IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 26-0036

STERLING GLENN BROWN,

Petitioner,

v.

MONTANA SEVENTH JUDICIAL DISTRICT COURT, PRAIRIE COUNTY, HON. JESSICA T. FEHR, Presiding,

Respondents.

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[I]t is inconceivable to any of us that there would ever exist a situation in the State of Montana where electronic surveillance could be justified.

– Delegate Wade Dahood, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1682.

Introduction

Despite the clear intentions of the Montana Constitutional Convention of 1972, electronic surveillance of the private telephone conversations of more than 7,000 Montana residents has become the norm.[1] Recording and monitoring of inmate phone calls in Montana's jails and prisons is ubiquitous. For the residents of these facilities, whether pretrial or post-sentencing, it is now virtually impossible to have a private conversation with friends or family. And when all calls are recorded by default, it is inevitable that conversations with their attorneys will be compromised as well.

This practice is frequently excused by appeals to the need for facility security. But it has also become a valuable tool for criminal investigation and prosecution, and courts across the country have

[1] *Montana Profile*, Prison Policy Initiative, (2023), https://www.prisonpolicy.org/profiles/MT.html.

allowed the use of recordings of inmate conversations as evidence in criminal proceedings. The State is thus incentivized to surveil all communications between prisoners and the outside world.

The routine monitoring of pretrial detainees' telephone calls violates Article II of the Montana Constitution in at least three ways. First, as this Court has previously held, nonconsensual electronic surveillance of telephone conversations is an invasion of the right to privacy protected by Section 10. Second, it is an unreasonable search in violation of Section 11. Everyone has a subjective expectation of privacy in their private telephone conversations; the fact that the State deliberately deprives prisoners of the opportunity to have private conversations and tells them they are being monitored does not render an expectation of privacy unreasonable. Third, because pretrial defendants in custody are subject to monitoring while those who are released are not, the practice implicates the equal protection clause of Section 4.

When inmates' confidential communications with their attorneys are monitored or recorded, the constitutional violation is even more severe, as it undermines their right to effective assistance of counsel

under Section 24, and to due process under Section 17. When pretrial detainees cannot be certain that their conversations with their attorneys will not be intercepted by State agents, they cannot have the candid and comprehensive discussions with their attorneys that are necessary for their defense.

It is axiomatic that pretrial defendants are entitled to a presumption of innocence. When the State imprisons them to ensure their presence at trial, the State–not defendants or their attorneys–bears full responsibility for ensuring that their constitutional rights are honored and protected. The routine monitoring of their private conversations with friends and family, and the inevitable interception of attorney-client communications, is a grave abdication of that responsibility. This Court should hold that the practice cannot be sustained under Article II. At minimum, it should hold that such surveillance is unconstitutional absent a demonstrated compelling interest and narrowly tailored safeguards that preserve the confidentiality of attorney-client communications and protect pretrial detainees from structural disadvantage.

Interest of MTACDL

MTACDL is an affiliate of the National Association of Criminal Defense Lawyers, comprising nearly 200 members of the Montana Criminal Defense Bar. MTACDL was formed to ensure justice and due process for persons accused of crimes, to foster the integrity, independence, and expertise of the criminal defense profession, and to promote the proper and fair administration of criminal justice. MTACDL files amicus briefs in state and federal courts on the request of its membership and at the request of the courts seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

MTACDL is keenly interested in the fundamental rights of accused persons as guaranteed by Article II of the Montana Constitution. The monitoring and recording of inmate phone calls implicates the right to privacy, the right against unreasonable searches, and the right to equal protection of the laws. When a detainee's calls to his attorney are monitored or recorded, the right to due process and to the assistance of counsel are also implicated. MTACDL hopes and

believes that its unique perspective on these matters will assist this Court in resolving this case.

Statement of Facts

Monitoring and recording of inmates' telephone conversations has been the norm in the United States since at least the turn of the century. As early as 1986, the U.S. Bureau of Prisons (BOP) had "install[ed] monitoring technology to record 100 percent of all non-attorney calls and provide for live monitoring of some calls by staff[.]"[2] By 2010, monitoring and recording of inmate telephone calls was a "mandatory requirement in almost every Request for Proposal for inmate phone systems."[3] By 2022, following the Covid-19 pandemic,

[2] U.S. Dep't of Justice, Office of the Inspector Gen., *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges*, *Chapter Two, Federal Inmate Access to Telephones* (Aug. 1999), https://oig.justice.gov/sites/default/files/archive/special/9908/callsp2.htm

[3] IC Solutions, response to National Telecommunications and Information Administration, *Preventing Contraband Cell Phone Use in Prisons* (June 7, 2010), https://www.ntia.gov/files/ntia/ics.pdf.

electronic surveillance of phone and video calls was ubiquitous in state and county detention facilities.[4] Montana is no exception.[5]

While electronic surveillance is typically justified by appeals to the need for facility security, it is also a valuable tool for criminal investigation and prosecution. The contents of inmate phone calls are routinely used by the prosecution as evidence in criminal cases.[6] And while monitoring and recording of attorney-client communications are formally prohibited, it is far from rare. Securus Technologies, the second largest jail telecom service provider in the country,[7] settled

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[4] *See generally* Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What's Next* (Dec. 2022), Prison Policy Initiative, https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html; Cynthia Alkon, *We Need to Talk: Modernizing Attorney-Client Jail Communications*, 59 U. Rich. L. Rev. 199 (Feb. 2025).

[5] *See* National Association of Criminal Defense Lawyers (NACDL), *Prison and Jail Call Communication Systems in Montana* (Mar. 2021), https://www.nacdl.org/mapdata/Prison-Jail-Call-Communication-Systems-in-MT.

[6] Richard A. Oppel Jr., *Calling Your Lawyer's Cell From Jail? What You Say Can and Will Be Used Against You.*, N.Y. TIMES, (May 22, 2018), https://www.nytimes.com/2018/05/22/us/new-orleans-jail-calllawyer.html*; see also State v. DeMarie,* 2025 MT 115, ¶ 7, 422 Mont. 208, 212, 569 P.3d 602, 606; *State v. Oliver*, 2022 MT 104, ¶ 40, 408 Mont. 519, 534, 510 P.3d 1218, 1230*; State v. Denny,* 2021 MT 104, ¶ 10, 404 Mont. 116, 123, 485 P.3d 1227, 1232.

[7] Wagner & Bertram, *supra* note 4, https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html.

several class action lawsuits after a 2015 leak revealed their systems had recorded over 57,000 attorney-client calls, many of which were turned over to prosecutors.[8] In 2021, the New York City Department of Corrections revealed that more than 2,200 attorney-client calls were recorded in a two year period, even after the attorneys followed official protocols for having their phone numbers exempted from monitoring.[9]

The phone services in the Prairie County jail at issue in this case are provided by ICSolutions, the third largest jail telecom provider in the country.[10] ICSolutions was a defendant in lawsuits currently pending in Pennsylvania[11] and Wisconsin[12] for allegedly recording

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[8] Ella Fassler, *Prison Phone Companies Are Recording Attorney-Client Calls Across the US*, Vice (Dec. 2021), https://www.vice.com/en/article/prison-phone-companies-are-recording-attorney-client-calls-across-the-us/.

[9] Anthony Accurso, *New York City Jails Admit Illegally Recording Over 2,200 Attorney-Client Phone Calls*, Prison Legal News (Nov. 2022), https://www.prisonlegalnews.org/news/2022/nov/30/new-york-city-jails-admit-illegally-recording-over-2200-attorney-client-phone-calls/.

[10] Wagner & Bertram, *supra* note 7.

[11] *Wertz v. Inmate Calling Sols., LLC,* No. 2:23-CV-01045-CCW, 2025 U.S. Dist. LEXIS 171073, at *11-14 (W.D. Pa. Sep. 3, 2025) (dismissing claims because plaintiff failed to allege intentional recording under the Federal Wiretap Act).

[12] *Page v. Inmate Call Sols.*, No. 21-cv-761-wmc, 2023 U.S. Dist. LEXIS 202302, at *12 (W.D. Wis. Nov. 8, 2023) (dismissing claims because plaintiff failed to exhaust administrative remedies).

attorney-client calls. The claims against ICSolutions were dismissed in both cases, but not for lack of evidence of the recordings. ICSolutions' telecom system was also a focal point of a 2023 audit of the Douglas County (Kansas) Sheriff's Office, which found 1,520 attorney-client phone calls were recorded as a result of "data entry error."[13]

These are not isolated incidents. In a 2020 survey by NACDL, 69% of defense attorney respondents reported that their calls with their incarcerated clients had been monitored by the state.[14] 54% reported that their calls were recorded.[15] And 48% reported that they were aware of instances in their jurisdictions where these recordings were provided to prosecutors.[16][17]

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[13] Douglas County Jail Audit, *ICSolutions Attorney-Client Call Recordings* (Oct. 18, 2023), https://lawrencekstimes.com/wp-content/uploads/2023/10/20231018-ICS-Audit.pdf.
[14] *The State of Prison and Jail Communication Systems,* NACDL (Mar. 2022), https://www.nacdl.org/Map/State-of-Prison-Jail-Call-Communication-Systems.
[15] *Id.*
[16] *Id.*
[17] Anecdotally, a prosecutor once played recordings of my own phone calls with an incarcerated client at a detention hearing in open court.

Argument

The routine monitoring of incarcerated pretrial defendants' private conversations violates their rights under the Montana Constitution. This Court should put an end to this practice entirely. Alternatively, it should impose strict requirements on the State to ensure attorney-client communications are protected, and that the defendant is not prejudiced.

The normalization of technological surveillance without a warrant or suspicion of a crime is contrary to the values and principles of the Montana Constitution. It is well established that "the rights and protections guaranteed by one provision of the [Montana] Constitution may also be found in other provisions[.]" *Montanans Securing Reprod. Rights v. Knudsen*, 2024 MT 54, ¶ 13, 415 Mont. 416, 545 P.3d 45. "The Montana Constitution is "not simply a cook book of disconnected and discrete rules[.]" *Armstrong v. State*, 1999 MT 261, ¶ 71, 296 Mont. 361, 388-89, 989 P.2d 364, 383. It is a "web of rights and powers holding each other in tension."[18] Together, these rights and powers encompass a

[18] Constance Van Kley, *A Constitution Unique to Montana and Uniquely Montanan*, State Court Report (Jan. 2025), https://statecourtreport.org/our-work/analysis-opinion/constitution-unique-montana-and-uniquely-montanan.

"cohesive set of principles, carefully drafted and committed to an abstract ideal of just government." *Armstron*g, ¶ 71. The Constitution must, therefore, be "read as a whole and its separate sections interpreted in relation to one another. *State v. Hyem*, 193 Mont. 51, ¶ 55, 630 P.2d 202, 205 (1981).

The routine electronic surveillance of pretrial detainees undermines the principles of the Montana Constitution. It implicates the rights secured by Sections 4, 10, and 11, and, when attorney-client communications are recorded, Sections 17 and 24. Taken together, these infringements contradict the Constitution's commitment to just government.

1. <u>The routine recording of pretrial detainees' telephone calls violates the Montana Constitution.</u>

A. Invasion of Privacy

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Mont. Const. art. II, § 10.

The Montana Constitution stands apart from the United States Constitution in many ways, not least because of its inclusion of an

express right to privacy. This right is not only "one of the most important rights guaranteed to the citizens of this State," *Gryczan v. State*, 283 Mont. 433, ¶ 455, 942 P.2d 112, 125 (1997), but also "one of the strongest state constitutional protections of privacy in the Nation." *Friedman v. Boucher*, 580 F.3d 847, 856 (9th Cir. 2009). It reflects "Montanans' historical abhorrence and distrust of excessive governmental interference in their personal lives." *Gryczan*, 283 Mont. at 455, 942 P.2d at 125.

The authors of Section 10 "went to great and conspicuous lengths to preserve it in the face of what they correctly anticipated would be increasing political pressure and the developing technological ability to erode it." *Dorwart v. Caraway*, 2002 MT 240, ¶ 76, 312 Mont. 1, 23, 58 P.3d 128, 141 ("The right to privacy-to be left alone-is precious."). Among the concerns motivating its ratification was that of "increasing technological surveillance." *Planned Parenthood of Mont. v. State*, 2025 MT 120, ¶ 16, 422 Mont. 241, 257, 570 P.3d 51, 64 (citing comments of Delegate Campbell, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, Vol. V, p. 1680). Montana Supreme Court Justice James Nelson was particularly concerned with the

Government's use of technologies to "snoop, discover, and record." 68 Mont. L. Rev. at 259.

In *United States v. White*, a plurality of the United States Supreme Court held that police eavesdropping on the defendant's private conversations, conveyed by a hidden radio transmitter worn by a confidential informant, did not violate the Fourth Amendment of the U.S. Constitution. 401 U.S. 745, 753-54 (1971). In a dissenting opinion, Justice Harlan noted that the Court's precedent left "no doubt" that "as a general principle, electronic eavesdropping was an invasion of privacy[.]" *Id*. at 779. Such surveillance "undermine[s] that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in free society." *Id.* at 787. The knowledge that one's private conversations are being monitored "might well smother that spontaneity -- reflected in frivolous, impetuous, sacrilegious, and defiant discourse -- that liberates daily life." *Id*.

This Court cited Justice Harlan's dissent approvingly in *State v. Allen*, in which it held that the warrantless surveillance of the defendant's private cell phone conversations did violate Article II,

Sections 10 and 11 of the Montana Constitution. 2010 MT 214, ¶¶ 37-61, 357 Mont. 495, 241 P.3d 1045. In an exhaustive analysis of its own precedent and of the 1972 Constitutional Convention, this Court concluded that Section 10's authors "would not have countenanced warrantless monitoring of private telephone conversations" at the time of its drafting, and that "the citizenry of this state would not tolerate such unrestrained government conduct today." *Id.*

Justice Harlan's reasoning in *White* is unequivocal: government monitoring of citizens' conversation is an invasion of privacy. The invasion of privacy inherent in government monitoring of private conversations does not disappear merely because the speaker is incarcerated. Prisoners are not only physically isolated from their friends and family, but they are deprived of virtually any opportunity to engage in the spontaneous interactions that most of us take for granted. For months and years on end, their relationships are smothered by relentless, sweeping surveillance. For the authors of our Constitution, such unrestrained government conduct was "inconceivable." *Allen*, ¶ 54 (quoting Delegate Dahood, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1682.)

B. Unreasonable Search

> The people shall be secure in their persons, papers, electronic data and communications, homes and effects from unreasonable searches and seizures. No warrant to search any place, to seize any person or thing, or to access electronic data or communications shall issue without describing the place to be searched or the person or thing to be seized, or without probable cause, supported by oath or affirmation reduced to writing.

Mont. Const. art. II, § 11.

Operating in tandem with Section 10, Section 11's limitations on search and seizure provide greater protections than the Fourth Amendment of the U.S. Constitution. *Allen*, ¶ 47 (citing *State v. Goetz*, 2008 MT 296, ¶ 14, 345 Mont. 421, 191 P.3d 489). When a criminal defendant challenges state action as violative of these provisions, three questions must be answered: whether the challenger had a subjective expectation of privacy; whether Montana society is willing to accept that expectation of privacy as reasonable; and whether the state action was justified by a compelling state interest or was undertaken with "procedural safeguards such as a properly issued search warrant or other special circumstances." *Allen*, ¶ 47 (quoting *Goetz*, ¶ 27).

With respect to electronic surveillance of private telephone conversations generally, this Court answered the first two questions in the affirmative in *Allen*. ¶¶ 48-61. Citizens generally expect their phone conversations to be private, and such an expectation is generally considered reasonable. When it comes to the telephone conversations of prisoners, the question becomes whether the mere fact of their incarceration renders their expectation of privacy unreasonable.

Some courts, including the Court of Appeals for the Ninth Circuit, have held that because prisoners are informed that their phone calls are monitored, any expectation of privacy in those calls is unreasonable. *See, e.g., United States v. Van Poyck,* 77 F.3d 285, 290 (9th Cir. 1996). In *State v. Dubray*, this Court similarly held that, because the defendant was aware that his calls were subject to monitoring, he implicitly consented. 2003 MT 255, ¶¶ 94-101, 317 Mont. 377, 77 P.3d 247. Notably, the defendant in *Dubray* challenged the monitoring as a violation of state and federal wiretap laws. *Id.* This Court made no mention of the Montana Constitution and only a passing reference to the Fourth Amendment. *Id.*

In his *White* dissent, Justice Harlan warned against the circular reasoning at play in *Van Poyck* and *Dubray*, by which the surveillance justifies itself by its very existence. He observed that our expectations are "in large part reflections of laws", and we should not simply recite these expectations "without examining the desirability of saddling them upon society." 401 U.S. at 786.

When it detains Montanans, the State openly deprives them of privacy and then invokes that deprivation as justification. Prisoners have no privacy *because the State tells them* they have no privacy. Consent obtained in the absence of any meaningful alternative is no consent at all. And constitutional reasonableness cannot be defined by the scope of the government's own intrusion. To preserve its jail and prison surveillance program, the State must demonstrate that it is justified by a sufficiently compelling state interest and undertaken with sufficient procedural safeguards to protect the constitutional rights of its wards.

C. Violation of Dignity and Denial of Equal Protection of the Laws

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state

> nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

Mont. Const. art. II, § 4.

Section 4 embodies a "fundamental principle of fairness: that the law must treat similarly-situated individuals in a similar manner." *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct.*, 2023 MT 7, ¶ 24, 411 Mont. 201, 523 P.3d 519. It provides greater individual protection than the Fourteenth Amendment of the U.S. Constitution. *Id.* Unlike its federal counterpart, Section 4 expressly prohibits discrimination on the basis of "social origin or condition."

To assess an Equal Protection claim, this Court first identifies the classes involved and determines whether they are similarly situated. *State v. Ellis*, 2007 MT 210, ¶ 11, 339 Mont. 14, 17, 167 P.3d 896. Then it determines what level of scrutiny is appropriate. Claims involving fundamental rights–that is, rights expressed in Article II–are subject to strict scrutiny. Under this standard, the State must justify its actions by demonstrating that they are narrowly tailored to serve a compelling government interest. *A.J.B.*, ¶ 28 (citations omitted).

In *Bearden v. Georgia*, the U.S. Supreme Court added that, when applied to the issue of the "treatment of indigents in our criminal justice system . . . due process and equal protection principles converge." 461 U.S. 660, 664-65. The general focus in such cases is on "the fairness of relations between the criminal defendant and the State under the Due Process Clause . . . and whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Id.* at 665. The Court cautioned, however, that under either approach, such issues "cannot be resolved by resort to easy slogans or pigeonhole analysis." *Id.* at 666. (holding the state "cannot justify incarcerating a probationer who has demonstrated sufficient bona fide efforts to repay his debt to society, solely by lumping him together with other poor persons and thereby classifying him as dangerous").

Here, the classification at issue is between pretrial defendants who are incarcerated, and pretrial defendants who are not. Because the State's surveillance program implicates the fundamental rights of Sections 10 & 11, it must be subjected to strict scrutiny. Moreover, while one's ability to post bail is not a perfect proxy for social status,

there are documented "connections between an individual's economic status and pretrial detention."[19] The discrimination burdens only those who cannot afford release. This implicates *Bearden* and the Montana Constitution's prohibition on discrimination based on social condition. *McClanathan v. Smith*, 186 Mont. 56, 69, 606 P.2d 507, 514 (1980) (holding "social condition" relates to "one's economic status or rank in society.).

Even assuming facility security constitutes a compelling state interest, the routine monitoring and recording of every non-privileged call is not narrowly tailored to serve that interest. Montana's Constitution requires more than generalized appeals to safety or administrative convenience. It requires a showing that the challenged practice is necessary, that less intrusive alternatives would be insufficient, and that adequate procedural safeguards exist to protect fundamental rights. *See Goetz*, ¶ 27; *Allen*, ¶ 47.

[19] *Financial Conditions of Release Research Summary*, Advancing Pretrial Policy & Research (Aug. 2024), available for download at https://www.advancingpretrial.org/pretrial-justice-essentials/pretrial-justice-issue-financial-release-conditions/.

Pretrial detainees are subject to round-the-clock surveillance and generally prohibited from having unmonitored calls with their loved ones. This is not only an indignity, but also puts them at a strategic disadvantage compared to their non-incarcerated peers. Freedom and privacy allow defendants not only to meet with their attorney whenever and however they want, but to receive social support. For example, a married defendant who is not in jail can discuss his case openly with his spouse and know that their conversations are protected by spousal privilege. § 26-1-802, MCA. He can articulate his anxieties, clear his conscience, and receive comfort. Even an unmarried defendant at least has the opportunity to confide in a trusted friend or relative.

A pretrial detainee, on the other hand, cannot speak about any of these things with anyone without fear that the State will use his own words against him. The emotional toll this deprivation takes is considerable, and may affect a defendant's ability to participate fully in his defense. These are high prices for defendants to pay for the State's interest in facility security.

2. Monitoring and recording confidential attorney-client communications further violates pretrial detainees' constitutional rights.

> No person shall be deprived of life, liberty, or property without due process of law.

Mont. Const. art. II, § 17.

> In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel[.]

Mont. Const. art. II, § 24.

The one person incarcerated defendants can (sometimes) speak openly and candidly with is their attorney, a right protected by both the Montana and United States constitutions. According to Justice Marshall, there are two constitutional rights at stake when the government intrudes upon a defendant's private communications with counsel: the right to counsel, protected by the Sixth Amendment, and the right to a fair trial, protected by the Fifth and Fourteenth. *Weatherford v. Bursey,* 429 U.S. 545, 562 (1976) (Marshall, J., dissenting) (citations omitted). Each right has its counterpart in Sections 17 and 24, respectively, of Article II of the Montana

Constitution. *State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091.

"[T]he essence of the Sixth Amendment is . . . privacy of communication with counsel." *Weatherford* at 562. Without this privacy, "the integrity of the adversary system and the fairness of trials is undermined[.]" *Id*. Its constitutional enshrinement reflects the recognition that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The candid conversations needed for such advocacy "can only be safely and readily availed of when free from the consequences *or the apprehension of disclosure*." *Hunt v. Blackburn,* 128 U.S. 464, 470 (1888) (emphasis added).

Confidentiality is not only important for developing trial strategy, but for plea negotiations. Well over 90% of criminal convictions nationwide come from guilty pleas.[20] Negotiating requires lawyers to

[20] *See* Lindsey Devers, *Plea and Charge Bargaining Research Summary,* U.S. Department of Justice, Bureau of Justice Assistance (Jan. 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/pleabargainingresearchsummary.pdf; *In the Shadows, A Review of the Research*

speak with their client, learn what their priorities are, counsel them on the strength and weakness of their case, convey any plea offers, and advise whether to accept them or to make a counteroffer.[21] When prosecutors have access to this information, they gain enormous leverage. They may be able to speculate as to what sort of sentence the defendant would accept, what advice they are receiving from counsel, and how willing they and their attorney are to go to trial. An admission of guilt, even if never admitted at trial, can bolster the state's confidence in their case, which may translate into harsher plea offers.

The right to counsel protects not merely against actual intrusion, but against structural conditions that reasonably deter full communication. When the State surveils all phone calls by default, it is inevitable that some confidential calls will be compromised. Even when they are not, the defendant and the attorney's confidence in their confidentiality is enough to chill their conversations and their relationship. The very possibility of the State's access to their

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on Plea Bargaining, Vera (2020), https://www.vera.org/publications/in-the-shadows-plea-bargaining.

[21] *See* Alkon, *supra* note 4.

communications tips the scales so far in the State's favor as to undermine the defendant's right to a fair trial.

3. The State must bear the burden of justifying its surveillance program, ensuring attorney-client communications remain confidential, and proving the defendant was not prejudiced when violations occur.

In its order denying Petitioner Brown's Motion to Dismiss, the District Court emphasized that Brown knew that his calls were being monitored but made them anyway, and that it is unclear whether Brown's attorneys followed proper protocols for having their numbers blocked. (Doc. 389.) This is a fair point and, taken in isolation, a compelling one. When considered as one data point of a pervasive problem experienced by criminal defendants and their attorneys nationwide, it shifts responsibility from those who created the problem onto those who have no real power to do anything about it.

There are approximately 40 county detention facilities spread across Montana's 56 counties.[22] The State Department of Corrections

[22] Data sheet prepared by Montana Sheriffs & Peace Officers Association for the Montana Legislature Law and Justice Interim Committee (Mar. 2022), https://archive.legmt.gov/content/Committees/Interim/2021-2022/Law-and-Justice/Studies/SB-303/sb303-table-detention-center-beds-march-2022.pdf.

operates another nine secure facilities,[23] and has contracts with facilities in Arizona and Mississippi.[24] Each organization has its own telecom system and its own procedures for handling attorney calls. The staff at each facility can be more or less helpful with processing requests for private calls.[25] For attorneys with large caseloads and little or no support staff, the time required to comply with each facility's procedures can be cumbersome.

Visiting clients in person is often not a realistic alternative. The drive from Missoula, where Petitioner's attorney is located, to the Prairie County Sheriff's Office takes about seven hours. For attorneys who represent clients all over the state, it is impossible to make regular in-person visits with incarcerated clients. And when they do make such

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[23] *Secure Facility Daily Population*, Montana Department of Corrections, https://dataportal.mt.gov/t/COR/views/POPReportPublic_15931787918580/SecurePopulation.

[24] Christopher Cartwright, *Montana works to build its way out of overcrowded prison system*, NBC Montana (Oct. 2025), https://nbcmontana.com/news/local/montana-works-to-build-its-way-out-of-overcrowded-prison-system.

[25] Anecdotally, my initial request to have my phone number added to the Montana State Prison's attorney list was denied because only landlines were permitted and my only work phone was cellular. My number was added only after I formally requested special accommodations.

journeys, they may encounter new and unexpected procedures for in-person visits as well.[26]

The ability to have convenient, confidential conversations is essential to an effective attorney-client relationship. For incarcerated defendants, the telephone is their only means of communication with counsel. When neither client nor attorney can be confident in the privacy of those conversations, the harm is real, even if difficult to measure.

This is a large-scale problem that cannot be addressed by simply blaming defendants and their attorneys for failing to follow procedures. The procedures are created and controlled by the State. They are only necessary because of the widespread surveillance programs created and controlled by the State. But defendants and their attorneys are the ones who are affected by it.

Given the fundamental rights at stake, the State should be required to justify its use of electronic monitoring and recording of

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[26] Also anecdotally, the first time I visited a client at the Cascade County Detention Facility, I was nearly turned away after a three-hour drive from Missoula because I did not bring my bar card, which I never thought to bring because no other detention facility I had previously visited required it.

prisoner phone calls. If it can meet that burden, it should be required to create uniform, streamlined procedures for ensuring prisoners can speak with their attorneys confidentially and conveniently. And when the State breaches attorney-client confidentiality, it should be required to prove that absolutely no information relevant to the prisoner's defense was obtained, and that no prejudice will result from it. When the State cannot meet that burden, meaningful remedial consequences must follow.

Conclusion

For the foregoing reasons, MTACDL respectfully requests that this Court use the opportunity presented by this matter to address the constitutional problems the State's surveillance program raises. It should require the State not only to prove the petitioner was not prejudiced, but to justify its continued surveillance of pretrial detainees.

Respectfully submitted this 26th day of February 2026.

/S/RYAN W. AIKIN
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Certificate of Compliance

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