CASE No. S23G1192

IN THE

Supreme Court of Georgia

DEREK JAMES BURNS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Brief of the Georgia Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Petitioner

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INTRODUCTION

Guaranteeing not only the assistance of counsel but the *effective* assistance of counsel, the Sixth Amendment shields privileged communications between attorney and client. Where the State intentionally pierces that shield, it violates the Sixth Amendment. Although courts tailor remedies to fit the harm, this Court should join its sister jurisdictions in adopting a presumption of prejudice for state intrusions, rebuttable only if the State persuades beyond a reasonable doubt the intrusion did not contribute to the verdict. Anything less would turn that shield into a parchment barrier.

INTEREST OF AMICUS

A frequent friend of this Court, the Georgia Association of Criminal Defense Lawyers (GACDL) is a domestic nonprofit corporation whose members routinely execute the only office of the court dignified in the Bill of Rights: defending the life and liberty of the accused against the powers of organized society and ensuring the processes of law that they are due. GACDL's membership comprises both public defenders and private counsel. They are united in their dedication to the rule of law, the fair and impartial administration of criminal justice, the improvement of our adversarial system, the reasoned and informed advancement of criminal jurisprudence and procedure, and the preservation and fulfillment of our great constitutional heritage.

Our interest in this case centers around the appropriate framework for when the State intrudes on attorney-client privileged communications. Given the foundational nature of the right at stake, Amicus urges this Court adopt a presumption of prejudice when the State invades the attorney-client privilege rebuttable only upon proof beyond a reasonable doubt that the violation did not affect the trial. Finally, we ask the Court to declare in no uncertain terms that confidential communications between attorney and client are off-limits.

VIEWS OF THE AMICUS

Enshrined in the organic charter of our Nation, the Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence." U.S. CONST., amend. VI. In an age of rampant overcriminalization, where the science of law grows ever more detailed, the right to counsel stands as a constant font of liberty. See *Mitchum v. State*, 11 Ga. 615, 630 (1852) (discussing how "the lawyer is the champion of popular rights" who "is indispensable to a fair and full administration of justice.") Critical to that right lies the attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law"—which encourages open and honest dialogues between attorney and client. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). When the government invades that privilege, it eviscerates "one of the soundest and most valuable rules ever established to promote the fullest confidence between attorney and client." *Doe v. Roe*, 37 Ga. 289, 291 (1867).

As shown below, courts across the country dicker on the details, but agree in the abstract to two answers: First, intentionally listening to attorney-client communications implicates the Sixth Amendment. Second, courts tailor their remedies to the specific violations, but presume prejudice and require the State rebut that presumption.

1. The State Intentionally Listening to Calls between Attorney and Client Violates the Sixth Amendment.

State actors intentionally listening to calls between attorney and client violate the Sixth Amendment. The importance of the right at stake demands nothing less. The Court of Appeals erred in concluding Appellant did not confidentially communicate to his attorney because his phone call lacked any "reasonable expectation of privacy in a recorded telephone call" made from custody. *Burns v. State*, 368 Ga. App. 642, 646 (2023), cert. granted, S23G1192 (Feb. 6, 2024) (citing *Keller v. State*, 303 Ga. 492, 497 (2020)). Because the State intentionally intruded into Appellant's attorney-client relationship not once but twice, it violated his Sixth Amendment rights.

(a) The Court of Appeals erred in injecting Fourth Amendment "reasonableness" into Sixth Amendment analysis.

The Court of Appeals conflated the Fourth Amendment's reasonableness inquiry with Sixth Amendment attorney-client analysis. For starters, the case it cites—*Keller v. State*—does hold no reasonable expectation of privacy exists in jail calls, but between a defendant and his friends or family, *not* an attorney and client. The *Keller* defendant sought to claim his trial counsel ineffective for not suppressing a recorded jail phone call between the defendant and his ex-wife with whom he lived. *Keller*, 303 Ga. at 497 (discussing "recorded jail call from Keller to Ashley"); id. at 493 (describing how at time of incident defendant "was living in Columbus with his first wife, Ashley Keller"). Similarly, *Keller*'s

authority for its "no reasonable expectation of privacy in a recorded telephone call made from a jail" proposition—*Preston v. State*—likewise involved "telephone conversations [the defendant] had with his mother while he was in jail," not his attorney. *Preston v. State*, 282 Ga. 210, 213 (2007); see *Keller*, 308 Ga. at 497 (citing *Preston*, 282 Ga. at 213-14). The same holds true of the *Burns* Court's reliance upon *Rogers v. State*. See *Burns*, 368 Ga. App. at 646 (citing *Rogers v. State*, 290 Ga. 18, 21 (2011)). Although *Rogers* does say that the incarcerated defendant had no reasonable expectation of privacy in his phone calls to his attorney, the Court addressed the argument under Georgia's Invasion of Privacy Act rather than the Sixth Amendment. See *Rogers*, 290 Ga. at 21-22. Since the phone calls were via the defendant's girlfriend creating a "three-way connection" between the defendant, the attorney, and herself, the *Rogers* Court held no privilege attached. Id. at 20.

Other courts already recognize this distinction. The Wisconsin Court of Appeals in *State v. Riley* held that "[j]ail inmates have no expectation of privacy in calls to *nonattorneys* placed on institutional telephones[.]" *State v. Riley*, 704 N.W.2d 635, 640 (Wis. Ct. App. 2005) (emphasis supplied), cited approvingly in *Preston*, 282 Ga. at 214. Likewise, Delaware courts have rejected similar arguments for "fail[ing] to appreciate the substantial differences between Fourth and Sixth Amendment jurisprudence" and the differences between personal items/calls "and privileged attorney-client communications." *State v.*

Robinson, 222 A.3d 143, 154 (Del. Super. 2018) ["*Robinson I*"], aff'd in part, rev'd in part on other grounds, 209 A.3d 25 (Del. 2019); accord *State v. Robinson*, 209 A.3d 25, 47 (Del. 2019) ["*Robinson II*"] (concluding "the State deliberately invaded Robinson's attorney-client privilege by searching for, seizing, and reviewing his legal materials.") And given how the "reasonable expectation of privacy" analysis is wholly disconnected from the Fourth Amendment's original public meaning,[1] lower courts should beware importing such unstable footings into the Sixth Amendment's analysis.

(b) Although unintentional intrusions alone may not implicate the Sixth Amendment, intentional ones by the State do.

State actors do not violate the Sixth Amendment when they unintentionally intrude into attorney-client privileged communications so long as the intrusion neither produces tainted evidence nor discloses the defense's strategy. *Intentional* intrusions, however, violate the right to counsel on its face, as intimated by the U.S. Supreme Court and held by lower courts.

When confronting claims of State intrusion into attorney-client privileged matters, much turns on whether the intrusion was intentional or not. For unintentional intrusions, courts begin their analysis with *Weatherford*

[1] See, e.g., *State v. Cohen*, 302 Ga. 616, 633 (2017) (Nahmias, J., concurring in part and concurring specially in part) (discussing how "reasonable expectation of privacy" only entered Fourth Amendment jurisprudence in 1967).

v. Bursey, 429 U.S. 545 (1977). See *State v. Bain*, 872 N.W.2d 777, 784 (Neb. 2016) (discussing in context of state intrusion in attorney-client communications how "[o]ur starting point is *Weatherford v. Bursey*.") (citation omitted); see also *Robinson II*, 209 A.3d at 47 (beginning analysis with *Weatherford*); *Morrison v. State*, 575 S.W.3d 1, 11 (Tex. App. 2019) (same). In *Weatherford*, the U.S. Supreme Court held that where the State intrudes on the attorney-client privilege, but the intrusion does not produce tainted evidence, disclosure of defense strategy, and was not purposeful, no Sixth Amendment violation occurs. *Weatherford*, 429 U.S. at 558. Critical to *Weatherford*'s analysis, no defense strategies were disclosed at trial, none of the State's evidence had originated from protected disclosures, and the overheard conversations had not been used against the accused in any way, nor even disclosed to the prosecution. Id. at 554.

Intentional intrusions, by contrast, violate the Sixth Amendment. See *State v. Quattlebaum*, 527 S.E.2d 105, 109 (S.C. 2000) ("*Weatherford* is inapplicable to the case sub judice, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation.") A few years after *Weatherford*, the Supreme Court in *United States v. Morrison* assumed without deciding that a Sixth Amendment violation had occurred when a counseled defendant was interrogated by government agents without his attorney. 449 U.S. 361, 364 (1981). After *Morrison*, the Supreme Court

would add in *Maine v. Moulton* that the Sixth Amendment imposes an affirmative obligation on the States "to respect and preserve the accused's choice to seek" the assistance of counsel. *Maine v. Moulton*, 474 U.S. 159, 171 (1985). This obligation demands that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." *Moulton*, 474 U.S. at 171. This includes intentionally intruding into the attorney-client privilege without any compelling justification. See *State v. Lenarz*, 22 A.3d 536, 548 (Conn. 2011) (noting how "a number of courts have held the defendant is not required to prove that he was prejudiced by the government's intrusion into attorney-client communications when the intrusion was deliberate and was unjustified by any legitimate governmental interest in effective law enforcement.") (citations omitted).

Thus, State intrusions upon the attorney-client privilege implicate the Sixth Amendment. In determining whether a violation has occurred, courts examine (1) whether any tainted evidence was obtained, either directly or through the violation's fruits; (2) whether any defense strategy was discovered; and (3) whether the intrusion was purposeful. See *Bain*, 872 N.W.2d at 787 & n.26 (noting how "other federal appellate courts similarly suggest that a court would treat a state's *intentional* intrusion differently than an unintentional one" and collecting authorities). If the answer is yes to any of the three, a Sixth

Amendment violation has occurred. The question of remedy, however, differs depending upon the violation's degree and nature.

2. Courts Tailor Sixth Amendment Remedies to the Harm through Suppressing Tainted Evidence and Precluding Conflicted Prosecutors from Trying the Case.

Where a Sixth Amendment violation occurs from State intrusion, courts generally tailor their remedies to fit the facts. *Morrison*, 449 U.S. at 364. With tainted evidence, suppression from trial remains the standard course. See id. at 366 ("The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression.") For attorney-client communications, courts grant mistrials, new trials, or similar relief where the prosecution can continue if the conflicted persons are removed. Only where the intrusion so undermines the attorney-client privilege, or where the tainted evidence itself is the only support for the grand jury's indictment, can courts dismiss prosecutions with prejudice.

In determining the analytical framework, Amicus proposes this Court adopt a two-part test. In the first part, defendants bear the burden of showing a prima facie intrusion into the attorney-client privilege. If the defendant meets their burden, it shifts to the State, as the beneficiary of the constitutional error, to show how the error did not contribute to the outcome. With tainted evidence, this fits under the *Chapman* standard for constitutional harmless error. See *Chapman v. California*, 386 U.S. 18 (1967) (establishing

constitutional harmless error doctrine where government proves beyond reasonable doubt that constitutional error did not contribute to conviction). Where attorney-client communications and strategy are pierced, however, this Court should presume prejudice. Lastly, although dismissals with prejudice are reserved for the most egregious situations, new trials with suppressed evidence remain readily available.

(a) Defendants must first show a prima facie case of attorney-client privilege intrusion to obtain relief.

Before obtaining any remedy, defendants must first show an injury occurred. As the California Supreme Court concluded in reviewing the case law in this area, though the courts differ on who bears the burden on prejudice, "there is *no* dispute as to the duty of the defense to establish, as part of its prima facie case, that confidential information was actually communicated to the prosecution team." *People v. Ervine*, 220 P.3d 820, 841 (Cal. 2009). This makes sense: Absent some evidentiary support in the record for it, a defendant's claim is meritless.

To satisfy the prima facie burden, defendants "must prove that confidential communications were conveyed as a result" of the government's intrusion into the privileged communications. *United States v. Mastroianni*, 749 F.2d 900, 907 (1st Cir. 1984) (citations omitted). Cf. *Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986) (detailing three-prong analysis for racial

discrimination in peremptory strikes by first requiring defendant make prima facie showing of harm). Importantly, unintentional intrusion is not enough, provided the State takes actions to quarantine the taint. See *Weatherford*, 429 U.S. at 558 (finding no Sixth Amendment violation where no purposeful intrusion, no tainted evidence, and no defense strategies revealed to the government). Where the government actor affirmatively "intrude[s] the attorney-client relationship…to obtain the privileged information," however, defendants meet their burden of proof. *United States v. Danielson*, 325 F.3d 1054, 1071 (9th Cir. 2003).

(b) Once the defendant makes their showing, the burden shifts as courts apply a rebuttable presumption of prejudice against the State.

This Court should adopt a rebuttable presumption of prejudice for invasions of privileged communications. It balances the inherent difficulties in proving prejudice on prosecutorial plans, while also acknowledging the realistic probability of harmless intrusions. That said, this Court should clarify the high burden to overcome prejudice if it wants the test to have teeth.

(i) Presuming prejudice censures the State's role as a bad actor.

Although some circuits require defendants show both injury *and* prejudice,[2] Amicus urges this Court join with the modern consensus of

[2] See *Robinson II*, 209 A.3d at 49-50 & nn.137-39 (noting how "[t]he Sixth, Eighth, and Ninth Circuits" require defendants demonstrate prejudice,

requiring the State to bear the burden. Requiring defendants to prove prejudice flouts the *Chapman* standard's placing the burden on those benefiting from the constitutional violation. Although Sixth Amendment claims in other contexts do require the defense prove prejudice, those do not involve State interference. See *Strickland v. Washington*, 466 U.S. 688 (1984) (requiring defendants in ineffective-assistance-of-counsel claims prove prejudice); see also *United States v. Cronic*, 466 U.S. 648, 658 (1984) ("[B]ecause we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.") (citation and footnotes omitted).

When the State invades privileged communications, no fault lies on the defense. To require the defendant then to prove the impact of that violation would only capitalize on the injury the State created. As the Nebraska Supreme Court recognized after examining the case law, federal precedents agree on two points: "(1) *any* use of the confidential information to the defendant's detriment is a Sixth Amendment violation that taints the trial and requires a reversal of the conviction; *and* (2) a defendant cannot know how the prosecution could have used confidential information in its possession." *Bain*, 872 N.W.2d at 791 (emphasis in original). Given the "virtually impossible" task

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"even where the government intentionally intrudes in the attorney-client relationship" and collecting authorities).

anyone else—defendant or reviewing court—would bear in showing prejudice from privileged disclosures, presuming prejudice serves to put the onus on the State to justify why its conviction should stand. *Danielson*, 325 F.3d at 1071 (quoting *Briggs v. Goodwin*, 698 F.2d 486, 494 (D.C. Cir.), vacated on other grounds, 712 F.2d 1444 (D.C. Cir. 1983)); accord *Mastroianni*, 749 F.2d at 907; *Bain*, 872 N.W.2d at 788. As the Washington Supreme Court put it, requiring the defendant to bear the burden of proving prejudice disregards that "[t]he State is the party that improperly intruded on attorney-client conversations and it must prove that its wrongful actions did not result in prejudice to the defendant." *State v. Fuentes*, 318 P.3d 257, 262 (Wash. 2014). Anything less would allow the abuse to continue.

(ii) Constitutional error warrants proof beyond a reasonable doubt.

Presuming prejudice requires the State to justify its misconduct, but an irrebuttable presumption can undermine the foundational interests society has in criminal justice. Since irrebuttable presumptions have long been disfavored in the law, see *Vlandis v. Kline*, 412 U.S. 441, 446 (1973), a rebuttable presumption of prejudice allows the State to prove the taint had no effect on the prosecution, like "showing that it had legitimate, independent sources" for the privileged information. *Bain*, 872 N.W.2d at 791.

Although some locales like the Ninth Circuit require the government rebut by a preponderance, see *Danielson*, 325 F.3d at 1074, Amicus again urges this Court adopt the Washington Supreme Court's reasoning and require the State overcome the presumption beyond a reasonable doubt. *Fuentes*, 318 P.3d at 262. Compare *Bain*, 872 N.W.2d at 791-92 (adopting clear-and-convincing standard) and *Lenarz*, 22 A.3d at 550 (same). The right to counsel, including the right to attorney-client privileged communications, "is a foundational right. We must hold the State to the highest burden of proof to ensure that it is protected." *Fuentes*, 318 P.3d at 262; accord *United States v. Levy*, 577 F.2d 200, 209 (3rd Cir. 1978) ("Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact finding process itself.")

Burdens of proof describe the confidence in outcome society demands in justifying "a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (citation omitted). A preponderance standard is appropriate where society has a minimal concern in the outcome, like most civil suits. Id. Beyond a reasonable doubt, on the other hand, applies in criminal cases because "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself." Id. at 423-24. Where the State has invaded the oldest

and most sacrosanct of the privileges, one constitutionally protected by the Sixth Amendment, anything short of beyond-a-reasonable-doubt denigrates the Constitution.

(c) Though suppression and new trials generally remedy the violation, dismissals with prejudice are appropriate in extreme instances.

As discussed above, courts address Sixth Amendment violations under the general rule tailoring remedies to the harm caused. *Morrison*, 449 U.S. at 364. Absent irreparable prejudice, dismissals with prejudice are flatly inappropriate. Id. Rather, where the State has obtained evidence tainted from unconstitutional intrusion, the general remedy remains "not to dismiss the indictment but to suppress the evidence or order a new trial if the evidence has been wrongfully admitted and the defendant convicted." Id. at 365.[3] That said, irreparable injuries can warrant dismissals with prejudice, like where "the information has been disclosed to the public domain following trial," or where the government "effectively diminished the ability of the defendant to mount a full defense, or where the government's misconduct secured the indictment." *Robinson II*, 209 A.3d at 57 (citations omitted).

[3] Of course, the *Morrison* Court left open dismissals with prejudice for cases involving "a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy in order to deter further lawlessness." *Morrison*, 449 U.S. at 365 n.2.

When the State has obtained the defense's trial strategy, courts consider whether the taint can be isolated, like with a new prosecution team. In *Robinson II*, the Delaware Supreme Court declined to dismiss the defendant's prosecution with prejudice where the intrusion occurred pretrial because an entirely new prosecution team could be installed that would cure the taint. *Robinson II*, 209 A.3d at 59 n.192. Instead, the *Robinson II* Court held that the taint could be eliminated by "requir[ing] the disqualification of [the members of the offending prosecution team] from participation in Robinson's trial, along with anyone else who has been exposed" to the privileged information. Id. at 60. Additionally, the Court required the prosecution "to destroy all trial work product developed" for the case. Ibid. Similarly, the South Carolina Supreme Court disqualified the offending prosecutor's office from the defendant's retrial because "[t]he participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice." *Quattlebaum*, 527 S.E.2d at 109. As the Idaho Supreme Court recognized, "the pervasive depths prejudicial access to defense strategies" can reach make it difficult to cure with retrial with the offending actors' offices recused. *State v. Robins*, 431 P.3d 260, 272 (Idaho 2018). Those situations may warrant more drastic remedies, "such as the employment of additional,

independent counsel assigned solely to ensure that no further prejudice emerges during any subsequent prosecution[.]" Id.

By contrast, Connecticut's supreme court ordered the dismissal with prejudice in a case where "the prosecutor clearly invaded privileged communications that contained a detailed, explicit road map of the defendant's trial strategy." *Lenarz*, 22 A.3d at 558. Important to the *Lenarz* Court's analysis, the prosecutor "not only failed to inform the defendant and the trial court of the invasion immediately," but met with multiple witnesses and investigators and even tried the case to verdict. Id. Seeing no real way to untangle the web the prosecutor had weaved, the court concluded that dismissing with prejudice was the only remaining remedy. *Lenarz*, 22 A.3d at 558; accord *Robins*, 431 P.3d at 437 (noting "dismissing the charges should remain an option if the…prejudice arising from the State's prior transgression cannot be completely purged or escaped.") Or consider the Third Circuit's decision in *Levy* approving a dismissal with prejudice. See *Levy*, 577 F.2d at 210. It based its decision on (1) the State's intentional intrusion resulted in actual disclosure of defense strategy, (2) the case had already been to trial so was part of the public record, and (3) "[a]ny effort to cure the violation by some elaborate scheme" like replacing the prosecution team "would involve the court in the same sort of speculative enterprise which we have already rejected." Id.

Of course, "complete and permanent elimination of the prejudice arising from the State's intrusion must remain the paramount objective" for reviewing courts. *Robins*, 431 P.3d at 272. But where courts cannot meaningfully see how the State's misconduct can be cured short of dismissing with prejudice, that remains a valid option. The threat of a dismissal can help motivate state actors to understand the misconduct's severity. Compare *Fuentes*, 318 P.3d at 266 (noting "the prosecutor acted promptly and ethically to remedy and disclose the violation once it was discovered by him") with *Robinson II*, 209 A.3d at 54 (discussing trial court's finding "the State demonstrated 'a seeming indifference to the serious constitutional issues at stake'") and id. at 64 (Strine, C.J., concurring in part and dissenting in part) (agreeing with trial court dismissal appropriate in light of repeated State misconduct "undercuts our confidence in the State's ability to implement a 'clean team' solution.") As the Washington Supreme Court put it, "if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice," can we truly suppose the bad actors "will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy[?]" *State v. Cory*, 382 P.2d 1019, 1023 (Wash. 1963).

CONCLUSION

The Sixth Amendment does not guarantee a perfect trial, only a fair one. Though not mandating the prosecution and defense "enter the ring with a near match in skills, neither is [a criminal trial] a sacrifice of unarmed prisoners to gladiators." *Cronic*, 466 U.S. at 657 (citation omitted). By piercing privileged communications and obtaining evidence/strategy, the State effectively nullifies the greatest armor available to defendants. Because intentionally violating the attorney-client privilege violates the Sixth Amendment, because presuming prejudice places the onus on the bad actor, and because other options besides dismissals exist to remedy misconduct, Amicus urges this Court reverse.

At 4054 words prior to this sentence, this submission does not exceed the word limit imposed by Rule 20.

Respectfully submitted this 7th day of March, 2024.

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CERTIFICATE OF SERVICE

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