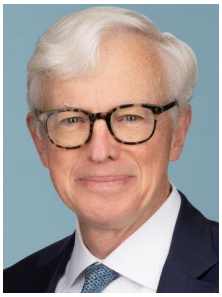
Challenging Prosecutors' Use Of Defendants' Jail Phone Calls

By **Jim McLoughlin and Fielding Huseth** (July 17, 2024)



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Pretrial detention imposes severe burdens on a defendant's ability to prepare for trial.

One such burden is that the prosecution may receive, without a warrant, recordings of the defendant's electronic communications, especially telephone calls, that the jail recorded.

Standard jail practice requires a detainee to consent to the recording of calls as a condition of using the jail telephone system. As a result, the pretrial detainee cannot contact witnesses or others without the risk of the prosecution obtaining the call, which could impede candid discussion.

In some cases, the detainee may have reason for concern that calls with defense counsel could be shared with the prosecution.

Right now, in U.S. v. Hohn,[1] the en banc U.S. Court of Appeals for the Tenth Circuit is poised to decide an important issue: whether the prosecution's use of a recorded call between a pretrial detainee and his attorney violated the defendant's Sixth Amendment rights.

Steven Hohn, the detainee, was given notice that his calls would be recorded for jail security reasons, but not that prosecutors could receive the recordings.[2]

In his post-conviction collateral challenge, the U.S. District Court for the District of Kansas concluded in part that the prosecutor "intended to intrude into [his] attorney-client relationship by intentionally becoming privy" to an attorney-client call, but that the call was not privileged, and no Sixth Amendment right attached because the defendant knew the call would be monitored.[3]

Hohn argues that the Sixth Amendment right attached to his attorney-client communication, whether privileged or not.[4]

The en banc court should soon decide whether the Sixth Amendment safeguards the attorney-client relationship against such intrusion.

The Tenth Circuit will likely set a major precedent either for or against the protection of a detainee's Sixth Amendment right against prosecutorial intrusion into attorney-client communications.

Regardless of its outcome, we offer recommendations to challenge a jail's use and disclosure of pretrial detainees' recorded communications.[5] Although it is an uphill battle under current case law, there are arguments to be made under the First, Fourth, Fifth and Sixth Amendments and the Wiretap Act.[6]

The Wiretap Act

The Wiretap Act prohibits the intentional interception and use of electronic

communications.[7] Applying two statutory exceptions — (1) consent and (2) law enforcement — courts have held that jails can record pretrial detainees' calls to maintain jail security.[8]

Once the calls are recorded, the Wiretap Act permits broad derivative use of the recordings by other "law enforcement officers," including prosecutors.[9]

The U.S. Supreme Court has repeatedly upheld regulations that limit a pretrial detainee's constitutional rights to maintain jail security,[10] but has not opined on the derivative use by prosecutors of the jail's recordings of detainee's communications.

Understanding the two exceptions and the derivative use provisions is critical.

The Consent Exception

Jails typically notify detainees that their calls will be recorded, e.g., by posting signs, distributing written policies or playing a message at the outset of a call.[11]

This exception permits "a person acting under color of law to intercept a wire, oral, or electronic communication ... [if] one of the parties to the communication has given prior consent to such interception."[12]

In most cases, courts have held that the jail has met the exception so long as the jail provided notice.[13]

The Law Enforcement Exception

The Wiretap Act excludes "equipment ... being used ... by an investigative or law enforcement officer in the ordinary course of his duties."[14]

In most cases, like with the consent exception, courts have held that jail security officers count as law enforcement officers acting in the ordinary course of their duties when recording jail calls.[15]

The Derivative Use Provisions

So long as an exception applies, a law enforcement officer generally can share recorded calls with other law enforcement, including prosecutors, when "appropriate to the proper performance of the official duties of the officer" and the prosecutors.[16] Courts have broadly interpreted this authorization.[17]

Defendants face an uphill battle when challenging the prosecution's reliance on these two exceptions and the derivative use provisions, but taking steps in advance and focusing on certain issues could improve outcomes.

Challenge Based on the Fifth and Sixth Amendment Rights to Prepare a Meaningful Defense

Taken together, the Fifth and Sixth Amendments ensure a pretrial detainee's right to communicate with potential witnesses and others to prepare the detainee's defense.

As the U.S. Court of Appeals for the Fourth Circuit succinctly explained in its 2015 decision in U.S. v. Beyle, "Fifth Amendment due process and Sixth Amendment compulsory process

are closely related, for the right 'to call witnesses in one's own behalf ha[s] long been recognized as essential to due process.'"[18]

The Supreme Court held in its 1974 ruling in U.S. v. Nixon that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive."[19] The year prior, in Chambers v. Mississippi, it wrote that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."[20]

And, as the Supreme Court held in its 1967 decision in Washington v. Texas, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense ... [which] is a fundamental element of due process of law."[21]

The prosecution's broad access to the pretrial detainee's electronic communications in jail chills the ability to prepare a meaningful defense and is fundamentally unfair in the adversarial process. To the extent the Wiretap Act purportedly permits the prosecution's use of those communications, the Fifth and Sixth Amendments must control.

The reality is that no court will prohibit the jail from recording such communications for jail security, so a defendant's viable challenge is to derivative use — i.e., to the jail's sharing of the communications with prosecutors.

The detainee should challenge the practice when detention begins by submitting a demand for notice and the opportunity to be heard should the jail plan to share any recordings with prosecutors. Without such a challenge, counsel likely will either never learn of the disclosure, or learn too late.

The notice should set out the detainee's right to have direct communications with witnesses and others to prepare the detainee's defense, as protected by the Fifth and Sixth Amendments.

Challenge to the Fiction of Consent

A pretrial detainee retains not just Fifth and Sixth Amendment rights, but also First and Fourth Amendment rights, though the latter rights are more limited.

The reliance of the courts on a pretrial detainee's consent, particularly implied consent — i.e., placing a call after mere receipt of notice — to justify the waiver of these constitutional rights is surprisingly frequent.

But the line of Supreme Court cases following its 1967 decision in Garrity v. New Jersey[22] and 1977 decision in Lefkowitz v. Cunningham[23] stand for the principles that a coerced waiver of rights is ineffective, and conditioning the exercise of a right on waiving Fifth Amendment rights is unconstitutional.

If defendants have no realistic alternative to using the telephone in preparing their defense, then those defendants arguably are coerced and do not consent to waiving their constitutional rights. Such consent, the Supreme Court wrote in its 1968 Bumper v. North Carolina decision, must be "freely and voluntarily given."[24]

Other circumstances can reinforce the challenge. If the jail did not notify the detainee that the calls would be recorded, then the detainee may have a straightforward statutory argument that they did not consent.

If the detainee is a non-English speaker who received notice only in English, then they similarly could assert that they did not consent or otherwise waive their Fourth Amendment right to be free from a warrantless search.[25]

In analogous contexts, courts have held that a defendant did not waive his rights when he had received information in a language that he did not understand.[26]

The detainee should provide notice to the jail of their rights under the Fifth and Sixth Amendments at the outset of detention, which can reinforce the detainee's subsequent argument that any recorded communications shared with prosecutors violated these rights.

Challenge to the Law Enforcement Exception and Derivative Use

If an officer at the jail records or reviews a detainee's call for a criminal investigation, such as at the request of an investigator or prosecutor, then the officer arguably acts outside the ordinary course of their duties.

In 1994, the U.S. District Court for the Western District of New York held in U.S. v. Green decision that the prosecution could not meet the "ordinary course" prong because the jail did not record the defendant's calls "to advance prison security but rather to gather evidence in a criminal investigation."[27]

And, in Amati v. City of Woodstock, the U.S. Court of Appeals for the Seventh Circuit in 1999 interpreted "ordinary" to mean "routine noninvestigative recording of telephone conversations."[28]

As a matter of statutory interpretation and Fourth, Fifth and Sixth Amendment jurisprudence, it is arguably not appropriate to the proper performance of the official duties of either jail security or the prosecution for jail security to share those recordings to facilitate the existing prosecution against the pretrial detainee.[29]

Conclusion

In short, the prosecution's derivative use of a jail's recorded communications to prosecute existing charges against a pretrial detainee arguably infringes on the detainee's Fourth, Fifth and Sixth Amendment rights.

A jail's use of those same recordings for security or for the prosecution of an offense related to jail security, in contrast, presents a different scenario not addressed by this article.

Again, the detainee should challenge improper derivative use by providing notice to the jail of these rights and demanding notice and an opportunity to be heard if the jail plans to share any recordings with prosecutors. Doing so could reinforce any arguments raised later.

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affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] United States v. Hohn, 91 F.4th 1060 (10th Cir. 2024).

[2] CCA Recordings 2255 Litig. v. United States, No. 12-CR-20003-03-JAR, 2021 WL 5833911, at *9 (D. Kan. Dec. 9, 2021).

[3] Id. at *17, 24.

[4] See United States v. Hohn, 91 F.4th 1060 (10th Cir. 2024).

[5] See McLoughlin and Huseth, 'Challenging Prosecutorial Use of a Pretrial Detainee's Electronic Communications,' 33 S. Cal. Rev. L. & Social Justice 89, https://www.mvalaw.com/media/news/15148_ARTICLE_%20CHALLENGING%20PROSECUTORIAL%20USE%20OF%20A%20PRETRIAL%20DE.pdf.

[6] 18 U.S.C. §§ 2510–23.

[7] 18 U.S.C. § 2511(1).

[8] 18 U.S.C. § 2511(2)(c) and § 2510(5)(a)(ii); see, e.g., United States v. Willoughby, 860 F.2d 15, 21 (2d Cir. 1988).

[9] 18 U.S.C. § 2517(1)-(3). Related provisions are in § 2517(4)-(8).

[10] See, e.g., Block v. Rutherford, 468 U.S. 576 (1984).

[11] See, e.g., United States v. Friedman, 300 F.3d 111, 121 (2d Cir. 2002) (posted sign near telephones); CCA Recordings 2255 Litig., 2021 WL 5833911, at *9 (recorded preamble at beginning of each call); Willoughby, 860 F.2d at 18 (written policy distributed to inmates).

[12] 18 U.S.C. § 2511(2)(c).

[13] See Supra, n. 5.

[14] 18 U.S.C. § 2510(5)(a)(ii).

[15] See, e.g., United States v. Hammond, 286 F.3d 189, 192 (4th Cir. 2002) (interpreting 18 U.S.C. § 2510(5)(a)(ii)).

[16] 18 U.S.C. § 2517(1); see also § 2517(2)-(8).

[17] See State v. Jackson, 460 N.J. Super. 258 (App. Div. 2019), aff'd, 241 N.J. 547 (2020) ("The jail authorities were in the proper performance of their official duties when they recorded the calls, and the Prosecutor's Office was properly performing its official duties by conducting the investigation."); United States v. O'Connell, 841 F.2d 1408, 1417 (8th Cir. 1988) ("The disclosures to the secretaries and intelligence analyst were probably valid under section 2517(2).").

[18] United States v. Beyle, 782 F.3d 159, 170 (4th Cir. 2015) (quoting Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

[19] United States v. Moussaoui, 382 F.3d 453, 471 (4th Cir. 2004) (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)).

[20] Chambers, 410 U.S. at 302.

[21] Washington v. Texas, 388 U.S. 14, 19 (1967).

[22] 385 U.S. 493 (1967).

[23] 431 U.S. 801 (1977).

[24] Bumper v. North Carolina, 391 U.S. 543, 548 (1968); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

[25] See United States v. Cohen, 796 F.2d 20, 24 (2d Cir. 1986) (holding that a pretrial inmate "retains a Fourth Amendment right . . . tangible enough to mount the attack on this warrantless search.").

[26] United States v. Guay, 108 F.3d 545, 549 (4th Cir. 1997) (A defendant's "[l]imited ability to understand English may render a waiver of rights defective."); United States v. Montreal, 602 F. Supp. 2d 719, 723–24 (E.D. Va. 2008) (holding that a defendant with "no understanding of the English language" did not waive her Fifth Amendment rights by signing a statement without knowledge of its contents).

[27] 842 F. Supp. 68, 73–74 (W.D.N.Y. 1994).

[28] 176 F.3d 952, 955 (7th Cir. 1999).

[29] See 18 U.S.C. § 2517(1)-(2).