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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 74

KERBET DIXON,

Appellant.

20 Eagle Street
Albany, New York
September 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Kerbet Dixon.

3 Counsel?

4 MR. FITZMAURICE: Good evening, Your Honors.
5 David Fitzmaurice from Appellate Advocates, on behalf of
6 Mr. Dixon. And I'd like to reserve four minutes.

7 CHIEF JUDGE WILSON: Yes.

8 MR. FITZMAURICE: Your Honors, a Sixth Amendment
9 violation, once considered hypothetical by members of this
10 court in People v. Johnson, has happened here and may be
11 happening in untold number of other cases, because the
12 status quo under New York law is that the prosecution can
13 have unfettered and undisclosed access to a pro se
14 defendant's jail calls, which will include calls with
15 defense witnesses and involve defense strategy. And this
16 tactical advantage could be potentially happening in every
17 single pro se case. We only know about it here because it
18 actually arose at trial.

19 JUDGE TROUTMAN: Do you contest here that the
20 defendant was apprised that any time he used the phone it
21 was being recorded?

22 MR. FITZMAURICE: No, Your - - - Yes, Your Honor,
23 he was - - - he was advised that he was being recorded.

24 JUDGE TROUTMAN: So he knew he was pro se,
25 correct?

1 MR. FITZMAURICE: Yes, Your Honor.

2 JUDGE TROUTMAN: And he could have made an
3 application to the court with respect to the People
4 automatically getting conversations.

5 MR. FITZMAURICE: No. No, Your Honor, I'm not -
6 - - I'm not sure it falls so - - - so neatly.

7 JUDGE TROUTMAN: So he couldn't have told the
8 court that he's talking - - - he's using the phone to talk
9 to witnesses and has a concern that the People may be
10 receiving a tactical advantage because his calls are
11 automatically being turned over?

12 MR. FITZMAURICE: Well, Your Honor, he - - - he
13 said almost those exact words to the court.

14 JUDGE TROUTMAN: After - - -

15 MR. FITZMAURICE: After - - -

16 JUDGE TROUTMAN: - - - the fact.

17 MR. FITZMAURICE: After the use became known,
18 yes.

19 JUDGE TROUTMAN: But it's - - - it's a practice.
20 The phone is there; the calls are recorded. You're not
21 suggesting that only when he spoke to a witness did he ever
22 realize the phone was being monitored?

23 MR. FITZMAURICE: Your Honor, I think there's a
24 big difference between being warned, which you are, that
25 the jail is recording it, and knowing - - - and being told

1 within three days that the trial prosecutor will hear
2 everything.

3 CHIEF JUDGE WILSON: So do we - - - do we have to
4 - - - do we have to ask, in this case, whether his defense
5 was actually impaired, if there's some evidence of that, or
6 to what degree it was impaired?

7 MR. FITZMAURICE: You know what, Your Honor, I
8 think that - - - I think the revelation of the status quo
9 and the unfettered access here - - -

10 CHIEF JUDGE WILSON: Let me - - - let me try and
11 - - - and put more of a point on it. So what the court
12 says in response, when he does say, wait a minute, they're
13 listening to and using my calls, the court says, well,
14 actually, you haven't been in jail for most of this, you
15 know, two and a half years, you've been out and had plenty
16 of chances to talk to witnesses and find witnesses.

17 The court also says you have an advisor who was
18 your counsel, and he can go contact people. And the court
19 then also says, and I'll give you some time privately with
20 the witnesses you're calling in your case so you can
21 prepare them. And the court, I think the record reflects,
22 actually did that for the two witnesses after the point
23 that Mr. Dixon made that statement. The third witness was
24 he, himself, and I presume that he was not calling himself.

25 MR. FITZMAURICE: A Fight Club situation, Your

1 Honor.

2 CHIEF JUDGE WILSON: Right. So on the facts of
3 this case, if - - - let me ask it this way, if we thought
4 that we do have to ask was his - - - is there evidence that
5 his defense here was impaired - - -

6 MR. FITZMAURICE: Um-hum.

7 CHIEF JUDGE WILSON: - - - what is that evidence?

8 MR. FITZMAURICE: So - - - okay. On this case,
9 which again, I submit is exposing a state-wide problem
10 here. But on this case, we have certain known advantages.
11 We have overt use with a witness which resulted in
12 testimony that the prosecutor later called important
13 testimony during summation. We do have a reference to the
14 - - - on the record, to the prosecution arriving to court
15 one day with, quote, files about a witness that he could
16 only have known about from listening to the calls. And
17 then we do have a objection on the record, multiple times,
18 to the chilling effect, because he was using the calls to
19 conduct his defense preparation.

20 CHIEF JUDGE WILSON: Well, presumably there's no
21 chilling effect up until the point that he finds out that
22 they're using the information?

23 MR. FITZMAURICE: Yeah.

24 CHIEF JUDGE WILSON: Right?

25 MR. FITZMAURICE: Yes, Your Honor, but I don't

1 think trial preparation stops at trial.

2 CHIEF JUDGE WILSON: Well, no, right. I'm just
3 saying that your chilling effect argument would take effect
4 from the point that he learned that this was being used?

5 MR. FITZMAURICE: Yes, Your Honor, the chilling -
6 - -

7 CHIEF JUDGE WILSON: Then the only - - -

8 MR. FITZMAURICE: - - - yes.

9 CHIEF JUDGE WILSON: - - - witnesses after that
10 point, I think, are two character witnesses and Mr. Dixon
11 himself?

12 MR. FITZMAURICE: Yes, Your Honor, but the - - -
13 the - - - so the chilling effect, yes, that - - - that can
14 only be chilled once - - - once it's disclosed. But,
15 really - - -

16 CHIEF JUDGE WILSON: And at that point, for those
17 witnesses, he's allowed to talk with them privately before
18 they testify?

19 MR. FITZMAURICE: Well, he's afforded a - - - a -
20 - - a small amount of minutes. But I - - - I think what it
21 boils - - -

22 CHIEF JUDGE WILSON: Does the record show how
23 much time that is?

24 MR. FITZMAURICE: No, I think he complains at
25 some stage that he - - - he's - - - he's given a few

1 minutes at the end of trial, which - - - which isn't quite
2 the same thing. And the court says, well, you've had years
3 to prepare this case.

4 So I - - - I - - - these are the known
5 advantages. I submit that there are quite a number of
6 unknown advantages, because we're not sure, since it
7 happened for several weeks, how it even affected the
8 prosecution's case. And it's not hard to imagine a
9 situation where a prosecutor who is listening to these
10 calls for weeks, months, years, can learn an untold number
11 of things about a defense case, whether that's identity of
12 defense witnesses, the content of their - - - of their - -
13 - of their examination, weaknesses - - -

14 JUDGE SINGAS: But that's not what happened here,
15 right? I mean, here, that evidence wasn't even used as
16 direct evidence. That was used for cross-examination
17 purposes, for credibility purposes, correct?

18 MR. FITZMAURICE: Well, yes. But we - - - that's
19 just a - - - one known use that we have. We don't know
20 what we don't know. That - - - that's kind of the problem
21 here, which is why that we can't say how it affected
22 potentially the prosecution's case, and - - -

23 JUDGE GARCIA: So - - - so, counsel, going back
24 to the Chief Judge's question, I think you're arguing that
25 there would not be a required showing of prejudice then?

1 MR. FITZMAURICE: So I think that down the line,
2 if we have a situation where courts can make a record of
3 the tactical advantage, then I think we could think about
4 analyzing it under that respect. But right now, at the - -
5 - at the very beginning of this problem, which was once
6 just considered hypothetical, we can't exclude - - - we
7 can't exclude the tactical advantages that we don't know
8 about, so - - -

9 JUDGE GARCIA: And so would the rule you're
10 asking for, would that be that in a case where a defendant
11 goes pro se and is incarcerated, they have to set up an
12 ethical wall, the screening team?

13 MR. FITZMAURICE: I think that - - - one of a few
14 rules. I think that's what prosecutors have done in other
15 cases. And I submit that that would go a long way. I
16 submit - - -

17 JUDGE GARCIA: Would that be enough?

18 MR. FITZMAURICE: I would think, yes. But one
19 more stage I would - - - I would ask for which would be
20 that, like this court said in Johnson about the - - - the
21 gatekeeping role, I think that when the - - - when the
22 taint team - - -

23 JUDGE GARCIA: Um-hum.

24 MR. FITZMAURICE: - - - makes a decision, you
25 know, we don't think this gives a tactical advantage,

1 perhaps submit it to the judge as a gatekeeper. And that
2 way we can be sure whether the prosecutor actually gets a
3 tactical advantage, and then we can start analyzing on
4 appeal things like prejudice - - -

5 JUDGE TROUTMAN: What happens in smaller offices,
6 does resources come into play with the ability to set up
7 these teams, screenings?

8 MR. FITZMAURICE: That - - - that's a fair
9 question, Your Honor. I submit that if you have the
10 resources to - - - to - - - to monitor and access, you
11 know, hours and hours, days of - - - of calls, it's
12 incumbent to then find the resources for a screen, maybe,
13 internally. I'm not saying that it necessarily has to be a
14 member of the court system - - -

15 JUDGE HALLIGAN: And would that apply to all
16 conversations or - - - or would you, you know, envision
17 that - - - that a incarcerated pro se defendant would
18 provide a list of individuals who he or she plans to speak
19 with in terms of witness prep? Because I - - - I assume,
20 but tell me if you have a different view, that to the
21 extent you're arguing that there are constitutional
22 interests that are being impinged upon, that's only the
23 case under your view, with respect to witness preparation?

24 MR. FITZMAURICE: Yes, Your Honor, I think - - -
25 I think this is the - - - the - - - the problem with the

1 combination of a pro se defendant - - -

2 JUDGE HALLIGAN: Um-hum.

3 MR. FITZMAURICE: - - - and a remand. When we
4 considered this issue in - - - in Johnson with represented
5 defendants - - -

6 JUDGE HALLIGAN: Yeah.

7 MR. FITZMAURICE: - - - the constitutional issues
8 didn't really arise because there was an assumption that,
9 well, they have their communication with their lawyer, so
10 that's where the Sixth Amendment is protected. For pro se
11 defendants, we - - - we can't say that. So there's an
12 inherent risk that calls - - - maybe even calls with it - -
13 - with the same witness.

14 JUDGE HALLIGAN: But - - - but so are you - - -

15 MR. FITZMAURICE: Might fall - - -

16 JUDGE HALLIGAN: - - - are you proposing, just so
17 I'm clear, that - - - that this - - - whatever this
18 procedure might be under your - - - under your view, would
19 be limited to individuals whom the defendant identifies as
20 witnesses in - - - in - - - in his or her case. Because to
21 go beyond that, even if we were to accept your premises up
22 to that point, it seems to me that there's no
23 constitutional interest at play, unless I'm missing
24 something.

25 MR. FITZMAURICE: I mean, Your Honor, I think - - -



1 - I think any rule is better than the status quo of
2 unfettered - - -

3 JUDGE TROUTMAN: Well - - -

4 MR. FITZMAURICE: - - - access. But you - - -

5 JUDGE TROUTMAN: - - - what about the fact that
6 there's an investigator that's given to the defendant, and
7 investigators, even when defendants are out on bail,
8 interview witnesses for them, help prep their defense, and
9 you have standby counsel; does that matter?

10 MR. FITZMAURICE: I think these could be people
11 that - - - that could potentially be put on a list like
12 this, you know, certain known representatives. I - - - I
13 don't think that having standby counsel - - - I don't think
14 standby counsel could conduct your witness preparation. I
15 think that comes too far into the potentially violating the
16 right to pro se itself. But maybe there would be some - -
17 - some ones that might clearly flag it. The tricky part
18 about all this is that - - - is that we don't know, these
19 are evolving situations. And - - - but I would submit that
20 if - - -

21 JUDGE HALLIGAN: But presumably - - -

22 MR. FITZMAURICE: - - - if it could be limited,
23 yes.

24 JUDGE HALLIGAN: - - - if we were to agree with
25 your - - - your premises, providing some clarity would be

1 helpful to avoid, you know, confusion, litigation, all
2 kinds of other - - -

3 MR. FITZMAURICE: Right.

4 JUDGE HALLIGAN: - - - you know, outcomes?

5 MR. FITZMAURICE: Your Honor, I think it would be
6 a fair - - - I think it would be a fair thing to tell pro
7 se defendants that the Faretta colloquy, if they're
8 remanded, that they could propose certain - - - certain
9 numbers and that those numbers may be subject to screening.

10 JUDGE SINGAS: Well, didn't - - - isn't this
11 defendant really situated differently because it's not that
12 he was a pro se defendant, incarcerated from the beginning.
13 He was remanded because he was trying to impact and
14 dissuade a witness from testifying. He was out the entire
15 time, and then the judge remanded him because of that,
16 which I think might - - - some people might conclude that
17 his calls then should have been monitored because of how he
18 was conducting himself and the reason for which the judge
19 put him in. So does he really stand or sit the way other
20 pro se defendants do?

21 MR. FITZMAURICE: Your Honor, my position isn't
22 that his calls couldn't necessarily have been monitored for
23 potential reasons like jail security, or even in certain
24 cases, a risk of intimidation of witnesses. But they are
25 not decisions that a trial prosecutor has to make. There

1 are things that can be accommodated by a screened
2 prosecutor, you know, and - - - and - - - and the legal
3 system creates these - - - these things.

4 I mean, we - - - we have them for if cases
5 involve lawyers. I mean, there's so many examples from the
6 Southern District where white collar cases involve lawyers
7 and prosecutors created a screen. So I think to Your
8 Honor's point, security concerns, abuse concerns, I - - - I
9 think there are situations that can be accommodated by an
10 intermediary.

11 JUDGE HALLIGAN: So - - - so practically how
12 would - - - how would that work in a case, for example,
13 where there's a legitimate concern about witness tampering,
14 and the calls are being monitored and there's some separate
15 screened individual who's monitoring them, and hears the
16 defendant, you know, threaten, tamper with a witness. What
17 then would that individual do? Could she - - - would - - -
18 would you have her go to the judge in the case? Would she
19 then be able to tell the prosecutor in the case? How - - -
20 how would it work - - -

21 MR. FITZMAURICE: I mean - - -

22 JUDGE HALLIGAN: - - - on the ground?

23 MR. FITZMAURICE: That's a good question. And
24 I've thought about that question - - -

25 JUDGE HALLIGAN: What's the rule you're asking us

1 to adopt?

2 MR. FITZMAURICE: Yeah, I mean, look, you're
3 right, and I've thought about that question. I will start
4 by saying that the - - - the - - - the trial of the
5 gatekeeper can address a lot of it. And - - - and in
6 extreme cases, I do think that it could rise to the level
7 where - - -

8 JUDGE HALLIGAN: So you would have - - - you
9 would have some other lawyer in the DA's office who has not
10 been involved in the case, go in to the judge and lay out
11 whatever she heard on a tape.

12 MR. FITZMAURICE: Yes, Your Honor.

13 JUDGE SINGAS: But - - - but how would that work
14 here because it wasn't evidence that was put in their
15 direct case. So it came up during cross-examination. So
16 your formulation of this team, they wouldn't know the
17 significance of what they heard until the cross-examination
18 started happening, correct?

19 MR. FITZMAURICE: No, Your Honor, and we don't
20 even have enough of a record to really know. And - - - and
21 we do it in other contexts, so - - -

22 JUDGE SINGAS: No, no, but we know that the - - -
23 the - - - the witness was asked about the password, and she
24 said, I don't know anything about a password. And he said,
25 well, let me refresh your recollection. There's no way

1 that a team would have known before that question and
2 answer happened that that call was significant. That's why
3 I think there is a distinction between whether it's put in
4 as direct evidence or whether it's put in for credibility
5 purposes.

6 JUDGE GARCIA: But, Counsel, is your position
7 that that material that Judge Singas is saying right now
8 could be used if there was a taint team in place, or that
9 that's not the type of thing they should be able to use?

10 MR. FITZMAURICE: I'm not - - - I'm not here to -
11 - - to relitigate Johnson, which - - - which allow - - - I
12 know there was a threshold question once upon a time of
13 whether these calls should be used at all, assuming that
14 calls can - - - can be listened to and some information can
15 be used.

16 I - - - I'm here to say that we need to decide
17 whether the prosecution is getting a tactical advantage.
18 And I think in some cases it's going to be a case-by-case
19 basis. And I - - - in some cases it might involve - - -

20 JUDGE HALLIGAN: I'm - - - I'm surprised - - -
21 I'm a little surprised, I guess, because it seems to me, if
22 I'm understanding you correctly, you're saying that in this
23 case, if a screened individual had heard the recording,
24 that the screened individual would have been able to
25 provide it for use, you know, in the - - - in the cross-

1 examination of the witness.

2 MR. FITZMAURICE: No, I'm not saying that at all.

3 JUDGE HALLIGAN: Okay.

4 MR. FITZMAURICE: No, no, no, no.

5 JUDGE HALLIGAN: So - - - so - - - but that's
6 what I thought Judge Garcia was asking you.

7 MR. FITZMAURICE: No, no, no, no.

8 JUDGE HALLIGAN: Is the - - - is the information
9 something that cannot be used at all?

10 MR. FITZMAURICE: I'm saying that right now, this
11 sliver of information that we know about, isn't enough to -
12 - - to - - - to make these determinations. Potentially, if
13 there was a screen in place, they could evaluate the
14 overall context and decide if there's a tactical advantage.

15 JUDGE HALLIGAN: Well, one thing we do know, I
16 think, from the record, is that there was a specific piece
17 of information that was used with respect to a witness,
18 right?

19 MR. FITZMAURICE: Yes, Your Honor.

20 JUDGE HALLIGAN: And is your view that that
21 information could have been used if there was a taint team
22 in - - - in place or that it was completely off the table?

23 MR. FITZMAURICE: I - - - I think that if the
24 taint team is there, I think it would - - - along the lines
25 of what you mentioned earlier about, you know, certain

1 people who are more likely to involve trial preparation
2 calls, I think that this would have been presumptively a
3 call with a defense witness. And I think that under that
4 circumstance, it's entirely likely that the taint team
5 might not have passed along this kind of information - - -

6 JUDGE HALLIGAN: Might not or would not be - - -

7 MR. FITZMAURICE: - - - but it would have more -

8 - -

9 JUDGE HALLIGAN: - - - allowed to?

10 MR. FITZMAURICE: But it would have had - - -
11 would not have been allowed to if it was - - - if - - - if
12 it didn't meet the criteria of - - - of implicating no
13 tactical advantage.

14 CHIEF JUDGE WILSON: Well, if - - - I mean, if we
15 viewed this as attempting to get a witness to lie under
16 oath, and I'm not saying that that's what it was, but
17 that's at least an inference. Are you saying that, well,
18 because - - - if the prosecutor knew that, that would give
19 the prosecutor a tactical advantage, the taint team should
20 not pass that information on?

21 MR. FITZMAURICE: I - - - I think that when it
22 comes to like realizing or hearing certain misconduct, I
23 think that's a separate inquiry that could implicate
24 whether the pro se status could continue at all, because it
25 is a conditional right and can be forfeited by misconduct.

1 I'm saying that you really have to pick one. You either
2 have to have a lawyer who has the - - - the privileges and
3 protections of a lawyer, or a pro se defendant who is
4 functionally equivalent - - -

5 CHIEF JUDGE WILSON: Yes, but in the - - - in the
6 context of preparing witnesses, sometimes the witnesses
7 said to me, you know, I think the following happened. And
8 I'll say, are you sure about that, you know, was it
9 possible that it was something else, and give them a
10 suggestion about what it might have been. I mean, I think
11 lawyers do that all the time.

12 I'm not sure how a taint team decides if that's a
13 tactical advantage, or it's an attempt to convince a
14 witness to say something the witness doesn't actually
15 believe.

16 MR. FITZMAURICE: Your Honor, I think if we can't
17 answer that question, then maybe we shouldn't be listening
18 to these calls at all. Like, if it is that difficult, then
19 I think we have to assume that the pro se right has to
20 include a firmer line. I'm trying to come with a - - -
21 with a - - - with a, what I think, is a more workable
22 approach. But if it turns out that that approach isn't
23 workable, then I think we have to be very cautious and - -
24 - and realize that there is an, you know, an inherent risk
25 of a pro se defendant, and when we say that they're going



1 to be treated like a lawyer seven times, we know that we
2 couldn't do this with a lawyer - - -

3 CHIEF JUDGE WILSON: One fundamental thing - - -

4 MR. FITZMAURICE: - - - or an - - -

5 CHIEF JUDGE WILSON: - - - though, is they don't
6 have a code of ethics and they can't be disbarred.

7 MR. FITZMAURICE: No. And they also can't be
8 held ineffective on appeal either.

9 JUDGE HALLIGAN: Okay. Is your - - - is your
10 position that no matter what alternatives are made
11 available to the defendant to engage in witness
12 preparation, whether that's time prior to incarceration, as
13 here, I know you - - - you take the position that it's not
14 sufficient, specifically, an opportunity to talk to
15 witnesses in some separate setting or in the courtroom,
16 that the defendant still has a constitutionally protected
17 right to - - - to be able to screen her phone calls?

18 MR. FITZMAURICE: I think so, Your Honor, because
19 I think that - - -

20 JUDGE HALLIGAN: How - - - what - - -

21 MR. FITZMAURICE: Well, I think that the nature
22 of - - - of exercising this right and - - - and having a
23 functional equivalence, you might need to continue
24 communication with - - - with people pertinent to your
25 defense.

1 JUDGE HALLIGAN: But - - - but wouldn't it be, it
 2 - - - it seems to me that perhaps what's protected, if
 3 something is protected, is the right to prepare your
 4 witness so that you have - - - are able to proceed pro se
 5 in a - - - in a meaningful way. Why do you have a - - - a
 6 right to - - - to do it over a particular medium, a
 7 telephone, as opposed to a meeting room or at the
 8 courthouse or something like that?

9 MR. FITZMAURICE: I think you have a right to do
 10 that. And - - - but the right turns on it being outside
 11 the earshot of the prosecution.

12 JUDGE HALLIGAN: Uh-huh.

13 MR. FITZMAURICE: So from that end, maybe work
 14 backwards to say that if the prosecution has access to it,
 15 that's the problem. I would submit that, yes, if you can
 16 prepare a defense, and you have accommodations, that's all
 17 good, but - - - and the prosecution can't be there, which
 18 is why we - - - we - - - we accept them as a functional
 19 equivalence. Here, the problem is that the prosecution has
 20 access - - -

21 JUDGE HALLIGAN: Well, but - - -

22 MR. FITZMAURICE: - - - and that's why we have -
 23 - -

24 JUDGE HALLIGAN: But if there are alternatives
 25 available - - - I know your red light's on, I'm sorry, I'll



1 - - - I'll keep it short. But if there are alternative
2 avenues available to prepare your witness, and a defendant
3 nonetheless chooses to talk on the phone, why would that be
4 something that - - - that - - - that would be
5 constitutionally prohibited?

6 MR. FITZMAURICE: Well, we do come closer to the
7 Johnson situation there of we gave you an avenue, so if you
8 didn't use that avenue - - -

9 JUDGE HALLIGAN: Um-hum.

10 MR. FITZMAURICE: - - - you know, you've assumed
11 a risk. We don't have that here. And I think that we're a
12 far cry from that because - - -

13 JUDGE CANNATARO: I'm sorry, why don't we have
14 that here?

15 MR. FITZMAURICE: Well - - -

16 JUDGE CANNATARO: I mean, we - - - we were just
17 talking, he was given the opportunity to do conferencing.
18 He was given an investigator to assist. There were
19 accommodations being made. So what's the basis of that
20 statement?

21 MR. FITZMAURICE: Well, because we - - - we just
22 have unfettered and undisclosed access and we don't know
23 what else he learned. And these - - - these accommodations
24 are minimal and weren't made at the Faretta hearing. I
25 mean, if - - - just to - - - to wrap it up, and answer Your

1 Honor's question, if defendants were told at the Faretta
2 hearing that the prosecution will hear every call with
3 defense witnesses under the status - - - status quo, I'm
4 not sure how many would actually go pro se at all.

5 And so I think that that's - - - that's an
6 interesting way of looking about this. When we're trying
7 to make a functional equivalence and respect this, we - - -
8 our Faretta hearings are nowhere equipped to - - - to warn
9 of this kind of - - - of danger.

10 And if I just - - - the case before us, I - - - I
11 agree with what was said. I'd also submit that just a
12 single question in - - - in our case would have solved it.
13 Do you know what you're sending exposure is? If yes, tell
14 me. If no, then I'll explain it. And - - -

15 CHIEF JUDGE WILSON: So, let me - - - on that,
16 let me just ask you to briefly tell us, if there are - - -
17 if the factual record is stronger than in the case we just
18 heard, let me know why.

19 MR. FITZMAURICE: I think so because there's - - -
20 - there is - - - there's no prior conviction. Case - - -
21 the charges are immensely complex. And there - - - there
22 was the word sentence or allusions to time is - - - is
23 completely absent. So we actually have - - - if McIntyre,
24 the purpose of McIntyre is to standardize the inquiry so
25 that we can have appellate review of these decisions, we

1 can't have appellate review of whether he was aware of his
2 sentence exposure, because it's just nowhere on the record
3 at all, not even an allusion.

4 So I don't think that's a new rule that I'm
5 asking for. I think that this court breaks no new ground
6 by holding a colloquy like this invalid, because it has no
7 way of knowing and - - - and upholding that - - - that it
8 was made with a knowing sentencing exposure or a proper
9 understanding of the charges, which were also significant
10 in this case.

11 CHIEF JUDGE WILSON: Thank you.

12 MR. FITZMAURICE: Thank you.

13 MS. FENN: For the Office of District Attorney
14 Melinda Katz, Assistant District Attorney Danielle Fenn.
15 May it please the court.

16 Here, the ADA's monitoring of the Rikers Island
17 phone calls, and the very limited use of the calls at trial
18 to refresh a witness's recollection was proper. This court
19 - - -

20 JUDGE GARCIA: Counsel, it seems to me that the
21 best argument here is - - - for the defendant is - - - it's
22 not so much the use, the use shows what was going on, and
23 that they were potentially - - - I think they were
24 interested in using this at some point. But it's that I'm
25 preparing for trial, and you're listening to me real time

1 question - - - practically real time, question witnesses.
2 So it's going to chill the questions I ask.

3 I think the Chief Judge was saying how you
4 normally prep a witness might be, well, you know, let's go
5 back over that again and let's go walk through. Maybe I'm
6 not going to ask it that way, because the taint team might
7 come in and say, hey, you know, this is - - - or the
8 prosecutor may come in and play that or - - - so everything
9 I'm doing in terms of witnesses I'm talking to over the
10 phone, or how I'm talking to them, is influenced by the
11 fact that the prosecutor in this case is sitting in with
12 me.

13 MS. FENN: To answer that question, I think
14 there's a more general response about how witness calls are
15 monitored, but also in this specific case, to more
16 generally, there are other avenues for a person to prep
17 witnesses. In this case - - - and in this case, a lot of
18 that happened. This defendant decided to go pro se in July
19 of 2013, and he wasn't remanded until February of 2014
20 during the trial. And it was through - - -

21 JUDGE GARCIA: I understand.

22 MS. FENN: - - - his own malfeasance.

23 JUDGE GARCIA: But as a general rule, and that's
24 a fact that cuts the other way in this particular case.
25 But let's say it wasn't. Let's say this person's in from

1 day one, remanded, and they're - - - want to prepare their
2 defense. They're going pro se, they've waived. And now
3 they're thinking, what am I going to do because the
4 government is prepping with me?

5 MS. FENN: There are several avenues that a
6 defendant can do in that circumstance to prepare their
7 defense. They can have people come to Rikers Island. And
8 in this case, that's what happened for at least some of the
9 witnesses, because, defendant - - - there was testimony
10 that one of the defense witnesses went to Rikers Island.
11 The court can allow courtroom time, which the court also
12 did - - -

13 CHIEF JUDGE WILSON: Well, so let me - - -

14 MS. FENN: - - - in this case.

15 CHIEF JUDGE WILSON: - - - let me ask you
16 something a little different, but - - - but related to
17 Judge Garcia's questions. Suppose there are - - - there
18 were a requirement that you had to tape all of your witness
19 interviews and turn those over to defendants. Would that
20 impair your ability to prosecute cases?

21 MS. FENN: You would be able - - - there would be
22 - - - recorded, like, on the telephone because there's
23 still those - - -

24 CHIEF JUDGE WILSON: Yeah. Or - - -

25 MS. FENN: - - - the option - - -



1 CHIEF JUDGE WILSON: - - - or in person, any time
2 that you were interviewing a witness, somebody from your
3 office, whether it's a DA or an investigator, you had to
4 record them and you had to turn them over to the defense.
5 A new category of Brady material.

6 JUDGE SINGAS: No. Isn't that Rosario material?

7 CHIEF JUDGE WILSON: Yeah, that's fine.

8 MS. FENN: In terms - - - in terms of - - -

9 CHIEF JUDGE WILSON: If you - - - but that's only
10 if you did record it.

11 MS. FENN: Yeah.

12 CHIEF JUDGE WILSON: Yeah. But instead it - - -
13 we're imposing a requirement that you do record it.

14 MS. FENN: Well, that would be - - - that would
15 be different because in this case - - -

16 CHIEF JUDGE WILSON: I'm sorry? That would be -
17 - -

18 MS. FENN: That would be different because, here,
19 in terms of the Rikers calls, it's just one medium of
20 witness prep that's affected. But the - - -

21 JUDGE TROUTMAN: Let me ask you this. Why are
22 the - - - the purpose of the calls being recorded isn't for
23 them to be turned over to the district attorney's office,
24 correct?

25 MS. FENN: Yes. They're - - - and in this

1 court's prior cases, it discusses - - -

2 JUDGE TROUTMAN: They're for the - - - they're
3 for security purposes?

4 MS. FENN: Yes. Yeah. At Rikers.

5 JUDGE TROUTMAN: Why are the People entitled by
6 default to just get them, and how long has that been going
7 on?

8 MS. FENN: In terms of the cases before this
9 court, Johnson and Diaz, it does discuss the - - - the
10 rules about corruption.

11 JUDGE TROUTMAN: But why are they entitled - - -
12 why is the DA entitled to have these calls in the first
13 instance?

14 MS. FENN: Rikers and the Department of
15 Corrections record that for witness security concerns - - -

16 JUDGE TROUTMAN: I understand the security. For
17 prosecution purposes, why are the People entitled to have
18 them, to prosecute the defendant; not for a new crime, but
19 to help them prosecute in the crime that the defendant is
20 being held for especially when he's pro se?

21 MS. FENN: Well, in the terms of - - - I mean,
22 this is a question about the release of these calls that
23 this court has addressed in a - - - various cases in
24 Johnson and Diaz, and this court has held that the release
25 of the nonprivileged phone calls, and the admission of

1 those calls at trial, which didn't even happen here, was -
2 - - was consistent, that followed the - - -

3 JUDGE TROUTMAN: So does a pro - - -

4 MS. FENN: I'm sorry.

5 JUDGE TROUTMAN: - - - you're saying a pro se
6 defendant has no right to interview his clients in private?

7 MS. FENN: No, that's not the case at all. And,
8 here, he did have the opportunity to interview his
9 witnesses in private. There was testimony that one of his
10 witnesses, his daughter, Lauren (ph.), went to - - -

11 JUDGE TROUTMAN: But the People - - - but the
12 calls that are turned over to the People right away,
13 they're listening to them, correct?

14 MS. FENN: Yes.

15 JUDGE TROUTMAN: So they're listening to them,
16 they're getting whatever advantage - - - or whatever
17 advantage you can get, they get to do that. But the
18 question was asked by one of my colleagues, but it's not
19 reciprocated; the defendant is not getting the same thing
20 automatically turned over to him, is he?

21 MS. FENN: Actual recordings, no. When we do
22 take notes of our witness prep, that's Rosario material,
23 and does have to be turned over. Are - - - there's no - -
24 -

25 JUDGE TROUTMAN: But like the Chief Judge said,

1 if it were mandated, and then it would have to be turned
2 over, you - - -

3 JUDGE RIVERA: Well, it's different to read a
4 cold piece of paper - - -

5 JUDGE TROUTMAN: Yes.

6 JUDGE RIVERA: - - - and hear someone's reaction,
7 and the way the conversation is going back and forth. You
8 gain a lot of information in that way also, as all
9 attorneys do.

10 MS. FENN: Yes, Your Honor.

11 JUDGE RIVERA: But let me ask you, why - - - why
12 wouldn't you have a rule that when someone is pro se, or -
13 - - or the court allows them to proceed pro se, the court
14 informs them that if there's any witness you wish to speak
15 to, you have to give - - - give us notice, otherwise you
16 know you're being recorded. And then they can give notice,
17 these are the people I want to talk to, I want to be
18 accommodated. I'm happy to see them in person, or if it's
19 impossible to see them in person, I need to do it by phone.

20 MS. FENN: In - - - in terms or - - -

21 JUDGE RIVERA: That's - - - the burden is on
22 them. They've got to come forward with their list. Why
23 wouldn't that be a - - - a - - - a better accommodation
24 than this team is going to review it, people listening to
25 it; let them tell you who it is that they want to talk to,

1 to prepare their defense.

2 MS. FENN: In terms of a defendant, a pro se
3 defendant, providing a list for witness prep calls, those
4 calls wouldn't be in terms of like - - - there's no
5 attorney/client privilege that these - - -

6 CHIEF JUDGE WILSON: But that's a work product
7 protection - - -

8 MS. FENN: I'm sorry?

9 CHIEF JUDGE WILSON: - - - for it perhaps.

10 MS. FENN: I'm sorry?

11 CHIEF JUDGE WILSON: There's a work product
12 protection for it, perhaps.

13 MS. FENN: Yes, there could be a work product
14 protection. But in terms of the - - - providing a list,
15 that would be difficult because, say, a person provides, I
16 don't know, say, ten names, these are my potential
17 witnesses. You can't listen to my calls, Rikers can.
18 Because in terms of the - - -

19 JUDGE CANNATARO: Okay.

20 JUDGE TROUTMAN: No.

21 JUDGE RIVERA: No. No one said that.

22 JUDGE CANNATARO: What if we have a rule that - -
23 -

24 JUDGE TROUTMAN: No.

25 JUDGE CANNATARO: - - - that says - - -



1 JUDGE RIVERA: No one said that.

2 JUDGE CANNATARO: - - - you could record the
3 calls, but when - - - when the person is pro se, you can't
4 turn those recordings over to the district attorney, or - -
5 - or at least not the team of district attorneys that are
6 prosecuting the present crime that's being, you know, dealt
7 with. What - - - what - - - what's - - - what's the harm
8 in making that rule?

9 MS. FENN: In terms of having a taint team to - -
10 -

11 CHIEF JUDGE WILSON: For those specific - - -

12 MS. FENN: - - - or - - -

13 JUDGE CANNATARO: Not even a taint team - - -

14 JUDGE HALLIGAN: But just to say you can't - - -

15 JUDGE CANNATARO: Just cordoning them off. I
16 mean, there - - - there is no requirement that district
17 attorneys receive - - - I mean, they're not receiving
18 transcripts or recordings of phone calls of every other
19 person at Rikers. They seem to only be getting them when
20 the person is going pro se, right? Or - - - or do they
21 hand them over in every case?

22 JUDGE RIVERA: No, they turn over a lot - - -

23 MS. FENN: Yes.

24 JUDGE RIVERA: - - - of recordings.

25 MS. FENN: And - - -



1 JUDGE CANNATARO: All right. So why not just
2 cordon them off for pro se?

3 MS. FENN: And there's - - - in terms of pro se
4 defendants, there's no reason why - - - or - - - or to say
5 that a pro se defendant gets certain calls shielded would
6 create a consent - - - incentive for people to proceed pro
7 se. And there's no reason - - -

8 JUDGE HALLIGAN: Well, presumably, they would
9 still need to be sufficiently cautioned. But - - - but I
10 take it that the primary purpose for recording the calls is
11 - - - is security at the facility; is that right?

12 MS. FENN: Yes.

13 JUDGE HALLIGAN: Okay. And so what if, following
14 up on - - - on what I take Judge Cannataro's question to
15 be, the rule was the facility can record the calls because
16 that serves the - - - and listen to them, because that
17 serves the purpose of protecting security concerns but
18 cannot turn them over where you have a pro se defendant and
19 the pro se defendant has identified the person on the other
20 end of the call as a witness. Johnson, perhaps, presents
21 different questions because you have a counseled defendant
22 there. But - - - but, you know, why not simply say, given
23 how important it is, as a practical matter, to be able to
24 do your witness prep on the phone, that the - - - Rikers
25 can't turn those calls over to the DA's office if they have

1 been identified as witnesses.

2 MS. FENN: Well, in this - - - in that case, it
3 would shield an entire - - - there - - - who determines who
4 - - - how those calls would be shielded, because why
5 couldn't a pro se defendant say, well, there could be any
6 number of people I could call and so that the - - -

7 JUDGE HALLIGAN: I - - - I take that point. But
8 the primary purpose for recording the calls, which is jail
9 security, would still be served because Rikers could still
10 record them. Presumably, the Rikers personnel could still
11 listen to them, address any security concern, and the only
12 constraint would be, Rikers, you cannot turn over the
13 recordings to the DA's office where you have a pro se
14 defendant, and the person on the other end of the call has
15 identified that person as a witness.

16 I mean, the only interest there that's not being
17 served, I think, is - - - is the DA's interest in - - - in
18 hearing the call. But there are, I think, arguably,
19 significant interests on the other side that the defendant
20 has in being able to do unmonitored witness prep.

21 MS. FENN: I think in terms of this specific
22 case, it was such a limited - - - in terms of the review of
23 the calls, it was such a limited time period, and then it
24 was just so specifically for - - - I mean, the - - - the
25 causal - - -

1 JUDGE HALLIGAN: But even if there are some
2 administrability, you know, challenges in particular cases,
3 why not - - - why not have that as the rule; how would that
4 impinge on the - - - the DA's mandate of, you know,
5 protecting the public and - - - and prosecuting cases?

6 MS. FENN: It would pre - - - having - - -
7 allowing pro se defense - - - allowing different rules for
8 pro se defendants, where a pro se defendant could shield
9 any number of calls, saying - - -

10 JUDGE RIVERA: Yeah, but you already - - - but
11 you already said that there could be other accommodations
12 and you pointed to them here. So the reality is that if
13 the court was willing to let or - - - or find a way for the
14 defendant to meet in person, you - - - you couldn't listen
15 in either, or are you arguing you could anyway?

16 MS. FENN: No. No.

17 JUDGE RIVERA: No. Okay. So you couldn't
18 anyway. So the question is, when you have someone who they
19 cannot communicate other than by this phone, what rights,
20 if any, do they have to be able to have a confidential
21 conversation in order to prepare their defense?

22 MS. FENN: Which I don't think it's - - - I don't
23 think you can say this is the only way that they can
24 communicate, because in this - - - in this case, or any
25 other cases, there were other methods. If someone could go

1 to Rikers Island, which one of the witnesses did here.

2 JUDGE RIVERA: No, I'm not disagreeing - - -

3 MS. FENN: The court - - -

4 JUDGE RIVERA: - - - with you about any of those
5 possible accommodations; one would think that most
6 defendants would rather have these discussions in person.
7 But for those individuals with whom they cannot have a
8 face-to-face conversation, their only option being a phone
9 call, why not - - - they - - - they turn over the names and
10 the - - - those - - - they're taped, but they can't be sent
11 over directly to the DA's office. Now, if the DA is
12 concerned about something, certainly, DOCCS can hear if
13 there's an attempt at witness tampering. I think that
14 would be fair to say, okay, then they have to alert the
15 DA's office.

16 MS. FENN: But in this specific case, or even in
17 other cases with remanded pro se defendants - - -

18 JUDGE RIVERA: Um-hum.

19 MS. FENN: - - - there was just such a - - -
20 really, hours that we were talking about in terms of this
21 witness tampering, that during the - - -

22 JUDGE RIVERA: So, it's even less burdensome for
23 you, if it's so little?

24 MS. FENN: No. I'm sorry. It was such a short
25 period of time between when the defendant found out about

1 the next witness because - - -

2 JUDGE RIVERA: Oh, okay.

3 MS. FENN: - - - yeah. So - - - so I'm sorry.

4 It was such a short period of time between when the
5 defendant found out that D.M. was going to be the next
6 witness, and this blog post, which was later in the night,
7 by the prosecutor - - -

8 JUDGE TROUTMAN: But isn't your problem, you want
9 the DA to have unfettered access to these calls, period.
10 That - - - that is essentially what you're saying, that
11 certainly the institution has the right to tape them, to
12 record them, and keep them; they have a valid purpose for
13 doing so. The only question that we're - - - we're
14 questioning is the practice of sua sponte turning them over
15 to the district attorney's office in a pro se situation.

16 MS. FENN: In cases - - - in other cases where
17 defendants are represented by counsel, this court has
18 allowed that. But that's - - -

19 JUDGE HALLIGAN: But that's - - - that's such a
20 critical distinction, perhaps.

21 JUDGE TROUTMAN: Distinction.

22 JUDGE HALLIGAN: Here's what I'm grappling with.
23 If you are representing someone, there is no, I don't
24 think, tell me if I'm wrong, no circumstance under which
25 the People could receive a recording or transcript of

1 witness prep calls, right. And I take your point that
2 there are alternative avenues available for the defendant
3 to engage in witness prep. And there may be a number here
4 in particular, because he wasn't remanded until pretty far
5 along in the process; I take that point, too.

6 But it just seems to me that, as a practical
7 matter, if your option is to get someone to come out to
8 Rikers in order to prepare them as a witness, that's a
9 substantial thing to try to get a potential witness to do
10 as compared with what any counseled defendant can do, which
11 is they can pick up the phone and call them.

12 So - - - so it just seems to me that we have to
13 ask whether or not that automatic pass over of the
14 recordings, you know, really intrudes on - - - on the right
15 to go pro se.

16 MS. FENN: In terms of the counseled defendants,
17 the calls that are excluded are between the attorney and
18 the defendant, not between the attorney and a witness.

19 JUDGE HALLIGAN: Yes, but the - - - the - - -

20 MS. FENN: So that's - - -

21 JUDGE HALLIGAN: - - - the attorney can speak
22 with any third - - - any witnesses, and those exchanges are
23 not in any way, I don't think, something that the People
24 can record or get a transcript of. And, here, because the
25 defendant is serving as his or her own attorney, that's - -

1 - that's the difference that I am grappling with.

2 MS. FENN: And not - - - and not - - - the terms
3 of the claim, which is the preparation of the - - - or to
4 present a defense, to prepare your defense - - -

5 JUDGE HALLIGAN: Um-hum.

6 MS. FENN: - - - it doesn't dictate that there
7 has to be one specific way that the defendant must be
8 allowed to present his defense or prepare his defense. And
9 in this case, there were so many different avenues.
10 Defendant had time before he was remanded, after his own
11 malfeasance, and either causing to - - - causing someone to
12 post it or posting himself this information about a - - -
13 about the witness D.M. He had his file. He had the - - -
14 an 18B investigator. He had his standby attorney. He had
15 the option of witnesses coming to Rikers Island, which he
16 did take advantage of. He had the opportunity for the
17 court to allow him to prep in the courtroom, which he also
18 took advantage of.

19 So the fact that one very specific avenue was
20 being monitored, which is monitored for every defendant,
21 it's something that they are made aware of, and the
22 defendant knew it - - - it was going to be recorded and
23 turned over. That does not mean that he did not have the
24 ability to prepare.

25 JUDGE CANNATARO: Do you want - - -

1 JUDGE SINGAS: Did defendant - - - did the
2 defendant object to this; is this even preserved?

3 MS. FENN: He did not - - - he objected later.
4 So I wouldn't say it's - - - when did he - - -

5 JUDGE SINGAS: The constitutional - - -

6 MS. FENN: Oh, the constitutional - - -

7 JUDGE SINGAS: - - - issues that we're grappling
8 with right now - - -

9 MS. FENN: No.

10 JUDGE SINGAS: - - - were those preserved?

11 MS. FENN: No, he didn't say I - - - it violates
12 my right to present a defense. He said it violated
13 attorney/client privilege. So it's a different issue that
14 he raised before the trial court.

15 JUDGE CANNATARO: Is there, in your view, any
16 merit to defendant's argument that the accommodations that
17 were given may simply have not been sufficient? Because I
18 can certainly understand a - - - a claim that you - - - the
19 judge might have given you some time to interview a witness
20 in the courtroom after the day was over, but you're not
21 going to get a lot of time to do that, maybe a few minutes
22 before they clear the courtroom for the - - - for the day.
23 Or - - - or do you think that the accommodations here were
24 more than sufficient to warrant what seems to be your
25 conclusion, which is if you want to do witness prep, fine,

1 you just can't do it on the phone from Rikers.

2 MS. FENN: In this case, it seems that the court
3 gave him time. Defendant, at one point, complained it
4 wasn't enough time, but defendant never said, judge, I'd
5 like to prep this witness in the courtroom, can I do it
6 after the testimony of this witness or at - - - at
7 different times. That didn't happen at all.

8 He just never made any objection to the court's
9 accommodations. And the court even told him, you have Mr.
10 Rothberg (ph.), you have your standby counsel. At one
11 point, the court had an 18B investigator. He said to the
12 court, Mr. Rothberg made aware, that the defendant's sister
13 was bringing the file. So there were various avenues he
14 could have, and he didn't complain and say, well, judge,
15 you didn't give me enough time in the courtroom. He didn't
16 want the prosecutor to listen - - -

17 JUDGE CANNATARO: So this is a preservation
18 problem of sorts, that he just didn't develop the issue
19 sufficiently?

20 MS. FENN: No, it's - - - it's not - - - it's
21 that he was given these opportunities, and that he had one
22 specific thing that he raised about these Rikers Island
23 phone calls, does not mean he didn't have the opportunity
24 to prepare or present a defense, which is what his claim
25 is, what his constitutional claim is. And the record in

1 this case shows that he had that ability, and also it
2 shows, just to address the - - - the use - - - I'm sorry,
3 my red light is on.

4 JUDGE CANNATARO: Yeah, and I - - - and your red
5 light is on. So at my own peril, I just want to switch
6 gears really quickly and ask you about the joinder issue in
7 this case.

8 MS. FENN: Yeah.

9 JUDGE CANNATARO: I get - - - thirty seconds on
10 joinder if you can, because I'm struggling understanding
11 the admissibility of - - - of the evidence especially with
12 respect to these hundreds and hundreds of pornographic
13 photographs with respect to the claims - - - the charges
14 for the sexual abuse; can you clarify that for me?

15 MS. FENN: In this case, the child pornography,
16 and then the sexual assault charges, were properly joined
17 because proof of the former was material and admissible
18 regarding the latter charges and vice versa. The fact - -
19 -

20 JUDGE CANNATARO: And they were material in what
21 way?

22 MS. FENN: The two younger complainants, J.H. and
23 A.M., testified that before and during the assaults,
24 defendant showed them computer images of adults having sex
25 with children, and that helped prove the knowledge element

1 of the promoting and possessing charges. The defendant
2 knew the images were on his computer and he knew the
3 contents of them.

4 Also, the - - - the admitted images were material
5 and admissible to corroborate the victim's accounts of the
6 sexual assaults during, of course - - - during which they
7 were shown - - - shown child pornography. That defendant
8 showed them pornography on the computers and that it was
9 later found - - - formed the basis of the search warrant,
10 the children's statements to police, formed the basis of
11 the search warrant, and it was really intertwined and
12 interwoven with those charges. A more - - -

13 CHIEF JUDGE WILSON: Thank you, Counsel.

14 MS. FENN: Oh, okay. Thanks.

15 MR. FITZMAURICE: So I think that the
16 prosecution's position here doesn't quite grapple with the
17 extent of this problem, and the extent of the status quo
18 here of unfettered and undisclosed access and monitoring
19 and use. I would accept a rule where pro se defendants can
20 identify certain numbers, and that those numbers are - - -
21 are - - - are subject to - - - to these kinds of
22 protections. I think that if we're going to trust people
23 to represent themselves against 641 charges, it's not too
24 much to ask them to propose certain - - -

25 JUDGE GARCIA: So under that rule - - -

1 MR. FITZMAURICE: - - - numbers - - -

2 JUDGE GARCIA: - - - under that rule, then the
3 witness is called, as in this case - - -

4 MR. FITZMAURICE: Yes.

5 JUDGE GARCIA: - - - would the prosecution team
6 then get the prior recorded statements in order to prepare
7 to cross the witness? If not, why not?

8 MR. FITZMAURICE: Wait, so - - -

9 JUDGE GARCIA: So here we have a rule, you can
10 monitor, prison; prosecution doesn't get real time
11 recordings out of the prison so that they can say, oh, he's
12 talking to this person, and they raised this issue, let's
13 go and - - - but - - - and they're identified numbers,
14 let's say ten witnesses. You call witness one - - -
15 defense calls witness one, do those tapes go to the
16 prosecution team at that point as prior recorded statements
17 of a witness at this point?

18 MR. FITZMAURICE: No, I don't think so.

19 JUDGE GARCIA: Why not?

20 MR. FITZMAURICE: I - - - I think because if
21 we're concluding that the team - - - if we're concluding
22 the team has - - - that it will be a, you know, tactical
23 advantage on a Sixth Amendment problem, then I don't think
24 it can go to the trial prosecutor.

25 JUDGE GARCIA: But it's a tactical advantage to

1 me, it seems, that I'm listening to how you're prepping,
2 and I'm taking steps in my prosecution to counter you. But
3 any witness - - - prosecution as a witness in WITSEC, they
4 take those calls, and the marshals, then when they call
5 that witness, they turn the tapes over, right, they're
6 taped recordings of a witness.

7 You can't call a witness - - - let's say the
8 witness gets on the stand, and says, you know, I identified
9 a third-party as the shooter. They were the shooter, not
10 the defendant. And there's a tape of that witness telling
11 the defendant nothing bad, but just saying to the defendant
12 in a call, no, I never saw anybody else there. Why
13 couldn't they use that statement to impeach the testimony?
14 It's a recorded statement of a witness.

15 MR. FITZMAURICE: Because I think, Your Honor, it
16 - - - it's - - - it's - - - it's too - - - it's too far
17 away from what would be happening if a remand weren't in
18 place. If a remand weren't in place, we would just be able
19 to have these conversations without the prosecutor knowing
20 at all - - -

21 JUDGE GARCIA: Right, but if - - -

22 MR. FITZMAURICE: - - - so what we're - - -

23 JUDGE GARCIA: - - - but if my witness wasn't in
24 witness security, that wouldn't have been taped. But
25 they're taped. I know they're taped. The defendant here

1 knows they're taped. You can use that to cross a witness.
2 I don't understand why you couldn't, like any other
3 recorded statement of a witness.

4 MR. FITZMAURICE: I think if a - - - if a - - -
5 if we have a system in place to stop unfettered access and
6 we have a gatekeeper of that system, I think then we can
7 start reviewing production like that and - - - and
8 analyzing whether it falls into Your Honor's - - - you
9 know, whether it falls into the existing set of rules or
10 whether it still violates it. I think that kind of - - -
11 those kinds of facts are discussions that we can't have
12 right now, because we just don't have a record of - - - of
13 - - - of any such steps.

14 So if a better process is in place, then we may
15 be able to consider aspects of that process, prejudices of
16 that process. But right now we just, I think, have a
17 bigger Sixth Amendment problem that we just need to
18 address. And unfortunately, I guess, in this situation, we
19 - - - we - - - we can't even look to harmless error because
20 we don't know what we don't know. We - - - we have
21 documented - - - we have documented uses on the record.
22 But we have situations where - - - and there's a lot of
23 talk about other accommodations. On the record, there's a
24 reference to an expert not being able to make it on a
25 weekend. And we know for a fact that he was talking to his

1 witnesses and was complaining that it's very hard to prep
2 my witnesses if he's listening in. I mean, that - - - that
3 is a - - - you - - - you made me pro se and he's listening
4 in, that is - - -

5 JUDGE HALLIGAN: But just so - - - so I'm clear,
6 if there were sufficient alternatives, and we were to agree
7 that they were sufficient, would you still be arguing that
8 there was a constitutional bar to passing along the
9 recordings of the defendant's conversations that he or she
10 chose to have with a witness to the DA?

11 MR. FITZMAURICE: I think - - - I think I would
12 be still because I think that you'd be just, you know,
13 you're putting the - - - the starting point, I guess, like
14 the facts - - -

15 JUDGE HALLIGAN: Assuming - - - assuming - - -
16 please take for granted the assumption that the
17 alternatives are sufficient.

18 MR. FITZMAURICE: Yeah, but I still think my
19 starting point would be slightly different. I would start
20 with, well, what did the prosecutor learn and why, as
21 opposed to what did the defendant do and why. But I do
22 think it's a closer case, and we might be closer to Johnson
23 where we were able to, you know, not find a Sixth Amendment
24 problem because we had presumed it was catered for
25 elsewhere. And we don't have that situation here.

1 So on this record, we can't say it was a fair
2 trial when we cannot say the extent of knowledge, whether
3 it's - - - you know, whether it's weeks or months, the fact
4 is that in defense cases, a lot of this work happens at
5 trial as we know what the prosecution is doing.

6 So the amount of untold advantages, just even in
7 terms of witness identity, is enough of a problem and a
8 tactical advantage, and that, you know, he argues on the
9 record and points to a binder that the prosecutor comes in
10 one day and the court says, well, you've had years to
11 prepare. That - - - that's not an inquiry that meets the
12 moment of the Sixth Amendment problem.

13 CHIEF JUDGE WILSON: Thank you, Counsel.

14 MR. FITZMAURICE: Can I just respond to the
15 joinder, if you have any or I'm happy to not.

16 CHIEF JUDGE WILSON: If you'd like. I mean, it
17 seems to me that you expressly waived the joinder issue,
18 and that's at page 447 and 448 of the record.

19 MR. FITZMAURICE: That it was waived?

20 CHIEF JUDGE WILSON: Yeah, I can read you the
21 colloquy if you want. The judge says it's my recollection,
22 there was some discussion of whether you were consenting to
23 having these matters consolidated for trial. Otherwise,
24 the defendant would have to face separate trials. Mr.
25 Rothberg says, I have spoken to Mr. Dixon at length about

1 this issue, and we are not going to oppose the People's
2 application to join the cases for trial. The court says,
3 is that correct, Mr. Dixon? And the defendant says, yes,
4 that's correct.

5 MR. FITZMAURICE: Your Honor, that was for the
6 second set of cases, that second set of charges that - - -
7 that - - - that were brought in a year or two later. The
8 initial joinder decision and - - - the initial joinder
9 objection is what the argument hinges on, and - - -

10 CHIEF JUDGE WILSON: And where is that in the
11 record that that was preserved?

12 MR. FITZMAURICE: Well, that - - - that was a - -
13 - the cases are joined at the grand jury stage.

14 CHIEF JUDGE WILSON: Uh-huh.

15 MR. FITZMAURICE: And then defense counsel as
16 part of his omnibus motion filed a motion to sever. And
17 that - - - even responded - - - not only did that get a - -
18 - a typical stock omnibus response, that got a specific
19 extra brief by the prosecutor on that joinder issue. So
20 that's where this joinder - - -

21 CHIEF JUDGE WILSON: Okay.

22 MR. FITZMAURICE: - - - discussion happened. I
23 submit that with that decision already in place, then when
24 several hundred extra charges came, then there was no
25 objection, but - - - but the case, the issue that we're

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reviewing here, is that initial joinder decision. And I do think that it is a Molineux problem, and that the basis for joinder, things like it proves that the counts of the - - - the counts of the assault, or proves prior possession, proves knowing future possession. I think these in the Molineux context have been rejected by this court, and that's for just a single piece of Molineux evidence that can come in with an instruction.

This - - - this - - - this was used to join hundreds of cases together without any such instruction. So I submit that it was improper and that the court - - - that this case should be reversed and separate trials ordered. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Kerbet Dixon, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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