In the
Supreme Court of Maryland

September Term, 2022

No. 25

DAMIEN GARY CLARK,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Writ of Certiorari to the
Appellate Court of Maryland

Brief of the Maryland Criminal Defense Attorneys' Association as *Amicus Curiae* in Support of the Petitioner (Filed with All Parties' Consent)

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STATEMENT OF INTEREST

The mission of the Maryland Criminal Defense Attorneys' Association ("MCDAA") includes research, education, and advocacy relating to criminal defense practice, the proper administration of justice, and the protection of individual rights. MCDAA respectfully submits this *amicus curiae* brief to address the serious implications the Appellate Court's decision will have on the attorney–client relationship and defendants' rights in future cases. The parties have consented to MCDAA filing this brief.

ARGUMENT

Everyone agrees that under U.S. Supreme Court precedent, the circuit court acted *improperly* when it ordered Mr. Clark not to speak with his lawyer during an evening recess following Mr. Clark's first day of testimony in his homicide trial. Yet the Appellate Court reached the surprising conclusion that "although an order to the defendant not to discuss his or her testimony with anyone during an overnight recess is improper, it does not, by itself, constitute a deprivation of the right to counsel." *State v. Clark*, 255 Md. App. 327, 345 (2022). Instead, the court held that a deprivation of the right to counsel occurs only when a defendant can show, either through an objection, or "some other evidence," that he "*wanted* to speak with counsel and *would* have done so absent the instruction." *Id.* (emphasis added). Absent such an

"actual deprivation of counsel," a defendant cannot show his Sixth Amendment right to counsel was violated. *Id.*

Mr. Clark's briefing in this Court and Judge Nazarian's dissent below amply demonstrate why the Appellate Court's holding is inconsistent with binding precedent. But there are deeper problems with that holding, and they are of great concern to defendants and defense attorneys across the State.

First, the "actual deprivation" standard requires defendants to place their attorney–client relationship in issue and expose it to examination by prosecutors, which significantly jeopardizes a defendant's right to a confidential relationship with his attorney.

Second, the scope of the Appellate Court's holding is not limited by the specific posture of this case—a post-conviction petition alleging ineffective assistance of counsel for failure to object to the circuit court's gag order. This is because, in evaluating Mr. Clark's ineffective-assistance claim, the Appellate Court expressly held that *no underlying constitutional violation* occurred and thus rewrote the standard for denial of counsel not just on post-conviction review, but on direct appeal and at trial as well.

Third, the Appellate Court's reasoning—which emphasized *counsel's* priorities and noted Mr. Clark's inability to call his lawyer from jail—is consistent with a view of criminal defendants as passive spectators to their own trial, denying them full participation in the most important event of

their lives. If Mr. Clark were not incarcerated and could confer with counsel whenever he wanted, the burdens imposed by the actual-deprivation standard would be easier to see. Incarcerated defendants should not have a diminished right to counsel just because it may be harder for them to access counsel.

I. THE APPELLATE COURT'S HOLDING WILL CAUSE FAR-REACHING HARM TO THE ATTORNEY–CLIENT RELATIONSHIP IN CRIMINAL CASES.

Perhaps the most important guarantee of the Sixth Amendment is not just *access* to counsel, but *confidential* access to counsel. *See Weatherford v. Bursey*, 429 U.S. 545, 563 (1977) (Marshall, J., dissenting) ("[I]t has long been recognized that the essence of the Sixth Amendment right is privacy of communication with counsel.") (internal quotation marks and modifications omitted). "A criminal defendant's ability to communicate candidly and confidentially with his lawyer is essential to his defense," and "the right to privately confer with counsel is nearly sacrosanct." *Nordstrom v. Ryan*, 762 F.3d 903, 910 (9th Cir. 2014). A requirement that defendants prove that they would have spoken to counsel, if the court hadn't ordered them not to, will significantly jeopardize the guarantee of a confidential attorney–client relationship by inevitably placing confidential details about that relationship in issue. And this harm will be widely felt because the Appellate Court's holding is not confined to post-conviction challenges.

A. The Actual Deprivation Standard Threatens the Confidentiality of the Attorney–Client Relationship.

The Appellate Court held that, absent an objection, a defendant must show through "some other *evidence*" that he would have spoken to his lawyer but for the court's order. 255 Md. App. at 345 (emphasis added). And though the court rightly did not require defendants to reveal the nature of privileged communications with counsel, its holding risks pushing defendants to that point if their intent to speak to counsel becomes an evidentiary issue.[1]

Indeed, there is a real risk that the actual deprivation standard will result in a compelled waiver of the attorney–client privilege or disclosure of privileged information when a defendant's intent to confer with counsel is put in issue. Even in post-conviction proceedings, privilege waivers are not automatic. This Court has held that, in the post-conviction context, a client waives the attorney–client privilege "where he or she asserts a claim against counsel of ineffective assistance and those communications . . . *are relevant to the determination of the quality of counsel's performance*." *State v. Thomas*, 325 Md. 160, 174 (1992) (emphasis added). Thus, ordinarily, when a

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[1] On the other hand, if the actual-deprivation standard really is a clear bright line—a defendant *must* say he wished to speak to counsel but *cannot* be required to say anything more—it is close to an empty formality. Requiring a defendant to confirm merely that he actually wanted to speak with his lawyer, without more, adds very little when it is already undisputed that he has been ordered not to communicate with counsel.

defendant alleges that the *court* denied him access to counsel but does not allege deficient performance by *counsel*, his claim of error should not result in a waiver of the privilege. But the Court has also held that "a privileged party cannot fairly be permitted to disclose as much as he pleases and then to withhold the remainder to the detriment of the [other party]." *Parler & Wobber v. Miles & Stockbridge*, 359 Md. 671, 693 (2000) (internal quotation marks omitted). And that rule threatens to erode attorney–client confidentiality if a defendant must prove an actual deprivation of access to counsel.

If a defendant's desire to speak with counsel becomes an evidentiary issue, it can be challenged like any evidentiary issue. There is no plausible way to probe whether a defendant really wanted to speak to counsel, and would have done so, without inquiring into the defendant or counsel's mental impressions about the case. So, once a defendant testifies that he intended to speak to his lawyer, prosecutors will no doubt argue that they should be entitled to challenge his assertion: How could a prosecutor effectively rebut a defendant's claim that he wanted to speak with his lawyer without asking why he wanted to talk to counsel, or what he wanted to talk about, or calling counsel to contradict her client? Thus, unless prosecutors are prepared to simply accept a defendant's statement that he wanted to talk to counsel without digging deeper—an outcome we would welcome but which we doubt

is realistic because it would amount to conceding the defendant's post-conviction challenge—it seems unavoidable that the actual deprivation standard will expose aspects of the attorney–client relationship that ought to remain confidential.

And even if the actual deprivation standard would not always result in a privilege or confidentiality waiver, the *fear* that it may do so could make clients more reluctant to articulate that they wished to talk to their lawyers. *See, e.g.*, *Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987) ("It is conceivable that disclosure of the bare fact that counsel was consulted might in some circumstances chill the willingness of citizens to approach a lawyer's office."); *cf. also Swidler & Berlin v. United States*, 524 U.S. 399, 407 (1998) (observing, in the context of posthumous waiver, that it is "unreasonable to assume that" "the fear of disclosure, *and the consequent withholding of information from counsel*" "vanishes altogether") (emphasis added). Clients should not have to worry that by insisting on their right to access counsel, they may expose aspects of their attorney–client relationship to scrutiny. This Court should confirm that the Sixth Amendment right to counsel does not need to be weakened in order to be successfully invoked.[2]

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[2] This phenomenon has occurred in other contexts—for instance, in U.S. Supreme Court precedent effectively requiring suspects to *speak* in order to invoke their right to remain *silent*. *See Berghuis v. Thompkins*, 560 U.S.

B. The Appellate Court's Decision is Not Limited to Post-Conviction Claims of Ineffective Assistance.

The detrimental effects of the Appellate Court's holding will not be limited to post-conviction challenges like Mr. Clark's. Although this case arose in the post-conviction context, and although the Appellate Court purported to analyze Mr. Clark's claims of error under the *Strickland v. Washington* test for post-conviction claims of ineffective assistance of counsel, the court's core holding cannot be limited to that context.

As Judge Nazarian sets forth in his dissent, this case involves two distinct Sixth-Amendment contexts: one is a trial court denying a defendant access to counsel, which is analyzed under *Geders v. United States*, 425 U.S. 80 (1976); the other is ineffective assistance of trial counsel, which is analyzed under *Strickland v. Washington*, 466 U.S. 668 (1984). *See* 255 Md. App. at 352 (Nazarian J., Dissenting). Although Mr. Clark argues that the *circuit court* denied him access to counsel, his post-conviction petition rested on a claim that *counsel* performed deficiently by failing to object to the circuit court's instruction. Nevertheless, the Appellate Court squarely addressed the underlying deprivation *by the circuit court* and announced a new legal requirement for establishing such a deprivation under *Geders*. The court

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370, 412 (2010) (Sotomayor, J., dissenting) ("Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak.").

"disagree[d] with the premise that there was a showing of an actual deprivation of the right to counsel" and held that "to show a *deprivation of the right to counsel* in this context"—i.e., the context of "an instruction not to communicate"—"there must be a showing that the instruction actually prevented the defendant and defense counsel from communicating." *Id.* at 341 (emphasis added). And to remove any doubt, the court clearly stated:

> We hold that, although an order to the defendant not to discuss his or her testimony with anyone during an overnight recess is improper, it does not, by itself, constitute a deprivation of the right to counsel. Rather, *to show that the instruction resulted in a violation of the defendant's Sixth Amendment right to counsel*, there must be some evidence that there was an actual deprivation of counsel.

Id. at 345 (emphasis added).

The Appellate Court's holding, therefore, directly addresses the standard for when a trial court deprives a defendant of access to counsel and is not limited to examining whether trial counsel's performance was deficient. In fact, as the majority acknowledged, prejudice under *Strickland* is presumed when there is an actual denial of counsel. 255 Md. App. at 341. Thus, the court *could not have found* a lack of prejudice, under *Strickland*, without first holding that the circuit court's instruction did not deprive Mr. Clark of counsel, under *Geders*.

The State, similarly, argued that Mr. Clark "wasn't actually deprived of the opportunity to confer with his counsel" because "a Sixth Amendment

deprivation *of the type recognized in Geders* does not occur unless a court's no-communication directive actually prevents the defendant and defense counsel from communicating[.]" *Id.* at 359 (Nazarian, J., dissenting) (emphasis added) (internal modifications omitted). Indeed, the State explicitly argued that "the actual-deprivation rule" "is a requirement for the defendant to show that there was a *deprivation of counsel in the first place*." *Id.* at 360 n.2 (emphasis added).

Because the holding below is not simply about how a defendant must prove ineffective assistance of counsel for failing to object to a *Geders* violation—rather, it is a substantive ruling that a *Geders* violation does not occur unless a defendant can show the court's instruction actually prevented him from conferring with his counsel—it will affect defendants at trial and on direct appeal as well as in post-conviction proceedings.

II. THE APPELLATE COURT'S DECISION DEVALUES DEFENDANTS AS PARTICIPANTS IN THEIR OWN TRIALS.

Implicit in the holding below is a view of defendants as passive bystanders to their trials, instead of active participants in their defense. This is a harmful perspective from which to view criminal defendants and their constitutional rights because it can occlude the seriousness of deprivations like the one Mr. Clark suffered.

The Appellate Court quoted a lengthy passage from the post-conviction proceeding in which the State questioned Mr. Clark's trial counsel about the fact that Mr. Clark was being held at the detention center. *See id.* at 334. In that exchange, the State asked counsel "[Mr. Clark] wasn't coming to your office that night. Is that fair?" *Id.* Counsel agreed that "we can't call him," and the State reiterated that "[y]ou couldn't even call him." *Id.* Although the Appellate Court does not expressly state it, the clear import of this language is to suggest that Mr. Clark couldn't really have been harmed by the court's no-contact order because he was locked up and unable to call his lawyer even if he wanted to.

The court also stressed *counsel's* testimony that *he* did not have anything to talk about with Mr. Clark. *See id.* at 333–34 (noting that "counsel had no concerns to be addressed," that counsel "did not have anything to say to appellee that he was prevented from saying to him," and that "appellee did not ask to speak to him"). But as Judge Nazarian pointed out, "the right to effective assistance of counsel belonged solely to Mr. Clark. Just because trial counsel may not have been aware of any need to consult with Mr. Clark overnight doesn't mean that that was what Mr. Clark really wanted." *Id.* at 376 (Nazarian, J., dissenting) (internal quotation marks and modifications omitted).

The emphasis on counsel's preferences and Mr. Clark's inability to participate are consistent with a broader trend in the criminal-justice system. Commentators have observed that, although the "history of the Sixth Amendment right to counsel reveals an idea of the defendant as the leader of their trial, with defense counsel assisting rather than supplanting the defendant," there is a modern tendency to view defendants as mere "service recipients" instead of "change agents." Sara R. Faber, Note, *Competency, Counsel and Criminal Defendants' Inability to Participate*, 67 Duke L.J. 1219, 1229 (2018); Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 Albany L. Rev. 1281, 1282 (2015). That attitude harms defendants because it makes it easier to tolerate limiting their access to counsel.

In this case, the actual deprivation standard is much harder to justify without the perception that defendants are unavailable to help in their own defense.[3] Imagine if Mr. Clark were a wealthy white-collar defendant out on bond—the kind of client who has his lawyer's cell phone number and can call her day and night; the kind who can spend whole weekends or long evenings

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[3] In fact, it is realistic to assume the opposite: From November 2016 to September 2017, an average of 52% of defendants who had initial appearances in district court were released on their own recognizance or an unsecured bond and an additional average of 23.8% posted bond within 5 days. Maryland Judiciary, *Impact of Changes to Pretrial Release Rules* 35 (Table 2), *available at* https://tinyurl.com/bailreport; *id.* at 97 (Table 8).

in a law firm conference room going over evidence and hashing out case strategy. If a court ordered *that* Mr. Clark not to speak with his attorney overnight, is there any reason not to *presume* that the order denied him actual access to counsel? But all defendants have the same right to counsel as that version of Mr. Clark, and the right to counsel should not be cabined just because some defendants are incarcerated and cannot exercise it as easily.

When construing defendants' rights, courts can and should think of defendants as essential and active participants in their cases; viewing them as inaccessible and or inessential makes it easier to accept a holding that requires a defendant to prove he was harmed even after a court ordered him not to speak with counsel. This Court should reject that attitude and hold that when a defendant is ordered not to speak to his lawyer, nothing more is necessary to establish a Sixth Amendment violation.

CONCLUSION

The Court should reverse the judgment of the Appellate Court.

January 27, 2023

Respectfully submitted,

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CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 2,813 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief is typeset in 13-point Century Schoolbook font.

2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.

/s/ John R. Grimm
John R. Grimm

RULE 1-313 CERTIFICATION

Pursuant to Md. Rule 1-313, I hereby certify that although I do not maintain an office for the practice of law in Maryland, I am admitted to practice law in this State.

/s/ John R. Grimm
John R. Grimm

CERTIFICATE OF SERVICE

Pursuant to Maryland Rules 20-201(g)(3) and 20-405(b), I certify that on this day, January 27, 2023, I used the MDEC System to electronically file the Brief of the Maryland Criminal Defense Attorneys' Association as *Amicus Curiae* in Support of the Petitioner, which sent electronic notification of filing to all persons entitled to service, and also caused two hardcopies to be mailed to counsel for both parties at the following addresses. This document does not contain confidential or restricted information as defined by Maryland Rule 20-101(s).

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