(a) expressly does not
14 require interrogation. It simply says that a person - - -

15 CHIEF JUDGE DIFIORE: Does it require a conduct
16 that would prod a defendant to make an incriminatory state
17 - - - incriminating statement?

18 MR. BOVA: It requires undue press - - - pressure
19 by a person. 10.00(7) defines a person - - -

20 CHIEF JUDGE DIFIORE: And your position is, being
21 housed on Rikers Island fits that test?

22 MR. BOVA: Yes, it does. There's an issue of
23 fact that should have gone to the jury.

24 CHIEF JUDGE DIFIORE: For every - - - every
25 seventeen-year-old?



1 MR. BOVA: Certainly for every seventeen-year-
2 old. Yes.

3 CHIEF JUDGE DIFIORE: Or every eighteen-year-old?

4 MR. BOVA: Yes. I don't think age is dispositive
5 - - -

6 CHIEF JUDGE DIFIORE: For every twenty-one-year-
7 old?

8 MR. BOVA: I don't - - - again, I don't think age
9 is dispositive. I think - - -

10 CHIEF JUDGE DIFIORE: For every fifty-year-old
11 career criminal?

12 MR. BOVA: That might be a different case. But
13 the bottom line here is that Rikers places Mr. Cisse - - -
14 the DO - - - the government and a government
15 instrumentality, DOC, places Mr. Cisse on an isolated
16 island and says either use our wiretapped system or be cut
17 off from the outside world.

18 JUDGE STEIN: No, no. They - - -

19 MR. BOVA: Yeah.

20 JUDGE STEIN: No, no. He could still - - -

21 JUDGE FEINMAN: No, he himself knew he had other
22 opportunities.

23 JUDGE STEIN: He can talk to people. He may not
24 be able to make incriminating statements, but he could
25 certainly talk to people about what's going on in the



1 neighborhood, and you know, how - - - how's Mom, and you
2 know, stuff like that.

3 MR. BOVA: No, no. But his choice to make
4 statements on the wiretapped system is the product of undue
5 pressure. Because if he doesn't use - - -

6 JUDGE STEIN: We're talking about isolation being
7 that coercion, that pressure.

8 MR. BOVA: Yes.

9 JUDGE STEIN: So and I'm saying it's not
10 isolation. It - - - it - - - it does require a choice as
11 to what you're going to say and to whom. There's no
12 question about that. But it's not the isolation that, I
13 think, as you're describing it.

14 MR. BOVA: Yes, the isolation forces the
15 statements - - - funnels them onto the wiretapped system.
16 Because if he doesn't use that system, he's cut off from
17 the outside world. That is an issue that should have gone
18 to the jury.

19 Perhaps the District Attorney could say well, you
20 can write letters; you could have visitors. But that is
21 the classic factual issue that should go to a jury. And
22 all we're asking for is a jury instruction on that
23 question, so the jury can assess that undue pressure.

24 And here, the rational jury could have certainly
25 found that the statutory test was satisfied.



1 Also just to go back to the issues that were
2 discussed in the prior case, there was lots of discussion
3 about expectation of privacy. That's a Fourth Amendment
4 doctrine. Mr. Cisse's counsel preserved state and federal
5 wiretapping claims. Under that analysis, expectation of
6 privacy is irrelevant. The statute does not require that.

7 So any analysis in that case as to expectation of
8 privacy does not cover this case.

9 JUDGE GARCIA: And also under that argument,
10 which I understand you've preserved here, the - - - a
11 finding for you in that case would prevent the use of these
12 tapes at all?

13 MR. BOVA: Well, that's our - - - that's our
14 broad - - - that's our broad argument in terms of - - -
15 yes.

16 JUDGE GARCIA: That's your argument under the
17 wiretapping statute, because - - -

18 MR. BOVA: Yes.

19 JUDGE GARCIA: - - - if it's - - - if it's
20 illegal under the wiretapping statute, you can't use it.
21 And in fact, if you used it to prevent a riot, you'd be
22 subject to civil suit, because you're using illegally
23 obtained evidence, right?

24 MR. BOVA: Yes, under - - - under the wiretapping
25 statute, the state and federal legislatures have held - - -



1 and it's - - - it's conceded that the wiretapping statutes
2 apply to Rikers Island. So yes, if the statutory standards
3 are not satisfied, that evidence is inadmissible.

4 As to the De Bour issue - - -

5 JUDGE GARCIA: It's not only inadmissible in a
6 criminal case. The prison can't use it. I mean, nobody
7 can use it if it's a wiretapping violation?

8 MR. BOVA: Well, the - - - the acquisition would
9 be - - - would be illegal under the - - -

10 JUDGE GARCIA: Right.

11 MR. BOVA: - - - wiretapping statute. But our
12 narrower argument is that as to scope - - - is as to scope
13 of consent.

14 JUDGE GARCIA: But that's not your wiretapping
15 argument; is it?

16 MR. BOVA: Yes, it is, be - - -

17 JUDGE GARCIA: I mean, because wiretapping is,
18 consent or not consent - - - like you say, it's not a
19 Fourth Amendment issue. It's a statutory issue. So either
20 you consented or you didn't.

21 MR. BOVA: No, but under the wire - - -

22 JUDGE GARCIA: You don't have a partial consent
23 to the wiretapping statute, right?

24 MR. BOVA: - - - tapping statute, the - - - the
25 wiretapping cannot exceed - - - assuming we're in the



1 consent - - - under the - - - we're under the consent
2 analysis, the wiretapping cannot exceed the scope of
3 consent. So the statutory analysis - - -

4 JUDGE WILSON: What - - - what could Rikers do -
5 - - what kind of notice, if any, could they give to avoid
6 wiretapping and be able to monitor calls for security
7 purposes? Is there anything they could do?

8 MR. BOVA: Well, un - - -

9 JUDGE WILSON: Because your first argument seemed
10 to be if you were held at Rikers, you can't give voluntary
11 consent to anything?

12 MR. BOVA: Yes, be - - - yes, that's our - - -
13 our first broad argument is that notice does not equal
14 consent.

15 JUDGE WILSON: Well, what could - - -

16 MR. BOVA: But as to the limited argument - - -

17 JUDGE WILSON: - - - what could they do?

18 MR. BOVA: Well, under that argument, they
19 couldn't - - -

20 JUDGE WILSON: Does Rikers - - - does Rikers have
21 a legitimate need to be able to listen to phone calls made
22 by inmates to make sure they're not bringing bombs into
23 Rikers?

24 MR. BOVA: Rik - - - Rikers can - - - if Rikers
25 has probable cause, they can get a warrant, yes. But



1 beyond - - - beyond that, if the wire - - -

2 JUDGE WILSON: But otherwise, they can't just
3 monitor the calls to make sure nothing's happening?

4 MR. BOVA: No, they can't engage in dragnet
5 surveillance under our first broad argument.

6 JUDGE WILSON: And there's no way that they could
7 get any sort of consent from anyone who's housed there that
8 would be effective?

9 MR. BOVA: Well, no. If someone affirmatively
10 consented by - - - by virtue of saying I understand you
11 would like to - - -

12 JUDGE WILSON: But they're - - - they're under
13 undue pressure, because they're being locked up there with
14 no ability to - - - if I understood your first argument
15 correctly, nobody can give voluntary consent if they're at
16 Rikers?

17 MR. BOVA: Yes, I mean, we - - - we have several
18 arguments here. But as to - - - so in terms of - - -

19 JUDGE WILSON: They don't seem to all work
20 together.

21 MR. BOVA: No, but - - - well, if - - - our first
22 argument is that - - - Rikers cannot acquire these
23 statements because the wiretapping statutes prohibit it.
24 But if that argument is unsuccessful, then we have a
25 narrower argument, which is they can acquire the statements



1 so long as they provide the notice that this court
2 referenced in Johnson, which is prosecutorial access;
3 because then it's ensuring that the con - - - that the
4 notice that is provided is covering the acquisition.

5 JUDGE RIVERA: But I think in part what - - -
6 what you're being asked about, at least with respect to
7 that particular argument is: but if they're under so much
8 coercion and pressure, and as I called it before, hell on
9 earth, when would they be able to give consent? Under what
10 circumstances could they consent?

11 MR. BOVA: Well, if someone - - -

12 JUDGE RIVERA: Under the - - - your - - - the
13 argument you're making?

14 MR. BOVA: Un - - - if someone - - - if someone
15 has been - - - if someone has a long history of experience
16 with Rikers Island, and they have been there for a very
17 long time, they under - - - they're - - - they're not new
18 to the system, like Mr. Cisse was, then it might be a
19 different analysis. But Mr. Cisse - - -

20 JUDGE RIVERA: Do they become numb to the hell on
21 earth?

22 MR. BOVA: No, they don't become numb to it. But
23 the circumstances change. I mean, your - - - your
24 experience and the application of that undue pressure is
25 going to change.

1 But all - - - but to resolve all those problems,
2 in terms of broader issues as to whether they can acquire
3 it, our narrow argument is that all we - - - all we're
4 asking for is the instruction. That's the - - - that's a
5 narrow argument under 60.45. Just let the jury assess
6 this.

7 JUDGE FEINMAN: All right, so - - -

8 JUDGE RIVERA: So let them record it, let them
9 use it and disseminate the recordings to the ADA or whoever
10 else they want to, as long as you get the instruction?

11 MR. BOVA: Well, we oppose that, but our narrow
12 argument is that the instruction, in this case, requires
13 reversal.

14 JUDGE RIVERA: If we're going to permit that,
15 then you've got to get the instruction?

16 MR. BOVA: Yes. If you're - - - if that is going
17 to be allowed, if - - - the acquisition of the - - - of the
18 calls is going to be permitted under the federal and state
19 wiretapping statutes, then what has to happen is a jury has
20 to be able to consider the rational theory that exists
21 because of the - - -

22 JUDGE RIVERA: What - - - what if - - - what if
23 the People get a warrant or a subpoena for the calls? Do
24 you still have to get the jury instruction?

25 MR. BOVA: Yes. Yeah, because the - - - the



1 warrant - - - the warrant is only relevant to the question
2 of the federal and state wiretapping statutes, because that
3 warrant - - - the warrant is the touchstone of that - - -
4 of that statutory analysis.

5 But the 60.45(2)(a) analysis, the - - - the
6 analysis, the warrant is irrelevant. That - - - that's
7 simply asking the jury to focus on when someone is at
8 Rikers Island, what kind of choices are they faced with?

9 I mean, this - - - Judge Pigott recognized this
10 in Johnson, and federal judges have recognized it as well.
11 I mean, from Cheely: "A prisoner either uses institutional
12 phones or is cut off from the outside world. It tortures
13 the meaning of the word to call it consent."

14 Another federal judge: "Prisoners are faced with
15 the Hobson's choice of consenting to having their private
16 calls - - -

17 JUDGE FEINMAN: Your red light's on, so I just
18 want to make sure. Is there anything at all that you want
19 to tell us about the De Bour issue?

20 MR. BOVA: Yes. The first thing is that there
21 was LaFontaine error - - - error in the Appellate Division,
22 and this court should reverse on those grounds. If the - -
23 - but alternatively, Reyes should be revisited, because
24 Reyes clashes with the basic reality of police-citizen
25 encounters.



1 JUDGE STEIN: Well, but then is there any - - -
2 then there's - - - there's no way for - - - you're saying
3 there's no way that a - - - that a police officer can ask
4 someone to hold up or stop or question them in any way
5 without a much higher level of - - - of suspicion or cause,
6 right?

7 MR. BOVA: All we're saying is that there has to
8 be founded suspicion. That's it. All we're saying is that
9 the police cannot go among - - - go out on the streets and
10 based purely on a level 1, the lowest level possible, it's
11 almost impossible to fail to satisfy level 1 - - - based
12 purely on that, they cannot go around and ask - - -

13 JUDGE RIVERA: Does your argument turn on whether
14 or not the officer asks or commands?

15 MR. BOVA: It's a command. I think the - - - the
16 command - - -

17 JUDGE RIVERA: So if the officer - - - if - - -
18 if there's a fact finding that here what the officer did
19 was ask, do you lose on this issue?

20 MR. BOVA: No, be - - - well, no, because that
21 fact finding hasn't - - - that - - - if that were the
22 finding - - -

23 JUDGE RIVERA: Yes.

24 MR. BOVA: - - - there would be no rational basis
25 in the record for that.



1 JUDGE RIVERA: Okay.

2 MR. BOVA: This is an officer darting out of a
3 car at 12:15 at night and directing someone - - -

4 JUDGE RIVERA: Didn't the officer testify that he
5 asked?

6 MR. BOVA: The officer testified - - - the
7 officer testified that he said hold - - - stop, hold up,
8 turn around.

9 JUDGE RIVERA: He said I asked him to stop.

10 JUDGE FEINMAN: Wait a minute, wait a minute.
11 But if we're going to go by findings of fact, and we look
12 at A-202, I think what J.H.O. Adlerberg said was: "And he
13 approached and told the defendant to hold up." Nothing
14 about turn around. The testimony may be whatever the
15 testimony is, but those are the findings of fact.

16 Now, I know that there is reference in the
17 Appellate Division to the "turn around"; does that matter?
18 And is - - - is the Appellate Division then invoking
19 different fact finding than was made by the J.H.O.?

20 MR. BOVA: Well, I think - - - I think you could
21 look at it in two ways. First, the Appellate Division fact
22 finding is going to supersede the trial - - - the lower
23 court's fact - - -

24 JUDGE FEINMAN: But they don't say that's what
25 they're doing.



1 MR. BOVA: No, they don't. And I actually think
 2 it's actually academic in this case, because the record
 3 only supports one conclusion, which is what - - - exactly
 4 what the officer testified. On - - - on page 103: "When
 5 you got out of the car, two seconds went by and then you
 6 asked him to stop, correct?" Answer: "Correct."

7 A-107 to 108, testifying that when he approached
 8 appellant the officer had "already asked him to hold up and
 9 turn around."

10 JUDGE RIVERA: Right, so we have - - -

11 MR. BOVA: So what we have - - -

12 JUDGE RIVERA: - - - he asked.

13 Thank you counsel. You have rebuttal.

14 Go ahead.

15 MS. AXELROD: Good afternoon, Your Honors, may it
 16 please the court. My name is Susan Axelrod, and I
 17 represent the respondent.

18 I was going to start with the Rikers Island
 19 calls, unless the - - - the court would like me to start
 20 with the De Bour.

21 JUDGE FEINMAN: It's your argument.

22 MS. AXELROD: Okay, well, it's - - - but it's the
 23 court's questions that I want to make sure that I get - - -

24 JUDGE RIVERA: See how far you get.

25 MS. AXELROD: I'm sorry.



1 JUDGE RIVERA: See how far you get. Go ahead.

2 MS. AXELROD: Okay. In terms of the
3 voluntariness, there was zero evidence on the record in
4 terms of the isolation, beyond the fact that this was a
5 prisoner at Rikers Island. There was no discussion of his
6 inability to communicate with his family. There was no
7 discussion of family and friends who wanted to come but
8 couldn't come. It was the defense attorney saying, look,
9 the notice in this case, because he's in Rikers, isn't
10 sufficient for consent, and we want a voluntariness charge.

11 That is so far removed from what the statute
12 itself requires, that the court was correct in its
13 determination that it would not give the charge.

14 What counsel is now essentially saying is any
15 time we have Rikers Island calls, as a matter of law, every
16 defendant should be entitled to a voluntariness charge.
17 Aside from the broad sweep of that, that's a completely
18 unpreserved complaint, because below, defendant - - -
19 defense counsel never suggested that this - - - that their
20 use of Rikers Island - - -

21 JUDGE FEINMAN: There's an automatic - - -

22 MS. AXELROD: - - - calls goes hand-in-glove with
23 60.45.

24 In terms of the discussion about consent and the
25 limitations of consent, the bottom line is in order for the



1 prisons to intercept these phone calls, they have to bring
2 themselves within the New York State wiretap statute. The
3 way our wiretap statute is drafted, unlike the federal
4 statute, the only way they are entitled to listen at all is
5 if they obtain the consent of the defendant - - - or I'm
6 sorry, of the prisoner.

7 Under the wiretap statute itself, it does not
8 state anything about the limitation of use of calls. It
9 merely focuses on consent. Now, when you think about the
10 wiretap statute, that is a statute that anticipates the use
11 of those calls at trial. So implicit in the consent of the
12 wiretap statute is that those calls are going to be used at
13 trial.

14 The - - - the defense - - - the legislature
15 clearly did not see reason to bifurcate the consent and say
16 not only do you have to consent to the recording, but you
17 also, at that time, have to consent to the dissemination to
18 the prosecutor.

19 JUDGE RIVERA: So - - - so then the notice is
20 misleading that says it's being monitored and recorded for
21 public security pur - - - are you saying that's misleading?

22 MS. AXELROD: No, not at all, Your Honor.
23 They're explaining why they're asking for your consent.
24 But the bottom line is they need to ask for your consent.
25 They didn't have to put in that they're monitoring it for



1 security purposes. But they gave the defendants that
2 information. That's separate from - - - from telling them
3 we need you to consent to this recording in order for you
4 to use those phone calls.

5 JUDGE FEINMAN: That's our rationale? The "for
6 purposes of" is DOC's - - -

7 MS. AXELROD: Exactly. It's their - - -

8 JUDGE FEINMAN: - - - rationale?

9 MS. AXELROD: - - - rationale.

10 JUDGE WILSON: But there's not a - - - there's
11 not a Fourth Amendment claim in this case, correct?

12 MS. AXELROD: There is not. And in - - - in - -
13 -

14 JUDGE WILSON: So then I'm not sure why - - - I
15 think maybe you're doing more work than you needed to do,
16 right? That is - - -

17 MS. AXELROD: Well, I'm happy to sit down.

18 JUDGE WILSON: Well, I didn't mean it that way.
19 I'll keep you up here for at least a minute longer. If
20 there's - - - if - - - if this is just a wiretapping claim,
21 if there's consent to the recording and the wiretapping for
22 any purpose, that ends the inquiry for the wiretapping,
23 right?

24 MS. AXELROD: Correct.

25 JUDGE WILSON: I mean, if - - - it's not a - - -



1 whether the wiretapping statutes were enacted with the
2 expectation they would be used in court or not seems sort
3 of irrelevant. That may be relevant to a Fourth Amendment
4 inquiry, but that's not - - - there's no argument about
5 that here, right?

6 MS. AXELROD: That's correct, Your Honor.

7 JUDGE WILSON: So we don't - - - we don't worry
8 about what the scope of the consent is. If there's consent
9 for anything at all, that's consent to the recording, and
10 that ends the story, no?

11 MS. AXELROD: That's - - - that's exactly
12 correct. And that's - - - that's the point that we're
13 making.

14 In terms of - - -

15 JUDGE RIVERA: Did he make a due process
16 argument?

17 MS. AXELROD: He made a due process argument.
18 But his due process argument had nothing - - - I actually
19 would have to go back and double check his due process
20 argument. But his due process argument was - - - actually,
21 I'm blanking on his due process argument. If you can give
22 me one moment, I'll just double check the - - -

23 JUDGE FAHEY: I thought the argument there was
24 that it wasn't preserved. I thought that's what your
25 argument - - -



1 MS. AXELROD: Well, the - - - the due process
2 argument - - -

3 JUDGE FAHEY: Yeah.

4 MS. AXELROD: - - - he's trying to make now was
5 not preserved. His current due process argument is I can't
6 facilitate my defense because my client is - - - I - - - as
7 a defendant, I'm worried about calling witnesses, because -
8 - -

9 JUDGE FAHEY: And I thought - - - there was a
10 right to counsel argument regarding the recordings also?

11 MS. AXELROD: That's correct. And that - - - the
12 defendant is, again, asking this court to extend the state
13 right to counsel - - -

14 JUDGE FAHEY: Constitutional right to counsel to
15 cover - - -

16 MS. AXELROD: - - - which this court has not
17 seemed inclined to do, did not do in Johnson. In fact,
18 extending it in this matter, would run - - - would push
19 Velasquez way beyond all of its boundaries.

20 JUDGE RIVERA: But he didn't raise - - - I
21 thought he raised a due process and standards of fairness.
22 I - - - I thought both defendants did that, but we're only
23 talking about Mr. Cisse.

24 MS. AXELROD: He made a general statement that -
25 - - for people in prison, they are going to be talking



1 about the case. And as a result, the admission of the
2 calls give rise to equal depress - - - equal protection and
3 due process issues. That - - - that is what he said.

4 JUDGE RIVERA: Um-hum. And can you address that
5 argument?

6 MS. AXELROD: Yes.

7 JUDGE FEINMAN: He said that to the trial judge
8 or he said that to the Appellate Division?

9 MS. AXELROD: No, no, he said that to the trial
10 judge.

11 JUDGE FEINMAN: Okay.

12 MS. AXELROD: The notion that due process is
13 violated by allowing Department of Corrections to engage in
14 the security measures that it needs to keep itself safe,
15 that's the balancing - - -

16 JUDGE RIVERA: No, I - - - I think the point was
17 the dissemination to the People for purposes of bolstering
18 their case that's pending against the individual.

19 MS. AXELROD: I understand that.

20 JUDGE RIVERA: Their argument is not about the
21 public security of the facility.

22 MS. AXELROD: Well, actually - - -

23 JUDGE RIVERA: They have no grounds to challenge
24 that.

25 MS. AXELROD: - - - he actually made that in the



1 context, I believe, of just the general wiretapping, and
2 not actually turning it over to the prosecutor.

3 But the bottom line is, the prisoners have - - -

4 JUDGE RIVERA: But now we're talking about this
5 due process argument.

6 MS. AXELROD: I understand that, Your Honor. But
7 the bottom line is, while it's certainly correct that it is
8 more comfortable to be out of jail than to be in jail, any
9 defendant actually faces the problem that anything they say
10 about the case to anybody outside of their spouse is now
11 fair game to be - - -

12 JUDGE RIVERA: Yeah, but the difference is that
13 if - - - if they had the money to post bail and get out, if
14 the ADA wanted this, unless, as you say, the third party
15 wants to give it up in the con - - - after having a
16 conversation, they have to get a warrant.

17 MS. AXELROD: If the ADA - - -

18 JUDGE RIVERA: They'd have to take some - - -
19 would they not have to do something else? They can't just
20 record, right? They can't just record their phone
21 conversations, correct?

22 MS. AXELROD: Well, no, that's not actually what
23 I was saying. What - - -

24 JUDGE RIVERA: No, but that's what I'm saying.

25 MS. AXELROD: I understand that. But - - -



1 JUDGE RIVERA: That's what I'm saying is the
2 distinction - - -

3 MS. AXELROD: - - - when you're talking about a -
4 - - a due process argument, you're also talking about a
5 balancing of - - - of factors. And one factor is that
6 there is a security risk. And with that factor comes the
7 fact that the State actually has some rights and
8 protections it's - - - it's entitled to take.

9 JUDGE RIVERA: Yes, to protect the facility. I
10 understand that. I'm not asking you about that. I'm
11 asking you about the People getting access to these calls -
12 - -

13 MS. AXELROD: That, unfortunately, is all part
14 and parcel of being an incarcerated defendant.

15 JUDGE RIVERA: And that's the question. Why is
16 that so?

17 MS. AXELROD: Because there is - - -

18 JUDGE RIVERA: He makes a due process argument
19 that if he could post bail and he gets out that the People
20 have to do something else. They can't just go around
21 recording their calls.

22 MS. AXELROD: No, but we can also go around and
23 talk to every single person that he talks to.

24 JUDGE RIVERA: You - - - you could.

25 MS. AXELROD: And - - -



1 JUDGE RIVERA: And you could have done that when
2 he was at Rikers.

3 MS. AXELROD: We could - - - we could do - - - we
4 could do - - -

5 JUDGE RIVERA: Do all those things. But that's
6 not what - - -

7 MS. AXELROD: - - - many of those things - - -

8 JUDGE RIVERA: - - - happened.

9 MS. AXELROD: - - - but the bottom line is, we -
10 - - no prison - - - no defendant is simply free to go about
11 talking in the way that he wants. And in this particular
12 case, this defendant can certainly talk to his - - -

13 JUDGE RIVERA: You mean, then they don't have to
14 consent?

15 MS. AXELROD: If I - - - if you - - - if you
16 confess - - -

17 JUDGE RIVERA: There's no consent requirement?

18 MS. AXELROD: - - - to a crime to me, and the
19 prosecutor says to me, I'm putting you in the grand jury
20 and I want to know what Justice - - - Judge Rivera said,
21 you didn't have to consent to that.

22 JUDGE RIVERA: No, you just said they have no
23 right to say anything they want. So my question is you're
24 saying that they have no expectation of any privacy, so
25 there is no requirement for consent? Is that the People's

1 position?

2 MS. AXELROD: I think I've made my position
3 clear. Judge, when you were talking - - -

4 JUDGE RIVERA: No, but I'm asking you again,
5 then. Perhaps I need clarification.

6 MS. AXELROD: When you're talking about out
7 defendants - - -

8 JUDGE RIVERA: No, no, no, at Rikers.

9 MS. AXELROD: Then I'm not understanding your
10 question.

11 JUDGE RIVERA: Perhaps I misunderstood you. I
12 thought you had made an argument that a person who's at the
13 time detained can't really just say anything they want?

14 MS. AXELROD: Well, they can say - - - they can
15 say what they want - - -

16 JUDGE RIVERA: Okay.

17 MS. AXELROD: - - - and they can also guard
18 against use of incriminatory evidence by not discussing the
19 case with anybody but their lawyer.

20 JUDGE RIVERA: But you agree that consent is
21 required.

22 JUDGE FEINMAN: And I don't think I'm - - - maybe
23 I'm mixing this up.

24 MS. AXELROD: I'm - - - I'm sorry, I'm still not
25 understand - - - so you're just getting - - -



1 JUDGE RIVERA: So your position is that - - -
2 that DOCs didn't req - - -

3 MS. AXELROD: No, no, no.

4 JUDGE RIVERA: - - - it was not necessary for
5 DOCs to get consent?

6 MS. AXELROD: No, no, no. That's not my
7 position.

8 JUDGE RIVERA: Okay, well, that's what I was
9 trying to clarify.

10 MS. AXELROD: I'm sorry, we were - - - we were at
11 cross purposes.

12 JUDGE RIVERA: Okay, that's fine.

13 MS. AXELROD: No. DOCs cannot listen to a single
14 phone call unless - - -

15 JUDGE RIVERA: Without consent.

16 MS. AXELROD: - - - it comes within the wiretap
17 statute.

18 JUDGE RIVERA: Okay.

19 MS. AXELROD: And here that means consent.

20 JUDGE RIVERA: Okay.

21 MS. AXELROD: That's - - - I'm sorry, that's
22 absolutely correct.

23 JUDGE RIVERA: So that's what I thought your
24 position was.

25 MS. AXELROD: Okay. I'm sorry, Judge Feinman,



1 were you - - -

2 JUDGE FEINMAN: I was just going to clarify
3 factually - - - in this case he actually knew that he was
4 being recorded, because his statements indicate that he
5 knew he shouldn't be making incriminatory statements.

6 MS. AXELROD: Not only that. But this poor
7 seventeen-year-old, who by the way, committed a gunpoint
8 robbery - - -

9 JUDGE FEINMAN: That's irrelevant - - -

10 MS. AXELROD: Well, if defense can - - - defense
11 counsel is going to play on the harsh things, I think I'm -
12 - - it's fair game for me to just point out something else.
13 He - - - when he used this - - - this - - - the phone, one
14 of the things he was doing was engaging in the destruction
15 of evidence by making sure that his co-defendant had gotten
16 rid of the gun. Not only did he do that, but he used code
17 to do that, referring to the gun as "shalom", which was
18 clever, but it was code, which suggested that he was well
19 aware that somebody would be listening and maybe using
20 these calls down the road.

21 And then he said elsewhere, I'm not talking on
22 the phone.

23 JUDGE FEINMAN: Right.

24 MS. AXELROD: So yes, this defendant was well
25 aware.



1 JUDGE FEINMAN: He wasn't as naive as some would
2 paint him.

3 But anything else you want to say - - - because I
4 see the red light's on - - - on the De Bour issue?

5 MS. AXELROD: Well, the - - - while the judge's
6 ruling was a little bit convoluted, the - - - given the
7 nature of the arguments that the People made, it's our
8 position that the judge was actually finding this was level
9 1. This - - -

10 JUDGE FEINMAN: And - - - and that's what the
11 Appellate Division - - -

12 MS. AXELROD: That's what the Appellate Division
13 found.

14 JUDGE FEINMAN: - - - using Nicholson, clarified?

15 MS. AXELROD: Yes. And then the Appellate
16 Division agreed with that. The - - - the police officer's
17 testimony was that he asked. He got out of his car. He
18 didn't come charging out of the car. In fact, they said he
19 got out of the car and waited several seconds before he
20 said anything.

21 He said, hey, hold up a second. And then as he
22 was walking towards the defendant, he started - - - he was
23 seeing the hold - - -

24 JUDGE FEINMAN: Well, by his own testimony, I
25 think he's asking.



1 MS. AXELROD: He - - - he asked.

2 The bottom line is, now the - - - the defense
3 counsel is asking this court to adopt a finding of fact
4 that merely the interaction between him and the defendant
5 made this an authoritative command which automatically
6 moved it into level 2. If this is not a case of a level-1
7 benign interaction, I don't know what a police officer
8 could do much more than that than give somebody candy as -
9 - - as well.

10 The bot - - - if - - - if this case doesn't
11 amount to level 1, then there's no way a police officer can
12 go talk to anybody about anything because it's immediately,
13 according to the defendant's reasoning, level 2.

14 And that me - - - makes De Bour completely
15 unworkable. It reads out level 1 and De Bour analysis - -
16 -

17 JUDGE FEINMAN: De Bour may be unworkable. But
18 nobody, I think, has asked us to overrule it.

19 MS. AXELROD: And I'm about to, as a matter of
20 fact, to point out that because level 1 and level 2, now,
21 are se - - - under their analysis, are so meaningless, that
22 it may be time - - - and I'm asking the court to
23 considering - - - adopting the federal stat - - - standard,
24 which is you only look to see whether there's enforce - - -
25 I'm sorry - - - but the door was open - - - you only look



1 to see if there was enforcement procedures.

2 JUDGE FEINMAN: You know, if the door is open,
3 you walk through it.

4 MS. AXELROD: Exactly.

5 JUDGE RIVERA: Is the door open - - - did they
6 challenge Reyes below? He's asking us now to reconsider
7 it.

8 MS. AXELROD: They didn't. They never raised
9 that below.

10 JUDGE RIVERA: Okay, so when - - - when was this
11 door opened, the one that you're talking about.

12 MS. AXELROD: Right now by the question.

13 JUDGE RIVERA: No, no, I mean, preserving the
14 claim. I understand you're responding to - - -

15 MS. AXELROD: If - - - if this is what they're -
16 - -

17 JUDGE RIVERA: - - - to the bench.

18 MS. AXELROD: - - - if their argument is going to
19 essentially be that any time the police interact with a
20 certain level of the population - - - certain population
21 that it's - - - that they feel that they're - - - have no
22 ability to do anything but stop and freeze - - -

23 JUDGE RIVERA: Yes.

24 MS. AXELROD: - - - then essentially, he's asking
25 you to read out level 1 and level 2, quite frankly, and



1 look to see whether it's level 3. That's really the
2 logical extension of his argument.

3 If that's his argument, then we're going to ask
4 this court to actually reconsider De Bour and - - -

5 JUDGE RIVERA: I think he's trying to bump it up
6 to level 2. But - - -

7 MS. AXELROD: I understand that.

8 JUDGE RIVERA: - - - fair enough. Thank you,
9 counsel. Thank you very much.

10 MS. AXELROD: Thank you very much. For the rest
11 of my arguments, I rely on my brief.

12 JUDGE RIVERA: Thank you, thank you.

13 Counsel? Why isn't he right? Why aren't you
14 just trying to get rid of level 1 and 2?

15 MR. BOVA: Yeah, that's - - - that's - - - all
16 we're - - - all we're doing is asking this court to apply
17 the already-established distinctions between levels 1 - - -
18 level 1, level 2, and level 3.

19 JUDGE GARCIA: Actually not.

20 JUDGE RIVERA: Do we have to overrule Reyes to do
21 that?

22 MR. BOVA: Yes, because Reyes - - - Reyes holds
23 that a command to stop - - -

24 JUDGE RIVERA: Was that argument preserved below?

25 MR. BOVA: The a - - - no, well counsel - - -



1 that argument is preserved, because counsel expressly says
2 this is a common-law inquiry that lacks founded suspicion.

3 To suggest that a trial lawyer has to ask a
4 hearing court to overrule this court, is an act of pure
5 waste. The trial court obviously lacks the authority to
6 overrule this court. It is a total waste of time for
7 counsel to engage in that futile exercise.

8 As to the - - - as to the issue with the
9 preservation of the voluntariness charge, I mean, the
10 record is very clear that counsel expressly asked for the
11 charge on the grounds of isolation. He ex - - - he quotes
12 the statute. At 687 he expressly asks for - - - explaining
13 that the facts presented in this case and it's a byproduct
14 of a coercion contract, because Mr. Cisse was incarcerated
15 at the time.

16 That's - - - that's preserved the claim.

17 CHIEF JUDGE DIFIORE: What were the facts adduced
18 at trial about that, though? That's my question to you.

19 MR. BOVA: Well, counsel's focusing on the
20 incarceration. And that is prec - - -

21 CHIEF JUDGE DIFIORE: But what did he tease out
22 at the trial to support that grand statement of his?

23 MR. BOVA: Well, beyond - - - he didn't need to
24 tease out any more.

25 JUDGE FEINMAN: All right, so is - - - but then



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we're back to where we were before, which is your position becomes that anytime somebody's incarcerated at Rikers, you have to give the charge?

MR. BOVA: Yes, that - - - and all we're saying is that federal - - -

JUDGE FEINMAN: That is a position. We'll - - - we'll think about it.

MR. BOVA: Thank you.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Ali Cisse, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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