18-670

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CORALYN GRUBBS, LOUIS SMITH, ALI RIVERA, SEAN MILLER, individually and on behalf of all other persons similarly situated,

—against—

Plaintiffs-Appellants,

LEE BROWN, in his official capacity as Police Commissioner of the City of New York, NEW YORK CITY POLICE DEPARTMENT, GERALD L. MITCHELL, in his official capacity as Acting Commissioner of Correction of the City of New York, NEW YORK CITY DEPARTMENT OF CORRECTION, DAVID DINKINS, in his official capacity as Mayor of the City of New York, CITY OF NEW YORK,

Defendants-Appellees,

MATTHEW T. CROSSON, in his official capacity as Chief Administrator of the Courts, MILTON L., in his official capacity as Deputy Chief Administrative Judge of the New York City Courts, OFFICE OF COURT ADMINISTRATION, OF THE NEW YORK STATE COURTS,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* NEW YORK STATE DEFENDERS ASSOCIATION, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, AND NEW YORK CRIMINAL BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, amicus curiae the New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,800 public defenders, legal aid attorneys, 18-b counsel, and private practitioners throughout the state. Amicus curiae the New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit organization of more than 800 members who practice in the field of criminal defense in the State of New York. Amicus curiae the National Association for Public Defense ("NAPD") is an association of more than 14,000 professionals who provide indigent defense in criminal cases throughout all U.S. states and territories. Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a not-for-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Amicus curiae the Bronx Defenders ("BxD") is a not-for-profit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Amicus curiae Brooklyn Defender Services ("BDS") is a non-profit legal services organization providing public defense and related representation to almost 35,000 low-income people each year who are accused of crimes and cannot afford an attorney. Amicus curiae New York Criminal Bar Association

("NYCBA") is a not-for-profit association organized to protect and preserve the rights of individuals accused of crimes and to serve as a unifying force for criminal defense lawyers in the Greater New York City metropolitan area. None of the amici have any parent corporations or issue any shares of stock.[1]

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or a party contributed money that was intended to fund preparing or submitting this brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. See Fed. R. App. P. 29(a)(4)(E).

CONSENT OF PARTIES

The parties have, through counsel, consented to the filing of this brief.

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INTERESTS OF AMICI CURIAE

As discussed in the Corporate Disclosure Statement, the amici curiae are not-for-profit membership associations of lawyers who focus on criminal defense, public defense, and access to justice.

With funds provided by the state of New York, NYSDA operates the Public Defense Backup Center, which offers legal consultation, research, and training to nearly 6,000 lawyers who serve as court-appointed defense counsel in criminal cases in New York. Members represent individuals in criminal cases throughout the New York City metropolitan area, including individuals detained and arraigned in the Richmond County Courthouse. For these reasons, NYSDA has a direct and vital interest in the issues before this Court. This brief has been approved by the NYSDA Amicus Curiae Committee.

NYSACDL is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, including private practitioners, public defenders, and law professors, and is the largest private criminal bar in the State of New York. It is a recognized state affiliate of the NACDL and, like that organization, works on behalf of the criminal defense bar to ensure justice and due process for those accused and convicted of crimes. Many NYSACDL members practice in New York City and seek to protect their clients' Sixth Amendment right to counsel. This brief has been approved by the NYSACDL Amicus Curiae Committee.

NAPD members include attorneys, investigators, social workers, administrators, and other support staff who are responsible for providing legal representation to those who cannot afford counsel. NAPD's members are advocates in jails, courtrooms, and communities, and are experts in both best practices and the practical, day-to-day delivery of services. Members represent individuals in criminal cases throughout the New York City metropolitan area, including individuals detained and arraigned in the Richmond County Courthouse. For these reasons, NAPD has a direct and vital interest in the issues before this Court. This brief has been approved by the NAPD Amicus Committee, as authorized by the NAPD Executive Committee.

NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular

interest in this case as it seeks to preserve, protect, and defend the Sixth Amendment right to counsel and to ensure that the confidentiality of attorney-client communications remains sacrosanct. From time to time, NACDL's Ethics Committee has issued opinions that provide ethical guidance to ensure the protection the attorney-client privilege, and NACDL's Lawyers' Assistance Strike Force has provided representation to attorneys when their efforts to secure the privilege has placed them in legal jeopardy. This brief has been approved by NACDL's Amicus Curiae Committee.

The BxD staff of over 200 advocates represents approximately 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. BxD regularly represents clients in criminal matters who are unable to afford even relatively small amounts of bail and who are incarcerated pending trial. BxD has filed amicus curiae briefs in numerous cases involving criminal justice and civil rights issues. For these reasons, BxD has an interest in this case as part of its efforts to support defending a pre-trial detainees' Sixth Amendment right to counsel and to ensure the confidentiality of any attorney-client communications. This brief has been approved by BxD's Legal Department for the Criminal Defense Practice.

BDS is a public defense organization providing criminal defense and related representation to almost 35,000 low-income people each year who are accused of

crimes and cannot afford an attorney in Kings County, New York. BDS attorneys meet most of these clients for the first time just before they are arraigned on criminal charges, in the same courthouse attorney-client interview booths as those at issue in this case. It is during these initial interviews with a detained client that attorneys must establish the trust necessary to elicit sensitive facts critical to investigating the defense, entering a competent plea, and making a bail application at the client's first appearance. Thus, beyond BDS's interest in guaranteeing that its clients have the absolute protections of the provisions of the United States and New York Constitutions implicated in this case; BDS's practice and clients will be directly impacted by the Court's ruling here, which will implicate the confidentiality of attorney-client communications that occur within attorney-client interview booths. This brief has been approved by BDS's executive leadership.

NYCBA was founded in 1972 to enhance the stature of defense counsel and to improve the professionalism of the criminal bar. NYCBA provides continuing legal education, advice on professional ethics, and has worked to improve the public perception of and respect for defense counsel's constitutional mandate to vigorously represent all persons accused of crime irrespective of the crime charged. For these reasons, NYCBA has a direct and vital interest in the issues before this Court. This brief has been approved by NYCBA's Amicus Curiae Committee.

As membership organizations representative of national and local criminal defense attorneys, the amici have an interest in any measures that impact or affect the provision of legal services by counsel to individuals detained in New York City courthouses. If allowed to remain, the presence of video cameras within the Richmond County Courthouse's pre-arraignment attorney-client consultation booths ("attorney-client booths") will continue to inflict irreparable harm on clients in Richmond County, and set dangerous precedent for other jurisdictions in New York and throughout the United States. Furthermore, the violation of the District Court's orders and the public's trust by Defendants City of New York and Department of Correction (together, the "City") has had a widespread impact upon the practice of counsel who are members of the amici, and must not go unchecked. Accordingly, the amici have an acute interest in ensuring these video cameras are removed immediately.

SUMMARY OF ARGUMENT

The ability of an individual charged with a crime to consult privately and without inhibition with his or her attorney is fundamental to the right to counsel under the Sixth Amendment, and indispensable to a fair and equitable justice system. The District Court's ruling minimizes and overlooks that arraignments are a crucial stage of litigation in which the individual's Sixth Amendment right to private communication with counsel must be guaranteed.

The presence of video cameras in attorney-client booths of the Richmond County Courthouse obstructs free and open communication between clients and attorneys in violation of the Sixth Amendment. The District Court below refused to order the City to comply with a previous settlement order and permit clients in Richmond County to "consult privately" with their attorneys. Instead, the District Court allowed the City's intrusive video-recording system to remain in place. The very existence of the video cameras threatens irreparable harm to the constitutional rights of the more than 8,000 people processed annually through the arrest-to-arraignment system at the Richmond County Courthouse.[2] The amici strongly urge the Court to reverse the District Court's ruling, and order the video cameras immediately removed from the courthouse to prevent any future harm.

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[2] Office of the Chief Clerk of N.Y.C. Criminal Court, Crim. Ct. of City of N.Y., 2016 Ann. Rep. 22 (2017).

Plaintiffs filed this class action in 1992, alleging that the lack of private attorney-client interview facilities in Richmond County violated the Sixth Amendment right to counsel of persons awaiting arraignments or appearances in criminal proceedings in New York. The District Court upheld Plaintiffs' Sixth Amendment claims on summary judgment, finding that "[t]he assistance of counsel would be rendered meaningless if that counsel's client were to be inhibited from speaking openly and freely." Grubbs v. Safir, No. 92-CV-2132, 1999 WL 20855 at *7 (S.D.N.Y. Jan. 15, 1999). The parties then reached a settlement agreement pursuant to which the City agreed to provide attorney-client booths that allow clients to "consult privately" with their attorneys. (A32) This settlement agreement was so-ordered by the District Court on September 24, 1999 (the "1999 Settlement Order"). (A21)

On September 28, 2015, the City opened the new Richmond County Courthouse. Although the new courthouse has four attorney-client booths, each is outfitted with video surveillance cameras facing the detainee. Following Plaintiffs' motion for preliminary injunction, on October 20, 2015, the District Court ordered the City to refrain from "continuous minute-by-minute recording or monitoring by camera of attorney-client private consultations." (A223) The City responded to this Order by saying that it would use the video cameras intermittently, so that they would record every other minute, prompting the Court to expand its initial

preliminary injunction to temporarily bar any use of video cameras pending a hearing. On November 4, 2015, the District Court agreed to allow the parties to negotiate, during which time the City was to refrain from any video monitoring or recording because the continuous operation of the video cameras "very possibly" violated both the 1999 Settlement Order and the Sixth Amendment. (A222)

Despite repeatedly representing that the video cameras were off during the negotiation period, in February 2017, the City revealed that some of the video cameras had captured video footage of attorney-client meetings in violation of the District Court's order. On March 27, 2017, counsel for the City informed Plaintiffs' counsel that, in fact, each of the four video cameras had been on and recording for at least some period of time between the issuance of the District Court's October 20, 2015 Order and February 17, 2017. The City further admitted that one of the video cameras was continuously recording between November 20, 2015 and June 20, 2016, and possibly again thereafter. See Mem. of Law in Supp. of Pls.' Mot. Seeking Enforcement of This Court's Orders, Modified Injunctive Relief, and a Finding of Civil Contempt at 7-8, Grubbs, No. 92-CV-2132 (S.D.N.Y. Mar. 20, 2017), ECF No. 103.

Notwithstanding the City's violations of the District Court's order and its assurances that the video cameras would be turned off until a settlement was reached, on February 26, 2018, the District Court rendered a decision allowing the

City to video-record attorney-client meetings provided that the City execute its proffered "Plan" for limiting the cameras' scope by (1) not capturing any audio; (2) filming only the detainee's side of the booth; (3) using masking technology to block the portion of the booth where the detainee sits; and (4) deleting all footage after 90 days unless the DOC is notified of an incident (the "Decision"). (SPA1-20)

Plaintiffs have submitted extensive arguments as to why the City's use of video cameras has violated the District Court's historical orders. We fully support and agree with those arguments, and do not repeat them here. Rather, the amici will focus on demonstrating that the Decision (i) minimizes and overlooks the Sixth Amendment's guarantee of open and uninhibited attorney-client communications; (ii) minimizes and overlooks the critical nature of the pre-arraignment consultation between attorney and client; (iii) disregards how the presence of video cameras in attorney-client consultation booths prevents free and open communication; (iv) ignores the legitimate fears of attorneys and clients that the recording may be abused; and (v) gives inadequate justification for the presence of video cameras in attorney-client consultation booths without explaining why the security measures are necessary. For these reasons, the amici respectfully request that this Court reverse the Decision, and order the immediate

removal of the video cameras from attorney-client booths in the Richmond County Courthouse.

ARGUMENT

The District Court ruled on whether the City's use of the video cameras violated the 1999 Settlement Order and the Sixth Amendment. These are questions of law, which this Court considers under a de novo standard of review. Am. Int'l Group, Inc. v. Bank of Am. Corp., 712 F.3d 775, 778 (2d Cir. 2013). Thus, the District Court's ruling is not entitled to deference. Shahriar v. Smith & Wollensky Rest. Grp., Inc., 659 F.3d 234, 251 (2d Cir. 2011).

I. THE DISTRICT COURT'S RULING MINIMIZES AND OVERLOOKS THE SIXTH AMENDMENT'S GUARANTEE OF OPEN AND UNINHIBITED ATTORNEY-CLIENT COMMUNICATIONS.

As the District Court recognized, "the ability for an attorney to communicate privately and freely with his client is key to the constitutional guarantees of the right to effective assistance of counsel." (SPA6) Yet the Decision diminishes an essential purpose of the Sixth Amendment: to prohibit measures, such as electronic surveillance, which "inhibit[] . . . free exchanges between defendant and counsel." Weatherford v. Bursey, 429 U.S. 545, 554, n.4 (1977). As Judge Denny Chin recognized in the case below more than 19 years ago, "[t]he assistance of counsel would be rendered meaningless if that counsel's client were to be inhibited from speaking openly and freely." Grubbs, 1999 WL 20855 at *7.

Empirical research supports the crucial importance of full and open attorney-client communication. Defense lawyers emphasize that communication is the foundation upon which effective representation rests,[3] as do the individuals who need defense lawyers and already have limited access to them because they are detained.[4]

The presence of video cameras in attorney-client interview booths at the Richmond County Courthouse presents precisely such an obstacle to detainees' exercise of their Sixth Amendment rights and an impediment to open attorney-client communications. The Decision assumes that clients will (i) know about the City's "Plan" to "mask" clients and (ii) trust that the City is adhering to the "Plan." Nowhere in the Decision does the District Court consider how clients will perceive the presence of a video camera in what is supposed to be a private consultation booth, regardless of whether that perception is correct, and what potential chilling effect that may have on attorney-client communications. Indeed, the District Court does not provide any support to indicate that the cameras do not create a chilling

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[3] See Janet Moore & Andrew L.B. Davies, Knowing Defense, 14 Ohio St. J. Crim. L. 345, 362-63 (2017).

[4] Christopher Campbell et al., Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders, 33 Behav. Sci. & L. 751, 763 (2015) (describing defendant's experience with public defender); see also Marla Sandys & Heather Pruss, Correlates of Satisfaction Among Clients of a Public Defender Agency, 14 Ohio St. J. Crim. L. 431 (2017) (demonstrating the importance of attorney-client communication to people who need public defense lawyers).

effect, instead dismissing the claims clients may have as subjective. This is exactly the sort of intrusion on the attorney-client relationship the Sixth Amendment is meant to prevent.

II. THE DECISION OVERLOOKS THE CRITICAL PRE-ARRAIGNMENT CONSULTATION BETWEEN ATTORNEY AND CLIENT.

Forcing clients to have pre-arraignment consultations with their attorneys while being video recorded obstructs the right to counsel at one of the most critical crossroads of the criminal justice system. The pre-arraignment meeting is when the attorney-client relationship is formed, crucial information is gathered, and high-stakes decisions are made. In many cases, especially where the court has just assigned counsel[5] and cases with non-felony charges, this may be the only meeting that ever takes place between a defense attorney and his or her client.

The Decision relies on the City's unreliable assurances that the City will carry out its "Plan" and implement masking technology. As a consequence of this flawed reliance, attorneys and clients must now have their vital first meetings in front of a video camera, unable to speak privately and freely. This result is unreasonable and unconstitutional.

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[5] See, e.g., U.S. Dep't of Justice, Bureau Of Justice Statistics Special Report: Defense Counsel In Criminal Cases 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf (estimating that eighty-two percent of criminal defendants in large State courts facing felony charges cannot afford to hire counsel).

1. Adequate Representation in Arraignments Requires an Attorney to Build Trust with His Client Within Minutes of Their First Meeting.

Building trust with a client is one of the most important and difficult parts of a defense attorney's job. A broad group of organizations provide practice standards that emphasize the need to establish open and honest communication with clients at the initial meeting. For example, the ABA's Criminal Justice Section Standards instruct that "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused,"[6] and the National Legal Aid and Defender Association's Performance Guidelines for Criminal Defense Representation advise that "[c]ounsel should ensure at this and all successive interviews and proceedings that barriers to communication . . . be overcome."[7]

Developing trust during the crucial first minutes of a lawyer-client relationship can determine whether an attorney elicits information that critically impacts the client's case. During this single interview and often under tight time constraints, counsel must not only prepare for the forthcoming bail hearing, but

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[6] Am. Bar Ass'n, Criminal Justice Section Standards for the Defense Function §4-3.1 (4th ed.), https://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html (last visited July 18, 2018).

[7] Nat'l Legal Aid and Defender Ass'n, Performance Guidelines for Criminal Defense Representation §2.2, http://www.nlada.org/defender-standards/performance-guidelines/black-letter (last visited July 18, 2018); see also Indigent Def. Org. Oversight Committee, General Requirements for all Organized Providers of Defense Services to Indigent Defendants §II.B.1(a) (amended 2011), https://www.nycourts.gov/courts/AD1/Committees& Programs/IndigentDefOrgOversightComm/general%20_requirements.pdf (all lawyers must be proficient in communication with clients).

also gather enough information to (i) assess the strength of the prosecution's case, (ii) identify defenses, and (iii) consider potential procedural violations by investigators that could lead to the suppression of evidence. This initial conversation informs a myriad of decisions in the case in addition to framing bail arguments, including arguments for dismissal, assessments of plea bargains, and whether to serve notice that the client wishes to testify or offer evidence before the Grand Jury in felony cases. In this formative time, criminal defendants place great weight on their attorney's perceived loyalty and client relations skills, and are "more open, honest, and assistive" to an attorney who possesses those skills.[8] For many individuals, especially indigent clients who are represented by public defenders, trust must be developed in a rushed pre-arraignment meeting in which they meet their attorney for the first, and perhaps only, time – a point the Decision fails to address.

Even without the presence of video cameras in attorney-client booths, establishing the requisite trust between attorney and client in these circumstances is challenging. When defense attorneys meet their clients at the Richmond County Courthouse, for example, clients have typically been in the custody of the

[8] Marcus T. Boccaccini & Stanley L. Brodsky, Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice, 25 L. & Psychol. Rev. 81, 115 (2001).

Department of Corrections for 18-24 hours,[9] and are often confused, afraid, frustrated, and sleep-deprived. During their time in custody, clients have no control over when or whether they get to eat or rest, and have lost almost all personal autonomy. Indigent individuals who step into an attorney-client booth are meeting a lawyer who they likely have never met before and did not select to represent them. They are then asked to share personal details about their lives and answer questions regarding the charges against them, while being told to remain in a narrowly circumscribed space and to avoid gestures so that an unfamiliar "masking" technology will prevent them from being recorded by the video camera that is trained directly on them.

In this vulnerable state, many people are already disinclined to speak openly with an attorney they have just met and did not choose themselves. Many clients express distrust of appointed defense attorneys, often because they perceive the attorneys as being in league with the prosecution, believe a stereotype that public defenders are not competent, or are simply aware of the resource limitations and heavy caseloads most public defenders are required to manage.[10] A driving force of this pre-disposed mistrust is that clients know public defenders are paid by the government, and often perceive their assigned attorney as being part of the system

[9] See The Legal Aid Society, What is Pre-Arraignment?, http://www.legalaidnyc.org/what-is-prearraignment (last visited July 18, 2018).

[10] Campbell et al., supra note 4, at 762-64.

that is working against them. One misconception even holds that public defenders receive bonuses for taking plea deals. "[A]t one point or another, most of the men interviewed either called the Public Defender the prosecutor or called the prosecutor the Public Defender. This is a subtle, but significant indication of the confusion of roles that these defendants perceived – the near interchangeability of 'their' lawyer with the prosecutor."[11] Social scientists have documented numerous examples of this distrust in focus groups, including the following examples:

- "A public defender is just like the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but relay it back to the public defender [sic: he means the prosecutor], they'll come to some sort of agreement, and that's the best you're gonna get. You know, whatever they come to and he brings you back the first time, well, you better accept it because you may get more."[12]

- "Take, for instance, . . . Mr. Watkins [the chief prosecutor in the district from which this man came]. Mr. Watkins runs his office, and Mr. Stankowski, the head Public Defender, he runs his office, but no one can't tell me that they're not on good terms or even friends. If not friends, they're . . . they've got a nice working arrangement . . . I think, in a sense, one hand washes the other."[13]

These examples illustrate that developing client trust is far from easy, and requires an environment that permits full and open communication. The use of video cameras in the interview room poisons that environment.

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[11] Jonathan D. Casper, Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender, 1 Yale Rev. L. & Soc. Action 4, 7 (1971).

[12] Id. at 6.

[13] Id.

Yet the Decision never discusses the fact that in these interview booths, clients are meeting their attorneys for the first time. None of the cases the Decision cites deals with the state surveilling a pre-arraignment consultation between attorney and client. The District Court's assertion that the video cameras do not "substantially interfere with . . . access [to counsel] or prejudice the detainee" does not contextualize these cameras as recording a pre-arraignment interview booth. The Decision simply does not appreciate the stress and import of the first meeting, and fails to provide a clear explanation for why a client's subjective impressions do not meet the "substantial interference" standard or consider whether there could ever be any exceptions to this.

2. The Advice Provided During Pre-Arraignment Consultation Informs Decisions with Far-Reaching Consequences.

The efficacy of the pre-arraignment consultation between attorney and client can influence the entire course of a client's case. The first meeting often involves making critical decisions, e.g., whether or not to testify before a grand jury; whether to demand a jury trial; whether or not to plead guilty; and if so, to what charges. These decisions, in turn, impact the success of a client's case, whether the client is able to secure pre-trial release, the length of time the client may spend in jail or prison, and many other outcomes. Because of the volume of pleas that take

place immediately after the first meeting,[14] and the collateral consequences that may result from a guilty plea, the consequences of inadequate pre-arraignment consultation can have a ripple effect through the justice system and the course of a client's life. For this reason, "[i]nformed, reasonable, and constitutional pretrial release decision-making among all relevant criminal justice stakeholders is imperative to a just and effective criminal justice system."[15]

The inability to consult openly and freely with attorneys also presents the risk that clients will be unnecessarily subject to pretrial detention, which has been found in New York to "not only increase[] the likelihood of conviction, [but] also lessen[] the likelihood that the individual would be offered the opportunity to plead to a less severe charge."[16] In fact, pretrial detention has been found to be the "most significant factor contributing to a harsher outcome," including a greater chance of conviction and longer sentences.[17]

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[14] 29% of cases in Richmond County were disposed of by arraignment in 2016, the most recent year for which data is available. Office of the Chief Clerk of N.Y.C. Criminal Court, supra note 2, at 28. In 2010, more than half of cases disposed of at arraignment were resolved by guilty plea. Nick Pinto, Bail is Busted: How Jail Really Works, The Village Voice (Apr. 25, 2012, 4:00 AM), http://www.villagevoice.com/news/bail-is-busted-how-jail-really-works-6434704.

[15] Am. Council of Chief Def., Policy Statement on Fair and Effective Pretrial Justice Practices 2 (2011), http://nlada.net/sites/default/files/na_accdpretrialstmt_06042011.pdf.

[16] Id. at 6.

[17] Id. at 6-7.

Clients who are unable to consult meaningfully with their attorneys prior to arraignment also experience particular risks with regard to plea deals, which constitute ninety to ninety-five percent of resolved cases at both the federal and state level.[18] If attorneys fail to learn crucial information that could catalyze a negotiated plea, clients lose viable plea deals to lesser charges. If clients are unable to consult with their attorneys, and thereby determine the appropriate plea option, they risk agreeing to an inappropriately harsh plea deal with a myriad of collateral consequences. Finally, if clients feel inhibited from speaking candidly with their attorneys, they are unlikely to be forthcoming with additional relevant information – such as immigration status – that can determine the severity of collateral consequences and thus weighs heavily in the decision to take a plea deal or proceed to trial.

The American Bar Association recognizes that these types of collateral consequences "can be the most important and permanent results of a criminal conviction."[19] Empirical research by legal scholars and social scientists amply

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[18] Lindsey Devers, U.S. Dep't of Justice, Bureau of Justice Assistance, Plea and Charge Bargaining: Research Summary 1 (2001), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

[19] Am. Bar Ass'n, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 11 (3rd ed. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf.

supports that conclusion.[20] Collateral consequences of a conviction can include disenfranchisement, loss of professional licenses, deportation, felon registration and ineligibility for certain public welfare benefits such as student loans, housing, and contracting.[21] These collateral consequences may apply indefinitely for the convicted person's lifetime.[22] Worse, "[t]o the extent [collateral consequences] occur outside the sentencing process, they may take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney, or defendant even be aware that they exist."[23]

Defendants risk devastating unanticipated consequences following arraignments. Failing to ensure their ability to consult privately with an attorney before this crucial hearing makes a mockery of the guarantee of effective counsel that has been repeatedly affirmed by the Supreme Court. And, again, the Decision pays no attention to these far-reaching consequences, overlooking that the presence

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[20] See, e.g., Margaret Colgate Love et al., Collateral Consequences of a Criminal Conviction: Law, Policy and Practice (2013).

[21] Am. Bar Ass'n, supra note 19, at 7; Sarah B. Berson, Beyond the Sentence - Understanding Collateral Consequences, Nat'l Inst. of Justice, https://www.nij.gov/journals/272/Pages/collateral-consequences.aspx (last visited July 18, 2018).

[22] Am. Bar Ass'n, supra note 19, at 7.

[23] Id. at 7-8.

of video cameras recording attorney-client interview booths influences a foundational stage in a defendant's criminal representation.

III. THE DECISION DISREGARDS HOW THE PRESENCE OF VIDEO CAMERAS IN ATTORNEY-CLIENT CONSULTATION BOOTHS PREVENTS FREE AND OPEN COMMUNICATION IN VIOLATION OF ATTORNEYS' ETHICAL OBLIGATIONS, THE SIXTH AMENDMENT AND THE 1999 SETTLEMENT ORDER.

The presence of video cameras that both monitor and record attorney-client consultation booths has a chilling effect on communications between clients and attorneys that causes irreparable harm to the representation and prevents the effective assistance of counsel. See Weatherford, 429 U.S. at 554, n.4; cf. United States v. Elzahabi, No. 04-282, 2007 WL 1378415 at *2 (D. Minn. May 7, 2007) (the mere possibility that defendant's conversations are being audio or video recorded may impede the willingness to communicate openly with counsel).

The Decision disregards this chilling effect, and the fact that attorneys face an ethical dilemma regarding what to disclose to their clients. Instead, the Decision asserts, with no empirical basis, that the "obvious presence of video cameras itself" boils down to only a client's potential "subjective impression or belief that the New Plan does or will interfere with [attorney-client] communications." (SPA15) Then, the Decision asserts that this "obvious presence" does not "unjustifiably obstruct[] or significantly interfere[] with access to counsel. (SPA15-16)

Contrary to the District Court's conclusion, the presence of video cameras adds a tremendous and unjustified barrier to the attorney-client relationship, one that even the most experienced attorneys can find insurmountable. By installing video cameras in the attorney-client consultation booths, the City has introduced an entirely new topic that must be discussed before the crucial information exchange can take place: Is this conversation being recorded by that video camera and will the footage be used against me? Are you trying to get me to confess on video so you can close this case?

This discussion is further complicated by the City's past misrepresentations regarding the video cameras, a fact the Decision never comes to terms with. Defense attorneys have an ethical obligation to be honest with their clients about the video cameras and their recording capabilities. The New York Rules of Professional Conduct require attorneys to provide "candid" advice,[24] and to explain matters "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[25] Defense attorneys must be honest that they cannot independently verify that the video cameras' masking technology will protect their clients' privacy. Following the City's prior misrepresentations, attorneys may feel obliged to disclose to their clients that past representations by

[24] N.Y. State Unif. Ct Sys., Part 1200: Rules of Prof. Conduct R. 2.1 (2017), http://www.nycourts.gov/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf.

[25] Id. at R. 1.4(b).

the City regarding the video cameras have turned out to be false, and that conversations between attorneys and their clients have in fact been recorded.[26]

Clients have no independent method of confirming that they are not being recorded by video cameras pointed at them in the attorney-client booth. Likewise, a client has no way of verifying whether audio is also being recorded, or the extent to which any "masking" technology is being applied to recordings. Instead, a client's decision whether he or she can communicate freely and openly with his or her attorney will rest entirely upon the representations made by the City and the explanation of counsel. Following such unsatisfactory reassurances, it is difficult to see how anyone, let alone an individual in the custody of the City, would feel they could speak "openly and freely" with their attorneys, as Judge Chin originally directed.[27] The result is a chilling effect on the information clients feel they can provide to their attorneys, in violation of the Sixth Amendment. See Weatherford, 429 U.S. at 554, n.4 ("One threat to the effective assistance of counsel posed by government interception of attorney-client communications lies in the inhibition of

[26] Defense attorneys have a like ethical obligation to maintain the confidentiality of all information relating to the representation. See Comments of the National Association of Criminal Defense Lawyers on the Attorney General's Order Regarding Monitoring of Confidential Attorney-Client Communications, 66 Fed. Reg. 55062 (Oct. 31, 2001), at 19; Avidan Y. Cover, A Rule Unfit for All Seasons: Monitoring Attorney-Client Communications Violates Privilege and the Sixth Amendment, 87 Cornell L. Rev. 1233, 1256 (2002). The presence of video cameras in the attorney-client booth – and the associated risk of a conversation being recorded and shared with others – hampers a defense attorney's ability to fulfill this obligation.

[27] Grubbs, 1999 WL 20855 at *7.

free exchanges between defendant and counsel because of the fear of being overheard.").

It has been well-documented that people change their behavior in the presence of cameras, and, specifically, that individuals censor their behavior when they believe they are being watched. Indeed, courts have recently recognized the chilling effect of prison monitoring. See Elzahabi, 2007 WL 1378415 at *2 ("The Court . . . agrees that defendant's awareness of the prison monitoring may have a tendency to discourage the spirit of candor that is at the heart of the attorney-client privilege. [. . .] The mere possibility that defendant's conversations are being recorded may now impede his willingness to communicate openly with counsel."). The introduction of video cameras within what should be private attorney-client consultations has the effect of obstructing the very purpose of these interactions. The first client interviewed by Legal Aid in the newly opened Richmond County Courthouse was distressed at learning he was being filmed: he immediately stated "this is wrong," covered his head, moved under the camera to block himself from view, and felt he could not communicate freely with his attorney. (A44, A57) Attorneys feel similar inhibitions when conducting pre-arraignment interviews, potentially altering their own questions and practices out of concern that recordings of these conversations may be used against their clients. (A74) ("I was concerned that any conversation I had with my client could be observed and or [sic]

overheard due to the presence of the technology in the interview area [and] those concerns inhibited me from conducting a full [and] complete interview of my client as I was again concerned that any statement of my client could be used and subsequently noticed by the District Attorney. . . .")

IV. THE DECISION IGNORES THE LEGITIMATE FEARS OF ATTORNEYS AND THEIR CLIENTS THAT THE RECORDINGS MAY BE ABUSED.

The Decision disregards the legitimate fear that these recordings may be abused. Municipalities have, at times, flouted laws and regulations and abused surveillance systems. In 2003, staff members of the Metropolitan Detention Center in Brooklyn were found by the Department of Justice to have secretly and unlawfully audiotaped detainees' visits with their attorneys.[28] This year, the Alaska public defender's office revealed that a particular jail had been recording attorney-client conferences for four years.[29] In January 2017, inmates in Kansas filed a class action suit when it was revealed the prison where they were held had secretly

[28] U.S. Dep't of Justice, Office of the Inspector Gen., Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York at 31 (2003), https://oig.justice.gov/special/0312/final.pdf.

[29] See Lisa Demer, State admits recording jail conversations between defense lawyers and clients, Anchorage Daily News (Jan. 16, 2018), https://www.adn.com/alaska-news/crime-courts/2018/01/15/state-admits-recording-jail-conversations-between-defense-lawyers-and-clients/.

recorded over 700 attorney-client conferences during a 12-week period.[30] In 2013, a Police Chief in Edison, New Jersey made similar promises to those made by the City that microphones in surveillance cameras were disabled, all the while recording attorney-client conversations.[31] And a police sheriff in Louisiana also secretly recorded attorney-client conversations until his actions were exposed by a whistleblower.[32]

In light of these abusive intrusions into the attorney-client privilege, the fears surrounding the implementation of the City's "Plan" are legitimate and justified, rather than "subjective," as the District Court described them. The Department of Justice's Inspector General's Office reported that the Metropolitan Detention Center's audiotaping of inmates "violated the law and interfered with the detainees' effective access to legal counsel."[33] The Alaska jail shared one of the confidential and privileged attorney-client conversations it recorded with law

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[30] See Christopher Zoukis, Taping Inmate-Lawyer Conferences Stirs Outrage at Kansas Prison, Huffington Post (Feb. 24, 2017), http://www.huffingtonpost.com/entry/taping-inmate-lawyer-conferences-stirs-outrage-at-kansas_us_58b094fbe4b02f3f81e44707.

[31] Mark Mueller, Listening Devices in Edison Police Headquarters Secretly Recorded Officers, Attorneys, Civilians, New Jersey Advance (Dec. 15, 2013, 12:09 AM), http://www.nj.com/news/index.ssf/2013/12/listening_devices_in_edison_police_headquarters_secretly_recorded_discussions_of_officers_attorneys.html.

[32] Juliet Linderman, Secret Recordings at St. John's Sheriff's Office Not Illegal, State Police Conclude, Times-Picayune (Aug. 30, 2013, 12:10 AM), http://www.nola.com/crime/index.ssf/2013/08/allegations_that_st_john_sheri.html.

[33] U.S. Dep't of Justice, Office of the Inspector Gen., Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York at 33 (2003), https://oig.justice.gov/special/0312/final.pdf.

enforcement.[34] And the Kansas prison also revealed confidential and privileged attorney-client conversations to federal prosecutors.[35] In Edison and Louisiana, state law enforcement officials had ready access to a multitude of confidential and privileged attorney-client conversations, which could have been used to prosecute an individual.[36]

And in this case, the "Plan" for Richmond County may well become the "Plan" in all of New York City. The City has already stated its intention to expand the use of cameras and masking technology to other courthouses.[37] Simply put, the plaintiffs' concerns with the "Plan" are legitimate and justified, not subjective as the Decision describes them.

V. THE DECISION GIVES INADEQUATE JUSTIFICATION FOR THE PRESENCE OF VIDEO CAMERAS IN ATTORNEY-CLIENT CONSULTATION BOOTHS.

The Decision curtails a client's right to consult with his or her attorney privately and free from governmental intrusion by determining that the presence of video cameras in attorney-client consultation booths did not "unjustifiably obstruct, unreasonably burden, or interfere with the right of access to counsel, 'in light of the central objective of prison administration, safeguarding institutional

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[34] See Demer, supra note 29.

[35] See Zoukis, supra note 30.

[36] See Mueller, supra note 31; Linderman, supra note 32.

[37] (A536) ("The City . . . would like to expand [its technology] to other courthouses").

security.'" (SPA11). In making this determination, the Decision misapplies the appropriate balancing test, and gives inadequate justification for the presence of video cameras in attorney-client consultation booths.

The Decision places far too much weight on the video cameras' potential use "to create a record of problematic incidents that may take place in the booths (*e.g.*, medical emergencies, use of contraband, use of force, etc.) and gather helpful information so that the City can improve its protocols to minimize problematic incidents in the future." (SPA11-12) While the Decision explores several hypothetical security scenarios that could be mitigated by the presence of a video camera, there is no evidence justifying this new security measure at this time. Attorney-client booths are for one-on-one attorney client consultations, requiring the presence of one attorney and one client only, and are conducted with a physical barrier between the two. A use of force situation is unlikely, and any immediate harm is better addressed through less intrusive means such as an emergency button than after-the-fact video review. Similarly, medical emergencies do not require video camera monitoring to be brought to the attention of DOC staff, as an attorney can easily (and likely more swiftly) call attention to any client in distress. Finally, the implication that clients would use or receive contraband substances during an attorney-client consultation is simply unfounded and contrary to the treatment of attorneys as officers of the Court.

The fact that the City has chosen, through the "Plan," to record attorney-client meetings and then process any "helpful information" long after the fact, as opposed to monitoring the meetings and responding in real-time, additionally betrays that the slight risk that one of these incidents might occur cannot be that important to the City. Further, any of these occurrences would also be hidden from view if they happened within the so-called "privacy zone" – which is, helpfully for a presumptive violator, demarcated on the floor. This also undermines the City's proffered justification. The City believes these events are important enough to intrude upon attorney-client privilege and defendants' constitutional rights, and yet the City plans to implement a facially flawed plan for countering these occurrences.

The City fails to explain why far less intrusive means to ensure that these booths are used only for the purpose for which they were constructed are insufficient. The City can achieve these aims by, for example, regulating who enters the booths and when. It belies logic – and would be concerning for other reasons – that correction officers cannot dictate and keep track of the location of detainees within their custody or find other means of restricting access to these booths. Courthouses have implemented such measures, for example, by allowing attorneys to control the unlocking of the client-side booths to facilitate attorney-client consultations and restrict access. (A71) (Kings County Criminal Courthouse

implements "a lock between the holding cell and the interview room, which is controlled by the attorney on the other side of the interview booth.")[38] There is no legitimate justification for placing video cameras in attorney-client booths, and they should be removed immediately.

CONCLUSION

The continued presence of video cameras in pre-arraignment attorney-client booths that both monitor and record attorney-client interactions imposes an unreasonable, unjustified, and unconstitutional infringement on the Sixth Amendment rights of individuals detained in the Richmond County Courthouse. The presence of video cameras, coupled with the City's inability to provide adequate assurances regarding their use, deters clients from consulting openly and freely with their attorneys. Clients are thereby prevented from exercising their constitutionally guaranteed rights at a time when assistance of counsel is crucially important. The only adequate remedy is the removal of the video cameras from the attorney-client interview booths. For these reasons, the amici respectfully request

[38] Even if these justifications had merit – which they do not – and less restrictive means for addressing them did not exist, it is hard to imagine how video camera recordings implementing the "masking" technology previously proposed by the City would effectively address Defendants' purported concerns at all. (A536) (describing the masking technology). A client could evade detection by staying within the "masked" area of the screen. Even if some action were caught outside of the "masked" area, the fact that a video camera recording is only partial and likely would not capture all of an incident (e.g., a use-of-force incident) raises a myriad of potential evidentiary concerns that might vitiate any use these video cameras could have as evidence.

that this Court reverse the District Court's ruling and order the City to remove the video cameras from the Richmond County Courthouse interview booths.

Dated: July 20, 2018
New York, New York

Respectfully submitted,

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,937 words, excluding the parts of the brief exempted by Rule 32(f).

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