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To Speak or Not to Speak, That is the Question: The Impact of Attorney-Client Privilege in Prosecuting the Death of Dr. Eric Miller

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COMMENT

TO SPEAK OR NOT TO SPEAK, THAT IS THE QUESTION: THE IMPACT OF ATTORNEY-CLIENT PRIVILEGE IN PROSECUTING THE DEATH OF DR. ERIC MILLER*

I. INTRODUCTION

While as captivating to the public as a John Grisham novel, the investigation into Dr. Eric Miller's death should hold the attention of lawyers in North Carolina as well.¹ Amidst the adultery, poison, and murder hangs the legal question of how far the attorney-client privilege should extend after the client's death, if at all.²

Identified as a potential suspect in Miller's death, Derril Willard contacted a local attorney, Richard Gammon. After meeting with Gammon, Willard committed suicide. Those investigating Miller's death believed that Willard's conversations with his attorney would yield a much-needed break in the case, and therefore filed an order to compel the disclosure of the client's comments involving Miller's death. Gammon objected contending that the disclosure would violate attorney-client privilege. The district court judge concluded that the information should be disclosed, but Gammon appealed the decision and the case is currently pending before the North Carolina Supreme Court. The Supreme Court should not extend the common law privilege but, in order to preserve justice, should narrowly prescribe an exception to the privilege in this case.

* The author would like to thank Beth, Bill and Elizabeth Oden.

1. See Oren Dorell, *Leads Scarce in Death*, NEWS AND OBSERVER, (Raleigh), May 28, 2001; Andrea Weigl, *DA Seeks Lawyer's Secrets in Miller Case*, NEWS AND OBSERVER, (Raleigh), Feb. 21, 2002; Matthew Eisly, *State's Top Court Takes Case*, NEWS AND OBSERVER, (Raleigh), June 29, 2002; Andrea Weigl, *High Court Delves into Privilege*, NEWS AND OBSERVER, (Raleigh), Oct. 16, 2002; 48 Hours: "Tracking a Killer-Virus or Murder?" (CBS television broadcast, December 11, 2002).

2. See e.g., *Poisoning Mystery Unfolds in N.C.*, <http://www.detnow.com/news/0102040702.html>; *DA Wants Lawyer to Release Information Linked to Eric Miller Case*, <http://www.nbc17.com/News/1401550/detail.htm>

II. CASE BACKGROUND

On November 15, 2000, Eric Miller went bowling with several of his wife's co-workers.³ While there, he drank part of a cup of beer given to him by Derril Willard.⁴ After commenting that the beer tasted funny, Dr. Miller began experiencing severe nausea, vomiting and abdominal cramping later determined to be early symptoms of arsenic poisoning.⁵ After a brief round of hospital visits, Dr. Miller died on December 2, 2000.⁶ The cause of his "death was arsenic poisoning, the manner of his death was homicide."⁷

Derril Willard avoided any attempts by investigators to question him, and Ann Miller, Eric Miller's wife, was only interviewed once.⁸ Following Dr. Miller's cremation at his wife's request, Mrs. Miller left town and upon her return, she refused to be interviewed again.⁹ Nonetheless, the investigation turned up proof of "an ongoing romantic relationship between Ann Miller and Derril Willard."¹⁰ Subpoenaed telephone records for both Ann Miller and Derril Willard revealed that several calls were placed between the two of them, and the calls had a "marked increase in . . . frequency and duration . . . immediately before and after the poisoning."¹¹ These calls were more suspicious given the odd times at which they were made.¹² Investigators also recovered e-mail messages sent from Ann Miller to Derril Willard, which indicated that the two were involved in a personal relationship.¹³

Derril Willard, apparently concerned about the pending investigation, retained the services of attorney Richard Gammon. Subsequently, Derril Willard committed suicide.¹⁴ When Yvette Willard was interviewed after her husband's suicide, she admitted that Derril had acknowledged a personal involvement with Ann Miller.¹⁵ According to Ms. Willard's affidavit, Derril told her that Gammon had informed

3. See *In Re: The Investigation of the Death of Eric D. Miller*, No. 02 SP0550, slip op. at 60 (Wake Co., 2002).

4. See *id.*

5. See *id.*

6. See *id.*

7. *Id.* at 60.

8. See *id.*

9. See *id.* at 60-61.

10. *Id.* at 61.

11. *Id.* at 61, 62.

12. *Id.*

13. See *id.*

14. See *id.* at 62.

15. See *id.*

him that he could potentially be charged with attempted murder.¹⁶ Mrs. Willard, as executor for her husband's estate, waived any attorney-client privilege that existed between Gammon and her husband, and requested that Gammon disclose any information relevant to Eric Miller's death that he learned from her husband, Derril.¹⁷

The prosecution requested that the presiding senior resident superior court judge, Judge Stevens, conduct an *in camera* examination to determine whether, in the interests of a proper administration of justice, the attorney-client privilege between Derril Willard and Gammon had been or should be waived.¹⁸ The Wake County District Attorney, Colon Willoughby, submitted that the State had "reason to believe that Richard T. Gammon [had] information relevant to the investigation into the death of Eric D. Miller [that there were] no other means to obtain this information," and that the information was necessary for a "proper administration of justice."¹⁹ The district attorney's petition relied on "the inherent power [of the courts] to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly."²⁰

Answering a judicial order, Gammon challenged the district attorney's petition, claiming that any information in his possession was protected by the attorney-client privilege and that Yvette Willard did not have the authority to waive her husband's attorney-client privilege.²¹

Determining that Yvette Willard's affidavit created "a reasonable basis" to believe that Derril Willard had possessed information relevant to Eric Miller's death, and that he had told Gammon this information, Judge Stephens reasoned that the interest in solving a murder and protecting the community outweighed Derril's privacy.²² Further, "Yvette Willard, as spouse and as Executor of the estate of Derril Willard, has waived the marital privilege by the filing of her affidavit."²³ Judge Stephens explained that,

there [was] no evidence before the court that Derril Willard reserved only to himself the right to waive this privilege by specifically precluding, orally or in writing, the Executor of his estate from effecting this

16. *See id.* at 6.

17. *See id.* at 6.

18. *See id.* at 3.

19. *Id.* at 4.

20. *Id.* at 3 (quoting *In re: Albemarle Mental Health Center*, 42 N.C. App. 292, 296, 256 S.E.2d 818, 821 (1979)).

21. *Id.* at 21.

22. *Id.* at 66.

23. *Id.* at 67.

waiver . . . [and] Derril Willard did not by his words or conduct prohibit or preclude this waiver.²⁴

Following the hearing, Judge Stephens ordered Gammon to submit to the court a sealed affidavit containing any relevant information that he had received from his client.²⁵ Judge Stephens's Order declared that the information sought was "highly important, material and relevant to an ongoing homicide investigation into the death of Eric Miller" and did not appear to be available from any other source.²⁶ Judge Stephens stated:

[t]he State's and public's interest in determining the identity of the person or persons responsible for the death of Eric Miller outweigh the public interest in protecting the attorney-client privilege, where the estate of the deceased has waived the privilege and the estate has specifically requested that the information be disclosed by the attorney.²⁷

In explaining why the precedential effects of his decision would be minimal, Judge Stephens emphasized that his Order would not stretch the attorney-client privilege beyond its common law existence because one who wishes to prevent waiver by his estate "may expressly prohibit such [waiver] at any time prior to his death."²⁸

Gammon refused to comply with the order and Judge Stephens determined that his ruling should be immediately reviewed by the North Carolina Appellate Courts.²⁹ Gammon's attorneys gave notice of Appeal to the Court of Appeals of North Carolina.³⁰ Subsequently, District Attorney Willoughby and the attorneys for Gammon wrote a joint petition to the North Carolina Court of Appeals asking the court for discretionary review by the North Carolina Supreme Court prior to determination by the Court of Appeals due to the first impression nature of the case.³¹ The North Carolina Supreme Court granted review and arguments were heard on Tuesday, October 15, 2002.³² In the interests of justice, the North Carolina Supreme Court should affirm Judge Stephens's decision requiring Gammon to reveal the substance of his conversation with Derril Willard.

24. *Id.* at 67.

25. *Id.* at 66.

26. *Id.* at 67.

27. *Id.* at 67-68.

28. *Id.* at 68.

29. *See id.* at 75.

30. *See id.* at 76.

31. *See* Joint Petition For Discretionary Review Prior To Determination By The North Carolina Court of Appeals, In Re: The Investigation of the Death of Eric D. Miller, xx NC xx, xx S.E.2d xx (N.C. 2003) (No. 303PA02).

32. *See* <http://www.aoc.state.nc.us/www/public/sc/cal0210.htm>.

III. NORTH CAROLINA'S ATTORNEY-CLIENT PRIVILEGE

State law controls the North Carolina attorney-client privilege.³³ North Carolina chose not to codify the attorney-client privilege and therefore, common law governs the attorney-client privilege.³⁴

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law."³⁵ Its purpose is to "encourage full and frank communication between attorneys and their clients and *thereby promote broader public interests in the observance of law and the administration of justice.*"³⁶ The attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."³⁷ The general rule is not disputed—confidential communications between client and attorney should not be revealed at any time, as the privilege is that of the client and not the attorney.³⁸ "The [attorney-client] privilege exists only to aid in the administration of justice, and when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed."³⁹

The North Carolina attorney-client privilege is not absolute.⁴⁰ Rule 1.6(d)(3) of the North Carolina Revised Rules of Professional Conduct allows an attorney to disclose confidential information "when permitted under the Rules of Professional Conduct *or required by law or court order.*"⁴¹ Rule 1.6 also contains other exceptions to the

33. See N.C. GEN. STAT. § 8C-1 (2002). ("Except as otherwise required by the Constitution of the United States, the privileges of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with the law of this State.")

34. See *In Re: The Investigation of the Death of Eric D. Miller*, No. 02 SP0550, slip op. at 50 (Wake Co. 2002). The "common law" is the "common law of England as of the date of the signing of the Declaration of Independence." *Id.* (quoting *State v. Vance*, 328 N.C. 613, 617, 403 S.E.2d 495, 498 (1991)).

35. *Upjohn v. United States*, 449 U.S. 383, 389 (1981).

36. *Evans v. United Services Auto. Ass'n*, 142 N.C. App. 18, 31, 541 S.E.2d 782, 790 (2001), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001) (emphasis added).

37. *Upjohn*, 449 U.S. at 389 (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

38. See *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826).

39. *Cohen v. Jenkintown*, 238 Pa. Super 456, 464, 357 A.2d 689, 693-94 (Pa. Super. Ct. 1976).

40. See *In Re: The Investigation of the Death of Eric D. Miller*, No. 02 SP0550, slip op. at 52 (Wake Co. 2002).

41. N.C. RULES OF PROFESSIONAL CONDUCT RULE 1.6(d)(3) (2001) (emphasis added).

attorney-client privilege. For example, when an attorney, by keeping the attorney-client privilege intact, would be assisting his client in the commission of a crime or other fraudulent practice, an exception to the privilege can be made.⁴² RPC 206 following Rule 1.6 also reads, “[a] lawyer may disclose the confidential information of a deceased client to the personal representative of the client’s estate”⁴³

IV. THE STATE’S ARGUMENT

Arguing that the attorney-client privilege should be strictly construed and only used for the purpose for which it was created, the district attorney contended that there was an “administration of justice” exception to the attorney-client privilege.⁴⁴ The district attorney also emphasized that there are exceptions to the general rule that the privilege survives the death of the client.⁴⁵

The United States Court of Appeals case, *In re: Sealed Case* dealt with an investigation into the dismissal of White House Travel Office employees.⁴⁶ An attorney made notes of an initial interview with a client shortly before the client committed suicide.⁴⁷ The Government, represented by the Office of Independent Counsel, wanted the notes for use in a white-collar criminal investigation.⁴⁸ Independent Counsel contended that the attorney-client privilege should be qualified because the client was dead.⁴⁹ The Court of Appeals noted that “holdings actually *manifesting* the posthumous force of the privilege are relatively rare.”⁵⁰ The Court of Appeals allowed Independent Counsel access to the notes and emphasized that “there is little by way of judicial holding that affirms the survival of the privilege after death, and the framing of the posthumous privilege as belonging to the client’s

42. *See id.* at cmt. 12.

43. *See id.* at RPC 206.

44. *See In Re: The Investigation of the Death of Eric D. Miller*, No. 02 SP0550, slip op. at 37, 38 (Wake Co. 2002).

45. *See id.* An example of such an exception involves a deceased client’s communications with his attorney when people are fighting over the estate.

46. *See In re: Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), *rev’d by Swidler & Berlin v. United States*, 524 U.S. 399 (1998), *remand to In re: Sealed Case*, 172 F.3d 921 (D.C. Cir. 1998).

47. *See id.* at 231.

48. *See id.*

49. *Id.* (citing MCCORMICK ON EVIDENCE §94 at 348: “the operation of the privilege has in effect been nullified in the class of cases where it would most often be asserted after death.”)

50. *Id.* (emphasis added).

estate or personal representative both suggests that the privilege may terminate on the winding up of the estate”⁵¹

The Supreme Court of the United States reversed the Court of Appeals decision in *Swidler & Berlin v. United States*.⁵² The Supreme Court held that the attorney-client privilege protected the notes.⁵³ However, even the majority opinion admitted that “the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context”⁵⁴

In writing the dissenting opinion in *Swidler*, Justice O’Connor, joined by Justices Scalia and Thomas, agreed with the District Court of Appeals in *In re: Sealed Case*.⁵⁵ Justice O’Connor wrote, “a criminal defendant’s right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client’s posthumous interest in confidentiality.”⁵⁶ Justice O’Connor continued that, “after death, the potential that disclosure will harm the client’s interests has been greatly diminished, and the risk that the client will be held criminally liable has abated altogether.”⁵⁷ Indeed, an “exception may . . . be warranted in the face of a compelling law enforcement need for the information.”⁵⁸

In certain circumstances, Justice O’Connor explained, the attorney-client privilege should not prevent disclosure of a deceased client’s communications. Justice O’Connor argued that information should be disclosed despite the existence of the attorney-client privilege when 1) the privilege is asserted in a criminal context, 2) the information cannot be obtained in any other way and 3) the Court has conducted a balancing test and determined that the interests of justice outweigh the reason for the privilege.⁵⁹ Justice O’Connor concluded that where:

[A] compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication. . . .

51. *Id.*

52. *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

53. *See id.* at 410.

54. *Id.* at 407.

55. *Swidler & Berlin v. United States*, 524 U.S. 399, 411 (1998) (O’Connor, J. dissenting).

56. *Id.*

57. *Id.* at 412.

58. *Id.*

59. *Id.* at 413-14.

[T]he cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client.⁶⁰

Even though the facts before the North Carolina Supreme Court are similar to *Swidler*, North Carolina is not bound by the U.S. Supreme Court's decision.⁶¹ The authority for the *Swidler* decision rested on Federal Rule of Evidence 501, which makes clear that in this case, state law controls.⁶² District Attorney Willoughby also emphasized the U.S. Supreme Court's "disinclination to employ a balancing test regarding evidentiary privileges"⁶³ as evidenced in *Jaffee v. Redmond*, where the Court "reject[ed] the balancing component of the privilege implemented by [the Seventh Circuit] and a small number of States"⁶⁴ One of the states that the Supreme Court in *Jaffee* referred to as implementing the balancing approach is North Carolina.⁶⁵ Because state law governs the attorney-client privilege and because North Carolina courts are willing to use the balancing rejected by the U.S. Supreme Court, the North Carolina Supreme Court should follow the U.S. Court of Appeals' decision in *In re: Sealed Case* and Justice O'Connor's dissenting opinion in *Swidler*, and weigh the interest of justice against the importance of the privilege.⁶⁶

V. GAMMON'S ARGUMENT

On the other side, Gammon's attorneys argued that 1) the attorney-client privilege survives the client's death under North Carolina law;⁶⁷ 2) that there is no basis for the "administration of justice" excep-

60. *Id.* at 416.

61. See *In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550*, slip op. at 47 (Wake Co., 2002).

Because the majority in *Swidler* looked to the federal rules of evidence and not to the Constitution or to an Act of Congress affecting the States, it does not serve as binding precedent on the States . . . state courts may take a different position. They may adopt the dissenting opinion or even the opinion by the Court of Appeals.

62. "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined *in accordance with State law.*" FED. R. EVID. 501 (emphasis added).

63. *In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550*, slip op. at 49 (Wake Co., 2002).

64. *Id.* (quoting *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996)).

65. See *In Re: The Investigation of the Death of Eric D. Miller*, No. 02 SP0550, slip op. at 50 (Wake Co. 2002) (citing *Jaffee v. Redmond*, 518 U.S. 1 (1996)).

66. *Id.*

67. See *id.* at 24 (citing *In re Kemp's Will*, 236 N.C. 680, 73 S.E.2d 906 (1953)). *In re Kemp's Will* created a testator exception to the attorney-client privilege, allowing an

tion sought by the state; and 3) that the attorney-client privilege has not been waived, and the executor of Mr. Willard's estate cannot waive the privilege.⁶⁸ Gammon's attorneys focused on the fact that the State was asking the North Carolina Supreme Court to do something that no other court in the United States had ever done.⁶⁹

Gammon's attorneys couched their argument in the decision reached in *Swidler & Berlin*, discussed previously.⁷⁰ The majority opinion in *Swidler* reads, "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel."⁷¹ The *Swidler* Court continued, "[c]lients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosures of such communications may be as feared as disclosure during the client's lifetime."⁷² The majority in *Swidler* also determined that

[t]he loss of evidence admittedly caused by the privilege is justified in part by the fact that . . . [w]ithout assurance of the privilege's posthumous application, the client may very well not have made disclosures to his attorneys at all, so the loss of evidence is more apparent than real. In the case at hand, it seems quite plausible that [the client] already contemplating suicide, may not have sought legal advice from [the attorney] if he had not been assured the conversation was privileged.⁷³

Admittedly, other state supreme courts have rejected the exception sought by District Attorney Willoughby in this case. The Colorado Supreme Court in *Wesp v. Everson*, decided that an attorney who had previously represented a dead client on related criminal charges could not "testify about communications between the defendant and his counsel regarding the criminal charges."⁷⁴ The court in *Wesp* could find "neither legal precedent nor authority that supports the

attorney to testify as to his deceased client's mental state at the time he executed his will. Gammon's attorneys argued that because the North Carolina Supreme Court in *Kemp* had to create an attorney-client privilege exception that this implies the attorney-client privilege itself survives the death of the client.

68. *See id.* at 21, 25.

69. *Id.* at 21-22.

70. *See id.* at 25.

71. *Swidler & Berlin*, 524 U.S. at 407.

72. *Id.*

73. *Id.* at 408.

74. In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550, slip op. at 28 (Wake Co., 2002) (citing *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001)).

existence of any such [posthumous] exception to the rule of attorney-client privilege."⁷⁵

Gammon's attorneys also suggested that the exception sought by the State was contrary to the will of the North Carolina legislature.⁷⁶ The North Carolina legislature has specifically addressed various areas of privilege law, such as the doctor-patient privilege, the psychologist-patient privilege, and the marital privilege.⁷⁷ The North Carolina legislature has also created exceptions to those privileges.⁷⁸ Gammon's attorneys concluded that the legislature's failure to carve out the exception sought by the State, when such exceptions had been created for other privileges, is proof that the intent of the legislature does not support creation of the exception sought by the State.⁷⁹

Gammon's attorneys also moved to strike the affidavit of Yvette Willard on the basis that it contained information protected by the marital privilege.⁸⁰ Without evidence that Derril Willard desired that the information be disclosed upon his death, Gammon's attorneys argued that North Carolina law prohibits one spouse waiving this privilege without first getting the other spouse's consent.⁸¹

Gammon's attorneys further rationalized that "no case in this State, or any other, has permitted an executor of an estate to waive the attorney-client privilege of the decedent to require disclosure of communications between the decedent and his attorney regarding the decedent's knowledge of or involvement in a criminal investigation."⁸² Gammon's attorneys also argued that "neither North Carolina estate law nor Derril Willard's will permits the executor of his estate to waive the attorney-client privilege."⁸³ Specifically, Mr. Willard's will only empowered his executor to "'deal with any property, real or personal, held in [his] estate or in any trust as freely as [he] might in the handling of [his] own affairs, including the power to make any tax elections available to [his] estate or any trust created hereunder' and further 'all of the powers set forth in North Carolina General Statute, Section 32-27.'"⁸⁴ Although N.C. Gen. Stat. §32-27 lists thirty-one powers a fiduciary can exercise if granted the power, "[n]one of these

75. *Id.* at 29 (citing *Wesp v. Everson*, 33 P.3d 191 (Colo. 2001)).

76. *See id.* at 30.

77. *See id.* at 30.

78. *Id.* at 30.

79. *Id.* at 30-31.

80. *Id.* at 16.

81. *See id.* at 17, 19.

82. *Id.* at 31.

83. *Id.* at 32.

84. *Id.* at 32 (quoting Derril Willard's will).

thirty-one powers includes the ability to waive the attorney-client privilege of the testator.”⁸⁵ Furthermore, Gammon’s attorneys argued that nothing in Section 28A-13-3 of the General Statutes, which lists the powers that an executor has in administering the estate, “permits an executor to waive the attorney-client privilege of the decedent with respect to communications the decedent had with his attorney relevant to a criminal investigation.”⁸⁶ Even if she was permitted to disclose the information, for Yvette Willard to do so is contrary to the best interests of her husband’s estate and impermissible under N.C. Gen. Stat. § 28-13-3, according to Gammon’s attorneys.⁸⁷

Gammon’s attorneys also focused on the importance of the attorney-client privilege and its goal of impenetrable client confidence. They emphasized that attorneys rely on Rule 1.6 of the Revised Rules of Professional Conduct and the exceptions it specifically enumerates and that this situation was not among those exceptions.⁸⁸ Gammon explained that he did not advise Mr. Willard of a posthumous exception because there was no such exception under Rule 1.6 and forcing him to reveal his client’s confidences would be inequitable.⁸⁹

VI. GAMMON SHOULD BE COMPELLED TO DISCLOSE

The North Carolina Supreme Court should affirm Judge Stephens’s decision to compel Gammon to disclose information regarding Dr. Miller’s death. Because the North Carolina legislature has not codified the attorney-client privilege, the common law controls, and judges must accordingly decide whether additional exceptions are available in certain circumstances. It is upon this inherent power of the court that the State based its original petition.⁹⁰

Swidler & Berlin v. United States does not bind the North Carolina Supreme Court’s decision in this case because the attorney-client privilege is governed by state law.⁹¹ Furthermore, *Swidler* and the case at hand are easily distinguishable. Here, the State attempted to discover information to further the investigation of an already-established crime. In *Swidler*, the U.S. Supreme Court considered the attorney-client privilege as it related to the discovery of information leading to

85. *Id.* at 32; see also N.C. GEN. STAT. §32-27 (2002).

86. *Id.* at 32.

87. See *id.* at 33.

88. *Id.* at 34.

89. See *id.* at 35.

90. See *id.* at 3.

91. See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

establishing the existence of a crime.⁹² The North Carolina Supreme Court should also consider that while *Swidler* dealt with white-collar crime, the Eric Miller case is a murder investigation.⁹³ It is obvious that the need to establish the identity of an at-large killer is great. The North Carolina Supreme Court should base its decision on the United States Court of Appeals decision in *In re: Sealed Case* and Justice O'Connor's dissenting opinion in *Swidler* and employ a balancing test to determine the admissibility of the information Derril Willard provided Attorney Gammon.

The argument by Gammon's attorneys, that Willard's reliance on the confidence of his communications with Gammon should preclude disclosure, is unconvincing because no harm would befall Derril Willard's estate upon the disclosure of the information, nor is it certain that his reputation would be tarnished. Eric Miller's parents, the fiduciaries authorized to administer Eric Miller's estate, signed an Administrator's Release that waived any action Eric's estate might have against Derril Willard's estate or his heirs.⁹⁴ Such a release ensures that divulging the attorney-client privilege in this case would not cause harm to Willard's estate.

Although Willard's reputation is a factor, the North Carolina Supreme Court should not preclude waiver because of the interest in protecting Derril Willard's reputation, as that would be pure speculation. Specifically, we do not know what information Gammon gleaned from his conversations with Derril Willard. The media has already exposed Derril Willard to the public and the information sought for disclosure by the State could very well place him in a better light, especially if the information sought exonerates him from all guilt.

Yvette Willard is not acting contrary to the interests of her husband's estate or memory. She is merely attempting to discover the truth surrounding her husband's death, a truth to which she is entitled. Gammon's attorneys argued that Yvette Willard's affidavit be struck because it is covered by the confidential provisions of the marital privilege. However, two North Carolina cases imply that Yvette Willard should be allowed to act contrary to the marital privilege she shared with Mr. Willard. In *State v. Freeman*, the "defendant invoked the rule of spousal disqualification . . . to exclude evidence of criminal acts committed in a public place and in the presence of a third per-

92. See *Swidler & Berlin*, 524 U.S. at 407.

93. See *In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550*, slip op. at 48 (Wake Co., 2002).

94. See *id.* at 64, 65.

son.”⁹⁵ *Freeman* reiterates the court’s inherent power relied upon by the district attorney, specifically that; “[a]bsent a legislative declaration, this Court possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason.”⁹⁶ The court in *Freeman* continued, “[w]hen we consider the common law rule preventing spouses from testifying against each other as to any matter at issue in a criminal proceeding in light of its purpose to promote marital harmony, we find that the rule sweeps more broadly than its justification.”⁹⁷ The court explained that “the public interest in ascertaining the truth outweighs any policy to promote marital harmony.”⁹⁸

State v. Holmes, another North Carolina Supreme Court case, considered whether a “witness spouse [could] testify at trial as to confidential communications made to her by defendant spouse over defendant spouse’s objection and assertion of privilege.”⁹⁹ Although the Court decided that the spouse could not testify, it emphasized the objection of the defendant spouse in its decision.¹⁰⁰ However, unlike in *State v. Holmes*, there is no evidence that Derril Willard would object to the disclosure.

There is further evidence that Yvette Willard should be allowed to waive her husband’s attorney-client privilege. For instance, one of the powers expressly enumerated within N.C. Gen. Stat. § 28-13-3 is the right of a representative or fiduciary of the decedent to “compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate.”¹⁰¹ Furthermore, the New York court in *In re: Estate of Colby* decided that, “the right to waive the [attorney-client] privilege can survive the client . . . [s]ince the client could have waived the privilege to protect himself or to promote his interest,” and found it “reasonable to conclude that, after his

95. *State v. Freeman*, 302 N.C. 591, 595, 276 S.E.2d 450, 453 (1981).

96. *Id.* at 594, 276 S.E.2d at 452.

97. *Id.* at 595, 276 S.E.2d at 453.

98. *Id.* at 595-96, 276 S.E.2d at 453- 54.

99. *State v. Holmes*, 330 N.C. 826, 827, 412 S.E.2d 660, 660 (1992).

100. See *id.* at 828, 412 S.E.2d at 660.

101. See *In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550*, slip op. at 32 (Wake Co. 2002). See also N.C. GEN. STAT. § 28A-13-3(a)(15) (2002); N.C. GEN. STAT. § 32-27(23) (2002) (one of the powers incorporated by reference to a fiduciary is the right to “compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary’s decision shall be conclusive between the fiduciary and the . . . person against or for whom the claim is asserted. . .”)

death, [a] personal representative stands in his shoes for the same purposes.”¹⁰²

The current attorney-client privilege is not absolute. “[P]rivilege has in effect been nullified in the class of cases where it would most often be asserted after death, namely, cases involving the validity or interpretation of a will, or other dispute between parties claiming by succession from the testator at his death.”¹⁰³ Furthermore, there is such a thing as “temporary confidentiality” as is the case with discussions relevant to the creation of a client’s will, it exists during his lifetime but does not necessarily extend past the client’s death.¹⁰⁴ Similarly,

[i]t would only be a short step forward for the courts to apply here the notion that the [attorney-client] privilege is ‘personal’ to the client, and to hold that in all cases death terminates the privilege. This could not to any substantial degree lessen the encouragement for free disclosure which is the purpose of the privilege.¹⁰⁵

Public policy demands that Gammon be forced to speak. There is the possibility that by not waiving the attorney-client privilege in this case, that an innocent person will be charged with the crime of the murder of Eric Miller. Therefore, the North Carolina Supreme Court could affirm Judge Stephens’s decision, but narrowly tailor its decision to the facts at hand. For example, the State suggests certain prerequisites that would help “channel the precedential effect” of the Court’s decision in future cases including: 1) the client must be deceased; 2) the exception must be limited to cases involving a murder charge; 3) the lower court must have had a reasonable basis for believing that the deceased client divulged relevant information concerning the crime to his attorney; 4) the information must not be available from any other source; 5) the information must be highly important to the investigation; and 6) the representative of the deceased client must have waived the attorney-client privilege.¹⁰⁶ The likelihood of these conditions all repeating themselves is slight, and even if met again, nothing will force the trial judge’s hand in admitting the evidence

102. In re: Estate of Colby, 723 N.Y.S.2d 631, 634 (N.Y. Sur. 2001).

103. MCCORMICK ON EVIDENCE, § 94, at 348. (4th ed., 1992).

104. MCCORMICK ON EVIDENCE, § 94, at 378 (5th ed. 1999).

105. MCCORMICK ON EVIDENCE, § 94, at 349-350 (4th ed. 1992).

106. Brief For The State at 73-74, In Re: The Investigation of the Death of Eric D. Miller, xx NC xx, xx S.E.2d xx (N.C. 2003) (No. 303PA02).

because the judge would still need to utilize a balancing test, as *In re: Sealed Case* and Justice O'Connor's dissent in *Swidler* suggests.¹⁰⁷

Finally, the waiver of the attorney-client privilege in this narrow fact pattern will not substantially affect the trust clients are willing to place in their attorneys. The attorneys for Gammon admit that exceptions do already exist to the privilege and cannot point to any evidence that this effects a client's trust.¹⁰⁸ Attorneys will not feel obligated to mention the exception sought in this unique case for the same reason that they do not warn their clients of other possible, yet rare exceptions.

VII. CONCLUSION

Regardless of whether the attorney-client privilege is waived in this case, Eric Miller's death will affect future North Carolina decisions. If the North Carolina Supreme Court affirms Judge Stephens's ruling, the decision should be narrowly tailored to fit the facts of this unusual case. However, there seems to be little to prevent ambitious prosecutors from trying to push the envelope and expand the exception. Waiver should only be considered in cases involving a murder in which the killer has not been identified. North Carolina courts, however, may consider expanding this exception to include rape, child abuse, or other acts that society abhors. Regardless, the court should be wary of opening the door to any more waivers than is necessary to properly administer justice. In the alternative, if the North Carolina Supreme Court chooses to reverse Judge Stephens's decision, attacks on the North Carolina attorney-client privilege will continue and a murder will go unsolved.

William A. Oden, III

107. See *In re: Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997), *rev'd by Swidler & Berlin v. U.S.*, 524 U.S. 399 (1998), *remand to In re: Sealed Case*, 172 F.3d 921 (D.C. Cir. 1998).

108. See *In Re: The Investigation of the Death of Eric D. Miller No. 02 SP0550*, slip op. at 30 (Wake Co.,2002).