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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 1

GREGORY VINING,

Appellant.

20 Eagle Street
Albany, New York 12207
January 03, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 First matter on this afternoon's calendar is appeal number
3 1, the People of the State of New York v. Gregory Vining.

4 Counsel?

5 MS. KNIGHT: Good afternoon. Margaret Knight
6 from the Office of the Appellate Defender. If I might have
7 two minutes for rebuttal, Your Honor?

8 CHIEF JUDGE DIFIORE: You may.

9 MS. KNIGHT: By Gregory Vining's 2012 trial, the
10 district attorney's office made more than 10,000 requests
11 per year for Rikers Island telephone calls. With every
12 call, detainees are repeatedly told that their calls are
13 being monitored, and one of the first things that attorneys
14 tell their clients at arraignment is not to talk over these
15 telephones. Yet when Mr. Vining refused to talk, his
16 silence was used as an admission - - -

17 JUDGE ABDUS-SALAAM: Was he really silent,
18 though, counsel? Didn't he actually speak and say some
19 things that tended to turn the conversation toward his
20 sentencing rather than Ms. - - - you know, his girlfr - - -
21 former girlfriend's injuries?

22 MS. KNIGHT: He certainly made some statements,
23 but none of them were an acquiescence or indicated, in any
24 sense, that he was adopting what she was saying. And this
25 case was litigated, throughout, as an adopted admission by

1 silence. That is what the prosecutor argued to the Court
2 that it was being admitted for. That was what the Court
3 instructed the jurors that it was being admitted for. And
4 that is what the First Department found that the statements
5 were admitted for. So this case was about his silence.
6 And this - - -

7 JUDGE STEIN: Have we ever - - - have we ever
8 applied the Eighth Amendment to situations where it's a
9 conversation between two civilians?

10 MS. KNIGHT: This court has not, but I think that
11 the Rikers Island telephone calls represent something that
12 this court really does need to speak on in this context,
13 and it wasn't just between two civilians, because these
14 calls are being monitored, and they're being recorded, and
15 they've being provided regularly to the government. So
16 even though the conversation was between two civilians,
17 like defense counsel said at trial, it might as well have
18 been made with a police officer sitting there.

19 JUDGE STEIN: But should we consider the fact
20 that - - - that the defendant initiated the call and
21 apparently for the purpose of pressuring his domestic
22 violence victim to - - - to not pursue the charges against
23 him? So in - - - in essence, it - - - it appears that,
24 rather than using the Eighth Amendment as a shield, he's
25 really, in effect, using it as a sword. Should - - -

1 should that be a - - - a consideration?

2 MS. KNIGHT: That is - - - I mean, as the
3 district attorney office noted, there were about twenty-
4 five calls between these two people, and they didn't just
5 talk about her injuries. The vast majority of times they
6 must have been discussing something else. And in fact he
7 was also asking if, you know, she had spoken with his
8 brother. They were talking about where he would live. So
9 I mean, this - - - for Mr. Vining, but also stepping back,
10 for so many New Yorkers, these telephone calls are a
11 lifeline to the outside world for detainees who have not
12 been convicted of anything, who are the poorest New
13 Yorkers, who cannot afford bail, and these phone calls are
14 how they communicate with people. And you're really
15 putting people in sort of a damned-if-you-do and
16 damned-if-you-don't kind of situ - - -

17 JUDGE GARCIA: So it should be one rule: you can
18 never do this. Or is this a case-by-case analysis for us?

19 MS. KNIGHT: I think the categorical rule of
20 Conyers and DeGeorge, should apply. At least this court
21 has generally said that silence post-arrest should not used
22 in the direct - - -

23 JUDGE GARCIA: All of those cases, as I read
24 them, involve some type of involvement by law enforcement.
25 Now, we had a recent case on the Sixth Amendment. It was a

1 different - - -

2 MS. KNIGHT: Um-hum.

3 JUDGE GARCIA: - - - with Rikers Island tapes
4 where we said it wasn't a violation of the Sixth Amendment.
5 It seems to me here, isn't this a discretionary call for
6 the judge? I mean, it's a private party calling up another
7 private party, I think in violation of a restraining order
8 here, if I'm - - - I'm not wrong. And having this
9 conversation, is it really the fact just that it's a Rikers
10 Island overhear that would make it, what, a Constitutional
11 violation or an evidentiary violation?

12 MS. KNIGHT: We certainly argue that it's both,
13 and that this court in Pavone said that a defendant's
14 silence after arrest cannot be used by the People in their
15 direct case. But even if it's in - - -

16 JUDGE GARCIA: All to - - - I understand that in
17 the sense of it all goes to an interrogation or a law
18 enforcement presence, and you have a right to remain silent
19 and you don't answer. And then we get into, well, should
20 you have said something at that point or are there unusual
21 circumstances. But this really is - - - if this took place
22 privately - - -

23 MS. KNIGHT: Um-hum.

24 JUDGE GARCIA: - - - if we're - - - you know,
25 this call were taped by the person who had the restraining

1 order here, and we had the same conversation, would there
2 be a problem in admitting it?

3 MS. KNIGHT: I think that that would be a very
4 different situation, and I think it is critical that the
5 government was there. I mean, what the Court talked about
6 in Conyers and DeGeorge was the insoluble ambiguity of a
7 defendant's silence. And that is at the fore here, because
8 Mr. Vining was sitting under a sign that says your call is
9 being recorded. When he picks up the phone it says, your
10 call is being recorded. And he has been told - - - the
11 district attorney's office even said in Johnson that it
12 blinked reality to assume that he has not been told not to
13 speak on those phones. So he's making this call with the
14 knowledge that anything he said is being recorded, can, and
15 almost certainly, given the volume of these calls, being
16 turned over to the district attorney's office. And his
17 attorney has told him not to speak about this case.

18 So in this situation, you do have the insoluble
19 ambiguity that was so problematic in Conyers and DeGeorge.
20 And weighed against that is the prejudice because jurors -
21 - - it was also noted in those cases that jurors are not
22 well-equipped to - - - to weigh a defendant's silence in
23 these situations, that they often will overweigh that. And
24 so that risk of prejudice was very much here as well.

25 And it should - - - you know, going to

1 respondent's harmless error argument, it also should be
2 noted that this was not an overwhelming case of guilt, that
3 the first thing that the prosecutor said, after explaining
4 the complainant's testimony, was, you know, I acknowledge
5 she's a disaster, but this is not the only thing that you
6 have to look at; the first thing that I want you to look at
7 are these Rikers Island telephone calls. And the
8 prosecutor used that as the evidence that the jurors could
9 rely on to corroborate the complainant's account. So - - -

10 JUDGE ABDUS-SALAAM: But there was other evidence
11 that corroborated the complainant's account too, wasn't
12 there, counsel? Like the medical records that showed that
13 her injuries were recent, not what your client was
14 claiming, that some other person had inflicted those
15 injuries on her at some earlier time?

16 MS. KNIGHT: What Mr. Vining said was that he did
17 not know how the injuries were inflicted, that he
18 speculated that maybe it was a prior boyfriend. There had
19 been some overlapping relationship. But where there is
20 only one witness to what happened, where this witness
21 suffered, unfortunately, from drug abuse and schizophrenia,
22 where the prosecutor's office turned over masses of Brady
23 evidence that she had prior domestic violence incidents
24 where she was the perpetrator against other individuals and
25 where she had other criminal charges involving violence,

1 it's just - - - it can't be said that Mr. Vining was the
2 only potential cause for her injuries.

3 JUDGE ABDUS-SALAAM: Could I get back to one of
4 the questions I think Judge Garcia asked? Are we to look
5 at this categorically, or is it a case by case?

6 MS. KNIGHT: I think that in - - - I think it
7 should be a categorical rule. That's the rule in DeGeorge
8 and Conyers; this court found that, categorically, this is
9 a class of evidence that cannot - - - should not come in.
10 Whether there is some very unusual circumstance where the
11 amount of silence on a Rikers Island telephone call would
12 come in, this certainly doesn't meet that standard because
13 there is - - - because the inference that can be drawn - -
14 - that is drawn here is that he was exercising his right to
15 remain silent.

16 JUDGE STEIN: But just to be clear, the rule that
17 you're suggesting - - - because again, in Conyers and
18 DeGeorge we were talking about, you know, interrogation,
19 your rule is that if - - - if a defendant knows that his or
20 her call is being recorded by the government, that is
21 equivalent to interrogation for purposes of - - - of our -
22 - -

23 MS. KNIGHT: Yes, that silence in the face of an
24 accusation, when the call is being monitored by the
25 government, whether that accusation is made by the police

1 or by a private individual, the - - - the indication of the
2 right to remain silent or the right - - - exercise of a
3 right to remain silent in that situation should not be
4 admissible as direct evidence of guilt.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.
6 Counsel?

7 MR. MAZER: May it please the court. My name is
8 Ross Mazer on behalf of the People.

9 While the defendant was at Rikers awaiting trial,
10 he voluntarily placed a call to the victim of his assault,
11 violating an order of protection. The trial judge admitted
12 a portion of that call as an adoptive admission by silence,
13 and the trial judge issued the limiting instruction that
14 was requested by defense counsel.

15 So turning first to defendant's Constitutional
16 claim, that argument fails for two fundamental - - -
17 fundamental reasons. First, as Your Honors have already
18 alluded to, private parties don't acquire a Constitutional
19 right to remain silent with each other just because law
20 enforcement can overhear what they're saying. The Fifth
21 Amendment is meant to ensure that defendants can't be
22 compelled to talk to the police, but here the defendant
23 wasn't confronted with the police. In fact, law
24 enforcement didn't do anything to elicit or induce any of
25 the statements that defendant or V.S.R., the victim, made

1 on the phone call.

2 Recently this court held almost as much in
3 Johnson when it found that the Department of Corrections
4 didn't solicit, elicit, encourage or provoke the
5 conversations from Rikers Island. Now - - -

6 JUDGE RIVERA: But aren't they inducing silence
7 because the reality is that he's informed, he's notified?
8 You've all argued this. We've held this. You've given - -
9 - you've given him a lot of notice. His counsel has told
10 him that he's being listened to. So if he doesn't respond,
11 he says, well, people are listening to me; I'm not going to
12 say anything, aren't you inducing that silence, because
13 that's really what, as I understand it, the People have
14 argued before, that this is a way they can avoid this
15 information being used, which is just stay silent.

16 MR. MAZER: No, Your Honor. The - - -

17 JUDGE RIVERA: Um-hum.

18 MR. MAZER: - - - law enforcement is not inducing
19 the silence. In some cases it may be true that a defendant
20 is following his attorney's advice not to speak, or trying
21 to assert his right to remain silent, but it's certainly
22 not true in this case.

23 First of all, if his attorney advised him to do
24 anything, surely it was to not risk a contempt charge by
25 calling the victim of his crime in violation of an order of

1 protection. More than that, the vic - - - he called the
2 victim in order to dissuade her from testifying against
3 him, and the only way he could do that was to talk about
4 his case. In fact, in the call itself, we actually hear
5 the defendant reference the fact that he might have to
6 spend time in prison. So he was talking about his case.
7 So under the circumstances of this case, I don't think the
8 defendant was on - - -

9 JUDGE FAHEY: So what if he had responded? Would
10 it have been automatically inadmissible or admissible?

11 MR. MAZER: I'm sorry; if he had responded?

12 JUDGE FAHEY: If he had responded. If - - - if
13 there wasn't silence in the face of an alleged accusation
14 that - - - that there was - - - that there was violence,
15 and he - - - and he - - - he addressed what she referred to
16 in - - - in the conversation what you did to me. I think
17 she was referring to her ribs, right?

18 MR. MAZER: That he broke her ribs, yes, Your
19 Honor.

20 JUDGE Fahey: Right, right. He was referring to
21 the number of broken ribs. Would that have been
22 automatically admissible or automatically inadmissible?

23 MR. MAZER: If a defendant conf - - - confirmed
24 the accusation, that would be admissible.

25 JUDGE FAHEY: And what if he denied them?

1 MR. MAZER: If he denied it - - -

2 JUDGE FAHEY: Then you wouldn't be using it?

3 MR. MAZER: No, we wouldn't be, Your Honor.

4 JUDGE FAHEY: I see. So does this create a rule,
5 then, that requires that a defendant respond whenever a - -
6 - an accusation is made against that person and - - - and
7 the phone call is being monitored?

8 MR. MAZER: Different cases may present different
9 arguments.

10 JUDGE FAHEY: But let's stay with this argument,
11 because this is - - - this is what concerns me: is a
12 response required?

13 MR. MAZER: No, a response isn't required. This
14 case is unique - - -

15 JUDGE FAHEY: Okay. Then if a response isn't
16 required, then how are we not dealing with the right to
17 remain silent, simply because it's a police agency - - - or
18 not a police agency; I'm sorry.

19 MR. MAZER: Well, I think this is outside the
20 right to remain silent.

21 JUDGE FAHEY: Um-hum.

22 MR. MAZER: Our response - - - you know, this
23 case is somewhat unique because it's the victim who's
24 accusing him, and in most of the cases in which the
25 defendant is accused by someone other than law enforcement,

1 it's usually a codefendant, or in this case a victim,
2 someone who was at the scene of the crime and knew what
3 happened. But if a defendant was just talking to a family
4 member or another relative, he's less likely to be in a
5 position where that person is going to accuse him of
6 anything, since they weren't there when it happened, and
7 that he'd be then in a position where he would have to deny
8 something. So if a - - - if a relative asked him a
9 question or made a general statement, that doesn't seem to
10 require a denial in the same way that an accusation does in
11 this case.

12 It also bears mention that most of the
13 ambiguities that this court has - - -

14 JUDGE RIVERA: Why not? I don't - - - I'm sorry;
15 I'm not following that argument. I get the point about the
16 victim, but I'm not following why then, a fortiori, anyone
17 else who alleges or who claims that the defendant, as the
18 person who's on Rikers, has committed this crime that they
19 wouldn't say - - - that not saying something isn't
20 required.

21 MR. MAZER: If - - -

22 JUDGE RIVERA: I'm not following that.

23 MR. MAZER: If ano - - -

24 JUDGE RIVERA: Why are you less inclined to tell
25 your mother, no, I didn't do this?

1 MR. MAZER: If another person leveled an
2 accusation, certainly it would be the same situation, but
3 if someone - - -

4 JUDGE FAHEY: So in essence, then, anyone can
5 interrogate this person, and then that can be then used
6 against that person, the defendant, in any situation?

7 MR. MAZER: As you mentioned, as an evidentiary
8 doctrine, certainly the People have to satisfy three
9 threshold requirements before a statement can be admitted.
10 You know, we have to prove not only that the defendant
11 heard and understood the accusation, that he was in a
12 position to respond, but also that, under the
13 circumstances, a similarly-situated person would have
14 denied the accusation if it weren't true. And that
15 requires a case-by-case balancing, depending on the
16 particular circumstances.

17 JUDGE RIVERA: You made a point that he violated
18 the order of protection by making this phone call. What if
19 he had not initially intended to violate the order of
20 protection? Let's say he had called - - - let me go back -
21 - - to his mother, but the victim happened to be there, and
22 she grabs the phone and starts talking to him. Would you
23 still be trying to use this?

24 MR. MAZER: As a Constitutional matter, if law
25 enforcement's only role was to overhear what was said, then

1 the defendant's Constitutional right to remain silent
2 wouldn't be implicated. However, I do think that, in this
3 case, the fact that he did violate an order of protection,
4 that he did voluntarily call the victim, tend - - - those
5 facts tend to undercut defense counsel's alternative
6 argument that he may have been relying on his right to
7 remain silent, or following counsel's advice not to talk
8 about his case.

9 The last thing I would mention is that when the
10 trial judge admitted the call into evidence, he issued a
11 limiting instruction that defense - - - that was written by
12 defense counsel. That instruction not only cautioned the
13 jurors that they could afford whatever weight they thought
14 was appropriate to the call, but it specifically enumerated
15 the three innocent explanations that defense counsel
16 thought were his best shot in that case. So it told the
17 jurors to keep in mind, one, that a person might remain
18 silent because they're under - - - because they understand
19 they have no obligation to speak; a person might remain
20 silent because of the natural caution that arises from
21 knowing that your conversation is being overheard; or a
22 person might remain silent because he thinks it's futile to
23 try to respond in that situation.

24 JUDGE ABDUS-SALAAM: So is your - - - is it your
25 position, counsel, that these are always issues that should

1 go before the jury, that this goes to the - - - the weight
2 of that admission not its admissibility?

3 MR. MAZER: Absolutely. After the People satisfy
4 those three threshold requirements, then any innocent
5 explanation that the defendant may have to offer to explain
6 his non-denial is a question for the jury to evaluate and
7 goes to weight not admissibility.

8 JUDGE GARCIA: But it is a discretionary call for
9 the judge, in evaluating those factors, whether to admit it
10 or not as an evidentiary matter, right?

11 MR. MAZER: Absolutely, Your Honor.

12 JUDGE GARCIA: So this would be an abuse of
13 discretion review under that analysis?

14 MR. MAZER: Yes, it would, and - - -

15 JUDGE GARCIA: To go back to, though, something
16 that Judge Abdus-Salaam asked about earlier, there seems to
17 be, in this back and forth with the victim, more than mere
18 silence, particularly in reference to one - - - in response
19 to one statement about you broke my ribs so I'm a threat to
20 you, language to that - - - so you think I'm a threat to
21 you. Was - - - I think your - - - counsel for the
22 defendant said that this was only submitted as a silence,
23 adoption by silence; is that right?

24 MR. MAZER: The trial prosecutor asked the court
25 to admit the call as an adoptive admission by silence. But

1 despite its name, that doctrine applies not just to silence
2 but also to evasive or equivocal responses. The
3 significant factor, as an evidentiary matter, is just that
4 the defendant failed to deny the accusation that was
5 leveled against him.

6 JUDGE FAHEY: So does the right to not
7 incriminate yourself - - - I wasn't sure if that issue had
8 been preserved.

9 MR. MAZER: Yeah, the Constitutional claim in
10 this case has been preserved, Your Honor.

11 JUDGE FAHEY: It's fully preserved, okay, so - -
12 -

13 CHIEF JUDGE DIFIORE: Counsel, if we were to - -
14 - oh - - -

15 JUDGE FAHEY: Go ahead, Judge.

16 CHIEF JUDGE DIFIORE: - - - excuse me, Judge.

17 JUDGE FAHEY: No, go ahead. Go ahead.

18 CHIEF JUDGE DIFIORE: If we were to find that the
19 admission of this recording was error, how do we get to a
20 conclusion that it was harmless error?

21 MR. MAZER: Well, Your Honor, certainly if you
22 excise the Rikers call from the case, there's no reasonable
23 probability or possibility that the jury would have
24 acquitted. For one, we know that the victim broke her ribs
25 because we have x-rays and medical records and the

1 radiologist testified to that effect. We know that the
2 defendant was with her at the time he broke her ribs - - -
3 at the time she broke her ribs, because in a pre-trial
4 interview with the prosecutor, which was played to the jury
5 and admitted as evidence at trial, he admitted that he was
6 there, but he didn't have a good explanation for how else
7 her ribs could have been broken.

8 So a combination of, you know, her consistent
9 testimony that her ribs were broken because he stomped on
10 them, his placing himself at the scene of the crime,
11 without offering any innocent explanation, and the other
12 medical evidence - - -

13 JUDGE RIVERA: Well, he argued someone else did
14 it at a different time.

15 MR. MAZER: I'm sorry, Your Honor?

16 JUDGE RIVERA: He argued someone else might have
17 done it at a different time because you've got other
18 boyfriends or other people she's with.

19 MR. MAZER: It was something he said in the
20 interview but - - -

21 JUDGE RIVERA: Um-hum.

22 MR. MAZER: - - - even by his own admission, the
23 incident he was referring to with an ex-boyfriend happened
24 several months earlier, whereas the radiologist in this
25 case testified that she - - - because the fractures hadn't

1 begun to heal yet, it meant that she had necessarily
2 sustained them probably within the last couple days, but at
3 a maximum, no more than three weeks earlier.

4 JUDGE RIVERA: Too much time had elapsed. So
5 let's say we agree with you on this question of the use of
6 the Rikers call, should the notice change at Rikers?
7 Should it now say: and if you don't speak, that might be
8 used by the DA?

9 MR. MAZER: I don't think this case would have an
10 impact on that issue.

11 JUDGE RIVERA: They're usually monitoring for
12 what's said; you're trying to monitor, yes, for what's
13 said, but what's missing and what's said, right? Should
14 that also be - - - should the notice now have to be somehow
15 modified to properly inform - - - if we agree with you, to
16 properly inform those people who are detained at Rikers of
17 the implications of the use of that phone and what they
18 don't say or how they say it?

19 MR. MAZER: I don't think that a new warning
20 would be required, and certainly it's not a - - - an issue
21 that defense counsel raised below.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. MAZER: Thank you very much.

24 CHIEF JUDGE DIFIORE: Ms. Knight?

25 MS. KNIGHT: Respondent refers to the fact that

1 the government didn't deliberately elicit the statement.
2 However, that refers to the Sixth Amendment righted issue
3 in People v. Johnson; that's the not due process, Fifth
4 Amendment, fundamental right to remain silent that is at
5 issue here.

6 And the government really is minimizing the
7 import of the surve - - - surveillance of these Rikers
8 Island telephone calls and how often they are provided to
9 the district attorney's office. And I would direct the
10 Court's attention to Weaver, the GPS case. This court has
11 always interpreted the New York Constitution in a way that
12 reflects fundamental values and also changing technology.
13 And these calls are being turned over en masse to the
14 government. Even four years ago, ten thous - - - over ten
15 thou - - -

16 JUDGE RIVERA: So if we agree with the People - -
17 -

18 MS. KNIGHT: Um-hum.

19 JUDGE RIVERA: - - - what - - - what does that
20 mean for defense counsel's advice to those on Rikers? Are
21 they going to use these phones?

22 MS. KNIGHT: It really puts people in an
23 incredibly hard position where, as Judge Pigott said in his
24 concurring opinion in Johnson, that almost the only option
25 is not to use these telephone calls at all, because any

1 time anyone brings up your case, which is very likely to
2 happen when you're talking to loved ones, friends,
3 potential witnesses, you either have to engage with them
4 and risk that whatever you say is going to - - -

5 JUDGE STEIN: Can the defendant say I can't
6 respond to that; my attorneys advised me not to and - - -

7 MS. KNIGHT: Well, certainly under the rule - - -

8 JUDGE STEIN: - - - I have to protect all my
9 rights?

10 MS. KNIGHT: Certainly under the rule espoused by
11 respondent, it's not even clear that that would be enough,
12 because they're saying it's a purely civilian encounter and
13 there is no protection, no Fifth Amendment or due process
14 protection - - -

15 JUDGE ABDUS-SALAAM: Counsel, if we adopted your
16 position, wouldn't people held at Rikers or any - - - any
17 other facility just have to stop talking at all, because if
18 they talk about their case to, say, another person who's
19 incarcerated, they ri - - - they risk that person being a
20 snitch and trying to get a better deal. So how - - - how
21 is - - - I'm - - - I'm trying to weigh in my mind what - -
22 - what would be different if they didn't talk on the phone
23 but they talked in person. What if Ms. R. came to visit, I
24 mean, not like - - - forget about the - - - the protection
25 order, but she decided to come and visit him and they had a

1 conversation and not on the phone, and then she then
2 testifies that, you know, I - - - I accused him of breaking
3 my ribs and he didn't - - - he didn't say anything.

4 MS. KNIGHT: The language that the Court has used
5 is that a defendant's silence after arrest shouldn't be
6 used by the People in their direct case but I do think that
7 it would be a very different - - - different situation if
8 someone made this in a situation where there was no risk of
9 government monitoring. I'm not saying that it should be
10 admissible, but it is a critical and salient difference
11 that someone who is sitting under a sign saying "Your call
12 is going to be monitored by the government" says I'm not
13 going to speak about my case. And I mean, that's what we
14 have right here, and that's why his silence was so
15 ambiguous because it was perfectly consistent with the
16 exercise of his right to remain - - -

17 JUDGE FAHEY: Well is - - -

18 MS. KNIGHT: - - - silent in the presence of the
19 government.

20 JUDGE FAHEY: Isn't the key distinction that
21 you're arguing is that you have government monitoring and a
22 required response?

23 MS. KNIGHT: Yes, absolutely. And I think that
24 putting forward a rule that makes it virtually impossible
25 for people to speak on the Rikers Island telephone calls,

1 which is really their only option, without grave risk of
2 either saying something incriminating or having their
3 silence be incriminating, is an untenable rule.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MS. KNIGHT: Thank you.

6 (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 v. Gregory Vining, No. 1 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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Date: January 10, 2017