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APPENDIX A – OPINION OF THE SUPREME COURT OF THE STATE OF GEORGIA FILED OCTOBER 15 2024

In the Supreme Court of Georgia

Decided: October 15, 2024

S23G1192. BURNS v. THE STATE.

LAGRUA, Justice.

"The Sixth Amendment to the United States Constitution guarantees that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" *Adams v. State*, 317 Ga. 342, 350 (2) (893 SE2d 85) (2023) (quoting U.S. Const. amend. VI). "It is well established that the right to counsel protected by the Sixth Amendment is the right to the effective assistance of counsel." Id. (citation and punctuation omitted). And "[t]he Sixth Amendment right to effective assistance of counsel includes the ability to speak candidly and confidentially with counsel free from unreasonable Government interference." *United States v. Carter*, 429 FSupp.3d 788, 890 (VI) (B) (1) (D. Kan. 2019) (citing *Shillinger v. Haworth*, 70 F3d 1132, 1142 (II) (B) (10th Cir. 1995)).

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In this case, Petitioner Derek Burns, who was convicted of aggravated assault and other crimes following a jury trial in 2019, argues that he is entitled to a new trial because the State intentionally listened to recorded jail calls between Burns and his attorney in violation of his Sixth Amendment rights. We granted certiorari to decide whether Burns's Sixth Amendment rights were violated by the State as he claims, and if so, what the remedy would be for such a violation. The trial court concluded that the jail calls between Burns and his attorney were not protected by the attorney-client privilege, and thus, there was no violation of Burns's Sixth Amendment right to counsel. The Court of Appeals affirmed the trial court's ruling, but for different reasons. See *Burns v. State*, 368 Ga. App. 642, 645-646 (1) (a) (889 SE2d 447) (2023). For the reasons that follow, we also conclude that the attorney-client privilege did not protect the jail calls at issue and that Burns's Sixth Amendment rights were not violated, and we therefore affirm the judgment of

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the Court of Appeals', albeit on different grounds. See id. at 646 (1) (a).

1. On April 23, 2018, Burns was arrested on aggravated assault and other charges in connection with the attempted strangulation of his girlfriend. Following his arrest, Burns was detained in the Cobb County Adult Detention Center, and during his detention, he made three outgoing phone calls on the jail's recorded phone line to Daniel Daugherty, a lawyer who represented Burns from April 30, 2018 to May 31, 2018,[1] for the limited purpose of seeking a bond for Burns. The recorded jail calls between Burns and Daugherty occurred on April 27, 2018. May 1, 2018, and May 2, 2018.

The recordings of the three jail calls reflect that, at the beginning of each phone call, a recorded message notified Daugherty that "this [was] a free call from [Burns], an inmate at the Cobb County Adult Detention Facility" and then informed the two men that the call was being recorded—specifically stating, "this call is

[1] Burns was also represented during this timeframe by Connie McManus, a public defender.

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from a corrections facility and is subject to monitoring and recording." As soon as the recorded message ended on the April 27 call, Daugherty requested that the jail "stop recording" and stated that the call was protected by the attorney-client privilege. At the beginning of the May 1 call, after the recorded message concluded, Burns said to Daugherty, "Hey, do you want to do the f**king recording thing." Daugherty then stated his name and bar number, identified himself as Burns's attorney, indicated that the call was protected by the attorney-client privilege, and said, "please turn off the recording now or stop listening." Right after making these statements, Daugherty advised Burns that "they" could still listen to the calls, but "they just don't use it in court." Burns said he knew that, but "either way," they were "not going to talk about anything sensitive" anyway. At the beginning of the May 2 call, after the recorded message ended, Daugherty stated his name, identified himself as Burns's attorney, indicated that the call was protected by

attorney-client privilege, and directed the jail to "stop recording or stop listening."

At various points during each of the jail calls, Daugherty told Burns that there were certain matters he wanted to discuss with Burns, but he wanted to wait until they met in person at the jail. In large part, the three phone conversations concerned bond and personal matters—including Daugherty telling Burns that he would pick up Burns's mail; Burns asking Daugherty to bring him newspapers and other reading materials; Daugherty describing his recent trip to the lake and what he did over the weekend; and a discussion about Burns's dog. With respect to bond, during the first call, Burns asked Daugherty when he could "get a bond," and Daugherty said that "step one" was to "get a hearing." During the second call, Burns told Daugherty that he "need[ed] a bond" and asked Daugherty when the bond hearing would occur, and Daugherty responded that the hearing would take place in "probably a couple weeks." During the third call, Daugherty told Burns that

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the bond hearing was scheduled for May 15 and that his "main goal" was to get Burns out of jail on bond.

The three jail calls were raised for the first time at Burns's trial in October 2019 during the testimony of Cobb County Police Department Detective Lisa Wells. After the State concluded its direct examination of Detective Wells, Burns cross-examined Detective Wells, initially focusing on whether Detective Wells had noted any inconsistencies between the victim's trial testimony and the victim's prior account of the events leading to Burns's arrest. Burns's trial counsel then paused her examination of Detective Wells and asked the trial court for permission to address the court "outside of the presence of the jury." After the jury was excused, defense counsel advised the trial court that Detective Wells needed to be questioned "on the record but outside the presence of the jury." without giving any details about the nature of that questioning. The trial court allowed defense counsel to proceed without the jury, and the following exchange occurred:

[DEFENSE COUNSEL]: Did you review the jail calls between my client and his attorney?

[DETECTIVE WELLS]: Yes.

[PROSECUTOR]: Between Mr. Burns and his attorney?

[DETECTIVE WELLS]: Oh, no, no, no. If he came on the recording, I did not listen to any of those. I did not listen to those, because I know better than to listen to them.

[DEFENSE COUNSEL]: Okay, then why did you say in your supplemental report that all calls involving Daniel Daugherty were reviewed but not documented due to the attorney-client privilege?

[DETECTIVE WELLS]: Because at the time, I didn't—I don't know. Yeah, I stopped listening to them. That's the best answer I can give you, is that when I realized that he was the attorney, I had to shut it down.

[DEFENSE COUNSEL]: Isn't it true that at the beginning of every phone call with my client and his attorney, he states his name and his bar number?

[DETECTIVE WELLS]: I don't think he stated his bar number.

[DEFENSE COUNSEL]: He stated he was his attorney. You knew he was his attorney, you put it in the supplemental report.

[DETECTIVE WELLS]: Yeah, I did. I reviewed some of the calls. I reviewed some of the calls and did not

> document. I believe I made a phone call to ask the District Attorney's Office if I could review the calls, and I was told no, to document. So yes, I did listen to some of the calls.

Following this testimony, Burns moved for a mistrial, arguing that he had been prejudiced by Detective Wells's review of "confidential information, telephone calls" between Burns and his attorney. The trial court advised that it would need to hear testimony from Daugherty to rule on the motion, and defense counsel indicated she could make Daugherty available to testify the next day. The trial court reserved its consideration of the motion until the following morning.

The next day, Burns again presented his motion for a mistrial,[2] arguing that, although Burns was ultimately represented by different counsel prior to and at trial, Daugherty represented Burns for a brief period following his arrest.[3] Burns contended that,

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[2] The record reflects that Daugherty did not ultimately testify at the motion-for-mistrial hearing.

[3] The trial court acknowledged that it had received a copy of Daugherty's entry of appearance, which was entered on April 30, 2018, and withdrawn on May 31, 2018.

because Detective Wells testified that she listened to recordings of jail calls between Burns and Daughterty, the "attorney-client privilege [was] violated for security purposes," and it was "grounds for a mistrial."

In response, the State argued that Daugherty strictly represented Burns in the "limited capacity" of "a bail hearing only," and not in any other aspect of the case. One of the prosecuting attorneys, Assistant District Attorney ("ADA") Lindsey Raynor, then informed the trial court that, the prior evening, she reviewed the "three jail calls that [we]re listed in Detective Wells' report," and she stated the following with respect to those calls:

> Mr. Daugherty, the purported lawyer, says [on one of the calls]: "You know that they still get to listen to these calls, they just don't get to use it in court." And the defendant says: "Yeah, I know, either way, but we're not really going to talk about anything sensitive here anyway." So he's aware at least. Either he's pretending or some kind of way invoking some kind of attorney-client privilege or whatever the situation. But he knows: "We're not going to talk about anything sensitive, and we know they're still going to listen anyway, so just don't talk about anything sensitive. . . ." [T]hey are [also] talking about influencing, persuading, or coercing the victim in this case to change

> her statement or to give a statement that this never happened or that she overexaggerated or whatever. They have conversations as such that they need to make her change her statement before anybody's willing to file a motion for bond.

The State further argued that there had been "no unfair advantage" or "harm to the defendant in this situation" because the State was about to conclude its case-in-chief, and none of the jail calls had been played for the jury or even referenced at trial. The State reiterated that, "once [Detective Wells] learned" that Burns was speaking to his lawyer on the calls, she notified her supervisor and the other prosecuting attorney in the case that Burns's calls with his lawyer were being recorded. The State argued that Detective Wells was advised by the prosecuting attorney not to listen to any more of the calls, and so Detective Wells stopped listening to "the substance of those calls." ADA Raynor then emphasized that she did not listen to the substance of the calls either.

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Following the State's argument, Burns argued that "the problem [was] even worse now, because now the State and the prosecution ha[d] actually listened to the calls" and relayed "what the substance of the calls was," and thus, "everybody ha[d] violated [his] attorney-client privilege." Burns also noted that Detective Wells did not discontinue listening to the calls "once she realized who it was," as alleged by the State. Burns advised that, at the beginning of every one of the phone calls he made to Daugherty, Daugherty stated his name and his bar number and said to "[p]lease discontinue recording."

The trial court informed the parties that it had reviewed the entire case file and observed that Daugherty entered "a limited appearance, only for the purpose of bail . . . for a bail hearing." The trial court also noted that, while Detective Wells listened to the calls between Burns and Daugherty, she stopped listening when she realized who was speaking. The trial court ruled that there was "no

harm to the defendant at this point," and that it was "certainly not going to grant a mistrial."

At trial, the jury found Burns guilty of aggravated assault, false imprisonment, family violence battery, and family violence assault. Following Burns's convictions, he filed a motion for new trial, contending, among other things, that his attorney-client-privilege rights were violated when Detective Wells and ADA Raynor listened to the jail calls between Burns and Daugherty. Burns further argued that the State's intentional intrusion into his attorney-client relationship constituted a direct interference with and *per se* violation of his Sixth Amendment rights.

The trial court denied Burns's motion for new trial. On appeal, the Court of Appeals vacated the trial court's ruling because the trial court had not "explicitly engaged in any analysis of the Sixth Amendment" and remanded the case 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 by

intruding upon his attorney-client communications. *Burns v. State* 364 Ga. App. XXV (Case No. A22A0566) (May 26, 2022) (unpublished).

On remand, the trial court held an evidentiary hearing on Burns's motion for new trial and heard testimony from Daugherty about his representation of Burns and the nature and purpose of the three jail calls, and from Detective Wells and ADA Raynor about the circumstances surrounding their review of the jail calls. Following the motion-for-new-trial hearing, the trial court conducted an in camera review of the three jail calls between Burns and Daugherty and subsequently issued an order denying Burns's motion for new trial.

In denying Burns's motion for new trial, the trial court addressed the three jail calls at issue, noting the following: (1) during the April 27 jail call, Daugherty "gave his Bar Number and asked that the recording of [the call] be terminated," but "[t]here was nothing in this call that, if overheard, would prejudice [Burns's]

defense" and "[n]o privileged information was heard"; (2) during the May 1 jail call, Burns "reminded Daniel Daugherty" at the outset of the phone call "to give the information so the call would not be recorded," but the second "call did not contain any trial or case information"; and (3) during the May 2 jail call, Daugherty "answered himself as the attorney of record" and told Burns when the bond hearing had been set; Burns was "concerned about another case, not this one, but Mr. Daugherty was clear that his representation was only to get [Burns] out of jail in this case"; and "there was no privileged information heard or anything that would prejudice [Burns's] defense in this case." The trial court also determined that Burns's and Daugherty's "only communication about legal matters was the question of a bond hearing"—specifically, that Daugherty said "he would apply for one, had applied[,] and had a court date." The trial court further noted that, during the jail calls, "[n]o legal advice was given nor strategy for the case was set out," and "Daugherty said his only role in the case was

to get [Burns] out of jail." For these reasons, the trial court concluded "there was no protected attorney-client communication in these calls" or "Sixth Amendment violation," and thus, Burns's motion for new trial should be denied.

Burns timely appealed the denial of his motion for new trial to the Court of Appeals. The Court of Appeals affirmed Burns's convictions, concluding that "'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)), and thus, Burns could not "rightfully contend" that his calls with Daugherty were "confidential or privileged." Id. at 646 (1) (a). The Court of Appeals further determined that, because the attorney-client privilege "'does not extend to those situations in which third parties are present for attorney-client discussions'" and because Burns and Daugherty "knew they were being recorded and knew the State would be able to listen," the calls were not "confidential or ever

reasonably intended to be such." Id. at 645-646 (1) (a) (quoting *Rogers v. State*, 290 Ga. 18, 20-21 (2) (717 SE2d 629) (2011)). On this basis, the Court of Appeals held that "the trial court did not abuse its discretion in finding that the three calls at issue were not privileged and that Burns failed to show a violation of his Sixth Amendment right to counsel." Id. at 646 (1) (a).

Burns filed a petition for a writ of certiorari in this Court, which we granted to decide whether the State violated Burns's Sixth Amendment right to counsel when it listened to the jail calls at issue. However, we need not reach that issue because, as explained below, the jail calls were not privileged in the first instance.

2. A threshold issue in assessing Burns's Sixth Amendment claim in this case is whether the communications at issue are privileged. See *Howard v. State*, 279 Ga. 166, 169-170 (3) (a) (611 SE2d 3) (2005) (holding that, if the communications at issue "are not afforded privileged status," it "negates any claim that their disclosure violated defendants' right to counsel under the Sixth

Amendment"). That is a question of state law. See *State v. Ledbetter*, 318 Ga. 457, 461-462 (1) (c) (899 SE2d 222) (2024). "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). "The [attorney-client] privilege belongs to the client, not the attorney," and "as the proponent of the privilege," the client "has the burden to establish that the privilege exists." *Ledbetter*, 318 Ga. at 462 (1) (c) (citations and punctuation omitted). See also *Howard*, 279 Ga. at 170 (3) (a).

In this case, the trial court concluded that the jail calls were not protected by the attorney-client privilege because no "trial or case information" was discussed and "[n]o legal advice was given nor

strategy for the case was set out" during these communications. We review a trial court's decision regarding the application of a privilege, including the attorney-client privilege, for an abuse of discretion. See *Wiles v. Wiles*, 264 Ga. 594, 598 (2) (448 SE2d 681) (1994) (holding that appellate courts review a trial court's decision about the application of the psychiatrist-patient privilege for an abuse of discretion). See also e.g., *Adams v. State*, 260 Ga. 298, 300 (2) (392 SE2d 866) (1990) (holding that a trial court's decision concerning the marital privilege is reviewed for an abuse of discretion); *Etowah Environment Group, LLC v. Walsh*, 333 Ga. App. 464, 475 (3) (774 SE2d 220) (2015) (noting that appellate courts review a trial court's decision as to the application of the attorney-client privilege for abuse of discretion). Under the abuse-of-discretion standard, the trial court "is afforded substantial deference that allows for a range of permissible outcomes, as long as that discretionary decision is based on a correct understanding of the law and facts." *Premier Pediatric Providers, LLC v. Kennesaw*

Pediatrics, P.C., 318 Ga. 350, 359 (3) (898 SE2d 481) (2024) (citation omitted). Accordingly, "those findings will generally not be disturbed as long as they are within the bounds of the law, based on correct, relevant facts, and within the range in which reasonable jurists could disagree." Id. at 358 (2) (citation and punctuation omitted).

Under this deferential standard of review, we conclude that the trial court did not abuse its discretion in concluding that the jail calls at issue were not protected by the attorney-client privilege. We have held that, for the attorney-client privilege to attach, "the communication must have been made for the purpose of getting or giving legal advice." *St. Simons Waterfront, LLC*, 293 Ga. at 426 (1). And, "[i]n Georgia, the privilege is narrowly construed, because its application operates to exclude evidence and thus to impede the search for the truth." *Hill, Kertscher & Wharton, LLP v. Moody*, 308 Ga. 74, 79 (2) (839 SE2d 535) (2020). See also *Rogers*, 290 Ga. at 20 (2) (quoting *Bryant v. State*, 282 Ga. 631, 636 (4) (651 SE2d 718)

(2007)) ("Indeed, the statutes outlining the attorney-client privilege are not broadly construed; the attorney-client privilege . . . has been confined to its narrowest permissible limits," and "[i]nasmuch as the exercise of the privilege results in the exclusion of evidence, a narrow construction of the privilege comports with the view that the ascertainment of as many facts as possible leads to the truth, the discovery of which is the object of all legal investigation.") Accord *Davis v. State*, 285 Ga. 343, 347 (6) (676 SE2d 215) (2009); *Tenet Healthcare Corp. v. La. Forum Corp.*, 273 Ga. 206, 208 (1) (538 SE2d 441) (2000).[4]

Given this narrow construction and application of the attorney-client privilege, the trial court's findings and conclusions regarding the jail calls at issue are sufficiently supported by the record in this case. Based on these recordings, the trial court was within its

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[4] We note that, in *St. Simons Waterfront, LLC*, we also stated that the attorney-client privilege attaches where "the communications in question relate to the matters on which legal advice was sought." *St. Simons Waterfront, LLC*, 293 Ga. at 423 (1). However, that statement was dicta, and we do not apply it here.

discretion to conclude that, while Burns and Daugherty discussed trying to obtain a bond for Burns and when the bond hearing would occur, this exchange of information was not made for the purpose of Burns's "getting" or Daugherty's "giving" of "*legal* advice." *St. Simons Waterfront, LLC*, 293 Ga. at 426 (1) (emphasis supplied). These were—essentially—procedural, scheduling matters about which Daugherty's advice was neither sought nor rendered. And the rest of their conversations during the jail calls largely pertained to personal issues, requests, and favors, further revealing the generally informal nature of these communications.

Thus, the trial court did not abuse its discretion when it concluded that the attorney-client privilege did not attach to these communications. *St. Simons Waterfront, LLC*, 293 Ga. at 426 (1). And, absent privileged communications, there was no violation of Burns's Sixth Amendment right to counsel in this case. See *Howard*, 279 Ga. at 169-170 (3) (a) (holding that, where communications are not attorney-client privileged, their "disclosure" will not violate

"defendants' right to counsel under the Sixth Amendment"). Accordingly, we affirm.[5]

Judgment affirmed. All the Justices concur, except Bethel, J., who concurs in judgment only, and Warren and McMillian, JJ., who dissent.

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[5] Because we conclude that the trial court did not abuse its discretion in determining that the particular communications at issue here were not privileged, we express no opinion as to the Court of Appeals' conclusion that the communications here were not confidential.

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LAGRUA, Justice, concurring.

I concur fully in the majority opinion. I write separately to address and rectify one of the Court of Appeals' legal conclusions in this case. See *Burns v. State*, 368 Ga. App. 642, 646 (1) (a) (889 SE2d 447) (2023).

The Court of Appeals concluded that "the three calls at issue were not privileged and that Burns failed to show a violation of his Sixth Amendment right to counsel" for two reasons. *Burns*, 368 Ga. App. at 646 (1) (a). First, the Court of Appeals determined that the jails calls were not protected by the attorney-client privilege because "'there is no reasonable expectation of privacy in a recorded call made from jail or prison.'" Id. (quoting *Keller v. State*, 308 Ga. 492, 497 (2) (b) (842 SE2d 22) (2020)). Second, the Court of Appeals determined that the attorney-client privilege did not attach to these jail calls because the communications were not confidential. See id. (citing *Rogers v. State*, 290 Ga. 18, 21 (2) (717 SE2d 629) (2011)). I

am writing only to address the Court of Appeals' "no reasonable expectation of privacy" analysis.

Although the Court of Appeals did not explicitly cite the Fourth Amendment in reaching its conclusion that "there is no reasonable expectation of privacy in a recorded call made from jail or prison," *Burns*, 368 Ga. App. at 646 (1) (a) (citation and punctuation omitted), the concept of reasonable expectation of privacy is commonly used in determining whether there has been a violation of the Fourth Amendment, which is not at issue here. However, I note that, in reaching this conclusion, the Court of Appeals was simply following our lead. See id. (citing *Rogers*, 290 Ga. at 21 (2)). In *Rogers*, this Court erroneously cited *Preston v. State*, 282 Ga. 210, 213-214 (4) (647 SE2d 260) (2007)—a Fourth Amendment case holding that the defendant "had no reasonable expectation of privacy in the calls he placed to his mother from jail"—to conclude that the defendant Rogers had no "reasonable expectation of

privacy" in the phone calls he placed to his attorney from the jail. *Rogers*, 290 Ga. at 21 (2).

The Fourth Amendment sets forth the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. And, in *Preston*, we held that, "[t]o invoke the privacy protection of the Fourth Amendment," a defendant "must establish a legitimate expectation of privacy," which does not exist in outbound, personal telephone calls from prisoners to non-attorneys. *Preston*, 282 Ga. at 213-214 (4). While our holding in *Preston* was correct, I disapprove of our application of Fourth Amendment principles in *Rogers* and any other cases where we inadvertently conflated the Fourth Amendment expectation of *privacy*—i.e. the expectation of being free from unreasonable searches and seizures—with the Sixth Amendment expectation of *confidentiality*—i.e., the expectation that attorney-client privileged communications are or will remain confidential.

Appendix A

MCMILLIAN, Justice, dissenting.

Because I have serious concerns about whether the Court has correctly determined that the communications between Derek Burns and his attorney Daniel Daugherty were not made for the purpose of obtaining legal advice, I respectfully dissent.

"The attorney-client privilege is 'the oldest of the privileges for confidential communications known to the common law.'" *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 421 (1) (746 SE2d 98) (2013) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (II) (101 SCt 677) (1981)).[6] "The privilege generally attaches when legal advice is sought from an attorney, and operates to protect from compelled disclosure any communications, made in confidence, relating to the matter on

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[6] I agree with the Court that the question of whether communications are protected by the attorney-client privilege is a question of state law. See *State v. Ledbetter*, 318 Ga. 457, 461-62 (1) (c) (899 SE2d 222) (2024). But we have often relied on *Upjohn*, a seminal federal case construing the attorney-client privilege under the common law. See *Upjohn*, 449 U.S. at 389 (relying on Fed. R. Evid. 501 which provided at the time that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience").

which the client seeks advice." Id. at 421-22. "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's being fully informed by the client." Id. at 422 (quoting *Upjohn*, 449 U.S. at 389).[7]

The following facts are undisputed. On April 23, 2018, Burns was arrested and detained at the Cobb County Adult Detention Center. Burns retained Daniel Daugherty for the purpose of seeking bond; Burns made three outgoing phone calls to Daugherty during his detention and those calls were recorded; and Detective Wells and

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[7] I also have some serious concerns about how narrowly the Court has read *St. Simons* to only protect attorney-client communications for the purpose of obtaining legal advice but not information that is merely "related to" the legal representation. Clients retain counsel to provide legal advice; therefore, it is not clear to me how conveying information related to the legal representation is not for the purpose of obtaining legal advice. However, for the purpose of this dissent, I assume that the Court is correct in its description of the scope of the attorney-client privilege.

later ADA Raynor listened to those recordings. The parties also do not dispute what the content of those communications were because the recordings are in the record on appeal.

What is disputed is whether these communications were protected by the attorney-client privilege, with the Court determining that the trial court did not abuse its discretion in concluding that the jail calls at issue were not protected by the attorney-client privilege. However, 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."

In the second call on May 1, 2018, the trial court found that *Burns* "reminded Daniel Daugherty to give the information so that the call would not be recorded." Although the trial court found "[t]hat call did not contain any trial or case information," the Court recounts that the recording showed that "Burns told Daugherty that he 'need[ed] a bond' and asked Daugherty when the bond hearing would occur, and Daugherty responded that the hearing would take place in 'probably a couple weeks.'"

In the third call on May 2, 2018, the trial court found that "Daugherty answered himself as the attorney of record. He told the Defendant that the bond hearing was set for May 15, 2018. The Defendant was concerned about another case, not this one. but Mr. Daugherty was clear that his representation was only to get the Defendant out of jail in this case." Yet again, the trial court found that "there was no privileged information heard."

A few days later, on May 7, 2018, Daugherty filed a 5-page motion to reduce or modify bond with great detail about Burns to support the argument that Burns was not a flight risk, was not a threat or danger to any person or the community, was not likely to commit a felony pending trial, and would not intimidate witnesses or otherwise obstruct the administration of justice.[8]

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 Daugherty presumably used his knowledge as an attorney to inform

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[8] Some of this detail included Burns's long-time residence in the Atlanta metro area, his employment and business, his work with a non-profit organization to help injured veterans, and his family ties. Presumably, Daugherty obtained this information from Burns.

Burns that "step one" was to get a bond hearing 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.

For these reasons, I have serious doubts about the Court's conclusion that the trial court did not abuse its discretion in finding that there were no attorney-client communications made in the recorded calls. However, I do not see that a reversal is required at this juncture given the conflicting findings of the trial court, which make it difficult to determine whether the trial court abused its discretion. Instead, I would vacate the judgment of the Court of Appeals and direct that the case be remanded to the trial court to reconsider whether the communications were for the purpose of obtaining legal advice.[9] See *Tatum v. State*, 319 Ga. 187, 196 (903 SE2d 109) (2024) (vacating and remanding to determine whether

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[9] Because this case may be resolved on this point, I do not see a need at this time to consider whether the communications were confidential.

State's decision to seek a search warrant was prompted by the unlawful search when the record was unclear on this point); *Parker v. State*, 255 Ga. 167, 168 (1) (336 SE3d 242) (1985) (vacating and remanding for clarification as to the admissibility of any statements or confessions made by the defendant because "the court's rulings are unclear").

I am authorized to state that Justice Warren joins in this dissent.

APPENDIX B – ORDER OF THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA, FILED AUGUST 31, 2022

IN THE SUPERIOR COURT OF COBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	*	INDICTMENT NUMBER:
VS.	*	18-9-2853
DEREK BURNS	*	

AMENDED ORDER ON MOTION FOR NEW TRIAL

The Court having entered an Order denying the Defendant's Motion for New Trial on September 21, 2021, and;

The Defendant having filed an Appeal to the Court of Appeals for the State of Georgia, and;

The Court of Appeals having reviewed in part, vacated in part and remanded the case to the trial Court, and;

The Court having held a hearing on the issue sent back to the Court with the Defendant present and represented by counsel and evidence, and argument of counsel having been heard, and the three jail calls that are the issue in this matter having been tendered into Court and reviewed In Camera by the Court;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1.

This Courts Order of 21st September, 2021 is amended by striking Paragraph 35, 36, 37. 38 and 39 in their entirety, the remaining paragraphs of the Court's September 21, 2021 order remain in full force and effect.

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2.

This Court's Order of September 21st is amended by adding the following paragraphs which are hereby made apart thereof.

45.

"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 detaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Constitution, Amendment VI.

46.

Devius vs. Dunlap 209 F 34 944, 953 (II) (B) (3) (a) 7th Circuit 2000 states, "Where the sixth amendment right to the effective assistance of counsel attaches, this right includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference".

47.

In this case, the investigator for the State, Detective Wells, and an Assistant District Attorney listened to three recorded jail calls between the Defendant and Daniel Daugherty. There are twenty-two calls total, but they only listened to the first three calls.

48.

The Court of Appeals has remanded this case for the Trial Court to consider the Defendant's contention that the investigator's act of listening to the recoded calls violated his Sixth Amendment rights by intruding upon his attorney client communication.

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49.

In making this determination the trial Court has made an In Camera inspection of the three calls involved, the records of the case in the Clerk's Office and the applicable portions of the Trial Transcript. On August 19th, 2022 the Court held a full hearing in open Court concerning this Sixth Amendment issue at which the Defendant was present and represented by counsel, and the State was present and evidence was heard from Detective Wells, the Assistant District Attorney Raynor, and Attorney Daniel Daugherty.

50.

The crimes committed by the Defendant Derek Burns occurred on April 19, 2018 and the Defendant was arrested shortly thereafter.

51.

The Defendant was appointed Attorney Connie McManus, based on his indigence on April 26, 2018.

52.

On April 27, 2018, the Defendant called Daniel Daugherty. Mr. Daugherty is a licensed attorney. On this call he gave his Bar Number and asked that the recording of it be terminated. This was the first felony that Daniel Daugherty had represented and did not know that the Cobb Sheriff has a system whereby attorneys could register their information and telephone number and there would automatically be no recording of the call.

53.

The initial call shows that Mr. Daugherty and the Defendant were friends, and Mr. Daugherty sought to help the Defendant with routine personal matters. Mr. Daugherty did agree

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to file a Motion for Bond. There was nothing in this call that, if overheard, would prejudice his defense. See Stovall vs. Sikes 2014 WC1473659. No privileged information was heard.

54.

On May 1, 2018 Daniel Daugherty entered his name as counsel of record for the Defendant. Attorney Connie McManus remained as counsel.

55.

At the beginning of the May 1, 2018 telephone call, the Defendant reminded Daniel Daugherty to give the information so that the call would not be recorded. That call did not contain any trial or case information. It concerned the Defendant's dog, his newspaper, mail, Daniel Daugherty's lake trip, and conditions in jail.

56.

At the beginning of the May 2, 2018 call Daniel Daugherty answered himself as the attorney of record. He told the Defendant that the bond hearing was set for May 15, 2018. The Defendant was concerned about another case, not this one, but Mr. Daugherty was clear that his representation was only to get the Defendant out of jail in this case. Again there was no privileged information heard or anything that would prejudice his defense in this case.

57.

Nothing contained in any of these calls was used at the trial of this case.

58.

On May 7, 2018 Daniel Daugherty filed a Motion to Reduce/Modify bail or Alternatively Right to Grand Jury hearing within 90 days where bail refused under O.C.G.A. § 17-7-50. This was set for June 14. 2018.

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59.

In the meantime, on May 4, 2018, Connie McManus filed a Motion for bond for the Defendant which was set June 12, 2018.

60.

Daniel Daugherty withdrew as counsel for the Defendant on May 31, 2018. He did not appear at the bond hearing for the Defendant.

61.

During Detective Wells' testimony at the trial she testified that it was normal practice to listen to all of a Defendant's telephone calls for possible admissions. She had done so with Derek Burns (the case supplemental report on those calls, State's Exhibit 1 to the August 19, 2022 hearing indicates that only the April 27, 2018, May 1, 208, May 2, 2018 calls were listened to). When this information came out at trial, the trial attorneys for the defendant moved for a mistrial and a hearing was held outside the presence of the jury. At that hearing Det. Wells explained what she had done, not realizing Daniel Daugherty was the attorney until the third call. Assistant District Attorney Raynor then listened to the calls and reviewed them for prejudice. The Trial Court denied the mistrial, finding that the calls did not reveal any privileged or confidential information.

62.

Under the United States vs. Carter 429 F Supp. 3d 788, 890 (8) (VI) (B) (1) (D. D Kou, 2019) a person's Sixth Amendment violation occurs when:

1) Is there is a protected attorney-client communication?

2) Did the State purposefully intrude into the attorney-client relationship?

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3) Did the State become "privy to" the protected attorney-client communication because of the intrusion?

4) Was the intrusion justified by any legitimate law enforcement interest?

All four parts must be established for prejudice to be presumed.

United States vs. Carter Supra at p591 further states:

"A party claiming the attorney-client privilege has the burden to show its applicability. The mere fact that an attorney was involved in communication does not automatically render the communication subject to the attorney-client privilege. Rather, the communication between a lawyer and client must relate to legal advice or strategy sought by the client.

63.

In applying the law in this case the Court will address the Investigator, Det. Wells first and then Assistant District Attorney Raynor second as their factual situation are different.

64.

Det. Wells is an Investigator with the Cobb County Police Department. As such she routinely reviews jail calls of Defendants to see if there are any admissions. Because of the policy of the Sheriff's Department concerning lawyer's registration, these are not usually any attorney client telephone calls.

65.

In the first two telephone calls between the Defendant and Daniel Daugherty, Daugherty did not say he was representing the Defendant although, it could be implied that he was under US vs. Carter, supra. The investigator did not purposely intrude into the attorney-client relationship. Only on the third call did Daugherty say he was the lawyer. However, at that point Det. Wells did not stop listening. Nothing in that continued call contained attorney-client advice,

or strategy that the State could use against the Defendant. Normally, the State's intrusion into jail telephone calls is to find evidence not to invade the attorney-client relationship.

66.

The third issue in US vs. Carter, supra, is for the Court to determine if the State became privy to protected attorney client communication because of the intrusion.

67.

Det. Wells did not become privy to protected attorney-client communication. The Defendant and Daniel Daugherty's only communication about legal matters was the question of a bond hearing. Daugherty is heard saying he would apply for one, had applied and had a court date, although at that time he did not. No legal advice was given nor strategy for the case was set out. In fact, Daugherty said his only role in the case was to get the Defendant out of jail. See Bryant vs. State 282 Ga 631, 636-637 (2007) Parish vs. State 362 Ga 392, 400-401 Howard vs. State 279 Ga 166. Just hearing a call is not sufficient, the call must contain attorney-client privilege.

68.

In regard to Detective Wells intrusion into the attorney-client calls this was not done purposefully, she did not become privy to any protected attorney client communication because of the intrusion, the intrusion was justified by legitimate law enforcement interest and there was no protected attorney-client communication. There is no Sixth Amendment violation.

69.

Assistant District Attorney Raynor did purposely listen to the three calls. She did so during trial, when the issue came up and she was trying to determine if there was any harm from Det. Wells' actions. This is arguably a valid reason to listen. Shillinger vs. Haworth 70F3rd

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1132 (10th Cir 1995) states "when the State becomes privy to confidential communication because of its purposeful intrusion into the attorney-client relation and lacks a justification for doing so, a prejudicial effect on reliability of the trial process must be preserved." However, there was no protected attorney-client communication in these calls and therefore there is no Sixth Amendment violation.

70.

Even if privilege attached to the phone calls between Defendant and Daniel Daugherty and there is a presumption of prejudice occasioned by the State listening to the same, that presumption can be overcame where no information was gained by the State that they could use against the Defendant.

In Weatherford vs. Busey 429 U.S. 545, 97S. Ct. 837 the Court refused to adopt a per se rule that the Sixth Amendment is indicated whenever the State overhears what is said during an attorney-client exchange. The Court held "when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether the overheard conversation have produced, directly or indirectly any of the evidence offered at trial".

71.

The conversations in this case were very shortly after arrest where the only legal issue discussed was that of bond. Daniel Daugherty withdrew as counsel on May 31, 2018. The case was tried on October 2, 2019 at which time the Defendant had different lawyers. Nothing in those calls was used at trial in this matter, and the Defendant was not prejudiced thereby in any manner.

72.

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The Court finds no prejudicial violation of the Defendant's Sixth Amendment rights and the Defendant's Motion for New Trial is denied on that ground.

73.

This Court order of September 21st, 2020 remains in full force and effect except stated herein.

SO ORDERED this 31 day of August, 2022.

HONORABLE ADELE P. GRUBBS
State of Georgia
Senior Judge, Presiding in Superior Court of Cobb County

ADELE P. GRUBBS, SENIOR JUDGE
SUPERIOR COURTS OF GEORGIA
PRESIDING IN COBB JUDICIAL CIRCUIT

APPENDIX C – OPINION OF THE COURT OF APPEALS THE STATE OF GEORGIA, FILED MAY 26, 2022

In the Court of Appeals of Georgia

A22A0566. BURNS v. THE STATE.

DILLARD, Presiding Judge.

Following a trial by jury, Derek Burns was convicted of committing aggravated assault, false imprisonment, simple battery, family violence battery, and family violence simple assault. Burns now appeals those convictions, arguing the trial court erred by (1) failing to recognize a violation of his Sixth Amendment rights after intrusions into his attorney-client communications; and (2) admitting certain testimony under OCGA § 24-4-404 (b). For the reasons set forth *infra*, we reverse in part, vacate in part, and remand this case for further proceedings consistent with this opinion.

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Viewed in the light most favorable to the jury's guilty verdict,[1] the record shows that in 2015, shortly after they began dating, Burns moved in with the victim and her two children. At the beginning of the relationship, while the victim was in the process of divorcing her ex-husband, Burns treated her like an equal. But eventually, he became violent, including during a trip to his family's home over Christmas, when his younger sister walked in to find him repeatedly slapping the victim. Burns also gradually decreased the amount of help he provided within the home and with the victim's children, sometimes disappearing and failing to return for days.

Burns's demeanor and presence changed after the victim's divorce was finalized, at which point he no longer permitted her to have male friends. He told the victim that if anyone crossed him, they would "go on vacation," which was his way of saying the person would die. Burns—who was a cocaine dealer—had also threatened to harm the victim and her children by burning the house down with them inside if they ever revealed his activities.

The victim recalled that Burns strangled her for the first time after he became irate upon seeing one of her past boyfriends appear on television. Once the victim realized Burns was actually angry and not joking, she tried to walk away from him

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[1] *See, e.g., Wilcox v. State*, 310 Ga. App. 382, 382 (713 SE2d 468) (2011).

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but he followed behind and placed her in a choke hold until she lost consciousness. While unconscious, the victim believed she was on a beach, and as she came to, Burns asked her where she had gone. From that point on, Burns would warn the victim that he would "send her to the beach" and could take her life if he wanted to do so.

As the attacks continued, the victim would fight back or attempt to defend herself against Burns, but he would photograph any injuries she inflicted upon him and tell others that *she* attacked him. She eventually ended the relationship and asked him to move out due to the amount of drugs he trafficked through her home. But even after Burns moved out, the relationship remained on-again, off-again. And in March 2017, although the relationship was in an "off" period, the two met for dinner, were sexually intimate, and the victim became pregnant with Burns's child.

The victim was nervous about the pregnancy because of the volatile nature of her relationship with Burns. By that point, Burns had strangled her 10 to 15 times, was in the habit of slapping her, and threatened her or loved ones on a weekly basis. Nevertheless, she had not yet disclosed the abuse. Then, during a cruise with Burns's family the month after she became pregnant, the victim disclosed the abuse to Burns's older sister. But when they returned home, the abuse continued, the pregnancy

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notwithstanding, including instances of sexual violence, and the victim started to document the abuse with photographs.

In September, 2017, the victim gave birth to a baby boy three months prematurely, and he stayed in the NICU until November. Once the baby was home, abuse of the victim increased. The night before Christmas Eve, Burns beat and strangled the victim so badly that she had visible marks and broken blood vessels around her neck, which she documented in photographs. From that point onward, each time Burns strangled the victim, she experienced worsening side effects while losing and regaining consciousness, including temporary paralysis and migraines.

Around Easter in 2018, the couple's infant son had a mass growing near his spine, which was checked by doctors. Surgery was scheduled to follow the week after a surgical consultation. Several days before the scheduled procedure, Burns arrived home intoxicated, carrying a half-consumed bottle of vodka. After helping the victim complete several tasks around the house, Burns sat down with her in the kitchen. While Burns conducted a video-chat with a friend at the table, the victim was busy at the counter nearby. While doing so, she overheard Burns ask his friend for the details of a party that weekend. Hearing this, the victim became upset because of

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Burns's history of disappearing for days at a time when going out with friends, and their son's surgery was scheduled for several days later.

When the victim confronted Burns about these plans, he screamed at her and the two then struggled. Burns ended up on top of the victim, slapping her. After he got up, she ripped the chain of his necklace and insulted him, saying he was "acting like a little bitch," at which point he turned and came toward her again. Recognizing that "it was bad," she reached for a nearby frying pan to defend herself, but Burns began to strangle her before she could do so. She lost consciousness from the choke hold almost immediately.

As she regained consciousness, the victim realized that her shorts were wet because she had urinated upon herself, and she saw a line of urine across the kitchen floor because Burns dragged her body while she was unconscious. When she tried to get up from the floor, Burns screamed at her and then pushed her head into a corner before threatening that if she tried to get up again, he would shoot her and make it look like a suicide. She did not move until he left the house, at which point she took photographs of her injuries. The attack left the victim with a battered nose and strangulation marks.

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After speaking with her best friend, to whom she recently disclosed the other instances of abuse, the victim decided to contact law enforcement. Burns was subsequently arrested the day before their son's surgery (which was successful). Following trial, a jury convicted him on all counts. Burns then filed a motion for new trial, which the trial court denied. This appeal follows.

1. First, Burns argues the trial court erred in denying his motion for new trial on the basis that an investigator for the State and an assistant district attorney listened to recorded jail phone calls between him and one of his earliest attorneys in the case, thereby violating his Sixth Amendment right to a fair adversarial proceeding.[2] The trial court denied the motion after concluding that although the investigator violated OCGA § 24-5-501 (a) (2), Burns failed to show he was harmed thereby. For the

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[2] *See* U.S. Const. amend. VI ("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."); *see Denius v. Dunlap*, 209 F3d 944, 953 (II) (B) (3) (a) (7th Cir. 2000) ("Where the Sixth Amendment right to the effective assistance of counsel attaches, this right includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference.").

reasons that follow, we reverse in part, vacate in part, and remand for further proceedings consistent with this opinion.

The record shows that when this particular issue arose during a State investigator's testimony, the jury left the courtroom and the investigator then denied listening to recorded jail calls between Burns and one of his earlier attorneys because she "know[s] better than to listen to them." She then explained that she stopped listening to the calls when she realized "that he was the attorney" because she "had to shut it down." But the investigator *then* testified she "reviewed some of the calls" and "did listen to some of the calls." Based on this testimony, Burns moved for a mistrial.

In the course of preparing for the trial court to rule on the motion the following day, an assistant district attorney reviewed the relevant calls and told the trial court the conversations did not contain any discussion of strategy. But Burns argued the assistant district attorney had committed a *second* violation of his attorney-client privilege when she too listened to the calls. The trial court, however, denied the motion for mistrial after finding that Burns was unharmed by any violation because the recorded conversations were with an attorney who only represented Burns in an early bail proceeding.

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Later, at the hearing on Burns's motion for new trial, the State argued the trial court could conduct an *in camera* review of the recorded calls to determine if they contained anything concerning strategy for the case, and the court indicated it would do so. Ultimately, the trial court denied the motion for new trial after again finding Burns failed to show any harm, despite concluding that the investigator's actions were a violation of OCGA § 24-5-501 (a) (2). But the court did not address the assistant district attorney having listened to the calls once the issue was brought up at trial. Burns now argues the trial court erred by applying a harmless error standard to the intrusion upon his attorney-client privileged communications as to the investigator and for failing to address the attorney's act of listening to them.

OCGA § 24-5-501 (a) (2) provides that "[t]here are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to . . . [c]ommunications between attorney and client[.]" And our Supreme Court has explained. "the purpose of an evidentiary privilege is to preclude the dissemination of the communication and to preclude a trier of fact from hearing otherwise relevant evidence."[3] Here, the trial court concluded the investigator's act

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[3] *Zielinski v. Clorox Co.*, 270 Ga. 38, 40 (1) (504 SE2d 683) (1998); *see St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 422 (1) (746 SE2d 98) (2013) ("[B]ecause recognition of the [attorney-client] privilege

of *listening* to recorded jail calls between Burns and one of his earliest attorneys violated this provision but did not harm Burns. In finding that this provision was violated, the trial court erred because the plain language of OCGA § 24-5-501 (a) (2) prohibits the use of attorney-client communications as *evidence*,[4] and at no point were the communications used as evidence at trial.

The trial court ended its consideration of this issue at this point and never discussed Burns's argument that his Sixth Amendment rights were violated by the investigator having listened to the recorded communications. And now, on appeal, Burns asks us to reverse the trial court on the basis that a violation of OCGA § 24-5-

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operates to exclude evidence and thus impede the truth-seeking process, the privilege is narrowly construed.").

[4] *See, e.g., Revera v. State*, 223 Ga. App. 450, 452 (1) (477 SE2d 849) (1996) ("[T]he trial court erred in permitting the State, on cross-examination, to have the defense psychologist refresh his recollection (thereby effectively impeaching defendant) by use of a privileged and confidential communication to the attorney's investigator."); *Weatherbee v. Hutcheson*, 114 Ga. App. 761, 766 (2) (152 SE2d 715) (1966) ("[W]hen the court requires defendant's counsel to be sworn as a witness, over proper objection and to testify concerning matters knowledge of which he obtained from his client, it is reversible error."). *Cf. Rogers v. State*, 290 Ga. 18, 20-21 (2) (717 SE2d 629) (2011) (holding that trial court did not err in admitting into evidence three-way jail-recorded phone calls between defendant and his attorney because defendant's girlfriend participated in the calls and never ceased to listen, and the attorney-client privilege "does not extend to those situations in which third parties are present for attorney-client discussions").

501 (a) (2)—as the court below found—is a *per se* violation of the Sixth Amendment. But as we have just explained, the trial court erred in concluding that there was a violation of OCGA § 24-5-501 (a) (2), and thus, we must reverse the trial court's finding in that regard.

Nevertheless, the trial court *should* have considered Burns's contention that the investigator's act of listening to the recorded calls violated his Sixth Amendment rights by intruding upon his attorney-client communications. We, of course, cannot conduct this review in the first instance because we are "a court of review, not of first view."[5] Thus, because the trial court never explicitly engaged in any analysis of the Sixth Amendment issue,[6] we vacate the trial court's order to the extent it at least

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[5] *State v. Jennings*, 362 Ga. App. 790, 795 (1) (c) (869 SE2d 183) (2022) (punctuation omitted).

[6] *See Howard v. State*, 279 Ga. 166, 170 (3) (a) (611 SE2d 3) (2005) (quoting with approval the standard established by *Shillinger v. Haworth*, 70 F3d 1132 (10th Cir. 1995), such being 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"); *United States v. Carter*, 429 FSupp3d 788, 890 (8) (VI) (B) (1) (D. Kan. 2019) ("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

implicitly denied that claim and remand for further proceedings on this question as it applies not only to the investigator but the assistant district attorney as well.[7]

2. In light of our holding in Division 1, we need not address Burns's enumeration of error related to the admission of certain witness testimony at trial.

For all these reasons, we reverse in part, vacate in part, and remand this case to the trial court for further proceedings consistent with this opinion.[8]

Judgment reversed in part, vacated in part, and case remanded. Mercier and Markle, JJ., concur.

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is presumed." (footnote omitted)), *order vacated in part on other grounds*, No. 16-20032-02-JAR, 2020 WL 430739 (D. Kan. Jan. 28, 2020); *see also United States v. Morrison*, 449 U.S. 361, 364 (101 SCt 665, 66 LE2d 564) (1981) ("Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.").

[7] *See Flanders v. State*, 360 Ga. 855, 855 (862 SE2d 152) (2021) ("Given the trial court's failure to address [the] claim, we must vacate the trial court's order to the extent it at least implicitly denied that claim and remand for the trial court to address the claim in the first instance." (footnote omitted)).

[8] We do not authorize the reporting of this opinion because it does not announce a new rule or involve interpretation of law that is not already precedential. *See* CT. APP. R. 33.2 (b); CT. APP. R. 34.

APPENDIX D – OPINION OF THE COURT OF APPEALS OF THE STATE OF GEORGIA, FILED JUNE 20, 2023

In the Court of Appeals of Georgia

A23A0577. BURNS v. THE STATE.

LAND, Judge.

After a jury trial, Derek Burns was convicted of committing several crimes in connection with the assault of his girlfriend . Burns appeals from the trial court's denial of his motion for new trial, arguing that the State violated his Sixth Amendment rights when an investigator and an assistant district attorney listened to three recorded jailhouse phone calls between him and one of his earliest attorneys in the case , and that the trial court erred by finding that the attorney said he was Burns' counsel in only one of the three calls. Burns also argues that the trial court erred in admitting testimony from his former girlfriend . For the following reasons, we affirm.

As set forth in the prior unpublished opinion in this case, Burns was indicted for committing aggravated assault, false imprisonment, simple battery, family

violence battery, and family violence simple assault in connection with the 2015 strangulation of the victim. *Burns v. State*, __ Ga. App. __ (Case No. A22A0566, decided May 26, 2022). At trial, the State introduced substantial evidence in support of those charges, including testimony by the victim. Id. The State also called an investigator to testify regarding her investigation of the incident. During the investigator's direct examination, the State did not elicit any testimony concerning the phone calls. However, during cross-examination, Burns' counsel requested to ask the investigator a question outside the presence of the jury. The jury left the courtroom, and Burns' counsel asked the investigator whether she had reviewed jail calls between Burns and "his attorney." The investigator initially denied listening to recorded jail calls between Burns and one of his earlier attorneys, David Daugherty, but eventually testified she "did listen to some of the calls." Id. Based on this testimony, Burns moved for a mistrial. Id.

Before the trial court made its ruling on the motion for mistrial, an assistant district attorney reviewed the three phone calls and informed the trial court that they contained no discussion of strategy, that Daugherty told Burns the State would be able to listen to the calls but would not be able to use them in court, and that Burns stated they were "not really going to talk about anything sensitive here anyway."

Based on this revelation, Burns argued that the assistant district attorney violated his attorney-client privilege by listening to the calls. *Burns*, __ Ga. App. at __. The trial court denied the motion for mistrial after finding that Burns was unharmed by any alleged violation. Id. Burns was found guilty of all counts, and he filed a motion for new trial, which was denied by the trial court. Id. Despite its denial of the motion, the trial court found that the investigator's actions were a violation of OCGA § 24-5-501 (a) (2).[1] Id.

On appeal, we reversed the trial court's finding that the investigator had violated OCGA § 24-5-501 (a) (2) and remanded the case to the trial court for it to consider whether the investigator and assistant district attorney violated Burns' Sixth Amendment rights when they listened to the phone calls. *Burns*, __ Ga. App. at __. We did not address Burns' second enumeration of error related to the admission of witness testimony. Id.

On remand, the trial court held a hearing at which Daugherty testified that he was unaware that he needed to register his phone number with the jail so that his calls

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[1] OCGA § 24-5-501 (a) (2) provides that "[t]here are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to . . . [c]ommunications between attorney and client[.]"

would not be recorded and that Burns did not ask him to do so. At the time Burns made the relevant phone calls to Daugherty, Daugherty was one of Burns' attorneys. Daugherty testified that Burns initiated each call and acknowledged that at the beginning of each one, an announcement informed the parties that the call was being recorded.

Daugherty testified that he "started every call by identifying myself as his attorney of record. Sometimes I would say my bar number, and I then requested anyone listening or recording to please stop." He also testified that he intended the calls to be privileged and thought his statement would be "sufficient enough to notify anybody listening" that "there's attorney-client privileged conversations happening." Daugherty testified that he and Burns discussed case preparation and strategy on several calls, but Daugherty could not specifically recall what was discussed on each call. Although Daugherty testified that he believed that Burns' calls to him were the only means of communicating with him, he conceded that he met with Burns in person at the jail "between four and six times" to discuss his case. . Thus, it is clear that speaking with his client on a recorded line was not his only option.

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During the hearing, the investigator testified that, as part of her work on the case, she requested and obtained from the sheriff's department Burns' jail call recordings for dates between April 23, 2018 and June 21, 2018. She did not request Burns' phone calls with his attorney, and she had never before received a CD of jail calls that contained phone calls between a defendant and his attorney. The investigator testified that she listened to the entirety of the three calls at issue but did not listen to another complete call between Daugherty and Burns after speaking with her supervisor and the lead prosecutor in the case. The investigator's log of the jail phone calls, including the calls between Daugherty and Burns, was provided to Burns and his trial counsel with the CD of calls during pre-trial discovery.

The investigator testified that after Burns moved for a mistrial, she discussed the phone calls with one of the prosecutors on the case, assistant district attorney Lindsey Raynor. Raynor admitted that she listened to the calls after Burns moved for a mistrial in order to address Burns' claim that the calls contained confidential information.

After the hearing on remand, the trial court conducted an in camera review of the three jail calls at issue, dated April 27, 2018, May 1, 2018, and May 2, 2018. The trial court then entered an amended order denying Burns' motion for new trial, holding that

there was no protected attorney-client communication in the calls and that as a result, Burns' Sixth Amendment rights had not been violated. The trial court further held that since nothing in the calls was used at trial, Burns was not prejudiced by any alleged violation of his Sixth Amendment rights. Burns appeals from that order.

1. Burns argues that because the State knowingly listened to the jail phone calls without justification, his Sixth Amendment rights were "per se" violated and all charges against him should be dismissed, or alternatively, he should receive a new trial. We are not persuaded.

(a) Sixth Amendment Violation. The Supreme Court has held that, under some circumstances, a defendant's Sixth Amendment rights may be violated by the State's intrusion into the attorney-client relationship. *Weatherford v. Bursey*, 429 U. S. 545 (97 SCt 837, 51 LEd2d 30) (1977). As relevant here, the Supreme Court of Georgia has determined that "when the [S]tate 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." (Emphasis omitted.) *Howard*, 279 Ga. at 170 (3) (a) (citing *Shillinger v. Haworth*, 70 F.3d 1132, 1142 (10th Cir. 1995)). In other words, a per se

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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." *Carter*, 429 F. Supp. 3d at 790. As can be seen by this case law, there is no Sixth Amendment violation where the communications at issue are not confidential.

Under Georgia law,"[i]t is well established that the attorney-client privilege protects communications between the client and the attorney that are intended to be confidential; *the protection does not extend to communications which are not of a confidential nature.*" (Citation and punctuation omitted; emphasis supplied.) *Parrish v. State*, 362 Ga. App. 392, 400-401 (868 SE2d 270) (2022). More specifically, the privilege does not "extend to those situations in which third parties are present for attorney-client discussions." *Rogers v. State*, 290 Ga. 18, 20-21 (2) (717 SE2d 629) (2011). We review a trial court's decision as to the application of the attorney-client privilege for abuse of discretion. *Etowah Env't Grp., LLC v. Walsh*, 333 Ga. App. 464, 475 (774 SE2d 220) (2015). "Further, we also may review the documents at issue to

determine whether the trial court correctly applied the privilege." *Brown v. Howard*, 334 Ga. App. 182, 183 (778 SE2d 810) (2015).

Fatal to defendant's argument is the fact that "there is no reasonable expectation of privacy in a recorded telephone call made from a jail or prison." *Keller v. State*, 308 Ga. 492, 497 (2) (b) (842 SE2d 22) (2020). With no reasonable expectation of privacy, Burns cannot rightfully contend that his jailhouse calls were confidential or privileged. Burns has cited no binding precedent, and we have found none, supporting his assertion that Daugherty's announcement at the beginning of each call creates an exception to the rule announced in *Keller*. See *Rogers*, 290 Ga. at 21 (defendant "had no reasonable expectation of privacy in the telephone calls he placed to [his attorney]"). In addition, there is no evidence that Daugherty or Burns was led to believe that the warnings before each jail call did not apply to them. Moreover, Burns concedes that even after Daugherty announced himself as an attorney and requested that a call no longer be recorded, he told Burns that the State would still be able to hear the recordings. Our review of the calls shows that Burns acknowledged Daugherty's warning and stated that he would not talk about "anything sensitive" on the call, and

that on all three of the calls. Daugherty frequently told Burns that they would discuss his case in more detail in person.

This evidence directly contradicts the assertion that these calls were confidential or ever reasonably intended to be such. To the contrary, both attorney and client knew they were being recorded and knew the State would be able to listen. Based on this evidence, the trial court did not abuse its discretion in finding that the three calls at issue were not privileged and that Burns failed to show a violation of his Sixth Amendment right to counsel.[2] See *Howard*, 279 Ga. at 170 (3) (a).

(b) Remedy. While it is clear to us that no Sixth Amendment violation occurred, we also hold that even if there was such a violation arising from the facts discussed above, neither dismissal of the indictment nor the grant of a new trial would have been justified under the circumstances of this case. The Supreme Court has rejected the idea that a Sixth Amendment violation requires dismissal of the indictment in every instance, instead holding that "[c]ases involving Sixth Amendment deprivations are

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[2] Burns also argues that the trial court erred by finding Daugherty only said he was Burns' attorney in one of the three calls. Based on our holding in Division 1, any error in this factual finding is harmless. See *C.P. v. State*, 167 Ga. App. 374, 377 (4) (306 SE2d 688) (1983) (concluding that the juvenile court's incorrect factual findings amounted to harmless error since the record evidence otherwise supported the court's decision).

subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U. S. at 364. "Dismissal [of an indictment] is only favored in the most egregious cases." (Citation and punctuation omitted.) *Robinson v. State*, 200 Ga. App. 515, 517 (1) (408 SE2d 820) (1991). In contrast to the sweeping relief requested here, "a properly tailored remedy will neutralize the taint of the constitutional violation without granting a windfall to the defendant or needlessly squandering the considerable resources the State properly invested in the criminal prosecution." (Citation and punctuation omitted.) *Scott v. State*, 364 Ga. App. 276, 278 (874 SE2d 459) (2022).

Here, there is no basis for the dismissal of the indictment or the grant of Burns' motion for new trial. None of the calls and nothing flowing from them was sought to be admitted as evidence by the State during trial. Instead, the calls only came up during Burns' cross-examination of the investigator, which took place outside the presence of the jury. Thus, the State never sought to use these calls in any fashion and did not do so. Accordingly, we conclude that even if there was a Sixth Amendment violation, Burns' proposed remedies are exceedingly overbroad and not properly tailored to any

alleged injury. Compare *Shillinger*, 70 F.3d at 1143 ("We believe that a new trial may well be the appropriate remedy in this case because of the *use of improperly obtained evidence to impeach [the defendant] at his trial.*") (emphasis supplied). While suppression of evidence could be an appropriate remedy where evidence has been wrongfully obtained in violation of a defendant's Sixth Amendment rights, the record shows that these calls were never admitted at trial and that the State did not attempt to use them in any way. Compare *Morrison*, 449 U. S. at 364 (where "the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted"). Based on the above, it is apparent that the remedy sought by the defendant is not justified by the evidence and that the trial court's order should be affirmed.

2. Burns argues that the trial court abused its discretion by admitting testimony from Burns' former girlfriend that Burns had choked her until she passed out. Specifically, Burns argues that the trial court erred in allowing the girlfriend's testimony to be admitted to show motive, intent, and to rebut Burns' affirmative

defense of justification. We conclude, however, that the girlfriend's testimony was properly admitted to show motive and that Burns has shown no error.

Under OCGA § 24-4-404 (b), "[e]vidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith," but such other-acts evidence is admissible for other purposes, including to prove motive, intent, plan, and identity. "The party offering evidence under Rule 404 (b) must show three things: (1) that the evidence is relevant to an issue in the case other than the defendant's character; (2) that the probative value of the evidence is not substantially outweighed by its undue prejudice; and (3) that there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the other act."[3] *Heard v. State*, 309 Ga. 76, 84 (3) (b) (844 SE2d 791) (2020). "We review the trial court's ruling admitting evidence under Rule 404 (b) for abuse of discretion." Id. at 85 (3) (b).

With regard to the first prong of the test, OCGA § 24-4-401 defines "relevant evidence" as evidence that "has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than

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[3] Burns does not argue that the State failed to show that he committed the act about which his former girlfriend testified.

it would be without the evidence." "The test for relevance is generally a liberal one, and relevance is a binary concept – evidence is relevant or it is not[.]" (Citations and punctuation omitted.) *Harris v. State*, 314 Ga. 238, 262 (3) (a) (875 SE2d 659) (2022).

To properly show motive, "the extrinsic evidence must be logically relevant and necessary to prove something other than the accused's propensity to commit the crime charged." *Heard*, 309 Ga. at 85 (3) (c). "As the Supreme Court of Georgia has explained, motive has been defined as the reason that nudges the will and prods the mind to indulge the criminal intent." (Citation and punctuation omitted.) *Chambers v. State*, 351 Ga. App. 771, 777 (2) (833 SE2d 155) (2019).

It is well established that testimony regarding prior acts of domestic violence committed by a defendant can be relevant to show motive to harm and control intimate partners. See *Smart v. State*, 299 Ga. 414, 418 (2) (a) (788 SE2d 442) (2016) ("While motive is not an element of any of the charged offenses here, . . . testimony [from a witness regarding appellants' acts of violence against his ex-wife] was relevant to help the jury understand why Appellant might have used violence against [the victim]. Though [the witness's] testimony referenced specific acts of domestic violence, her testimony also revealed the impetus behind that violence: control."); *Chambers*, 351

Ga. App. at 777 (2) (officer's testimony regarding defendant's prior family violence battery conviction was admissible to show motive because it "revealed that the impetus behind the violence was control, or more specifically, reasserting control after being challenged by his girlfriend.")

Here, Burns' former girlfriend testified that when she met him in 2013, Burns was initially "very sweet [and] charismatic," but as the relationship progressed, Burns started to insult and berate her. On multiple occasions, Burns "raised his hand" at her and threatened to hit her, and each time she told him that she would end the relationship if he ever hit her. In 2015, while they were living together, the girlfriend believed that Burns had cheated on her and confronted him. In response, Burns "got behind" her and "choked [her] into unconsciousness." When she regained consciousness, she asked Burns what had happened, and Burns admitted that he had choked her to "calm her down."[4] Burns then left their home. The girlfriend called Burns' mother, told her what happened, and asked Burns' parents to come get Burns' things because "he didn't live

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[4] Burns attempts to distinguish *Smart* from the facts of this case, arguing that because his former girlfriend testified to only one incident of domestic violence, her testimony fails to show that Burns exercised "control" over her. This argument is a nonstarter. See *Chambers*, 351 Ga. App. at 775-779 (2) (affirming admission of testimony regarding a single incident of battery against the defendant's former girlfriend).

with [her] anymore." Accordingly, the former girlfriend's testimony showed not only that Burns had committed prior acts of domestic violence, but also that Burns had used violence as a means to try to control his romantic partners. *Chambers*, 351 Ga. App. at 777 (2).

The relevance of the evidence, however, does not end our analysis, and we also consider whether the probative value of the other acts evidence is substantially outweighed by its unfair prejudice. See *Smart*, 299 Ga. at 418 (2) (b). "In weighing the probative value of other acts evidence, a court may consider a number of factors, including (1) prosecutorial need, (2) overall similarity of the other acts and the acts charged, and (3) the temporal remoteness of the other acts." *Lowe v. State*, 314 Ga. 788, 793 (2) (a) (879 SE2d 492) (2022). We must keep in mind that "the exclusion of evidence under Rule 403 is an extraordinary remedy which should be used only sparingly." *Smart*, 299 Ga. at 419 (2) (b).

"While the evidence against [Burns] was prejudicial — as almost all evidence presented by the State will be — on balance, we agree with the trial court that the probative nature of [his former girlfriend's] testimony outweighed that prejudice." *Smart*, 299 Ga. at 419 (2) (b). There is a three-year gap between the 2015 and 2018

acts, but "the significant similarity between those acts of domestic violence and the testimony concerning [Burns'] history of controlling and abusive behavior toward [the victim] shows that the [prior] acts are probative of his motive and not so remote as to be lacking in evidentiary value." *Lowe*, 314 Ga. 794 (2) (a). Further, "nothing in the testimony would shock the average juror or otherwise render the jury incapable of weighing the evidence in a disinterested manner, and given the relevance of the evidence to the question of motive, we cannot say that any prejudice it might have caused outweighed its significant probative value." (Citation and punctuation omitted.) *Smart*, 299 Ga. at 419. Accordingly, the trial court did not abuse its discretion in admitting the former girlfriend's testimony into evidence.[5]

Judgment affirmed. Barnes, P. J., and Hodges, J., concur.

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[5] Because we conclude that the former girlfriend's testimony was admissible as to motive, we need not examine whether this evidence was also admissible on the issue of intent and to rebut Burns' justification defense. See *Mike v. State*, 358 Ga. App. 113, 117 (3) (a) n.3 (853 SE2d 887) (2021).

APPENDIX E – ORDER DENYING MOTION FOR RECONSIDERATION, FILED NOVEMBER 14, 2024

SUPREME COURT OF GEORGIA
Case No. S23G1192

November 14, 2024

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DEREK BURNS v. THE STATE.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Warren and McMillian, JJ., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk