

Court of Appeals
of the
State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

EMMANUEL DIAZ,

Defendant-Appellant.

**BRIEF FOR *AMICUS CURIAE* SANCTUARY FOR
FAMILIES, INC. IN SUPPORT OF RESPONDENT**

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STATEMENT OF INTEREST

Sanctuary for Families (“Sanctuary”) is New York’s largest dedicated service provider and advocate for victims of domestic violence, human trafficking, and related forms of gender violence. Every year, Sanctuary provides legal, clinical, shelter and economic empowerment services to over 15,000 victims and their children. Sanctuary provides training on domestic violence and trafficking to community advocates, pro bono attorneys, law students, service providers and the members of the judiciary. Sanctuary represents victims—the vast majority of whom are low income women of color—in custody, visitation, matrimonial, child support, protective-order, immigration, housing, public benefits, and child abduction cases.

While a large number of Sanctuary clients have been complainants in criminal cases against abusive intimate partners, in the vast majority of these cases the defendants are released on their own recognizance after orders of protection have issued on behalf of the complainants. It is only in a small but significant number of these criminal cases—almost always those in which the defendants are facing felony-level charges because the level of violence was exceptionally severe, or because the defendants have multiple arrests and/or convictions for crimes of domestic violence—that bail is set or remand is ordered and the defendant is jailed in a detention facility. These are almost invariably cases in which Sanctuary clients and their children are at exceptionally grave risk.

In this case, Appellant argues that his consent to have his telephone calls recorded for a legitimate governmental purpose while in pretrial detention renders all use of those recordings for other purposes unconstitutional. That proposed reconfiguration of the Fourth Amendment from a shield against unreasonable intrusion into a sword to limit the use of lawfully obtained evidence would sanction and immunize the widespread practice of intimate partner abusers in pretrial detention using the telephone to intimidate, manipulate, and coerce their victims—often the only available witnesses to crimes of domestic violence—in order to induce them to limit or recant their testimony or otherwise refuse to cooperate with the investigation and prosecution of violent crimes against them. Sanctuary has a substantial interest in preventing the use of this insidious form of witness tampering against survivors of domestic violence and human trafficking, and respectfully urges the Court to affirm.

SUMMARY OF ARGUMENT

The Constitution creates a balance between freedom from unreasonable government intrusion and the legitimate government interest in prosecuting crimes against its citizens. There is no imbalance in this case: the Appellant knew his calls would be recorded, and had no reasonable expectation of privacy in them. But the Court should affirm not only because that is the correct constitutional result, but to avoid permanently shifting the balance in favor of pretrial detainees—in particular,

domestic abusers and sex traffickers—who use jail telephone calls to manipulate, control, and coerce their victims not to testify.

More than two decades of research confirm that the dynamic between abusers and their victims involves not only physical violence, but coercive tactics that result in acute psychological trauma and trauma-coerced bonding. That trauma-coerced bonding explains why so many victims recant or refuse to cooperate with police, and why abusers are so successful in their efforts to coerce their victims to recant. Abusers are also highly motivated to engage in those efforts because, often, their victims are the only available witnesses to the crimes they committed. These tactics constitute criminal witness tampering and, often, also constitute violations of orders of protection. There is no question this happens frequently in New York.

In this case, reversal would not only lack any support in the law, but would also galvanize abusers' ongoing efforts to coerce their victims to recant. The Court should not tolerate that obstruction of justice by needlessly converting the Fourth Amendment from a shield against unreasonable intrusion into a sword by which prisoners dictate how lawfully gathered evidence may be used.

ARGUMENT

I. Witness Tampering is a Pervasive and Destructive Practice of Domestic Abusers and Sex Traffickers in Pretrial Detention

The traditional conception of domestic abusers and sex traffickers was that they controlled their victims exclusively through physical intimidation and violence.

On that view, arrest and pretrial detention would not only stop the abuse but would also prevent abusers from coercing their victims to limit or recant their testimony or otherwise refuse to cooperate with the investigation and prosecution of crimes against them.

We now know that view is incorrect. More than two decades of research confirm physical violence is only one of a multitude of behaviors abusers use to maintain coercive control over their victims. Understanding that broader dynamic between abusers and their victims explains why victims so frequently recant their testimony or refuse to cooperate with law enforcement officials after speaking with their abusers. In turn, understanding the psychological trauma sustained by abuse victims shows not only how lawful recordings of pretrial detainees (like those at issue here) can help stop the cycle of violence by protecting victims and their children and holding perpetrators accountable, but why those recordings are a critical means to prevent and prosecute witness tampering and manipulation that is so pervasive in domestic violence and trafficking cases.

A. Coercive Control is a Pervasive and Dangerous Form of Domestic Violence

The insidious reality of domestic abuse and sex trafficking is that physical violence is just one tactic used by perpetrators as part of a broader pattern of behavior designed to strip victims of their independence and subject them to their abusers' will. That dynamic is called "coercive control." *See, e.g.,* Michael P. Johnson &

Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAM. 948, 948-63 (2000); Mary A. Dutton, Lisa A. Goodman & R. James Schmidt, DEVELOPMENT AND VALIDATION OF A COERCIVE CONTROL MEASURE FOR INTIMATE PARTNER VIOLENCE: FINAL TECHNICAL REPORT (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/214438.pdf>.

Coercive control refers to a set of tactics abusers deliberately use to deprive their victims of autonomy and liberty, which include physical intimidation and violence, micro-regulation of the victim's activities and finances, blackmail, sexual degradation, and isolation. *See, e.g., People v. Abdur-Razzaq*, 60 Misc.3d 631, 637, 77 N.Y.S.3d 842, 846 (Sup. Ct. Bronx Cty. May 29, 2018). Rather than obtaining control over victims exclusively through physical violence, coercive control is characterized by an ongoing pattern of gender-based domination by which abusive intimate partners “interweave repeated physical abuse with intimidation, sexual degradation, isolation, and control.” Evan Stark, COERCIVE CONTROL, FATALITY REVIEW BULLETIN 2 (Spring 2010); *see also* Evan Stark, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 5 (2007) (hereinafter COERCIVE CONTROL).

Physical violence alone does not account for the nature and degree of the trauma often experienced by victims of domestic violence and sex trafficking. *See, e.g.,* Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 985-86 (1995). Dr. Stark notes that even

where physical violence was not present, abused women subject to coercive control nonetheless “exhibited the signs and symptoms of abuse as the result of intimidation, isolation, and control.” Stark, COERCIVE CONTROL, 278. Victims of coercive control in intimate partner relationships often report acute traumatic symptoms such as “psychic ‘numbness,’” *id.*, and dissociation, both common reactions to sustained physical, sexual, and psychological abuse.

As such, physical violence is only one of the many tactics that abusers employ to maintain control over their victims. For example, perpetrators of domestic violence frequently “shift responsibility for the effects of [their] actions” by both minimizing the effects of their abuse and blaming their victims (or other external factors) for the abuse. Lundy Bancroft et al., THE BATTERER AS PARENT 19-20 (2d ed. 2012). Pretrial detainees use minimization and blame-shifting to challenge the victim’s memory of the violence or to persuade her that it was caused by her ostensible provocation and that she was responsible for it. Amy E. Bonomi et al., “*Meet me at the hill where we used to park*”: *Interpersonal Processes Associated with Victim Recantation*, 73 SOCIAL SCIENCE & MED. 1054, 1057 (2011) (hereinafter “*Interpersonal Processes*”).

Thus, the physical separation of abuser and victim through the abuser’s pre-trial incarceration not only fails to abate abusers’ efforts to continue asserting control over their victims, but provides abusers with an especially powerful incentive to

intensify their tactics of coercive control. Laura Dugan et al., *Do Domestic Violence Services Save Lives?*, 250 NAT'L INST. JUST. J. 20, 20-25 (2003); American Psychological Association, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 39 (1996) ("Physical separation . . . increase[s] a man's need to control his partner and children"); see also Zeoli et al., *Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers*, 28 J. FAM. VIOLENCE 547, 547 (2013) (citing "threats against [] children" as a manner in which abuse escalates post-separation).¹ Further, research shows that separation "from an abusive partner after living together was associated with a higher risk of femicide." Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089, 1090 (July 2003). Victims of domestic violence and sex trafficking who were living with their abusive partners prior to their arrest are thus

¹ See also U.S. Attorney General's National Task Force on Children Exposed to Violence, *Defending Childhood*, at 114 (Dec. 12, 2012); Bureau of Justice Statistics, U.S. Department of Justice, *INTIMATE PARTNER VIOLENCE 1993-2010*, at 6 (Nov. 2012); Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205, 227 (1997); Andree G. Gagnon, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272, 273 (1992) ("One of the most dangerous times for a battered woman occurs when she separates from her batterer.").

likely to be in even greater danger than they were previously during the period of their abuser's pretrial incarceration.

Tactics of coercive controls used against victims of domestic violence are also deployed by perpetrators of sex trafficking, both in the “grooming process” by which sex-trafficking victims are recruited and afterwards to secure and maintain absolute control. See M. Alexis Kennedy et al., *Routes of Recruitment: Pimps' Techniques and Other Circumstances That Lead to Street Prostitution*, 15 J. OF AGGRESSION, MALTREATMENT & TRAUMA 1, 7 (2007). For example, pimps attract vulnerable girls and young women—including homeless youth, and young girls in the foster system—with expensive gifts and dinners or with a weekend away, only to tell their young victims that they are “out of money” to get them home, or that the victims owe the pimps a “debt” they need to repay. *Id.* Pimps threaten young women who attempt to escape their clutches by threatening to “out” them as prostitutes or “whores.” *Id.* Traffickers and their confederates deploy these tactics to maintain coercive control over their victims and continue their exploitation and abuse, leaving them isolated and estranged from family and friends, ashamed, and disoriented. *Id.* at 7-8.

B. Coercive Control Explains Why Many Victims Recant

Despite the likelihood of continued violence upon reuniting with their abusers, victims of domestic violence and sex trafficking frequently recant their testimony of

abuse or refuse to cooperate with police. According to some reports, approximately 80 percent of abuse victims recant their testimony. Bonomi, *Interpersonal Processes*, at 1054. Even when victims do not fully recant, they often stop cooperating with the police after their abusers call them from jail. William Glaberson, “Abuse Suspects, Your Calls Are Taped. Speak Up,” N.Y. TIMES Feb. 25, 2011, at A1 (hereinafter “Speak Up”) (reporting “that 75 percent of the time, the women who were victimized stop helping prosecutors, often after speaking to the men accused of abusing them”).

Why would victims do this? The grim reality is that many victims of domestic abuse and sex trafficking crimes are also victims of an acute form of psychological trauma or complex Post Traumatic Stress Disorder with symptoms similar to Stockholm Syndrome known as “traumatic” or “trauma-coerced bonding.” Abusers deliberately and systematically strip away their victims’ autonomy through coercive controlling techniques: surveillance, micro-regulation of the victim’s activities, threats and intimidation, and isolation, interspersed with protestations of love and devotion often coupled with other positive rewards such as a meal at a fast food restaurant or a gift of clothing. C. Raghavan & K. Doychak, *Trauma-Coerced Bonding and Victims of Sex Trafficking: Where do we go from here?*, 17 INT’L J. OF EMERGENCY MENTAL HEALTH & HUMAN RESILIENCE 583, 584 (2015) (hereinafter “*Trauma-Coerced Bonding*”). The attachment between an abuser and a victim is the

predictable result of trauma under isolation (referred to as an “appeasement” response), in which the victim finds the situation inescapable and has no perspective other than the abuser’s. C. Cantor & J. Price, *Traumatic Entrapment, Appeasement and Complex Post-Traumatic Stress Disorder: Evolutionary Perspectives of Hostage Reactions, Domestic Abuse and the Stockholm Syndrome*, 41 AUSTRALIAN & NEW ZEALAND J. OF PSYCH. 377, 379 (2007). Just as captors have induced in hostages a psychological condition that cause them to identify with (or even join) the captors in their crusade, intimate partner abusers using these coercive techniques “create an environment of psychological captivity for the victim marked by powerlessness and uncertainty, but also love and idolization” of the abuser. Raghavan & Doychak, *Trauma-Coerced Bonding*, at 584.

The psychological effect of coercive-control techniques is particularly pervasive and acute among victims of sex trafficking. Such victims will often deny they have pimps or traffickers, and instead say they are “working to help their boyfriends.” Joan A. Reid, *Doors Wide Shut: Barriers to the Successful Delivery of Victim Services for Domestically Trafficked Minors in a Southern U.S. Metropolitan Area*, 20 WOMEN & CRIM. JUSTICE, 147, 158 (2010). It is also common for trafficked girls to attempt to escape social-services custody and return to their traffickers at the first opportunity. Joan A. Reid, *Entrapment and Enmeshment Schemes Used by Sex Traffickers*, 28 SEXUAL ABUSE 491, 493 (2016).

C. Pretrial Detainees Use Coercive Controlling Techniques to Force Their Victims to Recant

Given the breadth of coercive controlling tactics that have nothing to do with physical violence and do not require physical access to victims, it is no surprise pretrial detention fails to stop abusers from continuing to use those tactics against their victims. And given the success of abusers' use of these tactics and the high stakes for abusers of eliminating witness cooperation with law enforcement, it is not surprising abusers' use of coercive control tactics against their victims from jail is ubiquitous.

One important study of the specific phenomenon of victim recantation following conversations with their abusers in pretrial detention examined recorded telephone conversations between 25 pretrial detainees charged with felony domestic-violence offenses and their victims in Ohio. Bonomi, *Interpersonal Processes*, at 1054-61. The study found pretrial detainees used familiar coercive controlling techniques to secure recantation: the abusers minimized the abusive act or positioned themselves as the victim; attempted to invoke the victim's sympathy often by recounting their experience in jail; invoked (and thereby threatened) life without the abuser and how, for example, it would negatively affect shared children; and ultimately leveraged traumatic bonds to redefine the abuse narrative and instruct the victim to recant. *Id.* at 1057-61.

Reputable reporting on this specific issue also shows that abusers in pretrial detention in New York use the same tactics examined in the Bonomi study. For example, in one recorded call, a detainee charged with burning his girlfriend's face with a hot iron in front of their children instructed her, "I need you to prepare the kids to start lying." *Speak Up*, at A1. While the instruction is clear, it derives its effectiveness from the coercive power dynamic between abuser and victim by invoking their shared role as parents and the threat of life without each other should the prosecution move forward. *See, e.g., Bonomi, Interpersonal Processes*, at 1057-58. On another call, a detainee promised a new beginning, stating he was a "brand new" man who only attacked his victim with a meat cleaver out of "passion of love." *Speak Up*, at A1. On another particularly illustrative call, a detainee walked through several coercive steps to coerce his victim to recant:

Basically tell him [the prosecutor] things like this: 'It was just a misunderstanding. I love him. We want to get married and we want to have children together.... Say something nice like that, anything like that, you know what I'm saying, baby? ... Even though you probably don't want to marry me and you don't want to have kids. But it's all right. It's all right. It's no big deal. We're not going to talk about that now.'

Speak Up, at A1. Similar to the calls observed in the Bonomi study, this New York detainee redefined the abuse narrative to instruct his victim to recant, playing on

visions of a new and better life together that could not happen if he were imprisoned. See Bonomi, *Interpersonal Processes*, at 1058.

Sanctuary's experience in serving victims of domestic violence and sex trafficking accords with and amplifies the Bonomi study and reporting on this issue. For example, in one case, a Sanctuary client received multiple calls from her abuser threatening to kill her and stating she would "pay the price" for not bringing their children to visit him in jail; when the victim later refused his calls, the abuser called the victim's parents to make the same threats.

Sanctuary's experience also confirms it is not uncommon for pretrial detainees to contact their victims hundreds of times while in pretrial detention. For example, in another particularly troubling case—where the victim's intimate partner and father of her daughter and unborn son subjected her to forced prostitution for years before he was arrested and indicted for brutally beating her into unconsciousness while she was eight months pregnant and for concealing their infant daughter in a freezer—the abuser telephoned her from his detention facility from morning until night each day for a period of six months, minimizing the abuse and painting a rosy picture of the wonderful life that he would provide her and their children while repeatedly violating her order of protection through his calls. Not surprisingly, when it came time for the victim to testify at trial against him, she refused and, when served with a material witness order, threatened to go into hiding.

The abuser's daily barrage of calls kept alive the traumatic bonding he instilled in her during the time that he lived with and physically and psychologically controlled her. The fact that he could no longer *physically* abuse her from jail aided his efforts to persuade her that he was a changed man, a devoted husband and father.

In short, while the specifics vary in each case, the patterns in each are the same: abusers employ coercive controlling tactics to convince their victims to recant or cease cooperating with law enforcement, and, in up to 80 percent of domestic-violence cases, the psychologically traumatized victims accede to their abusers' latest demand.

D. Pretrial Detainees' Use of Coercive Controlling Techniques in Domestic Violence and Trafficking Cases is an Effective and Destructive Type of Witness Tampering

There is no question as to whether witness tampering is a pervasive problem in domestic violence cases. *See, e.g.,* Bonomi, *Interpersonal Processes*, at 1054 (“Prosecutors and advocates have known for many years that witness tampering is a significant problem in domestic violence cases, and that victims recant and/or refuse prosecution due, in part, to perpetrators’ threats of retaliation.”); *Davis v. Washington*, 547 U.S. 813, 832-33 (2006) (noting domestic violence crimes are “notoriously susceptible to intimidation or coercion of the victim to ensure that she does not testify at trial”). The reason why is obvious: abusers are highly motivated to force their victims to recant because, often, the victims are the only available

witnesses to the crime. Abusers who have locked their victims into a coercive and traumatic pattern of control also correctly estimate they will succeed.

There can likewise be no question whether pretrial detainees' use of coercive controlling tactics via the telephone to convince their victims to recant or stop cooperating with the prosecution is criminal witness tampering.² Under New York law, criminal witness tampering occurs when a person, knowing another is to be called as a witness, wrongfully induces or attempts to induce the witness's absence or failure to testify, or makes any false statement or practices any fraud or deceit with the intent to affect the witness's testimony. Penal Law § 215.10. Even putting aside the blatant examples of detainees instructing their victims to lie or not testify recounted above, detainees' attempt to leverage the trauma they have inflicted on their victims to avoid conviction are, at a minimum, clear attempts to induce victims' failure to testify.

Pretrial detainees' use of coercive controlling techniques upon their victims also prevents Sanctuary and other service providers from providing counseling to survivors of domestic violence and trafficking. For example, in one case in

² Additionally, abusers' mere contact with victims is typically a criminal violation of orders of protection routinely requested and issued in domestic-violence and trafficking cases. If that violation involves the commission of a family offense it becomes a felony-level crime. Suppression of lawfully gathered evidence of family offenses would immunize abusers from that enhanced penalty.

Brooklyn, an abuser in pretrial detention called his victim over 1,200 times. Speak Up, at A1. Sanctuary's experience also confirms it is not uncommon for pretrial detainees to contact their victims hundreds of times while in detention. In one example recited above—in which the abuser beat his eight-months'-pregnant victim unconscious and put their infant daughter in a freezer—the abuser called the victim multiple times a day, every day, for six months while in pretrial detention; as a result, the victim threatened to go into hiding after being served with a material witness order. That level of continued contact, frequently in violation of an order of protection, impedes the rebuilding process for victims and allows the cycle of abuse to continue—often with the devastating consequence that the abuser succeeds in his effort to manipulate his victim to avoid justice.

II. Recording Pretrial Detainee Calls On Notice Is Constitutional and Critical to Prevent Continued Violence and Witness Tampering in Domestic Violence and Trafficking Cases

The Constitution creates a balance between freedom from government intrusion and the need to prosecute crimes. There is no imbalance in this case, where Appellant knew his calls would be recorded and had no reasonable expectation of privacy in them. But this case risks creating a severe imbalance in favor of criminal domestic abusers and sex traffickers by reconfiguring the Fourth Amendment from a shield against unreasonable government intrusion into a sword by which abusers and traffickers could dictate how evidence gathered in lawful searches can be used.

The Court should affirm not only because it is the correct constitutional result, but to avoid creating an exception to the Fourth Amendment that would permanently shift the constitutional balance against survivors of domestic abuse and trafficking.

A. The Rikers Island Recordings Do Not Violate the Fourth Amendment Because Appellant Consented to the Search

The recordings at issue in this case did not violate Fourth Amendment because the record shows Appellant consented to them upon entry into Rikers Island, each time he walked to the telephone and saw posted signs telling him his calls would be recorded, and at the start of each call when he heard his call would be recorded. The People, as Respondent here and in *People v. Cisse* (APL-2017-00174),³ discuss the propriety of these recordings at length. Sanctuary will not burden the Court by repeating those arguments here, but instead highlights two arguments in favor of affirmance.

First, Appellant argues that even if he consented to DOC recording, the evidence gathered in the search could only be used to ensure prison security and order. App. Br. 19. That is wrong.

³ For the sake of judicial economy and in view of the fact *Cisse* will be argued on the same day as this case, Sanctuary submits this single *amicus* brief, but respectfully submits that its concerns regarding the impact of the Court's decisions upon survivors of domestic violence and sex trafficking apply equally in both cases.

Appellant seeks to convert the Fourth Amendment from a shield against unreasonable government intrusion into a sword to dictate how evidence gathered pursuant to a lawful search can be used. This proposed expansion of the exclusionary rule from excluding the fruits of unlawful searches to regulating the use of evidence discovered during *lawful* searches is without support.

Appellant's argument also makes little sense and, if adopted, would yield absurd and destructive results that harm survivors of domestic violence. Under Appellant's argument, an abuser in pretrial detention who is recorded threatening his victim if she agrees to testify against him could do so with impunity: the content of the recording would not affect prison security and discipline, which in Appellant's view would be the only appropriate *uses* for that lawfully-obtained evidence. As a result, on Appellant's view, evidence of the telephone threats or more subtle manipulation could not be used to prosecute witness tampering. Worse, on Appellant's view, an abuser could ask a conspirator at liberty to harass, assault, or kill the abuser's victim so long as the victim was outside the prison, as those actions also would not affect prison security and discipline.

Put simply, consent to a search under the Fourth Amendment concerns consent *to the intrusion itself*, not the terms of use criminal defendants wish to attach to evidence discovered during a lawful search. Appellant's view would require a hairsplitting analysis by which courts would need to divine—doubtless without the

defendant’s testimony—the specific uses for which *lawfully* gathered evidence of crimes from a consented-to search can be used. The Court should avoid that impracticable result.⁴

Second, Appellant also argues there was a separate, second “search” when prosecutors reviewed the recordings DOC had already made, or that prosecutors’ review of consented-to DOC recordings was somehow a separate “seizure” at the prosecution’s request. *See, e.g.*, App. Br. 26-27. But the law is clear that where an initial search was lawful, subsequent review of the evidence gathered as part of that lawful search is not an “additional” search. *See, e.g., Illinois v. Andreas*, 463 U.S. 765 (1983) (warrantless re-opening of container after initial lawful seizure does not violate criminal defendant’s Fourth Amendment rights).⁵ In any event, Appellant’s

⁴ Nor would the destructive effects of a reversal end there. For example, if the Court permits pretrial detainees to dictate the terms of use for lawfully gathered evidence, even prison guards searching prison cells would face new and varying restrictions on searches they choose to undertake to maintain prison security and order.

⁵ *Amici*’s citations to *Ross*, *Walter*, and *Wells* are inapposite. *See* Br. of *Amici Curiae* Brooklyn Defender Servs. et al., at 8. In each case, the issue concerned the scope of the intrusion—not terms of use for lawfully gathered evidence Appellant advances here. *Ross* concerned a search warrant for erotic magazines and publications, not videos, and suppressed evidence of the contents of videos as beyond the scope of the warrant. *Ross v. Maryland*, 475 A.2d 481, 485-86 (Md. Ct. Spec. App. 1984). *Walter* involved the government’s lawful possession of films through a misdelivered shipment to third parties where the films’ owner had not consented to their exhibition, and the Court excluded evidence of their contents. *Walter v. United States*, 447 U.S. 649, 654 (1980). *Wells* concerned an inventory search of an

argument would entail that one lawful search revealing evidence of multiple crimes would in fact constitute multiple “searches,” one for each crime, and that Appellant would have to consent to each of them. That is not the law, nor should it be.

B. Reversal Would Shift the Constitutional Balance in Favor of Domestic Abusers and Sex Traffickers

Nor should the law change to reconfigure the Fourth Amendment as Appellant requests. The Rikers Island recordings are often the exclusive evidence of witness tampering, particularly where witnesses stop cooperating with prosecutors after speaking with their abusers (which, again, occurs in the vast majority of domestic-violence cases). Those recordings often also contain direct evidence of domestic abuse and enable prosecutions of those crimes even where the victim has been intimidated from testifying. Even where victims of domestic violence or sex trafficking testify, consented-to recordings of pretrial detainee calls enable the prosecution to reconstruct the psychological or emotional manipulation that perpetrators use against their victims.

Additionally, in many instances, pretrial detainee calls allow prosecutors to proceed with “evidence-based prosecutions” (that is, cases where the victim disappears or refuses to cooperate because of intimidation and witness tampering),

impounded car following the defendant’s arrest that revealed a locked suitcase, which officers improperly opened, revealing contraband. *Florida v. Wells*, 495 U.S. 1, 4 (1990).

securing conviction even though witness tampering has occurred. *E.g.*, Vanessa O’Connell, “Prosecutor Find Way to Help Victims Too Afraid to Testify,” WALL STREET JOURNAL, May 12, 2010. Where abusers engage in witness tampering and intimidation as recounted above, phone conversations from pretrial detainees are often the only evidence left to secure justice where the perpetrator has convinced the victim not to testify. *Id.*

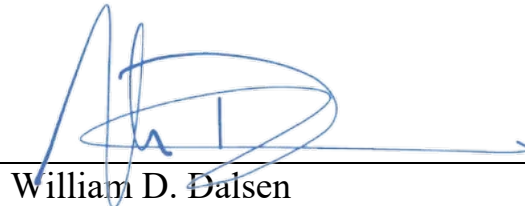
CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

Boston, Massachusetts
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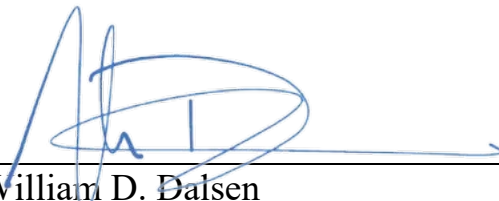
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