

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DREW PETERSON,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. THE ILLINOIS SUPREME COURT'S JUDICIALLY CREATED EXCEPTION TO THE PROTECTIONS OF THE ATTORNEY-CLIENT PRIVILEGE—THAT COMMUNICATIONS BETWEEN A LAYPERSON AND AN ATTORNEY, DURING WHICH THE ATTORNEY PROVIDES LEGAL ADVICE, ARE NOT PROTECTED WHEN THE ATTORNEY IS NOT GOING TO BE ABLE TO ENTER INTO FORMAL REPRESENTATION—IS AN UNWARRANTED DISTORTION OF THE LAW OF PRIVILEGE. THE RULING CONFLICTS WITH THE MAJORITY OF STATE AND FEDERAL COURTS AND IS CONTRARY TO THE MODEL RULES.
- II. THE COURT'S ALLOWANCE OF MURDER VICTIM HEARSAY STATEMENTS UNDER A TRANSFERRED INTENT THEORY OF FORFEITURE BY WRONGDOING IS CONTRARY TO THIS COURT'S DECISION IN *GILES* AND OTHER FEDERAL AND STATE AND STATE PRECEDENT.
- III. THE ILLINOIS SUPREME COURT'S HOLDING THAT THE DECISION OF MR. PETERSON'S COUNSEL TO CALL A WITNESS TO TESTIFY THE DEFENDANT COMMITTED THE CRIME IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN *MCCOY V. LOUISIANA*.

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PETITION FOR A WRIT OF CERTIORARI

Drew Peterson petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court affirming his conviction and sentence.

OPINIONS AND ORDERS BELOW

The opinion of the Illinois Supreme Court—modified upon denial of Peterson’s petition for rehearing—affirming Mr. Peterson’s conviction is not yet published in a regional reporter but appears at 2017 IL 120331 (Pet’r’s App., Doc. A). The opinion of the Third District Appellate Court of Illinois affirming Mr. Peterson’s conviction can be found at 2015 IL App (3d) 130157 and 47 N.E.3d 1005 (Pet’r’s App., Doc. B). The trial court order entering a judgment of conviction is unpublished (Pet. App., Doc. C).

The opinion of the Third District Appellate Court of Illinois dismissing the State’s interlocutory appeal and affirming the circuit court’s admission of hearsay evidence can be found at 2012 IL App ((3d) 100514-B and 952 N.E.2d 691 (Pet’r’s App., Doc. D). The circuit court order admitting hearsay evidence is unpublished (Pet. App., Doc. E).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Illinois Supreme Court entered judgment on September 21, 2017, and modified its opinion

upon denial of Peterson’s petition for rehearing on January 19, 2018. This Court extended Petitioner’s time for filing a petition for a writ of certiorari to June 18, 2018. This Petition was timely filed pursuant to Supreme Court Rule 13.1.

RELEVANT AUTHORITIES

The questions presented in this Petition implicate the following provisions: U.S. Const. amend. VI; Fed. R. Evid. 501, 804(b)(6); and Ill. R. Evid. 501, 804(b)(5).

INTRODUCTION

The decision of the Illinois Supreme Court is flawed and in conflict with common law and the reasoned decisions of this Court in three critical respects:

First, concerning attorney-client privilege, it marks a substantial departure from the “principles of common law” as they have historically been “interpreted by the courts of the United States in the light of reason and experience,” Fed. R. Evid. 501; Pet’r’s App., Doc. H at A-143; *see also* Ill. R. Evid. 501.¹ It appears to be the first time a court of last resort has determined that the ability to engage the

¹ The Illinois rule, while worded differently, is similar:

Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience.

Ill. R. Evid. 501. *See* Pet’r’s App., Doc. I at A-144.

lawyer's services is a precondition to cloaking the entire consultation with the attorney-client privilege. This novel ruling has the potential to affect the candor during an initial meeting, destroying the "initial consultation," and to impair the goals of the ethical principles that require attorneys to protect client confidences. It undermines the certainty of the potential client—the holder of the privilege—that their communications will remain confidential when they seek advice from an attorney. This Court has recognized that "[a]s a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer, and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976).

The attorney-client privilege exists because it is important that the disclosure to lawyers of confidences allows people to obtain advice and assistance. The issue here is whether the engrained privilege ought to be rolled back through the establishment of a new hurdle—at odds with its history and purposes—that the attorney must have some intention to represent the individual, or their conversation, regardless of its content, is no longer privileged. To follow the logic—that the moment a "prospective client" is no longer prospective and will not be a client, the privilege ends—ignores that it is intended to apply whenever legal advice is sought from an attorney. It changes the demarcation point from "any time advice is sought" to "only when the attorney may be hired."

Secondly, *Giles v. California*, 554 U.S. 353 (2008), made it clear that the Confrontation Clause is to be interpreted as it was written by the framers. Murder victim testimony has not historically been allowed. Nonetheless, the Illinois Supreme Court permitted the introduction of the victim's hearsay under the doctrine of forfeiture by wrongdoing, at the very trial for the crime that caused her unavailability (murder). Included amongst the statements were accusations from the deceased that she believed the defendant was going to kill her.

Last, the Illinois Supreme Court—in endorsing as reasonable trial strategy defense counsel's decision to present testimony that the defendant committed the crime—ignored the very idea that a criminal trial is an adversarial proceeding. The court believed that the testimony implicating the defendant in the crime and purposely presented during the defense case—the only direct accusation—was strategic. There was no evidence the defendant consented to the strategy. The court's decision stands in stark contrast to this Court's decision in *McCoy v. Louisiana*, 200 L. Ed. 821 (2018), and cannot be reconciled with either *Strickland v. Washington*, 466 U.S. 668 (1984), or *United States v. Cronin*, 466 U.S. 648 (1984).

STATEMENT OF THE CASE

History of Proceedings

There were extensive pretrial matters in this case. Chiefly, on the State's motion, the circuit court—by the Honorable Judge Stephen D. White—admitted six

(6) of 14 hearsay statements proffered by the State, pursuant to Illinois' forfeiture by wrongdoing (FBWD) statute, 725 ILCS 5/115-10.6. The State filed an interlocutory appeal, which was initially dismissed for untimeliness, and then appealed to the Illinois Supreme Court. On remand from the Illinois Supreme Court, the Third District held that all 14 of the statements were admissible under the common law doctrine of forfeiture by wrongdoing (FBWD), including those the trial court found to be unreliable.

In a jury trial in the Circuit Court of Will County, Petitioner was found guilty of first-degree murder on September 6, 2012, and sentenced to 38 years' imprisonment. Pet'r's App., Doc. C. Petitioner appealed to the Third District Appellate Court, which upheld Mr. Peterson's conviction and sentence. Petitioner then sought leave to appeal to the Illinois Supreme Court, which affirmed the appellate court's decision on September 21, 2017, and denied Mr. Peterson's Petition for Rehearing on January 19, 2018. Petitioner now seeks a grant of certiorari.

Factual Background

On Sunday, March 1, 2004, around 10:30 p.m., Kathleen Savio (Savio)—the ex-wife of Drew Peterson (Peterson)—was found dead in a bathtub in her home. In light of Peterson's employment as a municipal police officer with the Bolingbrook Police Department, the Illinois State Police assumed responsibility for the investigation of Savio's death.

The following day, Peterson told police in an interview that he had spent Saturday at home with his children as part of his scheduled visitation. Peterson explained that he had been unable to reach Savio to return their children, Thomas and Christopher, from his visitation with them; he discovered the body after gaining entry to the home with two of Savio's neighbors. Witnesses described Peterson as visibly distressed. The police also interviewed Peterson's wife, Stacy Ann Peterson (née Cales) (Stacy), who offered no information that inculpated Peterson in Savio's death.

Investigators found no signs of foul play at the scene, concluding that Savio had slipped and fallen in the bathtub. An autopsy performed by Dr. Bryan Mitchell led him to rule her death as an accidental drowning. A subsequent inquest by the Will County Coroner's Office resulted in a jury finding that Savio's death was accidental. The police and coroner's office provided their reports to the Will County State's Attorney's Office, which concurred with the findings and closed the file on Savio's death.

Two years before her death, in early 2002, Savio and Peterson had separated after a breakdown of their marriage. In July 2002, Savio told Bolingbrook Police Lieutenant Teresa Kernc that Peterson had broken into her home, pushed her down the stairs, and threatened to kill her while brandishing a knife. Lt. Kernc then instructed Savio to prepare a statement about the incident, so Savio wrote one out.

In 2003, Savio and Peterson were divorced in a bifurcated proceeding that dissolved the marriage but left the marital estate undistributed.² Shortly thereafter, Peterson married Stacy. A few years later, Stacy decided to leave Peterson. On August 30, 2007, she met with Reverend Neil Schori at a Starbucks where she told Schori that on the weekend Savio died, she and Peterson had gone to bed together, but when she woke up in the middle of the night, Peterson was gone. Stacy also told Schori that she saw Peterson dressed in all black, standing by the washer and dryer with a duffle bag of women's clothing that she did not own.

On October 24, 2007, Stacy called Attorney Harry Smith, who had represented Savio in her divorce from Peterson, seeking to retain him for her own divorce. Stacy asked Smith whether they could use accusations of Peterson's involvement in Savio's death to Stacy's benefit in the divorce case against Peterson. Smith cautioned that he "might" not be able to represent her, but he continued to answer her legal questions.

Several days later, Stacy's sister reported her missing. Peterson became the focus of media attention following Stacy's disappearance. In the wake of the media coverage, stories began to emerge about the Petersons from those who knew them. Mary Sue Parks, who had attended the same community college where Savio studied nursing, told investigators that Savio had shown her red marks on her neck around

² Because they were divorced before she died, Savio's death had no effect on the divorce property distribution; that case proceeded as if she were still alive. Evidence of the property distribution as a possible motive was not allowed at trial.

Thanksgiving in 2003. According to Parks, Savio told her that Peterson had snuck into her home, pinned her down, grabbed her by the neck, and told her “why don’t you just die.” Savio also allegedly told Parks that Peterson said he “could kill her and make her disappear.”

Kristin Anderson, who lived with her family in Savio’s basement for a three-month period in the fall of 2003, testified that around the time Savio allegedly made the statements to Parks, Savio told her about the 2002 break-in she reported to Lt. Kernc at the Bolingbrook Police Department. Though Anderson said she called police to report the information following Savio’s death, no record of her report was found by the police.

Stacy’s disappearance and subsequent media interest prompted Will County to convene a special grand jury to investigate both her disappearance and Savio's death. The medical examiner, Dr. Larry Blum, was asked to review Dr. Mitchell’s autopsy findings. Blum exhumed Savio’s body and proceeded to perform a second autopsy. His findings were that the casket contained “a lot of water” and that the body showed marked deterioration. The x-rays he took of Savio’s body were “largely unremarkable,” though he did note deep bruising on her lower body and bruising on her left breast. No evidence of hemorrhaging was found on her neck or back, and the toxicology report showed Savio had no drugs in her system at the time of death. Nonetheless, Dr. Blum ruled Savio's manner of death homicide.

On May 7, 2009, a grand jury indicted Peterson for the first-degree murder of Savio. Between January 2010 and February 2010, the Will County Circuit Court held a preliminary hearing (the "hearsay hearing") pursuant to the State's Motion to Admit Certain Hearsay Statements in accordance with Illinois' forfeiture by wrongdoing statute, 725 ILCS 5/115-10.6, and common law. Judge White found that the prosecution had proved by a preponderance of the evidence that Peterson killed both Savio and Stacy, but had failed to specify what testimony Peterson wished to avoid. Furthermore, applying the statute, the court only deemed eight (8) statements admissible, and the remainder inadmissible and unreliable.

Although the prosecution had lobbied for the enactment of the statute (dubbed "Drew's Law") to aid its cause in the case, it filed an interlocutory appeal of the court's hearsay ruling, arguing that all of the offered statements were admissible under the common law doctrine of forfeiture by wrongdoing. The Third District Appellate Court of Illinois agreed, holding that the statements were admissible under the common law doctrine of forfeiture by wrongdoing and Illinois Rule of Evidence 501.

At trial, the prosecution did not present any physical evidence linking Peterson to Savio's death, nor did it present a witness who placed Peterson at Savio's home during the estimated time of her death. Instead, the prosecution argued that Peterson had drowned Savio, relying heavily upon the admitted hearsay statements. The statements included a letter Savio wrote to the Will County State's Attorney's Office describing how Peterson had broken into her home and threatened her, and a

handwritten statement by Savio to Lt. Kernc in which she described the same incident. The admitted hearsay also included statements made by Savio to her sisters that Peterson was going to kill her and make it look like an accident, and that she would not make it to the divorce settlement or receive a portion of his pension; statements by Savio to Parks describing how Peterson broke into her residence, grabbed her by the throat, and told her “why don’t you just die”; and Savio’s statement to Parks, that Peterson said he could kill her and nobody would know. Stacy’s statements to Schori about Peterson’s absence and his possession of women’s clothing the night of Savio’s death; that Peterson told her what to say to police; and that she lied on Peterson’s behalf were also allowed. Lastly, statements by Harry Smith—that Stacy had sought to retain him for a divorce, that she received phone calls from Peterson during their conversations, and that she inquired about using allegations of Peterson’s involvement in Savio’s death in the divorce proceeding—were also admitted.

The prosecution’s reliance on the hearsay testimony as central to its case was illustrated by its closing argument:

“I am going to kill you. You are not going to make it to the divorce settlement.”

“You are not going to get the pension.”

“You are not going to get the kids.”

That is the statement that the defendant told Kathleen Savio just weeks before her death.

Indeed, on more than 10 separate occasions during closing argument, the prosecution cited one or more of Savio's statements to others as evidence of Peterson's guilt.

After a six-week trial, a jury returned a guilty verdict on September 6, 2012, and the court sentenced Peterson to 38 years' imprisonment. Peterson appealed to the Third District Appellate Court of Illinois, which affirmed his conviction and sentence. Pet'r's App., Doc. B at A-41. Peterson was granted leave to appeal to the Illinois Supreme Court, which affirmed the decision of the appellate court, and later modified its opinion upon denial of Peterson's petition for rehearing. Pet'r's App., Doc. A at ¶ 134.

REASONS FOR GRANTING THE PETITION

IV. THE ILLINOIS SUPREME COURT'S EXCEPTION—THAT COMMUNICATIONS BETWEEN A LAYPERSON AND AN ATTORNEY, DURING WHICH THE ATTORNEY PROVIDES LEGAL ADVICE, ARE NOT PROTECTED BY ATTORNEY-CLIENT PRIVILEGE IF THE ATTORNEY IS NOT GOING TO BE ABLE TO ENTER INTO FORMAL REPRESENTATION—IS AN UNWARRANTED DISTORTION OF THE LAW OF PRIVILEGE.

The attorney-client privilege exists because it is essential that in seeking advice and assistance from a lawyer, a person is able to share confidences. In this case, the Illinois Supreme Court held that the initial consultation between Attorney Harry Smith and Stacy Peterson, during which Stacy confided that she knew how Peterson murdered Savio, was not privileged. Pet'r's App., Doc. A at ¶¶ 84, 91. That conclusion was based on the finding that Smith told Savio at some point during the

conversation that he “could not represent her.” Pet’r’s App., Doc. A at ¶¶ 62-63.³ Thus, the Illinois court drew a bright line, presumably finding it insignificant that regardless of his statement, Smith continued to speak with Savio and offer legal advice. *See id.* at ¶ 63.

A. THE DECISION IS A DEPARTURE FROM COMMON LAW.

The decision of the Illinois Supreme Court marks a substantial departure from the "principles of the common law" as they have historically been "interpreted by the courts of the United States in the light of reason and experience," Fed. R. Evid. 501. *See also* Ill. R. Evid. 501.⁴ The Illinois court essentially makes the ability to engage a lawyer’s services an indispensable precondition to cloaking a consultation with the attorney-client privilege. This novel ruling has the potential to impact attorney-client relationships everywhere, and to weaken the principles that require attorneys to protect client confidences. The erroneous ruling also undermines the beliefs of

³ This quote appears when Smith testified pre-indictment, before the grand jury. He later testified at a pretrial hearing on a motion to bar that because the discussion was privileged, he said he may not be able to represent Stacy. At trial, he said he “believe[d] there was” a conflict that would have prevented him from representing Stacy. Pet. App., Doc. F at A-141.

⁴ The Illinois rule is similar to and modeled after the Federal Rule:

Rule 501. GENERAL RULE - Except as otherwise required by the Constitution of the United States, the Constitution of Illinois, or provided by applicable statute or rule prescribed by the Supreme Court, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by Illinois courts in the light of reason and experience.

laypersons that their communications will remain confidential when they seek the advice of an attorney, even if one is not ultimately retained. And it does so without requiring a word of caution that the exchange may not be protected.

The issue here is whether an entrenched privilege ought to be eroded through the creation of a new hurdle, wholly at odds with its history and purpose, that the attorney must have some intention to represent the person, or their conversation will not be privileged, regardless of its contents.

The attorney-client privilege is the oldest of the privileges for confidential communications in common law. *Upjohn Co.*, 449 U.S. 383, 389 (1981) (citing 8 John Henry Wigmore, Evidence in Trials at Common Law § 2290 (McNaughton rev. 1961)). “Its purpose is to encourage full and frank communication between attorneys and their clients.” *Id.* The privilege is required because “sound legal advice or advocacy serves public ends,” and “such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Id.* at 389; *see also Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”), and *Fisher v. United States*, 425 U.S. 391, 403 (1976) (holding that the purpose of the privilege is “to encourage clients to make full disclosure to their attorneys”).

Still, while this Court has repeatedly recognized the privilege and even determined that it survives death, *Swidler & Berlin v. United States*, 524 U.S. 399

(1998), it has never defined the limits of the privilege during a consultation that does not result in representation. Although perhaps no longer a prospective client, the individual is still seeking legal advice from an attorney, who is still acting in that capacity:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or is his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services (iii) assistance in some sort of legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

Under this oft quoted provision, the privilege should still apply. The person still “sought to become a client,” and the reasons why the consultation did not end in representation should be irrelevant. The attorney is still providing legal advice.

When an attorney refuses to act on behalf of the prospective client, he or she “does not need or deserve the protection of the privilege.” Wigmore, *supra*, § 2304; *see also* 1 Kenneth S. Broun et al., McCormick on Evidence § 88 n.3 (7th ed. 2013) (“Of course, statements made after the employment is declined are not privileged.”); *People v. Gionis*, 892 P.2d 1199, 1207 (Cal. 1995) (collecting cases and observing that “authorities in other jurisdictions appear to uniformly hold that the attorney-client privilege does not protect statements made after an attorney declines employment”). All of this may be true of the attorney who refuses to act in the capacity of counsel,

but serious questions arise when the attorney declines employment but continues to provide legal counsel.

By providing legal advice, the attorney is not “refusing to act;” he is simply declining employment. The attorney is still acting in the capacity of an attorney and communicating as a lawyer. Long ago, this Court appeared to have settled what was required to designate a communication as privileged when the attorney acted in his capacity as legal counsel:

If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege.

Alexander v. United States, 138 U.S. 353, 358 (1906) (citing *Williams v. Fitch*, 18 N.Y. 546; *Britton v. Lorenz*, 45 N.Y. 51; *Bacon v. Frisbie*, 80 N.Y. 394).

Indeed, the unreasonably narrow view espoused by the Illinois court could only have a chilling effect on attorney-client disclosures.

What of the prospective client who seeks advice for a divorce from a divorce attorney who tells them early in the meeting the matter will be too complex for them? If the person then continues to ask questions, general ones, is the conversation is unprotected? Or what of the criminal defendant who, after the attorney tells him he only handles drug cases, shares the details of his/her involvement in a homicide, seeking general legal advice from that attorney? Should the confession be unprotected when the attorney suggests he cannot represent the prospective client yet continues to provide legal advice to the prospective client thereafter? Or what

about the too common conversation between layperson and lawyer that begins with, “I am not looking to retain counsel, but I had a few questions . . .” Should it be left to unretained counsel and the lower courts to litigate this issue? The Illinois court’s ruling, if left unchecked, would not protect any of these communications.

B. THE DECISION DEPARTS FROM THE ABA MODEL RULE AND CONFLICTS WITH MOST OTHER JURISDICTIONS.

In prior decisions on issues of privilege, this Court has examined federal and state case law, *see, e.g., Upjohn Co.*, 449 U.S. at 389-93, as well as scholarly commentary, *see, e.g., Trammel*, 445 U.S. at 50 & n. 11. Moreover, because “the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of [a] privilege,” this Court has recognized that “the policy decisions of the States”—as reflected both in state court decisions and state legislation—“bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one.” *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996) (citing *Trammel*, 445 U.S. at 48-50, and *United States v. Gillock*, 445 U.S. 360, 368 n. 8 (1980)). In addition, the Court has looked to “accepted norms of professional conduct” (including ABA ethical standards) bearing on confidentiality in determining the extent to which legal protection should be given to confidential communications. *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).

In federal matters, Federal Rule of Evidence 501 applies. “Federal privilege law applies to this case because the Relators assert federal claims

against Supervalu.” *United States v. Supervalu, Inc.*, No. 11-cv-3290, 2018 U.S. Dist. LEXIS 88845, at *6 (C.D. Ill. May 29, 2018) (citing *Wilstein v. San Tropai Condominium Master Association*, 189 F.R.D. 371, 375-76 (N.D. Ill. 1999)).

"But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision. Fed. R. Evid. 501. As the Rule reflects, where state law applies to the claim or defense, as in this diversity action, the scope of the attorney-client privilege and any limitations on its reach are determined by state law." *Hedger v. Bar Harbor Tr. Servs.*, No. 1:17-cv-00087-NT, 2018 U.S. Dist. LEXIS 83791, at *9 (D. Me. May 18, 2018).

There is no uniformity, although the majority of district courts look to the model rules. *See, e.g.*, N.D. Ill. LR 83.50 – Rules of Professional Conduct:

Applicable disciplinary rules are the Model Rules adopted by the American Bar Association. On any matter not addressed by the ABA Model Rules or for which the ABA Model Rules are inconsistent with the Rules of Professional Conduct, a lawyer admitted to practice in Illinois is governed by the Illinois Rules of Professional Conduct, as adopted by the Illinois Supreme Court, and a lawyer not admitted to practice in Illinois is bound by the Rules of Professional Conduct for the state in which the lawyer's principal office is located. . . .

N.D. Ill. LR 83.50. This rule, from the U.S. district court in Illinois, crystalizes the issue. The rule is potentially dependent upon where the attorney offices. So, an attorney from one state may be governed by a different set of rules.

This invites conflict when a state case is removed, or a case has both federal and state claims. *See* Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 S.M.U. L. Rev. 13-14

(2004)⁵; see also Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created*, 64 Geo. Wash. L. Rev. 460 (1995).⁶ The Judicial Conference has struggled for years in an unsuccessful effort to draft uniform rules. Given the realities of modern life, the rules on matters of attorney-client privilege should be uniformed, as defined by this court.

The American Bar Association has emphasized the critical importance of attorney-client confidentiality and has promulgated model ethical standards that reinforce the obligation of confidentiality protected by the privilege. The official comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct describe the policies underlying the ethical requirement of attorney-client confidentiality in terms that parallel those used by this Court in *Upjohn*:

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the

⁵ Available at:

<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1020&context=lsfp>.

⁶ Available at:

https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1298&context=faculty_scholarship.

law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Model Rules of Professional Conduct r. 1.6 cmts. (2)-(4) (Am. Bar Ass'n 1983).

Also in accord is Rule 1.18 of the American Bar Association's (ABA) Model Rules⁷:

Rule 1.18 Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a

⁷ This Court uses the ABA Rules of Professional Conduct for guidance. See, e.g., *Holland v. Florida*, 560 U.S. 631, 652, 130 S. Ct. 2549, 2564 (2010) (duty to communicate and keep client informed); *Burger v. Kemp*, 483 U.S. 776, 797, 107 S. Ct. 3114, 3127 (1987) (rules against joint representation); *Nix v. Whiteside*, 475 U.S. 157, 165, 106 S. Ct. 988, 993 (1986) (duty to not present perjured testimony).

matter is a prospective client.

- (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

Id. r. 1.18(a)-(b). The Comment to Rule 1.18 goes further:

[3] . . . Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] . . . Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

Id. r. 1.18 cmts. 3, 4.

Thus, the Model Rule and Comment contemplate that information must be revealed during the consultation, and even in the event of a conflict, confidentiality must be preserved. Notably, nowhere in the Model Rules does it state that communications made after the attorney declines representation are not privileged.

The Illinois Supreme Court's ruling is also in conflict with a vast majority of the states. Nearly all states have adopted a rule that is similar to the ABA Model

Rule 1.18. Pet'r's App., Doc. J at A-145.⁸ Aside from stylistic, or minimal word changes, the states that have adopted the Model Rule have kept the rule identical to the ABA's. *See id.* But two (2) states—Nevada and New York (and soon to be California)—have included language that is similar to the Illinois court, instructing that a prospective client must have a reasonable expectation that an attorney-client relationship will form in order for communications to be kept confidential. *Id.* at 148-50.⁹ Other states have implemented rules to protect the confidentiality of all information an attorney learns from a prospective client, regardless of whether a client-lawyer relationship ensues. These rules do not establish an endpoint or representational prerequisite in order for attorney-client communications to remain confidential. The Illinois Supreme Court's ruling conflicts with the rules of these other states for the same reasons it conflicts with the Model Rule.

Having one rule for three (3) of the most populous states, and another rule for the remaining states, as well as the federal circuits, will cause chaotic litigation regarding an issue that is so foundational as the attorney-client privilege is to the practice of law.

⁸ The ABA prepared an analysis of the 50 states' rules of professional conduct and charted the variations in the state rules from the ABA Model Rule. ABA Comm. on CPR Policy Implementation, *Variations of the ABA Model Rules of Professional Conduct: Rule 1.18 Duties to Prospective Client* (Apr. 20, 2018), available at www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_18.authcheckd.pdf. This chart is attached hereto as Pet'r's App., Doc. J.

⁹ California, which structures its rules differently than the Model Rules, has adopted a rule similar to Model Rule 1.18 that will take effect on November 1, 2018. The pending rule includes a notation that statements made after an attorney has stated his or her unwillingness or inability to consult with the person are not confidential. Supreme Court of California, *Administrative Order S240991*, p. 54-56 (May 10, 2018). So at least the California rule require fair warning.

C. THE DECISION IGNORES THE PURPOSE OF THE PRIVILEGE.

Equally important, this Court has shown that it is keenly aware of the importance of the privilege, and recognized that it must be seen thru the client's lens:

Clients consult attorneys for a wide variety of reasons, only one of which involves possible criminal liability. Many attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed in order to assure sound legal advice. The same is true of owners of small businesses who may regularly consult their attorneys about a variety of problems arising in the course of the business. These confidences may not come close to any sort of admission of criminal wrongdoing, but nonetheless be matters which the client would not wish divulged.

The contention that the attorney is being required to disclose only what the client could have been required to disclose is at odds with the basis for the privilege even during the client's lifetime. In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. See *Jaffe*, 518 U.S. at 12; *Fisher v. United States*, 425 U.S. 391, 403, 48 L. Ed. 2d 39, 96 S. Ct. 1569 (1976).

Swidler & Berlin, 524 U.S. at 407-08.

The attachment of privilege had always begun the moment a prospective client consults with an attorney with the intent of obtaining professional legal advice, and been based on the belief and intent of the client, not those of the attorney. In deciding that Stacy would not have believed that her conversation with Smith was privileged because of his own belief a conflict may have existed, the court

decimated the concept of attorney-client privilege, without reason. By conditioning its existence on the attorney's subjective belief, the Illinois court has transferred ownership of the privilege from client to attorney.

The layperson, who does not have an intimate understanding of attorney-client privilege and when it does and does not attach, relies on attorneys with the common and well-settled belief their conversations are confidential. The person who seeks counsel is typically under the obvious belief that if an attorney is answering legal questions, the conversation is confidential. Here, the prospective client, after being told the attorney "might" not be able to represent, asked if he could still answer questions. He, without a word of warning, did. How could a person ever sensibly believe that was not privileged?

The lack of a bright-line termination point is sensible; an attorney does not need to undertake formal representation in order to offer legal advice. The attorney-client privilege is designed to foster representation, allowing for frank disclosure so that competent legal advice may be offered and obtained. Here, the attorney was always in that capacity; Stacy had no other relationship with him outside of that of counsel. "Whatever facts, therefore, are communicated by client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent." *Alexander*, 138 U.S. at 358. This Court should clarify the existing conflict and create a binding rule that as long

as an attorney is offering legal advice,¹⁰ the communications should remain privileged.

V. THE TRIAL COURT’S ALLOWANCE OF MURDER VICTIM HEARSAY STATEMENTS UNDER A TRANSFERRED INTENT THEORY OF FORFEITURE BY WRONGDOING IS CONTRARY TO THIS COURTS DECISION IN *GILES* AND OTHER FEDERAL AND STATE AND STATE PRECEDENT.

In this murder case the accusatory statements of the alleged victim, and those concerning past domestic abuse, were admitted.¹¹ The trial court had found the doctrine of forfeiture by wrongdoing applied because at the time of Savio’s death, the parties were litigating their divorce property settlement. But at the time of Savio’s death, there was no murder prosecution, so the defendant could not have had the intent to prevent that testimony. Instead the court relied upon to the doctrine of transferred intent and ignored this Court’s concerns expressed in *Giles v. California*, 554 U.S. 353 (2008). There, this Court clearly stated that it was a violation of the

¹⁰ Of course, the advice must be lawful. Petitioner is not suggesting the Court revisit the crime-fraud exception. *Alexander*, 201 U.S. at 121.

¹¹ There was never any suggestion Savio was murdered to prevent her from disclosing or testifying about any abuse: “Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. *Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution*—rendering her prior statements admissible under the forfeiture doctrine. Earlier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.” *Giles*, 554 U.S. at 377 (emphasis added).

Confrontation Clause for the accusatory hearsay testimony of an alleged victim to be heard by a jury in a murder trial for killing that alleged victim. Forfeiture by wrongdoing could not be utilized to deny the accused his confrontation right:

In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying - - as in the typical murder case involving accusatorial statements by the victim - - the testimony was excluded unless it was confronted or fell within the dying declaration exception. *Giles*, 128 S. Ct. at 2684.

The notion that judges may strip the defendant of a right that the constitution deems essential to a fair trial, on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’ *Crawford v. Washington*, 541 U.S. 36 (2004), at 62, (emphasis in original); *Giles*, 128 S. Ct. at 2686.

Significantly, the *Giles* Court rejected the notion that domestic wrongdoing should have a separate rule:

In any event, we are puzzled by the dissent’s decision to devote its peroration to domestic abuse cases. It is a suggestion that we should have one Confrontation Clause (the one the framers adopted and *Crawford* describes) for all other crimes, but is special, improvised, confrontation for those crimes that are frequently directed against woman?

Giles, 128 S. Ct. at 2692.

An intentional criminal act, such as murder, is itself insufficient to invoke forfeiture by wrongdoing absent a showing that the defendant’s conduct was

specifically “designed” to prevent the victim’s testimony. *Id.* at 361. If the motive was anything other than preventing specific testimony—such as jealousy, financial gain, unhappiness or even cruelty—forfeiture by wrongdoing is unwarranted. The theory that it can be applied merely when the defendant has acted purposefully in ending a life would swallow the forfeiture by wrongdoing exception to permit hearsay routinely in murder trials.

Just as this Court held in *Giles*, courts in other states have cautioned against the very mistake that the court made here. For instance, in *People v. Aiden*, 2014 WL 4930703 *1, at *5 (Mich. App. Oct. 2, 2014), the Michigan Court of Appeals examined the doctrine of forfeiture by wrongdoing in an analogous context. In *Aiden*, the prosecution accused the defendant of burglarizing a car dealership and killing an individual who surprised the defendant during his commission of the crime, and could have been a witness in any potential trial against the defendant. *Id.* The court was not satisfied that there was enough evidence to infer that the defendant killed the victim to prevent his future testimony. *Id.* The court held that testimony of the victim should not have been used in the defendant’s murder trial because “the judge should not be allowed to find defendant guilty . . . of murdering the to-be-witness before the jury finds defendant guilty or not.” *Id.*

Similarly, in *Jensen v. Schwochert*, 2013 WL 6708767 *1, *8 (E.D. Wis. Dec. 18, 2013), the federal district court granted a habeas corpus petition based on similar reasoning. Prior to *Giles*, the Wisconsin Supreme Court had decided, like

the trial court erroneously decided here, that if a defendant caused the absence of a witness for any reason, the forfeiture by wrongdoing doctrine would apply. The federal court found *Giles* mandated that the prosecution prove a specific purpose to prevent testimony, and found the trial court's error prejudicial.

The Seventh Circuit Court of Appeals, in *Jensen v. Clements*, 2015 U.S. App. LEXIS 15942 (7th Cir. Sept. 8, 2015), affirmed the district court's decision, holding both that the forfeiture by wrongdoing doctrine was inapplicable, and that use of the doctrine at trial was reversible error. Of particular relevance in *Clements*, the court reiterated language from *Giles* that forfeiture by wrongdoing "applies only if the defendant has in mind the particular purpose of making the witness unavailable" to testify. *Clements*, 554 U.S. at 359.

In *Jensen*, the fact that the accused may have wished to "avoid a messy divorce" was not directly relevant. The Seventh Circuit stressed the harm that resulted from the introduction of such accusatory statements: "[t]hat the jury improperly heard [the victim's] voice from the grave in the way it did means there is no doubt that [defendant]'s rights under the federal Confrontation Clause were violated." The court also stressed that "[t]he prosecution's choice to end its closing arguments with the [hearsay] reflects its importance in the prosecution's case . . . No other piece of evidence had the emotional and dramatic impact as did this 'letter from the grave.'" In both *Aiden* and *Jensen*, the courts held that the doctrine of

forfeiture by wrongdoing does not apply unless the prosecution first identifies the testimony that the defendant was trying to avoid.

The view that Defendant could not have killed Kathleen Savio in an effort to keep her from testifying at her own murder trial has likewise been incorporated into Federal Rule of Evidence 804(b)(6).¹² The commentary to the rule is instructive:

. . . . If the defendant kills a declarant simply because he did not like him, or because he was burned in a drug deal by him, then the defendant has not forfeited his right to object to the declarant's hearsay statement. It follows that the defendant in a murder case cannot be held to have forfeited his objection to hearsay statements made by the victim. The defendant might have murdered the victim, but he undoubtedly did not murder the victim to prevent him from testifying in the murder trial.

Fed. R. Evid. 804(b)(6) (2010). The defendant's desire to make the witness unavailable must be formed as a condition precedent to the defendant acting upon that intent. The defendant cannot seek to make the witness unavailable for a crime that has not yet occurred. They cannot be a witness to the future.

¹² The corresponding Illinois rule is similarly worded:

RULE 804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE- (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Yet it appears that Illinois and other jurisdictions believe that the mere possibility of a future testimonial need is enough to trigger the rule's application:

When we codified the common-law doctrine of forfeiture by wrongdoing in Illinois Rule of Evidence 804(b)(5), we did not condition the doctrine's application on the existence of a pending legal proceeding. Courts in other jurisdictions, analyzing their own states' forfeiture rules that are essentially identical to our rule, have held that the existence of a pending legal proceeding is not a requirement. E.g., *Supanchick*, 323 P.3d at 238 (holding that "nothing in the text" of Oregon's forfeiture rule "requires that a matter be ongoing when the party acts to eliminate a witness"); *State v. Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006) (holding that Tennessee forfeiture rule, like the federal rule, "is not limited to those cases in which a formal charge or judicial proceeding was pending against a defendant when the declarant's statements were made"); *State v. Hand*, 107 Ohio St. 3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶ 90 (holding that Ohio forfeiture rule extends to "potential witnesses," and the absence of pending charges at the time the defendant killed the victim did not preclude admission of the victim's statements at trial (internal quotation marks omitted)); see also *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001) (agreeing that under federal Rule 804(b)(6) "a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness" (quoting *United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999))); *Houlihan*, 92 F.3d at 1279 ("we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a potential witness" (emphasis in original)).

Pet'r's App., Doc A at ¶ 56; see also *United States v. Gray*, 405 F.3d 227, 243 (4th Cir. 2005) ("[t]he text of Rule 804(b)(6) requires only that the defendant intend to render the declarant unavailable 'as a witness.' The text does not require that the declarant would otherwise be a witness at any particular trial."

Reference to "potential witnesses" seems to open the floodgates to allowing victim testimony at almost any time. After all, most murders are not random, and it is likely the victim would almost always have something to say about their killer.

In this case many of the admitted statements were predictive—if anything happens to me Drew did it—and so it is illogical to conclude the murder was to silence those statements, because without death they were meaningless. It also was not to keep Savio from reporting acts of abuse. Thus, although never exactly articulated, if to prevent testimony, it must have been to prevent her from testifying at the divorce trial, if at all. And it would be sensible to allow hearsay at the proceeding for which there was an intent to silence. But this court has never suggested that the right to confront be waived in perpetuity.

The use of unfronted and unreliable hearsay violated the Confrontation Clause and denied Mr. Peterson due process. Moreover, the admission of hearsay the trial court had found to be unreliable rendered the trial unfair, in violation of the 14th Amendment's Due Process Clause. In *Giles*, this Court appeared to reject a transferred intent theory. It should grant this writ to clarify whether the theory applies, or murder victim hearsay is excluded, in that murder trial.

VI. THE ILLINOIS SUPREME COURT'S HOLDING THAT THE DECISION OF MR. PETERSON'S COUNSEL TO CALL A WITNESS TO TESTIFY THE DEFENDANT COMMITTED THE CRIME IS IN CONFLICT WITH THIS COURT'S RECENT DECISION IN *MCCOY V. LOUISIANA*.

Defendant's counsel calling of a witness to say the defendant committed the crime was unconscionable. Counsel's decision, without any demonstration of consent, squarely conflicts with this courts holding in *McCoy v. Louisiana*, 200 L. Ed. 821 (U.S. 2018). "With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his

defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.” *McCoy*, 200 L.Ed.2d at 827. Calling a defense witness to say they know the defendant is guilty is no different than counsel saying it during argument.

On direct examination by defense counsel, Harry Smith testified that Stacy said she knew Peterson killed Kathleen; she knew how Peterson killed Kathleen; Peterson believed she had told his son that Peterson killed his mother; that Mr. Peterson was following her; and that she was willing to use what she knew for leverage in a divorce. Beyond her proclaimed knowledge of Mr. Peterson’s involvement in the crime, Smith testified that Stacy expressed a desire to flee from the dangerous Mr. Peterson, and that when she consulted with counsel he advised her to exercise caution because she could be arrested for “concealment of a homicide.” All of this testimony was known to counsel from the pretrial proceedings.

The Court reached its conclusion that counsel was not ineffective, but merely offered reasonable strategy that was “proved unsuccessful.” *Id.* at ¶ 88. In light of *McCoy*, it was, instead, a complete abandonment of counsel’s required role as an advocate.

This Court has explained the function of the Sixth Amendment is to provide the accused with adversarial process:

[T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

United States v. Cronin, 466 U.S. 648, 656-57 (1984) (internal citations omitted) (citing *Anders v. California*, 386 U.S. 738, 743 (1967)); *see generally* Pet'r's App., Doc. G at A-142.

Counsel here did not merely concede guilt, as in *McCoy*. He elicited the strongest evidence proving Mr. Peterson's guilt during the defense case. It is difficult to imagine a greater abandonment of the adversarial process than producing evidence to support the adversary's case. *See Rickman v. Bell*, 131 F.3d 1150, 1159 (6th Cir. 1997) ("[Defense counsel's] behavior cannot be characterized as legitimate trial strategy; no rational individual could think that painting a picture of one's client even more frightening than the prosecution could paint, would do anything other than doom the client.").

Defense counsel at trial presented to the jury what the prosecution did not: a witness who testified to Mr. Peterson's direct involvement in Kathleen Savio's death, thereby planting the idea of guilt without a single circumstantial or eyewitness statement. "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting)). Stacy was either an eyewitness, or Mr. Peterson had confessed.

The “strategy” was an admission of guilt, without any showing of consent. It was a structural error.

CONCLUSION

Petitioner respectfully requests that this Court grant writ of certiorari, and allow briefing and argument on the issues presented in this Petition.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping, stylized loops and strokes, positioned above a horizontal line.

STEVEN A. GREENBERG
Counsel of Record
Attorney for Petitioner

DATED: June 18, 2018