No. 19-CF-687

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIAN E. MOORE,
APPELLANT,

V.

UNITED STATES,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA'S BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

GRAHAM E. PHILLIPS
Deputy Solicitor General
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6647
graham.phillips@dc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

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* Authorities upon which we chiefly rely are marked with asterisks.

Statutes and Regulations

Other

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Brian Moore was convicted for repeatedly and explicitly threatening to shoot an employee of the Office of the Attorney General ("OAG"). *See Moore v. United States*, 285 A.3d 228, 232-34 (D.C. 2022). He now seeks to reverse that conviction, arguing that the primary evidence against him should have been excluded because it was covered by the attorney-client privilege. A split division of this Court agreed—not because the privilege applies under the usual test but because it applies under a novel expansion of the privilege that the majority fashioned specifically for conversations between criminal defendants and court-appointed counsel. *See id.* at 244-48, 251. In Moore's en banc brief, however, he does not meaningfully defend a special rule for criminal defendants and court-appointed counsel, instead arguing that he prevails under the ordinary significant-purpose test. That is wrong. Under a straightforward application of that test, Moore's criminal threats were not privileged because they did not relate to seeking legal advice and, alternatively, would fall within the crime-fraud exception to the privilege. At all events, this Court should reject the division majority's reasoning, which would permit an entire category of criminal threats to be made with no accountability.

The District of Columbia has multiple strong interests at stake here. It has an interest in the consistent and fair prosecution of its threat and obstruction-based criminal statutes, which protect residents and preserve the integrity of its justice

system. It also must ensure that its officials—especially those in high-risk prosecutorial teams such as OAG's Domestic Violence and Special Victims Section—can continue safely to advocate for the District and its residents. The division's decision undermines both interests and should be rejected.

SUMMARY OF ARGUMENT

1. A straightforward application of this Court's significant-purpose test shows that the attorney-client privilege does not protect Moore's statements. As numerous other courts have held in comparable scenarios, Moore's repeated criminal threats did not relate to the purpose of seeking legal advice and thus do not qualify for the privilege. Even if they otherwise qualified, they would fall within the crime-fraud exception because the statements themselves materially advanced—indeed were integral to—the crime of threatening the prosecutor. Recognizing that the threats were unprivileged does not require fashioning a "threats exception" to the privilege, Moore En Banc Br. 33, nor will it do "violence to the very core of the attorney-client relationship," *Moore*, 285 A.3d at 249. Rather, it accords with the purpose of the privilege and furthers public safety.

2. Regardless, the Court should not adopt the division majority's novel expansion of the attorney-client privilege for court-appointed counsel only. Rather than safeguarding the attorney-client relationship, the majority's new rule endangers public safety by providing a shield for indigent criminal defendants to issue a wide

range of threats with impunity. Neither law nor logic supports such a result, and this Court should reject it.

ARGUMENT

I. Under Blackletter Law, Appellant's Repeated Criminal Threats Were Not Privileged.

Although a single paragraph of Moore's en banc brief (at 19-20) nods in the direction of the division majority's rationale, he never in fact argues that a special test for attorney-client privilege applies in the context of criminal defendants and court-appointed counsel, or that the usual test should apply "permissively"—let alone "much more permissive[ly]"—in this setting. *See* Moore En Banc Br. 18-39; *cf. Moore*, 285 A.3d at 245, 246. The District agrees that no special test applies. But under a straightforward application of standards this Court has already endorsed, Moore's repeated threats against the life of an OAG prosecutor were not privileged. Indeed, as courts and commentators have recognized, criminal threats like those Moore uttered here fail to qualify for attorney-client privilege. That commonsense conclusion comports with the purposes of the privilege and poses no serious policy concerns.

A. Moore's statements fail this Court's significant-purpose inquiry.

The attorney-client privilege is a common-law rule designed to encourage a client to "confide in his lawyer" and thereby "obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). But because the privilege has the

harmful "effect of withholding relevant information from the fact-finder" in subsequent litigation, "it applies only where necessary to achieve its purpose." *Id.* In *Jones v. United States*, 828 A.2d 169 (D.C. 2003), this Court held that the privilege is limited to instances where "one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." *Id.* at 175 (internal quotation marks omitted). This significant-purpose inquiry depends upon "the nature of the communication in question." *Id.* Analyzing the "nature" of a communication sometimes requires parsing statements made within the same conversation or document. Only once the appropriate communication is identified can the requirements of the significant-purpose inquiry be applied. Where, as here, the relevant communications are criminal threats, they are not privileged.

1. Courts routinely parse communications to determine which statements are privileged.

Contrary to both Moore and his amicus's argument and the division majority's logic, it is entirely appropriate to distinguish between privileged and non-privileged communications occurring within the same overall conversation or encounter. Indeed, parsing communications to determine where the privilege attaches is essential to ensuring that it "applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403. That is why, "[i]n the case of most statutory and common-law privileges, appellate courts have authorized trial judges to conduct a line-by-line analysis to determine the scope of the privilege protection." Edward J.

Imwinkelried, *Parsing Privilege: Does the Attorney-Client Privilege Attach to an Angry Client's Criminal Threat Voiced During an Otherwise Privileged Attorney-Client Consultation?*, 72 Case W. Res. L. Rev. 871, 883 (2022); *accord*, *e.g.*, 2 Paul R. Rice et al., *Attorney-Client Privilege in the United States* § 11:21 (Dec. 2022 Update) (hereinafter Rice, *Attorney-Client Privilege*) (endorsing disclosure of "the nonprivileged portions of a communication [that] are distinct and severable").

For instance, courts have had little trouble separating privileged and non-privileged sections of the same document. *See, e.g.*, *Rohlik v. I-Flow Corp.*, No. 7:10-CV-173, 2012 WL 1596732, at *4 (E.D.N.C. May 7, 2012); *F.C. Cycles Int'l, Inc. v. Fila Sport, S.p.A.*, 184 F.R.D. 64, 71 (D. Md. 1998); *United States v. Chevron Corp.*, No. 94-CV-1885, 1996 WL 444597, at *2 (N.D. Cal. May 30, 1996) (calling the notion that "the attorney-client privilege applies to discrete communications contained within a document" a "long recognized rule"). Indeed, the division's opinion seems to accept that, at least for documents in corporate litigation, parsing attorney-client communications is unproblematic. *See Moore*, 285 A.3d at 243.

Like documents, conversations between attorneys and their clients may contain both privileged and non-privileged information. Like documents, then, conversations also may be parsed to separate the two categories. *See* 1 Rice, *Attorney-Client Privilege* § 5:17 ("It is broadly accepted that the privilege applies equally to all types and forms of client communications."). "[E]ven if at the outset

of a consultation the client and attorney are discussing matters incident to a legitimate legal purpose, at a later point in the conversation the privilege might become inapplicable," such as when "the defendant voice[s]" "threats." Edward J. Imwinkelried, *The New Wigmore—A Treatise on Evidence: Evidentiary Privileges* § 6.11.1, at 1225 (4th ed. 2022). A defendant must demonstrate that the privilege applies "with respect to each communication." *Id.* at 1226.

In *United States v. Ivers*, 967 F.3d 709 (8th Cir. 2020), for example, the Eighth Circuit held that the final portion of an otherwise-privileged phone conversation with counsel, during which the client made repeated threats against the life of the judge who had overseen his case, was not privileged. *See id.* at 716. As that court correctly observed, "courts routinely decide which specific communications between a client and his attorneys are privileged, and they often segregate privileged and non-privileged communications in particular conversations or documents." *Id.* at 717. "That some parts of" a conversation may be "privileged does not mean that the entire [conversation] was privileged." *Id.* Likewise, the Ninth Circuit held in *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002), that a client's repeated threats "to kill various individuals" during conversations with his court-appointed lawyers were not privileged. *Id.* at 815; *see id.* at 816-17. That was so even though counsel "scrupulously protected" the aspects of those conversations with the client that were privileged. *Id.* at 817.

The Eighth and Ninth Circuits' commonsense rulings that only *parts* of a single conversation may be privileged accord with those of numerous other courts. *See, e.g.*, *Loguidice v. McTiernan*, No. 1:14-CV-1323, 2016 WL 4487779, at *11 (N.D.N.Y. Aug. 25, 2016); *Hodgson Russ, LLP v. Trube*, 867 So.2d 1246, 1248 (Fla. Dist. Ct. App. 2004); *United States v. Sabri*, 973 F. Supp. 134, 140 (W.D.N.Y. 1996); *Int'l Bhd. of Teamsters v. Loc. No. 743, Warehouse, Mail Ord. Off., Tech. & Pro. Emps. Union*, No. 94-CV-5128, 1995 WL 22942, at *2 (N.D. Ill. Jan. 14, 1995); *State v. Mewherter*, 46 Iowa 88, 93-94 (1877); *cf. In re Curtis*, 273 A.3d 841, 844-45 (D.C. 2022) (parsing statements in a text exchange to distinguish those made for a purpose allowed by a civil protective order from others that plainly were not). Parsing conversations as well as documents also makes good sense: just as clients cannot smuggle evidence into the privilege by inserting it into an otherwise-privileged memorandum, they likewise cannot protect an unprivileged statement merely by saying it during a private conversation with their attorney.

The division majority did not dispute that its position runs counter to mainstream legal authority. It instead claimed that "commentators have acknowledged" that parsing "does violence to the very core of the attorney-client privilege." *Moore*, 285 A.3d at 249. Yet the majority cites just one authority for this dramatic proposition, Rice's *Attorney-Client Privilege* treatise. That treatise offers no persuasive explanation for this assertion and elsewhere in the same section

correctly recognizes that, "[c]learly, statements of the client about future crimes he intends to commit will not be protected by the privilege." 1 Rice, *Attorney-Client Privilege* § 5:21. For his part, Moore relies (at 26) on a Kansas decision that asserts that the "piecemealing" of attorney-client communications "would fundamentally undermine the attorney-client relationship." *State v. Boatwright*, 401 P.3d 657, 664 (Kan. Ct. App. 2017). But that decision, too, offers no support or explanation for this overwrought pronouncement, ignoring that attorney-client communications are routinely parsed by courts in various jurisdictions without ill effect.

Both Moore and the division's opinion proceed on the doubtful assumption that carefully assessing specific communications would irrevocably damage trust between clients and their counsel. However, the "uncertain and conjectural character" of the alleged harms to the attorney-client relationship that Moore invokes "should not take precedence over concrete risks to innocent third party victims." Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 616 (1985). And the notion that the attorney-client privilege is necessary to promote trust—and thus candor from clients—has long faced "many skeptics." Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 262 & n.179 (1992); *see* Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 378

(1989) (empirical evidence "cast[s] doubt on whether the effect" of the privilege on client trust "is as substantial as proponents . . . presume").

Moreover, the "purpose" of "full and frank communication between attorneys and their clients" is to fulfill "broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Those broader interests are damaged by overly expansive conceptions of the attorney-client privilege that hamstring efforts to prosecute criminal threats made against lawyers themselves. Parsing communications to permit finer application of the significant-purpose test is necessary to vindicate those core interests.

2. The statements at issue here were not privileged.

In the District, "[t]he party asserting the attorney-client privilege has the burden of proving that communications are protected." *In re Pub. Def. Serv.*, 831 A.2d 890, 902 (D.C. 2003). To meet his burden under the significant-purpose test, Moore must "clearly show" both that one of his significant purposes in speaking with his counsel was "that of obtaining legal assistance," *Jones*, 828 A.2d at 175, and that the specific communications at issue were "related" to that purpose, *In re Pub. Def. Serv.*, 831 A.2d at 902. Moore fails to meet his burden on both counts—and even if he met it, the crime-fraud exception applies.

First, Moore did not clearly show that he had the significant purpose of seeking legal advice when he spoke with his counsel. The division majority

erroneously viewed the mere existence of a "relationship between a defendant and their court-appointed counsel" as creating a "strong presumption" that all conversations between them have the significant purpose of seeking legal advice. *Moore*, 285 A.3d at 246. But the fact that a statement takes place within the context of a pre-existing attorney-client relationship is not sufficient, on its own, to demonstrate a significant purpose to seek legal advice. *See Jones*, 828 A.2d at 175 (privilege applies only "where legal advice . . . is sought"). Indigent criminal defendants may have any number of reasons to communicate with their court-appointed attorneys that have nothing to do with obtaining legal counsel, including, as here, the desire to communicate the intention to harm others. The fact that Moore's two conversations with Harvey occurred during, and were related to, his contempt prosecution does not itself carry Moore's burden to clearly show that his purpose in speaking with his counsel was to receive legal advice.

Second, even if on both occasions Moore had the initial purpose of seeking legal advice from Harvey, his repeated threats to kill an OAG prosecutor were not related to that purpose. Under the test endorsed by Moore's amicus, *see* PDS Br. 18, a communication is "related" to seeking legal advice when "the client or lawyer *reasonably believed* the communication to be relevant to . . . the seeking or rendering of the lawyer's legal service in his professional capacity." 24 Kenneth W. Graham & Ann Murphy, *Federal Practice & Procedure: Evidence* § 5490 (Charles

A. Wright & Arthur R. Miller eds., Apr. 2023 update) (emphasis added) (hereinafter Graham & Murphy). Yet Moore could not have reasonably believed his repeated threats against the OAG prosecutor were relevant to procuring Harvey's legal services. The "nature" of a threat, *Jones*, 828 A.2d at 175, is a completed expression of "an intent to inflict loss or pain on another," *Threat*, Black's Law Dictionary (11th ed. 2019). A threat does not seek or invite the provision of legal advice, and no client could reasonably believe that it does. Indeed, Moore himself concedes that "[t]hreats . . . are not requests for advice." Moore En Banc Br. 31.

Moore's creative attempts to argue that repeated criminal threats are somehow "related" to the purpose of seeking legal advice run headlong into a nearly uniform consensus to the contrary. *See, e.g.*, *Ivers*, 967 F.3d at 716 ("Threats of violence are not statements that fall under the scope of the attorney-client privilege."); *United States v. Stafford*, No. 17-CR-20037, 2017 WL 1954410, at *3 (E.D. Mich. May 11, 2017) ("Defendant fails to demonstrate" that his threats "were made in pursuit of legal advice."); *United States v. Jason*, No. 09-CR-87, 2010 WL 1064471, at *2 (N.D. Iowa Mar. 18, 2010) (holding that threats in a letter were not "made for the purpose of seeking legal advice"); *Alexander*, 287 F.3d at 816 (defendant's "threats to commit violent acts" against third parties "were clearly not communications in order to obtain legal advice"); *Sabri*, 973 F. Supp. at 140-41 (rejecting attempt to invoke privilege for threats made against others made to defendant's attorney);

United States v. Thomson, Nos. 94-CR-30083, 94-CR-30085, 1995 WL 107300, at *1 (9th Cir. Mar. 13, 1995) ("We . . . have absolutely no difficulty concluding that Thomson's threatening statements are not protected by the privilege"); *Jackson v. State*, 293 S.W. 539, 540 (Tenn. 1927) ("[T]hreats made by a client against the life of a person during a professional consultation with his attorney are not privileged."); *Mewherter*, 46 Iowa at 94 (threats against opposing litigant uttered by client during consultation with his lawyer "in no manner pertained to the business of the professional consultation").

The division majority tried to explain away Moore's threats as mere expressions of anger or frustration incidental to a privileged conversation. *See Moore*, 285 A.3d at 246 ("emotional outbursts"); *id.* at 247 ("forceful reactions, frustrated venting, . . . [and] verbally violent outbursts"); *id.* at 251 ("counterproductive . . . expressions of anger"). But that euphemistic depiction is belied by the record. During the April 12 conversation, Moore made repeated, specific threats to shoot the OAG prosecutor. *See* 5/30/19 Tr. 89-90. These threats were not phrased as questions, nor did they invite input. They therefore did not "reasonably relate" to the purpose of seeking legal advice. This is all the more true for the June 29 conversation, by which point Harvey had repeatedly warned Moore that his threats would be considered credible. *See* 5/30/19 Tr. 92-93. Nonetheless, Moore had scarcely left the courtroom on June 29 before again repeating his intent

to kill the OAG attorney. *See* 5/30/19 Tr. 103-05. As the motions judge correctly recognized, such statements are "not related to anything except the desire to kill the prosecutor"—and "that is not a legal purpose." 2/25/19 Tr. 42.

Third, even if Moore's threats were otherwise privileged, the crime-fraud exception would apply here. That exception applies to, *inter alia*, communications occurring when, "'regardless of the client's purpose at the time of consultation, [he] uses the lawyer's advice or other services to engage in or assist a crime or fraud.'" *In re Pub. Def. Serv.*, 831 A.2d at 906 (quoting *Restatement (Third) of the Law Governing Lawyers* § 82 (2000)). In other words, it applies when an "attorney-client communication itself materially advances a crime or fraud." *Id.* at 902.

Moore's statements to Harvey of his intent to shoot the OAG prosecutor themselves materially advanced a crime—the crime of threatening a District official. *See* D.C. Code § 22-851(c). Threats need audiences. "An uncommunicated threat, by definition, cannot threaten. A fortiori, a person making threats does not commit a crime until the threat is heard by one other than the speaker." *United States v. Baish*, 460 A.2d 38, 42 (D.C. 1983). Moore's communication with Harvey was thus itself an integral step in the commission of a crime.

It makes good sense for the crime-fraud exception to apply in such circumstances. If it did not, clients could use the attorney-client relationship to make credible threats of death or serious injury in their lawyer's presence, knowing that

the threat would likely reach its intended target—since a conscientious lawyer would report it under D.C. R. Prof. Conduct 1.6(c)—but that criminal prosecution would be impossible. That is precisely the type of "abuse[] of the attorney-client relationship to further the commission of a crime" that the crime-fraud exception was designed to prevent. *In re Pub. Def. Serv.*, 831 A.2d at 908; *see Restatement (Third) of the Law Governing Lawyers* § 82 cmt. b ("[T]here is a public interest in preventing clients from attempting to misuse the client-lawyer relationship for seriously harmful ends."). And when the attorney-client relationship "is abused" in this way, "the privilege takes flight." *Clark v. United States*, 289 U.S. 1, 15 (1933).

Moore and the division's analyses of the crime-fraud exception miss the mark because they focus on the wrong crime: the potential shooting. True, the attorney-client communications here did not themselves further *that* crime. But this view ignores that Moore's credible threat on the life of a District official was, for good reason, *itself* a crime—and one that was complete as soon as Moore spoke the words to Harvey. Harvey thus had no opportunity to "talk[] the client out of committing the crime." Moore En Banc Br. 32 (quoting *In re Pub. Def. Serv.*, 831 A.2d at 895).[1]

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[1] Moore's reliance (at 34) on *United States v. Chase*, 340 F.3d 978 (9th Cir. 2003), misses the mark. The "dangerous-patient" exception to the patient-psychotherapist privilege that the *Clark* court rejected, *see id.* at 985, does not turn on whether the patient is *using* the psychotherapist's services to facilitate a crime, as does the crime-fraud exception at issue here.

B. Excluding criminal threats from the attorney-client privilege accords with the purposes of the privilege while preserving public safety.

Credible criminal threats against a third party will rarely, if ever, qualify for the attorney-client privilege. Contrary to Moore and his amicus, recognizing this fact does not entail fashioning a "novel 'threats' exception" to the privilege. Moore En Banc Br. 33; *see* PDS Br. 21. Rather, as numerous courts have recognized, *see supra* at pp. 11-12, it is a natural consequence of applying blackletter evidence law. It also protects third parties from real harm.

Unlike impassioned outbursts and profane language, credible threats against the life of another are not part of the ordinary attorney-client relationship. In this case, for instance, Harvey testified that he had represented "well over 1,000" clients in his career, and, while it was "common" for them to get upset, none before Moore had ever threatened a prosecutor. 5/30/19 Tr. 117. Criminal threats are categorically different from "[e]xpressions of anger" designed to communicate "the depth of concern that a client has about a particular issue in a case." PDS Br. 20. That is why, for example, they "are outside the bounds of First Amendment protection and punishable as crimes," *Counterman v. Colorado*, 143 S. Ct. 2106, 2111 (2023), while angry—even profane—speech is not, *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982). And that is why threats do not qualify for the attorney-client privilege. *See* 24 Graham & Murphy § 5490 (noting that the common law

understood "statements to the lawyer containing threats by the client" not to be privileged and that such communications are today "commonly held not privileged"); 2 Christopher B. Mueller, *Federal Evidence* § 5:16 (4th ed. 2023 Update) ("Threats to the personal safety of the lawyer are not within the privilege . . . ."); *cf.* Imwinkelried, 72 Case W. Res. L. Rev. at 902 (urging courts to be explicit about adopting "a carefully circumscribed, categorical exception to the attorney-client privilege for client statements that amount to criminal threats").

Though Moore's threats *do* fall within the crime-fraud exception, they would be unprivileged even if they did not. In arguing otherwise, Moore relies on two cases from Massachusetts holding that there is no "gap" between the scope of the attorney-client privilege and the crime-fraud exception. *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436, 441 (Mass. 1997); *see In re Grand Jury Investigation*, 902 N.E.2d 929, 933 (Mass. 2009). On that logic, if the crime-fraud exception is inapplicable to a threat, then the privilege presumptively applies. But that reasoning is directly contrary to the well-established rule that evidentiary privileges are not to be "expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). And it ignores the simple fact that a communication may fall outside *both* the crime-fraud exception (because it does not

further a crime) *and* the privilege (because it does not reasonably relate to the provision of legal services).[2]

Lacking legal support for their position, Moore and his amicus offer policy reasons why criminal threats should fall under the aegis of the attorney-client privilege. None is persuasive.

To begin, Moore's amicus argues that the privilege should apply to threats in order to encourage non-threatening client expression. *See* PDS Br. 21. That contention proceeds from the mistaken premise that excluding criminal threats from the privilege would "chill" substantially more speech between clients and their lawyers than does the status quo. But there is no basis for concluding that any additional "chilling" of client speech would occur beyond what already occurs given that, as everyone concedes, attorneys ethically may break client confidences to prevent death or substantial bodily harm. *See* D.C. R. Prof. Conduct 1.6(c)(1). It strains credulity to claim that clients will precisely calibrate how much they

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[2] Also unpersuasive is Moore's reliance on *Newman v. State*, 863 A.2d 321 (Md. 2004). *Newman* concerned statements by the defendant in the presence of her attorney that she was "considering" killing her ex-husband and one of her children. *Id.* at 326. Such musing about future crimes is categorically different from making criminal threats. Moreover, in *Newman*, unlike here, the government did not dispute that the statements related to seeking legal advice; it argued only that the presence of a third party waived the privilege and that the crime-fraud exception applied. *See id.* at 329, 333. The latter argument understandably failed because Newman's statements, unlike Moore's, did not themselves constitute a crime.

"swallow" their words, PDS Br. 21, based on whether they anticipate a permissive disclosure under the ethical rules or an exception to attorney-client privilege. On the contrary, the available evidence suggests that the privilege plays only a minor role in cultivating client trust. *See supra* at pp. 8-9.

In addition, Moore and his amicus contend that the supposed "exemption" would undermine public safety by dissuading clients from communicating about unlawful conduct and by deterring attorneys from permissively disclosing under the ethical rules "based on their desire not to harm their clients." PDS Br. 23; *see* Moore En Banc Br. 23-24. But, as noted, there is little evidence that the nuances of the privilege are pivotal to ensuring client candor. Nor is it true that lawyers will necessarily be deterred from making permissive disclosures in the interest of public safety. Moore and his amici speculate that many lawyers would divulge serious criminal threats only if assured their clients would never be held accountable. *See* PDS Br. 22 (quoting *Purcell*, 676 N.E.2d at 440). The opposite is at least as likely: many lawyers may be willing to go through the ordeal of breaking their client's confidences *only* if assured that their testimony would be admissible in court and lead to real consequences.

II. The Court Should Reject The Division Majority's Novel Carveout From The Significant-Purpose Test.

Perhaps recognizing that a straightforward application of blackletter privilege law would require admitting Harvey's testimony, the division majority instead

adopted a "much more permissive" version of the significant-purpose test. *Moore*, 285 A.3d at 245. Under the majority's novel and "expansive" application of the attorney-client privilege, *id.* at 246 n.22, communications between indigent criminal defendants and their court-appointed counsel are presumptively privileged as long as they are "connected to how the client experiences the criminal case or impact how the client is able to engage with counsel" or are not "unrelated to [the lawyer's] court appointment," *id.* at 247, 251.

Even if the Court concludes that Moore's threats were privileged, it should reject this path to reaching that result. The division majority's new rule would be a blanket shield for threats against any witnesses, lawyers, judges, jurors, courthouse staff, or others connected to the case. No party has endorsed the principle the division adopted, *see* Moore En Banc Br. 21-29; PDS Br. 12-20; U.S. En Banc Br. 15-23, and it lacks a legal or logical basis. If adopted, it would seriously undermine public safety and trust in the criminal-justice system.

A. Neither law nor logic supports an expanded version of attorney-client privilege for court-appointed counsel only.

To start, there is no legal authority in this jurisdiction or others for the majority's appointed-counsel carveout. Neither the District nor any party before this court has found legal support for the notion that the significant-purpose test should apply any differently for appointed counsel than it does for retained counsel. In the last decision by this Court squarely addressing the scope of the privilege in the

context of a court-appointed counsel, this Court simply applied the blackletter rule. *See In re Pub. Def. Serv.*, 831 A.2d at 902.

Lacking precedent from within our jurisdiction, the majority relied on two cases from peer jurisdictions. *Moore*, 285 A.3d at 245-46 (citing *Purcell*, 676 N.E.2d 436, and *Boatwright*, 401 P.3d 657). Yet neither case turned on the presence of court-appointed counsel. *Purcell* relied on the erroneous notion that there can be no "gap" between the scope of attorney-client privilege and the crime-fraud exception. *Purcell*, 676 N.E.2d at 441. And *Boatwright* wrongly rejected, without explanation, the well-established practice of separating privileged and unprivileged client statements. *Boatwright*, 401 P.3d at 664. Neither provides any support for an expansion of the attorney-client privilege for indigent criminal defendants alone.

Taken on its own terms, the division majority's proffered logic for its new rule does not hold up. The majority claims that "the typical relationship between a defendant and their court-appointed counsel has only one objective: representation in the ongoing criminal case." *Moore*, 285 A.3d at 246. In fact, however, public defenders often offer clients social, non-legal support that goes beyond "getting a good outcome in the criminal case." James Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819, 848 (2019); *see id.* at 836-37; U.S. En Banc Br. 19-20. Moreover, even if it were true that the "relationship" typically has the sole objective of legal representation, any given

"communication" within that relationship—which is the proper unit of analysis, *see Jones*, 828 A.2d at 175—may have a non-legal purpose. *See Moore*, 285 A.3d at 258 n.6 (Thompson, J., dissenting in part). The division majority provided no reason why this is any less true for court-appointed counsel.

The majority also claimed that its new rule enables "the kind of wide-ranging conversation" between defendants and their court-appointed lawyers "that establishes genuine trust." *Moore*, 285 A.3d at 246. As already established, however, *see supra* at pp. 8-9, this claim rests on a questionable empirical assumption. It also blinks the reality of the record in this case. No party disputes the value of room for "wide-ranging conversation." But there is a world of difference between "emotional outbursts," *Moore*, 285 A.3d at 246, and repeated criminal threats made over two separate occasions. Meaningful, trusting attorney-client relationships can develop without granting defendants blanket immunity to issue threats.

Finally, the majority tried to justify its rule with assumptions and generalizations about defendants who obtain court-appointed counsel. But although such defendants "are, by definition, low-income," *id.* at 247—at least when counsel is appointed—that does not mean they are categorically less educated, sophisticated, or emotionally composed than other defendants or litigants more broadly, many of whom also face "additional stressors" in their personal lives, *id.* While "frustrated

venting," *id.*, is a natural act by *any* criminal defendant, the notion that indigent defendants need special leeway because they will predictably threaten violence is baseless. Judge Thompson was right: "[S]uch an assumption is patronizing and demeaning, because it fails to acknowledge the autonomy and agency of Mr. Moore and indigent criminal defendants more generally." *Id.* at 260 (dissenting op.) And no party has argued that the privilege turns on "verbal marker[s]." *Id.* at 248 (majority op.). Moore's threats are unprotected *not* because they did not adhere to "formalistic rules," *id.* at 247, but because there is no "plausible way" they related to obtaining legal advice, *id.* at 254 (dissenting op.).

B. The division's rule risks chilling public officials and undermining public safety and trust in the criminal-justice system.

The division's holding is not just doctrinally wrong; it risks serious consequences for public safety and trust in the justice system. The problem of criminal defendants threatening individuals connected in some way to their cases is all too real. *See, e.g.*, *Haney v. United States*, 41 A.3d 1227, 1229 (D.C. 2012) (defendant threatened to attack witness); *United States v. Tanner*, 26 F. App'x 469, 472 (6th Cir. 2001) (per curiam) (defendant threatened to attack his lawyer); *State v. Perkins*, 626 N.W.2d 762, 765 (Wis. 2001) (defendant threatened to kill judge). Under the division majority's holding, indigent criminal defendants are free to make such threats "with impunity as long as they do so in private conversation with appointed counsel." *Moore*, 285 A.3d at 259 (Thompson, J., dissenting in part). The

majority's denial that it was establishing any such "categorical rule" rings hollow. *Id.* at 249 n.30. So long as the target of the threat is somehow connected to the case, the threat would not be "unrelated to [counsel's] court appointment" and could be an "opportunity for counseling." *Id.* at 251.

Such impunity is dangerous. To start, it is not sufficient, as both Moore and his amicus claim, that the ethical rules permit attorneys to break client confidences to prevent death or serious bodily injury. Threats are criminal not just because of the possibility of death or bodily injury but also because the *words themselves* are harmful acts that engender fear in others. *See Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971). A permissive disclosure does little to prevent this psychic harm, even if it interrupts a planned course of physical violence against a third party. Without prosecution, that harm goes unaddressed. But the majority's rule may make it nearly impossible to prosecute criminal threats when defendants communicate them only to their court-appointed attorneys.

Moreover, by frustrating prosecutions of those who make such threats, the division's rule makes coercion or physical violence more likely. First, threats may coerce their targets to take harmful or inappropriate action out of fear. *See Tanner*, 26 F. App'x at 470 (threatening to attack the lawyer unless he "get[s] something done"). Second, those who threaten violence are especially likely to commit violence, and prosecuting them is critical to preventing words from escalating to

deeds. *See, e.g.*, Lisa J. Warren et al., *A Clinical Study of Those Who Utter Threats To Kill*, 29 Behav. Sci. & L. 141, 142 (2011) (almost half of those "convicted of the offence of threat to kill subsequently committed violent acts").

For that reason, the District's prohibitions on threatening a public official and obstruction of justice, like other statutes that protect District residents from criminal threats, *see, e.g.*, D.C. Code §§ 22-1810, 22-407, are critical to public safety because they allow the District to intercede before a defendant follows through on his threats. This ability is all the more critical at a time when threats to attorneys, judges, and others essential to the functioning of our justice system have become increasingly commonplace. *See* Barry J. McMillion, Cong. Rsch. Serv, IN11947, *Security of the Federal Judiciary: Background and Recent Congressional Legislation* 1 (June 17, 2022) (documenting a 387 percent increase in threats to federal judges, federal-court employees, and jurors between 2015 and 2021). Here, too, permitting Rule 1.6 disclosures while barring attorney testimony about those threats is insufficient to ensure public safety or truth in the criminal-justice system. The majority's ruling suggests that criminal defendants may coerce their attorneys or threaten witnesses with the full knowledge that the threats may be disclosed, and thus reach their intended targets, and yet never be prosecuted.

Although the division's decision risks chilling many actors in the criminal justice system, the facts here highlight the special problem it creates for prosecutors.

The prosecutor threatened here was a member of OAG's Domestic Violence and Special Victims unit, which employs a nearly all-female prosecutorial team that regularly interacts with defendants charged with crimes of gender-based violence. She was "doing her job" to advocate for a complainant's safety when Moore threatened her life. *Moore*, 285 A.3d at 232-33. Prosecutors may be chilled from engaging in that kind of zealous advocacy if they cannot trust that those who threaten their own safety will face legal accountability.

The division gave short shrift to the serious public-safety concerns its new rule creates, focusing narrowly on "fostering trust between attorney and client." *Moore*, 285 A.3d at 248-49. But fostering trust does not require allowing the client to threaten violence without fear of consequence. The division's contrary conclusion should be rejected.

CONCLUSION

The Superior Court's judgment of conviction should be affirmed.

Respectfully submitted,

BRIAN L. SCHWALB
Attorney General for the District of Columbia

CAROLINE S. VAN ZILE
Solicitor General

ASHWIN P. PHATAK
Principal Deputy Solicitor General

/s/ Graham E. Phillips
GRAHAM E. PHILLIPS*
Deputy Solicitor General
Bar Number 1035549
Office of the Solicitor General

Office of the Attorney General
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
(202) 724-6647
(202) 741-0444 (fax)
graham.phillips@dc.gov

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District of Columbia
Court of Appeals

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Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

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A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
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B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

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Graham Phillips	10/13/2023
Name	Date
graham.phillips@dc.gov	
Email Address	

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I certify that on October 13, 2023, this brief was served through this Court's electronic filing system to:

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