NO. 3:13-0157

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	**Appeal from the Circuit Court**
Plaintiff-Appellee,	)	**of the 12th Judicial Circuit**
	)	**Will County, Illinois**
	)	
v.	)	**Indictment No.: 09 CF 1048**
	)	
	)	
DREW PETERSON,	)	**Honorable Edward Burmilla, Jr.**
Defendant-Appellant.	)	**Judge Presiding**
	)	

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

Counsel for Defendant-Appellant:

STEVEN A. GREENBERG
STEVEN A. GREENBERG AND ASSOC., LTD.
53 W. JACKSON BOULEVARD, SUITE 1260
CHICAGO, ILLINOIS 60604
(312) 879-9500

HAROLD J. KRENT
CHICAGO-KENT COLLEGE OF LAW
565 WEST ADAMS STREET
CHICAGO, ILLINOIS 60035

Of Counsel:

JOHN W. HEIDERSCHEIDT
703 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60605

ANDREW S. GABLE
330 S. WELLS STREET, SUITE 400F
CHICAGO, ILLINOIS 60606

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

POINTS AND AUTHORITIES

I. DREW WAS DENIED A FAIR TRIAL WHEN ATTORNEY HARRY SMITH TESTIFIED ABOUT A PRIVILEGED CONVERSATION WITH STACY THAT HAD BEEN RULED INADMISSIBLE, AND WAS HEARSAY OPINION INSINUATING DREW WAS GUILTY OF MURDER.

A. Attorney Smith never should have testified since, as the trial court held, the discussion was protected by attorney-client privilege.

B. Drew received ineffective representation when counsel, for no understandable purpose, called Attorney Smith as a witness so that he could tell the jury that Stacy had information about how Drew killed Kathleen, that Drew thought Stacy was telling people he killed Kathleen, and that Drew was a dirty cop.

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, VIA THE FORFEITURE BY WRONGDOING DOCTRINE, HEARSAY STATEMENTS THAT THE COURT HAD PREVIOUSLY FOUND UNRELIABLE.

A. **The prosecution did not prove by a preponderance of evidence that Drew Peterson killed Kathleen Savio with the intent of making her unavailable as a witness for a legal proceeding.**

B.
The prosecution did not prove by a preponderance of the evidence that Drew Peterson killed Stacy Peterson with the intent of making her unavailable as a witness for a legal proceeding.

1.
There was insufficient evidence that defendant was responsible for Stacy Peterson's disappearance.

2. Intent to prevent testimony at a future proceeding.

C.
Even if the common law forfeiture by wrongdoing doctrine applies, the due process clause operates as an independent check on admission of hearsay statements.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING JEFFREY PACHTER'S TESTIMONY BECAUSE THE STATE FAILED TO PROVIDE PROPER NOTICE OF THE TESTIMONY UNDER RULE 404(b), WHICH WAS PREJUDICIAL PROPENSITY EVIDENCE.

VI. DREW WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT

VII. THE CUMULATIVE ERRORS DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL AND CAST DOUBT UPON THE INTEGRITY OF THIS PROCEEDING.

NATURE OF THE CASE

This appeal arises from the conviction by a jury of Drew Peterson (“Drew”) for the death of Kathleen. No question is raised about the pleadings.

JURISDICTION

Jurisdiction is proper under Supreme Court Rule 603.

STATEMENT OF FACTS

In early 2002, Drew and his wife Kathleen encountered marital difficulties. (R. 8269).

On July 18, 2002, Kathleen called the Bolingbrook Police, telling Lieutenant Teresa Kernc - who responded to her call - that she had been served with a criminal complaint for battery against Stacy Peterson ("Stacy"). (R. 8772; 8674). Kathleen intimated she was angry with Drew for obtaining the complaint. (R. 8783). She said Drew broke into her home at 392 Pheasant Chase on July 5, 2002, pushed her down on the stairs and pulled a knife. Drew, according to Kathleen, withdrew, saying he "couldn't hurt" Kathleen, threw down a garage door opener, took off an earpiece, and then left. (R. 8677-8684).

Lt. Kernc asked Kathleen to write a statement about the event. She did so, omitting any mention of the knife. After the lieutenant directed her to write about the knife, Kathleen complied, but then scratched it out. (R. 8750-8751).

On June 3, 2003, Kathleen visited her internist, Vinod Motiani, M.D. (R. 9832). Kathleen had seen Dr. Motiani since 1992. She regularly complained of being fatigued, irritable, and depressed. (R. 9846-9847). Dr. Motiani noted Kathleen's regular chest

pains, family history of diabetes and high cholesterol, and heart murmur. (R. 9850). At one point Dr. Motiani believed Kathleen had fibromyalgia. (R. 9858).

In September 2003, Kathleen rented the basement of her home to Kristin Anderson's family. Three weeks went by when Kathleen told Anderson that Drew had attacked her with a knife in July 2002. Kathleen came off to Anderson as "security conscious," sleeping with a knife under her bed. (No knife was found anywhere when the police searched at the time of her death (R. 10677). Anderson also knew Kathleen locked the doors to 392 Pheasant Chase frequently. (R. 7980-8003).

In October 2003, Kathleen and Drew agreed to a bifurcated divorce proceeding, whereby the bonds of their marriage were dissolved, but the marital estate was not distributed. Shortly thereafter, Drew married Stacy. (R. 6896). Because they were divorced before she died, Kathleen’s death had no effect on the property distribution. 750 ILCS 5/503, et. seq. (R. 6797).

Mary Sue Parks testified that near Thanksgiving, 2003, Kathleen showed her three red marks on the middle of her neck. (R. 8086). Kathleen said Drew had snuck in to her home, grabbed her by the neck, pinned her down, and said, "why don't you just die." Kathleen also told Parks that Drew told her "he could kill her and make her disappear." (R. 8087-8088; 8097). Parks offered to take Kathleen and her children in, but Kathleen declined. (R. 8089). On cross, Parks conceded she could not have been with Kathleen when Parks claimed Kathleen allegedly made these statements. (R. 8150).

When Anderson was asked about this same event she insisted either she or her husband would have been home for the event Parks claimed was described, but they did not recall witnessing any such event. (R. 8003 - 8043).

Around the same time, Drew asked Jeffrey Pachter on a “ride along” in Drew's squad car. (R. 9664). The ride along started with small talk, but then Drew asked whether Pachter could help "take care" of Drew's wife. (R. 9667). Drew offered Pachter $25,000.00 in exchange for his help killing Kathleen. (R. 9671). Pachter did not inform law enforcement authorities about the incident because he "did not make much of it." (R. 9694; 9704). Drew did not follow-up. (Id.).

In January 2004, Kathleen visited her sister, Anna Doman ("Anna"). (R. 7394 - 7507). Kathleen told Anna that Drew snuck into her home and told her he would kill her before he let her touch his pension. Kathleen repeatedly asked Anna to "take care of her boys" if something ever happened to Kathleen. Anna said she would. Yet when Kathleen died, Anna made no effort to care for her children. (Id). Nor did she tell anyone about any threats. When asked about a briefcase of Kathleen’s “important papers” that would prove Drew’s culpability, Anna admitted she put it on a shelf in her garage and let it sit for three years after Kathleen’s death, unopened, before giving it to the state police in 2007. No evidence was introduced from the briefcase at trial. (R. 7394; 7507).

On February 27, 2004, Kathleen and her boyfriend, Steve Maniaci, went to the Samba Room in Naperville with another couple. (R. 8284). After dinner the couples went to a bar named the Lantern in Naperville. (Id.). Both consumed alcohol before going to Kathleen's and having sex on their knees in the living room. (R. 8285-8286; 8290). That evening Maniaci had turned down Savin’s marriage overtures.

The next day, Maniaci and Kathleen went to Steak n' Shake in Bolingbrook, Il. (R. 8297). The two parted ways with soft plans to meet later. (R. 8300). Maniaci then went to

band practice. They spoke by phone at 9:00 p.m. and again around midnight. (R. 8301-8302).

That afternoon Kathleen bumped into her next door neighbors, the Pontarellis, outside of her home. (Mary Pontarelli was Kathleen's best friend). (R. 10287–10300). They invited Kathleen to a family party, but she declined. (R. 9909). Neither Maniaci nor the Pontarellis had contact with Kathleen on Sunday or Monday. (R. 8304-8306). Kathleen's children did not have contact with her either, as they were with Drew for his regularly scheduled visitation weekend. (R. 10807–10826).

On Monday, March 1, 2004, fearing something amiss, Drew called the Pontarellis, asking them to accompany him inside Kathleen's home. (R. 7052). Drew, who no longer had access, obtained a locksmith's services and, accompanied by the Pontarelli family and neighbor Steve Carcerano, gained entry. (R. 9925). Around 10:30 p.m., Carcerano and Mary Pontarelli discovered Kathleen's body in the master bathtub. (R. 6996). When Drew saw Kathleen he knelt over and checked her pulse. She was dead. (R. 7058). A visibly disturbed Drew contemplated what he would tell his children and summoned authorities. (R. 7058-7090). When questioned by Maniaci, Drew denied wrongdoing. (R. 8313). Drew went home to tell his sons, Thomas and Kristopher, about their mother. (R. 10822). Thomas observed Drew to be "really upset" by Kathleen's death. (R. 10807–10826).

At approximately 11:14 p.m., Will County Deputy Coroner Michael Van Over arrived and examined Kathleen. Van Over found Kathleen "cool to the touch", with clear signs of lividity and slight rigor mortis. (R. 7520-7521). A Bolingbrook Police Officer informed Van Over that Illinois State Police ("ISP") would handle the investigation. (R.7525-7526).

ISP Evidence Technician Bob Deel arrived on scene at approximately 1:30 a.m. (R. 7527). On arrival Deel canvassed 392 Pheasant Chase's exterior with ISP Troopers Bryan Falat and Patrick Collins. They noted nothing suspicious or out of the ordinary. (R. 7597). Deel found no physical evidence of wrong-doing inside Kathleen's home. (R. 7604). There were no signs of disturbance, struggle, or defensive wounds on Kathleen. (R. 7870-72; 7605). Deel concluded Kathleen had slipped and fell in the tub. (R. 7606; 7682).

Together, Van Over and Deel photographed Kathleen. They found her medication bottles in her kitchen. (R.7527). Trooper Falat found orange juice and pills on the kitchen counter, and a mug of tea in the microwave. (R.9754). Van Over transported Kathleen to the Will County morgue. He processed Kathleen's body, writing in his report, "it was felt at the time by all parties that there were not signs of any foul play or trauma for this death investigation." (R.7559).

Nonetheless, investigating, Troopers Collins and Falat conducted four primary interviews in Mr. Carcerano's house, gleaning no inculpatory information concerning Drew. (R.7804-05).

At approximately 6:00 a.m. on March 2, 2004, Collins and Falat interviewed Drew at the Bolingbrook Police Department. Drew explained he had spent Saturday, February 28, 2004, at home with his children. On Sunday, February 29, he took them to the Shedd Aquarium. Between 5:00 and 5:30 p.m., he attempted to return he kids to Kathleen's, but she did not answer. He took them back to his house and went to work. He checked at Kathleen's again, but she did not answer.

On Monday morning, and continuing through the day, Drew tried to reach Kathleen. She did not respond. At 7:00 p.m. Drew again brought the children, but Kathleen still did not answer. Drew spoke with Mary Pontarelli before leaving. He returned with the locksmith who helped Drew and the Pontarellis to enter. (R.7814-7822).

On March 2, 2004, Bryan Mitchell, M.D., who passed away before trial, conducted Kathleen's autopsy. After the autopsy, Dr. Mitchell opined Kathleen's death was not a homicide. (R.7677). He found no major signs of trauma on Kathleen's body. (R.8843). Dr. Mitchell's report concluded Kathleen accidentally drowned. (People's Ex. 89).

On March 3, 2004, Troopers Collins and Falat interviewed Stacy. Drew sat in on the interview to support a "nervous and shaken" Stacy. (R.7825-7832). Stacy offered no information that inculpated Drew in Kathleen's death. (Id.).

On March 4, 2004, Toxicologist Christopher Long's assistants ran lab tests on tissue samples taken from Kathleen's body. (R.8559). The tissue samples contained indicators for sertraline and norsertraline (Zoloft), caffeine, and methadone (opiates). (R.8594-8596). The tests Long ordered could not identify whether Kathleen's tissue samples contained traces of Lipitor, Celebrex, or herbal fat reduction pills. (R.8597; 8605).

In early May 2004, the Will County Coroner conducted an inquest with evidence presented to determine Kathleen's manner of death. (R.8438). The coroner's jury ruled Kathleen's death accidental. Old Republic Insurance, who also investigated, paid a life insurance claim for the benefit of Kathleen’s sons after inquiry. (R.10334). ISP investigators Collins and Falat formally summarized the case and provided their work to

the Will County State's Attorney's Office. The Prosecutor did not file criminal charges. (R.7849). No one questioned the decision.

Three years passed when, on August 30, 2007, Stacy called Reverend Neil Schori. The two arranged to meet the next day at a Caribou Coffee in Bolingbrook, IL. (R.10002). When they met, Stacy appeared nervous, physically withdrawn, and in tears. (R.10004). Stacy told Schori about an evening when she and Drew went to sleep together, but she woke up in the middle of the night and Drew was gone. (R.10005). Stacy unsuccessfully checked the house for Drew. Later, in the early morning hours, Stacy saw Drew dressed in all black standing by the washer and dryer. (R.10006). Drew had a duffle bag in his hand, and emptied the contents in to the washing machine. Stacy identified the contents of the bag as women's clothing that she did not own. (Id.).

According to Schori, Drew told Stacy what to say to the police. (R.10007.). Stacy told Schori she lied on Drew's behalf when speaking with police. (R.10008).

During the same conversation Stacy told Schori Drew had, "killed all his men" in the Army (Drew was an MP at the White House (R. 11908**)).**). (R.10015-10019). The whole conversation lasted about an hour and a half. Schori believed Stacy may have been lying. (R.10025; 10029).

Two months later, on October 24, 2007, Stacy called Attorney Harry Smith. (R.10775). She wanted to retain Smith as a divorce attorney. (R.10756). Stacy told Smith she had information about Drew. (R.10762). She wanted to know whether accusations of Drew's involvement in Kathleen's demise could be used against Drew in a divorce proceeding. (R.10772). In essence, Smith believed Stacy sought economic gain from her accusations. (R.10776).

Several days after Stacy contacted Smith, her sister Cassandra Cales reported Stacy missing. (R. 2100 – hearsay hearing, not testified to at trial).

Drew sought legal counsel and in November 2007 and retained Joel Brodsky to represent him. (R.11551). Brodsky did not advise Drew to remain silent. Instead, Brodsky encouraged a first-of-its'-kind joint-publicity agreement for the two parties. (C. 1285). After signing the agreement, Brodsky advised a slew of public appearances.[0] (R.11475). He repeatedly told his partner, Reem Odeh, that he believed the case would benefit their law firm financially. (R.11560). At one point Brodsky even attempted the sale of Drew's family footage for $200,000.00. (R.5361).

Will County convened a special grand jury to investigate Stacy's disappearance and Kathleen's death. The Coroner's Office contacted Dr. Larry Blum, M.D., to review Dr. Mitchell's autopsy report on Kathleen. (R.8837). On November 13, 2007, Dr. Blum proceeded with a second autopsy when Kathleen was exhumed. There was "a lot of water in the casket ... and marked deterioration of the tissues of [Kathleen's] body". (R.8862-8863).

Dr. Blum took X-Rays that were "largely unremarkable". (R.8664). He noted deep bruising over the left lower quadrant of Kathleen's body. (R.8865-8866). Dr. Blum also noted bruising on the left breast. (R.8911). He found no evidence of hemorrhage in Kathleen's neck or back. (R.8873). Dr. Blum reviewed Dr. Long's toxicology report and concluded Kathleen had no drugs in her system at the time of death. (R.8877). Based on the entirety of his findings, Dr. Blum eventually ruled Kathleen's manner of death homicide. (R.8980-8987). Drew was indicted a year and a half later. (C.2).

---

0 Clips from the media interviews were used as substantive evidence against Drew during the State's case-in-chief. (R. 5562; R. 10176; C. 1065)

Between January 19, 2010, and February 19, 2010, the Court held a hearing ("the hearsay hearing") pursuant to the State's Motion to Admit Certain Hearsay Statements in accordance with 725 ILCS 5/115-10.6 and the Common Law Doctrine of Forfeiture by Wrongdoing. (C. 876; RP 3-19). The State had the burden of proving, by a preponderance of the evidence: (1) that Drew murdered Kathleen and Stacy and the murders were intended to cause their unavailability as witnesses; (2) that the time, content, and circumstances of the statements provide sufficient safeguards of reliability; and (3) that the interests of justice would best be served by admission of the statement into evidence.

At the hearing, the State called Thomas Morphey as its "star witness." Morphey testified he helped Drew move a blue barrel that he “believed” held Stacy's remains. (R.980). On cross, Morphey admitted he had been a regular alcoholic and narcotic user. (R. 1002). Walter Martineck testified Morphey was common and frequent liar with substance abuse problems. (R. 4575-4590). The State also called Pastor Neil Schori and Attorney Harry Smith. Schori's testimony tended to show Stacy was unhappy with Drew and she believed Drew had a hand in Kathleen's death. (R. 1633-1716; R. 2287-2376). Smith's testimony tended to show Stacy was considering a divorce from Drew. (R. 3896-4022) Candace Aiken (R. 1785-1828) and Sharon Bychowski (R. 1291-1418) testified Stacy loved her children. The State did not produce physical, forensic, occurrence, or confession evidence showing a person murdered Stacy.

The Court ruled: 1) Drew murdered Kathleen and Stacy; 2) did so to preclude them from testifying against him at "proceedings;" and, 3) that the interests of justice would be served by admitting certain hearsay statements from Kathleen and Stacy at

Drew's murder trial. (A. 3-4).The State appealed this and several other pre-trial rulings. (C. 751).

Upon remand, the defense moved to bar Attorney Smith's testimony. (C. 1022). Smith had testified before the special grand jury and during the hearsay hearing. The defense argued Smith's prior testimony violated Kathleen and Stacy's attorney-client privilege rights. The trial court agreed Stacy had not waived confidentiality in communications with Smith. (R. 5563–5572). It further ruled that, absent a clear waiver of the privilege, the attorney must assert the privilege when asked to testify in a legal proceeding. (Id.)

At trial the State called more than thirty witnesses. They testified to hearsay (R. 1633 – 1697; 7394 – 7425; 8393 – 8437;), two prior bad acts. (R. 8078 – 8100; 8675 – 8755) and medical propositions (R. 8832 – 8988; 9445 – 9559; 10878 – 10921). The defense called witnesses who impeached the State’s prior bad act evidence (R. 10630 – 10642), family who professed Drew’s innocence (R. 10807 – 10834), and Harry Smith. After asking the court what the word "unanimous" meant (R. 11440), the jury returned a guilty verdict on September 6, 2012. (C. 1256).

Post-trial, Brodsky withdrew from representing Drew. (R. 11492). Brodsky's conduct became a focal point of a post-trial motion filed by Drew's new defense team. (C.1277).

At an evidentiary hearing Drew called Reem Odeh, Brodsky's former partner. She verified the media contract executed between Brodsky, Drew, and Selig Multimedia. (C. 1285). Odeh testified that Brodsky threatened her outside of the courthouse prior to her

testimony in the evidentiary hearing. (R. 11556). Brodsky had physically attacked her when she discovered the contract. (R. 11563).

Attorney Brodsky testified he received monies from ABC which he converted to fees. (R. 11619 - 11637).

John Marshall Law School Professor Clifford Scott Rudnick testified as an expert on ethics. Rudnick opined that Brodsky's execution of the agreements "raised ethical concerns," and were violations of Illinois' Rules of Professional Responsibility 1.7 and 1.8. (R. 11579; 11582). Rudnick opined that Brodsky's contracts gave rise to a per se conflict of interest. (R. 11584). Rudnick explained “It raises ethical problems in a couple ways. What I see is the ethical dilemma and as reason for the rule is that when the lawyer is in a position of his or herself from not being congruent with that of the client…then the value of the anticipated money might go down that you might not act or an attorney might not act in what might be the best interest of the client.” (R. 11578).

Retired Judge Daniel Locallo likewise opined Brodsky's contracts violated Illinois Rule of Professional Conduct 1.8 (b). (R. at 11665). Judge Locallo had also reviewed much of the trial record. He opined the decision to call Attorney Smith was "not reasonable trial strategy". (R. 11674). He more fully opined:

“The jury had already heard testimony from, I believe (Pastor Schori) about Mr. Peterson coming home in black clothing. Up until that point there had not been any direct evidence with respect to Mr. Peterson causing the demise of Ms. Savio.”

While the Court denied Drew's post-trial motion from the bench, it made the following observations about Brodsky:

“It was clear to the court from the very beginning that Mr. Brodsky was out of his depth. It was clear to me from the very beginning he didn't possess the lawyerly skills that were necessary to undertake this matter on his own ... Mr. Brodsky was clearly at a

different spectrum of lawyerly skills than the other attorneys that were in this case." (R. at 11833).

Drew was sentenced to 38 years in prison. (C. 1401).

Outside of the sentencing, Brodsky spoke to the media, revealing allegedly privileged information about Drew's case. Counsel brought forth a motion asking that the Court impose a gag order on Brodsky. (C. 1410). While it declined to take such measures the Court again directly addressed Brodsky's conduct:

"In 37 years almost now of being a prosecutor, an attorney in private practice, and a judge, I've never seen an attorney comport himself in the fashion that Mr. Brodsky did of going on television and willingly speaking about his conversations with his client ... the client's impressions about why witness [sic] were called, threats that were made, innuendo about the affect of a client's testimony on a trial, things of that nature.

And I can't - I wish I could think of a word beyond shocked that I could apply to Mr. Brodsky's appearance on television in this case. I think it makes the comments that I made in the ruling on the post-trial motion about his abilities even more magnified." (R. 11923).

The Court referred the matter to the ARDC. (C. 1455). Drew filed a timely notice of appeal. (C. 1453).

ARGUMENT

I. DREW WAS DENIED A FAIR TRIAL WHEN ATTORNEY HARRY SMITH TESTIFIED ABOUT A PRIVILEGED CONVERSATION WITH STACY THAT HAD BEEN RULED INADMISSIBLE, AND WAS HEARSAY OPINION INSINUATING DREW WAS GUILTY OF MURDER.

A. Attorney Smith never should have testified since, as the trial court held, the discussion was protected by attorney-client privilege.

Shortly before leaving, Stacy phoned Attorney Harry Smith to request his representation when she filed for divorce from Drew. The attorney-client privilege attached and was permanent. *Exline v. Exline, 277 Ill. App. 3d 10 (2nd Dist. 1995)*. During that consultation Stacy said she had knowledge Drew had killed Kathleen and knew how. She

inquired if her awareness would be beneficial in a divorce. Smith thought Drew heard this conversation. (R.10756-10776).[0]

Attorney Smith first discussed his consultation with the state police in October 2007 and made it public during a radio appearance on the Roe and Roeper Show on WLS AM. http://www.youtube.com/watch?v=gPfLnviokiw). He testified under oath about the conversation on at least five separate occasions. R. 3953-54; 5563-5572; 10751). Smith ignored any thought of attorney-client privilege. When asked Attorney Smith, "couldn't [yet] gauge" whether his choices have been "good for business". (R. 5736).

Absent compulsion, Smith never should have spoken to the police or testified. He was well aware of this ethical obligation (R. 5708) (Smith testifying only the client can waive the privilege). Counsel was required to refuse to speak. [0]

In this regard, the prosecutor ignored that he is the representative of all parties. *People v. Cochran, 313 Ill. 508, 526 (1924)*("The State's attorney in his official capacity is the representative of all the people, including the defendant, and it was as much his duty to safeguard the constitutional rights of the defendant as those of any other citizen."). *See also United States v. Young, 470 U.S. 1 (1985)*. Accordingly, "The prosecutor has a duty to

---

0 Presented at the hearsay hearing, this was key testimony Stacy "knew" anything about Kathleen's death, or that Drew knew Stacy claimed she had information. Accordingly it was the principle testimony to inferentially support any claim Drew feared Stacy might someday talk. Minus Smith the court certainly could not have found forfeiture. (R. 3953; 5563).

0 The attorney must assert the privilege "Thus, only the client may waive this privilege." *In Re: Marriage of Decker*, at 313. Accordingly, "it is immaterial that an attorney called as a witness is willing to disclose privilege communications." *In Re: Estate of Busse, 332 Ill App. 258, 266, 75 N.E. 2d 36 (2nd Dist. 1947)*. See Illinois Rule of Professional Conduct Article VIII, Preamble [4] and Rule 1.6; *People v. Adam (1972), 51 Ill.2d 46, 48* (quoting 8 J. Wigmore, Evidence § 2292 (McNaughton rev. ed. 1961)), cert. denied (1972), *409 U.S. 948, 34 L. Ed.2d 218, 93 S.Ct. 289*.

ensure defendant receives a fair trial. Defense counsel's failure to properly object does not alleviate that duty (citations omitted)." *People v. Taylor, 244 Ill.App.3d 806, 819, 612 N.E.2d 943, 952 (1993)*. The prosecutor never should have presented privilege testimony, nor should they have discouraged the court from addressing the issue at the hearsay hearing.[0]

The court likewise had a responsibility to ensure the communication was not shared. Illinois Rule of Evidence 104 ("preliminary questions concerning…the existence of a privilege…shall be determined by the court"). "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused." *Glasser v.*

---

0 An objection at the hearsay hearing was overruled. (R. 3899; 3952). But before trial the court reversed, agreeing the conversation was privileged. (R. 5563 – 5572).

Once the court held the consultation was privileged, the prosecutor respected the ruling, did not appeal, and did not call Smith.

"The attorney-client privilege is an 'evidentiary privilege…'" *Ctr. Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, 981 N.E.2d 345, 355*. As an evidentiary privilege the defendant has standing. See for example *Parkinson v. Central DuPage Hospital, 105 Ill App 3d 850 (1st. Dist. 1982)*(Hospital had standing to raise non-party physician-patient privilege); cf *United States v. White, 743 F.2d 488, 494 (7th Cir. 1984)* ("The Government, however, cannot appeal based upon the inadequate protection of someone else's privilege. In so saying, we are not unmindful of the duty of every lawyer to bring to the attention of the trial court possible ethical problems in the case; nor do we find fault with the Government for having done so in this case.") Thus, at a minimum, Drew had standing to bring the issue before the court, who before trial correctly held that privilege applied. Drew's quarrel on appeal is both with the overruling earlier objection and with Attorney Smith's failure to obey the court's ruling, and the court's failure enforce its' own ruling. Under the unique facts of this case defendant has standing on appeal, given it is at this point an evidentiary issue,as well as the court's failure to apply its' correct ruling. Further, given the prosecutions and counsel's failure to respect the privilege, and given Stacy was not present, Drew was, and is, the only one who can urge the court to follow the law. *In Re Adoption of Baby Girl Ledbetter, 125 Ill.App.3d. 306 (4th Dist. 1984)*(Court has duty to enforce principle of law *sue sponte* when it is brought to its' attention. To find standing wanting would make the actions of Smith, the prosecutor, and the Court immune from review.

United States, 315 U.S. 60, 71, 62 S. Ct. 457, 465, 86 L. Ed. 680 (1942), superceded by statue on other grounds. *Bourjaily v. United States, 483 U.S. 171, 179 (1987)*.

At trial, having correctly held Stacy's conversation with Smith was privileged the court barred the prosecution from presenting it. Yet when the defense called Smith, the issue of privilege was inexplicably abandoned. The ruling necessarily had to apply to both sides. The court should not have allowed the defense to call Attorney Smith. If the consultation was privileged, it was privileged. End of story.

Certainly, the idea of not allowing either side to call a particular witness for a myriad of reasons is not novel, it happens all the time. Moreover, here the court knew the witness was going to devastate the defense. That provided a secondary basis – the court knew it was legal suicide to call Smith.

The harm cannot be marginalized. Smith never should have testified at the hearsay hearing. His explosive testimony was essential to the finding Drew had a reason to make Stacy unavailable. He never should have testified at trial. The consultation was ruled inadmissible on the basis of privilege. The court should not have blithely stepped aside simply because the defense wanted to call the witness. Privilege is not party dependent. The trial court ought to have enforced its' order, rather than allow defense counsel to commit malpractice.

B. Drew received ineffective representation when counsel, for no understandable purpose, called Attorney Smith as a witness so that he could tell the jury that Stacy had information about how Drew killed Kathleen, that Drew thought Stacy was telling people he killed Kathleen, and that Drew was a dirty cop.

"A person charged with a crime has the right to expect his lawyer's questions to prosecution witnesses will not help the State prove its accusation… 'For defense counsel to elicit testimony which proves a critical element of the State's case where the State has

not done so upsets the balance between defense and prosecution so that defendant's trial is rendered unfair…'" *Jackson, 318 Ill.App.3d at 328, 741 N.E.2d 1026*. Defense counsel's repeated and misguided efforts to elicit damaging testimony not introduced by the State…resulted in an unfair trial for the defendant." *People v. Orta, 361 Ill.App.3d 342, 343, 836 N.E.2d 811, 813 (1st Dist. 2005).*

If this statement holds true, what of the defense attorney who elicits from his own witness testimony to prove the accusation? Testimony the trial judge said was the most incriminating evidence in the case. (R.11159). Quite logically, counsel is ineffective.

It was a disaster to call Attorney Smith.[0] He began with "she [Stacy] wanted to leave the state with the children" and "she had information regarding Kathleen Peterson she wanted to use." R 10762. Then it got worse. Inexplicably, defense counsel next asked Smith whether he had previously testified, under oath:

- That Stacy had asked "could we get more money out of Drew if we threatened to tell the police about how he killed Kathy." (R 10772);
- "That she [Stacy] had so much s-h-i-t on him [Drew] at the police department that he couldn't do anything to her." (R 10773-74);
- "[Stacy] asked me if we could get more money out of Drew if we tell the police how he killed Kathy." (R 10775); and,
    - "She said she wanted to say he killed Kathy." (R 10777).

The prosecutors capitalized on this horrific gaffe, quickly reinforcing the damaging parts from the privileged conversation, and adding others:

- That Stacy said Drew was furious with her because he thought she had told his son that he had killed Kathleen;
- That Drew was conducting surveillance on her or following her;
- That she had too much shit on him for him to do anything to her;
- That she wanted to know if she could get more money out of Drew if she threatened to tell the police about "how he killed Kathy";

---

0 The entire examination is included in the Appendix.

- Q. She specifically used the word "how" in describing, not just the fact that he killed Kathy, but how he killed Kathy."
  A. Yes.

- That Drew was calling to Stacy from another room and "… Asked her what she was doing and who she was talking to, I believe."

(R 10790-10797).

Continuing the damage, on redirect Smith told the jurors he cautioned Stacy to be careful because she could be arrested for concealment of a homicide, testimony the court recognized "… adds credibility to her statement because he's saying I believe that it really happened so I was cautioning her don't conceal a homicide, not don't conceal her death, don't conceal a homicide…" (R 10803 and R 11112). [0]

There was no sound strategy for calling this witness. Defense counsel presented to the jury what the prosecution could not-a witness to say Drew killed Kathy, embedded in their conscience without a single actual fact being testified to. Counsel knew that Smith would testify Stacy told him she knew Drew killed Kathleen, and how. He had time and again during earlier warnings. (R. 3953-54; 1896; 4022;).

Moreover, Smith never told the jurors how Stacy knew Drew killed Kathleen; that she saw Drew kill Kathleen; or any fact as to how he killed Kathleen. To be sure, Stacy never would have been able to testify, "Drew killed Kathy and I know how" and then disembark. Plainly, absent facts, foundation, and knowledge the statements were wholly

---

0 See Drew Peterson Defense Witness called 'Gift From God' by Prosecutor. "It's a gift from God," State's Attorney James Glasgow was overheard saying … after Smith finished testifying," and "Brodsky just walked backward over a cliff with Drew Peterson in his arms," said Kathleen Zellner…" - (http://articles.chicagotribune.com/2012-08-30/news/ct-met-drew-peterson-trial-0830-20120830_1_stacy-peterson-bolingbrook-bathtub-peterson-attorney-joel-brodsky)

inadmissible. Illinois Rule of Evidence 602.[0]

Every criminal defendant is guaranteed the right to "effective assistance of competent counsel." *McMann v. Richardson, 397 U.S. 759, 771 (1970); Strickland v. Washington, 466 U.S. 668, 687 (1984); People v. Albanese, 104 Ill.2d 504, 525–26, 473 N.E.2d 1246, 1255–56 (1984), cert. denied, 471 U.S. 1044 (1985).* A trial strategy is unsound when no reasonably effective criminal defense attorney, facing similar circumstances, would pursue the strategy.[0] *People v. Fletcher, 335 Ill.App.3d 447, 453, 780 N.E.2d 365, 370 (5th Dist. 2002*). If there "is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding could have been different." (*People v. Lefler, 294 Ill.App.3d 305, 311, 689 N.E.2d 1209, 1214 (1998)* (citing *Strickland, 466 U.S. at 695)* reversal is required. Here the evidence was tenuous, even with the error, thus the probability of harm from the mistake is overwhelming.

---

0 Regardless of the forfeiture ruling, the testimony was rank hearsay because the witness was asked about prior testimony, not what happened. As presented the testimony could not support a finding "that the witness has personal knowledge of the matter". IRE 602 (identical to former FRE 602). Although personal knowledge can include inferences, the inferences "must be grounded in observation or other first-hand personal experience" and cannot simply be "flights of fancy, speculations, hunches, intuitions, or rumors…" *Vissser v. Packer Eng'g Assocs. Inc., 924 F. 2d 655,659 (7th Cir. 1991)*; *See also United States v. Santos, 201 F. 3d 953, 963 (7th Cir. 2000*)(city employees were improperly allowed to testify they had no doubt or personal feelings about allegations because statements were speculative and invaded the province of the jury); (*Marfia v. T.C. Ziraat Banaski, 874 F. Supp. 560, 563 (S.D.N.Y. 1994*)("a witness has personal knowledge if he or she testifies from general observation and knowledge, and not upon conjecture"), vacated on other grounds 100 F. 3d 243 (2nd. Cir. 1996).

0 One of fellow defense counsel who argued against calling Smith was overheard in the hallway proclaiming "I've filed 74 (expletive) motions to keep him out and now you're going to undo all of it." See http://articles.chicagotribune.com/2012-09-11/news/chi-drew-peterson-fires-lawyer-who-opposed-savio-divorce-lawyer-as-witness-20120911_1_lead-attorney-joel-brodsky-stacy-peterson-drew-peterson. As the examination progressed fellow counsel repeatedly called lead counsel over in an effort to get him to stop. (R. 10751-10857).

In *People v. Salgado, 200 Ill.App. 3d 550 (1st Dist. 1990)*, defense counsel was held to be ineffective for eliciting defendant's admission while defendant testified:

"We perceive no logical reason for counsel to have called defendant as a witness and elicited a confession on direct examination…By pleading not guilty, defendant was entitled to have the issue of his guilt or innocence of residential burglary presented to the court as an adversarial issue. Defense counsel's conduct in this case amounted to ineffective assistance of counsel because it nullified the adversarial quality of this fundamental issue." *People v. Salgado, 200 Ill.App.3d 550, 553, 558 N.E. 2d 271, 274 (1990)*.

Likewise, in *People v. Baines, 399 Ill.App.3d 881 (2010)*, the court reversed when counsel was clumsy and confusing, in addition to bringing forth an admission:

"However, the record in this case is replete with examples of unusual behavior by defense counsel. It was at this juncture that defense counsel elicited from the defendant a damning admission. Under questioning by defense counsel, the defendant admitted that although he had earlier told the police that he did not know Wilson, his alleged accomplice in the crime, in fact he knew Wilson 'quite well.' This evidence is clearly harmful to the defendant. And, a review of the record reveals that the gravity of the harm caused by this evidence was lost on defense counsel, as he continued to question his own client in a manner which bolstered the State's case. " at 888-889.

The affirmative solicitation of damaging testimony is obviously an unsound strategy. In addition, *See People v. Phillips, 227 Ill.App.3d 581, 590, 592 N.E.2d 233, 239 (1st Dist. 1992)* (ineffective counsel elicited hearsay statements about defendant's connection to the crime on trial and others); *People v. Moore, 356 Ill.App.3d 117, 127, 824 N.E.2d 1162, 1170–71 (1st Dist. 2005)*(ineffective when defense counsel established defendant was at scene, connecting him to the crime); *People v. Rosemond, 339 Ill. App.3d 51, 65-66, 790 N.E. 2d 416, 428 (**1st Dist.** 2003)*("Sound trial strategy embraces the use of established rules of evidence and procedures to avoid, when possible, the admission of incriminating statements, harmful opinion and prejudicial facts."); *People v. Bailey, 374 Ill.App.3d 608, 614-15 (1st Dist. 2007)* (defense counsel elicited testimony that harmed the defendant's case when he brought forth evidence that the defendant had

been speaking to potential narcotics purchasers); and *People v. De Simone 9 Ill.2d 522, 138 N.E.2d 556 (1956)*(Ineffective where counsel introduced evidence that his clients were evil men and hardened criminals who had committed numerous burglaries previously).

In the instant case, counsel introduced the incriminating words about how "he [Drew] killed Kathy"; that Stacy wanted to go to the police and tell how Peterson killed Kathy; that Peterson thought she had told Tom (his and Kathy's son) he killed Kathy and that Stacy had "so much shit" on Peterson for being a bad cop, implying dishonesty and awful character, as well as a bad man. On cross-examination, the State was able to reinforce the damage, stressing that Drew was angry at Stacy for talking to Tom (logic dictates that he would not be angry unless the statement were true); that Drew was conducting illegal surveillance on Stacy; and, repeatedly, that she wanted to tell the police "how Drew killed Kathy." And finally, on re-direct, defense counsel brought out that Smith cautioned Stacy to be careful given her involvement in a "homicide." As cited above, individual instances of similar testimony have supported finding counsel ineffective. Here, we have a buffet with courses from all the cases.

Presenting a statement of guilt is counter-intuitive. The defense offering a witness to state they know "how" the defendant committed the murder is tantamount to admitting guilt, that "nullified the adversarial quality…" *Salgado at 553*.

The harm was so extreme that the court opined "I will say that it's unusual that the State responds that the information of how he killed her came from the very last witness called by the defendant in the case." R 011159. Plainly ineffective.

II. DREW'S PRINCIPAL ATTORNEY, BY SIGNING A MEDIA RIGHTS CONTRACT WHEN RETAINED, CREATED A *PER SE* CONFLICT.

"[T]he question of whether a *per se* conflict exists is a legal question we review *de novo*." *People v. Hernandez, 231 Ill. 2d 134, 144 (Ill. 2008)*.

When Stacy disappeared, all eyes turned toward Drew. While he may have reveled in his role as a suspect at first, he was a layperson with no formal training as a counselor or attorney. Unfortunately, at this most crucial moment Drew hired a lawyer who "did not possess the lawyerly skills necessary" to undertake the investigation at hand. (R. 11833) Rather than advising silence - something any attorney would feel professionally and morally obligated to do - Attorney Brodsky acquired a financial interest in his client's cause, advising him to address the matter through a media blitz Brodsky benefitted from.[0]

Counsel sat idly by while media outlet after media outlet asked his client questions that were "accusatorial in nature" and had designs of eliciting incriminating information. (R.5603). Why? In a manner of months, Brodsky went from obscure to sought after.[0]

---

0 "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963).

0 "Representing Drew Peterson – landing "big name" clients a watershed moment…" http://articles.chicagotribune.com/2008-01-15/news/0801140689_1_drug-cases-lawyers-drew-peterson. Nonetheless, given the *per se* conflict why does not matter.

From the outset, Attorney Brodsky entered into a business transaction and acquired literary rights connected with his client's cause thereby creating an irreconcilable conflict of interest with his client ("contract"). (C. 1285). To benefit he encouraged and participated in a whirlwind media tour defending his client against charges that had not materialized, marveling even the prosecutor.

"The media coverage, I don't know that there has before ever been a case with more media coverage, and it's all been orchestrated by defense counsel and the defendant himself". (R. 109).[0]

It was in December 2007, when Attorney Brodsky and Drew entered into a contract with Selig Multimedia, Inc. f/s/o Glenn Selig ("Selig").[0] The agreement called for Selig to provide publicity and promotional services for Drew and/or Brodsky. (C. 1285 – 1290). For any appearance Brodsky was entitled to up to eighty-five (85) percent of the revenues. (He offered a news outlet an exclusive for $200,000.00 (85%=$175,000.00)). (R. 5361). He received "compensated" hotel stays, meals, and spa treatments for he and his wife while representing Drew. (C.1295). Brodsky received cash and other material benefits from the interviews. (R. 11619-11637).

---

0 Clips from the campaign were used against Drew during the State's case-in-chief. (R. 10176-10177). The trial court noted that the majority of the interviews were "accusatory in nature" and conducted with an eye towards proving Drew's guilt, asking rhetorically what lawyer would do this? (R. 5630 – 5640).

0 Although the contract was not re-signed, Selig continued to represent Brodsky (http://thepublicityagency.com/drew-peterson-defense-team-online-media-kit/), through the trial, even appearing on TV with Brodsky on FoxNews discussing earning opportunities from the case. http://www.youtube.com/watch?v=ozpaa9iB-i8

This was not a contract to protect Drew, but to provide "publicity" and "promote" fees for Brodsky himself. Thus, Brodsky had a pecuniary interest in the value of the publicity, regardless whether it was prudent or sensible. The more sensational the case, the more interest for Brodsky.

By entering into the contract, Brodsky violated the following Illinois Rules of Professional Conduct: a) Rule 1.7(a)(2) in that there was a significant risk the representation would be effected by the personal interests of the lawyer (the comments in part 10 speak to financial conflict); b) Rule 1.8(a) in that he entered into a business transaction with a client, without safeguards); and c) Rule 1.8 (d) acquired rights ("[p]rior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.") Ill. Rules of Prof'l Conduct Rules 1.7 and 1.8 (2010). (The commentary to 1.8 (d) states its breach causes a conflict). The rule codifies the commonsense precept that lawyers cannot be loyal to their clients if their own financial interest clouds their judgment as to the best course of representation. Plainly put, attorneys breach their duty of loyalty by entering into a contract that provides an incentive for them personally to capitalize from sensationalizing representation of a client. (R.11577 and R.11665). [0]

The rules violations are *per se* conflict. A *per se* conflict exists when "facts about a defense attorney's status . . . engender, by themselves, a disabling conflict." *Hernandez, 231 Ill.2d at 142*. Accord *Illinois v. Austin M., 2012 IL 111194 ¶ 81*. ("As we explained

0 *See also* Geoffrey C. Hazard, Jr. & Susan P. Koniak, The Law and Ethics of Lawyering 498 (1990) ("The reason for prohibiting such arrangements is that what makes 'good copy' does not necessarily make a good defense.").

in Washington, the reason for having a *per se* rule prohibiting representation by an attorney with possible conflicting interests is that certain associations may have "subliminal effects" on counsel's performance which are difficult to detect and demonstrate. *Washington, 101 Ill.2d at 110. See also Spreitzer, 123 Ill.2d at 16, 525 N.E.2d 30; People v. Daly, 341 Ill.App.3d 372, 376, 792 N.E.2d 446 (4th Dist. 2003)* (the per se conflict rule is designed to (1) avoid unfairness to the defendant, who may not be able to determine whether his representation was affected by the conflict…"). Accordingly, if a *per se* conflict is established, the defendant need not show that the conflict affected the attorney's actual performance in order to secure a reversal of his conviction. *Taylor, 237 Ill.2d at 374–75, 930 N.E.2d 959); Austin M., 2012 IL 111194*.

The Illinois Supreme Court anticipated this inexcusable conflict in *People v. Gacy, 125 Ill.2d 117, 135 (Ill. 1988)*. The Court equated the conflict arising from a literary contract with that from multiple representations. Id. *Gacy* involved a book contract rejected by counsel. Id. at 134. The Court reasoned that "the mere fact that the defendant's attorney was offered, and refused to accept, a contract for publication rights does not constitute a 'tie' sufficient to engender a per se conflict." Id. at 136. But, in so doing, the Court clearly signaled that acceptance of a media contract would have resulted in a per se ineffective of assistance claim. The Court explained:

> "The acquisition of financial rights creates a situation in which the attorney may well be forced to choose between his own pocketbook and the interests of his client. Vigorous advocacy of the client's interest may reduce the value of publication rights; conversely, ineffective advocacy may result in greater publicity and greater sales. In fact, it has been held that the acquisition of such book rights by a defendant's attorney constitutes a conflict of interest which may so prejudice the defendant as to mandate the reversal of a conviction." Id. at 135.

Thereafter, Rule 1.8 was enacted to clarify.[0] Professor Rudnick explained, "comment 9 [to rule 1.8] says an agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interest of the lawyer. Measures suitable in representation of a client may distract from the publication value of an account of the representation." (R. 11582).

The contract provided Brodsky with an incentive to make the case as enticing as possible, not as legally and tactically sound as feasible (perhaps explaining why Smith was called – to keep the 15-minutes-of-fame going). Thus, the mere existence of the contract between the client and attorney in this case created a *per se* conflict that requires no further showing of prejudice. (R. 11581-11584).

It is not simply the rules violations. Counsel sought to profit financially from the sensationalism of this case. In Illinois, *per se* conflicts also arise when there is financial tension. In *People v. Stoval*, the defense attorney and his firm had previously represented the victim business. *40 Ill 2d 109 (1968)*. The Court held that, in light of this previous relationship with the victim of the robbery, there was significant risk that the attorney would not advocate for his client with sufficient vigor. Although there is "no showing that the attorney did not conduct the defense of the accused with diligence . . . sound policy disfavors the representation of an accused . . . by an attorney with possible conflict of interests." Id. At bottom, "[t]he assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from .

---

0 Our Supreme Court obviously finds this conduct deeply disturbing. Attorney Herbert Hill engaged in misconduct by violating Rules 1.8(b) and 8.4(a)(1) of the Illinois Rules of Professional Conduct *in attempting* to acquire a media rights assignment during the course of his representation of his clients. Holding the conduct to be unprofessional and in violation of the Rule the attorney was suspended from practicing law. *In the Matter of Herbert Hill, No. M.R. 12575, (1996)*; *See also Winkler v. Keane, 7 F.3d 304 (2d Cir. 1993)* (contingency arrangement between counsel and criminal defendant gave rise to *per se* conflict of interest).

. . undertaking the discharge of inconsistent obligations." See also *People v. Coslet, 67 Ill. 2d 127 (Ill. 1977)*(attorney cannot represent defendant and also represent victim's estate). cf *People v. Banks 121 Ill.2d 36 (1987)*("Public defender's offices, we have recognized, are unlike private law firms for purposes of conflicts of interest").

In this case, there were many conflicts. Counsel saw this case as a promotional tool, and exploited it for professional and financial gain. The more sensational the case, the more publicity for Brodsky. His self-interest completely clouded his judgment, to the detriment of the client.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADMITTING PASTOR SCHORI'S TESTIMONY, BOTH AT THE FORFEITURE BY WRONGDOING HEARING AND AT TRIAL, IN CONTRAVENTION OF THE CLERGY PRIVILEGE DOCTRINE.

The lower court's evidentiary rulings are subject to an abuse of discretion standard on review. *People v. Williams, 188 Ill. 2d 365, 369, 721 N.E.2d 539, 542 (1999)*. Nevertheless, review will be de novo "[w]here a trial court's exercise of discretion has been frustrated by an erroneous rule of law...." Id. at 542.

The court below made two separate rulings rejecting Mr. Peterson's challenge to the testimony of Pastor Schori. The court determined at the pretrial hearsay hearing that the privilege did not apply to counseling in a public place. After the trial, when that was shown to be incorrect, the court newly asserted that the counseling itself did not merit the privilege. Each ruling misapprehends basic tenets of privilege law.

A. Requirement that the counseling be in a private place

As a matter of law, the trial court erred by adding a new element to clergy-parishioner privilege – that the communication to be privileged must take place in a "private" place. Although the conversation must be private, the locale – whether a park,

library, or coffee shop – need not be. Hence, Pastor Schori's statements should have been excluded because they were privileged.

Under Illinois law, clergy members or spiritual advisors cannot testify about a "… confession or admission made to him or her in his or her professional character or as a spiritual advisor in the course of the discipline enjoined by the rules or practices of such religious body or of the religion which he or she professes…" 735 Ill. Comp. Stat. Ann. 5/8-803 (West).[0] The trial court below initially agreed that Stacy Peterson enjoyed an expectation of confidentiality in the counseling session, that Pastor Schori was acting as her "spiritual advisor" and that he had always pledged confidentiality in the course of counseling sessions. (R. 1672). Nonetheless, the court held that the conversations were not privileged because they took place at Caribou, a public place: "[C]aribou Coffee is not a place where you can expect to have privilege of this nature because it's in a public setting." (R. 1681). In holding that conversations in public places are not protected by privilege, the trial court grafted a requirement onto the statute that simply does not exist.

---

0 The party asserting privilege must prove that all of the elements of the privilege exist before the court can exclude the testimony. *People v. Diercks*, *88 Ill. App. 3d 1073, 1077 (1980)*. Here, the court before the trial acknowledged the existence of all of the elements in this case except the element of confidentiality. Privilege belongs to both the spiritual advisor and parishioner, so if the spiritual advisor willingly testifies, the defendant must prove that the rules of practice of the relevant religion forbids disclosure. *People v. Diercks, 88 Ill. App. 3d 1073, 1077, 411 N.E.2d 97, 101 (1980)*. Pastor Schori testified that he was the counseling pastor at Westbrook Christian Church in 2007 during the time that Stacy attended the church, and Stacy sought Pastor Schori as a marital counselor. The Pastor further testified that there were not any written precepts for him to follow. Thus, as the pioneering pastor, he "established the practices" and developed his own precedent for the rules of his counseling sessions. His rules for counseling included keeping strict confidence in all of his sessions and conducting all of his counseling at public places in order to avoid "any question of impropriety" on his part. (R. 1656 – 1713).

The key question in any privilege case, whether arising out of a physician-patient, attorney-client, or clergy-penitent relationship, is whether the parties intended the communication to be confidential. As this Court has stated, "the privilege extends only to admissions or confessions made in confidence." *People v. Campobello, 348 Ill. App. 3d 619, 636 (3rd Dist. 2004)*. The place of the communication has never been talismanic – all the statute requires is that the parties intend the communication to be confidential: "A plain reading of the Illinois statutes reveals a design to protect those communications between clergyman and laymen that originate in a confidence." *Snyder v. Poplett, 98 Ill.App.3d 359, 362 (1981)*(protecting communication in a hospital).

Pastor Schori testified that he was the counseling pastor at Westbrook Christian Church in 2007 during the time that Stacy attended the church, and that Drew and Stacy sought him as a spiritual counselor, principally about issues relating to their marriage. The Pastor further testified that there were not any written precepts for him to follow. (R. 1656–1692). Thus, as the pioneering pastor, he "established the practices" and developed his own precedent for the rules of his counseling sessions. His rules for counseling included keeping strict confidence in all of his sessions and conducting all of his counseling at public places in order to avoid "any question of impropriety" on his part. (Id.) He specified that the session with Ms. Peterson at Caribou's was no different. The trial court's decision that privilege was lost because "somebody could have" overheard the conversation cannot be squared with Campobello and Snyder. (R. 1681).

To be sure, the chance that a third party could overhear an otherwise confidential conversation is greater in some locales than others. Yet Pastor Schori's practice of having his counseling session in public did not undermine the private nature of the counseling

because he recognized a need for privacy in such a setting and took measures to ensure privacy. He and Stacy purposely sat away in a corner, with Pastor Schori making sure that nobody, including the third party he brought along, was within hearing distance of the discussion. (R. 1656–1692).

Although Illinois courts have held that the privilege may be lost if a third party who is not essential to the communication overhears it, they have never held that the privilege is lost if a third party is merely in eyeshot. For instance, in *People v. Diercks, 88 Ill.App.3d 1073 (Ill App. 1980)*, defendant's confession of a burglary to a reverend was admitted into evidence because the reverend was accompanied by the defendant's landlord during the discussions. The court did not focus on the place of the confession, but rather on the fact that the landlord's presence undercut any notion "that the communication [was] made in confidence." Id. at 1078. Moreover, the court in *Diercks* also held that the reverend's discussions with the defendant in the jail cellblock were privileged, even though presumably there were others nearby.

In other jurisdictions as well, confessions that parishioners made in the vicinity of third parties have been held to be privileged as long as no one overhears the conversation In *State v. Orfi, 511 N.W.2d 464 (Minn. Ct. App. 1994)*, defendant, who was convicted of murdering his girlfriend's son, argued that the trial court erred when it allowed a priest to testify about a discussion between the defendant and the priest in a hospital reception room, which was open to the public. Id. at 468. Indeed, much as in this case, the prosecution argued that the privilege was lost because an unknown individual entered the reception room at one point. The court rejected that argument because there was no evidence that the individual, or anyone else, overheard the conversation. Id. at 470.

Similarly, in *Washington v. Martin, 959 P.2d 152 (Wash. App. 1998), aff'd 975 P.2d 1020 (1999)*, the court considered whether a conversation between defendant and a pastor could qualify for the privilege given that defendant's mother and evidently others were present in the apartment when the discussions took place. The court held that, even though "other individuals were present during those instances for at least part of the time," as long as the particular conversations in question "were outside the presence of others," Id. at 159, the privilege should attach. The key in both cases was whether the parties intended the communication to remain confidential, irrespective of the venue. See also *Schwartz v. Wenger, 124 N.W.2d 489, 492 (1963),* (holding that conversations in public places defeated attorney-client privilege only if the conversation is in fact overheard by a party using non-surreptitious means); *Giraldo v. Drummond Co., 2012 U.S, Dist LEXIS 53759 (N.D. Ala.)*(focusing on steps the parties took to maintain privilege as opposed to the fact that meetings between attorneys and clients took place in semi-public locales).

It is similar to spousal privilege, recognizing the same basic premise of confidentiality. Under spousal privilege, the courts recognize that communication made "in the presence and hearing of a third person are generally not considered to be confidential." *People v. Murphy, 241 Ill. App. 3d 918, 924, 609 N.E.2d 755, 760 (1992)*. There, the defendant's wife testified that the defendant and another man known as Boo came into the defendant's home, and the defendant told his wife in front of Boo that he thought he killed someone. Id. Before the defendant spoke further, he and his wife stepped into the kitchen where he told her the circumstances of the killing. Id at 921. The appellate court held that the defendant's admission made in the presence and hearing of

Boo was not confidential, but the wife's testimony about the communication that took place in the kitchen should not have come into evidence because it was intended to be confidential. Id at 925.

In short, this Court should reverse the trial court's admission of Pastor Schori's testimony. Pastor Schori and Stacy plainly intended their conversation to be confidential, and the court never found to the contrary. Moreover, the court never found that anyone at Caribou overheard the conversation.

B. The scope of the clergy privilege

When Mr. Peterson renewed his privilege challenge after trial, the court did an about face, this time ruling that the privilege did not apply because the marital counseling did not fall within the scope of the clergy privilege. The court reasoned first that counseling by clergy relating to marriage does not merit the privilege because such discussions do not reflect "unburdening [one's] soul" (R.11828-11829), and second that the privilege does not attach because the church had no "formalized process by which a person unburdens their soul [sic.] such as in the Roman Catholic church." Id. Neither ground is tenable.

Counseling by clergy with respect to issues arising in marriage does not fall outside the privilege. Rather, the discussions with clergy must be "made to him or her in his or her professional character or as a spiritual advisor." 735 III. Comp. Stat. Ann. 5/8-803. There is no question but that Pastor Schori throughout acted in his capacity as spiritual advisor, as he testified at length. (R. 1633 – 1697). Indeed, issues arising in marriage frequently touch on issues of faith, guilt, forgiveness, and religious

commitment. It is not the reason for the conversation that renders it privileged. Such a test would be far too subjective to be workable.

Not surprisingly, courts have found marital counseling to fall within the clergy privilege.[0] In *Oregon v. Cox, 742 P. 2d 694 (Ore. 1987)*, for example, the court reversed a conviction based upon the trial court's holding that the privilege did not attach to marital counseling. The court reasoned that "at the time when defendant confessed, he knew that Beck was a clergyman and regarded him, and reasonably could regard him, as acting in his professional character; he intended his communication to Beck to be confidential; and he knew that Beck had expressed a willingness to hear the communication in confidence and his professional character as a member of the clergy." Id. at 696-97. See also *Ohio v. Mason, 2011 Ohio App. LEXIS 2767 (June 30, 2011)* (rejecting State's interlocutory appeal challenging applicability of clergy privilege arising out of marital counseling); *In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990)* (recognizing that privilege may exist for Lutheran clergyman engaged in family counseling). The Illinois statute plainly covers Pastor Schori's counseling sessions regarding the sanctity of marriage.

The court post-trial also rejected privilege because Pastor Schori's church had no "formalized process" such as the confessional for hearing the innermost secrets of congregants. There is absolutely no support in logic or the governing Illinois statute for the court's distinction. Clergy from new religions as well as old qualify for the privilege,

---

0 Illinois courts have not decided the issue squarely, but the court, in Campobello summarized that, "to fall under the protection [of the statute], a communication must be an admission or confession (1) made for the purpose of receiving spiritual counsel or consolation (2) to a clergy member, whose religion requires him to receive admissions or confessions for the purpose of providing spiritual counsel or consolation." 348 III. App. 3d at 635.

and rules for the counseling process need not be inscribed. Rather, Illinois' statute requires merely that the counseling be with a "spiritual advisor in the course of the discipline enjoyed by the rules or practices of such religious body or of the religion which he or she professes…" As the trial court originally ruled in this case, Pastor Schori was acting within his church's tenets by engaging in counseling and by pledging confidentiality. (R. 1656-1692). No greater formalized process is required and, accordingly, the trial court's rejection of privilege must be overturned. Indeed, in Washington v. Martin, supra, the court held that clergy of the Evangelical Reformed Church could claim the privilege because, "[a]s many states have properly recognized, the clergy member privilege should be liberally interpreted to include more than just those religions with formalized systems of confession." Id. at 628 n.3.

Pastor Schori's testimony unquestionably was prejudicial. His testimony was critical in convincing the court to admit other hearsay statements pursuant to the forfeiture by wronging doctrine and then in placing before the jury the defendant's purported guilt. Only the counseling session with Pastor Schori could plausibly place the defendant at the scene of Kathleen Savio's death, contradicting defendant's alibi. The impact of the testimony cannot be gainsaid. Testimony about those counseling sessions violated privilege, predicated the court's forfeiture by wrongdoing determination, misled the jury, and deprived defendant of a fair trial.

IV. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, VIA THE FORFEITURE BY WRONGDOING DOCTRINE, HEARSAY STATEMENTS THAT THE COURT HAD PREVIOUSLY FOUND UNRELIABLE.

To determine the admissibility of hearsay statements under the forfeiture by wrongdoing doctrine, the trial court must assess whether the prosecution established by a preponderance of the evidence that the defendant caused a potential declarant to be unavailable as a witness at a legal proceeding. *People v. Hanson, 238 Ill.2d 74, 97-99 (2010); 725 ILCS 5/115-10.6 (b)*. As discussed, when an appellate court analyzes a trial court's decision to allow or exclude evidence, the court will review the determination under an abuse of discretion standard of review, *In re D.T. 212 Ill.2d 347, 356 (2004)*, but accord no deference to legal determinations. *People v. Williams, 188 Ill. 2d 365, 369 (1999)*.

In this case, the circuit court both erred as a matter of law in interpreting the requirements of the forfeiture by wrongdoing proceeding and abused its discretion in finding that the prosecution sufficiently proved that Drew Peterson killed both Kathleen and Stacy with the intent of making them unavailable to testify at specified legal proceedings. Therefore, the trial court erred in admitting, pursuant to the forfeiture by wrongdoing doctrine, hearsay statements that became the lynchpin of the prosecution's case, depriving Drew of a fair trial.[0]

The Supreme Court of the United States made it clear in *Giles v. California* that the forfeiture by wrongdoing doctrine only applies when the defendant "designed to

---

0 Two of the eight statements – Kathleen Savio's statement to Officer Kernc and Kathleen Savio's letter to the Will County State's Attorney's Office -- were testimonial and thus their introduction triggers rights under the Sixth Amendment's Confrontation Clause. *Giles v.California, 554 U.S. 353 (2008)*. The analysis as to admissibility, however, for those two statements is similar as for the other six that the trial court originally determined to be unreliable given that the forfeiture by wrongdoing doctrine articulated by the Illinois Supreme Court in *Hanson* "serves both as an exception to the hearsay rule and to extinguish confrontation clause claims." *238 Ill.2d at 97*. In both contexts, the specific intent to make a person "unavailable as a witness," must be demonstrated. *Id.*at 96.

prevent the witness from testifying." *554 U.S. 353, 360 (2008)*. To apply, the defendant's purpose in making the declarant unavailable must be to keep him or her from testifying at a proceeding. Id. Moreover, the Court indicated that:

> "In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declarations exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial." Id. at 361-362.

If a specific proceeding was not contemplated at the time, defendants would lose their right to challenge hearsay evidence on the basis of a bad act, not on the basis of an effort to stymie the justice system. No one's right to a fair trial should be eviscerated merely because he or she "is obviously guilty." *554 U.S. at 361 (citing Crawford v. Washington, 541 U.S. 36, 62 (2004))*.

A. The prosecution did not prove by a preponderance of evidence that Drew Peterson killed Kathleen Savio with the intent of making her unavailable as a witness for a legal proceeding.

The prosecution failed in this case to show what testimony of Kathleen's, Drew wished to avoid. At the time of Kathleen's death there was a legal proceeding pending for her and Drew's divorce. According to the prosecution, Drew killed Kathleen due to a financial motive to keep her from testifying at the divorce trial. (R. 4886-4887). The prosecution correctly noted that dissolution of a marriage normally abates when one of the spouses die. (*See In re Marriage of Davies, 95 Ill.2d 474, 481 (1983)*).

The prosecution, however, failed to take into account that the "dissolution action," or "actual final judgment" as to Kathleen and Drew's marriage had already been decided in October 2003. This Court, in *In re Marriage of Black, 155 Ill.App.3d 52, 54 (3rd*

Dist.1987), explained that, although the death of a spouse typically already abates the proceeding, when there is a bifurcated proceeding and the litigation is already "ripe for judgment," the proceeding is able to continue with the absence of the one spouse. The court made clear that the surviving spouse and the estate of the deceased spouse continue in an adverse relationship, and therefore that "the death extinguishes nothing, it merely substitutes one adverse party (the estate) for another (the decedent), [and allows] the controversy concerning the marital property to live on between two interested parties." *Davies, 5 Ill.2d at 481; See also 750 ILCS 5/503(e)*.

The supposed great "million dollar motive" (R. 4889) that Drew had in killing Kathleen was a figment of the prosecution's imagination. Like the couple in Davies, Drew and Kathleen were subject to a bifurcated divorce (People's Exh. 104) (C. 1066) therefore, the only thing left to settle was the distribution of the marital property. Kathleen's estate had the right to continue the legal battle of distributing the marital property. As such, the things the prosecution claimed that Drew would not have to pay because of Kathleen's death could be claimed by Kathleen's estate. (R. 4889).

Indeed, the prosecution's theory suffered from an even more serious flaw. Aside from the realities of a bifurcated divorce, the prosecution failed to show why Drew would have wished to avoid Kathleen's testimony at the divorce proceedings. The prosecution focused on why Drew would have lost money from the divorce and how he wanted to keep custody of the children. Even if true, however, such arguments provide no reason to infer that Drew would have benefited from avoiding Kathleen's testimony. In other words, Drew may have wished to avoid the distribution, but not her testimony *per se*. No matter how horrific murdering a spouse is to escape from the financial or emotional toll

of a divorce, the forfeiture by wrongdoing doctrine would not apply unless the defendant killed his spouse to prevent specific testimony. The court below merely stated that "the murder was intended to cause the unavailability of the declarant, Kathleen Savio, as a witness."

The trial court's unadorned conclusion omitted any mention whatsoever of the testimony that defendant purportedly wished to avoid. The prosecution never even proffered what Kathleen would have testified to that was of such great salience.[0] That omission compels the conclusion that the trial court abused its discretion in finding that Drew killed Kathleen with the intent to keep her from testifying at the divorce proceedings.

Recently, the District Court for the Eastern District of Wisconsin in Jensen v. Schwochert, No. 11-C-803 (Dec. 18, 2013), granted a habeas petition on that precise ground in a remarkably similar case. The prosecution had argued that the defendant had murdered his wife to avoid her testimony in a divorce proceeding, particularly in order to obtain child custody. The court responded persuasively that if defendant "caused Julie's death as the State alleged, he did so not to prevent her from testifying at a divorce but to eliminate any need for a divorce…This is not the kind of specific intent that Giles requires in order to invoke the forfeiture by wrongdoing exception." Slip op. 16. The Jensen court thus stressed that, absent a clear showing of the testimony purportedly feared by defendant, the forfeiture by wrongdoing doctrine did not apply.

---

0 The prosecution offered an expert, disallowed by the trial court and this court, who allegedly was to testify that the divorce judge was likely to adhere to his pre-trial recommendations, even if a trial occurred, meaning any testimony was meaningless. (C. 839; R. 6798).

Finally, the prosecution ignores that, even if Drew killed Kathleen to prevent testimony at the divorce proceeding, that intent cannot be transferred to permit introduction of hearsay statements in an unconnected proceeding. Defendants' wrongdoing may "forfeit" their right to challenge hearsay in the proceeding they were trying to avoid, but there is no reason that even such wrongdoing should preclude challenges to hearsay in unrelated tax, license, or criminal proceedings. No other wrongdoers are treated in such fashion. Indeed, in a closely analogous case, the court in *United States v. Lentz, 282 F. Supp. 2d 399 (E.D. Va 2002), aff'd, 58 Fed. Appx 961 (4th Cir. 2003)*, stated that, even if defendant had killed the victim to prevent her testimony at a divorce case, "the divorce proceeding is not the proceeding that will be before the court…. [The victim] would not be testifying in this case if she were available." Id. at 426-27. *See also United States v. Jordan, 2005 U.S. Dist. Lexis 3289 (D. Colo. 2005)* (similarly holding that forfeiture by wrongdoing does not prevent challenges to hearsay statements in proceedings unrelated to that for which victim was silenced). cf. *Wisconsin v. Jensen, 794 N.W.2d 482, 493 (Wisc. 2010)* (declining prosecution's theory that forfeited confrontation rights apply to unrelated proceedings), habeas granted on other grounds. It is akin to a "but for" analysis – but for the unavailability would they testify. Plainly, Kathleen would not purposely be made unavailable to be a witness at a murder trial for her death. Logically, forfeiture cannot apply. Accordingly, in light of the prosecution's failure to demonstrate that Mr. Peterson killed Kathleen with the intent to preclude her testimony, the forfeiture by wrongdoing finding must be reversed.

B. The prosecution did not prove by a preponderance of the evidence that Drew Peterson killed Stacy Peterson with the intent of making her unavailable as a witness for a legal proceeding.

1. There was insufficient evidence that defendant was responsible for Stacy Peterson's disappearance.

The prosecution submitted little direct evidence Drew was responsible for Stacy's disappearance, let alone that he killed her with the intent to preclude her testimony. During the pre-trial hearing, the prosecution asserted that Stacy Peterson was dead. (R. 4751). They presented documents, including credit card records, phone call and texting records, tracking of the last time her passport was used, and her last filing of taxes. Id. Moreover, prosecutors explained that people who "should have had contact with Stacy" had not since October 28th. (R. 4752-56). Other alleged means of proof that Stacy is dead included that she loved her kids, (Id.), that she was looking forward to Halloween, (Id.), that she had painting plans the day she disappeared, (Id.), that her personal effects were not missing, (Id.), and finally, that she had career aspirations. (Id.). None of this proves by a preponderance of the evidence that Stacy is dead.

The details listed are all facts that could very well be present in regards to any missing person's case. In fact, Stacy's own mother, Christie, has been missing since March of 1998. Christie also loved her children, had a strained relationship with her husband, and presumably has generated no phone call, tax, or passport records of use following her disappearance.[0] The lack of traceable activity by Stacy demonstrates that she is missing, but to go further and conclude that she is dead is not sufficiently supported by evidence.

Even assuming, arguendo, she is unavailable in this case the prosecution, in the absence of tangible evidence, relied principally on motive. But references to a difficult

---

0 "Christie Marie Cales" North American Missing Persons Network, citing Charley Project, August 2012. (R. 2148-2178).

marital relationship, Stacy's apparent unhappiness, and Drew's alleged jealousy cannot supply proof sufficient to justify a finding that it was Drew who was responsible for Stacy's disappearance. (In reviewing this Court should not consider the improperly admitted testimony from Smith and Shori).

2. Intent to prevent testimony at a future proceeding.

At the time of Stacy's disappearance, Kathleen Savio's death was classified as an accident, and had long been closed. No investigation was underway at the time. Id. There simply was no realistic prospect she would be a witness. For sure, as far as everyone, including Drew, was concerned, Kathleen's death was a tragic accident. As the U.S. Supreme Court suggested in *Giles*, the lack of "evidence of ongoing criminal proceedings of which the victim would have been expected to testify," undermines the forfeiture by wrongdoing claim. *554 U.S. at 377*.

Thus, even if the prosecution proved by a preponderance of the evidence that Drew made Stacy unavailable, as a matter of law there was insufficient evidence that the death was linked to a specific intent to prevent Stacy from testifying at a proceeding that was, at that point, non-existent. Again, assuming that Drew killed Stacy, the prosecution motives of jealousy, financial gain, or even cruelty are insufficient to trigger the testimonial forfeiture by wrongdoing doctrine. See also *In re Rolandis G., 232 Ill.2d 13, 43 (2008)* (rejecting forfeiture by wrongdoing claim because no indication that "assault was motivated in any way by desire to prevent [the victim] from being a witness against him at trial"). There must be a nexus between the alleged killing and a specific proceeding at which the victim would be a witness. Thus the trial court's decision with respect to Stacy's hearsay statements must be reversed.

Finally, even if the theoretical prospect of a future murder proceeding at the time of Stacy's disappearance was not too remote, the only evidence even suggesting a motive to quell future testimony was raised by Stacy's divorce attorney, Harry Smith.

As the court later agreed, the privilege applied. (R. 5563; R. 7341). See Issue I, infra. The trial court's earlier error infected the pretrial hearing, leading the court to conclude that Drew was responsible for Stacy's unavailability as a witness.[0] The court's refusal to block that testimony at the pretrial hearing constitutes reversible error, and leaves the prosecution with no recognizable evidence that Drew wished to make Stacy unavailable to testify at a murder proceeding, that at the time, was imaginary.[0]

---

0 Drew, after the court reversed and correctly held Smith could not testify, asked the court to reconsider the forfeiture ruling. The court refused. (C. 992). R. 5563).

0 Although defendant is loath to re-argue an issue raised and lost in this Court previously, this Court's earlier decision that the common law as opposed to statute should apply and therefore that the hearsay admitted under the forfeiture by wrongdoing doctrine need not be reliable misstates Illinois Supreme Court precedent. *968 N.E.2d 204 (Ill. App. 2012*). While Illinois Supreme Court rules and decisions take precedence over state legislation if they concern internal rules of housekeeping or docket management, courts will attempt to reconcile any conflict between state legislation embodying a public policy choice and the court's rules and decisions. People v. Walker, *519 N.E.2d 890, 893 (Ill. 1988)*. Only if the legislation "directly and irreconcilably conflicts" with a Supreme Court rule will the rule take precedence. *Id*. Drew's Law is a permissible exercise of legislative power reflecting public policy to protect the rights of defendants. Even as early as 1942, it was "well settled [by the supreme court] that the legislature of a State has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof." *People v. Wells, 380 Ill. 347, 354, 44 N.E.2d 32 (1942)*. Over the decades, the Illinois legislature has enacted many statutes affecting rules of evidence which have been upheld. *See People v. Rolfingsmeyer, 461 N.E.2d 410, 412 (Ill. 1984)* (collecting valid state legislation covering admissibility of business records, coroner's records, rape victims' prior sexual conduct, and defendant's payment of plaintiff's medical expenses); *Hoem v. Zia, 239 Ill.App.3d 601, 611-612 (1992)* (commenting on valid state legislation covering admissibility of evidence, including witness competency, prior identifications, prior inconsistent statements). Because the state statute requiring findings of reliability does not intrude into the judiciary's province, no separation of powers violation would arise and the eight hearsay statements found unreliable by the trial court should have been excluded.

C. Even if the common law forfeiture by wrongdoing doctrine applies, the due process clause operates as an independent check on admission of hearsay statements.

At trial, Mr. Peterson argued that the eight hearsay statements were so unreliable as to violate his rights to Due Process. (R. 7920-7979). The court below recognized the salience of the Due Process claim and held a hearing on whether the statements could be admitted consistent with Due Process even though the prior trial court judge had found that their introduction would defeat "the interests of justice." The court ultimately adopted an extremely narrow test for determining whether introduction of the statements would violate Due Process, namely that the statements must be "facially unreliable." (R. 7940-78). To the court, the hearsay statements had to seem unreliable without reference to the time and circumstances in which they were made before they could be excluded. Under that "facially unreliable" standard, the court ruled that there was no Due Process violation.

The court erred as a matter of law in adopting the "facial unreliability" standard. The Due Process issue cannot be cabined so neatly – statements may violate Due Process for reasons other than unreliability – most importantly, if there is not sufficient corroboration, it would be a violation of Due Process to permit a conviction based on hearsay alone.

A finding based on a preponderance of the evidence that a defendant made a potential witness unavailable for trial has never been held to forfeit all of his or her constitutional rights. Defendant retains the right to a jury trial, right to counsel, right to cross-examination of other witnesses, etc. Otherwise, the trial would become a mockery. Indeed, if the judge's decision as to culpability under the forfeiture by wrongdoing

doctrine itself inexorably led to a conviction, then the judge in essence would be undermining a defendant's right to jury factfinding as guaranteed under the *Apprendi v. New Jersey, 530 U.S. 466 (2000)*, line of decisions.

"The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury." *Giles*,at 365.

Thus, even though application of the forfeiture by wrongdoing doctrine can result in admission of unreliable hearsay evidence, when introduction of that evidence fundamentally distorts the fact-finding process, the Due Process Clause requires its exclusion. The doctrine cannot be used to "violate those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Dowling v. United States, 493 U.S. 342, 353 (1990). See also Tome v. United States, 513 U.S. 150 (1995)*(ordering new trial in light of erroneous admission of hearsay).

When there is corroboration, the introduction of hearsay, even if unreliable, does not violate the Constitution. But, here, there was no corroboration of key evidence, such as Mary Park, and particularly the statements to Attorney Harry Smith, which should have been excluded in any event on privilege grounds. His testimony vividly invoked the voice of Stacy to condemn defendant for Kathleen's death. As discussed earlier, that hearsay statement was fundamental to the prosecution's case.

Indeed, the trial court judge relied on the Due Process Clause in refusing to allow another witness, Scott Rossetto, to testify about hearsay statements. Although the court

called it a case of "facial unreliability," his reasoning belied that assertion for the court excluded the proposed testimony under the Due Process Clause in light of all surrounding circumstances: "Now, taking all of these things into account and examining this from the perspective a due process claim, the unreliability of this witness's testimony, these discovery violations, the misinformation given to the defendant, the information now that the witness was put on the stand and allowed to testify to something that was apparently false." (R. 9281-9352).

The court went beyond "facial unreliability" to consider an overall assessment of fairness to the defendant – due process must be based on all the circumstances, even if a more demanding test than reliability itself.

Drew's Due Process challenge should be granted. Introduction of those eight hearsay statements, previously found to be unreliable, deprived him of a fair trial because there was no corroboration of key allegations. Basic fairness was lost. Those hearsay statements constituted almost the entire case against defendant, which even the prosecution acknowledged. In these unusual circumstances, the trial below should be set aside as a violation of Mr. Peterson's right to Due Process.

V. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING JEFFREY PACHTER'S TESTIMONY BECAUSE THE STATE FAILED TO PROVIDE PROPER NOTICE OF THE TESTIMONY UNDER RULE 404(b), WHICH WAS PREJUDICIAL PROPENSITY EVIDENCE.

On appeal, the trial court's decision to admit evidence under Rule 404(b) is reviewed for an abuse of discretion. *People v. Ward, 952 N.E.2d 601, 605-06 (2011)*; *United States v. Prevatte, 16 F.3d 767, 774 (7th Cir. 1994)*. If erroneous, the admission of

bad act evidence carries a high risk of prejudice and generally calls for reversal. *People v. Mason*, 219 Ill.App.3d 76, 80 (4th Dist. 1991).

Rule 404(b) of the Illinois Rules of Evidence states in relevant part: "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Il. R. Evid. 404(b). The rule also states: "in a criminal case in which the prosecution intends to offer evidence [under 404(b)] it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown." Il. R. Evid. 404(c). This recently codified rule is modeled after the Federal Rule of Evidence 404; therefore, Illinois courts frequently rely on the federal analysis of Rule 404. *People v. Dabbs, 239 Ill.2d 277, 295 (2010).*

In this case, the testimony of Jeffrey Pachter ("Pachter") should have been excluded because the prosecution failed to provide notice of its intent to introduce bad act testimony, contrary to IRE 404(c).

IRE 404(c) plainly states that if the prosecution indicates that it will offer character evidence of the defendant, it must disclose that evidence at a reasonable time in advance of trial. Il. R. Evid. 404(c). Here, the prosecutors never indicated, pre-trial, they would introduce this evidence. (R. 9203). Accordingly, when the prosecution mentioned Pachter in opening statements a mistrial was nearly declared, because the incident was not going to be presented to the jury. (R. 6816-17).

The rule explicitly states that the prosecution may only disclose such evidence during trial if the court excused pre-trial notice on good cause shown. Il. R. Evid. 404(c); *Dabbs, 239 Ill.2d at 285*. In interpreting the rule's federal counterpart, the Seventh

Circuit similarly stated in *United States v. Blount* that "without notice, 404(b) evidence is inadmissible." *502 F.3d 674, 677 (7th Cir. 2007).*

Nonetheless, during trial the court reversed itself, opining good cause was synonymous with constructive notice. (R. 9405). Drew's defense was shocked and unprepared for this reversal. "We would be so severely prejudiced [by introduction of Pachter's testimony]…it wasn't prepared for, it wasn't addressed in opening. We'd have to figure out who is going to handle the witness. We have to do an investigation…We'd have to get all sorts of information…" (R. 9196).[0]

The purpose of the notice requirement is to reduce surprise and promote early resolution on the issue of admissibility. *See United States v. Carrasco, 381 F.3d 1237, C.A.11 (Fla.) 2004*. (Reversing guilty verdict because government failed to provide adequate notice of 404(b) evidence before trial).

Here, the trial court correctly noted, "unless the [proponent of the evidence] can present evidence separate and apart from…inadvertence or attorney neglect to support an argument that there was good cause for the delay in compliance, the extension will not be granted." (R. 9393). The State did not provide any reasonable excuse for ignoring 404 (b)'s notice requirement. (R. 9391–9429). Thus, Drew could not help but have been taken by surprise at the offer of this evidence so late in the proceeding. Even the court noted the unfairness of the situation in a colloquy with the State. "So at this point in time if the

---

0 The suggestion that Drew's defense may have been better able to attack Pachter is not simply speculation. After losing the hearsay hearing Drew replaced two-thirds of his lawyers. The new lawyers discovered important facts to attack Mary Parks (that she was not in class with Kathleen as claimed) and Rosetto (that he was at work – causing the court to bar him). Who is to say that the new lawyers would not have been equally successful with Pachter. After all, although required, there was no written proof the ride along ever occurred. (R. 6755).

defendant attempted to investigate [Pachter's testimony] with this constructive notice that you are now urging upon me, his investigation would be …completely fruitless…" (R. 9203). Thus the Court's reversal so late in the proceeding was an abuse of discretion. More to the point, the Court's ruling frustrated the purpose of 404(c). In making its' ruling the Court pointed out that the concept of "constructive notice" would likely swallow 404(c)'s requirements whole. (R. 9393).

In United States v. Skoczen the government introduced 404 evidence of defendant's flight from Illinois to show his consciousness of guilt. While the court declined to reverse Skoczen's conviction because he could not show prejudice, its mandate was clear:

> "The government argued, over the objection of Skoczen's counsel, that Skoczen (and his lawyer) were aware of his flight and that the defense had been on notice that the government's physical evidence of flight Skoczen's Florida driver's license, was available for review at any time. Although Skoczen could hardly dispute this, he was not aware the government intended to use this evidence at trial. The point of the pretrial notice is to prevent undue prejudice and surprise by giving the defendant time to meet such a defense…[W]e agree with Skoczen that the government should have provided proper notice.

Skoczen, 405 F.3d 537, 548 (7th Cir. Ill. 2005).

Here, as defense counsel correctly pointed out, the prejudice to Drew's case was extreme. Drew's defense had not time to investigate or prepare for Pachter's testimony. Further, introduction of this testimony allowed the jury to hear information that tended to paint Drew in the worst light. The simple fact is that the State failed to live up to its statutory obligation to notify Drew of bad acts evidence. If the Illinois Rules of Evidence mean what they say, then the trial court abused its' discretion in allowing Pachter's bad acts evidence to come in at trial.

VI. DREW WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT

Thus far, Drew has pointed to a bevy of technical errors, all of which require a new trial. But there is another predominant issue at the heart of this matter: the record is not sufficient to support a finding of guilt in this case.

The State's theory of the case is that Drew snuck in to Kathleen's home and murdered her sometime between February 28, 2004 and February 29, 2004. (C. 2). In support of this theory, the State presented in excess of 25 witnesses. Not one provided a first-hand account of Drew's whereabouts during the time frame in question, let alone knowledge of what actions Drew took in causing Kathleen's demise. The State did not present physical evidence linking Drew to Kathleen's body. The State did not present forensic evidence linking Drew to Kathleen's body. In short, the record is bereft of any fact from which a rational trier of fact may infer Drew murdered Kathleen.

To sustain a first-degree murder charge the State must prove Drew took an act which caused Kathleen's death and that, when he took this act, he intended to end Kathleen's life. (C. 1125). If it cannot prove each of these elements beyond a reasonable doubt a guilty verdict cannot stand.

While great deference is given to the findings of the jury, a criminal conviction cannot be upheld if the evidence is so improbable or unsatisfactory as to give rise to a reasonable doubt regarding an essential element of the offense that the defendant has been found guilty of committing. Where the State's witnesses give contradictory testimony and no physical evidence links a defendant to crime, a judgment of not guilty is mandatory. *People v. Smith, 185 Ill. 2d 532, 542 – 543 (Ill. 1999).*

In *People v. Rivera* the Second Appellate District clearly stated that "a fact-finder's acceptance of certain testimony does not guarantee its reasonableness." *People v. Rivera, 962 N.E.2d 53, 65 (Ill. App. 2., 2011)*. Indeed, courts must look at the record as a whole and make a common-sense judgment as to whether any rational trier of fact could find guilt beyond a reasonable doubt based on the circumstances of the facts adduced at trial. Here the court is faced with a record saturated by inconsistency and incredulousness.

It is important to note at the onset that the State did not present a single eyewitness, physical evidence linking Drew with Kathleen's body, forensic evidence linking Drew with Kathleen's body, or a confession from Drew. And while it is true there is no magic formula for a murder conviction, at least *one* of these pieces of evidence is usually present where an appellate court upholds murder convictions. *See, People v. Daheya, 2013 WL 5972978, (Ill. App. 1st Dist., 2013)*. Here the State relied entirely on statements that were inconsistent, motivated by pecuniary gain, and/or severely impeached.

For instance, Anna Doman testified to a conversation she and Kathleen had six weeks prior to Kathleen's death. During this conversation Kathleen supposedly told Anna that Drew threatened to kill her to gain the upper hand in their divorce. Kathleen made Anna promise "over and over" to take care of her children. Kathleen also instructed Anna to get a briefcase of important papers from her SUV if something happened to her. Yet, when confronted with Kathleen's death, Anna did not make any attempt to care for Kathleen's children. She also took the briefcase of "important papers" and put it on a shelf in her garage, leaving it there for years. While Anna ignored her sister's requests

about the children and the briefcase, she moved swiftly to find "wills or life insurance" that may have benefitted her financially. (R. 7425–7466).

The State also presented Kathleen's sister Susan Doman. Not only had Susan been ruled unreliable by Judge White (A. 4), she entered in to a movie contract which stood to benefit her *only* if the State obtained a conviction against Drew. (R. 8437–8476). The State also presented Kristin Anderson to testify about an incident that allegedly occurred on July 5, 2002. Setting aside the fact that this incident was highly prejudicial and irrelevant to the inquiry of whether Drew murdered Kathleen on February 29, 2004, it was severely impeached by Special Agent Robin Queen who said that Anderson gave information in a police interview that contradicted Anderson's trial testimony. (R. 10630).

Then there was Mary Parks. Mary Parks testified that Kathleen told her about an incident that occurred near Thanksgiving, 2003. According to Park's memory, Kathleen told her that Drew attacked her and told her he could kill her and make it look like an accident. Of course, on cross, Parks conceded that she was not with Kathleen at the time Kathleen made these allegations.

The State also introduced evidence from Jeffrey Pachter concerning a ride along he shared with Drew. Pachter testified that Drew asked him to "take care" of Drew's wife during this ride along. But Pachter's credibility was brought in to doubt with cross-examination that revealed he had previously: falsified drug tests; owed back taxes; aided in a workman's compensation scam; had a sex crimes conviction; owed gambling debts to a bookie; and made inconsistent statements to the grand jury. (R. 9678 – 9720).

The State presented evidence from Lt. James Coughlin. Coughlin told the jury he heard Drew say he'd be better off if Kathleen were dead outside of a courtroom. Of

course Coughlin had previously given different variations of the story and the State withheld *Brady* information from the defense that tended to impeach Coughlin. (R. 7732 – 7755).

These were the witnesses that the State relied on to prove Drew murdered Kathleen on February 29, 2004. They were absent-minded, inconsistent, financially motivated and wholly unbelievable people who couldn't testify to anything concerning the night in question because they hadn't heard or seen a thing.

In *People v. Jones*, the appellate court reversed a first-degree murder conviction because the State failed to prove the defendant's mental state beyond a reasonable doubt. There the defendant pummeled the victim down a flight of stairs, put his foot on the victim's throat, then pulled away at the last second, leaving the victim barely breathing. At a bench trial the court found the defendant guilty of first-degree murder. In reversing, the appellate court stated:

> "Because a defendant's mental state is not commonly proved by direct evidence, it may be inferred from the surrounding circumstances, including the character of the defendant's acts and the nature of the victim's injuries … We conclude that the evidence presented at trial was insufficient to establish that at the time defendant placed and held his foot in the area of Howell's neck, defendant intended to kill Howell or that he was consciously aware that his conduct was 'practically certain' to cause a particular result."

People v. Jones, 404 Ill App. 3d. 734, 750 (Ill. App. 1st Dist., 2010).

In Drew's case the State presented absolutely no evidence in which a jury could infer the necessary *mens rea* to convict for first-degree murder. In *Jones* there was undisputed eyewitness testimony of an attack, medical evidence concerning the victim's asphyxiation, and a confession from the defendant. Yet the appellate court stated there wasn't enough on record to infer that the defendant had the appropriate mental state. In Drew's case there is not any evidence delineating what steps were taken to murder

Kathleen, let alone any evidence that supports a finding concerning the alleged actor's mental state.

VII. THE CUMULATIVE ERRORS DENIED DEFENDANT HIS RIGHT TO A FAIR TRIAL AND CAST DOUBT UPON THE INTEGRITY OF THIS PROCEEDING.

Throughout this Brief defendant identifies abundant substantial defects in the process. The prosecutor will respond that defendant is wrong, that the error(s) were waived, or are *de minimus* and harmless. They are not.

Every one of the errors, individually, operated to deny this defendant a fair trial. But, even if this Court does not believe any singular error warrants a new trial, the record in its totality requires this Court reverse this conviction because of the outrageous cumulative effect of the errors in the proceedings. *See People v. Kidd (1992), 147 Ill.2d 510, 544–45, 169 Ill.Dec. 258, 274, 591 N.E.2d 431, 447; People v. Smith (1990), 141 Ill.2d 40, 67, 152 Ill.Dec. 218, 229, 565 N.E.2d 900, 911; and People v. Taylor, 244 Ill. App. 3d 806, 819, 612 N.E.2d 943, 952 (1993)*. Several of the errors involve constitutional questions. Accordingly, in order to be found harmless, they must be harmless beyond a reasonable doubt. *People v. Swaggirt, 282 Ill.App.3d 692, 705, 668 N.E.2d 634 (1996)*.

The record before this court easily demonstrates that Drew did not receive the type of fair, orderly, and impartial trial guaranteed by our state and federal constitutions.

In evaluating this claim this court should be mindful of some of the errors that space constraints prevented defendant from fully briefing. For example, the State prosecuted the matter in such a way that shocked the trial court's conscience. (R. 8888 - 8903). This included mentioning "hit-man" Jeffrey Pachter in opening statements (R. 6500), linking Peterson to a bullet through inadmissible testimony (R. 7100 - 7169),

presenting evidence in the face of a *Brady* violation (R. 7761 - 7789), presenting evidence the trial court had previously deemed "unreliable" (R. 7940 - 7988; 8404 - 8411), presenting testimony concerning "recreation" of Kathleen's death despite countless directives to avoid such a topic (R. 8888 - 8903), and impermissibly piercing privileged information for the jury's review. Every one of the errors, individually, operated to deny this defendant a fair trial. Taken together, it is clear the cumulative whole of the errors denied Drew the same.

Our Supreme Court best stated it best in *People v. Blue, 189 Ill. 2d 99, 137-39, 724 N.E.2d 920, 940-41 (2000)*:

> "In response to each assertion of error by defendant, the State urges that, regardless of whether error occurred, the evidence against defendant at the guilt and sentencing phases was so overwhelming that the absence of these errors would have made no difference in the outcome of the trial. This court may invoke the harmless error doctrine to dispose of claims of error that have a *de minimis* impact on the outcome of the case." *Kliner, 185 Ill.2d at 157, 235 Ill.Dec. 667, 705 N.E.2d 850; People v. Brown, 172 Ill.2d 1, 38, 216 Ill.Dec. 733, 665 N.E.2d 1290 (1996).*

***

Yet prejudice to a defendant's case is not the sole concern that drives our analysis of defendant's appeal: "A criminal defendant, whether guilty or innocent, is entitled to a fair, orderly, and impartial trial" conducted according to law. *People v. Bull, 185 Ill.2d 179, 214, 235 Ill.Dec. 641, 705 N.E.2d 824 (1998)*. This due process right is guaranteed by the federal and state constitutions. *Bull, 185 Ill.2d at 214, 235 Ill.Dec. 641, 705 N.E.2d 824; U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, § 2; See also Peeples, 155 Ill.2d at 480, 186 Ill.Dec. 341, 616 N.E.2d 294… People v. Green, 74 Ill.2d at 455, 25 Ill.Dec. 1, 386 N.E.2d 272* (Ryan, J., specially concurring), quoting *Screws v. United States, 325 U.S. 91, 107, 65 S.Ct. 1031, 1038, 89 L.Ed. 1495, 1506 (1945)*.

Even if this Court does not believe any singular error warrants a new trial, the record in its totality requires this Court reverse this conviction because of the outrageous cumulative effect of the errors in the proceedings. *See People v. Kidd (1992), 147 Ill.2d 510, 544–45, 169 Ill.Dec. 258, 274, 591 N.E.2d 431, 447; People v. Smith (1990), 141*

Ill.2d 40, 67, 152 Ill.Dec. 218, 229, 565 N.E.2d 900, 911; and People v. Taylor, 244 Ill. App. 3d 806, 819, 612 N.E.2d 943, 952 (1993).

CONCLUSION

This Court should find that Defendant was not proven guilty because the prosecution failed to establish he was at Kathleen's, or had any involvement in her death. Alternatively, this Court should hold the errors, at a minimum, require a new trial.

Respectfully Submitted,

DREW PETERSON
Defendant-Appellant

By: _____
One of His Attorneys

STEVEN A. GREENBERG
STEVEN A. GREENBERG AND ASSOC., LTD.
ATTORNEY AT LAW
53 W. JACKSON BLVD., SUITE 1260
CHICAGO, ILLINOIS 60604
(312) 879-9500

NO. 3:13-0157
IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	**)**	**Appeal from the Circuit Court**
Plaintiff-Appellee,	**)**	**of the 12th Judicial Circuit**
	)	**Will County, Illinois**
	)	
v.	**)**	**Indictment No.: 09 CF 1048**
	)	
	)	
DREW PETERSON,	**)**	**Honorable Edward Burmilla, Jr.**
Defendant-Appellant.	**)**	**Judge Presiding**
	)	

CERTIFICATION OF COMPLIANCE

I certify that this Brief conforms to the requirements of Rules 341 (a) and (b). The length of this Brief, excluding the Appendix, is Fifty-Four (54) pages.

Respectfully submitted,
Drew Peterson, Defendant-Appellant

By:_____
One of His Attorneys

STEVEN A. GREENBERG
STEVEN A. GREENBERG AND ASSOC., LTD.
ATTORNEY AT LAW
53 W. JACKSON, SUITE 1260
CHICAGO, ILLINOIS 60604
(312) 879-9500