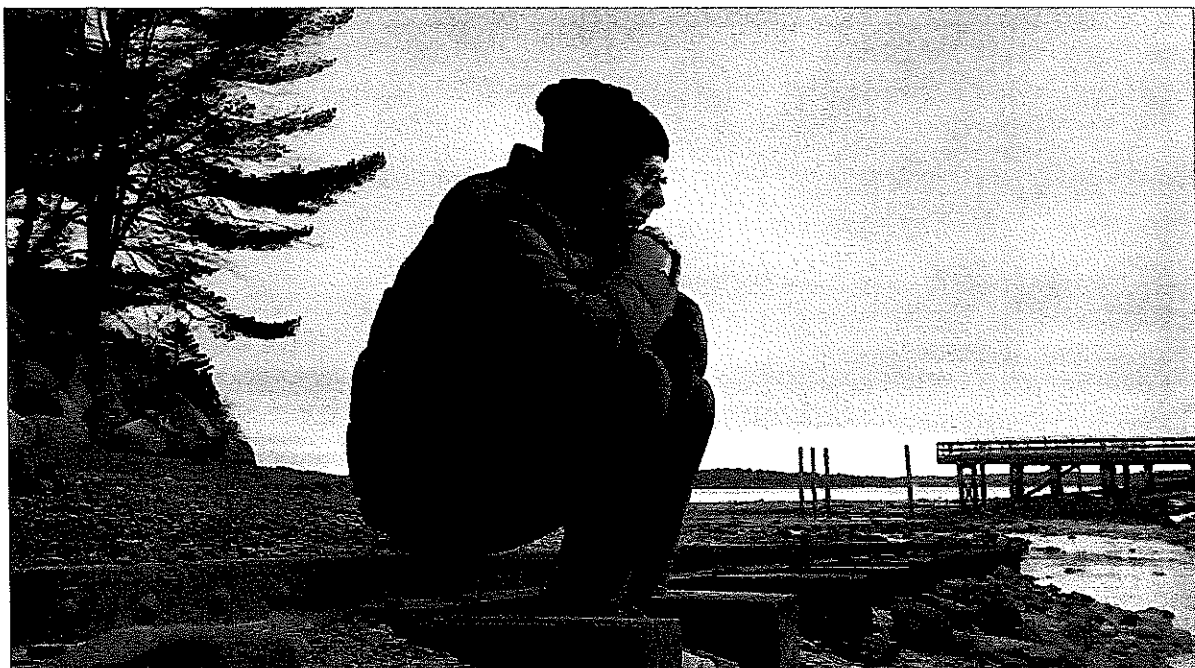


EAVESDROPPING IN MAINE JAILS (HTTPS://WWW.THEMAINEMONITOR.ORG/CATEGORY/PROJECTS/EAVESDROPPING-IN-MAINE-JAILS/)

# One man fights to undo plea deal due to jail recording of attorney calls

Steven Clarke gambles that a justice will let him take back his guilty plea.

BY SAMANTHA HOGAN (HTTPS://WWW.THEMAINEMONITOR.ORG/AUTHOR/SAMANTHAHOGAN/) | FEBRUARY 13, 2022



Steven Clarke near where he lives in Northport, Maine, after describing his fight over jail recordings of his attorney calls. Photo by Fred J. Field.



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*This is part of a continuing series.*

While awaiting trial in 2014, Steven Clarke's calls with his attorneys were secretly recorded by the Somerset County Jail and then turned over to prosecutors.

Clarke and his attorneys initially hoped the 715 minutes of insider information could be leveraged to get the state to dismiss burglary, domestic violence and other criminal charges, court records show. Instead, he took a plea deal of prison time and probation.

Now released, Clarke continues fighting for a judge to review his guilty plea, given that prosecutors had discs with dozens of calls between him and his attorneys. By withdrawing his plea, Clarke could have a worse outcome, a prosecutor said. He could face a new trial on all of the original charges and be sentenced to serve decades in prison.

"I'm so invested in this, and I feel that throughout the years I've always pled guilty when I was guilty and took the deal," said Clarke, 57, who said this deal was different for him because his questions about the effect of the recorded calls remains unanswered. "I've been stubborn I guess, but for good reason."

Hunter Tzovarras, who represents Clarke now in a post-conviction review, told The Maine Monitor he has listened to recordings of the phone calls between Clarke and his previous attorneys.

"They were clearly calls between the attorney and the client," Tzovarras said. "...As far as the content of calls, I can't really get into that, but certainly some of them involved attorney-client privilege." He described the conversations as including strategies and ways to proceed with the case.



Steven Clarke, who lives in a Waldo County motel, describes how a jail's recording of calls with his attorneys has kept him from getting a fair trial. Photo by Fred J. Field.

Clarke filed a handwritten petition from prison in 2016 asking a judge to review his case citing a litany of errors, including the existence of recorded calls with his attorneys. He expected an answer within a year, but instead he has waited five years. During that time he whittled down his complaint so the court now has just one issue to decide: Whether Clarke knew pleading guilty meant he wouldn't get to challenge the recordings.

He got one step closer on Dec. 20, 2021 during a hearing when he told a judge that he took the plea deal believing a court could still decide to dismiss all of the charges because of the recordings.

Jailers are allowed to record and listen to phone calls of people in their custody, but conversations with attorneys are off limits. Defendants have a constitutional right to seek confidential legal advice from a lawyer, including on the telephone, federal courts have ruled. State law (<https://www.mainelegislature.org/legis/statutes/15/title15sec712.html>) also prohibits jailers from interfering in those calls.

**RELATED: Jailed defendants expected private attorney calls. They didn't always get them. (<https://www.themainemonitor.org/jailed-defendants-expected-private-attorney-calls-they-didnt-always-get-them/>)**

The Maine Monitor first reported in 2020 that the Somerset County Jail was recording calls (<https://www.themainemonitor.org/breach-of-attorney-client-privilege-in-somerset-county-sparks-outrage-in-maine-legal-community/>) between attorneys and jailed defendants, often awaiting trial. Clarke's case, along with others, shows that the practice extended back years, at least to 2014.

■ ■ ***It just screamed out that it was a 6th Amendment violation.***

— Hunter Tzovarras, defense attorney

County jails across Maine recorded and shared some attorney calls with police and prosecutors, a months-long investigation (<https://www.themainemonitor.org/jailed-defendants-expected-private-attorney-calls-they-didnt-always-get-them/>) recently published by The Maine Monitor found. Nearly 1,000 attorney calls were recorded by four jails between June 2019 and May 2020, data show. Clarke and other defendants have tried to alert judges to the jails' recording of attorney-client conversations, court documents and interviews reveal. They got plea deals and empty promises, they told The Maine Monitor.

### **Taking a plea deal**

In 2015, Clarke's lawyers found recordings, in discovery sent from the Knox County District Attorney, of 79 conversations between Clarke, lawyers and a private investigator at the Somerset County Jail in the years prior.

His lawyers alleged an investigator used information from their calls to develop leads in Clarke's case, according to court records. But the deeper the defense dug into the recordings, the more roadblocks prosecutors put in their way. The district attorney's office claimed it lost its copy of the recordings, blocking the defense from analyzing which calls they may have heard, court records show.

"We went ballistic," said Justin Andrus, one of Clarke's attorneys when he took the plea deal.

Andrus asked the court to dismiss the charges against Clarke in December 2015 because the release of his attorney calls had destroyed Clarke's ability to defend himself. Before a judge could decide on the dismissal, the case settled through a plea deal.

On May 25, 2016, Clarke entered an Alford plea — meaning he maintained his innocence, but admitted that the prosecution had enough evidence to likely find him guilty at trial — and was sentenced to 10 years in prison. He would serve five years and spend another three years on probation, according to the deal.

While in prison, Clarke pushed for a review of his plea so the court would be forced to examine the recordings of his attorney calls.

When Clarke's file landed on Tzovarras' desk later in 2016, it wasn't widely known that Maine county jails were recording attorney's phone calls and it immediately caught his eye, said Tzovarras, a criminal defense lawyer in Bangor.

"It just screamed out that it was a 6th Amendment violation," said Tzovarras, referring to a defendant's constitutional right to counsel.

Clarke was released in 2018 after two years in prison and remains on probation.



With his left hand, Steven Clarke pulls out original paperwork for the case he is fighting. Photo by Fred J. Field.

Over the course of several hours during a Dec. 20 Zoom hearing before Superior Court Justice William Stokes, Clarke and his attorneys insisted that Clarke believed when he signed the plea deal that he would reserve the right to challenge the phone recordings.

A transcript presented during the hearing detailed Clarke's former attorney, Andrus, telling the court as much in 2016 when Clarke accepted the plea deal, "It will be the basis of further action by Mr. Clarke, frankly. And by doing this today, he's not waiving any rights."

State prosecutor Jeff Baroody countered those claims with multiple letters between Clarke and his attorneys, which showed that Clarke was advised that he had a slim chance of getting charges dismissed because of the recordings.

"Did it ever seem strange to you that you would be contesting issues of evidence and what could come into a trial after you had pled guilty in a case?" Baroody asked Clarke during the hearing.

Clarke testified he didn't find it strange and that plea deals and negotiations change over time.

Baroody also focused on the gamble Clarke was taking by trying to take back his guilty plea. The state could seek a new trial exposing him to a lengthy prison term.

"Here you go again, putting that fear in me," Clarke told the court.

Baroody told *The Maine Monitor* he did not listen to any of Clarke's recorded attorney calls while prosecuting him in 2016.

The state also subpoenaed Andrus to testify at his former client's hearing. Andrus testified he had told Clarke that he would be better off taking a plea deal than risking trial. He also said the significance of the recordings and whether the discs of the calls between Clarke and his attorneys could be enough to dismiss some of Clarke's charges was unresolved.

"The issue was that the Somerset County Jail was recording privileged calls. There's no question about that... those calls were recorded wrongly and they were distributed wrongly and, to me, that was a serious problem," testified Andrus.

The court's decision is pending.

### **'Serious doubts'**

Clarke wasn't the only defendant whose attorney calls were recorded in 2014 and 2015. Two other men alerted the court that they were being recorded at the Two Bridges Regional Jail, the *Maine Monitor* found.

Michael Brewer was arrested by the Lincoln County Sheriff's Office for allegedly robbing and burglarizing a home on March 17, 2013. He was assigned a court-appointed attorney, who Brewer called on the jail's phones.

"I figured that I was supposed to be able to talk to him — that it'd be confidential. And talk about the case ... I had to try to keep the case moving," said Brewer, who spoke with *The Maine Monitor* from federal prison.

Brewer said he later received a document showing the jail had recorded his calls to his attorneys. He showed the document to his defense attorney, prosecutor and the judge, but he observed no changes in how he was allowed to use the phone system.

(12) The Defendant has serious doubts that he can receive a fair trial on what he knows now and would likely want to be heard on the matter when he receives all the evidence.

Michael Brewer, in a letter a year after he first raised the issue of the Two Bridges Regional Jail recording his calls with his attorney, said, "The defendant has serious doubts that he can receive (sic) a fair trial on what he knows now and would likely want to be heard on the matter when he receives (sic) all the evidence."

The inmate handbook at the Two Bridges Regional Jail said calls to verified attorney phone numbers wouldn't be recorded, and a form handed out by the jail said attorney calls would not be intercepted, recorded, monitored or divulged, Brewer wrote in letters sent to a court a year later in July 2015.

Brewer wrote he was preparing his entire defense on the phone: speaking to a private investigator, deciding on witnesses to be interviewed and trial strategy.

"The defendant has serious doubts that he can receive a fair trial on what he knows now," Brewer wrote, referring to himself in the third-person.

Brewer accepted a deal to plead guilty to felony burglary charges and was later charged with a federal gun crime. He is serving a 47-month federal prison sentence in Memphis, Tennessee.

A second defendant, who declined to be named in this article given the nature of the charges, found out shortly after Brewer that he and his attorney also were recorded by the Two Bridges Regional Jail. Jonathan Liberman, in his capacity at the time as district attorney, told Andrus about the attorney-client calls the prosecutors had received from the jail.

Those calls were recorded because a supervisor at the Two Bridges Regional Jail did not click a box on a computer to block the phone system from recording calls to Andrus, jail investigator Paul Rubashkin told the court. He testified at a hearing that the jail recorded Andrus multiple times speaking to two clients, despite each defendant following the jail's procedure to make their attorney calls private.

The jail contracts for its inmate phone system with GTL, a national telecom company that specializes in phone systems for jails and prisons. GTL declined to comment for this story.

Rubashkin no longer works at the jail, but he told The Maine Monitor that he regrets that he released the calls to prosecutors.

"I felt bad, you know, I didn't check the calls when I released them," Rubashkin said. "I just did whatever block (of calls) that the prosecutor asked for and sent them off."

### **'Unacceptable behavior'**

Recording and sharing defendants' attorney calls "affects very serious rights," said former chief justice of the Maine Supreme Judicial Court and University of Maine School of Law Dean Leigh Saufley.



Former Chief Justice Leigh Saufley.

Judges today are regularly deciding whether litigation can move forward after opposing lawyers receive private information that they shouldn't have. Lawyers are expected to stop looking and immediately return private materials, Saufley said.

But it's increasingly a problem that private information is inadvertently being shared in the first place, she said.

Remedies are difficult. Privileged material can be excluded before trial, but after sentencing there are multiple hurdles to getting information thrown out or to receive a new trial, said Daniel Pi, a visiting assistant professor of criminal law at the University of Maine School of Law.

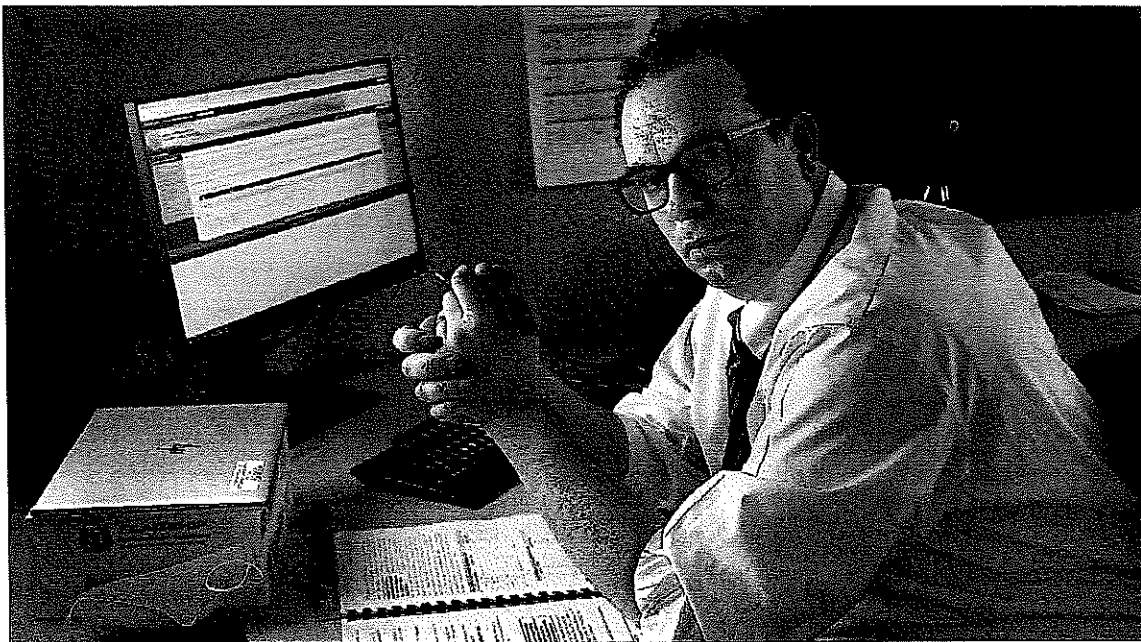
There wouldn't be a blanket reversal of cases just because recordings of attorney calls exist, Pi said. Defendants would have to prove the government purposefully interfered and that the attorney calls weren't swept up in a "dragnet" of recordings by the jails, he said. He doubts prosecutors would seek out attorney-client calls recorded by the jails. "... Why would you risk your career for that?"

One path forward is for defendants to file a class action lawsuit alleging that their constitutional rights were violated when the jails recorded their attorney calls, legal experts said.

Maine has no public defenders and relies on private attorneys, who contract with the Maine Commission on Indigent Legal Services, or MCILS, to represent adult and juvenile criminal defendants who are unable to afford to hire their own attorneys. Many of the defendants recorded and listened to between 2019 and 2021 had court-appointed lawyers through the state agency.

The agency doesn't have the power to file a lawsuit on behalf of defendants, said Andrus, who became the executive director of MCILS in 2021. His job doesn't give him the authority to force elected sheriffs to disclose if they recorded defense lawyers at the county jails. He also cannot seek a court order to make the jails stop recording attorneys, he said.

When he was in private practice, Andrus handled his calls being recorded on a case-by-case basis. In his new role as the head of a state agency, he is seeing a system-wide failure to protect the privacy of attorney-client calls in the jails.



Justin Andrus works in the executive director office at the Maine Commission on Indigent Legal Services. Photo by Fred J. Field.

"Now it's my job. And so now I am trying to take some system level approaches," Andrus said.

Andrus wants to shake up the jail system by making it a felony to record a person in custody while speaking to an attorney.

He proposes (<http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1451&item=1&snm=130>) a fine of up to \$10,000 for each time a person "knowingly eavesdrops on, records or transmits the conversation..." between a lawyer and a person in the custody of law enforcement. Any person who accesses or receives a recording of attorney-client conversations would be disqualified from participating further in the investigation or prosecution of the person.

If the legislation (<https://legislature.maine.gov/LawMakerWeb/dockets.asp?ID=280082584>) becomes law, jails would be required to look back six years to see if any attorney-client calls were recorded. Defendants would have two years to request a judicial post-conviction review of their case based on any intercepted communications.

Every 90 days, jails would have to check whether any attorney calls were recorded, along with videos and any other communications.

The bill is sponsored by the chair of the Legislature's Judiciary Committee Rep. Thom Harnett (D-Gardiner). Harnett spent 27 years working for the Office of the Maine Attorney General on natural resources and civil rights.

"The more important aspect of the statute is to make sure that this does not happen, and if it does happen, that there are remedies to the individual who is affected," Harnett said. "There is the carrot and stick approach, and some of it is the stick here. That's just to make it clear that this is unacceptable behavior."