IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, STATE OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	**NO.: 09 CF 1048**
	)	
DREW PETERSON	)	
	)	
DEFENDANT.	)	

MEMORANDUM IN SUPPORT OF SOME ISSUES CONCERNING CONFLICT OF INTEREST & INEFFECTIVE ASSISTANCE OF COUNSEL[1]

Drew Peterson:

I'm asking America's attorneys, please help with my case

Television Host Matt Lauer:

There are probably *a lot of legal experts* and lawyers out there, right now, *saying this guy should not be sitting on this show*, talking to this guy right now, while he's the subject of this investigation ... perhaps even *these investigations*. Why did you decide to do this interview?

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[1] **Defendant is requesting an evidentiary hearing.**

Drew Peterson:

> **I'm doing all that I can, my god; get the media off my back! Get 'em off my family's back! That's all I'm asking. And I'm here today (pause) to let them see my face, here I am, please get away from my house and leave my family alone.**

- Drew Peterson interview with Matt Lauer, *Today Show,* NBC November 14, 2007. *(Emphasis added)*
http://www.youtube.com/watch?v=puYz12gbChw

In 2007, when Drew took to the airwaves, he needed serious representation; an even-keeled, seasoned trial lawyer who would artfully guide him through the coming storm. Instead, he was lured into accepting Captain Joel Brodsky[2].

Much has changed since Drew Peterson's 2007 request for legal assistance. A death investigation re-opened, an evidentiary statute passed ("Drew's Law"), he was charged, the State tried two murder cases by a preponderance of evidence standard (Hearsay Hearing), an interlocutory appeal followed, a six-week murder trial was held, featuring bullets that were not used, hit-men that were not hired, hearsay within hearsay, color-coordinated wardrobes, "a gift from God," and a guilty verdict was returned.

Attorney Brodsky expected that Drew Peterson would be his ticket

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[2] **To the extent he can Drew will attach supporting exhibits. With respect to certain exhibits counsel will ask that the documents be sealed before being produced.**

to the legal elite. Regrettably, he was poorly equipped to try a case of this magnitude, resulting in hornbook errors and a smorgasbord of ethical violations. Individually and cumulatively Brodsky singlehandedly deprived Drew of his right to effective assistance of and conflict-free counsel[3].

Brodsky has publicly admitted that he called the "Green Room" at the Today Show, seeking to have his name passed on to Peterson, advising that he could represent Peterson in the inquiry concerning the disappearance of Stacy Peterson and the re-investigation of the demise of Kathleen Savio. The two consequently met. Throughout the meeting Brodsky lied to Peterson by misrepresenting his qualifications, going so far as to tell Peterson that he, Brodsky, had previously successfully tried murder cases and other serious felonies.

After Peterson agreed to retain Brodsky, counsel exploited Peterson to elevate his own profile. Brodsky hired a publicity agent for the two of them. He paraded Drew across the airwaves as if Drew were a sideshow, suggesting carnival like pranks to heighten public recognition of himself and his client, as exemplified by the infamous "Win a Date With Drew" and a Bunny Ranch Reality Show. In the process Brodsky accumulated large bills for hotel stays, meals, and spa treatments for he

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[3] **While it is true that Brodsky was not sole counsel, his obstinacy, insistence on his way, refusal to discuss, and thirst for the spotlight rendered the opinions of others impotent.**

and his wife, all paid for by the respective media outlets.

Brodsky repeatedly endowed columnist Michael Sneed of the Chicago Sun Times with fodder regarding Drew in order to keep Brodsky's name in the news. He would construct the story, write the letter, or provide the leak. In doing so he routinely breached attorney-client privilege. Always brazen, Brodsky would leak information to Sneed so that he could then appear on national news shows that same day and comment on the very information that he had secretly leaked.

Perhaps his most audacious step calculated to get a rise out of the media was the listing of Stacy Peterson as a potential defense witness. In fact he never spoke to Stacy regarding Kathy, never interviewed her, and did not know where to serve her with a subpoena.

Once trial began Brodsky insisted on obtaining as much media hysteria for himself as possible. Like a petulant child, he could not mask his discontent when others on the defense team received attention, and he had not. Throughout the trial Brodsky's tactics were focused on his own self-glorification, rather than legal acumen of the best interests of his client.

Then came the *crème de la crème*, when Brodsky presented what could only be described as a confession, through privileged hearsay that the court had completely barred the prosecution from introducing[4].

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[4] **There has never been any suggestion that Stacy was an eyewitness or**

Ethical Improprieties

At its genesis, the attorney-client relationship forged between Brodsky and Peterson was ethical catastrophe. To wit, attorney Brodsky:

1. **Solicited Drew Peterson as a client, with pecuniary gain as a significant motive. See Illinois Rule 7.3 Professional Conduct;**

2. **Misrepresented his trial expertise and experience[5];**

3. **Encouraged a pre-indictment media blitz, sensationalizing the matter to Mr. Peterson's extreme detriment. See Illinois Rule 3.6 Professional Conduct;**

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participant. Accordingly her knowledge, if she had any, could only have come from being told something by Drew, hence the conclusion it was a confession.

[5] **On January 15, 2008 the Chicago Tribune published an article titled "*Representing Drew Peterson—Landing Big-name Client a watershed Moment for the Lawyer, Whose more Familiar handling civil suits and drug cases*."Articles.Chicagotribune.com/2008-01 15/news/0801140689_1_drug_cases_lawyers_Drew_Peterson**

(The second paragraph reads, "*after all, Brodsky has never defended a homicide case. He is on more familiar turf handling drug cases and civil lawsuits*." Brodsky explained in that article how he had solicited Peterson's case.)

4. **Signed a publicity contract, creating a per se conflict of interest. See Illinois Rule 1.8 Professional Conduct[6], People v. Gacy, 125 Ill. 2d 117, # (1988);**

5. Threatened to reveal confidential information, affecting Defendant and others, throughout his representation, and after. Most recently in a November 24, 2012, correspondence, "…this is of course the last thing you or I would want, but this could happen as an unintended consequence of unfounded ineffective assistance accusation, which is not fully thought through."[7]

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[6]**Rule 1.8 provides: conflict of interest: current client: specific rules subparagraph (d) prior to the conclusion of the representation of a client, a lawyer shall not make or negotiate an agreement the lawyer literary or media rights to a portrait or account based on substantial part on information relating to representation. Peterson relied upon Brodsky's advice in signing the contract. At no time was he advised to either obtain or consult with independent counsel prior to entering into the contract. The contract provided that Selig Multimedia was to render services with respect to publicity and promotional services in the entertainment industry, which include or procuring in soliciting "appearances, product endorsements (including commercials, photo opportunities and/or interviews for Peterson and/or Brodsky on television shows, news related television shows, talk shows, panel shows, reality shows and/or other live or taped appearances, and/or in magazines, newspapers and tabloids, and/or soliciting, procuring and/or negotiating book deals for Peterson and/or Brodsky (Agreement, paragraph 2).**

[7] **The matters Brodsky refers to are covered by both attorney-client privilege and work product concerns and he could not be compelled to reveal any. The letter will be made available should there be an evidentiary hearing in this matter.**

Each of the above-referenced points possesses a unique flavor of impropriety worthy of condemnation, but points three and four, which are not mutually exclusive, deserve more detailed analysis.

The Improper Agreement and Publicity

Soon after he began his representation, Brodsky entered into an agreement (hereinafter "Agreement") with Peterson and a public relations agent, Glenn Selig, in which Brodsky was to share in any literary or media rights and therefore entered into a business transaction with the client. The contract was a clear violation of Rule 1.8 of the Rules of Professional Conduct.

The idea of entering into such an agreement is so obviously unethical that counsel has been unable to locate a single case where an attorney has actually been found conflicted for similar conduct. This is likely because no credible practitioner would ever engage in such conduct, because it gives rise to a *per se* conflict.

In People v. Gacy, 125 Ill. 2d 117 (1988) the Illinois Supreme Court was asked to evaluate, in connection with Gacy's Post-Conviction Petition, whether trial counsel operated under a conflict of interest because he:

"…was offered a book deal in April of 1979, [and that] even while he refused to accept this offer the seed was planted as to how much money was or could be made. The offer was six million for book rights. From that point forward, [trial counsel's] main concern was making and keeping records as he called it; 'to preserve the record for a book.' Tapes were made on all previously covered conversations, all writing by the defendant was taken and kept by the defense attorney even after trial. He was more concern[ed] with that than preparation for the defense." At 134.

Considering the claim the Supreme Court wrote:

"Had trial counsel actually accepted this alleged "book offer," this claim would be worthy of serious consideration under our Rule 5-104(b) (107 Ill.2d R. 5-104(b)):

'prior to the conclusion of aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.'

The rationale for this rule is that 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. (See People v. Corona (1978), 80 Cal.App.3d 684, 145 Cal.Rptr. 894.) [...]

Under our precedents [...] we have held that the acquisition by an attorney of a financial stake in litigation directly adverse to that of his client is a per se conflict, which warrants reversal even in the absence of prejudice. (See, e.g., People v. Washington (1984), 101 Ill.2d 104, 77 Ill.Dec. 770, 461 N.E.2d 393; People v. Coslet (1977), 67 Ill.2d 127, 7 Ill.Dec. 80, 364 N.E.2d 67; People v. Stoval (1968), 40 Ill.2d 109, 239 N.E.2d 441.) In such cases, defense counsel's 'tie to a person or entity * * * which would benefit from an unfavorable verdict for the defendant * * * might 'subliminally' affect counsel's performance in ways difficult to detect and demonstrate.' Moreover, such a conflict might

subject the attorney to later charges that his representation was less than faithful. (People v. Spreitzer (1988), 123 Ill.2d 1, 16, 17, 121 Ill.Dec. 224, 525 N.E.2d 30.) However, 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. We could not therefore reverse on the basis of this alleged conflict without some showing of prejudice—i.e., without a showing that the alleged conflict caused specific, identifiable deficiencies in defense counsel's performance. People v. Gacy, 125 Ill. 2d 117, 134-36, 530 N.E.2d 1340, 1347-48 (1988).

Here the agreement traversed the course frowned upon by the *Gacy* court.[8] The lawyer entered into a transaction. The agreement was

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[8] **A book was written called "Drew Peterson Exposed". Defense counsel was paid for Defendant's involvement with that publication. At a pre-trial hearing there was testimony that Brodsky tried to sell a video of Drew:**

> **THE WITNESS: The video was to be of Mr. Peterson and his alleged new fiancée, Christina Raines, at home. He was going to give Mr. Peterson a camera and he was going to take video of Ms. Raines and him and their life together, and he wanted $200,000 for the video.**
>
> **Transcript, July 2, 2010, pg. 92.**

not simply to benefit the client but was to benefit the lawyer. The nature and extent of how the lawyer was to benefit was undetermined, obviously dependent upon the quality and quantity of degree of excitement, information, and anticipation that the case generated.[9]

Perhaps this explains, in part, why Drew was paraded around in an unprecedented media blitz. As this court once rhetorically commented when discussing videos of interviews with Drew and Brodsky "How could it not be prejudicial to the defendant regardless of what the statement is?" Transcript, June 6, 2012, seriatim.

Other monies were paid. Present defense counsel is in the process of putting together documentation of payment that was made directly to attorney Brodsky.

[9] **See also Model ABA Rule 1.8 which is even more expansive than the Illinois Rule and is the Rule upon which Illinois is based.**

Ineffective Assistance[10]

In a widely criticized move Brodsky called attorney Harry Smith to the stand. Prior to this renegade move, the case was going well for the Defendant, with some of the jurors commenting afterwards that they could not have convicted the Defendant before Harry Smith was called.

Nobody who watched or participated in the trial, except for Brodsky, thought that the idea of calling Smith was anything less than delusional. Knowing what everyone knew, based on the voluminous record that already existed, this could not have been sensible strategic reason.

The prosecutor called Harry Smith's testimony "a gift from God." He recognized that calling Smith was a miracle for the prosecution.[11] Not strategy!

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[10] **Various commentators, pundits, and State's Attorney Glasgow have commented that the Defendant had six attorneys and thus it is mathematically impossible for him to raise an ineffective assistance claim. Counsel has been unable to locate a single case, in any jurisdiction, holding a claim of ineffective assistance is contingent upon a lower mass of attorneys or, alternatively, any case that held conduct of counsel that was otherwise ineffective to be reasonable trial strategy simply because a Defendant had a team of attorneys.**

[11] **A miracle is commonly defined as: 1) an extraordinary event manifesting divine intervention in human affairs; or 2) an extremely outstanding or unusual event, thing, or accomplishment. http://www.merriam-webster.com/dictionary/miracle**

Counsel Was Concerned With The Irrelevant and Unfocused

Things were unraveling for the self proclaimed lead counsel long before calling Smith. He was unable to concentrate, and clearly strained. He was concerned with publicity, the immaterial, annoying opposing counsel, and minimizing credit for his co-counsel. All of this is provable and largely confirmed within emails Brodsky wrote.

Before calling Smith Brodsky called Sergeant Brian Fallat. During the examination Brodsky sought to convey statements by Stacy that had previously been ruled inadmissible, resulting in the following exchange:

MR. BRODSKY: Mr. Schori testified that Stacy told him that she gave an alibi for Drew Peterson for Saturday night. Ok. That was –

THE COURT: And we went to bed and then we got up the next morning and so we were all at home. That's not an alibi?

MR. BRODSKY: Doesn't say he never left my side, doesn't say he was in bed with me all night, doesn't say --

THE COURT: I'll tell you what. You're the captain of the ship. You want to travel in that direction, you go right ahead that's up to you.

MR. GREENBERG: **Come here, captain.**

MR. BRODSKY: **My shipmate wants me.**

MR. GREENBERG: **You are about to witness a mutiny.**

MR. KOCH: **And, Judge, just so its clear, the State's position will be if they go down this line of questioning we are going to ask the Court to revisit the whole marital privilege--**

THE COURT: **I think that's crystal clear and there is a whole--panoply of areas that would have to be revisited.**

MR. BRODSKY: **OK. We will withdraw that last question your Honor.**

Although the captain was saved from torpedoing his ship at this point, the exchange is telling. Attorney Brodsky did not understand testimony that Drew was home when Stacy went to bed, and home in the morning when she awoke, was circumstantially an alibi, i.e. he was home all night. Furthermore, in arguing it was not an alibi he was suggesting that Drew, in fact, could have left the house during the night, an argument wholly in support of the State's theory. It was fortunate for Defendant that on this occasion counsel was able to prevail upon Brodsky to abandon the line of questioning.

Stacy's Conversation With Harry Smith Was Privileged

When Stacy spoke to Harry Smith it was for the express and sole purpose of obtaining legal advice in the form of a consultation about a potential divorce action. Accordingly, an attorney-client relationship was created. Any conversations had during the course of this, albeit limited consultation, were privileged. Assuming for the moment the decision to call attorney Smith was "reasonable trial strategy," the privilege issue remained. This Court had already determined that the conversation was privileged. The Court should have, with all due respect, not allowed attorney Smith to testify, irrespective of who never wanted to call him.

Just as the Court prohibited the prosecution from calling Smith, it should have prohibited the defense. For it is well settled that attorney client privilege is neither the prosecution's nor the defendant's to waive, but belongs to the client. Indeed, by the time attorney Brodsky sought to call attorney Smith the roles of the respective parties in relation to Smith's testimony had completely reversed. While it had been the State that had repeatedly attempted to call Smith, only to be repeatedly shut down as the Court unswervingly found the matters the State sought to introduce to be privileged and/or irrelevant, when attorney Brodsky sought to call Smith the State appropriately argued the testimony was privileged. Attorney Greenberg refused to argue against the State's position because it was legally and factually valid, if not strategically

favorable. Thus attorney Brodsky argued.

Defendant Peterson realizes that an argument will be made that he has waived this claim because typically the defense cannot create an error and then cite that error in an effort to gain a new trial. However, when viewed in the context of otherwise inept effort put forth in the presentment of this witness, as will be detailed below, the claim becomes not only whether the Court failed in its gatekeeper function but whether counsel rendered ineffective assistance in urging the Court to abandon its role. Of course it cannot be said that the Defendant invited ineffective assistance.

<u>Smith's Testimony Was A Disaster</u>

When counsel devastates his own client's case he has been ineffective. <u>People v. Phillips</u>, 227 Ill. App. 3d 582 (1992). Anyone who was in that courtroom knew the Smith testimony was the death knell. (pun intended)

To understand why the decision to call attorney Smith was so obviously ineffective some historical background is required.[12] At prior hearings attorney Smith testified he had received a phone call from Stacy

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[12] **While Smith was Savio's attorney his most damaging testimony only concerned his telephone conversation with Stacy and thus his interactions with Savio, as well as statements he made regarding his representation and/or things she may have told him are irrelevant and need not be addressed herein.**

Peterson days before she disappeared. Although the conversations were privileged, as this Court appropriately found, Smith had recklessly, and in complete disregard of his ethical obligation, testified before the Grand Jury and at the hearsay hearing.

When previously asked about his conversation with Stacy, Smith stated that she wanted to know if she would gain an advantage in the divorce if she *said* Drew killed Kathleen. During his prior testimony he did not testify that Stacy concluded, "Drew killed Kathleen". He did not, during his prior testimony, testify that Stacy had any first hand knowledge that Drew had killed Kathleen. He did not, during prior testimony, state that Stacy had helped Drew in relation to the death of Kathleen.

Attorney Brodsky began the examination by informing the jury that Harry Smith had been Kathleen Savio's divorce attorney. He then asked about the October 24, 2007 phone call Smith had allegedly received from Stacy Peterson. The conversation was elicited without the benefit of any foundation (of course the State was not going to object).

After asking a few questions about when the call took place, and blessing the jury with the knowledge Smith had reported all of this to the police, Brodsky started to lose control of the examination. He blurted out in front of the jury that he wanted to "question this witness as an adverse witness" prompting the court to immediately send the jury out. When

the jury returned, quickly entering stumbling mode, Brodsky continued by asking Smith "did she [Stacy] eventually retain you?" In response to the obvious and irrelevant answer, which was "no," Brodsky asked "why not?" Yet again saving Brodsky, the State intervened, sparing counsel from interjecting Stacy's disappearance into the proceedings.[13]

As the questioning continued, things quickly turned for the worse. Attorney Brodsky asked Smith whether Stacy told him that she had information regarding Drew. After a little bit of back and forth Smith told the jurors, inter alia, "She wanted to know if the fact that he killed Kathy could be used against him." Brodsky then, in a complete exhibition of his incompetence, tried, but was unable, to impeach Smith, in a manner that only reinforced this damaging remark. Brodsky repeatedly asked the witness whether he had previously testified, under oath, that Stacy had:

- **"said we could get more money out of Drew if we threatened to tell the police about how he killed Kathy;"**

- **"that she [Stacy] had so much s-h-i-t on him at the police department that he couldn't do anything to her;"**

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[13] **This followed Brodsky's attempt to bring up Stacy in relationship to the "alibi."**

- **again how "[Stacy] asked me if we could get more money out of Drew if we tell the police how he killed Kathy;" and**

- **yet again "she said she wanted to say how he killed Kathy."**

Thus defense counsel interjected through his questioning what amounted to the most damning evidence of his guilt. He put it in as positive evidence. He never impeached the witness, never brought forth any condition or threat, and failed to accomplish anything favorable to his client. He dithered before the jury as attorney Smith repetitively daggered the concept of doubt, accomplishing in a few minutes what the prosecution had been unable to present--a witness to say Drew killed Kathy.[14]

Brodsky was able to leave the jury with the impression that Stacy knew something, without truly presenting a single fact. Had Brodsky been this deft at creating an impression when he crossed a witness, his greatness would have been applauded.

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[14] **He also failed to impeach Smith claim he conseled Stacy that she may be an accomplice to concealment. This was not only legally wrong, but was also wholly inconsistent with Smith's prior testimony. It did, however and unfortunately, reinforce the idea Drew killed Kathy (concealed a homicide).**

Of course any competent attorney not only considers what he wants to bring out on direct, but also anticipates what damaging evidence could be brought out on cross. Not surprisingly, the prosecutors capitalized on this horrendous blunder. They brought out more of the privileged conversation, including:

- **that Stacy said Drew was pissed at her because he thought she had told his son that Drew had killed Kathleen;**
- **He was angry;**
- **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; and**
- **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.**

Just for good measure the last point was re-emphasized,

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

A. Yes."

The direct was the iceberg, the cross the rushing water, and the result was the Captain had sunk the ship.

The Law

In People v. Chandler, 128 Ill. 2d 233 (1989), our own Supreme Court wrote about the minimum level of meaningful adversarial advocacy required:

"A defendant alleging a violation of his sixth amendment right to effective assistance of counsel must generally meet the two-pronged test announced by the United States Supreme Court in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, in order to establish a valid claim. Strickland requires a defendant to prove (1) that his counsel's performance was deficient by having made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the sixth amendment, and (2) that his counsel's deficiencies prejudiced the defendant. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; see People v. Albanese (1984), 104 Ill.2d 504, 526-27, 85 Ill.Dec. 441, 473 N.E.2d 1246. To prove this, a defendant must show that his counsel's errors were so serious that they deprived the defendant of a fair trial, a trial whose result is reliable. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.The Court also emphasized that scrutiny of counsel's performance must be highly deferential, noting that "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95.In a companion case to Strickland, the Court indicated that in rare instances, ineffectiveness of counsel will be presumed without application of the Strickland test. (United States v. Cronic (1984), 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657.) As this court has recognized, the Supreme Court in Cronic "emphasized that the sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. Where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " (People v. Hattery (1985), 109 Ill.2d 449, 461, 94 Ill.Dec. 514, 488 N.E.2d 513, quoting United States v. Cronic (1984), 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657, 668.) Relying on People v. Hattery (1985), 109 Ill.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513, defendant argues that defense counsel's actions constitute a failure to subject the prosecution's case to meaningful adversarial testing and that, under Hattery, his convictions must be reversed."

An ineffective assistance claim requires consideration of how a reasonably effective defense attorney would conduct himself if confronted with circumstances similar to defendant's trial. People v. Fletcher, 335 Ill. App. 3d 447, 453. The question of what constitutes

sound trial strategy is necessarily fact dependent. Id, as cited in People v. Watson, 2012 Ill. App. (2d) 091328. Tellingly, while there is a presumption that a criminal defense attorney's decisions are sound, when no reasonably effective defense attorney facing similar circumstances would pursue such strategies that presumption gives way. People v. Faulkner, 292 Ill. App. 3d 391, 394 (1997). "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. Moore, 279 Ill. App. 3d 152, 159, 663 N.E. 2d 490 (1996)" People v. Rosemond, 339 Ill. App. 3d 51, 65-66, 790 N.E. 2d 416, 428 (2003).

The attorney torpedoing his client's case and accordingly supporting a claim of ineffective assistance is not without precedence. In People v. Moore, 356 Ill. App.3d 117 (1st Dist. 2005) defense counsel elicited incriminating hearsay testimony during his cross-examination of two of the state's witnesses. They testified in response to defense counsel's questioning that people in a crowd near the crime scene had told them that someone who was with the defendant had assisted in the crime. Noting that the examination violated defendant's right to confront because the information was obviously hearsay the court held that the incriminating hearsay was prejudicial, ineffective assistance. Counsel prejudiced defendant by not only bringing forth incriminating

evidence but by furnishing the prosecution with evidence upon which to comment in closing. The Court noted that defense counsel provided evidence connecting that defendant to a crime. See also People v. Bailey, 374 Ill. App. 3d 608, 614-15 (2007) (defense counsel elicited testimony that harmed the defendant's case when he brought forth evidence that the defendant had been seen speaking to potential narcotics purchasers); People v. Phillips, 227 Ill. App. 3d 581 (1st Dist. 1992) (Defense counsel elicited hearsay statements about defendant's connection to the crime on trial and others.

The same is true in the instant case. Brodsky put in the incriminating words, the prosecution argued their importance, and the jurors said it was the death knell.

Brodsky has said since that he had to call Smith to impeach Stacy's statements to Schori. That is in contrast to the exchange he had with the Court before calling Smith. Then attorney Brodsky was asked by the Court "you agree with Ms. Griffin that this doesn't impeach the statement they made to reverend Schori. In fact you could make an argument that enhances it." To which attorney Brodsky replied, "One could." At the conclusion of the arguments the Court commented during its ruling "and I don't see that the statement that the Defendant wants to use in this case impeaches the statement that [Stacy] made to reverend

Schori. It impeaches her credibility generally."

The sixth amendment requires, at a bare minimum, that defense counsel act as a true advocate for the accused. United States v. Cronic (1984), 466 U.S. 648, 659. The constitutional right of a criminal defendant to plead not guilty entails the obligation of his attorney to structure the trial of the case around his client's plea. Wiley v. Sowders (6th Cir. 1981), 647 F.2d 642, 650, cert. denied (1981), 454 U.S. 1091, 102 S.C5. 656, 70 L.Ed.2d 630. Putting a statement of guilt is counter-intuitive.

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. The trial judge specifically stated that until defendant testified, the court had intended to find him guilty only on the theft charge, but because defendant admitted that he committed the residential burglary, the court had no choice but to convict him of that offense. 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).

Similarly, in the case at bar, as this court commented, "I will say that I think 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." See August 31, 2012 transcript.

Likewise, in People v. Baines, 399 Ill. App. 3d 881 (2010) the court reversed because defense counsel was clumsy and confusing, to the point he was ineffective:

"From this exchange it is clear that the defendant is guiding his defense counsel in how to conduct the direct examination in order to elicit relevant information. This is most unusual, as one would expect the lawyer to develop the strategy that guides the questions. 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.

The defendant asserts, and argued strenuously during oral argument on appeal before this court, that defense counsel was "clumsy" in eliciting an admission from Deveaux that he (Deveaux) had misidentified an innocent man, Hedley, as the third man who attacked him. As the defendant points out on appeal, this was clearly an extremely important fact in attacking the strength of Deveaux's identification testimony. A review of the transcript confirms the defendant's assertion of an extremely clumsy cross-examination by defense counsel." At 888-89.

Otherwise Ineffective

Attorney Brodsky was also ineffective or otherwise conflicted in the following respects:

a. He encouraged Peterson to engage in as much pretrial publicity as possible, advising Peterson that the more publicity Peterson and Brodsky received the less chance Peterson had of being indicted. Brodsky said even if charged the pretrial publicity would increase Peterson's chances of an acquittal.

b. During trial Peterson wanted to waive the jury and proceed with a bench trial. Attorney Brodsky initially refused to discuss Peterson's wishes with him, later advising Peterson that a jury could not be waived once selected.

c. **Brodsky repeatedly threatened to reveal privileged information if Peterson were to discharge him or otherwise reduce his role. Those threats have continued notwithstanding the fact that Brodsky has now been discharged. In a letter dated November 24, 2012 Brodsky wrote Peterson a letter in which contained the following language in which he threatens to reveal confidential information, affecting Defendant and others, concluding "…**

this is of course the last thing you or I would want, but this could happen as an unintended consequence of unfounded ineffective assistance accusation, which is not fully thought through."[15]

d. Refused to present testimony that there were no secret activities at the Bolingbrook Police Department, thereby impeaching Stacy;

e. Refused to present evidence that Drew had served as a military policeman in Washington, D.C., this evidence, combined with the fact that there was no evidence, that while serving Drew had killed all of his men, would have rebutted Stacy's outrageous statement and shown her to be a liar. Instead the jurors were left with the impression that they were free to speculate as to whether Stacy's statement about Drew may have been true and just covered up; and

f. Withdrew a request for a mis-trial with great fanfare.

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[15] **The matters Brodsky refers to are covered by both attorney-client privilege and work product concerns and he could not be compelled to reveal any. The letter may be made available should there be an evidentiary hearing in this matter.**

WHEREFORE, the Defendant Drew Peterson, respectfully requests that this Honorable Court provide the appropriate relief, including an acquittal, or, in the alternative, grant to him a new trial, and for any and all such further and other relief as this Court deems just, including if necessary an evidentiary hearing.

Respectfully submitted,

Drew Peterson, Defendant

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