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120 WALL STREET – 28TH FLOOR, NEW YORK, NY 10005 TEL. (212) 577-2523 FAX 577-2535

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ISSUES TO DEVELOP AT TRIAL

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This month's issue focuses on Rikers Island phone calls, a hot issue following the Court of Appeals decision in April in ***People v. Marcellus Johnson****. As discussed below, the Court left wide open (and appeared to invite) challenges based on inadequate notice. But we'll suggest a few other bases for challenging this extraordinarily prejudicial evidence as well.*

Bottom line:

- **Object if the prosecutor wants to introduce your client's taped Rikers phone calls. Argue, noting that *Johnson* left the issue open, that your client did not consent to the dissemination of the recordings to the District Attorney's office, regardless of whether he was notified that he was being recorded.**

The issue: If an individual in pretrial detention at Rikers Island wants to speak to anyone in the outside world, he or she must use the Rikers phone system, which records all non-privileged calls. Calls to friends and family are therefore recorded, with notice provided to the inmate of such recordation. Despite the warning, defendants, having no choice but to use the phone system to talk about their situation with their friends and relations, may make incriminating statements or statements evidencing a consciousness of guilt (or that allow for such implication). These calls are often the single most effective evidence against the defendant. Conversely, individuals at liberty pending trial can speak freely to friends and family with no one listening in. Increasingly, prosecutors have seen the tapes as a rich source of inculpatory proof. DOC provides the tapes to the District Attorney, and the prosecution introduces the calls, or excerpts of them, into evidence.

Relevant caselaw: In People v. Johnson, decided April 5, 2016, the Court of Appeals considered a challenge to the admission of this extremely prejudicial evidence.

The defense argued, as it had before the trial court, that the practice violated the defendant's right to counsel and exceeded the scope of DOC's regulatory authority. In the Court of Appeals, the defense added a third argument, that the dissemination was conducted without the defendant's consent – while DOC notified him that his calls were being recorded, they did not inform him that the recordings could be released to the prosecutor.

After reviewing the regulatory framework, the Court of Appeals rejected the first two claims on the merits, finding that DOC did not act as an agent of the State when it recorded the calls it turned over to the DA, and that, whether or not DOC acted beyond its regulatory authority in disseminating the calls to the DA's office, suppression or preclusion wasn't warranted because

the defendant didn't identify a statutory right violated by DOC.

As for the consent issue, the Court found that it was unpreserved and did not reach the merits — leaving the issue open for another day. Notably, the Court signaled its concern with current practices, so hopefully the issue will be decided favorably if properly preserved. Worth reading is Judge Pigott's frank and refreshing concurrence, in which he set forth the incredible inequities distinguishing people who are in pretrial detention, whether because they can't make bail or are remanded, from those who are at liberty pending trial.

Preserving the issue: Argue that your client did not have notice that the calls would be disseminated to the District Attorney.

Consider these additional objections as well, especially since, in Johnson's wake and picking up the Court's signals, DOC may take steps to provide such notice :

- **Argue that DOC needed a warrant to tape your client's phone calls**. Federal and state wiretapping statutes bar state agents from wiretapping calls without a warrant. 18 U.S.C. §2511(1)(a); Penal Law §250.05. Federal and state exclusionary rules bar the use of material obtained through the crime of eavesdropping. 18 U.S.C. §2515; C.P.L.R. §4506(1). Argue that your client did not consent by using the phone system, because, where eavesdropping is concerned, knowledge does not equal consent. See United States v.Daniels, 902 F.2d 1238, 1244 (7th Cir. 1990).

- **Argue that your client's statements were "involuntary" under C.P.L. §60.45.** C.P.L. §60.45 deems involuntary statements that result from "undue pressure which impaired the defendant's physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement." Here, on the most basic level, your client had no choice but to use the Rikers phone system if he wanted to communicate with the outside world. That alone probably won't carry the day, so marshal facts relevant to your client to support that his particular circumstances (for example, age, mental condition, seriousness of charges, length/circumstances of detention, previous experience with criminal justice system) created "undue pressure which impaired" his "physical or mental condition to the extent of undermining his ability to make a choice whether or not to make a statement" on the Rikers call system.

    - At a minimum, request a voluntariness instruction, to allow the jury to assess the circumstances bearing on your client's choice to make the statements.

- **If your client speaks a language other than English or Spanish, argue that he did not consent at all**. In recounting DOC procedures, the Court in Johnson stated that notice that the calls were being recorded was provided in English and Spanish. If your client speaks a different language, argue that he did not have notice even that the calls were being recorded.

- **Argue that, as an evidentiary matter, the calls should not be admitted because of their extreme prejudice.** Even relevant evidence can be excluded if its prejudicial impact exceeds its probative value. See People v. Scarola, 71 N.Y.2d 769 (1988). Identify the extreme prejudice to your client of admitting these calls and minimize the probative value to the extent possible — perhaps the calls are ambiguous in some respect or cite the mountain of other evidence the prosecution has.

- **Argue that the prosecutor's disclosure of the tapes, if right before or during trial, violated your client's constitutional right to your effective assistance during plea bargaining, a duty imposed by the United States Supreme Court in *Lafler v.Cooper*, 132 S.Ct. 1376 (2012).** You should ask the prosecutor as early as possible whether he or she will be seeking to introduce Rikers tapes and for their disclosure. If the prosecutor hems and haws and refuses to disclose (saying not sure she's going to use them, hasn't decided), but then seeks to introduce them later, you should argue for preclusion of the tapes because the prosecutor's dilatory decision-making affected your ability and constitutional obligation to properly counsel your client. Had you known the contents of the tapes, you might have counseled your client to take a plea. Alternatively, try arguing that your client should get the plea offer back, if he wants it. That is suggested by Lafler itself as the appropriate remedy, albeit there, it was after the defendant had lost at trial and been sentenced more harshly than the plea offer.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- If the judge only takes objections at sidebar, or you've asked to approach to flesh out your objection, make sure the court reporter is recording the sidebars. It is on the attorney, not the judge, to ensure recordation, and, if not recorded, the issue will not be preserved for appeal. Alternatively, repeat your objection and the court's ruling, on the record, at the earliest opportunity.

Next month: Crawford issues in New York in the wake of People v. Sean John (Court of Appeals,. April 28, 2016).

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