No. 20-7304

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT PHILLIP IVERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's statements threatening violence against a federal judge -- which came at the end of a phone call with his attorneys, which were not made for the purpose of obtaining legal services, and after which the call was truncated without any response from the attorneys -- are subject to the attorney-client privilege.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Minn.):

Ivers v. CMFG Life Insurance Co., No. 15-cv-1577 (June 30, 2017)

Ivers v. CMFG Life Insurance Co., No. 17-cv-5068 (May 15, 2018)

United States v. Ivers, No. 18-cr-90 (Mar. 1, 2019)

United States Court of Appeals (8th Cir.):

United States v. Ivers, No. 19-1563 (July 23, 2020)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 967 F.3d 709. The order of the district court is not published in the Federal Supplement but is available at 2018 WL 11025541.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2020. A petition for rehearing was denied on September 21, 2020 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on February 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of threatening to murder a federal judge, in violation of 18 U.S.C. 115(a)(1)(B), and interstate transmission of a threat to injure the person of another, in violation of 18 U.S.C. 875(c). Judgment 1. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-24a.

1. In February 2015, petitioner filed a breach-of-contract action in Minnesota state court against a life-insurance company. The company removed the case to federal district court, where it was assigned to Judge Wilhelmina M. Wright. Pet. App. 2a-3a. The court granted summary judgment in favor of the insurance company on all but one of petitioner's claims. Ibid.; see 15-cv-1577 D. Ct. Doc. 81 (Sept. 30, 2016).

The next month, petitioner mailed Judge Wright a packet of court-related materials on which petitioner had written notes, such as "I do not know where I am fucking sleeping tonight! Think about it!"; "I am sick and tired of this fucking bullshit!"; "I want my fucking money"; "I will not negotiate!!!"; "Have I made myself clear!!!"; "I am in dire fucking straits!"; and "I am becoming a very dangerous person!!!" Pet. App. 3a. In November 2016, after the case had been set for a bench trial before Judge Wright, petitioner sent the court a letter demanding "a jury trial

or [his] fucking money." Ibid. (brackets in original). The same letter stated: "I smell a rat! Somebody needs to explain to me what the fuck is going on!?" Ibid.

Petitioner's communications were sent to the United States Marshals Service. A deputy marshal learned that petitioner had previously been convicted of stalking a Minnesota state court judge who had presided over a separate civil action filed by petitioner. Pet. App. 3a-4a. Petitioner was on probation for that offense when he made the statements to Judge Wright. Id. at 4a.

At a pretrial conference in January 2017, a deputy marshal spoke to petitioner about the communications to Judge Wright. Pet. App. 4a. Petitioner told the deputy marshal that the communications had been intended to speed up the proceedings, that he was frustrated with the insurance company, that he did not want to "carry that hurt around inside," and that he would "be a walking bomb" if he did not vent his frustrations. Ibid. The deputy marshal warned petitioner that sending threatening communications could be a crime, and the Marshals Service provided increased security at trial. Ibid.

Following trial, the district court entered final judgment in favor of the insurance company. 15-cv-1577 D. Ct. Doc. 105 (June 30, 2017). Petitioner sent letters to Judge Wright, the chief judge, a magistrate judge, and the court clerk, claiming that Judge Wright had been biased. Pet. App. 4a. The letter to Judge Wright stated, "You cheated me and I will not stop smearing your name

until I get redress." Id. at 4a-5a. Petitioner also called the chief judge's chambers; when told that an appeal was the proper course of action, he stated that he "was crazy mad" and was like a "walking bomb." Id. at 5a. A few days later, petitioner sent another round of letters, addressing one to "Corrupt Judge Wright" and insisting that she "pay attention." Ibid.

Petitioner's post-trial conduct prompted two deputy marshals to visit his home. Pet. App. 5a. The deputy marshals expressed concerns about "the aggressive nature" of petitioner's multiple letters, the "fixation on" and "increased agitation against Judge Wright," and "the phrase 'walking bomb.'" Ibid. In his encounter with the two deputy marshals, petitioner refused to retract his statements, remained visibly angry, and confirmed that he felt like a "ticking time bomb." Id. at 5a-6a. Petitioner also told the deputy marshals that he was "out of his fucking mind crazy" and that he was "glad [the judges] took [his communications] seriously." Id. at 6a. Referring to Judge Wright, petitioner stated: "that fucking judge -- you know, if she's scared and she's fearful, it's not my problem. She made her bed." Ibid. Petitioner reiterated that he "could be a walking bomb" and stated that "[i]f they're living in fear, too fucking bad. It's what they deserve." Ibid.

2. In November 2017, petitioner filed a second suit against the insurance company. See 17-cv-5068 Docket Entry 1 (D. Minn. Nov. 9, 2017). The magistrate judge found that petitioner's

complaint failed to state a claim for relief and referred petitioner to the district's Pro Se Project, which matches pro se litigants with private attorneys, to help petitioner file an amended complaint. Pet. App. 6a.

The attorneys with whom petitioner was matched determined that petitioner did not have a claim against the life-insurance company, and therefore called him to inform him that they would not be taking the case. Pet. App. 7a. In the first part of the roughly 30-minute call, the attorneys discussed the pending action, explaining that petitioner's claim would likely fail because of the rulings made by Judge Wright in the prior action. Ibid.; see D. Ct. Doc. 60, at 25, 41 (June 18, 2018).

After the attorneys had finished explaining their assessment of the case, a "shift" occurred in the conversation, with petitioner engaging "at length" in "an angry rant" about Judge Wright. Pet. App. 62a. One attorney transcribed portions of his rant, including the following statements: "this fucking judge stole my life from me"; "I had overwhelming evidence"; "the judge 'stacked the deck' to make sure I lost the case"; "[I] didn't read the fine print and missed the 30 days to seek a new trial"; "'she is lucky' I was 'going to throw some chairs'"; and "you don't know the 50 different ways I planned to kill her." Id. at 57a-59a. The attorneys did not speak during petitioner's "rant[]," and they terminated the call after it ended. Id. at 7a. Both attorneys

found petitioner's statements frightening; one summarized them as "a death threat against Judge Wright." Id. at 59a.

After consulting with their firm's ethics advisors, the attorneys informed the Pro Se Project's coordinator of the threat, and the coordinator informed Judge Wright. Pet. App. 8a; see D. Ct. Doc. 60, at 53-54. Deputy marshals again visited petitioner, but he refused to speak with them, repeatedly shouting at them from the front door. Pet App. 8a. Even after petitioner's sister tried to explain to him that the marshals merely "need[ed] to know that you're not serious about something like that, killing a judge," petitioner told the marshals to leave. Ibid. He referred to Judge Wright using a racial epithet; called her the "fucking judge who stole" his life, money, and future; stated that "if she doesn't sleep very good, fuck her"; and instructed the deputies to report that he remained "crazy fucking angry." Ibid.

3. A federal grand jury indicted petitioner for threatening to murder a federal judge, in violation of 18 U.S.C. 115(a)(1)(B), and transmitting in interstate commerce a threat to injure the person of another, in violation of 18 U.S.C. 875(c). Superseding Indictment 5-6.

Before trial, petitioner moved to exclude all the statements that he made during the call with the attorneys on the ground that they were subject to the attorney-client privilege. Pet. App. 8a. Following an evidentiary hearing, the district court denied petitioner's motion. Id. at 25a-37a. The court noted that,

although petitioner had acknowledged that "some of the statements he made during the phone call were not made for the purpose of seeking legal advice," he "nevertheless argue[d]" that "the entire phone call is privileged." Id. at App. 29a; see D. Ct. Doc. 25, at 3. Rejecting that argument, the court determined that statements that were "not made in pursuit of legal advice" could be "separated" from the statements that were. Pet. App. 32a. The court found that, because the "threatening statements directed toward a federal judge" were not "made for the purpose of facilitating the rendition of legal services," they were "not protected by the attorney-client privilege." Id. at 35 (citation omitted).

Petitioner proceeded to trial, at which both of the attorneys testified about petitioner's statements during the telephone call. Pet. App. 57a-59a; see id. at 62a-63a. Petitioner was convicted on both counts of the superseding indictment and was sentenced to 18 months of imprisonment. Judgment 1-2.

4. The court of appeals affirmed. Pet. App. 1a-24a. The court determined that, "while the communications made in the first part of the call were indisputably for the purpose of obtaining legal services," that portion of the call was "easily severable from" the "threat statements" made during "the second part of the call." Id. at 12a, 14a. The court found that the threatening statements at the end of the call "were not protected by the attorney-client privilege" because they "were in no way necessary

to further [petitioner's] civil lawsuit or made in order to obtain guidance in filing an amended complaint." Id. at 12a-13a. The court observed that petitioner made the threatening statements "only after the attorneys had finished discussing his case with him," that "[t]he attorneys did not engage with him or speak at any time during his tirade," and that "when he was finished, they simply ended the call." Id. at 12a.

The court of appeals rejected petitioner's contention that "the entire conference call with [the attorneys] was privileged." Pet. App. 14a. The court noted that "courts routinely decide which specific communications between a client and his attorneys are privileged" and that "they often segregate privileged and non-privileged communications in particular conversations or documents." Ibid.

ARGUMENT

Petitioner contends (Pet. 13-21) that the court of appeals erred in determining that the threatening statements petitioner made during the latter portion of his call with attorneys are not subject to the attorney-client privilege. The court of appeals correctly rejected that contention, and its fact-bound decision does not conflict with any decision of this Court or of any other court of appeals. The petition for a writ of certiorari should be denied.

1. Under the Federal Rules of Evidence, "[t]he common law -- as interpreted by United States courts in the light of reason

and experience -- governs a claim of privilege." Fed. R. Evid. 501. A well-established privilege protects communications between attorneys and their clients. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). That privilege, however, "protects only those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976). The privilege also is subject to exceptions. See, e.g., United States v. Zolin, 491 U.S. 554, 563 (1989) (crime-fraud exception); Glover v. Patten, 165 U.S. 394, 406-408 (1987) (testamentary exception).

The court of appeals correctly determined that the attorney-client privilege does not protect the threatening statements that petitioner made during the latter portion of his phone call with the attorneys. As the court observed, "while the communications made in the first part of the call were indisputably for the purpose of obtaining legal services," the threatening statements made during the latter portion were not. Pet. App. 12a. Petitioner made those statements "only after the attorneys had finished discussing his case with him"; "[t]he attorneys did not engage with him or speak at any time during his tirade"; and "when he was finished, they simply ended the call." Ibid. The statements "were in no way necessary to further his civil lawsuit or made in order to obtain guidance in filing an amended complaint." Id. at 13a.

Although the government did not rely on it directly in this case, see Pet. App. 14a n.8, the crime-fraud exception to the attorney-client privilege reinforces the correctness of the result here. Under the crime-fraud exception, the attorney-client privilege does not extend to communications made for the purpose of obtaining advice for the commission of a future crime. Zolin, 491 U.S. at 563. If petitioner had made a threat of violence and asked his lawyers for help in perpetrating the crime, his statement would have fallen within that exception. Petitioner did something slightly different: he gratuitously threatened violence in a conversation with an attorney, but did not seek the attorney's assistance in committing the crime. That distinction, however, simply confirms that the statement here falls outside the scope of the privilege to begin with. It would be perverse to deny protection to threats accompanied by requests for attorney assistance, but to extend protection to gratuitous threats unaccompanied by such requests. And any concerns about inextricable intertwinement of protected and unprotected communications is not present on these facts, where the gratuitous threats came after the legitimate attorney-client consultation had concluded. Pet. App. 12a.

2. Petitioner errs in contending (Pet. 17-21) that his entire phone call with his attorneys was privileged and that the discrete threatening portion of the call cannot be severed from the legal portion. It is blackletter law that, if the legal and

non-legal portions of a conversation or document "are easily identified and separated," the court should order the "excision of the protected legal portions and the production of the remainder." 1 Paul R. Rice, Attorney-Client Privilege in the United States § 7:5 (2020-2021 ed.) (collecting cases). Accordingly, as the court of appeals observed, "courts routinely decide which specific communications between a client and his attorneys are privileged" and "often segregate privileged and non-privileged communications in particular conversations or documents." Pet. App. 14a. Here, the court found that the initial, legal portion of the call was "easily severable from" the latter, non-legal portion, in which petitioner engaged in a lengthy, uninterrupted, and threatening tirade about Judge Wright. Id. at 12a. That fact-bound decision does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner errs in characterizing (Pet. 2, 5-6, 17-21, 24-25) the decision below as announcing a sweeping rule that "any statement not made for the express purpose of obtaining legal advice is categorically nonprivileged," with the result that "a client must prove the privilege attaches to each statement made during an attorney-client consultation." Pet. 21, 24-25 (emphasis

added). In deeming the first portion of the phone call privileged, neither the district court nor the court of appeals required petitioner to prove that every statement made during that portion was made to obtain legal services. The court of appeals found only that, on the facts of this case, the non-legal portion of the phone call was "easily severable" from the legal portion and thus was not subject to the attorney-client privilege. Pet. App. 14a.

3. Contrary to petitioner's contention (Pet. 21-25), the decision below does not conflict with the decision of any other court of appeals. The Ninth Circuit is the only other court of appeals to have addressed the question presented. See United States v. Alexander, 287 F.3d 811, 815-817 (2002). As petitioner acknowledges (Pet. 18-19), it has adopted an approach consistent with the decision below, ruling that "threats to commit violent acts" made in a communication with an attorney are not subject to the attorney-client privilege because such statements "[a]re clearly not" made "in order to obtain legal advice." Alexander, 287 F.3d at 816.

Petitioner erroneously asserts (Pet. 21) that the decision below "directly conflicts" with the Second Circuit's decision in In re the County of Erie, 473 F.3d 413 (2d Cir. 2007), and two unpublished decisions from other circuits, see Rush v. Columbus Mun. Sch. Dist., 234 F.3d 706 (5th Cir. 2000) (Tbl), and Alomari v. Ohio Dep't of Pub. Safety, 626 Fed. Appx. 558, 570 (6th Cir. 2015), cert. denied, 136 S. Ct. 1228 (2016). As an initial matter,

none of those cases involved threatening statements. Nor do those cases stand (as petitioner asserts) for the broader proposition that the attorney-client privilege always applies to every statement in "an overall exchange of information," Pet. 22, thereby precluding severance of a segregable non-legal portion of a conversation with counsel from a legal portion. In Erie, for example, the Second Circuit concluded only that, when an attorney provides legal advice along with non-legal "considerations and caveats" appurtenant to that advice, the non-legal statements are not severable from the privileged legal advice. 473 F.3d at 420. Indeed, the Second Circuit recognized that "redaction is available" in certain "instances where both privileged and non-privileged material exist." Id. at 421 n.8 (citation omitted). Likewise, in each of the unpublished decisions, the court did not address the propriety of severing non-legal portions of a conversation from legal portions, but merely applied the privilege to statements made in a meeting with an attorney "for the purpose of obtaining legal advice." Rush, 234 F.3d at 2; see Alomari, 626 Fed. Appx. at 570. The unpublished decisions in any event do not constitute binding precedent. See 5th Cir. R. 47.5.4; 6th Cir. R. 32.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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