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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 37

MARCELLUS JOHNSON,

Appellant.

20 Eagle Street
Albany, New York 12207
February 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
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: Okay, number 7 - - -
2 37 on the calendar, People v. Marcellus Johnson.

3 MR. NEUSTADTER: Good afternoon, Your
4 Honors; Stanley Neustadter for appellant. Three
5 minutes will suffice for rebuttal.

6 CHIEF JUDGE DIFIORE: You have three
7 minutes.

8 MR. NEUSTADTER: Let me get right to the
9 point here. We're asking for a bright-line rule of
10 law; nonprivileged phone conversations of pre-trial
11 detainees after right to counsel has attached are
12 inadmissible unless the detainee has been explicitly
13 warned not only that such conversations may be
14 recorded and monitored by Department of Corrections,
15 but that they may also be disclosed to prosecutors
16 for use against them in court at the trial of the
17 charges pending against them.

18 JUDGE RIVERA: When - - - when and how did
19 Mr. Johnson present that argument about the notice
20 being insufficient regarding the consent - - -

21 MR. NEUSTADTER: It - - -

22 JUDGE RIVERA: - - - below. When - - -
23 when did he do that?

24 MR. NEUSTADTER: In the - - - when?

25 JUDGE RIVERA: When and how, yes.

1 MR. NEUSTADTER: On page - - - I'll get you
2 the page on that - - - expressly argued in the motion
3 papers at our appendix at page 22. The People
4 understood what we were arguing because they answered
5 that at page 36 in their papers, appendix page 36.
6 The - - - both the - - - the trial court - - - the
7 trial court's ruling was kind of sketchy, it didn't
8 really say much except interesting motion, counsel,
9 but I'm denying it. But that was argued at the
10 Appellate Division. They didn't have a problem with
11 preservation. It's not a problem here. We had
12 argued it expressly at - - - at trial at - - - and
13 the People - - - key point is, you gave notice to the
14 prosecution, they answered it in those terms, and the
15 judge saw their papers, presumably, as well as they
16 saw ours. So - - -

17 JUDGE RIVERA: At A-22 in their response
18 establishes that you made the argument about the
19 scope of consent? This particular argument that - -
20 - that notification that the DOCs is listening and
21 recording, observing this - - -

22 MR. NEUSTADTER: They just said that - - -

23 JUDGE RIVERA: - - - right, that - - - that
24 - - -

25 MR. NEUSTADTER: - - - that the warnings

1 produced a valid consent, the warnings alone were an
2 adequate predicate for the consent. So they answered
3 the very question in front of this court.

4 JUDGE GARCIA: So if we put your bright-
5 line rule in place - - -

6 MR. NEUSTADTER: Yeah.

7 JUDGE GARCIA: - - - so they put up a sign
8 that says, these can be used against you in court,
9 that's good? That takes care of all the arguments in
10 your brief?

11 MR. NEUSTADTER: Well, it takes care of one
12 argument in the brief. We're looking for a bigger
13 play here.

14 JUDGE GARCIA: You're not just looking for
15 the bright-line rule?

16 MR. NEUSTADTER: I'll take that bright-line
17 rule.

18 JUDGE GARCIA: And then do you - - - so the
19 next case that comes up where there's a sign, there's
20 no Sixth Amendment problem?

21 MR. NEUSTADTER: Hmm, no Sixth Amendment
22 problem? There's much less of a Sixth Amendment
23 problem.

24 JUDGE GARCIA: Why?

25 MR. NEUSTADTER: Because the defendant is

1 on notice that he is giving up his right - - -

2 JUDGE GARCIA: So he can waive that Sixth
3 Amendment claim without his lawyer being present?

4 MR. NEUSTADTER: Well, probably - - - it's
5 doubtful that he can do that, but - - - but at least
6 the State would have the argument that he was told
7 that he no longer would have the protection, he's
8 giving up the protection of counsel, the medium of
9 counsel, to intercede with him and the State. In
10 other words, his - - - his connection to the
11 prosecutor is done only through counsel and not
12 alone.

13 JUDGE STEIN: How - - - how have the People
14 elicited any statements from the defendant?

15 MR. NEUSTADTER: Basically, they haven't
16 elicited it through Q&A, they didn't - - -

17 JUDGE STEIN: Right.

18 MR. NEUSTADTER: - - - put some informer
19 there to stimulate a conversation. I'm not saying -
20 - - that's not my argument.

21 JUDGE STEIN: So by making a telephone
22 available, is that enough to say that they're - - -
23 they're - - -

24 MR. NEUSTADTER: No. Essentially, I want
25 to pick up on a phrase that Judge Fahey used in the

1 prior case, it's essentially the warnings provided a
2 false inducement, in a sense, a lulling inducement.
3 They tell him that your conversations may be recorded
4 and monitored. He's thinking Department of
5 Corrections. He's not thinking cops and law
6 enforcement. And the - - - the most damaging
7 possibility that could emerge from - - - from
8 speaking candidly on the phone to friends and family
9 is the very thing omitted from the warnings.

10 JUDGE ABDUS-SALAAM: Well, if someone were
11 standing right next to him, another inmate, while he
12 was the phone overhearing these things, then that
13 inmate could be called to say, you know, not - - -
14 not because somebody put that inmate there but
15 because the inmate just happened to be there.

16 MR. NEUSTADTER: That's true. But that - -
17 - that's not State action. We're complaining about
18 the State producing circumstances that make these
19 conversations routinely available. And, you know,
20 the - - - the Department of Corrections and - - - and
21 the DAs, "agency" isn't enough to describe that
22 relationship. That's an inadequate phrase. It's a
23 tag team. The - - - the Department of Corrections
24 records, they do almost no monitoring unless they get
25 a specific tip of contraband coming in or gang

1 activity or a threat to staff or corruption, they
2 don't do the monitoring. It's very restricted. It's
3 a whole bureaucratic steps that have to be fulfilled
4 in order to do any monitoring by a very limited
5 specialized staff. So what they do is they pass off
6 the monitoring to the DAs.

7 JUDGE PIGOTT: You - - - you make the
8 point, I think, in your brief that regardless of any
9 suspicions or thoughts, that every single phone call
10 at Rikers is taped; is that right?

11 MR. NEUSTADTER: That's correct,
12 automatically digitally recorded. And in due time,
13 we haven't reached that as far as I know, the - - -
14 the DAs won't even have to bothering with
15 transcribing these things, there will be voice
16 recognition technology that will automatically decode
17 all of this.

18 JUDGE GARCIA: But you would agree the
19 prison has legitimate security interests in - - - in
20 monitoring.

21 MR. NEUSTADTER: Absolutely do. I
22 absolutely do.

23 JUDGE GARCIA: So I don't know how many
24 inmates are in Rikers right now.

25 MR. NEUSTADTER: There are roughly 10,000,

1 I think; 9,000, 10,000.

2 JUDGE GARCIA: I don't know how many calls
3 are made. But you think the answer to that security
4 concern is live monitoring of inmate calls on a per -
5 - - with a reasonable suspicion that they're doing
6 something wrong?

7 MR. NEUSTADTER: Well, I'd prefer that, but
8 I don't care whether Corrections monitors. I just
9 care that they disclose to the police, that - - -
10 that they shouldn't be doing.

11 JUDGE RIVERA: Yeah, I thought in part your
12 argument or part of what you had argued was that they
13 sometimes don't monitor because of the volume - - -

14 MR. NEUSTADTER: That's right. That's
15 right.

16 JUDGE RIVERA: - - - but they're constantly
17 recording and that, in fact, there's this almost
18 symbiotic relationship with the DA because - - -

19 MR. NEUSTADTER: That's exactly right.

20 JUDGE RIVERA: - - - I can't monitor, you
21 want it, you look at it, if you find something, let
22 me know.

23 MR. NEUSTADTER: Right, but in answer to
24 Judge Garcia's question, they should be monitoring
25 for security purposes. They used to monitor for

1 security purposes. It was difficult because it was
2 reel to reel. Now that it's easier, they do less of
3 it.

4 CHIEF JUDGE DIFIORE: Well, if they're - -
5 - if they're monitoring legitimately - - -

6 MR. NEUSTADTER: Yes.

7 CHIEF JUDGE DIFIORE: - - - are you
8 suggesting to us, and flesh this out a little for me,
9 that the prosecutor doesn't have the ability to
10 subpoena those records or get those records by court
11 order?

12 MR. NEUSTADTER: I have no problem with
13 them making a - - - a motion, like, for a warrant. I
14 don't have a problem with that. They issued a agency
15 subpoena, which is not really approved a judge, this
16 is a - - - the judge signs off on it, they don't even
17 have to show any specific reason to believe there'd
18 be anything incriminating or of evidentiary value in
19 those conversations. They just - - -

20 JUDGE STEIN: You - - -

21 MR. NEUSTADTER: - - - a case comes up and
22 it's shortly before trial, they think the case is
23 going to go to trial, they call Corrections, they get
24 these tapes, and tran - - - have them transcribed.

25 JUDGE STEIN: Here - - - here the judge

1 actually reviewed the transcripts. Does that make
2 any difference here? And - - - and - - -

3 MR. NEUSTADTER: No.

4 JUDGE STEIN: - - - kept some of the
5 information out?

6 MR. NEUSTADTER: No, because we weren't a
7 party to this subpoena. We learned it after the
8 judge approves it when they come into court. We - -
9 - we don't know that the subpoena - - -

10 JUDGE STEIN: What about the - - - what
11 about the fact that there was - - - one of the
12 arguments that you make is that - - - that it - - -
13 it would interfere with the ability to - - - to
14 create a defense, to - - - but there was nothing in
15 these tapes that we know of that were - - -

16 MR. NEUSTADTER: No, not in these tapes.
17 That is true. But the - - - because it was redacted
18 to the point where only the most incriminating things
19 - - - you should hear these tapes, they're awful.
20 They're not only incriminating in substance, they're
21 ugly in tone and demeanor. It's the kind of thing
22 that really would turn off a jury. I'm sorry. I
23 lost my train of thought.

24 JUDGE PIGOTT: That the judge reviewed the
25 tapes and - - - and - - -

1 MR. NEUSTADTER: Well, it doesn't matter
2 whether the judge reviewed it. We're not part of
3 that review. We don't get notice of these subpoenas.
4 I think that - - -

5 JUDGE PIGOTT: Let - - - let me interrupt
6 you for a minute.

7 MR. NEUSTADTER: Yeah.

8 JUDGE PIGOTT: I didn't - - - I didn't see
9 a subpoena in the record. I think these are just - -
10 -

11 MR. NEUSTADTER: A physical subpoena, no.
12 But I think it - - - I - - - I - - -

13 JUDGE PIGOTT: I don't think so. I think
14 they're just requests. In fact, if I understand Ms.
15 Axelrod's brief, you just write a letter or, you
16 know, just ask for them and then they get them to you
17 in three days.

18 MR. NEUSTADTER: Well, I - - - the rule - -
19 - their own internal regulation says they have to get
20 them back in three days or rule on the request in
21 three days. I'm not sure it makes a difference
22 whether it's a subpoena or not.

23 JUDGE PIGOTT: I thought I - - - when we
24 did the CLA, A, I thought it ought to be a subpoena;
25 B, I thought it should be a judicial one because it's

1 a public body or officer and apparently, it's
2 neither. But Ms. Axelrod will straighten us out.

3 MR. NEUSTADTER: But we don't get - - we -
4 - we have any voice in that, and there's no real
5 review of the need for that. They should be doing
6 that through a request for a warrant, sort of like a
7 search warrant almost.

8 But getting back to the agency thing,
9 agency is inadequate phrase for this. They're a tag
10 team. They work together, and they rely - - - the
11 People rely on the, you know, Kuhlmann and Cardona
12 from this court. There - - - there has be some sort
13 of active stimulus. The active stimulus here - - -
14 and they know it because they've been doing it for
15 six years now, seven years, they know how this thing
16 works to produce valuable, incriminating evidence - -
17 - those warnings, those incomplete warnings lull the
18 defendant into believing that it's only - - - the
19 only people that are going to hear those
20 conversations are the people they're speaking to and,
21 if they're misbehaving in some way in terms of prison
22 infractions, Department of Corrections. There's no
23 clue in there that police are involved, law
24 enforcement is involved, outside of - - -

25 JUDGE PIGOTT: Legal - - - the amicus brief

1 from Legal Aid - - -

2 MR. NEUSTADTER: - - - the institution.

3 JUDGE PIGOTT: - - - I think, one of the
4 two had some examples of - - - of problems that had
5 cropped up in this in their view.

6 MR. NEUSTADTER: Right, right.

7 JUDGE PIGOTT: Did you want to - - -

8 MR. NEUSTADTER: Well, the - - - the thing
9 with these conversations with friends and family,
10 there's sort of a false dichotomy, really, when you
11 think about it. It's an artificial dichotomy between
12 privileged conversations and nonprivileged
13 conversations, because when you're locked up, any
14 trial lawyer is depend - - - when you're not locked
15 up, your trial lawyer is accessible to you, he needs
16 you to help develop the defense.

17 You're locked up, the access is very
18 limited. Anybody who knows Rikers Island; that's a
19 daylong roundtrip, that's a Hajj to Mecca. It takes
20 forever and it's a whole workday. So the - - - the
21 inmates are dependent on that phone to help their
22 lawyers develop a defense, but try getting the trial
23 lawyer, assigned counsel - - - which is what you're
24 talking about in eighty percent of the cases - - -
25 try to get him by phone when you call. Just try.

1 Leave a message; he can't call you back. You're
2 locked up.

3 JUDGE STEIN: Wouldn't you - - -

4 MR. NEUSTADTER: Bottom line is you're
5 dealing with friends and family to help develop your
6 defense. That's part of your - - -

7 JUDGE STEIN: But that's not - - - that's
8 not the issue in this particular case.

9 MR. NEUSTADTER: No.

10 JUDGE STEIN: In this particular case, it
11 was incriminating statements.

12 MR. NEUSTADTER: That's right.

13 JUDGE STEIN: Wouldn't you think, counsel,
14 once counsel - - - right to counsel attached and
15 counsel is appointed or retained, says, don't admit
16 anything on these telephones? Wouldn't they say
17 that?

18 MR. NEUSTADTER: I think that is true, but
19 one of the reasons - - - you know, the right to
20 counsel is to protect the - - - the defendant against
21 being stupid, and he's isolated in that prison.
22 Whatever the lawyer told him was who knows how many
23 months before. And that's why I want to get back to
24 that notice sign. Think of what - - - my - - - my
25 request - - - the rule I'm requesting is essentially

1 parallel to a fifth Miranda warning. The analog is a
2 fifth Miranda warning that's sort of given once
3 you're in jail. It's repeating the last of the
4 Miranda warnings an extra time when you're in jail on
5 those notices that anything you say is going to be
6 recorded or monitored, not just by the Department of
7 Corrections but by the very people who are
8 prosecuting you.

9 JUDGE RIVERA: So you - - - you want the
10 rest of the line "and it may be used against you."

11 MR. NEUSTADTER: That's correct. And by
12 the way, talking of the need for this kind of a
13 warning; you know in the Miranda sphere, even an
14 attorney who's in custody and being interrogated has
15 to be given complete Miranda warnings. If you gave
16 an attorney in custody a Miranda warning that
17 excluded, omitted "and it can be used against you at
18 trial", that's suppressed. There's case law on that.
19 And - - - and - - -

20 CHIEF JUDGE DIFIORE: Counsel, given what
21 you're arguing - - -

22 MR. NEUSTADTER: Yes.

23 CHIEF JUDGE DIFIORE: - - - and the
24 defendant at the trial court attempted to address
25 this issue by a motion in limine?

1 MR. NEUSTADTER: Correct.

2 CHIEF JUDGE DIFIORE: Why not a suppression
3 motion?

4 MR. NEUSTADTER: I - - - I fail to see the
5 distinction between them. The - - - the motion was
6 made as a matter of law, this - - - for - - - for the
7 reasons expressed in the motion papers and repeated
8 here. It should - - - it should not have come in.
9 Those statements were admissible. This is just a - -
10 - a label. I don't see what earthly difference it
11 makes. The - - - the ruling would have been the
12 same, the judge would have seen the same papers, what
13 difference does it make? It's a pre-trial thing.
14 Call it whatever you like. I don't think it makes a
15 difference.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. NEUSTADTER: Is my time up? I guess it
18 is.

19 CHIEF JUDGE DIFIORE: Yes, sir.

20 MR. NEUSTADTER: Sorry.

21 CHIEF JUDGE DIFIORE: Counsel.

22 MS. AXELROD: Good afternoon, Your Honors.
23 May it please the court, my name is Susan Axelrod. I
24 represent the respondent.

25 Judge Pigott, I'll start right away by

1 saying to you that, in fact, there was a subpoena
2 issued. It was - - - it was not reproduced in the
3 record. It typically wouldn't be because that
4 subpoena goes to DOC. DOC hangs onto it. But the -
5 - -

6 JUDGE PIGOTT: Don't you keep a copy of
7 your own subpoenas?

8 MS. AXELROD: We do, but that would be kept
9 internally in our file. It doesn't become part of
10 the judicial record. But the prosecutor, I believe,
11 actually represented - - - I can't remember if it was
12 in the motion - - - in motion practice or orally, but
13 he did represent that he received these things
14 pursuant to a subpoena.

15 JUDGE STEIN: But - - - but a subpoena's
16 not required under the policy; is it?

17 MS. AXELROD: No, it's not. DOC does not
18 require it. But it does require a request.

19 JUDGE STEIN: Should it be?

20 MS. AXELROD: Well, DOC doesn't require it.

21 JUDGE STEIN: But should they?

22 MS. AXELROD: I can't speak to - - - to - -
23 -

24 JUDGE RIVERA: Does your office do it as a
25 matter of course, use subpoenas as a matter of

1 course, or do you not know?

2 MS. AXELROD: Do we - - -

3 JUDGE RIVERA: As a matter of course, do
4 the - - -

5 MS. AXELROD: No, no, I under - - -

6 JUDGE RIVERA: - - - ADAs use subpoenas as
7 a process - - -

8 MS. AXELROD: When we're getting these - -
9 -

10 JUDGE RIVERA: Yes.

11 MS. AXELROD: - - - things do we use
12 subpoenas?

13 JUDGE RIVERA: Yes.

14 MS. AXELROD: My understanding is that yes,
15 we are doing them pursuant to subpoena and not simply
16 - - -

17 CHIEF JUDGE DIFIORE: Counsel, do you seek
18 the calls of every defendant who goes to trial?

19 MS. AXELROD: I - - - I can't answer that
20 with a hundred percent certainty. I can certainly -
21 - - I will certainly admit that we are aware that
22 they are there, that it's on a checklist of - - - of
23 things that we're - - - it is suggested that you
24 consider getting. And there's certainly no secret
25 anywhere that we get them a lot and we use these in -

1 - - in a lot of cases.

2 CHIEF JUDGE DIFIORE: And is there some
3 standard threshold of determination that's made with
4 respect to when you would seek out these wholesale
5 conversations?

6 MS. AXELROD: There - - - there is not.
7 And there doesn't have to be, because as - - - as
8 things are set up, given that the defendant is given
9 warnings - - - which I would like to address, as
10 well, the scope of those warnings - - - we are - - -

11 JUDGE PIGOTT: Because - - -

12 MS. AXELROD: - - - we are - - - I'm sorry.

13 JUDGE PIGOTT: No, please. I'm - - - I'm
14 interrupting you. Go ahead.

15 MS. AXELROD: Okay, we are outside of the
16 Fourth Amendment, which everybody concedes, and we
17 are now in a consent situation, which means we are
18 outside of the wiretap statute, which means we are
19 not required to have any standard of proof. There's
20 no statutory requirement that we show some threshold.

21 JUDGE PIGOTT: That's - - - that's like the
22 licensing agreement you sign when you - - - when you
23 go online and - - - and you want an app or something.
24 You have to agree to - - -

25 MS. AXELROD: No, actually. Because it's -

1 - - it's much different.

2 JUDGE PIGOTT: Because nobody reads them.

3 MS. AXELROD: No, actually, Judge - - -

4 JUDGE PIGOTT: And I know you're going to
5 show us, you know, that - - - that warning, but - - -
6 but it - - - there is a - - - there was a test. You
7 can - - - it's online, by the way, but with twelve
8 pennies and it says pick out the - - - the correct
9 penny, and I guarantee you you can't do it, because
10 we think we know what a penny looks like and then you
11 look at all these other penni - - - and you don't
12 because it just goes by you. You don't - - - you
13 don't think of it. And - - - and at some - - -

14 MS. AXELROD: And that would be - - - that
15 would be an apt analogy if the defendant walked into
16 prison, was handed a handbook, and then said go with
17 God. But not only is he handed a handbook that
18 specifically explains to him how the monitoring
19 process works so that he can put his attorney's
20 information in the file so that that won't be
21 recorded, but there's that big sign right up there by
22 the phone and before each and every phone call that
23 he makes, an electronic voice comes on and says, this
24 call is subject to monitoring and recording.

25 JUDGE PIGOTT: But the - - - what's cute is

1 you say that it's - - - the Fourth and the Sixth
2 Amendments don't count. We have got this thing so
3 cooked that this guy who - - - who the lawyer said
4 you got to get a hold of your parents and tell them
5 to get these two witnesses here, that that can be - -
6 - that that can be listened to by the DA and action
7 can be taken on it. And - - -

8 MS. AXELROD: No.

9 JUDGE PIGOTT: And - - - yes. You can - -
10 -

11 MS. AXELROD: The lawyer said? No. We
12 don't hear that call.

13 JUDGE PIGOTT: Oh, yeah. You're hear - - -
14 no, you're hearing the call from the defendant who
15 then calls his parents and said - - - and says my
16 lawyer says we got to get Johnny and Frankie in
17 because, you know, they're supposed to help us with
18 this case. Or, as I think Brooklyn pointed out,
19 where it's - - - where somebody pointed to a
20 defendant - - - told the defendant's wife that the
21 defendant was calling his paramour to try to get the
22 wife to - - - to not testify on behalf of the
23 defendant. Now, I don't know if that's true or not,
24 that's just the - - - that's one of the things they
25 put in. But can you see the possibilities of abuse?

1 MS. AXELROD: I can see the possibilities
2 that defendants end up in positions where they're not
3 supposed to be. But - - - but the idea - - - and
4 there's certainly no record here, and even in the - -
5 - the affirmations that Legal Aid supplied, the idea
6 that a - - - a experienced attorney would call a
7 defendant, have a defendant in - - - in jail, and say
8 to him, listen, use the phone to do these things, I
9 would submit, doesn't exist. And if it does, that
10 can be dealt with at the appropriate time.

11 JUDGE PIGOTT: Probably ineffective
12 assistance of counsel.

13 MS. AXELROD: Exactly; there are other
14 ramifications.

15 JUDGE RIVERA: What - - - what's the danger
16 of the rule that you just add the few words, "and
17 this may be used against you"?

18 MS. AXELROD: That would - - - we would
19 have no problem with that, but DOC came up with this.
20 We didn't come up with this. This is DOC's policy
21 and now - - -

22 JUDGE PIGOTT: But you're the one that uses
23 them. They - - - they even say that. They say that
24 we - - - you know, all we do is record them. We - -
25 - we don't even monitor anymore. It's all the DA,

1 and somebody makes the allegation that you use
2 student interns to sit there and listen to these
3 things. It almost sounds 1984.

4 MS. AXELROD: Okay, first of all, we - - -
5 the idea that DOC is saying no, we don't monitor, we
6 leave the DA, that - - - that statement exists
7 nowhere other than from defense counsel's mouth. He
8 hasn't shown that that's what they say. DOC set up a
9 policy for sec - - - for internal security and they
10 came up with certain rules for when they would
11 monitor that would encourage their safety and limit
12 abusive practices by DOC correctional agents.

13 The district attorney's office then
14 subpoenas those conversations because they think
15 there's going to be evidence. That's what we do, we
16 look for evidence. There has never been - - -

17 JUDGE RIVERA: If they - - - if they turn
18 you down, what do you do?

19 MS. AXELROD: We're out of luck.

20 JUDGE RIVERA: If for some reason they
21 turned you down - - -

22 MS. AXELROD: We're out of luck.

23 JUDGE RIVERA: I know they argue that - - -
24 that they never turn you down, but let's assume you
25 have a - - - a situation where they turn you down.

1 What would you do?

2 MS. AXELROD: I believe that we are out of
3 luck. And we may be able - - - they - - - if we are
4 doing it by - - -

5 JUDGE RIVERA: You wouldn't go - - - you
6 wouldn't go to court and - - -

7 MS. AXELROD: Well, it's a - - -

8 JUDGE RIVERA: - - - say we need access to
9 these?

10 MS. AXELROD: Then it depends on - - - on a
11 number of things. If we - - - if we've issued a
12 subpoena and they've denied the subpoena and they do
13 a motion to quash, that puts us in court. If,
14 however, a prosecutor were doing this just by letter,
15 well, then we're out of luck because it is within
16 their ability to - - - to deny us, so we are not a
17 symbiotic - - - you know, two - - - we're not Yin and
18 Yang here.

19 JUDGE RIVERA: But you ask - - - ask for
20 them even if you have no idea what's been said,
21 correct?

22 MS. AXELROD: That's correct, because we
23 listen - - -

24 JUDGE RIVERA: You're fishing, you're
25 looking for something.

1 MS. AXELROD: We - - - we listen to find
2 out if there's evidence that's been created that we
3 can use at trial. And in terms of the - - - the
4 allegations about interns - - -

5 JUDGE RIVERA: So what would be your
6 argument on the motion to quash?

7 MS. AXELROD: That we - - -

8 JUDGE RIVERA: Because you don't know
9 what's being - - - been said.

10 MS. AXELROD: That we're entitled to - - -
11 to the - - - these records pursuant to the county law
12 that requires the Department of Correction to turn
13 things over to us, and that they're in - - - actually
14 in violation of county law. But in - - - in terms of
15 the intern, again, there's no record of it. Here,
16 the - - - the prosecutor himself listened to these
17 phone calls and made the decision as to what to do.
18 So the - - -

19 JUDGE PIGOTT: There was a - - -

20 MS. AXELROD: All of these things are
21 outside of the record and simply weren't at - - -

22 JUDGE RIVERA: Can I go back to this thing
23 about the county law? So you're saying the - - - the
24 DOCs has no discretion to deny you?

25 MS. AXELROD: The - - - according to the

1 county law, it appears that they don't, and so it
2 looks like the reasons that they have their policies
3 in place - - - and again, we're not DOC, and DOC
4 lawyers didn't come and talk to us - - -

5 JUDGE RIVERA: Um-hum.

6 MS. AXELROD: - - - so I'm speculating
7 myself a little bit. But it looks like the reason
8 they have these policies in place is so that they can
9 comport with the county law in a way that makes sense
10 for them too.

11 JUDGE PIGOTT: It gets to the point, I - -
12 - not in this case but in another one where the - - -
13 the judge - - - it was irrelevant to this particular
14 case, but when I was reading the transcript it said,
15 by the way, have you subpoenaed Rikers yet? I mean,
16 it's almost as if, you know, one of the things that
17 I'm expecting to happen in this case is that you guys
18 are going to subpoena Rikers, and I thought, geez,
19 it's just SOP.

20 MS. AXELROD: It is. And - - - and it's
21 also well known and well documented and for that
22 reason, somebody on the - - - the bench just brought
23 up that the defendant is given an attorney in
24 arraignments. He's given somebody who can say to him
25 listen, don't talk about the case on the phone.

1 JUDGE PIGOTT: But you're officers of the
2 court. I - - - and I realize you - - - you're
3 looking for evidence, but boy, you know, as your
4 opponent points out, when you listen to these tapes
5 and you realize - - - I - - - I would convict this
6 guy without any evidence based upon what was said on
7 those tapes.

8 MS. AXELROD: The - - -

9 JUDGE PIGOTT: He sounds mean, he sounds
10 nasty, he swears, he makes all kinds of - - - of - -
11 - and all of this got before a jury.

12 MS. AXELROD: No, not - - - portions of
13 nine phone calls got before a jury.

14 JUDGE PIGOTT: Yeah, the ones that we got,
15 I think. I mean, I assume.

16 MS. AXELROD: Yes, that's - - - that's what
17 I - - - I sent to you.

18 JUDGE PIGOTT: Yeah.

19 MS. AXELROD: But if - - - you know,
20 there's a judge sitting there reviewing all of this
21 evidence and making determinations on whether
22 something is more prejudiced than probative, and if
23 we're just trying to introduce tapes to show well,
24 gee, he's a bad guy - - -

25 JUDGE PIGOTT: Yeah, but they've been - - -

1 judges have been reversed before. I know that for a
2 fact.

3 MS. AXELROD: Judge, if you're - - - if
4 you're saying to me this is a problem and my answer
5 to you is, but a judge can always take steps to
6 prevent that problem by saying this is - - - this is
7 more probative - - - this is not more probative, it's
8 too prejudicial - - -

9 JUDGE PIGOTT: Um-hum.

10 MS. AXELROD: - - - and the comeback is but
11 judges get it wrong, you know, I don't know where to
12 go with that. But the truth - - -

13 JUDGE PIGOTT: Well, I'm talking about it
14 in the context of this case.

15 JUDGE RIVERA: Let's say - - -

16 JUDGE PIGOTT: I don't know if it was
17 preserved or not but one of the points that I thought
18 was being made was that if you listen to these tapes,
19 they're pretty scurrilous.

20 MS. AXELROD: Well, first of all, that - -
21 - I don't believe that that was one of the - - - the
22 bases for the objections. There was some Molineux
23 evidence that had to be kept out, and I believe that
24 was the basis for the - - - the discussion about what
25 was going to be exercised. And also, not everything

1 was relevant. But the bottom line is the fact that
2 we get these tapes and the fact that we find
3 information on them that is useful to us doesn't mean
4 that defendants aren't without remedies if they think
5 there is some harms, if they think we're trying to be
6 too expansive. Here we were trying to get Molineux
7 evidence in. There's a judge sitting there who can
8 make rulings as to evidentiary rulings.

9 JUDGE STEIN: How does a - - - how does a
10 defendant remedy a problem if the People are hearing
11 their trial strategy, what witnesses they're going to
12 call?

13 MS. AXELROD: I think it - - - first of
14 all, you know, our prosecutors weren't born yesterday
15 and a lot of these strategies aren't surprises. So
16 it's not like a - - - a defendant who's exhibited odd
17 behavior, we're not anticipating an EED defense and
18 that we need to hear that.

19 JUDGE STEIN: Well, what about an alibi
20 defense? I mean how would you know what their alibi
21 was going to be unless somebody overheard their
22 conversation?

23 MS. AXELROD: Because we're going to get
24 notice of that anyway. So a lot of the defendant's
25 complaints about all of this, I submit, when you - -

1 - when you sort of parse them out, they're not a harm
2 to the degree that - - - that they're claiming. Now
3 obviously, you know, there's information that gets to
4 us that defense attorneys - - -

5 JUDGE RIVERA: But - - - yeah, but,
6 counsel, obviously if they were discussing with the
7 attorneys, you couldn't hear it.

8 MS. AXELROD: Right.

9 JUDGE RIVERA: So - - - so your answer to
10 that well, eventually we'd know, is not a response
11 because their point is - - - and I understand your
12 position. Lawyers can let them know, they've got
13 notice, and you're working in a world of
14 rationalities. They're - - - they're suggesting that
15 it's - - - people are desperate and don't act
16 necessarily so rational and they're not with lawyers
17 all the time, and I know lawyers that are hard to
18 reach.

19 But let me ask you this question; let me
20 actually get to a question. Do you - - - what - - -
21 what's your position on this question of the notice
22 and the scope of the consent with respect to
23 preservation?

24 MS. AXELROD: Well, they - - - they never
25 preserved that. They simply didn't argue that below.

1 They also didn't argue it in the Appellate Division.
2 And because they didn't do a - - - ask for a
3 suppression motion, no testimony was taken, so
4 there's a lot of supposition that a defendant - - -

5 JUDGE RIVERA: They're saying you responded
6 to it. What was the nature of your response?

7 MS. AXELROD: We - - - we said consent, but
8 - - - but first of all, the obligation isn't on us to
9 preserve, it's on them to preserve and make records,
10 which they didn't. And secondly, I believe that what
11 happened, actually, was that both parties filed their
12 papers pretty much around the same time and so we
13 were anticipating that they would be arguing consent
14 which is why we raised it. But they didn't raise it,
15 the judge didn't decide on it, they didn't raise it
16 in the Appellate Division, they judge didn't decide
17 on it. Had they done a - - - a suppression - - -
18 move for suppression, that would have been a take - -
19 - taking of testimony as opposed to what they did
20 which was a motion in limine which placed this within
21 the court's discretion.

22 Defense counsel has been making leaps that
23 a defendant who - - - who reads these notices which
24 say these con - - - these phone calls will be
25 recorded and monitored pursuant to DOC policy, must

1 assume that it's a very limited reason. But then,
2 ironically, he turns around and says but - - - but
3 the - - - but DOC and the DA's office, are just - - -
4 they're basically one beast. So apparently, the
5 defendant doesn't know that except that we're acting
6 that way. So the - - - there is no evidence here as
7 to whether the defendant knew or even cared as to
8 where these conversations could - - - could be going.

9 JUDGE PIGOTT: One of the things I - - - I
10 don't know what the answer to this is, maybe you can
11 enlighten me, but one of the things that comes up is
12 that the fact that if you can't make bail, this is
13 where - - - this is your - - - this is your
14 purgatory. You're - - - you're now going to have all
15 your phones monitored. And if DOCs doesn't - - -
16 DOCs doesn't monitor it, it just simply records. And
17 then - - - and then if the only purpose they're put
18 to later is for you, he used the term "troll", to
19 fish, why do we do this at all?

20 MS. AXELROD: We like search.

21 JUDGE PIGOTT: Why do we do - - - well,
22 searches require probable cause, I suppose, but why -
23 - - why do this at all? I mean, the - - - it's true,
24 is it not, that it's people who can't make bail who
25 are not able to make phone calls to witnesses or - -

1 - or things like that and help their lawyer, but the
2 people who can't make bail, you know, are stuck.

3 MS. AXELROD: Well, first of all, that's a
4 policy argument.

5 JUDGE PIGOTT: Right.

6 MS. AXELROD: And he can't point to a
7 statute or a constitutional provision. And this
8 court has routinely said that this court grants
9 relief based on constitutional violations and
10 statutory violations. So I don't want to make light
11 of his argument, but it's not a legal argument for
12 the purpose of this court to grant a remedy.

13 I also just want to point out that - - -
14 that while he's talking about the unfairness of in
15 defendants, out defendants also need to keep their
16 mouths shut, or they are creating evidence. And
17 while it's - - - it may not necessarily be recorded
18 phone calls, although they could call somebody who
19 has an ax to grind with them who would record that
20 phone call and turn it over to the People, the bottom
21 line is when you are a defendant, you are given a
22 lawyer who explains to you the ramifications that
23 every time you open your mouth, you are creating
24 evidence, and the best way not to create evidence is
25 not to open your mouth about the case.

1 And while somebody talked about stupid
2 people or stupid defendants or whatever the language
3 was, this court has specifically said that the Sixth
4 Amendment does not give defendants immunity from
5 statements they have made every time their lawyer
6 isn't there. The best that we can do, and the only
7 thing that is required, is that we give the defendant
8 the tools so that when he makes decisions, he is
9 armed with the tools to make them. If he makes
10 stupid decisions, that's on him, but he finds no
11 relief in the Constitution because he is not acting
12 in his best interest.

13 And in this particular case, the defendant
14 was warned, in sort of broad strokes, that his phone
15 calls were being recorded and monitored. And by the
16 way, the warnings didn't say well, while we say
17 recorded and monitored, eh, not so much with the
18 monitoring, we might do it, we might not do it. It
19 said recorded and monitored, which meant when he
20 picked up that phone, he had every expectation that
21 somebody else was listening to that call. When he
22 had that expectation, he consented to the recording
23 of those conversations, and he lost the right to
24 control how those conversations were used. And I see
25 that my time is up. I will rely for the remainder of

1 the arguments on my brief. Thank you.

2 CHIEF JUDGE DIFIORE: Thank you.

3 Counsel.

4 JUDGE GARCIA: Counsel, before you start,
5 could we pick up with remedy. So assume this is a
6 Fourth Amendment violation. Assume for now it's not
7 a Sixth Amendment violation; along the lines of Judge
8 Stein's question of State action, what's the remedy?

9 MR. NEUSTADTER: Remedy is inadmissibility
10 of the evidence.

11 JUDGE GARCIA: Everything's inadmissible?

12 MR. NEUSTADTER: Yes, I mean - - -

13 JUDGE GARCIA: Everything - - -

14 MR. NEUSTADTER: - - - everything harvested
15 by this big trolling that - - - without any judicial
16 review, without anything resembling a reason to
17 believe that anything incriminating would be found
18 there. It's just a wholesale harvesting of intimate
19 conversations.

20 JUDGE GARCIA: And that remedy's based on
21 what?

22 MR. NEUSTADTER: On the right to counsel.

23 JUDGE GARCIA: But that's a Sixth Amendment
24 violation.

25 MR. NEUSTADTER: Correct. We're not

1 arguing Fourth Amendment.

2 JUDGE GARCIA: So let's assume there's no
3 Sixth Amendment.

4 MR. NEUSTADTER: No, there - - - there is
5 no Fourth Amendment. We're not making a Fourth
6 Amendment argument.

7 JUDGE GARCIA: Okay, but let's assume for
8 now that there's no Sixth Amendment.

9 MR. NEUSTADTER: Then the - - - then it's
10 the - - - the problem with the consent. And - - -

11 JUDGE GARCIA: The problem with the consent
12 leads to, essentially, suppression of all it takes?

13 MR. NEUSTADTER: That's correct.

14 JUDGE GARCIA: Not a review by the judge
15 and an in limine motion to say, going to Judge
16 Pigott's point, this is too prejudicial, the tone,
17 put a transcript in, or - - -

18 MR. NEUSTADTER: No, that's a separate - -
19 -

20 JUDGE GARCIA: - - - supervisory point - -
21 -

22 MR. NEUSTADTER: That's a - - -

23 JUDGE GARCIA: - - - you listened to
24 defense strategy, I find that misconduct on the part
25 of the People, you know, and - - - and taking action

1 like that. It's a wholesale suppression of evidence?

2 MR. NEUSTADTER: That's correct. Now, if -

3 - - if - - -

4 JUDGE ABDUS-SALAAM: Counsel, whether or

5 not - - -

6 MR. NEUSTADTER: Whether it's prejudicial,

7 the prejudice probative value thing, that's a

8 freestanding independent grievance, so that if they

9 came in, you might have an argument on that ground.

10 But we're looking for wholesale suppression of these

11 recordings.

12 JUDGE ABDUS-SALAAM: You're not arguing - -

13 -

14 JUDGE GARCIA: But this is evidence, right?

15 MR. NEUSTADTER: Of course, but we suppress

16 evidence all the time.

17 JUDGE GARCIA: Based on a constitutional

18 violation so - - -

19 MR. NEUSTADTER: We have it here.

20 JUDGE GARCIA: Right, but assume it's not.

21 MR. NEUSTADTER: Okay, just a moment.

22 Well, let me get to that. There are four cases

23 involving violations of nonconstitutional norms,

24 okay. I cite them in the brief; People have it in

25 their brief. And they were - - - one was a post - -

1 - a conver - - - something a postmaster did that he
2 shouldn't have done that got information and that was
3 suppressed. It was in violation of postal
4 regulations, suppressed. There was another one with
5 release of a sealed photograph that was used to
6 affect an ID - - - a reliable ID, but an ID - - -
7 suppressed - - - not suppressed.

8 But there was another case where the - - -
9 the violation was of - - - of the search warrant
10 statute, not - - - the - - - the judge to whom the
11 warrant was turned didn't - - - didn't do the right
12 paperwork. In that - - - in that case, this court
13 suppressed that. Why, because it was closely
14 intertwined with the vindication of a constitutional
15 right, their Fourth Amendment right. Here we're
16 talking about - - -

17 JUDGE ABDUS-SALAAM: That's my question,
18 counsel.

19 MR. NEUSTADTER: Yes.

20 JUDGE ABDUS-SALAAM: You said you're not
21 arguing the Fourth Amendment.

22 MR. NEUSTADTER: We are not.

23 JUDGE ABDUS-SALAAM: And I was - - - I
24 wondered whether - - - because in your brief, you - - -
25 - you used language suggesting you were arguing Fifth

1 Amendment, right against self-incrimination, but are
2 you arguing that too?

3 MR. NEUSTADTER: Well, the Sixth Amendment
4 - - -

5 JUDGE ABDUS-SALAAM: Or not?

6 MR. NEUSTADTER: - - - is there to prevent
7 a self-incrimination. That's one of the purposes of
8 having a lawyer.

9 JUDGE ABDUS-SALAAM: Well, but my point is
10 that if you're not arguing Fourth or Fifth Amendment
11 and if - - - if you set aside Sixth Amendment, what
12 would the suppression be based on? And the only
13 thing you've mentioned so far is the postal
14 regulation violation.

15 MR. NEUSTADTER: No, no. I - - - first of
16 all - - -

17 JUDGE ABDUS-SALAAM: A regulation
18 violation, that's what you're saying?

19 MR. NEUSTADTER: I am, but I'm also saying
20 that the consent that they're relying on is
21 inadequate because the warnings that preceded it were
22 limited. They're not as expansive as the consent
23 that the People want to extract from it. It's like
24 the - - -

25 JUDGE FAHEY: I guess the problem I had

1 with that is that the basis of the warning is a
2 constitutional violation. It's Miranda-esque, let me
3 put it.

4 MR. NEUSTADTER: Yes.

5 JUDGE FAHEY: That's - - - that's the
6 problem I had. So if there's no constitutional
7 violation, then we're - - - then we're back on the
8 regs and you've got a tougher argument.

9 MR. NEUSTADTER: Well, I do, but I don't
10 think I'm off the Constitution. Let me make an
11 appeal to tradition in this court.

12 JUDGE FAHEY: Um-hum.

13 MR. NEUSTADTER: Before any lawyer in this
14 room was admitted to the bar, the New York State
15 Court of Appeals was the cutting edge of right to
16 counsel law, going back to the early 60s. And by
17 increment, over time, this court has more and more
18 said always increasing, bumping up, the - - - the - -
19 - ever so slightly, the right to counsel, more
20 expansive, greater awareness of the importance of
21 counsel's role in protecting defense interests.
22 Don't be shy here. This is a cutting edge
23 opportunity. This really does touch upon right to
24 counsel.

25 And on my last thought is this - - - two

1 last thoughts. First, we're using analog law for a
2 digital age. This is too easy, all this tape
3 recording. It's - - - you know, even NSA can't. It
4 just does metadata, and that's been stopped. They
5 don't have the actual conversations.

6 This court has recognized how technology,
7 modern technology, is so intrusive that we've made
8 adjustments in the law. The GPS case, Weaver, some
9 years ago. And the Supreme Court just recently,
10 Riley, with search of a cell phone upon arrest, as
11 incident to an arrest. So there's an awareness all
12 over, including this court, that technology has
13 changed the formulas here and we can't rely on the
14 neat, little stiff categories of an analog age.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 MR. NEUSTADTER: Thank you

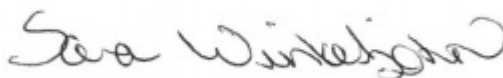
17 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Marcellus Johnson, No. 37 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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