SUPREME COURT OF THE UNITED STATES

No. 97–1192

SWIDLER & BERLIN AND JAMES HAMILTON, PETITIONERS *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 25, 1998]

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, 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.

We have long recognized that "[t]he fundamental basis upon which all rules of evidence must rest– if they are to rest upon reason– is their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U. S. 371, 381 (1933). In light of the heavy burden that they place on the search for truth, see *United States* v. *Nixon,* 418 U. S. 683, 708–710 (1974), "[e]videntiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances," *Herbert* v. *Lando,* 441 U. S. 153, 175 (1979). Consequently, we construe the scope of privileges narrowly. See *Jaffee* v. *Redmond,* 518 U. S. 1, 19 (1996) (SCALIA, J., dissenting); see also *University of Pennsylva-*

nia v. *EEOC,* 493 U. S. 182, 189 (1990). We are reluctant to recognize a privilege or read an existing one expansively unless to do so will serve a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Trammel* v. *United States,* 445 U. S. 40, 50 (1980) (internal quotation marks omitted).

The attorney-client privilege promotes trust in the representational relationship, thereby facilitating the provision of legal services and ultimately the administration of justice. See *Upjohn Co.* v. *United States,* 449 U. S. 383, 389 (1981). The systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence. A privilege should operate, however, only where "necessary to achieve its purpose," see *Fisher* v. *United States,* 425 U. S. 391, 403 (1976), and an invocation of the attorney-client privilege should not go unexamined "when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise," *Cohen* v. *Jenkintown Cab Co.*, 238 Pa. Super. 456, 464, 357 A. 2d 689, 693–694 (1976).

I agree that a deceased client may retain a personal, reputational, and economic interest in confidentiality. See *ante*, at 7. But, 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. Thus, some commentators suggest that terminating the privilege upon the client's death "could not to any substantial degree lessen the encouragement for free disclosure which is [its] purpose." 1 J. Strong, McCormick on Evidence §94, p. 350 (4th ed. 1992); see also Restatement (Third) of the Law Governing Lawyers §127, Comment *d* (Proposed Final Draft No. 1, Mar. 29, 1996). This diminished risk is coupled with a heightened urgency for discovery of a deceased client's communications in the criminal context. The privilege does not "protect[] disclosure of the underlying facts by

those who communicated with the attorney," *Upjohn*, *supra*, at 395, and were the client living, prosecutors could grant immunity and compel the relevant testimony. After a client's death, however, if the privilege precludes an attorney from testifying in the client's stead, a complete "loss of crucial information" will often result, see 24 C. Wright & K. Graham, Federal Practice and Procedure §5498, p. 484 (1986).

As the Court of Appeals observed, the costs of recognizing an absolute posthumous privilege can be inordinately high. See *In re Sealed Case*, 124 F. 3d 230, 233–234 (CADC 1997). Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. See *State* v. *Macumber*, 112 Ariz. 569, 571, 544 P. 2d 1084, 1086 (1976); cf. *In the Matter of a John Doe Grand Jury Investigation*, 408 Mass. 480, 486, 562 N. E. 2d 69, 72 (1990) (Nolan, J., dissenting). In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. See, *e.g.*, *Schlup* v. *Delo,* 513 U. S. 298, 324–325 (1995); *In re Winship,* 397 U. S. 358, 371 (1970) (Harlan, J., concurring). Indeed, even petitioner acknowledges that an exception may be appropriate where the constitutional rights of a criminal defendant are at stake. An exception may likewise be warranted in the face of a compelling law enforcement need for the information. "[O]ur historic commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer." *Nixon*, *supra*, at 709 (internal quotation marks omitted); see also *Herrera* v. *Collins,* 506 U. S. 390, 398 (1993). Given that the complete exclusion of relevant evidence from a criminal trial or investigation may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts, I do not be-

lieve that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.

A number of exceptions to the privilege already qualify its protections, and an attorney "who tells his client that the expected communications are absolutely and forever privileged is oversimplifying a bit." 124 F. 3d, at 235. In the situation where the posthumous privilege most frequently arises– a dispute between heirs over the decedent's will– the privilege is widely recognized to give way to the interest in settling the estate. See *Glover* v. *Patten,* 165 U. S. 394, 406–408 (1897). This testamentary exception, moreover, may be invoked in some cases where the decedent would not have chosen to waive the privilege. For example, "a decedent might want to provide for an illegitimate child but at the same time much prefer that the relationship go undisclosed." 124 F. 3d, at 234. Among the Court's rationales for a broad construction of the posthumous privilege is its assertion that "[m]any attorneys act as counselors on personal and family matters, where, in the course of obtaining the desired advice, confidences about family members or financial problems must be revealed . . . which the client would not wish divulged." *Ante*, at 8. That reasoning, however, would apply in the testamentary context with equal force. Nor are other existing exceptions to the privilege– for example, the crime-fraud exception or the exceptions for claims relating to attorney competence or compensation– necessarily consistent with "encouraging full and frank communication" or "protecting the client's interests," *ante*, at 10. Rather, those exceptions reflect the understanding that, in

certain circumstances, the privilege "'ceases to operate'" as a safeguard on "the proper functioning of our adversary system." See *United States* v. *Zolin,* 491 U. S. 554, 562–563 (1989).

Finally, the common law authority for the proposition that the privilege remains absolute after the client's death is not a monolithic body of precedent. Indeed, the Court acknowledges that most cases merely "presume the privilege survives," see *ante*, at 4–5, and it relies on the case law's "implicit acceptance" of a continuous privilege, see *ante*, at 6. Opinions squarely addressing the posthumous force of the privilege "are relatively rare." See 124 F. 3d, at 232. And even in those decisions expressly holding that the privilege continues after the death of the client, courts do not typically engage in detailed reasoning, but rather conclude that the cases construing the testamentary exception imply survival of the privilege. See, *e.g.*, *Glover*, *supra*, at 406–408; see also Wright & Graham, *supra*, §5498, at 484 ("Those who favor an eternal duration for the privilege seldom do much by way of justifying this in terms of policy").

Moreover, as the Court concedes, see *ante*, at 4, 6, there is some authority for the proposition that a deceased client's communications may be revealed, even in circumstances outside of the testamentary context. California's Evidence Code, for example, provides that the attorney-client privilege continues only until the deceased client's estate is finally distributed, noting that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." Cal. Evid. Code Ann. §954, and comment, p. 232, §952 (West 1995). And a state appellate court has admitted an attorney's testimony concerning a deceased client's communications after "balanc[ing] the necessity for revealing the substance of the [attorney-client conversation] against the unlikelihood of

any cognizable injury to the rights, interests, estate or memory of [the client]." See *Cohen*, *supra*, at 464, 357 A. 2d, at 693. The American Law Institute, moreover, has recently recommended withholding the privilege when the communication "bears on a litigated issue of pivotal significance" and has suggested that courts "balance the interest in confidentiality against any exceptional need for the communication." Restatement (Third) of the Law Governing Lawyers §127, at 431, Comment *d*; see also 2 C. Mueller & L. Kirkpatrick, Federal Evidence, §199, p. 380 (2d ed. 1994) ("[I]f a deceased client has confessed to criminal acts that are later charged to another, surely the latter's need for evidence sometimes outweighs the interest in preserving the confidences").

Where the exoneration of an innocent criminal defendant or 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. In my view, the cost of silence warrants a narrow exception to the rule that the attorney-client privilege survives the death of the client. Moreover, although I disagree with the Court of Appeals' notion that the context of an initial client interview affects the applicability of the work product doctrine, I do not believe that the doctrine applies where the material concerns a client who is no longer a potential party to adversarial litigation.

Accordingly, I would affirm the judgment of the Court of Appeals. Although the District Court examined the documents *in camera*, it has not had an opportunity to balance these competing considerations and decide whether the privilege should be trumped in the particular circumstances of this case. Thus, I agree with the Court of Appeals' decision to remand for a determination whether any portion of the notes must be disclosed.

With respect, I dissent.