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OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SWIDLER & BERLIN AND JAMES HAMILTON,

Petitioners v. UNITED STATES

CASE NO: 97-1192

PLACE: Washington, D.C.

DATE: Monday, June 8, 1998

PAGES: 1-54

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IN THE SUPREME COURT OF THE UNITED STATES

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SWIDLER & BERLIN AND :

JAMES HAMILTON, :

Petitioners :

v. : No. 97-1192

UNITED STATES :

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Washington, D.C.

Monday, June 8, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:38 a.m.

APPEARANCES:

JAMES HAMILTON, ESQ., Washington, D.C.; on behalf of the Petitioners.

BRETT M. KAVANAUGH, ESQ., Associate Counsel, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:38 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 97-1192, Swidler & Berlin and James Hamilton v. the United States.

Mr. Hamilton.

ORAL ARGUMENT OF JAMES HAMILTON

ON BEHALF OF THE PETITIONERS

MR. HAMILTON: Mr. Chief Justice, and may it please the Court:

On Sunday, July 11, 1993, at 10:00 a.m. in the morning, Vince Foster came to my home to consult me as a lawyer in the Travel Office matter, which was then the matter of intense public controversy.

We spoke alone for 2 hours, during which time I took three pages of notes, which are the subject of this litigation here today.

Before we began, Mr. Foster asked me if the conversation was privileged and, without hesitation, I said that it was. It is not disputed that my notes would be privileged had Mr. Foster not taken his own life 9 days later in Fort Marcy Park, Virginia.

Mr. Chief Justice, I wish to make five major points this morning which I would like to summarize briefly at the outset. First, any balancing test or

ruling that leaves the existence of the attorney-client privilege after death in doubt would have a significant chilling effect on client candor, particularly as to those who expect to die soon, because people do care about their reputations and the fate of family and friends after death.

Secondly, Independent Counsel's central contention that only the perjurer would be chilled if the privilege does not survive but not the truthful client, or the client intending to invoke his Fifth Amendment privilege, is contrary to reason and experience and is unsupported by any decision of this Court.

Third, the conclusion that the privilege should survive in civil cases but not in criminal cases is illogical and unworkable and is supported by no case, no statute, or no commentator.

Fourth, all the pertinent State statutes recognize and virtually all of the nontestator cases hold that the privilege survives death, and the testator cases generally recognize that they apply an exception to the general rule that is intended to effectuate the testator's intent.

QUESTION: It's an exception that pretty much swallows up the rule though, isn't it?

MR. HAMILTON: Well --

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QUESTION: I mean, like 95 percent of the cases involve the exception to the rule.

MR. HAMILTON: Justice Scalia, that is correct, but they apply to a very specific situation, when there is a will contest, where there is a question about the testator's intent.

QUESTION: It's very specific, but it also happens to be the situation that is most likely to arise with respect to privilege as to a decedent.

MR. HAMILTON: Justice Souter --

QUESTION: It's precisely the situation most likely to arise.

MR. HAMILTON: Justice Scalia, it is certainly the situation that has arisen most in the past. I would suggest, though, that if the court's opinion below is upheld, the situation will arise much more in the criminal context.

QUESTION: How many cases upholding the privilege uphold it, uphold it against either a demand by a prosecutor in the -- in a criminal case, or a grand jury request?

MR. HAMILTON: There are only two cases that I know of. One is the case here. The other is the case in Massachusetts, the case -- the case involved a John Doe, as it is styled.

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QUESTION: Counsel, I recognize that the time frame for your briefing was compressed, but I think there may be at least a misimpression left by your footnote 22 at page 21 and it bears, too, on Judge Tatel's discussion and it bears, too, on your opening remarks that the States say the privilege does not survive.

In California, at least, and that's one of the States you cite in the footnote, the privilege does expire when the estate's closed, and that's been so for 35 years, and I have not found anything in the literature indicating that in California this has caused, number 1, any lack -- any diminishment in the number of lawyers, or in their effectiveness in representing their clients.

And so I think it's a very important distinction to say that the privilege can be exercised pending the administration of the estate, and then it closes, and if the other States, or some of them, are like California, that is, it seems to me, a very significant indication that experience has shown that this is not a problem.

MR. HAMILTON: Justice Kennedy, I believe that California is the only jurisdiction that has that specific reservation or provision --

QUESTION: Have other States addressed the problem? Can you say that the other States specifically do not?

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MR. HAMILTON: Our study of the State statutes find that they do not.

I would also point out that there are a number of States --

QUESTION: That they do not address the point.

MR. HAMILTON: That they -- well, that they do not specifically address the point.

QUESTION: Well, and if the administrator of the estate is designated as the one to exercise the privilege, then that means the lawyer alone would not be able to exercise it, so it seems to me you can infer that it expires.

MR. HAMILTON: Justice Kennedy, in a number of States, close to 20 States, the State provisions apply, or say that the lawyer also can assert the privilege, not just the personal representative but the lawyer also and, of course, that indicates that the survival of the privilege has nothing to do with the winding up of the estate.

QUESTION: But if I'm correct about California, you would agree that that is relevant in considering whether or not experience shows that this causes a problem.

MR. HAMILTON: I will agree that it is a relevant factor.

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I should point out that there is a California case, the Pena case that we cite in our brief, where this particular statute was applied in a criminal case, not just in a civil case relating to the administration of the estate.

QUESTION: Was that post the 1965 California amendment, do you know?

MR. HAMILTON: I believe it was, but I'll have to check the date of the case --

QUESTION: All right. I'll check that.

Well, in any event, in your brief and in a number of the amicus briefs it's stated that what the Independent Counsel is requesting here is very sweeping and unprecedented, but we have at least California, we have Pennsylvania, we have the ALI, which speaks for lawyers, we have all of the commentators except Wigmore, I think, and we have, as Justice Scalia points out, the privilege that in any event is inapplicable when estates and property are concerned.

It's inapplicable if there's an ongoing scheme that the attorney is consulted for in order to continue. It's inapplicable as to fees, inapplicable as to clients who dispute what the attorney told them and that the clients then are in dispute and, also, the privilege that we're talking about here is one only as to compelled

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testimony. The attorney's ethical duty to remain silent continues.

And so it seems to me that this not the sweeping change that the amicus briefs and that you indicate.

MR. HAMILTON: Well, there certainly are some exceptions that you have mentioned, but so far, with the exception of this case and the one case in Pennsylvania, there has been no case that has found that in a nontestamentary situation that the privilege expires when the client dies, and I would suggest, as I suggested to Justice Scalia, that if this Court upholds the lower court decision we will have many, many more cases that will raise this particular issue.

QUESTION: It hasn't happened in California for 35 years.

MR. HAMILTON: But if the Supreme Court of the United States announces that the privilege expires upon death, I think that we will find many, many more cases raising this particular issue.

QUESTION: May I ask if the California statute has been construed by the California supreme court?

MR. HAMILTON: By the California supreme court? It was construed by a California court of appeals in 1984. It was applied in a criminal case to bar the testimony of an attorney.

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QUESTION: It barred the testimony --

MR. HAMILTON: Yes.

QUESTION: -- in a case construing the statute?

MR. HAMILTON: Yes.

QUESTION: Judge Williams did say further, in some States the privilege does not survive the winding up of an estate, and cited California for that proposition. I know it isn't part of this record, Mr. Hamilton, but is the Foster estate wound up?

MR. HAMILTON: The Foster estate is not wound up.

QUESTION: But the period of claims is 3 months, the period for filing claims against the estate is 3 months in Arkansas?

MR. HAMILTON: I believe that is correct. As far as I know, no claims have been filed against the Estate, but it's not been finally wound up.

QUESTION: But if this were California you would be able to assert the privilege, is that right?

I mean, assuming that you read the California words, Personal Representative, to mean someone who ceases to exist when the estate closes, which I don't know whether that's true or not, but assuming that that is true, because here the estate isn't closed, it would be proper to assert the privilege, even under California's --

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MR. HAMILTON: I -- if the question is whether the attorney is the Personal Representative, I don't believe the statutes have been interpreted that way, Justice Breyer.

QUESTION: No, it says in California that if there is -- you can't claim the privilege if there is no holder of the privilege in existence, and the holder of the privilege is defined as a Personal Representative of the client, so if you were to construe that as saying the privilege dies after the estate's closed, still you'd be able to assert it here because the estate hasn't closed.

MR. HAMILTON: That's correct.

QUESTION: Mr. Hamilton --

QUESTION: Well, unless only the holder can assert it. Is it clear under California law that someone other than the holder of the privilege can assert the privilege?

MR. HAMILTON: Well, under California law the Personal Representative is the one who can assert the privilege.

QUESTION: And no one else.

MR. HAMILTON: I don't believe anyone else --

QUESTION: No, no, that's --

QUESTION: So you could not assert it under

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California law, then.

MR. HAMILTON: The attorney is not -- under California law the attorney is not given the right to assert the privilege.

QUESTION: I'm not -- are you sure? I have this now in front of me. I'm reading it quickly, but it says the lawyer who received or made the communication subject to the privilege shall claim the privilege, in -- do you know that -- that's section 955. It seems to give a -- I don't know how much you've looked at the --

MR. HAMILTON: At the California law.

QUESTION: Yes, so I'm not certain that the lawyer couldn't assert it.

MR. HAMILTON: Well, certainly -- certainly, Justice Breyer, in many States the lawyer can assert the privilege.

QUESTION: Mr. Hamilton, you take the position that there can be no compelled testimony by someone in your circumstances even if the information would be essential to show that a third person was not guilty of a crime, such as in the Macumber case in Arizona.

You say even in those circumstances there's no way to get at the information. Is that right?

MR. HAMILTON: Justice O'Connor, what we said was this, that in a situation where a defendant's rights

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are at issue and where denying a defendant access to certain information might unconstitutionally arbitrarily and disproportionately infringe upon his or her right to weigh the evidence, perhaps the Court in that situation --

QUESTION: Well, we don't even know that unless the material can be reviewed, do we?

MR. HAMILTON: Well, that is correct. That is correct. You don't know that.

QUESTION: And you don't oppose reviewing it if a defendant in some other case needs the information, or says he needs it?

MR. HAMILTON: If there was some demonstration that evidence in the hands of an attorney would be crucial to a defendant's right in this situation I would not oppose in camera review.

QUESTION: So you make an exception for criminal cases.

MR. HAMILTON: I would make an --

QUESTION: There goes your absolute rule that you can't draw a distinction between civil and criminal. You're willing to make a distinction between criminal to that extent.

MR. HAMILTON: Justice Scalia, in the case of a situation where a defendant's rights may be at issue, then I think that --

QUESTION: But that's still a criminal case.

MR. HAMILTON: That is still -- that is still a criminal case.

QUESTION: Let's put it in the context, why just the defendant's rights? I mean, let's put it in the context of your client and, as you know, there are conspiracy theorists who believe that his death was not a suicide but in fact was murder.

You acknowledge that if his evidence was necessary to prove that it was not his wife who committed the murder, that that indeed might be able to come in, but what if his evidence was necessary to prove that somebody else committed the murder? Then you would not let it come in for that purpose?

MR. HAMILTON: In that circum --

QUESTION: Even if it was necessary to show who killed the --

MR. HAMILTON: In that circumstance I would not, and let me tell the Court why. I --

QUESTION: It seems to me quite disproportionate. I mean, courts like to get to the truth, and it seems to me that in that situation I can't see what interest is being preserved.

MR. HAMILTON: Justice Scalia, courts do like to get to the truth, but this Court has said that a privilege

like the attorney-client privilege is of transcendent importance. It is important so clients will go to their lawyers and talk to their lawyers with candor. That's central for the lawyer, for the client, but also for the administration of justice.

Now, if we have a rule that allows the privilege to be broken whenever a prosecutor or a grand jury feels that he or it needs the information to pursue who committed a crime, then the privilege will be of little value.

Obviously, here, we have a balancing, if you will, of interest, the interest in having lawyers speak to their clients with candor and the interest of getting to the truth, but all of the privileges that we have recognize that to some degree, to some degree they will inhibit the search for information.

QUESTION: But virtually all the other privileges we have have somebody else around who can say, well, in this circumstance I'm going to let it go. The attorney-client privilege, when the client is still alive he can say, okay, you know, in the interests of justice this ought to come out.

But what's extraordinary here is, you're saying there is nobody -- no matter how severe the public interest is on the other side, there is nobody who can

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say, enough is enough, in these circumstances the information ought to come out.

Even if you yourself thought that the information was really crucial to you, you would have to say, nobody can let it out. That's extraordinary.

MR. HAMILTON: Justice Scalia, in this particular situation I do believe the Personal Representative of Mr. Foster's estate could waive the privilege.

QUESTION: Is the doctor-patient privilege different in that respect, on death?

MR. HAMILTON: In terms of -- in terms of who can waive it?

QUESTION: Yes.

MR. HAMILTON: I would think -- Justice Ginsburg, we have not briefed that particular issue but I would think that in that circumstance also the Personal Representative of the estate could waive.

QUESTION: But you --

QUESTION: Is there authority for either of those propositions, that the Personal Representative of the estate could waive either the physician-patient privilege or the lawyer-client privilege, or is this just kind of speculation on your part?

MR. HAMILTON: There certainly is authority for

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the proposition that the Personal Executive can waive the attorney-client privilege.

QUESTION: Authority by virtue of statute.

MR. HAMILTON: And in other --

QUESTION: And in a few other States.

MR. HAMILTON: And in other --

QUESTION: By virtute of statute.

MR. HAMILTON: And in other jurisdictions, too.

QUESTION: By virtue of statute.

MR. HAMILTON: Yes. Yes.

QUESTION: Wouldn't you suppose, though, that the extent of the waiver would be limited by the extent of the Personal Representative's authority, which I guess I have always assumed is essentially authority over property, so that if we're concerned about reputational protection absent a statute, I would suppose the Personal Representative could not waive it.

MR. HAMILTON: Well, the cases are not very specific on that, but there is at least some implication that the Personal Representative could waive in other situations. For example, let me speak about the Macumber case, because I think that is an example of how the courts, even in affirming the privilege, have found a way to do justice.

In that case, on remand the Personal

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Representative of the deceased's estate did waive the privilege, and so the attorney's testimony was available to the court.

And it so happened in that situation that the court decided that the testimony was untrustworthy for a number of reasons, and it was not admitted into evidence, but there --

QUESTION: But that came at the initiative of the attorneys, did it not? I mean, if they had -- they had this confidence that had been made to them, but the defendant never would have found out about it had it not been for the attorneys for the other client.

MR. HAMILTON: Well, in that situation the attorneys did seek guidance from the bar to see what they could do, so I think it is fair to say that the attorneys had something to do with --

QUESTION: Your typical defendant in a criminal case is simply -- in a lot of -- they're simply not going to know of the existence of this evidence, so -- if the privilege obtains, and that presumably is -- if the privilege does obtain, that's the way it ought to be.

MR. HAMILTON: Well, they may or they may not. I mean, we don't know what a deceased person has told some third party, so it's hard to speculate as to what someone might know, Mr. Chief Justice.

QUESTION: Mr. Hamilton, you said you had five points, and you got out four, so we'd like to hear what the fifth one was.

MR. HAMILTON: The fifth one was this, Justice Ginsburg. As to work product, the court of appeals' notion that even seasoned attorneys do not exercise any professional judgment in taking notes during an initial client interview is contrary to reason and experience, it's without case support, and it is contrary to the facts of this particular case.

I would like to go back to my point that persons will not talk with a lawyer with candor if they know that, when they die, what they say can be discovered by a prosecutor. Over and over and over again this Court has said that the purpose of the privilege is to encourage clients to talk to their lawyers in a candid fashion.

QUESTION: I think this is very important and I want to pursue it with you a little, but as you begin, I'm thinking back to the errors on a case, the Macumber case. You indicate that one of the situations where the confidence might be disclosable is when the client confesses a crime and then someone else is charged with the crime after the death.

So that's the instance where the confidentiality is most important in -- to encouraging the disclosure, and

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yet we have -- you admitted the possibility, in any event, that it would be discoverable.

MR. HAMILTON: In the extreme situation where a defendant's rights would be unconstitutionally, arbitrarily and disproportionately infringed upon, a court might find an exception.

QUESTION: And the paradigm example of that is when the client confesses the crime to the attorney.

MR. HAMILTON: That is the paradigm example but, Justice Kennedy, that is not this case. Here, we have a prosecutor and a grand jury seeking, not specific information about -- that's exonerating, but seeking all relevant information.

QUESTION: Agreed.

MR. HAMILTON: And not to exonerate anyone, but to see whether prosecution is a possibility.

As I was saying, the candor rationale has been announced by this Court in Upjohn, Jaffee, Fisher, Zolin, Trammel, and other cases.

QUESTION: What do you -- what's the classic instance in which the attorney really should know something in order to help the client, but that the attorney would not hear this? The client would be silent if the Independent Counsel's position prevailed. What's the classic example, do you think?

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MR. HAMILTON: Well, I think --

QUESTION: It can't be confession of the crime, can't be property.

MR. HAMILTON: I think you can think of many hypotheticals where a client might be disinclined to reveal something to an attorney if the client knew that after death it might be revealed to the prosecutor.

I mean, in this situation an attorney would have to say, well, I would like for you to tell me the facts, but don't tell me what's really bad, what's really bad, because if you die I may have to reveal this to a prosecutor.

So I think you can come up with many hypotheticals where a client might not want to reveal some facts to the attorney.

Let me just give you a specific one that I used in the court of appeals. What if we have a father who is dying, and he wants to consult a lawyer about the criminal drug problems of his child. Now, in this circumstance the dying father will know that as soon as he passes away some prosecutor might be able to get to the information that he has imparted to his lawyer and, in that circumstance, I think that candor would be chilled, because the father is not going to want to say things --

QUESTION: Why does the father have to do that?

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Can't he just say, I want a spendthrift trust for my son, my son has got some problems. That's all he needs to say.

MR. HAMILTON: Well, he may not --

QUESTION: Because you're presuming that there's something that's very necessary for the attorney to know that the client won't be able to tell, and I don't see that in that hypothetical.

MR. HAMILTON: Justice Kennedy, the father may not come to the lawyer about some estate problem, may not come to the lawyer to set up a trust. The father may come to the lawyer to consult about the criminal problems of his son, because he is concerned about him and he needs advice as to how these matters should be handled.

QUESTION: Certainly many lawyers are kind of family confidantes, as well as just advisors on purely legal matters, I suspect.

MR. HAMILTON: Well, that, of course, is true. The privilege applies when legal advice is sought.

QUESTION: But a person may -- might go to a lawyer and -- with respect to your -- the drug, criminal drug problems of the son and say, you know, I really don't know what to do about it. He wouldn't necessarily have in mind a particular testamentary disposition. He probably wants the lawyer to tell him what he might do about it.

MR. HAMILTON: Well, he may seek the lawyer's

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advice about this criminal issue, that is certainly right. People who are near death do not always consult lawyers about estate issues.

QUESTION: If I consult you about somebody else's criminal problem, is that privileged?

MR. HAMILTON: If you -- if you consult me and you're asking my advice particularly as to a matter that may affect you in some way, yes, it is privileged.

QUESTION: Well, I'm asking, you know, can my son be prosecuted. I mean, there's nothing --

MR. HAMILTON: If --

QUESTION: Or, can my brother be prosecuted.

MR. HAMILTON: If --

QUESTION: Can my third cousin be prosecuted? Would that be --

QUESTION: What if he's asking, should I make an insurance claim on behalf of my son, who has this problem? He might not necessarily be asking about whether the man committed a crime, but whether it would be wise to make a claim knowing these background facts.

There are a lot of different things, other than crimes, that lawyers consult -- are consulted about.

MR. HAMILTON: Well, that is certainly true. That is certainly true, and if I am consulted by a person who wants my legal advice, even though it involves issues

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concerning other people, that type of conversation, Justice Stevens, is privileged.

Now, if the situation is only, will you help me get a lawyer for my son, that would not necessarily be -- I think that would not be privileged, but certainly you can consult about the legal issues of others. You can consult with an attorney. You can ask the attorney to advise you, and that certainly has happened in my own practice.

Mr. Chief Justice, I would like to reserve some time for rebuttal.

QUESTION: Very well, Mr. Hamilton.

Mr. Kavanaugh, we'll hear from you.

ORAL ARGUMENT OF BRETT M. KAVANAUGH

ON BEHALF OF THE RESPONDENT

MR. KAVANAUGH: Thank you, Mr. Chief Justice, and may it please the Court:

In light of what petitioner has stated, let me state at the outset there can be no mistake about the pernicious consequences of petitioner's theory, taken to its logical extreme. By permanently walling off a critical category of evidence from the criminal process, petitioners' theory will lead to extreme injustice. Not our words, the words of Mueller & Kirkpatrick. That will mean that innocent people --

QUESTION: Who are Mueller & Kirkpatrick?

MR. KAVANAUGH: They are two commentators on the law of evidence.

QUESTION: Oh.

MR. KAVANAUGH: That will mean that --

(Laughter.)

QUESTION: They're not quite as well known as Professor Wigmore and the like.

MR. KAVANAUGH: That will mean that innocent people will be wrongly convicted and guilty people will be wrongly exonerated, each of which implicates a substantial societal interest. The case of State v. Macumber is exemplary of that point.

QUESTION: Mr. Kavanaugh, we've been just told by Mr. Hamilton that he wouldn't take it to that extreme, where it's a question of a defendant who was convicted -- who's charged with a crime, and the information was that some other person had done that and the lawyer knew that.

He did not press his case to that extreme, so I think it would be useful if you curtailed your argument to the one that Mr. Hamilton is making on behalf of the privilege.

MR. KAVANAUGH: If that's true that he's not pressing it to the logical extreme, that undercuts entirely his chilling effect argument, because the person

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consulting his attorney before death will not have the expectation of confidentiality on which their entire theory is premised.

QUESTION: No, you're only leaving out the case where he's confessing to a crime, and there are a lot of consultations between lawyers and clients where the client does not confess to a crime.

MR. KAVANAUGH: That's right, Justice Stevens, but the most likely issue about which a client might consult an attorney in which the communications might be sought after death are testamentary cases, and in that circumstance the law has long established -- over a century in this Court -- that the privilege does not survive death, notwithstanding, notwithstanding the embarrassment and the harm to reputation that can ensue from disclosure --

QUESTION: Yes, but the assumption -- no, go ahead.

QUESTION: Why do you accept the qualification that your argument only goes to when there's an admission to a crime? Wouldn't your argument also go to the situation where there's an admission that somebody else did the crime?

MR. KAVANAUGH: Well, in that --

QUESTION: My son did the crime. My third

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cousin did the crime. Wouldn't that also open up, if you accept the qualification, the consultation to intrusion?

MR. KAVANAUGH: Yes, Justice Scalia.

QUESTION: Well, my point is, there are a of consultations where nobody committed a crime.

MR. KAVANAUGH: That's right.

QUESTION: You can't assume all consultations between client and lawyer involve criminal behavior. Generally, we presume people are innocent unless somebody proves otherwise.

MR. KAVANAUGH: But most likely consultation, again, will be in the testamentary context, and there the law has long established that the privilege --

QUESTION: How do we know that's the most likely consultation between lawyer and client? Clients talk to lawyers about a host of problems, not just testamentary dispositions.

MR. KAVANAUGH: The most likely situation in which the communications would be sought after death, experience tells us, are testamentary cases. In fact, it is --

QUESTION: And maybe one reason for that is, it has generally been assumed, as the literature is unanimous on it, that these conversations are privileged.

MR. KAVANAUGH: We don't know --

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QUESTION: That is the background assumption, on the cases you describe all say they are exceptions from the general rule.

MR. KAVANAUGH: Exceptions from the general rule of attorney-client privilege. It's not exceptions from a general rule about what happens to the privilege after death, the most prevalent rule after death. The only thing we know that is settled with respect to posthumous privilege is that the privilege does not apply in the vast majority of cases in which it's raised, namely, testamentary cases.

QUESTION: No, but does that prove very much for your side, because the theory of the testamentary exception is that the client would, in fact, want the lawyer to talk for the purpose of implementing whatever the client's intent was.

The assumption seems to be that there's a point to which the client wants to go. That was the object of the will or the trust, or what-not, and so in fact the theory behind that exception is really that the client authorizes it.

You're arguing for the converse case, in which we assume the client would not, so what does that prove?

MR. KAVANAUGH: Two points in response, Justice Souter. First, as Judge Williams and Judge Wald stated in

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the court of appeals opinion, that rationale for the testamentary exception simply does not work. We don't know whether, in intending for a particular property distribution, the testator intended that his or her attorney-client communications also be disclosed to fulfill that property intent, so --

QUESTION: Well, we may not in the sense that in this case there is in fact a statement that can be attributed to the client saying, I want you to talk or I don't want you to talk, but it seems to me there is a reasonable argument that the client wants the object of his testamentary intent to be served and if in order to serve it, it is necessary to disclose something, it's reasonable to suppose the client would want the disclosure.

I think that's as far as the theory goes.

MR. KAVANAUGH: Well, it may be reasonable to suppose but most believe that that's the one situation above all others where clients would be chilled to nondisclosure by the possibility of posthumous disclosure of the attorney-client communications, and if we're going to presume intent in that context, why do we not also presume intent in this context: presume that a person near death would want to fulfill what this Court has called his basic obligation as a citizen to provide

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information to the grand jury?

And even on the facts of this case --

QUESTION: Because there are a great many people who know they have that obligation, or at least that there is a general theory that they have that obligation, but they do not, in fact, want to fulfill it.

I mean, we're being realistic, I think.

MR. KAVANAUGH: Well, it's again what we should presume someone's intent to be, and if we presume it in the testamentary context, even though it's going to be embarrassing information about one's family members, it could cause great harm --

QUESTION: Well, if I may interrupt you, I think it's the difference between a presumption of fact and a presumption of law.

I mean, in the testamentary case, we figure in fact the fellow wants to accomplish something. If we're going to presume it in this case, I think it probably would have to be a presumption of law quite divorced from any specific actual intent on the part of the client because we know that if embarrassment would in fact result to the client's reputation, to living individuals, probably the client would not want that disclosed.

MR. KAVANAUGH: Well, again, I guess we just have a disagreement about what people would want done in

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the testamentary context as well, but --

QUESTION: May I ask you a different question, which hasn't specifically come up, I think. Who has the burden of persuasion here? Do you have it?

MR. KAVANAUGH: This Court has stated repeatedly that privileges obstruct the search for truth and thus must be strictly construed, so to the extent there's a burden with respect to a legal issue, we would suppose that the burden would be on petitioners to establish what they want here, which is --

QUESTION: What if we -- if we assume -- and I realize that you dispute this, but if we assume, in fact, the understanding of the profession has been, at least for a very long time, that there is a privilege as broad as Mr. Hamilton argues for, so that we start with a privilege which has been established, then I suppose the burden would be upon you, in fact, to justify a curtailment.

MR. KAVANAUGH: Well, in the -- the testamentary exception did not exist forever, either. That was an exception that was developed over time, and this Court recognized it in Glover v. Patten.

With respect to exceptions to an absolute privilege, we stili think, when the societal interests are balanced, the burden is on the privilege proponent to establish that the need for confidentiality outweighs the

need for relevant information.

QUESTION: Mr. Kavanaugh, you're confining your argument to the -- to a criminal case?

MR. KAVANAUGH: That's correct, Mr. Chief Justice.

QUESTION: Now, when you say a criminal case, do you mean a case where the statement made by the client to the attorney has perhaps some earmarks of a declaration against penal interest, or is it just any statement made by the client towards the attorney which might be admissible or useful to a criminal investigation?

MR. KAVANAUGH: It's the latter, Mr. Chief Justice.

QUESTION: In that context your brief, I think at about page 8, indicates, well, there's no danger to the client of criminal liability once -- after his death, but there is substantial danger of civil liability.

If X confesses to the attorney that he's engaged in a pattern of fraud that's criminal, and that comes out, that would subject his estate to a civil liability by the injured persons.

MR. KAVANAUGH: The rule we seek in this case leaves open one of two possibilities in a civil case in which the estate is a party. Either in that future case the court or the Federal courts could end the privilege at

death, or they could end it when the estate is wound up.

In your earlier questions, Justice Kennedy, about the estate being wound up, that rule shows that the rationale behind winding it up on the estate, ending the privilege when the estate winds up, means that interests and reputation, and interests and protecting others, are not what justifies the privilege after death.

It is simply to protect the financial interests of the estate and, thus, those codes which have been in the proposed Federal rule and the Model Code of Evidence, the rationale for those codes, limitation and duration and scope, support our position when that rationale is translated to the criminal --

QUESTION: I think that perhaps understates the -- one reason which I think is generally agreed to, that the client must feel free to tell the lawyer, you know, the truth, the whole truth, et cetera, so that the lawyer will be able to give him good legal advice, and it seems to me when you narrow the rationale the way you do, perhaps you overlook some of that.

MR. KAVANAUGH: Well, we think the attorney-client privilege, as it is developed over time, represents not a single policy. Petitioners cherry-pick out the one policy of encouraging client candor, but it represents a balancing, a mix of considerations and policies that have

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led to different rules in different contexts, such as the crime-fraud exception, such as the exception for testamentary cases.

QUESTION: Mr. --

QUESTION: Well, in the case of the drug-user son, the hypothetical we were discussing, it seems to me there is some merit to that argument. Attorneys, especially in practices where they advise families, often have this kind of question. What shall I do with X in my family who's an alcoholic, or a drug user?

Attorneys engage in not just retrospective analysis of what happened. They try to give guidance for the future, and it seems to me that the profession might be a little poorer for the restriction you ask us to adopt.

MR. KAVANAUGH: The American Law Institute, which does represent the interest of judges and lawyers, and has been followed by this Court in many different bodies of law, has concluded, in agreement with our position, that the privilege should end after death. In the hypothetical --

QUESTION: Well, Mr. Kavanaugh, that position is not really supported by much of any case law that I can find. I mean, that's a position they take in the explanation, but it does not appear to have a lot of

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support.

And while I have you interrupted, how do you characterize the holding of the majority of the panel below that we're reviewing? They seem to adopt some sort of balancing test as applied to a specific case to see whether testimony should be -- whether the privilege should be breached and the testimony compelled.

MR. KAVANAUGH: The --

QUESTION: Is that how you understand the holding?

MR. KAVANAUGH: The court of appeals did require that the information be, quote, of relative importance, a standard that they said was plainly met in this case.

QUESTION: But it seemed to be some kind of a balancing test applied case by case. Do you support that approach? Is that the rule you suggest that we should apply?

MR. KAVANAUGH: We support that approach, but we also pointed out in our brief that it may be somewhat inconsistent with what this Court has done in cases such as Branzburg, where --

QUESTION: Yes, I think it is. This Court has rejected a sort of balancing approach.

MR. KAVANAUGH: In many cases it has, and that's why we pointed out in our brief that in cases such as

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Branzburg and University of Pennsylvania within the context of grand jury proceedings the need has already been established. There's no necessity for further balancing once you're within that narrow, limited context.

QUESTION: Mr. --

QUESTION: Well, it sounds like you're not arguing for affirmance of the test articulated by the panel below, but you didn't cross-petition.

MR. KAVANAUGH: We're arguing for affirmance of the judgment and we pointed out an alternative legal standard in support of the judgment below. We are not seeking to enlarge the judgment in any way, Justice O'Connor.

QUESTION: What was the judgment below? Was it that the district court consider the matter and come to a determination, or was it that the material had to be provided?

MR. KAVANAUGH: It reversed and remanded without specific directions as to what was going to happen on remand. Presumably -- we don't know whether all the notes even concern the Travel Office matter, since we haven't seen the notes, and there may be parts of it that aren't even relevant to our investigation.

QUESTION: Well, did it tell the district court to apply the weighing test that it enunciated?

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MR. KAVANAUGH: It simply said, reversed and remanded for further proceedings consistent with this opinion, so --

QUESTION: Well, wouldn't one think that further proceedings consistent with this opinion would be to apply the weighing test that the court announced?

MR. KAVANAUGH: We don't think so, because the court said the standard was plainly met here, and it was talking about --

QUESTION: Where -- can you point out the portion of the opinion, because that's blurry in my mind. I don't remember the court of appeals having resolved the issue for the district court.

MR. KAVANAUGH: On page 11a of the petition appendix, where the proponent has offered facts supporting a --

QUESTION: Whereabouts on page 11a are you reading from?

MR. KAVANAUGH: The beginning of the first full paragraph, where the proponent has offered facts supporting a good faith reasonable belief that the materials may qualify for the exception, a standard plainly met here by the Independent Counsel, and the preceding paragraph --

QUESTION: But what does it say after that? It

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says, the district court should, in its sound discretion, examine the communications to see whether they in fact do. That's hardly instructing the district court, go ahead and order the disclosure of this material. It says, examine the communications.

MR. KAVANAUGH: Well, we think the communications have to be examined to determine whether they're relevant to our investigation. There may be portions of the notes, again, that have nothing to do with the Travel Office and may be extraneous materials, and that's why the district court in the first instance has to look at it.

QUESTION: And then the court goes on to say, to the extent that the court finds an interest in confidentiality -- the district court -- it can take steps to limit access, et cetera, so it's hardly an instruction to the district court to go ahead and order the divulgence of these notes.

May I ask you a question in that line. Could you, if Foster were alive, say -- subpoena him as a witness before the grand jury and say, tell us what you told your lawyer?

MR. KAVANAUGH: No. We could say, tell us everything you know about the Travel Office matter, which is the same information that he told -- presumably told

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Mr. Hamilton.

All we seek in this case -- the grand jury seeks no windfall. It seeks to be -- the same information to which it would have been entitled were Mr. Foster alive.

QUESTION: But you would not have been entitled to these notes if the client were alive, so it's his death that establishes your qualification for something you could not have gotten. I thought your main argument was, this is a backup for the client, we could have had the client were he only alive, but now what you're really urging is something you never could have gotten when the client was alive. You could have gotten the client's testimony.

Do you think you could ask the lawyer, tell us what Foster told you, instead of looking for his notes?

MR. KAVANAUGH: If he were alive?

QUESTION: No. Foster --

MR. KAVANAUGH: In the current situation?

QUESTION: Yes. You're saying --

MR. KAVANAUGH: Yes.

QUESTION: -- you have a right to his notes. Do you also have a right to the lawyer's testimony?

MR. KAVANAUGH: Absolutely, Justice Ginsburg.

QUESTION: And is it up to you interchangeably, or do you have to do one before the other?

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MR. KAVANAUGH: The orderly process of a grand jury, you usually seek someone's documents and then question them about those documents.

QUESTION: How --

QUESTION: But even on the work product side of it, if you have access to the lawyer's testimony, why do you need the notes?

MR. KAVANAUGH: Because the notes may help to show what was discussed in the conversations between Mr. Foster and Mr. Hamilton and refresh Mr. Hamilton's recollection.

QUESTION: Well, he can use them to refresh his recollection.

But I thought, now turning to the work product side of it, that a statement that's not the witness' verbatim statement, that is the most closely guarded kind of work product, a lawyer's notes as distinguished from his verbatim transcript of the witness' testimony.

MR. KAVANAUGH: The settled case law in the lower courts, Justice Ginsburg, is in situations where the witness who communicated with the lawyer is unavailable, then those portions of the notes that at least reflect the factual statements of the witness and surrounding information must be disclosed, even when the client, the witness is still alive.

QUESTION: But you have to make a substantial showing under the rule, don't you, and for those perhaps under Upjohn you have to make even more of a showing.

What showing did you make in this case as to the work product?

MR. KAVANAUGH: The showing that has to be made, Mr. Chief Justice, is a showing that the witness in question is no longer available for questioning, as the Second and Third Circuit stated, and that is what the showing is, and that's been a traditional showing in the lower courts and is approved in the Restatement, that suggest that the notes must be produced in that circumstance.

QUESTION: That itself is a substantial showing that the witness is no longer available?

MR. KAVANAUGH: That's correct, Mr. Chief Justice, and those opinions have -- and the Restatement follow what Upjohn stated on that point.

In Upjohn, of course, and this goes to the attorney-client privilege point that Justice Ginsburg raised, a fundamental pillar on which the attorney-client privilege rests, a pillar that this Court emphasized in Upjohn, is that the client can be questioned directly about the underlying events, and that's simply not true after death, and that's what fundamentally alters the

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privilege analysis in this case. The client --

QUESTION: Well, you can't question a person after his death -- sorry. You can't question the person before his death about a matter that's privileged, can you?

MR. KAVANAUGH: No, but the same information --

QUESTION: Well, how do you know that he didn't talk to the lawyer about privileged matters, matters that were the subject of some other privilege? How do you know that? You haven't seen the notes.

MR. KAVANAUGH: We don't know what's in the notes, correct.

QUESTION: All right. So is it your rule that what's supposed to happen is that after a person dies the judge is supposed to go through the notes that his lawyer has to see if they're subject to some other privilege or not, and some materials would survive the death and others wouldn't survive the death? Is that basically it?

MR. KAVANAUGH: Well --

QUESTION: I mean, some conversations with lawyers would survive death as privileged.

MR. KAVANAUGH: Ordinarily --

QUESTION: Others would not.

MR. KAVANAUGH: Ordinarily when you disclose information to your attorney, if the attorney-client

privilege doesn't apply -- for example, in a crime-fraud situation you couldn't come in and say, oh, some other privilege applies.

QUESTION: Why not? You might have told the attorney what you told your wife, or what your wife told you, or what you told your psychiatrist, or what the psychiatrist told you, or any other dozens of privileges that could apply.

So if you're saying, I guess, that those still would apply, even though they'd normally be waived when you talk to somebody about them, you're asking the judge to start picking and choosing among them, is there any common law support, or do you find in the last 30 years, even in California, any instance -- I guess you did a handful, six or something.

But I mean, you looked at hundreds of cases. Did you find instances where either in civil or criminal proceedings, in California or anywhere else, somebody did breach this privilege, other than the testamentary context?

MR. KAVANAUGH: Well, the case in Pennsylvania --

QUESTION: I'm not saying, necessarily, cases. I mean, is it the practice in California that prosecutors or civil litigants routinely obtain material on discovery

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from a lawyer of a person who's died after the closing of the estate?

MR. KAVANAUGH: Well, again, there is a distinction between civil cases in which the estate is a party and other civil cases. You're question goes to the unusual nature of the facts presented in this proceeding and in cases such as the Charles Stewart case or the Macumber case.

QUESTION: No, I'm asking you basically -- you've done a lot of excellent research, and I'm saying in the course of that research, either through conversations or otherwise, have you found it to be a practice in California, which has had this evidence code for 30 years, have you found that it is the practice, have you found an instance, either in cases or outside of cases, where lawyers routinely or otherwise, in civil or criminal proceedings other than the testamentary context, breached the lawyer-client privilege?

MR. KAVANAUGH: It's simply silent on that point, Justice Breyer. We have not found instances. A lot of this will come up, of course, in the criminal context in the context of secret grand jury proceedings in a --

QUESTION: If not it perhaps shows that criminal prosecutions are very responsible, that criminal

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prosecutors are very responsible and don't abuse the privilege that California apparently gives them.

MR. KAVANAUGH: I think it might show that the kind of situation -- that's true, and also shows that the kind of situation we have here, as the facts and the statement of facts indicate, are rarely going to arise.

QUESTION: Another thing it shows is the woeful dearth of any empirical research in the legal profession, because the kind of questions that Justice Breyer and some of the rest of us asked, you know, if lawyers were polled as to how they treated client confidences, and people asked prosecutors, we would have a much better idea of how to decide this case than, you know, AB writes a law review article and says, here's what I think.

MR. KAVANAUGH: I couldn't agree more, Mr. Chief Justice, and the empirical question, even as to the attorney-client privilege for living clients outside the context where the client asserts the Fifth Amendment, there is very little empirical support behind --

QUESTION: Well, of course, this is against a background in which the attorney has the unceasing ethical obligation not to discuss the confidential communications. We're talking only about compelled testimony.

MR. KAVANAUGH: That's exactly right, and that's important, Justice --

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QUESTION: But even there, I'm a little concerned. Suppose that there is a multidefendant crime, and there are five lawyers representing five different defendants.

Defendant number 1 dies. Under your view I guess the prosecution could compel the attorney for the now-deceased defendant to disclose all of the information, which it seems to me might among other things put the attorney for the deceased clients in great danger.

(Laughter.)

MR. KAVANAUGH: That's right, and actually, Justice Kennedy, your question is a problem in the law notwithstanding dying clients.

QUESTION: Why is it a problem? I mean, death has sort of given one of the five defendants absolute immunity --

MR. KAVANAUGH: That was my --

QUESTION: -- which the State could have given anyway, right?

MR. KAVANAUGH: That's absolutely right.

QUESTION: It was given in a more extreme fashion, so to speak.

MR. KAVANAUGH: That's right, Justice Scalia, and, in fact, what I was going to say is, the law has a --

QUESTION: But Mr. Kavanaugh, in that case it's

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the defendant who would have the worry, not the defendant's lawyer.

MR. KAVANAUGH: Well, the law has experience with the situation Justice Kennedy raises, not with someone dying but someone pleading or being granted immunity, and there are complications.

QUESTION: Right, and he may have to worry about it, but his lawyer doesn't have to worry about it.

MR. KAVANAUGH: Well, I think Justice Kennedy was positing a situation in an organized crime type of case where the lawyer would be in danger if the client --

QUESTION: Because the lawyer is the source --

QUESTION: Well, I am.

QUESTION: -- of the information.

QUESTION: I am. What's the answer to it?

MR. KAVANAUGH: Well, the answer --

QUESTION: I --

MR. KAVANAUGH: -- in that case is that the attorney must disclose the communications and there can be conflict problems if there was a joint defense arrangement whereby everyone was meeting in the same room.

QUESTION: Mr. Kavanaugh, you say that the attorney must disclose the communications. This goes to your basic theory. I'd just like to know, are you urging us to decide what the law now is, or are you asking us to

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change the law?

MR. KAVANAUGH: We think the law is -- in Federal courts there is no law, and so I guess it's both. We don't know whether --

QUESTION: You want us both to say what the law now is and change it.

(Laughter.)

MR. KAVANAUGH: We don't know what the law -- we don't know what the law is, Justice Stevens.

QUESTION: But you're not urging that the law be what the D.C. Circuit -- as I understand your position, you say, we think that death ends it, period. The D.C. Circuit said there's some kind of balancing.

Do I understand you correctly to say, we think the D.C. Circuit was wrong, but we'll take that as second best, so that your position is, death ends the privilege?

MR. KAVANAUGH: We don't think the D.C. Circuit was wrong. We do think the D.C. Circuit's articulation of the phrase, relative importance, has some inconsistency with what this Court has stated in cases such as Branzburg --

QUESTION: Well, what is your first position, then? Is your first position is, death ends it, or is it -- is it --

MR. KAVANAUGH: That is our first position. Our

second position, alternative positions is that relative importance is a standard that we would be happy with, but again, we --

QUESTION: And is that the ALI standard? I think earlier you said the ALI agrees with you. I thought the ALI position was, there's some kind of balance. How --

MR. KAVANAUGH: It's some kind of vague balancing.

As to Pennsylvania --

QUESTION: You're hold -- your position is that it ends for both civil and criminal -- no, only for criminal?

MR. KAVANAUGH: Correct.

QUESTION: All right. If it's only for criminal, then who -- which group of States -- I guess the answer's none, but which group of commentators or law reformers or whatever have advocated that the rule apply -- terminate only in criminal but not civil cases?

MR. KAVANAUGH: Well, with hesitation at raising their names again, Mueller & Kirkpatrick do suggest that --

(Laughter.)

QUESTION: The ALI -- the ALI does not, is that --

MR. KAVANAUGH: Yes.

QUESTION: Right.

MR. KAVANAUGH: That's correct. I want to make one point about --

QUESTION: Yes.

MR. KAVANAUGH: -- Pennsylvania.

For 22 years, Justice Kennedy, there's been experience in Pennsylvania after Cohen v. Jenkintown Cab. It's a big State with a lot of lawyers, and there's no evidence, even with petitioners and their amici and their vast resources, of any chilling going on in the Commonwealth of Pennsylvania based on the experience --

QUESTION: Do you have the -- what I'm quite curious about is, of course, the California Code and maybe Pennsylvania, I don't know, are maybe a little ambiguous as to whether it ends at death, as I read it through here, so an explanation to the dearth of cases may be that all clients basically think they're privileged. Lawyers think they're privileged. Everybody thinks they're privileged, so they don't try to get it.

Now, is there any reason you have for thinking what I just said is wrong?

MR. KAVANAUGH: I don't think many people have thought about this issue, Justice Breyer, it comes up so rarely, and that would be my --

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QUESTION: Well, is the reason that it comes up rarely, because California lawyers, throughout the country lawyers, clients throughout the country go in to a lawyer and they think, I'm safe. They all think that's the rule, so they don't try to get it. Is that the reason why there is a dearth?

MR. KAVANAUGH: The reason that there is a dearth is the factual situation rarely comes up, we think, and clients know when they talk to their lawyers, I'm going to have to disclose these facts when I'm called to testify anyway, so that kind of chilling is far greater than anything we propose here.

QUESTION: Thank you --

MR. KAVANAUGH: I thank the Court.

QUESTION: Thank you, Mr. Kavanaugh.

Mr. Hamilton, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF JAMES HAMILTON

ON BEHALF OF THE PETITIONER

MR. HAMILTON: Mr. Chief Justice, I want to come back to the work product issue, because I believe Mr. Kavanaugh has misstated the law in that -- in that area.

I believe that the Upjohn case, the Hickman case demonstrate that the type of notes that I took are protected by the work product. Upjohn says that notes that embody what the lawyer saw fit to write down enjoy

special protection, not an ordinary protection, but special protection. This is found at 449 U.S. at 399.

QUESTION: Don't these cases usually come up in the context where somebody would want to use -- where insight into the lawyer's thinking would be useful in litigation against the lawyer's client?

I mean, is it -- what is the purpose of the work product privilege? Is it some copyright benefit that the lawyer has in the particular, unusual way that his lawyer's mind works --

(Laughter.)

QUESTION: -- even in future cases that have nothing to do with this client, or with this litigation?

MR. HAMILTON: The work product privilege is intended to protect the adversary system. It is intended to let lawyers work in a certain sphere without interference.

QUESTION: Sure, so that your opponent can't see behind your thinking, your strategizing in this particular case.

MR. HAMILTON: That's --

QUESTION: But when the case is all gone, when there's no case left at all, is there something sacrosanct about the way this lawyer's mind was working --

MR. HAMILTON: Well --

QUESTION: -- in a long gone case that has no future implications?

MR. HAMILTON: I think this Court, in the Grolyer case, has said that the work product privilege extends even after the litigation involved has concluded, but the purpose is to protect the lawyer's thought processes, his methods of working. This protection --

QUESTION: So it is sort of a copyright. It's an intellectual property thing, right? Is that what it is?

MR. HAMILTON: I have not read any opinion, Justice Scalia, that describes it that way, but there are opinions, including the Moody case that Mr. Kavanaugh cites, that say that the work product privilege belongs to the lawyer as well as to the client, because the cases recognize that the lawyer has an interest to protect and the lawyer can assert that work product privilege even though the client does not.

QUESTION: What is that interest that he has to protect?

MR. HAMILTON: It is --

QUESTION: When there's -- this litigation is all gone, it's not usable in any other litigation, what is the interest that the lawyer has to protect?

MR. HAMILTON: It is protecting his thought

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processes, his methods of operation. It allows him to prepare his cases in a certain amount of privacy, knowing that his adversaries will not have access to his work product.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hamilton. The case is submitted.

(Whereupon, at 11:38 a.m., the case in the above-entitled matter was submitted.)

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CASE NO: 97-1192

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BY Ann Marie Federico

(REPORTER)