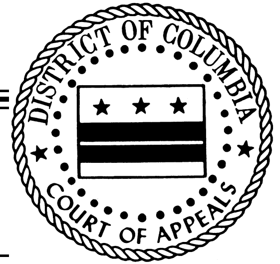


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**19-CF-0687**

**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 REPLY BRIEF OF APPELLANT

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**This brief is 20 pages long excluding content excluded under Rule 32(a)(6).**

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## REPLY ARGUMENT

### A. The privilege belongs to the client.

The government argues that the attorney may waive the privilege by stating that future statements of the same nature will be disclosed. (Govt. Br. at 48.) But an attorney cannot waive the *client's* privilege for alleged threats any more than for confessions of guilt or any other privileged statements. (See opening brief for discussion and citations.) Plus, the avenue (professional rule) and apparent purpose (to get a different attorney for Mr. Moore) of the disclosures, in addition to being incongruent with each other, would not implicate a waiver of privilege which is an independent evidentiary issue.

The government conditions the privilege on a reasonable expectation of privacy. The argument becomes circular on the facts here, as opposed to situations where clients talk to their attorneys knowing that third parties are listening or recording. If the statements were privileged because they in some way related to the representation, then there was a reasonable expectation that Mr. Harvey could not waive the privilege (even if he could disclose the alleged threats without affecting the privilege), and that the statements would thus remain privileged.

### B. Asking whether a statement is a "request for advice" misinterprets the elements of privilege.

The government and the District (*amicus*) argue that because a threat is not a "request for advice," it cannot be privileged. (Govt. Br. at 14, 23; District Br. at 11.) On this point, the District picks out a quote in Appellant's Brief from a discussion about the crime-fraud exception, where the question is whether the client requested assistance in the commission of a crime. Because a threat is not a request for an attorney's help in committing a crime, it falls outside the crime-fraud exception. But that does not place it outside the attorney-client privilege. Asking whether the communication is a "request for advice" to determine whether the communication is privileged incorrectly reads Wigmore's first requirement ("where legal advice of any kind is sought"). Most of what a client says to an attorney is not a request for advice; even a client's recitation of the underlying facts of the case is not a "request for advice." The first Wigmore question is *whether advice has been sought* — not whether each communication is a request for advice. It is the third element at issue here: whether the communications *relate to that purpose*. "To make the communications privileged, they must relate to professional advice and to the subject-matter about which the advice is sought." *Newman v. State*, 384 Md. 285, 302, 863 A.2d 321, 331 (2004)

(citation and quotation marks omitted) (threats about spouse and children were related to the divorce and custody dispute). Whether a communication relates to the representation should be viewed in a way that avoids piecemeal dissection of attorney-client conversations, allows room to breathe, and appreciates the dynamics of the attorney-client relationship and the allowance required to promote free and open conversations within that relationship.

### C. Attorney-client oral communications should not be dissected line-by-line to determine privilege.

The government seeks to limit the scope of privileged discussions between a defendant and his attorney, and to allow the inspection and dissection of discussions between criminal defendants and their attorneys about matters that often trigger an emotional response. The attorney-client privilege "is not a case in which [the] traditional view that testimonial privileges should be construed strictly should be applied." *Purcell v. DA for the Suffolk Dist.*, 424 Mass. 109, 116, 676 N.E.2d 436, 441 (1997).

For a contrary view the government cites *Adams v. Franklin*, 924 A.2d 993 (D.C. 2007). In *Adams*, a party sought to depose the other party's former attorney to authenticate a settlement demand letter, which would implicate client communications about the letter. The court held that the limited proposed

questioning would not reveal client communications. *Adams* does not suggest that the privilege should be narrowly construed to allow sentence-by-sentence scholarly parsing of communications that without question occurred within a *bona fide* attorney-client relationship and during a discussion about events in a legal proceeding.

The government also urges that *Jones v. United States*, 828 A.2d 169, 171 (D.C. 2003), warrants a narrow interpretation. Jones made statements to his girlfriend, who just happened to be an attorney who did not practice criminal law, and the conversation was about crime scene science. *Jones* involved a situation where there was no clear attorney-client relationship, and so it was necessary to probe the nature of the communications to determine whether an attorney-client relationship existed. *Jones* is distinguishable from this case, where there was an undisputed attorney-client relationship.

In criminal cases, a person is faced with losing their livelihood, being separated from their families, and being locked in a cell; the cases call for "giv[ing] clients breathing room to express frustration and dissatisfaction with the legal system and its participants." *In re A Grand Jury Investigation*, 453 Mass.

453, 458, 902 N.E.2d 929, 933 (2009).[1] As Professor Imwinkelried notes, the view that the attorney is nothing more than a gatherer of facts, such that anything outside the gathering of facts is unprivileged, is "incomplete and outmoded." 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. Law R. 871, 886 (2022). He writes:

> Facts come associated with feelings. The client almost always has some emotional reaction to a legally pertinent event, and in many cases the client's thoughts about the event will be intensely emotionally charged. ... If the attorney does not allow the client to express those emotions and feelings during the interview process, the client may withhold or hold back legally relevant factual information. Denying the client that opportunity will inhibit the flow of information between client and attorney. The contemporary view is that the attorney should not merely passively listen to the client's statements of associated emotions. Rather, the attorney ought to adopt a general approach of affirmatively encouraging such expressions. Doing so increases the flow of information between client and attorney and enhances the attorney's ability to promote the observance of law.

*Id.* at 887. Regarding the attorney's role in public safety, Professor Imwinkelried notes that "[t]he attorney can promote the observance of the law only if the attorney realizes the emotions that may tempt the client to violate the law," and

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[1] Though intense emotions are not limited to criminal cases. Many other legal disputes trigger emotional responses, such as child custody, housing eviction, and medical malpractice, to name a few.

that typically the "emotional release of venting" causes those emotions to calm. *Id.* at 889.

In *Parsing Privilege*, it is not clear that Professor Imwinkelried advocates for the exclusion of threats, rather than providing guidance and limits for jurisdictions that decide to do so. Professor Imwinkelried discusses the more modern approach of "active listening" and how it advances the attorney's dual roles as an advocate for the client and a public servant. *Id.* at 888-89. After a client has "vented" the attorney is better able to "help the client realize the need to control the emotions and perform their duty to observe the law." *Id.* at 889. Under this view, line-by-line analysis is improper so long as the "primary purpose" test is passed. "The prospect of atomistic, line-by-line review may deter attorneys from employing active listening and encouraging clients to express the emotions that the attorney needs to identify to properly advance the client's individual interests and promote the public interest in compliance with the law[.]" *Id.* at 889-90. Under this primary purpose test, if "the predominant purpose of the consultation" was to provide legal services, the inquiry ends without a line-by-line review. *Id.* at 990.

In opposing this modern view, the government goes to the other extreme, citing an author who would eliminate the privilege altogether. (Govt. Br. at 41,

citing Dru Stevenson, *Against Confidentiality*, 48 U.C. Davis L. Rev. 337 (2014)). Stevenson calls confidentiality rules for lawyers "destructive." *Id.* at 343. Stevenson imagines that "sophisticated lawyers abstain from questioning their clients about certain matters, or otherwise avoid having their clients tell them the truth." *Id.* at 347. He also believes that clients "do not know or understand the confidentiality rules," so we might as well do away with them. *Id.* Stevenson contends that the attorney-client privilege should be replaced with marketplace incentive — that lawyers will follow good practices because those who fail to protect information would suffer in the marketplace: "Lawyers have plenty of personal and marketplace incentives to guard clients' confidential information and would do it without the rule." *Id.* at 346.

If defense lawyers never sought the truth from clients, including those who are guilty of a crime, it would be difficult to get plea agreements done, which resolve a majority of criminal cases.[2] And contrary to how Stevenson

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[2] "[P]lea bargains have become [] central to the administration of the criminal justice system[.]" *Missouri v. Frye*, 566 U.S. 134, 143, 132 S. Ct. 1399, 1407 (2012). A study by the Pew Research Center found that only 2% of cases in the federal system result in trial, and many states have trial rates of less than 3%. American Bar Association, *2023 Plea Bargain Task Force Report*, p. 36 n.2. Available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf

supposes criminal defense attorneys operate, privilege is at the forefront of the attorney-client relationship in criminal cases; the relationship and the attorney's ability to effectively represent the client depend on it. In discussing "The Client Interview," the first instruction in the District of Columbia Public Defender Service's *Criminal Practice Institute Manual* (2015)[3] is: "The client should be carefully advised that all communications between attorney and client are absolutely confidential." *Id.* at 2.2. Likewise, the Superior Court's *Attorney Practice Standards for Criminal Defense Representation* (2010) states that "[a]t the initial meeting" the attorney should "[e]xplain the role of counsel, the attorney-client privilege and its limits, and advise about the consequences of the client discussing the facts of the case with others without first consulting with the attorney." *Id.* at 9.

### D. The government wrongly devalues the privilege and over-simplifies the real-world application of the rule it advocates.

The government argues that the attorney-client privilege has little impact in what clients tell their attorneys, citing a law review article by Professor Imwinkelried that reviewed survey and interview-based studies. (Govt. Br. at

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[3] Available at www.pdsdc.org/docs/default-source/default-library/2015-cpi.pdf

41.) The government's argument here contradicts Supreme Court precedent concluding that the privilege leads to disclosures that would otherwise not have been made, and questioning the significance and real-world application of the same three studies reviewed by Professor Imwinkelried. *Swidler & Berlin v. United States*, 524 U.S. 399, 409 n.4, 118 S. Ct. 2081, 2087 (1998).

The government tries to explain what is good for the relationship between a criminal defendant and their attorney; that the outcome sought by Mr. Moore and the PDS "would poison the attorney-client relationship." (Govt. Br. at 40.) Advice from the fox about how to guard the henhouse should be disregarded.

If the privilege is undercut, the government imagines an easily-navigated world where attorneys "would act in good faith in exercising their discretion to disclose client confidences." (Govt. Br. at 43.) This fails to appreciate the inherent tension between (1) zealously defending a client and protecting confidences versus (2) maybe protecting public safety by disclosing threats that may *or may not* be genuine, that may dissipate even if momentarily genuine, but that will cause the attorney to become an adversarial witness against the (former) client.

The District goes even further, effectively defaming defense attorneys, arguing that many defense attorneys would be motivated to disclose alleged threats if assured the client would be punished: "[M]any lawyers may be willing

to go through the ordeal of breaking their client's confidences *only* if assured that their testimony would be admissible in court and lead to real consequences." (District Br. at 18 (emphasis in original).) That claim is outrageous.

Professional Rule 1.6 and the attorney-client privilege should work in tandem, allowing the attorney to make the disclosures *safely*. The government's stated concern is that this allows the alleged threat to go unpunished, as if that is better than: (1) the threat is never expressed, the attorney never knows the level of the client's frustration, and so the attorney cannot intervene to calm and dissuade the client; or (2) the threat is made but the attorney errs on the side of non-disclosure because the attorney-client privilege will not insulate the disclosure. It will rarely be a case where the attorney *knows* a threat is serious, and if the attorney cannot safely disclose the threat, the attorney will be motivated to treat the threat as not serious or serious but fleeting (an attorney can go on that presumption throughout their career and likely never be wrong). And to the government's concern about a threat going unpunished, in these alternative scenarios the undisclosed threat also goes unpunished, but without any report to and investigation by law enforcement and without any warning to the alleged target.

Along this line the Supreme Court has dismissed concerns about the loss of evidence, observing that without the privilege the "lost" evidence often would not have existed, making "the loss of evidence [] more apparent than real." *Swidler*, 524 U.S. at 408, 118 S. Ct. at 2086. "[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place." *Id.*

The government claims that attorneys can feel free to err on the side of disclosure because "attorneys understand that courts retain discretion to admit an attorney's testimony only where necessary in the interests of justice," citing *Neku v. United States*, 620 A.2d 259 (D.C. 1993). (Govt. Br. at 44.) There is no support for this in the record, nor would one expect to find it. *Neku* involved balancing the right of a defendant to confront a witness with impeachable statements, against the right of confidential communications with one's attorney.

The government argues that the conflict for the attorney could be solved by mandating that attorneys disclose serious threats (Govt. Br. at 43. n. 10), but in addition to something this court cannot change in an opinion, that does not help an attorney trying to decide whether the threat is serious. An attorney who knows that disclosure will harm the client (who gets prosecuted) and at the very least will be highly unpleasant for the attorney (forced to be the witness

necessary for conviction), is still motivated to presume or guess that the threat is not serious, knowing that such a presumption will almost certainly be correct. And again, that same evidence for which the government would like to mandate disclosure will not exist if, by virtue of the rule they advocate, the threat is not made and so the attorney cannot calm and advise the client and, if warranted, notify appropriate authorities.

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

The government contends that a threat is different from an admission to a crime; that hearing a threat is no different from witnessing any other crime during the meeting. But the alleged threats are communications, which are the very nature of attorney-client interactions. There is no reason why words that constitute a threat cannot be both a completed crime and something that the attorney may not testify about. On this point the government cites no authority to the contrary, other than to say that the published opinions that have gone against its position did not address the argument. (Govt. Br. at 43.) In the context of another, weaker privilege, one federal appellate court dismissed the distinction. *United States v. Chase*, 340 F.3d 978, 982 (9th Cir. 2003).

The District makes a new argument not previously made in this appeal — that threats to one's attorney fall within the crime-fraud exception. Their

reasoning is that the attorney is being used to hear the threat and to convey it. (District Br. at 13.) Here the District believes that a "conscientious attorney" will report it under Rule 1.6, ignoring the uncertainty in such utterances and the attorney's competing obligations. But it is a safe assumption that attorneys rarely report such threats, such that uttering them to one's attorney is a poor mode of publication. In claiming that this was the first time Mr. Harvey had a client threaten a prosecutor, the District misstates the record. (District Br. at 15.) Mr. Harvey testified that this was the first threat "such that [I] had to report it to a judge." (5/30/19 at 117.) In fact it happened "maybe three of four" times without reporting. (*Id.* at 183.) And by "had to report it to a judge," Mr. Harvey meant that he reported the alleged threat solely because he was forced to do so to get out of the case.[4] The allege threat was not disclosed to the prosecutor that day or the next court date. (Apx. 77-80.) The argument that Mr. Harvey was used to threaten Ms. Guest is short on facts and is not within the narrow scope of the crime-fraud exception, which covers "communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *United States v. Zolin*, 491

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[4] Harvey at trial: "I asked to withdraw. And if I could not withdraw and 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. And I did." (5/30/19 at 184.) Harvey in original case: "I can't represent him. And if you force me to tell you, then I'll just have to tell you this time." (6/29/18)

U.S. 554, 563, 109 S. Ct. 2619, 2626 (1989) (citation omitted). The Supreme Court of Maryland declined an expansive approach, "join[ing] 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 …." *Newman*, 384 Md. at 309.

**F. The majority opinion follows the modern emerging consensus.**

The government claims that "the majority's new rule distorts the Wigmore attorney-client privilege beyond recognition and lacks any real limiting principle." (Govt. Br. at 18.) The panel majority's opinion was the fourth published appellate court opinion with the same interpretation, following Massachusetts, Maryland, and Kansas, all of which vehemently declined to piecemeal attorney-client communications (with the Supreme Court of Maryland concluding that allowing Rule 1.6 disclosures to waive the privilege would be "repugnant to the entire purpose of the attorney-client privilege," *Newman*, 384 Md. 285 at 306). While the government attempts to distinguish these cases, it fails. For instance, the government argues that in *Newman* the court did not address whether the threats were for the purpose of legal advice. (Govt. Br. at 28. n.2.) But the *Newman* court, in a section titled "The Scope of the

Privilege," discussed the scope of the privilege and knew well what the legal standard was, explaining that for the privilege to apply, the communication only needs to "relate to professional advice and to the subject-matter about which the advice is sought." *Id.* at 302 (quoting prior decision). Under that view the privilege readily covered the threats, as in this case. The "limiting principle" is that the communication must, in a broad sense without "atomistic" review, "relate to" the representation.

### G. A privilege analysis may consider the context of the particular attorney-client relationship.

A privilege analysis may consider the context of the relationship. The government decries a rule that whenever a client talks to their court-appointed attorney, there is a strong presumption that a significant purpose of the communications relates to the pending case. But this presumption merely acknowledges the context of the particular relationship. The client has not retained the attorney generally, nor is it in a corporate or government agency environment where communications often fall outside an attorney-client relationship, or where organizations may attempt to cloak unprivileged statements by having an attorney involved. For indigent defendants the appointment sets the scope of the relationship, and they have no purpose in

talking about anything except matters in some way relating to the case. A contextual analysis is appropriate for understanding the special factors involved in a court-appointed client-attorney relationship, such as the environment of distrust that must be overcome. It is also relevant context that many criminal defendants have mental health struggles; "37% of prisoners and 44% of jail inmates had been told in the past by a mental health professional that they had a mental disorder." U.S. Department of Justice/ Bureau of Justice Statistics, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates*, 2011-12 (2017), at https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf. Indigent defendants may struggle to communicate eloquently and carefully. That the indigent defendant has collateral issues, as stated in a Public Defender interview that the government cites, does not take those communications outside the attorney-client relationship. If the attorney and client are discussing the client's housing situation, drug treatment, or mental health treatment, for instance, it is still within the attorney-client relationship, as all these things need to be explored and problems addressed for pretrial release, investigation, trial preparation including effective assistance and participation from the client, trial participation, and any possible sentencing hearing. The majority in the panel opinion were right to consider the context of the relationship between an

indigent defendant and a court-appointed attorney.

The District is wrong to suggest that the District and Moore are in agreement. (District Br. at 3.) Mr. Moore argues for a broader rule but supports a contextual analysis as well, as stated in the opening brief. (Br. at 19-20.) Mr. Moore simply argues that, while the nature of a court-appointment provides relevant context, the outcome here does not depend on it. In this case Mr. Moore was talking to his attorney about the case when he allegedly made statements communicating his extreme frustration about the legal proceeding and his treatment by the prosecutor. "Breathing room," even to say things that are "jarring in isolation," is required. *In re A Grand Jury Investigation, 453 Mass. at 458, 902 N.E.2d at 933*; *State v. Boatwright*, 54 Kan. App. 2d 433, 442, 401 P.3d 657 (2017). Mr. Moore's alleged statements were privileged without regard to having a court-appointed attorney.

### H. Cases cited by the Appellee and the District are distinguishable.

The opening brief discusses and distinguishes cases cited by the dissent in the panel opinion (*Ivers, Alexander, Hodgson Russ, Thomson, Hansen, Hopkinson, Jackson*).[5] In their briefs, the government and the District cite additional

[5] Only one case, *United States v. Stafford*, 2017 U.S. Dist. LEXIS 71835 (E.D. Mich. May 11, 2017), appears to be on point. The judge in that case too narrowly

appellate decisions which are also distinguishable.

The government cites *Cernoch v. State*, 128 Tex. Crim. 327, 81 S.W.2d 520, 523 (1935) (on motion for rehearing). Colbert was the prosecutor in the case; Cernoch "consulted him" about a debt owed by another person. "[I]n the course of a conversation" Cernoch made threats toward the debtor. In rejecting the claim of privilege, the appellate court's entire discussion was: "We can not agree with appellant's contention." But since Colbert was not Cernoch's attorney, there was no attorney-client relationship and the court had good reason to reject the claim of privilege.

The government goes even further back to *Pearson v. State*, 56 Tex. Crim. 607, 120 S.W. 1004 (1909). In *Pearson*, the attorney (Lassiter) was said to have "occupied the relation of attorney to [Pearson]," but the trial judge reported in the bill for appeal that "he was not clear in regard to the matter." *Id.*, 120 S.W. at 1006. Pearson and the attorney were discussing business matters. Then, "during a conversation," Pearson told Lassiter that the decedent, an attorney, would be unwise to file a divorce case for Pearson's wife. The court, without discussion, concluded that it was a "qualified threat" and therefore not privileged. But it was

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viewed whether the statements were "in pursuit of legal advice," and too loosely applied the crime-fraud exception.

not clear whether Lassiter was Pearson's attorney or the full context in which the conversation arose. Moreover, being an intermediate appellate decision from Texas more than a century old, it has little if any value here.[6]

Other cases the government cites, such as *Commonwealth v. Nichelson*, 262 A.3d 467 (Table) (Pa. Super. Ct. 2021) (unpublished), which have little persuasive value to begin with, are distinguishable as well. In *Nichelson*, it was significant that the threat happened "after the legal consultation had ended."[7]

In arguing for a piecemeal analysis of attorney-client communication, the District cites a few cases involving documents. (District Br. at 5.) But documents

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[6] The District goes even deeper into history, to an 1877 Iowa case in which a client was meeting about a civil lawsuit; the court held that the threats were separate from and had nothing to do with the litigation. *State v. Mewherter*, 46 Iowa 88, 94 (1877).

[7] The government and District also cite trial court decisions that are distinguishable. *Loguidice v. McTiernan*, 2016 U.S. Dist. LEXIS 113745 (N.D.N.Y. Aug. 25, 2016) (different topics were on the agenda for government agency meeting); *United States v. Jason*, 2010 U.S. Dist. LEXIS 25437 (N.D. Iowa Mar. 18, 2010) (unrelated to representation were an entire letter and a voicemail pertaining to getting contact information for new attorney which the client could have obtained without professional assistance); *United States v. Sabri*, 973 F. Supp. 134 (W.D.N.Y. 1996) (plans to do something like the Oklahoma City terrorist bombing for political change was not connected to representation and was further excluded by crime-fraud exception); *Int'l Brotherhood of Teamsters v. Local No. 743*, 1995 U.S. Dist. LEXIS 440 (N.D. Ill. Jan. 5, 1995) (discussion among union leaders with attorneys present; parties ordered to try to resolve which communications were privileged).

do not warrant the same kind of "breathing room" needed for clients speaking spontaneously in the moment about emotional issues and venting without the benefit of editing (or a delete button or trash can).

The government also reaches into cases involving the patient-psychologist privilege. These cases are unavailing. Like the rules for attorneys, mental health professionals generally have rules allowing them to disclose threats. As one court noted, it appears only a minority of courts have held that the profession's disclosure rule carves out an exception to the evidentiary privilege. *State v. Orr*, 291 Conn. 642, 661, 969 A.2d 750, 763 (2009). The proper interpretation is that the disclosure rule leaves the privilege intact. *Id.* This court, in the context of the rules for attorneys, consistent with the decisions of other courts interpreting their professional rules allowing attorney disclosures, has held that "the 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.") *Adams v. Franklin*, 924 A.2d 993, 999 n.6 (D.C. 2007).

This court should follow the modern view of what communications "relate to" the attorney-client relationship, adopted by appellate courts in Maryland, Massachusetts, and Kansas, rather than the assortment of distinguishable and/or aged cases.

## SIGNATURE OF COUNSEL

Respectfully submitted,

/s/ Sean R Day

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EN BANC REPLY BRIEF

has been served electronically, by the Appellate E-Filing System, upon:

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this 27th day of October 2023.

/s/ Sean R Day

Sean R. Day

# 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
(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.

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**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/ Sean R. Day**
Signature

**19-CF-0687**
Case Number(s)

**Sean R. Day**
Name

**10/27/23**
Date

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