SUPREME COURT OF MARYLAND

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SEPTEMBER TERM, 2022

CASE NO. 25

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DAMIEN GARY CLARK,

*Petitioner*

v.

STATE OF MARYLAND,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE
APPELLATE COURT OF MARYLAND

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# REPLY BRIEF AND APPENDIX OF PETITIONER DAMIEN GARY CLARK

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## ARGUMENT

The State's brief demonstrates that the post-conviction court properly awarded Mr. Clark a new trial. It misplaces the burden of proving prejudice on Mr. Clark, cites a misplaced legal fiction reinforcing the finding of prejudice and trial counsel's deficient performance, overcomplicates the right to counsel by clinging to the alleged need for actual prejudice, overlooks the unrealistic retroactive burden imposed by the Appellate Court on Mr. Clark, places trial counsel's opinions over Mr. Clark's constitutional rights, and cites unpersuasive foreign precedent. Thus, the State's brief merely confirms that the Appellate Court's judgment should be reversed.

### I. THE STATE NEGLECTS *ITS* BURDEN TO REBUT THE PREJUDICE PRESUMED FROM BOTH TRIAL COUNSEL AND THE TRIAL COURT.

The State's focus on "ordinary *Strickland* requirements"[1] disregards the presumption of prejudice in explained in *Strickland v. Washington*, 466 U.S. 668 (1984). Worse, it ignores the rejection of the actual deprivation rule in *Geders v. United States*, 425 U.S. 80 (1976), and *Perry v. Leeke*, 488 U.S. 272 (1989). The State also overlooks the presumption of prejudice from the trial court's gag order explained in *United States v. Cronic*, 466 U.S. 648 (1984), and exemplified by both *Steven Clark v. State*, 306 Md. 483 (1986), and *Austin v. State*, 327 Md. 375 (1992).

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[1] *Brief of Respondent*, at 3.

### A. *Strickland* establishes the presumption of prejudice from counsel and the court.

In *Strickland*, the Supreme Court stated: "in certain Sixth Amendment contexts, prejudice is presumed"[2]:

> Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. *See United States v. Cronic*, 466 U.S., at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 466 U.S., at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

*Id.* at 692 (emphasis added). Prejudice can be presumed from both trial counsel's failure to object to the gag order and the trial court imposing it.

### B. *Geders* and *Perry* demonstrate that prejudice should be presumed, not proven.

The State ignores the following explanation provided by the United States Court of Appeals for the District of Columbia about the Supreme Court's refusal to apply the "actual deprivation" rule in *Geders*:

> While the majority opinion [in *Geders*] did not explicitly discuss the issue, the Court never inquired whether defendant *Geders* had been prejudiced by the judge's instructions. It necessarily rejected the holding of the Fifth Circuit, which had held that reversal was not justified unless there was a showing of "actual harm." Given that the question was squarely presented, it is unreasonable to assume that the Supreme Court *sub silentio* subjected the violation to a harmless error test. *See Geders*, 425 U.S. at 92 ("a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice") (Marshall, J., concurring).

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[2] *Strickland*, 466 U.S. at 692.

*Mudd v. United States*, 798 F.2d 1509, 1513 (D.C. Cir. 1986).

Likewise, the State fails to overcome the Supreme Court's observation in *Perry v. Leeke*, 488 U.S. 272 (1989), that "a showing of prejudice is not an essential component of a violation of the rule announced in *Geders*", and that the *Geders* Court "simply reversed the defendant's conviction without pausing to consider the extent of the actual prejudice, if any, that resulted from the defendant's denial of access to his lawyer during the overnight recess." *Id.* at 278-279. Instead, the State clings to trial counsel's failure to object, which as discussed below, is irrelevant. The State not met *its* burden to rebut the presumption of prejudice.

**C. *Cronic* explains that the presumption of prejudice extends to the trial court.**

In *Cronic*, the United States Supreme Court observed: "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976)." *Id.* at 659 n. 25 (emphasis added). "Circumstances of that magnitude may be present", it elaborated, "on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* Therefore, the trial court's gag order can, and for the reasons stated below, does warrant presuming prejudice.

**D. *Perry, Clark*, and *Austin* show prejudice is presumed from the court's order.**

In *Perry*, the Court stated the following while discussing the requirement for *Strickland* prejudice in standard claims of ineffective assistance: "Prior to our consideration of the standard for measuring the quality of the lawyer's work, however, we had expressly noted that direct governmental interference with the right to counsel is a different matter", and, "Our citation of *Geders* in this context was intended to make clear that '[a]ctual or constructive denial of the assistance of counsel altogether,' is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective." *Id.* (quoting *Strickland*, 466 U.S. at 692).

In *Clark*, Steven Clark was tried by a jury in the Circuit Court for Baltimore City and convicted of possession of heroin. On appeal, Mr. Clark argued that the circuit court violated his right to counsel by prohibiting his attorney from communicating with the attorney of his co-defendant, Jonathan Hemphill, to coordinate their peremptory strikes of prospective jurors. *Id.* at 486-487. However, the Court of Special Appeals affirmed the circuit court's judgment. This Court reversed, holding that the trial court violated Mr. Clark's right to effective assistance of counsel:

> As we see it, effective representation means representation in which the attorney is unhindered in the lawful pursuit for knowledge which might benefit the client. The trial judge's ruling here in effect tied counsel's hands and foreclosed him from pursuing a valuable source of information in a consolidated trial—the co-defendant's attorney...the trial judge's action adversely impacted upon the effectiveness of the defendant's attorney by placing an impediment on his assistance.

*Clark*, 306 Md. at 489 (emphasis added).

Then, this Court rejected the State's argument that Mr. Clark was required to prove actual deprivation of counsel (the same argument by the State here):

> In spite of these violations of defendant's rights, the State argues that appellant has failed to show that he has been actually prejudiced by the trial judge's action. We do not believe that appellant has the burden of proving prejudice, however. The Supreme Court has stated that where the state deprives the defendant of effective assistance of counsel, constitutional error will be found without the showing of prejudice. *United States v. Cronic*, 466 U.S. 648, 668 & n. 25 (1984); *cf. Strickland v. Washington*, *supra* (where the Court held that the petitioner is required to show prejudice where asserting ineffective assistance of counsel claim; the Supreme Court also recognized in *Strickland*, 466 U.S. at 692, however, that there is no requirement to show prejudice when asserting state interference with assistance of counsel).

*Clark*, 306 Md. at 489 (emphasis added).

The trial court's order had the same effect here by preventing trial counsel from both consulting with Mr. Clark and providing him with the "guiding hand of counsel at every step in the proceedings against him". *Perry*, 488 U.S. at 286 (Kennedy, J., concurring) (quoting *Geders*, 425 U.S. at 89).

In *Austin*, Leroy Austin was convicted of conspiracy to distribute heroin and distribution of heroin following a jury trial in the Circuit Court for Baltimore City. The circuit court issued a gag order prohibiting communication between Mr. Austin's attorney, John Denholm, and his law partner, James Salkin, who represented a co-defendant, Christine Wise. *Id.* at 378. Specifically, the court ordered Mr. Salkin "not to discuss the case in any way with Mr. Denholm, not even to disclose that Ms. Wise would be testifying

against Mr. Austin". *Id.* The court also denied Mr. Salkin's request for permission to tell Mr. Denholm that Ms. Wise would be testifying against Mr. Austin, ordering Mr. Salkin to "say nothing to Mr. Denholm about what is going on in this case". *Id.* The court overruled Mr. Denholm's objection. *Id.* at 379.

Although the Court of Special Appeals affirmed Mr. Austin's conviction and sentence in an unreported opinion, this Court reversed. It held that there was an actual conflict of interests "so immediately obvious and apparent [that] the trial court ha[d] the responsibility, with or without objection from counsel, to protect the right of the accused from being lessened by an actual...conflict of interest"[3], and that "the imposition of the gag order clearly adversely affected defense counsel's representation of Mr. Austin"[4]. This Court elaborated: "What Judge Angeletti chose to do was reach an improper compromise. He, in effect, discharged one-half of Mr. Austin's defense team. By imposing the gag order, Judge Angeletti did not reduce the conflict; he reduced the defense team." *Id.* at 393.

This Court also rejected the State's argument that the matter should have been decided in a post-conviction petition, in relevant part, because: "In the instant case, it was the action of the trial court as the result of the conflict which caused an adverse effect on defense counsel's representation. There is no need to await a fact-finding post conviction hearing". *Id.* at 394.

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[3] *Id.* at 390.

[4] *Id.* at 392-393

Like *Austin*, prejudice was properly presumed in this case from the trial court's violation of Mr. Clark's constitutional right to counsel through the gag order.

The State's claims about the need to prove an actual deprivation of counsel are incorrect, Mr. Clark is entitled to the same presumption of prejudice applied in *Geders, Clark,* and *Austin,* and the Appellate Court's judgment should be reversed.

## II. *NEWTON V. STATE* IS A LEGAL FICTION WHEN APPLIED TO THIS CASE, INVALIDATING THE STATE'S CONTENTION ABOUT THE FINDING OF PREJUDICE AND TRIAL COUNSEL'S PERFORMANCE.

The State's five-page argument that *Newton v. State*, 455 Md. 341 (2017), forecloses the mere possibility of trial counsel's deficient performance is defeated in four words: Ignorance of the law. Trial counsel "did not read [*Geders*] and know it specifically"[5], a fact unaltered by his mere ***post-hoc*** statement that Mr. Clark, "always has a right to confer with me"[6] (a present-sense statement). Hence, trial counsel would have been unprepared to provide an explanation worthy of sustaining an objection to the trial court's gag order.

*Newton* does not change the likelihood of the trial court sustaining any objection from trial counsel. This Court rejected Donta Newton's argument that his attorney's failure to object to presence of alternate juror during deliberations was ineffective assistance of counsel because it "assume[d] that if Newton's attorney had objected, the judge would have sustained Newton's objection and excused the alternate as required by Maryland Rule 4-

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[5] (E. 74).

[6] *Id.* (emphasis added).

312(g)(3)". 455 Md. at 361. This assumption was based on the "presume[ption]...that the judge...[would have] acted according to the law". *Id.* (quoting *Strickland*, 466 U.S. at 694). However, this Court did not hold that trial courts are presumed to act according to the law whimsically or that they would reach the proper legal conclusion merely because the words, "I object", are spoken, and the following discussion in *Newton* shows that the circuit court did not permit the alternate juror to remain present during deliberations whimsically:

> THE COURT: I have never done this before, but I might suggest that, generally, I excuse the alternate juror, but I need your answer anyway. I am open to any request that you want to keep the alternate in the courtroom or let the alternate go to the Jury Room with instructions not to participate, in light of my past experience in the case.
>
> [PROSECUTOR:] Your Honor, I would not object to the second one with instructions not to participate unless we excuse a juror. I agree.
>
> THE COURT: Send all of them to the jury room?
>
> [PROSECUTOR:] Yes.
>
> [DEFENSE COUNSEL:] Yes.
>
> THE COURT: With the instruction not to participate?
>
> [PROSECUTOR:] Uh-huh.
>
> [DEFENSE COUNSEL:] Yes.

*Id.* at 348 (emphasis added).

The circuit court was already inclined to sustain any objection to the alternate juror remaining present during deliberations. The fact that it had "never done this before", and that it "generally excuse[d] the alternative juror", also suggests that the circuit court would

have done so again without further research or even further discussion with the parties if the objection were raised. *Newton*, 455 Md. at 348.

The preliminary inclination to sustain an objection to the alternate juror remaining present during deliberations, combined with the State's comment that it did not object to the juror remaining, would likely have prompted the circuit court to sustain any objection from defense counsel. Such objection would have very likely led the circuit court to at least engage in a cursory review of the Maryland Rules, which would have led it to discover Maryland Rule 4-312(g)(3), leaving no doubt that the alternate juror should be discharged.

The circuit court's acknowledgment that it was unusual to permit the alternate juror to remain present during deliberations, combined with the uniquely critical risk of an alternate juror's improper influence resulting in a guilty verdict[7], was also more than sufficient to lead any reasonable judge to at least engage in a cursory review of the Maryland Rules, and discover Maryland Rule 4-312(g)(3).

Stated alternatively, the circuit court had every reason to grant an objection, and there is no reasonable dispute that it would have done so.

Here, the trial court made no suggestion that it was abnormal to impose a gag order during an overnight recess, there was no indication that the trial court was even inclined to rescind the gag order (or to never impose it), and there was no immediately apparent risk

[7] This risk was expressly noted by the State while the jury was deliberating. *See Newton*, 455 Md. at 349.

of the jury's verdict being corrupted by Mr. Clark being prevented from speaking with trial counsel during the overnight recess. Given that trial counsel, and apparently even the State, were ignorant of Mr. Clark's right to confer with trial counsel during the overnight recess, there is not even a reasonable probability of a different outcome if trial counsel merely uttered, "I object".

Even misreading trial counsel's testimony to infer that at the time of the trial he was generally aware that Mr. Clark had a right to confer with him during the overnight recess leaves no substantial possibility under a totality of the circumstances that an objection on those general grounds would have led the trial court to sustain the objection. The trial court was so intent on imposing the gag order that it repeated that order to Mr. Clark *three* times. *See* E. 23-24. Trial counsel did not object once, he was not aware of Mr. Clark's right to confer with him during the overnight recess and he was not aware of the seminal case articulating that right (*Geders*).

Furthermore, the record suggests that trial counsel was *reluctant* to object to the gag order. During the post-conviction hearing, when post-conviction counsel asked trial counsel why he did not challenge Judge McCrone's decision to discuss jury instructions in chambers rather than on the record, trial counsel responded, "[T]he judge is in charge and if the judge says we're going to do this and that and this thing, you do it." Appx. at 4: 20-21 (emphasis added).

*Newton* does not invalidate the post-conviction court's finding of prejudice and deficient performance, the State has failed to prove otherwise, and the Appellate Court's judgment should be reversed.

## III. THE STATE'S EMPHASIS ON ACTUAL DEPRIVATION OVERCOMPLICATES THE SIMPLE VIOLATION OF MR. CLARK'S RIGHT TO COUNSEL.

The State dwells on an alleged need to prove actual prejudice from the trial court's gag order, not because it is required by either the Constitution of the United States or Maryland, but because trial counsel did not object to a gag order that the State admits was "improper"[8].

### A. The constitutional right to counsel means the constitutional right to counsel.

Neither the Constitution of the United States nor the Constitution of Maryland contain a word about ineffective assistance of counsel, structural error, trial error, the harmless error analysis, a need to object, or even *post-hoc* testimony from the defendant that he wanted to exercise his rights. They simply state: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence"[9], and "in all criminal prosecutions, every man hath a right . . . to be allowed counsel[.]"[10]

Similarly, the United States Supreme Court has observed: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice

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[8] *Brief of Respondent*, at 21.

[9] U.S. Const. amend. VI (emphasis added).

[10] Md. Const. Decl. of Rts. art. 21 (emphasis added).

calculations as to the amount of prejudice arising from its denial." *Glasser v. United* States, 315 U.S. 60, 76 (1942).

Restricting the fundamental constitutional right to counsel to when an objection is raised at the trial level or when a defendant testifies during a post-conviction proceeding, "I wanted to speak with my attorney", would diminish it to words on paper.

But that is exactly what the State desires. It's claim that Mr. Clark's rights should be suppressed because there was "no objection at trial to the directive" and "no other evidence that [he] was actually deprived of any consultation with counsel"[11] spins the revolving door set in motion by the Appellate Court's holding. The former alleged justification for suppressing Mr. Clark's constitutional right to counsel disregards this Court's holding in *Curtis v. State*, 284 Md. 132 (1978), that "a criminal defendant cannot be precluded from having this issue considered because of his mere failure to raise the issue previously". *Id.* at 150. The latter's call for "other evidence" ignores the fact that all testimony at the post-conviction hearing about *Mr. Clark's* desire to speak with trial counsel during the overnight recess came from *trial counsel*. Mr. Clark was not asked a single question about it, and if Mr. Clark sporadically began testifying about what he would have said to trial counsel, he would have been told to be silent.

[11] *Brief of Respondent*, at 35.

The State's claim that Mr. Clark must show actual prejudice is wrong, the trial court's gag order violated Mr. Clark's constitutional right to counsel, and the Appellate Court's judgment should be reversed.

**B. The State's focus on actual deprivation disregards the actual evidence.**

The State's contention that "there is no other evidence that Clark was actually deprived of any consultation with counsel that he desired or would have undertaken but for the court's directive"[12] mises the mark while demonstrating its inability to put itself in Mr. Clark's shoes. Mr. Clark was ordered by the trial court not to speak with his attorneys during the overnight recess *three times*. *See* E. 23-24. Three times those attorneys, the legal professionals that Mr. Clark paid thousands of dollars to defend him, did and said nothing. Mr. Clark did not understand that the court just violated his constitutional right to counsel. He did not understand that trial counsel could have objected. Mr. Clark simply did what he was told and remained silent.

Mr. Clark had no reason to believe that he had a constitutional right to speak with his attorneys during the overnight recess, and thus no reason to commit to memory what he would have said to them but for the gag order. Mr. Clark was not even informed of the alleged "actual deprivation rule".

Since Mr. Clark was a layman with no legal education, no legal advice about the alleged requirement to show actual prejudice from the gag order, and no practical means for doing

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[12] *Brief of Respondent*, at 35.

so, affirming the State and Appellate Court's *post hoc* demands for it would only violate his constitutional rights to counsel and due process. The State is wrong, and the Appellate Court's judgment should be reversed.

**C. The law was too ambiguous to require proof of actual deprivation of counsel.**

The forementioned cases supporting the presumption of prejudice were uncontradicted by any Maryland law requiring proof of an actual deprivation of counsel. It appears that the only reported opinions in Maryland addressing gag orders between a criminal defendant and his attorney(s) during a recess at the time of Mr. Clark's post-conviction hearing were *Wooten-Bey v. State*, 318 Md. 301 (1990), and *Snyder v. State*, 104 Md.App. 533 (1995). As explained in Mr. Clark's opening brief to this Court, those cases reinforce the *Geders* court's holding that proving prejudice is unnecessary.

The State also agrees that "no previous reported Maryland case addressing a *Geders* or *Geders*-like issue has had any occasion to address the actual-deprivation standard". *Brief of Respondent*, at 40.

Moreover, neither *Wooten-Bey*, *Snyder*, or any other case regarding a recess and gag order were even mentioned by trial counsel, the State (represented by the same prosecutors at both trial and the post-conviction hearing), the post-conviction court, or post-conviction counsel before or during the post-conviction hearing.

No one in Mr. Clark's position could reasonably anticipate a requirement for actual prejudice from the gag order, the State failed to prove otherwise, and the Appellate Court's judgment should be reversed.

## IV. THE CASES CITED BY THE STATE ARE DISTINCT, REINFORCING THE VALID PRESUMPTION AND FINDING OF PREJUDICE.

The State's claims that *Ramirez v. State*, 464 Md. 532 (2019), *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), *Newton v. State*, 455 Md. 341 (2017), and *United States v. Nelson*, 884 F.3d 1103 (11th Cir. 2018), support a need to prove actual prejudice is incorrect.

### A. The cases cited by the State are collectively inapposite.

*Ramirez, Weaver*, *Newton*, and *Nelson* do not involve an intermediate appellate court forcing the defendant into a post-conviction petition after recognizing that his claim "has merit"[13], and they do not contain a confession from the trial attorney that he did not even read the seminal case underlying the contested constitutional violation (here, *Geders*). *See* E. 74.

### B. *Ramirez, Weaver,* and *Newton* are inapposite.

The defendants in those cases made no effort to vindicate the violation of their constitutional rights on direct appeal. They also alleged distinct claims of ineffective assistance involving neither a gag order nor violations of the right to counsel by both trial counsel and the trial court. *Ramirez*, *Weaver*, and *Newton* are inapposite.

[13] *Clark v. State*, No. 486, Sept. Term, 2019, 2020 WL 3498463, at *7 (Md. Ct. Spec. App. June 29, 2020)

**C. *Nelson* is inapposite.**

The distinctions between *Nelson* and this case begin with its distinct gag order:

> [Attorney]: And, Your Honor, may I speak to Mr. Skillern[14] about matters other than his testimony this evening—
>
> The Court: Yes.
>
> [Attorney]:—that may come up?
>
> The Court: You can talk about the weather. What do you mean, other than may come up? Not his testimony or his impending testimony.
>
> [Attorney]: Right, Your Honor, but maybe witness problems or things like that?
>
> The Court: Yes, anything about the proceeding and so forth, who's coming, who is not coming, that's fine, but just not his testimony or his impending testimony.
>
> [Attorney]: Fine, Your Honor.

884 F.3d at 1109 (emphasis added).

As the Eleventh Circuit observed: "the limitation here was more narrowly circumscribed than in *Geders*, in that Skillern was permitted to talk to his lawyer about issues other than his testimony". 884 F.3d at 1106.

The Eleventh circuit also deemed the fact that Mr. Skillern's attorney "actually proposed the limitation that Skillern now challenges" to be a "wrinkle"[15] not present in

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[14] Although Jon Nelson was listed as the primary appellant, the appellate courts primarily addressed the claims of his co-defendant, Michael Skillern.

[15] *Nelson*, 884 F.3d at 1106.

*Geders*, adding: "He specifically asked the district court for permission to speak to Skillern about 'matters other than his testimony,' and then, when the district court acceded to his request, he never expressed any regret, objection, or desire to clarify"[16].

It was from *that* premise that the Eleventh Circuit concluded, "Skillern can't show that he was actually deprived of his right to counsel . . ."[17], not, as in this case, the trial court's order alone.

Then, the Eleventh Circuit held that there was no "showing that the defendant and his lawyer desired to confer but were precluded from doing so by the [trial] court". *Nelson*, 884 F.3d at 1109. It explained:

> The issue here isn't just that Skillern's lawyer failed to object to the district court's limitation. Instead, the problem is that the record is entirely devoid of *any* indication—in *any* form—that Skillern or his attorney planned or wanted to confer about his testimony during the recess. To the contrary, Skillern got from the district court exactly what his lawyer asked for—namely, permission to speak "about matters other than his testimony".

*Id.* at 1110 (italics in original, underlining added).

Regarding its comment about the lack of an objection, the Eleventh Circuit clarified: "[W]e do not hold that there must always be a formal objection where a district court prevents attorney-client communication during an overnight recess." *Id.* at 1110 n. 3 (emphasis added).

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[16] *Id.* at 1107.

[17] *Nelson*, 884 F.3d at 1107.

The Eleventh Circuit's refence to the statement by Mr. Skillern's attorney in his colloquy with the court as a "request" was a charitable observation of what was really just a hypothetical question. Mr. Skillern's attorney did not say, "I need to speak to Mr. Skillern" about matters that "have or will come up". Nor did he say, "There are witness problems or things like that". Mr. Skillern's attorney said, "May I speak to Mr. Skillern about matters . . . that may come up?", and suggested, "maybe witness problems or things like that". *Nelson*, 884 F.3d at 1109 (emphasis added).

The State's claim that *Nelson* is "illustrative"[18] is flat wrong. Unlike Mr. Skillern, Mr. Clark did *not* "get exactly what his lawyer asked for"[19] and Mr. Clark did not have "permission to speak about matters other than his testimony". *Nelson*, 884 F. 3d at 1110. The trial court, unsolicited by either of Mr. Clark's attorneys, addressed him sporadically and directly, ordering Mr. Clark *three times* not to speak with his attorneys about "the case" as follows: "You can't talk to anybody about the case this evening even Mr. Garcia and Ms. Mantegna"[20], "You can't talk to anybody. It sounds counter intuitive"[21], and, "You can't talk to your own attorney about the case"[22].

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[18] *Brief of Respondent*, at 33.

[19] *Nelson*, 884 F.3d at 1110.

[20] (E. 23) (emphasis added).

[21] *Id.* (emphasis added).

[22] (E. 24) (emphasis added).

Also, unlike *Nelson*, the record in this case was not "devoid of any indication—in *any* form—that [Mr. Clark] or his attorney planned or wanted to confer about his testimony during the recess". *Nelson*, 884 F.3d at 1110 (emphasis in original). The State only *assumes* that the record was devoid based on its *assumption* that Mr. Clark had nothing to say to trial counsel during the overnight recess and from trial counsel's mere presence in the courtroom. The State does not consider whether trial counsel was attentive (or conscious), and it hastily brushes aside trial counsel's testimony, "Wow, I should have objected". (E. 86).

Additionally, while the record strongly implies, if not demonstrates, that Mr. Skillern's attorney was aware of *Geders* and Mr. Skillern's right to speak with him about all maters not related to his testimony during the overnight recess, Mr. Clark's trial counsel was not familiar with *Geders* and "did [not] read that particular case [] and know it with specificity". (E. 74).

Finally, unlike the Appellate Court, the Eleventh Circuit, albeit in a footnote, at least considered the rights of *Mr. Skillern* not merely the words of his attorney over two years after the trial at a post-conviction hearing. It did so while rejecting his attorney's contention that the trial court's interactions with *other witnesses* mitigated the absence of any desire to confer with his attorney by creating a chilling effect, stating: "The mere fact that other, non-party witnesses were instructed not to discuss their testimony with anyone has no particular bearing on Skillern's rights as a defendant." *Nelson*, 884 F. 3d at 1110 n. 4.

The State's claim that *Nelson* warrants applying the "actual deprivation" rule here is disingenuous, *Nelson* is unpersuasive foreign precedent that should be rejected for the halfhearted smokescreen it is, and the Appellate Court's judgment should be reversed.

## V. THE STATE'S CONFUSION ABOUT WAIVER AND THE ATTORNEY-CLIENT PRIVILEGE DOES NOT JUSTIFY USURPING MR. CLARK'S CONSTITUTIONAL RIGHTS WITH TRIAL COUNSEL'S OPINIONS.

The State's conflicting emphasis on trial counsel's testimony, which it uses to claim that Mr. Clark both consensually waived the attorney-client privilege and that waiver is inapplicable, illuminates its erroneous belief, and the Appellate Court's erroneous holding, that trial counsel's *words* dictate Mr. Clark's *right* to counsel.

### A. The State's belief that actual prejudice does not equate to waiver is meritless.

Divulging one's actual or even intended communications with their attorney constitutes a waiver of the right to counsel by removing their reasonable expectation of privacy. For individuals like Mr. Clark, divulging that information also subjects what would be private communication to invasive dissection through cross-examination by the State and the court, and potential ridicule by the State, court, and general public.

The State's assertion that Mr. Clark did not cite any cases stating that the actual deprivation standard equates to a waiver of counsel[23], suggests that it did not read Mr. Clark's brief, or at least pages six, twenty-five, and thirty-two through thirty-five of it[24],

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[23] *Brief of Respondent*, at 47.

[24] Interestingly, the State the State's sole mention of *Mudd* is within a footnote, where it deems the case, among others, "inapposite". *Brief of Respondent*, at 41 & 41-42 n. 11.

where Mr. Clark discussed *Mudd v. United States*, 798 F.2d 1509 (D.C. Cir. 1986). Again, in *Mudd*, the United States Court of Appeals for the District of Columbia rejected the same arguments about the need for a showing of actual deprivation from a gag order during a weekend recess that the State makes here, and explained that satisfying this standard requires waiver:

> The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question [the] defendant and counsel about the discussion that did take place, to see if [the] defendant nevertheless received adequate assistance. We cannot accept a rule whereby private discussions between counsel and client could be exposed in order to let the government show that the accused's sixth amendment rights were not violated.

*Id.* at 1513.

Demonstrating actual deprivation of counsel equates to waiver, violating Mr. Clark's constitutional right to counsel. Therefore, the State is wrong, and the Appellate Court's judgment should be reversed.

**B. The State confirms that actual prejudice violates the attorney-client privilege.**

The State admits that "in some circumstances, the credibility of an assertion that the defendant wished to meet with counsel would be enhanced by the disclosure of some degree of concrete detail about the topics of the desired communication". *Brief of Respondent*, at 50. This contradicts its assertion that the actual deprivation rule does not

require divulging "the substance of intended attorney-client communication". *Id.* It also reinforces the fact that Mr. Clark could not have satisfied the actual deprivation rule by merely testifying, "I wanted to speak with my attorney during the overnight recess".

Worse, the State claims: "the necessity to disclose some degree of otherwise-privileged information to establish an ineffective-assistance claim is commonplace". *Brief of Respondent*, at 50 (citing *State v. Thomas*, 325 Md. 160 (1992)). This "commonplace" necessity, described in *Thomas* as, "the universally accepted rule that the [attorney-client] privilege is waived by the client in any proceeding where he or she asserts a claim against counsel of ineffective assistance"[25], is limited to situations where the *attorney*'s testimony would help determine whether his or her assistance was ineffective, *not* the *petitioner's* testimony. It only matters what *Mr. Clark* would have said to trial counsel during the overnight recess, not *trial counsel's* speculation about what Mr. Clark might have said.

Applying the law to the fact that the actual deprivation rule would require Mr. Clark to testify about his desired communications with trial counsel provides further proof that the Appellate Court's holding violated the attorney client-privilege and Mr. Clark's constitutional right to counsel. The attorney-client privilege became "a right of the client" in 1776 through "the Duchess of Kingston's Trial (20 Howell, State Trials 355, 386 (1776))". *Newman v. State*, 384 Md. 285, 301 (2004). It is "is so basic to the relationship of trust between an attorney and client that, although it is not given express constitutional

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[25] *Thomas*, 325 Md. at 174.

protection, it is essential to a defendant's exercise of the constitutional guarantees of counsel and freedom from self-incrimination". *Id.* at 301-302. The privilege attaches when each of the following elements are met:

> (1) legal advice of [any] kind is sought,
> (2) from a professional legal adviser in his capacity as such,
> (3) the communications relating to that purpose,
> (4) made in confidence,
> (5) by the client,
> (6) are at his insistence permanently protected,
> (7) from disclosure by himself or by the legal adviser,
> (8) except the protection [may] be waived.

*Id.* at 302. Considering that the trial court prevented Mr. Clark from seeking advice from trial counsel, all of these elements are presumptively satisfied.

Furthermore, pursuant to CJP § 9-108, "a person may not be compelled to testify in violation of the attorney-client privilege". "A person" includes Mr. Clark.

Additionally, as observed by this Court in *Att'y Grievance Comm'n of Maryland v. Powers*, 454 Md. 79 (2017), "the attorney-client privilege belongs to the client; the attorney cannot legally waive the privilege on behalf of the client without the client's consent." *Id.* at 102 (citing *Newman v. State*, 384 Md. 285, 301 (2004)).

"The Sixth Amendment right to counsel protects the right to effective assistance of counsel, and so, necessarily, the 'privacy of communication with counsel'". *United States v. Elbaz*, 396 F. Supp. 3d 583, 591 (D. Md. 2019) (quoting *United States v. Brugman*, 655 F.2d 540, 546 (4th Cir. 1981)). The State is wrong as a matter of law, and the Appellate Court's judgment should be reversed.

### C. The State fails to show why trial counsel's testimony should supersede Mr. Clark's attorney-client privilege and constitutional right to counsel.

Beyond the fact that trial counsel lied to the post-conviction court[26] with no attempted correction by the State, the State's heavy reliance on his testimony, specifically that he did not believe that there was anything to speak with Mr. Clark about during the overnight recess, is both contradictory[27] and misplaced. "The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial". *Cronic*, 466 U.S. at 658 (emphasis added). Whether, as the State claims, *Mr. Garcia* "had no concern that he believed he needed to address with Clark"[28] and whether *Mr. Garcia* was "going to meet with him or say anything that night"[29] is irrelevant. *Mr. Clark* was the holder of the right to counsel, not Mr. Garcia. Nor did Mr. Garcia have any ability to determine what Mr. Clark *would have* said to him or Ms. Mantegna during the overnight recess. His thoughts about Mr. Clark's thoughts, are, respectfully, useless. The Appellate Court's judgment should be reversed.

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[26] Mr. Garci testified: "You know, I can't call into JCI at that time, they have it now, because of all the COVID". *Brief of Respondent*, at 11. The first case of COVID in the United States was not until January 20th, 2020 CDC, *CDC Museum COVID-19Timeline*,https://www.cdc.gov/museum/timeline/covid19.html#:~:text=January%2020%2C%202020,respond%20to%20the%20emerging%20outbreak.

[27] Again, the State concedes, "Garcia's assessment of whether he should have objected in hindsight bears little weight". *Brief of Respondent*, at 60.

[28] *Brief of Respondent*, at 12.

[29] *Id.* at 14 (quoting E. 86).

## VI. THE STATE'S ARGUMENTS ABOUT FOREIGN CASES ARE INVALID.

The State forgets that the precedent of this Court and the United States Supreme Court supersedes conflicting foreign precedent, especially the precedent of *intermediate* appellate courts. Hence the State's citation to *Wallace v. State*, 851 So.2d 216 (Fla. Ct. App. 3d Dist. 2003), an opinion from Florida's appellate court, is irrelevant at best.

The *Wallace* court's holding is also incorrect. Neither this Court's precedent nor the United States Supreme Court's precedent supports *Wallace*'s holding that the presumption of prejudice is inapplicable "in the absence of any demonstration that anything that the trial court did affected anything, including the exercise of sixth amendment rights, that Wallace or his counsel did or wanted to do'". *Brief of Respondent*, at 33-34 (quoting *Wallace*, 851 So.2d at 217-218).

The State's sweeping claims about other foreign jurisdictions are no better than its citation to *Wallace*. The State's claim that the Appellate Court "joined a near-unanimous body of authority from other federal and state courts"[30] by requiring Mr. Clark to show actual prejudice is simply wrong. As noted in Mr. Clark's opening brief to this Court, the Second, Fifth, Seventh, and D.C. Circuits directly uphold the *Geders* presumption of prejudice, the Sixth, Eighth, and Ninth Circuits indirectly uphold the *Geders* presumption of prejudice, 16 of 26 other states uphold the *Geders* presumption of prejudice, and none of those courts or the *Geders* court required that the defendant prove prejudice.

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[30] *Brief of Respondent*, at 2

The State's remarks that "the cases [Mr.] Clark cites do not support his claims"[31] and that his cases are "almost all inapposite"[32], are equally inadequate and hypocritical. The State neglects to elaborate on this claim despite the full list of those cases and pin cites for each case that Mr. Clark provided in his opening brief to this Court. Furthermore, it is the State, not Mr. Clark, who: sparked a frivolous survey of state and federal courts, made bold claims about their "near-unanimous"[33] authority, and failed to substantiate those claims.

The State's only appropriate action with the majority of its comments about cases from foreign jurisdictions is crouching them in footnotes. The State is wrong. The Appellate Court's judgment should be reversed.

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[31] *Brief of Appellant*, at 37.

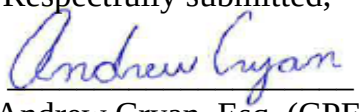
[32] *Id.* at 41.

[33] *Brief of Respondent*, at 2.

## CONCLUSION

For the foregoing reasons, Mr. Clark respectfully requests that this Court reverse the judgment of the Appellate Court of Maryland.

Respectfully submitted,



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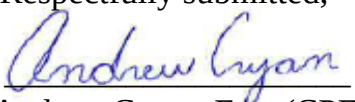
**CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112**

1. This brief contains 6,490 words, excluding the parts of the brief exempted from the word count by Maryland Rule 8-112.
2. This brief complies with the font, spacing, and type size requirements stated in Maryland Rule 8-112.

Respectfully submitted,



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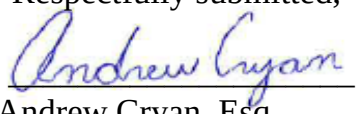
## CERTIFICATE OF SERVICE

I electronically filed the foregoing *Reply Brief and Appendix of Petitioner Damien Gary Clark and Request for Oral Argument* in accordance with Maryland Rule 20-201(g) using the MDEC system to send electronic notification to all parties entitled to service, including Assistant Attorney General Jer Welter at jwelter@oag.state.md.us, on this 17th day of February 2023.

Respectfully submitted,



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