

**IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA**

STATE OF GEORGIA, )  
Plaintiff. )  
 )  
V. ) Case No.: 23SC189192  
 ) Hon. Kimberly M. Esmond Adams  
 )  
VICTOR PUERTAS, )  
Defendant. )

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**MOTION TO DISMISS FOR STATE’S VIOLATION OF DEFENDANT’S RIGHT  
TO COUNSEL OR, IN THE ALTERNATIVE, TO SUPPRESS ATTORNEY-  
CLIENT PRIVILEGED CONVERSATIONS**

COMES NOW Defendant Victor Puertas, by and through undersigned counsel, and moves this Court to dismiss this case for the State’s violation of his right to counsel as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 1, Paragraph XIV of the Georgia Constitution. In the alternative, Mr. Puertas moves this Court to suppress any and all evidence derived from the State’s recording, listening to, transcribing, annotating, and disseminating the privileged conversations between Mr. Puertas and his counsel at the time. In support of this motion, Mr. Puertas states as follows:

**I. FACTUAL BACKGROUND**

On March 5th, 2023, the State arrested Mr. Puertas. He was brought to the DeKalb County jail and detained there for several weeks. During that time, Mr. Puertas was represented by Mr. Eli Bennett. While represented by Mr. Bennett, Mr. Puertas had numerous phone calls with counsel that were recorded by the DeKalb County jail. Upon information and belief, at the time these calls were made and recorded, Mr. Puertas had

been denied access to an unrecorded, confidential phone line to use for privileged conversations with his attorney.

Not only did the State record and listen to Mr. Puertas' phone calls with Mr. Bennett, but also the State *specifically flagged these recordings as "legal" calls*. The State then transcribed these calls, annotated the transcriptions with extreme detail, and disseminated these annotated transcriptions to all co-defendants in this case through discovery disclosures.

During the time that he was representing Mr. Puertas, while Mr. Puertas was incarcerated in DeKalb County jail, Mr. Bennett also had an actual conflict of interest which deprived Mr. Puertas of effective, conflict-free counsel. Upon information and belief, both Mr. Bennett and the State were actually or constructively aware of this conflict. While Mr. Bennett was representing Mr. Puertas, he was simultaneously representing one of Mr. Puertas' co-defendants who had been arrested at the same location on the same date. Upon information and belief, during the time Mr. Bennett represented Mr. Puertas, he organized and attended a proffer session between this co-defendant and the State, at which Mr. Puertas' co-defendant presumably proffered information favorable to the State's case against Mr. Puertas and his other co-defendants, with the support or even encouragement of Mr. Bennett. This actual conflict, of which Mr. Bennett and the State were or should have been aware, unequivocally deprived Mr. Puertas' right to effective, conflict-free counsel.

## II. LEGAL ARGUMENTS

### ***A. The State’s Knowing Interference with and Deprivation of Mr. Puertas’ Right to Counsel Warrants Dismissal of this Case.***

“In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. The assistance of counsel that is guaranteed by the Sixth Amendment contemplates that the assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. *Wilson v. State*, 257 Ga. 352, 352 (1987). “Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises.” *Id.*

As explained by the United States Supreme Court, Sixth Amendment violations come in a variety of contexts and degrees, resulting in varying levels of prejudice presumed or not. *See generally Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court has described the most serious violations—warranting legally presumed prejudice—as follows:

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. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. 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 (citing *United States v. Chronic*, 466 U.S. 648, 658, 659 & n.25 (1984)). Similarly, in *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980), the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In describing why prejudice is presumed when a defendant has shown an actual conflict of interest, the Court explained:

In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.

*Strickland*, 466 U.S. at 692.

In this case, the State knew or should have known that an actual conflict existed given Mr. Bennett's dual representation of both Mr. Puertas and Mr. Puertas' co-defendant whose proffer with the State Mr. Bennett actively facilitated. Instead of alerting Mr. Bennett or Mr. Puertas' current undersigned counsel to the issue, the State further exploited the conflict—in plain violation Mr. Puertas' constitutionally guaranteed right to counsel—in two egregious ways. First, the State proceeded with the proffer session by Mr. Puertas' co-defendant organized and attended by Mr. Bennett, despite the glaring conflict inherent in Mr. Bennett's representation of Mr. Puertas. Second, the State recorded, listened to, transcribed, annotated, and broadly disseminated the privileged conversations between Mr. Puertas and Mr. Bennett, despite the State's awareness of Mr. Bennett's conflict and his facilitation of the proffer by Mr. Puertas' co-defendant.

The actual prejudice to Mr. Puertas is currently unknown, though likely extensive. Regardless, this prejudice is presumed and cannot be cured. Accordingly, the case must be dismissed.

***B. Should the Court Deny Mr. Puertas' Motion to Dismiss, He Moves to Suppress Any and All Evidence Derived from the State's Recording, Listening to, Transcribing, Annotating and Disseminating His Privileged Conversations.***

“There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to . . . [c]ommunications between attorney and client.” Ga. Code Ann. § 24-5-501 (West).

Of course, the attorney-client privilege may be waived explicitly or where there is no reasonable expectation of privacy. And in fact, the Georgia Court of Appeals has recently found that a waiver may occur during a recorded telephone conversation at which the defendant had no reasonable expectation of privacy. *See Burns v. State*, 368 Ga. App. 642, 646 (2023). But such a finding was made in the *Burns* case only following an evidentiary hearing, where it determined that counsel for the defendant informed him that the State was listening to their calls and they would discuss the case in more detail in person. In other words, the Court did not rule that any recorded jail call between a client and their attorney is not a Sixth amendment violation.

This case is notably distinguishable, for two reasons. First, as is reflected in the annotated transcripts themselves, Mr. Puertas was denied access to non-recorded phone communications with his counsel by the Dekalb County jail. Second, and most importantly, the glaring actual conflict that existed by virtue of Mr. Bennett's joint representation of Mr. Puertas and his co-defendant who cooperated in the State's case against Mr. Puertas deprived Mr. Puertas of effective, conflict-free counsel. As a result, any alleged waiver that the State might assert could not have been knowing and intelligent—in short, even if the State alleges a waiver, given the active conflict, and the active exploitation of that conflict by the State, such a waiver could not be legally valid.

Accordingly, even if this case is not dismissed, the Court must suppress all evidence derived from the State's recording, listening to, transcribing, annotating, and dissemination of the privileged conversations between Mr. Puertas and his prior counsel.

### **III. CONCLUSION**

For the foregoing reasons, Mr. Puertas moves this Court to dismiss this case or, in the alternative, grant his motion to suppress or any other relief the Court deems appropriate. To the extent the Court does not grant this motion to dismiss on the papers, Mr. Puertas requests an evidentiary hearing and an opportunity to submit further arguments following the admission of evidence.

Respectfully submitted this March 15, 2024.

/s/ David Gastley  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the foregoing **Motion to Dismiss for State's Violation of Defendant's Right to Counsel or, in the Alternative, to Suppress Attorney-Client Privileged Conversations** on the Prosecutor, John Fowler, via statutory electronic service.

Respectfully submitted this March 15, 2024.

/s/ David Gastley

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