

No. 120331

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, Third Judicial District
Plaintiff-Appellee,	)	No. 3-13-0157
)	
v.	)	There on Appeal from the
	)	Circuit Court of the Twelfth
	)	Judicial Circuit, Will County, Illinois
	)	No. 09 CF 1048
)	
DREW PETERSON,	)	The Honorable
	)	Stephen D. White and Edward A.
Defendant-Appellant.	)	Burmila, Jr., Judges Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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POINTS AND AUTHORITIES

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ISSUES PRESENTED

Defendant Drew Peterson was convicted of the first degree murder of his third ex-wife, Kathleen Savio (Kathy) after the disappearance of his fourth wife, Stacy Peterson (Stacy), led law enforcement officers to revisit their prior determination that Kathy's death had been accidental.

1. Defendant contests the rulings of the circuit and appellate courts finding hearsay by Kathy and Stacy admissible through the forfeiture-by-wrongdoing exception to the hearsay rule, raising three sub-issues: (a) whether the appellate court correctly held that there was an irreconcilable conflict between 725 ILCS 5/115-10.6 and Illinois Rule of Evidence (IRE) 804(b)(5), and that, under separation of powers principles, the latter governed; (b) whether the appellate court correctly rejected defendant's suggestion that, to trigger application of the forfeiture doctrine, the State was required to specify the testimony defendant sought to prevent; and (c) whether the circuit court abused its discretion in finding that the State proved the intent factor with regard to declarants Kathy and Stacy.
2. Whether the appellate court correctly rejected defendant's claim that trial counsel's decision to present testimony from attorney Harry Smith was ineffective assistance of counsel.
3. Whether the circuit court should have disallowed Smith's testimony at the hearsay hearing and at trial about his conversation with Stacy because it was protected by attorney-client privilege.
4. Whether defense counsel was operating under a *per se* conflict of interest due to a media contract that expired before defendant was indicted in the present case.

5. Whether the appellate court correctly held that the circuit court did not abuse its discretion in finding that the State demonstrated good cause for extending the deadline to provide the notice, required by IRE 404(c), of its intent to present other-crimes evidence via the testimony of Jeffrey Pachter.
6. Whether the appellate court correctly rejected defendant's cumulative error claim.

JURISDICTION

Contrary to defendant's assertion, Def. Br. 1, jurisdiction lies under Supreme Court Rules 315 and 612(b). On March 30, 2016, this Court allowed defendant's petition for leave to appeal. *People v. Peterson*, 48 N.E.3d 1095 (Table) (Ill. 2016).

STATUTORY PROVISION AND COURT RULES INVOLVED

The Code of Criminal Procedure provides in relevant part:

§ 115-10.6. Hearsay exception for intentional murder of a witness.

(a) 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 Section 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.

(b) While intent to procure the unavailability of the witness is a necessary element for the introduction of the statements, it need not be the sole motivation behind the murder which procured the unavailability of the declarant as a witness.

(c) The murder of the declarant may, but need not, be the subject of the trial at which the statement is being offered. If the murder of the declarant is not the subject of the trial at which the statement is being offered, the murder need not have ever been prosecuted.

(d) The proponent of the statements shall give the adverse party reasonable written notice of its intention to offer the statements and the substance of the particulars of each statement of the declarant. For purposes of this Section, identifying the location of the statements in tendered discovery shall be sufficient to satisfy the substance of the particulars of the statement.

(e) The admissibility of the statements shall be determined by the court at a pretrial hearing. At the hearing, the proponent of the statement bears the burden of establishing 3 criteria by a preponderance of the evidence:

- (1) first, that the adverse party murdered the declarant and that the murder was intended to cause the unavailability of the declarant as a witness;
- (2) second, that the time, content, and circumstances of the statements provide sufficient safeguards of reliability;
- (3) third, the interests of justice will best be served by admission of the statement into evidence.

(f) The court shall make specific findings as to each of these criteria on the record before ruling on the admissibility of said statements.

(g) This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.

725 ILCS 5/115-10.6 (2008).

Illinois Rule of Evidence 804 states in relevant part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

...

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

Ill. R. Evid. 804(b)(5). Illinois Rule of Evidence 404 states in relevant part:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith except as provided by sections 115-7.3, 115-7.4, and 115-20 of the Code of Criminal Procedure (725 ILCS 5/115-7.3, 725 ILCS 5/115-7.4, 725 ILCS 5/115-20). Such evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(c) In a criminal case in which the prosecution intends to offer evidence under subdivision (b), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

Ill. R. Evid. 404(b) & (c).

STATEMENT OF FACTS

Defendant and Kathy were married on May 3, 1992. C3415.¹ Kathy decided to seek a divorce in February 2002 upon discovering that defendant was having an extramarital affair with Stacy. R6901, 6966-67. On October 10, 2003, their marriage was dissolved, although property and child custody issues remained unresolved. Peo. Exhs. 103 & 104; C2955. During the divorce process, Kathy was awarded temporary custody of their two sons, and defendant had visitation rights every other weekend. Peo. Exhs. 98 & 103; C3426. The weekend of February 28 – 29, 2004, defendant had weekend custody of the children. R6957-58, 9912, 9914-20.

Several people were unable to contact Kathy on Sunday, February 29, 2004 and Monday, March 1, 2004; defendant enlisted the assistance of a locksmith and several neighbors to check on her in her home on March 1. R6920-22, 7080-83, 8306. Late that evening, the neighbors and defendant discovered Kathy dead in her bathtub. R6898, 6901, 6921-25, 6933-36, 7081, 7090, 9926. After the first autopsy, forensic pathologist Dr. Bryan Mitchell opined to police that Kathy's death was not a homicide, R7677, and the death was ruled accidental after a coroner's inquest, C3431; R7571-72. But soon after Stacy's October 2007 disappearance, R1456-61, 2110-30, Kathy's body was exhumed and autopsied twice more, after which three experts concluded that her manner of death was a homicide, R8832,

¹ "C" refers to the consecutively-numbered nineteen-volume common law record, the final volume of which is supplemental record; "R" refers to the consecutively-numbered forty-nine-volume report of proceedings; "Def. Br." refers to defendant's opening brief; "A" refers to the appendix to defendant's brief; "AE" refers to the appendix to this brief; "PLA" refers to defendant's petition for leave to appeal; and "Peo. Exh." refers to State trial exhibits that can be found within the box in the record on appeal labeled "EX 7."

8837, 8861-62, 8987, 9505 (forensic pathologist Dr. Larry Blum); R9445-46, 9451, 9461, 9557-58 (forensic pathologist/neuropathologist Dr. Mary Case); R4666, 9506, 10878, 10882, 10887, 10889-91 (forensic pathologist Dr. Michael Baden). Defendant was charged by indictment with Kathy's first degree murder in May 2009. C2-3.

At defendant's 2012 trial, compelling evidence established that Kathy was murdered and that she did not drown after falling in the bathtub. First, Kathy's body bore numerous fresh injuries that were consistent with a struggle rather than a single fall.² All of these injuries occurred before Kathy's death and were fresh, R8915, 8922-26, 8930-31, 8939-44, 8947-51, 9080, 9087-88, 9092, 9131; *see also* R10527 (defense expert Dr. Jeffrey Jentzen); R10580-81 (defense expert Dr. Vincent DiMaio), which for contusions means within twelve to twenty-four hours of death, and for abrasions means within an hour of death, R8915, 8940-44, 9618. Kathy's boyfriend, Steve Maniaci, saw no bruises or abrasions on Kathy's body when they had sex on the night of Friday, February 27, 2004. R8260, 8287-91, 8297-98.

Expert witnesses explained how Kathy's numerous injuries were more consistent with a struggle than with a single accidental fall while bathing. The laceration to Kathy's head could not have occurred in the bathtub because it was caused by a trauma by a

² Her noted injuries included (1) a one-inch laceration on the left, back region of the scalp, R8905, 8907, 8933; (2) a three-by-one-inch abrasion on the left buttocks, R8843; (3)-(5) three one-to-two-inch contusions on the lower left abdomen, R8867, 8922-23; (6) a one-inch contusion on the front of the left thigh, R8924; (7)-(8) a $\frac{3}{8}$ -inch contusion on each shin, R8925; (9)-(10) a $\frac{1}{2}$ -inch and a $\frac{3}{4}$ -inch abrasion on the right outer wrist, R8942-43; (11) a $\frac{1}{8}$ -inch abrasion on the back of the right first finger, R8943; (12) a $\frac{3}{8}$ -inch abrasion on the left elbow, R8941; (13)-(14) a contusion below each clavicle, R8912; (15) a contusion on the side of the left breast, R8911, 8914-15; (16) abrasions on the front of the left arm, R8939; and (17) a two-inch contusion in the diaphragm, R10892-93. *See also* C3361-62, 3382.

concentrated, blunt edge, and there was no such edge in the bathtub area. R8887, 8937-39, 9130, 9532-34. The abrasion on Kathy's left buttock could not have been caused by the smooth surface of the tub because an abrasion is a scraping injury to the skin caused by rubbing against a rough surface. R8844, 8886-88, 8946-47, 8957, 9132-34, 9546-49. The three bruises on Kathy's lower left abdomen were caused by three separate points of impact that each required a "great amount of force" to cause hemorrhaging down to the bone; they could not have been caused by a single fall in the tub. R8865-67, 8922-23, 9136-37, 9508-11. "Very significant" force was also required to cause the bruise in the diaphragm, such as a blow below the rib cage or a strong squeeze, like a bear hug, at the edge of the rib cage. R9515, 10892-93. And the bruises to the clavicles and the left breast were caused by blunt force impact from two or three separate strike points. R9544-46. The symmetrical injuries to the clavicles were consistent with someone pushing Kathy against a hard surface. R10937-38, 10959-60.

Other evidence belied an accidental slip-and-fall death. Had a backwards fall caused the laceration on the back of Kathy's head, there also would have been bruising, not abrasions, to her back or buttocks, and bruising on her arms as she reflexively would have attempted to catch herself, but there was none in either location. R8869, 8957, 8974, 9506, 9511-12. Moreover, the laceration that damaged only her scalp would not have rendered Kathy unconscious. R9517-20, 9524, 9527-28. The scalp laceration would have bled immediately and profusely with spatter at the point of impact, but blood was found only on the bottom of the tub. R7870, 8909-10, 9530-32, 9548. And Kathy's body was wedged into the tub, with the toes of one foot bent at a ninety-degree angle, which position was inconsistent with a theory that she passively floated after a loss of consciousness. R8884-85,

9138. Further, Kathy's body was found face-down in the dry bathtub; the dried rivulets of blood on the left side of her face would "[a]bsolutely not" have been there if her face had been submerged in water. R7057, 8908-11, 9138-39.

Second, the State provided evidence that defendant had the motive and opportunity to kill Kathy. As detailed in Part I.C.2.a., *infra*, defendant had a strong motive to kill Kathy: trial on the marital property distribution and child custody issues was imminent, and the prior orders and settlement recommendation by the judge presaged that Kathy would receive many hundreds of thousands of dollars in the divorce and obtain custody of the two children. And in November 2003, four months before Kathy's death, defendant offered an acquaintance \$25,000 if he could help him find a hit man to "take care of his third wife" because she "was causing him some problems" and she "had something on him." R9653, 9656-57, 9664, 9668, 9671, 9708, 9710. In July 2004, months after Kathy's death, defendant told that same acquaintance that he no longer needed the favor. R9675, 9678.

As for opportunity, defendant had no alibi: Pastor Neil Schori testified that Stacy told him in August 2007 that on the night of Kathy's death, after being absent for a time overnight, Stacy saw defendant, dressed in black, placing women's clothes that were not hers into the washing machine; afterwards, he coached her for hours about lying to the police. R9998, 10005-08. Schori believed Stacy was telling the truth. R10015, 10029. And defendant had access to Kathy's house even after he moved out. Even though Kathy changed the locks on her garage and front doors in early 2002, R7047, 9904, defendant entered multiple times afterward, including in July 2002 through use of a garage door opener that he programmed himself, C3340-41, 3452; R8684, 8753-54, and again in November 2003, R8084, 8087. Moreover, when Kathy's body was found, there was no sign of forced entry,

R7646, 9792-93, although the officers at the scene never checked whether the basement windows were locked, R7597-98, 9756-57.

Finally, there was abundant evidence that defendant threatened Kathy. Regarding defendant's July 2002 break-in, Kathy reported to police and a prosecutor that defendant had entered her home without permission in full police uniform, forced her to remain on the stairs to talk about their history for over three hours, acting upset and brandishing a knife before leaving. C3340-41, 3452; R8677-79, 8684, 8748-55, 10203-04. Kathy crossed out the word "knife" in her written statement to police because she did not want defendant to lose his job. R8750-51. And during the November 2003 break-in, Kathy said that defendant pinned her down, grabbed her by the throat — leaving dark red marks — and said "why don't you just die?" R8084, 8086-88. Kathy told two people that defendant had held her at knifepoint and threatened that he could kill her and make it look like an accident, R7994, 8402; she told another friend that defendant threatened to kill her and make her disappear, R8097. In mid-January 2004, Kathy reported to her sister that defendant told her that he would kill her so that she would not make it to the divorce settlement and she would not get his pension or the children; he also threatened that he could kill her and make it look like an accident. R7397-98, 7434-35. Kathy asked her two sisters to take care of her sons. R7399, 8412. Kathy reported sleeping with a knife under her mattress "for protection," R7994, 10394-95; she also asked a neighbor to install a deadbolt on the inside of her bedroom door, R6904-05, 7044-45.

In September 2012, a jury found defendant guilty of Kathy's first degree murder, C1146; R11439, 11444, and the trial court sentenced defendant to thirty-eight years of imprisonment, C1403; R11908. On appeal, defendant raised several claims, all of which the

appellate court rejected in affirming defendant's conviction and sentence. *People v. Peterson (Peterson III)*, 2015 IL App (3d) 130157 (A53-94).³

Additional facts related to particular issues are included in the Argument section.

ARGUMENT

I. The Circuit and Appellate Courts Correctly Found Hearsay Admissible Under the Forfeiture-by-Wrongdoing Doctrine.

A. Background

The State filed pretrial motions seeking admission of hearsay statements made by Kathy and Stacy, relying on both the common-law doctrine of forfeiture by wrongdoing and the statutory hearsay exception for intentional murder of a witness, 725 ILCS 5/115-10.6 (2008) (eff. Dec. 8, 2008).⁴ C1656-66, 1719-23, 1866-70. In January and February 2010, the circuit court held a pretrial hearing to evaluate the admissibility of the statements. R603, 614-4909. Ultimately, in a May 18, 2010 order, the court found six of fourteen hearsay statements admissible. C2102-10 (A3-6); *see also* AE8-9. Among its findings, the court ruled that the State proved by a preponderance of the evidence that defendant murdered Kathy and Stacy with the intent to make them unavailable as witnesses. C2102 (A3), 2104 (A5). In response to a defense motion for clarification, C2209-15, the court noted that it had analyzed the admissibility of the statements solely under section 115-10.6 and not under the common-law forfeiture doctrine, R4938-39, 4945.

On June 30, 2010, the State moved the circuit court to evaluate the statements' admissibility under the common-law doctrine, citing *People v. Hanson*, 238 Ill. 2d 74 (June

³ The State cites the opinion as if it began at A53.

⁴ Effective August 3, 2015, this provision was repealed. Pub. Act 99-243.

24, 2010). C2291-94. On July 6, 2010, the court denied the motion, noting only that “the Court’s previous ruling is to stand.” C2344. On July 7, 2010, the State filed a certificate of impairment and a notice of appeal from both the May and July rulings. C2347-50, 2496.

The appellate court reversed and remanded for trial, holding that the eight remaining hearsay statements were admissible under IRE 804(b)(5).⁵ *People v. Peterson (Peterson II)*, 2012 IL App (3d) 100514-B, ¶¶ 23, 25, 31-32 (AE5-6). Specifically, the appellate court noted that in 2007, this Court adopted the longstanding common-law forfeiture doctrine (codified by Federal Rule of Evidence (FRE) 804(b)(6)), which provides a hearsay exception for a statement offered against a party (1) that engaged or acquiesced in wrongdoing (2) that was intended to, and did, render the declarant an unavailable witness. *Peterson II*, 2012 IL App (3d) 100514-B, ¶¶ 20-21 (AE4-5) (citing *People v. Stechly*, 225 Ill. 2d 246, 272-73 (2007)). In addition to the two criteria of the common-law doctrine, section 115-10.6 required a showing (by a preponderance of the evidence) that the time, content, and circumstances of the statements provided sufficient safeguards of reliability. *See id.* at ¶ 22 (AE5) (citing 725 ILCS 5/115-10.6(e)(2) (2008)). As relevant here, the statute also required the court to make specific findings on the record. 725 ILCS 5/115-10.6(f) (2008).⁶ Effective

⁵ This Court directed the appellate court to consider the merits of the appeal, *People v. Peterson*, 958 N.E.2d 284 (Mem) (Ill. 2011), after the appellate court initially ruled that it lacked jurisdiction, *People v. Peterson (Peterson I)*, 2011 IL App (3d) 100513, ¶¶ 25-48.

⁶ Section 115-10.6 was also narrower than the common-law doctrine in that it (1) limited the qualifying “wrongdoing” to intentional or knowing murder committed by defendant, 725 ILCS 5/115-10.6(a) (2008), and (2) required that the “interests of justice” be served by admission of the hearsay, 725 ILCS 5/115-10.6(e)(3) (2008). Defendant makes no argument that the circuit court erred in failing to conduct an “interests of justice” inquiry, although he does contest the reliability and specific-findings requirements.

January 1, 2011, IRE 804(b)(5) codified the common-law doctrine, which lacked a reliability requirement. *Peterson II*, 2012 IL App (3d) 100514-B, ¶¶ 22-23 (AE5).

In deciding which provision governed — section 115-10.6 or IRE 804(b)(5) — the appellate court concluded that under separation-of-powers principles, this Court has the ultimate authority to determine evidentiary rules for courts, and that rules or decisions from this Court prevail when they conflict with a statute on the same topic. *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 24 (AE5) (citing Ill. R. Evid. 101; *People v. Walker*, 119 Ill. 2d 465, 475 (1988); *People v. Joseph*, 113 Ill. 2d 36, 45 (1986)). Thus, the appellate court held that the circuit court erred in applying section 115-10.6. *Id.* (AE5). Finally, the appellate court noted that the circuit court's findings — that the State proved by a preponderance of the evidence that (1) defendant murdered Kathy and Stacy, and (2) he did so with the intent to make them unavailable as witnesses — rendered the remaining eight hearsay statements that had been excluded as unreliable under section 115-10.6 admissible under IRE 804(b)(5). *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 25 (AE5).

On remand, the State argued that in light of *Peterson II*, any relevant hearsay statement by Kathy and Stacy was potentially admissible at trial via the forfeiture doctrine, *i.e.*, not just the fourteen statements addressed at the pretrial hearsay hearing. R5685-86. The circuit court agreed. R6096-99, 7977-78. Ultimately, twelve witnesses testified about hearsay statements made by Kathy and Stacy. *See* AE9-14.

On appeal, defendant challenged the admission of the hearsay statements on multiple grounds, including that the State failed to prove the intent factor, *i.e.*, that defendant killed Kathy and Stacy with the intent of preventing them from testifying as witnesses, because (1) the circuit court failed to require a showing of the specific testimony defendant wanted

to prevent; and (2) the State provided insufficient evidence to establish the same. The appellate court addressed and rejected only the first argument, noting that it had already held in *Peterson II* that the circuit court had made the appropriate findings and that the holding was now the law of the case. *Peterson III*, 2015 IL App (3d) 130157, ¶ 204 (A90) (citing *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 25 (AE5) (holding that circuit court's findings that (1) defendant killed Kathy and Stacy (2) with intent to make them unavailable as witnesses rendered statements admissible under IRE 804(b)(5)).

Here, defendant again challenges the admission of the hearsay statements. This Court should affirm the appellate court's holding that IRE 804(b)(5) took precedence over section 115-10.6 under separation-of-powers principles. And this Court should hold that the circuit court did not abuse its discretion in concluding that the State provided sufficient evidence of the intent factor, in part because the State was not required to specify the testimony that defendant sought to prevent by killing Kathy and Stacy.

**B. The Appellate Court Properly Held that IRE 804(b)(5), Rather than 725 ILCS 5/115-10.6, Governed the Admissibility Issue.
(Response to Defendant's Part II)**

Standard of Review: The appellate court held that, under separation-of-powers principles, IRE 804(b)(5), not 725 ILCS 5/115-10.6, controlled. *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 24 (AE5). Defendant's challenge to this holding, Def. Br. 20-27, presents a question of law that is reviewed *de novo*. See *Davidson v. Davidson*, 243 Ill. App. 3d 537, 538 (1st Dist. 1993) (separation of powers challenge to statute presents question of law); *People v. McCarty*, 223 Ill. 2d 109, 135 (2006) (question of law is reviewed *de novo*).

Defendant's separation-of-powers arguments are meritless.⁷ Legislation can raise separation-of-powers concerns in two distinct situations: (1) when it "unduly encroaches" on the "inherent powers" of the judicial branch (even in the absence of a court rule affirmatively addressing the same specific subject); or (2) when it conflicts with a court rule on the same specific subject (even if the subject is one that the legislature is not otherwise forbidden to address). See *Walker*, 119 Ill. 2d at 475-78; *People v. Flores*, 104 Ill. 2d 40, 48-50 (1984) (docket control is example of first type of violation). The first type of violation is not implicated in this case because the legislation does not concern a matter of inherent judicial authority such as docket control; the admission of evidence at trial is *potentially* a valid subject of legislation. See, e.g., *People v. Felella*, 131 Ill. 2d 525, 537-40 (1989) (statute allowing testimony of victim or witness at sentencing did not violate separation of powers). Thus, the several cases that defendant cites that reject separation-of-powers challenges *when there was no conflicting court rule*, Def. Br. 23-24 (citing *Felella*, 131 Ill. 2d at 537-40; *Hoem v. Zia*, 239 Ill. App. 3d 601, 611-12 (4th Dist. 1992); *People v. Ramirez*, 214 Ill. 2d 176, 184-86 (2005)),⁸ demonstrate only that the first type of separation-of-powers violation is not present here — a point on which the State agrees.

The appellate court found the *second* type of separation-of-powers violation: that the statute "directly and irreconcilably conflicts" with a court rule on a matter within the court's

⁷ Defendant has forfeited his ability to rely on the factual assertions in footnote 8, Def. Br. 21 n.8 (quoting Will County State's Attorney) due to his failure to cite to the record on appeal. *People v. Urdiales*, 225 Ill. 2d 354, 420 (2007); Ill. Sup. Ct. R. 341(h)(7); see also *infra* Part IV.C.

⁸ Defendant's citation of *People v. Sandoval*, 135 Ill. 2d 159 (1990), is puzzling, Def. Br. 24, as he fails to provide a pin cite and the phrase "separation of powers" appears nowhere in that thirty-eight-page case.

authority: judicial practice. *Walker*, 119 Ill. 2d at 475 (where statute “directly and irreconcilably conflicts with a rule of this court on a matter within the court’s authority, the rule will prevail”) (citing *People v. Cox*, 82 Ill. 2d 268, 274 (1980); *People v. Jackson*, 69 Ill. 2d 252, 259 (1977)). Under a straightforward application of this well-established principle, IRE 804(b)(5) governs over the conflicting legislative enactment, section 115-10.6. On the specific question of when hearsay is admissible due to forfeiture by wrongdoing, IRE 804(b)(5) plainly imposes only two criteria — that “[(1)] a party [] has engaged or acquiesced in wrongdoing [(2)] that was intended to, and did, procure the unavailability of the declarant as a witness,” Ill. R. Evid. 804(b)(5) — while section 115-10.6 imposed additional requirements, including the reliability and specific-findings requirements that defendant claims should have applied, Def. Br. 26. Either the additional requirements of the statute apply or they do not; there is no way to reconcile the two. *See Cox*, 82 Ill. 2d at 271, 273, 275 (nullifying statute under separation-of-powers doctrine given irreconcilable conflict between Ill. Sup. Ct. R. 615(b)(4) (authorizing reviewing courts only to reduce punishment imposed by circuit court) and Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-4.1 (authorizing reviewing court to increase sentence imposed by circuit court)).

Walker, which reconciled a statute on substitution of judges with a cited court rule, *see* Def. Br. 22-23, is distinguishable because that rule concerned only the general authority of chief judges to initially assign cases — there was no conflict. *Walker*, 119 Ill. 2d at 475-77. In contrast, applying the extra requirements from section 115-10.6 would not reconcile it with IRE 804(b)(5), but rather would permit the statute to govern a particular matter specifically addressed by court rule, contrary to *Walker*.

Defendant's suggestion that the two can be reconciled by applying section 115-10.6 in murder cases and IRE 804(b)(5) in all other cases, Def. Br. 25, should be rejected. IRE 804(b)(5) governs forfeiture by wrongdoing in *all* cases — regardless of how a declarant was made unavailable and whether defendant committed or merely acquiesced in the act rendering her unavailable. Defendant's suggestion for reconciling the two provisions is absurd. Intentional and knowing murder are the most egregious ways in which a defendant can render a witness unavailable to testify. It defies reason to conclude that only defendants who interfere with the functioning of the judicial system in the most egregious ways should benefit from a *narrower* forfeiture-by-wrongdoing rule (so that *less* hearsay will be admissible against them).

Accordingly, this Court should affirm the appellate court's holding that IRE 804(b)(5), rather than section 115-10.6, governed the admissibility of hearsay in this case.

C. The Appellate Court Properly Interpreted the Scope of IRE 804(b)(5)'s Intent Factor, and the Circuit Court Correctly Held that the State Proved the Factor.
(Response to Defendant's Part I)

For hearsay to be admissible via the forfeiture doctrine, the State has to prove that “[(1)] a party [] has engaged or acquiesced in wrongdoing [(2)] that was intended to, and did, procure the unavailability of the declarant as a witness.” Ill. R. Evid. 804(b)(5). Here, defendant does not dispute that the State met its burden regarding the first factor: he does not dispute the circuit court's finding that he murdered Kathy and Stacy. Def. Br. 9-20. Defendant argues only that the State failed to prove the second factor — that he acted with the intent of preventing Kathy and Stacy from testifying as witnesses. *Id.* Defendant is incorrect. To the extent that defendant is faulting the circuit court for not requiring the State

to specify the testimony that defendant sought to prevent, precedent does not support his position. *Id.* In any event, the circuit court did not abuse its discretion in finding that the State proved that intent.⁹

1. This intent factor does not require the State to identify the specific testimony defendant acted to prevent.

Standard of Review: The appellate court held that the trial court’s findings — that the State proved by a preponderance of the evidence that (1) defendant murdered Kathy and Stacy, and (2) he did so with the intent to make them unavailable as witnesses — rendered their hearsay statements admissible under IRE 804(b)(5). *Peterson II*, 2012 IL App (3d) 100514-B, ¶ 25 (AE5). Defendant claims that proof of the intent factor must include a description of the testimony that the defendant acted to prevent. Def. Br. 10, 14. Defendant raises a question of law about the meaning of IRE 804(b)(5), so a *de novo* standard of review applies. *See In re Det. of Hardin*, 238 Ill. 2d 33, 44 (2010).

The plain language of the evidentiary rules codifying the common-law forfeiture doctrine requires proof that defendant intended to render the declarants unavailable as witnesses. Ill. R. Evid. 804(b)(5); Fed. R. Evid. 804(b)(6). It says nothing about the declarant’s specific statements. Similarly, defendant finds no support from his cited cases, Def. Br. 9-14, because none requires the prosecution to identify the precluded testimony.

Giles v. California, cited in Def. Br. 10-12, addressed whether the forfeiture doctrine applied whenever the declarant’s absence was the result of defendant’s conduct, as held by

⁹ Although Part I.C. assumes that IRE 804(b)(5) governs the forfeiture doctrine as demonstrated in *supra* Part I.B., the analysis is equally applicable under section 115-10.6 because it similarly requires that defendant “intend[ed] to procure the unavailability of the declarant as a witness in a criminal or civil proceeding.” 725 ILCS 5/115-10.6(a) (2008).

the California Supreme Court, or whether the doctrine required the prosecution to prove that the defendant acted with the intent to make the declarant unavailable as a witness, 554 U.S. 353, 357-58, 361 (2008). The Court endorsed the latter interpretation. *Id.* at 361, 367-68. Thus, *Giles* confirmed that the forfeiture doctrine was narrower than had been previously found in many jurisdictions. But this narrowing came not from requiring the prosecution to identify the testimony a defendant sought to avoid, as defendant here contends, but from requiring a showing that defendant acted with the intent to render the declarant unavailable.

Subsequent case law — including the four cases defendant cites, Def. Br. 12-14 — wrestled with whether the prosecution satisfied its burden of proving this intent factor. But none of defendant's cases even suggests that the prosecution must identify the specific testimony a defendant seeks to avoid. *See People v. Jenkins*, 2013 IL App (4th) 120628, ¶¶ 2, 31 (insufficient evidence of intent to render the victim unavailable witness where defendant shot victim intending to procure his wallet, not his unavailability as witness); *People v. Roscoe*, 846 N.W.2d 402, 406-08 (Mich. Ct. App. 2014) (*per curiam*) (insufficient evidence of intent to render victim unavailable witness because defendant shot victim while stealing and before crime reported to police or charges filed); *State v. Dillon*, __ N.E.3d ___, 2016 WL 1545136, at *1, *7 (Ohio Ct. App. Apr. 15, 2016) (insufficient evidence of intent to render victim unavailable witness when defendant shot mother after argument about taking truck without permission).

Finally, although defendant contends that *Jensen v. Schwochert*, No. 11-C-0803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013), is the “[m]ost similar” to his own case, Def. Br. 13, it does not come close to supporting his argument for requiring specification of precluded testimony. There, the defendant sought federal habeas corpus relief under 28 U.S.C. § 2254,

claiming a Confrontation Clause violation in the admission of hearsay expressing the victim's fears that her husband was plotting to kill her. *Id.* at *1. The federal district court noted that under *Giles*, admitting hearsay without any showing of intent violated the defendant's confrontation rights. *Id.* at *7. The State argued that defendant killed his wife to avoid divorce or child custody issues. *Id.* at *8. The district court rejected the State's argument, observing that — unlike this case — “neither person was actually pursuing or even planning to pursue” a divorce at the time of the murder. *Id.* at *8-*9. On appeal, the Seventh Circuit did not reach the forfeiture question because the State did not dispute that admitting the hearsay *without any showing of intent* violated the Confrontation Clause. *Jensen v. Clements*, 800 F.3d 892, 898-99 (7th Cir. 2015).

Giles and the other cases defendant cites undeniably reflect a concern that the forfeiture doctrine not be applied too expansively. But those cases establish that this concern is satisfied by requiring proof that defendant intended to procure the declarant's unavailability as a witness. Defendant cites no cases, and the State is aware of none, requiring the prosecution to identify *what specific* testimony the defendant acted to prevent. Nor is there any support in the text of the evidentiary rules for such a limitation. Thus, the appellate court correctly held that the circuit court had applied the appropriate admissibility criteria under IRE 804(b)(5).

2. The circuit court did not abuse its discretion in holding that the State established the intent factor.

Standard of Review: The State must prove the two factors of the forfeiture doctrine by a preponderance of the evidence. *Stechly*, 225 Ill. 2d at 278 (Freeman, Fitzgerald, Burke, JJ.) (citing *Davis v. Washington*, 547 U.S. 813, 833 (2006)); *id.* at 329 (Kilbride, J., concurring

in part, dissenting in part) (agreeing with plurality's discussion of forfeiture doctrine); *see also* Def. Br. 10. The circuit court's admissibility ruling is reversible upon an abuse of its discretion, *Hanson*, 238 Ill. 2d at 96, 99, *i.e.*, only if it "is 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it,'" *People v. Kladis*, 2011 IL 110920, ¶ 23 (quoting *People v. Ortega*, 209 Ill. 2d 354, 359 (2004)); *see also* Def. Br. 10.¹⁰

Despite defendant's claims to the contrary, Def. Br. 14-18, the State proved by a preponderance of the evidence that defendant murdered Kathy and Stacy with the intent to cause their unavailability as witnesses, C2102 (A3), 2104 (A5).

a. The State proved by a preponderance of the evidence that defendant intended to make Kathy unavailable as a witness.

Defendant's claim that he had no reason to seek Kathy's absence as a witness in their divorce case because Kathy's estate litigated the financial aspects of the case in her stead and because her death "pretermitted any unresolved issues as to custody" of their two children, Def. Br. 15-16; *see also id.* at 2 n.1, is incomplete and misleading. Kathy's estate could (and did) continue to litigate the unresolved marital property and child custody issues in her stead after her death. *See, e.g., In re Marriage of Garlinski*, 99 Ill. App. 3d 107, 107, 110 (2d Dist. 1981). But defendant incorrectly insists that Kathy's death and her absence as a witness at the divorce trial had no effect on the outcome of the remaining unresolved issues in the divorce.

¹⁰ The People agree that the appellate court erred in declining to consider the merits of the admissibility of the hearsay, citing the law-of-the-case doctrine, *Peterson III*, 2015 IL App (3d) 130157, ¶ 204 (A90), and that, regardless, the doctrine does not bar this Court's review of the merits, *People v. Hopkins*, 235 Ill. 2d 453, 469-70 (2009). Def. Br. 21 n.7. This Court should reach the merits here to avoid further delay given that the issue will be fully briefed and argued before this Court. *See People v. Wilson*, 143 Ill. 2d 236, 249 (1991).

On March 22, 2002, the divorce court entered an interim order concerning financial and child custody issues. Peo. Exh. 98 (unredacted order); C3426-27 (redacted order); R3904-06.¹¹ The court awarded Kathy “temporary care, custody & control” of their two children, Thomas and Kristopher (born January 5, 1993 and August 8, 1994, respectively, C2954), and exclusive possession of the marital home. Peo. Exh. 98; C3426. The court ordered defendant to pay Kathy \$1,100 per month in child support, Peo. Exh. 98; C3426, a figure that was below statutory guidelines in that it represented 28% of defendant’s salary as a police officer and included no income from his other business ventures and employment, R3907; *see also* 750 ILCS 5/505(a)(1) (2016) (setting 28% of net income as minimum child support obligation for two children under age eighteen), and also included no spousal maintenance, Peo. Exh. 98; C3426-27; R3911.

On June 10, 2002, the court held a hearing concerning temporary support, maintenance, and visitation at which defendant and Kathy testified. Peo. Exh. 103; C831.¹² The court ordered defendant to pay \$2,000 per month to Kathy as unallocated family support. Peo. Exh. 103; C831; R4254. The court ordered visitation for defendant on every other

¹¹ Citations in this section to R3896-4025 are to the testimony of Kathy’s divorce attorney, Harry Smith. Defendant has never objected to Smith’s testimony about the facts of the divorce case that did not concern his conversations with Kathy. In fact, the circuit court took judicial notice of the divorce case file. R4234. In the appellate court and this Court, defendant asserts that attorney-client privilege applies only to Smith’s conversation with Stacy.

¹² Citations in this section to C829-35 are to a letter by family-law attorney Diane Panos, opining how the financial aspect of the divorce would have turned out had it reached judgment before Kathy’s death. The letter postdated the hearsay hearing, and her opinion testimony was ruled inadmissible at trial. R5372-76. It is cited here for the limited purpose of providing further objective details from the divorce case. Again, the circuit court took judicial notice of the divorce case file. R4234.

weekend and every Tuesday and Thursday evening. Peo. Exh. 103. On October 10, 2003, the court entered its order bifurcating the case and dissolving the marriage. Peo. Exh. 104; C2955. At the time of Kathy's death (approximately March 1, 2004), trial on the remaining contested issues in the divorce case was scheduled for April 6, 2004. Peo. Exh. 104; C832.

After Kathy's death, the divorce court made its final determinations regarding marital property and child custody. Defendant was awarded sole custody of the two children, the full proceeds from the sale of the marital home (\$288,235.31), and the business known as the Blue Lightning Corporation. C2954-57. Additionally, a trust fund "in excess of one million dollars" was acknowledged; it would be used for future educational, medical, or other necessary expenses of the children. *Id.* The trust fund was established using the proceeds of Kathy's life insurance policy. Peo. Exh. 109, Exhibit B; R3948-50. At defendant's subsequent criminal trial, expert testimony established that the marital portion of defendant's pension totaled \$323,955 and that the Blue Lightning Corporation was valued at \$219,434. R4216-18, 4222, 4228, 4232, 4260-61.

James Carroll, defendant's uncle, testified that defendant called him after Kathy's death to tell him that they had found Kathy's will, which named Carroll executor. R2977, 2980. Carroll testified that he had not wanted the role; defendant persuaded him to be executor by hiring a lawyer and offering to drive him to court. R2980-82. Carroll had expected to write checks to the two minor children, but defendant decided, as guardian, that defendant should handle the money for them. R2984-85. In the end, defendant made all the decisions about the distribution of money; as executor, Carroll did everything that defendant asked him to do, including "eliminat[ing]" Kathy's divorce attorney. R2984, 2986.

In March 2008, Kathy's relatives sought to reopen her estate, remove Carroll as executor, and appoint family members as coexecutors. *In re Estate of Savio*, 388 Ill. App. 3d 242, 243, 245 (3d Dist. 2009). Initially, it was believed that Kathy had died intestate, so the public guardian, Richard Kavanagh, had been appointed independent administrator of her estate. *Id.* at 244. Later, after a handwritten will was found and defendant petitioned for Carroll to be appointed executor, a court order admitted Kathy's will to probate, discharged Kavanagh, and appointed Carroll as executor. *Id.* Kavanagh filed a final report, noting that Carroll (1) fired Kathy's divorce attorney, (2) appeared for the estate in the divorce case without counsel, and (3) agreed to turn over all marital property, including the proceeds of the marital home and business interests, to defendant. *Id.*; *see also* C2954-57. The appellate court agreed with Kavanagh's ultimate conclusion that Carroll's actions were arguably against the best interests of the estate and its beneficiaries. *Estate of Savio*, 388 Ill. App. 3d at 244, 251.

Moreover, the State presented testimony showing that defendant was concerned and even angry about Kathy's participation as a witness in their divorce case. When he asked Jeffrey Pachter in the winter of 2003 if he knew anybody "that could have his third wife taken care of," he explained "that she had something on him." R2208, 2215, 2219, 2231. In an October 2003 pretrial conference with the attorneys in the divorce case, the judge made a settlement recommendation, proposing that Kathy would receive sole possession of the marital home, child support and maintenance, her marital portion of defendant's pension, and the balance of proceeds from the sale of the business. C832; R3935. After the conference, Kathy's attorney observed defendant talking to his attorney in the hallway outside the courtroom, visibly angry. R3935-36. Two weeks before Kathy's death, defendant's

coworker, Lieutenant James Coughlin, saw defendant in the Will County Courthouse with two men who appeared to be defendant's and Kathy's attorneys; defendant angrily commented that the men were happy because they were getting all of his money and that his life would be easier if Kathy died. R745, 747-49. And multiple people testified that defendant did not want to share his pension with Kathy. R2072-76, 2078 (prosecutor Elizabeth Fragale testified that, when insisting in 2002 that she prosecute Kathy for domestic battery to "fullest extent" possible, defendant told her that Kathy was "out to receive his pension" in their "nasty divorce"); R1997-98, 1999-2000, 2004 (defendant's mistress, Susan McCauley, testified that defendant told her in early 1998 that he would never divorce Kathy because he did not want her to get half of his pension); *see also* R4306-07, 4321-24 (Victoria Connolly, defendant's second ex-wife, testified that their divorce was smooth, in part, because she did not pursue his pension).

In sum, Kathy testified at the June 10, 2002 divorce hearing about temporary support, maintenance, and visitation, Peo. Exh. 103; C831, and defendant had every reason to expect that Kathy would testify at the divorce trial (scheduled for the month following her death) about the remaining contested financial and child custody matters. And it is reasonable to conclude that defendant acted with the intent to make her unavailable as a witness at that divorce trial: Kathy's absence as a witness had a profound effect on the outcome. Preliminary orders in the divorce case awarded Kathy primary custody of the children and monthly family support payments of \$2,000. The value of the marital property was considerable, including the marital home (\$288,235.31), the marital portion of defendant's pension (\$323,955), and the value of the Blue Lightning Corporation (\$219,434). Even under a conservative estimate of expected support payments, which would continue for over

eight years (until their younger son turned eighteen, *see* C2954), plus an award to Kathy of half, or at least some, of other marital property, Kathy would have received many hundreds of thousands of dollars. Instead, after Kathy's death, all marital property was awarded to defendant through the actions of defendant's uncle acting (at defendant's behest) as executor of Kathy's estate, actions that the appellate court in a later probate case deemed had no "just or fair" explanation. *Estate of Savio*, 388 Ill. App. 3d at 251. And rather than a multi-year support obligation, defendant received sole custody of the children with a large trust to cover the children's expenses that was funded by Kathy's life insurance. Finally, as recounted, several witnesses testified about defendant's anger and resentful comments about how Kathy would be getting a lot of money — especially much of his pension — in their divorce.

In light of this evidence, the circuit court's holding — that the State proved that it was more likely than not that defendant murdered Kathy with the intent to thwart her testimony as a witness about financial and child custody issues at the imminent trial — is not so fanciful or arbitrary that no reasonable person would agree with it. *See Kladis*, 2011 IL 110920, ¶ 23. Thus, Kathy's hearsay was properly admitted under the forfeiture doctrine.

b. The State proved by a preponderance of the evidence that defendant intended to make Stacy unavailable as a witness.

The State also sufficiently proved that defendant acted with the intent to render Stacy an unavailable witness. *See* Def. Br. 16-18. Defendant claims that the intent factor was not established because no proceeding was pending at the time of Stacy's murder. *Id.* at 17. But the forfeiture doctrine applies not only when a defendant intends to prevent a declarant from testifying, but also when he intends to prevent a declarant from reporting a crime to authorities. As the *Giles* Court explained,

Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers *or* cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities *or* cooperating with a criminal prosecution — rendering her prior statements admissible under the forfeiture doctrine.

554 U.S. at 377 (emphasis added).¹³ Subsequent case law has emphasized that the Court’s use of “or” in the above-quoted passage confirms that the forfeiture doctrine applies when the defendant intended to prevent the declarant from (1) reporting abuse to the authorities; or (2) cooperating in a criminal proceeding. *People v. Banos*, 100 Cal. Rptr. 3d 476, 491 (Cal. Ct. App. 2009). There need not be a case pending at the time the declarant is rendered unavailable. Instead, it is sufficient that a defendant acted to silence a declarant when he thought that she would be reasonably expected to testify in the future or that she would report his wrongdoing to police. *See also State v. Hosier*, 454 S.W.3d 883, 896-97 (Mo. 2015) (*en banc*) (finding hearsay admissible via forfeiture doctrine; victim had applied for order of protection, though it had not yet taken effect due to inability to serve defendant); *State v. Supanchick*, 323 P.3d 231, 238 (Or. 2014) (noting no requirement that defendant act to prevent victim’s testimony at “an ongoing matter”); *State v. Ivy*, 188 S.W.3d 132, 147 (Tenn. 2006) (pre-*Giles* case noting forfeiture doctrine not limited to cases in which formal charge or judicial proceeding pending when declarant’s statements made). Thus, the fact that there was no legal proceeding pending when defendant murdered Stacy does not preclude application of the forfeiture doctrine.

¹³ This Court follows federal Confrontation Clause case law when evaluating the admissibility of hearsay. *See, e.g., In re Rolandis G.*, 232 Ill. 2d 13, 28 (2008).

And the circuit court did not abuse its discretion in holding that the State proved that defendant intended to silence Stacy as a witness, with regard to either her reporting defendant's involvement in Kathy's murder to police, or her testifying at a future divorce or criminal trial. Although the court did not specify one, it was not arbitrary or unreasonable for the court to conclude that it was more likely than not that defendant acted to silence Stacy in at least one of these ways, so that the holding was not an abuse of discretion.

The State's evidence of intent sufficed even without the testimony from divorce attorney Harry Smith and Pastor Schori that defendant claims is privileged. *See* Def. Br. 17-18. The remaining testimony demonstrated that defendant sought to avoid the financial repercussions of a divorce from Stacy and that he acted with the intent to silence her days before he expected her to file for divorce. Tom Morphey, defendant's stepbrother, testified that on Saturday, October 27, 2007, the day before Stacy disappeared, defendant told him that Stacy was cheating on him, that she wanted a divorce, and that she wanted him "out by Wednesday." R905, 907, 914, 920-21. Defendant complained to Morphey that he was due to retire in fourteen working days and that Stacy would take everything, including his children and half of his pension, and that he would have to keep working for the rest of his life. R921. Defendant's co-worker, Officer Jeremie Johnson, testified that shortly before Stacy disappeared, defendant told him that he and Stacy were not getting along and that he had refused Stacy's request to move out. R4438-40. Special Agent Patrick Callaghan of the Illinois State Police interviewed defendant on Monday, October 29, 2007, in connection with Stacy's disappearance. R1913-14, 1916. Defendant acknowledged that they were discussing divorce; defendant explained that he had ten working days until his retirement and that he

had told Stacy to wait to file for divorce until after he retired so that she would be entitled to half of his pension, creating a better situation for their children. R1920, 1925.

Harry Smith's testimony addressed two relevant points that are indisputably not privileged. Four days before she disappeared, Stacy called seeking Smith's representation on her divorce from defendant, R3896, 3951. *See People v. Williams*, 97 Ill. 2d 252, 295 (1983) (generally, client's identity not protected by attorney-client privilege unless client would be substantially prejudiced by disclosure). And during the phone call, Smith heard defendant in the background asking what she was doing, and Stacy responded that she would be inside shortly; she ended the call soon after when defendant called for her again, R3953-54. *See People v. Radojic*, 2013 IL 114197, ¶ 40 (privilege only covers communications made to attorney in confidence concerning legal advice client is seeking from attorney).

Additional witnesses confirmed that Stacy and defendant were having serious marital problems and that Stacy was about to file for divorce when she disappeared. Stacy's sister, Cassandra Cales, testified that two days before her disappearance Stacy told her that she wanted a divorce, that she was telling her friends that she was consulting attorneys, and that rather than just leave with the children "she wanted to go about it the legal way . . . through the Court." R2110-11, 2115, 2117, 2119. Cales learned from Stacy that defendant was tracking her phone. R2116; *see also* R3515, 3518, 3520-22 (family friend Irene Alagos testified that she learned from Stacy that defendant checked Stacy's vehicle's mileage). Stacy's friend, and neighbor, Sharon Bychowski, testified that a week before Stacy's disappearance, Sharon saw Stacy crying; Stacy explained that she had packed ten boxes of defendant's things, but he had refused to leave. R1291, 1294-95, 1419, 1439. The Monday before she disappeared, Stacy showed Sharon a ring defendant had given her to encourage

her to stay in the marriage, but Stacy said that it would not work, R1410-11; Stacy wanted a divorce, R1405, 1440. Stacy's friend, Scott Rossetto, testified that days before her disappearance, Stacy told him that she had contacted a lawyer and started the divorce process, R2449, 2452, 2470; a few weeks before that, Stacy said that she had wanted a divorce for about two years but that she wanted to ensure that she retained custody of her children, R2468-69.¹⁴

And testimony confirmed that defendant was concerned that Stacy would go to the authorities to report her knowledge about defendant's murder of Kathy. Sergeant Craig Gunty testified that on September 11, 2007, Stacy called him and said that she wanted a divorce from defendant, that defendant would not give her a divorce, and that she was afraid of him. R4425-28. Stacy told Gunty that if he knew what defendant had done, "your head would flip"; Gunty asked her to explain, but Stacy said that she could not say because defendant would kill her. R4428-29. Two weeks later, defendant came to Gunty's home demanding an explanation why he had been on a two-hour-long phone call with Stacy two weeks earlier. R4431. Defendant told Gunty that they were having "difficulties" and that he was having trouble sleeping. R4432. Days before her disappearance, Stacy told Rossetto a "secret": the night Kathy died, defendant had come home late, dressed in black, and told her that if anyone asked where he had been, she should say that he had been at home. R2472.

In sum, although their marital difficulties had been building for some time, several people testified that shortly before her murder Stacy had sought legal representation to file

¹⁴ As defendant correctly acknowledges, Def. Br. 17, IRE 104 provides that the rules of evidence do not apply to preliminary questions of evidence admissibility, except for privilege rules. Ill. R. Evid. 104(a). Accordingly, this Court can consider Rossetto's testimony despite the fact that it was ruled inadmissible at trial. R9334-52.

for divorce, asked defendant to move out, and rebuffed his attempt to reconcile, showing that defendant would have known that Stacy was about to file for divorce. As with Kathy, defendant expressed to multiple people that he was frustrated and angry about the money to which Stacy would be entitled in the divorce, and that this would delay his otherwise imminent retirement. And as their marital discord intensified, defendant surveilled Stacy; the inference is clear that he feared that she would report to law enforcement her knowledge of how he had killed Kathy. Thus, the circuit court did not act arbitrarily or unreasonably in holding that the State proved that it was more likely than not that defendant killed Stacy with the intent to prevent her from reporting his crime to authorities or testifying at a reasonably anticipated divorce hearing or murder trial.

If the Court finds the above evidence insufficient, it should consider the testimony of Harry Smith and/or Pastor Schori. As explained in Part III.B. & C., *infra*, this Court should consider Smith's conversation with Stacy because (1) it was not protected by attorney-client privilege, (2) defendant lacks standing to invoke Stacy's privilege, or (3) Stacy waived the privilege. As relevant to this issue, Smith testified that four days before she disappeared, Stacy told him that defendant was angry at her because he thought she "told [his son] Tom that he killed Kathy." R3951, 3953. When Smith warned her to be careful, Stacy said that she did not fear for her safety because she had "too much expletive on him at the police department." R3953. Stacy then asked Smith, "could we get more money out of [defendant] if we threatened to tell the police about how he killed Kathy." *Id.* Finally, she asked about leaving Illinois with Tom and Kris — defendant's children with Kathy — given that she had adopted them. R3954-55.

Pastor Schori's testimony also should be considered, despite defendant's clergy-privilege objection. First, defendant forfeited a challenge to Schori's testimony as privileged because the argument was not adequately raised in his counseled PLA, which included only a brief reference in a footnote, within argument on a different issue, and without citation to authority. *See* PLA 32 n.10 ("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."). *McCarty*, 223 Ill. 2d at 122 (failure to raise issue in PLA forfeits issue before this Court); *People v. Hunt*, 234 Ill. 2d 49, 67 (2009) (failure to provide legal support for position forfeits issue). Second, the circuit court's ruling that the conversation was not privileged, R1681, 5664A-65A,¹⁵ was not against the manifest weight of the evidence, *People v. McNeal*, 175 Ill. 2d 335, 359 (1997), in part because, as the circuit court correctly noted, R5664A, Illinois's clergy privilege belongs solely to the clergy member and not to the communicant(s). *See* James W. Hilliard, *The Public's Right to Evidence — Sometimes: The Clergy Testimonial Privilege*, 83 Ill. Bar. J. 182, 184 (April 1995) (citing 735 ILCS 5/8-803). Schori did not invoke the privilege, and defendant has no standing to invoke the privilege under any construction of its terms.

Schori testified that on August 31, 2007 — around two months before Stacy's disappearance — Stacy told him that the night Kathy died, she and defendant went to bed together but that when she woke up he was gone. R2287-88, 2291, 2301. She looked around the house but could not find him; she tried several times, unsuccessfully, to call his cell

¹⁵ For the June 6, 2012 hearing date, pages 51-74 and 75-98 (numbered in the bottom center of the page) are both Bates-stamped 5660-83 (numbered in the bottom right-hand corner of the page). The State has added "A" to the end of the numbering of the second group, so citations here to R5664A-65A are to pages 79-80.

phone. R2292. In the early morning hours, defendant returned; Stacy saw defendant dressed in black clothing and carrying a bag. *Id.* Defendant removed women's clothes that did not belong to Stacy from the bag and put them in the washing machine, along with his own clothes. R2292-93. For hours afterwards, defendant coached her on what lies to tell to the police; Stacy, in fact, lied to police about that night. R2295-96, 2361. Stacy also told Pastor Schori that she was scared of the control defendant had over her life; she did not believe that she could get away from him safely; and she did not want to be separated from her children. R2290, 2296.

The testimony of Smith and/or Schori further supports the conclusion that defendant had reason to fear that, at the time of her murder, Stacy was about to file for divorce and/or report to the police or make public what she knew about how defendant had killed Kathy. The circuit court did not abuse its discretion in holding that the State proved that it was more likely than not that defendant acted with the intent of preventing Stacy from testifying at a future divorce hearing or murder trial.

Ultimately, the circuit and appellate courts properly held that hearsay by Kathy and Stacy was admissible under the forfeiture doctrine. Petitioner's prejudice argument, Def. Br. 18-20, need not be considered because the State does not assert that any error in the admission of the hearsay was harmless.

II. The Appellate Court Properly Rejected Defendant's Claim that Trial Counsel Was Ineffective for Calling Attorney Harry Smith to Testify.
(Response to Defendant's Part III)

Defendant asserts that defense counsel provided ineffective assistance by calling attorney Harry Smith to testify during his case-in-chief about a conversation that Smith had

with Stacy that implicated defendant in Kathy's murder. Def. Br. 27-36. The appellate court correctly held that defendant failed to demonstrate deficient performance or prejudice.

A. Background

During the State's case-in-chief, Pastor Neil Schori testified that, on the night of Kathy's death, and after defendant was absent for a time overnight, Stacy saw defendant, dressed in black, put women's clothes that did not belong to her into the washing machine; afterwards he coached her for hours on lying to the police. R10005-08. Schori testified that Stacy was crying when she conveyed this information to him and that she "was very scared." R10008.

During the defense case-in-chief, Harry Smith testified that Stacy called him four days before she disappeared, seeking to retain him as her divorce attorney. R10755-56, 10760, 10789. Stacy asked Smith "could we get more money out of [defendant] if we threatened to tell the police about how he killed Kathy." R10772, 10775-77, 10790-91. Stacy told him that "[s]he had so much, S-H-I-T, on him at the police department he couldn't do anything to her." R10773-75, 10790. Stacy also told Smith that defendant was angry at her because he thought that she had told his son, Tom, that he killed Kathy. R10790, 10791-92. Finally, Stacy asked Smith about leaving the state with the children. R10792.

During closing argument, defense counsel explained that Smith's testimony showed that Stacy was trying to gain an advantage in her divorce from defendant by starting false rumors about defendant, first through Schori and then through Smith. R11300-03.

The appellate court held that the decision to call Smith was neither deficient performance nor prejudicial under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Peterson III*, 2015 IL App (3d) 130157, ¶¶ 219-25 (A93-94). The court explained that

calling Smith was not deficient performance because it involved a strategic decision to undermine Schori's testimony about Stacy's frightened demeanor when implicating defendant in Kathy's murder. *Id.* at ¶ 224 (A94). And defendant was not prejudiced because the potentially damaging aspect of Smith's testimony — that Stacy told him that defendant killed Kathy — was largely cumulative of Pastor Schori's testimony. *Id.* at ¶ 225 (A94). The court rejected defendant's assertion that the phrasing of Stacy's statement to Smith — how defendant killed Kathy — made the statement more damaging than Stacy's statement to Schori. *Id.* (A94).

B. The Appellate Court Correctly Held that Trial Counsel Neither Provided Deficient Performance Nor Prejudiced Defendant by Calling Smith as a Witness.

Standard of Review: To prevail on an ineffective assistance claim, a defendant must establish both that (1) his attorney's performance "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Manning*, 241 Ill. 2d 319, 326 (2011) (citing *Strickland*, 466 U.S. at 688, 694). This Court reviews an ineffective assistance claim *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15.

The appellate court correctly found that defense counsel was not deficient for calling Smith to testify. Counsel's performance is evaluated using an objective standard of competence drawn from prevailing professional norms. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). To demonstrate deficient performance, defendant must overcome a strong presumption that the challenged action was the product of sound trial strategy. *Id.* As defendant correctly acknowledges, Def. Br. 35-36, the decision of which witnesses to call at trial ultimately rests with counsel, *People v. West*, 187 Ill. 2d 418, 432 (1999) (citing

People v. Ramey, 152 Ill. 2d 41, 53-55 (1992)). It is a decision that has “long been viewed” as a matter of trial strategy that is generally immune from ineffectiveness challenges. *Id.* (citing *People v. Haywood*, 82 Ill. 2d 540, 543-44 (1980)). Reviewing courts are, therefore, very deferential when reviewing strategic decisions by counsel, and ““every effort [must] be made to eliminate the distorting effects of hindsight.”” *People v. Guest*, 166 Ill. 2d 381, 393 (1995) (quoting *Strickland*, 466 U.S. at 689).

As the appellate court reasonably concluded, defense counsel’s decision to call Smith reflected a strategic attempt to undermine Schori’s testimony about Stacy’s frightened demeanor when implicating defendant in Kathy’s murder; counsel sought to raise an inference through Smith’s testimony that Stacy instead wanted to make, or even invent, the accusation for her personal financial gain. *Peterson III*, 2015 IL App (3d) 130157, ¶ 224 (A94). Even if this strategic choice now appears to have been an *unsuccessful* attempt to rebut Schori’s testimony, counsel’s strategic decisions are to be assessed as of the time they were made, and not through the lens of hindsight. *Guest*, 166 Ill. 2d at 393.

Defendant criticizes the appellate court for supplying a “post hoc” reason for calling Smith given that “the record is silent.” Def. Br. 33. But defense counsel explained during closing argument why Smith was called: counsel argued that Smith’s testimony showed that Stacy was trying to gain an advantage in her divorce from defendant, so she started “a rumor campaign” about defendant, first through Schori and then through Smith. R11300-03. As for defendant’s point that defense attorney Joel Brodsky’s posttrial hearing testimony was silent on strategy, Def. Br. 33, it was defendant’s choice not to question Brodsky about why he called Smith as a witness, R11620-37. In any event, precedent requires evaluation of counsel’s performance under an objective standard based on established professional norms,

not counsel's subjective reasons. *See Smith*, 195 Ill. 2d at 188. There was a strategic, if ultimately unsuccessful, reason to call Smith as a witness that did not run afoul of professional norms: to discredit Stacy's hearsay statement to Schori implicating defendant in Kathy's murder.

Defendant's cited cases, Def. Br. 32-33, are distinguishable. Five involved defense counsel eliciting *undeniably* damaging testimony for a point about which the State had not provided *any* evidence; two of these five also involved other severe omissions or mistakes by counsel. *People v. Baines*, 399 Ill. App. 3d 881, 888-90, 894-98 (1st Dist. 2010) (counsel elicited admission from defendant; counsel's other deficiencies included "shocking lack of familiarity with the basic facts of the case," needing frequent assistance from trial court about rudimentary trial procedures, and inability to ask clear questions to elicit key testimony from witnesses); *People v. Salgado*, 200 Ill. App. 3d 550, 552-53 (1st Dist. 1990) (counsel elicited confession by defendant to residential burglary for which he otherwise would have been acquitted; counsel never cross-examined State witnesses and put on no defense); *People v. Bailey*, 374 Ill. App. 3d 608, 613-15 (1st Dist. 2007) (counsel elicited incriminating testimony from State witness relevant to element of charged offense that State had not elicited); *People v. Moore*, 356 Ill. App. 3d 117, 126-27 (1st Dist. 2005) (counsel elicited incriminating hearsay providing sole evidence connecting defendant to crime); *People v. Phillips*, 227 Ill. App. 3d 581, 584, 590 (1st Dist. 1992) (counsel elicited hearsay from State witness about defendant's guilt for charged armed robbery and arrest for prior robbery). Defendant's sixth case is unhelpful because the court never decided whether counsel provided deficient performance, holding instead that defendant could not satisfy the prejudice prong. *People v. Rosemond*, 339 Ill. App. 3d 51, 65-66 (1st Dist. 2003). And the seventh

case is inapt because it predates *Strickland* by nearly thirty years. *People v. De Simone*, 9 Ill. 2d 522, 524 (1956). None of these cases finds deficient performance in repeating damaging testimony for the purpose of discrediting it.

Nor did defendant establish *Strickland* prejudice. To demonstrate prejudice, defendant must prove that there was a reasonable probability that, but for his attorney's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A "reasonable probability" is one that undermines confidence in the outcome, meaning it renders the result of the trial unreliable, or the proceeding fundamentally unfair. *People v. Evans*, 186 Ill. 2d 83, 93 (1999).

Though not identical to Schori's testimony, Smith's testimony similarly included hearsay from Stacy about her knowledge of defendant's involvement in Kathy's murder. Because it was "largely cumulative," the appellate court reasonably found that defendant had not demonstrated that, but for counsel's decision to present Smith's testimony, there was a reasonable probability that the result of the trial would have been different. *Peterson III*, 2015 IL App (3d) 130157, ¶ 225 (A94); *see also Smith*, 195 Ill. 2d at 188-91 (no *Strickland* prejudice in failure to call second witness to corroborate claim of police coercion; proposed testimony did not "significantly differ" from other witness's testimony, so it was "merely cumulative").

This Court should affirm the appellate court's holding that defendant established neither deficient performance nor prejudice with regard to counsel's decision to call Smith.

C. This Court Should Disregard Defendant's Factual Assertions that Rest on Extra-Record Newspaper Articles and Misleading Characterizations of the Lower Courts' Comments on this Issue.

This Court should decline to consider three extra-record newspaper articles that defendant failed to submit to the circuit court. Def. Br. 27, 30 n.12. Defendant's citations to these extra-record articles are improper because, on direct appeal, the reviewing court cannot consider matters outside the record. *People v. Woolley*, 178 Ill. 2d 175, 204 (1997); *see also People v. Boykin*, 2013 IL App (1st) 112696, ¶¶ 4, 7, 9 (in case in which defendant was convicted of delivery of controlled substance within 1,000 feet of school, appellate court declined to consider newspaper articles regarding whether school had been closed because they were outside record on appeal). Additionally, the contents of newspaper articles are hearsay and therefore inadmissible. *McCall v. Devine*, 334 Ill. App. 3d 192, 203 (1st Dist. 2002) (citing R. Stiegmann, Illinois Evidence Manual, § 14:28, at 365 (2d ed. 1995)).

Moreover, considering these articles would permit defendant to make an end run around the advocate-witness rule, the special witness doctrine, and the well-established rule that courts cannot consider juror affidavits to impeach jury verdicts. With regard to the second article cited in footnote 12, defendant's brief quotes "[o]ne fellow defense counsel" — Steven Greenberg — regarding his opposition to calling Smith as a witness. Def. Br. 30 n.12. If defendant desired to make a record of Greenberg's opinion about the decision to call Smith as a witness, then defendant should have called him to testify during the posttrial hearing. But if Greenberg were called as a witness, then, under the advocate-witness rule, he could not now serve in his current role as one of defendant's two appellate lawyers. *People v. Blue*, 189 Ill. 2d 99, 136 (2000) (advocate-witness rule bars attorney from serving dual role as advocate and witness in same case). Similarly, defendant cites an article to

support his factual assertion that jurors considered Smith's testimony to be significant. Def. Br. 27. But it is well-established that courts cannot consider juror affidavits to impeach their verdict. *See, e.g., Palmer v. People*, 138 Ill. 356, 369 (1891); *Browder v. Johnson*, 1 Ill. 96, 96-97 (1825); *R.R. Supply Co. v. Klofski*, 138 Ill. App. 468, 482 (1st Dist. 1908); *see also* Ill. R. Evid. 606(b). Finally, defendant provides quotes from State's Attorney Glasgow and attorney Kathleen Zellner, taken from the first article cited in footnote 12. Def. Br. 30 n.12. But defendant failed to call Zellner to testify at the posttrial hearing, R11548-11704, and he does not claim that the circuit court abused its discretion in barring him from calling Glasgow during the posttrial hearing under the "special witness doctrine" applicable to prosecutors, R11703-04; *see People v. Willis*, 349 Ill. App. 3d 1, 17 (1st Dist. 2004) (describing special witness doctrine). Thus, this Court should disregard all factual assertions supported by citation to these newspaper articles because the articles are extra-record hearsay, and because the contents, except for Zellner's statement, could not have been introduced below.¹⁶

Additionally, defendant twice misdescribes statements of the lower courts to support his claim that they found Smith's testimony to be important evidence of his guilt. Review of the courts' actual statements reveals that the courts were merely describing the arguments of the parties. *Compare* Def. Br. 28 ("I will say that it's unusual . . . that the information of how he killed her came from the very last witness called by the defendant in the case.") *with* R11159 ("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.") (emphasis

¹⁶ Nor should the Court consider the extra-record newspaper article cited in defendant's Statement of Facts. Def. Br. 8 n.2.

added); *compare* Def. Br. 28 (“The appellate court called it an admission. ¶ 43.”)¹⁷ *with Peterson*, 2015 IL App (3d) 130157, ¶ 220 (A93) (“**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.”) (emphasis added).

III. The Circuit Court Properly Allowed Smith to Testify at the Hearsay Hearing and at Trial about a Conversation with Stacy.
(Response to Defendant’s Part IV)

Despite defendant’s claims of attorney-client privilege, Def. Br. 36-39, the circuit court correctly permitted Smith to testify about a conversation with Stacy in which she implicated defendant in Kathy’s murder. Defendant appeared to object to Smith’s testimony both at the hearsay hearing and at trial. *Id.* But there was no error because the conversation was not privileged. Even if it were privileged, allowing Smith’s testimony on this topic was not error because defendant lacked standing to assert Stacy’s privilege and Stacy waived the privilege. Finally, any error does not warrant a new trial because admission of Smith’s testimony from the hearsay hearing was harmless and because Smith’s trial testimony was invited error.

A. Background

During Smith’s testimony at the hearsay hearing, before his description of his conversation with Stacy, the circuit court overruled defendant’s privilege objection because

¹⁷ Defendant’s citation to ¶ 43, which describes the testimony of an unrelated witness, seems mistaken. The quote provided from ¶ 220 is the only time the word “admission” appears in the section of the appellate court opinion analyzing this issue.

defendant lacked standing to assert the privilege. R3951-52; *see also* R3899. After that hearing but before the trial, the circuit court reversed its ruling, holding that the conversation was privileged. R5569, 5570. The State did not call Smith to testify at trial and objected to defendant's plan to do so, though not on attorney-client-privilege grounds. C3227-35; R10648-62. Ultimately, the appellate court rejected defendant's claim that the circuit court erred in allowing the defense to call Smith at trial, finding that defendant invited the error; the court did not address defendant's objection to the testimony from the hearsay hearing.

Peterson III, 2015 IL App (3d) 130157, ¶ 192 (A87-88).¹⁸

The attorney-client privilege is created

“(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.”

People v. Radojcic, 2013 IL 114197, ¶ 40 (quoting *People v. Adam*, 51 Ill. 2d 46, 48 (1972) (quoting 8 John H. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. ed. 1961))). The purpose of the attorney-client privilege is to encourage thorough and frank communication between the attorney and client by addressing any fear that confidential information will be disseminated to others. *Id.* at ¶ 39. Because the privilege is inconsistent with the search for the truth, it must be “strictly confined within its narrowest possible limits.” *Id.* at ¶ 41 (quoting *Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 190 (1991)).

¹⁸ Defendant's factual assertions that improperly rely on extra-record sources, Def. Br. 37 (citing YouTube clip), 39 (citing online news article), should be disregarded by this Court, *see supra* Part II.C.

B. Smith's Conversation with Stacy Was Not Covered by the Attorney-Client Privilege.

Standard of Review: The parties do not dispute the only relevant facts: (1) Stacy called to ask Smith to represent her in her divorce from defendant; (2) Smith told Stacy that he could not represent her due to the conflict of interest created by his prior representation of Kathy in her divorce from defendant; and (3) Stacy then made the comments at issue. R3951, 3953, 10755-56, 10760-62. And defendant agrees, Def. Br. 37, that the circuit court's holding that Smith's conversation with Stacy was privileged, R5569, 5570, should be reviewed *de novo*. See *Radojcic*, 2013 IL 114197, ¶¶ 32-36 (applying *de novo* standard to review whether crime-fraud exception to attorney-client privilege applied because circuit court had heard no live testimony and made no related factual findings).

Attorney-client privilege does not apply to matters disclosed during an initial consultation after the attorney declines representation. *United States v. Dennis*, 843 F.2d 652, 657 (2d Cir. 1988) (citing *Wigmore, supra*, § 2304, at 587 (“[I]f the client continues his communication after the attorney’s refusal to act for him . . . he does not need or deserve the protection of the privilege.”); *People v. Gionis*, 892 P.2d 1199, 1211-12 (Cal. 1995) (*in bank*) (collecting cases and citing *Wigmore, supra*, § 2304, at 587, and 1 McCormick on Evidence § 88, at 322 n.3 (4th ed. 1992) (“Of course, statements made after the employment is declined are not privileged.”)). Thus, the circuit court erred in holding that Smith and Stacy’s conversation was privileged because the challenged remarks were made after Smith declined to represent her.

C. Even If the Conversation Was Privileged, the Circuit Court Did Not Err in Allowing Smith's Testimony.

Even if the conversation was privileged, the circuit court nonetheless did not err in allowing Smith to testify about it for two independent reasons: (1) defendant lacks standing to assert Stacy's privilege; and (2) Stacy waived the privilege by disclosing the same information to a non-attorney.

1. Defendant lacks standing to assert attorney-client privilege.

Standard of Review: This Court should review *de novo* the circuit court's decision to reverse its prior ruling that defendant lacked standing because this is a question of law in which no credibility or fact-finding determinations are involved. *See People v. Hall*, 195 Ill. 2d 1, 21 (2000); *see also In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998) (whether party has standing to assert attorney-client privilege reviewed *de novo*).

Defendant has no standing to assert Stacy's privilege. This Court has long held that the attorney-client privilege belongs to the *client* alone. *People ex rel. Shufeldt v. Barker*, 56 Ill. 299, 301 (1870); *see also Radojcic*, 2013 IL 114197, ¶ 39 (citing *In re Marriage of Decker*, 153 Ill. 2d 298, 313 (1992)). Given that the purpose of the privilege is to protect the client's interests, only the client can be injured by its breach and only she has standing to assert the privilege. *See People v. Duarte*, 79 Ill. App. 3d 110, 125 (1st Dist. 1979); *see also Adam*, 51 Ill. 2d at 48 (privilege must be timely asserted "by the client for whose protection it exists"). The privilege does not belong to adverse parties or to the general population. *In re Sean H.*, 586 A.2d 1171, 1176 (Conn. App. Ct. 1991).

For example, the Connecticut Appellate Court held that a defendant lacked standing to claim that attorney-client privilege should have barred testimony by his ex-wife's attorney,

especially when his homicidal act prevented her from testifying herself or from asserting the privilege. *Id.*; *State v. Jarvis*, 483 S.E.2d 38, 45-46 (W. Va. 1996) (similar). Thus, courts have rejected attempts by anyone other than the client — including the government¹⁹ — to claim he has standing to invoke the client’s privilege. *People v. Radojcic*, 2012 IL App (1st) 102698, ¶ 21 (if witness spoke to attorney on own behalf rather than defendant’s, defendant cannot assert witness’s privilege); *Henderson v. United States*, 815 F.2d 1189, 1192 (8th Cir. 1987) (defendant lacks standing to assert that attorney-client privilege should have barred testimony by witness’s attorney); *Womack v. State*, 393 S.E.2d 232, 234 (Ga. 1990) (similar); *Barnes v. State*, 460 So.2d 126, 128-29, 131 (Miss. 1984) (similar); *United States v. Smith*, 454 F.3d 707, 713 (7th Cir. 2006) (collecting cases) (government lacks standing to raise attorney-client privilege of witness).

Thus, defendant lacks standing to assert Stacy’s privilege.

2. Stacy waived the privilege by voluntarily disclosing the allegedly privileged communication to a third party.

Moreover, Stacy waived any privilege. The holder — here, Stacy — may waive the privilege. *Ctr. Partners, Ltd. v. Growth Head GP, LLC*, 2012 IL 113107, ¶ 35; *Turner v. Black*, 19 Ill. 2d 296, 309 (1960). The client waives the privilege by voluntarily revealing the privileged communication to a person with whom the privilege is not shared. *Ctr. Partners, Ltd.*, 2012 IL 113107, ¶ 35; *People v. Ryan*, 30 Ill. 2d 456, 461 (1964); *see also People v. Wagener*, 196 Ill. 2d 269, 274-76 (2001) (privilege waived upon giving police

¹⁹ Defendant’s criticism of the prosecutor for presenting Smith’s testimony before the grand jury and at the hearsay hearing, Def. Br. 38 n.16, is misguided both because the prosecutor, too, lacked standing to assert the privilege, and because the prosecutor has consistently taken the (correct) position that this information was not privileged, *see supra* Part III.B.

report with statement to testifying expert witness) (citing *Profit Mgmt. Dev., Inc. v. Jacobson, Brandvik & Anderson, Ltd.*, 309 Ill. App. 3d 289, 299 (2d Dist. 1999)); *People v. Childs*, 305 Ill. App. 3d 128, 136-38 (4th Dist. 1999) (privilege waived when defendant filed *pro se* motion with attached attorney notes); *cf. Fox Moraine, LLC v. United City of Yorkville*, 2011 IL App (2d) 100017, ¶¶ 63-69 (privilege waived when city attorney's report freely discussed during open deliberations by city counsel on proposed project). The client's voluntary disclosure waives the privilege regarding all communications with the attorney on the same subject. *See People v. O'Connor*, 37 Ill. App. 3d 310, 314-15 (3d Dist. 1976) (client's testimony about conversation with attorney waived attorney-client privilege on other parts of same conversation that concerned same subject matter) (citing McCormick on Evidence, § 93, at 194 (2d ed. 1972)).

Stacy waived any attorney-client privilege against disclosure of her conversation with Smith by telling Scott Rossetto, shortly after her phone call with Smith, that the night Kathy died, defendant came home late, dressed in black, and asked her to give him a false alibi. R2449, 2452, 2470, 2472. Stacy's disclosures to Rossetto concern the same subject matter that she discussed with Smith: her knowledge that defendant murdered Kathy and her fear of him as she prepared to seek a divorce. R10772, 10775-77, 10790-91.

D. Any Error in Allowing Smith's Testimony about His Conversation with Stacy Does Not Warrant Reversal.

Alternatively, any error in permitting Smith to testify about his conversation with Stacy does not necessitate a new trial. First, Smith's testimony at the hearsay hearing, if error, was harmless. *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 524 (4th Dist. 2001) (error in evaluating whether certain information is inadmissible because of attorney-client

privilege is subject to harmless-error review); *People v. Harris*, 211 Ill. App. 3d 670, 675-76 (1st Dist. 1991) (same).

This Court has provided three approaches for evaluating whether an error is harmless beyond a reasonable doubt: (1) whether the error contributed to the conviction; (2) whether other evidence compellingly demonstrates defendant's guilt; and (3) whether excluded or improperly admitted evidence is cumulative to properly admitted evidence. *People v. Lerma*, 2016 IL 118496, ¶ 33. Under the third approach, any error here was harmless because Smith's hearsay hearing testimony was cumulative to the hearsay hearing testimony of both Rossetto and Schori. *See supra* Part III.C.2. (Rossetto); *supra* Part I.C.2.b. (Schori).

Because Rossetto did not testify at trial, whether Smith's trial testimony was cumulative to Schori's trial testimony alone may be a closer question. But this Court need not address it because, as the appellate court correctly held, *Peterson III*, 2015 IL 130157, ¶ 192 (A87-88), any error in allowing Smith's testimony was invited error given that defendant called Smith at trial, R10751. *People v. Harvey*, 211 Ill. 2d 368, 386 (2004) (when defendant procures or invites improper admission of evidence, he cannot contest its admission on appeal); *People v. Caffey*, 205 Ill. 2d 52, 114 (2001) (same); *In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) ("manifestly unfair" to grant defendant new trial based on error that he injected into first trial).

IV. Defense Counsel Brodsky Was Not Operating Under a *Per Se* Conflict of Interest.
(Response to Defendant's Part V)

Lead defense attorney Joel Brodsky's entry into a media contract that expired before defendant was indicted did not create a *per se* conflict of interest. This Court should not expand the limited list of *per se* conflicts of interest to include media contracts signed by

defense counsel because the circumstances of some — like in this case — raise no concern that counsel could be motivated by adverse financial interests, so that the case-by-case actual conflict-of-interest inquiry is more appropriate. Further, defendant forfeited many of his factual allegations by providing only inaccurate record citations or no record citation.

A. Background

On October 31, 2007, three days after Stacy's disappearance, defendant contacted Greta Van Susteren, R1335-36, 1381-83, a national talk show host from Fox News. Two weeks later, defendant appeared on the NBC Today Show and, noting the great expense of a legal defense, asked "attorneys of America" to contact him if they were willing to take his case. C3797, 3799. In response to this appeal, Brodsky contacted defendant and, shortly thereafter, began representing him. R11620-21, 11830.

Soon afterward, defendant and Brodsky co-signed a contract with Selig Multimedia ("Selig") under which Selig would solicit, procure, and negotiate appearances and interviews for either or both of them in exchange for a 15% commission. C1285-90 (A7-12). The revenue generated by the contract was to be deposited in a trust account and used to pay defendant's legal expenses. R11623-26, 11630-31. Testimony established that revenue generated under the contract was limited to (1) a \$10,000 payment from ABC in March 2008 for videos and photographs; and (2) a \$5,901.18 payment from a publisher in March 2008 earned when defendant co-authored a book. R11628-30. The term of the one-year contract was December 16, 2007 through December 15, 2008, C1285 (A7), so it terminated five months before defendant was indicted for Kathy's murder, C2-3, 1285.

After hearing testimony, R11548-11602, 11620-37, 11647-90, and argument, R11770-11823, the circuit court rejected defendant's *per se* conflict claim, R11830-32,

11839, and the appellate court affirmed, noting that the situation did not fall into any of the three recognized categories of *per se* conflicts of interest. *Peterson III*, 2015 IL App (3d) 130157, ¶¶ 216-17 (A92). The court observed that even if Brodsky's conduct violated the Illinois Rules of Professional Conduct, that fact alone did not give rise to a *per se* conflict of interest. *Id.* at ¶ 217 (A92). Finally, the court rejected defendant's argument that *People v. Gacy*, 125 Ill. 2d 117 (1988), required recognition of a *per se* conflict of interest, distinguishing *Gacy* on its facts, *Peterson III*, 2015 IL App (3d) 130157, ¶ 218 (A92-93).

B. Brodsky Did Not Have a *Per Se* Conflict of Interest.

Standard of Review: Whether the appellate court correctly rejected defendant's claim that the Selig contract created a *per se* conflict of interest is reviewed under the *de novo* standard. *People v. Fields*, 2012 IL 112438, ¶ 19; *see also* Def. Br. 40.

Illinois law recognizes two categories of conflicts of interests: *per se* and actual. *Fields*, 2012 IL 112438, ¶ 17. A *per se* conflict is one in which facts about counsel's status, in and of themselves, create a disabling conflict. *Id.* This Court has recognized three categories of *per se* conflicts: when defense counsel (1) has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) contemporaneously represents a prosecution witness; or (3) was a former prosecutor who had been personally involved with defendant's prosecution. *Fields*, 2012 IL 112438, ¶ 18; *People v. Taylor*, 237 Ill. 2d 356, 374 (2010); *People v. Hernandez*, 231 Ill. 2d 134, 143-44 (2008). Although these categories are not exclusive, *see, e.g., People v. Austin M.*, 2012 IL 111194, ¶¶ 85-86 (finding *per se* conflict of interest when counsel serves as both defense counsel and guardian *ad litem* for juvenile), in the recognized *per se* conflict cases, defense counsel has some link to the victim or a person or entity assisting or involved in defendant's

prosecution. *See Fields*, 2012 IL 112438, ¶ 18. In every criminal case, the prosecution's interests are always directly adverse to the defendant's, so a link between defense counsel and a person or entity with ties to the prosecution always raises concerns.

Defendant argues only that a *per se* conflict of interest is present here due to the media contract that Brodsky signed. Def. Br. 40-44; *see also Peterson III*, 2015 IL App (3d) 130157, ¶ 214 (A92). As a matter of policy, however, this Court should be circumspect about recognizing a new category of *per se* conflict. A *per se* conflict of interest requires reversal without any showing of prejudice — and without any error or knowledge on the part of the prosecution or the trial court. *People v. Miller*, 199 Ill. 2d 541, 545 (2002) (regarding *per se* conflict of interest, prejudice is presumed, meaning defendant need not show that conflict contributed to his conviction).

This Court should decline to recognize that a *per se* conflict is created when defense counsel signs a media contract because — unlike the recognized *per se* conflict categories — every media contract does not create directly adverse incentives for defense counsel. Defendant's cited case, *Gacy*, Def. Br. 41-42, is instructive. There, this Court rejected *Gacy*'s claim that his counsel had a *per se* conflict of interest because counsel was offered (but turned down) a \$6 million “book deal” that allegedly motivated counsel to focus more on keeping detailed records than on preparing *Gacy*'s defense. 125 Ill. 2d at 133-34, 136. This Court did not state that acceptance of a media contract creates a *per se* conflict of interest; rather, this Court noted that “acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a *per se* conflict of interest.” *Id.* at 135.

And all media contracts do not provide an attorney with a financial stake in litigation directly adverse to that of his client. It is neither obvious nor necessarily true that a media

contract will create a financial interest for defense counsel that is adverse to or even inconsistent with defendant's desire for an acquittal in his criminal case. A defense attorney's potential media-related financial interests often could be perfectly aligned with defendant's. *See, e.g., United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) ("surely the salability of [attorney F. Lee] Bailey's book would have been enhanced had he gained an acquittal for Hearst"). In fact, a media contract could be contingent on defense counsel securing an acquittal for his client.

In the case at hand, defendant has not established that the Selig contract gave Brodsky an adverse financial interest in defendant's conviction. The contract lasted for only one year and terminated before defendant's criminal case even began. C1285 (A7). As noted by the appellate court, defendant and counsel jointly entered into the media contract that expired pre-indictment with the strategy of "getting ahead of the story [of Stacy's disappearance] in the media." *See Peterson III*, 2015 IL App (3d) 130157, ¶ 218 (A92). Thus, the timing of the contract belies the argument that the contract affected Brodsky while he represented defendant in the criminal matter.

Because the timing and terms of a media contract can affect whether it might create a financial interest for the attorney inconsistent with his duty to diligently defend the client, an attorney conflict claim premised on defense counsel signing a media contract is properly evaluated for whether it poses an actual, rather than a *per se* conflict of interest. *See, e.g., Neeley v. State*, 642 So. 2d 494, 503 (Ala. Crim. App. 1993) (noting "vast majority" of courts review attorney's agreement for media rights for whether it is actual, not *per se*, conflict of interest); *Dumond v. State*, 743 S.W.2d 779, 784-85 (Ark. 1988) (declining to presume prejudice for claim regarding attorney media contract). Here, defendant has forfeited any

argument that the media contract created an actual conflict of interest, both by omitting it from his opening brief before this Court and by failing to raise it in the appellate court. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 (omission from opening brief); *People v. Williams*, 235 Ill. 2d 286, 298 (2009) (argument not raised in appellate court).

Finally, defendant's citation to the Rules of Professional Conduct is inapt. Def. Br. 40 & n.18. Whether Brodsky should be disciplined for signing the media contract is a matter for the Attorney Registration and Disciplinary Commission (ARDC). *See People v. Armstrong*, 175 Ill. App. 3d 874, 876 (4th Dist. 1988) (declining to reverse conviction in light of defendant's claims of counsel's out-of-court unethical conduct without showing of actual prejudice because such was matter for ARDC); *United States v. Marrera*, 768 F.2d 201, 202, 204, 207-09 & n.6 (7th Cir. 1985) (finding no actual conflict, although court noted that trial counsel committed "serious breach of ethics" through fee arrangement that awarded counsel 50% of money from sale of movie rights).

C. Defendant Forfeited Numerous Factual Allegations Underlying This Claim.

Defendant has forfeited many of the factual allegations in this section of his brief because they are unsupported. Ill. Sup. Ct. R. 341(h)(7). Defendant asserts, without citation, that "the relationship [with Selig] continued" after its expiration. Def. Br. 40 n.18. But Brodsky testified posttrial that although Selig did some public relations work for defendant during trial, it was not pursuant to the contract or on behalf of Brodsky. R11620, 11622. Defendant's claims that he relied upon Brodsky's advice in signing the media contract and was not advised to consult independent counsel are also unsupported. Def. Br. 40, n. 18.

Defendant criticizes Brodsky for contacting him in the “Green Room” of the Today Show but provides no supporting citation. *Id.* at 43. Defendant claims that Brodsky misrepresented his qualifications when seeking defendant as a client, *id.*, but cites only a newspaper article and not the record on appeal. *Id.* at 43 n.21. Moreover, that article fails to support his claim of misrepresentation; it states only that Brodsky had not defended a prior homicide case and that defendant hired him after a ninety-minute meeting during which defendant declined to review Brodsky’s proffered credentials. *Id.*; *see also supra* Part II.C. (discussing impropriety of citing extra-record newspaper articles).

Defendant suggests that Brodsky “dragg[ed]” him along on “a media blitz,” but does not specify the number or type of interviews to which he refers, much less provide citations to the record. Def. Br. 41. He similarly faults Brodsky for “stunts (like the proposed ‘Win a Date with Drew’),” without explanation or citation. *Id.* at 42. He quotes an exchange between defendant and Matt Lauer on the Today Show in which Lauer questioned the wisdom of the public appearances, but he cites only an extra-record YouTube video. *Id.* at 42-43; *see supra* Part II.C. Defendant quotes the circuit court as describing most media interviews of defendant as “accusatory in nature,” and claims that the court rhetorically asked “what lawyer would do this?” Def. Br. 41 n. 19. But in his cited record pages, R5630-40, the court was considering the admissibility of videotaped interview clips; it stated that it was not considering the content of the interviews or whether the appearances were a good idea, R5633. Although defendant describes the interviews as containing “critical” questioning that was later used by the prosecution at trial, Def. Br. 41 & n.19, the State introduced only the transcripts from two interviews, one of which was an excerpt from the Today Show interview referenced above during which defendant sought legal representation,

R10214-16; C3797-3800. The other transcript posed only three questions: (1) what happened?; (2) were you surprised when the “determination of death” was changed?; and (3) were you separated at the time?, R10216-17. These questions are not fairly characterized as “critical” of defendant.

Defendant’s claim that Brodsky received cash, hotel stays, meals, and spa treatments for himself and his wife, Def. Br. 41, finds no support in the cited record pages, R11619-37. And defendant’s assertions that Brodsky used defendant’s case to “accept[] gifts for himself and his wife,” “catapult to fame,” and “rais[e] his profile,” and that Brodsky received money from a book deal include no supporting citation at all. Def. Br. 41-42. Finally, defendant notes that Brodsky offered photos and an exclusive interview to a news outlet for \$200,000. *Id.* at 41 & n.20. But defendant omits that the offer — which instead was for a not-yet-made video of defendant and his then-fiancée — was not accepted. R5361-62.

Defendant may not rely on these factual assertions that lack accurate — or any — citation to the record. *Urdiales*, 225 Ill. 2d at 420; *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (citing 188 Ill. 2d R. 341(e)(7), now found at 210 Ill. 2d R. 341(h)(7)).²⁰

V. The State Demonstrated Good Cause for Failing to Provide Pretrial Notice of Its Intent to Present Jeffrey Pachter’s Testimony as Other-Crimes Evidence, as Required by IRE 404(c).

(Response to Defendant’s Part VI)

Defendant challenges the admission of Jeffrey Pachter’s testimony — that defendant offered to pay him to find a hit man to kill Kathy — because the State did not provide pretrial

²⁰ Relatedly, defendant does not cite, as grounds for finding a *per se* conflict of interest, the agreement with Screaming Flea Productions. Def. Br. 40-44. Thus, defendant has forfeited any such argument. *BAC Home Loans Servicing, LP*, 2014 IL 116311, ¶ 23 (failure to argue point in opening brief forfeits it under Rule 341(h)(7)).

notice of its intent to offer it as bad-acts evidence, as required by IRE 404(c) (prosecution must disclose its intent to use such evidence at a “reasonable time” before trial, or during trial if the circuit court excuses pretrial notice upon a showing of “good cause”). Def. Br. 44-49. This Court should hold that the circuit court did not abuse its discretion in finding that the State established good cause under IRE 404(c) for filing its notice on the third day of trial.

A. Background

On January 28, 2010, Pachter testified during the pretrial hearsay hearing that in the winter of 2003, defendant asked Pachter if he knew someone who would “take care of his ex-wife”; defendant offered to pay Pachter \$25,000. R2109, 2215, 2221-24. The State’s pretrial filing seeking admission of other-crimes evidence did not include Pachter’s testimony about defendant’s solicitation of a hit man. C2502-06.

On July 31, 2012, the first day of trial, the State noted during opening statements that defendant had offered \$25,000 to a co-worker from a cable installation company (Pachter), and defense counsel objected. R6771, 6809. The court sustained the objection on the ground that testimony that defendant tried to hire a hit man was a bad act that was not included in the State’s motion to admit other-crimes evidence. R6810-13; *see also* C2502-06. Defendant moved for a mistrial, which the trial court denied because the State had not mentioned what the money was offered for and because the State would not be allowed to mention it again. R6813-17.

On August 2, 2012, the third day of trial, the State filed a motion to admit Pachter’s testimony about the hit man offer, C2973-81, and on August 14, 2012, defendant filed a response, C3012-17. On August 16, 2012, the circuit court, after hearing argument, R9042, 9176-9205, held that the hit man offer was a prior bad act and rejected the State’s argument

that IRE 404(b) & (c) were inapplicable because the hit man offer was merely a step in the course of conduct that was intrinsic to the charged crime of murdering Kathy, R9205.

The next day, the court heard argument on the notice question. R9391-9405. The State acknowledged that the hit man offer was not included in its pretrial filing, R9189-90, but argued that it had good cause for the failure to provide pretrial notice as required by IRE 404(c) due to: (1) its mistaken belief that this evidence was intrinsic to the charged murder so that it did not qualify as other-crimes evidence; and (2) its provision of “constructive notice” of the evidence through discovery and Pachter’s testimony at the hearsay hearing, R9392, 9394, 9395, 9397; *see also* R9183. Defendant responded that mistake alone should not constitute good cause and that the defense had prepared with the understanding that Pachter’s testimony would not be presented because the State had not provided written notice of its intent to offer it as bad-acts evidence. R9400, 9403-04. The circuit court held that the State’s misapprehension of the law qualified as good cause for extending the deadline for providing notice. R9405-06.

On August 21, 2012, after a hearing, R9413-29, the circuit court held that the hit man offer evidence was admissible under IRE 404(b), R9429. On August 22, 2012, Pachter testified at trial that defendant asked him in November 2003 “if I could find someone to take care of his third wife” in exchange for \$25,000; defendant stated that “his ex-wife was causing him some problems” and that she “had something on him.” R9653, 9656-57, 9664, 9668, 9671, 9708, 9710.²¹

²¹ Earlier this year, defendant was convicted of solicitation of murder for hire (720 ILCS 5/8-1.2(a)) of Will County State’s Attorney James Glasgow; he was later sentenced to forty years of imprisonment. AE15-19. *See People v. Mata*, 217 Ill. 2d 535, 539-40 (2005) (court can take judicial notice of documents that are “readily verifiable from sources of

The appellate court held that the circuit court did not abuse its discretion in finding good cause to excuse the State's failure to provide pretrial notice as required by IRE 404(c), reasoning that the circuit court considered the State's explanation for its failure to provide pretrial notice and that the State filed its late IRE 404(c) notice on August 2, 2012, twenty days before Pachter testified at trial. *Peterson III*, 2015 IL App (3d) 130157, ¶ 210 (A91). Additionally, the appellate court observed that there was little impact on the defense, given that defense counsel did not seek a continuance to prepare for Pachter's testimony and thoroughly cross-examined him. *Id.* (A91).

B. The Circuit Court Did Not Abuse Its Discretion in Permitting the State to Provide Notice on the Third Day of Trial.

Standard of Review: The circuit court's ruling on the admission of other-crimes evidence is reviewed for an abuse of discretion, *People v. Ward*, 2011 IL 108690, ¶ 21; *see also* Def. Br. 44, which exists only if it was so arbitrary, fanciful, or unreasonable that no reasonable person would agree, *Kladis*, 2011 IL 110920, ¶ 23. The circuit court's decision to extend a discovery-related deadline is similarly reversed only if the court abused its discretion, *see Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 353-54 (2007).

The State did not include the hit man offer evidence in a pretrial written notice because it reasonably, though incorrectly, believed that the evidence did not qualify as bad-acts evidence subject to IRE 404 under the intrinsic-evidence doctrine applied in *People v. Morales*, 2012 IL App (1st) 101911. C2973-77. *Morales* noted that different evidentiary rules applied to other-crimes evidence unrelated to the charged offenses and other-crimes evidence that was part of the course of conduct leading to the charged offenses: the latter was

indisputable accuracy”).

subject only to the ordinary relevancy requirement. 2012 IL App (1st) 101911, ¶¶ 24-25. In *Morales*, the defendant and others attacked a victim in the parking lot of a factory around three weeks before the charged murder was committed in the same parking lot. *Id.* at ¶¶ 20, 30. The court held that the earlier attack was admissible other-crimes evidence that was intrinsic to the murder and helped explain the otherwise inexplicable charged crime, so that it was subject only to ordinary relevancy limitations. *Id.* at ¶¶ 30, 32, 34-35. Here, the circuit court acknowledged that this intrinsic-evidence doctrine was still viable under Illinois law, R9177-78, but ultimately distinguished *Morales* because defendant was not accused of killing Kathy by hiring a hit man, R9184-88.

Moreover, defendant suffered little or no prejudice from the delayed notice. The State had previously disclosed Pachter as a witness, both a week before opening statements, C3990-93, 3996, 3998; R6771, 6806, and in 2009 (before the trial was delayed by the hearsay hearing and the interlocutory appeal), C1565, 1568. Defendant claims prejudice given that opening statements and cross-examination of some other witnesses had already occurred and that investigation was needed, Def. Br. 48 (citing R9196), but this argument is belied by two factors. First, Pachter's testimony was not related to that of any of the witnesses who had already testified on or before August 2, 2012, all of whom testified about entry into Kathy's house, discovery of her body, and initial activity at the crime scene. R6886, 6898-7027 (neighbor Mary Pontarelli, July 31); R7033, 7037-7115 (neighbor Thomas Pontarelli, August 1); R7142, 7185-7246 (firefighter/paramedic Louis Oleszkiewicz, August 2); R7142, 7247-7309 (locksmith Robert Akin, Jr., August 2); R7142, 7348-59 (firefighter Michael Newton, August 2); R7142, 7360-69 (firefighter/paramedic Michael Johnson, August 2); R7142, 7370-83 (firefighter/paramedic Timothy Berkery III, August 2).

Second, when Pachter was called, the defense did not request a continuance and thoroughly cross-examined him, questioning his credibility both with regard to his statement to police and events from his personal history. R9656-57, 9678-9721; *see also Peterson III*, 2015 IL App (3d) 130157, ¶ 210 (A91). And Pachter had previously testified to the same events (and been subject to cross-examination) at the hearsay hearing years earlier. R2208-76. Defendant's claim of prejudice because the prosecution stressed Pachter's testimony during closing argument, Def. Br. 49, is forfeited because he cites only to a page from Pachter's testimony, R9678, not argument. *Urdiales*, 225 Ill. 2d at 420; Ill. Sup. Ct. R. 341(h)(7); *see also supra* Part IV.C.

Further, defendant incorrectly asserts that he had only five days' notice before Pachter's testimony. Def. Br. 47 n.23. To the contrary, the appellate court correctly calculated it as twenty days' notice: the State's notice was filed August 2, 2012, C2973, and Pachter testified on August 22nd, R9653, 9656-57. *Peterson III*, 2015 IL App (3d) 130157, ¶ 210 (A91). In light of the foregoing, defendant suffered no prejudice.

Although there is a dearth of precedent interpreting what constitutes "good cause" under IRE 404(c) or its statutory counterparts addressing other-crimes evidence (e.g., 725 ILCS 5/115-7.3(d), 115-7.4(c) & 115-20(d)), the appellate court here appropriately relied on an analogous civil case, *Vision Point of Sale, Inc. Peterson III*, 2015 IL App (3d) 130157, ¶ 209 (A91). In *Vision Point*, this Court addressed whether a party demonstrated good cause under Rule 183 for an extension of a deadline for plaintiff's responses to defendant's Rule 216 request to admit. 226 Ill. 2d at 335, 339-40. This Court confirmed that the absence of inconvenience or prejudice to the opposing party alone was insufficient to establish good cause. *Id.* at 344. But defendant inaccurately characterizes the case as holding that the party

seeking the extension must provide a reason other than inadvertence or attorney neglect to establish good cause, Def. Br. 46; *see also* R9392, and the circuit court judge misinterpreted the case as holding that mistake, inadvertence, and neglect can be considered but cannot be the sole justification for a finding of good cause, R9400-01. To the contrary, *Vision Point* overruled several appellate court cases that excluded inadvertence, mistake, or attorney neglect from consideration in determining whether good cause exists to warrant an extension of time under Rule 183 and did not comment, one way or the other, on whether such evidence could be the sole basis for a good cause finding. *Vision Point of Sale, Inc.*, 226 Ill. 2d at 351-53. This Court also noted that, in evaluating whether good cause exists, a court should consider all objective, relevant evidence and focus on the conduct of the party seeking the extension. *Id.* at 351, 353. Consistent with *Vision Point*, the circuit court's finding of good cause under IRE 404(c) was not "arbitrary, fanciful, or unreasonable" given that the State reasonably, though mistakenly, believed that the intrinsic-evidence doctrine applied and given that the delay did not prejudice defendant. *See Kladis*, 2011 IL 110920, ¶ 23.

VI. The Appellate Court Correctly Rejected Defendant's Cumulative Error Claim. (Response to Defendant's Part VII)

Finally, defendant argues that even if no single error warrants a new trial, the cumulative effect of the errors warrants reversal of his conviction. Def. Br. 49-50. Because all of his claims of error are meritless, a cumulative-error analysis is unnecessary. *People v. Perry*, 224 Ill. 2d 312, 356 (2007). In any event, a new trial due to cumulative error is warranted only under "extreme circumstances." *People v. Hall*, 194 Ill. 2d 305, 350-51 (2000) (citing *Blue*, 189 Ill. 2d 99) (finding cumulative error in State encouraging jurors to consider improper factors grounded in emotion, such as gratitude to police force, in State

editorializing when making objections, and in introduction and display of dead officer's bloodied uniform). Such circumstances are not present here.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the Illinois Appellate Court, Third District.

October 12, 2016

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

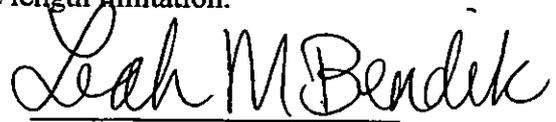
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 59 pages. On September 29, 2016, this Court granted my motion to file a brief up to 15 pages in excess of the 50-page length limitation.

A handwritten signature in black ink that reads "Leah M. Bendik". The signature is written in a cursive style with a horizontal line underneath the name.

LEAH M. BENDIK
Assistant Attorney General

APPENDIX

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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.

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 jurisdiction¹ 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.

¹ 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.

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 3² 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. 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).

2 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.³ 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.⁴

3 Two of the statements, which were written, were admitted in redacted form.

4 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, 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.

[4] ¶ 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).⁵

⁵ 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”).

[5] ¶ 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 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).

[6] ¶ 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.

[7] ¶ 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).

[8] [9] [10] ¶ 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.

[11] ¶ 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).⁶

6 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.

[12] [13] ¶ 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 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.⁷

⁷ 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 Wilhelm) (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.⁸ 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.

⁸ 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. 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

2012 IL App (3d) 100514-B, 968 N.E.2d 204, 360 Ill.Dec. 125

Hearsay Statements Considered at Pretrial Hearsay Hearing

1. Letter from Kathy to Will County State's Attorney's Office dated November 14, 2002 about a July 5, 2002 incident between defendant and Kathy. C1867.
— Admissible. C2102 (A3), 2106-07.
2. Handwritten statement by Kathy to police about a July 5, 2002 incident. Kathy alleged that defendant entered her home, stayed for several hours, and threatened her. C1868.
— Admissible. C2102-03 (A3-4), 2108-10.
3. Oral statement by Kathy to her sister, Anna Doman, in January 2004. Kathy said that defendant told her that he was going to kill her, that she was not going to make it to the divorce settlement, and that I would never get his pension or his children. C1868.
— Admissible. C2102-03 (A3-4).
4. Oral statement by Kathy to Mary Parks in late fall 2003. Kathy said that defendant entered her house, grabbed her by the throat, held her down, and told her "why don't you just die." C1867.
— Admissible. C2102-03 (A3-4).
5. Oral statement by Kathy to Parks. Kathy said that defendant told her that he could kill her and get away with it. C1867.
— Admissible. C2102-03 (A3-4).
6. Oral statement by Kathy to Kristen Anderson, who lived in Kathy's basement for a few months in late 2003. Kathy said that defendant told her he could kill her at any time and make it look like an accident. C1867.
— Inadmissible. C2104 (A5).
7. Oral statement by Kathy to coworker Issam Karam in 2003. Kathy said that defendant snuck into her house and told her that she could not hide, that nothing could make her safe, and that he could kill her right then but it would be too bloody. C1868.
— Inadmissible. C2104 (A5).
8. Oral statement by Kathy to her sister, Susan Doman. Multiple times, Kathy said that defendant told her that he could kill her and make it look like an accident and no one would ever know. C1868.
— Inadmissible. C2104 (A5).
9. Audiotaped statement by Kathy to Country Companies Insurance agent Scott Gibson in July 2003. C1869.
— Inadmissible. C2104 (A5).
10. Portions of transcribed "Examination Under Oath" of Kathy on August 6, 2003. C1869.
— Inadmissible. C2104 (A5).
11. Oral statement by Kathy to her attorney, Harry Smith. Kathy said that defendant had threatened her and that he could kill her and make it look like an accident. C1869.
— Inadmissible. C2104 (A5).

12. Oral statement by Stacy to Pastor Neil Schori in August 2007. Stacy said that before Kathy's body was discovered, defendant returned home in the early morning hours, dressed in black, with a bag containing women's clothing that were not hers. C1869. — Admissible. C2104 (A5).
13. Oral statement by Stacy to Scott Rossetto in October 2007. Stacy said that on the night Kathy died, defendant returned home late at night dressed all in black. C1869. — Inadmissible. C2104 (A5).
14. Oral statement by Stacy to Michael Miles. Stacy said that defendant told her that he could kill Kathy and make it look like an accident; Stacy also said that she had stopped defendant from killing Kathy on a previous occasion. C1870. — Inadmissible. C2104 (A5).

[Note: During the hearsay hearing, the State withdrew consideration of a hearsay statement made by Stacy to psychic Irene Alagos. C1869, R3514-3553, 5383]

Hearsay Statements by Kathy or Stacy that Were Presented at Trial

Hearsay Related to Whether Defendant Murdered Kathy, First Elicited by State

(The final column in all following tables indicates who asked the question: S is the State and Δ is the defense. Additional cites eliciting the same hearsay, sometimes by the opposing party, are also listed. Hearsay statements whose admissibility was considered at the pretrial hearing are in bold and have the number from the list above in parenthesis afterward.)

Witness Testifying	Hearsay Statement(s)	Citations
Tom Pontarelli	*In early 2002, Kathy asked him to install a lock on her bedroom door	S: R7044-45
Anna Doman	*6 weeks before her death, Kathy said that defendant told her that he would kill her, that she would not make it to the divorce settlement, and that she would not get his pension or the children (#3) *During the same conversation, Kathy repeatedly asked Anna to promise to take care of her boys *During the same conversation, Kathy said that her important papers were inside a briefcase that she kept in the back of her SUV, and that if anything happened to her, Anna should get it	S: R7397-98 Δ: R7435, 7450-51 S: R7399 S: R7399-7400
Kristen Anderson	*In October 2003, Kathy said previously (before Anderson family moved into her basement during the Fall 2003), defendant broke into her house wearing a SWAT uniform, held her at knifepoint, and said that he could kill her and make it look like an accident (#6) *During the same conversation, Kathy showed her a knife that she kept in between her mattresses for protection	S: R7983-84, 7989, 7994 Δ: 8006-07 S: R7994

Mary Parks	<p>*Right before Thanksgiving 2003, Kathy said that the previous night she had been coming down the stairs when defendant, wearing a black police uniform, grabbed her neck, pinned her down, and said, "why don't you just die" (#4)</p> <p>*In the late fall 2003, during a different conversation, Kathy said that defendant told her that he could kill her and make her disappear (#5)</p>	<p>S: R8084, 8087-88, 8185 Δ: R8172</p> <p>S: R8089-90, 8097 Δ: R8134, 8144, 8149, 8151, 8152, 8153</p>
Susan Doman	<p>*Kathy said that defendant came into her home, she was in the basement, and that defendant had a knife by her throat and said that he could kill her and make it look like an accident; she was terrified and described the incident several times (#8)</p> <p>*A week before her death, Kathy asked Susan "to take care of her boys"</p>	<p>S: R8401-02 Δ: R8442, 8443</p> <p>S: R8412</p>
Lt. Teresa Kernc	<p>*On 7/18/02, Lt. Kernc was dispatched to take a delayed police report about a domestic incident. Kathy said the following. On 7/05/02, she had taken her sons to camp, went to the market, went home, went upstairs for laundry, and as she was coming downstairs, she saw defendant in a SWAT uniform with black gloves. Defendant pushed her back onto the stairs and told her that she was a mean bitch, that she would not talk to him when he called or brought the boys home, and that he wanted to speak to her now. They spent 3.5 hours talking about their life together; defendant wanted Kathy to say what happened was her fault. Defendant asked Kathy if she was afraid of him; she said yes. Kathy got tired of sitting there, so she told defendant to do what he came to do, to kill her. She turned her head and waited; defendant said I cannot hurt you. She was very tired and upset. Defendant asked if she was going to call the Bolingbrook Police Department. The phone rang 3 times while they talked. Defendant threw down a garage door opener, removed an ear piece, and left the house. She did not file a police report that day because defendant was unstable and if she did so, he would deny it. She added the word "knife" to her written statement at Kernc's request but crossed it out because she did not want defendant to lose his job or be arrested.</p> <p>*Kernc read Kathy's written statement aloud (#2)</p>	<p>S: R8677-79, 8683-85, 8749-51 Δ: R8806-09, 8814, 8822</p> <p>S: R8752-55</p>

<p>Pastor Neil Schori</p>	<p>*On 8/31/07, Stacy said that one night, she and defendant had gone to bed at the same time and went to sleep; she woke up in the middle of the night and defendant was gone; she looked around the house and could not find him; she tried to call him but could not reach him. During the early morning hours, Stacy saw defendant standing near the washer carrying a bag while dressed all in black; defendant took off his clothes, put them and the bag's contents in the washer, and walked away; Stacy looked inside the washer and saw women's clothes that did not belong to her. (#12) *During the same conversation, Stacy said that soon after, she talked with defendant who said that the police would want to talk to her shortly, and for hours he told her what to say to the police. Stacy said that she lied to the police on defendant's behalf.</p>	<p>S: R10002, 10005-06 S: R10007-08</p>
<p>Harry Smith</p>	<p>*On 10/24/07, Stacy said that defendant was mad at her because he thought that she told Tom that he killed Kathy *During that same conversation, Stacy said that defendant was surveilling/following her; he tracked her with her phone's GPS *During that same conversation, Stacy used the word "how" in describing, not just the fact that defendant killed Kathy, but how he killed Kathy *During that same conversation, defendant's voice was in the background calling for her, and Stacy yelled to defendant that she would be in in a minute *During that same conversation, Stacy said that she was using a cell phone that defendant did not know about</p>	<p>S: R10789-90 S: R10790, 10797 Δ: R10804 S: R10790-91 S: R10793-95 S: R10797</p>

Hearsay First Elicited by Defense

<p>Witness Testifying</p>	<p>Hearsay Statement(s)</p>	<p>Citations + Who Asked</p>
<p>Tom Pontarelli</p>	<p>*Kathy asked him to move some of defendant's things into the garage *On 2/28/04, Kathy declined invitation to come with Pontarellis to family birthday party that evening; she needed to study</p>	<p>Δ: R7065 Δ: R7075-76</p>
<p>Anna Doman</p>	<p>*Kathy said that defendant said he would kill her and make it look like an accident</p>	<p>Δ: R7435, 7450-51</p>

Mary Parks	<p>*Kathy said that she kept the house locked up</p> <p>*Kathy said that she was fighting with defendant over their businesses</p> <p>*Kathy said that she needed someone to walk her to her car after nursing classes because she was afraid of defendant</p> <p>*Kathy said that male friends of defendant's were reporting her moves to defendant</p> <p>*Kathy said that she was afraid defendant would get her when she was away from home</p> <p>*Kathy said that she was afraid defendant would disable her car</p> <p>*Kathy said that she kept her doors locked</p>	<p>Δ: R8150 S: R8181-82 Δ: R8160</p> <p>Δ: R8161 S: R8182 Δ: R8163-64</p> <p>Δ: R8164-65</p> <p>Δ: R8165</p> <p>Δ: R8166</p>
Steve Maniaci	<p>*There were times when Kathy's divorce attorney, Harry Smith, would not return her calls and Kathy would ask Steve to call him for her</p>	<p>Δ: R8328</p>
Teresa Kernc	<p>*On 7/18/02, Kathy said that she had spoken to "some other people"</p> <p>*Kathy said that she did not want to file a police report</p> <p>*Kathy said that there were two arrests for battery</p> <p>*Impeached with hearsay hearing testimony: Kathy said that she had been recently served with a summons for the battery case and that she was upset about it</p> <p>*Impeached with notes from 7/18/02: Kathy said that defendant had filed a battery complaint against her for two charges and that she would be fired and would lose her children so she wanted him to stop</p> <p>*Impeached with hearsay hearing testimony: Kathy said defendant had been wearing blue jeans, belt, cell phone, ear piece and black gloves (rather than a SWAT uniform)</p> <p>*Kathy said that after the 7/05 incident, she called her attorney (Harry Smith) and Mary Pontarelli</p> <p>*When talking, Kathy did not vacillate about the presence of the knife on 7/05, only about including it in her written statement</p>	<p>Δ: R8764</p> <p>Δ: R8764-65 Δ: R8771-72 Δ: R8778-80, 8783, 8806 Δ: R8781-83</p> <p>Δ: R8786-87</p> <p>Δ: R8808, 8816 Δ: R8820-21</p>
Pastor Neil Schori	<p>*On 8/31/07, Stacy said that defendant told her that he killed his own men when he was in the Army</p> <p>*During that same conversation, Stacy asked Pastor Schori to keep the conversation secret</p>	<p>Δ: R10019</p> <p>Δ: R10024, S: R10033</p>
Harry Smith	<p>*On 10/24/07, Stacy called him wanting to hire him as a divorce attorney but not possible due to conflict</p>	<p>Δ: R10755-61</p>

<p>Harry Smith</p>	<p>*During that same conversation, Stacy said that she had information about defendant; she wanted to leave the state with her children; she had information that might benefit her in getting that done; “[s]he said that she had information regarding Kathleen Peterson she wanted to use.”</p> <p>*Stacy “wanted to know if the fact that he killed Kathy could be used against him” in the divorce proceeding, intimating as leverage</p> <p>*Impeached with hearsay hearing testimony: Stacy asked “could we get more money out of Drew if we threatened to tell the police about how he killed Kathy”</p> <p>*Impeached with hearsay hearing testimony: Stacy said that “she had information about Drew”; “she had so much, S-H-I-T, on him at the police department that he couldn’t do anything to her”</p>	<p>Δ: R10761-62, 10777 S: R10792</p> <p>Δ: R10762, 10777</p> <p>Δ: R10772, 10775, 10776, 10777 S: R10790 Δ: R10773 S: 10790</p>
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Hearsay Only Providing Background or Context, First Elicited by State

Witness Testifying	Hearsay Statement(s)	Citations + Who Asked
<p>Mary Pontarelli</p>	<p>*On 2/28/04, Kathy said she had a great week at nursing school and she helped deliver a baby</p> <p>*On 2/28/04 Kathy said she was studying for finals that were in a few weeks, and she had a lot of studying to do</p>	<p>S: R6914-15 S: R6915-16 Δ: R6952</p>
<p>Tom Pontarelli</p>	<p>*On 2/28/04, Kathy said she was excited because she helped to deliver her first baby</p>	<p>S: R7049</p>
<p>Steve Maniaci</p>	<p>*In January 2002, Steve learned that Kathy was still married but defendant was staying in the basement</p> <p>*When Steve asked Kathy to come to his house on 2/28/04 to study and that after his band practice they would have dinner and watch a movie, Kathy said she would think about it</p>	<p>S: R8267-68 Δ: R8325 S: R8299</p>

Steve Maniaci	<p>*The evening of 2/28/04, Steve called and asked if Kathy was at his house and she was not; Kathy asked Steve if he was coming over and Steve said no, he was too tired</p> <p>*Kathy called again later around midnight, she was upset because Steve would not come over and said that Steve was never going to marry her</p>	<p>S: R8300</p> <p>S: R8301-02</p> <p>Δ: R8351</p>
Susan Doman	<p>*Discussing plans for the weekend of her death, Kathy said she had to study but she was planning to see her kids Monday</p>	<p>S: R8413-14</p>
Dominic DeFrancesco	<p>*On 2/28/04, Kathy asked how was the family trip to Florida</p>	<p>S: R8511-12</p>
Nick Pontarelli	<p>*On 2/28/04, Kathy talked about what she had done that week while the Pontarelli family was in Florida</p>	<p>S: R9909-10</p>

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
RANDOLPH COUNTY, ILLINOIS

FILED

FEB 09 2015

David Gibson
CIRCUIT CLERK
RANDOLPH COUNTY, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)
)
v.)
)
DREW PETERSON,)
)
Defendant.)

15-CF- 26
INFORMATION

**JEREMY R. WALKER, Randolph County State's Attorney, informs the Court that
DREW PETERSON**

committed the following offenses within Randolph County on or between September, 2013 and
December, 2014:

COUNT I

SOLICITATION OF MURDER FOR HIRE

in that the said Defendant, in violation of SECTION 8-1.2(a) of ACT 5 of CHAPTER 720
of the Illinois Compiled Statutes of said State, with the intent that the offense of first degree
murder be committed, in violation of Section 9-1(a)(1) of Act 5 of Chapter 720 of the Illinois
Compiled Statutes, procured Individual A to commit that offense pursuant to a request, whereby
Individual A would find another to kill James Glasgow and the Defendant would pay Individual
A or another United States Currency.

**A Class X Felony – Mandatory Prison Sentence of 20-40 years. Three (3) years MSR. The
Defendant must serve 85% of any sentence he receives pursuant to 730 ILCS 5/3-6-
3(a)(2)(ii). Any sentence the Defendant receives must be consecutive to the sentence he is
currently serving, pursuant to 730 ILCS 5/5-8-4(d)(6). Defendant is extended term eligible
for 60 year prison sentence due to prior conviction for Class M Felony in Cause # 09-CF-
1048 (Will County, Illinois).**

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COUNT II

SOLICITATION OF MURDER

in that the said Defendant, in violation of SECTION 8-1(b) of ACT 5 of CHAPTER 720 of the Illinois Compiled Statutes of said State, with the intent that the offense of first degree murder be committed, in violation of Section 9-1(a)(1) of Act 5 of Chapter 720 of the Illinois Compiled Statutes, requested Individual A to commit that offense by finding another to kill James Glasgow.

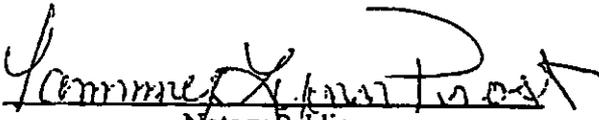
A Class X Felony – Mandatory Prison Sentence of 15-30 years. Three (3) years MSR. The Defendant must serve 85% of any sentence he receives pursuant to 730 ILCS 5/3-6-3(a)(2)(ii). Any sentence the Defendant receives must be consecutive to the sentence he is currently serving, pursuant to 730 ILCS 5/5-8-4(d)(6). Defendant is extended term eligible for 60 year prison sentence due to prior conviction for Class M Felony in Cause # 09-CF-1048 (Will County, Illinois).

Said State's Attorney requests process that said defendant may be arrested and dealt with accordingly to law.

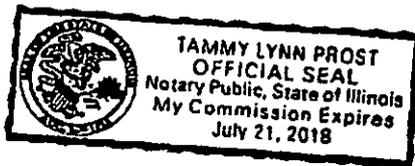


State's Attorney

SUBSCRIBED AND SWORN TO BEFORE ME this 5 day of February, 2015.



Notary Public



IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT

RANDOLPH COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS)
vs.)
DREW PETERSON)
Defendant.)

Case No. 2015-CF-26 Date of Sentence July 29, 2016
Date of Birth 01-05-1954
(Defendant)

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS, the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

Table with 7 columns: COUNT, OFFENSE, DATE OF OFFENSE, STATUTORY CITATION, CLASS, SENTENCE, MSR. Row 1: 1, Solicitation of Murder For Hire, between Sept. 2013 and December 2014, Ch. 720 Act 5 Section 2014, X, 40 Yrs., 3 Yrs.

This Court finds that the defendant is:

Convicted of a class offense but sentenced as a class X offender pursuant to 730 ILCS 5/5-5-3(c)(8).

The Court further finds that the defendant is entitled to 0 days credit. The defendant is also entitled to receive credit for the additional time served in custody from the date of this order until defendant is received at the Illinois Department of Corrections.

- X The defendant remained in continuous custody from the date of this order.
The defendant did not remain in continuous custody from the date of this order (less days from a release date of to a surrender date of).

The Court further finds that the conduct leading to conviction for the offenses enumerated in counts resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii)).

The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a)).

The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a))

The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program Educational/Vocational Substance Abuse Behavior Modification Life Skills Re-Entry Planning provided by the county jail while held in pre-trial detention prior to this commitment and is eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded additional sentence credit as follows: total number of days in identified program(s) x .50 = days, if not previously awarded.

The defendant passed the high school level test for General Education and Development (GED) on while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 60 days of additional sentence credit, if not previously awarded.

X IT IS FURTHER ORDERED the sentence(s) imposed on count(s) 1 be consecutive to the sentence imposed in case number 2009-CF-1048 in the Circuit Court of Will County.

X IT IS FURTHER ORDERED that the defendant's sentence must be served at 85%.

The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is X effective immediately.

DATE: July 29, 2016

ENTER: Richard A. Brown

Richard A. Brown
(PLEASE PRINT JUDGE'S NAME HERE)

Approved by Conference of Chief Judges 6/20/14

IN THE CIRCUIT COURT OF RANDOLPH COUNTY, ILLINOIS

TWENTIETH JUDICIAL CIRCUIT

Defendant Drew Peterson

Case Number 2015-CF-26

JUDGMENT - SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

X IT IS FURTHER ORDERED that all court costs are remitted.

DATE: July 29, 2016

ENTER: Richard A. Brown

Richard A. Brown
(PLEASE PRINT JUDGE'S NAME HERE)

I, Sherry L. Johnson, Clerk of the Circuit Court, Randolph County, Illinois, hereby certify this to be the original filed in this office.



Sherry L. Johnson Date 10-12-16
Clerk of the Circuit Court

STATE OF ILLINOIS)
)
COUNTY OF COOK) ss.

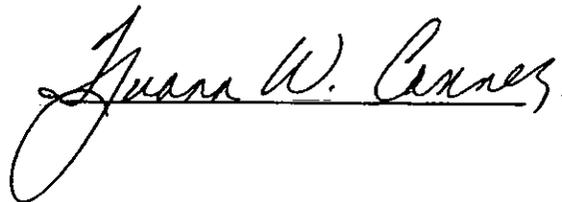
PROOF OF FILING AND SERVICE

The undersigned deposes and states that on October 12, 2016, the original and nineteen copies of the foregoing **Brief and Appendix of Plaintiff-Appellee People of the State of Illinois** were filed with the Clerk, Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois 62701, and three copies were served upon the following, by placement in the United States mail at 100 West Randolph Street, Chicago, Illinois, 60601, in an envelope bearing sufficient first-class postage:

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Notary Public

