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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

MOTION TO SUPPRESS
S.C. Code Ann. Sec. 17-30-110

Warrant Number: 2014A0810200160

State of South Carolina, Respondent

v.

Brian Marryo Singleton, Petitioner.

MOTION TO SUPPRESS JAIL TAPES
AND DERIVATIVE EVIDENCE

VANNOY | MURPHY
105 Carolina Avenue
Moncks Corner, SC 29461
PH 843-761-0610
FX 843-761-4458

Moncks Corner, South Carolina
July 14, 2015

R. Brady Vannoy
SC Bar No. 75827
ATTORNEY FOR THE DEFENDANT

INDEX

TABLE OF AUTHORITIES

United States Supreme Court

Fourth Circuit Court of Appeals

Seventh Circuit Court of Appeals

Ninth Circuit Court of Appeals

Eleventh Circuit Court of Appeals

District of Connecticut

South Carolina Supreme Court

South Carolina Court of Appeals

Federal Statutes

South Carolina Statutes

Dictionaries

South Carolina Constitution

Exhibits

STATEMENT OF ISSUES

THIS COURT SHOULD SUPPRESS ALL TELEPHONIC CORRESPONDENCE AND DERIVATIVE EVIDENCE IN THIS CASE BASED ON A VIOLATION OF TITLE 17, CHAPTER 30 OF THE SOUTH CAROLINA CODE OF LAWS ("Wiretap Law" or "Chapter 30")

A. The "Securus" phone system did not provide sufficient notice for a person to make a knowing and voluntary decision to consent to monitoring.

B. The Hill Finklea Detention Center's policy regarding the recording of jail phone calls is insufficient to establish knowing and voluntary consent to monitoring.

C. Equivocal language cannot put a user on notice that he or she is being recorded in the context of the Wiretap Law.

D. The "Law Enforcement Exception" of S.C. Code Ann. § 17-30-15(4)(a)(ii) does not provide a blanket exception to monitoring calls in this case.

E. The policy of recording phone calls at the Hill Finklea Detention Center is not rationally related to a defined penological interest and is therefore unconstitutional.

STATEMENT OF THE CASE

On May 12, 2014 a young man lost his life in a tragic accident at around 9:30 p.m. on Highway 45 in Berkeley County. It is alleged that Defendant Brian Marryo Singleton ("Defendant" or "Singleton") was operating a 2003 Honda Accord, was passing another vehicle in a lawful passing zone, and struck the decedent who was walking in the roadway resulting in death. It is further alleged that Singleton failed to stop after the accident and fulfill the requirements of S.C. Code Ann. § 56-5-1210, § 1210(A)(3), and § 1230.

Mr. Singleton was arrested in the early morning hours of May 13, 2014 following an alleged confession, which is the current subject of a motion to suppress filed with the Court of General Sessions in Berkeley County on July 1, 2015.[1] Mr. Singleton was incarcerated in the Hill Finklea Detention Center from May 13, 2014 until on or about August 28, 2014. (See Exhibit B). Throughout Mr. Singleton's pretrial confinement, his phone calls to others have been recorded by the Hill Finklea Detention Center using a system owned and operated by Securus Technologies ("Securus") out of Dallas, Texas. These phone conversations and the evidence derived therefrom is the subject of this motion. Specifically, Singleton is moving this Court for an order suppressing all conversations between him and third parties during his pretrial incarceration and the evidence derived therefrom. Upon information and belief, the issue of under what circumstances a South Carolina jail may lawfully intercept a jail phone call under the Wiretap Law is a novel issue for this Court.

[1] See correspondence to the Honorable Kristi Harrington dated July 1, 2015. (Exhibit A)

FACTS

On May 28, 2015, Counsel appeared for a pretrial conference in front of the Honorable Kristi Harrington in this matter. Earlier that day, Counsel met with the Assistant Solicitor prosecuting the case at the Berkeley County Solicitor's Office where he was advised of the existence of jail tapes that the State planned to use at trial. Judge Harrington issued an oral order from the bench that Counsel was to be given one month to review the tapes prior to the plea offer being withdraw and the matter set for trial. (Exhibit C). This matter is currently set for trial on July 27, 2015 in Berkeley County in front of the Honorable W. Jeffrey Young.

Counsel has been provided discs containing approximately 326 calls going in and out of the jail. These calls consist of conversations between family and friends and the conversations range from personal and private to matters that may become admissible at trial. The "jail tapes" are not really tapes. The discs prompt the user to a URL that opens a web browser which is required to be opened in Internet Explorer, sometimes with difficulty. The calls begin with an introduction to Securus and that they are "subject to recording and monitoring".

ARGUMENT

THIS COURT SHOULD SUPPRESS ALL TELEPHONIC CORRESPONDENCE AND DERIVATIVE EVIDENCE IN THIS CASE BASED ON A VIOLATION OF TITLE 17, CHAPTER 30 OF THE SOUTH CAROLINA CODE OF LAWS ("Wiretap Law").

S.C. Const. Art. I, § 10 provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated. " In 2002, the Legislature enacted South Carolina Code Ann. § 17-30-10 which states that "the interception of wire,

electronic, or oral communications is hereby authorized only in the manner permitted by this chapter." A wire communication is defined under § 17-30-15(1) as "any aural transfer made in who or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection." § 17-30-30 makes recording under color of law lawful "where the person is a party to the communication, or one of the parties to the communication has given prior consent to the interrogation." § 17-30-15(4)(a)(ii) excludes law enforcement from the definition of "[e]lectronic, mechanical, or other device" so long as that entity is utilizing the device in the "ordinary course of his duties." Absent consent, law enforcement must obtain an Order pursuant to § 17-30-70—with the exception of a public safety exigency listed in § 17-30-95—to record a telephone call.

§ 17-30-110 gives aggrieved parties an avenue for redress for purposes of suppression with "the reviewing authority", a three-judge panel consisting of members of this Court. See § 17-30-15(9). § 110(A) provides important procedural safeguards, *inter alia*, an aggrieved party may move to suppress the contents and "evidence derived therefrom" on the grounds that (1) the communication was unlawfully intercepted; (2) staying of the lower court proceeding pending the outcome of a motion to suppress; (3) a determination as to whether all discoverable materials were made available under South Carolina law; and (4) a unanimous determination by the reviewing authority that the recordings were lawful or unlawful. Singleton specifically moves for a finding that the tapes and all derivative evidence should be suppressed based on a violation of the Wiretap Law.

A. The "Securus" phone system did not provide sufficient notice for a person to make a knowing and voluntary decision to consent to monitoring.

Upon information and belief, the Hill Finklea Detention Center outsources its jail telephone system to a company called Securus.[2] (See Exhibit D). Securus maintains a website for purposes of enrollment and serves, as of the date of this motion, thirty-three detention facilities in South Carolina.[3]

Like many websites that utilize personal identifying information, Securus has both privacy and terms and conditions links.[4] Nowhere in the "privacy" or in the "terms and conditions" section does it expressly state that a party's phone call is monitored. Subsection (G) of the "Friends and Family Terms and Conditions" addresses interaction between Securus and law enforcement. It states,

> "G) Information used in connection with and in support of law enforcement activities
>
> When provided with a warrant or other lawful order, and when in possession of information about you, we will assist law enforcement in the conduct of its affairs. Law enforcement, by purchasing and using our services and accessing our website, shall act in accordance in all legal authorities." [5]

The "Privacy" section also reiterates Subsection (G)'s disclaimer *in toto*.

It is relevant for present purposes to point out that Securus also offers a service called "Securus Video Visitation" ("SVV"), which is not the subject of any intercepts in this case. Especially relevant is a disclaimer in Subsection (J) that reads,

> **"J) Access by Governmental Authorities**

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[2] https://securustech.net/facilities-we-serve
[3] Id.
[4] https://securustech.net/web/securus/privacy; https://securustech.net/web/securus/terms-and-conditions
[5] https://securustech.net/web/securus/terms-and-conditions

> Purchasers and users acknowledge, understand and agree that the SVV session and the data collected in the use of *SVV will be accessed, reviewed, analyzed, searched, scrutinized, rendered searchable, compiled, assembled, accumulated, stored, used, licensed, sublicensed, assigned, sold, transferred and distributed by personnel involved in the correctional industry* (federal, state, county and local), investigative (public and private), penological or public safety purposes and specifically including the Department of Homeland Security and any other anti-terrorist agency (federal, state and local) (collectively, "Law Enforcement")."[6]

(italics supplied). While notice to monitoring is given at best in equivocal terms under the phone call portion of the terms and conditions section, Securus explicitly states that the SVV videos will be monitored and used by law enforcement. As such, the old Latin maxim, *expressio unius est exclusio alterius*—"the expression of one thing is the exclusion of the other"—is applicable. Succinctly, where Securus specifically tells the user of the SVV system "use...will be...scrutinized" by law enforcement *but* they will only "assist law enforcement in the conduct of its affairs" regarding phone calls, consent to record those phone calls cannot be implied from the language of the terms and conditions section. Therefore, consent must be found outside of the boilerplate terms and conditions of the Securus website.

B. <u>The Hill Finklea Detention Center's policy regarding the recording of jail phone calls is insufficient to establish knowing and voluntary consent to monitoring.</u>

The Berkeley County Sheriff's Office has a written policy regarding inmate phone calls. (Exhibit E). The portion of that policy regarding recordings of calls reads,

> "V. Recording and Monitoring of Telephone Calls
>
> A. In the interest of facility security, all telephone calls made on inmate accessible telephones are the subject of being monitored and recorded.

[6] https://securustech.net/web/securus/privacy

B. Inmates will be notified that telephone calls may be monitored or recorded by an announcement, audible to both parties of the phone call, and by a posted notice in all housing units.

C. Inmate Telephone recordings will be archived in a secure manner by the Records Department.

(Exhibit E, page 4).

The vast majority of the tapes produced by the State in this case begin with the following introduction,

> "Hello, this is a free call from _____[inmate name], an inmate at Hill Finklea Detention Center, this call is subject to recording and monitoring. To accept this free call press 1. [Whereby the party on the other end accepts.] Thank you for using Securus, you may start the conversation now."

At least two recordings contain a different introduction which recites similar language as listed above. These recordings also use the equivocal language "calls are subject to be recorded and may be monitored". Upon information and belief, nowhere is the user of the Securus phone service utilized by Hill Finklea ever expressly told that their phone calls are being recorded, either verbally or in writing. Further, Counsel is informed and believes that *all* calls made from the jail are in fact recorded and stored with the Records Department. One of the questions presented in this case is whether an equivocal warning that a call *maybe* recorded is enough to put the parties on notice that they *are* being recorded. Singleton posits that this question should be answered in the negative.

C. Equivocal language cannot put a user on notice that he or she is being recorded in the context of the Wiretap Law.

Consent for purposes of Chapter 30 is not defined. However, the Legislature does define "oral communication" as "any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation". § 17-30-10(2). "Consent" is defined by Black's Law Dictionary as "[a]greement, approval, or permission as to some act or purpose...given voluntarily by a competent person; legally effective assent." Black's Law Dictionary, 8th Edition (2004). "Consent" can be broken down into four general subcategories. These are "express", "implied", "informed", and "voluntary". Id. "Express" being "consent that is clearly and unmistakably given", "implied" being "consent inferred by one's conduct", "informed" being "a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives", and finally "voluntary" being "consent that is given freely and that has not been coerced." Id. The notice given in this case fails to establish consent under any of these four subcategories.

As a preliminary note, Singleton is not asking this Court to back-pedal on nearly fifty years of constitutional jurisprudence regarding the issue of "consent" in the context of the 5th Amendment privilege against self-incrimination. In 1966 the Miranda Court specifically stated that equivocal language—i.e. "may"—*must* be used, at minimum, to put a suspect on notice that any statement he or she made to law enforcement during custodial interrogation could be used against him or her in a later proceeding. See Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612 (1966). The purpose of this inquiry is not "consent" for purposes of custodial interrogation but lawfulness under the Wiretap Law.

Unfortunately the Wiretap Law does not define "consent" and under what circumstances it can be lawfully had. The issue of one party's consent to recording has however been litigated by South Carolina courts. See Mays v. Mays, 267 S.C. 490, 494, 229 S.E.2d 725, 726 (S.C. 1976) (In the context of a private party recording another, "one party to a telephone conversation may lawfully tape the conversation without the other's knowledge or permission and subsequently disclose it."); See State v. Andrews, 324 S.C. 516, 479 S.E.2d 808 (S.C. App. 1996) (Where an agent for the government records a conversation he is a party to, the 4th Amendment is not offended).

In State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (S.C. 2012), our Supreme Court recently addressed recordings in the context of the Wiretap Law. In Whitner, the Court addressed whether or not the Wiretap Law was violated when a mother of a minor child, who was the victim of a sexual assault by the child's father, vicariously consented to her current husband recording a telephone conversation between the biological father and the minor child. The Court held that the recording was not made in violation to the Wiretap Law based on the law relating to parental consent on behalf of a child. Whitner, 399 S.C. 547, 554, 732 S.E.2d 861, 865. What Whitner does address for present purposes is that "[t]he Wiretap Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17–30–30. Evidence intercepted in violation of the Wiretap Act must be suppressed." Whitner, 399 S.C. at 552, 861 S.E.2d at 863.

It is axiomatic that a person in pretrial detention is deprived of many communication resources available to the free man. Generally speaking, telephonic communication is the only available means to speak with loved ones, friends, attorneys, ministers and other

approved parties. The prisoner faces a Hobson's Choice, use the prisoner phone or be confined to silence. Phone privileges are thus given on a "take it or leave it" basis.

Being told that one *may* be monitored is different than being informed that one *is* being monitored. This is especially relevant to the issue of consent for purposes of Chapter 30. In U.S. v. Daniels, 902 F.2d 1238 (7th Cir. 1990), the 7th Circuit provides a very precise analogy. The court stated, "[a] person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed. We would be surprised at an argument that if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality." Daniels, 902 F.2nd 1238, 1244. (Jail calls held admissible because Daniels signed a form acknowledging the recordings and because he expressly stated to a caller on the other end that the calls were being recorded). The following facts of this case militate against a finding of consent.

First, equivocal language, standing alone does not give a person proper notice that they *are* being recorded under Chapter 30. A person cannot knowingly and voluntarily consent when faced with *only* under present circumstances. For example, prior to taking a guilty plea, no judge in America would ever say, "by pleading guilty, you *may* be knowingly and voluntarily waiving your right to a jury trial." This Court should require fair notice to be given to both private parties and inmates that they are in fact being recorded. By out-sourcing the recording admonishment to a private company such as Securus, the Hill Finklea Detention Center has delegated an important legal duty to a private entity, which Singleton argues this Court should not condone.

Second, more affirmative means were available to Hill Finklea to obtain a valid consent waiver. The facility could have had the inmates sign a waiver attesting to the fact that all calls would be recorded, which would vitiate any problems with the Securus warning. They could have also instituted a very simple introduction to the phone system upon admission to Hill Finklea and been advised verbally and in writing that by using the phones, they consent to being recorded. Obtaining a valid consent waiver in this context could hardly be deemed as unduly burdensome. Rather than implementing direct measures to address consent to monitoring, users are left to speculate as to whether a particular call is being monitored, when in fact *all* calls are being monitored.

What both the Securus notice and the Hill Finklea recording notices do provide is notice of the capability *to* record conversations. That however should not be enough to find consent to recording in this case. See Watkins v. L.M. Berry & Co., 704 F.2d 577 (11th Cir. 1983) (In the context of corporate office recordings, "knowledge of the capability of monitoring alone cannot be considered implied consent."); Crooker v. US Dept. of Justice, 497 F. Supp. 500, 503 (D. Conn. 1980) ("[K]nowledge of the monitoring (assuming, *arguendo*, that the inmates had actual knowledge) and the existence of a justifiable need for such monitoring are clearly not sufficient to establish consent.")

D. The "Law Enforcement Exception" of S.C. Code Ann. § 17-30-15(4)(a)(ii) does not provide a blanket exception to monitoring calls in this case.

The Fourth Circuit has addressed the issue of recording prison phone calls in the context of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-22 ("Title III"). See 18 U.S.C. § 2511(2)(c) (providing that interception of communication is not unlawful where one of the parties to the communication has given prior consent to such interception). In U.S. v. Hammond, 286 F.3d 189 (4th Cir. 2002),

the Fourth Circuit addressed the validity of the Title III's consent provision and § 2510(5)(a)(ii)'s law enforcement exclusion in the context of jail recordings. The prisoner in Hammond was incarcerated in a Federal institution in Fort Dix, New Jersey. Inmates at Fort Dix received "notice of the monitoring by BOP in several forms. They receive two handbooks that state that all calls other than those to their attorneys are monitored. They sign a consent form acknowledging that their calls may be monitored and recorded and that use of the telephones constitutes consent of monitoring. They also receive an orientation lesson plan stating that calls are monitored and are told that such is the case orally during an orientation lesson. Finally, the BOP reminds the inmates that their calls may be monitored by placing notices of monitoring on or near the actual telephones." Hammond, 286 F.3d 189, 191 (4th Cir. 2002). The Hammond Court held that notice in that case was sufficient to defeat any argument that the conversations were not recorded consensually. The Hammond court also held that 2510(5)(a)(ii), the "law enforcement exception" to Title III, also gave the jail permission to intercept phone calls.

In Abraham v. County of Greenville, 237 F.3d 386 (4th Cir. 2000), several municipal court judges brought suit under Title III against Greenville County after learning that their phone calls were being recorded. In Abraham, the County argued that the law enforcement exception, 18 U.S.C.§ 2510(5)(a)(ii), to Title III was applicable and should excuse the recordings. Abraham, 237 F.3d 386, 389. In rejecting this notion, the Abraham Court held, "[t]he law enforcement exception does not authorize all conversations to be recorded by a wiretapping device so long as the device captured some conversations in the ordinary course of a law enforcement officer's duties. Rather, the law enforcement exception specifically focuses on whether the device is 'being used . . . by

an investigative or law enforcement officer in the ordinary course of his duties.'" Id. at 390. The Court stated further, "[t]he law enforcement exception may not be read to allow a single recording device to deconstruct the whole system of separation of powers." Id.

Admittedly, the holding in Abraham does seem to condone the recording of jail conversations arising from an inmate's use of a detention center phone under the law enforcement exception to Title III. The Abraham Court cites with approval the holding of U.S. v. Van Poyck, 77 F.3d 285 (9th Cir. 1996) (The law enforcement exception applies to detention center's recording of telephone calls by inmates.) Abraham, at 391. However, as in the Hammond case discussed in detail below, "Van Poyck signed a consent form and was also given a prison manual a few days after his arrival" and was witness to an admonishment listed above the phone that calls were monitored. Van Poyck, 77 F.3d 285, 292. As such, the jail in Van Poyck was carrying out the duties of its *own policy manual* when they recorded the calls. (italics supplied). The absence of a similar policy manual in this case warrants a different decision.

§ 17-30-15(4)(a)(ii) is identical to § 2510(5)(a)(ii). At first blush, this appears to defeat any argument that Hammond should not carry the day in South Carolina state courts. However, the use of Securus by Hill Finklea, the factual differences between this case and Hammond, and the plain reading of Chapter 30 counsel otherwise.

There are important distinctions between Hammond and this case. In Hammond, the Court specifically stated that "[b]ecause the BOP was acting pursuant to its *well-known policies* in the ordinary course of its *duties* in taping the calls, the law enforcement exception exempted the actions of the BOP from the prohibitory injunction of Section 2511." Hammond, 286 F.3d at 192. (italics supplied). As stated *supra*, the prison in

Hammond provided various forms of notice that calls would be recorded, including the signing of a consent form, which are absent from the Singleton matter. Two main factors make Hammond different from the case at bar. First the out-sourcing of important legal duties to a private third party and second, the prophylactic protections provided by the Fort Dix as part of their "well-known policies" regarding obtaining consent to record phone calls. Id at 192. In order for a law enforcement officer to perform his "duty" to record and monitor calls, there must first be an established responsibility, or more succinctly, a *duty* to be followed. In this case, there is no written manual regarding affirmative recordings. The Hill Finklea policy merely states, "all telephone calls made on inmate accessible telephones are subject to being monitored and recorded." (Exhibit E, page 4). There is no defined duty, or procedure to be followed. It therefore follows that without a *duty* to record, jail employees cannot be acting in the "ordinary course of their duties" when they decide to record calls. As such, this Court should not hold that Hammond's analysis of the "law enforcement exception" to Title III should carry the day here.

However, despite the distinction, Singleton asks this Court not to adopt the analysis of Hammond and excuse law enforcement from compliance with the consent and warrant provisions of Chapter 30 in any case because such reasoning would lead to a result that is not harmonious with the purpose of Chapter 30. Surely our Courts would not excuse a police officer planting a listening device without a warrant because the planting of the bug was made in the "ordinary course of his duties". It is widely understood that the "cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute." Cabiness v. Town of

James Island, 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011). "These words must be construed in context and in light of the intended purpose of the statute in a manner which harmonizes with its subject matter and accords with its general purpose" and "if language is plain and unambiguous, we must enforce the plain and clear meaning of the words used." Id. However, "if applying the plain language would lead to an absurd result, we will interpret the words in such a way as to escape the absurdity." Id.

Singleton posits that excusing law enforcement from either obtaining a warrant or obtaining consent prior to intercepting a phone call because part of their duties is to record in some cases would be an absurd conclusion. Surely our Legislature would not excuse non-compliance with a warrant or consent requirement just because the person was performing their investigative duties as a law enforcement officer. In fact, our Supreme Court stated in Whitner, "[t]he Wiretap Act is violated when a person intercepts oral communications that are not otherwise exempt from or subject to an exception contained in section 17–30–30. Evidence intercepted in violation of the Wiretap Act must be suppressed." Whitner, 399 S.C. at 552, 861 S.E.2d at 863.

The Whitner Court could have added the law enforcement exception authorized by the Hammond Court in their holding but they did not. The Whitner Court specifically held that absent an exception under § 17-30-30, the recordings must be suppressed. It did not say, § 17-30-15 or § 17-30-30. This holding should vitiate any claim a jail can record without a warrant or without consent simply because they are a jail and it is part of some jail's duties to record phone calls. Valued privacy and constitutional issues are at stake when the government intrudes in such a fashion. Though this Court may not reach this issue in the current matter, Singleton posits that to allow law enforcement to circumvent

the requirements of § 17-30-30 would lead to an absurd result, namely implicit approval of the warrantless bugging of phones done in the "ordinary course" of law enforcement duties.

In the case *sub judice*, the Hill Finklea Detention Center failed to enact the policies and procedures the Fourth Circuit relied on in Hammond to uphold consent to monitoring and the law enforcement exception to Title III. First, there was no policy at Hill Finklea outlining an affirmative monitoring program as in Hammond. Second, there is no consent form signed by Singleton acknowledging that his calls may be recorded. Third, there was no orientation plan administered to any inmate upon entry that stated by using the phone, they consented to being monitored, nor was he ever informed orally that he was in fact being monitored on all calls. The only evidence of any policy that the State can argue validates the law enforcement exception under the Wiretap Act is the vague policy that "all telephone calls made on inmate accessible telephones are subject to being monitored and recorded." (Exhibit E, page 4). This is an option, not a *policy* or *duty*. Rather than enacting an affirmative monitoring policy and initiating proper cautionary procedures prior to recording, Hill Finklea relies on an out-sourced, private company to provide notice that has legal significance along with an alleged posted notice that the user "may be monitored and recorded". See (Exhibit E, page 4).

The reliance on a private company to notice a user that his or her call could be monitored should not be condoned by this Court. By analogy, if a store owner alleges theft of an item from a person, then reads him his Miranda rights, it would not follow that law enforcement would be excused from not reciting Miranda to the alleged thief prior to engaging in custodial interrogation at the police station. It likewise follows that in order

for the State to use evidence obtained under these circumstances, the burden is on them to get the consent, not a private corporation such as Securus. This is a very simple fix for the detention center.

Prosecutors across the Country are making valuable use of inmate phone calls. They are undoubtedly a great crime solving tool and likely serve some interest in jail security, albeit what that "interest" is in this case is unknown. It therefore follows that inmates should be expressly advised that they are being recorded prior to their choosing to use the telephone system in order for the State to make lawful use of the intercepts under South Carolina's Wiretap Law. Moreover, absent a defined policy that gives a correctional officer a *duty* to record, the law enforcement exception to Chapter 30 cannot apply since he or she cannot be acting "in the ordinary course of his duties" without a defined *duty* to follow. The Wiretap Law is harsh. Violation of its provisions could result in up to five years in prison. See §17-30-50. It should likewise follow that its provisions should be read with a skeptical eye looking towards the governmental intrusion.

Consent for purposes of Chapter 30 fails in this case because (1) the warnings provided by Securus do not put the users on notice that they are being recorded and therefore lawful consent cannot be had and (2) the Hill Finklea Detention Center did not obtain lawful consent from the inmates since they failed to implement policies and procedures that would warrant consent to monitor calls.

The Hammond decision is distinguishable to the facts and circumstances of this case. The prison in Hammond provided numerous ways to obtain consent including a signed waiver. They also had a firm policy in place that gave law enforcement a *responsibility* regarding recording inmate calls. This Court should not apply the "law enforcement

exception" of 18 U.S.C.§ 2510(5)(a)(ii), to the facts of this case since (1) Fort Dix's policies regarding obtaining a valid waiver and establishing a law enforcement duty to record are different than the muted attempts in this case; (2) applying the law enforcement exception to South Carolina's Wiretap Law would lead to an absurd result; and (3) the Court in Whitner ruled that absent an exception listed in § 17-30-30, phone recordings must be suppressed.

E. The policy of recording phone calls at the Hill Finklea Detention Center is not rationally related to a defined penological interest and is therefore unconstitutional.

The practice of recording inmate conversations is not an unconstitutional practice and the issue of jail correspondence is nothing new to this Court, the United States Supreme Court, and other courts across the Country. Generally speaking, jail officials have been given a wide berth in this area. See Lanza v. State of New York, 370 U.S. 139, 143, 82 S.Ct. 1218 (1962) ("[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."); U.S. v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000, 98 S.Ct. 1656 (1978) (Denying F. Lee Bailey's constitutional challenge to the admission of a taped conversation between a visitor and Patty Hearst); Bell v. Wolfish, 441 U.S. 520, 539, 99 S.Ct. 1861 (1979) (Issue of "double-bunking", limiting certain books, limiting the receipt of care packages does not offend the Constitution. "[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment.""); Turner v. Safley, 482 U.S. 78, 89-91, 107 S.Ct. 2254 (1987) (Issuing a four part test to determine whether a prison regulation affecting a First

Amendment right withstands Constitutional assault. (1) Whether the regulation has a "valid, rational connection" to a legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of the right would have on guards and inmates and prison resources; and (4) whether there are "ready alternatives" to the regulation.); Overton v. Bazzetta, 539 U.S. 126, 132, 156 L.Ed.2d 162 (2003) (The burden, moreover, is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.)

The problem in this case is not the infringement upon the constitutional privilege, rather it is the lack of definition. Hill Finklea reasons they may monitor calls because it is "[i]n the interest of facility security". Exhibit E, page 4. Nowhere in the policy is it defined *why* recording calls is in the interest of facility security. Nor is there any reason explained as to *how* the policy of maybe monitoring calls came to be or *what* jail security interests are being protected by recording phone calls. Nothing presented to Singleton, either in Rule 5 or through compulsory process, articulates what the "rational connection" between recording calls and inmate security is or how it is "reasonably related to a legitimate governmental objective". See Turner, 482 U.S. at 89 (1987) and Bell, 441 U.S. at 539 (1979). Moreover, Singleton cannot "disprove" the validity of the "regulation" without understanding *what* the security interest actually is and how it is preserved by recording inmate phone calls. Overton, 539 U.S. at 132 (2003).

CONCLUSION

Upon information and belief, the questions presented in this motion under the Wiretap Law are novel and complex. What is clear is that Wiretap Law contains serious consequences for breaches of its provisions. Further, both our common and statutory law

makes clear that in the absence of consent or an order, recording is unlawful. See Whitner, 399 S.C. at 552; § 17-30-30. The question of whether law enforcement can record jail calls absent consent is much more involved but still fails in this case.

This Court should suppress the jail tapes and all evidence derived therefrom because (1) the Securus warnings are inadequate for a reasonable person to knowingly and voluntarily consent to telephonic monitoring, (2) the policy of noticing inmates of recordings at the Hill Finklea Detention Center is inadequate to likewise warrant a knowing and voluntary waiver to record inmate phone calls, (3) Hill Finklea employees had no duty to record thus the law enforcement exception of Hammond is inapplicable, and (4) the Berkeley County Sheriff's Office policy of recording and monitoring calls is not rationally related to a legitimate penological interest.

WHEREFORE, Singleton, by and through his undersigned attorney, hereby moves this Court for an Order SUPPRESSING all conversations between Defendant and third parties and for an Order SUPPRESSING all evidence derived therefrom.

I SO MOVE!

VANNOY | MURPHY
105 Carolina Avenue
Moncks Corner, SC 29461
PH 843-761-0610
FX 843-761-4458

Moncks Corner, South Carolina
July 14, 2015

R. Brady Vannoy
SC Bar No. 75827
ATTORNEY FOR THE DEFENDANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

MOTION TO SUPPRESS
S.C. Code Ann. Sec. 17-30-110

Warrant Number: 2014A0810200160

State of South Carolina, Respondent

v.

Brian Marryo Singleton, Petitioner.

MOTION TO SUPPRESS JAIL TAPES
AND DERIVATIVE EVIDENCE

I certify that I have served Motion to Suppress on the 9th Circuit Solicitor's Office, by hand delivery on 7/14/15 addressed to Mr. Mason West, Esquire at 300 California Avenue, Moncks Corner, SC 29461.

I certify that I have served a copy of the Motion to Suppress on The Honorable Kristi Harrington by depositing the same in her box located at 300 California Avenue, Moncks Corner, SC 29461 on 7/14/15.

I certify that I have served a copy of the Motion to Suppress on The Honorable W. Jeffery Young by depositing the same in the United States mail on 7/14/15 addressed to him at his Sumter County Chambers, 215 N. Harvin Street, Sumter, SC 29150.

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Moncks Corner, SC 29461
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FX 843-761-4458

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ATTORNEY FOR THE DEFENDANT