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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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IN THE MATTER OF THE APPLICATION OF RAISER & KENNIFF, P.C., BRANDON SWOPES, DAVID BRIMMER, and JAVON ZACHARY,

Plaintiffs-Petitioners,

For a Judgment Under Article 78 of the CPLR,

-against-

The NASSAU COUNTY SHERIFF'S DEPARTMENT, MICHAEL J. SPOSATO, in his official capacity as the Sheriff of Nassau County, The NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE, and Kathleen M. RICE, in her official capacity as the Nassau County District Attorney,

Defendants- Respondents.

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TRIAL/IAS PART 18
INDEX No.: 010102/14
Submission Date: 01/20/15
Motion Sequence: 001

DECISION & ORDER

Papers Numbered

Sequence #001

Order to Show Cause, Affirmation & Exhibits	1
Verified Answer, Affirmation & Exhibits	2
Verified Answer and Objections in Point of Law of Nassau County Sheriff's Office and Michael J. Sposato	3
Affirmation of James M. Ingoglia in Reply and in further Support of Order to Show Cause	4
Reply Memorandum of Law in further Support of Petitioner's Order to Show Cause pursuant to CPLR Article 78	5
Transcript of Proceedings on October 21, 2014	6

Upon the foregoing papers, this motion by the Plaintiffs-Petitioners Raiser & Kenniff, P.C., Brandon Swopes ("Swopes"), David Brimmer and Javon Zachary for a Judgment: (1)

prohibiting the Nassau District Attorney ("DA") from requesting or demanding recordings of telephone calls by individuals (or inmates) housed at Nassau County Correctional Facility ("the Jail") by "official requests" such as by fax, phone calls, requests to said Jail, or by subpoena without notice to defense counsel for such inmates (except in sealed indictments); (2) prohibiting the DA from directly accepting such recordings in her office from the Jail (which is under the authority and supervision of the Nassau County Sheriff) by any means, unless sent to her by the authority of a grand jury through a grand jury subpoena returnable to the attention of the grand jury judge or through a judicial subpoena returnable to the court in which said inmate's case is pending, in either case with notice to defense counsel for said inmate (except in cases of a sealed indictment); (3) prohibiting the Sheriff from delivering or handing over such recordings directly to the DA or its agents; (4) prohibiting the Sheriff from releasing such recordings for review and/or use by the DA without a properly issued subpoena returnable to the court where such case is pending or by the authority of a grand jury subpoena returnable to the attention of the grand jury judge; (5) and, by way of mandamus, pursuant to Article 78 of the CPLR, requiring the Sheriff to only release such recordings once it receives a properly issued subpoena returnable to the court in which such case is pending or by the authority of a grand jury subpoena returnable to the attention of the grand jury judge, and in either case requiring that along with such recordings, the Sheriff attach a list of all phone numbers called by the inmate who is the subject of the subpoena, is determined as provided herein.

The Plaintiff-Petitioners in this case, Inmates at the Jail and their attorneys ("inmates' attorneys") challenge the Sheriff's release of recordings of telephone conversations by inmates at the Jail, including conversations between inmates and their attorneys, to the DA without notice to the inmates or their attorneys and without a so-ordered subpoena returnable before a judge. They allege that the release of those recordings is violative of the inmates' rights to due process and their sixth amendment right to counsel. Via their petition, the inmates and their attorneys seek, *inter alia*, a *writ of prohibition* permanently enjoining the DA from requesting and the Sheriff from tendering those recordings absent notice to the inmates and/or their attorneys and either a grand jury subpoena returnable before the grand jury judge or a judicial subpoena returnable before the judge before whom the inmate's case is pending. The petitioners also seek a *writ of mandamus* requiring the Sheriff to include with any recording(s) produced in court pursuant to a subpoena, a list of all of the phone numbers called by the inmate whose recordings are being produced, thereby allowing the judge to review the list for any recordings of attorney-client conversations.

The County, Sheriff and District Attorney ("DA") all maintain that the inmates and their attorneys lack standing because they have not personally suffered any injury and the issue presented is not a matter of great public interest. They also maintain that neither a *writ of prohibition* nor a *writ of mandamus* are appropriate because if and when the DA attempts to use

evidence procured via these procedures in court, the inmates and their attorneys still have the opportunity to challenge the DA's use thereof in the underlying proceeding. In addition, the County, the DA and the Sheriff maintain that the inmates and their attorneys have not demonstrated a clear legal right to the relief sought because there is no evidence that the Jail's system "records privileged communications between inmates and their attorneys" as "[b]y design, it is incapable of doing so." They argue that there has been no violation of the inmates' 6th amendment right to counsel nor is there a risk of any such violation. Finally, they maintain that there is no legal authority for requiring the DA to obtain a court ordered subpoena on notice to the inmate and/or his or her attorney in order to obtain the Jail's recordings of inmates' phone calls.

On October 21, 2014, this Court issued an order temporarily restraining and enjoining the Sheriff from disclosing "privilege[d] recordings of phone calls made by inmates housed at the [Jail] to the [DA]" and temporarily restraining and enjoining the DA from obtaining "privilege[d] recordings of phone calls made by inmates housed at the [Jail] from the ...Sheriff except by court order."

The facts relevant to the determination of this matter are as follows:

The inmates allege that their telephone calls have been recorded while held at the Jail. In addition, they allege that they have been and continue to be at risk of having those recordings, including conversations with their attorneys, turned over to the DA without notice to them or their attorneys and without review by the court. More specifically, the inmates and their attorneys allege that petitioner, Brandon Swopes, was the victim of an ADA's attempt to have recording(s) of his conversation with his attorney admitted at trial against him. Further, the inmates' attorneys allege that their business practices as criminal attorneys has been impeded and that their communication with their clients has been stifled due to the threat of their conversations with their clients being recorded and released to the DA without notice to them or their clients and without an opportunity for review by a court.

The inmates' attorneys allege that Raiser & Kenniff ("Raiser") have been members of the Nassau County Bar Association for the past five (5) years and that their firm's office telephone number was listed in the Nassau County Bar Association's registry at all relevant times. They also allege that the Sheriff records all of the inmates conversations with the stated purpose of enhancing security at the Jail. They acknowledge that the Sheriff intends to exclude attorney-client calls from that surveillance.

Raiser contends that his firm was representing "Client 1" in a criminal proceeding before Judge Peck in April 2013 and that at the trial, an ADA indicated on the record that she was in

possession of recordings of telephone conversations between "Client 1" and the firm which she intended to use as direct evidence at trial. The inmates and their attorneys maintain that those recordings were not admitted into evidence based on foundational issues and therefore, the attorney-client privilege issue was never addressed.

The DA explains that the defendant in that case ("Client 1") was charged with witness tampering based on an eyewitnesses' refusal to testify in a burglary case against him because of an anonymous threatening letter she had received in the mail. The DA argues that the ADA permitted "Client 1" to plea to a lesser charge in the burglary case based upon the witness' refusal to cooperate but "Client 1" was subsequently charged with witness tampering. In that case, the ADA sought to admit recordings of "Client 1's" phone calls placed from the Jail which allegedly connected him to the threatening letter received by the intimidated witness in the burglary trial. The Court refused to admit the recordings based on a lack of foundation and "Client 1" was acquitted.

Troubled by this incident and concerned about its potential effects, Raiser, as President of the Nassau County Criminal Courts Bar Association ("NCCCBA"), wrote to the DA informing her of his and the NCCCBA's concerns about the DA's practice of obtaining and reviewing recordings of inmates' phone calls with their attorneys without due process of law. That practice was challenged as violative of the inmates' due process rights, especially when done without notice to their attorneys so as to afford them the opportunity to challenge the release of privileged conversations. He noted that even if made aware of the DA's possession of these recordings at trial, the potential for damage to an inmate nevertheless existed. Raiser asked that the DA's office to "cease listening to/using these calls when they are inadvertently collected by the [Jail]."

In response, the ADA represented that the situation in the case of "Client 1" did not reflect the broad policy regarding attorney-client privilege regarding telephone calls. Nevertheless, the ADA did not in fact dispute that the DA's office receives recordings of Inmates' telephone calls including some with their attorneys. She informed the inmates' attorneys as follows:

> The [Jail] has a system in place whereby attorney phone numbers can be registered. If that is done, calls to those numbers are not recorded. Notwithstanding that practice, not all conversations with an attorney or his employees are privileged.

The inmates and their attorneys allege that Raiser then went to meet with Captain Golio

("Golio") at the Jail to discuss the procedure followed by the Jail in recording inmates' telephone conversations. The Inmates and their attorneys allege that Golio stated that the Jail's policy was to "try to avoid" recording attorney-client privileged phone calls. In an attempt to avoid recording those communications, the Jail enters all of the telephone numbers from the Nassau County Bar Association's registry of attorneys into the database. Golio represented that phone calls made to those numbers "should" not be recorded. Golio was unable to explain why "Client 1's" conversation with Raiser's firm was recorded but speculated that the inmate may have dialed a number of the firm that had not been registered or the call may have rolled over to an unregistered number. Raiser requested a list of all phone numbers dialed by "Client 1" and was instructed to put his request in writing.

On or about November 15, 2013, Raiser wrote Golio on behalf of the NCCCBA requesting a list of all of "Client 1's" telephone calls made during his incarceration under indictment I-01756N-12. He also asked the DA how she procured recordings of inmates' telephone conversations as well as how the recordings were delivered to her. Golio responded on December 4, 2013 wherein he refused to produce the list of "Client 1's" phone calls without a subpoena. The inmates' attorneys allege that they were unable to obtain a subpoena for those records because that case had been closed. As for the DA's procurement of the recordings, Golio stated that they were only produced:

> in compliance with the issuance of a subpoena or in response to an official request received regarding an ongoing criminal investigation. Once complied, the materials are either retrieved from [the Jail] by DAO [District Attorney's Office] staff or, on occasion, are delivered to the DAO Facility staff.

The inmates and their attorneys allege that an ADA confirmed to Raiser that these recordings can be obtained by the DA's office via fax or requests on the phone.

Again, as president of the NCCCBA, Raiser sent Golio a follow-up letter on December 11, 2013 seeking information regarding the amount of requests made via subpoena as well as the amount so-ordered and returnable before the grand jury. Additionally, he inquired how many requests were "official requests." On January 17, 2014, Golio responded that the Sheriff was not able to provide Raiser with the requested information. A second attempt made by a paralegal at Raiser & Kenniff to procure "Client 1's" recorded telephone conversations was rejected on the grounds that a so-ordered subpoena was required.

On February 26, 2014, NCCCBA board member Amy Marion sent FOIL requests to the

DA requesting recordings of telephone conversations and logs for three inmates. The DA sent those requests to the Jail requesting that the information be sent to the DA. On or about March 5, 2014, Marion sent an additional FOIL request to both the DA and the Jail requesting the following for the two month period January and February 2014: copies of all subpoenas submitted to the Jail by the DA seeking copies of recorded phone calls (privileged and non-privileged); copies of any letters, documents, correspondence, emails and similar documents and/or electronic communications from the DA to the Jail seeking copies of inmate recorded phone calls (privileged and non-privileged) at the Jail; copies of any and all policy and procedures regarding: Recording inmates calls (privileged and non-privileged) at the Jail; requests by law enforcement to record inmate calls (privileged and non-privileged) submitted to the [Jail]; procedures for turning over inmate recorded phone calls to law enforcement entities making such requests for said calls (privileged and non-privileged); and, any policy or procedure for listening in on phone calls of inmates at the Jail.

The DA responded on or about March 11, 2014 stating that she would respond within thirty (30) days. The Jail responded on or about March 12, 2014 stating that the requested materials were "exempted" from "the Freedom of Information Law" and that the Sheriff was not responding to the request, with the exception of providing the policy and procedures which "are contained on two (2) pages" and which would be provided upon payment of $0.50. On April 24, 2014, the DA further responded that the office did not possess any written policies and procedures regarding recording, requesting or disclosing inmate phone calls. In addition, she responded that the DA's Office made twenty (20) requests of the Sheriff's Department for copies of recorded inmate phone calls during the period in question which were made "to assist in the investigation and prosecution of criminal cases." All but three (3) of these requests related to pending criminal cases or active criminal investigations being conducted by the DA's Office. She stated that "[d]isclosure of the requests made in these criminal cases and investigations would 'interfere with law enforcement investigations or judicial proceedings (citation omitted)' " and that their "[p]remature disclosure ... could jeopardize these investigations by 'prematurely tipping the [DA's]hand (citation omitted).' " She further stated that disclosure "would also pose a danger to the individuals referenced or participating in the underlying inmate phone calls." The ADA denied those FOIL requests pursuant to, *inter alia*, Public Officers' Law §87(2)(e). With respect to the other three cases, since they were closed, disclosure would not interfere with law enforcement investigations and so disclosure pursuant to FOIL was permissible upon the payment of the requisite fee. Marion was cautioned that any information which would cause an unwarranted invasion of personal privacy, would be redacted. The responsive documents were provided on April 30, 2014.

On or about April 23, 2014, Marion filed an appeal of the Jail's March 12, 2014 decision which was denied as untimely. The Jail responded to that appeal as follows:

> Pursuant to §89, subdivision 4(a) of the New York State Public Officers Law, persons denied access to any record(s) may appeal in writing, within thirty (30) days of the denial of access to the requested records. The documentation in this case shows that access to requested records was denied to you by letter dated March 12, 2014. Therefore, you have failed to timely file an appeal of that denial.

Raiser submitted yet another FOIL request on September 15, 2014, requesting the DA's "copies of visitor logs, telephone logs, and any recordings made and received by Javon Zacary and Dave Brimmer...in the [Jail] for the nine-month period between January 2014 and September 2014." That request also sought the production of the same documents that Marion previously sought but expanded the time period from January to September 2014. Specifically, the production of:

> [A]ll subpoenas submitted to the [Jail] by the [DA] seeking copies of recorded phone calls (privileged and non-privileged); Copies of any letters, documents, correspondence, ... from the [DA] to the [Jail] seeking copies of inmate recorded phone calls (privileged and non-privileged); Copies of any and all policy and procedures that are in your possession regarding: Recording Inmates calls...requests by law enforcement to record inmate calls submitted to your office...procedures for turning over inmate recorded phone calls to law enforcement entities... Any policy or procedure for listening in on phone calls of Inmates at the [Jail].

The DA responded on or about October 15, 2014 indicating that she did not possess any documents that satisfied said request. The DA represented that it would continue to investigate whether it had any responsive materials and that Raiser would be updated within 30 days.

Swopes, who had been charged with several robbery and weapon possession offenses, pled guilty to criminal possession of a weapon in the third degree and attempted robbery in the second degree in full satisfaction of his indictment on October 20, 2014.

In Opposition to the Petition/Complaint, the Commanding Officer of the Sheriff Department's Legal Unit Michael R. Golio attests that the policy now being challenged has been in effect at the Jail since 2005 at which time the Jail began recording all calls placed by inmates with the exception of those that were "properly placed." That is, calls dialed directly to attorneys' phone numbers that have been registered by inmates' attorneys. A call placed to a

non-registered number or one that is used to conference in a third-party are recorded. In addition, if a call placed to a registered number rolls over to a unregistered number, that conversation will also be recorded. Golio notes that there is no limit to the number of telephone numbers an attorney may register and once registered, those numbers stay in the system and any calls made to those numbers are not recorded, whether placed by an inmate/client or merely an inmate. Presently, the Jail requires attorneys to register via a "writing on firm letterhead identifying the telephone number(s) that they will be using for inmate calls." This requirement is posted both in the Jail's visiting area and on the Jail's website.

Captain Golio attests that when this system went into effect, "a notice to attorneys was posted in and around the [Jail's] visiting registration areas advising them of the need to register their telephone numbers to ensure the confidentiality of their calls with inmates." He also attests that "it is [his] understanding and belief that notifications regarding the system were sent to the Nassau County Bar Association, Legal Aid, and other attorney groups at time [sic] [the Jail] initiated the recording program." Furthermore, he attests that in the event that a call is placed by an inmate to an attorney at a number which has not been registered with the Jail and the call is recorded, a voice recording warns both the caller and the recipient that the call is subject to monitoring and recording and that "[o]nly after the prompt is heard may the recipient of the inmate's call accept the call and begin the conversation."

Moreover, Golio asserts that upon admission to the Jail, inmates receive a handbook warning them that other than "properly placed" calls to attorneys, all calls made from the facility are subject to monitoring and recording. He maintains that the inmates also receive a form containing their personal identification number which advised them that their calls are subject to monitoring and recording. This form is signed by the inmates. In addition, Golio avers that there are signs bearing such warnings posted on the walls in the Jail's telephone area. Golio notes that in addition to "properly placed" calls, inmates have the opportunity to confer in private with their attorneys during Jail visiting hours as well as via letter and at other times on an as-needed basis. Lastly, Golio attests that recordings are provided to the DA's office pursuant to a subpoena or upon an official written request made by a representative of the DA.

ANALYSIS

At the onset, this Court must determine whether Petitioners have standing to bring this Article 78 proceeding. There is a two-part test for determining standing, to wit: "[f]irst, a plaintiff must show injury in fact, meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or

concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (*New York State Assn. of Nurse Anesthesia v. Novello*, 2 NY3d 207, 211 [2004]).

To successfully establish an injury in fact, the petitioner must have "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761, 772 [1991]). Additionally, it requires a showing of cognizable harm; "tenuous and ephemeral harm is insufficient to trigger judicial intervention" (*New York State Assn. of Nurse Anesthesia v. Novello*, 2 NY3d at 214; *citing, Society of Plastics Indus. v. County of Suffolk,* 77 NY2d 761). "Aggrievement warranting judicial review requires a threshold showing that a person has been adversely affected by the activities of defendants (or respondents), or - put another way - that it has sustained special damage, different in kind and degree from the community generally. Traditionally, this has meant that injury in fact must be pleaded and proved." (citations omitted) (*Matter of Sun-Brite Car Wash v. Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406 [1987]).

If Petitioners successfully demonstrates an injury in fact, Petitioners must also show that the injury in fact "falls within the zone of interests, or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted." *Society of Plastics Indus. v. County of Suffolk,* 77 NY2d at 773. "The requirement that the injury suffered be within the zone of interests sought to be protected by the statute serves to filter out cases in which a person's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that [the drafters] intended to permit the suit." (citation omitted) (*Society of Plastics Indus. v. County of Suffolk,* 77 NY2d at 774). In the event Petitioners are unable to satisfy the test for standing, "a citizen may maintain a mandamus proceeding to compel a public officer to do his/her duty" in matters of "great public interest." (*Police Conference of NY v. Municipal Police Training Counsel,* 62 AD2d 416, 417-418 [3d Dept. 1978]).

The record at bar demonstrates that Petitioners have successfully established their standing to bring this action by demonstrating "an actual legal stake in the matter being adjudicated" as well as "cognizable harm." The statutory provisions concerning privileged communications, especially between a client and her attorney, is intended to protect the parties ability to freely communicate without obstructions and is a matter of great public interest. Based upon the foregoing, Petitioners have standing to bring this action.

The Court will not turn its attention to Petitioners request for a writ of prohibition to prevent the DA from obtaining recorded inmate phone calls without a court-ordered subpoena returnable to the grand jury or to the court, issued on notice to defense counsel, as well as

Petitioners request for a writ of mandamus to compel the DA to seek such recordings only by use of a judicial subpoena.

"It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion. A party seeking mandamus must show a clear legal right to relief. The availability of the remedy depends not on the petitioner's substantive entitlement to prevail, but on the nature of the duty sought to be commanded - i.e., mandatory, nondiscretionary action." (citations omitted) (*Matter of Brusco v. Braun*, 84 NY2d 674, 679 [1994]). "A discretionary act involves the exercise of reasoned judgment which could typically produce different acceptable results whereas as a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." *New York Civ. Liberties Union v. State of New York*, 4 NY3d 175, 184 [2005], quoting, *Tango v. Tulevech*, 61 NY2d 34, 41 [1983]).

Here, the new procedures and obligations Petitioners seek to impose on the Respondents, to wit: requiring the release of recorded phone calls upon receipt of a properly issued subpoena, returnable to the court or through a grand jury subpoena, returnable to the grand jury, is not merely ministerial in nature since the issuance of a subpoena involves the exercise of discretion or judgment on the part of the DA. Petitioners argument in reply that they are not seeking to challenge the DA's decisions in seeking to obtain evidence, only the manner in which it is done, is unavailing as the manner in which evidence is obtained by the DA is discretionary in nature.

Further, "[t]he extraordinary remedy of prohibition is available only where a judicial or quasi-judicial body acts or threatens to act without or in excess of its jurisdiction and then only when the clear legal right to relief appears and, in the court's discretion, the remedy is warranted" (citations omitted) (*Allen B. v. Sproat*, 23 NY3d 364, 375 [2014]). Generally, the proceeding is instituted to restrain courts or Judges. However, a public prosecutor may also be subject to prohibition under certain circumstances (*see, Schumer v. Hotzman*, 60 NY2d 46 [1983]). "When a prosecutor represents the public in bringing those accused of crime to justice, he may be viewed as performing a quasi-judicial function and properly be subject to an article 78 proceeding in the nature of prohibition" (*Schumer v. Hotzman*, 60 NY2d at 51; see also, *Matter of McGinley v. Hynes*, 51 NY2d 116 [1980]. A prosecutor's acts are defined as "quasi-judicial" when "the matter had progressed well past the investigative, fact-finding stage and the function of the prosecutor had become purely that of an accuser" (*McGinley v. Hynes*, 51 NY2d 116, 126 [1980]). "On the other hand, public prosecutors also perform a role 'analogous to that of a police officer', which entails the investigation of suspicious circumstances with a view toward determining whether a crime has been committed. Manifestly, when this purely investigative function is involved, the acts of the public prosecutor are to be regarded as 'executive' in nature

and, in consequence, cannot legitimately be the object of a writ of prohibition, except, perhaps, in a most unusual and at present unforeseeable circumstances." (*McGinley v. Hynes*, 51 NY2d 116, 123 [1980], citing *Toker v Pollak*, 44 NY2d 211, 220 [1978]).

Apply these principles to the instant matter, the Court cannot opine upon whether or not the DA is acting within a "quasi-judicial" role when obtaining the recorded communications of inmates. The record at bar does not present a specific fact pattern from a pending matter. Petitioners seek a blanket ruling prohibiting the DA from obtaining all of the inmates' recorded communications without a "properly issued subpoena returnable to the court." Since the recorded phone-calls may be sought by the DA in future matters at either stage, whether as a purely investigatory matter, or in the alternative, to use such recordings to prosecute an inmate at trial, the Court declines to issue an advisory opinion.

Moreover, while it is well settled that some conversations between inmates and attorneys may be deemed privileged, the conversations, here, between the detained inmates and Raiser & Kenniff are not rendered privileged as a matter of law.

"The attorney client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice" (*U.S. v. Mejia*, 655 F3d 126, 132 [2d Cir. 2011]). However, this privilege may be waived. "[T]he person invoking the privilege must have taken steps to ensure that it was not waived ... he must take some affirmative action to preserve confidentiality." (citation omitted) *U.S. v. Mejia*, 655 F3d at 134.

The issue of whether the attorney-client privilege extends to conversations knowingly recorded by the Jail is not one of first impression. In *U.S. v. Hatcher,* 323 F3d 666, 674 [8th Cir. 2003]), counsel sought tapes of conversations that took place between co-conspirators to a crime and their attorneys while the co-conspirators were incarcerated. The Eighth Circuit determined that "[t]he presence of the recording device destroyed the attorney-client privilege." *U.S. v. Hatcher,* 323 F3d at 674. Since "the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private. The presence of the recording device was the functional equivalent of the presence of a third party." (*Id.*). In *U.S. v. Mejia,* 655 F3d 126 [2nd Cir. 2011], the defendant inmate argued that the attorney-client privilege extended to his sister, acting similar to that of a translator, to pass a confidential message to his attorney. The Second Circuit upheld the district court's determination which found the defendant was on sufficient notice that his telephone calls at the Jail would be recorded and, thus, the attorney-client privilege was waived. Further, in *U.S. Pelullo*, 5 FSupp2d 285 [D NJ 1998], the court held that the attorney-client privilege was

waived. The court reasoned that the defendant's telephone conversations with attorneys were knowingly made in the presence of the prison through its taping and monitoring procedures and, as such, defendant had no expectation of privacy in those conversations.

The record at bar demonstrates that Petitioners possessed the knowledge that their conversations were recorded by the Jail. It is uncontroverted that the Jail notifies all inmates, upon admission, that their telephone calls are being recorded and they are provided with a handbook indicating same. Also, inmates are provided with a form containing said notification which requires his/her signature and signs bearing said notification are posted on the walls in the Jail's telephone area. Similarly, attorneys, like Petitioner, are aware that all calls are monitored and recorded at the Jail unless the telephone number is properly registered with the Jail. The record further evidences that when an inmate places a call, a voice recording warns both the caller and the recipient that the call is subject to monitoring and recording. In light of Petitioners knowledge that calls are monitored and recorded by Jail, they have failed to establish the necessary element of confidentiality to invoke the attorney-client privilege.

Accordingly, the Petition is denied and the temporary restraining order is vacated.

The parties remaining contentions have been considered by this Court and do not warrant discussion in light of this Court's decision.

This constitutes the Decision and Order of this Court.

Dated: March 30, 2015
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.