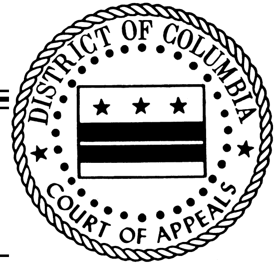

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19-CF-0687

**IN THE
DISTRICT OF COLUMBIA
COURT OF APPEALS**

BRIAN E. MOORE
Appellant

v.

UNITED STATES
Appellee

**ON APPEAL FROM
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**

Case No. 2018-CF3-011411

EN BANC BRIEF OF APPELLANT

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LIST OF ALL PARTIES, INTERVENORS, AMICI CURIAE, AND THEIR COUNSEL IN THE TRIAL COURT AND IN THE APPELLATE PROCEEDING

Party	**Attorneys and Judges - Superior Court**	**Counsel - Appeal**
Brian E. Moore	Kristin McGough	Sean R. Day
United States	Seth M. Gilmore	Katherine Kelly
Public Defender Service (*Amicus*)		William Collins
Judges	The Honorable Craig Iscoe, Associate Judge (privilege hearing) The Honorable Milton C. Lee, Jr., Associate Judge (trial) The Honorable Judith A. Smith, Associate Judge (related proceeding)	
Attorney who disclosed the alleged threats	John T. Harvey, III	
Subject of alleged threats	Roseline Guest, Assistant Attorney General	

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STATEMENT OF THE ISSUE(S)

I. Are mere statements of conditional intent to commit a crime made to one's attorney in the course of attorney-client representation, manifesting frustration about one's case, protected by the attorney-client privilege?

(Pursuant to the Court's order dated June 13, 2023, only the attorney-client privilege issue is briefed.)

STATEMENT OF THE CASE

It is alleged that on April 12 and June 29, 2018, during the course of case number 2017-CCC-000057 (alleged violation of civil protective order), Brian Moore made threatening statements to his attorney about the prosecutor in that case. In this case Moore was charged by indictment with *Obstruction of Justice*[1] and *Threatening a District of Columbia Government Official*[2] (one pair of charges for each alleged threat).

There was a hearing on the applicability of the attorney-client privilege on February 25, 2019 (Honorable Craig Iscoe, Associate Judge). There was a jury trial May 29-31, 2019 (Honorable Milton C. Lee, Jr., Associate Judge). The jury returned guilty verdicts on all four counts.

On July 31, 2019, Moore was sentenced to a total of eight (8) years

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[1] D.C. Code § 22-722

(a) a person commits the offense of obstruction of justice if that person:
(5) ... threatens to injure any person ... on account of the person ... performing his [or her] official duty as a[n] ... officer in any court in the District of Columbia[.]

[2] D.C. Code § 22-851

(c) A person who ... threatens ... any official or employee ... while the official or employee is engaged in the performance of his or her duties or on account of the performance of those duties, shall be fined ... or imprisoned not more than 3 years, or both[.]

incarceration.

On November 17, 2022, a divided panel of this court reversed the trial court, published at *Moore v. United States*, 285 A.3d 228, 232 (D.C. 2022). On January 30, 2023, the government petitioned for rehearing *en banc*, which was granted on May 25, 2023.

Mr. Moore was tentatively due to be released following the division decision, but continues to be held pending *en banc* review as his detention continues to be governed by D.C. Code § 23-1325(c) (post-conviction detention).

STATEMENT OF FACTS

Background

Attorney John T. Harvey was appointed to represent Brian Moore on charges of non-violently contacting his wife in violation of a protective order. (5/30/19 at 85-86, 118) During the course of that case, Harvey claimed that Moore made threatening statements about the prosecutor in that case, Roseline Guest.[3] There was no evidence that Moore took any steps or preparation toward committing any violent acts or harassment toward Guest.

Privilege Hearing

On February 25, 2019, the trial court held a hearing regarding the applicability of the attorney-client privilege. The parties agreed that for the purposes of the motion, the court would accept Harvey's October 26, 2018 grand jury testimony as true, and also rely on the transcripts and audio from the proceedings in 2017-CCC-000057 on April 12, June 29, and July 2, 2018. (2/25/19 pp. 5-6, 10, 37, 44-45.)[4]

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[3] Moore denies making any of the alleged statements.

[4] Notes Regarding Record

Note 1. Mr. Moore's *pro se* interlocutory appeal regarding release

In the grand jury proceeding, Harvey testified that the bench trial (Honorable Judith Smith, Associate Judge) in 2017-CCC-000057 started February 21, 2018, then was carried over to April 12, 2018. (Apx. 88-89) On April 12, 2018, Moore allegedly became agitated about Guest and with Harvey. According to Harvey, Moore said "I can't stand this bitch. I hate this bitch. Fuck this bitch." Harvey defended Guest as a prosecutor just doing her job. Moore said "What, are you trying to have sex with her or something?" Harvey repeated that Guest was just doing her job. Moore said, "She keep fucking with me I'm going to shoot this bitch. I'll fuck this bitch up." (Apx. 91) Moore added, "Yeah, Harvey. I will fuck this bitch up. I will shoot her ass." Harvey testified that Moore said he had "guns and

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conditions (19-CO-0417) contains the record through the date of that notice of appeal. After the appeal from final judgment, the Clerk of the Superior Court submitted a supplemental record to this case number (*i.e.*, filings after the interlocutory notice of appeal, but not before).

Note 2. Moore's *Motion in Limine to Preclude the Testimony of Mr. Moore's Prior Attorney*, filed January 27, 2019, relied upon the transcripts and audio from proceedings in 2017-CCC-000057 on April 12, June 29, and July 2, 2018 (in part filed in the record in 19-CO-0417, and in part coming *via* a July 17, 2020, trial court order supplementing the record). The government filed Harvey's grand jury transcript with its opposition on February 21, 2019 (filed in the record in 19-CO-0417). These transcripts are provided in the Limited Appendix herein.

this and that. He started talking this nonsense." (91) Harvey testified that he told Moore he was taking Moore seriously. Moore said, "You goddamn right I'm serious." (91)

Harvey testified that he then called Bar Counsel and afterward asked Judge Smith to allow him to withdraw from the case. Judge Smith would not allow Harvey to withdraw unless he revealed Moore's statements, which Harvey declined to do at that point. (Apx. 92-93) Harvey testified that he called Bar Counsel again about his options, but Moore approached Harvey and told him "Man I was just bullshitting. So, you know, let's just leave it alone. Let's just go on for the trial." (93) Harvey told Moore that if Moore ever did anything like that again, he would believe Moore and disclose it to the court. (93)

The trial continued that afternoon (April 12, 2018) and the next day, but again the case did not finish and was carried over to June 11, 2018. (Apx. 93-94, correct date inserted herein.) On June 6, 2018, Harvey filed for a postponement of the June 11 trial date (due to Harvey's knee surgery) and requested that Moore, who resided in North Carolina, not be required to appear at the resulting June 12 status hearing solely for the purpose of signing a promise to appear for the next court date. (94-95)

According to Harvey, Moore did not appear for the June 12 status hearing but did appear at the next date, June 29. (95)

On the late afternoon of Friday, June 29, 2018, the trial court ordered Moore to have an ankle GPS monitor but it was too late to accomplish that day so Moore would have to return to court on Monday, July 2. (Apx. 95) Harvey and Moore spoke in the hallway. Harvey described Moore as "out of control" and testified that Moore said "Harvey, I'm telling you right now, if I lose my job I'm going to bust a cap in that bitch [Guest]." (100)[5] Moore continued, "Fuck that bitch. Fuck that bitch. I'm going to shoot that bitch." (96) Harvey said "Man, what did I tell you about you making that kind of comment to me?" (96) Moore responded, "Fuck that bitch and fuck you, Harvey. I will fucking kill that bitch." (96)[6] Harvey responded with comparably coarse language. (100-1). Harvey told Moore that he was going to tell the judge, and according to Harvey, Moore said "Fuck that. Let's go in there right now." (101)

Harvey then went into the courtroom and approached the bench

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[5] The alleged threats were conditional; *i.e.*, if Guest continued antagonizing him (April 12) and if Moore lost his employment (June 29).

[6] Or not that he would kill her *per se*, but that he would "bust a cap in that bitch." (Apx. 96)

without Moore:

> Mr. Harvey: I can't represent him. And if you force me to tell you, then I'll just have to tell you this time.
>
> Court: OK, I'm going to direct you to tell me because I've shared with you before —
>
> Mr. Harvey: He's threatening to shoot her. I ain't representing him. We are adversaries but I respect Ms. Guest. I'm not representing that man. He said it again. I cannot represent him. So whatever needs to happen needs to happen but I believe him this time.
>
> [Judge arranges to have someone from United States Marshals Service come to the courtroom.]
>
> Mr. Moore: Judge, may I speak?
>
> Court: No sir.
>
> [Judge confirms with deputy marshal that he can take custody of Mr. Moore.]

(6/29/18 audio 5:00:20 p.m.)[7] Judge Smith then ordered Moore detained and set the matter in for Monday, July 2, for ascertainment of counsel.[8]

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[7] This portion was omitted from the official transcript but was recovered from the courtroom audio and made part of the record; an unofficial transcription is at Apx. 33.

[8] After not hearing Moore on whether Harvey should be permitted/required to disclose what Moore allegedly said, Judge Smith ordered Moore detained without an opportunity to be heard ("Judge, may I speak? *No sir.*"); further, Judge Smith did not advise Moore why his release conditions were summarily revoked. (Apx. 35-37) Mr. Moore has been

The focus on July 2 was whether Harvey could withdraw from the case. Having consulted with colleagues on the judicial ethics committee, Judge Smith questioned the sincerity of the alleged threats, noting that it is not uncommon for disgruntled defendants to threaten an attorney or judge. ("[P]eople make threats all the time to get a judge off the case, to get a prosecutor off a case, to get an attorney off a case." Apx. 50-51.)[9] Harvey insisted that his relationship with Moore had become toxic. ("The relationship between he and I now has become toxic. Our ability to communicate — my skin starts to boil and so does his." Apx. 55.) After considerable exchanges with Judge Smith, Harvey was permitted to withdraw. As of July 2, 2018, Guest had not heard about the alleged

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locked up ever since (initially in the protective order case and then in this case).

[9] Nonetheless, Judge Smith did not release Moore, which Judge Smith predetermined a second time without a hearing. Moore was asked his position regarding Harvey's withdrawal and a mistrial, and Moore stated that he wanted to seek outside advice before making a decision. Judge Smith let Moore know he would not be able to leave custody to speak with people: "Mr. Moore, I just want to be clear I'm not releasing you today." (Apx. 58)

Moore stated that he still did not know what was going on: "I'm trying to figure out what's going on. I asked that Friday." (Apx. 60) Moore was not informed what the issue was.

threats and they were not disclosed to her that day. (77-80)

At the privilege hearing in this case the trial court analyzed the communications narrowly and in piecemeal fashion; focused on whether the alleged statements were, in isolation, for seeking legal advice; and concluded that Moore was stating what he was going to do, not seeking legal advice. (Apx. 111.) The trial court further concluded that Moore was understandably angry and that his statements were related to his anger, not getting legal advice. (111) The trial court noted that a single comment might merely be an “ill-advised” yet privileged statement, but that repeating the comments, among other factors, caused them to fall outside the privilege. (113-14)

Trial Evidence

Harvey testified that Moore was out on release but on April 12, 2018, Guest attempted to have Moore placed on GPS monitoring. (5/30/19 p. 88.) Harvey testified that when Moore made the alleged threats, Guest was not in the vicinity nor was anyone else close enough to hear the conversation; Harvey testified that “[t]here could have been other people around,” but “[n]ot close enough to hear our conversation.” (133-34)

Moments later Moore told Harvey, “I was just bullshitting, man. I was just bullshitting, man. I didn’t mean it.” (92)

Harvey testified that thereafter Moore missed a court date and on June 29, 2018, on Guest’s request Moore was ordered to be fitted and monitored with an ankle GPS device. (5/30/19 p. 95.) This occurred late on a Friday afternoon and would require Moore, residing and working in North Carolina, to wait until Monday to have the GPS device affixed. (97-98) According to Harvey, Moore had job training on Monday and was concerned he would lose his job. (177-78) Harvey alleged that Moore said, “If I lose my job, I’m going to bust a cap in this bitch” and made a hand gesture in the form of a gun. (103-5)

Guest testified that she had already left and did not hear anything that was said. (5/30/19 at 56, 77-78.) There was no evidence that anyone other than Harvey was in hearing range; video shows an empty courthouse hallway other than Harvey and Moore (with Guest initially chatting with Harvey but walking away when Moore exited the courtroom). (Video stills from 6/29/18 at Apx. 29-33.)[10]

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[10] A courthouse security officer testified that he could not recover video for the 4/12/18 incident due to the passage of time.

SUMMARY OF ARGUMENT

Mr. Moore's statements were protected by attorney-client privilege. Other courts have rejected looking at attorney-client communications in "piecemeal" fashion and have held that statements such as those attributed to Mr. Moore are within the scope of the attorney-client privilege. There is an exception for statements seeking the attorney's assistance in committing a crime: the "crime-fraud exception." However, statements of intent to commit a crime do not, without more, fall within the crime-fraud exception because such statements are not using the attorney's advice to commit a crime. Rule of Professional Conduct 1.6 does not change the outcome. Rules of professional conduct govern the conduct of attorneys; they do not change the law governing privileges. Rule 1.6 allows an attorney to disclose a client's statement where the attorney believes disclosure is needed to prevent death or bodily harm. Working together, the attorney-client privilege and Rule 1.6 serve the public interests in promoting free and open communications with lawyers (who may discourage illegal conduct) while allowing attorneys to disclose communications as deemed necessary to protect life and safety without fear of becoming a witness against the client.

ARGUMENT

MR. MOORE'S ALLEGED STATEMENTS WERE PRIVILEGED

A. Standard of Review

Because the legal aspects on this issue are dominant, *de novo* review applies. *In re Pub. Def. Serv.*, 831 A.2d 890, 898 (D.C. 2003).

B. Introduction

As an initial matter, Mr. Moore notes that the language, repetition, mood, and circumstances of the alleged statements suggest anger, frustration, and fantasy, not genuine threats. As noted, there was no allegation that Mr. Moore took any steps toward harming Ms. Guest even though he was free between the first set of alleged statements (April 12) and the second (June 29). And Mr. Harvey testified that he made the disclosures because it was required to get out of the case, not due to public safety concerns.[11]

But even if the alleged threats were made and were serious, public safety is served by preserving the privilege. As courts have held (discussed

[11] "I asked to withdraw. And if ... the only way to get out of the case would be for her to order me to tell her what he said, that I would. She did [order me to tell her]. And I did." (5/30/19 p. 184.)

below), encouraging open communication gets the client's thoughts to the attorney, who can then counsel the client against foolish and unlawful actions. If the attorney believes disclosure is necessary, Rule of Prof. Cond. 1.6 allows disclosure; if the underlying statements then lose the privilege, however, an attorney weighing disclosure would have to consider that it may put them on the witness stand in a criminal case against their client. That would deter attorneys from making disclosures that would allow authorities to investigate threats and prevent potential harm. Even Mr. Harvey was reluctant to do so, declining the first time and doing so the second time only after Judge Smith required disclosure for Mr. Harvey to get out of the case.

The division majority was correct to consider the attorney-client privilege in the relevant context of the case — here, a court-appointed attorney and an indigent defendant. An indigent defendant has not researched, interviewed, and freely chosen an attorney he or she trusts and believes in; rather, the court, part of the same system that is prosecuting the indigent defendant, has selected the attorney for him or her. Trust and candor are essential in an attorney-client relationship, and given that an attorney is appointed for, not selected by, an indigent

defendant, such a relationship is disadvantaged in this regard. "Many indigent criminal defendants are suspicious of the government-funded counsel to which they are constitutionally entitled." *United States v. Wright*, 923 F.3d 183, 191 (D.C. Cir. 2019). It is therefore important that the attorney-client privilege be considered in context to serve its purpose of uninhibited communication. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981). The privilege is worthy of "maximum legal protection." *In re Pub. Def. Serv.*, 831 A.2d at 900 (internal quotation marks and citation omitted). To promote full and frank communications, the court should consider real-world circumstances of the particular attorney-client relationship, including the type of relationship, the type of case, and the stressors and challenges commonly involved.[12]

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[12] An indigent defendant is also more likely to have untreated mental health issues, behavioral difficulties, and/or lack of education, and therefore have a diminished ability to articulate and vent frustration in a

Even without considering that Mr. Moore had a court-appointed attorney, however, the alleged statements were privileged.

There are two questions in determining whether a statement is privileged: (1) whether the statement is otherwise within the privilege, and (2) whether an exception applies. At least one appellate court has connected these questions, determining that if the communication is not within the exception, it is within the privilege.

C. The alleged statements were within the scope of the privilege.

Regarding the scope of the privilege, this court and the Supreme Court of Maryland have adopted the *Wigmore on Evidence* formulation of the privilege. *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003); *Newman v. State*, 384 Md. 285, 302, 863 A.2d 321, 331 (2004).[13] So, then, the attorney-

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careful and moderated manner.

[13] *Wigmore on Evidence* § 2292 formulation of the attorney-client privilege:

> (1) where legal advice of any kind is sought (2) from a professional legal advisor 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.

client privilege applies to communications related to the purpose of legal representation. *Jones*, 828 A.2d at 174-75 (citing *Wigmore*). In deciding whether a statement is for the purpose of legal representation, courts should not look at statements in a piecemeal fashion, going line-by-line and word-by-word through an attorney-client conversation looking for a statement that — in calm scholarly hindsight — might not have been necessary for the representation.

The Supreme Court of Maryland has applied the privilege broadly. In *Newman*, Ms. Newman was involved in an acrimonious divorce and custody battle. She and a friend who was assisting her met with Newman's attorney in preparation for trial. In the lawyer's presence Newman and her friend discussed plans to kill one of the couple's two children and blame Newman's husband. Newman told her lawyer, "You know, I don't have to kill both children. I only need to kill Lars because I can save Herbie, and then [my husband] will go to jail and get what he deserves because he is a criminal, and I can at least save Herbie." *Newman*, 384 Md. at 291. The attorney disclosed the communications to the court. The Supreme Court of Maryland held the statements were privileged because they "occurred during the existence of [the] attorney-client relationship" and "were

related to the [legal matter].” *Newman*, 384 Md. at 306.

The Supreme Court of Maryland discussed the role of Ethical Rule 1.6(b), based on ABA Rule 1.6 which has been adopted in many jurisdictions including the District and Maryland. Rule 1.6 permits an attorney to disclose client communications and information to the extent reasonably necessary to prevent an act the attorney believes likely to result in death or substantial bodily harm.[14] This should not confuse the matter. Ethical Rule 1.6(b) and the privilege work together to allow a concerned attorney to disclose the communications without fear that the disclosure can be used against the client and make the attorney a witness in a criminal charge against the client. What happened here should not have happened and sends the wrong message to attorneys who receive questionable comments from their clients. The outcome here, if allowed to stand, would not only undermine the attorney-client relationship and an atmosphere of free and open communications, it would deter many

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[14] D.C. Rule of Prof. Conduct 1.6(c)(1) reads:

> (c) A lawyer may reveal client confidences and secrets, to the extent reasonably necessary:
>
> > (1) To prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer[.]

attorneys from disclosing threats that might be serious. "To permit a Rule 1.6 disclosure to destroy the attorney-client privilege and empower the attorney to essentially waive his client's privilege without the client's consent is repugnant to the entire purpose of the attorney-client privilege in promoting candor between attorney and client. Moreover, it would violate our duty to maintain the integrity of the legal profession." *Newman*, 384 Md. at 306 (quotation marks omitted).[15]

Other courts are aligned with the Supreme Court of Maryland. In *Purcell v. DA for the Suffolk Dist.*, 424 Mass. 109, 676 N.E.2d 436 (1997), the court concluded that if a statement made to an attorney during the course of representation is not within the crime-fraud exception, it is within the privilege; there is no "gap" between them. Purcell was meeting with a client about an order for the client to vacate his apartment and the client threatened to burn down the building. Purcell advised the authorities, which he was permitted to do under the ethical rules. The Supreme Court

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[15] This court has recognized in other contexts that Rule 1.6 determines what disclosures are allowed; it does not affect the scope of the attorney-client privilege. *Adams v. Franklin*, 924 A.2d 993, 999 n. 6 (D.C. 2007) ("[T]he rule of evidence [protecting attorney-client privilege] governs admissibility in a trial court; [Rule 1.6], on the other hand, governs only disciplinary actions of the D.C. Bar.")

of Massachusetts decided that the communication did not meet the crime-fraud exception. The court went on to hold that where a client states an intention to commit a crime made to the attorney during the course of representation, it is *not* a situation where a privilege should be "construed strictly." *Id.*, 676 N.E.2d at 441. Either the statement falls within the crime-fraud exception, or it is privileged; there is no third option, or "gap," as the court put it, which would make no sense and frustrate the purposes of the privilege:

> A strict construction of the privilege that would leave a gap between the circumstances in which the crime-fraud exception applies and the circumstances in which a communication is protected by the attorney-client privilege would make no sense. ...
>
> Unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct and, if not, under the ethical rules may elect in the public interest to make a limited disclosure of the client's threatened conduct.

Id. In a later decision, where a client left six messages on an attorney's voicemail threatening the presiding judge and a court social worker, the Supreme Court of Massachusetts noted that allowing an attorney's disclosures to destroy the privilege would, as argued herein, impinge the

public safety interests behind allowing disclosures under Rule 1.6:

> Requiring the privilege to yield for purposes of a criminal prosecution would not only hamper attorney-client discourse, but also would discourage lawyers from exercising their discretion to make such disclosures, as occurred here, and thereby frustrate the beneficial public purpose underpinning the discretionary disclosure provision of rule 1.6.

In re A Grand Jury Investigation, 453 Mass. 453, 458-59, 902 N.E.2d 929, 933 (2009). If loss of the privilege deters the threats from being spoken in the first place, that is not desirable either; if a client plans but does not disclose intended harm, that impairs "a lawyer's ability to aid in the administration of justice by dissuading a client from engaging in such behavior is impaired" (citing *In re Pub. Def. Serv.*, 831 A.2d at 901) and prevents the lawyer from getting information that may warrant Rule 1.6(b) public safety disclosures to thwart genuine dangers. *Id.*, 453 Mass. at 459, 902 N.E.2d at 934.

In *State v. Boatwright*, 54 Kan. App. 2d 433, 401 P.3d 657 (2017), the Kansas court also rejected the strict application of the privilege, describing it as the "piecemealing" of attorney-client communications. While Kansas has a statute-based privilege, the *Wigmore* elements form the foundation for the privilege as in the District, Maryland, and Massachusetts. *Id.* at 442.

In *Boatwright*, the appellant threatened to kill his ex-fiancée while discussing a plea offer with his attorney; his attorney told the Sheriff's Office. The court held the crime-fraud exception did not apply. The State alternatively argued for a strict construction of the privilege — that the statement was not for the purpose of seeking legal advice. The court firmly rejected such an approach as "piecemealing" attorney-client communications which would undermine the privilege and its purposes: "[T]he State's approach to determining if this communication was privileged calls for the piecemealing of attorney-client communications and would fundamentally undermine the attorney-client relationship." *Id.* at 664. The court further explained that while statements in isolation may seem unrelated to the representation, clients are often stressed and frustrated in legal matters, and outbursts are often par for the course and hopefully lead to further attorney-client communications to calm and dissuade the client:

> Although Boatwright's comment is jarring in isolation, the expression of such frustrations is not an uncommon occurrence in the course of an attorney-client relationship, 'particularly in an adversarial context, and may serve as a springboard for discussion and attempts to dissuade the client on the part of the attorney.'

Id. at 442 (quoting *In re A Grand Jury Investigation*, 453 Mass. at 458, 902 N.E.2d at 933.

Mr. Moore's alleged communications were firmly within the scope of the attorney-client privilege. The alleged statements were amidst and related to the legal proceedings and Mr. Moore was venting to his attorney his frustration and exasperation regarding the pending legal proceedings, the prosecutor, and his own attorney. This case should be decided no differently than the cases above. In Mr. Moore's case the judge drew a distinction between one statement, which the judge opined would be "simply an ill-advised statement within the context of [discussions about case]," versus repeated statements, which made the statements "anger based on the legal advice" and outside the privilege. What level of anger about one's legal case is allowed before a client inadvertently trips the invisible trigger that causes statements to go from privileged to unprivileged?

The Supreme Court of Massachusetts has noted problems in trying to come up with a satisfactory test, and concluded that such tests do not "give clients breathing room to express frustration and dissatisfaction with the legal system and its participants." *In re A Grand Jury Investigation*, 453

Mass. at 458, 902 N.E.2d at 933. The better approach is not to try such an analysis, but simply to ask, as the Supreme Court of Maryland does, whether the statements "occurred during the existence of [the] attorney-client relationship" and "were related to the [legal matter]." Mr. Moore's alleged statements clearly were.

D. Mr. Moore was the sole owner of the privilege; only he could waive the privilege.

The client is the sole owner of the privilege and is the only one who can waive the privilege. 8 *Wigmore on Evidence* § 2321, at 629; *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 932 (D.C. 2004) (right to assert or to waive the privilege belonged to the party); *College Park v. Cotter*, 309 Md. 573, 591, 525 A.2d 1059, 1068 (1987) ("[T]he authority to waive the privilege belongs to the client alone."); *In re Seagate Tech.*, LLC, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (*en banc*) ("The attorney-client privilege belongs to the client, who alone may waive it.")

Even where an attorney has been ordered to disclose privileged communications, because the privilege belongs to the client, the client must be afforded the opportunity to object and appeal. *Adams*, 924 A.2d at 998.

It therefore does not matter that Mr. Harvey allegedly warned Mr. Moore that further alleged threats would be disclosed. First, as explained above, that the alleged threats were disclosed under Ethical Rule 1.6 does not mean the privilege disappeared. In Mr. Harvey's words, "You will never, ever say anything like that to me again because if you do, I am going to believe you and I'm going to tell the court that you said it." Nothing in Mr. Harvey's statement referenced a waiver of the privilege; the disclosures, if they were allowed to be made, were purportedly made under Ethical Rule 1.6, which allows the disclosures but has no impact on the privilege. Second, Mr. Harvey did not have the right to waive the privilege, even with a warning, because the privilege belonged solely to Mr. Moore. If an attorney were to tell a client, "if you admit to committing the crime, I will let the prosecutor know you have confessed," such a warning would be invalid and have no impact on the privilege; the attorney does not get to choose which statements are privileged.

E. The alleged statements do not meet the narrow crime-fraud exception.

Having established that the statements otherwise fall within the privilege, the only question is whether the statements meet the crime-

fraud exception; they do not. The crime-fraud exception has a narrow focus: where the attorney's advice is sought to commit a crime. "[T]he crime-fraud exception … assure[s] that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491 U.S. 554, 563, 109 S. Ct. 2619, 2626 (1989) (citation omitted). Threats or statements of intent to commit a crime do not fall within the crime-fraud exception because they are not requests for advice. "We … join our colleagues on both the federal and state levels who have required more than a mere statement of the intent to commit a crime or fraud to trigger the crime-fraud exception to the attorney-client privilege." *Newman*, 384 Md. at 309 (citing consensus of state and federal cases, including *In re Pub. Def. Serv.*, *infra*, and the public policy interests stated therein).

This court has recognized the public interests served in narrowly construing the crime-fraud exception, consistent with the reasoning of the Supreme Court of Maryland in *Newman*. For instance, this court has noted that the crime-fraud exception evaporates where the attorney talks the client out of the crime. "The crime-fraud exception does not apply where

the attorney talks the client out of committing the crime or fraud he contemplates or stops the client's scheme dead in its tracks." *In re Pub. Def. Serv.*, 831 A.2d at 895.[16] "By encouraging full and frank discussions between attorneys and their clients, the attorney-client privilege promotes broader public interests in the observance of law and the administration of justice." *Id.* at 900. Assuming that a client is sincerely contemplating killing a prosecutor, is it preferred that the client tell his attorney, who can try to persuade the client otherwise and contact authorities if necessary, or is it better that the client just keeps it to himself? "A lawyer's advice … is even more vital when the client misguidedly contemplates or proposes actions that the client knows to be illegal. The existence of the attorney-client privilege encourages clients to make such unguarded and ill-advised suggestions to their lawyers." *Id.* at 901. This freedom gives the attorney the opportunity to deter the contemplated course. "[D]iscouraging clients from illegal conduct is a regular occurrence in an attorney's practice. 'About half of the practice of a decent lawyer is telling would-be clients

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[16] Even if the plan is not stopped, merely advising the client of the criminality of the conduct, if it does not assist the client in the criminal plan, leaves the privilege intact. *In re Grand Jury Subpoena*, 745 F.3d 681, 693 (3d Cir. 2014).

that they are damned fools and should stop.'" *Id.* at 901 (quoting *McCandless v. Great Atlantic & Pacific Tea Co.*, 697 F.2d 198, 201-02 (7th Cir. 1983); quote attributed to Elihu Root).

F. There is no "threats" exception to the attorney-client privilege.

The government has attempted to distinguish *Newman* and *Purcell* by claiming they did not involve threats, seeking to create a novel "threats" exception to the attorney-client privilege on the theory that a threat is, unlike other statements, a completed crime. But there is no meaningful difference between saying "I am going to shoot her" (this case), or telling one's attorney that one will kill their child (*Newman*),[17] or stating

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[17] The Supreme Court of Maryland repeatedly framed the issue as "threats" uttered to an attorney. For example —

> Allowing disclosures of "threats" to be used against the client "could chill the free discourse between the lawyer and the client, thereby limiting the lawyer's ability to thwart threats in the future." *Newman*, 384 Md. at 305.
>
> "Friedman stated that Newman's threats were typical in hotly contested custody proceedings." *Id.* at 311.
>
> "Friedman viewed Newman's threats as serious." *Id.* at 312.

the intent to burn down an occupied apartment building (*Purcell*).[18] Furthermore, the question is not whether a crime was committed; the question is whether the statements to the attorney are privileged. In the context of a weaker privilege (patient-psychiatrist), the Ninth Circuit compared a threat with statements in which a patient describes an earlier bank robbery; in both cases a crime has been completed, but the issue is not whether a crime has been completed but whether the statements are privileged: "Once Defendant finished uttering the threats, the charged crime was completed, and the psychiatrist was in the same position she would have occupied had her patient described a bank robbery in which he had participated a week earlier." *United States v. Chase*, 340 F.3d 978, 982 (9th Cir. 2003). The court concluded that statements that are the completed crime of threats should be protected the same as statements admitting a completed crime. The attorney-client privilege is at least as strong as the patient-psychiatrist privilege.

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[18] *In re A Grand Jury Investigation*, *infra*, also involved clear threats; the defendant threatened to "raise some hell" with the presiding judge, to "exterminate" some people "with prejudice," and "also threatened a Juvenile Court social worker." *Id.*, 453 Mass. 453 and 453 n.2, 902 N.E.2d at 930.

G. Cases cited in the dissent in the panel opinion are distinguishable.

Cases cited in the dissenting opinion are distinguishable.

Several of the cases cited involve communications divorced from the representation. *United States v. Ivers*, 967 F.3d 709, 717 (8th Cir. 2020) (after a discussion about the case ended, Ivers went on an uninterrupted, "easily severable" ten-minute tirade at the end of which he hung up the phone); *United States v. Alexander*, 287 F.3d 811, 815 (9th Cir. 2002) (many threatening letters and telephone communications including threats to kill his attorneys and numerous other persons); *Hodgson Russ, LLP v. Trube*, 867 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 2004) (after the attorney-client meeting was over, as the client was walking out of the office he threatened to kill his sister to end the dispute over the mother's estate); *United States v. Thomson*, 1995 U.S. App. LEXIS 4876 (9th Cir. Mar. 13, 1995) (listed as unpublished and not appropriate for citation) (in conversation with his attorney and his wife's attorney, Thomson was upset over the sentence given to his wife and threatened the judge's life; further context not provided).

In *State v. Hansen*, 122 Wash. 2d 712, 720, 862 P.2d 117, 121 (1993),

after the defendant was released from prison he became frustrated by his inability to find an attorney to take his civil case against the court, the prosecutor, and the public defender, and threatened to "blow them all away." The court primarily held that the attorney-client relationship was not in effect because the threats were made after the attorney declined representation. The court alternatively concluded that even if there was an attorney-client relationship, the "remarks concern[ed] the furtherance of a crime." *Id.* at 720. The court thus seemed to place the threats within the crime-fraud exception, and was wrong to do so because the statements must not merely *concern* a future crime, they must be "made for the purpose of getting advice for the commission of a fraud or crime." *Zolin*, 491 U.S. at 563; *accord*, *Newman*, 384 Md. at 309-10.

In *Hopkinson v. State*, 632 P.2d 79, 115 (Wyo. 1981), the trial judge applied the privilege to a threat Hopkinson made to a prosecutor who was also Hopkinson's attorney. The issue was whether a prosecutor improperly referenced the threat in his opening statement. Without resolving the issue regarding privilege, the Supreme Court of Wyoming concluded that the prosecutor had a good faith belief that the threat would be admitted "because *one would assume*, based on case law, that a threat made by a

client to his attorney would not come within the ambit of the privilege" and that *"[i]f anything*, it was error against the State to exclude the testimony." *Id.* at 115 and 116 (emphasis added). The same court dealt with the issue more directly after the attorney was allowed to testify about the threats during the death penalty phase. *Hopkinson v. State*, 664 P.2d 43, 48 (Wyo. 1983). In *Hopkinson II*, the court explained that in Wyoming prosecutors were also allowed to practice civil law. The attorney in question was representing Hopkinson in civil matters and also had a criminal case pending against a friend of Hopkinson's. Hopkinson visited the attorney, urged him to dismiss the criminal case, picked up from the attorney's desk a photo of the attorney's wife and family, and said it would be "terrible" if anything happened to his wife, his family, or his new home that was under construction. *Id.* at 65. The court concluded that at the time of the threats the attorney was in the role of the prosecutor, not Hopkinson's attorney in civil matters; therefore the threats were made outside the attorney-client relationship. *Id.* at 66-67. The court then added that "[e]ven if by any conceivable way it could be conjured up that an attorney-client relationship existed," the crime-fraud exception would apply. *Id.* at 67. The court should not have continued on to an alternative

holding or *dictum*; the facts of the case are outside the concept of the attorney-client relationship such that it is difficult to analyze within a crime-fraud exception analysis. In fact the court, knowing that the privilege should not apply, simply found the closest exception to apply alternatively, writing that "there comes a time when a necessary exception comes into play" and that "[w]e find an *acceptable* doctrine" to apply. *Id.* (emphasis added).

Jackson v. State, 155 Tenn. 371, 374, 293 S.W. 539, 540 (1926), is also distinguishable. The defendant brothers, Robert and Hobart Jackson, claimed self defense in killing Ed Smith. Robert consulted with an attorney about "the duty of the postmaster in forwarding complaints filed against a mail carrier."[19] *Id.* at 375. After the consultation was completed, Robert added that he "was going to see that Hobart Jackson whipped Ed Smith." The court concluded: "The threat to have his brother whip Smith was in no wise connected with the subject-matter of his inquiry; was a statement of no fact, but was simply a casual remark, suggested, perhaps, by the fact that he had Smith on his mind." *Id.* at 375.

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[19] It is not entirely clear what was going on, though it seems that Hobart Jackson and Ed Smith were feuding mail carriers.

Thus, there is similarity between this case and the cases in the dissent only generally at the surface; a deeper dive in each case reveals distinguishing circumstances. Those cases have no applicability to Mr. Moore's alleged statements, which were made during court recesses, pertained to the pending case, and emotionally without filter implored Mr. Moore's attorney to be his advocate and a calming voice.

CONCLUSION

For these reasons and others that may appear on the record, Mr. Moore's convictions should be reversed.

SIGNATURE OF COUNSEL

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing

En banc brief

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this 7th day of August 2023.

/s/ Sean R. Day
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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

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.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

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

(1) An individual's social-security number
(2) Taxpayer-identification number
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(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

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(a) the acronym "SS#" where the individual's social-security number would have been included;
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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

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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/s/ Sean R. Day
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19-CF-0687
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