UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| SEAN McCLENDON<br>Plaintiff,<br>v.<br>CITY OF CHICAGO, et al.,<br>Defendants, | Judge Sharon Coleman<br>Magistrate Judge Valdez<br>No. 1:22-cv-05472 |

**THE CITY OF CHICAGO'S RESPONSE TO PLAINTIFF'S MOTION TO QUASH**

Plaintiff moves to quash the City's subpoenas for his recorded Cook County Jail phone calls and Illinois Department of Corrections prison phone calls, arguing that (1) his privacy interest in the calls and (2) the burden of reviewing those calls both outweigh the calls' relevance. Neither argument warrants foreclosing Defendants from this critical information.

First, whatever privacy interest that exists is minimal and does not warrant barring access to the calls. Plaintiff knew that his calls were recorded and could be listened to by jail/prison personnel at any time. In any event, his privacy concerns are easily allayed because the City is agreeable to treating Plaintiff's calls as confidential under this case's protective order, thus alleviating any concern that the public will hear Plaintiff's non-relevant calls.

Plaintiff also fails to acknowledge that any calls in which he discussed the underlying incident may not only be relevant, but dispositive. This action largely hinges on whether Plaintiff possessed a handgun the night he was arrested. Even the briefest acknowledgment by Plaintiff that he did would end the case. Ultimately, the relevance of any call discussing the underlying incident

– as well as non-dispositive but vital issues such as Plaintiff's conditions of confinement and other elements of damages – overwhelmingly outweighs the privacy intrusion at issue here.

Second, Plaintiff's burden argument likewise does not support granting the relief sought. Plaintiff needn't review anything if he doesn't want to. The rules of discovery ensure that Plaintiff will have advance notice of any calls the City intends to use. Thus, if he chooses, Plaintiff can simply wait and listen to whatever calls the City discloses after its own review.

For these reasons, the Court should deny Plaintiff's Motion outright. However, should the Court agree with Plaintiff, the Court should permit more limited subpoenas to issue as proposed below. In no event should Plaintiff be fully insulated from his own admissions, as such admissions may prove to be – like in other cases – the most important evidence.

## ARGUMENT

### I. The Relevance of Plaintiff's Recorded Calls Outweighs the Minimal Privacy Intrusion Here.

Plaintiff invites the Court to engage in a balancing test between his privacy interests and the relevance of his phone calls. In doing so, Plaintiff exaggerates the former and pays short shrift to the latter. In reality, Plaintiff's privacy interest in calls that he knew could be listened to by strangers is low, and the relevance of any calls in which Plaintiff discussed the underlying incident, or matters related to his purported damages stemming therefrom, is high.

#### A. Plaintiff's privacy interest in recorded calls is low, and is protected if such calls are initially treated as confidential under the governing protective order.

Plaintiff knew that his phone calls were recorded and could be listened to by jail/prison personnel, given he was caught making calls with other inmates' PINs because those calls were reviewed and Plaintiff's voice was identified. (*See*, *e.g.*, Grp. Ex. A (IDOC citations).) As such, Plaintiff had no reasonable expectation that anything he said on a phone call would remain between

the call participants. *See U.S. v. Sababu*, 891 F.2d 1308, 1329 (7th Cir. 1989) (holding prisoner had no reasonable expectation that her calls would remain private). In that regard, Plaintiff's privacy interest remains unchanged by the City's subpoenas.

Instead, the privacy concern here is not whether Plaintiff's calls can be heard by non-participants, but *how many* non-participants. There is admittedly a difference between jail/prison personnel listening to Plaintiff's calls and the entire public having access to the calls. But the City's proposed discovery falls closer to the restricted end of that spectrum than the unfettered.

Once received, only defense counsel and their call review consultants will need to listen to Plaintiff's calls.[1] That will increase the sphere of strangers who already could listen to Plaintiff's calls by a relatively small number. To ensure that is the case, the City suggests that this Court adopt the same process as was used in *Coleman v. City of Peoria*, No. 15-cv-1100, 2016 WL 3974005 (N.D. Ill. Jul. 2, 2016). There, the defendants subpoenaed the plaintiff's prison calls for a roughly 19-year period. *Id.* at * 1-2. Plaintiff moved to quash the subpoena, arguing his privacy interest outweighed the subpoena's breadth. *Id.* at *5. The Court ruled that the plaintiff's diminished privacy interest in his calls was not strong enough to invalidate the subpoena. *Id.* at *4. Nevertheless, as a compromise, the calls were initially treated as confidential pursuant to the governing protective order. *Id.* at *5.

[1] Plaintiff's efforts to distract the Court by attacking the integrity of the lawyers in this case is as disheartening as it is meritless. *See* Pl.'s Mot., p. 12. As explained throughout, the information the City seeks is potentially game-changing, and it would be a violation of defense counsel's duty of zealous advocacy to forgo such a potential minefield of important information. If Plaintiff did not make relevant admissions on the calls, he has nothing to be concerned about, but advancing baseless accusations at lawyers in this case way to distract this Court from the salient issues undermines the legitimacy of Plaintiff's entire motion and exposes his motivation to bury the relevant evidence in the calls at all costs.

None of the cases cited by Plaintiff warrant a different approach. As an initial matter, none recognized a strong privacy interest in a plaintiff's jail calls. *See, e.g., Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, *4 (N.D. Ill. Oct. 20, 2020) (referring to plaintiff's privacy interest as "minimal"); *DeLeon-Reyes v. Guevara*, Nos. 1:18-cv-01028 & 1:18-cv-02312, 2020 WL 7059444, *2 (N.D. Ill. Dec. 2, 2020) (addressing the privacy interest of a non-party, which is inapplicable here); *Pursley v. City of Rockford*, No. 18-cv-50040, 2020 WL 1433827, *2-4 (N.D. Ill. Mar. 24, 2020) (quashing subpoena largely due to overbreadth, not a strong privacy interest); *Simon v. Northwestern University*, No. 1:15-CV-1433, 2017 WL 66818, *3-4 (N.D. Ill. 2017) (same).

Additionally, of those cases, only *DeLeon* considered the compromise used in *Coleman*, and rejected it because the phone calls at issue were made by a non-party, which is inapposite here. *See DeLeon-Reyes*, 2020 WL 7059444, *2, n. 4. Not only did the other cases cited by Plaintiff ignore the compromise in *Coleman*, but the *Simon* Court expressly envisioned the plaintiff's phone calls becoming available to the public regardless of relevance, which is not a concern under the *Coleman* approach. *See Simon*, 2017 WL 66818, *2.

Finally, being the party who voluntarily filed this suit, and knowing the Defendants would test the veracity of his allegations, Plaintiff cannot claim surprise that the City is seeking discovery that would undermine his liability and damages claims. On this point, the Court in *Pursley* was incorrect in reasoning that a plaintiff "would not reasonably expect the details of their recorded calls [to] be handed over to civil litigants." 2020 WL 1433827, *2. To the contrary, that is one of the most foreseeable outcomes of filing a suit like this.

In short, Plaintiff's privacy interest in his calls is slight, and the intrusion into his privacy beyond that which already existed is minimal under the *Coleman* approach. Therefore, even

moderate relevance would be enough to outweigh the mild privacy concerns here. As discussed below, such relevance exists.

**B. The relevance of any calls discussing the underlying incident or aspects of Plaintiff's damages is high.**

Plaintiff essentially claims that he was framed for gun possession. Pl.s' Compl., ¶¶ 4-10. Any admission by Plaintiff that he possessed the gun would undeniably be relevant, and Plaintiff does not argue otherwise. Similarly, when asked to identify his damages in this case, Plaintiff said he is seeking compensation for, *inter alia*, "being taken away from my normal life, and emotional injuries." (*See* Ex. B. (Pl.'s Ans. to the City's Interrogatories).) Any phone calls indicating Plaintiff already had weak relationships with family members or friends, or calls that otherwise indicate what Plaintiff's "normal life" was like before prison, would be relevant to Plaintiff's damages. Further, Plaintiff's calls may shed light on his experiences while in custody and whether they support or contradict his alleged injuries; plainly such information is relevant and discoverable.

Thus, the question is not whether some of Plaintiff's calls may be relevant, but which ones. The City cannot know the answer at this stage.[2] However, logic and other cases provide good reason to believe that such calls do exist, and the cost of missing them could be dire.

First, the unique nature of prison calls greatly increases the likelihood that Plaintiff would discuss the underlying incident that led to his arrest and his daily experiences in prison. As Plaintiff acknowledges, phone calls are the primary means that prisoners speak with those outside of prison. Pl.s' Mot., p.7. That fact, combined with the fact that people outside of prison are often the people a prisoner trusts most (family and friends), means that if a prisoner confides a detail about the cause and nature of his arrest, it will likely be on a phone call as opposed to some other means.

[2] Unlike text messages or emails, there is no feasible way to search Plaintiff's jail calls for relevant keywords.

For these reasons, Plaintiff's answer to the City's interrogatory 16 supports the requested discovery instead of negates it (as Plaintiff argues). Plaintiff alleges that he was framed and fought for years to regain his freedom, all while enduring the trauma of prison as an innocent man. Yet he claims that he "never" discussed his arrest, his prosecution, his conviction, or his effort to vacate that conviction in detail with anyone on the phone. *See* Pl.'s Mot., p. 11. That is facially incredible, especially for someone who was reprimanded for making too many calls. (*See* Ex. C (IDOC reprimand).) The City need not and should not be forced to take Plaintiff's word for it, particularly given the unbelievable claim that he never discussed the very reason he was in prison, the alleged officer misconduct that occurred, or his release efforts on the phone with anyone. Instead, the City is entitled to test the veracity of such denials.[3]

Other cases bear out this logic and show how crucial the discovery of prisoner phone calls can be. For example, in *Harris v. City of Chicago*, No. 20-CV-4521, the plaintiff claimed he was falsely arrested for gun possession. *See Harris v. Chicago*, No. 20-CV-4521, 2020 WL 7059445 (N.D. Ill. Sept. 2, 2020). The City subpoenaed the plaintiff's prison calls and learned he admitted to possessing the gun. *See* Defs.' Sum. J. Mot. in *Harris v. Chicago*, Case 20-CV-4521, 2021 WL 10864282, § 1. After the calls were discovered, the plaintiff's counsel withdrew, *see id.* at n.1, and summary judgment was granted in the City's favor, *see Harris v. Chicago*, 2020 WL 7059945.

In *Teague v. Salgado*, No. 19-CV-04113, the plaintiff claimed he was, *inter alia*, falsely arrested and framed for drug dealing. (*See* Ex. D (excerpts of Def.'s Mot. to Compel in Case 19-CV-04113), p.2.) The City obtained the plaintiff's calls, in which the plaintiff made damning

[3] Plaintiff's use of other inmates' PIN numbers to make phone calls increases this skepticism, as it is logical to presume Plaintiff used other inmates' PINs so the calls would not be traced to him.

admissions about his dealing drugs. (*See id.*) After these calls were discovered, the plaintiff dismissed his case with prejudice. (*See* Ex. E.)

Ironically, in the *Bishop* case cited by Plaintiff, the Court originally quashed the phone call subpoena, but a more narrow subpoena was issued that uncovered the plaintiff was tampering with witnesses and had perjured himself. *See Bishop v. White*, 2023 WL 35157, *6-13. The calls obtained by the subpoena led to the dismissal of the lawsuit as a sanction. *Id.* at *13.

Without the discovery of these calls, these plaintiffs' admissions and fraud may have gone undiscovered.[4] Indeed, this Court has previously acknowledged the relevance of at least some discovery into a plaintiff's jail calls. (*See*, *e.g.*, Ex. F (order denying Motion to Quash in *Morfin v. Cassidy*, No. 1:21-CV- 05525).)

**II. The Subpoenas Impose No Cost or Undue Burden on Plaintiff.**

Plaintiff claims that allowing the proposed discovery will require him to review thousands of hours of irrelevant personal phone calls. Not so. Plaintiff will not be required to review anything. It is the City that seeks these calls. Applicable discovery rules protect Plaintiff from undue surprise, *see* Fed. R. of Civ. Pro. 26(a) & 26(e), so he need only wait for the City to supplement its discovery with phone calls the City intends to use. And the Court has discretion to fashion other orders to alleviate any burden on Plaintiff, *see* Fed. R. of Civ. Proc. 26(c), such as requiring advance disclosure of phone calls the City intends to play at Plaintiff's deposition (which the City would not oppose).

[4] These are only a few examples of how prison calls can be relevant, if not outright dispositive. There are more: *See*, *e.g.*, *DeWitt v. Ritz*, No. DKC 18-3202, 2021 WL 915146 (D. Md. Mar. 10, 2021) (dismissing case as sanction when plaintiff's jail calls showed evidence fabrication); *Johnson v. Baltimore Police Dep't*, No. ELH-19-0698, 2022 WL 9976525 (D. Md. Oct. 14, 2022) (same).

Tellingly, Plaintiff cites no authority indicating that weighing the burden of a subpoena focuses not on the subpoena recipient – who is truly compelled to act – but a non-recipient whose only burden is whatever it voluntarily chooses to incur. If Plaintiff believes there might be information beneficial to him in some of his calls, he is in the best position to identify those calls and his counsel can review them, but any involved burden does not warrant quashing the subpoena.

Finally, given Plaintiff claims to have been wrongfully incarcerated for years, it is possible that any judgment in Plaintiff's favor would be in the seven figures. Such potential liability justifies the discovery sought, even if Plaintiff were truly subjected to a compelled burden, which he is not.

## III. Alternatively, if the Court Agrees with Plaintiff, the City Should Be Permitted to Issue Narrower Subpoenas as Discussed Below.

If the City is forced to tailor its subpoenas based on guessing where relevant calls may exist, it proactively asks the Court to consider the following narrower scope of discovery:

- All Cook County Jail calls involving Plaintiff from October 2014 to December 1, 2016. Per Plaintiff's answer to the City's interrogatory 1, Plaintiff was in the Cook County Jail from October 2014 to May 2015, and from when he was found guilty (July 2016) to when he was shipped to IDOC (around November 2016). (*See* Ex. B.) This time period is close to Plaintiff's arrest and conviction, increasing the chance that Plaintiff would discuss those events during that timeframe.
- All Illinois Department of Corrections jail calls involving Plaintiff from October 1, 2016, to January 31, 2017. As best the City can tell, this timeframe would cover the Plaintiff's first few months in IDOC, which would increase the likelihood of him discussing the reason for his new incarceration.
- All Illinois Department of Correction jail calls involving Plaintiff from December 1, 2018, to March 31, 2019. According to the docket for Plaintiff's underlying

criminal case (*see* Ex. G), Plaintiff prosecuted an unsuccessful post-conviction motion challenging his conviction during this timeframe, increasing the chance he would talk about his underlying arrest and prosecution while that process unfolded.

- All Illinois Department of Correction jail calls involving Plaintiff's documented use of other inmates' PINs. This subpoena already exists, and Plaintiff does not seriously challenge it given its narrow scope in requesting calls on specific dates, except to say that the Court should quash the subpoena to protect the interests of third parties. However, not only does Plaintiff lack standing to assert those interests, *see Coleman*, 2016 WL 3974005, * 5, but those parties presumably chose to give Plaintiff their PINs, and cannot now claim a privacy interest in the timeframe in which they allowed those improper calls to be made.[5]

**Conclusion**

For the reasons stated above, the Court should deny Plaintiff's Motion to Quash and permit the City to issue its subpoenas, with an order that all discovered calls are initially to be treated as confidential under the operative protective order. In the alternative, the Court should permit subpoenas to be issued in accordance with the scope outlined in Section III above.

Respectfully submitted,

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[5] If the Court chooses to allow only this narrower subpoena – or something like it – the City reserves its right to timely seek additional calls if future discovery warrants.

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