Appeal No. 19-CF-687

En Banc Argument: February 29, 2024 at 10:00 AM

DISTRICT OF COLUMBIA COURT OF APPEALS

BRIAN E. MOORE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

REDACTED REPLY BRIEF ON BEHALF OF AMICUS PUBLIC DEFENDER SERVICE IN SUPPORT OF APPELLANT

SAMIA FAM

JACLYN FRANKFURT

*WILLIAM COLLINS

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
Telephone: (202) 628-1200

*Counsel for Oral Argument

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I. MR. MOORE'S STATEMENTS WERE "RELATED TO" HIS PURPOSE OF OBTAINING LEGAL ADVICE.

In holding that Mr. Moore's statements to counsel about the prosecutor were protected by attorney-client privilege, the division majority recognized "a strong presumption that, any time [a] client speaks to their court-appointed lawyer, a significant purpose of that communication is to receive legal advice in the case for which the lawyer has been appointed to represent them." *Moore v. United States*, 285 A.3d 228, 246 (D.C. 2022). The government devotes significant ink in its brief to characterizing this presumption as a dramatic "expansion the attorney-client privilege for criminal defendants with court-appointed lawyers," Gov. Br. at 18, suggesting that it "disavows blackletter law" by creating a "special rule" that this Court should reject. *Id.* at 2-3.[1] This argument incorrectly presupposes a default rule whereby no client utterance may be privileged unless proven to constitute a request for legal advice.[2] As Amicus demonstrated in its opening brief (at 12-20), the test for whether an individual utterance is protected by the privilege is not whether,

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[1] *See also* Gov. Br. at 14 (describing the division holding as "unmoored in the law"); *id.* at 17 (describing the majority opinion as "a radical and unwarranted departure from [the] traditional understanding of the privilege"); *id.* at 18 ("[T]he majority's new rule distorts the Wigmore attorney-client privilege beyond recognition."); OAG Br. at 2 (describing the majority presumption as a "novel expansion of the attorney client privilege").

[2] *See* Gov. Br. at 14 ("Threats are not requests for legal assistance."); *id.* at 23 (arguing that privilege should be withheld "where the nature of the communication is a criminal threat and does not contain any request for legal advice"); *id.* at 26 ("[A] client does not utter threats to obtain legal advice."); *see also* OAG Br. at 11 ("A threat does not seek or invite the provision of legal advice, and no client could reasonably believe that it does.").

viewed in isolation, it constitutes a request for legal assistance. The test is whether, considering the entire relationship, the statement "relate[s] to [the client's] purpose of obtaining" such assistance, 8 J. Wigmore, *Evidence* § 2292, at 554 (McNaughton rev. 1961) or is "made as *a part of [that] purpose*," *Id.* § 2310, at 599. Wigmore expressly contemplated that this test could be satisfied by a presumption where the client's decision to "commit[]" a "matter . . . to a professional legal adviser" was "*prima facie*" evidence that he did so "*for the sake of [obtaining] legal advice*." 8 Wigmore, *supra* § 2296, at 567. Thus, in no way did the majority's analysis "distort[] the Wigmore attorney-client privilege." Gov. Br. at 18.[3]

Jones, 828 A.2d 169, does not suggest otherwise. There, the issue was whether the privilege attached to any part of a telephone call between the defendant and his

[3] The government's argument to the contrary rests on a misconception (at 13) that the "context-specific showing" required for the privilege "should not vary based on the identity of the litigant." The privilege applies to corporate and government actors differently than it does to private individuals. *See, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981) (distinguishing the "corporate context" from "the case of the individual client"; noting that in the latter scenario "the provider of information and the person who acts on the lawyer's advice are one and the same," whereas in the former "it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers"); *In re Lindsey*, 148 F.3d 1100, 1108, 1114 (D.C. Cir. 1998) ("[u]nlike a private practitioner, the loyalties of a government lawyer . . . cannot and must not lie solely with his or her client agency"; "[i]t would be contrary to tradition, common understanding, and our governmental system for the attorney-client privilege to attach to White House Counsel in the same manner as private counsel"). Similarly, because privilege is analyzed from the privilege holder's perspective, their degree of sophistication is necessarily relevant. *See Jones v. United States*, 828 A.2d 169, 176 (D.C. 2003) (noting the trial court's observation that appellant was "very bright"). It offends no blackletter law to consider such circumstances.

attorney girlfriend, given the defendant's need to establish that he sought her advice "in a professional legal capacity." *Id.* at 175 (internal quotation marks and citation omitted). This Court had no occasion to determine whether any one statement satisfied Wigmore's "related to" test. It was in this context of determining whether the *consultation* was privileged that the Court observed the "general" rule 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.* (internal quotation marks and citation omitted). Contrary to the OAG's argument (at 4), this did not amount to a holding that no *statement* may be privileged unless motivated by a significant purpose to obtain legal advice. Critically, while the *Jones* Court's analysis turned on the nonlegal nature of the questions asked, the Court acknowledged that the same ones might well "fall within the privilege if they were expressed in a communication within a clearly established attorney-client relationship." *Id.* at 176-77. These are precisely the circumstances presented here.

Nor, contrary to the government's suggestions (at 24), can the Restatement be read to require a showing that Mr. Moore's utterances were explicit requests for legal advice. Section 72, from whence the "significant purpose" tests derives, *id.* at 175, states repeatedly that a purpose to obtain legal advice need only attach to the overall "consultation," not necessarily to the individual statements made therein.[4] As to

[4] *See, e.g.*, *Restatement (Third) of the Law Governing Lawyers* § 72 cmt. b (2000) ("The claimant of privilege must have consulted the lawyer to obtain legal counseling or advice, document preparation, litigation services, or any other assistance customarily performed by lawyers in their professional capacity."); *id.* § 72 cmt. c ("A client must consult the lawyer for the purpose of obtaining legal

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individual "communications," the Restatement provides that they are "made for the purpose of obtaining . . . legal assistance" as required for the privilege to attach, if they are "made to . . . a person who is a lawyer . . . and whom the client . . . *consults* for the purpose of obtaining legal assistance." *Restatement (Third) of the Law Governing Lawyers* § 72 (emphasis added). As noted in PDS's opening brief (at 12-16), Mr. Moore's statements easily pass this test as both arose in the context of ongoing consultations regarding the District's requests for further ankle monitoring.

Seeking a narrower definition of "relatedness" than Wigmore provides, the government and its amicus point to (1) cases involving corporate communications, *See* OAG Br. at 5; and (2) cases which read *Fisher v. United States*, 425 U.S. 391, 403-04 (1976), to limit attorney-client privilege to those statements "necessary to obtain informed legal advice which might not have been made absent the privilege."[5] The Court should reject both arguments.[6]

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assistance and not predominantly for another purpose."); *id.* § 72 Rep. Note ("The evidence codes commonly limit the privilege to client consultations for the purpose of obtaining legal assistance from a lawyer.").

[5] *See* Gov. Br. at 26-27 (citing *United States v. Ivers*, 967 F.3d 709, 714-16 (8th Cir. 2020); *United States v. Alexander*, 287 F.3d 811, 816-17 (9th Cir. 2002); *Reg. Airport Auth. of Louisville, v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006); *In re Fischel*, 557 F.2d 209, 212 n.4 (9th Cir. 1977); *United States v. Thomson*, Nos. 94-30083 & 94-30085, 1995 WL 107300, at *1 (9th Cir. Mar. 13, 1995); *United States v. Stafford*, Crim. Case No. 17-20037, 2017 WL 1954410, at *3 (E.D. Mich. May 11, 2017); *United States v. Jason*, No. 09-CR-87-LRR, 2010 WL 1064471, at **1-2 (N.D. Iowa Mar. 18, 2010); *Hodgson Russ, LLP v. Trube*, 867 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 2004); *Ullmann v. State*, 647 A.2d 324, 331-32 (Conn. 1994)).

[6] The government's reliance (at 27-28) on *Cernoch v. State*, 81 S.W.2d 520, 523 (Tex. Crim. App. 1935), *Jackson v. State*, 293 S.W. 539 (Tenn. 1927), and *Pearson*

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To begin with, the cases applying the "significant purpose" test to corporate communications are inapposite because, unlike in-house counsel who is dually obliged to safeguard a company's legal and financial future, Mr. Harvey had only one job: defending Mr. Moore in Superior Court. *See Moore*, 285 A.3d at 246. As Mr. Harvey was at pains to mention when he moved to withdraw, he was not Mr. Moore's friend. Moore App. at 55 (describing the relationship as "toxic"). Thus, there is no reason to think that Mr. Moore was addressing him in anything other than his capacity as a professional legal advisor.

The government's reliance on *Fisher* is equally misplaced, as that case did not purport to determine when an utterance would relate sufficiently to the purpose of obtaining legal assistance such that the privilege would protect it. The question there was "whether the attorney-client privilege applies to [pre-existing] documents [furnished to] an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment." *Fisher*, 425 U.S. at 402. In concluding that it does, the Court reasoned that the "purpose of the privilege is to encourage clients to make full disclosure" and that a client might be reluctant to disclose "if [he] knows that damaging information could more readily be obtained from the attorney." *Id.* at 403 (citations omitted). Even so, the Court declined to extend the privilege to other "pre-existing documents" for two reasons: (1) because "the privilege has the effect of withholding relevant information from the fact-finder," and (2) because documents "obtainable from the client" do not become "appreciably

v. State, 120 S.W. 1004, 1006 (Tex. Crim. App. 1909) is no more persuasive, as these cases predate the modern, psychologically sound view of the attorney function.

easier to obtain from the attorney after transfer to him." *Id.* at 403-04. En route to this determination, the Court opined, gratuitously, that the privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege." *Id.* at 403.

Latching onto this passage, the government contends (at 28-30) that the privilege of any utterance should depend on whether it was necessary to obtain informed legal advice. *See also* OAG Br. at 4-5. However, the *Fisher* Court's statements in this regard were dicta for at least four reasons: (1) because they were "unnecessary to the outcome of the . . . case"; (2) because they were not "an integral part of the . . . opinion"; (3) because they were not "grounded in the facts of the case"; and (4) because they concerned an issue that was uncontested and thus not subject to "refine[ment] by the fires of adversary presentation." *Albertie v. Louis & Alexander Corp.*, 646 A.2d 1001, 1005 (D.C. 1994) (citation omitted).[7] Taken together, these circumstances strongly suggest that this "passage was not a fully measured judicial pronouncement." *Id.*; *see also Murphy v. McCloud*, 650 A.2d 202, 205 (D.C. 1994) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (internal quotation marks and citations omitted)); 24 Charles Alan Wright & Kenneth W. Graham, *Fed. Prac. & Proc. Evidence* § 5490, at 441 & n.29 (1986) (describing this part of *Fisher* as "dictum";

[7] Appellants had failed to "urg[e] the attorney-client privilege" by name and the parties were in "unqualified[]" agreement about the extent of the attorney's immunity from disclosure. *Fisher*, 425 U.S. at 402.

noting that it is unsupported by citations to relevant precedent).[8]

Moreover, as Amicus outlined in its opening brief (at 18), "testing for *Fisher* necessity in a segmented utterance-by-utterance manner" would deprive the attorney-client relationship of the space it needs to function properly. 1 Paul R. Rice, *Attorney-Client Privilege in the U.S.* § 5:21 (2022). As the division majority noted, "room for the kind of wide-ranging conversation that establishes genuine trust" is especially important for indigent criminal defendants and their court-appointed counsel because "a criminal defendant who has not hired their lawyer and is not paying their bills 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 (citations omitted). The government argues (at 20-21, 30) that these circumstances are no different from an insurance defense client, whose attorney is provided by the insurer, or a corporate employee whose interests may diverge from

[8] Even if the statements in question were not dicta, they would hardly be persuasive here, as they concerned the scope of the privilege for "pre-existing documents" responsive to IRS subpoenas. *See Fisher*, 425 U.S. at 393-94; *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944) (admonishing that "words of [the Court's] opinions are to be read in the light of the facts of the case under discussion"). As the Supreme Court has held, "a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry" compels a narrower interpretation of the privilege in this setting. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984). For this same reason, the government's reliance (at 30) on *Taylor Lohmeyer L. Firm P.L.L.C. v. United States*, 957 F.3d 505, 510 (5th Cir. 2020) is misplaced. *United States v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015), a case involving "communications between a lawyer and a private investigator," is similarly inapposite, as the privilege applies more narrowly to communications originating from attorneys. *See id.* at 902 (noting that lawyer communications are only privileged where they would "reveal confidential client communications.").

her company's. However, while conflicts may arise in these contexts, such clients have the option to retain separate counsel, and may even be entitled to have such counsel provided to them free of charge. By definition, indigent criminal defendants do not have that option.

According Wigmore's "related to" test its ordinary "loose," "minimal," and "liberal[] constru[ction]," 24 Wright & Graham, *supra* § 5490, at 440-41, there is no question that Mr. Moore's statements about the prosecutor qualify. As the motions judge found, Mr. Moore's statements were expressions of "anger based on the legal advice" he was in the process of receiving. 2/25/19 Tr. 43.[9] As Amicus noted in its opening brief (at 19-20), expressions of frustration and anger play a vital role in the attorney-client relationship, even when they take the form of a threat, because they enable clients to communicate what matters to them about a case, while providing the lawyer an opportunity to address their frustration and anger. The government does not disagree. *See* Gov. Br. at 34 ("To be sure, lawyers must often defuse volatile situations with angry clients.").

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[9] This finding is entitled to appellate deference unless it is "plainly wrong or without evidence to support it." D.C. Code § 17-305. Without claiming clear error on the part of the motions judge, the government seeks to downplay this finding by asserting (at 42) that the jury rejected Mr. Moore's defense at trial that he was "just blowing off steam." *See also* Gov. Br. at 1; OAG Br. at 12. However, the jury's verdict is of no moment here, as the ruling on review is the judge's *pretrial* denial of Mr. Moore's motion *in limine*, based on an express finding of fact. In any case, the jury's verdict does not undermine this finding, as the jury was instructed that it could find Mr. Moore guilty as long as he uttered his statements "with knowledge that [they] would be viewed as a threat." 5/31/19 Tr. 308-09; *see also id.* at 275 (emphasizing this instruction in closing). Such knowledge is entirely consistent with Mr. Moore having uttered his statements in anger.

Even so, the government maintains (at 34) that Mr. Moore's statements cannot be privileged because he "could have expressed anger and hostility" differently, "as he did when he repeatedly said, 'F*ck that bitch.'" However, whether he "could have expressed [his] anger and hostility" differently is beside the point, as it does not change the fact that he was expressing anger in a manner that was related to and consistent with his continued pursuit of Mr. Harvey's services. The government's contrary logic would sanction governmental intrusions to the attorney-client relationship depending on the serendipity of a particular client's choice of words.

The government further argues (at 31-32) that Moore's statements cannot relate to the purpose of obtaining legal advice because they were made "in the public hallway at the conclusion of court proceedings after the judge had" made her rulings on the government's requests for GPS monitoring. However public the hallway was, the record does not suggest that Mr. Moore's statements were overheard by anyone. *See* 5/30/19 Tr. 55-56 (by the AAG; testifying that she had retreated to a safe distance and did not learn of Mr. Moore's statements until later).[10] This Court should reject the government's argument that Mr. Moore's statements cannot be privileged unless they were directed toward a prospective ruling. As noted in PDS's opening brief (at 15 n.4), an attorney's superior knowledge of the legal system plays an

[10] Moreover, this argument proceeds on a partial misconception (at 31-32) that Mr. Moore's alleged threat came only "after the judge had . . . rejected the AAG's request to place [him] on a GPS monitor." Not so. Rather, his threat was made, allegedly, "*prior to trial commencing*," such that there was no opportunity for the court to rule on the government's request. *See, e.g.*, R.26 at 2 (Government's Opposition to Defendant's Motion to Preclude Testimony) (emphasis added).

invaluable role in helping clients to process adverse rulings, both intellectually and emotionally, so that they are better equipped to resist the temptation to take the law into their own hands. It is for precisely this reason that the privilege also extends to "communications retrospectively reflecting on past legal services," including and especially those transmitted "after a trial." *Restatement (Third) of the Law Governing Lawyers* § 72 cmt. b.

II. THIS COURT SHOULD REJECT THE GOVERNMENT'S PROPOSAL TO CREATE AN EXCEPTION TO THE PRIVILEGE FOR THREATS.

As an alternative argument, the government urges this Court to adopt a new exception to the attorney-client privilege for "criminal threats." This Court should decline to do so because the government's proposal is unmoored from the policy objectives that the Court has deemed sufficiently compelling to warrant an exception to the privilege; because it lacks any foundation in existing case law and commentary; and because such an exception would "frustrat[e] the very purpose of the privilege" to promote public safety and the free flow of case-relevant information between attorney and client. *Cf. Upjohn*, 449 U.S. at 392.

A. THE GOVERNMENT HAS IDENTIFIED NO VALID JUSTIFICATION FOR CREATING A THREATS EXCEPTION.

Currently, the only exception to the attorney-client privilege that this Court has recognized is the crime-fraud exception. *See In re Pub. Def. Serv.* (*In re PDS*), 831 A.2d 890, 900 (D.C. 2003). The rationale for that exception is that "the purposes of the privilege . . . do not include concealing abuses of the attorney-client relationship to further the commission of a crime or fraud." *Id.* at 908 (internal

quotation marks and citation omitted). There is no question that privilege applies to communications regarding "past or completed crimes," even though this limitation inhibits the government's ability to prosecute potentially serious offenses. *Id.* at 906 (citation omitted). Likewise, the crime-fraud exception excludes communication regarding ongoing or future crimes, unless they "actually were in furtherance of an ongoing or future crime." *Id.* at 895; *accord id.* at 906-10. This Court has held that these constraints are "fundamental" to the sound administration of justice, *id.* at 906, given the "vital" role that the privilege plays in that regard. *Id.* at 901. "By encourag[ing] full and frank discussions between attorneys and their clients" regarding past crimes, completed crimes, and those ongoing crimes that attorney-client consultation does not facilitate, the attorney-client privilege "promotes broader public interests in the observance of law and the administration of justice," both by promoting disclosure of case-relevant information and by enabling the attorney to "discourag[e] clients from illegal conduct." *Id.* at 900-01 (internal quotation marks and citation omitted). Thus, the privilege only relents when there is probable cause to believe it has actually been "abused."

Separately, the Rules of Professional Conduct authorize attorney disclosure of client confidences "to the extent reasonably necessary to prevent" (or, in the case of financial injury, to "prevent, mitigate or rectify") certain kinds of harms to people, property, and the legal system. D.C. R. Prof. Conduct 1.6(c)(1) ("a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm"); *id.* 1.6(c)(2) ("the bribery or intimidation of witnesses, jurors, court officials, or other persons . . . involved in proceedings before a tribunal"); *id.* 1.6(d)(1) (a

"crime or fraud" that is "reasonably certain to result in substantial injury to financial interests"); *id.* 1.6(d)(2) ("substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of the crime or fraud"). These exceptions have been drawn narrowly, in view of the fact that a lawyer's "ethical obligation . . . to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance." *Id.* 1.6 cmt. [2].

Unlike the aforementioned exceptions, the government's proposed threats exception is not rooted in the specific need to prevent death, substantial bodily harm, or abuses of the attorney-client relationship. Rather, the government urges such an exception because piercing the privilege would facilitate the prosecution of a completed crime. Such a garden-variety concern has never justified piercing the attorney-client privilege, which necessarily shields from the prosecution evidence that would be helpful to it in pursuing criminal prosecutions.

B. A THREATS EXCEPTION IS NOT SUPPORTED BY EXISTING CASE LAW AND COMMENTARY.

The government's affirmative case for recognizing an exception to the privilege for threats boils down to three contentions: (1) that "[c]rimes committed in the presence of one's attorney" can never be protected by attorney-client privilege, Gov. Br. at 24; *see also id.* at 38 ("Because Moore's threatening statements were crimes, the privilege should not apply."); (2) that a threats exception follows logically from the existence of a crime-fraud exception, *id.* at 38 n.7; and (3) that a

threats exception has been "endorsed" by multiple commentators, *id.* at 33-34 n.3, 38. None of these arguments has merit.

To begin with, the government offers no support in caselaw or scholarship for its assertion (at 24) that "[c]rimes committed in the presence of one's attorney" cannot be privileged, even where, as here, they consist entirely of communications directed to an attorney in confidence.[11] Assuming "'[t]he privilege does not extend to a [nonverbal] act simply because the client performed [it] in the lawyer's presence,'" Gov. Br. at 37-38 (quoting *Restatement (Third) of the Law Governing Lawyers* § 69e), there is no question that it applies when, as here, the "act" consists of "communication," or any other conduct whose "purpose . . . is to convey information to the lawyer," *Restatement (Third) of the Law Governing Lawyers*

[11] The government argues (at 45-49) that Moore had no reasonable expectation of confidentiality in the threat he allegedly uttered on June 29 because on April 12, Harvey warned that any future threat would be reported. As the division majority noted, Harvey's warning did not vitiate Moore's expectation of privilege because it did not constitute a promise to disclose. Indeed, Harvey had no power to waive the privilege on Moore's behalf. Even assuming Harvey's warning carries some weight, this case is nothing like *United States v. Auster*, 517 F.3d 312, 315, 320 (5th Cir. 2008), where the defendant was warned "repeatedly" regarding his therapist's duty to report his threats, or *United States v. Schwartz*, 698 F. App'x 799, 801 (6th Cir. 2017), and *Commonwealth v. Nichelson*, 262 A.3d 467 (Table) at *3 (Pa. Super. Ct. 2021) (unpublished), where the statements in question came immediately after the warnings. In any event, the question whether Harvey's statement two and a half months prior sufficed to vitiate Moore's expectation of privilege is a mixed question of law and fact that the government waived by failing to raise it below. Had the issue been raised properly, Moore could have responded with information regarding Harvey's previous advice on the privilege. *See, e.g.*, *Randolph v. United States*, 882 A.2d 210, 218-19 (D.C. 2005) (noting that affirmance on an alternate ground is inappropriate where appellant has not had "a reasonable opportunity to be heard with respect to the reasoning on which the proposed affirmance is to be based").

§§ 69b, 69e. As the privilege exists to protect freedom of consultation, it necessarily extends greater protection to *words* than it extends to *deeds*. *See* 8 Wigmore, *supra* § 2306, at 588 (distinguishing "communications" from "acts").

Moreover, there is no merit to the government's contention (at 38 n.7) that "it would be incongruous" to withhold privilege under the crime-fraud exception, while extending its protections to those statements, like threats, which constitute crimes in and of themselves.[12] As discussed, the crime-fraud exception exists to prevent abuse of the attorney-client privilege and thus applies "where a client 'consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud.'" *In re PDS*, 831 A.2d at 909 (citation omitted). Threats, on the other hand, do not involve an abuse of the privilege and need not be motivated by "purpose . . . of obtaining assistance to engage in a crime or fraud" or any purpose at all. Rather, it suffices for the speaker to know his words will be perceived as threatening. *Carrell v. United States*, 165 A.3d 314 (D.C. 2017) (en banc). Moreover, a client does not succeed in "obtaining assistance to engage in a crime or fraud" simply because his attorney hears him utter a threat. Rather, for a communication to "materially advance[] a crime or fraud," *In re PDS*, 831 A.2d at 902, the attorney must take a

[12] The OAG separately argues (at 13-14) that Mr. Moore's statements about the AG are subject to the crime-fraud exception because transmission of the threat to Harvey was "itself an integral step in the commission of a crime." However, the District of Columbia is not a party to this appeal, and the United States has not raised the crime-fraud exception as an independent basis for affirming. Because "'[a]n amicus curiae must take the case as he finds it, with the issues made by the principal parties,'" this issue has been waived. *See, e.g.*, *Apartment & Off. Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772, 784 (D.C. 2019) (quoting *Givens v. Goldstein*, 52 A.2d 725, 726 (D.C. 1947)).

more active role, for instance by "agreeing to help the client carry out his illegal scheme instead of rejecting it outright." *Id.* at 909 (citation omitted); *see also Newman v. State*, 863 A.2d 321, 335-36 (Md. 2004) (joining "colleagues on both the federal and state levels who have required more than a mere statement of the intent to commit a crime or fraud to trigger the crime-fraud exception to the attorney-client privilege") (collecting cases). A threat confided to one's attorney does not implicate the crime-fraud exception or its underlying rationale.

Indeed, while the government claims (at 38 n.7) that a threats exception would bring much needed "[]congru[ency]" to this area of the law, such an exception would, in fact, be at odds with *In re PDS*. There, in holding that some "actual[] . . . furtherance of an ongoing or future crime or fraud" was required for the crime-fraud exception to apply, *In re PDS*, 831 A.2d at 895, the Court reasoned that the benefit to society of extending the privilege where "the client misguidedly contemplates or proposes actions that the client knows to be illegal" outweighs the benefit that might be gained from withholding the privilege to facilitate prosecution, as long as the attorney persuades the client to abandon the illegal plan. *Id.* at 901. Specifically, the Court reasoned that "encourag[ing] clients to make such unguarded and ill-advised suggestions to their lawyers" is "vital" to the administration of justice because lawyers have a special obligation "to urge the client, as forcefully and emphatically as necessary, to abandon illegal conduct or plans" and because "[t]he sincere counsel of a trusted advisor will persuade many clients to comply with the law." *Id.*

A threats exception would turn this logic on its head, making whether the consultation furthered or hindered an unlawful proposal irrelevant whenever there is

probable cause to believe that the attorney has become "the percipient witness to a [completed] crime." Gov. Br. at ix. Essentially, the government asks this Court to conclude that the attorney's role as a "trusted advisor" loses its value to society under these circumstances.[13] But there is no reason to believe that the attorney's unique ability to "persuade . . . clients to comply with the law" is any less "vital" or effective when the communication at issue constitutes a completed crime. Simply put, although a threat to commit murder is bad, an actual murder is much, much worse. This is true regardless of whether the proposal to commit murder constitutes a completed crime or not.

Lacking case support, the government argues (at 33-34 n.3, 38) that its threats exception has been "endorsed" by multiple commentators. Not so. To begin with, there is general agreement that because threats may be related to the purpose of obtaining legal services, the question of privilege should depend primarily on what rule will best enable lawyers to "discourag[e]" clients from "act[ing] upon" threats, rather than what will best facilitate prosecution of completed threats. 24 Wright & Graham, *supra* § 5490, at 442. Moreover, although there is some agreement that a threats exception would be "*one way*" of enabling lawyers to "discourag[e]" their clients from "act[ing] upon" threats, *id.* (emphasis added); *accord* Gov. Br. at 34 n.3 (internal quotation marks and citation omitted), the authorities cited by the

[13] Alternatively, the government argues (at 41-44) that a threats exception would not hinder counsel's ability to function as a "trusted advisor" in the manner that *In re PDS* contemplates. This argument should be rejected for the reasons set forth in Section II.C below.

government stop short of concluding that it is the *best* way to do so.[14] As the esteemed authors of these treatises would acknowledge, Rule 1.6(c) already allows attorneys to "discourag[e]" clients from "acting upon" the threats they make by advising them "that the threat . . . will be reported to authorities" and will result in attorney withdrawal and the potential for further investigation and prosecution if the threat is "not recanted." 24 Wright & Graham, *supra* § 5490, at 442. That is precisely the leverage that courts traditionally trust to dissuade clients from engaging in misconduct. *In re PDS*, 831 A.2d at 901 ("We believe that lawyers' efforts to prevent the introduction of false evidence are often successful, in part because the necessity of the lawyer's withdrawal will dissuade clients from pursuing plans to testify falsely."); *see also State v. Boatwright*, 401 P.3d 657, 660, 664 (Kan. Ct. App. 2017); *In re Grand Jury Investigation*, 902 N.E.2d 929, 932-33 (Mass. 2009); *Purcell v. Dist. Att'y for Suffolk Dist.*, 676 N.E.2d 436, 440 (Mass. 1997). The government offers no reason to believe it will not suffice here.

C. A THREATS EXCEPTION WOULD "FRUSTRAT[E] THE VERY PURPOSE OF THE PRIVILEGE."

As noted in PDS's opening brief (at 20-25), a threats exception would frustrate the purpose of the privilege, (1) by "chilling non-threatening expression" regarding

[14] Notably, although Imwinkelried has advocated a narrow exception to the privilege for a specific kind of "illegal threat"—that which threatens "reasonably certain death or substantial bodily injury," 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, 904-905 (2022) (citation omitted)—it does the government no good here as they have waived any argument that Mr. Moore's threats fell into this narrow category. *See* Gov. Br. at 36 n.5.

case-relevant information, *Counterman v. Colorado*, 600 U.S. 66, 77-78 (2023); (2) by "reducing the prospect that the lawyer will learn of a serious threat to the well-being of others," *Purcell*, 676 N.E.2d at 440; and (3) by making lawyers "reluctant to come forward" and make permissive disclosures under the ethical rules, based on their desire not to harm their clients, *id.*; *In re Grand Jury Investigation*, 902 N.E.2d at 933 (noting that withholding privilege from threats "would discourage lawyers from exercising their discretion to make [permissive] disclosures").[15]

In response, the OAG argues (at 17) that "there is no basis for concluding" that a threats exception would result in "any additional 'chilling' of client speech . . . beyond what already occurs" under the Rules of Professional Conduct. However, this argument assumes incorrectly that a threats exception would not expand access to confidential attorney-client communications beyond the "status quo" under Rule 1.6(c)(1). OAG Br. at 17. Unlike the threats exception that the government proposes, permissive disclosure under Rule 1.6(c)(1) does not automatically vitiate the privilege. *See* D.C. R. Prof. Conduct 1.6 cmts. [6]-[8]. Further, while Rule 1.6(c)(1) authorizes disclosure only "to prevent death or substantial bodily harm," OAG Br. at 17, an exception based on D.C.'s threats statute would be far broader. The felony threats statute penalizes threats to property to the exact same degree as threats to human life. D.C. Code § 22-1810. Moreover, under those statutes, a person's

[15] In addition, the government's proposal should be disfavored because it goes beyond what is needed to prevent harm or injury to others, and because it will disproportionately impact members of cultural, religious, and racial minorities, whose speech is more likely to be regarded as dangerous. *Counterman*, 600 U.S. at 88-89 (Sotomayor, J., concurring in part and concurring in judgment).

likelihood of following through on a threat is irrelevant, so long as the person is *apparently capable* of following through on it. *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971).

Citing law review articles, the government contends that "the fear of chilling client communication is overblown" because without counsel's intervention, "[m]ost clients do not know or understand the confidentiality rules." Gov. Br. at 40-41 (internal quotation marks and citation omitted); *see also* OAG Br. at 8-9. However, whether clients understand the privilege without counsel is beside the point, as creating a threats exception would "prompt [] lawyer[s] to warn [their] client[s] in advance that the disclosure of certain information may not be held confidential." *Purcell*, 676 N.E.2d at 440; *accord* 1 Rice, *supra* § 5:21. "The most recent research data indicates that if, at the very time of communication, a layperson actually knows that an exception will apply to the communication, in many cases that knowledge may render the layperson unwilling either to consult with a confidant . . . or to reveal sensitive information to the confidant." 2 Edward J. Imwinkleried, *The New Wigmore* § 6.13, at 1349 (3d ed. 2016).[16] Currently, criminal defense lawyers are trained to build rapport by "carefully advis[ing] [each client] that all

[16] *See* Deborah Paruch, *The Psychotherapist-Patient Privilege in the Family Court: An Exemplar of Disharmony Between Social Policy Goals, Professional Ethics and the Current State of the Law*, 29 N. Ill. Univ. L. Rev. 499, 531-32 (2009) (finding "ample empirical evidence in support of the necessity for the psychotherapist-patient privilege"; noting that "[a]lthough [one researcher] initially reached an opposite conclusion, his early conclusion appears to be based principally on . . . unaware[ness] of the existence of privilege" and that "[o]ther studies . . . have clearly demonstrated that a patient's willingness to self-disclose sensitive information is significantly higher once they are informed that a psychotherapist-patient privilege exists").

communications between attorney and client are absolutely confidential." PDS Criminal Practice Institute Manual 2.2(I)(A) (2015 Supp.). If the Court were to adopt a threats exception, this advice would certainly change to reflect it, with serious attendant consequences for the free flow of information.

Finally, the government seeks to minimize the consequences of creating a threats exception by arguing (at 43-44) that "the prospect of an attorney testifying against a client is rare," because attorneys will exercise "discretion" and "good faith" in deciding to report a threat,[17] and because judges will do the same, in deciding whether it is "necessary in the interests of justice" for an attorney to testify. This argument assumes incorrectly that every prosecution for a threat relayed to an attorney will arise out of that attorney's own report. Adopting a threats exception may enable the government to compel attorney testimony about the context of a threatening gesture that is caught on surveillance. Moreover, the additional layers of protection that come from the good faith and discretion of attorneys and judges will do little to counter the chilling effects of a threats exception because they are uncertain. "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

[17] The government does not dispute, and therefore concedes, that a threats exception will serve to make attorneys more reluctant to report the threats they receive. Against this concern, the government suggests (at 43 & n.10) that the Court could address any reluctance by making public safety reporting mandatory, rather than permissive. However, the chilling effect remains because the standard for determining whether to report will inevitably be open to interpretation.

Respectfully submitted,

/s/
Samia Fam
Bar No. 394 445

/s/
Jaclyn S. Frankfurt
Bar No.415 252

/s/
*William Collins
Bar No.1029604

PUBLIC DEFENDER SERVICE
633 Indiana Avenue, NW
Washington, DC 20004
(202) 628-1200
Fax: (202) 824-2784

*Counsel for Oral Argument

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served, by the Appellate E-Filing System, upon:

Chrisellen R. Kolb, Esquire, Chief of the Appellate Division, Office of the United States Attorney USADC.DCCAFilings@usdoj.gov

Graham Phillips, Solicitor General, Office of the Solicitor General, Graham.Phillips@dc.gov

Sean R. Day, Counsel for Appellant, at Sean@DayInCourt.Net

this 12th day of February, 2024.

/s/
William Collins

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed April 3, 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, filed April 3, 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

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(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

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

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

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

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

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

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19-CF-687

Case Number(s)

William Collins

Name

2/9/2024

Date

WCollins@PDSDC.ORG

Email Address