

Case No. \_\_\_\_\_

**IN THE  
SUPREME COURT OF ILLINOIS**

<b>PEOPLE OF THE STATE OF ILLINOIS</b>	)	<b>Petition for Leave to Appeal</b>
	)	<b>From the Appellate Court,</b>
<b>Plaintiff-Respondent,</b>	)	<b>Third District, Nos. 3-13-0157</b>
	)	
	)	
<b>v.</b>	)	<b>On Appeal from the 12th</b>
	)	<b>Judicial Circuit of Will County</b>
<b>DREW PETERSON,</b>	)	<b>Trial Court Nos. 09 CF 1048</b>
	)	
<b>Defendant-Petitioner</b>	)	
	)	<b>Honorable Edward Burmilla, Jr.</b>

**PETITION FOR LEAVE TO APPEAL**

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**ORAL ARGUMENT REQUESTED**

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### **PRAYER FOR LEAVE TO APPEAL**

Pursuant to Illinois Supreme Court Rule 315 defendant respectfully requests this Court to grant leave to appeal from the November 12, 2015 decision of the Illinois Appellate Court, Third District, affirming defendant's conviction.

### **STATEMENT OF JURISDICTION**

Illinois Supreme Court Rule 315 confers jurisdiction upon this Court. The appellate court issued its decision on November 12, 2015 and denied defendant's Petition for Rehearing on December 16, 2015.

### **POINTS RELIED UPON**

1. Forfeiture by wrongdoing requires that the defendant acted with the specific purpose of preventing testimony. The trial court did not make this finding, instead ruling that the doctrine applies whenever someone is a potential witness, regardless of the defendant's purpose. This ruling is at odds with the United States Supreme Court, the Seventh Circuit Court of Appeals, and courts of sister States. The appellate court below ignored this Court's law of the case precedent and refused to address the erroneous application of the forfeiture by wrongdoing doctrine. Most of the statements introduced by the prosecution at trial were included in the trial court's original ruling and therefore were never considered during the interlocutory appeal.

2. Illinois Rule of Evidence 404(c) requires the prosecution to provide pre-trial notice of its intent to introduce bad act evidence. Here the prosecution did not provide any pre-trial notice, meaning that good cause for the lack of notice had to be demonstrated before the evidence could be admitted. The appellate court deemed attorney neglect to be "good cause." This holding is the first time attorney neglect has ever been found to be "good cause," and effectively makes the notice requirement meaningless.

3. Peterson was denied effective assistance of counsel in two respects-1) his lead counsel entered into a media rights deal that created a per se conflict. The appellate court, disagreeing with the suggestion of a per se conflict made by this Court in *People v. Gacy*, 125 Ill. 2d 117,135 (1988), felt constrained and only able to find a per se conflict under the three common fact patterns: a contemporaneous association with the victim, prosecution or entity assisting the prosecution; when there is simultaneous representation of a prosecution witness; or when defense counsel was formerly involved in the prosecution; and 2) at trial when defense counsel called attorney Harry Smith as a witness, so that he could testify to a conversation he had with Stacy Peterson to the effect that she knew the defendant had committed the murder for which he was on trial. The trial court had prohibited the prosecution from introducing the conversation because it was privileged.

## FACTS

Sometime between February 28 and March 1, 2004, Kathleen Savio died. Her body was found on Monday March 1, in the bathtub of her master bedroom (R.6996). Drew Peterson, whom witnesses described as visibly shaken, summoned authorities to the scene. (R.7058). The Illinois State Police ("ISP") did not find any signs of foul play or trauma, so they considered the case a death investigation. (R.7559).

On March 2, Bryan Mitchell, M.D., conducted Savio's autopsy, and he opined that Savio's death was an accident. (R.7677). He noted no major signs of trauma. (R.8843). Dr. Mitchell, who passed away before the trial, concluded Savio had drowned in the tub.

On March 3, ISP investigators Collins and Falat interviewed Stacy Peterson. Drew Peterson sat in on the interview to support his "nervous and shaken" wife. (R. 7825-7832). Stacy offered no information that inculpated her husband in Savio's death. (Id.). On March 9 and 10, Kristin Anderson - Savio's former tenant - called the ISP. Anderson related that Savio had told her that Drew Peterson once broke into her home and held a knife to her throat. She claimed that Savio slept with a knife under her bed for the purpose of protecting herself. (R. at 7999 - 8000). No such knife was located.

The Will County Coroner conducted an inquest to determine Savio's manner of death. Susan Doman - Savio's sister - testified at the inquest about allegations of wrongdoing by Peterson, which Savio had made known to other people, including Anna Doman, Bolingbrook police Lt. Kernc, Mary Sue Parks,

and Kristin Anderson. (R.8438-42). Still, the inquest jury ruled Savio's manner of death as accidental. The investigators provided their reports to the Will County State's Attorney's Office ("WCSAO"). The WCSAO agreeing with the investigators that the death was accidental closed the file. (R. at 7849). After this, the matter went dormant.

On August 30, 2007, Stacy called Reverend Neil Schori and the two arranged to meet the next day at a Starbucks in Bolingbrook (Schori had provided counseling to Drew and Stacy the year before). When Schori saw Stacy she appeared nervous, withdrawn physically, and crying. Stacy told Schori about an evening when Stacy and Peterson went to sleep together, but she awoke in the middle of the night and Peterson was gone. Stacy checked the house for Peterson but could not find him, and he did not answer when she called. Later, during the early morning hours, Stacy saw Peterson standing by the washer and dryer, dressed in all black. Peterson had a duffle bag in his hand, and emptied the contents into the washing machine. Stacy identified the contents of the bag as women's clothing that she did not own. (R.1000-06). Peterson told Stacy that the police would be coming to speak with her, so he told her what to say. Stacy told Schori that she lied on Peterson's behalf when speaking with police. Stacy also told Schori that Peterson, who at one point was an Army Military Policeman at the White House, "killed all his men" while in the Army. (R.10015-10019).

The conversation lasted about an hour-and-a-half. Schori thought that Stacy may have been lying, and thus he did not in any way follow-up on her

statements. (R.10025; 10029). Moreover, Schori did not refer Stacy to any shelter where she might seek refuge or help.

On October 24, 2007, Stacy called Attorney Harry Smith because she wanted to retain him as a divorce attorney. 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. (R. 10771-76).

Several days later, Stacy's sister reported her missing. Stacy's absence generated enormous and immediate media interest. Peterson sought legal counsel. In November, 2007, he retained Attorney Joel Brodsky to represent him. (R.11551). Brodsky did not advise Peterson to remain silent, or to assist the police. Instead, he had Peterson sign a joint-publicity agreement in which Brodsky was to receive 85% of the proceeds, and advised a slew of public appearances. (R.11475). Some of these interviews that Peterson provided were offered by the prosecution at trial.

Will County convened a special grand jury to investigate Stacy's disappearance and Savio's death. The Coroner's Office contacted Larry William Blum, M.D., to review Dr. Mitchell's autopsy report on Savio. (R. at 8837). On November 13, 2007, he proceeded with a second autopsy by exhuming Savio and opening her casket. Dr. Blum found "a lot of water in the casket ... and marked deterioration of the tissues of [Savio's] body." (R. at 8862-8863). He took X-rays that were "largely unremarkable," noted deep bruising over the left lower quadrant of Savio's body, and bruising on the left breast. He found no evidence of hemorrhage in Savio's neck or back. Dr. Blum reviewed the

toxicology report and concluded Savio had no drugs in her system at the time of death. Nonetheless, based on the entirety of his findings, Dr. Blum eventually ruled Savio's manner of death homicide. (R.8664-87).

On May 7, 2009, the grand jury indicted Peterson for first-degree murder. Between January 19, 2010 and February 19, 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 ("FBW") statute, 725 ILCS 5/115-10.6 The Honorable Judge Stephen White made the required factual and legal determinations:

- The State proved by a preponderance of the evidence that Peterson killed Savio and Peterson did so to cause Savio's unavailability at proceedings against Peterson;
- A letter from Savio dated November 14, 2002, a written statement from Savio concerning the July 5th, 2002 incident, statements made to Anna Doman and Mary Parks were all reliable;
- Admission of that evidence would serve the interests of justice;
- Any remaining statements that other people attributed to Savio were unreliable, and their admission at trial would not further the interests of justice;
- A conversation between Neil Schori and Stacy was reliable, and admission of that evidence would serve the interests of justice;
- Any remaining statements that other people attributed to Stacy were unreliable, and their admission at trial would not further the interests of justice; and
- 725 ILCS 5/115-10 supplanted the Common Law Doctrine of FBW.

Although the prosecution had lobbied for enactment of a statute (725 ILCS 5/115-10, so called "Drew's Law") to assist its cause in this case, it filed an

interlocutory appeal of Judge White's ruling, arguing that all of the offered statements were admissible under common law FBW. The Third District Appellate Court agreed that Drew's law did not supplant the common law doctrine. *People v. Peterson*, 2012 IL App (3d) 100514-B.

After the interlocutory appeal, but before trial, the defense successfully argued that Smith's testimony violated Savio and Stacy's attorney-client privilege. The attorney was duty-bound to raise the privilege and thus any testimony from Smith was not admissible. (R.5563-72).

At trial, the prosecution presented more than 30 witnesses, including Anna Doman,\* Susan Doman,\* Troopers Deel, Falat and Collins, Steve Maniaci, Jeff Pachter,\* Schori,\* Anderson,\* Parks,\* Dr. Blum, Dr. Case, Dr. Neri, and Dr. Motiani. The prosecution never presented physical evidence linking Peterson to Savio's death, nor did it present any witness who placed Peterson at the Savio home between February 28, 2004, and the evening of March 1, 2004. The defense presented several witnesses, including a handful of police officers, Peterson's son, Thomas Peterson, and Attorney Smith.

Arguing that Peterson drowned Savio, the prosecution relied heavily upon the FBW testimony, and the defense testimony from attorney Smith. After six weeks of trial, the jurors returned a guilty verdict on September 6, 2012.

At a post-trial evidentiary hearing, Peterson's new defense team presented several witnesses. Reem Odeh, Brodsky's former partner, verified the media contract executed among Brodsky, Peterson, and Selig Multimedia. Odeh also verified the existence of a contract that Brodsky executed with Screaming

Flea Productions, regarding the case. In addition, Odeh testified that Brodsky had physically attacked her when she had discovered the contracts at their office, and that Brodsky had again threatened her outside of the courtroom prior to her testimony. (R. 11151-56).

John Marshall Law School Professor Clifford Scott Rudnick opined that Brodsky's execution of the agreements "raised ethical concerns" and were violations of Illinois' Rules of Professional Responsibility 1.7 and 1.8. Rudnick felt that Brodsky's contracts gave rise to a per se conflict of interest. (R.11584). Furthermore, retired Judge Daniel Locallo opined that the decision to call Attorney Smith was "not reasonable trial strategy." (R.11674).

The court denied Peterson's post-trial motion from the bench, but in so doing, made the following observations about Brodsky:

It was clear to the court from the very beginning that Mr. Brodsky was out of his depth. It was clear to me from the very beginning he didn't possess the lawyerly skills that were necessary to undertake this matter on his own ... Mr. Brodsky was clearly at a different spectrum of lawyerly skills than the other attorneys that were in this case. (R.11833).

The court sentenced Peterson to 38 years' imprisonment (R.11908). After sentencing, Brodsky conducted a number of television interviews revealing privileged information about Peterson's case. New counsel brought forth a motion asking that the court impose a gag order on Brodsky. While it declined to take such a measure, the court directly addressed Brodsky's conduct:

In 37 years almost now of being a prosecutor, an attorney in private practice, and a judge, I've never seen an attorney comport himself in the fashion that Mr. Brodsky did of going on television and willingly speaking about his conversations with his client . . .

the client's impressions about why witness [sic] were called, threats that were made, innuendo about the affect of a client's testimony on a trial, things of that nature . . . And I can't - I wish I could think of a word beyond shocked that I could apply to Mr. Brodsky's appearance on television in this case. I think it makes the comments that I made in the ruling on the post-trial motion about his abilities even more magnified. (R. at 11923).

Peterson timely appealed, and on November 12, 2015, the appellate court affirmed the conviction. The court refused, on law-of-the-case grounds, to consider Peterson's challenge to the FBW determinations. Furthermore, the court denied, on the merits, Peterson's challenges to other crimes evidence and ineffective assistance of counsel. The court also failed to address defendant's challenge to the introduction of privileged information. Peterson timely moved for rehearing, which petition the court rejected in December 16, 2015.

## **ARGUMENT IN SUPPORT**

### **I. FORFEITURE BY WRONGDOING**

This Court should grant this petition to review the fundamental evidentiary mistakes flowing from the trial court's reliance on the forfeiture-by-wrongdoing doctrine because: 1) the appellate court's refusal to consider defendant's appeal was inconsistent with this Court's law-of-the-case precedent, and therefore the most important aspects of the trial court's evidentiary ruling have never been

tested on appeal; 2) the trial court's misapplication of the doctrine violated defendant's right to a fair trial and threatens to undermine defendants' rights in subsequent cases; and 3) the appellate court in its first decision violated this Court's separation of powers doctrine in holding that the common law applied instead of the statutory forfeiture-by-wrongdoing doctrine.

**A. The Appellate Court Misapplied this Court's Law-of-the-Case Precedent.**

In upholding Peterson's conviction, the appellate court declined to rule on one of Peterson's pivotal contentions on appeal, namely that the prosecution's introduction of numerous hearsay statements, from Kathleen Savio and Stacy Peterson, violated Illinois rules of evidence, undercut his right to confrontation, and deprived him of a fair trial. Statements that the court admitted pursuant to the forfeiture-by-wrongdoing doctrine were unquestionably essential to the prosecution's case. By way of example, during closing argument, on more than ten separate occasions, the prosecution cited one or more of Kathleen's statements to others, as evidence of guilt. These statements included Kathleen telling people that Drew was going to kill her, that Drew taunted her "why don't you just die," that he threatened her that she was not going to make it to the divorce settlement, and that he warned her that he could kill her and make it look like an accident. For each of these statements, a third-party testified that Kathleen relayed them to the witness before her death. The court admitted these statements under the forfeiture-by-wrongdoing doctrine, and the prosecution repeated them for the jury as it concluded its closing summation. The court also

erroneously admitted Stacy's statements to Pastor Schori and attorney Harry Smith, both of which the prosecution stressed during closing argument.

Despite the profound role that the hearsay statements played at trial, the appellate court refused to address defendant's challenge to the trial court's rulings on the hearsay evidence. In a sua sponte ruling, the court stated that the law-of-the-case doctrine barred it from reviewing the hearsay issues. The court reasoned that the forfeiture-by-wrongdoing "issue was definitively decided in the previous appeal in this case . . . Our decision in that regard now stands as the law of the case . . . the statements were admissible under the FBWD doctrine." 2015 Ill. App. LEXIS 854, ¶204. Because the appellate court misapplied the law-of-the-case doctrine, as articulated by this Court, review is warranted.

As an initial matter, the appellate court's decision overlooks the fact that it addressed a very different question when deciding the interlocutory appeal. namely whether the common law rule on forfeiture-by-wrongdoing, or the subsequently enacted Illinois statute, governed the issue. The prosecution appealed before trial because it wished to shed its burden of demonstrating that the hearsay statements were reliable, as required under the statute. The appellate court held that the common law rule governed, and thus the prosecution would not have to show reliability of the statements, and it remanded the case accordingly.

In holding that the common law, as opposed to the statutory rule on forfeiture- by-wronging governed – which defendant contests infra – the appellate court was considering the prosecution's appeal, not that of defendant.

The first appeal, therefore, could not have resolved the propriety of the trial court's decision to admit the six hearsay statements into evidence pursuant to the forfeiture-by-wrongdoing doctrine because the issue (and those statements) was not on appeal. Although the appellate court stated in its first decision that the defendant acted "with the intent to make them unavailable as witnesses," that off-hand statement cannot be transformed into the holding.

In *People v. Johnson*, 208 Ill.2d 118, 140-41 (2003), this Court dealt squarely the question of when an appellate court has jurisdiction over contested hearsay statements. This Court reasoned that the appellate court was without jurisdiction, in an initial appeal, to consider the hearsay statements that the trial court already had permitted to be introduced at trial:

The "case on review" mentioned in article VI, section 6, is defined by our Rule 604(a)(1). That rule, in turn, limits the "case on review" to the evidence actually suppressed by the circuit court. In other words, under article VI, section 6, the appellate court obtains original jurisdiction over the evidence suppressed by the circuit court when the State files an appeal. The appellate court does not, however, obtain jurisdiction over evidence that was not suppressed by the circuit court. Such evidence is simply not part of the case which may be reviewed pursuant to Rule 604(a)(1)....Principles of judicial economy may not trump the jurisdictional barrier erected by Rule 604(a)(1) in this case.

*Johnson* reveals that the court below lacked jurisdiction to determine the admissibility of the hearsay statements that the trial court had ruled admissible. Those statements were not then at issue.

The original trial court order admitting statements under the forfeiture statute included almost all of those introduced at trial: the letter Kathleen wrote

to the Will County State's Attorney's Office describing how Drew had broken into her house and threatened her; a second handwritten statement she wrote describing the same incident; a statement to her sister that Drew was going to kill her and she would not make it to the divorce settlement, receive any part of his pension or her children; a statement to Mary Sue Parks describing how Drew broke into her residence, grabbed her by the throat and said "why don't you just die"; a statement to Mary Sue Parks that Drew could kill her and no one would know; and Stacy Peterson's statement to Neil Schori. These statements introduced at trial were not the subject of the State's earlier interlocutory appeal because they had not been excluded.

The appellate court's law-of-the-case holding, therefore, simply cannot be reconciled with this Court's decision in Johnson. Despite the dicta in the first appellate court decision, no appellate review has ever been afforded to consider the fundamental forfeiture-by-wrongdoing issues raised below. Specifically, no appellate court has considered whether the forfeiture-by-wrongdoing doctrine requires the prosecution to demonstrate that defendant made the victim unavailable to prevent specific testimony at a judicial proceeding, and whether the prosecution can even use the doctrine when a defendant is on trial for murdering the potential witness. The court below made no finding whatsoever – and the prosecution introduced scant evidence – as to what testimony defendant sought to prevent. See *infra*. As this Court stressed in *People v. Tenner*, 206 Ill. 2d 381, 395 (Ill. 2002), the law-of-the-case doctrine prevents "a defendant from

taking ‘two bites out of the same appellate apple.’” Defendant has yet to get his first bite, and accordingly, this Court should grant his petition for review.

**B. The Trial Court’s Application of the Forfeiture-by-Wrongdoing Doctrine Contravened U.S. Supreme Court Precedent and Precedent from Other Jurisdictions.**

The legal issue that the appellate court avoided is of critical importance. The trial court allowed the contested hearsay statements without finding, or even explaining what testimony the defendant allegedly tried to avoid. The prosecution never introduced probative evidence to show why defendant would have wanted to avoid Kathleen Savio’s testimony at their pending property settlement proceeding. Savio had already been deposed at the time of her death and had already been granted a divorce. The property settlement was the only outstanding issue. Nothing in the record suggests what additional information she would have offered. Rather, the State claimed that Peterson wanted to avoid the asset division itself, not Savio’s testimony. In the absence of the defendant’s intent to avoid the declarant’s testimony, the very rationale for the forfeiture-by-wrongdoing doctrine collapses. In *Giles v. California*, the United States Supreme Court rejected the notion that forfeiture-by-wrongdoing could apply to a situation where the prosecution failed to prove the defendant’s intent to procure the witness’s unavailability. 554 U.S. 353 (2008). The Court explained that 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. Here, the prosecution argued that Peterson may not have wished to divide his and Savio's assets.<sup>1</sup> That does not, however, show that Peterson's motive was to keep Savio from testifying at any proceeding. Forfeiture-by-wrongdoing does not apply to every litigant. The prosecution's 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.<sup>2</sup>

Just as the Supreme Court held in *Giles*, courts in neighboring states have recently cautioned against the very mistake that the trial 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 forfeiture-by-wrongdoing doctrine 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

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<sup>1</sup> As the prosecution stressed in introducing hearsay from Kathleen's sister recounting their prior conversation: "Drew said he's going to kill me and I would not make it to the divorce settlement. I will never get his pension or my children." No testimony is even alluded to.

<sup>2</sup> The *only* testimony suggesting that defendant acted to prevent Stacy Peterson from testifying at a trial for the murder of Kathleen Savio came from attorney Harry Smith, and that testimony should have been barred as privileged, Ill. R. Evid. 104, as the trial court in fact later determined.

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."<sup>3</sup> 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. After *Giles*, the Wisconsin appellate court found that only a specific purpose to prevent testimony would trigger forfeiture-by-wrongdoing. However, the court determined that the trial court's error was not given the facts of the case. The federal court agreed with the Wisconsin court that *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 above, holding both that the forfeiture-by-wrongdoing doctrine was inapplicable and that use of the doctrine at trial was reversible error. Of particular relevance here, 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. 554 U.S. at 359. In *Jensen*, the fact that the accused may have wished to "avoid a messy divorce"

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<sup>3</sup> The court concluded, however, that the erroneous admission of the statements in violation of the defendant's constitutional rights was not outcome-determinative and affirmed the conviction.

was not directly relevant. The Seventh Circuit stressed the harm from introducing 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 forfeiture-by-wrongdoing does not apply unless the prosecution first identifies the testimony that the defendant was trying to avoid. This Court should review this case to determine whether Illinois law requires courts to follow that same logic from Aiden and Jensen before admitting the unfronted hearsay of a witness’s voice from the grave.

**C. The Appellate Court’s Decisions Departed from This Court’s Separation of Powers Jurisprudence.**

Review is further warranted in light of the appellate court’s determination in the first appeal that the common law rule on forfeiture-by-wrongdoing trumps the statute that the General Assembly passed, which, ironically, was championed by the State’s Attorney in this case.<sup>4</sup> The General Assembly’s version, unlike that at common law, requires that the court first assess the reliability of a proffered hearsay statement before admitting into evidence under the forfeiture-by-wrongdoing doctrine. Accordingly, the trial court excluded eight statements as

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<sup>4</sup> *People v. Peterson, 2012 Ill. App. 3d, supra, at n.7.*

unreliable. The prosecution then appealed, challenging the applicability of its own law, and arguing that it need not show that the hearsay statements in question bore any indicia of reliability. The appellate court agreed, and remanded the case for admission of even the statements that the trial court had found unreliable.<sup>5</sup>

The appellate court's decision misstates this Court's controlling separation of powers principles. Illinois Supreme Court rules and decisions take precedence over state legislation if they concern internal rules of housekeeping or docket management. However, this Court has instructed that courts must attempt to reconcile any conflict between state legislation embodying a public policy choice, and the court's rules and decisions. *People v. Walker*, 519 N.E.2d 890, 893 (Ill. 1988). Only if the legislation "directly and irreconcilably conflicts" with a Supreme Court rule will the rule take precedence. *Id.* *Drew's Law* was a permissible exercise of legislative power reflecting public policy to protect the rights of defendants. Even as early as 1942, it was "well settled [by the Supreme Court] that the legislature of a State has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof." *People v. Wells*, 380 Ill. 347, 354, 44 N.E.2d 32 (1942). Moreover, the Illinois legislature has enacted many statutes affecting rules of evidence, which Illinois courts have upheld. See *People v. Rolfingsmeyer*, 101 Ill. 2d 137, 140 (1984) (collecting valid state legislation covering admissibility of business records, coroner's records, rape victims' prior

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<sup>5</sup> At trial Peterson unsuccessfully argued that, with the judicial finding the evidence was unreliable, due process was offended by the admission.

sexual conduct, and defendant's payment of plaintiff's medical expenses); Hoem v. Zia, 239 Ill. App. 3d 601, 611-612 (4th Dist. 1992) (commenting on valid state legislation covering admissibility of evidence, including witness competency, prior identifications, and prior inconsistent statements). Because the Illinois forfeiture-by-wrongdoing statute, which requires findings of reliability, does not intrude into the judiciary's province, no separation of powers violation arises and the eight hearsay statements found unreliable by the trial court should have been excluded.

To be sure, the statute (§ g) also provides that "This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing." There is no dispute that the statute leaves the core of the common law rule untouched, and rather only clarifies proper procedures in order to protect defendants' rights. The court below stressed "the importance that the statute's sponsors attached to this reliability requirement." 2012 Il App. 3d at n.7. Otherwise, the statute would be a nullity if courts were to ignore the procedures established, such as requiring a specific finding that the defendant sought to avoid testimony in making a witness unavailable for a proceeding. This Court, as a consequence, should rectify the fundamental separation of powers error made below to prevent further departures from the General Assembly's evidentiary determinations.

**II. THE TRIAL COURT'S REFUSAL TO ENFORCE RULE 404(B) SHOULD NOT HAVE BEEN SANCTIONED ON APPEAL**

As the appellate court recognized, Illinois Rule of Evidence 404(b) provides that the prosecution must provide notice of its intent to admit other crimes evidence prior to trial. But, the court below evidently found good cause to excuse the prosecution's conceded failure to provide notice that it planned to introduce evidence that Peterson had solicited a hit man. Aside from the prosecution's failure to provide the required notice, the court found no reason, let alone "good cause," to allow the evidence, but it did so anyway. This is the first case of which defendant is aware, in which an appellate court has found "good cause" to excuse attorney neglect even after the parties had delivered opening statements and the prosecution had begun its case-in-chief.

This is not a case in which the other crimes evidence was only discovered after trial began, or only became relevant because of unexpected testimony during trial. Tellingly, the trial court threatened to call a mistrial when the prosecution referred to the would-be hit man evidence in its opening statement. The court criticized the prosecution for failing to provide notice before trial, thus reassuring the defense that it need not structure subsequent cross-examinations on the likelihood that the court would allow the prosecution to present the other crimes evidence. Despite that reassurance, the court subsequently eviscerated the thrust of Rule 404(b)'s insistence that notice be given before trial. The appellate court found good cause existed to provide notice after the trial started merely because defendant had "a full 20 days after the defense was put on

notice of the State's intent." 2015 Ill. App. ¶1211.<sup>6</sup> But Rule 404(b) requires notice before trial for precisely this reason; a defendant needs notice of proffered other crimes evidence so that he may prepare to rebut entire facets of the case against him, not just the testimony of one witness. Likewise, the defendant must have notice before trial so that he can prepare his own case-in-chief around the evidence. See *United States v. Skoczen*, 405 F.3d 537, 548 (7<sup>th</sup> Cir. Ill. 2005):

The government argued, over the objection of Skoczen's counsel, that Skoczen (and his lawyer) were aware of his flight and that the defense had been on notice that the government's physical evidence of flight, Skoczen's Florida driver's license, was available for review at any time. Although Skoczen could hardly dispute this, he was not aware the government intended to use this evidence at trial. The point of the pretrial notice is to prevent undue prejudice and surprise by giving the defendant time to meet such a defense...[W]e agree with Skoczen that the government should have provided proper notice.

Although the court below did not mention "prejudice," perhaps it believed that no prejudice existed because the defendant had five days in which to prepare after the trial court changed its mind to allow the evidence. But defendant did not merely rely on whether five days to prepare was sufficient. Rather, defendant pointed to the difficulty, after opening statements and initial cross-examination of other witnesses had been completed, of defending against the sensational evidence that defendant had tried to hire a hit man: "[w]e would

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<sup>6</sup> In reality, defendant only had five days' notice of the trial court's bizarre about face in allowing evidence it had already ruled inadmissible during the opening statement. Although the prosecution had filed a motion to introduce the evidence after the trial court's admonition, defendant had no reason to believe that the trial court would change its ruling, which it made 15 days after nearly declaring a mistrial.

be so severely prejudiced [by introduction] of Pachter's testimony] . . . it wasn't prepared for, it wasn't addressed in opening. We'd have to figure out who is going to handle the witness. We have to do an investigation . . . We'd have to get all sorts of information." (R.9196).

As this Court has noted in the past, improper admission of bad act evidence carries a high risk of prejudice and generally calls for a new trial. *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980). Because no other court has ever found "good cause" to excuse a Rule 404(b) violation in this context, this Court should grant review to ensure the integrity of Rule 404.

### **III. INEFFECTIVE ASSISTANCE OF COUNSEL**

#### **A. Media Rights Deal (¶¶ 211-218)**

The appellate court below acknowledged that defendant's lead trial attorney, Joel Brodsky, had signed a media rights deal prior to trial. Afterward, he traveled on a media blitz, crossing the country as he presented Peterson for interviews. In some of the interviews, the questioning was critical, and Peterson's answers were later used by the prosecution at trial.<sup>7</sup> According to the agreement, Brodsky was to receive 85% of the revenues generated. He offered one news outlet an exclusive interview for \$200,000. Brodsky also received compensation through hotel stays, meals, and spa treatments for he and his wife, cash and other benefits. (R. 11619-11637).

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<sup>7</sup> Clips from some of the interviews were used against Peterson during the State's case-in-chief. (R. 10176-77). The trial court characterized the majority of the interviews as "accusatory in nature" and conducted with an eye towards proving Peterson's guilt, asking rhetorically what lawyer would do this? (R. 5630-40).

The appellate court, however, denied the agreement created a per se conflict of interest. The court's holding is in conflict with, and ignores this Court's clear statement in *People v. Gacy*, 125 Ill. 2d 117, 135 (1988), equating conflicts arising from a media rights contract with those from multiple representation. *Id.* True, this Court then stated in *Gacy* that "the mere fact that the defendant's attorney was offered, and refused to accept, a contract for publication rights does not constitute a 'tie' sufficient to engender a per se conflict." *Id.* at 136. But, in so doing, the Court clearly signaled that acceptance of a media contract would have resulted in a per se ineffective assistance of counsel claim, explaining:

[T]he acquisition of financial rights creates a situation in which the attorney may well be forced to choose between his own pocketbook and the interests of his client. Vigorous advocacy of the client's interest may reduce the value of publication rights; conversely, ineffective advocacy may result in greater publicity and greater sales. In fact, it has been held that the acquisition of such book rights by a defendant's attorney constitutes a conflict of interest which may so prejudice the defendant as to mandate the reversal of a conviction. *Id.* at 135.

This Court should consider the case because the appellate court's holding that an agreement for publication rights and publicity, like the one in this case, does not give rise to a per se conflict of interest is inconsistent with *Gacy*. Brodsky's acceptance of this media deal during representation deprived the defendant of his constitutional right to effective assistance of counsel.

Concluding "the alleged conflict created by the media rights contract . . . does not fall into one of the categories of per se conflicts established by our supreme court." ¶217, the court wrote that it was constrained by the three

categories of per se conflict most commonly cited: 1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution or an entity assisting the prosecution; 2) when defense counsel contemporaneously represents a prosecution witness; and 3) when counsel was a prosecutor who had been personally involved in the prosecution of defendant. ¶216.

But, in Illinois, per se conflicts are not as limited as the appellate court claims. Rather, “[a] per se conflict exists where certain facts about a defense attorney's status create, by themselves, the conflict of interest.” *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). The three categories simply reflect the common fact patterns that give rise to a per se conflict. For example, in *People v. Banks*, 121 Ill. 2d 36 (1987), the Court reviewed cases in which per se conflicts arose from defendant’s allegations that prior counsel in the same firm provided ineffective assistance of counsel due to incompetency. *Id.* at 40. An attorney cannot be counted on to prove his own colleague’s incompetence, particularly in light of the financial repercussions. *Id.* at 41. (noting that, in contrast, such financial repercussions do not arise in a public defender’s office).<sup>8</sup> Similarly, a per se conflict arises when an attorney’s financial stake is in tension with his client’s interests. *People v. Coslet*, 67 Ill. 2d 127 (1977) (attorney cannot represent defendant and also represent victim’s estate). Accordingly, this Court should consider the media rights issue so that it may provide clarity to the lower

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<sup>8</sup> Even in the public defender context, “a case-by-case inquiry should be conducted to determine whether any circumstances peculiar to the case indicate the presence of an actual conflict of interest.” *Id.* at 621.

courts and practitioners as to whether, as a matter of law, a per se conflict is limited to the traditional three bases or whether it is a case specific inquiry.

In addition to finding that the media agreement here fell outside of the typical bases for a per se conflict, the appellate court also found Gacy inapposite because Peterson had signed the contract. ¶218. Pronouncing that it was a "strategy" to avoid an indictment (if so it was obviously a bad one; why talk to TV shows and not the prosecutor or police, and how do stunts such as "Win a Date With Drew" or selling photos aid that), the court below ignored that the media rights deal unquestionably violated the Rules of Professional Responsibility. Regardless of whether that conflict was a "strategy," the court should not have accepted it when there was no knowing and intelligent waiver of the conflict and where Brodsky never advised Peterson to obtain independent counsel to review the agreement.

The court's reasoning ignores that the Rules similarly prohibit an attorney from entering into a business transaction with a client, and here, doing so created a per se conflict. "Under our precedents such a showing would not be necessary, because we have held that the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a per se conflict, which warrants reversal even in the absence of prejudice." Gacy, 125 Ill. 2d at 135 (citing *People v. Washington* 101 Ill. 2d 104 (1984); *People v. Coslet* 67 Ill.2d 127 (1977); *People v. Stoval* 40 Ill.2d 109 (1968)); See also *Walker v. Keane*, 7 F. 3d 304 (2nd Cir. 1993) (contingency arrangement between counsel and criminal defendant gave rise to a per se conflict of interest). Review is also

warranted, therefore, to consider whether defendant's knowledge of a media rights contract absolves the attorney of his duty to provide conflict-free counsel.

When a defendant's lead attorney signs a media rights contract before trial, the risk of diluted or defective representation is too great. If Brodsky wanted to continue to travel, be seen on media outlets and give interviews, he had an incentive to make the case as interesting as possible, not as legally and tactically sound as possible. Thus, the mere existence of the contract between the client and attorney in this case created a per se conflict that requires no further showing of prejudice. Therefore, this Court should grant review to determine if, as this Court strongly suggested in Gacy, a media rights deal leads to a per se conflict of interest.

### **B. Defense Counsel's Decision to Call Harry Smith as a Witness**

The most damning evidence of this sensationalism that the media rights contract engendered, and a ringing reflection of ineffective assistance of counsel, was Brodsky's decision to summon divorce attorney Harry Smith as a witness in the trial, during the defense case, to testify that Stacy knew how Drew had killed Savio. Smith testified that in October 2007 he received a phone call from Stacy Peterson who wanted to hire him to represent her in a divorce from defendant. Stacy wanted to know if she could obtain more money in a divorce if she told the police about how Peterson had killed Savio. She explained that Peterson was angry with her because he thought that she had told his son, Thomas, that he had killed his mother, and that Peterson was watching or tracking her. Stacy told

him that she had so much stuff on Peterson at the police department that he could not do anything to her. Smith cautioned Stacy that she could get in trouble for concealment of a homicide. ¶¶160-61.

Ignoring well-settled Illinois law holding that, when defense counsel brings forth incriminating evidence, they are ineffective, the court opined that, because the decision to call Smith was "strategy" the decision is unchallengeable.

The court stated:

First, defendant has failed to establish deficient performance. The decision of whether to call attorney Smith to testify was clearly a matter of trial strategy as defense counsel was seeking to discredit the impression of Stacy that Schori's testimony had given to the jury. Id. at ¶224

The court, however, did not consider whether the "strategy" was "objectively reasonable." In other words, the court failed to measure Brodsky's strategy through the framework that the United States Supreme Court laid out in *Strickland v. Washington*: "[p]erformance is deficient if it falls below an objective standard of reasonableness, which is defined in terms of prevailing professional norms." 466 U.S. 668, 688 (1994). The appellate court did not discuss or analyze whether the "decision" was "objectively reasonable." Moreover, the court did not discuss any of the many cases that Peterson cited that found similar "strategic" decisions ineffective, or the fact that the State failed to cite a single case holding or even implying that a similar choice was "objectively reasonable." Thus, the appellate court's analysis of ineffective assistance of counsel creates a conflict with all courts' *Strickland* decisions.

“Strategic” is not the touchstone of ineffective assistance cases because all trial decisions of counsel are strategic in some sense. Rather, “a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence.” *People v. Haynes*, 192 Ill. 2d 437, 472–73 (2000) (quoting *People v. Coleman*, 183 Ill. 2d 366, 397 (1998)). When defense counsel's strategy appears so objectively irrational and unreasonable that “no reasonably effective defense attorney, facing similar circumstances, would pursue such strateg[y],” the ineffective assistance claim overcomes the presumption that counsel’s strategy was sound. *People v. Faulkner*, 292 Ill. App. 3d 391, 394 (5th Dist. 1997). The appellate court never addressed whether the bizarre decision to call Smith as a witness fell below “an objective standard of reasonableness.”

Brodsky summoned Smith to testify that, days before disappearing, Peterson’s wife contacted Smith, told him that Peterson had murdered Savio and asked whether that information could advantage her in future divorce proceedings. The testimony was not, as the appellate court wrote, duplicative of that given by Pastor Schori.<sup>9</sup> Schori’s testimony had been that Stacy related to

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<sup>9</sup> Recognizing the evidence was independently damaging, the trial court commented “I will say that it's unusual that the State responds that the information of how he killed her came from the very last witness called by the defendant in the case.” R 11159. *See also* “Drew Peterson Defense Witness called ‘Gift From God’ by Prosecutor.” *“It's a gift from God,” State's Attorney James Glasgow was overheard saying ... after Smith finished testifying,*” and *“Brodsky just walked backward over a cliff with Drew Peterson in his arms,” said Kathleen Zellner.*”

him that she had seen Drew on the relevant night with clothing that belonged to a woman, and that Drew had coached Stacy to lie (the prosecution never established or argued what that particular lie may have been). ¶121.<sup>10</sup> Smith's testimony added hearsay well beyond that offered by the previous witness, namely: 1) a direct accusation by Stacy that defendant killed Savio as opposed to circumstantial evidence, and 2) that she knew how. Moreover, because defendant himself had called Smith, as opposed to calling Schori, to testify, the jury far more likely believed that Smith's testimony was true – after all, it was elicited by defendant!

In *People v. Salgado*, 200 Ill. App. 3d 550 (1st Dist. 1990), defense counsel was ineffective for eliciting defendant's admission when he testified:

We perceive no logical reason for counsel to have called defendant as a witness and elicited a confession on direct examination . . . By pleading not guilty, defendant was entitled to have the issue of his guilt or innocence of residential burglary presented to the court as an adversarial issue. Defense counsel's conduct in this case amounted to ineffective assistance of counsel because it nullified the adversarial quality of this fundamental issue. 200 Ill. App. 3d at 553.

Calling a defendant to the stand can be seen as strategic as well.

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[http://articles.chicagotribune.com/2012-08-30/news/ct-met-drew-peterson-trial-0830-20120830\\_1\\_stacy-peterson-bolingbrook-bathtub-peterson-attorney-joel-brodsky](http://articles.chicagotribune.com/2012-08-30/news/ct-met-drew-peterson-trial-0830-20120830_1_stacy-peterson-bolingbrook-bathtub-peterson-attorney-joel-brodsky)

<sup>10</sup> Pastor Schori's testimony should have been barred both because it was hearsay and privileged. There is no dispute that Stacy Peterson spoke to him in confidence in his capacity as her Pastor.

Similarly, in *People v. Baines*, 399 Ill. App. 3d 881 (1st Dist. 2010), the court reversed when counsel brought forth a harmful fact (not confession) during defendant's direct examination:

It was at this juncture that defense counsel elicited from the defendant a damning admission. Under questioning by defense counsel, the defendant admitted that although he had earlier told the police that he did not know Wilson, his alleged accomplice in the crime, in fact he knew Wilson 'quite well.' This evidence is clearly harmful to the defendant. And, a review of the record reveals that the gravity of the harm caused by this evidence was lost on defense counsel, as he continued to question his own client in a manner which bolstered the State's case. 399 Ill. App. 3d at 888-889.<sup>11</sup>

Again, questioning the defendant may seem like a "hail Mary," but it was strategic.

Thus, the court below skipped a crucial step of the Strickland analysis.

The question is not whether the trial counsel's decision to question Smith may

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<sup>11</sup> See also: *People v. Phillips*, 227 Ill. App. 3d 581, 590, 592 N.E.2d 233, 239 (1st Dist. 1992) (ineffective counsel elicited hearsay statements about defendant's connection to the crime on trial and others); *People v. Moore*, 356 Ill. App. 3d 117, 127, 824 N.E.2d 1162, 1170-71 (1st Dist. 2005) (ineffective when defense counsel established defendant was at scene, connecting him to the crime); *People v. Rosemond*, 339 Ill. App. 3d 51, 65-66, 790 N.E. 2d 416, 428 (1st Dist. 2003)("Sound trial strategy embraces the use of established rules of evidence and procedures to avoid, when possible, the admission of incriminating statements, harmful opinion and prejudicial facts."); *People v. Bailey*, 374 Ill. App. 3d 608, 614-15 (1st Dist. 2007) (defense counsel elicited testimony that harmed the defendant's case when he brought forth evidence that the defendant had been speaking to potential narcotics purchasers); and *People v. De Simone* 9 Ill. 2d 522, 138 N.E.2d 556 (1956)(Ineffective where counsel introduced evidence that his clients were evil men and hardened criminals who had committed numerous burglaries previously). *People v. Orta*, 361 Ill. App. 3d 342, 343, 836 N.E.2d 811, 813 (1st Dist 2005) ("A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusation").

have been strategic. The dispositive question is whether the strategy was “deficient” in defying all reason by, in essence, raising for the first time, a direct accusation that Peterson had killed Savio, and the witness knew how (as with the lie comment to Shori, the how remained unexplained). The only seeming explanation for Brodsky to call Smith to so testify was sensationalism.

In addition to erring by not analyzing the objective reasonableness of Brodsky’s strategy to call Smith as a witness, the appellate court also failed to consider whether Peterson understood the decision. Relying only upon *Stoia v. United States*, 109 F.3d 392 (7th Cir. 1997), the court stated that, because defendant agreed with Brodsky’s decision to call Smith as a witness, no ineffective assistance claim exists. The court below erred as a legal matter because a defendant’s blessing cannot excuse an attorney’s incompetence, unless the defendant understands the nature of the decision.<sup>12</sup>

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<sup>12</sup> Similarly a waiver of an existing conflict of interest is not valid unless the defendant is admonished regarding the existence and the significance of the conflict, *i.e.*, the waiver must be made knowingly. *People v. Olinger*, 112 Ill. 2d 324, 339, 97 Ill.Dec. 772, 493 N.E.2d 579, 587 (1986) (citing *Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), and *People v. Kester*, 66 Ill. 2d 162, 168, 5 Ill.Dec. 246, 361 N.E.2d 569, 572 (1977)). Courts should attempt to “indulge every reasonable presumption against waiver \* \* \* and \* \* \* not presume acquiescence” ((internal quotation marks omitted) *Stoval*, 40 Ill.2d at 114, 239 N.E.2d at 444), even if counsel was retained (*People v. McClinton*, 59 Ill.App.3d 168, 173, 17 Ill.Dec. 58, 375 N.E.2d 1342, 1346–47 (1978)). “Regardless of whether a defendant is represented by a public defender or a private practitioner, a criminal defendant has a constitutional right to the undivided loyalty of counsel, free of conflicting interests.” \*\*268 \*1094 *People v. Woidtke*, 313 Ill.App.3d 399, 409, 246 Ill.Dec. 133, 729 N.E.2d 506, 513 (2000) (citing *People v. Coleman*, 301 Ill.App.3d 290, 298–99, 234 Ill.Dec. 525, 703 N.E.2d 137, 143 (1998)). In determining whether there has been an intelligent waiver of the defendant's right to conflict-free counsel, the circumstances surrounding the claimed waiver must be considered.

The court stated that “the decision to call Smith to testify was ultimately a fully-informed decision that was made by defendant himself after considering the conflicting advice of his many attorneys on the matter.” (¶224)<sup>13</sup> This is not correct. While the record reflects that Peterson consulted with his counsel throughout the trial, including on the day attorney Smith was called, the substance of their discussion is unknown. Waiver or approval cannot be inferred because the defendant spoke with his counsel, or because he is present in the courtroom when the witness is called, and does not voice an objection. The trial court did not, at any time, warn Peterson of the risks attendant upon calling Smith as a witness, although the Court cautioned Brodsky. On a silent record, an appellate court cannot presume a waiver of incompetence.

**C. THE COURT SHOULD HAVE NOT ALLOWED ATTORNEY SMITH TO TESTIFY TO HIS PRIVILEGED CONSULTATION**

When Stacy spoke with Smith about representation the attorney-client privilege attached and was permanent. *Exline v. Exline*, 277 Ill. App. 3d 10 (2<sup>nd</sup> Dist. 1995). After she disappeared attorney Smith first discussed his consultation with the state police in October 2007, and then made it public during a March 2008 radio appearance on the Roe and Roeper Show on WLS AM. He testified

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*People v. Washington*, 101 Ill.2d 104, 114, 77 Ill.Dec. 770, 461 N.E.2d 393, 398 (1984).”

<sup>13</sup> The fact Peterson had “many attorneys” is meaningless. Peterson could have had a hundred lawyers, with thousands of years of experience. It is the caliber of the decision at issue. In *Dragani v. Bryant*, 2005 WL 3542498 (not reported), the Court considered a claim that *Dragani’s* “multiple attorneys” were ineffective. The Court paid no mind to the fact there were “multiple attorneys.”

under oath about the conversation on at least five separate occasions. R. 3953-54; 5563-5572; 10751, before the grand jury, at the hearsay hearing, and at trial.<sup>14</sup>

Absent compulsion Smith never should have spoken to the police or testified. He was well aware of this ethical obligation (R. 5708) (Smith testifying only the client can waive the privilege). Counsel was ethically bound to refuse to speak.<sup>15</sup>

The attorney-client privilege is an 'evidentiary privilege...' Ctr. Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, 981 N.E.2d 345, 355. Thus, Peterson has standing to raise the issue. See, for example Parkinson v. Central DuPage Hospital, 105 Ill App 3d 850 (1<sup>st</sup>. Dist. 1982)(Hospital had standing to raise non-party physician-patient privilege); cf United States v. White, 743 F.2d

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<sup>14</sup> An objection at the hearsay hearing was overruled. (R. 3899; 3952). But before trial the court reconsidered, agreeing the conversation was privileged. (R. 5563 – 5572). The prosecutor did not appeal, and did not call Smith. See also Illinois Rule of Evidence 104 ("preliminary questions concerning...the existence of a privilege...shall be determined by the court"). "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." Glasser v. United States, 315 U.S. 60, 71, 62 S. Ct. 457, 465, 86 L. Ed. 680 (1942), superseded by statute on other grounds. Bourjaily v. United States, 483 U.S. 171, 179 (1987). In Re Adoption of Baby Girl Ledbetter, 125 Ill.App.3d. 306 (4<sup>th</sup> Dist. 1984) (Court has duty to enforce principle of law *sue sponte* when it is brought to its' attention.

<sup>15</sup> The attorney must assert the privilege "Thus, only the client may waive this privilege." *In Re: Marriage of Decker*, at 313. Accordingly, "it is immaterial that an attorney called as a witness is willing to disclose privilege communications." *In Re: Estate of Busse*, 332 Ill App. 258, 266, 75 N.E. 2d 36 (2<sup>nd</sup> Dist. 1947). See Illinois Rule of Professional Conduct Article VIII, Preamble [4] and Rule 1.6; *People v. Adam* (1972), 51 Ill.2d 46, 48 (quoting 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961)), cert. denied (1972), 409 U.S. 948, 34 L. Ed.2d 218, 93 S.Ct. 289.

488, 494 (7th Cir. 1984)(“The Government, however, cannot appeal based upon the inadequate protection of someone else's privilege. In so saying, we are not unmindful of the duty of every lawyer to bring to the attention of the trial court possible ethical problems in the case; nor do we find fault with the Government for having done so in this case.”)

The quarrel now is with Attorney Smith’s failure to obey the court’s ruling, and the court’s failure to enforce its own ruling. Under the unique facts of this case it is an evidentiary issue regarding the court’s failure to implement its correct ruling.

At trial, having correctly held Stacy's conversation with Smith was privileged, the court barred the prosecution from presenting it. Yet when the defense called Smith the issue of privilege was inexplicably abandoned. The ruling necessarily had to apply to both sides. The court should not have allowed the defense to call Attorney Smith. If the consultation was privileged, it was privileged. End of story.

Certainly, the idea of not allowing either side to call a particular witness for a myriad of reasons is not novel, it happens all the time. Here, the harm cannot be marginalized. Smith never should have testified at the hearsay hearing. His testimony was essential, indeed the only testimony, to support the finding that Peterson had a reason to make Stacy unavailable. He never should have testified at trial.

The issue was raised on appeal. In fact, it was the first issue raised on appeal. Inexplicably, the appellate court refused to address it. The issue is never

mentioned or discussed within its opinion. This is an important issue that this Court ought to address. The trial court struggled with whether the attorney-client privilege was valid given the death of Kathleen and the court's finding that Stacy was unavailable. This Court needs to provide clear guidance that the attorney-client privilege is absolute, survives death, and that its waiver does not belong to the attorney.

### **CONCLUSION**

For the forgoing reasons, Mr. Peterson asks the Court to grant this Petition, remand for a new trial, and for such further relief as is appropriate.

Respectfully submitted,

**DREW PETERSON**, Defendant-Petitioner

By: /s/ Steve Greenberg  
One of His Attorneys

**CERTIFICATE OF COMPLIANCE**

I, Steven Greenberg, attorney of record, certify that the Brief on Appeal filed in the above-entitled matter on behalf of Defendant-Petitioner complies with Supreme Court Rule 315 and Rule 341(a),(c), and (d). The length of the brief excluding the appendix and table of contents is 35 pages long and is double-spaced.

/s/ Steve Greenberg

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No.120331

02/02/2016

**Supreme Court Clerk**

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Case No. \_\_\_\_\_

**IN THE  
SUPREME COURT OF ILLINOIS**

<b>PEOPLE OF THE STATE OF ILLINOIS</b>	)	<b>Petition for Leave to Appeal</b>
	)	<b>From the Appellate Court,</b>
<b>Plaintiff-Respondent,</b>	)	<b>Third District, Nos. 3-13-0157</b>
	)	
	)	
<b>v.</b>	)	<b>On Appeal from the 12th</b>
	)	<b>Judicial Circuit of Will County</b>
<b>DREW PETERSON,</b>	)	<b>Trial Court Nos. 09 CF 1048</b>
	)	
<b>Defendant-Petitioner</b>	)	
	)	<b>Honorable Edward Burmilla, Jr.</b>

**APPENDIX TO PETITION FOR LEAVE TO APPEAL**

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**People v. Peterson, 2012 IL App (3d) 100514-B (2012)**

968 N.E.2d 204, 360 Ill.Dec. 125

2012 IL App (3d) 100514-B  
Appellate Court of Illinois,  
Third District.

The PEOPLE of the State of Illinois, Plaintiff-  
Appellant,

v.

Drew PETERSON, Defendant-Appellee.

No. 3-10-0514.

April 12, 2012.

**Synopsis**

**Background:** Defendant was charged with two counts of first degree murder. The Circuit Court, Will County, Stephen D. White, J., issued several rulings on the admissibility of evidence the State intended to present at trial. State appealed. The Appellate Court, 2011 IL App (3d) 100513, 351 Ill.Dec. 899, 952 N.E.2d 691, dismissed in part and affirmed in part and remanded in part. State filed a petition for leave to appeal. The Supreme Court, 354 Ill.Dec. 541, 958 N.E.2d 284, denied petition, but vacated judgment and directed that appeal be addressed on the merits.

**Holdings:** The Appellate Court, Holdridge, J., held that:

[1] Supreme Court decisions adopting the common law rule of forfeiture by wrongdoing, and rule of evidence codifying the doctrine, prevail over conflicting statutory hearsay exception for the intentional murder of a witness, and

[2] hearsay statements, though unreliable, were admissible under rule of forfeiture by wrongdoing upon trial court's findings that defendant murdered the declarants, and that he did so with the intent to make them unavailable as witnesses.

Reversed and remanded.

Carter, J., specially concurred and filed opinion.

West Headnotes (13)

[1] **Criminal Law**  
⊖Effect of delay

The appellate court's jurisdiction turns on litigants' compliance with the supreme court's rules prescribing the time limits for filing appeals, and an appellate court has no authority to excuse compliance with those rules; thus, when an appeal is untimely under a supreme court rule, the appellate court has no discretion to take any action other than dismissing the appeal.

Cases that cite this headnote

[2] **Courts**  
⊖Supervisory jurisdiction

The supreme court, which possesses a broad and unlimited supervisory authority over the Illinois court system, is not constrained by its rules governing appellate jurisdiction.

Cases that cite this headnote

[3] **Courts**  
⊖Modification, amendment, suspension, or disregard of rules  
**Courts**  
⊖Supervisory jurisdiction

The supreme court's broad supervisory authority allows it to confer jurisdiction on the appellate courts even when the appellant has flouted a jurisdictional deadline prescribed by a supreme court rule.

Cases that cite this headnote

[4] **Criminal Law**  
⊖Review De Novo  
**Criminal Law**  
⊖Preliminary proceedings

Because motions in limine invoke the circuit

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court's inherent power to admit or exclude evidence, a court's decision on a motion in limine is typically reviewed for an abuse of discretion; however, where a trial court's exercise of discretion has been frustrated by an erroneous rule of law, appellate review is de novo.

Cases that cite this headnote

[5]

**Criminal Law**

☞Statements of persons not available as witnesses

The common law rule of "forfeiture by wrongdoing," which provides a hearsay exception for statements made by an unavailable witness where the defendant intentionally made the witness unavailable in order to prevent her from testifying, allows for the admission of qualifying hearsay statements even if there is no showing that such statements are reliable.

3 Cases that cite this headnote

[6]

**Criminal Law**

☞Statements of persons since deceased

Reliability is an element of the statutory hearsay exception for the intentional murder of a witness. S.H.A. 725 ILCS 5/115-10.6(e)(2).

Cases that cite this headnote

[7]

**Criminal Law**

☞Statements of persons not available as witnesses

Reliability is not an element for admission of hearsay under rule of evidence codifying the common law doctrine of forfeiture by wrongdoing. Rules of Evid., Rule 804(b)(5).

1 Cases that cite this headnote

[8]

**Constitutional Law**

☞Nature and scope in general

**Courts**

☞Admissibility of evidence

As a matter of separation of powers, the state supreme court has the ultimate authority to determine the manner by which evidence may be introduced into the courts.

1 Cases that cite this headnote

[9]

**Courts**

☞Operation and Effect of Rules

**Courts**

☞Highest appellate court

Where a statute conflicts with a supreme court rule of evidence or supreme court decision adopting a rule of evidence, courts are to follow the rule or decision.

Cases that cite this headnote

[10]

**Criminal Law**

☞Statements of persons not available as witnesses

Supreme Court decisions adopting the common law rule of forfeiture by wrongdoing, and rule of evidence codifying the doctrine to admit hearsay statements of a witness intentionally made unavailable by the defendant, without regard to reliability, prevail over conflicting statutory hearsay exception for the intentional murder of a witness, which does require reliability as an element. S.H.A. 725 ILCS 5/115-10.6(e)(2); Rules of Evid., Rule 804(b)(5).

Cases that cite this headnote

[11]

**Criminal Law**

☞Statements of persons since deceased

Hearsay statements, though unreliable, were admissible under rule of forfeiture by

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wrongdoing in prosecution for first degree murder upon trial court's findings that defendant murdered the declarants, and that he did so with the intent to make them unavailable as witnesses. Rules of Evid., Rule 804(b)(5).

Cases that cite this headnote

[12]

**Criminal Law**

⇌ Statements of persons not available as witnesses

**Criminal Law**

⇌ Statements of persons since deceased

Although the statutory hearsay exception for the intentional murder of a witness applies only when the defendant intentionally murders a witness to prevent her from testifying, the common law rule of forfeiture by wrongdoing applies when the defendant intentionally prevents a witness from testifying by any wrongful means. 725 ILCS 5/115-10.6(e)(2); Rules of Evid., Rule 804(b)(5).

Cases that cite this headnote

[13]

**Criminal Law**

⇌ Statements of persons not available as witnesses

**Criminal Law**

⇌ Statements of persons since deceased

Unlike the statutory hearsay exception for the intentional murder of a witness, the long-established common law rule of forfeiture by wrongdoing allows for the admission of hearsay statements even if there is no showing that such statements bear any additional indicia of reliability. S.H.A. 725 ILCS 5/115-10.6(e)(2); Rules of Evid., Rule 804(b)(5).

Cases that cite this headnote

**Attorneys and Law Firms**

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**OPINION**

Justice HOLDRIDGE delivered the judgment of the court, with opinion.

\*\*127 ¶ 1 The defendant, Drew Peterson, was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2004)) in connection with the death of Kathleen Savio. During pretrial matters, the circuit court issued several rulings on the admissibility of evidence the State intended to present at trial. The State filed five appeals from these rulings—Nos. 3-10-0513, 3-10-0514, 3-10-0515, 3-10-0546, and 3-10-0550, which this court consolidated.

[1] [2] [3] ¶ 2 In one of these appeals, No. 3-10-0514, the State argued that the circuit court erred when it denied the State's motion *in limine* to admit certain hearsay \*\*128 \*207 statements under the common law doctrine of forfeiture by wrongdoing. A divided panel of this court held, *inter alia*, that we lacked jurisdiction to hear that appeal because it was untimely. *People v. Peterson*, 2011 IL App (3d) 100513, ¶ 75, 351 Ill.Dec. 899, 952 N.E.2d 691. The State filed a petition for leave to appeal in the Illinois Supreme Court. Our supreme court denied the State's petition. *People v. Peterson*, 354 Ill.Dec. 541, 958 N.E.2d 284 (Ill.2011). However, in the exercise of its supervisory authority, our supreme court directed us to vacate our judgment and to address the State's appeal on the merits, vesting us with jurisdiction<sup>1</sup> over the State's appeal. Upon consideration of the merits of appeal No. 3-10-0514, we reverse the circuit court's judgment and remand for further proceedings.

<sup>1</sup> As we explained in our initial opinion, the State's interlocutory appeal on the hearsay issue was untimely under Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006) and the *Taylor* rule (*People v. Taylor*, 50 Ill.2d 136, 277 N.E.2d 878 (1971)), leaving this court with no jurisdiction to address the merits of the State's appeal. See *People v. Holmes*, 235 Ill.2d 59, 67-68, 72, 335 Ill.Dec. 599, 919 N.E.2d 318 (2009); *People v. Williams*, 138 Ill.2d 377, 394, 150 Ill.Dec. 498, 563 N.E.2d 385 (1990). Thus, we were compelled to dismiss the appeal.

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In the exercise of its supervisory authority, our supreme court has now permitted us to address the merits of the State's appeal. Only the supreme court may do this. "The appellate court's jurisdiction turns on litigants' compliance with [the supreme court's] rules" prescribing the time limits for filing appeals, and an appellate court has no "authority to excuse compliance" with those rules. (Internal quotation marks omitted.) *People v. Lyles*, 217 Ill.2d 210, 216, 217, 298 Ill.Dec. 752, 840 N.E.2d 1187 (2005). Thus, when an appeal is untimely under a supreme court rule, the appellate court has "no discretion to take any action other than dismissing the appeal." *Id.* at 217, 298 Ill.Dec. 752, 840 N.E.2d 1187. Our supreme court, however, is not constrained by its rules governing appellate jurisdiction. *Id.* The supreme court possesses a "broad" and "unlimited" supervisory authority over the Illinois court system. *Id.*; see also *McDunn v. Williams*, 156 Ill.2d 288, 302, 189 Ill.Dec. 417, 620 N.E.2d 385 (1993). This broad authority allows the supreme court to confer jurisdiction on the appellate courts even when the appellant has flouted a jurisdictional deadline prescribed by a supreme court rule. See, e.g., *Lyles*, 217 Ill.2d at 217, 298 Ill.Dec. 752, 840 N.E.2d 1187 (directing appellate court to over the State's appeal). Upon consideration of the merits of appeal No. 3-10-0514, we reverse the circuit court's judgment and remand for further proceedings. reinstate appeal even though the appellate court had "acted entirely correctly" in dismissing the appeal for lack of jurisdiction because the defendant failed to file a timely petition for rehearing after his appeal was dismissed for want of prosecution); *People v. Moore*, 133 Ill.2d 331, 334, 140 Ill.Dec. 385, 549 N.E.2d 1257 (1990) (reinstating a criminal defendant's direct appeal from his conviction even though nearly 10 years had passed since the appellate court had dismissed the appeal). Because the supreme court's supervisory order did not impact the rulings this court issued in appeal Nos. 3-10-0513, 3-10-0515, 3-10-0546, and 3-10-0550, those rulings stand.

### ¶ 3 FACTS

¶ 4 On March 1, 2004, Kathleen Savio, the defendant's third wife, was found dead in her bathtub. At the time of her death, the Illinois State Police conducted an investigation into Kathleen's death and a pathologist performed an autopsy. The pathologist concluded that Kathleen had drowned but did not opine on the manner of death. A coroner's jury subsequently determined that the cause of death was accidental drowning. No charges were filed in connection with her death.

¶ 5 Several months before Kathleen's death, the judge presiding over divorce proceedings between Kathleen and the defendant entered a bifurcated judgment for dissolution of their marriage. The court's judgment reserved issues related to matters such as property distribution, pension, \*\*129 \*208 and support. A hearing on those issues had been scheduled for April 2004.

¶ 6 The defendant's fourth wife, Stacy Peterson, disappeared on October 27, 2007. Stacy and the defendant had been discussing a divorce. Following Stacy's disappearance, Kathleen's body was exhumed and two additional autopsies were conducted. The pathologists who conducted the autopsies concluded that Kathleen's death was a homicide.

¶ 7 On May 7, 2009, the State charged the defendant with the murder of Kathleen. During pretrial proceedings, the defendant contested the admissibility of some of the evidence the State intended to present at trial. At issue in this appeal are the court's rulings that pertained to the State's motions *in limine* to admit certain hearsay statements allegedly made by Kathleen and Stacy.

¶ 8 On January 4, 2010, the State filed a motion *in limine* arguing that 11 statements made by Kathleen and 3<sup>2</sup> statements made by Stacy were admissible under section 115-10.6 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.6 (West 2008) (hearsay exception for the intentional murder of a witness)) and under the common law doctrine of forfeiture by wrongdoing. Section 115-10.6 of the Code provides that "[a] statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed the declarant in violation of clauses (a)(1) and (a)(2) of [s]ection 9-1 of the Criminal Code of 1961 intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding." 725 ILCS 5/115-10.6(a) (West 2008). The statute requires the circuit court to conduct a pretrial hearing to determine the admissibility of any statements offered pursuant to the statute. 725 ILCS 5/115-10.6(e) (West 2008). During the hearing, the proponent of the statement bears the burden of establishing by a preponderance of the evidence: (1) that the adverse party murdered the declarant and that the murder was intended to cause the unavailability of the declarant as a witness; (2) that the time, content, and circumstances of the statements provide "sufficient safeguards of reliability"; and (3) that "the interests of justice will best be served by admission of the statement into evidence." 725 ILCS 5/115-10.6(e) (West 2008). The circuit court must make "specific findings as to each of these criteria on the record" before ruling on the admissibility of the statements at issue.

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725 ILCS 5/115–10.6(f) (West 2008). The statute provides that it “in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.” 725 ILCS 5/115–10.6(g) (West 2008). The common law doctrine of forfeiture by wrongdoing provides a hearsay exception for statements made by an unavailable witness where the defendant intentionally made the witness unavailable in order to prevent her from testifying. *People v. Hanson*, 238 Ill.2d 74, 345 Ill.Dec. 395, 939 N.E.2d 238 (2010); *People v. Stechly*, 225 Ill.2d 246, 272–73, 312 Ill.Dec. 268, 870 N.E.2d 333 (2007).

<sup>2</sup> The State’s motion had included four statements made by Stacy, but the State withdrew one of the statements at the hearing on the State’s motion.

¶ 9 The State asked the circuit court to conduct a hearing to determine the admissibility of these hearsay statements under both the statute and the common law doctrine of forfeiture by wrongdoing and sought the admission of the statements under both the statute and the common law. In January and February 2010, the circuit court held an evidentiary hearing \*\*130 \*209 on the State’s motion. The State argued, *inter alia*, that the defendant killed Kathleen with the intent of preventing her testimony at the hearing on the distribution of the marital property. The State also argued that the defendant killed Stacy with the intent of preventing her testimony not only at a future divorce and property distribution hearing, but also at a trial for Kathleen’s murder. Seventy-two witnesses testified at the hearing, including three pathologists. Two pathologists testified for the State that Kathleen’s death was a homicide. The defense’s pathologist disagreed with the State’s pathologist’s conclusions and testified that Kathleen had drowned accidentally.

¶ 10 The circuit court took the matter under advisement and issued its written ruling on May 18, 2010. Applying the statutory criteria, the court found that the State had proved by a preponderance of the evidence that: (1) the defendant murdered Kathleen and Stacy; and (2) he did so with the intent to make them unavailable as witnesses. Further, the court found that, pursuant to the statute, 6 of the 14 proffered hearsay statements contained sufficient “safeguards of reliability” and that the interests of justice would be served by the admission of those statements into evidence.<sup>3</sup> However, the circuit court excluded the remaining eight hearsay statements proffered by the State because it found that those statements did not meet the statutory standard of reliability and that the interests of justice would not be served by their admission.<sup>4</sup>

<sup>3</sup> Two of the statements, which were written, were admitted in redacted form.

<sup>4</sup> Because the circuit court record and the parties’ briefs on appeal have been placed under seal, we have chosen not to reveal the content of these statements. We are concerned that public dissemination of these statements could taint the jury pool.

¶ 11 The circuit court’s May 18, 2010, order failed to address whether any of the proffered statements were admissible under the common law doctrine of forfeiture by wrongdoing, as the State had requested in its motion. On May 28, 2010, the defendant filed a motion to clarify the circuit court’s ruling. The defendant’s motion asked the court to clarify whether it ruled under the common law doctrine. During a hearing held the same day, the court stated, “I didn’t even get to that. There was no request as to any of the others. I ruled strictly pursuant—there was a hearing pursuant to the statute.”

¶ 12 On June 30, 2010, the State filed another motion to admit the hearsay statements in which the State asked the court to reconsider its decision to exclude the statements and again requested the circuit court to rule on the admissibility of the same hearsay statements under the common law doctrine of forfeiture by wrongdoing. The defendant objected that the State’s motion to reconsider was untimely because the State did not file the motion within 30 days of the circuit court’s May 18 order. At a hearing on July 2, the court stated that it believed section 115–10.6 of the Code codified the common law doctrine and that “[i]f the common law is codified, the codification is what rules.” On July 6, the court issued an order denying the State’s motion, which it described as a motion to reconsider the May 18 ruling. The court’s order did not address the defendant’s argument that the State’s motion was untimely or provide any specific reasons for its ruling. Two days later, however, the court stated that its ruling was based on its belief that a statute that codifies the common law takes precedence over the common law unless the statute is declared unconstitutional or otherwise invalidated.

\*210 \*\*131 ¶ 13 The State appealed the circuit court’s May 18, 2010, order and its July 6 denial of the State’s motion to reconsider that order (No. 3–10–0514). The defendant moved to dismiss the State’s appeal as untimely. The defendant argued that the State’s appeal was jurisdictionally defective because the State had failed to file either a motion to reconsider or a notice of appeal within 30 days of the circuit court’s May 18, 2010, order,

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as required by Illinois Supreme Court Rule 604(a)(1) (eff. July 1, 2006) and various supreme court decisions construing that rule, including *People v. Holmes*, 235 Ill.2d 59, 67–68, 72, 335 Ill.Dec. 599, 919 N.E.2d 318 (2009). In response, the State filed a motion for leave to file a late notice of appeal under Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009). On August 9, 2010, this court allowed a late notice of appeal to be filed and denied as moot the defendant's motion to dismiss the appeal. The State also filed interlocutory appeals from several of the circuit court's other pretrial rulings (Nos. 3–10–0513, 3–10–0515, 3–10–0546, and 3–10–0550).

¶ 14 In a consolidated decision, a divided panel of this court dismissed appeal No. 3–10–0514 for lack of jurisdiction and affirmed the circuit court's rulings in the other four appeals. *Peterson*, 2011 IL App (3d) 100513, ¶¶ 75–80, 351 Ill.Dec. 899, 952 N.E.2d 691. We held that appeal No. 3–10–0514 was untimely under Supreme Court Rule 604(a)(1) and several Illinois Supreme Court decisions interpreting that rule, including *Holmes*, 235 Ill.2d at 67–68, 72, 335 Ill.Dec. 599, 919 N.E.2d 318, and *People v. Williams*, 138 Ill.2d 377, 390–91, 393–94, 150 Ill.Dec. 498, 563 N.E.2d 385 (1990), leaving this court with no jurisdiction to address the merits of the State's appeal.

¶ 15 The State filed a petition for leave to appeal in the Illinois Supreme Court. Our supreme court denied the State's petition. However, in the exercise of its supervisory authority, our supreme court directed this court to vacate our judgment and to address the State's appeal on the merits.

**¶ 16 ANALYSIS**

¶ 17 The State argues that the circuit court erred when it denied the State's motion *in limine* to admit certain hearsay statements allegedly made by Kathleen and Stacy. Specifically, the State appeals the circuit court's refusal to admit 8 of the 14 hearsay statements proffered by the State under the common law doctrine of forfeiture by wrongdoing.

<sup>14</sup> ¶ 18 Because motions *in limine* invoke the circuit court's inherent power to admit or exclude evidence, a court's decision on a motion *in limine* is typically reviewed for an abuse of discretion. *People v. Williams*, 188 Ill.2d 365, 369, 242 Ill.Dec. 260, 721 N.E.2d 539 (1999). However, “[w]here a trial court's exercise of discretion has been frustrated by an erroneous rule of law,” our review is *de novo*. *Williams*, 188 Ill.2d at 369, 242 Ill.Dec. 260, 721

N.E.2d 539.

¶ 19 The circuit court denied the State's motion *in limine* to admit 8 of the 14 hearsay statements under the common law doctrine because it believed that section 115–10.6 of the Code codified, and therefore supplanted, the common law doctrine of forfeiture by wrongdoing. In so ruling, the circuit court erred as a matter of law.

¶ 20 The common law doctrine of forfeiture by wrongdoing was recognized by the United States Supreme Court more than 130 years ago. See *Reynolds v. United States*, 98 U.S. 145, 158, 25 L.Ed. 244 (1878). In 1997, the doctrine was codified at the federal level by Federal Rule of Evidence 804(b)(6) as an exception to the **\*\*132 \*211** rule against hearsay. Fed.R.Evid. 804(b)(6); *Giles v. California*, 554 U.S. 353, 367, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Federal Rule 804(b)(6) provides a hearsay exception for “[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.” Fed.R.Evid. 804(b)(6). The rule does not condition the admissibility of such statements upon a showing that the statements are trustworthy or reliable. Fed.R.Evid. 804(b)(6); *United States v. White*, 116 F.3d 903, 912–13 (D.C.Cir.1997).<sup>5</sup>

<sup>5</sup> See also, e.g., Anthony Bocchino & David Sonenshein, *Rule 804(b)(6)—The Illegitimate Child of the Failed Liaison Between the Hearsay Rule and Confrontation Clause*, 73 Mo. L.Rev. 41 (2008) (noting that, unlike the other hearsay exceptions, Rule 804(b)(6) “admits out-of-court statements bearing no indicia of trustworthiness” and “allows for the admission of any relevant statement made by the absent hearsay declarant irrespective of the trustworthiness of that statement”); Kelly Rutan, *Comment, Procuring the Right to an Unfair Trial: Federal Rule of Evidence 804(b)(6) and the Due Process Implications of the Rule's Failure to Require Standards of Reliability for Admissible Evidence*, 56 Am. U. L. Rev. 177, 179 (2006) (noting that “unlike other exceptions to the hearsay rule, the [Federal Advisory] Committee adopted the forfeiture by wrongdoing rule [in Rule 804(b)(6)] without any standards of reliability or particular guarantees of trustworthiness”).

<sup>15</sup> ¶ 21 In 2007, our supreme court expressly adopted the common law doctrine as the law of Illinois. *People v. Stechly*, 225 Ill.2d 246, 272–73, 312 Ill.Dec. 268, 870 N.E.2d 333 (2007). In *Stechly*, our supreme court made clear that, as applied in Illinois, the doctrine was “coextensive with” Federal Rule 804(b)(6). *Stechly*, 225 Ill.2d at 272–73, 312 Ill.Dec. 268, 870 N.E.2d 333. Accordingly, in Illinois (as in Fed.R.Evid. 804(b)(6)), the

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common law rule allows for the admission of qualifying hearsay statements even if there is no showing that such statements are reliable. See *Stechly*, 225 Ill.2d at 272–73, 312 Ill.Dec. 268, 870 N.E.2d 333; see also *People v. Hanson*, 238 Ill.2d 74, 99, 345 Ill.Dec. 395, 939 N.E.2d 238 (2010) (“so long as the declarant’s statements are relevant and otherwise admissible, statements admitted under the forfeiture by wrongdoing doctrine need not reflect additional indicia of reliability”); Michael H. Graham, *Graham’s Handbook of Illinois Evidence* § 804.9, at 998–99 (10th ed. 2010) (noting that *Stechly* did not require a finding of “sufficient safeguards of reliability” with respect to statements admitted under the forfeiture rule); Bocchino & Sonenshein, *supra*, at 81 (noting that *Stechly* adopted the common law doctrine as a hearsay exception in Illinois without requiring a showing of trustworthiness).

<sup>161</sup> ¶ 22 In contrast to the forfeiture by wrongdoing doctrine, reliability is an element of the statutory hearsay exception for the intentional murder of a witness, under which the circuit court ruled on May 18, 2010. See 725 ILCS 5/115–10.6(e)(2) (West 2008) (providing that the party seeking the admission of hearsay statements under the statute bears the burden of establishing by a preponderance of the evidence that “the time, content, and circumstances of the statements provide sufficient safeguards of reliability”). Thus, the statute stands in direct conflict with the common law doctrine of forfeiture by wrongdoing in Illinois.

<sup>171</sup> ¶ 23 On September 27, 2010, our supreme court adopted the Illinois Rules of Evidence, which became effective in Illinois courts on January 1, 2011. The Illinois Rules of Evidence codified the existing rules of evidence in this state, including the common law doctrine of forfeiture by wrongdoing. Under Rule \*\*133 \*212 of Evidence 804(b)(5), a hearsay exception is provided for “[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.” Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Reliability is not an element of Rule of Evidence 804(b)(5).

<sup>181</sup> <sup>191</sup> <sup>101</sup> ¶ 24 As a matter of separation of powers in Illinois, our supreme court has the ultimate authority to determine the manner by which evidence may be introduced into the courts. See *People v. Bond*, 405 Ill.App.3d 499, 508–09, 347 Ill.Dec. 382, 942 N.E.2d 585 (2010). Thus, “[w]here a statute conflicts with a [supreme court] rule of evidence or supreme court decision adopting a rule of evidence, courts are to follow the rule or decision.” *Id.* at 509, 347 Ill.Dec. 382, 942 N.E.2d 585; see also Ill. R. Evid. 101 (eff. Jan. 1, 2011) (“A statutory rule of evidence is effective *unless in conflict with a rule or a decision of the Illinois Supreme*

*Court.*” (Emphasis added.)); see generally *People v. Walker*, 119 Ill.2d 465, 475, 116 Ill.Dec. 675, 519 N.E.2d 890 (1988) (“where \* \* \* a legislative enactment directly and irreconcilably conflicts with a rule of this court on a matter within the court’s authority, the rule will prevail”); *People v. Joseph*, 113 Ill.2d 36, 45, 99 Ill.Dec. 120, 495 N.E.2d 501 (1986). Accordingly, the conflict between section 115–10.6 of the Code and the forfeiture by wrongdoing rule adopted in *Stechly* and *Hanson* (and codified in Rule of Evidence 804(b)(5)) must be resolved in favor of the pronouncements of our supreme court. In this case, the circuit court believed that the statutory rule of evidence in section 115–10.6 of the Code supplanted the common law doctrine of forfeiture by wrongdoing. As a matter of law, we hold that the court’s decision was manifestly erroneous.

<sup>111</sup> ¶ 25 While the circuit court’s exercise of discretion in excluding the eight hearsay statements was frustrated by a manifestly erroneous rule of law, the court nevertheless made the appropriate and necessary factual findings for the evidence to be admissible under Rule of Evidence 804(b)(5). Specifically, the court found that the State proved by a preponderance of the evidence that: (1) the defendant murdered Kathleen and Stacy; and (2) he did so with the intent to make them unavailable as witnesses. Ill. R. Evid. 804(b)(5); see also *Hanson*, 238 Ill.2d at 97–99, 345 Ill.Dec. 395, 939 N.E.2d 238. Thus, we also hold that the eight excluded statements are admissible under Rule of Evidence 804(b)(5).<sup>6</sup>

<sup>6</sup> We do not mean to suggest, however, that the circuit court is *required* to admit those eight statements during the trial. Rather, we merely hold that the statements are admissible under Rule of Evidence 804(b)(5) and should be admitted under that rule unless the circuit court finds they are otherwise inadmissible.

<sup>112</sup> <sup>113</sup> ¶ 26 One further point bears mentioning. The Illinois legislature passed a statute which created a hearsay exception for statements made by a witness whom the defendant killed in order to prevent the witness from testifying in a civil or criminal proceeding. 725 ILCS 5/115–10.6 (West 2008). The statute conditioned the admissibility of such hearsay statements upon a showing that the statements were reliable. 725 ILCS 5/115–10.6(e)(2) (West 2008). However, as noted above, the common law rule of forfeiture by wrongdoing, which existed in Illinois *before* the statute was enacted, already contained a much broader hearsay exception covering the same type of statements. Although the statute applies only when the defendant intentionally murders a witness to prevent her from testifying, the common \*\*134 \*213 law

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rule applies when the defendant intentionally prevents a witness from testifying by *any* wrongful means. See, e.g., *United States v. Scott*, 284 F.3d 758, 763–65 (7th Cir.2002) (holding that Federal Rule of Evidence 804(b)(6) applies whenever the defendant intentionally procures a witness’s unavailability through murder, physical assault, bribery, threats, or any form witness intimidation or coercion). Moreover, unlike the statute, the long-established common law rule allows for the admission of hearsay statements even if there is no showing that such statements bear any additional indicia of reliability. See *Stechly*, 225 Ill.2d at 272–73, 312 Ill.Dec. 268, 870 N.E.2d 333 (recognizing that the common law doctrine is “coextensive with” Federal Rule 804(b)(6), which is a hearsay exception that does not require a showing of reliability as a condition of admissibility); see also *Hanson*, 238 Ill.2d at 99, 345 Ill.Dec. 395, 939 N.E.2d 238; Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Accordingly, by passing a narrower, more restrictive statute, the legislature must have intended to afford *greater* protections to criminal defendants than those existing under the common law. Specifically, the legislature must have intended to ensure that an unavailable witness’s hearsay testimony would be admitted *only* upon a showing of reliability, even if the circuit court finds by a preponderance of the evidence that the defendant murdered the witness to prevent him from testifying.<sup>7</sup>

<sup>7</sup> The statute’s legislative history demonstrates the importance that the statute’s sponsors attached to this reliability requirement. The initial bill was amended by the Illinois House of Representatives and Senate to ensure that hearsay testimony could be admitted under the statute only if the circuit court first found the testimony to be reliable. See 95th Ill. Gen. Assem., Senate Proceedings, July 10, 2008, at 57–58; see also 95th Ill. Gen. Assem., Senate Proceedings, Nov. 12, 2008, at 9 (statements of Senator Wilhelmi) (noting that the amended Senate bill included “a very specific test to ensure the reliability and a court would have to rule that that reliability test has been met before the statement would be offered”).

In addition, after the statute was passed (but before *Hanson* was decided), the Will County State’s Attorney—who during oral argument repeatedly claimed that he “wrote the statute”—told the circuit court that while the common law “does not require that there be any indicia of reliability,” “our statute has that [requirement],” which is “another protection built in for the defendant.”

¶ 27 However, after the circuit court applied the statute as written and excluded certain hearsay statements because it found them unreliable, the State, apparently changing course, filed this appeal, arguing that the statements are

nevertheless admissible under the common law because the common law does not require a showing of reliability.

¶ 28 This change in the State’s position is puzzling. If the legislature intended to facilitate the successful prosecution of criminal defendants who intentionally prevent witnesses from testifying (as the statute’s legislative history suggests), it is unclear why it passed a statute that imposed restrictions on prosecutors that are not found in the common law.<sup>8</sup> Regardless, after passing a more restrictive statute, one would expect the State either to enforce the statute as written or act to repeal the statute, not urge the courts to ignore it.

<sup>8</sup> We recognize that the statute purports to preserve the common law doctrine. 725 ILCS 5/115–10.6(g) (West 2008) (“This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.”). However, this could not include the common law doctrine’s lack of a reliability requirement because the statute explicitly imposes such a requirement.

¶ 29 Nevertheless, because the statute neither trumps nor supplants the common \*\*135 \*214 law, we must reverse the circuit court’s judgment.

### ¶ 30 CONCLUSION

¶ 31 The judgment of the circuit court of Will County is reversed and the cause is remanded for further proceedings.

¶ 32 Reversed and remanded.

¶ 33 Justice CARTER, specially concurring:

¶ 34 I concur with the majority’s judgment that reverses the circuit court’s ruling, finds the eight excluded statements admissible under Rule of Evidence 804(b)(5), and remands the case for further proceedings. I write separately, however, because I do not join in several aspects of the majority’s opinion, two of which I will address.

¶ 35 First, I do not join in the majority’s first footnote (*supra* ¶ 2 n. 1) in which it presumes that its interpretation of the *Taylor* rule was correct in the majority’s previous decision (*Peterson*, 2011 IL App (3d) 100513, 351 Ill.Dec.

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899, 952 N.E.2d 691), and that our supreme court directed this court to vacate our decision in appeal No. 3–10–0514 and to address the appeal on the merits simply because our supreme court can do so. In its supervisory order, our supreme court merely stated the following:

“In the exercise of this Court’s supervisory authority, the Appellate Court, Third District, is directed to vacate its judgment in *People v. Peterson*, case No. 3–10–0514, dismissing the appeal for lack of jurisdiction. The Appellate Court is directed to address the appeal on the merits.” *People v. Peterson*, No. 112875 (Ill. Nov. 30 2011) (table).

Nothing in these two sentences can be construed as an approval of the majority’s interpretation of the *Taylor* rule in its previous decision or, for that matter, as any explanation as to why our supreme court did what it did.

¶ 36 In an attempt to support its interpretation of our supreme court’s supervisory order, the majority cites to three cases, none of which in fact support the majority’s unsubstantiated assumptions. In all three of those cases, our supreme court provided lengthy explanations as to why it was reinstating appeals or finding jurisdiction. *Lyles*, 217 Ill.2d at 217–20, 298 Ill.Dec. 752, 840 N.E.2d 1187; *McDunn*, 156 Ill.2d at 302–04, 189 Ill.Dec. 417, 620 N.E.2d 385; *Moore*, 133 Ill.2d at 335–41, 140 Ill.Dec. 385, 549 N.E.2d 1257. We were not given any such explanation. Because we do not know the reason why our supreme court ordered us to vacate our previous decision and address the appeal’s merits, I refuse to speculate and

do not join in the majority’s first footnote.

¶ 37 Second, I do not join in the *dicta* the majority has included in paragraphs 26 through 28 and the accompanying footnote 7, which merely serves as the majority’s commentary on the Will County State’s Attorney’s actions. What the Will County State’s Attorney did in this case—and whether those actions were “puzzling” to the majority (*supra* ¶ 28)—is irrelevant to the disposition of this appeal.

¶ 38 We were instructed by our supreme court to address the merits of appeal No. 3–10–0514. Because neither of the two aforementioned matters is necessary to decide the merits of appeal No. 3–10–0514, I refuse to join in those aspects of the majority’s opinion.

Presiding Justice SCHMIDT concurred in the judgment and opinion.

Justice CARTER specially concurred, with opinion.

**All Citations**

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Appellate Court of Illinois,  
Third District.

The PEOPLE of the State of Illinois,  
Plaintiff–Appellee,  
v.  
Drew PETERSON, Defendant–Appellant.

No. 3–13–0157.

|  
Nov. 12, 2015.

#### Synopsis

**Background:** Defendant was charged with two counts of first-degree murder arising out of the death of his former wife. The Circuit Court, Will County, Stephen D. White, J., issued several rulings on the admissibility of evidence the State intended to present at trial. State appealed, and the Appellate Court, 2011 IL App (3d) 100513, 351 Ill.Dec. 899, 952 N.E.2d 691, dismissed in part and affirmed in part and remanded in part. State filed petition for leave to appeal. The Supreme Court, 354 Ill.Dec. 541, 958 N.E.2d 284, denied petition, but vacated judgment and directed that appeal be addressed on the merits. On remand, the Appellate Court, 2012 IL App (3d) 100514-B, 360 Ill. Dec. 125, 968 N.E.2d 204, reversed and remanded. After a jury trial, defendant was convicted in the Circuit Court, Edward A. Burmila, Jr., J., of first-degree murder and sentenced to 38 years in prison. Defendant appealed.

**Holdings:** The Appellate Court, Carter, J., held that:

- [<sup>1</sup>] sufficient evidence supported conviction;
- [<sup>2</sup>] clergy privilege did not prevent pastor from testifying concerning statements made by defendant's subsequent wife at a counseling session;
- [<sup>3</sup>] admission of hearsay statements by former wife and subsequent wife under the common law forfeiture by wrongdoing (FBWD) doctrine did not violate due process;

[<sup>4</sup>] trial court did not abuse its discretion by admitting other crimes evidence;

[<sup>5</sup>] media contract executed by defendant's lead attorney did not give rise to a per se conflict of interest;

[<sup>6</sup>] defendant failed to establish that trial counsel performed deficiently in calling former wife's divorce attorney to testify; and

[<sup>7</sup>] defendant failed to establish that he was prejudiced by any deficient performance of trial counsel in calling divorce attorney to testify.

Affirmed.

#### West Headnotes (42)

- [<sup>1</sup>] **Homicide**  
 ☞Intent or Mens Rea  
**Homicide**  
 ☞Cause of Death  
**Homicide**  
 ☞Commission of or Participation in Act by Accused; Identity

Sufficient evidence supported conviction for first-degree murder arising out of the apparent drowning death of defendant's former wife; medical evidence, including injuries consistent with a struggle rather than a slip and fall in the bath tub, showed former wife's death was the result of murder rather than accident, and the remaining circumstantial evidence, including evidence of defendant's motive to kill former wife, his opportunity to do so, his prior statements of intent to kill former wife, and his attempt to hire someone to do so, showed that defendant was the person who murdered former wife and that he acted with intent to kill her. S.H.A. 720 ILCS 5/9–1(a)(1), (a)(2).

Cases that cite this headnote

[2]

**Criminal Law**

☞Construction in Favor of Government, State, or Prosecution

**Criminal Law**

☞Reasonable Doubt

Pursuant to the *Collins* standard for reviewing the sufficiency of the evidence to support a conviction, a reviewing court faced with a challenge to the sufficiency of the evidence must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt.

Cases that cite this headnote

Cases that cite this headnote

[5]

**Criminal Law**

☞Conclusiveness of Verdict

Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court faced with a challenge to the sufficiency of the evidence to support a conviction.

Cases that cite this headnote

[3]

**Criminal Law**

☞Inferences or Deductions from Evidence

In applying the *Collins* standard for reviewing the sufficiency of the evidence to support a conviction, under which a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, the reviewing court must allow all reasonable inferences from the record in favor of the prosecution.

Cases that cite this headnote

[6]

**Criminal Law**

☞Conclusiveness of Verdict

The *Collins* standard of review, under which a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, fully recognizes that it is the trier of fact's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.

Cases that cite this headnote

[4]

**Criminal Law**

☞Weight of Evidence in General

In applying the *Collins* standard for reviewing the sufficiency of the evidence to support a conviction, under which a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, the reviewing court will not retry the defendant.

[7]

**Criminal Law**

☞Sufficiency of Evidence to Convict

**Criminal Law**

☞Circumstantial Evidence

The same *Collins* standard of review, under which a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, is applied by the reviewing court regardless of whether the

evidence is direct or circumstantial, or whether defendant received a bench or a jury trial, and circumstantial evidence meeting that standard is sufficient to sustain a criminal conviction.

Cases that cite this headnote

- [8] **Criminal Law**  
 ⇌ Reasonable Doubt

In applying the *Collins* standard, under which a reviewing court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt, a reviewing court will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt.

Cases that cite this headnote

- [9] **Criminal Law**  
 ⇌ Weight and Sufficiency

When considering a challenge to the sufficiency of the evidence, a reviewing court is not required to exclude evidence that may have been improperly admitted in the trial court.

Cases that cite this headnote

- [10] **Criminal Law**  
 ⇌ Admission of Evidence

Defendant could not raise, on appeal from his conviction for the first-degree murder of his former wife, any error by trial court in allowing attorney who represented former wife in the divorce proceeding to testify concerning conversations he had with defendant's subsequent wife, which conversations had already been determined to be protected by the

attorney-client privilege, where attorney was called to testify by the defense over State's objection. S.H.A. 720 ILCS 5/9-1(a)(1), (a)(2).

Cases that cite this headnote

- [11] **Privileged Communications and Confidentiality**  
 ⇌ Clergy and Spiritual Advisers

Clergy privilege did not prevent pastor from testifying at defendant's trial for the murder of his former wife concerning statements made to him by defendant's subsequent wife at a counseling session that implicated defendant in the murder; pastor's conversation with subsequent wife was not confidential, as it took place in public with at least one other person indirectly present, pastor asked subsequent wife what he should do with the information she gave him, which indicated that church rules did not mandate nondisclosure, pastor did not assert the privilege or refuse to testify, and there was no indication the church had formalized rules prohibiting pastor's disclosure. S.H.A. 735 ILCS 5/8-803.

Cases that cite this headnote

- [12] **Privileged Communications and Confidentiality**  
 ⇌ Clergy and Spiritual Advisers

The clergy privilege belongs to both the individual making the statement and the clergy member. S.H.A. 735 ILCS 5/8-803.

Cases that cite this headnote

- [13] **Privileged Communications and Confidentiality**  
 ⇌ Clergy and Spiritual Advisers

The party seeking to invoke the clergy privilege

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bears the burden of showing that all of the underlying elements required for the privilege to apply have been satisfied. S.H.A. 735 ILCS 5/8-803.

Cases that cite this headnote

Cases that cite this headnote

[17] **Privileged Communications and Confidentiality**  
 ☞Clergy and Spiritual Advisers

[14] **Privileged Communications and Confidentiality**  
 ☞Clergy and Spiritual Advisers

The clergy privilege applies only to admissions or confessions made in confidence. S.H.A. 735 ILCS 5/8-803.

A trial court's determination as to whether the underlying elements required for the clergy privilege to apply have been satisfied will not be reversed on appeal unless it is against the manifest weight of the evidence. S.H.A. 735 ILCS 5/8-803.

Cases that cite this headnote

Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**  
 ☞Clergy and Spiritual Advisers

[15] **Criminal Law**  
 ☞Reception and Admissibility of Evidence

In deciding whether an admission or confession was made to a clergy member in confidence, as necessary for the clergy privilege to apply, the perception of the person making the statement is not determinative in and of itself. S.H.A. 735 ILCS 5/8-803.

A trial court's ruling on the admissibility of evidence in general will not be reversed on appeal absent an abuse of discretion.

Cases that cite this headnote

Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**  
 ☞Clergy and Spiritual Advisers

[16] **Privileged Communications and Confidentiality**  
 ☞Clergy and Spiritual Advisers

An admission or confession is not privileged under the clergy privilege if it was made to a clergy member in the presence of a third person unless that person was indispensable to the counseling or consoling activity of the clergy member. S.H.A. 735 ILCS 5/8-803.

To fall under the protection of the clergy privilege, the communication must be an admission or confession: (1) made for the purpose of receiving spiritual counsel or consolation, (2) to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation. S.H.A. 735 ILCS 5/8-803.

Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

⚡Clergy and Spiritual Advisers

If the clergy member does not object to testifying about an admission or confession made to the clergy member, the burden is on the person asserting the clergy privilege to show that disclosure is prohibited by the rules or practices of the particular religion involved. S.H.A. 735 ILCS 5/8–803.

Cases that cite this headnote

[21] **Privileged Communications and Confidentiality**

⚡Clergy and Spiritual Advisers

The person who made a privileged statement to a clergy member may waive the clergy privilege by communicating the admission or confession to nonprivileged parties. S.H.A. 735 ILCS 5/8–803.

Cases that cite this headnote

[22] **Criminal Law**

⚡Reception and Admissibility of Evidence

The threshold for finding an abuse of discretion with respect to the admissibility of evidence is high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court.

Cases that cite this headnote

[23] **Criminal Law**

⚡Evidence in General

Even where an abuse of discretion with respect to the admissibility of evidence has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial

prejudice affecting the outcome of the trial.

Cases that cite this headnote

[24] **Criminal Law**

⚡Subsequent Appeals

Appellate Court's prior ruling that certain hearsay statements by defendant's former wife and subsequent wife would be admissible at his upcoming trial for the murder of former wife under the forfeiture by wrongdoing (FBWD) doctrine was law of the case on appeal from defendant's conviction for first-degree murder following a trial at which the statements were introduced.

Cases that cite this headnote

[25] **Constitutional Law**

⚡Hearsay

**Criminal Law**

⚡Statements of Persons Since Deceased

Admission into evidence, at defendant's trial for the murder of his former wife, of hearsay statements by former wife and by defendant's subsequent wife that were deemed admissible under the common law forfeiture by wrongdoing (FBWD) doctrine did not violate defendant's due process rights; use of the statements was not so extremely unfair to defendant that their admission violated fundamental concepts of justice or ordered liberty. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[26] **Criminal Law**

⚡Sufficiency of Notice; Time for Giving

Trial court did not abuse its discretion at defendant's trial for the murder of his former wife by admitting other crimes evidence in the

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form of a witness's testimony that defendant offered him \$25,000 to find someone to kill former wife, even though State did not provide notice of its intent to present the testimony until trial; testimony was not presented until 20 days after State put the defense on notice that it was going to ask trial court to change its prior ruling barring the testimony, defense did not seek a continuance to prepare for the testimony further, and defense fully cross-examined witness about the statement and matters related to his credibility. Rules of Evid., Rule 404(b, c).

Cases that cite this headnote

[27]

**Criminal Law**

⊖Sufficiency of Notice; Time for Giving

The determination of what constitutes good cause for the State to provide notice during trial of its intent to introduce other crimes evidence is a fact-dependent determination that rests in the sound discretion of the trial court. Rules of Evid., Rule 404(b, c).

Cases that cite this headnote

[28]

**Criminal Law**

⊖Other Offenses

Appellate Court will not reverse the trial court's determination as to whether good cause exists for the State to provide notice during trial of its intent to introduce other crimes evidence absent an abuse of discretion. Rules of Evid., Rule 404(b, c).

Cases that cite this headnote

[29]

**Criminal Law**

⊖Prejudice and Harm in Particular Cases or Situations

Media contract previously executed by lead

attorney for defendant convicted of the first-degree murder of his former wife did not give rise to a per se conflict of interest, so as to entitle defendant to new trial regardless of any showing of prejudice, even if it violated the Rules of Professional Conduct; alleged conflict created by the media contract did not fall within one of the established categories of per se conflicts. U.S.C.A. Const.Amend. 6; Rules of Prof.Conduct, Rules 1.7, 1.8.

Cases that cite this headnote

[30]

**Criminal Law**

⊖Conflict of Interest

A criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation, which is the right to be represented by an attorney whose loyalty is not diluted by conflicting interests or obligations. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[31]

**Criminal Law**

⊖Review De Novo

The question of whether the undisputed facts of record establish a per se conflict of interest between a defendant and his attorney is a legal question that is subject to de novo review on appeal. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[32]

**Criminal Law**

⊖Prejudice and Harm in General

In deciding whether a per se conflict of interest exists between a defendant and his attorney, the reviewing court should make a realistic appraisal of the situation. U.S.C.A.

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Const.Amend. 6.

Cases that cite this headnote

Cases that cite this headnote

[33]

**Criminal Law**

⚡Prejudice and Harm in General

A per se conflict of interest exists between a defendant and his attorney when certain facts about defense counsel's status engender, by themselves, a disabling conflict. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[36]

**Criminal Law**

⚡Conflict of Interest; Joint Representation

Unless the defendant has waived his right to conflict-free representation, if a per se conflict of interest exists, reversal is automatically required and there is no need for the defendant to show that the conflict affected the attorney's actual performance. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[34]

**Criminal Law**

⚡Prejudice and Harm in General

In general, when defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a per se conflict of interest exists. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[37]

**Criminal Law**

⚡Effective Assistance

An issue of ineffective assistance of counsel presents the reviewing court with a mixed question of fact and law. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[35]

**Criminal Law**

⚡Prejudice and Harm in General

There are two reasons for the rule that a per se conflict of interest with defense counsel violates a defendant's sixth amendment right to effective assistance of counsel; first is to avoid unfairness to the defendant, as certain associations may have subliminal effects on defense counsel's performance which would be difficult for the defendant to detect or to demonstrate, and second is to avoid later-arising claims that defense counsel's representation was not completely faithful to the defendant because of the conflict of interest. U.S.C.A. Const.Amend. 6.

[38]

**Criminal Law**

⚡Review De Novo

**Criminal Law**

⚡Counsel

To the extent that the trial court's findings of fact bear upon the determination of whether counsel was ineffective, those findings must be given deference on appeal and will not be reversed unless they are against the manifest weight of the evidence; however, the ultimate question of whether counsel's actions support a claim of ineffective assistance is a question of law that is subject to de novo review on appeal. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

☞Presentation of Witnesses

[39] **Criminal Law**  
☞Strategy and Tactics in General

Matters of trial strategy will generally not support a claim of ineffective assistance of counsel, even if defense counsel made a mistake in trial strategy or tactics or made an error in judgment. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Defendant who was convicted of the first-degree murder of his former wife failed to establish that he was prejudiced by any deficient performance of trial counsel in calling former wife's divorce attorney to testify as to a conversation with defendant's subsequent wife in which she implicated defendant in former wife's murder; damaging aspect of the testimony was largely cumulative to a pastor's testimony concerning his own conversation with subsequent wife. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[40] **Criminal Law**  
☞Strategy and Tactics in General

Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois. Circuit No. 09-CF-1048, Edward A. Burmila, Jr., Judge, presiding.

## OPINION

Justice CARTER delivered the judgment of the court, with opinion:

[41] **Criminal Law**  
☞Presentation of Witnesses

Defendant who was convicted of the first-degree murder of his former wife failed to establish that trial counsel performed deficiently in calling former wife's divorce attorney to testify as to a conversation with defendant's subsequent wife in which she implicated defendant in former wife's murder; decision was clearly a matter of trial strategy, as counsel was seeking to discredit the impression of subsequent wife that other testimony had given the jury, and decision was made by defendant himself after considering the conflicting advice of his many attorneys. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

\*1 ¶ 1 After a jury trial, defendant, Drew Peterson, was found guilty of the first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) of Kathleen Savio and was sentenced to 38 years in prison. Defendant appeals his conviction, arguing that: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court erred in several of its evidentiary rulings; (3) his trial attorney operated under a *per se* conflict of interest; (4) he was denied effective assistance of trial counsel; and (5) he was denied a fair trial because of cumulative error. We affirm defendant's conviction and sentence.

## ¶ 2 FACTS

¶ 3 On March 1, 2004, 40-year-old Kathleen Savio, defendant's third ex-wife, was found dead in the bathtub of her home in Bolingbrook, Illinois. There was no water in the tub at the time. Because defendant was a police officer in the same town, a separate, independent agency,

[42] **Criminal Law**

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the Illinois State Police, was called in to investigate Kathleen's death. A pathologist, Dr. Bryan Mitchell, performed an autopsy and concluded that Kathleen had drowned. Mitchell made no determination, however, as to the manner of Kathleen's death (whether it was natural causes, suicide, accident, homicide, or undetermined). An inquest was later held, and a coroner's jury found that the death was accidental. No criminal charges were initially filed. At the time of Kathleen's death, defendant and Kathleen were in the process of a divorce. Their marriage had already been legally dissolved, but the property division, pension, and child support issues were still pending and had been scheduled for a hearing to be held the following month in April 2004.

¶ 4 In October 2007, defendant's fourth wife, Stacy Peterson, disappeared. At the time of Stacy's disappearance, defendant and Stacy had been discussing a divorce. Following Stacy's disappearance, Kathleen's body was exhumed and two additional autopsies were conducted, one by Dr. Larry Blum and another by Dr. William Baden. After the autopsies, both pathologists separately concluded that Kathleen's death was a homicide.

¶ 5 In May 2009, the State charged defendant with the first degree murder of Kathleen. Throughout the proceedings in this case, defendant was represented by a team of several attorneys, including his lead attorney, Joel Brodsky. The remaining members of the defense team changed occasionally as some of the attorneys withdrew from the case and other attorneys joined the case.

¶ 6 In January 2010, during pretrial proceedings, the State filed a motion seeking to admit 14 hearsay statements that were made by Kathleen and Stacy. The State asserted in the motion that the statements were admissible pursuant to both the statute (725 ILCS 5/115-10.6 (West 2008) (hearsay exception for the intentional murder of a witness)) and the common law doctrine of forfeiture by wrongdoing (FBWD). Defendant opposed the motion, and an evidentiary hearing (the hearsay hearing) was held in front of the Honorable Stephen D. White. At the conclusion of the hearing, the trial court ruled that six of the statements were admissible under the statute and eight of the statements were not. The trial court made no ruling, however, as to the admissibility of the statements under the common law doctrine of FBWD. The State's motion to reconsider was subsequently denied, and the State appealed.

\*2 ¶ 7 On appeal, a divided panel of this court initially found that there was no jurisdiction to rule upon the admissibility of the eight hearsay statements under the

common law doctrine of FBWD. *People v. Peterson*, 2011 IL App (3d) 100513, ¶¶ 27-53, 351 Ill.Dec. 899, 952 N.E.2d 691 (*Peterson I*). However, after a supervisory order from the supreme court directed this court to consider the merits of the issue, this court found that all eight of the excluded statements were admissible under the common law doctrine. *People v. Peterson*, 2012 IL App (3d) 100514-B, ¶¶ 19-29 (*Peterson II*). In the decision, this court noted that on remand, the trial court was still free to find that the statements were inadmissible for some other reason (other than they did not qualify for admission under the FBWD doctrine). *Id.* ¶ 25 n. 6.

¶ 8 On remand in the trial court, the case was assigned to the Honorable Edward A. Burmila, Jr. During subsequent pretrial proceedings, the State and the defense filed various motions *in limine*. The State's motions primarily sought to admit additional hearsay statements into evidence or to expand upon the statements that had already been ruled admissible in *Peterson II*. The defense's motions sought to exclude those additional or broadened statements and the eight original statements that were at issue in *Peterson II*, albeit on grounds other than FBWD.

¶ 9 One such motion filed by the defense was a motion to exclude hearsay statements that Kathleen and Stacy had made to attorney Harry Smith. In the motion, the defense asserted that the statements were protected by the attorney-client privilege, that the privilege had not been waived by either Kathleen or Stacy, and that Smith could not, therefore, testify as to the statements. After considering the arguments of the attorneys on the motion, the trial court found that the statements of Kathleen and Stacy were protected by the attorney-client privilege. The trial court commented, however, that there was a portion of Smith's prior testimony that indicated that Kathleen might have waived the privilege. The trial court took the matter under advisement and gave the parties an opportunity to present any additional information they had as to whether Kathleen had waived the privilege and the extent and effect of any alleged waiver on the admissibility of the statements in question. At a later hearing, after some testimony from Smith, the trial court determined that Kathleen had, in fact, waived the privilege. The trial court concluded, therefore, that Kathleen's statements to Smith were not excludable on the basis of attorney-client privilege. The statements that Stacy had made to Smith, however, were still subject to exclusion.

¶ 10 A second defense motion sought to exclude hearsay statements that Stacy had made to Pastor Neil Schori regarding her observations of defendant's conduct on the

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night of Kathleen's death, claiming that the statements were protected under the clergy privilege. After considering the parties' arguments on the motion, the trial court ruled that the clergy privilege did not apply because: (1) Pastor Schori did not assert the privilege; and (2) the communication occurred in a public place where it could have been overheard by other people and with a third party present that Schori had brought with him to observe the communication.

\*3 ¶ 11 A third defense motion sought to exclude some of the eight hearsay statements based upon a violation of due process. The defense asserted in the motion that the admission at trial of the statements that Judge White had previously determined at the hearsay hearing to be unreliable would violate defendant's due process rights.<sup>1</sup> After considering the arguments of the attorneys on the motion, the trial court ruled that Judge White's prior reliability determination did not render the statements facially inadmissible but the defense was free to object to the admission of any of those particular statements during the trial and the trial court would make its ruling on each of the objections at that time after considering all of the evidence that had been presented.

¶ 12 The case proceeded to a jury trial in July 2012. At the time of the trial, defendant was represented by a team of six attorneys—Joel Brodsky, Steven Greenberg, Joseph Lopez, Lisa Lopez, Ralph Meczyk, and Darryl Goldberg. Attorney Brodsky was still the lead attorney. The trial lasted over seven weeks and spanned from July to September 2012.

¶ 13 After the trial had started and shortly into the State's opening statement, the defense objected to a reference that the prosecutor had made to evidence that would be provided by Jeffrey Pachter, that defendant had offered Pachter \$25,000. The objection was made by the defense before the prosecutor disclosed to the jury the alleged purpose for which defendant had offered Pachter the money—to find someone to kill Kathleen. A conference was held outside the presence of the jury on the defense's objection. The defense claimed that the prosecutor's statement was in reference to evidence that was not admissible because the State had failed to give notice to the defense that the State had intended to introduce the testimony as other crimes or other bad act evidence as provided for in Illinois Rule of Evidence 404(c) (eff. Jan. 1, 2011). The defense claimed further that the previous judge, Judge White, had already ruled upon the State's motion to admit other crimes evidence and had already determined what other crimes evidence would be admitted at trial. The Pachter evidence was not raised in the State's prior motion or ruled upon by Judge White.

The trial court agreed and sustained the objection but denied the defense's motion for a mistrial.

¶ 14 Moving into the evidence portion of the jury trial, Mary Pontarelli testified for the State that she was Kathleen's next-door neighbor and best friend.<sup>2</sup> Mary and her family (her husband, her children, her brother, and her parents) lived next door to Kathleen for several years and knew both Kathleen and defendant. After defendant and Kathleen separated and defendant moved out, Kathleen continued to live at the residence with her and defendant's two sons, Thomas and Christopher, and she and Mary continued to be friends. Mary had been in Kathleen's home on numerous occasions and was usually there several times a week.

\*4 ¶ 15 According to Mary, defendant and Kathleen began divorce proceedings around March 2002. Defendant moved out of the residence and eventually moved into another residence in the same subdivision about five or six blocks away. In the early part of the divorce process, things were very bitter between defendant and Kathleen. At Kathleen's request, Mary's husband, Tom, installed a deadbolt lock on Kathleen's bedroom door, and Mary's 14-year-old son, Nick, changed the locks on the front door of Kathleen's house. At some point after the deadbolt lock was installed (but well before Kathleen's death), someone drilled a hole into the bedroom door just above the deadbolt.

¶ 16 On Saturday, February 28, 2004, the weekend prior to Kathleen's death, Mary spoke with Kathleen in the front yard in the early afternoon. Kathleen's two boys were with defendant for the weekend and did not have school on Monday. Mary asked Kathleen if she wanted to go with Mary's family that evening to a party out of town. Kathleen declined and stated that she was going to stay home and study for her nursing school finals. When Mary and her husband got home from the party around midnight, they noticed that Kathleen's bedroom light was on and assumed that Kathleen was still up studying. None of the other lights in Kathleen's house were on at that time.

¶ 17 The following day, Sunday, February 29, Mary did not see Kathleen at all. Mary had her son try to call Kathleen to see if she wanted to come over for dinner, but there was no response. Mary later sent her son over to Kathleen's house with some food, but no one answered the door.

¶ 18 On Monday, March 1, defendant stopped by Mary's house at about 9 p.m. in his police uniform. Defendant asked Mary if she had heard from Kathleen and told Mary

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that he had tried to return the boys on both Sunday and Monday night, but Kathleen was not at home. Defendant and Mary both thought it was unusual that Kathleen was not at home to receive the boys. In the past, during the bitter part of the divorce, Kathleen would call the police if defendant was even a few minutes late in returning the children. Defendant asked Mary if she would go into Kathleen's house with him if he got a locksmith to open the door because Kathleen would be upset if he went into the house by himself. Mary told defendant that she would try to contact Kathleen and that she would call him back. Mary called Kathleen's cell phone and got her voice mail. She also called Kathleen's boyfriend, Steve Maniaci. Steve told Mary that Kathleen was not with him and that he had not spoken to her since about midnight on Saturday night.

¶ 19 Mary was concerned. She called defendant back and told him that she would meet him at Kathleen's house and that she would go inside the house with him. Mary, Tom (Mary's husband), Nick (Mary's 14-year-old son), and another neighbor, Steve Carcerano, went to the front of Kathleen's house. The outside of the house was completely dark. All of the inside and outside lights were off, including the light in Kathleen's bedroom. Defendant was already at Kathleen's front door with a locksmith.

\*5 ¶ 20 After the locksmith opened the door, Mary, Tom, Nick, and Steve went inside. As they did so, they turned on the lights. Defendant remained outside on the porch and talked with the locksmith. According to Mary, nothing in the house seemed to be disturbed and there was no sign of a struggle. Tom and Nick headed for the garage while Mary and Steve went upstairs to Kathleen's bedroom. Defendant remained downstairs by the bottom of the steps.

¶ 21 Upon reaching the bedroom, Mary turned the lights on and she and Steve went inside. The covers on the bed were jumbled, and Kathleen's books were next to the bed. Mary lifted up the covers, but no one was there. Steve walked into the bathroom and then called Mary's name. Mary went into the bathroom, saw Kathleen's lifeless unclothed body in the tub, and started screaming. During the trial, Mary identified photographs of the scene and of how Kathleen's body appeared in the bathtub when they found her that evening.<sup>3</sup>

¶ 22 Mary testified further that she knelt down next to the tub and saw that Kathleen had a cut on her head and that there was dry blood in Kathleen's hair. Kathleen's hair was down and there was some bruising on Kathleen's wrists and buttocks. There was some blood in the tub and some blood coming out of Kathleen's nose as well. Mary

did not see any bath rug, towel, or clothing near the tub.

¶ 23 Mary stated that she had been at Kathleen's home on several occasions when Kathleen was either getting ready to take a bath or had just gotten finished taking a bath, and that during those times, Kathleen had always had her hair up in a clip. When Mary found Kathleen's body in the bathtub that night, Kathleen did not have her hair up in a clip, and Mary did not notice if there was a clip anywhere around. Mary remembered seeing a bath rug in front of the tub on one prior occasion, but did not see any rug outside of Kathleen's tub on other occasions. Mary did not notice a bathrobe, although in a photograph of the scene that she was shown, there was a robe hanging behind the bathroom door.

¶ 24 After Mary screamed, Nick, Tom, and defendant ran upstairs. Defendant was the last one into the bathroom. He did not have his gun drawn at the time. Defendant checked Kathleen's wrist for a pulse and told Mary that Kathleen was dead. Defendant was visibly upset and wondered aloud what he was going to tell his children. Mary told defendant that she wanted to cover up Kathleen's body. Defendant responded that they were not supposed to touch anything and told Mary that she could not do so.

¶ 25 Mary left the bathroom and went home. Her son, Nick, had already left. A short time later, Mary and her husband, Tom, went to Steve Carcerano's house, where they were all questioned by investigators. Nick stayed home and went to sleep. Mary did not allow investigators to question Nick because he was only 14 years old.

¶ 26 Mary testified further that during the weekend leading up to Kathleen's death, she did not see anyone at, or hear any strange noises coming from, Kathleen's house. The divorce between defendant and Kathleen was bitter in the beginning on both sides, and defendant and Kathleen played "games" with one another. As time passed, however, defendant and Kathleen seemed to get along much better and they both seemed to be happy and peaceful. Defendant got remarried, and Kathleen had a boyfriend, Steve Maniaci. Kathleen wanted to marry Steve and thought about moving away and starting over. According to Mary, Kathleen was tough and would stand her ground; she had passion, was argumentative when she wanted to be, and would raise her voice if she was mad. Kathleen was not a pushover and would fight back if someone was trying to take advantage of her. Mary denied that Kathleen was the type of person who would exaggerate things.

\*6 ¶ 27 Mary stated during her testimony that Kathleen

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was very concerned about security and that she had her doors locked all of the time. There were three locks on Kathleen's front door: the deadbolt lock, the door knob lock, and the screen door lock. According to Mary, Kathleen always had the inside door and the screen door locked, unless she and Mary were sitting on the porch while the children were outside playing.

¶ 28 In addition to Mary, the State also called as witnesses Mary's husband, Tom; Mary's son, Nick; and Mary's brother, Dominic. For the most part, their testimony was similar to that of Mary. We will, therefore, highlight only the additional or different information that those witnesses provided.

¶ 29 Mary's husband, Tom Pontarelli, testified for the State that in 2002, when defendant found out that Tom had put a deadbolt lock on Kathleen's bedroom door, defendant called Tom and told Tom that he did not want Tom helping Kathleen to change the locks inside the house or on the front door. On another occasion around the beginning of the divorce when things were not going well between defendant and Kathleen, defendant caught Tom helping Kathleen move some of defendant's stuff out of Kathleen's house and into Tom's garage. Defendant was very mad and felt that Tom was taking Kathleen's side in the divorce. Defendant told Tom that he did not want Tom helping Kathleen move his stuff and that any friend of Kathleen was an enemy of defendant. Over time, however, as the divorce progressed and things between defendant and Kathleen became less bitter, Tom and defendant were cordial to one another.

¶ 30 On the night that they discovered Kathleen's body, Tom noticed that there was no ring or soap scum around the inside of the bathtub and that the tub did not have any water in it. Tom commented to the others in defendant's presence that there was no bath rug, towel, or clothes near the bathtub at that time. Later, after Mary and Steve Carcerano left the house, Tom overheard defendant talking on his cell phone and telling someone that he had just found his wife dead in the bathtub and that people were going to think that he did it.

¶ 31 Nick Pontarelli, Mary's and Tom's son, testified for the State that he was very close to Kathleen and that she was like a second mother to him. On the Saturday before Kathleen's death, after Nick and Mary saw Kathleen outside, Nick helped Kathleen carry groceries into her house. Nick stayed and had lunch with Kathleen while he told her about his family's recent vacation.

¶ 32 When Nick was in Kathleen's house on the night that they found her body, he saw an open carton of orange

juice on the kitchen counter with a pack of pills next to it. As a common courtesy and not knowing that Kathleen was dead in the bathtub upstairs, Nick put the cap back on the orange juice and put the orange juice back into the refrigerator. Nick also noticed that there was a mug of water or tea inside the microwave but did not touch the mug.

\*7 ¶ 33 The following day at about 9 a.m., Nick saw defendant going into Kathleen's house and taking stuff out. Defendant was with his wife, Stacy, and one of his other sons, Stephen Peterson. Nick did not see Anna Doman, Susan Doman, or Henry Savio (Kathleen's siblings) at Kathleen's house but knew that they were there at some point during the day.

¶ 34 Nick testified further that he had been at Kathleen's house over the years when defendant was there and that defendant, the two boys, and Nick would do stuff together. According to Nick, defendant was always good to the two boys and to Nick. Defendant had a close relationship with the two boys from what Nick could see.

¶ 35 Dominic DeFrancesco testified for the State that he lived with his sister, Mary Pontarelli, and that Kathleen was like a sister to him. The last time that Dominic saw Kathleen alive was on Saturday, February 28, 2004, when he and Mary were talking to Kathleen in front of the house. That evening, Dominic and the rest of his family went to a party out of town. Dominic drove his parents to the party in one vehicle and the other family members went in a separate vehicle. When Dominic and his parents returned home at about 2 a.m., Dominic noticed that Kathleen's bedroom light was still on and commented to his parents that it was odd that her light was still on at that hour of the morning. There were no other lights on inside or outside of the house. The following evening, Sunday, February 29, at about 6 p.m., Dominic noticed that all of Kathleen's lights were completely off, including the light in Kathleen's bedroom.

¶ 36 In December 2007, investigators from the State Police came to the Pontarelli home and questioned Dominic and his parents as a group. Dominic told the police about seeing Kathleen's bedroom light on early that morning in 2004 when they had returned from the party. Dominic's mother, and possibly Dominic as well, told the police that they thought it was unusual that Kathleen was still awake at that hour. The police asked Dominic to come in by himself for a further interview the following day at State Police headquarters, and Dominic did so.

¶ 37 At the interview the following day, the police asked

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Dominic why he did not tell them three years ago that he thought it was unusual that the light was still on in Kathleen's bedroom, and Dominic stated that he did not want to interfere with or contradict the police investigation. During that interview, the police kept pressing Dominic about what he had seen and about whether he had a sexual relationship with Kathleen. Dominic denied that he had any type of romantic relationship with Kathleen and told police that he would take a lie detector test, provide fingerprints, and provide a DNA sample, if they wanted him to do so. During his trial testimony, Dominic again denied that he had any romantic involvement with Kathleen.

¶ 38 Steve Maniaci testified for the State that he was Kathleen's boyfriend for the two years prior to her death, starting from about when Kathleen and defendant separated. After defendant moved out of the residence, Steve changed the codes to the garage door for Kathleen. While they were dating, Steve would usually enter Kathleen's residence through the garage door. If Steve could not access the garage, he would use the front entrance. The front entrance had both a storm door and a front door on it and they would both be locked. Steve would ring the doorbell and would wait for someone to unlock the doors and let him in. Steve did not have a key to Kathleen's house and only had the garage door opener one time when Kathleen gave it to him so that he could go into the house and wait for her to get home from work.

\*8 ¶ 39 Steve and Kathleen would spend the night at each other's houses about twice a month. During the course of their relationship, Steve had seen Kathleen take a shower about six times. Generally, during those times, Kathleen would take off her jewelry, although Steve was not sure whether she did so every single time. There were also a few occasions when Steve saw Kathleen take a bath or when Steve and Kathleen took a bath together. During those occasions, Kathleen would put her hair up in a clip. When Steve took a shower at Kathleen's house, he would get a towel out of the bathroom vanity. According to Steve, in Kathleen's bathroom, there was usually a bath mat in front of the vanity and another one in front of the bathtub. Steve acknowledged later in his testimony, however, that sometimes the mat was there and sometimes it was not. Steve also confirmed that Kathleen liked to drink orange juice and tea.

¶ 40 On Friday, February 27, 2004, Steve and Kathleen went out to dinner and then to a bar. After they returned to Kathleen's residence for the night, they had sexual intercourse on the living room floor. As they did so, Steve did not see any type of injuries on Kathleen's back, buttocks, or arms. During his testimony, Steve was shown

autopsy photographs of an abrasion on Kathleen's buttocks and bruises on Kathleen's arm and stated that he did not see any injuries like those when he and Kathleen were together that night, although he acknowledged that he was not inspecting Kathleen's body for bruises at the time. Steve testified further that he used a condom when he and Kathleen had sexual intercourse that night and that he threw the condom away in the kitchen garbage can after they were finished.

¶ 41 On Saturday morning, Steve and Kathleen went out to breakfast and then parted ways. Before they did so, they talked about possibly getting together that evening. Steve knew that Kathleen was studying that weekend for her finals and that she liked to study in her bedroom. Steve stated during his testimony that he did not see any marks on Kathleen's body that Saturday morning and that he did not see Kathleen fall down or bump into anything during that weekend. Kathleen did, however, tell Steve on Saturday that she was having chest pain, but, according to Steve, it was only pain in her chest muscles from working out.

¶ 42 At about 8 p.m. Saturday evening while Steve was at band practice, Kathleen called Steve. Steve asked Kathleen if she was at his house, and Kathleen responded that she was not. Kathleen asked Steve if he was going to come over to her house, and Steve told her no, that he was too tired. After that, Steve went home and went to bed. Later that evening, at about midnight, Kathleen called Steve again. The conversation lasted less than a minute. Kathleen was mad and upset that Steve had not come over. Steve told Kathleen that he was sleeping and asked if they could talk about it tomorrow. Kathleen said something to the effect that she knew that Steve was never going to marry her, and Steve again asked if they could talk about it tomorrow. Kathleen hung up on Steve, and Steve went back to bed.

\*9 ¶ 43 Steve did not see or speak to Kathleen at all the following day, Sunday, February 29. He wanted to give Kathleen some time to cool off. Steve thought that Kathleen would call him, but she never did.

¶ 44 On Monday, March 1, Steve worked all day. He tried to call Kathleen numerous times but was unable to reach her. On Monday evening, while Steve was out with friends, he received a call from Mary Pontarelli. Mary asked Steve if Kathleen was with him. Steve responded that she was not and told Mary that he had been trying to reach Kathleen all day. Mary told Steve that defendant was there with a locksmith and that he was going to go into Kathleen's house. Steve told Mary to call him as soon as she found out what was going on and left for

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home.

¶ 45 When Steve got home, he called Mary immediately. Mary told Steve that Kathleen was dead. Steve responded that he would be right over. When Steve got to Kathleen's house, he saw squad cars present and people gathered in the area. Defendant was standing underneath a streetlight and seemed to be writing out a report.

¶ 46 At one point, when it was just Steve and defendant in the area, Steve asked defendant what had happened. Defendant stated that he did not know. Steve told defendant that he sure hoped defendant did not have anything to do with Kathleen's death. Defendant responded that he did not. Steve commented to defendant that the situation sure worked out well for defendant, and defendant responded that Kathleen would have lost anyway, regarding the divorce. Defendant's demeanor during the conversation was calm.

¶ 47 After his conversation with defendant, Steve eventually went to Steve Carcerano's home, along with Mary and Tom Pontarelli. While they were there, the state police came to that location and did some interviews in the basement. Steve was interviewed individually. He did not speak to the state police again in 2004 about Kathleen's death.

¶ 48 At one point during his relationship with Kathleen, Steve had suggested to her that she get a spot cleaner to clean up after her cat. Steve acknowledged during his testimony that he may have given Kathleen the spot cleaner that was found in the residence after Kathleen's body was discovered and that was visible in one or more photographs of the scene. Steve acknowledged further that Kathleen was taking some medications at or around the time of her death, including Xanax, possibly Zoloft, and Ativan.

¶ 49 Robert Akin, Jr., testified for the State that he had been a locksmith for 40 years and that on March 1, 2004, he was called during the evening hours to open the front door of Kathleen's residence for a police welfare check. The call came in on Akin's personal cell phone, which was a little unusual because Akin's associate was on call that evening and would have had the phones for the business. Upon arrival at the house, Akin saw defendant outside, who he knew was a Bolingbrook police sergeant and had known for 30 years. Defendant was in uniform at the time. There were also other people present.

\*10 ¶ 50 On the front door of Kathleen's house, there were two locks, the deadbolt lock and the doorknob lock. There was also a screen door present, which Akin thought

must have been unlocked because he did not remember having to unlock it. Akin had difficulty with the doorknob lock initially because it had been put in upside down. The doorknob lock was the type that you could just push the button and lock it without a key and then pull the door shut and it would stay locked. Akin switched to the deadbolt lock momentarily and found that it was not locked. Akin resumed working on the doorknob lock. As Akin did so, defendant used his flashlight to give Akin a hand. In total, it took Akin about six minutes to open the door.

¶ 51 After the door was open, Akin talked with defendant briefly on the porch as he picked up his tools, while the other people who were present went into the house. Akin did not notice anything unusual about defendant's behavior at that time. As Akin and defendant were talking, there was a lot of commotion and a scream came from inside the house. Defendant said that he had to go and went running inside. Akin went to his truck and waited for a few minutes to see what had happened and then left when he saw the ambulance arrive.

¶ 52 Akin had never done a wellness check for defendant before and did not charge anyone for his services that night. According to Akin, when he worked on a lock, he usually did so by himself. The process of opening a lock with lock-pick tools could be done very loudly or very quietly, and any particular lock could take from 30 seconds to 15 minutes to get open.

¶ 53 Louis Oleszkiewicz testified for the State that he was a Bolingbrook firefighter and paramedic. On March 1, 2004, at about 10:45 p.m., he and his partner were dispatched to Kathleen's residence for an unresponsive subject. Upon arrival, they were directed upstairs by Bolingbrook police officers. Oleszkiewicz and the other members of the emergency response team went into the master bathroom and found Kathleen in the bathtub. Kathleen's body was cold to the touch, felt dry, and had a mottled appearance. Her hair was damp and matted down. She had no pulse. Oleszkiewicz attached an electrocardiogram and found that there was no electrical activity in Kathleen's heart. Kathleen was pronounced dead at 11:05 p.m., and the paramedics left the scene shortly thereafter.

¶ 54 In Oleszkiewicz's opinion, although Kathleen was found in the bathtub, it did not appear that she had anything in the near vicinity in preparation for taking a bath, such as a towel or a bath rug. In addition, none of the stuff next to the tub had been knocked over and there was no soap scum or sediment ring inside the tub. Oleszkiewicz acknowledged during his testimony that he

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did not check to see if there were towels in the cabinet under the sink and did not notice whether there was a towel or a robe hanging on the back of the bathroom door. Oleszkiewicz also acknowledged that he did not see any type of interior bath mat or non-slip surface that would have prevented a person from slipping and falling in the bathtub.

\*11 ¶ 55 Oleszkiewicz was told by his partner that Kathleen had a heart murmur but did not know how his partner had obtained that information. Oleszkiewicz noted in his report that Kathleen was taking Zoloft, Celebrex, and Sudafed but did not know where at the scene those medications were found. Oleszkiewicz remembered seeing defendant at the scene that evening in the landing area of the second floor. Oleszkiewicz did not at any time see defendant in the bathroom area.

¶ 56 Oleszkiewicz was interviewed about the matter a few days later by investigators from the state police. He told the investigators that he thought it was odd that there was no towel or bath mat present when he responded to the scene. Oleszkiewicz also told the state police that defendant appeared sad at the scene and that defendant's eyes were red.

¶ 57 The State also called the three other members of the emergency response team to testify as witnesses at defendant's trial. Their testimony, for the most part, was similar to that of Oleszkiewicz. In addition to the information provided by Oleszkiewicz, the three other members of the response team testified that defendant seemed upset that evening and that defendant had told them that the deceased was his ex-wife and to treat the scene with respect. None of the members of the response team saw defendant go into the master bathroom that evening while they were at Kathleen's residence; nor did any of them see defendant still at the residence when they were leaving. The only member of the response team that testified about a concern over the condition of the scene was Oleszkiewicz.

¶ 58 Will County Deputy Coroner Michael VanOver testified for the State that on March 1, 2004, he arrived at Kathleen's residence at about 11:14 p.m., after the paramedics had already left the scene. Upon arrival, VanOver spoke to Bolingbrook Police Officers Sean Talbot and Robert Sudd and was briefed on the situation. After the briefing, VanOver went inside the residence and was shown where the body was located in the upstairs bathroom.

¶ 59 Upon entering the bathroom, VanOver saw a Caucasian female subject (Kathleen) lying in the bathtub.

VanOver took some photographs of the scene and of the body with a Polaroid camera. VanOver noticed that Kathleen's body was cool to the touch, that there were some obvious signs of blood pooling and some slight rigor mortis, and that there were some abrasions on the body. The bathtub did not have any water in it and there were bottles of shampoo and other bath products around the tub. VanOver did not observe a wine glass or any glass of any kind in the vicinity. The inside of the tub was generally clean and the drain in the tub was closed. Kathleen's hair appeared to be dry and matted, and VanOver did not examine Kathleen's head that night to see if there were any injuries.

¶ 60 While at the scene, VanOver was told that the state police were going to be investigating the death, so he stood down and waited for them to arrive. At about 1:45 a.m., VanOver met outside with State Police Crime Scene Investigator (CSI) Bob Deel. VanOver and Deel went upstairs where Deel took photographs and processed the scene. VanOver and Deel checked the bedroom and the downstairs for medication bottles and found some in the kitchen area. They then went back upstairs to prepare the body for transport.

\*12 ¶ 61 While wearing rubber gloves, VanOver and Deel turned the body over in the bathtub so that they could reach the extremities, lifted the body out of the tub, and placed the body into a body bag. As VanOver observed the body, he was looking for obvious signs of major trauma, such as gunshot wounds, stab wounds, blunt force, bruises, abrasions, and cuts. According to VanOver, there was a suspicious death protocol in place at the time of Kathleen's death, but that protocol was not followed in this case, although VanOver acknowledged that there was not much difference between the suspicious death protocol and the non-suspicious death protocol. Deel put bags over Kathleen's hands and taped them. When Deel did so, VanOver asked Deel if he thought that there was something wrong in this case. Deel responded that he did not think so and that he was bagging the hands as a precautionary measure.

¶ 62 The body was taken downstairs and out of the residence and put in the coroner's vehicle. According to VanOver, when they carried Kathleen's body down the stairs they did not cause any damage to the body. VanOver left the residence with the body at about 3 a.m. After he left, he drove to the Will County morgue, processed the body, dictated his report, and went home.

¶ 63 During his testimony at trial, VanOver stated that he thought the circumstances of Kathleen's death were suspicious because there were no obvious signs of any

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kind of struggle or fall in the bathroom and he did not know how Kathleen would have drowned otherwise. VanOver commented that although there was a bar of soap and a shampoo bottle in the tub with Kathleen's body, none of the other bottles around the tub were disturbed and the tub was clean with no soap scum around the inside of it. In addition, in VanOver's opinion, Kathleen's body was not in a position in the bathtub that it would have come to rest naturally if she had fallen in the tub. VanOver admitted, however, that he did not tell Deel about his suspicions and that he had put in his report that it was felt by all parties, including himself, that there were no signs of foul play or trauma. VanOver stated that when he put that statement in his report, he was merely following the lead of the state police and that he had also put an indication in his report that he did not agree with the state police's assessment of the situation.

¶ 64 VanOver spoke to Kathleen's sister, Anna Doman, shortly after the autopsy but had no recollection of their conversation. According to VanOver, he would have remembered if Anna had told him about the specific threats that defendant had made to Kathleen. VanOver learned afterwards that the coroner's jury had ruled at the inquest that the manner of death was accidental. VanOver acknowledged that he did not protest that verdict to anyone and did not tell a single person that he thought the death was suspicious until 2007 when he was called into the State's Attorney's Office before Kathleen's body was exhumed.

\*13 ¶ 65 Robert Deel testified for the State that he had been a state police officer for nearly 27 years and was currently a sergeant. Deel described his training and experience for the jury, including his training and experience in investigating homicide cases and in processing crime scenes. Most notably, Deel had worked in investigations for several years; had investigated hundreds of serious crimes, including about 8 or 10 homicide cases; had investigated about 50 drowning deaths on Lake Michigan, which were accidents or suicides; had processed hundreds of crime scenes; and had been trained to spot when someone was trying to conceal a crime.

¶ 66 On March 2, 2004, Deel was dispatched to Kathleen's residence for a death investigation. He arrived at the residence at about 1:30 a.m. Defendant was not present at the scene at that time. Upon arrival, Deel was briefed on the situation by State Police Trooper Bryan Falat. Deel spent the next two hours processing the scene. As he did so, he took numerous photographs, which he identified during his testimony at trial. Deel started by walking around the outside of the residence and looking

for any sign of forced or unauthorized entry, damage or disturbance, anything out of place, or anything that seemed unusual. Nothing was out of order, and everything looked secure. Deel saw that the escape windows leading to the basement were closed but did not check to see if they were locked.

¶ 67 Deel continued with the same process inside the residence. Deel did not, however, go through every single room on either floor and did not go into the basement at all. His main area of focus was the second floor because that was where Kathleen's body was found. In one of the photographs of the master bedroom area, a can of spot cleaner could be seen on top of a dresser. Deel noticed the can that evening but did not think it was of any evidentiary value or unusual since the family had a cat. Deel did not process the can or take any fingerprints from it.

¶ 68 After examining the master bedroom, Deel worked his way into the master bathroom, looking again for anything unusual, broken, out of place, or that did not seem normal. Deel noticed that there were items on the bathroom vanity and around the tub, that Kathleen's body was inside the tub, and that there was a soap bottle in the tub as well. Deel concluded that nothing was out of place because nothing was broken and the items looked as if they had normally been placed where they were located. Deel felt that if someone was actually trying to stack things up around the tub, he would not have left the soap bottle in the tub.

¶ 69 Some of the photographs that Deel took of the scene that morning were to show the bathtub area and the position of Kathleen's body in the tub. The body did not appear to have been moved, and nothing in the bathroom appeared to have been damaged or disturbed. Deel did not, however, contact the paramedics and ask them how the body was positioned when they responded to the scene. Deel did not think there was anything unusual about the position of Kathleen's body in the tub because the tub was only so big and gravity and the weight of Kathleen's body would have pulled her further down into the tub. Knowing that the most common type of household accident was a slip and fall injury, Deel believed that the position of the body was consistent with someone who had slipped in the tub, had fallen, had possibly hit her head on the edge of the tub, and had landed in the tub in that manner.

\*14 ¶ 70 Deel discussed his observations with Investigator Collins, Trooper Falat, and Deputy Coroner VanOver. They were all in the bathroom at the time discussing what they were observing, or had observed, at

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the scene. The general consensus reached among all of them was that there was no sign of any foul play in the house. Deel did not process any of the objects around the bathtub for fingerprints. When asked why he did not do so, Deel stated that it was unclear as to what had happened to Kathleen, so Deel, and possibly VanOver, made the determination that the best course of action was to remove Kathleen's body from the scene, to attend the autopsy to try to determine exactly what had happened, and to determine from there what other investigative leads or processes to follow-up on. At that point, if it would have been necessary for any of the officers to return to the scene, they would have been able to do so.

¶ 71 As Deel and the others were preparing to remove Kathleen's body from the scene, Deel bagged Kathleen's hands and sealed the bags with tape as a precaution because they were not sure what had happened and Deel wanted to preserve any DNA or other material that might have been caught underneath the fingernails if there had been a struggle. Deel stated that it was protocol for him to do so. Another precaution that was taken was that Kathleen's body was wrapped in a white sheet, so that if any trace evidence fell off, it would be apparent to the investigators or the coroner. According to Deel, he processed all death cases the same way regardless of whether they were suspicious-death or non-suspicious death cases.

¶ 72 After Kathleen's body was removed from the scene, Deel looked inside the tub for any sign of transfer—a spot where Kathleen's head might have come in contact with the tub—but found nothing. In addition, because Deel did not see any sign of a blood trail leading to the bathroom or to the bathtub, he concluded that Kathleen must have died in the spot where she was found. According to Deel, a blood trail would not have been easy to hide, especially in this case where there was tile on the bathroom floor with grout in it. Blood on the floor would have stained the grout and would have been very easy to see.

¶ 73 As Deel investigated the scene, he tried to keep an open mind as to whether the death was a homicide, a suicide, or a natural death, but was thinking that the death was not a homicide. However, even if Deel had thought the death was a homicide, he still would have been looking for the same type of evidence—signs of a disturbance, things broken, things out of place or in disarray, or signs of a struggle. Deel looked at all of the surfaces in the bathroom and the objects in that area and thought that Kathleen may have fallen in the bathtub.

¶ 74 Deel stated that he had seen crime scenes before where people had been fighting for their lives. Indications

of that type of a struggle were such things as doors broken off the hinges, countertops broken, furniture disarrayed and broken, blood and hair all over the place, and torn clothing. Deel did not see anything remotely close to that when he processed Kathleen's house. In addition, Deel had seen a lot of blunt force trauma over the years and had seen bruises on a body from a fight to the death. There was nothing on Kathleen's body that looked like that. Although there were some bruises on Kathleen's body, they appeared to be, for the most part, the type of bruises that a person would have from daily life and did not raise any suspicions for Deel. There was nothing indicative of a beating or of any kind of blunt force trauma. The only evidence that Deel obtained from the bathroom were the photographs he had taken. Deel did not recall if there was a garbage can in the bathroom or whether he looked inside of that garbage can.

\*15 ¶ 75 Once the body was out of the house and placed in the coroner's van, Deel was finished processing the scene, and he left. In addition to the photographs that Deel had taken in the master bedroom and master bathroom, Deel had also taken photographs of the garage, the kitchen, and the outside of the house. The photographs in the kitchen, including one that showed a glass of orange juice and a pack of pills on the kitchen counter, were taken at the direction of another investigator. Deel did not remember who asked him to take that particular photograph.

¶ 76 As part of his job responsibilities as a CSI, Deel attended the autopsy conducted by Dr. Mitchell and took photographs. Although the photographs from the scene were not yet available for Deel to show them to Dr. Mitchell, as Deel photographed an autopsy, he would tell the pathologist what he had found or saw at the scene so that the pathologist could take Deel's observations into account in making his report. During the autopsy in this case, there was a discussion between Deel, a deputy coroner, and Dr. Mitchell as to the nature of Kathleen's death. Deel used that discussion to help him determine what his next step would be in the investigation.

¶ 77 Dr. Mitchell told Deel that Kathleen's death was not a homicide. Mitchell had passed away about two years before defendant's trial. Deel had talked to Mitchell from time to time in the years prior to his death and after the autopsy of Kathleen's body and at no point did Mitchell ever waiver in his opinion that Kathleen's death was not a homicide. Mitchell did, however, tell Deel at a later date that although he did not think the death was a homicide, he felt that the case should have been classified as an undetermined death. Deel had been interviewed by the State's Attorney's Office several times but was still of the

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opinion that Kathleen's death was an accident.

¶ 78 Patrick Collins testified for the State that he was a state police officer and that he retired in 2008 at the rank of sergeant. On March 1, 2004, Collins was called out to Kathleen's residence to investigate her death. Prior to that time, Collins had been in the investigations unit for about three years but had not investigated a single homicide case that was not traffic or highway related. Collins's supervisor had called him that evening and had briefed him on the situation and had told him that it appeared to be accidental.

¶ 79 Upon his arrival at Kathleen's residence, Collins was directed upstairs where he met with Deel and Falat. Deel briefed Collins on the situation and told Collins that the death appeared to be accidental. That was about 10 minutes after Collins had arrived on the scene. Collins asked Deel if Deel could walk him through the scene to see if there was any evidence that might need to be collected because it was a learning experience for Collins. Deel agreed and took Collins and Falat through several locations in the house over a five to seven minute period, while Collins and Falat asked Deel some questions. Deel was not collecting any items of potential evidence at that time. Collins confirmed during his testimony that he did not look inside the washing machine at the residence to see if there was a bath mat that was being washed.

\*16 ¶ 80 Before Collins assisted with the removal of the body from the scene, he went back to the bathroom to look at the body one more time and noticed that there was a laceration on the back of Kathleen's head. Collins asked Deel how Kathleen could have gotten that laceration, and Deel stated that Kathleen possibly slipped in the tub and struck her head. With regard to Kathleen's body, Collins did not see anything out of the ordinary or anything that would indicate that Kathleen had been in a fight, had been beaten, or had been in a serious struggle.

¶ 81 At about 2 a.m., Collins and Falat went next door to Steve Carcerano's house and interviewed four of the neighbors. Each person was interviewed separately. During those interviews, there was no indication by any of the neighbors that defendant had any way of getting into Kathleen's house. In addition, all of the neighbors confirmed that defendant and Kathleen were getting along much better in 2004 than they had previously.

¶ 82 After those interviews were completed, Collins and Falat notified the Bolingbrook police commanders that they needed to interview defendant. Initially when Collins and Falat discussed where the interview would take place, Collins suggested defendant's house and Falat suggested

state police headquarters. They compromised and conducted the interview at the Bolingbrook police department. The interview took place in one of the interview rooms at about 6 a.m. on Tuesday, March 2, 2004. Present for the interview were Collins, Falat, and defendant. According to Collins, defendant was cooperative during the interview, answered all of Collins's questions, and gave Collins a complete account of his whereabouts.

¶ 83 Defendant told Collins that his relationship with Kathleen had been going well, despite the fact that they were in the final steps of their divorce and the financial terms of the divorce had not yet been finalized. According to defendant, he and Kathleen were getting along much better in 2004 than they had previously. At one point, Collins asked defendant how he would benefit from Kathleen's death, and defendant stated that he and Kathleen owned the house jointly, which was paid off at the time, and was valued at about \$300,000. Defendant initially indicated that he would get half the value of the house but then stated that with Kathleen's death, he would get the whole value. When asked about insurance, defendant stated that he would not benefit from the insurance policy because Kathleen had changed the paperwork and had left the insurance money as a trust to the boys. Defendant told Collins that the last time that he had seen or had spoken to Kathleen was the previous Friday at about 5 p.m. when he picked up the boys. At that time, Kathleen appeared to be fine and nothing appeared to be wrong with her. Kathleen had indicated that she had plans for the weekend but did not tell defendant what her plans were.

¶ 84 Collins asked defendant if there was any possibility that Kathleen had committed suicide, and defendant responded that there was not and that he could not see Kathleen living without the children. When asked about medications, defendant commented that Kathleen was on an antidepressant because of the stress of the divorce and for other reasons.

\*17 ¶ 85 When asked to describe the events of that particular weekend, defendant told Collins that on Saturday, he spent the day at the home with his wife and children just doing the activities that they would normally do. On Sunday morning, after breakfast, defendant and the rest of the family left on a preplanned trip to the Shedd Aquarium in Chicago. They got home about 4:15 p.m. Defendant had to work at 5:30 p.m. At about 7 p.m., defendant tried to return the two boys to Kathleen, but no one answered the door or phone at Kathleen's house. Defendant thought that maybe he was supposed to have the children for the entire holiday weekend, took the

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children back to his house, and went back to work. Defendant stated that he might have driven by the residence during his shift to see if it appeared that anyone was home.

¶ 86 On Monday, defendant again spent the day at home with the children. Defendant made several attempts to contact Kathleen but was unable to reach her. Defendant had to work again that afternoon. At about 7 p.m. on Monday night, defendant again tried to return the children to Kathleen without success. Unable to make contact with Kathleen, defendant went next door to Mary Pontarelli's house. Mary told defendant that she had not seen Kathleen since about noon on Saturday. Defendant responded that he was somewhat concerned and that he was considering calling a locksmith if he did not hear from Kathleen by Tuesday.

¶ 87 Later that night, after Mary's son had spoken to Kathleen's boyfriend, Mary contacted defendant and told defendant that they should have the locksmith come to Kathleen's house that evening. Defendant did so, and the locksmith came and opened the door to Kathleen's house. At that point, the neighbors went into the house to look for Kathleen, while defendant remained outside. Several moments later, defendant heard a scream. Defendant went up to the bathroom and saw Kathleen's lifeless body in the tub. Defendant panicked and did not remember whether he had called for medical assistance on his police radio or on his cell phone.

¶ 88 After Collins and Falat were finished interviewing defendant, Collins told defendant that they would have to speak to his wife, Stacy. The interview of Stacy took place the following day on March 3, 2004, in the basement of defendant's home. On the way down to the basement, defendant asked Collins if he could sit in on the interview as a professional courtesy because Stacy was very nervous, shaken, and afraid, and was aware that with Kathleen's death, she was going to have to take on some new responsibility in raising the children. In addition, Stacy had recently had a baby of her own. Collins agreed. Falat's report of the interview, however, which Collins had subsequently reviewed and initialed, did not indicate that defendant sat in on Stacy's interview. Collins noted during his trial testimony that all of the reasons that defendant gave him for being allowed to sit in on the interview of Stacy appeared to be true. That was the only time that Collins had ever let one witness sit in on the interview of another witness.

\*18 ¶ 89 Present for Stacy's interview were Collins, Falat, defendant, and Stacy. They sat in chairs in the basement with Collins and Falat facing defendant and Stacy.

Defendant sat very close to Stacy during the interview, and one of them was holding the baby. Stacy was very emotional and distraught. Defendant had his hand on Stacy's leg and possibly his arm around her. At one point, defendant had to refresh Stacy's memory as to what she had made for breakfast Sunday morning. During the interview, Stacy became very upset and shaken and started to cry. All of the extra responsibility that Stacy would have had was one of the subjects that she became emotional about. At that point, Collins and Falat ended the interview. According to Collins, defendant's presence at the interview was nothing more than a concerned husband giving moral support.

¶ 90 Collins did not attend the March 2004 autopsy or the coroner's inquest, although other officers did so. Collins never heard from any member of Kathleen's family during the initial investigation in 2004 and did not try to contact them. In addition, neither Collins nor Falat spoke to defendant's and Kathleen's two children during the initial investigation. That decision was made by Collins's supervisor. At some point, Collins dropped the case file off at the State's Attorney's Office for review and was later told that the case could be closed out.

¶ 91 Bryan Falat testified for the State that he was currently a master sergeant with the state police. At the time of Kathleen's death, Falat was serving in a temporary capacity in the investigations unit so that he could learn by assisting the investigators with their cases. On March 1, 2004, Falat was called to Kathleen's residence to assist Sergeant Pat Collins with the death investigation. Collins was the head of the investigations unit.

¶ 92 For the most part, Falat's testimony about the investigation was similar to that of Deel and Collins. However, the following additions and exceptions must be noted. Falat checked the residence that evening and found and pointed out to Deel a glass of orange juice with a pack of pills next to it on the kitchen counter; a cup of what appeared to be coffee or tea in the kitchen microwave; and what appeared to be a used condom in the garbage can in the master bathroom located a few feet away from the bathtub. In the basement of the residence, Falat saw that the windows were not broken but did not touch the windows or the locks because he did not know if Deel was going to try to pull fingerprints off of them later. Although Falat knew that Mary and Tom's son, Nick, had been present with the others when Kathleen's body was found, Falat did not interview Nick. When Collins told Falat that they were going to interview defendant at the Bolingbrook police department, Falat responded that he did not think it was a good idea to do

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the interview at a place where defendant felt comfortable and that they should interview defendant at state police headquarters. Collins had a higher rank than Falat and was Falat's boss, so they went to the Bolingbrook police department to conduct the interview. During the interview, defendant's demeanor was cooperative, almost jovial-like, and defendant was joking. When Falat found out, as they were heading down into defendant's basement to interview Stacy, that defendant was going to sit-in on Stacy's interview, he pulled Collins aside and told Collins that he did not think it was a good idea for defendant to be present and that they never interviewed two people in the same room at the same time. After Collins and Falat discussed the matter, they interviewed Stacy with defendant sitting in. Falat did not put in his report that defendant was present for Stacy's interview because the intention was to re-interview Stacy later without defendant present. The report was only meant to be a summary of the interview.

\*19 ¶ 93 Dr. Larry Blum testified for the State as an expert witness in forensic pathology.<sup>4</sup> Blum was hired in 2007 by the Will County Coroner's Office to conduct a second autopsy on Kathleen's body after it was exhumed and to determine both the cause and manner of Kathleen's death. As part of his work in this case, Blum reviewed many of the reports and photographs and also went to Kathleen's house and viewed the bathroom and bathtub where Kathleen had died.<sup>5</sup>

¶ 94 The first autopsy in this case had been conducted in 2004 by the late Dr. Bryan Mitchell, a well-esteemed forensic pathologist, who had died in 2010. Blum described that autopsy at length. According to Blum, Mitchell had conducted a thorough examination and had found that Kathleen was in generally good physical condition, that her organs and body systems were basically normal, and that she did not have any drugs or alcohol in her system. Kathleen had various injuries at the time of her death, including a laceration to the back of her head, bruises to the front of her left hip and other areas of her body, and an abrasion on her left buttocks, all of which Mitchell examined, described, photographed, and documented in his autopsy report. Mitchell stated in his report that the laceration to the back of the head may have been related to a fall in which Kathleen had struck her head. While conducting the examination, Mitchell observed various characteristics in Kathleen's body and brain that indicated that Kathleen had drowned. Mitchell concluded, therefore, that the cause of Kathleen's death was drowning. Mitchell made no determination, however, as to the manner of Kathleen's death.

¶ 95 Blum performed the second autopsy on Kathleen's

body in November 2007 at the Will County Coroner's facility. Dr. Mitchell, who was still alive at the time, assisted with the autopsy. After conducting a thorough examination, Blum concluded that Kathleen had drowned and that her death was a homicide. Blum explained to the jury at length the reasons for his findings and conclusions in that regard. Blum noted, among other things, that Kathleen had no drugs or alcohol in her system; that none of the risk factors for accidental drowning or suicide were present; that in his opinion, the pattern of injuries and the position of Kathleen's body were not consistent with an accidental fall; that there was an absence of injuries on the backside of Kathleen's body that would have been present if she had fallen backward in the tub; and that the dry rivulets of blood on Kathleen's face from her head wound would not have formed if there had been water in the tub when Kathleen's head was bleeding.<sup>6</sup> Blum reviewed the reports provided to him by the defense of three other forensic pathologists: Dr. DiMaio, Dr. Jentzen, and Dr. Spitz, all of whom had concluded that Kathleen's death was an accident. Blum did not agree with those conclusions and did not change his opinion based upon those doctors' reports.

\*20 ¶ 96 Dr. Mary Case testified for the State as an expert witness in forensic pathology and neuropathology (a small specialty within pathology that dealt with diseases and injury of the nervous system). In 2010, the Will County State's Attorney's Office hired Case to review Kathleen's death. After a review of the matter, Case concluded that Kathleen had drowned and that her death was a homicide. Case explained to the jury at length the reasons for her findings and conclusion in that that regard. Case noted, among other things, that in her opinion, the injury to the back of Kathleen's head would not have caused her to lose consciousness. As part of her work in this matter, Case reviewed the opinions of Dr. Spitz, Dr. Jentzen, Dr. DiMaio, and Dr. Leestma, all of whom had concluded that Kathleen's death was an accident. Case disagreed with those opinions and explained to the jury why she disagreed with those opinions.

¶ 97 Dr. Vinod Motiani testified for the State that he was Kathleen's primary care physician from 1992 through 2003. During that time period, Motiani treated Kathleen for a variety of medical complaints, which he described in detail. Motiani did not at any time diagnose Kathleen as having any condition that would have caused her to be at a greater risk of falling than any other normal person, although he acknowledged that even a perfectly normal person could fall. Motiani also acknowledged that Kathleen was taking certain medications at various times and that there were possible side effects to those medications.

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¶ 98 Dr. Gene Neri testified for the State that he was Kathleen's treating neurologist from 1999 through 2002. When Neri first started treating Kathleen, she was having some pain in her neck and shoulders; some dizziness; some numbness and tingling in her arms, legs, hands, and feet; occasional trouble swallowing, and felt very unsteady in her gait. Neri diagnosed Kathleen with cervical vertigo. According to Neri, cervical vertigo was not like true vertigo where the person felt as if everything was spinning, but, rather, was more of a feeling of instability where the person did not feel very confident of place and space. Neri believed that Kathleen's condition was caused by stress, anxiety, lack of sleep, and tension in her back and neck muscles. As part of Kathleen's treatment, Neri prescribed Lorazepam and Zoloft. According to Neri, Kathleen progressed well through treatment to the point where her cervical vertigo had improved, her muscles were loose, the numbing and tingling in her hands and feet were gone, and she was less depressed and less anxious. Kathleen was still cautious but considerably better.

¶ 99 During his testimony, Neri opined that despite Kathleen's symptoms and treatment, she was not predisposed to fall or slip in a bathtub. In Neri's opinion, Kathleen's chances of falling were less than average because a person who felt unsteady was going to be very cautious and would hold onto things more. Neri acknowledged that he had not seen Kathleen as a patient since February 2002 and that he had no idea what Kathleen's medical condition was like at the time of her death. Neri acknowledged further that there were possible side effects to the medications that Kathleen was taking or had taken and that all of Kathleen's symptoms would eventually return if she was under stress and was not taking her medications.

\*21 ¶ 100 Anna Doman testified for the State that she was Kathleen's older sister. About six weeks before Kathleen's death, Kathleen came to Anna's house in the afternoon unexpectedly and was afraid and upset. Anna asked Kathleen what was wrong. Kathleen stated that defendant had told her that he was going to kill her, that she was not going to make it to the divorce settlement, and that she was not going to get his pension or the children. Defendant had stated further that he was going to kill Kathleen and make it look like an accident. Kathleen made Anna promise repeatedly to take care of the boys because everything was going to go to them. Kathleen told Anna that if anything happened to her to get her briefcase out of her car because it had all of her important papers in it. According to Anna, Kathleen was very scared and told Anna many times that defendant was

going to kill her and make it look like an accident.

¶ 101 During her testimony, Anna talked about learning of Kathleen's death and about going to Kathleen's house the following day with family members. While they were at Kathleen's house, defendant pounded on the outside door and yelled for them to open it. Once inside, defendant went around with a clothes basket and retrieved things from the house that he said the boys needed for school. At one point, Anna saw defendant cleaning up the blood in the bathtub. Defendant told Anna that he did not want the boys to see the blood. Before defendant left, he took \$100 out of Kathleen's purse, put it in his pocket, and said that the money belonged to the boys. Defendant also took Kathleen's garage door opener and refused to give it back.

¶ 102 According to Anna, about two times in the year prior to Kathleen's death, she had seen Kathleen getting ready to take a shower or bath and Kathleen was not wearing any jewelry. Anna did not tell police that information because she did not know that Kathleen had a necklace on when her body was found. In addition, although Anna told police that Kathleen would put her hair up when she bathed, Anna did not specifically tell them that Kathleen would put her hair up in a clip.

¶ 103 During her testimony, Anna acknowledged that even though she had obtained Kathleen's briefcase shortly after Kathleen's death, she did not turn over the documents in the briefcase to the state police until about 2007. Anna gave copies of those documents to the producer of the Greta Van Susteren show, even before she turned them over to the police. Anna also gave the producer of the show a copy of Kathleen's death certificate, which indicated that Kathleen's death was accidental. Anna described during her testimony the circumstances by which she met Greta Van Susteren, which she stated were completely by chance. When Anna told Greta that she was not happy about what was listed on Kathleen's death certificate, Greta said that she could put Anna in contact with a world-renowned pathologist, Dr. Michael Baden. An autopsy was later conducted on Kathleen's body by Dr. Baden. Anna did not pay for that autopsy and thought that Dr. Baden had done the autopsy for free.

\*22 ¶ 104 Anna also acknowledged that she did not tell anyone about the threats defendant had made to Kathleen until about 2007, although she did try to get into Kathleen's safety deposit box in 2004 and did try to become the administrator of Kathleen's estate. According to Anna, the police never interviewed her after Kathleen's death and would not listen to her or her family's concerns.

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Anna conceded during her testimony, however, that she did not try to get custody of the two boys after Kathleen's death and had not seen them since the funeral.

¶ 105 Susan Doman testified for the State that she was Kathleen's sister. During the divorce, Susan stayed over at Kathleen's house on at least two occasions. On both occasions, Susan had seen Kathleen getting ready to take a bath. Each time, Kathleen had her hair up. In addition, on the first occasion, it looked like Kathleen may have had some type of comb holding up her hair. According to Susan, Kathleen did not use a ponytail holder to put her hair up and could not use bobby pins to do so because her hair was very long and curly. Susan had never seen Kathleen put her hair up using a towel but acknowledged that it was possible that Kathleen had done so.

¶ 106 Susan stated that on one occasion, Kathleen had told her about an incident where defendant had made his way into Kathleen's home. Kathleen told Susan that during the incident, defendant had held a knife to her throat and had said that he could kill her and make it look like an accident. Kathleen was terrified and described the incident to Susan several times.

¶ 107 On the Thursday before Kathleen's death, Kathleen called Susan during the evening and told Susan to take care of her boys. Susan did not know if Kathleen and defendant were arguing at the time. Susan and Kathleen talked about getting together over the weekend but were unable to do so. Kathleen had to study that weekend for finals and had indicated that she was planning on seeing the two boys on Monday.

¶ 108 During her testimony, Susan described how she found out about Kathleen's death and what had happened at Kathleen's house the next day. According to Susan, after defendant came into the house, Susan asked him if he had killed Kathleen. Defendant was very surprised. He kind of choked and said that he would not kill the mother of the children. While defendant was at the house that day, Susan saw him cleaning up the blood in the bathtub.

¶ 109 In May 2004, Susan testified at the coroner's inquest. She told the inquest jurors about the threats that defendant had made to Kathleen and about the fact that defendant had gotten remarried to a younger woman. Susan also told the inquest jurors that Kathleen was not on any medications of which she was aware. When Susan later testified before the grand jury, however, she indicated that Kathleen was taking Zolof and another medication for a heart murmur. At some point after Kathleen's death, Susan brought a wrongful death suit against defendant on behalf of the children.

\*23 ¶ 110 During her testimony, Susan acknowledged that she had entered into a contract for a book and movie deal involving Kathleen's death and the prosecution of defendant. The contract was entered into in October 2009 and was supposed to last for two years. A copy of the contract was admitted into evidence and Susan was questioned extensively about it.

¶ 111 Kristin Anderson testified for the State that she was friends with Kathleen and that she and her family rented the basement in Kathleen's home from September until November 2003, while a new house was being built for Kristin's family. During that time period, Kristin saw Kathleen on a daily basis and never once saw defendant in Kathleen's house. Kristin and her husband worked opposite schedules, so there was always one of them present in Kathleen's home. While Kristin lived at Kathleen's residence, she did not observe any problem with Kathleen's ability to walk or balance. According to Kristin, Kathleen ran up and down the stairs doing laundry without any problem and worked in the kitchen just fine without having any trouble and without bumping into things.

¶ 112 In about October 2003, Kristin had a conversation with Kathleen in the master bedroom, after she noticed that Kathleen seemed upset about something. Kathleen told Kristin that prior to Kristin's family moving in, defendant had broken into the house dressed in a SWAT uniform, had held her at knife point, and had said to her that he could kill her and make it look like an accident. Kathleen showed Kristin a knife that she kept under her mattress for protection. Kristin and her family moved out of Kathleen's residence during the daytime on November 25, 2003, shortly before Thanksgiving.

¶ 113 In March 2004, after learning of Kathleen's death, Kristin called Mary Pontarelli and expressed her concerns. Over the next few days, Kristin made three phone calls to the state police. During one of those phone calls, Kristin explained her concerns to the state police in detail. Kristin heard nothing back from the state police and took no further action at that time.

¶ 114 In December 2007, the state police contacted Kristin about the case. Kristin informed the investigators of what Kathleen had told her in fall 2003 about defendant breaking into the house. According to Kristin, she was interviewed three times and each time, she told the investigators that Kathleen stated that defendant had broken into the house in his SWAT uniform, that he had a knife, and that he told Kathleen that he could kill her and make it look like an accident. Kristin acknowledged,

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however, that the word “knife” did not appear anywhere in the police report.

¶ 115 Mary Parks testified for the State that she met and became friends with Kathleen in 2002 while they were both taking nursing classes at Joliet Junior College (JJC). In fall 2003, right before Thanksgiving, Parks talked with Kathleen in an empty classroom at JJC. Kathleen was wearing a long-sleeve top with a high collar that was zipped up and looked as if she was in shock. Kathleen unzipped her collar, and Parks saw three dark red marks on Kathleen’s neck, one on each side and one in the middle at about center height. Kathleen told Parks that the previous night, defendant came into her house in a black police uniform, grabbed her by the neck while she was coming down the stairs, pinned her down, and told her, “why don’t you just die.” Kathleen’s children were upstairs at the time. Parks told Kathleen that she should call the police and offered to let Kathleen and her two boys live at Parks’s house with Parks and her husband. Kathleen declined Parks’s offer. Parks did not remember Kathleen saying anything about a knife during that conversation. In addition, on about four occasions in fall 2003, Parks walked Kathleen to her car at JJC because Kathleen was afraid that defendant would be out there. Parks never saw defendant on any of those occasions. As they walked to Kathleen’s car, Kathleen told Parks that defendant had stated that he could kill her and make her disappear. Defendant had also told Kathleen that he could do something to her and make it look like an accident.

\*24 ¶ 116 In the middle of March 2004, Parks called the State’s Attorney’s Office from a payphone at JJC to find out if there was an investigation into Kathleen’s death. Parks was told that the matter was not under investigation at that time. Parks thanked the woman and hung up. Parks did not tell the woman about the threats that defendant had made to Kathleen. In November 2007, on the day that Kathleen’s body was being exhumed, Parks spoke to Kathleen’s brother, Henry, but did not tell Henry about the information that she had. In August 2008, Parks talked to the state police for the first time about the case.

¶ 117 Parks initially stated in her trial testimony that Kathleen had told her about defendant’s statement (that he could kill her and make her disappear) in October 2003 and that the incident with the marks on Kathleen’s neck was in November 2003. However, after Parks was confronted with the transcripts from JJC, she realized that she had misspoken and that the Kathleen had actually told her about defendant’s statement in fall 2002. Parks maintained that the incident with the marks on Kathleen’s neck was in November 2003.

¶ 118 According to Parks, Kathleen was very obsessive about keeping her house locked and would carry a phone with her at all times in the house. Kathleen told Parks that she and defendant were fighting over their mutual businesses. Kathleen was very careful about where she went and what she did and was afraid that defendant would get her when she was away from home. Parks, however, did not remember Kathleen ever mentioning in their conversations that she kept a knife under her mattress at home.

¶ 119 Neil Schori testified for the State that he had a Master’s Degree in ministry counseling and that he met defendant and Stacy in late 2005 or early 2006 when he ministered to them as the counseling pastor at a Christian church in Bolingbrook. In late August 2007, Schori received a phone call from Stacy and arranged to meet with her the following morning on the patio of the local Starbucks. Schori did all of his counseling sessions out in public, usually at a coffee shop, because he never wanted to have any questions of impropriety on his part. On that particular occasion, Schori also brought a second person with him to sit nearby and to observe the counseling session because he sensed from Stacy’s phone call that he needed to have someone else present to see what was going on. Schori denied that it was because he felt that Stacy was trying to seduce him. As far as Schori knew, the second person was not listening to Schori’s conversation with Stacy. In addition, Schori did not believe that any of the other people who were outside at Starbucks that morning overheard his conversation with Stacy, although he did not know for sure.

¶ 120 When Schori arrived at Starbucks that morning for his meeting with Stacy, Stacy was already there, sitting on the patio by herself. She appeared to be nervous and tentative. Schori talked to Stacy for about 2 hours. At one point during the conversation, Stacy became more upset. She withdrew physically into herself, pulled her leg up, and was hugging it. Schori could see that Stacy was silently crying and that she had tears streaming down her cheeks. Stacy indicated that she had something to tell Schori about the night that Kathleen had died.

\*25 ¶ 121 Stacy told Schori that on one particular occasion, she woke up during the middle of the night and noticed that defendant was not in bed with her. She looked around the house but was unable to find defendant. Stacy called defendant’s phone but was unable to reach him. Sometime later, in the early morning hours, Stacy saw defendant in their house near the washer and dryer. Defendant was dressed in all black and was carrying a bag. Defendant removed his clothing and the contents of the bag and put it all into the washer. Stacy walked over

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to the washing machine, looked inside, and saw women's clothing that did not belong to her.

¶ 122 Shortly thereafter, Stacy had a conversation with defendant. Defendant told Stacy that soon the police would want to interview her. Defendant spent hours telling Stacy what to say to the police. Stacy told Schori further that she had lied to the police on defendant's behalf. Stacy did not tell Schori exactly what day the incident had occurred, and Schori did not have previous knowledge of Kathleen's death, other than some rumors he had heard. As Stacy was telling Schori the information, she continued to cry and was very scared. Initially, Schori did not tell anyone what Stacy had told him because Stacy had asked him not to do so. According to Schori, it was important to honor Stacy's request to maintain the integrity of the counseling session.

¶ 123 Schori confirmed during his testimony that he engaged in marital counseling in public places. When asked why he did not counsel people at the church in a private setting to discuss private issues, Schori stated that he did not believe that it had to be done that way. Schori acknowledged, however, that he was not a licensed counselor. Schori did not take notes during his counseling sessions and did not keep a log of when he met with Stacy. Schori did not know if what Stacy was telling him was the truth but believed that Stacy was being truthful. Schori acknowledged, however, that when he and Stacy talked, Stacy also told him that defendant had stated that he had killed his own men while he was in the army.

¶ 124 After their meeting in August 2007, Schori did not meet with Stacy again or follow up with her. He did not attempt to verify any of the information that Stacy had told him. Schori also did not reach out to Kathleen's family and provide the information that he had to them. In October 2007, Schori came forward and provided the information to the state police.

¶ 125 Bolingbrook Police Lieutenant James Coughlin testified for the State that in February 2004, he and Officer Rich Treece, saw defendant with a couple of other gentlemen at the Will County courthouse. Coughlin and Treece were near the elevators on the third floor of the court house at the time. Defendant was in plain clothes, and Coughlin assumed that defendant was there for his divorce case. The two gentlemen behind defendant were laughing, and Treece commented that they appeared to be happy. Defendant responded that the men were happy because they were getting all of his money. Coughlin and Treece took the comment to mean that the lawyers were getting all of his money. Defendant commented further that his life would be easier if she (Kathleen) was just

dead or died. Coughlin did not remember the exact wording. According to Coughlin, defendant was very irritated at the time. Coughlin remembered the conversation because Kathleen died a few weeks later. Following her death, Coughlin informed the state police of the conversation, although neither he nor Treece were formally interviewed by the state police. Coughlin did not think that defendant was serious when he made the comment.

\*26 ¶ 126 Susan McCauley testified for the State that she used to work at a bar defendant owned and was friends with defendant. On March 20, 2004, about three weeks after Kathleen's death, McCauley saw defendant at a fundraiser at the bowling alley in Bolingbrook. McCauley gave defendant a hug, told him that she had heard what had happened, and asked how the boys were doing. Defendant responded that the boys would be fine and that Kathleen was crazy. McCauley was taken aback by defendant's response and stated to defendant that she did not understand how Kathleen had died in a dry bathtub. Defendant told McCauley that the bathtub was a newer tub that would drain after a certain amount of time and that Kathleen was taking antidepressants or some sort of psychiatric medication and had been drinking wine. McCauley told defendant that he must have had a lucky horseshoe "up his a\* \*." Defendant chuckled and asked why, and McCauley stated that now defendant would not have to pay child support and would get the house and his pension. Defendant laughed it off and made a couple of jokes.

¶ 127 Teresa Kernc testified for the State that she was a Bolingbrook police officer from 1983 until she retired in 2005. Kernc worked with defendant but was not friends with him. Kernc was in charge of the dayshift, and defendant was in charge of the night shift. On July 18, 2002, Kernc and Officer Malloy were assigned to take a delayed domestic report from Kathleen regarding a July 5, 2002, incident. Kernc and Malloy interviewed Kathleen at her residence. Defendant was not present at the time. Kathleen told Kernc that during the morning hours of July 5, she returned home after running some errands. As she was coming down the stairs, defendant came out from the living room in his SWAT uniform, pushed her down on the stairs, and would not let her up. Defendant kept Kathleen there for 3½ hours talking about their life together and wanting her to say that the divorce was her fault. Defendant asked Kathleen if she was afraid of him, and Kathleen stated that she was. Eventually, Kathleen got tired of sitting on the stairs and told defendant to leave or to do what he came to do and to kill her. Defendant asked Kathleen where she wanted it, and Kathleen said in the head. Defendant took out his knife and told Kathleen

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to turn her head. Kathleen turned her head and waited. Defendant told Kathleen that he could not hurt her and left the residence. Kathleen did not file a report on the day of the incident because she felt that defendant was unstable and because defendant had told her that if she did file a report, he would deny it.

¶ 128 After the interview, Kernc asked Kathleen to give a written statement about the incident. When Kathleen had completed the statement, Kernc read it and realized that Kathleen had not put anything in the statement about defendant pulling out his knife. Kernc told Kathleen to put that information into the statement. Kathleen did so, and then, a short time later, scribbled out that portion of the statement because she did not want defendant to lose his job or to be arrested. Kernc then read the written statement to the jury.

\*27 ¶ 129 When Kernc spoke to Kathleen that day, she did not know that police officers had been at Kathleen's house on July 11, 2002, for a visitation issue and that Kathleen had failed to report the July 5 incident to those officers. Kernc also did not know that Kathleen had just been served that morning with two battery charges that defendant had filed against her, although Kernc admitted that she might have previously testified at the hearsay hearing that she did know that information. Kernc did not observe any injuries on Kathleen when she took the report. Although Kathleen did not want a police report filed, Kernc told her that a report had to be filed and that the allegations were going to be investigated.

¶ 130 Kathleen told Kernc that she had called her attorney, Harry Smith, and her friend, Mary Pontarelli, about the incident. Kernc never contacted Smith. Kernc spoke to defendant about the allegations during the course of her investigation, and defendant admitted that he had gone over to Kathleen's house that day. Kernc also spoke to Pontarelli about the matter. Based upon her complete investigation, Kernc had concerns about whether the incident actually occurred.

¶ 131 Joseph Steadman testified for the State that in 2004, he was a senior claim adjuster for an insurance company in Chicago, Illinois, and that he had worked on the insurance claim that was filed regarding Kathleen's death. During his testimony, Steadman identified two memos that he had made of his phone conversations with defendant regarding the claim. The first conversation took place on or about March 15, 2004. In the memo for that conversation, Steadman stated that he asked defendant what Kathleen had died from, and defendant stated that Kathleen had been found dead in her bathtub and that he thought it was drug related. Defendant did not claim to be

a beneficiary under the policy, but rather, stated that he was representing his two sons. The second conversation took place on or about April 21, 2004. In the memo for that conversation, Steadman stated that he called defendant with some questions after he had received the written proof of loss from defendant. During their conversation, defendant told Steadman that he was a Bolingbrook police officer, that he was working on the night of Kathleen's death, that he was the first person on the scene, and that he found Kathleen's body. Defendant stated further that he was not allowed to investigate the death because if Kathleen had been murdered, he would be one of the suspects since he was Kathleen's ex-husband. Steadman wanted to know if a final death certificate had been issued and whether the case was still under investigation. Defendant told Steadman that the case was still under investigation and gave Steadman the name and phone number of the state police investigators involved. According to Steadman, defendant was not the only individual that he had spoken to during the course of handling that particular claim. The first person who had contacted Steadman about filing a claim on the policy was Anna Doman.

\*28 ¶ 132 Jennifer Schoon testified for the State that she had previously dated defendant's son, Stephen Peterson, and that she had lived with Stephen in the basement of defendant's home from about June 2003 through March 2005. On Sunday, February 29, 2004, Jennifer was present in the residence when defendant left to take the two boys back to Kathleen's house after weekend visitation. Defendant returned to the residence a short time later with the two boys. Jennifer did not remember that ever happening before. Defendant made some phone calls to try to locate Kathleen so that he could return the children. According to Jennifer, defendant was annoyed that Kathleen was not there when he tried to drop the children off. The following evening, March 1, defendant told Jennifer that Kathleen had been found dead. Later that night or early the next morning, defendant told Jennifer more details about what had happened. Defendant stated that Kathleen was found dead in the bathtub, that she had hit her head and drowned, that there was no water in the tub when Kathleen was found because the tub had a leak in it, and that there was blood in the tub from Kathleen hitting her head. Defendant also stated to Jennifer that there were some antidepressants on the counter in Kathleen's home and that Kathleen may have taken them, although, according to Jennifer, that was just defendant's opinion.

¶ 133 At different points throughout the course of the trial, the trial court heard arguments and made rulings on various aspects of the State's motion to admit the

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testimony of Jeffrey Pachter regarding defendant's alleged offer to hire someone to kill Kathleen. On August 2, 2012, as the trial was ongoing, the State filed a late Rule 404(c) notice as to Pachter's testimony in the form of a motion to admit the testimony. On August 16, 2012, the trial court found that Pachter's testimony was testimony of a prior bad act of defendant. The following day, the trial court ruled that there was good cause to allow the State's late filing of its Rule 404(c) notice. The defense asked for a Rule 404(b) hearing by proffer. The trial court conducted the hearing, found that Pachter's testimony was admissible, and granted the State's motion to admit the testimony.

¶ 134 On August 22, 2012, the State presented the testimony of Pachter. Over the continuing objection of the defense, Pachter testified that he was currently 38 years old and that he lived in Braidwood, Illinois. In about 1993, Pachter was convicted of criminal sexual abuse in Du Page County and was required to register as a sex offender for 10 years. The charge in that case had been reduced from a felony to a misdemeanor.

¶ 135 In 2003, Pachter, defendant, and Rick Mims were all working for Americable or one of its subcontractors. Pachter would talk to defendant at company meetings and found defendant to be a friendly person. Pachter had also previously described defendant as an honest person as well. In summer 2003, Pachter asked defendant to run a background check on him because he was having trouble getting another job. Defendant looked into the matter and told Pachter that he had an FBI number, which he could not have unless he was a convicted felon. As a result of that conversation, Pachter was able to correct the problem (he had not been convicted of a felony) and was grateful to defendant for his help. Also in 2003, Pachter asked defendant if he would loan him money to pay off a \$1,000 gambling debt. Defendant declined and told Pachter that he did not loan money to friends because it caused too many problems.

\*29 ¶ 136 In November 2003, Pachter went on a police ride-along with defendant. At the time of the alleged ride along, Pachter was a convicted and registered sex offender. Pachter arrived at the police department at about 10:30 p.m., checked in at the front desk, signed a form, and left with defendant in his squad car. The ride-along lasted for about half an hour. During that time, defendant and Pachter drove around Bolingbrook and talked. After some basic small talk, defendant asked Pachter if he could find someone to take care of his third wife because she was causing him some problems. Defendant offered Pachter \$25,000 and told Pachter that if he could find someone to do the job for less, he could keep the

remaining balance. Defendant did not state the reason why he wanted Kathleen killed, and Pachter did not ask. At the end of the ride-along, defendant told Pachter that the conversation was something that Pachter would take to his grave. Defendant told Pachter further to let defendant know if Pachter found someone to do the job, so that defendant could make sure that he had an alibi. Defendant stated that he either wanted to be out of the country on vacation or at Great America and that he would cause a fight or something so that there would be a record of him being there at the time.

¶ 137 Several months after the ride-along, in July 2004, Pachter called defendant to see how he and his family were doing. Defendant told Pachter that everyone was doing well and that he did not need that favor that he had asked Pachter about before. Defendant told Pachter that Kathleen was found dead in a bathtub from an accident. Defendant did not tell Pachter, however, that he had taken care of it himself or that he had paid someone else to do so. Pachter had stated in prior testimony that the last time he had talked to defendant was in 2003. At trial, Pachter tried to clarify that prior statement and said that the last time he had talked to defendant in person was in 2003, but the last time he had talked to defendant on the phone was in 2004.

¶ 138 During his testimony, Pachter acknowledged that he was currently in arrears on his income taxes and that he had owed as much as \$35,000 to the IRS in back taxes at one time. Pachter admitted that he had previously assisted Mims (a former co-worker) in falsifying a drug test and also possibly in a worker's compensation scam. Pachter denied that he came forward in this case because he expected to make money or because he wanted his "15 minutes of fame" and stated that he never contacted any media outlets or the police about the case. Before the state police contacted him, Pachter had no intention of coming forward with the information.

¶ 139 Pachter acknowledged further that that he did not own a gun, was not a member of a street gang, had never been in a serious street fight, had never killed anyone, did not know how to kill anyone, and did not know what it was like to plan a killing. According to Pachter, defendant asked him to find somebody to do the job because Pachter worked in a bad neighborhood in Joliet. Pachter also acknowledged that during the alleged conversation, defendant never gave Pachter the name, address, picture, or description of his third wife and did not provide Pachter with a down payment or with a weapon with which to commit the offense. Pachter acknowledged further that after the incident occurred in 2003, he did not report it to any law enforcement agency and that he only

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came forward after he saw the Nancy Grace show.

\*30 ¶ 140 Pachter testified at trial that he did not think the solicitation was a joke, although he did not know for sure, and that he did not know how to take what defendant had stated to him. Defendant did not say anything about the matter when he and Pachter worked together the following day and never asked Pachter about the matter during the remaining time that they worked together. During his trial testimony, Pachter acknowledged that he had stated in a prior interview and prior testimony that he did not make much of the alleged solicitation and that he did not think defendant was serious at the time.

¶ 141 Norman Ray Clark III testified for the State that he was the custodian of the records for Sprint Nextel. Clark identified a 13–page bill for a Nextel phone plan for the period of February 23 to March 22, 2004. There were two different phones on the plan, one with the last four digits of 3149 and another with the last four digits of 2917. The two phones could directly “chirp” or contact other phones using a walkie-talkie-like feature. Because of the nature of “chip” conversations back and forth, the bill only listed a summary of the total minutes used in outgoing “chirps” (incoming “chirp” minutes were reflected on the sender’s bill). The bills did not state to whom the person was speaking in “chirp” mode, to which phone number the person was communicating, or the times and days that the “chirps” took place. If a chirp went out to a phone that was turned off, it would simply come back as unanswered and would not be reflected in the bill. According to Clark, the subscriber listed on the bill for those two phones was defendant. The bill did not, however, show who the person was who actually had or used the phones.

¶ 142 Bolingbrook Police Lieutenant Brian Hafner testified for the State and identified the following documents from defendant’s personnel file: (1) a certificate from July 1981 issued to defendant for completing a course in evidence handling and introduction to forensic science techniques; (2) a memo from January 1984 indicating that defendant and two other officers had been appointed to the position of evidence technician; and (3) a certificate from April 1988 issued to defendant for completing eight hours of basic crime scene training. Hafner did not see any evidence technician training certificates in defendant’s personnel file that were dated after 1988, although he did not go through the entire file. Hafner acknowledged during his testimony that he did not know how long the evidence course was in 1981 or what was taught in that course or in the other courses that defendant took. All that Hafner could say was that defendant was appointed as an evidence technician in January 1984 and that he had

received certificates for the particular courses indicated. Hafner did not know whether defendant ever processed a crime scene or whether defendant was an evidence technician for a week, a month, or a year.

\*31 ¶ 143 Toward the end of the State’s case-in-chief, the parties stipulated to the admission of the following: (1) a letter from November 2002 from Kathleen to an Assistant State’s Attorney in which Kathleen gave a description of the July 5, 2002, incident that was similar to the description of the incident that she had given to Officer Kernc; (2) Dr. Mitchell’s autopsy protocol and report from the 2004 autopsy; (3) a portion of the interview of defendant on NBC’s Today Show in November 2007; (4) a portion of the interview of defendant on CNN’s Larry King Live in April 2008; (5) the testimony of State Police Sergeant James Portinga that phone records in this case indicated that several phone calls were made from defendant’s landline or cell phone to Kathleen’s landline or cell phone in the time period when defendant was trying to return the children to Kathleen and leading up to the discovery of Kathleen’s body; (6) two of the 2004 autopsy photographs, showing the necklace that was found around Kathleen’s neck at the time of her death; (7) the testimony of Stacy’s sister that Stacy’s cell phone number in 2003 and 2004 ended with the four digits 2917; and (8) an aerial-view photograph of the subdivision in Bolingbrook, showing the location of Kathleen’s residence and defendant’s residence. In addition, prior to the conclusion of the State’s case-in-chief, the trial court admitted several of the State’s exhibits, including some which were admitted over the defense’s objections.

¶ 144 After the State rested its case-in-chief, the defense made a motion for a directed verdict, which the trial court denied. Before the defense began presenting evidence, the trial court addressed a State motion *in limine* to bar the defense from calling attorney Harry Smith to testify or from using other hearsay statements in an attempt to impeach Kathleen. The trial court found that the proposed testimony and statements pertained to a specific bad act of Kathleen (that she may have lied when she testified under oath in her criminal battery case) and that they were not admissible in this case to impeach Kathleen. The trial court, therefore, granted the State’s motion *in limine*. In making its ruling, however, the trial court indicated that under the rules of evidence, there were certain circumstances where the hearsay statements of an unavailable witness would possibly be admissible to impeach that witness, despite the doctrine of FBWD.

¶ 145 As the first witness in their case-in-chief, the defense called Mary Pontarelli back to the witness stand. In addition to repeating some of the testimony that she

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had provided when she was called to testify by the State, Mary stated that when Kathleen was getting ready to take a bath or had just gotten out of the bathtub, she would usually, but not always, wear her robe and have her hair in a clip. On other occasions, however, Kathleen would be in regular clothes. While they were neighbors, Mary never saw Kathleen with any injuries on her or with any red marks on her neck and never saw defendant get mad at, or strike, Kathleen. According to Mary, defendant was very nice, very respectful, and a good neighbor. Defendant was a happy person and was always smiling and joking. After Kathleen's body was found that night, defendant seemed worried and upset. Mary would have told the police if she thought defendant was not being sincere. According to Mary, Kathleen was a fighter—if she was attacked, she would have protected herself. Kathleen would not have let someone hit her without hitting them back.

\*32 ¶ 146 As their second witness, the defense called State Police Master Sergeant Bryan Falat back to the witness stand. Falat testified that he did not see any marks on defendant when defendant or Stacy was interviewed that looked as if defendant had been in a struggle. Falat acknowledged, however, that he did not have defendant remove his clothes, so that he could do a body search on defendant for injuries. Falat did not remember what clothing defendant was wearing at the time of the interviews but commented that it was not anything that made him suspicious. Falat stated further that he had taken part in the interviews of Mary and Tom Pontarelli, Steve Maniaci, and a number of other people, and that none of those witnesses ever said anything about Kathleen sleeping with a knife or about defendant allegedly breaking into Kathleen's house two years earlier and holding her at knifepoint.

¶ 147 As the defense's third witness, insurance claim adjuster Joseph Steadman was called back to the witness stand. Much of Steadman's testimony was similar to the testimony that he had provided earlier in the trial. Steadman confirmed that the first person to contact him about filing a claim on the insurance policy for Kathleen's death was Kathleen's sister, Anna Doman. Steadman told Anna that the claim would have to be filed by defendant. The insurance company eventually paid the claim in full, \$1 million plus interest and return of premium. Defendant was initially listed as the beneficiary on the policy, but that was changed in 2002 to the two boys, a change that Steadman thought was part of the divorce. It was Steadman's understanding that defendant knew that he was not the beneficiary on the policy.

¶ 148 Bolingbrook Police Officer Robert Sudd testified for the defense that on March 1, 2004, at about 10:44

p.m., he was dispatched to Kathleen's residence. Sudd was told that his sergeant at the time, the defendant, was at the residence and that defendant's ex-wife was found dead. Sudd and another officer arrived at the residence a couple of minutes later. The paramedics were already at the scene. Sudd saw defendant by the front door of the home. Defendant was visibly upset. Defendant told Sudd that the deceased person in the upstairs bathroom was his ex-wife.

¶ 149 After Kathleen was declared dead, Sudd had everyone leave the upstairs portion of the home, and he and Officer Talbot secured the area. While Talbot remained at the top of the stairs, Sudd spoke briefly to the neighbors who were present. Sudd walked around the house with one of his commanders and did not notice anything unusual or anything that would indicate that a struggle had occurred. At around midnight, Sudd learned that the state police were taking over the investigation. The state police officers arrived shortly thereafter. Sudd remained at the scene while the state police officers conducted their investigation. At about 4 a.m., the state police officers left, the residence was secured, and Sudd was given the keys and the garage door opener to the residence. Sudd did not put up crime scene tape at the residence and stated that it would have been the state police's responsibility to do so because it was the state police's investigation.

\*33 ¶ 150 Dr. Jeffrey Jentzen testified for the defense as an expert witness in forensic pathology. Jentzen was hired by the defense to determine the manner of Kathleen's death. After a review of this case, Jentzen concluded that Kathleen had drowned and that her death was accidental. In Jentzen's opinion, Kathleen had slipped and fallen while she was in the bathtub, struck her head violently, suffered a concussion or severe head injury, and slipped under the water and drowned. Jentzen explained to the jury at length the reasons for his findings and conclusions in that regard. Jentzen noted, among other things, that in his opinion, the pattern of Kathleen's injuries was the typical type of pattern that would be seen in a fall or a slip and fall accident; that he did not see any identifiable injury, such as defense wounds, that would indicate that an assault or a struggle had occurred; that he disagreed with Dr. Blum and felt that there was nothing unusual or indicative of a homicide about the position of Kathleen's body in the bathtub; and that he also disagreed with Dr. Case and felt that the injury to the back of Kathleen's head could have caused a loss of consciousness. Jentzen commented that most of the brain examinations (cuttings) that Case had done were on children. Jentzen acknowledged during his testimony that he did not perform an autopsy of his own on Kathleen's body but

stated that it was a common practice for a forensic pathologist to interpret the reports and photographs of another forensic pathologist in determining a cause and manner of death. Jentzen acknowledged further that he was not board certified in neuropathology and that it was possible that Kathleen's death was a homicide.

¶ 151 Dr. Vincent DiMaio also testified for the defense as an expert witness in forensic pathology. DiMaio was hired by the defense to render an expert opinion as to Kathleen's death. After a review of the case, DiMaio concluded that Kathleen had drowned and that her death was an accident. In DiMaio's opinion, Kathleen had died after she had slipped in the bathtub, struck the back of her head, was stunned or rendered unconscious, and slipped under the water and drowned. DiMaio explained to the jury in extensive detail the reasons for his conclusions and opinions in that regard. DiMaio told the jury, among other things, that in his opinion, Kathleen had a pattern of injuries that was consistent with a person falling onto the left side of her body and striking her head on a hard surface; that there were no signs of a struggle or of an assault; that there was nothing unusual about the way that Kathleen's body was positioned in the bathtub; that orthostatic hypotension (the body's reaction to warm water, which could cause a person to feel dizzy when she suddenly sat up) may have been a factor in Kathleen's death; and that a very hard hit to the head, such as the one in the present case, would cause a concussion and loss of consciousness for a short time or would cause the person to be somewhat stunned and to not know exactly what had happened. DiMaio acknowledged during his testimony, however, that whether someone was unconscious was a neurological determination and that he was not board certified in neuropathology.

\*34 ¶ 152 State Police Special Agent Robin Queen testified for the defense that in December 2007, she and Special Agent Steve Pryor interviewed Kristin Anderson at her home. Anderson and her family had lived with Kathleen for a short period of time prior to Kathleen's death. During that interview, Anderson did not indicate to Queen anything about anyone possessing a knife.

¶ 153 State Police Special Agent Darrin Devine testified for the defense that in June 2008, he and Sergeant Portinga interviewed Kristin Anderson. Anderson told Devine that Kathleen kept a knife under her mattress but did not tell Devine that Kathleen had indicated that defendant had held a knife under Kathleen's neck during the one particular incident.

¶ 154 State Police Captain Bridget Bertrand testified for the defense that in early 2009, she spoke to Kristin

Anderson about three telephone calls that Anderson had made to state police after Kathleen's death in March 2004. Bertrand had a copy of Anderson's phone records, which showed that phone calls had been made. Anderson stated that during those phone calls, she had told someone at state police headquarters that she had information pertaining to Kathleen's death. Anderson told Bertrand further that someone from the state police had called her back about the case. Bertrand conducted a further investigation into the matter but was unable to find any phone record showing that a return call had been made to Anderson or any officer who remembered speaking to Anderson on the phone about the case.

¶ 155 Retired State Police Investigator Patrick Collins was also called back to the witness stand by the defense. Collins testified that he was involved in the original investigation into Kathleen's death in 2004 and the reinvestigation in 2007 and 2008, until he retired. Kathleen's death was the first homicide case that Collins had worked on, so it was a learning experience for him. On the night that Kathleen's body was found, Collins did not notice anything that appeared to have been moved, broken, in disarray, or knocked over in the master bedroom or the master bathroom, even right by the bathtub. There was a bathrobe hanging on the back of the bathroom door. There were no signs of a struggle at the scene, on Kathleen's body, or on defendant. Collins described during his testimony the numerous steps that were taken by the state police during the initial 2004 investigation. According to Collins, he did not get any phone calls during the initial investigation that alerted him to any problems between Kathleen and defendant.

¶ 156 State Police Investigator Eileen Payonk testified for the defense that she interviewed Mary Parks three times in fall 2008. Parks told Payonk that Kathleen had complained that she was fighting with defendant over their businesses, Suds Pub and Fast and Accurate Printing. Parks also told Payonk that Kathleen had stated that she thought the males in the neighborhood were spying on her. According to Payonk, Parks never told her during any of those conversations that she had called the State's Attorney's Office in 2004 after Kathleen had died.

\*35 ¶ 157 During her testimony, Payonk also described the numerous steps that were taken by the state police as part of the reinvestigation into Kathleen's death. Among other things, Payonk spoke to Nick Pontarelli and obtained some photographs that Nick had taken before Kathleen's death and learned that Nick had made a 1 ½ -minute phone call to Kathleen's home on Sunday afternoon, the day before the body was discovered. In addition, the state police investigators went back into

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Kathleen's house in 2007 or 2008, which was then owned by another family, reinspected the house; took the carpeting from the master bedroom and from the stairs, which was still the same carpeting; re-inspected the bathroom; took the grout and the original bathtub; and submitted some samples for testing. According to Payonk, nothing of evidentiary value was learned from any of the further investigation into Kathleen's death.

¶ 158 At one point during the trial, the State made an oral motion *in limine* to bar the defense from calling attorney Smith to testify about statements that Stacy had made to Smith during a telephone conversation wherein Stacy asked Smith if she could get more money out of defendant if she threatened to tell the police how defendant had killed Kathleen. The State argued that it was impermissible under FBWD for the defense to attempt to impeach Stacy (or her hearsay statements) and, alternatively, that attorney Smith's testimony would not impeach the statements that Stacy had made to Pastor Schori. The defense disagreed. The trial court ruled that the defense could call attorney Smith to testify about Stacy's statement, but that if the defense did so, the entire conversation would be admissible, including a part where Smith could hear defendant in the background, and not just the portions of the conversation selected by the defense.

¶ 159 When the defense called attorney Smith to the witness stand, the trial court initially denied the defense's request to treat Smith as a hostile witness but later reversed its decision based upon some of Smith's responses to the defense's questions. Smith testified that he had been an attorney for the past 19 years and that he had been hired by Kathleen in 2002 to represent her in her divorce from defendant. The divorce was difficult for Kathleen and she was angry about it. During the course of the divorce proceedings, the marriage between defendant and Kathleen was dissolved, and defendant subsequently married Stacy. At the time of Kathleen's death, the property settlement in the divorce between defendant and Kathleen had not yet been finalized. Smith confirmed that during the divorce proceedings, defendant always paid his child support payments on time and that defendant also promptly paid \$15,000 of Smith's attorney fees that defendant was ordered to pay. Smith acknowledged that in a deposition in February 2004, Kathleen testified that Fast and Accurate Printing was sold in 1999 and that she and defendant had divided the money equally.

\*36 ¶ 160 Smith testified further that in late October 2007, he received a phone call from Stacy. Stacy wanted to hire Smith to represent her in a divorce from defendant. Although Smith could not represent Stacy because of a

conflict of interest, Stacy still asked Smith some questions about the divorce. Stacy wanted to know if she could get more money out of defendant if she threatened to tell the police about how defendant had killed Kathleen.<sup>7</sup> According to Smith, Stacy did not use the word, "leverage," but that was what she was implying. Smith told Stacy to be careful and that she could be arrested for something like that. Stacy replied that she had so much stuff on defendant at the police department that defendant could not do anything to her. During the conversation, Stacy also told Smith that defendant was mad at her because he thought that she had told his son, Thomas, that he had killed Kathleen. Stacy stated further that defendant was watching or tracking her. As the conversation progressed, Smith heard defendant call to Stacy in the background (not from right next to her) and ask her what she was doing and to whom she was talking. Stacy yelled to defendant that she would be in the house in a minute. Smith heard defendant call to Stacy a second time and that was when Stacy got off of the phone.

¶ 161 On redirect examination, defense attorney Brodsky asked Smith questions about Stacy threatening to tell the police. When Brodsky asked Smith in a leading manner if Smith had told Stacy to be careful because she could be arrested for extortion, Smith responded that he did tell Stacy to be careful and that she could be arrested for something like that but did not tell Stacy that she could be arrested for extortion. Brodsky asked Smith what Stacy could have been arrested for, and Smith stated for concealment of a homicide. Brodsky pressed Smith further on the issue, and Smith acknowledged that he made the statement to Stacy in response to Stacy asking if she could use the threat to get more money out of defendant but denied that he told Stacy that she could be arrested for threatening to tell a falsehood about defendant to get money.

¶ 162 Nineteen-year-old Thomas Peterson testified for the defense that he was defendant's and Kathleen's son. When Kathleen was alive, Thomas and his brother, Christopher, lived with Kathleen and had visitation with defendant. After Kathleen passed away, Thomas and Christopher lived with defendant and Stacy. Thomas believed that defendant was innocent. He never once suspected that defendant killed Kathleen and was at the trial to support defendant.

¶ 163 Thomas described defendant as a very good person, who was very fun and very happy-go-lucky. Thomas stated that the weekend visitations at defendant's house were very enjoyable. Defendant's demeanor during those visitations was very genial. Defendant seemed very happy with his life and with having the children around him.

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When defendant would bring Thomas and Christopher back to Kathleen's house from weekend visitations, sometimes the front screen door of Kathleen's house would be locked, and sometimes it would not be locked. In addition, sometimes the lights inside the house would be on, and sometimes they would not be on.

\*37 ¶ 164 On the weekend that Kathleen passed away, defendant picked Thomas and Christopher up on Friday night for visitation as usual. During the time from when defendant picked them up until he tried to drop them off on Sunday night, Thomas did not notice anything out of the ordinary in defendant's demeanor or personality. When defendant went to drop them off on Sunday evening, Kathleen did not answer the door. Defendant was a little bit concerned. He and the boys concluded that because there was no school on Monday, the boys were supposed to be with defendant all three days.

¶ 165 When defendant tried to drop the boys off at Kathleen's house on Monday night, Kathleen did not answer the door. Defendant was more concerned because that was definitely the day that defendant was supposed to drop the boys back with Kathleen since they had school the next day. Defendant brought the boys back to his house and told them to go to bed and that he would figure out what was going on. After they got back to defendant's house, they tried calling Kathleen's house, but there was no answer.

¶ 166 Later that night or early the next morning, defendant came home and told the boys that Kathleen had passed away. Defendant was very, very shaken up about it. Thomas had never seen anyone so sad, especially someone who did not break down out of emotion very often. Thomas did not have any feeling that defendant was faking it.

¶ 167 According to Thomas, Kathleen used to like to take very hot baths. Sometimes Kathleen would have her hair up when she took a bath; sometimes she would have her hair down. Even when Thomas was older, he knew that Kathleen would wash her hair in the bathtub at times because when she would come out of the bathroom, her hair would be wet.

¶ 168 After being duly admonished by the trial court, defendant elected not to testify in this case. Following the admission of certain defense exhibits, the defense rested.

¶ 169 In rebuttal, the State called Dr. Michael Baden to the witness stand to testify as an expert witness in forensic pathology. At the behest of Kathleen's family, Baden had performed an autopsy on Kathleen's exhumed body in

November 2007 at the Will County morgue, a few days after the second autopsy was conducted by Dr. Blum. Baden had been made aware of the opinions of Dr. DiMaio and Dr. Jentzen in this case—that Kathleen's death was an accident—and explained to the jury at length why he disagreed with those opinions. Among other things, Baden told the jury that in his opinion, the injury pattern on Kathleen's body was not consistent with a single fall; that Kathleen's pattern of injury was consistent with a struggle; that contrary to what Dr. DiMaio had stated, orthostatic hypotension was not a possible explanation for what had happened to Kathleen in the bathtub; and that he had personally observed an almost two-inch long area of hemorrhage on Kathleen's diaphragm, which could have been caused by a blow just below the rib cage or by a very strong bear-hug-type squeeze.

\*38 ¶ 170 At the time that he performed the autopsy in this case, Baden was a paid consultant for Fox National News. According to Baden, doing the autopsy had nothing to do with Fox, except that from what Baden had heard, the family may have been referred to him by somebody at Fox. At the request of the family, a producer for the Greta Van Susteren Show was present for the autopsy and videotaped the autopsy procedure (not the body).

¶ 171 As an additional rebuttal witness, the State re-called Dr. Mary Case to the witness stand. Case testified that the majority of the autopsies and brain cuttings that she had performed were on adults, rather than children, contrary to what had been suggested by Dr. Jentzen in his trial testimony; that she disagreed with Dr. Jentzen's opinion in this case as to the loss of consciousness by Kathleen; and that in her opinion, it was impossible for Kathleen to have suffered a severe head injury, known as diffuse brain injury (the shifting of the brain within the cranial cavity), from a slip and fall in the bathtub because such an accident would not have generated enough force to cause that type of an injury.

¶ 172 After the State rested its rebuttal case, the defense renewed their motion for a directed verdict, which the trial court denied. The case proceeded to closing arguments. Of relevance to this appeal, during the defense's closing argument, which was given by attorney Lopez, the defense addressed the calling of attorney Smith to testify. Mr. Lopez told the jury that the defense was not going to hide anything from it, including attorney Smith, and that the defense had put Smith on the witness stand, even though he had said some things that hurt the defense, because he had also said some things that were helpful to the defense.

¶ 173 The jury subsequently found defendant guilty of the first degree murder of Kathleen. After the guilty verdict, the defense was given an extended time to file posttrial motions. It became apparent during the posttrial proceedings that a rift had developed in the defense team between attorney Brodsky and attorney Greenberg. Eventually, in October 2012, Brodsky withdrew as co-counsel for defendant. The defense subsequently filed a posttrial motion, raising numerous allegations of error, including all of the allegations that have been raised in this appeal.

¶ 174 An evidentiary hearing was held on the posttrial motion in February 2013. The following evidence was presented. Attorney Reem Odeh testified for the defense that she was partners with Brodsky in a law firm from 2005 to 2010. In 2007, Brodsky told Odeh that he had agreed to represent defendant. Brodsky discussed with Odeh many times how he thought defendant's case would benefit himself or the firm, especially when she and Brodsky quarreled about financial matters regarding the case. During her testimony, Odeh identified a copy of a media contract that was signed by Brodsky and defendant. Brodsky had signed the contract both individually and on behalf of the firm. Odeh took a copy of the contract when she left the firm and gave it to defense attorney Greenberg. According to Odeh, Brodsky physically attacked her in an attempt to stop her from taking the media contract, and the police had to be called.

\*39 ¶ 175 Over the State's objection, a copy of the media contract was admitted into evidence. The media contract was entered into in December 2007 between the law firm, Brodsky, and defendant on the one side (collectively referred to as Brodsky and defendant) and Selig Multimedia and Glenn Selig on the other side (collectively referred to as Selig). Pursuant to the terms of the media contract, Selig was to provide Brodsky and defendant with publicity and promotional services in the entertainment industry, such as soliciting and procuring media appearances, interviews, photograph opportunities, and book and movie deals, and was to be paid a commission percentage of any fee that Brodsky and defendant received as a result of Selig's work. The media contract expired by its own terms in December 2008.

¶ 176 Clifford Rudnick, a teacher of professional responsibility, testified at the hearing for the defense as an expert witness, over the State's objection. Rudnick opined that the media contract in this case violated Rules 1.7 and 1.8 of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct (2010) R.s. 1.7, 1.8 (eff. Jan. 1, 2010)). Rudnick opined further that the media contract

caused a *per se* conflict of interest to arise between Brodsky and defendant, regardless of whether the contract expired before the charges were brought in this case. Rudnick acknowledged, however, that what constituted a *per se* conflict was not a settled or easy answer under the law.

¶ 177 Jennifer Spohn testified at the hearing for the defense that on August 29, 2012, during defendant's jury trial, she observed a heated discussion or argument take place between attorney Brodsky and attorney Greenberg in a hallway of the courthouse. Greenberg told Brodsky that they should not put Harry Smith on the stand. Brodsky responded that he was doing it and that they needed Smith. Greenberg stated that he had filed "74 f\* \* motions" to keep Smith from testifying and that Brodsky was going to undo all of that.

¶ 178 Attorney Joel Brodsky was called to testify at the hearing by the defense. Brodsky stated that he represented defendant from November 2007 until late 2012 and was lead counsel at defendant's trial. In December 2007, Brodsky and his law firm entered into the media contract with Selig. The contract expired in December 2008. Selig did not represent Brodsky or the defense team throughout defendant's trial but did do some public relations work during the trial for defendant. Brodsky believed that Selig may have been paid some small amount of money under the media contract while it was in effect.

¶ 179 Brodsky stated that he opened a trust account specifically for this case and identified a spreadsheet that he had prepared regarding money received to, and paid out of, that trust account. At defendant's direction, Brodsky turned over the spreadsheet to the current defense attorneys. Written receipts were included with the spreadsheet and everything was documented. Brodsky had put handwritten notes to the side of the entries on the spreadsheet because defendant had recently asked for an accounting of the money in the account. The notes were to indicate where the money was coming from and to where it was disbursed. According to Brodsky, the spreadsheet showed that various amounts had been received into the account, including \$10,000 from ABC Television for some videos and pictures and about \$5,900 for a book that defendant had authored or co-authored. The spreadsheet also showed that various amounts had been paid out of the account, including a payment of a certain amount to Brodsky's law firm for attorney fees and a payment of about \$885 to Selig. Brodsky was not sure if he had anything in writing from defendant authorizing a payment from the trust account to Brodsky's law firm.

\*40 ¶ 180 Daniel Locallo, a former Cook County Circuit judge and educator, testified for the defense at the hearing as an expert witness on ethics and evidence, over the State's objection. Locallo opined that the media contract in this case violated Rule 1.8(b) of the Illinois Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct (2010) R. 1.8(b) (eff. Jan. 1, 2010)) and raised a conflict as to whether Brodsky's loyalty was to his pocketbook or to defendant. According to Locallo, Brodsky should have brought the media contract to the trial court's attention during the proceedings, so that the trial court could have made some inquiries about the situation. In Locallo's opinion, even if the agreement had ended long before the charges were brought in this case, it still would have been an ethical violation.

¶ 181 As for calling attorney Smith to testify, Locallo opined that it was not a reasonable trial strategy to do so. Although the jury had heard Pastor Schori's testimony about defendant coming home in black clothing, until Smith testified, the jury had not heard any direct evidence that defendant had caused Kathleen's death. With Smith's testimony, the jury heard someone talking about defendant killing Kathleen. Locallo could not conceive of any benefit to defendant of putting in Smith's damaging testimony that Stacy knew how defendant had killed Kathleen. While Locallo recognized that defense attorney Lopez addressed Smith's testimony in closing argument, Locallo believed that Lopez had to do so to try to minimize the damage that had already been done.

¶ 182 After the hearing had concluded, the trial court made its ruling on the posttrial motion. In doing so, the trial court made numerous detailed findings. Regarding the media contract, the trial court found that defendant had assisted Brodsky in making the decision to enter into the contract, that defendant shared some of the blame for the conflict of interest that arose, and that defendant had failed to show that the conflict deprived him of effective assistance of counsel or of a fair trial.<sup>8</sup> As for Brodsky's decision to call attorney Smith to testify, the trial court found that defendant was well-represented at trial by the defense team that Brodsky had put together; that the trial court could only presume that defendant, when faced with the conflicting advice of his multiple attorneys on whether to call Smith to testify, had chosen to go with the advice of Brodsky on the matter over the advice of the others; that a tactical decision was made at that time that using Smith's testimony to try to show that Stacy was a greedy extortionist and to try to attack the credibility of her statement to Schori by doing so exceeded any penalty that would inure to defendant of having Smith repeat that Stacy had also said something to the effect of how defendant had killed Kathleen; that doing so was a

conceivably sound strategy; and that the defense staff, in the court's opinion, appropriately handled the subject in closing argument by suggesting that the State had hid Smith from the jury because the State knew that Stacy was little more than an extortionist. The trial court commented during its ruling that it was clear to the court from the very beginning that attorney Brodsky did not possess the lawyerly skills necessary to undertake this case on his own (which he did not do) and that he was clearly at a different spectrum of lawyerly skills than the other attorneys in this case. The trial court went on to find, however, that based upon the record before it, it could not conclude that defendant was deprived of the effective assistance of trial counsel. Therefore, the trial court denied that portion of defendant's posttrial motion. The trial court went on to deny the remainder of defendant's posttrial motion as well.

\*41 ¶ 183 Following the trial court's ruling on the posttrial motion, a sentencing hearing was held. At the conclusion of the sentencing hearing, the trial court sentenced the 59-year-old defendant to 38 years in prison. Defendant subsequently filed a motion to reconsider or to reduce the sentence, which the trial court denied. This appeal followed.

## ¶ 184 ANALYSIS

### ¶ 185 I. Proof Beyond a Reasonable Doubt

<sup>11</sup> ¶ 186 As his first point of contention on appeal, defendant argues that he was not proven guilty beyond a reasonable doubt of the first degree murder of Kathleen. Defendant asserts that there are no facts in the record from which a rational trier of fact could infer that either element of the offense had been proven (that defendant committed an act that caused Kathleen's death or that when defendant did so, he had the intent to kill Kathleen). In making that assertion, defendant points out that there were no eyewitnesses, no physical or forensic evidence linking defendant to the crime, and no confession from defendant. According to defendant, the State's entire case was based upon rumor, speculation, and burden shifting in that the State relied entirely upon statements from witnesses, who were inconsistent, motivated by financial gain, and/or severely impeached, and blamed defendant for the lack of physical evidence. Defendant asserts further that the mere fact that he had the opportunity to commit the crime was not sufficient for a finding of guilt. Based upon the perceived lack of evidence,

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defendant asks that we reverse his conviction outright.

¶ 187 The State argues that defendant was proven guilty beyond a reasonable doubt and that his murder conviction should be upheld. The State asserts that the vast amount of circumstantial evidence and the reasonable inferences therefrom, viewed in the light most favorable to the State, were sufficient to prove defendant guilty. In support of that assertion, the State points first to the medical evidence, which the State contends established that Kathleen had, in fact, been murdered. According to the State, the medical evidence showed that: (1) Kathleen had 16 injuries on all 4 quadrants of her body, which pointed to a struggle, rather than a single fall; and (2) the injury to Kathleen's head could not have rendered Kathleen unconscious and would not have caused Kathleen to drown accidentally. Second, the State points to the remaining circumstantial evidence, which the State contends, although somewhat implicitly, established that defendant was the person who had murdered Kathleen. According to the State, the remaining circumstantial evidence showed that defendant had: (1) repeatedly broadcast his intent to kill Kathleen; (2) repeatedly attacked Kathleen; (3) tried to hire a hit man to kill Kathleen; (4) admitted to Stacy that he had killed Kathleen; and (5) "telegraphed" that he had killed Kathleen by his actions on the night that Kathleen's body was found and in the ensuing days. The State asks, therefore, that we affirm defendant's conviction for the first degree murder of Kathleen.

\*42 [2] [3] [4] [5] [6] [7] [8] [9] ¶ 188 To prevail on a charge of first degree murder as alleged in the instant case, the State must prove two elements beyond a reasonable doubt: (1) that defendant performed the acts which caused the death of the victim; and (2) that when defendant did so, he intended to kill or do great bodily harm to the victim or he knew that his acts would cause death to the victim. See 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004); Illinois Pattern Jury Instructions, Criminal, Nos. 7.01, 7.02 (4th ed.2000). Pursuant to the *Collins* standard (*People v. Collins*, 106 Ill.2d 237, 261, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985)), a reviewing court faced with a challenge to the sufficiency of the evidence must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Jackson*, 232 Ill.2d 246, 280, 328 Ill.Dec. 1, 903 N.E.2d 388 (2009). In applying the *Collins* standard, the reviewing court must allow all reasonable inferences from the record in favor of the prosecution. *People v. Bush*, 214 Ill.2d 318, 326, 292 Ill.Dec. 926, 827 N.E.2d 455 (2005). The reviewing court will not retry the defendant. *People v. Austin M.*, 2012 IL 111194, ¶ 107, 363 Ill.Dec. 220,

975 N.E.2d 22. Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *People v. Jimerson*, 127 Ill.2d 12, 43, 129 Ill.Dec. 124, 535 N.E.2d 889 (1989). Thus, the *Collins* standard of review fully recognizes that it is the trier of fact's responsibility to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See *Jackson*, 232 Ill.2d at 281, 328 Ill.Dec. 1, 903 N.E.2d 388. That same standard of review is applied by the reviewing court regardless of whether the evidence is direct or circumstantial, or whether defendant received a bench or a jury trial, and circumstantial evidence meeting that standard is sufficient to sustain a criminal conviction. *Id.*; *People v. Kotlarz*, 193 Ill.2d 272, 298, 250 Ill.Dec. 437, 738 N.E.2d 906 (2000). In applying the *Collins* standard, a reviewing court will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it leaves a reasonable doubt of the defendant's guilt. *Austin M.*, 2012 IL 111194, ¶ 107, 363 Ill.Dec. 220, 975 N.E.2d 22. In addition, when considering a challenge to the sufficiency of the evidence, a reviewing court is not required to exclude evidence that may have been improperly admitted in the trial court. *People v. Furby*, 138 Ill.2d 434, 453-54, 150 Ill.Dec. 534, 563 N.E.2d 421 (1990). Thus, in the instant case, we need not address defendant's claims of error regarding the admission of evidence before we address defendant's challenge to the sufficiency of the evidence. See *id.*

¶ 189 In the present case, after considering all of the evidence presented at defendant's trial and viewing that evidence in the light most favorable to the State, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of the first degree murder of Kathleen. See *Jackson*, 232 Ill.2d at 280, 328 Ill.Dec. 1, 903 N.E.2d 388. First, the medical evidence showed that Kathleen's death was the result of murder and not the result of an accident. Kathleen had multiple injuries all over her body, which were not consistent with a slip and fall in the tub. Rather, the injuries indicated that Kathleen had been involved in a struggle in which a large amount of force was applied to various parts of her body. In addition, Kathleen's head injury was not likely to have been caused by a slip and fall in the tub and would not have caused Kathleen to become unconscious and to accidentally drown in the bathtub. Second, the remaining circumstantial evidence and the reasonable inferences therefrom showed that defendant was the person who murdered Kathleen and that when defendant committed the acts that brought about Kathleen's death, he did so with the intent to kill

her.

\*43 ¶ 190 Contrary to defendant's assertion on appeal, this was not a case where the State merely proved opportunity to commit the crime and nothing more. Rather, the circumstantial evidence in this case showed that defendant had the motive to kill Kathleen, either because of the bitterness of the divorce or to avoid a bad result in the property distribution; that defendant had repeatedly stated his intention to kill Kathleen and had tried to hire someone else to do so; that defendant had the opportunity to kill Kathleen in that he had broken into the house in the past and was missing from his own residence at the time of the murder; and that defendant had, in fact, killed Kathleen and had admitted to Stacy that he had done so. Based upon the facts presented in the instant case and the standard of review, we conclude that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt of the first degree murder of Kathleen. See *id.*

**¶ 191 II. Error in the Admission of Evidence: The Trial Court Allowing the Defense to Call Attorney Smith to Testify**

<sup>[10]</sup> ¶ 192 As his second point of contention on appeal, defendant argues that the trial court erred in allowing the defense to call attorney Smith to testify at trial after the trial court had already determined that Smith's conversations with Stacy were protected by the attorney-client privilege and knowing that Smith's testimony would be very damaging to the defense. According to defendant, both the trial court and the State had an obligation to prevent the defense from calling Smith as a witness to ensure that defendant received a fair trial. However, as the State correctly points out, Smith was called to testify at trial by the defense, over the State's objection. Under those circumstances, defendant cannot now complain on appeal that the trial court erred in allowing Smith to testify. See *People v. Payne*, 98 Ill.2d 45, 50, 74 Ill.Dec. 542, 456 N.E.2d 44 (1983) (a defendant, who invites, procures, or acquiesces in the admission of evidence, cannot complain about the admission, even if the evidence was improper); *People v. Segoviano*, 189 Ill.2d 228, 241, 244 Ill.Dec. 388, 725 N.E.2d 1275 (2000) (a defendant cannot ask the trial court to proceed in a certain manner and then claim on appeal that it was error for the trial court to do so); *In re Detention of Swope*, 213 Ill.2d 210, 217, 290 Ill.Dec. 232, 821 N.E.2d 283 (2004) (it would be manifestly unfair to allow a party to have a second trial based upon an error that the party injected into the first trial). Any argument

by defendant to the contrary is misplaced and more appropriately belongs in a claim of ineffective assistance of trial counsel, a claim which defendant also raises in this appeal and which we will address later in this decision.

**¶ 193 III. Error in the Admission of Evidence: The Trial Court's Finding that the Clergy Privilege Did Not Apply to Pastor Schori's Testimony**

<sup>[11]</sup> ¶ 194 As his third point of contention on appeal, defendant argues that the trial court erred in finding that the clergy privilege did not apply and in allowing Pastor Schori to testify at both the hearsay hearing and the trial about what Stacy had told him at her August 2007 counseling session, statements which implicated defendant in the death of Kathleen. Defendant asserts that the trial court's ruling was based upon: (1) an erroneous interpretation of the law on the clergy privilege—that the counseling session had to take place in private or at a private place, as compared to merely being confidential, and that the clergy privilege did not apply to marital counseling; and (2) an erroneous factual determination—that the requirements for the privilege had not been satisfied because the counseling in this case was not for the purpose of unburdening one's soul and because the church in this case had no formalized process for doing so. Defendant asserts further that he was prejudiced by this particular error because Stacy's statement to Schori was used at the hearsay hearing to convince the trial court to admit other incriminating hearsay statements under the doctrine of FBWD and because the statement misled the jury at trial and placed defendant at the scene of Kathleen's death, which was contrary to defendant's alibi.

\*44 ¶ 195 The State argues that the trial court's ruling was proper and should be affirmed. In support of that argument, the State asserts that: (1) the factual finding underlying the trial court's determination that the clergy privilege did not apply—that Stacy had no expectation of privacy because the conversation took place in a public place/public setting where it could have been overheard by a third person—was not against the manifest weight of the evidence; (2) defendant lacked standing to invoke the privilege; (3) defendant failed to meet the burden of establishing that the requirements necessary for invoking the privilege were present; (4) the nature of the counseling—marital counseling where Stacy was not making an admission or confession for the purpose of unburdening her soul but, rather, was seeking marital advice—was such that it did not qualify for the privilege;

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(5) even if Stacy's statement was a confession or an admission, no clergy privilege existed because Schori's church did not have any formalized rules or practices which would have governed him in hearing Stacy's statement; (6) if any clergy privilege did exist, Stacy waived that privilege when she told the same information to attorney Smith and to Scott Rossetto; and (7) any error that occurred was harmless because Schori's testimony about Stacy's statement was cumulative to the testimony of Smith and Rossetto, which provided the same information.<sup>9</sup>

¶ 196 In response to those assertions, defendant contends that: (1) he does have standing to invoke the clergy privilege because Schori was counseling both he and Stacy as to their marriage; (2) the clergy privilege does apply to marital counseling; (3) the crucial inquiry is whether the statement was given in confidence, not whether the statement was given in a public place or within possible hearing range of a third party; and (4) Stacy already asserted the privilege when she asked Schori not to tell anyone about their conversation.

[12] [13] [14] [15] ¶ 197 The clergy privilege, which is set forth in section 8-803 of the Code of Civil Procedure (Code), provides that:

"A clergyman or practitioner of any religious denomination accredited by the religious body to which he or she belongs, shall not be compelled to disclose in any court \* \* \* a confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes, nor be compelled to divulge any information which has been obtained by him or her in such professional character or as such spiritual advisor." 735 ILCS 5/8-803 (West 2006).

The clergy privilege belongs to both the individual making the statement and the clergy member. *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 94, 385 Ill.Dec. 316. The party seeking to invoke the clergy privilege bears the burden of showing that all of the underlying elements required for the privilege to apply have been satisfied. *People v. McNeal*, 175 Ill.2d 335, 359, 222 Ill.Dec. 307, 677 N.E.2d 841 (1997). A trial court's determination in that regard will not be reversed on appeal unless it is against the manifest weight of the evidence. *Id.* In addition, a trial court's ruling on the admissibility of evidence in general will not be reversed on appeal absent an abuse of discretion. See *People v. Illgen*, 145 Ill.2d 353, 364, 164 Ill.Dec. 599, 583 N.E.2d 515 (1991); *People v. Dabbs*, 239 Ill.2d 277, 284, 346 Ill.Dec. 484, 940 N.E.2d 1088 (2010).

\*45 [16] [17] [18] [19] [20] [21] ¶ 198 To fall under the protection of the clergy privilege, the "communication must be an admission or confession (1) made for the purpose of receiving spiritual counsel or consolation (2) to a clergy member whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation." *People v. Campobello*, 348 Ill.App.3d 619, 635, 284 Ill.Dec. 654, 810 N.E.2d 307 (2004). The privilege applies only to admissions or confessions made in confidence. *Id.* at 636, 284 Ill.Dec. 654, 810 N.E.2d 307. In deciding whether the admission or confession was made in confidence, the perception of the person making the statement is not determinative in and of itself. See *Thomas*, 2014 IL App (2d) 121001, ¶¶ 96-98, 385 Ill.Dec. 316. Furthermore, an admission or confession is not privileged if it was made to a clergy member in the presence of a third person unless that person was indispensable to the counseling or consoling activity of the clergy member. *Campobello*, 348 Ill.App.3d at 636, 284 Ill.Dec. 654, 810 N.E.2d 307. If the clergy member does not object to testifying, the burden is on the person asserting the privilege to show that disclosure is prohibited by the rules or practices of the particular religion involved. *Thomas*, 2014 IL App (2d) 121001, ¶ 94, 385 Ill.Dec. 316. In addition, the person who made the statement may waive the privilege by communicating the admission or confession to nonprivileged parties. See *Campobello*, 348 Ill.App.3d at 636, 284 Ill.Dec. 654, 810 N.E.2d 307.

¶ 199 Upon a review of the record in the present case, we conclude that the trial court did not err in finding that the clergy privilege was inapplicable to Pastor Schori's testimony about what Stacy had told him at her counseling session in August 2007. The trial court found that the conversation between Stacy and Schori was not confidential and that finding was not against the manifest weight of the evidence. See *McNeal*, 175 Ill.2d at 359, 222 Ill.Dec. 307, 677 N.E.2d 841. The meeting took place in public with at least one other person present, although not directly. At the end of the meeting Schori asked Stacy what she wanted him to do with the information she had given him, a question that would have been unnecessary if nondisclosure of the communication was mandated by the rules of the church. See *Thomas*, 2014 IL App (2d) 121001, ¶ 94, 385 Ill.Dec. 316. Indeed, Schori himself eventually approached the police and revealed the conversation to them. In addition, Schori never asserted the privilege or refused to testify about the matter, and there is no indication that the church itself had any formalized rules or procedures prohibiting Schori from disclosing what Stacy had told him. See *id.* Thus, even if we assume for arguments sake that the privilege applies to

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marital counseling in general, it would not have applied to the conversation in this case because the conversation was not confidential. See *id.*; *Campobello*, 348 Ill.App.3d at 636, 284 Ill.Dec. 654, 810 N.E.2d 307. Therefore, we need not determine whether the privilege applies to marital counseling in general or whether defendant has standing to assert the privilege in this case.

**¶ 200 IV. Error in the Admission of Evidence: The Trial Court's Finding that Certain Statements of Kathleen and Stacy were Admissible under the Doctrine of FBWD**

\*46 ¶ 201 As his fourth point of contention on appeal, defendant argues that the trial court erred in admitting certain statements of Kathleen and Stacy under the common law doctrine of FBWD. Defendant asserts first that the FBWD doctrine should not have applied because the State failed to prove by a preponderance of the evidence at the hearsay hearing that defendant killed Kathleen or Stacy or that defendant did so to prevent Kathleen and Stacy from testifying in legal proceedings. Second, defendant asserts that even if the statements were admissible under the FBWD doctrine, they should have still been excluded by the trial court as a violation of defendant's right to due process because there was no corroboration of some of the key allegations. Defendant asks, therefore, that his conviction be reversed and that the case be remanded for a new trial.

¶ 202 The State argues that the statements in question were properly admitted and that the trial court's ruling in that regard should be upheld. More specifically, the State asserts that the statements were correctly admitted under the FBWD doctrine because the evidence presented at the hearsay hearing was sufficient to establish by a preponderance of the evidence that defendant had killed Kathleen and Stacy and that defendant had done so to prevent their testimony at upcoming legal proceedings. As for defendant's due process contention, the State asserts that the admission of the statements in question did not give rise to the type of extremely unfair proceeding that would violate defendant's due process rights. The State asserts further that there was some corroboration of the statements in question and that Illinois does not require the corroboration for which defendant calls. For all of the reasons stated, the State asks that we affirm the trial court's ruling on this issue.

<sup>[22]</sup> <sup>[23]</sup> ¶ 203 As noted above, a trial court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion. See *Illgen*, 145 Ill.2d at

364, 164 Ill.Dec. 599, 583 N.E.2d 515; *Dabbs*, 239 Ill.2d at 284, 346 Ill.Dec. 484, 940 N.E.2d 1088. The threshold for finding an abuse of discretion is high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *In re Leona W.*, 228 Ill.2d 439, 460, 320 Ill.Dec. 855, 888 N.E.2d 72 (2008); *Illgen*, 145 Ill.2d at 364, 164 Ill.Dec. 599, 583 N.E.2d 515. In addition, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial. *Leona W.*, 228 Ill.2d at 460, 320 Ill.Dec. 855, 888 N.E.2d 72.

<sup>[24]</sup> ¶ 204 In the present case, although the parties spend a great deal of time discussing whether the statements in question were admissible under the FBWD doctrine, that issue was definitively decided in the previous appeal in this case. See *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 25. In that appeal, we found that the trial court had made the appropriate findings for the statements to be admitted under the FBWD doctrine and that the statements were, therefore, admissible. *Id.* We noted that the trial court was still free to find that the statements were subject to exclusion on another basis. *Id.* ¶ 25 n. 6. Our decision in that regard now stands as the law of the case—that absent some other exclusion, the statements were admissible under the FBWD doctrine. See *People v. Tenner*, 206 Ill.2d 381, 395–96 (2002) (the appellate court's determination of an issue on the merits is final and conclusive on the parties in a second appeal in the same case and cannot be reconsidered by the same court except on a petition for rehearing). Therefore, we need not address the parties' arguments as to that aspect of this issue any further.

\*47 <sup>[25]</sup> ¶ 205 The only remaining question on this issue is whether the statements should have been excluded to protect defendant's due process right to a fair trial. We agree with the State that the admission of the statements in this case was not the type of conduct that would support a violation of due process claim. See *Perry v. New Hampshire*, 565 U.S. —, —, 132 S.Ct. 716, 723, 181 L.Ed.2d 694 (2012) (due process prohibits the use of evidence only when it is so extremely unfair that its admission violates fundamental concepts of justice); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (due process prohibits the State's knowing use of false evidence because such use violates any concept of ordered liberty). The use of the statements in this case was not so extremely unfair to defendant that their admission violated fundamental concepts of justice or ordered liberty. See *id.* We, therefore, reject

defendant's argument on this issue.

**¶ 206 V. Error in the Admission of Evidence: The Trial Court's Admission of Jeffrey Pachter's Testimony Regarding Other Crimes Evidence**

<sup>[26]</sup> ¶ 207 As his fifth point of contention on appeal, defendant argues that the trial court erred in admitting the other crime testimony of Jeffrey Pachter that defendant had tried to hire him to kill Kathleen. Defendant asserts that the testimony should not have been admitted because the State failed to provide reasonable notice to defendant of the State's intent to admit the other crimes evidence at trial, as required by the rules of evidence, and that defendant, therefore, had no opportunity to investigate the matter or to prepare for Pachter's damaging testimony. Based upon that error, defendant asks that we reverse his conviction and remand the case for a new trial.

¶ 208 The State argues that the trial court's ruling was proper and should be upheld. The State asserts that the trial court's ruling upon reconsideration, that the State had good cause for failing to provide notice prior to trial, did not constitute an abuse of discretion. The State asserts further that any prejudice to defendant was minimized because the State had listed Pachter on its witness list, Pachter had testified extensively at the hearsay hearing, the State had filed the required notice during trial, and the time period from when the notice was filed until Pachter actually testified was 20 days. In fact, the State points out, defendant did not ask for a continuance at trial to prepare for Pachter's testimony and spent 45 pages of the trial record cross-examining Pachter.

<sup>[27]</sup> <sup>[28]</sup> ¶ 209 Illinois Rule of Evidence 404(b) provides for the admissibility of other crimes evidence in certain circumstances. See Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). Pursuant to the rule, when the State seeks to admit such evidence in a criminal case, it must disclose the evidence within a reasonable time prior to trial, including statements of witnesses or a summary of any testimony. See Ill. R. Evid. 404(c) (eff. Jan. 1, 2011). However, on good cause shown, the trial court may excuse pretrial notice and allow the State to give the required notice during trial. *Id.* The determination of what constitutes good cause in any particular situation is a fact-dependent determination that rests in the sound discretion of the trial court. See *Vision Point of Sale, Inc. v. Haas*, 226 Ill.2d 334, 353–54, 314 Ill.Dec. 778, 875 N.E.2d 1065 (2007) (discussing good-cause requirement under Illinois Supreme Court Rule 183). This court will not reverse the trial court's determination in that regard absent an abuse

of discretion. See *Haas*, 226 Ill.2d at 354, 314 Ill.Dec. 778, 875 N.E.2d 1065. In addition, as noted above, the trial court's general determination as to the admissibility of evidence will also not be reversed on appeal absent an abuse of discretion. See *Illgen*, 145 Ill.2d at 364, 164 Ill.Dec. 599, 583 N.E.2d 515; *Dabbs*, 239 Ill.2d at 284, 346 Ill.Dec. 484, 940 N.E.2d 1088.

\*48 ¶ 210 In the instant case, after reviewing the record on this issue, we find that the trial court's ruling on good cause and on the admissibility of Pachter's testimony did not constitute an abuse of discretion. See *Illgen*, 145 Ill.2d at 364, 164 Ill.Dec. 599, 583 N.E.2d 515; *Dabbs*, 239 Ill.2d at 284, 346 Ill.Dec. 484, 940 N.E.2d 1088. In making its initial determination and in reconsidering the matter, the trial court considered the reason for the failure to provide notice and the effect on the defense of allowing the testimony. The State filed its late Rule 404(c) notice on August 2, 2012, and the defense was put on notice at that time that the State was still seeking to admit Pachter's testimony and that the State was going to ask the court to change its prior ruling barring the testimony. The trial court reconsidered the matter during the course of the trial and gave the attorneys a full opportunity to be heard. Pachter's testimony was not presented until August 22, 2012, a full 20 days after the defense was put on notice of the State's intent. In addition, the defense did not seek a continuance to prepare for the testimony further and appears to have fully cross-examined Pachter about the statement itself and about matters related to his credibility. Under those circumstances, we find that the trial court's ruling upon reconsideration was not arbitrary, fanciful, or unreasonable, and that it did not constitute an abuse of discretion. See *Leona W.*, 228 Ill.2d at 460, 320 Ill.Dec. 855, 888 N.E.2d 72; *Illgen*, 145 Ill.2d at 364, 164 Ill.Dec. 599, 583 N.E.2d 515.

**¶ 211 VI. Conflict of Interest Based on the Media Contract**

<sup>[29]</sup> ¶ 212 As his sixth point of contention on appeal, defendant argues that the trial court erred in finding that attorney Brodsky did not have a *per se* conflict of interest in representing defendant as a result of the media contract and in denying defendant's motion for new trial on that basis. Defendant asserts that by entering into the contract, Brodsky took a potentially adverse financial interest in defendant's case in violation of Rules 1.7 and 1.8 of the Illinois Ruled of Professional Conduct. Defendant asserts further that Brodsky saw defendant's case as a promotional tool, that he exploited defendant's case for his own professional and financial gain, and that his self

interest clouded his judgment to the detriment of defendant. According to defendant, the most glaring evidence thereof was the fact that Brodsky failed to advise defendant not to talk about the case and instead advised defendant to address the matter through a media blitz that provided publicity and promotional fees to Brodsky. Defendant contends that Brodsky's self interest in the case gave rise to a *per se* conflict of interest such that defendant's conviction must be reversed and the case remanded for a new trial, regardless of any showing of prejudice to defendant resulting from the conflict.

¶ 213 The State argues that trial court correctly found that Brodsky did not have a conflict of interest and properly denied that claim in defendant's posttrial motion for new trial. The State asserts that there was no conflict of interest in this case because: (1) Brodsky and defendant were acting in concert and cosigned the media contract with Selig and, thus, no violation of Rules 1.7 or 1.8 of the Illinois Rules of Professional Conduct occurred; (2) the media contract began and ended before defendant was even indicted in this case; and (3) the 2010 Rules of Professional Conduct were not even in effect when defendant and Brodsky entered into the media contract. According to the State, the purpose of entering into the contract was to generate revenue to pay defendant's legal fees and to avoid an indictment by getting ahead of the story in the media. In the alternative, the State asserts that even if Brodsky labored under a conflict of interest, that conflict was only an actual conflict, not a *per se* conflict, and defendant has not argued or shown that he suffered any prejudice as a result of the conflict, as would be required for defendant to receive a new trial. In making that argument, the State notes that the issue of whether Brodsky should be disciplined for his conduct is not the issue that is before the court in this appeal and is a completely separate issue from whether defendant's conviction should be reversed.

\*49 <sup>[30]</sup> <sup>[31]</sup> <sup>[32]</sup> ¶ 214 It is well established that a criminal defendant's sixth amendment right to effective assistance of counsel includes the right to conflict-free representation—the right to be represented by an attorney whose loyalty is not diluted by conflicting interests or obligations. *People v. Taylor*, 237 Ill.2d 356, 374, 341 Ill.Dec. 445, 930 N.E.2d 959 (2010). Under Illinois law, there are two categories of conflicts of interest: *per se* and actual. *Id.* Only a *per se* conflict is argued in the present case. The question of whether the undisputed facts of record establish a *per se* conflict of interest is a legal question that is subject to *de novo* review on appeal. See *People v. Hernandez*, 231 Ill.2d 134, 144, 324 Ill.Dec. 511, 896 N.E.2d 297 (2008). In deciding whether a *per se* conflict of interest exists, the reviewing court should

make a realistic appraisal of the situation. See *id.*

<sup>[33]</sup> <sup>[34]</sup> <sup>[35]</sup> ¶ 215 A *per se* conflict of interest exists when certain facts about defense counsel's status engender, by themselves, a disabling conflict. *Id.* at 142, 324 Ill.Dec. 511, 896 N.E.2d 297. In general, when defense counsel has a tie to a person or entity that would benefit from an unfavorable verdict for the defendant, a *per se* conflict of interest exists. *Id.* There are two reasons for the *per se* rule. *Id.* at 143, 324 Ill.Dec. 511, 896 N.E.2d 297. First is to avoid unfairness to the defendant. *Id.* Certain associations may have subliminal effects on defense counsel's performance which would be difficult for the defendant to detect or to demonstrate. *Id.* Second is to avoid later-arising claims that defense counsel's representation was not completely faithful to the defendant because of the conflict of interest. *Id.*

<sup>[36]</sup> ¶ 216 Our supreme court has identified three situations where a *per se* conflict of interest arises: (1) when defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) when defense counsel contemporaneously represents a prosecution witness; and (3) when defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant. *Id.* at 143–44, 324 Ill.Dec. 511, 896 N.E.2d 297. Unless the defendant has waived his right to conflict-free representation, if a *per se* conflict of interest exists, reversal is automatically required and there is no need for the defendant to show that the conflict affected the attorney's actual performance. *Id.* at 143, 324 Ill.Dec. 511, 896 N.E.2d 297.

¶ 217 After having reviewed the record in the present case, we find that attorney Brodsky did not labor under a *per se* conflict of interest. Simply put, the alleged conflict created by the media contract in this case does not fall into one of the categories of *per se* conflicts established by our supreme court. See *id.* at 143–44, 324 Ill.Dec. 511, 896 N.E.2d 297. Regardless of whether Brodsky entering into the contract constituted a violation of the Illinois Rules of Professional Conduct, that relationship did not give rise to a *per se* conflict of interest. See *id.* Therefore, an automatic reversal is not required. See *id.* at 143, 324 Ill.Dec. 511, 896 N.E.2d 297. We agree with the State that the issue of whether Brodsky's conduct is grounds for disciplinary action is not an issue that is before this court in this appeal and is a completely separate issue from whether Brodsky labored under a *per se* conflict of interest. See *People v. Armstrong*, 175 Ill.App.3d 874, 876, 125 Ill.Dec. 409, 530 N.E.2d 567 (1988) (“[t]he professional ethics of defendant's trial counsel is a matter for the Attorney Registration and Disciplinary

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Commission”), *pet. for leave to appeal denied*, 124 Ill.2d 556, 129 Ill.Dec. 151, 535 N.E.2d 916 (1989).

\*50 ¶ 218 In reaching that conclusion, we note that we do not agree with defendant’s contention that our supreme court’s decision in *People v. Gacy*, 125 Ill.2d 117, 125 Ill.Dec. 770, 530 N.E.2d 1340 (1988), mandates that a *per se* conflict of interest be found in the present case. Although our supreme court indicated in *Gacy* that a *per se* conflict of interest might very likely arise if the defense attorney enters into a book deal about the case during the course of the representation, it did not involve or address a situation such as that involved in the present case—where a potential defendant and his attorney, acting in concert, jointly enter into a media rights contract with a media company prior to criminal charges being brought against the potential defendant as a strategy to try to head off a possible indictment by getting ahead of the story in the media. Compare *id.* at 134–36, 125 Ill.Dec. 770, 530 N.E.2d 1340 (the supreme court held that there was no *per se* conflict of interest where defense counsel was offered, but refused, a book deal worth millions of dollars during his representation of defendant). The circumstances before us in the instant case did not give rise to a *per se* conflict of interest. See *Hernandez*, 231 Ill.2d at 143–44, 324 Ill.Dec. 511, 896 N.E.2d 297. Having so decided, we need not address the other arguments made by the parties on this issue.

#### ¶ 219 VII. Ineffective Assistance of Counsel Based Upon Calling Attorney Smith to Testify

¶ 220 As his seventh point of contention on appeal, defendant argues that he was denied effective assistance of trial counsel when attorney Brodsky called attorney Smith to testify in defendant’s case-in-chief over the State’s objection and Smith provided testimony that implicated defendant in Kathleen’s death. Defendant asserts that there was no understandable strategic purpose for calling Smith, whose testimony was very damaging to the defense and was tantamount to an admission of guilt in that it put before the jury something the State was unable to present—a witness to say that defendant had killed Kathleen. Defendant asserts further that the prejudice resulting from that decision is obvious, as the testimony that Smith provided was, according to defendant, the most incriminating evidence in the case.

¶ 221 The State argues that defendant cannot establish that defense counsel’s performance was deficient or that any prejudice resulted from the decision to call Smith to testify and that defendant’s claim of ineffective assistance

of counsel, therefore, should be rejected. Regarding deficient performance, the State points out that defendant was represented at trial by six privately-retained attorneys, that defendant was advised of the possible positive and negative effects of calling Smith to testify, that defendant consulted with the four attorneys who were present about the matter, and that defendant ultimately decided to go with the advice of Brodsky, who felt that the defense should call Smith as a witness. The State asserts that defense counsel’s (and defendant’s) decision to call Smith was a matter of trial strategy and not susceptible to a claim of ineffective assistance of counsel, in that the defense counsel hoped to use Smith’s testimony to rebut Pastor Schori’s depiction of Stacy as being a weeping fearful mother with a depiction of Stacy as being a brazen opportunist who was trying to use false claims to extort money from defendant in their divorce proceedings. According to the State, that some of defendant’s attorneys disagreed with that trial strategy is not a basis upon which to claim deficient performance of counsel. As for the prejudice aspect of ineffective assistance, the State contends that no prejudice resulted to defendant from the decision to call Smith to testify because Smith’s testimony was cumulative to, and less damaging than, the testimony of Schori.

\*51 <sup>[37]</sup> <sup>[38]</sup> ¶ 222 An issue of ineffective assistance of counsel presents the reviewing court with a mixed question of fact and law. *People v. Davis*, 353 Ill.App.3d 790, 794, 289 Ill.Dec. 395, 819 N.E.2d 1195 (2004). To the extent that the trial court’s findings of fact bear upon the determination of whether counsel was ineffective, those findings must be given deference on appeal and will not be reversed unless they are against the manifest weight of the evidence. See *id.* However, the ultimate question of whether counsel’s actions support a claim of ineffective assistance is a question of law that is subject to *de novo* review on appeal. See *id.*

<sup>[39]</sup> <sup>[40]</sup> ¶ 223 A claim of ineffective assistance of counsel is analyzed under the two pronged, performance-prejudice test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *People v. Patterson*, 217 Ill.2d 407, 438, 299 Ill.Dec. 157, 841 N.E.2d 889 (2005). To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) defense counsel’s performance was deficient, and (2) the deficient performance prejudiced the defendant to the extent that he was deprived of a fair proceeding. *Id.* In reviewing a claim of ineffective assistance of counsel, a court must consider defense counsel’s performance as a whole and not merely focus upon isolated incidents of conduct. See *People v. Cloyd*, 152 Ill.App.3d 50, 57, 105 Ill.Dec. 257, 504 N.E.2d 126 (1987). A strong

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presumption exists that defense counsel's conduct was within the wide range of reasonable professional assistance and that all decisions were made in the exercise of reasonable professional judgment. *Id.* at 56–57, 105 Ill.Dec. 257, 504 N.E.2d 126; *People v. Martin*, 236 Ill.App.3d 112, 121, 177 Ill.Dec. 533, 603 N.E.2d 603 (1992). In addition, matters of trial strategy will generally not support a claim of ineffective assistance of counsel, even if defense counsel made a mistake in trial strategy or tactics or made an error in judgment. *Patterson*, 217 Ill.2d at 441, 299 Ill.Dec. 157, 841 N.E.2d 889; *People v. Perry*, 224 Ill.2d 312, 355, 309 Ill.Dec. 330, 864 N.E.2d 196 (2007). “Only if counsel’s trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State’s case will ineffective assistance of counsel be found.” *Id.* at 355–56, 309 Ill.Dec. 330, 864 N.E.2d 196. To establish prejudice, the defendant must prove that there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Id.* at 342, 309 Ill.Dec. 330, 864 N.E.2d 196. A defendant’s failure to satisfy either prong of the *Strickland* test prevents a finding of ineffective assistance of counsel. *Id.*

[41] ¶ 224 After reviewing defense counsel’s performance in the instant case, we find that defendant was not denied effective assistance of trial counsel. First, defendant has failed to establish deficient performance. The decision of whether to call attorney Smith to testify was clearly a matter of trial strategy as defense counsel was seeking to discredit the impression of Stacy that Schori’s testimony had given to the jury. See *Patterson*, 217 Ill.2d at 442, 299 Ill.Dec. 157, 841 N.E.2d 889 (the decision of whether to call a particular witness is a matter of trial strategy). Regardless of whether that strategy worked, the decision to call Smith to testify was ultimately a fully-informed decision that was made by defendant himself after considering the conflicting advice of his many attorneys on the matter. See *Stoia v. United States*, 109 F.3d 392, 398 (7th Cir.1997) (in a case where the defendant was represented by multiple attorneys, defendant had only himself to blame for taking the advice of one attorney over the other as to matters of trial strategy).

\*52 [42] ¶ 225 Second, defendant has also failed to establish that he was prejudiced by the decision to call attorney Smith to testify. As the State correctly notes, the potentially damaging aspect of Smith’s testimony—that Stacy had stated essentially that defendant had killed Kathleen—was largely cumulative to the testimony that had already been provided by Pastor Schori. Thus, we cannot say that but for the decision to call Smith there was a reasonable probability that the result of defendant’s trial would have been different. See *Perry*, 224 Ill.2d at

342, 309 Ill.Dec. 330, 864 N.E.2d 196. Contrary to defendant’s assertion on appeal, the specific language used by Stacy in making the statement to Smith—“how defendant killed Kathleen”—does not make the statement to Smith particularly more damaging to the defense than Stacy’s statement to Schori.

**¶ 226 VIII. Cumulative Error**

¶ 227 As his eighth point of contention on appeal, defendant argues that he was denied a fair trial because of the cumulative effect of all of the errors listed. However, since we have found that no errors occurred, defendant’s claim of cumulative error must be rejected. See *People v. Albanese*, 102 Ill.2d 54, 82–83, 79 Ill.Dec. 608, 464 N.E.2d 206 (1984) (the supreme court declined to apply the cumulative error doctrine where defendant failed to establish that anything approaching reversible error occurred), *rev’d on other grounds by People v. Gacho*, 122 Ill.2d 221, 262–63, 119 Ill.Dec. 287, 522 N.E.2d 1146 (1988).

**¶ 228 CONCLUSION**

¶ 229 For the foregoing reasons, we affirm defendant’s conviction and sentence.

¶ 230 Affirmed.

Justices O’BRIEN and SCHMIDT concurred in the judgment and opinion.

<sup>1</sup> This court had found in the prior appeal that reliability was not a factor to be considered in determining whether the statements were admissible under the FBWD doctrine. *Peterson II*, 2012 IL App (3d) 100514–B, ¶¶ 21, 23. Judge White had made the determination at the earlier hearsay hearing because reliability was listed as one of the considerations under the statute (see 725 ILCS 5/115–10.6(e)(2) (West 2008)).

<sup>2</sup> The order of the witnesses listed here does not represent the order in which the witnesses were called to testify at trial. In some instances, the order of the witnesses has been changed for the convenience of the reader.

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3 Much testimony was presented early in the case about a blue bath towel that was visible on the bathroom counter in one or more of the photographs of the scene and about whether that towel was present when the neighbors and defendant first found Kathleen's body and when the paramedics arrived. In response to an objection by the defense, the trial court precluded the State from arguing that defendant had subsequently placed the towel in that location because, according to the trial court, to do so in the manner in which the State intended to proceed would have constituted an impermissible direct comment upon defendant's right to remain silent and his right not to testify at trial.

4 All of the forensic pathologists that testified in this case described their background and experience to the jury in great detail.

5 Each of the forensic pathologists had reviewed numerous documents as part of his or her work in this case, such as the police reports, the photographs of the scene, the coroner's reports, the autopsy reports, the autopsy photographs, and the reports of the other forensic pathologists.

6 Blum and all of the other forensic pathologists stated that their findings, conclusions, and opinions were being rendered to a reasonable degree of medical and scientific certainty.

7 Although Smith initially stated in his trial testimony that Stacy had asked him if the fact that defendant killed Kathleen could be used against defendant in the divorce proceedings, it was made clear during further questioning in both direct- and cross-examination that Stacy had asked Smith if she could get more money out of defendant if she threatened to tell the police about how defendant had killed Kathleen.

8 It is not clear from the record whether the trial court had found that a conflict of interest arose or was merely assuming that one had arisen for the purpose of analysis.

9 Rossetto's testimony was barred at trial for due process reasons, so the jury never heard what Stacy allegedly told Rossetto.

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4. That the handwritten statement of Kathleen Savio referring to the investigation into the July 5, 2002 incident previously marked as People's Exhibit No. 115 provides sufficient safeguards of reliability as to the time, contents and circumstances of the statement.
5. That the interests of justice will best be served by the admission of the statement into evidence in its redacted form. See Attachment B.
6. That the statement made by Kathleen Savio to her sister, Anna Doman, to the effect that, "Drew said he's going to kill me and I would not make it to the divorce settlement, I will never get his pension or my children," provides sufficient safeguards of reliability as to the time, contents and circumstances of the statement.
7. That the interests of justice will best be served by the admission of the statement into evidence.
8. That the statement made by Kathleen Savio to Mary Susan Parks in the late fall of 2003 describing the incident wherein the defendant, DREW PETERSON, entered Kathleen Savio's residence and grabbed her by the throat holding her down and stating that "why don't you just die," provides sufficient safeguards of reliability as to the time, contents and circumstances of the statement.
9. That the interests of justice will best be served by the admission of the statement into evidence.
10. That the statement made by Kathleen Savio to Mary Susan Parks that "he could kill her and no one would know" provide sufficient safeguards of reliability as to the time, contents and circumstances of the statement.

11. That the interests of justice will best be served by the admission of the statement into evidence.
12. That the remaining statements attributed to Kathleen Savio do not provide sufficient safeguards of reliability as to time, contents and circumstances of the statements.
13. That the interests of justice would not best be served by the admission of the remaining statements attributed to Kathleen Savio into evidence.
14. That the State by a preponderance of the evidence has proven that the defendant, DREW PETERSON, murdered the declarant, Stacy Peterson, and proved by a preponderance of the evidence that the murder was intended to cause the unavailability of the declarant, Stacy Peterson, as a witness.
15. That the statement by Stacy Peterson to Neil Schori that prior to the discovery of Kathleen Savio's body the defendant, DREW PETERSON, returned home in the early morning hours dressed in black with a bag containing woman's clothing which were not Stacy Peterson's and describing the physical actions of the defendant, DREW PETERSON, at that time provides sufficient safeguards of reliability as to the time, contents and circumstances of statement.
16. That the interests of justice would best be served by the admission of the statement into evidence.
17. That the remaining statements attributed to Stacy Peterson that were not withdrawn from consideration by the State do not provide sufficient safeguards of reliability as to the time, contents and circumstances of the statements.
18. That the interests of justice would not be served by the admission of the statement into evidence.

**IT IS FURTHER ORDERED** that this ruling shall remain under seal and the parties shall not disclose or discuss the ruling publicly until further order of court.

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2010.

ENTERED: \_\_\_\_\_  
STEPHEN D. WHITE, CIRCUIT JUDGE