

IN THE DISTRICT COURT  
COUNTY OF SAN MIGUEL  
STATE OF NEW MEXICO

JUDICIAL DISTRICT COURT  
SAN MIGUEL, MORA & GUADALUPE  
FILED IN MY OFFICE

2018 DEC 11 PM 3:25

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No. D-412-CR-2017-00129

STATE OF NEW MEXICO,  
Plaintiff,

vs.

RICHARD JOSEPH GRIEGO,  
Defendant.

**MOTION IN LIMINE – JAIL RECORDINGS**

COMES NOW the State of New Mexico, by and through District Attorney Richard D. Flores (Thomas Clayton), and requests authorization to present audio recordings of defendant. In support of the motion the State asserts:

1. Defendant is charged with an open count of homicide and tampering with evidence.

The date of incident is March 28, 2017. The victim is Jimmy Griego.

2. The *Criminal Complaint* was filed on March 29, 2017.

3. The preliminary hearing was conducted on May 1, 2017.

4. The *Criminal Information* was filed on May 3, 2017.

5. Defendant was detained at the San Miguel County Detention Center.

6. The jail maintains a telephone system wherein inmates are provided an opportunity to make telephone calls/visits. At the beginning of each call/visit an automated recording advises that the call is subject to monitoring and recording.

7. While in custody defendant used the detention center telephone system.

8. At no time prior to making the call or visit, nor during the calls/visits, was the defendant ever compelled, coerced or improperly influenced into making the call, continuing the call or making any particular statement.

9. At no time was defendant questioned by law enforcement.

10. Jail recordings have been disclosed to defense counsel.

11. MARCH 29, 2017, TELEPHONE CALL

On March 29, 2017, the day the defendant was arrested he called [REDACTED]. Upon information and belief this is defendant's parents' telephone number. He spoke with his mother. She states, ***"I don't want you to discuss anything because they are recording everything."*** Recording, 3/29/17, 7:45 pm (3:20).

12. MAY 1, 2017, TELEPHONE CALL

The preliminary hearing in this matter was held on May 1, 2017. After the hearing defendant called his mother [REDACTED] (6). During the conversation he tells her, ***"somebody else wanted to borrow my truck."*** Recording, 5/1/17, 6:49 pm (3:55). He further stated, ***"those weren't even my shoes and I wasn't driving my truck."*** She responded, ***"we shouldn't discuss this stuff on the phone."*** Recording (5:00). The defendant's truck is an issue as the eyewitness placed the defendant in his vehicle at the scene of the bridge where the victim was thrown into the river. In addition, a shoe print on the bridge was taken from the crime scene and a pair of shoes with a similar pattern were seized from defendant's residence.

13. JUNE 6, 2017, TELEPHONE CALL

On June 6, 2017, defendant called [REDACTED]. Upon information and belief this is defendant's parents' telephone number. He discussed with his mother his conversation with his counsel regarding the possibility of bond and stated, ***"I feel this even more leaning towards, if I could get this to a justifiable homicide by citizen, protecting myself and family and property from all these conspiracies against me and stuff, will that make it easier to get a bond."*** Recording, 6/6/17, 2:30 pm (2:40). He further stated in the same call, ***"beating my case, . . . like justifiable homicide by citizen or whatever. It's still not murder in the first or second degree."*** Recording (7:49). Defendant's mother informs him to ***"be careful***

***what you say on this recorded line.***” Recording (8:05). These statements by defendant are relevant as they reflect a different position from defendant’s previous assertions on the date of the preliminary hearing (May 1) wherein he denied any involvement in the incident.

**14. JUNE 22, 2017, TELEPHONE CALL**

On June 22, 2017, defendant called [REDACTED]. He stated to his mother that he met with the evaluator, Dr. Susan Cave and stated, ***“she wanted a bunch of events and stuff that took place, and like details of events that happened that day. So I told her. But I think its more of an excusable homicide or justified homicide by citizen.”*** Recording, 6/22/17, 6:13 pm (8:32).

**15. JULY 24, 2017, TELEPHONE CALL**

On July 24, 2017, defendant called [REDACTED]. He spoke with his mother.

R. Griego: I can beat these charges cuz I didn’t do these charges, know what I mean. I was thinking, ***even if this guy pissed me off and he’s trying to steal from me and extort from me,*** and think I have all this money from lawsuits. ***And other guys are telling him he’s not worth a damn, you should to stab him, or kill him or take his shit, are instigating, and trying to conspirize (sic) against me and I beat him up.*** I never, I never hit him with a weapon. But say even if (inaudible) he was still alive. ***I didn’t want him to come back and try to kill me, but he could have crawled out of the water and fucking not died.***<sup>1</sup> And let me alone. But no, they do, they do all this stuff. It’s all their fault that this stuff happened. Not my fault.

Recording, 7/24/17, 5:22 pm (10:45, emphasis added).<sup>2</sup>

**16. JULY 29, 2017, TELEPHONE CALL**

On July 29, 2017, defendant called [REDACTED]. He spoke with his mother, setting forth his explanation for the incident.

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<sup>1</sup> As set forth in the *Affidavit for Arrest Warrant*, and within the anticipated testimony of an eye witness, it is alleged that the defendant threw the victim over the bridge and into the river.

<sup>2</sup> July 31, 2017, while defendant was in custody at the San Miguel County Detention Center, defendant mailed a letter to New Mexico State Police regarding a number of issues. Within the letter he again asserts the issue about individuals wanting to take his money from lawsuits.

- R. Greigo: Cuz this would never have happened if this guy didn't somehow see well . . .
- Mom: I know, I know.
- R. Griego: . . . he's a ... I don't know why he acts like that, he's weird, I think he just wanted to take my stuff, or he had personal problems, and he wanted to . . .
- Mom: Well, you know what. You don't know why other people do what they do Joseph.

Recording, 7/29/17, 3:34 pm (12:31, emphasis).

17. Due to the nature of the motion, concurrence of defense counsel was not requested.
18. Copies of the recordings were disclosed to defense.

### **LEGAL AUTHORITY**

The statements are admissible evidence as an admission by the defendant. The Rules of Evidence specifically provide that such statements are not hearsay.

A statement is not hearsay if:

- (2) The statement is offered against a party and is:  
(a) the party's own statement.

SCRA 1986, Rule 11-801(D).

There is a complete absence of any state action, interrogation or involvement in any manner. The defendant's contact was voluntary. Defendant was advised the calls were subject to recording and monitoring.

#### **I. DEFENDANT HAS NO FOURTH AMENDMENT RIGHT TO PRIVACY IN JAIL CALLS.**

The issue of the admissibility of jail recordings is well settled. The United States Supreme Court stated, "It 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." *Lanza v. New York*, 370 U.S. 139, 143, 82 S.Ct. 1218, 1221 (1962). Courts uphold the admissibility of jail recordings reasoning that

incarcerated individuals are not vested with right of privacy while communicating in places of confinement.

In *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194 (1984), the court addressed the claim of a Fourth Amendment right against a government interest regarding places of incarceration:

**[W]e hold that *society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell* and that, accordingly, *the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell*. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions.**

*Id.* at 525-26 (emphasis added). The Court continued:

**A right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. We are satisfied that society would insist that the prisoner's expectation of privacy always yield to what must be considered the paramount interest in institutional security. We believe that it is accepted by our society that "[l]oss of choice and privacy are inherent incidents of confinement."**

*Id.* at 527-28 (emphasis added, citation omitted).

New Mexico courts have adopted a similar position. See *State v. Ferguson*, 106 N.M. 357, 743 P.2d 113 (1987) (U.S. Constitution Amend. IV protects individual privacy, the fact of arrest and incarceration abates all legitimate Fourth Amendment privacy and possessory interests), and *State v. Coyazo*, 1997-NMCA-29 ("defendant knew telephone calls from the detention center were monitored and there could be no reasonable expectation of privacy").

In *State v. Lucero*, 96 N.M. 126, 628 P.2d 696 (Ct. App. 1981), the Court stated:

**It appears to be the general rule that *a prisoner in jail has no reasonable expectation of privacy* and that the custodians of such a detention center have the right to exercise constant surveillance of inmates, including eavesdropping on their conversations.**

*Id.* at 128 (citations omitted, emphasis added).

**II. THE RECORDED NOTICE BEFORE EACH JAIL CALL/VISIT SATISFIES NEW MEXICO'S ABUSE OF PRIVACY ACT REQUIREMENTS.**

In *State v. Templeton*, 2007-NMCA-108, the Court addressed the issue of whether Abuse of Privacy Act, §§30-12-1 to -11, applied to inmates where interference with electronic communications is prohibited without the consent of the sender or intended recipient. The Court held in the affirmative that the law applied, but concluded "an inmate's decision to make a telephone call after receiving notice in one of the above methods has been construed as an implied consent to the monitoring." *Id.* at 373 (citations omitted).<sup>3</sup> Consent is a well-recognized exception to the requirement of a search warrant, and "[a]n inmate's use of a telephone after receiving notice that his or her calls may be monitored or recorded **constitutes implied consent** to the monitoring." *Id.* at 375 (emphasis added).

In *State v. Johnson*, 2010-NMSC-16, the Court addressed the issue of calls made while in custody at a detention center. The recordings were admitted as evidence by the trial court. The defense argued that the recording of such calls violated the Abuse of Privacy Act and his constitutional rights. As in *Templeton*, the Court stated:

Federal courts have found implied consent under the wiretapping statute when jails notify inmates by sign or recording that their calls are being monitored, and thus **there exists no reasonable expectation of privacy in the phone call** that would result in a Fourth Amendment violation.

*Id.* at 57 (citations omitted, emphasis added). The Court held that defendant's rights were not violated where he was advised that calls were monitored and recorded.

In *State v. Melendrez*, 2014-NMCA-062, there was testimony that the phone calls from jail, which were voluntary, begin with an explanation that all calls would be

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<sup>3</sup> "Adequate notice has been found to include signs near telephones indicating that calls may be monitored, information in orientation or prison handbooks provided to inmates, prison lectures or discussions regarding monitoring policies, forms signed by inmates consenting to monitoring procedures, **recordings on telephones that indicate the monitoring policy prior to placing of a call**, and/or notice provided in the Code of Federal Regulations." *Templeton*, 142 N.M. at 373 (emphasis added).

recorded and monitored and the Court held that "under these circumstances, there could be *no reasonable expectation of privacy* and no unreasonable search or seizure or violation of defendant's privacy rights." *Id.* at ¶ 34 (emphasis added).

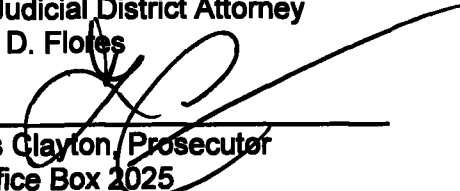
In the case before the Court the Defendant was notified that the calls were being monitored and recorded. Defendant received notice and by use consented to the monitoring and recording. Moreover, from the onset of this case, on March 29, 2017, defendant's mother informed him that the calls were on a recorded line. Defendant cannot claim any reasonable expectation of privacy in the calls made.

The State reserves the right to bring forward additional recordings.

**CONCLUSION**

Wherefore, the State respectfully requests that the Court enter an order admitting the recording as evidence, and for such other relief as the Court deems just and proper.

Fourth Judicial District Attorney  
Richard D. Flores

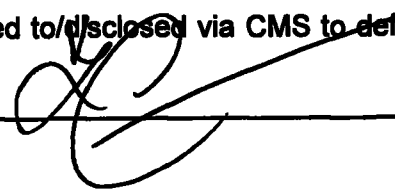


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**Certificate of Service**

I certify that a copy of the foregoing was faxed to/disclosed via CMS to defense counsel, on this 11<sup>th</sup> day of December 2018.



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