

Exhibit 21

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Matter of Marcus Reid, Eric Leon, Tyrell Scott, Lillian
Nelson, and Samiyah Defreitas,

On behalf of themselves and all others similarly situated,
Petitioners,

For a judgment under Article 78 of the Civil Practice
Law and Rules

--against--

NEW YORK CITY DEPARTMENT OF
CORRECTION,

Respondent.

**AFFIRMATION BY
ATTORNEY YUNG-MI
LEE IN SUPPORT OF
VERIFIED ARTICLE 78
PETITION**

I, Yung-Mi Lee, an attorney admitted to practice law before the courts of the State of New York,
and not a party to the above-certified cause of action, affirm pursuant to CPLR § 2106 and under
penalties of perjury as follows:

1. I am the Legal Director of the Criminal Defense Practice at Brooklyn Defender
Services (“BDS”). I am a member in good standing of the bar of the State of New York.

2. BDS is a full-service public defender 501(c)(3) organization that provides multi-
disciplinary and client-centered criminal defense, family defense, immigration, and civil legal
services, along with social work and advocacy support. BDS represents low-income people in
nearly 22,000 criminal, family, civil, and immigration proceedings each year. BDS represents
hundreds of people detained or incarcerated in New York City’s jails at any time.

3. As the Legal Director of the Criminal Defense Practice, I assist in developing
BDS’s policies and practices with regard to representation of clients in criminal cases and provide
guidance to supervisors as well as line attorneys. I also represent BDS in conversations with other
defender and legal services organizations, as well as the Brooklyn District Attorney’s Office and
the Department of Correction (“DOC”).

4. I have been an attorney in the Criminal Defense Practice at BDS since 1998. I became Legal Director in 2019 and, prior to that, served as a supervisor since 2014.

5. This declaration is based on my personal knowledge, gathered through my own experiences, supervision of staff in BDS's Criminal Defense Practice, and coordination with the other leaders of BDS's Criminal Defense Practice. I also regularly consult and coordinate with criminal defense practitioners at other defender organizations.

A. Phone Communication Is Crucial When Representing Incarcerated People Facing Criminal Charges

6. At BDS, a defense team consists of an attorney and an investigator, and in many cases a social worker. The defense team may also receive help from other specialized attorneys and the jail services team. Members of the defense team at BDS use phone calls regularly as an important method of communicating with clients. Phone calls are the only means people in DOC custody have of immediately initiating contact with anyone outside their jail, including their defense team. Attorneys typically provide the people they represent with their phone numbers upon first meeting them at criminal court arraignment and remain in regular communication with clients over the phone during the pendency of their cases.

7. Communication over the phone between a person facing criminal charges and their defense team is particularly important in the first few days after they are arraigned. In that initial stage, time is of the essence as attorneys and their clients talk about such important matters as investigations, the contents of initial discovery, the merits of any plea offer and whether or not a client should testify in the grand jury. Because Criminal Procedure Law § 180.80 creates either a five or six-day deadline for many of these important decisions, these conversations often occur over the phone. If someone is considering testifying before the grand jury, that initial preparation for testimony may also take place over the phone.

8. Video conferences must be scheduled in advance and generally do not take place until several days after they are requested, and people are not reliably produced to those conferences. Attorneys' schedules, long waits for in-person visits, and the remote location of Rikers Island, make it difficult for attorneys to make frequent trips to Rikers Island for in-person visits. The delays and confidentiality issues associated with receiving and sending letters in DOC custody are considerable. Accordingly, in many circumstances, conversations between an attorney and their client must occur over the phone.

B. DOC Has Recorded and Disseminated Thousands of Privileged BDS Calls

9. DOC began recording all calls made by people in its custody in 2008.
10. As early as 2015, BDS regularly sent a list to DOC for inclusion on DOC's "Do Not Record" lists, which included the phone numbers of BDS attorneys and staff whose calls should not be recorded.
11. In August 2018, BDS reported to DOC that a BDS social worker heard a pre-recorded message at the beginning of her call with a client in DOC custody saying that the call was being recorded even though her number had been included in prior lists that BDS had sent DOC. DOC promised to investigate, but BDS never received an update.
12. In April 2019, BDS sent a letter to DOC Legal by fax with an updated staff list for inclusion on the "Do Not Record" list; Marcia Maxwell, Executive Director of Intergovernmental Affairs, was copied. BDS also sent an email to Ms. Maxwell advising her that BDS's list had been faxed and asking her to confirm who such lists should be sent to in the future. Ms. Maxwell responded via email, "let me see who this should be sent to." BDS did not receive a further response.
13. In December of 2019, two attorneys at BDS learned that DOC had improperly recorded their legal calls with incarcerated clients. One of the attorneys received discovery from

the Brooklyn District Attorney's Office that contained her own calls with an incarcerated client. The other attorney heard the automated message saying that the call was being recorded when she spoke with her incarcerated client. BDS notified DOC Legal in December 2019. BDS informed Laura Mello at DOC Legal that BDS had sent a staff list for inclusion in the "Do Not Record" list in April 2019; Ms. Mello stated that the list needed to be sent directly to her to be processed. However, she confirmed that the phone numbers of the two attorneys whose calls had been recorded were already on DOC's "Do Not Record" list.

14. In early 2020, several BDS attorneys learned that DOC had improperly recorded legal calls between themselves and incarcerated people they represented. These attorneys' phone numbers had been included in prior staff lists sent to DOC. Two of these attorneys previously had calls improperly recorded in 2019 and Laura Mello at DOC Legal had confirmed that their numbers were on DOC's "Do Not Record" list.

15. On March 2, 2020, BDS sent a letter to Heidi Grossman, General Counsel for DOC and Brenda Cooke, Chief of Staff for DOC. The letter stated that BDS believed that DOC was improperly monitoring and recording legal calls between BDS clients and their attorneys, and that DOC was providing audio recordings of these calls to law enforcement. BDS requested that DOC immediately cease this practice, update the "Do Not Record" list, and delete any existing records, including audio recordings, of calls to or from these numbers. The letter appended an updated staff list for inclusion on the "Do Not Record" list.

16. In November 2020, BDS emailed Laura Mello at DOC Legal, expressing concern that DOC continued to record legal calls to BDS defense teams. Specifically, the email explained that a BDS attorney—who had been on the list previously provided to DOC to be processed as "Do Not Record"—was continuing to hear an automated message on her legal calls with

incarcerated clients informing her that “this call is being recorded.” The email also provided another updated staff list. Ms. Mello said she would “double check” that the attorney’s phone number was on the “Do Not Record” list and confirm whether that automated message indicated that the call was in fact being recorded.

17. In the winter of 2021, two BDS attorneys learned from Assistant District Attorneys that DOC had monitored and recorded their legal calls with incarcerated clients and provided those calls to the Brooklyn District Attorney’s Office. Phone numbers for these BDS attorneys were on lists that BDS had previously provided to DOC for “Do Not Record” processing. For one of these attorneys, this was the second time that she had learned through discovery that DOC had recorded a privileged call between her and a client.

18. BDS informed Ms. Mello at DOC Legal about these improperly recorded calls and provided the phone numbers of the attorneys whose calls had been improperly recorded. On February 18, 2021, Ms. Mello informed BDS via email that “the Department’s IT division has confirmed with Securus that all the numbers on the list you previously provided were checked and they are confirmed to be on the Do Not Record list.”

19. On February 25, 2021, Lisa Richardson, Deputy General Counsel at DOC, informed BDS that Securus was conducting a manual audit of each of the numbers that BDS provided for inclusion on DOC’s “Do Not Record” list and would identify which numbers, if any, had not been set to “private” in the system.

20. On March 19, 2021, BDS spoke with Ms. Grossman and Lisa Richardson, Deputy General Counsel at DOC. On that call, DOC acknowledged that the information DOC received from Securus indicated that many privileged phone calls had been recorded and they acknowledged that their office previously provided inaccurate information in response to BDS’s

inquiries regarding the “Do Not Record” list.

21. On the same day, BDS received the results of a DOC review of recorded calls in the format of an excel spreadsheet. No recorded calls were provided. The review revealed that DOC and Securus recorded at least 1,450 confidential calls between members of BDS defense teams with over 300 clients between March 10, 2020 and February 5, 2021.

22. DOC subsequently provided information that DOC and Securus shared many of these improperly recorded calls with law enforcement entities. These entities included the Brooklyn District Attorney’s Office, the Bronx District Attorney’s Office, the Queens County District Attorney’s Office, the New York County District Attorney’s Office, a Special Narcotics Prosecutor, the New York Police Department (“NYPD”), the New York City Department of Investigation, the New York City Law Department, and the United States Attorney’s Office for the Eastern District of New York. DOC also internally transmitted their recordings of these privileged calls, for example to DOC’s Correction Intelligence Bureau.

23. BDS has reason to believe that the DOC review of BDS numbers was incomplete. For example, a BDS attorney heard the automated message stating that her call with an incarcerated client was being recorded on September 23, 2020, within the time period covered by the review, but that call did not appear in the results.

24. BDS is concerned that DOC’s recording of privileged communications is ongoing. Beginning in late August 2023, a BDS attorney, whose phone number has been set to private according to the “Do Not Record” website, received at least five voicemails from incarcerated clients that began with an automated message suggesting that the calls are being recorded. He also received a call from an incarcerated client in November 2023 that began with this same message.

25. DOC Legal claimed that this number was successfully privatized and said that the message could be playing if call forwarding was being used. Call forwarding was not being used.

26. DOC does not timely privatize numbers. For example, BDS sent updated numbers for inclusion on the “Do Not Record” list in early November 2023, including the phone number of a new social worker. As of January 12, 2024, her number still was not privatized and all her calls with clients were still being recorded.

C. The Aftermath of DOC’s Disclosures to Law Enforcement

27. After BDS received the results of the DOC review, BDS began to internally assess the scope of the damage.

28. BDS immediately contacted the Brooklyn District Attorney’s Office because DOC had sent the majority of the improperly recorded calls to Assistant District Attorneys in Brooklyn. Because of DOC’s delayed and protracted review process, the Brooklyn District Attorney’s information technology unit had begun purging those privileged recordings without assessing whether the assigned Assistant District Attorneys had listened to or stored them elsewhere, and many Assistant District Attorneys had left the office before they could be questioned about the privileged recordings. As a result, after the unauthorized disclosure, BDS received copies of privileged recorded calls for only a handful of the three hundred cases that had been affected.

29. It was not possible to fully assess the damage caused by the improper disclosure of these calls for several reasons. As an initial matter, in almost all cases BDS was not able to obtain and review the recorded calls themselves, so we did not know their contents. Many of these conversations took place months before the review occurred and, therefore, it was difficult to discern what was discussed on the calls.

30. Additionally, the disclosure of these calls likely prejudiced our clients in myriad

ways. For example, some clients were likely prejudiced in situations where prosecutors heard them discuss defense strategy such as their grand jury testimony over the phone. Others were likely prejudiced when prosecutors learned information that gave them an advantage in plea negotiations. For example, if a prosecutor learns that a client is unable to afford bail or is rapidly decompensating and desperate to be released, they may offer a plea deal to secure a conviction on a case where the complaining witness may be uncooperative and if the client had been free, the case would have ultimately been dismissed. Law enforcement could also learn that witnesses are cooperating with defense investigators, which could lead them to try to cut off that access and negatively affect the client's ability to prepare a defense. BDS is unable to quantify how often clients were prejudiced in these and other ways because that information is in the hands of the law enforcement and district attorney's offices.

D. DOC's Recording of Phone Calls Continues to Impact the People We Represent, their Defense Teams, and their Communities

^{31.} As a result of DOC monitoring, recording, and distributing legal phone calls, attorneys at BDS have reported that they are not confident that their communications with incarcerated clients via telephone are truly confidential. Attorneys try to avoid having substantive conversations with their clients in DOC custody over the phone because they fear those conversations will be recorded despite their phone numbers being marked as private on the "Do Not Record" website. Instead, attorneys try to save substantive conversations for video conferences, court dates, or in-person visitation at DOC facilities. This, however, reduces the avenues of communication with incarcerated clients. Attorney and client concerns around the security of their communications have only become more acute as BDS learns more about the NYPD's access to Securus systems, recordings, and data.

^{32.} When BDS received DOC's disclosure detailing its privileged call production to

external entities, *see supra* ¶ 22, BDS noticed a reference to NYPD’s access to DOC’s recorded calls. Specifically, the spreadsheet indicated that some calls were “produced to and/or accessed by” NYPD detectives affiliated with “NYPD Fusion.”

33. As brief background, according to the Department of Homeland Security, Fusion Centers “are state-owned and operated centers that serve as focal points in states and major urban areas for the receipt, analysis, gathering and sharing of threat-related information between State, Local, Tribal and Territorial (SLTT), federal and private sector partners.”¹ DOC has publicly disclosed that—unlike any other jurisdiction in the United States—New York City has a Fusion Center in a jail, located on Rikers Island.

34. Beginning in 2020, BDS began to repeatedly see police reports in discovery that referenced a “Rikers Fusion Team” and “Pertinent Rikers Island Inmate Phone Calls.” These police reports appended phone call recordings that often included calls between people who had never previously been identified in the investigation. In these situations where the people on the calls had not been identified through law enforcement investigation, the calls must have been obtained without judicial authorization.

35. These police reports, combined with the insights gleaned from DOC’s production spreadsheet suggest that the NYPD—through the Rikers Fusion Team—is “accessing” DOC’s call recordings directly through Securus’s NextGen Secure Communications Platform, instead of through subpoenaed or warrant-collected records. The breadth of law enforcement access to our clients’ phone calls is therefore likely even greater than DOC’s disclosures suggest.

36. Many people we represent who are in DOC custody have reported increased fear that their calls with their defense teams are not confidential. Others do not understand why their

¹ Department of Homeland Security, “Fusion Centers,” <https://www.dhs.gov/fusion-centers>.

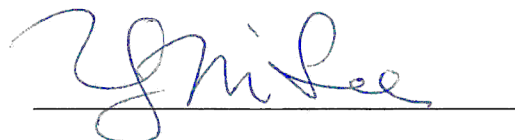
attorneys may decline to discuss crucial information or answer certain questions over the phone, impairing their trust in their attorney and damaging the attorney-client relationship.

37. Such limitations, of course, only exist for the people we represent who are incarcerated by DOC, usually because they cannot afford to pay bail. People we represent who are not detained during the pendency of their criminal cases do not need to worry about having their privileged legal calls recorded. They can meet with us at our offices to discuss their cases and prepare for important court dates without being concerned that the prosecutor is listening to their confidential communications with their defense team.

38. DOC's recording and disclosure of privileged calls not only prejudices BDS clients whose calls have been recorded, but also continues to make it more difficult to communicate with the people we represent who are incarcerated.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: April 10, 2024
Brooklyn, New York

A handwritten signature in blue ink, appearing to read "Ygnifee", is written over a horizontal line.