IN THE SUPERIOR COURT OF GLYNN COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	
	*	Indictment:
V.	*	CR 2000433
	*	
TRAVIS MCMICHAEL	*	
GREG MCMICHAEL	*	
WILLIAM R BRYAN	*	

2.1

STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE FROM TRIAL ALL JAIL CALLS

Defendants have moved this Court to exclude relevant and probative evidence based on the Due Process Clause of the Fourteenth Amendment and privacy expectations contained in the Fourth Amendment. The evidence they seek to exclude are the voluntary, incriminating statements of the Defendants, made to third parties, who are not their lawyers nor representatives of the State. They base their motion on the source of the voluntary, incriminating statements of the Defendants, which come from recorded jail phone calls, voluntarily made by the Defendants to third parties they selected, which the Defendants made from the jail knowing the conversations were recorded.

Part 1

The invocation, by the Defendants, of the Due Process Clause stems from the fact that some other defendants charged with murder are out on bond, while Defendants are incarcerated pending trial. Thus, Defendants argue, those other free-on-bond defendants may talk on the telephone to their chosen third parties about their cases without being recorded by the State, if they have access to a telephone and choose to use the telephone to speak with anyone about their case.

There are no statutes regulating jail calls. The jail is under no legislative mandate, obligation or requirement to provide telephone service to any inmate. (The State acknowledges that during the time of incarceration of the defendants the COVID-19 Pandemic has required social distancing, masks and limited physical contact, thus, the Pandemic has made the telephone the main way the defendants can communicate with their chosen third parties, since in person communication has been limited or even prohibited.) The defendants assert that the policy of providing telephone service to incarcerated persons (which is not a constitutional right but is a courtesy and convenience for the defendants' use), and then recording the telephone calls, interferes with the exercise of a fundamental right, Due Process. (Page 11-12 of Defendants Motion.)

The State action involved in obtaining these voluntary, incriminating statements by Defendants, is providing the defendants with courtesy access to a telephone so that they may speak with any third party with whom they choose to speak, knowing that the conversations are recorded.

- Defendants are free to use or not use the telephone to speak with any third party.
- Defendants are the ones who selected the third party with whom they speak.
- Defendants choose what to talk about with the third parties.
- Defendants have the ability and opportunity to discuss their case with their lawyer(s) as much as they want. They can discuss the indictment, their case strategy, their defenses and convey all pertinent information about their case to their lawyers, via telephone. None of these conversations are recorded, nor could they be used in any manner by the State.
- Defendants are told that their conversations with their selected third parties are being recorded.

Defendants assert that it is "punishment" to utilize their voluntary, inculpatory statements to third parties against them because the calls were recorded while being made from the jail. However, any incriminating statements the Defendants make to a third party, at any time, can be introduced into evidence via the testimony of the

person with whom the defendant spoke. This holds true for the other free-on-bond defendants.

Each defendant made a knowing, intelligent and deliberate choice to speak with third parties about his case, the evidence and the charges against him. Each defendant could have just as easily chosen to only speak with his attorney about his case and could have refused to speak to third parties about his case, keeping his conversation to other topics. Especially when each defendant was informed that the phone calls were being recorded.

Simply because the voluntary, incriminating statements were made on a jail call does not somehow turn the inculpatory statements from evidence into punishment. A defendant always has a choice about what he or she says in any of his or her communications whether it is written correspondence, texts, social media, or verbal statements to third parties during phone calls. There is no violation of Due Process in the use of recorded jail phone calls containing voluntary, inculpatory statements by a Defendant.

Part II

Defendants have no expectation of privacy in a jail call that they know is being recorded. See *Keller v. State*, 308 Ga. 492, 497 (2020) citing to *Preston v. State*, 282 Ga. 210, 214 (2007) (Holding that a defendant had no reasonable expectation of privacy in the calls he places from the jail.); see also *Rogers v. State*, 290 Ga. 18, 20-21 (2011) (Holding that a defendant had no reasonable expectation of privacy in the conversation he had with his lawyer during a phone call from the jail in which his girlfriend initiated and participated in the three way phone call with the lawyer.)

Defendants know their jail calls are being recorded. But Defendants want this Court to create a distinction between the jail using Defendants recorded phone calls for security purposes and the prosecution using Defendants recorded phone calls as evidence in their case. Either way Defendants have no expectation of privacy in their jail calls, and thus there is no Constitutional protection under the Fourth Amendment of the Constitution, nor any requirement that the prosecution obtain a search warrant for Defendants jail calls.

The Defendants cite to *Davis v. State*, 307 Ga. 625, 631 (2020). This was a case about jail mail, which are items that fall under the Fourth Amendment as "papers." In *Davis*, the Georgia Supreme Court held that a "pre-trial detainee's Fourth Amendment expectation of privacy **in his cell and personal effects** is necessarily diminished" and that "items found during searches conducted for security and maintenance purposes are not within the scope of protection of the Fourth Amendment." (Emphasis added.) Meaning if jail personnel search the defendant's cell and find probative and relevant evidence, the prosecution may use it at trial. But if the prosecution initiated the search of the cell for a defendants' papers or effects "for the purposes of bolstering the prosecution's case" then the pre-trial detainee is protected from an unreasonable search.

The Fourth Amendment to the Constitution states, "[t]he right of the people to be secure in their **persons, houses, papers, and effects**, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added.) Verbal conversations are not listed and there is nothing to suggest that voluntary recorded conversations fall under any of the categories.

The Defendants are trying to elevate jail calls, an optional courtesy and convenience offered to incarcerated defendants, into something protected by the Constitution, such as their person, houses, papers, and effects. The only case they cite to is *Davis*. The lack of cases on this point both in Georgia and the Eleventh Circuit support the State's position. However, *People v Diaz*, 33 N.Y.3d 92 (2019) out of New York is right on point, holding that the release of jail call recordings from the New York Department of Corrections to the prosecutor's office it is NOT an additional search that violates the Fourth Amendment.

> As a number of courts have explained, where detainees are aware that their phone calls are being monitored and recorded, all reasonable expectation of privacy in the content of those phone calls is lost, "and there is no legitimate reason to think that the recordings, like any other evidence lawfully discovered, would not be admissible" (*United States*

> *v Eggleston*, 165 F3d at 626; see also *United States v Novak*, 531 F3d 99, 103 [1st Cir 2008] [holding that because the defendant had consented to the monitoring of his calls, they could be introduced into evidence "consistently with the requirements of the Fourth Amendment"]; *United States v Green*, 184 Fed Appx 617, 618 [9th Cir 2006] [observing that disclosure of recordings to prosecution "does not . . . provide a basis for establishing a violation of . . . the Fourth Amendment"]; see also *People v Natal*, 75 NY2d 379, 382-383, 553 NE2d 239, 553 NYS2d 650 [1990])." *People v Diaz* at 99-100.

Defendants have motioned for an evidentiary hearing "in order to establish how recorded phone calls in possession of the detention center…end up in the possession of the prosecuting attorney." (P.23 Defendant's Motion.) The answer is law enforcement officials requested the jail phone calls and the detention center gave them to law enforcement, who in turn provided them to the prosecution as part of their case file. There is no requirement, statutorily nor Constitutionally, that the State establish probable cause for a search warrant to obtain voluntary jail calls of the Defendants, because there is no expectation of privacy in a jail call.

Conclusion

The Defendants are asking this Court to create a policy or "legislation" governing the use of jail calls containing relevant and probative evidence, by ruling that they should be excluded from trial because the use of the defendant's voluntary, incriminating statements contained in the jail calls constitutes "punishment" and is a violation of Due Process. (P.12 Defendant's Motion.) The Defendants are also asking this Court to elevate jail calls to a constitutional level of protection under the Fourth Amendment. (P. 20-23 Defendant's Motion.) The State asks that the Court deny the motion since there is no expectation of privacy in a jail call and Defendants, just like any other out-on-bond defendant charged with murder, have both the

freedom of choice to use or not use the telephone and to decide what they say during any conversation with a third party.[1]

This the 29th day of January, 2021.

/S/ Linda J. Dunikoski
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[1] The State has no intention of using privileged communication between Greg McMichael and his wife, unless it becomes relevant during his or her testimony. At which time, the State will request a ruling on the proffered evidence outside the presence of the jury.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served opposing counsel with a true and correct copy of the above 2.1 STATE'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE FROM TRIAL ALL JAIL CALLS via the Odyssey E-File System to:

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This the 29th day of January, 2021.

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