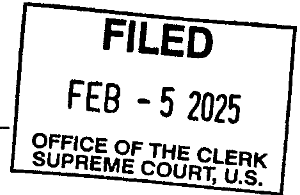
24-6656 No. ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES



DEREK JAMES BURNS

Petitioner,

V.

STATE OF GEORGIA,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

Derek J. Burns
1000060918
290 Donovan Harrison Rd,
Wrightsville, GA 31096

Pro Se Petitioner

February 3, 2025

QUESTION PRESENTED

The Georgia Supreme Court held that attorney-client communications about bond strategy and hearing preparation were merely "procedural scheduling matters" and unprotected. Does characterizing attorney client communications about bond strategy and hearing preparation as merely "procedural scheduling matters" defeat Sixth Amendment protections, particularly when state actors use information from those communications to obtain additional evidence and when multiple state actors intentionally intrude despite explicit assertions of privilege?

RULE 14(B) STATEMENT

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- State v. Burns, No. 18-9-2853 (Ga. Super. Ct., Cobb Cnty.) (final order following jury verdict entered September 2, 2021; order amended motion for new trial on remand denied August 31, 2022).
- Burns v. State, A22A0566 (Ga.) (remanded May 26, 2022)(unpublished)
- Burns v. State, No. A23A0577 (Ga.) (opinion issued June 20, 2023; reconsideration denied July 6, 2023).
- Burns v. State, No. S23G1192 (Ga.) (certiorari granted February 6, 2024; Decided October 15, 2024).

TABLE OF CONTENTS

QUESTION PRESENTED... i
RULE 14(B) STATEMENT... ii
TABLE OF CONTENTS... iii
TABLE OF AUTHORITIES...iv,v,vi
PETITION FOR WRIT OF CERTIORARI..1
OPINIONS BELOW... 1
JURISDICTION... 1
RELEVANT CONSTITUTIONAL PROVISIONS.............................. 1
STATEMENT OF THE CASE...2
REASONS FOR GRANTING THE WRIT.. 5

I. The Decision Below Creates an Irreconcilable Conflict with This Court's Sixth Amendment Jurisprudence.................................... 6

II. The Decision Violates Numerous Federal Statutes...................9

III. The Georgia Supreme Court's Decision not only Contradicts the United States Supreme Court but Stands Alone in State, Federal and District Courts... 10

IV. The Georgia Supreme Court's Decision Strips Criminal Defendants in Georgia of a Fundamental Constitutional Right........15

CONCLUSION... 17
TABLE OF APPENDICES...i

TABLE OF AUTHORITIES

Cases **Page(s)**

Arizona v. United States,
567 U.S. 387 (2012)....................10

Brewer v. Williams,
430 U.S. 387 (1977)....................5

Burns v. State,
364 Ga. App. XXV (Case No. A22A0566)(May 26, 2022)..............2, 3

Burns v. State,
368 Ga. App. 642 (2023)....................3

Clements v. Bernini,
471 P.3d 645 (Ariz. 2020)....................11

Glasser v. United States,
315 U.S. 60 (1942)....................7

In the Matter of John Doe Grand Jury Investigation,
408 Mass. 480 (1990)....................13

Jae Lee v. United States,
137 S. Ct. 1958 (2017)....................5

Keller v. State,
308 Ga. 492 (2020)....................3

Kirby v. Illinois,
406 U.S. 682 (1972)....................5

Maine v. Moulton,
474 U.S. 159 (1985)....................7, 8

Massiah v. United States,
377 U.S. 201 (1964)....................8

McQuiggin v. Perkins,
569 U.S. 383 (2013)..........7

Powell v. Alabama,
287 U.S. 45 (1932)..........15

Shillinger v. Haworth,
70 F.3d 1132 (10th Cir. 1995)..........3, 13

St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,
293 Ga. 419 (2013)..........4

Strickland v. Washington,
466 U.S. 668 (1984)..........8

Texas v. Cobb,
532 U.S. 162 (2001)..........5

United States v. Carter,
429 F.Supp.3d 788 (D. Kan. 2019)..........3, 13

United States v. Costanzo,
740 F.2d 251 (3d Cir. 1984)..........13

United States v. Henry,
447 U.S. 264 (1980)..........7

United States v. Jones,
44 F.3d 860 (10th Cir. 1995)..........5

United States v. Levy,
577 F.2d 200 (3d Cir. 1978)..........7, 12-13

United States v. Martin,
278 F.3d 988 (9th Cir. 2002)..........11

United States v. Morrison,
449 U.S. 361 (1981)..........8

United States v. Novak,
453 F.Supp.2d 249 (D. Mass. 2006)..........9

United States v. Salyer, No. S-10-0061 LKK (GGH), 2011 WL 6182423 (E.D. Cal. Dec. 13, 2011) 11

United States v. Wade, 388 U.S. 218 (1967) 5

United States v. Zolin, 491 U.S. 554 (1989) 7, 8

Upjohn Co. v. United States, 449 U.S. 383 (1981) 8, 14

Weatherford v. Bursey, 429 U.S. 545 (1977) 7

Constitutional Provisions

U.S. Const. amend. VI 2

Statutes

18 U.S.C. § 2510 et seq 9

18 U.S.C. § 2517(4) 9, 10

28 U.S.C. § 1257(a) 2

PETITION FOR WRIT OF CERTIORARI

Petitioner Derek James Burns respectfully petitions for a writ of certiorari to review the judgement of the Georgia Supreme Court.

OPINIONS BELOW

The opinion of the Georgia Supreme Court (Pet. App.1a-32a) is reported at Burns v. State, No. S23C1192 (Ga. Oct. 15, 2024). The earlier related opinions of the Georgia Appellate Court (Pet. App. 42a-52a) are reported at Burns v. State 364 Ga. App. XXV (case No. A22A0566)(May 26, 2022)(unpublished) and (Pet. App. 53a-68a) reported a Burns v. State, 368 Ga. App. 642, (889 SE2d 447) (2023).

JURISDICTION

The Georgia Supreme Court entered its judgement on October 15, 2024. Pet. App. 21a-22a(motion for reconsideration denied November 14, 2024. Pet. App. 69a). The Court has jurisdiction under 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISIONS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

In April 2018, Derek Burns was arrested and charged in Cobb County, Georgia, with aggravated assault, false imprisonment, family violence battery, and family violence assault stemming from an incident involving the mother of his son. While detained at the Cobb County Adult Detention Center, Mr. Burns made twenty two phone calls to his attorney Daniel Daugherty for the purpose of advice pertaining to his case, strategy with witness preparation as well as seeking bond. Each call began when Mr. Daugherty established that the calls were in fact protected by attorney-client privilege and that any state monitoring be immediately ceased. During jury trial Detective Lisa Wells with the Cobb County Police Department first denied reviewing the calls in question then after being confronted with her case notes changed her statement and testified that she had in fact listened to three of the attorney-client calls in their entirety.(Pet. App. 7a) The following day when Mr. Burns moved to suppress this recorded material and argued that the State's intentional intrusion into privileged counsel communications violated his Sixth Amendment rights the court was notified that the assistant prosecutor Lindsey Raynor also listened to the calls when after attempting to justify the breach under the guise of the crime fraud exception the assistant prosecutor articulated the substance of the calls for the court(Pet. App. 9a-10a).

Following the exposure, Mr Burns testified, asserted a affirmative defense of self defense, and was cross examined with facebook messages the search warrant for which had been secured via information the State's lead investigator obtained through the screened attorney client calls, and after the tainted assistant district attorney gave closing arguments, Mr. Burns was convicted on the charged offenses. The trial court denied Burns's motion for a new trial. On appeal, he renewed his argument that the State impermissibly interfered with attorney-client communications and that the recorded calls should have been excluded and likewise as a consequence of the intentionality his case ought to be dismissed. See (Shillinger v. Haworth, 70 F3d 1132, 1142 (II) (B) (10th Cir. 1995)). The Georgia Court of Appeals reversed and vacated the trial court's ruling with instruction that the case be remanded for the trial court to consider whether Detective Wells's and ADA Raynor's acts of listening to the recorded jail calls violated Burns's Sixth Amendment rights and intruded upon his attorney-client communications. The appellate court prescribed the four part test laid out in United States v. Carter, 429 F.Supp.3d 788,

890 (8) (VI) (B) (1) (D.Kan. 2019). See Burns v. State 364 Ga. App. XXV (Case No. A22A0566) (May 26, 2022) (unpublished)(Pet. App. 51a-52a)

Subsequent the evidentiary hearing and i*n camera* inspection and in contrast to Ada Raynor's statements the trial court found "there was no protected attorney-client communication in these calls" or "Sixth Amendment violation,". Burns's amended motion for a new trial was denied(Pet. App. 40a-41a).

On Mr Burns' second round in the appellate arena the justices affirmed but this time on entirely different grounds ascertaining, "'there is no reasonable expectation of privacy in a recorded telephone call made from a jail or prison,'" Burns, 368 Ga. App. at 645-646 (1) (a) (quoting Keller v. State, 308 Ga. 492, 497 (2) (b) (842 SE2d 22) (2020) (punctuation omitted)(Pet. App. 62a-63a).

Mr. Burns was then granted writ of certiorari by the Georgia Supreme Court on February 6, 2024 to answer the following questions: "If the State intentionally listens to a call between a defendant and his or her lawyer, does that violate the Sixth Amendment of the United States Constitution? See Shillinger v. Haworth, 70 F3d 1132 (10th Cir. 1995). (2) If so, what is the remedy for such violation? Compare Shillinger, 70 F3d at 1142 (II) (B) ("[W]e hold that when the state becomes privy to confidential communications because of its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed.")".

Ultimately the Georgia Supreme Court, in a split decision held that the attorney calls did not qualify as attorney-client privileged under state law because they were "procedural" in substance and thus concluded that any intrusion did not amount to a Sixth Amendment violation. The majority cited the following civil Georgia case law as justification for the limited ambit interpretation, "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law" and "has long been recognized in Georgia." St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C., 293 Ga. 419, 421 (1) (746 SE2d 983) (2013). "However, because recognition of the privilege operates to exclude evidence and thus impede the truth-seeking process, the privilege is narrowly construed." Id. at 422 (1) (citation omitted). (Pet. App. 20a2-22a)

And yet, the Georgia Supreme Court's unanimous decision was fractured by Justice McMillan and Justice Warren who dissented with the majority and established the following, " a review of the trial court's order denying the motion for new trial shows that the trial court made a number of conflicting factual findings within the order and that **some of the findings are belied by the recordings.** In the first call on April 27, 2018, the trial court found that Burns "called Daugherty," that Daugherty "gave his Bar Number and asked that the recording of it be terminated," and that on the call, Daugherty "did agree to file a Motion for Bond." Also, as recounted by the Court, with respect to the bond, the recording shows that "Burns asked Daugherty when he could 'get a bond' and Daugherty said that 'step one' was to 'get a hearing.'" Yet, the trial court concluded "[n]o privileged information was heard"(Pet. App. 28a). In conclusion they contended, "It is difficult to see why Burns's outgoing calls to Daugherty and asking questions about when the bond hearing would be set so he could be released from custody would not be for the purpose of obtaining legal advice on how to get released on bond, at least from Burns's perspective. Although the Court characterizes these communications as "procedural, scheduling matters about which Daugherty's advice was neither sought nor rendered," the purpose of the legal representation was to get Burns out on bond, and to thereafter determine how to schedule one, which he then conveyed to Burns. That the communications also contained personal matters unrelated to the representation **do not make the communications about obtaining a bond unprivileged**."(Pet. App. 30a-31a)

REASONS FOR GRANTING THE WRIT

Allowing this ruling to stand will permit state actors to deliberately intrude upon attorney-client communications by artificially bifurcating such communications into "procedural" and substantive components effectively nullifying the Sixth Amendment. The Georgia Supreme Court's decision sanctions an unprecedented erosion of constitutional protections that strikes at the heart of the adversarial process and warrants this Court's immediate review. The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, for "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." United States v. Wade, 388 U.S. 218, 226, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. (*See, e.g.* , *Jae Lee v. United States* , —— U.S. ——, 137 S. Ct. 1958, 1964, 198 L.Ed.2d 476 (2017)) (see also *Brewer v. Williams* , 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (holding that Sixth Amendment counsel rights attach when "judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " (*Kirby v. Illinois* , 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972))).

Mr Burns employed Daugherty's services in navigating the legal landscape from the onset of his arrest. The calls in question were the first three made from the institution and the closest in temporal proximity to the alleged event. Mr. Burns sought counsel's advice prior and during every interaction with the state. Mr. Burns has never relinquished the privilege of his attorney client conversation whether portions of those conversations involved scheduling or otherwise privilege has not been waived("The Sixth Amendment right to counsel is personal to the defendant...." Texas v. Cobb , 532 U.S. 162, 171 n.2, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) ; United States v. Jones , 44 F.3d 860, 873 (10th Cir. 1995). Mr. Burns and counselor Daugherty went so far as to erect reasonable defensive measures pertaining to his privilege and verbally establish the attorney-client privilege at the beginning of the calls (see Pet. App. 4a). Neither the trial court nor the Georgia Supreme court has provided any case law in support of a "procedural" exception as a destroyer of the Sixth Amendment right to counsel. Petitioner has searched diligently and can find no supporting case law Federal, State or

otherwise to substantiate the Georgia Supreme Court's assertion however on the contrary:

I. The Decision Below Creates an Irreconcilable Conflict with This Court's Sixth Amendment Jurisprudence

The Georgia Supreme Court's ruling that communications about bond proceedings and hearing schedules constitute mere "procedural" matters existing outside attorney-client privilege fundamentally misapprehends this Court's Sixth Amendment jurisprudence. See Weatherford v. Bursey, 429 U.S. 545, 554 n.4 (1977) (emphasizing that government intrusion into attorney-client communications threatens "fundamental rights" of criminal defendants). By artificially segregating attorney-client communications into an imagined "procedural" category, the court below has created an exception that swallows this Court's foundational principle that the Sixth Amendment safeguards the privacy of communication with counsel. see United States v. Henry, 447 U.S. 264, 295 (1980). This artificial distinction invites law enforcement to engage in precisely the type of intrusion into the attorney-client relationship that the Sixth Amendment was designed to prevent. See Maine v. Moulton, 474 U.S. 159, 176 (1985) (emphasizing that the right to counsel includes the right to prepare a defense free from governmental intrusion). Concurrently, allowing state monitoring of purportedly "procedural" attorney-client discussions, creates an exception that dissolves the rule. As recognized in United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978), any government intrusion into the attorney-client relationship threatens the Sixth Amendment right to counsel. The instant ruling permits law enforcement to record and monitor privileged calls despite explicit privilege assertions and to retroactively justify the intrusion by labeling portions as merely "procedural"—even though discussions of scheduling, filing deadlines, and hearing dates are inextricably intertwined with strategic decisions about case preparation and defense.

The Georgia Supreme Court's ruling represents a fundamental departure from the bedrock principles articulated in United States v. Zolin, 491 U.S. 554, 568-569 (1989), wherein this United States Supreme Court meticulously crafted a prophylactic framework requiring "a showing of a factual basis adequate to support a good faith belief by a reasonable person" before any intrusion into attorney-client communications may be countenanced. In the instant case the prosecutor intentionally disregarded the attorney-client privilege on the unfounded

and later abandoned basis that the crime fraud exception justified immediate intrusion. By sanctioning this action the trial court and the Georgia Supreme Court completely sidestepped the established precedent present in Zolin and the Constitutional protections therein. The implications of this behavior are profoundly grave. Consider, arguendo through the lens of a capital case, the Kafkaesque implications of permitting law enforcement to monitor all communications between death row inmates and their post-conviction counsel, later justifying such surveillance by categorizing discussions of filing deadlines or hearing dates as merely "procedural." Such a regime would eviscerate constitutional protections at precisely the moment when they are most vital. When counsel and a death row inmate discuss the timing of a habeas petition, they are not merely engaging in ministerial scheduling—they are making life-or-death strategic decisions about which claims to prioritize, which new evidence to develop, and how to navigate complex procedural barriers.

The seemingly mundane discussion of when to file becomes inextricably intertwined with substantive strategic choices: whether to wait for pending forensic results, whether to prioritize newly discovered Brady material, or whether to sequence claims to preserve both state and federal review. As the Court observed in McQuiggin v. Perkins, 569 U.S. 383, 393 (2013), even procedural decisions in capital cases can have life-or-death implications. Under the Georgia Supreme Court's reasoning, law enforcement could monitor these critical strategic discussions simply by labeling them "procedural," thereby obtaining a preview of the defense's post-conviction strategy and creating an insurmountable constitutional injury that no subsequent remedy could cure. See Glasser v. United States, 315 U.S. 60, 76 (1942) ("The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

The current ruling renders Zolin's carefully calibrated threshold requirements nugatory, effectively permitting the state to engage in precisely the type of speculative reconnaissance that this Supreme Court expressly proscribed. The detective and prosecutor's conduct here—listening to communications they indisputably knew were directed to counsel, absent any preliminary showing of non-privilege—exemplifies the very mischief Zolin's framework was designed to prevent. The investigator overheard Mr. Burns in the first and second call instruct his attorney to strategically procure facebook

messages relevant to the case alongside instructions for counsel to communicate with no less than four individuals all of whom ended up on the State's witness list. The State after gleaning information from the calls then went on to secure a warrant for the same facebook messenger account referenced in the attorney calls. By sanctioning this post hoc rationalization through an artificial bifurcation of attorney-client communications, the Georgia Supreme Court has not merely misapplied Zolin; it has effectively abrogated its essential protections, creating a blueprint for systematic circumvention of the attorney-client privilege through retroactive categorization of intercepted communications. see also, United States v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir. 1991) and United States v. DeLuca, 663 Fed. Appx. 875, 878-881 (11th Cir. 2016). Mr. Burns was denied his sixth amendment right and many more will suffer the same fate unless this writ is granted

This Court has consistently recognized that the right to counsel encompasses all aspects of legal representation. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Massiah v. United States, 377 U.S. 201, 205-06 (1964). Yet, the decision below permits law enforcement to deliberately monitor attorney-client communications about bond hearings, scheduling, and case management—matters inextricably intertwined with defense strategy and trial preparation. This directly contravenes this Court's admonition that the Sixth Amendment is violated whenever the state "deliberately elicits" information from an accused after the right to counsel has attached. Maine v. Moulton, 474 U.S. 159, 176 (1985). concurrently "The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." United States v. Morrison, 449 U.S. 361, 365 (1981). The Georgia Supreme Court's attempt to parse "procedural" from substantive communications ignores the reality that legal representation involves a seamless web of strategic choices. See Strickland v. Washington, 466 U.S. 668, 688 (1984).

Even seemingly procedural discussions about scheduling or filing deadlines inherently reveal defense strategy and preparation. Petitioner will not elaborate on the fact that the three calls total more than thirty five minutes, involve a tremendous amount of other case related elements and starkly contradict the block quote cited by the Georgia Supreme Court majority of ADA Raynor's in court rendition of the contents of the calls (Pet. App. 9a-10a). Nor will petitioner elaborate on Justice Warren and Justice McMillian's dissent wherein referencing the

trial court ruling they assert the “findings are belied by the recordings”(Pet. App. 28). This is due quite simply because the more paramount issue, the prohibition on assistance of counsel trumps all and exists as a fundamental Constitutional right. If permitted to stand, the decision below would expand the circumstances under which people in Georgia may have their attorney-client conversation dissected beyond what is permissible under any existing precedent. This Court should grant review to correct the lower court’s egregiously wrong decision.

II. The Decision Violates Numerous Federal Statutes

The Georgia Supreme Court's ruling contravenes explicit federal statutory protections codified in 18 U.S.C. § 2517(4) and the Electronic Communications Privacy Act, 18 U.S.C. § 2510 et seq., which collectively establish an inviolable barrier against governmental intrusion into privileged attorney-client communications. Congress's unambiguous command that privileged communications "shall not lose [their] privileged character" through interception creates a categorical prohibition that allows no exception for communications unilaterally deemed "procedural" by state actors.

The detective's intentional monitoring of these communications, followed by the prosecutor's exploitation thereof, constitutes precisely the type of unauthorized interception that Congress sought to proscribe. As the District Court held in United States v. Novak, 453 F.Supp.2d 249, 255-56 (D. Mass. 2006), attorney-client calls are fundamentally different from other inmate communications because "monitoring of those calls is expressly prohibited by [federal] regulations." The court emphasized that "in the case of attorney-client communications, the balancing of the institution's need for security against the inmate's privacy interest tilts heavily in favor of the inmate's privacy interest." Id. at 257. This principle is particularly resonant here, where the detective admitted knowing from the first call that it was to an attorney's office, yet continued monitoring without checking whether the number was on the protected attorney list. See id. at 254 (suppressing evidence where the officer "knew from the first call that [defendant] was calling an attorney's office" yet continued monitoring). The Georgia Supreme Court's attempt to retroactively justify this intrusion through an artificial "procedural" communications distinction finds no support in federal law and directly contravenes Congress's unambiguous command in 18 U.S.C. § 2517(4)

that privileged communications "shall not lose [their] privileged character" through interception.

The decision below effectively nullifies these federal protections by creating an unprecedented "procedural" communications exception that exists nowhere in the statutory text. This judicial grafting of extra-textual limitations onto explicit Congressional commands violates fundamental principles of federal supremacy and statutory interpretation. See Arizona v. United States, 567 U.S. 387, 399 (2012) (state law must yield when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Where Congress has spoken clearly to protect privileged communications from governmental intrusion, states may not create artificial distinctions to circumvent those protections.

III. The Georgia Supreme Court's Decision not only Contradicts the United States Supreme Court but Stands Alone in State, Federal and District Courts

The Georgia Supreme Court's decision in Burns stands in stark contrast to the well-reasoned approach to attorney-client privilege articulated by the Arizona Supreme Court in Clements v. Bernini. While the Arizona Supreme Court establishes that attorney-client privilege arises from constitutional rights and requires only a prima facie showing of basic elements (attorney-client relationship, legal advice purpose, confidentiality, and confidential treatment), the Burns ruling creates an artificially narrow standard excluding "procedural" or "scheduling" matters. The Arizona Supreme Court explicitly rejects a bright-line rule that recorded jail calls automatically waive privilege and requires courts to examine whether recording policies unreasonably burden the right to counsel. In contrast, Burns effectively creates such a bright-line rule without analyzing the constitutional implications. Furthermore, while the Arizona Supreme Court establishes a balanced burden-shifting framework requiring only a prima facie showing before the burden shifts to the party challenging privilege, Burns places a continuous heavy burden on defendants while allowing privilege invasion based on unsupported and abandoned assertions by both prosecutors and investigators alike. The Burns decision thus represents a significant

departure from established constitutional principles governing attorney-client privilege as articulated by the Arizona Supreme Court in Clements and other precedents(Clements v. Bernini, 471 P.3d 645, 249 Ariz. 434 (Ariz. 2020).

The U.S. District Court's decision in United States v. Salyer, No. S-10-0061 LKK (GGH), 2011 WL 6182423 (E.D. Cal. Dec. 13, 2011), provides a constitutionally rigorous framework that exposes fundamental flaws in the Georgia Supreme Court's Burns analysis. While Salyer established that attorney-client privilege requires proving "the primary or predominate purpose of the attorney-client consultations is to seek legal advice or assistance," id. at *1017 (citing Rice, Attorney-Client Privilege § 7:5), Burns creates an artificially narrow standard that categorically excludes certain communications without proper analysis. The Salyer court emphasized that "blanket assertions are extremely disfavored," id. at *1018 (citing United States v. Martin, 278 F.3d 988, 1000 (9th Cir. 2002)), requiring instead that parties "identify specific communications and the grounds supporting the privilege as to each piece of evidence." Id. The court meticulously reviewed 119 recorded conversations and after this analysis, the court found that five specific calls were protected by attorney-client privilege and must be suppressed, id. at *1031, demonstrating that even under the most exacting scrutiny, constitutional protections for genuine legal communications remain intact - a nuanced approach entirely absent from Burns' categorical dismissals.

The Moran framework (*U.S. v. Abbell*, 914 F. Supp. 519 (S.D. Fla. 1995) stands in stark contrast to the Georgia Supreme Court's decision, highlighting their failure to provide constitutionally adequate protections for attorney-client communications. While Moran established a comprehensive three-part analysis requiring examination of: "(a) whether documents are responsive to the search warrant... (b) whether documents are protected by attorney client privilege... and (c) whether any valid exception defeats the asserted privilege," id. at *2, Burns creates categorical exclusions without meaningful review. Moran mandated specific procedural safeguards including strict timeframes for privilege logs (48 hours), item-by-item privilege determinations by a neutral Special Master, and defined periods for objections (10 days) and responses (5 days). Id. at *2-3. The court even required technological protections for computer searches using "information retrieval software" rather than manual review, with prosecution teams barred from examining documents before privilege determinations. Id. at *3. Burns, in contrast, allows privilege invasion based on prosecution assertions

without requiring concrete evidence or neutral review (it should be noted in Burns that twenty two attorney calls were in the state's possession for more than a year before trial). The Moran approach thus provides a constitutionally sound model that other courts have followed, unlike the Georgia Supreme Court's disturbing departure that fails to adequately protect legitimate attorney-client communications through neutral, systematic review procedures.

Concurrently, the Stewart decision *U.S. v. Stewart*, No. 02 Cr. 395 (JGK) (S.D.N.Y. June 11, 2002) articulates a constitutionally cognizable framework that starkly illuminates the deficiencies in Georgia Supreme Courts treatment of attorney-client privilege. Whereas the language in Burns incentivises wholesale abrogation of privileged communications absent any meaningful judicial oversight, Stewart established a tripartite analysis mandating that a Special Master determine: "(a) whether documents are responsive to the warrant's particularity requirements; (b) whether materials are protected by attorney-client privilege or work product doctrine; and (c) whether any valid exceptions, including crime-fraud, vitiate asserted privileges." Id. at *15. The court emphasized that procedures must not only satisfy constitutional minima but must also maintain the appearance of justice to preserve "the public's confidence in the administration of justice and the willingness of clients to engage in candid communication with counsel." Id. at *12. Stewart explicitly rejected the government's contention that a "taint team" provided adequate prophylactic measures, holding that "reliance on the implementation of a Chinese Wall, especially in the context of a criminal prosecution, is highly questionable and should be discouraged." Id. (quoting In re Search Warrant, 153 F.R.D. at 59). The court mandated specific procedural safeguards including: neutral in camera review, detailed privilege logs subject to temporal constraints, and de novo judicial review of contested determinations. Id. at *15-16. Burns, by contrast, permits invasion of privileged communications based solely on patently false prosecutorial representations, absent the procedural protections necessary to safeguard Sixth Amendment interests. Stewart thus provides a constitutionally sound paradigm for protecting attorney-client communications that the Georgia Supreme Court resolutely failed to achieve.

The Third Circuit's ruling in *United States v. Levy*, 577 F.2d 200 (3d Cir. 1978) fundamentally defined the constitutional landscape governing prosecutorial intrusion into defense counsel communications,

and exposes critical flaws in Burns' superficial treatment of attorney-client privilege. While the Georgia Supreme Court rubber-stamps governmental invasion of confidential attorney communications without substantive judicial review, the Third circuit mandates that any deliberate breach of attorney-client confidentiality triggering disclosure to prosecutors demands dismissal, flatly rejecting the notion that such violations can be excused through post-hoc prejudice analysis. The opinion dismantles the government's proposed "actual harm" test as both practically unworkable and constitutionally inadequate, noting that courts cannot realistically trace how leaked defense information may have subtly influenced prosecutorial strategy. In establishing this bright-line rule requiring dismissal upon proof of disclosure, rather than proof of prejudice, a robust framework was established that safeguards the attorney-client relationship and stands in marked contrast to Burns' perfunctory approach permitting invasion of privileged communications based on unchecked prosecutorial assurances. see also United States v. Costanzo, 740 F.2d 251, 257 (3d Cir. 1984) (finding prejudice "inherent" in prosecution accessing defense planning).

The Supreme Judicial Court of Massachusetts which held sacrosanct the attorney-client privilege as fundamental to the administration of justice, stands in compelling contradiction to Burns' erosion of these protections. In John Doe the State Court Justices articulated an "extraordinarily high value" on preserving privileged communications as essential to informed representation and explicitly rejected any judicial balancing of societal interests against this constitutional safeguard, Burns fundamentally departed from this principle by sanctioning governmental intrusion through an artificial bifurcation of "procedural" versus "strategic" communications. The Burns dissent specifically challenges this distinction, noting that even seemingly procedural communications about bond hearings were inextricably linked to the purpose of legal representation and the attorney's professional judgment and remain privileged and protected(Pet. App. 30a-31a). This tension crystallizes in John Doe's foundational holding that "the social good derived from the proper performance of the functions of lawyers acting for their clients... outweigh[s] the harm that may come from the suppression of the evidence"—a constitutional principle that Burns' framework substantially undermines through its sanctioning of governmental intrusion into privileged communications see *In the Matter of a John Doe Grand Jury Investigation*. 408 Mass. 480, 562 N.E.2d 69 (Mass. 1990).

Finally we are led to the defining case law prescribed by Burns' initial appellate Court.(Pet. App. 51a-52a) In Carter, identical to Burns, prosecutors possessed and distributed audio recordings of telephone calls between various attorneys and several detainees at a large, private detention facility in Leavenworth, Kansas. The United States District Court for the District of Kansas noted the likelihood of habeas litigation which would result from the United States Attorney's Office (USAO) possessing recordings of attorney-client calls. Consequently, the Carter court laid out its roadmap for case-by-case individualized relief for the 110 habeas corpus petitions filed to date. The court asserted "Under Shillinger, a per se Sixth Amendment violation occurs when: (1) there is a protected attorney-client communication; (2) the government purposefully intruded into the attorney-client relationship; (3) the government becomes "privy to" the attorney-client communication because of its intrusion; and (4) the intrusion was not justified by any legitimate law enforcement interest. Once these elements are established, prejudice is presumed." *United States v. Carter*, 429 F. Supp. 3d 788 (D. Kan. 2019) also Shillinger v. Haworth, 70 F.3d 1132, 1142 (10th Cir. 1995) Different from Burns is the intentional listening by two state actors which which resulted in evidence being utilized against Mr. Burns in trial. Concurrently, nowhere did the Carter court contend that "procedural" attorney client discussion dissolves protection nor could the inference be made that "scheduling" or personal discussions with one's attorney would abrogate the protections afforded by the Sixth Amendment.

As petitioner has previously stated and as the above diverse case collection reaffirms, no standing case law can be found with substantiating language to vindicate Georgia's assertion that "procedural" attorney-client discussion diminishes Sixth Amendment constitutional protection or that such discussion somehow exists outside of the protections afforded by attorney-client privilege. Serving to reinforce the perplexity of Georgia Supreme Court's flawed legal logic. Justice Warren and McMillian in their dissent concluded. "the purpose of the [Daugherty's] legal representation was to get Burns out on bond, and to thereafter determine how to schedule one, which he then conveyed to Burns. **That the communications also contained personal matters unrelated to the representation do not make the communications about obtaining a bond unprivileged.**" (Pet. App. 30a-31a)

This persistent division has created a constitutional landscape where the scope of Sixth Amendment protection depends entirely on geography. A defendant in Massachusetts receives full protection for procedural communications, while an identical conversation in Georgia receives none. The Georgia Supreme Court's categorical exclusion of "procedural" and "scheduling" communications from constitutional protection further deepens these rifts and threatens to eviscerate meaningful attorney-client communication for detained defendants nationwide. Only this Court's intervention can restore uniformity to this vital constitutional protection.

IV. The Georgia Supreme Court's Decision Strips Criminal Defendants in Georgia of a Fundamental Constitutional Right.

The Georgia Supreme Court's decision creates an impermissible contradiction regarding the scope of the attorney-client privilege. The purpose of the privilege is:

> to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes 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 (II) (1981).

Allowing the State to maintain that "procedural" attorney client communication is not privileged and somehow negates the attached privilege to all conversation contained therein not only chills the attorney client relationship but effectively neutralizes any Sixth Amendment protections associated with attorney-client conversation and likewise negates a fair trial for those currently incarcerated in Georgia. How can it be said that incarcerated Georgians are afforded a Sixth Amendment when the ominous downstream effect is to enable new opportunities for law enforcement to knowingly review a defendant's jail calls with his attorney so that the State may unilaterally determine whether any communications therein were procedural or strategic, in furtherance of, or merely related to, the purpose of the representation?

At present, if a Georgia defendant speaks to his attorney about "scheduling" matters the entire conversation loses privilege. At present

if a Georgia defendant speaks to his attorney about "personal" matters the entire conversation loses privilege. At present if a Georgia defendant speaks to his attorney about "procedural" matters the entire conversation loses privilege. Likewise as the instant case proves the contents and work product of these calls and the poisonous taint therein can exist in discovery and will be used against a defendant in open court. Where and what will stop Georgia's Sixth Amendment eroding slippery slope if not this United States Supreme Court?

The absurdity existing within the instant legal logic only serves to fundamentally deprive accused Georgians of what little opportunity they have to mount a concerted defense. With the ruling below why would it matter whether Georgians used a public jail line or an attorney line? If the rule is now that communications merely related to the purpose of the representation are not protected, or that procedural or personal conversations may obviate the confidentiality of the entire call, what would preclude investigators from reviewing attorney-client calls on an attorney jail line? "The assistance of counsel...is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." Powell v. Alabama, 287 U.S. 45, 53 (1932). That safeguard becomes meaningless for Georgians if the State can unilaterally strip protection from attorney-client communications through artificial distinctions unknown to history or precedent. The Georgia Supreme court's endorsement of its officers' repeated conscious disregard for the law, the Sixth Amendment, and the sanctity of the attorney-client relationship cannot be allowed to stand. The writ should be granted

CONCLUSION

Only this Court's intervention can restore the Sixth Amendment safeguards that the Framers understood as essential to liberty. The tone and pitch of our Sixth Amendment must ring true, strong and unbroken, across every inch and every jurisdiction of this great country. Justices of the United States Supreme Court the writ should be granted.

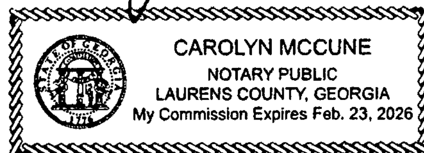
Respectfully submitted

Derek J. Burns
1000060918
290 Donovan Harrison Rd,
Wrightsville, GA 31096

Pro Se Petitioner

February 3, 2025

2/3/25
Carolyn McCune



APPENDIX