

2011 WL 2456107 (Md.) (Appellate Brief)
Maryland Court of Appeals.

Roger Mandel GREENBERG, Appellant,
v.
STATE OF MARYLAND, Appellee.

No. 144.
May 26, 2011.

On Writ of Certiorari to the Court of Special Appeals of Maryland

Appellant's Reply Brief

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***1 ARGUMENT**

At Appellant Roger Greenberg's trial, the court allowed his former civil attorney, Mark Hessel, to reveal a broad array of communications that unfolded in the course of Hessel's legal representation. Hessel then testified about communications regarding (i) Greenberg's appointment as healthcare agent for Zucker, including communications that indicated Greenberg's awareness of her worsening condition; (ii) Greenberg's solicitation of advice regarding a deed transferring Zucker's house to him; and (iii) Greenberg's solicitation of advice regarding whether Hessel could help Greenberg and Zucker regain access to some of Zucker's bank accounts. The trial court's only basis for admitting this *2 evidence was that in prior annulment proceedings, Greenberg waived any attorney-client privilege through his own testimony and by failing to object to Hessel's testimony there.

The central issue on appeal--whether the trial court erred by failing to conduct the proper evidentiary inquiry into the existence of attorney-client privilege, and thus erroneously held that Greenberg categorically waived the privilege at trial--is now answered. The State concedes that there was no evidentiary hearing, and it further concedes that the trial court's waiver ruling was not just erroneous, but also at odds with thirty-five years of established precedent in this Court. Appellee's Br. at 26, 30.

The State nonetheless advances two arguments as to why, notwithstanding these manifest errors, Greenberg is not entitled to a new trial. Neither of these arguments has merit. First, the State argues that there was no cognizable error here. Defense counsel's objections on the waiver issue, the State says, cannot be reviewed by this Court because they were not sufficiently preserved at trial and were affirmatively waived through defense counsel's trial tactics. That argument is at odds with the record and ignores a series of discrete factual and legal arguments advanced by defense counsel at trial.

The State also claims that the crime-fraud exception--which the State downplayed at trial, and which the trial court declined to rule upon--applies, and deprives any privileged communications of protection. But the only evidence the State belatedly proffers to show that the exception applies is Zucker's testimony at trial that she never signed the deed. That does not show that *specific communications* between Greenberg and Hessel were *in furtherance* of fraud. Even if it did, the crime-fraud exception would not exclude the overwhelming majority of the communications Hessel disclosed, which went well beyond matters related to the deed. Additionally, to the extent there is any doubt, this Court should not apply the crime-fraud exception on appeal. A fact-intensive inquiry and specific evidentiary findings are required before a court can find that the exception applies. Here, the

record is undeveloped, the State made no showing when it invoked the crime-fraud exception at trial, and to rule on this issue without giving Greenberg an opportunity to adduce rebuttal evidence would be unfairly prejudicial.

*3 Second, the State argues that even if Hessel's testimony was admitted in error, the stringent standard for harmless error is met: that "beyond a reasonable doubt," the trial court's "error in no way influenced the verdict." *Bellamy v. State*, 403 Md. 308, 332 (2008); Appellee's Br. at 33. The State first contends that there was no harm in admitting Hessel's testimony because it did not disclose *anything* subject to attorney-client privilege. *Id.* at 33-38. The State is wrong. Hessel's and Greenberg's conversations, the timing and circumstances of the representations, and Hessel's legal advice on the three sets of communications Appellant identified were unquestionably privileged. The State does not contest that these communications were intended to be confidential, and the record makes clear that these communications related to Greenberg's solicitation of Hessel's legal advice. The State's argument to the contrary relies on an excessively narrow definition of privilege at odds with this Court's recent precedents.

The State concludes that even if Hessel divulged considerable privileged communications, his testimony was not essential to establishing Greenberg's guilt because of all the other evidence at trial. Appellee's Br. at 38-43. But the State merely lists evidence without connecting it with the constituent elements of the offenses for which Greenberg was convicted. That is a key omission given the significance of Hessel's testimony to the State's case. Hessel's testimony was the only direct evidence that Greenberg was deliberately neglecting Zucker. Hessel's testimony also provided unique evidence of undue influence and of Greenberg's promotion of his own **financial** interests. Unquestionably, this testimony had at least some influence on the verdict. This Court should thus vacate Greenberg's convictions and remand for a new trial.

I. This Court Has Jurisdiction to Address All Errors Raised on Appeal

On appeal, Greenberg alleges five errors. The first and most fundamental error was procedural: the trial court did not conduct a preliminary evidentiary inquiry into all surrounding facts and circumstances to determine whether Greenberg and Hessel enjoyed a confidential attorney-client relationship, and whether privilege was waived. Appellant's Br. at 17. Second, the trial court failed to expressly identify privileged versus non- *4 privileged communications arising from the representation. *Id.* at 17-18. Third, the trial court's analysis of waiver failed to determine what, if any, specific portions of Greenberg's annulment testimony constituted waiver. *Id.* at 18. Fourth, the trial court erroneously held that an attorney can waive privilege by testifying in a proceeding in which the client has no opportunity to object to his testimony. *Id.* at 19. Finally, the trial court erred by allowing the prosecution to question Hessel about his entire representation, rather than limiting Hessel's testimony only to matters that were no longer privileged. *Id.*

The State concedes or fails to rebut all of these errors. It merely asserts that none of these arguments were raised at trial, where it says discussions of attorney-client privilege were limited to a narrow subset of the waiver analysis and the parties agreed on broad factual assertions. Appellee's Br. at 26-30. The State is incorrect. [Maryland Rule 8-131](#) permits appellate review of an "issue...[that] plainly appears by the record to have been raised in or decided by the trial court." [Md. Rule 8-131\(a\)](#). Whether an issue was preserved for review depends on whether the arguments made at trial put the trial court on notice of the basic, underlying claims. See *Longns v. State*, 416 Md. 433, 464 (2010); *Tinsley v. United States*, 868 A.2d 867, 883-84 (D.C. 2005). While the two discussions of attorney-client privilege at trial were no models of clarity, trial counsel's arguments sufficiently preserved the errors identified on appeal.

The State adds that defense counsel's trial tactics invited these errors, rendering them unreviewable in any event. Appellee's Br. at 27, 29. The record in no way supports that characterization. Far from focusing only on the narrow issue of whether any waiver by Greenberg was voluntary, defense counsel raised numerous factual contentions and legal arguments regarding other aspects of attorney-client privilege.

A. The Errors Identified on Appeal Were Sufficiently Preserved at Trial

At trial, Greenberg's trial counsel, Sherryl Statland, repeatedly voiced a general point as the "basis of [her] objection" to Hessel's testimony, E. 139. She stated that Hessel "was Mr. Greenberg's lawyer," raising "the issue of attorney-client privilege," E. 108, and again that "[t]here was an attorney-client relationship between the two of them. *5 So things that they discussed, talked about, I believe should be covered by the attorney-client privilege." E. 139; *see also* Md. Rule 4-323(a). Those objections put the court on clear notice that Greenberg was asserting attorney-client privilege. *See Longus*, 416 Md. at 464. At that point, the court was obligated to conduct an evidentiary inquiry, irrespective of whether defense counsel asked for one. *See Harrison v. State*, 276 Md. 122, 151 (1975). This error is sufficiently preserved. *See Morris v. State*, 418 Md. 194, 207, 209-11 (2011) (holding that "inarticulate[]" trial objections that logically, albeit "tangentially," related to arguments on appeal, sufficiently preserved those arguments).

Statland also squarely raised the scope of communications subject to attorney-client privilege at trial. She first stated "I'm not certain that the State can in fact call Mr. Hessel... or what they believe he is going to testify to that would be admissible evidence if there's evidence outside the privilege that they're trying to admit." E. 108-09. When the trial court suggested that Hessel might only be testifying about his services for Zucker, not Greenberg, Statland again objected, "I'd like to hear what the state thinks is admissible." E. 109. Rather than identifying which communications might not be privileged, the prosecution told the court that Greenberg's purportedly categorical waiver of privilege made it unnecessary to decide the scope of communications subject to privilege. E. 109. Later, Statland again asserted that all the "things that [Greenberg and Hessel] discussed, talked about, I believe should be covered by the attorney-client privilege." E. 139. The fact that the court declined to address this threshold issue--on the basis of the State's erroneous contention that Greenberg categorically waived all privilege--does not preclude Greenberg from reasserting it on appeal. E. 118-19, 147-48.

Given Statland's repeated objection that virtually everything about which Hessel would likely testify was privileged, the balance of the State's arguments on preservation are of no moment. Defense counsel raised the general issue at trial and objected to the evidence. Moreover, the trial court was aware of the controlling case law, namely *Harrison v. State*. Indeed, the court labeled *Harrison* "directly on point." E. 145. *Harrison* is not only the foundational decision regarding the proper procedure for a court to follow when attorney-client privilege is invoked. It is also the very case the State now *6 concedes established there could be no waiver in this case. Appellee's Br. at 30. The trial court simply misread the case and reached an erroneous result. Nothing more was necessary for Greenberg to preserve this issue and all associated arguments on appeal.

Unquestionably, Statland also pressed the point that any waiver of attorney-client privilege was involuntary because Greenberg was not informed of his right to assert the privilege in the annulment proceedings. E. 110-11, 140-43. But the State ignores Statland's further arguments, namely her rebuttal of the State's contention that Greenberg waived privilege by failing to object to Hessel's testimony in those proceedings. When the court asked if "there was no objection made to [Hessel] testifying" there, Statland argued that Hessel was present "in large part because he was seeking attorney's fees from...a guardian of the property for Ms. Zucker"--i.e. not on a matter adverse to Greenberg. E. 117-18. "[T]he posture of the annulment proceedings--where Hessel and Greenberg were not adverse parties, and Hessel's claims for attorney's fees were directed against Zucker's estate only"--was precisely why Greenberg's presence during Hessel's testimony did not impliedly waive privilege. Appellant's Br. at 25.

Finally, the fifth error identified on appeal--that the scope of Hessel's testimony at trial exceeded the subjects the prosecution identified during the attorney-client privilege discussions--derives from the trial court's failure to conduct the proper procedural inquiry. Before Hessel's testimony, the prosecution represented that the State only sought to admit "direct statements...in opening and in the trial about the deed that was drafted by Mr. Hessel and advice that [Greenberg] was given about establishing the deed." E. 109-10. Once the court decided to admit Hessel's testimony, the court granted Greenberg a continuing objection to the entirety of Hessel's appearance as a witness. E. 148-49. Statland need not have objected to specific parts of Hessel's testimony thereafter. Under these circumstances, the errors alleged on appeal are adequately preserved for review.¹

*7 B. Even If Unpreserved, These Errors Amounted to Plain Error

Even if unpreserved, this Court should address the numerous errors in the trial court's attorney-client privilege ruling under the plain error doctrine, under which courts can address obvious errors that "affect substantial rights," irrespective of whether they were raised at trial. *United States v. Olano*, 507 U.S. 725, 731-34 (1992); *State v. Rich*, 415 Md. 567, 579-80 (2010). Here, the errors alleged went well beyond "purely technical" mistakes or questionable judgment calls. *Boulden v. State*, 414 Md. 284, 313 (2010). Even the State now concedes that the trial court manifestly erred by failing to follow Maryland caselaw on attorney-client privilege dating to 1975. Appellee's Br. at 26, 30. Nor, given the "interrelate[ionship]" between attorney-client privilege and "the specific constitutional guarantees of the individual's right to counsel," *Haley v. State*, 398 Md. 106, 126 (2007), is there any question that these errors were "material to the rights of the accused." *Boulden*, 414 Md. at 313. Finally, Hessel's testimony was the only evidence of Greenberg's communications on matters central to the neglect, embezzlement, and **exploitation** charges, and undoubtedly affected the trial's outcome. See *infra* at 21-25.

This court reviews plain errors " 'if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.' " *Md. Rule 8-131(a)*. Two criteria govern the exercise of that discretion: whether addressing the issue (1) "will work unfair prejudice to either of the parties" and (2) "will promote the orderly administration of justice." *Jones v. State*, 379 Md. 704, 715, 738-39 (2004). Both criteria favor the exercise of discretion here. There is no unfairness to the State in recognizing the legal errors raised on appeal. This is not a case where the validity of the arguments impugning the trial judge's attorney-client privilege ruling "depend[s] upon evidence not adduced at *8 the trial level." *Id.* at 714 (citing *State v. Bell*, 334 Md. 178, 189-90 (1994)).² Likewise, the State not only needs no "opportunity to respond to the argument with [its] own evidence to the contrary" here, *id.* but has conceded the legal errors alleged. Appellee's Br. at 26, 30. Further, addressing these errors promotes efficient judicial administration. Given the magnitude of the trial court's errors, these issues are destined to recur on postconviction review, whether in an ineffective assistance claim or otherwise.

The State nonetheless claims that plain error review is unavailable because trial counsel " 'both invited the error, and relinquished a known right.' " Appellee's Br. at 29 (quoting *State v. Rich*, 415 Md. 567, 580-81 (2010)). The State specifically suggests that it is "hardly surprising" that the trial court bungled its handling of attorney-client privilege "in light of the parties' trial tactics." Appellee's Br. at 27. Nothing in the record supports the notion that defense counsel chose not to argue available grounds to object to the introduction of privileged evidence. Defense counsel can hardly be presumed to have known of, and purposefully ignored, obvious errors of law when, as here, Statland told the court that she had not read *Harrison*, the key case identifying the proper procedures for ascertaining attorney-client privilege and waiver, just before the court's final ruling. E. 144. Nor, as discussed above, did Statland deliberately confine her objections to whether Greenberg voluntarily waived privilege in the annulment proceeding, or pursue a "trial strategy that eschewed any factual dispute." Appellee's Br. at 27-29.

The State also asserts that Statland invited the trial court to assume no facts were at issue because she "was actually present, and perhaps even made an appearance on behalf of Greenberg, at the annulment proceeding." Appellee's Br. at 21. But Statland not only made no appearance on Greenberg's behalf; the trial court insisted that "[s]he didn't have anything to do with that hearing" and "she wasn't representing him in that hearing." E. 146. In any event, the trial court's fundamental error at trial was legal, not factual: it failed to rule on which communications were privileged, and to ascertain the scope of any *9 waiver based on the facts at hand. There was no invited error, and, to the extent unpreserved, plain error review is warranted here.

II. This Court Cannot Admit the Testimony Under the Crime-Fraud Exception

The State next argues that, notwithstanding the trial court's erroneous rulings on attorney-client privilege, it is "equally clear from hindsight... that Hessel's challenged testimony was admissible under the crime-fraud exception to attorney-client privilege." Appellee's Br. at 31. The State is wrong.

First, the State's retroactive proffer of Zucker's testimony at trial in no way satisfies the State's burden of making a *prima facie* showing that the exception applies. Even if that evidence did suffice, it would exclude only one of the three categories of privileged communications that Hessel divulged at trial.

Second, and in the alternative, because none of the required evidentiary procedures governing the crime-fraud exception were followed at trial, this issue can only be addressed in a new trial. The trial judge declined to reach crime-fraud, which the prosecution nearly abandoned. The State made no contemporaneous evidentiary showing that the exception applied. No relevant evidence was developed. No opportunity was afforded for Greenberg to adduce evidence to place the representation in context. The fact-specific nature of the crime-fraud exception demands a robust record before the issue can be decided. To decide this issue on appeal would result in unfair prejudice.

A. Zucker's Testimony Is Insufficient to Meet the State's Burden

Whether an otherwise privileged communication is admissible under the crime-fraud exception depends on whether those "communications [were] seeking advice or aid in furtherance of a crime or fraud." *Newman v. State*, 384 Md. 285, 309 (2004). That exception is narrow. Maryland, moreover, has never ruled on the degree of proof the State must satisfy to make a showing that the crime-fraud exception applies. Appellee's Br. at 31. In light of the strong interest in preserving attorney-client privilege against unnecessary encroachments, recent decisions in other states have required proof by a *10 preponderance of the evidence that the communications at issue furthered an existing or future crime or fraud. *See, e.g., In re Motion to Quash Bar Counsel Subpoena*, 982 A.2d 330, 337-38 (Me. 2009); *In re A Grand Jury Investigation*, 437 Mass. 340, 356-57 (2002).

The only evidence the State belatedly identifies as showing that the crime-fraud exception applies is Evelyn Zucker's testimony at trial. Appellee's Br. at 31-32. Zucker's testimony is insufficient for the State to carry its burden. It simply does not suggest that *specific communications* between Greenberg and Hessel were *in furtherance* of fraud.

First, in the portion of Zucker's testimony identified by the State as a "prima facie showing," Zucker was asked by the prosecution to read over a will that had been introduced into evidence. But the will has nothing to do with the crime-fraud exception, since there was no claim, either by Hessel or Zucker, that Hessel helped prepare the will. Zucker also stated that she did not sign the deed conveying Greenberg her property. *Id.* at 64-65. At best, that statement suggests that Zucker's signature may have been forged. It does not, however, suggest that Hessel's legal advice regarding the deed was used *in furtherance* of any such forgery, as the crime-fraud exception requires.³

Second, Zucker was an adverse witness for the State. T. 2/23/2010 at 47-48. The prosecution spent much of trial introducing witnesses to show that her recollections at trial were unreliable, and the trial court suggested she "may be confused" about the questions she was asked by the prosecution. *Id.* at 55. She also insisted that "I don't think [Greenberg] deserved to be in jail and locked up for nothing he did," that "[t]his isn't right," and that "[h]e hasn't done anything." *Id.* at 83-84. Given the weakness of Zucker's testimony, the State has not shown that the crime-fraud exception applies here.

Finally, Zucker's testimony said nothing of Hessel's role in assisting Greenberg and Zucker to access various bank accounts or in appointing Greenberg Zucker's *11 healthcare agent. Communications regarding these aspects of the representation would remain privileged even if this Court determined the crime-fraud exception did apply to the matters identified in Zucker's testimony.

B. The Record is Insufficient and an Evidentiary Hearing is Required

The State's belated effort to apply the crime-fraud exception to affirm the trial court's admission of Hessel's testimony only underscores the need for a new trial. While an appellate court has the discretion to affirm on an alternative ground, it may only do so on a basis "adequately supported by the record." *State v. Bell*, 334 Md. 178, 188 (1994) (quoting *Robeson v. State*,

285 Md. 498, 503 (1979)). If “the party did not adduce the requisite evidence” at trial, “then the record is necessarily lacking and will not be ‘adequate’ to support the alternative ground raised on appeal.” *Id.* And when a trial court “applied an improper standard” and “did not conduct an evidentiary hearing and made no findings” on an issue of testimonial privilege, “[o]rdinarily, therefore, the record would not be adequate for review.” *Hutchinson v. Farm Family Cas. Ins. Co.*, 273 Conn. 33, 48-49 (2005). Unfair prejudice would also result, since the parties would have never had a meaningful opportunity to address the issue, and introduce and rebut evidence, at a preliminary stage. *Bell*, 334 Md. at 189.

Here, Greenberg would be acutely prejudiced were this Court to decide that the State's retroactive proffer is sufficient to apply the crime-fraud exception on appeal. Whether an otherwise privileged communication is admissible under the crime-fraud exception inherently involves factual determinations, since “[f]he facts of each situation must be considered” to assess the purpose of the representation. *Purcell v. Dist. Attorney for Suffolk Dist.*, 424 Mass. 109, 114 (1997). In order to assess relevant facts and guard against unnecessary disclosure of privileged communications, *Newman* therefore held that certain evidentiary procedures must be followed at trial.⁴

*12 First, like other aspects of attorney-client privilege, the trial court must conduct an inquiry into the “ ‘surrounding facts and circumstances’ ” of the representation. *Newman*, 384 Md. at 337 n.7 (quoting *Harrison*, 276 Md. at 151). To show the crime-fraud exception applies, the party opposing privilege-- here, the State--must then “establish a prima facie case of abuse of the attorney-client relationship.” 1 Paul R. Rice, *Attorney-Client Privilege in the United States* §8:6 (West 2d ed. 1999). To do so, the State must make “a ‘specific showing’ ” that the crime-fraud exception applies, *In re Public Defender Serv.*, 831 A.2d 890, 903-04 (D.C. 2003) (quoting *In re BankAmerica Corp. Sees. Litig.*, 270 F.3d 639, 642 (8th Cir. 2001)), meaning that “the communication was itself in furtherance of the crime or fraud, not merely that it has the potential of being relevant evidence of criminal or fraudulent activity.” 1 John W. Strong, *McCormick on Evidence* 382 (5th ed. 1999). And this showing can be made only with evidence independent of the communications at issue, to avoid “force[d] disclosure of the thing the privilege was meant to protect.” *United States v. Zolin*, 491 U.S. 554, 570 (1989).⁵

This evidentiary proffer is the beginning of the inquiry, not the end. A court cannot decide that the crime-fraud exception applies, and that the “seal of a highly protected privilege” is broken, merely because the party opposing privilege has proffered evidence of whatever persuasive value. *Haines v. Liggett Group*, 975 F.2d 81, 96 (3d Cir. 1992). More is required. “The importance of the privilege...as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege.” *Id.* at 97; see also *13 *Shorter v. State*, 33 So. 3d 512, 516 n.1 (Miss. App. 2009); *First Union Nat. Bank v. Turney*, 824 So.2d 172, 183 (Fla. App. 1 Dist. 2001). Thus, “where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the absolute right to be heard by testimony and argument.” *Haines*, 975 F.2d at 97.

None of these procedures was followed at trial, where the crime-fraud exception was barely discussed. The State treated the issue as an afterthought, pressing the court to rule on its waiver arguments instead. When Statland first objected to Hessel's testimony on grounds of attorney-client privilege, the State asserted that “any advice that [Greenberg] sought about bank accounts or how to obtain property that belonged to Evelyn Zucker was in order to effectuate and perpetuate his fraud upon her.” E. 113. When defense counsel erroneously countered that *Newman* had not “explicitly accepted” the crime-fraud exception, the prosecution's only reply was to discuss the waiver issue in that case. There was no further elaboration of this issue at that point. E. 117.

When the trial court later told counsel “to be prepared” to discuss the crime-fraud exception, E. 136-37, the State instead emphasized “[t]he other argument which I believe is stronger”: that “the defendant has already testified about his representation, thereby waiving the privilege.” E. 137. When the parties debated the admissibility of Hessel's testimony a final time, the State merely made the fleeting assertion that “the State would also argue that the acts that were taken by Mr. Hessel were...basically (unintelligible) of the fraud.” E. 144. Unsurprisingly, the trial court declined to rule on this issue. E. 148. The trial record is too underdeveloped for this Court to undertake the fact-specific analysis that would be required to find the crime-fraud exception applicable here.

C. The Crime-Fraud Exception Cannot Be Applied Retroactively Here

Under the State's interpretation of the crime-fraud exception, an appellate court can nonetheless cherry-pick evidence elicited in another context at trial, retroactively deem it a "prima facie showing" by the State that privileged communications were in furtherance of fraud, and hold those communications admissible. Appellee's Br. at 31-33.

*14 The State's argument runs roughshod over the procedures that courts have required before applying the crime-fraud exception to otherwise privileged testimony. First, the trial court did not hold any kind of hearing on this issue; this court cannot do so now. Second, at trial, the prosecution never developed its argument for applying the exception, let alone offered specific evidence to show that particular communications between Greenberg and Hessel were in furtherance of Greenberg's alleged fraud. To give the State a second chance to do so now would be patently unfair and would relieve the State of its burden to make a specific evidentiary showing *at the time it invoked the crime-fraud exception*. The State now says that Zucker's testimony at trial establishes crime-fraud. But the prosecution first invoked the crime-fraud exception in a pre-trial hearing, and told the court that the State was unsure what Zucker--an adverse and unpredictable witness--would say until she actually testified. T. 2/23/2010 at 34-35.

Third, the trial court did not, and could not, rule on whether the State had made an initial showing. Nor did it ultimately determine whether the crime-fraud exception applied to any otherwise privileged communications. Without these "specific findings," this Court "cannot determine whether the [trial] court erred in denying" privilege with respect to the communications in question. *Cleco Corp. v. Sansing*, 8 So. 3d 555, 556 (La. 2009) (per curiam); see also *Arnoldy v. Mahoney*, 791 N.W.2d 645, 657 (S.D. 2010).

Finally, for this Court to now decide that the crime-fraud exception applies would deprive Greenberg of any opportunity to introduce evidence to rebut the State's proffer. Beyond obvious due process concerns, no facts on this issue were developed at trial. This Court thus has no access to other evidence, like Hessel's testimony at the annulment proceeding, that might have placed the representation in a fuller context.

Attorney-client "privilege [can] be given adequate protection...only when the [trial] court undertakes a thorough consideration of the issue, with the assistance of counsel on both sides of the dispute." *Haines*, 975 F.2d at 97. That consideration was missing here. Given that the law on this issue remains murky, the State chose not to put forward evidence on this issue at trial, and this Court has only applied the doctrine in a single case, *Newman*, reversal and remand for a new trial is particularly appropriate here.

*15 III. The Erroneous Admission of Hessel's Testimony Was Not Harmless Error

To show that the admission of Hessel's testimony was harmless error, the State must clear a high bar. "Harmless error review is the standard of review most favorable to the defendant short of an automatic reversal." *Bellamy*, 403 Md. at 333. The question is not whether "the prosecution needed Hessel's testimony to succeed." Appellee's Br. at 41. Rather, reversal is required unless this Court finds, "beyond a reasonable doubt," that "there is no reasonable possibility that the evidence complained of--whether erroneously admitted or excluded--may have contributed to the rendition of the guilty verdict." *Bellamy*, 403 Md. at 332. That standard cannot be satisfied here.

The State advances two grounds for harmless error: (i) attorney-client privilege does not extend to any of the communications that Hessel revealed at trial, Appellee's Br. at 33-38, and (ii) other evidence at trial was so strong that Hessel's testimony was inessential and duplicative. Appellee's Br. at 38-43. Both arguments fail. First, virtually all of Hessel's testimony related to matters about which Greenberg solicited, and Hessel gave, legal advice. Hessel then divulged extensive communications about these very matters. The State claims this testimony is not privileged by relying on an overly narrow interpretation of the scope of the privilege that is inconsistent with this Court's caselaw. To hold, as the State urges, that attorney-client privilege does

not extend to communications about facts, or to communications about publicly recorded legal documents, would deprive the privilege of all substance.

Second, while the State lists the “overwhelming” evidence at trial, it neglects to connect this evidence with the elements of the offenses for which Greenberg was tried. Hessel's testimony, in contrast, provided unique pieces of evidence available from no other source, and on key elements of the offenses for which Greenberg was convicted. Hessel provided the only direct evidence of Greenberg's awareness of, and response to, Zucker's worsening health just before her heart attack, i.e. Greenberg's statements that he knew Zucker was seriously ill and declined to call a doctor. Those communications were highly relevant to showing that Greenberg's neglect of Zucker was intentional, as required to convict him of second-degree neglect. Likewise, Hessel's disclosure of his *16 conversations with Greenberg portrayed Greenberg as the driving force behind the deed transfer and the visits to banks to lift restrictions on Zucker's accounts. This was the most direct evidence in support of the State's claim that Greenberg was exerting undue influence over Zucker for his personal gain, as opposed to the defense's theory that Zucker's generosity was the motivating influence. Hessel's testimony was thus important in relation to key elements of the crimes of **financial exploitation** of a vulnerable adult and embezzlement. Given the unlikelihood that the erroneous admission of Hessel's testimony “ ‘did not play any role in the jury's verdict,’ ” a new trial is required. *Bellamy*, 403 Md. at 332 (quoting *Spain v. State*, 386 Md. 145, 175 (2005) (Bell, C.J., dissenting)).

A. Hessel's Testimony Disclosed Numerous Privileged Communications

Attorney-client privilege “forever bars disclosure... of all communications that pass in confidence between the client and his attorney during the course of professional employment or as an incident of professional intercourse between them.” *Blanks v. State*, 406 Md. 526, 538-39 (2008) (quoting *State v. Pratt*, 284 Md. 516, 519-20 (1979)). Because of the significance of the privilege, this Court has rejected “strict limitations on its application” in recent cases. *Parler & Wobber v. Miles & Stockbridge, P.C.*, 359 Md. 671, 691 (2000). “The privilege protects, not merely the contents of communications between a client and counsel, but the fact that communications did or did not take place,” *Blanks*, 406 Md. at 538-39, “the timing of such communications,” *id.*, and “the entire setting of the confidential conference” between attorney and client, *Smith v. State*, 394 Md. 184, 204 (2006) (quoting *State v. Adams*, 283 S.E. 2d 582, 586 (S.C. 1981) (overruled on other grounds)). Under the interpretation of attorney-client privilege adopted by Maryland and other states, “all information regarding the client received by the attorney in his professional capacity and in the course of his representation of the client” is privileged. *Hewes v. Langston*, 853 So.2d 1237, 1244 (Miss. 2003).

The State does not challenge the validity of these cases. Nor does it contest that the communications Hessel disclosed at trial, *see* Appellant's Br. at 11-13, 20-22, were all “made with the intention of confidentiality.” *E.I. du Pont de Nemours & Co. v. Forma* *17 *Pack, Inc.*, 351 Md. 396, 416 (1998). Rather, the State asserts that the admission of Hessel's testimony was harmless error because none of the communications Hessel disclosed was “made for the purpose of procuring legal advice.” Appellee's Br. at 34.

That was not the State's position at trial, where the prosecution told the court that “even if there was an attorney-client relationship,” only “some,” but not all, “of the actions” fell outside the scope of the privilege. The State also deemed this issue irrelevant in light of Greenberg's purportedly categorical waiver. E. 109.⁶

This Court should reject the State's new and erroneous interpretation of the scope of attorney-client privilege, which relies heavily on non-binding federal caselaw that is inconsistent with this Court's interpretation of the scope of the privilege. The State's argument is also belied by the record, which shows that the bulk of Hessel's testimony involved the disclosure of Greenberg's statements to Hessel, and Hessel's advice, over the course of Hessel's representation. There are at least three broad categories of communications that the trial court would likely have deemed privileged, had it conducted the proper procedure: (i) communications regarding Greenberg's power of attorney and power of healthcare agent for Zucker, including Greenberg's communications regarding whether he had contacted a doctor; (ii) communications regarding the preparation of the deed and its

tax implications; and (iii) communications regarding Hessel's representation of Greenberg and Zucker as they sought to remove restrictions on Zucker's bank accounts. Appellant's Br. at 11-13, 20-22.

The State first says that Hessel was testifying about “purely factual” matters when he revealed that Greenberg told him that Zucker “had been up most of the night with soreness in her chest” and “wasn't up to going out” on December 8, just before Zucker's heart attack. Likewise, the State suggests that Hessel's advice to Greenberg to “take her *18 to a doctor,” and Greenberg's apparent failure to do so, was merely communicating non-privileged factual information. Appellee's Br. at 34-35; E. 167-69.

That argument ignores the “critical” distinction between facts and a client's communications of facts to his attorney. *Haley*, 398 Md. at 125 n.10. Attorney-client privilege protects the client, and prevents his attorney, from “answer [ing] the question, ‘What did you say or write to the attorney?’ ” It does not allow the client to “refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.” *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981) (quoting *Philadelphia v. Westinghouse Electric Corp.*, 205 F.Supp. 830, 831 (1962)). Here, Greenberg never testified, and the underlying facts--whether Greenberg knew of Zucker's worsening condition, and whether Greenberg called a doctor--were established only by asking Hessel what Greenberg said about these matters. That is precisely what attorney-client privilege bars.

Further, as the context of these communications makes clear, Greenberg's and Hessel's discussions about Zucker's health on December 8 “relate to professional advice and to the subject-matter about which advice is sought.” *Lanasa v. State*, 109 Md. 602, 617 (1909). Hessel was not idly inquiring about Zucker's health. He had just advised Greenberg that “[g]enerally, married couples will have power of attorney and appointment of healthcare agent for each other,” and “I suggested that it would be appropriate for me to draft that” for Greenberg and Zucker. E. 167-68. Those communications, too, were obviously privileged.

Nor were Greenberg's statements just communicating facts that Hessel “could ... well observe on his own.” Appellee's Br. at 34. Instead, they revealed Greenberg's ability to assess Zucker's condition and to make (or fail to make) health care decisions on her behalf. These statements were also relevant to Hessel's legal advice regarding the legal documents that Hessel prepared to appoint Greenberg as Zucker's healthcare agent. As the prosecution underscored at trial, Greenberg's statements informed Hessel's assessment that Zucker had the legal capacity to sign the documents. Indeed, the State *19 had Hessel confirm it was “normal to have clients who are suffering from medical conditions sign important documents” like appointing a healthcare agent. E. 169.⁷

The State next argues that all communications regarding Hessel's preparation of the deed, and his representation of Zucker and Greenberg at various banks, fall outside attorney-client privilege because neither action required Hessel to exercise legal judgment. Appellee's Br. at 35-38. The State's account of Hessel as a “mere scrivener” is misleading. Hessel's representation was not merely limited to filling out a simple deed form, nor was this all he divulged at trial. He testified about the frequency of Greenberg's communications about a deed, the fact that Greenberg first sought him out via telephone and later in person, the timing of those meetings, the fact that Greenberg, not Zucker, initiated the representation, and that he spoke with Zucker about the deed only after Greenberg called her from his office. E. 154-57. Hessel also testified about his legal advice to Greenberg regarding the tax implications of different types of deeds, and told Greenberg that marriage would allow him to avoid an \$11,000 tax. *Id.*; cf. *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998).⁸

*20 Likewise, Hessel was not merely a “business adviser” when he represented Greenberg and Zucker at various banks, as the State claims. Appellee's Br. at 36-37. Greenberg clearly sought Hessel's *legal* advice when, as Hessel testified, Greenberg asked Hessel to assist with “this other issue,” e.g. that Zucker's “sister had died, that the attorney handling the estate they didn't trust. They weren't able to get access to her bank accounts.” E. 158-59. Based on this information, Hessel advised Greenberg that “ ‘If your attorney goes with you, [the banks] will give [information about the accounts] to you.’ ” E. 159. That advice suggested that legal representation was important, for instance so that Hessel could explain why Greenberg and Zucker were legally entitled to access the accounts. Indeed, Hessel understood--based on Greenberg's representations--that his services were needed because

a different attorney “had restructured Evelyn's account” and required his approval prior to withdrawals--suggesting a legal impediment to her access. E. 162. Nor were these the only privileged communications disclosed on this matter. The timing of Greenberg's solicitation of advice, and the fact that Greenberg, not Zucker, initiated this matter, were also privileged.

Finally, the State is flat wrong when it argues that the act of recording a legal document, like a deed or power of attorney and appointment of healthcare agent, “destroys the confidentiality of the communications underlying” the documents. Appellee's Br. at 36 & n.12. Filing or recording a public document self-evidently destroys the confidentiality of the contents of that document. But it is equally obvious that the underlying deliberations and decisional processes leading to the end product remain privileged. To hold otherwise would produce an absurd result and would deprive attorney-client privilege of any meaning. Attorneys could be compelled to testify about everything from the client's motivations in making various bequests in a will to deliberations about litigation strategy before filing a brief. That is not the law.

B. Hessel's Testimony Contributed to Greenberg's Conviction

The State asserts that Hessel's testimony had no impact on the jury verdict because of independent evidence of Greenberg's guilt, Appellee's Br. at 38-39, the comparatively *21 few pages of summation that the prosecution devoted to Hessel's testimony, Appellee's Br. at 40-43, and the lack of persuasiveness of Hessel's testimony, Appellee's Br. at 42. But “[i]n performing a harmless error analysis,” this Court is “not to find facts or weigh evidence.” *Bellamy*, 403 Md. at 332. What matters is whether the error was “unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record.” *Id.* That is not the case here.

The State sums up the other evidence at trial as “truly overwhelming” proof of Greenberg's guilt, Appellee's Br. at 38, but fails to connect this evidence to the elements of the offenses for which Greenberg was convicted: second-degree neglect, **exploitation** of a vulnerable adult, and embezzlement. That is because this evidence was circumstantial proof of those charges, and was undercut by other evidence at trial.

Second-degree neglect requires, *inter alia*, proof of an “intentional failure to provide necessary assistance and resources for the physical needs of Evelyn Zucker,” a vulnerable adult. T. 2/26/2010 at 83. The only relevant evidence on this point identified by the State was Zucker's deteriorating health and poor living conditions. Appellee's Br. at 39. Given Zucker's age, pre-existing diabetes and heart problems, Zucker's testimony that Greenberg cared for her by bringing her meals and medicines, and the defense's theory that Greenberg was a hoarder unable to keep any dwelling remotely clean, those facts are hardly proof of intentional neglect. T. 2/23/2010 at 42-45, 66.

Hessel's testimony, on the other hand, established that Greenberg was well aware that Zucker had been up all night with chest pains just before a **heart attack** and was too ill to leave their hotel room. E. 168. Indeed, Hessel suggested to Greenberg that Greenberg should take Zucker to a hospital, and revealed that he had asked Greenberg whether Greenberg had done so. *Id.* 168-69. Instead, Hessel testified, Greenberg proceeded with having Zucker sign power of attorney and the healthcare agent documents, *22 which placed Greenberg in control of Zucker's healthcare-related decisions. *Id.* at 169. These communications were, in short, the strongest proof of intentional neglect at trial.⁹

Financial exploitation of a vulnerable adult requires, *inter alia*, proof of intimidation, deception, or “undue influence,” meaning “domination and influence” such that the vulnerable adult “was prevented from exercising free judgment and choice.” T. 2/26/2010 at 77-78. The State points to evidence that Zucker had complained about Greenberg's unsolicited visits to her home in 2004 and that Zucker became increasingly isolated after Greenberg entered her life in 2007. Appellee's Br. at 38-39. But Zucker insisted at trial that she “never reported that [Greenberg] was a suspicious person,” T. 2/23/2010 at 42, and that she told Adult Protective Services not to interfere, *id.* at 74-75. While Zucker professed herself unaware of Greenberg's other residence, she also stated that she wanted to help Greenberg **financially**, because he was caring for her and because she was generous. *Id.* at 34-35, 47-48. Zucker likewise denied having been threatened or intimidated when she married Greenberg. *Id.* at 61-62. While

the circumstances of Zucker's and Greenberg's marriage were certainly unusual, Zucker agreed that she freely consented to the marriage to "help him, because [she] knew he didn't have a lot of money" and "because [she's] a generous person." *Id.* at 76-77.

In contrast, Hessel's disclosure of Greenberg's requests for legal advice regarding the preparation of the deed, and the visits to banks, revealed that Greenberg, not Zucker, was the driving force behind both. According to Hessel, Greenberg sought his advice about the deed and associated tax consequences on several occasions, but Hessel only spoke to Zucker on the phone when the deed was ready to sign. E. 152-56. Likewise, Greenberg, not Zucker, solicited Hessel's advice about regaining access to Zucker's bank *23 accounts, purportedly because an untrustworthy attorney had blocked access. E. 158-59. Hessel also testified that he never met Zucker in person until the trio made trips to banks. E. 74. This testimony established what other evidence did not: that Greenberg, not Zucker, initiated the process of obtaining the deed and accessing Zucker's accounts, and Greenberg, not Zucker, was the dominant influence. E. 196-97. ¹⁰

Finally, embezzlement (or "misappropriation by a fiduciary") requires, *inter alia*, proof that the defendant "intended to promote a personal interest of someone other than the person who entrusted him with the money." T. 2/26/2010 at 84. The State cites evidence suggesting that Greenberg intended to deprive Zucker of her property when he wrote checks and made withdrawals. But much of that evidence is contradictory. While Zucker apparently complained to Wachovia of unauthorized withdrawals in November 2008, Zucker also testified that she authorized Greenberg to "draw out a lot of my money" during this period due to her fears of a bank collapse. T. 2/23/2010 at 45-46. Rather than accusing Greenberg of stealing the checks found on his person on October 28, 2008, Zucker testified at trial that she "ha[d] no idea" how many checks she wrote Greenberg, T. 2/23/2010 at 49, that she believed the police detectives stole the money Greenberg took out for her, and that she "accused them of it," *id.* at 50. Zucker also insisted that any blank checks Greenberg had "were to pay the bills." *Id.* at 51.

Finally, the discovery of various forms of documentation that could be used to access Zucker's accounts was consistent with Zucker's testimony that she had Greenberg make withdrawals and access her account while she waited in the car, *id.* at 46, and with the defense's theory at trial that Greenberg was an obsessive-compulsive hoarder.

Greenberg's statements to Hessel, on the other hand, suggested that Greenberg was not only acting on his own initiative, but for his own gain. For instance, Hessel testified *24 that when he told Greenberg that the deed transferring Zucker's house to Greenberg would result in \$11,000 in taxes, Greenberg asked about whether the tax would still apply if he and Zucker were married. E. 154.

The State tries to downplay the importance of Hessel's testimony by citing the infrequency of the prosecution's references to it in opening and closing arguments and by attacking Hessel's credibility as a witness. Appellee's Br. at 40-42. But the prosecution's references to Hessel only reveal the prosecution's view of the importance of the testimony, not how it related to the other evidence at trial and the elements of the offenses for which Greenberg was convicted. In any event, it was the way the prosecution emphasized Hessel's testimony, not the number of references, that underscored its significance to the prosecution's case. Though the prosecution assailed Hessel's credibility in assessing whether Greenberg was adequately caring for Zucker, the significance of Hessel's testimony was in conveying what Greenberg told Hessel, not Hessel's visual observations. Thus, the prosecution played up Hessel's ability to testify to Greenberg's innermost thoughts, telling the jury that "[w]e know from Mr. Hessel that [Greenberg] told him that she had been suffering from chest pains and Mr. Hessel told him to get her medical attention. And he didn't do so." E. 266.

Whatever the jury made of Hessel's motivations, one thing is clear: Hessel revealed Greenberg's innermost thoughts and communications to the jury, and on issues about which no other witness could, or did, testify. Greenberg exercised his right not to testify on his own behalf. Because the trial court allowed Hessel to testify extensively about Greenberg's contemporaneous statements, requests, and awareness of Zucker's condition in a crucial time period, communications Greenberg conveyed in confidence to his attorney during the representation were used as the strongest evidence against him. And by failing to follow long-established evidentiary procedures governing attorney-client privilege, the trial court also deprived Greenberg of the

opportunity to provide greater context for the representation. The admission of this testimony cannot be deemed harmless error. Appellant therefore respectfully requests that this Court reverse Greenberg's conviction and remand proceedings for a new trial.

Footnotes

- 1 Even if Greenberg forfeited the argument that he did not waive privilege through his own testimony in the annulment proceedings--which Greenberg in no way concedes--the effect of that forfeiture is limited. Only the subject matter of the specific communications Greenberg discussed, i.e. Hessel's representation regarding the deed, could be deemed waived. The erroneous admission of Hessel's testimony as to communications about lifting restrictions on Zucker's account, and Zucker's health and the appointment of healthcare agent, would still be properly before this Court.
- 2 Contrary to the State's claim, Appellee's Br. at 28 n.11, the court did reference Greenberg's annulment testimony transcript in the privilege discussions. E. 112.
- 3 The State says that Zucker also testified that "she never gave Greenberg the checks found in his possession." Appellee's Br. at 31-33. There is, however, no claim that Hessel had anything to do with preparing these checks, or was consulted about them. Again, this evidence is irrelevant to the applicability of the crime-fraud exception.
- 4 This aspect of the crime-fraud exception makes it fundamentally different from a waiver analysis. Waiver turns upon whether a defendant knowingly and voluntarily destroyed the privileged character of communications with his attorney by communicating them openly. The key evidence is the defendant's discrete, non-privileged prior statements, not other evidence about the representation.
- 5 *In camera* review of the communications at issue, upon a preliminary showing by the State, is an obvious and frequently employed means of ascertaining their purpose. *See Newman*, 384 Md. at 337 n.7. The State, however, does not argue that such review would have been appropriate here.
- 6 To the extent that this issue is now disputed, it should be resolved in a new trial, given the need to "hear testimony relative thereto out of the presence of the jury, looking at all the surrounding facts and circumstances." *Harrison*, 276 Md. at 151.
- 7 The State's assertion that Hessel's inquiry into the circumstances of Greenberg's marriage was merely "factual" fails on similar grounds. Hessel's discussions about these circumstances are privileged; the circumstances themselves are not. As Hessel noted, tax law distinguishes between the transfer of property between spouses and non-relatives. E. 153-54. Greenberg's statements about the circumstances of the marriage, E. 152-55, were made to obtain Hessel's legal advice. Hessel's resulting impression of the marriage's validity, E. 154, was also material to his legal advice.
- 8 The cases and authorities the State cites, *see* Appellee's Br. at 36, do not support its position. The test for whether documents are subject to attorney-client privilege turns upon, *inter alia*, whether the documents could be obtained from the client through legal process if they remained in the client's possession, not merely whether they were submitted for the purpose of obtaining legal advice. *Fisher v. United States*, 425 U.S. 391, 404-05 (1976). And the dispositive issue in *In re Arnold & McDowell*--as in *Canaday v. United States*, 354 F.2d 849, 857 (8th Cir. 1966)--was whether the underlying information provided to prepare documents was *confidential*, not whether it was provided in furtherance of legal advice. 566 F. Supp. 752, 755 (D. Minn. 1983).
- 9 They were not, however, communications *in furtherance* of a crime or fraud. Hessel inquired into Zucker's health as relevant to the preparation and execution of the appointment of healthcare agent. Greenberg plainly did not tell Hessel of Zucker's condition in order to facilitate neglect of Zucker. It was Greenberg's failure to subsequently seek out medical assistance, and Hessel's knowledge that Greenberg was aware of the severity of Zucker's condition, that made Hessel's testimony so damaging.
- 10 Though damaging, these communications were also disclosed without the requisite evidentiary procedures on attorney-client privilege. Given the opportunity to adduce evidence about the representation, Greenberg might have been able to show e.g. that Zucker asked him to seek legal representation, or that she was keenly engaged in these matters, as Hessel's cross-examination testimony suggested. E. 176-78