NO. 120331

IN THE
SUPREME COURT OF ILLINOIS

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

REPLY OF DEFENDANT-APPELLANT TO PLAINTIFF-APPELLEE'S BRIEF

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I. DREW WAS DENIED A FAIR TRIAL BY THE PREJUDICIAL INTRODUCTION OF HEARSAY VIA THE FORFEITURE BY WRONGDOING DOCTRINE (Brief Issues I & II)

In his opening brief, Defendant argued the trial court erred in permitting incendiary hearsay at trial because 1) the appellate court incorrectly directed the trial court to ignore the procedural protections in 725 ILCS 5/115/10.6 governing admission of evidence via the forfeiture by wrongdoing (FBW) doctrine; 2) the forfeiture by wrongdoing doctrine, as a matter of law, requires identification of the testimony to be avoided to satisfy the specific intent requirement; and 3) insufficient evidence existed to support a finding that Defendant "designed" to prevent Kathleen and Stacy's testimony.

In response, the State concedes the salience of the hearsay (St. Br. at 31), but argues that the General Assembly's refinement of the FBW doctrine must be invalidated on separation of powers grounds; that the forfeiture by wrongdoing doctrine can be triggered even without identifying the judicial proceeding or testimony that Defendant allegedly tried to avoid; and that evidence showing that Defendant sought to avoid a messy divorce and splitting his pension with others justified the FBW rulings. Because the State misperceives this Court's separation of powers jurisprudence, because its arguments would inevitably lead to a dangerous expansion of the FBW doctrine, and because its factual showing cannot satisfy even an expansive construction of the fbw doctrine, reversal is warranted.

A. The Appellate Court Erred in Nullifying the General Assembly's Procedural Protections in the FBW Statute

In its brief, the State argues (St. Br. at 12-15) that the trial and appellate courts

correctly ignored the General Assembly's provisions on FBW because the prior judicial rule on hearsay exceptions deprived the General Assembly of the power to craft procedural protections to guide the exercise of FBW. Its separation of powers argument is without merit.

The statute adds two procedural protections to the common law rule: first that the trial court make "specific findings" as to each of the criteria before admitting unconfronted hearsay, and that each statement so admitted also be deemed reliable. The State does not argue that the trial court made the required findings or improperly determined reliability but rather that the General Assembly impermissibly stepped on the toes of the judiciary in providing for such procedural protections.

The State's argument conflicts with a generation of decisions of this Court which recognized the pivotal role of the General Assembly in setting the rules of the game to govern admission of evidence in the courts. As this Court summarized in upholding the General Assembly's power to provide that evidence of a refusal to take a breath test can be admitted at trial, "[i]t is clear that the legislature of a State has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof." *People v. Rolfingsmeyer,* 101 Ill. 2d 137, 461 N.E.2d 410 (1984). Indeed, the State's argument founders on the many Illinois court decisions upholding General Assembly legislation governing admission of evidence, such as prior inconsistent statements, *People v. Hastings*, 161 Ill. App.3d 714, 515 N.E.2d 260 (1987), out of court statements by witnesses, *People v. Yarbrough*, 166 Ill. App. 3d 825, 520 N.E.2d 1116 (1988), and victim impact statements, *People v. Felella,* 131 Ill.2d 525 (1989).

In light of the array of precedents, the State raises a new argument not raised below and not relied upon by the appellate court. It suggests that, although the General Assembly can alter rules articulated in prior judicial decisions, it cannot alter criteria in a prior judicial rule. The State, however, declined to offer a rationale for distinguishing between a legislative clash with a judicial decision as opposed to a judicial rule and, from a separation of powers vantage point, the intrusion would seem similar. But, no matter, for this Court's decision in *People v. Walker*, 119 Ill. 2d 465, 519 N.E.2d 890 (1988), frames the inquiry. There, this Court held there was no separation of powers difficulty for the legislature to make it *easier* for a litigant to compel substitution of a judge despite a preexisting judicial rule. *Walker* held that, as long as "a legislative enactment expresses a public policy determination…our court has sought to reconcile conflicts between rules of the court and the statute." *Id.* at 475. The Court went out of its way to graft the new General Assembly policy on substitution of judges onto the preexisting judicial rule. And, this Court followed the same tack in *Burger v. Lutheran General Hospital,* 198 Ill. 2d 21, 759 N.E.2d 533 (2001), holding that the statutory immunity provision readily was reconcilable with, though quite different than, a prior judicial rule on permissible sanctions for discovery violations. As long as there is no direct clash, the legislation could be reconciled with the prior rule and followed in the future. See also *People v. Felella*, 131 Ill.2d 525 (1989) (holding that legislation's specification that courts consider victim impact evidence can be harmonized even though the legislation necessitated a change in practice).[1]

[1] Moreover, the logic of the State's analysis would negate wide swathes of 725 ILCS

The State, however, argues that the procedural protections in the Illinois statute cannot be reconciled in this case with the prior judicial rule governing FBW. The State's disdain for the General Assembly's policy judgment with respect to invocation of FBW, which indeed was spearheaded by the State's Attorney prosecuting this case,[2] is as ironic as it is unfortunate. The General Assembly sought to reconcile the right of the accused to confront testimony against them with the need for an exception to the exclusion of hearsay to protect the integrity of the judicial process. This Court should defer to the legislative judgment on how best to achieve that balance. "The legislature has the power to prescribe new rules of evidence and alter existing ones, and to prescribe methods of proof. Such action does not offend the separation-of-powers clause of our constitution." (*People v. Rolfingsmeyer*, 101 Ill.2d 137, 140, 77 Ill. Dec. 787, 461 N.E.2d 410 (1984)); *First Nat. Bank of Chicago v King*, 165, Ill. 2d 533, 542, 651 N.E.2d 127, 131 (1995). That is all the General Assembly did here in defining the parameters of the evidentiary rule, while leaving discretion in the courts.

With respect to the General Assembly's requirement of particularized findings, the State's argument that the requirement cannot be reconciled with the prior judicial

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5/115/1 et seq., addressing admissibility of business records, lab records, PTSD and the like. The State's argument would displace the General Assembly's role to guide admission of evidence in Illinois courts.

[2] The Appellate Court below stressed "the importance that the statute's sponsors attached to this reliability requirement," and continued that the "Will County State's Attorney who during oral argument repeatedly claimed that he 'wrote the statute' – told the circuit court that the statute ensured greater protection for Defendants." *People v. Peterson*, 2012 Il. App. 3d at n.7. Even he shared that the legislature had expressed a policy judgment.

rule is patently frivolous. The requirement of findings in no way alters underlying rights and responsibilities and therefore readily is reconcilable with the prior judicial rule and may even have benefited the State for it would then have been clear as to which testimony at what proceeding was at stake. Moreover, although the requirement of reliability adds a new layer to the prior rule, the General Assembly did not tie the judiciary's hands. The legislation left up to the courts how to assess whether the hearsay was reliable enough to be admitted, and the reliability inquiry is one familiar in many evidentiary contexts.

Under 725 ILCS 5/115-10.6, therefore, the trial court erred in not making particularized findings[3] with respect to the testimony that Defendant allegedly tried to prevent and the appellate court erred in allowing the statements without determining whether each satisfied a test of reliability. Accordingly, this Court should reverse the courts below and hold that the trial court should have followed the General Assembly's FBW provisions, and the statements should not have been admitted.

B. The Appellate and Trial Courts Erred as a Matter of Law in Expanding the Common Law FBW Doctrine Beyond Recognition

Even if the General Assembly's provision does not apply, controlling U.S. Supreme Court doctrine in *Giles v. California* provides that the FBW doctrine is triggered only when the Defendant "*designed* to prevent the witness from testifying." 554 U.S. 353, 360 (2008). That limitation is critical because, as this Court stressed in *In re Rolandis G.,* 232 Ill.2d 13, 39-40 (2008), it is not sufficient that the Defendant made the

[3] The Defendant urged that such findings be made. See, e.g., C. 2208.

potential witness "absent [if he] had not done so to prevent the person from testifying." If there is no proof that the Defendant wished to prevent testimony, the Defendant would lose the essential right "to a fair trial on the basis of a prior judicial assessment that the Defendant is guilty as charged."

Despite *Giles* and *Rolandis G.*, the State argues (St. Br. at 15-26) that the confrontation right can be stripped by a judge even when the judge cannot point to the testimony that is to be avoided, and even if the potential judicial proceedings are not identified. The State never explains how the specific intent requirement in FBW can be satisfied if the identity of the feared testimony is not delineated. In more prototypical cases, specific intent may be self-evident as, for example, when the critical testimony to be avoided is eyewitness identification. But, in this case, the trial court never sought to demonstrate the specific intent required under FBW – we do not know why it concluded that the specific intent requirement was satisfied. The FBW doctrine requires more: confrontation rights can be forfeited only if the trial court finds that the State sustained its burden of identifying the testimony allegedly prevented and the proceeding at which it was to take place. Viewed another way, if the State alleged that Defendant killed Kathleen and Stacy because he was vengeful or because he did not want them to benefit from any of his financial assets after a divorce, it would have been reversible error to admit the hearsay. Only because the State alleged, in addition, that Defendant did not wish Kathleen and Stacy to testify about something at some future proceeding would the FBW doctrine arguably be triggered. If the trial court need not find that Defendant "designed to prevent the witness from testifying," then the FBW exception

would swallow the general rule banning unconfronted hearsay. In order to determine the Defendant's design, the feared testimony must be identified.

Courts in neighboring states have focused on the specific intent requirement. For instance, in *Jensen v. Schwochert*, 2013 U.S. Dist. LEXIS 177420 (E.D. Wis. Dec. 18, 2013), *aff'd,* 800 F.3d 892 (7th Cir. 2015), Wisconsin lower courts had held that the forfeiture by wrongdoing exception applied in a similar murder case, but those decisions were reversed because the courts never determined that Defendant *designed to prevent testimony* as opposed to killing his wife out of hatred or a desire to "avoid a messy divorce." And, in *Ohio v. Dillon*, 2016 Ohio-1561, the appellate court overturned a trial court decision to introduce hearsay because of the lack of evidence that "Dillon killed his mother for the purpose of preventing her from testifying against him," as opposed to anger or resentment. Without a showing of what testimony was feared, the required specific intent could not be shown. The court below therefore erred as a matter of law in failing to demonstrate specific intent by identifying the testimony to be avoided, as opposed to some other purpose. Because the trial court misapprehended the limited nature of FBW, the conviction must be overturned.

C. The Trial Court Abused its Discretion in Finding that Defendant Killed Kathleen Savio and Stacy Peterson to Prevent Testimony

Even if there is no requirement that the trial court identify the testimony, then the evidence introduced at the hearing must show by a preponderance of the evidence that Defendant made the witnesses unavailable specifically to prevent their testimony.

Yet, as the State concedes (St. Br. at 20), the divorce was already granted at the time that Kathleen died and, indeed, Kathleen had already been deposed. The State argues, however (St. Br. at 22) that Defendant was "angry" that she had testified in the contested divorce proceedings – but a motive of revenge does not trigger FBW. Similarly, the State argues (St. Br. at 23) that Defendant "did not want to share his pension with Kathy." But, while that sentiment may suggest a motive for homicide, it does not show the specific intent to make a witness unavailable for testimony. Finally, the State argues (St. Br. at 23) that Defendant profited financially from Kathleen's unavailability and received sole custody of the children. Once again, the State may have shown that Defendant benefited from her death, but not that he wished to avoid her testimony. The State has confused a motive for homicide for the required motive or specific intent to avoid testimony.[4]

With respect to Stacy, the State compounds its error, arguing that it does not even have the burden of identifying a particular proceeding at which Defendant wished to prevent testimony. Rather, it states (St. Br. at 26) that Defendant may have wished to prevent her testimony "at a future divorce or criminal trial." The State continues (St.

[4] At St. Br. 21 the State cites testimony regarding the value of the marital estate as being from expert testimony at trial. There was no such testimony allowed. The reference is to the pre-trial hearing. Likewise, on pgs. 22 and 23 the State refers to reopening the Savio estate in 2008, a fact that is both irrelevant and *dehors* the record. In any event, if Drew killed Kathleen to avoid the property distribution it does not support FBW, because it was not to prevent testimony. See *Jensen*, supra. Finally, on pg. 28 the State relies upon the pre-trial testimony of Scott Rossetto, a witness found unreliable at the hearsay hearing and whose testimony was barred from trial as "facially unreliable". R.9334-52.

Br. at 26) that "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."

In regards to a prospective divorce, the State makes the same mistake as it did in arguing that Kathleen's hearsay should have been admitted – the State fails to suggest what testimony that Defendant feared at a divorce proceeding, rather than that Defendant feared the divorce proceeding and its consequences. The fact that Stacy and Defendant "were having serious marital problems" (St. Br. at 27) and that Stacy "wanted a divorce" (*id.*), and that "she had packed ten boxes of Defendant's things," (*id*), are simply not relevant.

Perhaps, instead, Defendant feared that Stacy could have testified at a prospective murder trial involving Kathleen, even though at the time, the death had been ruled accidental. The most salient testimony to that effect came from attorney Harry Smith, who testified that Defendant had heard Stacy relating to others that Defendant had killed Kathleen and that she knew how he did it. That testimony, however, should have been excluded because it was protected by the attorney-client privilege. Indeed, the trial court changed its mind after the FBW hearing and ruled that the discussion was privileged, but then strangely refused to reopen the FBW hearing to preclude that evidence. R.5569-72. Thus, to sustain use of Stacy's hearsay, the State must argue that the trial court erred as a matter of law in finding that the discussion was protected by the attorney-client privilege, a matter Defendant addresses *infra*.

The testimony of Pastor Schori was not as prejudicial to Defendant as that of

attorney Smith. Nonetheless, the State does not even defend the trial court's ruling which allowed the evidence to be considered at the FBW hearing on the grounds that the clergy privilege was lost because the conversation between Stacy and Pastor Schori took place in a coffee shop in eyesight of others.[5] Rather, the State raises a new argument (St. Br. at 30-31), without any citation to judicial authority, to the effect that a pastor has unilateral authority to waive the privilege when he or she deems it appropriate. The State's argument is ludicrous, for in its view the communicant, despite a pledge of confidentiality and statutory protection, can never be entitled to rely on continued confidentiality. The Appellate Court in *Illinois v. Burnridge,* 279 Ill. App. 3d 127, 131, 664 N.E.2d 656 (1996), sensibly disagreed, holding that "[t]he privilege belongs both to the person making the statement and the clergyman." S*ee also People v. Diercks,* 88 Ill. App. 3d 1073, 1077, 411 N.E.2d 97 (1980) (when clergy is willing to testify, the burden is on communicant to show that confidentiality was intended but the clergy cannot waive confidentiality at their discretion). As the U.S. Supreme Court

[5] The State claims Defendant waived any challenge to Pastor Schori's testimony because it was only referred to in a footnote within his PLA. The issue was raised at all levels below. Because "[t]he rule of waiver is an admonition to the parties and not a limitation on the jurisdiction of this court. *In re W.C.,* 167 Ill.2d 307, 323, 212 Ill.Dec. 563, 657 N.E.2d 908 (1995)," *People v. Normand*, 215 Ill. 2d 539, 544, 831 N.E.2d 587, 590 (2005) and "[e]ven '[w]hen an issue is not specifically mentioned in a party's petition for leave to appeal, but it is 'inextricably intertwined' with other matters properly before the court, review is appropriate.' *People v. Becker,* 239 Ill.2d 215, 239, 346 Ill.Dec. 527, 940 N.E.2d 1131 (2010) (quoting *People v. McKown,* 236 Ill.2d 278, 310, 338 Ill.Dec. 415, 924 N.E.2d 941 (2010))." *People v. Alcozer*, 241 Ill. 2d 248, 253, 948 N.E.2d 70, 74 (2011), this Court should reject the claim. Furthermore, given that 4 pages of the PLA were devoted to the appellate court's failure to address the merits of the hearsay claim, a failure the State agrees was error (St. Br.at 19), and in light of the limited space permitted, justice requires the claim be considered.

stressed, “The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, *in total and absolute confidence.*” *Trammel v. United States,* 445 U.S. 40, 51 (1980) (emphasis added). Thus, Pastor Schori’s testimony should have been excluded from the FBW hearing as well as testimony from Harry Smith. Without the testimony (even with), the finding of the court is factually incorrect and erroneously applied.

II. DREW WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL ELICITED INCRIMINATING INFORMATION DURING THE DEFENSE CASE (BRIEF ISSUE III)

Responding to Peterson's argument that his counsel was ineffective for calling Harry Smith, the State argues the decision to call Smith was a reasonable trial strategy or any error was harmless because the testimony was cumulative. St. Br. at 31 In support, besides reciting the hornbook law on ineffective assistance (*Strickland*, et.al.) the State fails to cite any authority. As Justice Freeman once wrote, "`Few judges would dispute, for example, that a court may decline to address an argument that speaks in conclusory fashion without citation to legal authority because, without legal support, it is nothing more than an opinion.' See *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.,* 118 Ill.2d 389, 401, 113 Ill.Dec. 915, 515 N.E.2d 1222 (1987) (noting that failure to support conclusory statement with legal authority results in waiver of the issue)." *People v. Jung*, 192 Ill. 2d 1, 9, 733 N.E.2d 1256, 1261 (2000) (J. Freeman concurring).

Here, the State does not cite any authority because there is no authority for defense counsel's indefensible blunder. Surely, if these facts fell within some "professional norm" there would be a case from some jurisdiction, across the United States, that they could point to. The State's failure to locate a single case, from any jurisdiction, is telling.

Left with no authority of their own, they try to distinguish the cases Defendant included in his brief, calling the testimony in them "undeniably damaging," versus, what they claim is "the cumulative" testimony here.

That argument, although similar to what the appellate court stated, simply rings hollow. Two witnesses testified about what Stacy said, Neil Schori and Harry Smith. Neil Schori provided circumstantial evidence, at best, when he relayed that Stacy had told him Drew came home in the middle of the night, dressed in black with women's clothing which he placed into the washing machine, and that she was coached to provide him an alibi. Harry Smith, on the other hand, when called during the defense case, repeatedly testified that Stacy said that she knew Drew killed Kathleen; she knew how Drew killed Kathleen; Drew thought that she had told his son that Drew had killed his mother; that he was following her; and that she was willing to use what she knew for leverage in a divorce. One witness, (Schori), testified about Stacy's observations and the other, (Smith), testified about her conclusions. The statements to Schori were circumstantial evidence, the ones to Smith were much more direct.

Reaching, the State seizes upon the desperate closing argument offered by different defense counsel than the one who presented Smith, that Stacy was trying to gain an advantage when she filed for divorce "so she started ‘a rumor campaign’ about the Defendant.” St. Br. at 34. Some argument was required, but it was ridiculous when it was made at trial and it remains nonsensical. The testimony was that Stacy confided in Schori and asked him to keep what she was telling him to himself, which is what he did until after she disappeared. One does not start a "rumor campaign" by asking someone, let alone a pastor, to keep something confidential. Likewise, a person does not speak to an attorney in confidence because they want to start a “rumor campaign,” which would be the antithesis of a privileged conversation. The idea that someone would start a

"rumor campaign" by confiding in two individuals whose profession requires them to keep a confidence is preposterous. "The mutual trust, exchanges of confidence, reliance on judgement and personal nature of the attorney-client relationship demonstrate the unique positions attorneys occupy in our society," *Herbster v. North American Co*., 150 Ill. App 3d 21, 29 (1986).

The prejudice is indisputable. Although it was Smith testifying, the story that was being told was Stacy's. Surely had defense counsel called Stacy to the stand and asked her questions, not factual questions, but the same kind that were asked here, and elicited the same responses, with her pointing an accusatory finger at Drew and testifying "I know he killed Kathleen" and "I know how he killed Kathleen," with no evidence or detailed knowledge, no court would hesitate to find counsel ineffective. That is, in effect, what occurred here. No relevant facts were elicited, just accusatory conclusions (another argument ignored by the State. See Def. Br. 30-31).

Defendant `need not show that counsel's deficient conduct more likely than not altered the outcome.' Rather, a "reasonable probability" is simply "a probability sufficient to undermine confidence in the outcome." People v. Stewart, 141 Ill. 2d 107, 118-19. (1990). Here, you had a completely circumstantial case, that was undeniably thin. When defense counsel presented this witness, regardless of the purpose, he knew in advance the witness was going to say Drew was guilty. The Court should equate counsel's performance with that found so obviously ineffective in *People v. Morris*, 209 Ill.2d 137, (2004), overruled in part on other grounds in *People v. Pitman*, 211 Ill.2d 502 (2004):

> "In *Morris*, defense counsel's opening statement "readily admitted" Defendant's guilt to the jury. 209 Ill.2d at 182, 282 Ill. Dec. 753, 807 N.E.2d 377. Moreover, the apparent purpose of this admission was to lay the groundwork for a plea of jury nullification based on sympathy or compassion, something this Court characterized as "a minimal, nonlegal defense. *Id* at 184….What tipped the scales in Morris was that, after conceding her client's guilt and pursing a nonlegal plea for jury sympathy, defense counsel then affirmatively introduced evidence of her client's involvement in a grisly and unrelated murder, even though the trial court previously had ruled such evidence inadmissible *at defense counsel's request. Id* at 184-85. "

The similarities to the case at bar are striking.

The defense fought so hard to keep this testimony out, and the State never called the witness. The defense did. As for the strategy, presenting testimony that your client is guilty to impeach some other piece of circumstantial evidence, is senseless. It no longer mattered what Schori said because the defense had told the jury Drew was guilty.

III. STACY'S DISCUSSIONS WITH ATTORNEY SMITH WERE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, AND ACCORDINGLY INADMISSIBLE (BRIEF ISSUE IV)

The attorney-client privilege in Illinois is derived from the common law. Illinois Rule of Evidence 501. The privilege provides that when legal advice of any kind is sought from a professional legal advisor, in his capacity as a legal advisor, the communications are made in confidence by the client and are protected from disclosures. *Fischel and Kahn, Ltd. v. Van Straaten Gallery, Inc.*, 189 Ill 2d 579, 584 (2000).

Sensibly, "it is immaterial that an attorney called as a witness is willing to disclose privileged communications." *In re Estate of Busse*, 332 Ill. App 258. 266. 75 N.E.

2d 36 (2nd Dist. 1947). "It is also immaterial whether the evidence relates to what was said by the attorney or what was said by the client." *Busse* at 267. And the fact that the attorney may have sometime previously disclosed these privileged communications does not either abrogate the privilege, or his obligation to keep the communication confidential. *Newton v. Meissner*, 76 Ill App. 3d 479 (1st Dist. 1979). *People v. Wagener,* 196 Ill.2d 269, 277 (2001). ("Although the client is the holder of the privilege, it is ordinarily the lawyer's obligation to claim privilege on the client's behalf, even in the client's absence." ABA Section on Litigation, The Attorney-Client Privilege and the Work Product Doctrine, at 165 (3d ed. 1997)). [6] Accordingly, the Court should bar the testimony. *United States v. Gatzonis*, 805 F.2d 72 (2nd Cir. 1986).

Importantly, the attorney-client privilege survives the client's death. *P. Rice, Attorney-Client Privilege in the United States, Sec. 2:5, at 69* (1993) as cited in *Hitt v. Stephens,* 285 Ill. App. 3d 713 (4th Dist. 1997); *Glover v. Patten*, 165 U.S. 394, 406-408 (1897) (Waiver is limited to will contests). The privilege exists and remains in place after death so that at the time the client confides with the attorney they can be certain that their discussions will remain forever secret. *People v. Knuckles*, 165 Ill. 2d 125, 130 (1995); *In Re John Doe Grand Jury Investigation*, 407 Mass. 480, 482-83, 562 N.E. 2d 69, 70 (1990). Thus the death of Kathleen Savio (and the disappearance of Stacy Peterson, who has not been declared dead) adds nothing to this analysis.

Of course, the client who is deceased is obviously not in a position to assert the

[6] The prosecutor had a similar obligation to respect the privilege, especially as the representative of *all t*he people, including those accused.

privilege. But if the client were the only one who could assert the privilege then the rule would state that the privilege dies with the client or that the privilege, upon the client's death, becomes the attorneys'. The rule does not and has not ever stated either. Therefore, the only logical and common sense conclusion that can be drawn from the fact that privilege survives death is that upon death the privilege becomes absolute, i.e. the information goes to the grave and stays in the grave with the client.

Responding, the State argues Drew is without standing, that Stacy waived her privilege, or that the error was harmless.[7] While they also argue that the conversation was not privileged, they did not previously appeal that ruling when made before trial. (R. 5569) Each of the arguments is so tenuous that their reach demonstrates their weakness.

As it relates to the State's argument that there was no privilege, Mr. Smith testified that he thought he had a conflict that would prevent representation. But the record is not clear that he told Stacy he could not represent her, and it is clear that even if he did so, he continued to speak with her and answer her questions. As before, unable to rely upon Illinois precedent, the State deceptively looks to a federal case, and one from California. (St. Br. at 41). In the former, the attorney explained to the prospective client that he would not represent him and that further conversation may not be privileged. Still, the court remanded the case so the court could determine if the

[7] The harmless error argument is the same argument raised in responding to Drew's ineffective assistance claim, and has been addressed. The State also argues invited error, without citation to the record. This is because there is no evidence Drew agreed with the decision, and upon a silent record invited error cannot be presumed.

potential client understood that the conversation would not be confidential. *United States v. Dennis*, 843 F.2d 652, 657 (2nd Cir. 1988), because it is from their perspective the evaluation must be made. In the latter, the Defendant was speaking with his friend, an attorney, who, before anything was said, "specifically stated he would not represent the Defendant…[and] was very clear that in no way he wanted to be involved…" *People v. Gionis*, 892 P.2d 1199, 1211 (Cal 1995).

Tellingly, while it included the cases, the State does not ever assert that Stacy did not believe the conversation would remain in confidence. That is understandable, since there is no evidence in support. The attorney-client relationship "for purposes of the privilege for attorney-client communications 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention to seek professional legal advice.'" *Westinghouse Electric Corp. v. Kerr-McGee Corp.,* 580 F.2d 1311 (7th Cir. 1978) (citation omitted). *See also* R. Wise, Legal Ethics 284 (1970) ("The deciding factor is what the prospective client thought when he made the disclosure, not what the lawyer thought.").

Next, the State urges this Court to find the Defendant lacks standing. While the argument is facially appealing, it ignores I.R.E. 104, which requires the trial court to determine issues of privilege as a preliminary matter. Sensibly, any party to the litigation is empowered to bring the matter to the court's attention. In this case, Drew did so, twice. The first time, during the hearsay hearing, the court erroneously agreed with the prosecutor that Drew lacked standing, and refused to consider the matter. The court did not then rule the consultation was not privileged. Upon consideration, before the trial,

the court reversed itself. Then the court should have revisited its hearsay ruling, excluding the Smith testimony from its analysis, but refused the defense request to do so. (C. 2566). In any event, the court applied the privilege going forward, and the prosecution did not quibble.

Against this factual backdrop, the State offers no response to Defendant's complaint that the court failed to enforce its ruling. Certainly, Defendant has standing to complain a ruling was not followed. The State offers no justification for the court's abandonment of its decision that the discussion was privileged.

Finally, again without citation to any authority, the State claims the privilege was waived when Stacy discussed with Schori and Rossetto her knowledge that Drew Killed Kathy.[8] No case has ever held that the privilege is waived because a similar subject was discussed with others. The absurdity of the argument is obvious – it would mean that no one could ever discuss their legal troubles with anyone other than an attorney. Imagine the Defendant who gives a statement to the police when arrested; under the State's theory he would have no privilege when he then speaks to his defense attorney. Or the spouse who tells a friend hey are going to seek a lawyer to file for divorce. Under the State's framework, the prior conversation with the friend would destroy the confidential nature of the subsequent conversations with counsel. That is obviously incongruous.

IV. DEFENSE COUNSEL BRODSKY WAS OPERATING UNDER A *PER SE* CONFLICT OF INTEREST (BRIEF ISSUE V)

[8] Any reliance on anything Rissotto said should be rejected based on the finding, both pre-trial (and during trial) that this testimony was unreliable.

Defendant-appellant has addressed this issue in large part in the prior briefing. But there are a few areas that require comment.

Initially, the question is not whether the relationship giving rise to the *per se* conflict or the contractual relationship was created at the time of trial. Rather, the question is whether *per se* conflict ever existed -- for once it exists, it does not go away absent a well-informed waiver, of which there was none. Likewise, it was in place during the representation, and the representation was continuous. The term of any contract is not relevant.

Here, the *per se* conflict arose before indictment, when the contract was entered into and the media blitz was taking place. Regardless of whether the statements made during that time were introduced at trial by video or transcripts of the interviews, the fact is that they were used against the Defendant. And regardless of whether a substantial amount of money was collected or the relatively small amount that was reported, it is the actions that occurred as a result of this profit-seeking that are so damaging. That is why it is the entry into a contract to profit from representation that is prohibited rather than profiting from representation. It is the entry into that kind of relationship that creates the *per se* conflict, and because it is *per se,* the resulting activity is irrelevant.

The second matter is whether the conflict that arises is *per se*, as Defendant maintains, or an actual conflict, as the State claims must be proven. In support of their quest for an actual conflict standard, they site a 1993 case from Alabama which refers to the "vast majority" of courts requiring a showing of an actual conflict. St. Br. 49. In

doing so they ignore what this Court said in *People v. Gacy*, 125 Il 2d 117 (1988), when this Court recognized that a contemporaneous contract involving the financial interest of the attorney and the client would be a *per se* conflict:

> The rationale for this rule is that the acquisition of financial rights creates a situation in which the attorney may well be forced to choose between his own pocketbook and the interests of his client. Vigorous advocacy of the client's interest may reduce the value of publication rights; conversely, ineffective advocacy may result in greater publicity and greater sales. In fact, it has been held that the acquisition of such book rights by a Defendant's attorney constitutes a conflict of interest which may so prejudice the Defendant as to mandate the reversal of a conviction. (See *People v. Corona* (1978), 80 Cal.App.3d 684, 145 Cal.Rptr. 894.) In *Corona* the Defendant retained a private attorney who, in exchange for his services, obtained exclusive rights to the Defendant's life story and a waiver of the attorney-client privilege. The income derived from publication was to go solely to the attorney. The court in *Corona* held that reversal was warranted because the attorney deliberately decided not to develop viable incompetence, insanity and irresponsibility defenses so as to insure that the publication rights would retain their value. The Defendant thus suffered actual prejudice from the conflict.
>
> **Under our precedents such a showing would not be necessary, because we have held that the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a *per se* conflict**, which warrants reversal even in the absence of prejudice. (See, *e.g., People v. Washington* (1984), 101 Ill.2d 104, 77 Ill.Dec. 770, 461 N.E.2d 393; *People v. Coslet* (1977), 67 Ill.2d 127, 7 Ill.Dec. 80, 364 N.E.2d 67; *People v. Stoval* (1968), 40 Ill.2d 109, 239 N.E.2d 441.) In such cases, defense counsel's "tie to a person or entity * * * which would benefit from an unfavorable verdict for the Defendant * * * might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate." Moreover, such a conflict might subject the attorney to later charges that his representation was less than faithful. (**1348 ***778 *People v. Spreitzer* (1988), 123 Ill.2d 1, 16, 17, 121 Ill.Dec. 224, 525 N.E.2d 30.)

People v. Gacy, 125 Ill. 2d 117, 135–36, 530 N.E.2d 1340, 1347–48 (1988) (bold added).

Without explanation or reasoning, the State is urging this Court to reject its own precedent. This Court should not do so. Instead, it should make clear that the entry into a media rights contract, during representation, consistent with this Court's comments in *Gacy*, creates a *per se* conflict.

V. THE APPELLATE COURT MISAPPLIED RULE 404(B) IN PERMITTING BAD ACTS TESTIMONY (Brief Issue VI)

The State concedes that it never provided Defendant notice that it intended to introduce Jeffrey Pachter's testimony as it was required to do under rule 404(c). Nor does the State dispute that the trial court admonished the prosecution in its opening not to mention the would-be hit man evidence on pain of a mistrial. Nonetheless, the State argues both that the prosecution demonstrated good cause for failing to provide pretrial notice and that the Defendant was not thereby prejudiced. The first argument as to good cause would gut Rule 404's protection, and the State has waived the second argument because it has never raised a separate argument that, if no good cause for the failure has been shown, Defendant suffered insufficient prejudice. In any event, Defendant unquestionably suffered prejudice from the court's decision, after opening arguments, to allow introduction of the controversial evidence.

The State argues that good cause for failing to abide by Rule 404(c) exists because the Defendant was on constructive notice that Pachter could have been called as witness when he was one of several hundred names disclosed months earlier to the defense as potential witnesses. The State conveniently ignores that the prosecution had filed a 404(b) motion to determine the admissibility of testimony covering several bad

acts, but did not include the would-be hit man evidence. C. 2502. [9] As the trial court correctly stated, "unless the [proponent of the evidence] can present evidence separate and apart from . . . inadvertence or attorney neglect to support an argument that there was good cause for the delay in compliance, the extension will not be granted." R. 9393. The "attorney neglect" here cannot be tantamount to "good cause" without rendering Rule 404 toothless.[10] And, the Appellate Court ruled that good cause existed because Defendant had "a full 20 days after the defense was put on notice of the State's intent." 2015 Ill. App. 211. The Appellate Court seemingly equated good cause with lack of prejudice. But they are different: "good cause" excuses the proponent's malfeasance, while "prejudice" measures the impact of the evidence on defendant. The idea the defense had 20 days is a fallacy. Surely, the defense was not to presume that the court, after nearly declaring a mistrial, would abruptly reverse itself.

Although the affirmative notice obligation in I.R.E 404 (c) is no longer present in the corresponding Federal rule, it was formerly. Its purpose was "to reduce surprise and promote early resolution on issues of admissibility" and although "no specific time limits are stated in recognition of what constitutes a reasonable request for disclosure will

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[9] The trial court's ruling that limited the State's 404(b) evidence was one of the basis of its interlocutory appeal. *People v Peterson*, 2011 IL. App.(3d) 199 513 ¶ 19 et. seq. Given the focus on the 404(b) material on appeal, the omission of the Pachter evidence can hardly be considered inadvertent.

[10] Perhaps in light of the weakness of this argument, the State (at 55-56) argues that good cause existed because the Pachter testimony was intrinsically connected to the alleged homicide itself. There is no tie, however, between the hit man evidence and the drowning in a bathtub. Even under the prosecution's theory, different people and methodology are involved, and the prosecution never alleged a continuous series of events. The prosecution simply made a mistake or changed its mind at the last minute.

depend largely on the circumstances of each case," without pretrial notice, 404(b) evidence was inadmissible. See Fed R. Evid. 404 (b) Advisory Committee's note (1991); *United States v. Blount*, 502 F. 2d 674 (7th Cir.)

Opening arguments were over; cross-examinations of many witnesses had been completed. Rule 404 protects the defense's ability to structure an entire case, not just to cross-examine one witness. And, the prosecution highlighted-Pachter's testimony in its closing argument. R. 9678. As this Court has stated, improper admission of bad act evidence carries a high risk of prejudice and generally calls for a new trial. *People v. Lindgren*, 79 Ill. 2d 129, 140 (1980).

CONCLUSION

For the foregoing reasons, Mr. Peterson asks the Court to grant his Petition, remand for a new trial, or enter a finding of not guilty, and for such further relief as is appropriate.

Respectfully submitted,

DREW PETERSON, Defendant-Petition

By: /s Steven Greenberg
One of His Attorneys

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief is 6914 words.

/s/ Steven Greenberg
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IN THE
SUPREME COURT OF ILLINOIS

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

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PLEASE TAKE NOTICE, that on **November 7, 2016**, I caused to be filed electronically with the Illinois Supreme Court Clerk, Supreme Court Building, 200 E. Capitol Avenue, Springfield, Illinois 62701-1721 this Notice of Filing and Defendant-Appellant's Reply to Appellee's Brief.

/s Steven A. Greenberg
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PROOF OF SERVICE

I, Steven A. Greenberg, certify that on November 7, 2016, all parties and counsel of record were served via electronic means via email and through the Illinois Supreme Court Clerk's office.

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