EN BANC BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 19-CF-687

BRIAN E. MOORE, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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Cr. No. 2018-CF3-11411

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ISSUES PRESENTED

I. Whether the Court should presume that the attorney-client privilege applies to any communication between an indigent criminal defendant and court-appointed counsel, where adopting such a presumption contravenes well-established precedent, expands the privilege beyond its narrow purposes, and benefits a particular group of litigants without adequate policy justification.

II. Whether a client may invoke the attorney-client privilege to preclude his attorney from testifying about threats that the client makes in the attorney's presence, where the threats were not made in order to obtain legal advice, where the attorney was a percipient witness to a crime, and where, in the circumstances of this case, the client had no reasonable expectation that his threatening remarks would remain confidential.

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INTRODUCTION

In the presence of his court-appointed lawyer, appellant Brian E. Moore, on two separate occasions, threatened to shoot the District of Columbia Assistant Attorney General ("AAG") prosecuting him for contempt in a domestic-relations matter. A jury thereafter convicted Moore of threatening a public official and obstructing justice, rejecting his characterization of those threats as "blowing off steam" within the "safe space" of the attorney-client relationship (Tr. 5/31/19:286-89).

However, in a split decision, a panel of this Court reversed Moore's convictions. *Moore v. United States*, 285 A.3d 228 (D.C. 2022). According to the majority, Moore's threat on April 12, 2018, to "shoot that bitch" (Tr. 5/30/19: 89), and his subsequent threat on June 29, 2018, to "bust a cap in this bitch" (Tr. 5/30/19: 103-04), were protected by the attorney-client privilege because, "like so many individuals facing a loss of liberty," Moore "made a series of 'unguarded and ill-advised' remarks" to his lawyer about the AAG "who he (not unreasonably) perceived to be his adversary." *Moore*, 285 A.3d at 250-51 (quoting *In re Public Defender Service ("In re PDS")*, 831 A.2d 890, 901 (D.C. 2003)). In its analysis, the majority expands the attorney-client privilege for criminal defendants with court-appointed counsel and holds that the attorney-client privilege shields a defendant from prosecution when the defendant utters criminal threats only in the presence of his lawyer. The en banc Court should not endorse the majority's conclusions.

First, the majority disavows blackletter law as "focused overwhelmingly on those in civil and corporate spheres," *Moore*, 285 A.3d at 243, and instead holds that the attorney-client privilege "applies more expansively" to communications between court-appointed lawyers and

criminal defendants, *id*. at 240. By fashioning this new rule, the majority defies the Supreme Court's admonition that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974). The majority's justification for carving out a special rule for indigent criminal defendants cannot withstand scrutiny. The policy considerations articulated by the majority apply beyond the world of indigent criminal defendants. Taken literally, the majority's analysis would expand the attorney-client privilege for a wide swath of litigants facing difficult circumstances and untether the evidentiary privilege from its proper purpose.

Second, the majority essentially immunizes indigent criminal defendants from prosecution for threats, as long as those threats are uttered only to court-appointed counsel. In doing so, the majority ignores the lawyer's role as an officer of the court and discounts the lawyer's unique perspective in discerning whether the client has made a true threat or has simply vented frustration. More importantly, a client's threatening statement is not a request for legal advice worthy of the privilege's protection. The attorney-client privilege also does not

authorize a lawyer to decline to testify about a crime committed in his or her presence. By allowing true threats to go unpunished, the majority's analysis unnecessarily subjects lawyers, judges, witnesses, and other third parties to harm.

Procedural Background

On November 7, 2018, the grand jury charged Moore with two counts of obstructing justice, in violation of D.C. Code § 22-722(a)(5), and two counts of threatening a public official, in violation of D.C. Code § 22-851(c) (Record on Appeal ("R.") A at 13). After a February 25, 2019, hearing, the Honorable Craig Iscoe denied Moore's motion to preclude testimony from his former attorney on attorney-client-privilege grounds (2/25/19:3-52). Following trial before the Honorable Milton C. Lee, the jury found Moore guilty as charged on May 31, 2019 (R.A at 29-32). On July 31, 2019, Judge Lee sentenced Moore to 96 months of incarceration and five years of supervised release (R.14). Moore noted a timely appeal on August 1, 2019 (R.15).

On direct appeal, a divided panel of this Court reversed Moore's convictions. *Moore v. United States*, 285 A.3d 228 (D.C. 2022). The United States, joined by the District of Columbia as amicus curiae, petitioned for

rehearing en banc. This Court granted the petition for rehearing en banc and vacated the panel opinion. *See* Order, *Moore v. United States,* No. 19-CF-687 (D.C. May 25, 2023).

The Pretrial Proceedings

Invoking the attorney-client privilege, Moore moved to preclude his former counsel, John Harvey, Esq., from testifying at trial about his threats to shoot the prosecutor (Docket ("Dkt.") #113). The United States opposed the motion (Dkt. #115). After a hearing, the trial court denied the defense motion (Dkt. #118).

The trial court concluded that a statement about shooting or killing the prosecutor "is not seeking legal advice" and is not a privileged communication (Tr. 2/25/19:23). Rather, "legal advice," as defined by *Jones v. United States*, 828 A.2d 169, 174-75 (D.C. 2003), involves a communication for "the purpose of securing primarily either, one, an opinion on the law or, two, legal services, or three, assistance in some legal proceeding" (*id*. at 42). Here, Harvey warned Moore to desist from this conduct and "did exactly what the cases" such as *In re PDS,* 831 A.2d at 900-01, "suggested he should do" (*id.* at 23). Yet Moore persisted in threatening the prosecutor (*id.*). In this context, the trial court concluded

that Moore's statements "were not within even a broad understanding of the seeking of legal advice," particularly where counsel told Moore that the statements were not appropriate "for the purpose of legal representation" (Tr. 2/25/19: 23-24). See also *id*. at 41 ("an extended monologue by the defendant about the violent actions he will take against a prosecutor are not for the purpose of obtaining legal advice"). The court rejected Moore's claim that separating his threats from the conversations in which they occurred constituted "over parsing" (*id*. at 22-24).

The trial court also found that "when an attorney tells the client [']if you say anything more, I will have to disclose it,['] whether the attorney is right or wrong, the client is informed this is not a privileged communication" (Tr. 2/25/19:26). See also *id*. at 33-34 ("telling a defendant I will have to disclose the conversation is telling the client that whatever you previously understood to be applicable to the confidential communication – the confidentiality of our communications will no longer apply, because I will have to tell others").

The Trial Evidence

R.G., an Assistant Attorney General for the District of Columbia, assisted appellant Moore's wife, Ms. Laposo, in enforcing a temporary

restraining order against Moore in connection with a domestic-violence case (Tr. 5/30/19:37-42). Because Moore violated the terms of the order, R.G. filed criminal contempt charges against him (*id.* at 42-44, 121). After Moore failed to appear for a scheduled status conference, R.G. asked the court to issue a bench warrant (*id.* at 45). When Moore ultimately appeared, R.G. convinced the court to alter Moore's conditions of release (*id.* at 46). Because Moore repeatedly failed to comply with his conditions of release, R.G. asked the court, on more than one occasion, to detain Moore (*id.* at 46-47). Although the court did not jail Moore as the AAG had requested (*id.* at 61), Moore seemed "highly agitable" during these proceedings (*id.* at 48).

Trial on the contempt charge began on April 12, 2018, before the Honorable Judith Smith (Tr. 5/30/19:48-49). John Harvey, a member of the Superior Court's CJA panel for over 30 years, represented Moore in the contempt case (*id.* at 83-84). At one point, the judge agreed to exclude some important government evidence (*id.* at 51). R.G. noticed Moore "smirking" about the ruling (*id.*). The next day, however, R.G. convinced the judge to reverse that evidentiary ruling (*id.* at 52). Moore "was

agitated" during the hearing and, on occasion, he would yell out, "Liar" (*id*.).

After the trial day ended, as Harvey and Moore walked out into the hallway, Moore was "very agitated" and was saying, "F*ck that bitch. I hate this bitch." (Tr. 5/30/19:89.) Harvey thought these remarks were "nothing unusual" (*id*.). When Harvey attempted to explain the court proceedings to Moore, he told Moore that it was R.G.'s "job" to "push the evidence" and that it was "just silly on his part to be angry" (*id*.). Harvey's comments "seemed to anger him even more" (*id*). Moore then said, "Man, f*ck that bitch. F*ck that bitch. I'll shoot that bitch. F*ck that bitch." (*Id*.)

Harvey asked Moore what he was talking about, to which Moore responded, "That's right, Harvey. I'll shoot that bitch." (Tr. 5/30/19:89.) Harvey told Moore, "Man, I'm taking – you starting to make me think you serious" (*id*.). Moore responded, "God damn right, Harvey. F*ck that bitch. I'll shoot that bitch." (*Id*.) Harvey told Moore, "Man, at this point, I'm not going to be a part of this. I'm going to have to withdraw." (*Id*. at 90.) Moore responded, "I don't give a f*ck what you do, Harvey. I don't give a f*ck." (*Id*.)

Harvey then called Bar Counsel "to find out what [his] options were" (Tr. 5/30/19:90-91). The Bar Counsel representative stated that an attorney in the District of Columbia could choose whether to divulge Moore's statements to the court (*id.*). At that point, Harvey decided "to try to maintain [Moore's] secrets," and moved to withdraw from the case (*id.*). However, the judge refused to let Harvey withdraw without an explanation (*id.*).

After the court passed the case, Harvey called Bar Counsel again, and learned that the judge could insist that Harvey provide additional details about the grounds for his motion to withdraw (Tr. 5/30/19:92, 125, 139). Harvey then discussed the situation with Moore (*id.* at 92). Moore told Harvey that he was "just bullshitting, man," and that he "didn't mean it" (*id.*). Harvey warned that Moore should "never, ever use this kind of language" because "from this point forward" Harvey was "going to believe [him]" (*id.*). After Moore agreed not to utter threatening words again, Harvey decided to proceed and asked the judge to continue the trial (*id.* at 92-93).

Trial was continued to June 2018 (Tr. 5/30/19:52). Moore did not appear as scheduled on June 12 (*id.* at 52-53). Given Moore's failure to

appear, his unauthorized contact with Ms. Laposo, and his failure to report to pretrial services, R.G. asked the court at the next scheduled hearing on June 29 to detain him (*id.* at 53). Moore was "upset" (*id.* at 54). Rather than detain Moore, the judge decided to place him on GPS monitoring (*id.* at 54, 95). However, because the hearing concluded on a Friday afternoon, the judge ordered Moore to return on Monday for installation of the GPS device (*id.* at 54, 95-97). The judge's order greatly inconvenienced Moore because he would need to remain in the District over the weekend and would likely miss a training session for his new job in North Carolina (*id.* at 98). Moore "was adamant that he was pissed off" (*id.*).

At the conclusion of the June 29 hearing, R.G. and Harvey briefly spoke in the hallway outside the courtroom (Tr. 5/30/19:55). Moore soon entered the hallway (*id.*). According to R.G., Moore "yelled really loud" (*id.*). R.G., accompanied by Ms. Laposo's attorney, then left the area to avoid any unnecessary "drama" and to "make sure that [they] were both safe" (*id.*). Moore walked over to Harvey and "was, like, 'Harvey, man, f*uck this bitch'" (*id.* at 98). He then said: "[I]f I lose my job, I'm going to bust a cap in this bitch, I'm going to bust a cap in this bitch." (*Id.* at 103-

04.) When Harvey asked what Moore was doing, Moore raised his hand to simulate a handgun (*id.* at 104-05). The courthouse video camera captured Moore's interaction with Harvey in the hallway, including the handgun gesture (*id*. at 109-117; Gov't Exhs. 1-8).

Harvey told Moore that he was going to tell the judge about these threats and withdraw from the case (Tr. 5/30/19:105). Moore said: "F*ck it, let's go." (*Id*.) Harvey then reentered the courtroom, interrupting another proceeding, and asked the judge to recall Moore's case (*id.).* Harvey was "extremely concerned" because he had "no idea what this man was going to do" (*id.* at 106). The judge ordered the marshals to take Moore into custody and ultimately granted Harvey's motion to withdraw (*id*.).

At the time of this trial, Harvey had represented over 1,000 clients (Tr. 5/30/19:117). In Harvey's experience, it was "common" for defendants to "get upset, agitated, [and] angry," but this was the first time a client's threat to a prosecutor prompted Harvey to report it to a judge (*id*. at 116-17). On cross-examination, Harvey also acknowledged that his relationship with Moore was "as toxic as [he had] ever experienced as a practicing attorney" (*id.* at 166, 168).

The Panel Decision

The panel concluded that Harvey's testimony was admitted in violation of the attorney-client privilege. *Moore*, 285 A.3d at 232. Because Harvey "was the only witness who actually heard Mr. Moore's statements" and his testimony "formed the entire basis of the government's charges," the panel reversed Moore's threats and obstruction convictions. *Id*. at 252. Senior Judge Thompson dissented. *Id.* at 253-61.[1]

In the majority's view, the attorney-client privilege "logically applies more expansively" in the context of "criminal defense cases involving court-appointed attorneys," *Moore*, 285 A.3d at 240, and courts must apply "a strong presumption that, any time the client speaks to their court-appointed lawyer, a significant purpose of that communication is to receive legal advice in the case," *id*. at 246. Because "being a criminal defendant is inherently stressful," courts must consider "forceful reactions, frustrated venting, or even verbally violent outbursts" part of a client's "significant purpose" in seeking legal representation. *Id*.

[1] The Court otherwise rejected Moore's challenges to the sufficiency of the evidence. *Id*. at 232-38.

at 247. Thus, Moore's "unguarded and ill-advised" threats to kill the prosecutor were privileged because he uttered these statements while seeking legal assistance from Harvey with respect to the conditions of his release in the contempt case. *Id*. at 250-51 (quoting *In re PDS*, 831 A.2d at 901).

Senior Judge Thompson dissented. *Moore*, 285 A.3d at 253-61. In her view, Moore failed to meet his burden to show that the threatening statements were made for the purpose of seeking legal advice. *Id.* Moreover, Moore could not show that the threatening statements on June 29 were made in confidence; Harvey had expressly warned Moore after the first series of threats on April 12 that any further threats would be reported to the judge. *Id.*

SUMMARY OF ARGUMENT

In keeping with longstanding case law and common sense, this Court should continue to require the claimant of the attorney-client privilege to make a context-specific showing that the protected communication is confidential and necessarily made for the substantial purpose of obtaining legal advice. These requirements should not vary based on the identity of the litigant. The panel majority has devised an

all-but-irrebuttable presumption that any communication by an indigent defendant to court-appointed counsel is privileged as a matter of law. That approach is unmoored in the law and unsound in policy.

When a defendant utters criminal threats in the presence of counsel, those threatening statements are not privileged communications. Threats are not requests for legal assistance. To the contrary, threats are efforts to intimidate, harass, and coerce, which are wholly unworthy of the protection of a privilege predicated on the value of candid conversation between attorney and client on legal matters. The attorney-client privilege also does not entitle an attorney to decline to testify about a criminal offense committed in the attorney's presence.

Even if this Court were to endorse the majority's analysis, however, Moore's convictions for the threats uttered on June 29 must stand. On April 12, counsel warned Moore that, if he uttered any threatening remarks, counsel would petition the court to withdraw from the case. Under these circumstances, Moore had no reasonable expectation on June 29 that his threat to "bust a cap in this bitch" would remain a confidential communication protected by the attorney-client privilege.

ARGUMENT

I. This Court Should Not Adopt a More Expansive Attorney-Client Privilege for Criminal Defendants with Court-Appointed Counsel.

"Testimonial privileges, such as protection for attorney-client confidences, operate as narrow exceptions to the general rule that every person must offer testimony upon all facts relevant to a judicial proceeding." *Edmund J. Flynn Co. v. LaVay*, 431 A.2d 543, 551 (D.C. 1981) (citing 8 J. Wigmore, *Evidence* § 2285 (McNaughton rev. 1961)). The panel majority erroneously ignored this overriding principle.

A. The Majority's Presumptive Privilege for Indigent Criminal Defendants Contravenes Well-Settled Precedent.

The attorney-client privilege "is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, *Evidence* § 2290). "Its aim 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.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 169, (2011) (quoting *Upjohn*, 449

U.S. at 389). "However, since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly, it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Fisher v. United States*, 425 U.S. 391, 403 (1976). "[T]the privilege should be narrowly construed to protect only the purposes which it serves." *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007).

As the panel acknowledged, this Court has "adopted the blackletter formulation" of the attorney-client privilege set forth in *Wigmore:*

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

Moore, 285 A.3d at 242 (quoting 8 J. *Wigmore on Evidence* § 2292, at 554). "The party asserting the attorney-client privilege has the burden of proving that communications are protected by the privilege." *In re PDS*, 831 A.2d at 902. "This means that the party asserting the privilege must clearly show that the communication was made in a professional legal capacity." *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003) (internal

quotation and citation omitted). "In general, American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." *Id.* (quoting Reporter's Note, *Restatement (Third) of the Law Governing Lawyers* § 72 (2000)).

However, the panel majority has crafted a radical and unwarranted departure from this traditional understanding of the privilege. Even while acknowledging that this Court "has adopted the blackletter formulation of the attorney-client privilege set forth in *Wigmore*," the panel majority dismissed existing case precedent defining the privilege's scope as "focused overwhelmingly on those in the civil and corporate spheres" and primarily addressing "concerns about canny attorneys and businesspeople manipulating the principle to shield virtually all their communications from litigation." *Moore*, 285 A.2d at 243. Finding that these principles "have little or no application to the relationship between a person accused of committing a crime and their court-appointed counsel," *id.* at 243, the panel held that the attorney-client privilege should apply "permissively in the context of communications between a client and their court-appointed criminal defense attorney," *id.* at 246.

Thus, the panel held that "[t]here is perforce a strong presumption that, any time the client speaks to their court-appointed lawyer, a significant purpose of that communication is to receive legal advice." *Id*. at 246.

Albeit well intentioned, the majority's new rule distorts the Wigmore attorney-client privilege beyond recognition and lacks any real limiting principle. Specifically, by announcing a "strong presumption" the privilege applies "any time the client speaks to their court-appointed lawyer," *Moore*, 285 A.3d at 246, the majority ignores well-settled law that requires the claimant of the privilege to justify its application. *See generally* 1 Robert P. Mosteller, *McCormick on Evidence* § 88 (8th ed. July 2022); *Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 696 (5th Cir. 2017) ("There is no presumption that a company's communications with counsel are privileged."); *Pearlshire Capital Group, LLC v. Zaid*, 490 F. Supp. 3d 1299, 1307 (N.D. Ill. 2020) ("Phrased differently, there is no prima facie presumption of privilege."); *In re Vioxx Products Liability Litigation*, 501 F. Supp. 2d 789, 799 n.15 (E.D. La. 2007) ("Neither the existence of an attorney-client relationship nor the mere exchange of information with an attorney make out a presumptive claim.") (quotation and citation omitted). Indeed, by expanding the

attorney-client privilege for indigent criminal defendants, the majority defies the Supreme Court's admonition that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed." *United States v. Nixon*, 418 U.S. 683, 710 (1974).

B. The Policy Rationale for Creating a Special Rule Does Not Withstand Scrutiny.

The panel majority advanced various policy justifications for its expansion of the attorney-client privilege for criminal defendants with court-appointed lawyers. *Moore*, 285 A.3d at 246-48. However, upon closer inspection, those rationales do not justify treating indigent criminal defendants differently from other litigants.

First, the majority asserted that "the typical relationship between a defendant and their court-appointed counsel has only one objective: representation in the on-going criminal case." *Moore*, 285 A.3d at 246. To the contrary, many public defender's offices endeavor to provide a holistic, client-centered approach extending well beyond the immediate criminal case. *See, e.g.*, Aasha Rajani, *A Public Defense Perspective: An Interview with Heather Pinckney, Director of Public Defender Service for the District of Columbia*, 60 Am. Crim. L. Rev. Online 1, 5 (2023) ("we are

meeting the full needs of our client, which includes the criminal case before us, but also the collateral consequences that occur as a result of the criminal case"; "our team of lawyers, social workers, and investigators work together to serve as advocates and provide holistic support to each client").

Second, the majority justified an expansive privilege for indigent defendants to provide "room for the kind of wide-ranging conversation that establishes genuine trust," particularly because these clients "may not have the same confidence as a paying client that the lawyer is serving their interests and not those of the government." *Moore*, 285 A.3d at 244, 246. Competent attorneys – whether court-appointed or privately paid – generally seek to build trust with the client. *See, e.g.*, Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 Geo. J. Legal Ethics 601 (2016). Nor are indigent criminal defendants alone in questioning whether a lawyer selected and paid by a third party will truly serve their interests. For example, in insurance-defense cases, parties are "routinely represented by counsel selected and paid by a third party whose interests may differ from those of the individual or entity the attorney is defending." *See, e.g.*, Douglas R. Richmond, *Lost in the*

Eternal Triangle of Insurance Defense Ethics, 9 Geo. J. Legal Ethics 475, 476–77 (1996). Similarly, employees cooperate with corporate counsel at their peril; "it is in the corporation's best interest to show that an errant employee or agent acted on her own without either corporate encouragement or corporate authority" and the employee "may not realize his or her potential vulnerability." Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. 859, 910 (2003).

Third, the majority asserted that, for indigent criminal defendants, "even communications that appear to be something unrelated may nevertheless be intimately connected to how the client experiences the criminal case" given the "inherently stressful" nature of the charges facing the client. *Moore*, 285 A.3d at 247. For this reason, the majority theorized that "verbally violent outbursts" are an inherent part of the attorney-client relationship in court-appointed criminal cases. *Id*. The majority's analysis does not justify treating indigent criminal defendants differently from other litigants, however. "Clients frequently seek legal assistance at a time when they are highly vulnerable and emotional. In practice areas such as family law, immigration, child welfare, criminal

law and others, by necessity, clients must share some of the most intimate and painful details of their lives." Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clinical L. Rev. 359, 361 (2016). In these various contexts, courts rely upon counsel to make informed decisions about whether to disclose a client's threatening statements posing serious risk to the client or third parties. *See, e.g.*, D.C. R. Prof'l Conduct 1.6(c); *Restatement (Third) of the Law Governing Lawyers* § 66 (2000) (articulating "an exception to the general duty of confidentiality . . . recognizing discretion in a lawyer to prevent the consequences of threats to life or personal safety"); *State v. Hansen*, 862 P.2d 117, 122 (Wash. 1993) (en banc) ("Whether a threat is a true or real threat is based on whether the attorney has a reasonable belief that the threat is real.").

Fourth, the majority asserted that "the sort of words or syntax that might alert a court to legal versus nonlegal purposes in many communications simply has no application in the typical court-appointed criminal case." *Moore*, 285 A.3d at 247. However, the existence of privilege is necessarily fact bound and it is often difficult to draw bright lines. *See, e.g.*, Stephen A. Saltzburg, *Communications Falling Within the*

Attorney-Client Privilege, 66 Iowa L. Rev. 811, 829 (1981) (citing 8 J. Wigmore, *Evidence* § 2306, at 590) (relating classic example: testimony about a scar visible on a client's forehead during visit to lawyer's office likely not privileged while testimony about client's display of the scar under his shirt to lawyer is likely privileged). In any case, where the nature of the communication is a criminal threat and does not contain any request for legal advice, the existence of the attorney-client privilege does not turn on syntax.

II. The Attorney-Client Privilege Does Not Protect Criminal Threats.

Moore and amicus endorse the majority's view that the attorney-client privilege barred Harvey from testifying about Moore's threats to shoot the prosecutor. *Moore*, 285 A.3d at 250. According to the majority, allowing such testimony "misunderstands the basic dynamic of the relationship between a criminal defendant and their court-appointed counsel" and "too narrowly construes statements that 'relate[]' to the provision of 'legal advice' within that relationship." *Id*. (citing *In re PDS*, 831 A.2d at 902). The majority flatly rejected the notion "that an individual should be prosecuted and punished using the uncensored

thoughts and feelings about their case that they have shared with their counsel." *Moore*, 285 A.3d at 247 n.24. The en banc Court should disavow the majority's analysis. Criminal threats are not communications related to obtaining legal assistance. Furthermore, public policy considerations should outweigh the protection of the privilege in these circumstances.

A. Criminal Threats Do Not Reasonably Relate to Obtaining Legal Advice.

Crimes committed in the presence of one's attorney do not enjoy privileged status. Instead, to invoke the attorney-client privilege, Wigmore's oft-cited treatise instructs that the claimant must show that the "communication" was "made in confidence" and involves "legal advice" sought "from a professional legal adviser in his capacity as such." 8 J. *Wigmore on Evidence* § 2292. More recent formulations recognize that "the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance." *Restatement (Third) of the Law Governing Lawyers* § 72, Reporter's Note c. (2000).

In keeping with these principles, the party asserting the privilege "must clearly show that the communication was made 'in a professional

legal capacity.'" *Jones,* 828 A.2d at 175 (citation omitted). Whether a purpose is "significantly that of obtaining legal assistance" depends upon the circumstances, "including the extent to which the person performs legal and nonlegal work, the nature of the communication in question, and whether or not the person had previously provided legal assistance relating to the same matter." *Id.* (citing *Restatement* comment c). *See also In re County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) ("Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. . . . It requires a lawyer to rely on legal education and experience to inform judgment.").

Applying these principles, commentators have generally excluded criminal threats from the protection of the privilege because such statements are not made for the purpose of seeking legal advice. Thus, in the *New Wigmore*, the authors explain:

> [E]ven if at the outset of a consultation the client and attorney are discussing matters incident to a legitimate legal purpose, at the later point in the conversation the privilege might become inapplicable: for example, while the privilege might attach to the early parts of a conversation between a defendant and his or her attorney, the privilege would not apply to threats against the judge that the defendant voiced later in the conversation.

David P. Leonard, et al., *New Wigmore: A Treatise on Evidence*, § 6.11 (2023 Supp.). *Accord* 24 Kenneth W. Graham & Ann Murphy, *Federal Practice and Procedure (Evidence)*, § 5490 (1st ed. & 2023 Update) (noting the common law view "that statements to the lawyer containing threats by the client to kill his adversary or himself are not privileged"); 2 Christopher B. Mueller, *Federal Evidence* § 5:16 (4th ed. 2023 Update) (endorsing view that threats to an attorney are not privileged).

Substantial case precedent also supports the view that a client's threatening statements are not covered by the privilege because a client does not utter threats to obtain legal advice. Rather, a client makes threats "to harass, intimidate, coerce, warn, or frighten the intended victim of the threat or a person who hears the threat." *United States v. Ivers*, 967 F.3d 709, 714-16 (8th Cir. 2020) (defendant's threats to kill judge made during conversation with his attorneys pertaining to his civil case not privileged). Indeed, if a client did seek counsel's advice regarding the threatened commission of a violent crime, the privilege would not protect that communication. *United States v. Alexander*, 287 F.3d 811, 816-17 (9th Cir. 2002) (defendant's statements threatening violence "were clearly not communications in order to obtain legal advice" and

soliciting counsel's advice for that purpose would not be privileged due to the crime-fraud exception). Other courts have reached similar conclusions. *See also United States v. Thomson*, 1995 WL 107300, at *1 (9th Cir. Mar. 13, 1995) (defendant's threats against judge and his family uttered in phone call to his attorney not privileged); *United States v. Stafford*, 2017 WL 1954410, at *3 (E.D. Mich. May 11, 2017) (same); *United States v. Jason*, 2010 WL 1064471, at **1-2 (N.D. Iowa Mar. 18, 2010) (threatening letter defendant sent to his attorney not privileged and thus admissible at trial for mailing threatening communications); *United States v. Sabri*, 973 F. Supp. 134, 140-41 (W.D.N.Y. 1996) (defendant's threatening statements to his attorney concerning immigration officials not privileged); *Hodgson Russ, LLP v. Trube*, 867 So. 2d 1246 (Fla. Dist. Ct. App. 2004) (privileged discussion "did not extend to the client's threat to end the matter by killing his sister"); *State v. Hansen*, 862 P.2d 117, 121-22 (Wash. 1993) (en banc) (threats to "blow away the judge" not privileged because remarks concerned "the contemplation of a future crime"); *Cernoch v. State*, 81 S.W.2d 520, 523 (Tex. Ct. App. 1935) (threats of violence toward debtor's family not privileged); *Jackson v. State*, 293 S.W. 539 (Tenn. 1927) (client's threat

not privileged); *Pearson v. State*, 120 S.W. 1004, 1006 (Tex. Crim. App. 1909) ("qualified threats . . . could not be the subject of privileged communications between attorney and client").[2]

Moore (at 35-39) and amicus (at 16-17) agree with the panel majority's rejection of this precedent, and amicus (at 16-17) adopts the panel's conclusion that these cases "(mis)interpret *Fisher* as imposing a 'necessity' requirement." *Moore*, 285 A.3d at 249. It is true, as the majority notes, *Moore,* 285 A.3d at 249, that *Fisher* addressed the compelled disclosure of documents held by a lawyer in a tax-enforcement case. However, in deciding that the privilege did not preclude the IRS from obtaining pre-existing documents transferred by the client to counsel, *Fisher* relied upon the well-established narrow construction of the attorney-client privilege; the privilege would "protect[] only those

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[2] Moore relies (at 22-23) on *Newman v. State*, 863 A.2d 321 (Md. 2004), to argue that his statements to Harvey were within the scope of the privilege. However, *Newman* did not address whether the client in that case had made the challenged remarks in seeking legal advice; the court primarily focused on whether the crime-fraud exception applied. Otherwise, to the extent that Moore (at 24-29) and amicus (at 20) rely on *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436 (Mass. 1997), and its progeny for the notion that Moore uttered threats in seeking legal assistance, this Court should instead follow the weight of authority cited here. See also discussion, *infra*, at 41-43.

disclosures necessary to obtain legal advice which might not have been made absent the privilege." *Fisher*, 425 U.S. at 403. Accordingly, contrary to amicus's claim (at 16-17), courts cite *Fisher*, among other cases, for the proposition that the privilege protects only those communications made to obtain legal advice. *See, e.g., Regional Airport Auth. of Louisville, v. LFG, LLC,* 460 F.3d 697, 713 (6th Cir. 2006) (citing *Fisher* to conclude privilege did not apply to documents memorializing conversations between counsel and outside parties; "the communications at issue were not made for the purpose of obtaining legal advice"); *Ullmann v. State*, 647 A.2d 324, 331-32 (Conn. 1994) (citing *Fisher* to conclude that the privilege did not preclude public defender's testimony about when he learned the phone number of a government witness); *In re Fischel*, 557 F.2d 209, 212 n.4 (9th Cir. 1977) (noting "the Supreme Court has taken a restrictive view of the reach of the attorney-client privilege," quoting *Fisher*). *See also* 1 Paul R. Rice, et al., *Attorney-Client Privilege in the United States,* § 5:21 (Dec. 2022 Update) (acknowledging that *Fisher* "announced that a client's communications would be protected only if it were 'necessary' to the legal advice sought," and arguing that the pre-*Fisher* standard requiring "only that the communication reasonably

relate (or reasonably be thought necessary) to the purpose of the consultation" was the "sounder view").

The majority, *Moore*, 285 A.3d at 249-51, and amicus (at 17-19) further contend that "[t]esting for *Fisher* necessity in a segmented, utterance-by-utterance manner" would deprive the attorney-client relationship of the space needed to foster meaningful representation. This claim rests heavily on the dubious presumption—which this Court should reject—that cases involving indigent criminal defendants somehow differ from other matters for purposes of the privilege. For most litigants, "the attorney-client privilege does not protect all aspects of the attorney-client relationship." *Hawkins v. Stables*, 148 F.3d 379, 383-84 (4th Cir. 1998). Instead, to resist producing evidence on the ground of privilege, counsel "must establish that the document contains a confidential communication, between it and a client, made with the client's 'primary purpose' having been 'securing either a legal opinion or legal services, or assistance in some legal proceeding.'" *Taylor Lohmeyer L. Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020); *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015) (reviewing tape-recorded conversations and concluding certain calls could be

segregated from those involving legal advice; "[t]he claim of privilege must be made and sustained on a question-by-question or document-by-document basis; a blanket claim of privilege is unacceptable" given the narrow scope of the privilege). Courts therefore routinely segregate privileged from non-privileged material. 2 Paul R. Rice, et al., *Attorney-Client Privilege in the United States*, § 11.21 (Dec. 2022 Update) ("If the nonprivileged portions of a communication are distinct and severable, and their disclosure would not effectively reveal the substance of the privileged legal portions, protected portions of the communication may be excised or redacted (blocked out) prior to disclosure."). As Moore's case illustrates, courts (and juries) can segregate a criminal threat from the rendering of legal advice.

Moore (at 28) and amicus (at 19-20) nonetheless argue that Moore's expressions of frustration and anger related to his effort to get legal assistance. Similarly, the majority asserted that the "significant purpose" of Moore's threats was to obtain Harvey's legal advice about the government's effort to restrict the conditions of his release in the contempt case. *Moore*, 285 A.3d at 250-51. The record refutes this claim. Moore made the threats in the public hallway at the conclusion of court

proceedings after the judge had resolved a disputed evidentiary issue and rejected the AAG's request to place Moore on a GPS monitor on April 12 (Tr. 5/30/19:89-90) and after the judge decided on June 29 (Tr. 5/30/19: 55, 98-106) to place him on GPS monitoring instead of detaining him. Moore sought no legal guidance of any kind. Instead, he voiced his anger about the outcome and then threatened to shoot the prosecutor. Although Moore's statements "may have referred to the effect of the [judge's] decision on his state of mind," these threatening statements were not made to obtain legal advice, whether about the advisability of murdering the prosecutor or any other issue. *Stafford*, 2017 WL 1954410, at *3.

Implicitly acknowledging that his threats were not requests for legal advice in the Wigmore sense, Moore suggests (at 18) that "the language, repetition, mood, and circumstances of the alleged statements suggest anger, frustration, and fantasy, not genuine threats." This argument merely repeats the sufficiency claim unanimously rejected by the panel, which is not at issue before the en banc Court. Moore further contends (at 28) that the Court must adopt a broad attorney-client privilege because hapless defendants will be unable to discern "[w]hat level of anger . . . is allowed before they inadvertently trip[ ] the invisible

trigger that causes statements to go from privileged to unprivileged[.]" However, "'[i]gnorance of the law' generally does not excuse a person from criminal liability, absent the 'unusual circumstance[ ]' in which the person 'had no reason to believe that the act for which he was convicted was a crime, or even that it was wrongful.'" *Beachum v. United States*, 197 A.3d 508, 511 (D.C. 2018) (upholding stalking statute) (cleaned up). The term "'[t]hreat' has a particular meaning and distinguishes a particular class of language which is prohibited." *United States v. Young*, 376 A.2d 809, 814 (D.C. 1977). Moore cannot credibly claim that the ordinarily privileged part of a conversation with counsel would encompass threats to shoot the prosecutor.

The panel majority similarly downplayed the criminal nature of the statements as part of the "basic dynamic" between attorney and client in a stressful criminal case. *Moore*, 285 A.3d at 250-52. The majority also excused Moore's criminal threats by attributing them to "the fact that Mr. Harvey was ineffective in counseling his client and failed to help him regain his composure and perspective." *Moore*, 285 A.2d at 251.[3] In the

[3] Although the majority criticized Harvey's conduct, some commentators have endorsed the general approach taken by Harvey. *See, e.g.*, 24 (continued . . .)

same vein, amicus asserts (at 20) that "the lawyer needs to hear the anger" to "remove it as an obstacle to the client's meaningful participation in the representation." To be sure, lawyers must often defuse volatile situations with angry clients. However, as Judge Thompson's dissent points out, 285 A.3d at 254, Moore could have expressed anger and hostility, as he did when he repeatedly said, "F*ck that bitch," without uttering criminal threats to "shoot that bitch," or to "bust a cap in this bitch." Whether Harvey could have done a better job tamping down his client's rage is beside the point. Moore is ultimately responsible for his own conduct. Adopting the majority's view would give criminal defendants freedom to cross the line from angry words to criminal threats, provided that those threats are made in the presence of counsel. The Court should reject that result.

Kenneth W. Graham & Ann Murphy, *Federal Practice and Procedure* (Evidence), at § 5490 (footnote omitted) (noting that "one way of discouraging [a client's threats] is to have the lawyer inform the client that the threat is not privileged and if not recanted will be reported to the proper authorities").

B. Protecting Criminal Threats Does Not Serve the Salutary Purposes of the Attorney-Client Privilege.

Evidentiary privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). In particular, the attorney-client privilege is "not absolute" and does not shield client communications "where application of the attorney-client privilege would not serve the purpose for which it is intended." *Adams,* 924 A.2d at 999 (quotation and citation omitted).[4] Because criminal

[4] For example, "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 (1989) (cleaned up). Similarly, a witness's attorney-client privilege must yield when it conflicts with a defendant's rights under the Confrontation Clause. *See*, *e.g., Neku v. United States*, 620 A.2d 259, 262-63 (D.C. 1993) (prior inconsistent statement by a critical government witness otherwise protected by the attorney-client privilege "must be admitted . . . if, in the trial judge's view, it is sufficiently probative on credibility to outweigh the interest served by the privilege") (internal footnote omitted). And the privilege must yield when necessary to save a child from abduction in a custody battle. *In re Jacqueline F.*, 391 N.E.2d 967, 970-72 (N.Y. 1979)

(continued . . .)

threats are not part of the "full and frank communication between attorneys and their clients" tending to "promote broader public interests in the observance of law and administration of justice," *id.* at 998, Moore may not fairly invoke the privilege to exclude Harvey's testimony about his criminal threats to shoot the prosecutor.[5]

"True threats subject individuals to fear of violence and to the many kinds of disruption that fear engenders," and are therefore criminal offenses. *Counterman v. Colorado*, 143 S. Ct. 2106, 2114 (2023) (internal

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(requiring attorney to disclose client's location where client fled jurisdiction to gain unlawful custody of a child). *Cf. United States v. Seminole*, 865 F.3d 1150, 1152 (9th Cir. 2017) (compelling spouse to testify against husband in domestic-violence case despite spouse's invocation of privilege).

[5] Amicus argues (at 21 n.9) that "there is no basis to conclude that Mr. Moore's threats gave rise to a reasonable belief that disclosure was necessary to prevent death or substantial bodily harm," particularly since "such a belief would have triggered an exception to Mr. Harvey's duty to maintain Mr. Moore's confidences" under D.C. R. Prof'l. Conduct 1.6(c)(1). To the contrary, Harvey testified that he was "extremely concerned" after Moore threatened to shoot the prosecutor (Tr. 5/30/19: 106). Bar Counsel advised that Rule 1.6 afforded Harvey discretion in reporting the threats to the judge, and Harvey decided to try to keep Moore's secrets (*id.* at 90-91). Harvey's decision to report the details of Moore's threats only when ordered to do so by the judge does not suggest that he did not perceive Moore's statements to be criminal. Instead, the judicial order made Harvey's decision to disclose an easy one, not subject to second-guessing by the client or others.

quotation and citation omitted). *See also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 Harv. J.L. & Pub. Pol'y 283, 367 (2001) (listing four reasons for prosecuting threats: (1) the need to protect people from the fear of violence; (2) the need to prevent the disruption that that fear engenders; (3) the need to incarcerate people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime; and (4) the need to prevent people from being coerced into acting against their will).[6] When the client utters criminal threats in the attorney's presence, the attorney has witnessed a crime. Therefore, contrary to amicus's claim (at 24), the fact that Moore's threat was itself a completed crime is not "a red herring." "[T]he privilege does not extend to a client act simply because the client performed the act in the lawyer's presence." *Restatement (Third) of the Law Governing*

[6] Amicus (at 23-24) argues that an exception for criminal threats "would sweep far broader than any public policy concern about preventing the harm of death or serious injury to others" because the District's common-law threats offense focuses on preventing fear in the hearer, as opposed to death or injury per se. However, threats themselves are punishable in the criminal law for reasons wholly independent of any subsequent death or injury to the subject or hearer of the threat. Moreover, the Rules of Professional Responsibility, particularly Rule 1.6(c), entrust lawyers with discretion to reveal only those threats deemed sufficiently serious to warrant judicial intervention.

Lawyers § 69e (May 2023 Update). This Court has also acknowledged that the privilege would not apply "if the attorney-client communication *itself* materially advances a crime or fraud." *In re PDS*, 831 A.2d at 902 (emphasis added).[7] Because Moore's threatening statements were crimes, the privilege should not apply.

Commentators have endorsed this approach. Although not mentioned by amicus, Professor Imwinkelried has argued that "the case for recognizing a categorical exception for client statements amounting to illegal threats is stronger than the case for the well-settled crime/fraud exception to the attorney-client privilege." 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, 904 (2022).

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[7] As noted in our opening brief (at 20-21), *In re PDS*, 831 A.2d at 895-902, did not address whether the crime-fraud exception would apply where the statement itself – such as a threat – was a crime. Although the Court here need not invoke the crime-fraud exception, that rule would militate against affording the protection of the privilege to a threat uttered in the presence of counsel. Indeed, it would be incongruous to hold that the privilege does not apply "if the attorney-client communication itself *materially advances* a crime or fraud," *In re PDS*, 831 A.2d at 902 (emphasis added), and then to hold in this case that the privilege would apply to a communication that *is itself* a crime.

A bright-line rule that removes criminal threats from the protection of the privilege would best advance the interests of justice and protect the client. Given a bright-line standard, "an attorney could more readily sense that a client's outburst was escalating to the point that the client was about to cross the line and preemptively both warn and remonstrate with the client" and "a judge could readily single out that statement as a threat" from other confidential communications. *Id.* at 906.

Citing *United States v. Chase*, 340 F.3d 978, 982 (9th Cir. 2003),[8] Moore argues (at 34) that "statements that are the completed crime of threats should be protected the same as statements admitting a completed crime." However, Moore ignores two important distinctions

[8] Moore's reliance on the psychiatrist-patient privilege does not get him far. Unlike in the attorney-client context, a client's threatening statements are often symptomatic of the underlying emotional condition entrusted to the psychiatrist's care. Moreover, in *Jaffee v. Redmond*, 518 U.S. 1, 18 n.19 (1996), the Supreme Court acknowledged that "there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." Courts have thereafter debated the circumstances under which a psychiatrist may be compelled to testify. *See* Blake R. Hills, *The Cat Is Already Out of the Bag: Resolving the Circuit Split over the Dangerous Patient Exception to the Psychotherapist-Patient Privilege*, 49 U. Balt. L. Rev. 153, 160 (2020).

between criminal threats and admission of past crimes. First, the client's admission of past crimes enables the lawyer to render legal advice about them; threats are not uttered for the purpose of obtaining legal assistance. Second, the attorney hearing the threat is a percipient witness to a crime, whereas an attorney hearing his client's confession is merely a witness to a statement, not the crime itself.

Moore (at 19-20) and amicus (at 21-22) insist that excluding criminal threats from the privilege would deter clients from providing unfiltered information to counsel and thereby impair the administration of justice. Not so. Courts should expect indigent clients – like everyone else – to engage meaningfully with counsel without uttering criminal threats. Taken at face value, Moore and amicus would permit a defendant to express frustration with counsel's performance by threatening to kill or rape the lawyer in the name of "fostering trust," *Moore*, 285 A.2d at 248-49, or chalk it up to "a missed opportunity for counseling[.]" *Id.* at 251. Such an outcome would poison the attorney-client relationship and undermine the administration of justice.

In any event, as the dissent noted, *Moore*, 285 A.3d at 254 n.3, the fear of chilling client communication is overblown. Indeed, "[t]here have

been several empirical studies of the impact of the evidentiary privileges on the willingness of clients and patients to confide in professional consultants, and those studies do not bear out Wigmore's generalization" about the need for absolute confidentiality in the attorney-client relationship. Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. Pitt. L. Rev. 145, 156 (2004). *See also* Dru Stevenson, *Against Confidentiality*, 48 U.C. Davis L. Rev. 337, 346-48 (2014) (the premise for the confidentiality rules "is a fiction"; "clients regularly lie to their lawyers or withhold relevant information" and "[m]ost clients do not know or understand the confidentiality rules, so it is unreasonable to talk of clients relying on the rules").

Moore (at 24-29) and amicus (at 21-23) also place heavy reliance on *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436 (Mass. 1997), *In re Grand Jury Investigation*, 902 N.E.2d 929 (Mass. 2009), and *State v. Boatwright*, 401 P.3d 657 (Kan. Ct. App. 2017), to argue that creating a threats exception would undermine public safety by hampering the lawyer's ability to dissuade the client from an unlawful course of conduct. This objection misses the mark. When a client expresses frustration or

anger, the lawyer has every incentive to dissuade the client from crossing the line into criminal threats, thereby fulfilling the lawyer's advisory role envisioned by the Court in *In re PDS*, 831 A.2d at 900-01. Indeed, *In re Grand Jury Investigation* and *Boatwright* do not grapple with the fact that the clients' threatening statements in those cases were, standing alone, criminal offenses. Both courts erroneously treat these criminal threats as harmless "frustration," *Boatwright*, 401 P.3d at 442, and expressions of "dissatisfaction with the legal system and its participants," *In re Grand Jury Investigation*, 902 N.E.2d at 933. The jury in Moore's case correctly concluded otherwise.

Purcell does not advance Moore's claims here, either. While discussing his eviction with counsel, the client in *Purcell* threatened to burn the apartment building. 676 N.E.2d at 437-38. Because *Purcell* involved a client's expressed intent to commit a future crime, the lawyer's role in dissuading the client from committing arson was a relevant consideration. *See id*. at 441 ("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")

(emphasis added). However, *Purcell* had no occasion to address whether the privilege would apply to a completed criminal threat, which, as a completed crime, cannot thereafter be dissuaded. *Id*. at 440-41. This factor casts serious doubt on the analysis in *Boatwright*, 401 P.3d at 664-65, and *In re Grand Jury Investigation*, 902 N.E.2d at 456-58, to the extent those courts purport to follow *Purcell*.[9]

Moore (at 23-26) and amicus (at 22-23) further warn that excluding a client's threatening statements from the protection of the privilege would discourage lawyers from making a permissive disclosure about the threat under Rule 1.6 for fear of being required to testify against the client. The very premise of this claim falters; courts should presume that lawyers, as officers of the court, would act in good faith in exercising their discretion to disclose client confidences.[10] In any case, the prospect of an

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[9] Moore's reliance (at 20-21) on *Newman v. State*, 863 A.2d 321 (Md. 2004), similarly fails because the attorney was not a direct witness to criminal threats. Rather, the attorney in that custody case overheard Newman and a coconspirator discussing a plan to kill Newman's child and blame her estranged husband for the offense. *Id*. at 324.

[10] Of course, the concern articulated by Moore and amicus could be easily remedied by mandating lawyers to report threats of death or serious bodily injury, as many jurisdictions currently do. *See, e.g.*, Fla. St. Bar R. 4-1.6; Wisc. Sup. Ct. R. 20:1.6; Nev. R. Prof'l Conduct 1.6; N.J. R. Prof'l

(continued . . .)

attorney testifying against a client is rare, s*ee Moore*, 285 A.3d at 259 n.7, and attorneys understand that courts retain discretion to admit an attorney's testimony only where necessary in the interests of justice. *Cf. Neku*, 620 A.2d at 263-64 (where defendant seeks to impeach government witness with statements protected by the privilege, the court should first assess "the intrinsic probative weight of the statements and the availability of other means" to pursue the impeachment). *See also Williams v. District Court, El Paso County*, 700 P.2d 549, 556 (Colo. 1985) (prosecutor must show "a compelling need for such evidence which cannot be satisfied by some other source"); *State v. Hawes*, 556 N.W.2d 634, 638

Conduct 1.6; Tex. R. Prof'l Conduct 1.05; Vt. R. Prof'l Conduct 1.6; Wash. R. Prof'l Conduct 1.6.

Amicus analogizes (at 24-25) the attorney-client privilege to the District's mandatory reporting statute for child abuse and neglect, D.C. Code § 4-1321.02 *et seq.*, but the analogy is a false one. The reporting statute imposes a criminal penalty for failure to report, but does not apply to lawyers or their agents where they learn of the information during the course of their representation. This exclusion makes sense because a lawyer could otherwise face a conflict of interest upon learning of the client's incriminating statement about child abuse. However, the Council's decision to exempt lawyers from criminal liability sheds no light on whether a lawyer may report suspected child abuse under Rule of Professional Conduct 1.6. Nor does the mandatory-reporting analogy shed light on whether a court could compel a lawyer to testify about, for example, a client's threat to kill a child or the lawyer's own observations of a physically injured or obviously malnourished child.

(Neb. 1996) (same); *Ullmann v. State*, 647 A.2d 324, 333-34 (Conn. 1994) (same). In fact, the regime envisioned by Moore and amicus creates the most perverse incentive: a criminal defendant could utter a criminal threat; an attorney could report that threat to authorities under Rule 1.6; authorities could advise the target about the threat, thereby causing the exact harm the threats and obstructions statutes are designed to prevent; and the defendant would nonetheless escape prosecution by invoking the attorney-client privilege. The Court should not countenance that result.

C. Moore Cannot Establish That His Threatening Statements on June 29 Were Confidential Given Harvey's Prior Warning About Reporting Such Incidents to the Court.

"A client must subjectively expect his communications with counsel to be confidential for them to be protected by the attorney-client privilege." 1 Paul R. Rice, et al., *Attorney-Client Privilege in the United States*, § 6:5 (Dec. 2022 Update). In particular, "[w]hen a matter is communicated to the lawyer with the intention or understanding it is to be repeated to another, the content of the statement is not within the privilege." *United States v. Bump*, 605 F.2d 548, 551 (10th Cir. 1979).

In this case, Moore had no reasonable expectation that his threatening remarks on June 29 would remain confidential. Harvey considered withdrawing from the case after Moore threatened the prosecutor on April 12 (Tr. 5/30/19:91-92). In discussing the possible withdrawal, Moore assured Harvey that he was "just bullshitting" (*id.*). Harvey agreed to continue the representation but warned Moore about making further threatening remarks (*id.* at 93). Despite Harvey's warning, Moore again threatened to shoot the prosecutor after court proceedings ended on June 29 (*id.* at 103-04). As promised, Harvey then advised the court and withdrew from the case (*id.* at 105-06).

In similar circumstances, courts have held that the client may not invoke the privilege because the communication is not confidential. Specifically, in *Commonwealth v. Nichelson*, the client could not invoke the privilege to exclude his attorney's testimony about threats to shoot the arresting officer in his DUI case; the threatening comments were not privileged because the client "made the threats multiple times after Attorney Doherty advised him that the conversation was not protected from disclosure." 262 A.3d 467 (Table) at *3 (Pa. Sup. Ct. 2021) (unpublished).

Courts have declined to enforce other evidentiary privileges when the client makes statements to counsel with knowledge that the statements may be shared with third parties. For example, in the context of the psychiatrist-patient privilege, a defendant could not claim the protections of the privilege where he "was informed repeatedly by his therapists that his violent threats, although made during therapy, would be communicated to his potential victim." *United States v. Auster*, 517 F.3d 312, 320 (5th Cir. 2008). *See also People v. Kailey*, 333 P.3d 89, 95 (Colo. 2014) (where defendant during therapy session made threats of violence directed at witnesses who had testified against him, the therapist had a statutory duty to warn the victims and the threats were therefore not confidential, as necessary to be protected by the psychologist-patient privilege). Courts followed the same analysis in rejecting a defendant's effort to invoke the clergy-communicant privilege. *See United States v. Schwartz*, 698 F. App'x 799, 801 (6th Cir. 2017) (defendant in a child-pornography case had no reasonable expectation of confidentiality in statements to his pastor after the pastor reminded the defendant of his status as a mandatory reporter).

The majority does not meaningfully address whether Moore reasonably expected his threatening statements on June 29 to remain confidential, and thus protected by the privilege, following Harvey's warning. Instead, sidestepping the confidentiality requirement, the majority asserts that Harvey's caution to Moore "is hardly the equivalent of a warning that if Mr. Moore made similar statements, Mr. Harvey would feel himself free to testify against Mr. Moore in a criminal case." *Moore*, 285 A.3d at 252. Harvey was not required to warn Moore of the potential for adverse testimony against him at a subsequent criminal trial. Rather, Harvey's warning prevented Moore from harboring any reasonable expectation that his June 29 threats would remain a confidence shared only with his lawyer. The majority also notes that Harvey "had no authority to limit the scope of the privilege" which belongs only to the client. *Moore*, 285 A.3d at 252. Harvey did not waive or limit the privilege. Moore chose to make the threatening statement, knowing it would be disclosed to the judge, and therefore Moore's own conduct vitiated the privilege. In that respect, Harvey's warning was no different than the warning a client receives from the Bureau of Prisons when calling his lawyer on a recorded line. *Cf. United States v. Hatcher*,

323 F.3d 666, 674 (8th Cir. 2003) ("The presence of the prison recording device destroyed the attorney-client privilege. Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private."). In both circumstances, the client's communication is not a confidential one to which the attorney-client privilege applies.

CONCLUSION

WHEREFORE, the United States respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

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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.

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
(3) Driver's license or non-driver's' license identification card number
(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

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(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.

Initial Here

G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.

/s/
Signature

19-CF-687
Case Number(s)

Chrisellen Kolb
Name

10/6/2023
Date

Chrisellen.R.Kolb@usdoj.gov
Email Address

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sean R. Day, Esq., at Sean@DayInCourt.net; counsel for amicus curiae Public Defender Service, Samia Fam and William Collins, Esqs., at WCollins@PDSDC.org; and upon counsel for amicus curiae District of Columbia, Caroline S. VanZile and Graham E. Phillips, Esqs., at Graham.Phillips@dc.gov, on this 6th day of October, 2023.

/s/
CHRISELLEN R. KOLB
Assistant United States Attorney