IN THE SUPREME COURT OF THE STATE OF ALASKA

J.W., Petitioner, vs. SUPERIOR COURT, Respondent.	Court of Appeals No. A-12128

Trial Court Case 4FA-S13-02667CI
Trial Court Case 4FA-S13-02668CI
Trial Court Case 4FA-S13-02669CI
Trial Court Case 4FA-S13-00976CI

PETITION FOR HEARING

I certify this document and its attachments do not contain the (1) name of a victim of a sexual offense listed in AS 12.61.140 or (2) residence or business address or telephone number of a victim of or witness to any offense unless it is an address identifying the place of a crime or an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

PRAYER FOR RELIEF

Pursuant to Appellate Rule 302(a)(1), J.W. hereby petitions the Alaska Supreme Court for hearing from the July 28, 2015 Order of the Alaska Court of Appeals which denied J.W.'s Petition for Review.[1] J.W. respectfully requests that this Court grant hearing and either determine on the merits the issues raised by J.W. or remand the case to the Court of Appeals with directions to grant review and determine on the merits the issues raised by J.W.

STATEMENT OF FACTS

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[1] See Appendix 1.

A Public Defender Agency employee learned client secrets while working for the agency.[2] S/he was later fired by the Public Defender Agency for misconduct.[3] The person got a job with another law firm directly involved in the litigation of this matter.[4] This person's law firm now wants to use the secrets that their employee learned while working for the Public Defender Agency in litigation directly benefiting their law firm.[5]

J.W. believes that what you tell your attorney while you are in jail awaiting trial should remain secret and be utilized only in your best interests.[6] He wonders how attorneys at the Public Defender Agency can tell clients to speak to their employee investigators when there are no rules or laws in place to stop non-lawyer Public Defender Agency employees to stop telling secrets that damage public confidence in the institution and further erode J.W.'s own attorney-client relationship with the organization.[7]

This case arises out of a post-conviction relief application.[8] J.W. was previously represented by the Public Defender Agency.[9] During the course of that representation, J.W. talked to a Public Defender Agency investigator, I1.[10] He told I1 things in confidence that could potentially be harmful to J.W.'s interests.[11]

[2] See Appendix 2 at 8-9.
[3] See id at 7.
[4] See id at 7-8.
[5] See id at 11.
[6] See id at 11-12.
[7] See id at 11-12.
[8] See id at 1.
[9] See id at 3-4.
[10] See id at 3-5.
[11] See id.

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I1 had developed strong opinions about the underlying PCR while he was investigating it on behalf of a party at the trial court level.[12] The facts underlying the PCR – a murder in Fairbanks largely proven by circumstantial evidence and confessions - occurred before J.W.'s matter.[13] I1 never told J.W. about his previous involvement in the case.[14]

J.W. never consented to I1 telling anyone the information J.W. provided to I1.[15] It is I1's belief that as an investigator with the Public Defender Agency, I1 cannot reveal such information to anyone outside of the Public Defender Agency, even today.[16]

I2 worked for the Public Defender Agency as its chief investigator.[17] S/he had some supervisory authority over I1, as s/he was the top investigator for the agency and was responsible for budgeting and various other administrative concerns.[18]

I1 and I2 talked about the case while both were private investigators and neither had yet met J.W.,[19] again when I1 and I2 were both employees of the Public Defender Agency shortly after I1 met J.W.,[22] and then after I2 was fired by the Public Defender Agency.

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[12] See id at 8.
[13] See id at 3-4.
[14] See id at 8.
[15] See id at 10.
[16] See id.
[17] See id at 2-3.
[18] See id.
[19] See id at 3.
[22] See id at 3-8.

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I2 started to work for I2's current law firm while maintaining his job at the Public Defender Agency.[28] I2 would call I1 on behalf of his new law firm on the Public Defender phone system.[29] I2 asked I1 about what J.W. had said to I1.[30] I1 refused to answer these questions.[31]

I2 was then fired for ethical misconduct.[32] The alleged ethical misconduct had nothing to do with the above-described misconduct.[33]

After being fired for ethical misconduct, I2 returned to Fairbanks to discuss the case.[34] She was now solely working for the current law firm.[35] I2 again met with I1.[36] I1 again refused to tell I2 what J.W. had told him.[37]

However, I2 already knew J.W.'s secrets from when he was employed by the Public Defender Agency.[38] And now he's trying to exploit J.W.'s secrets on behalf of his current client.[39]

I2's law firm began the instant action, alleging that J.W. had waived his privilege by talking to an investigator with the Public Defender Agency while that agency

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[28] See id at 5.
[29] See id at 6.
[30] See id at 9-10.
[31] See id.
[32] See id at 7.
[33] See id.
[34] See id at 9.
[35] See id at 7.
[36] See id at 9-10.
[37] See id.
[38] See id at 8-9.
[39] See id at 1-2.

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represented him.[40] I2's firm doesn't care that J.W. never agreed to have his secrets repeated to anyone and has not consented to his secrets being revealed.[41] J.W. never told anyone else about this but Public Defender employees who were actively representing him.[42]

STATEMENT OF POINTS AND AUTHORITIES RELIED UPON FOR REVERSAL OF THE DECISION OF THE COURT OF APPEALS

1. **A criminal defendant is denied effective representation in violation of his rights under Article 1, §11 of the Alaska Constitution where a privileged communication to one's attorney in the course of representation designed to further that representation is then repeated to a third-party that plans to use that statement in litigation directly benefiting the third-party violator, where the person has never consented to further use of the statement.**

In its Tentative Decision, the trial court ruled that J.W's attorney-client privilege was breached but that he did not waive it. The trial court further ruled that the remedy for the breach is only that the statements cannot be used against J.W. but that they are admissible in the Post-Conviction Relief proceeding because Wallace is not a party. The Court of Appeals ruled similarly, but did not reach the merits of J.W.,'s argument.

The trial court cited to Alaska Rule of Evidence 511 to support its interpretation of the Alaska Rules of Evidence. The Court of Appeals said that they did not necessarily endorse this interpretation.

ARE 511 is an identical copy of Rejected Rule 512.[43] In interpreting ARE 511, the trial court utilized a treatise, Federal Practice and Procedure, to come to its conclusion that any alleged statements may be used in proceedings not involving J.W.. However, the trial court

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[40] See id at 1-2.
[41] See id at 10.
[42] See id.
[43] 26A Graham, Fed. Prac. & Proc. Evid. §5741 (Statutory History) n. 19

misinterpreted the treatise. In the treatise, Graham notes that Rejected Rule 512 "makes evidence of a wrongful disclosure of a privileged matter inadmissible 'against the holder of the privilege.'[44] However, the section clarifying the term "against holder" explains that "the holder or other authorized claimants could, of course, still claim the privilege in other actions since by hypothesis the wrongful disclosure was not a waiver of the privilege.[45] The description seems to contemplate situations such as this one, where the statement is being used in a proceeding where the privilege holder is not a party to the immediate action. The attorney client privilege does not only apply to proceedings where the holder is a party but it should be applied to any situation where his or her statements may be used without consent or authorization.

Section 5742 explores the policy of the rejected rule. This section clarifies that the holder of the privilege can bar use of the statement in proceedings where she is not a party.[46] The purpose of excluding from evidence confidential communications between the attorney and the client is to ensure that the client is able to speak freely to his or her attorney.

The drafters of Uniform Rule of Evidence determined that Rule 511:

> Will most often operate as rule of exclusion, i.e., it will render inadmissible evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But the rule does more than prohibit the use of such evidence against the holder of the privilege (as does Rejected Rule 512), it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in action to which he is not a party.[47]

[44] Id. at §5748
[45] Id. at §5748 (Scope – "Against Holder", FN 1.
[46] Id. at §5742 (Policy of Rejected Rule)
[47] Id.

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Additionally, the commentary notes that Rejected Rule 512 would allow the holder to claim the privilege even if he or she is not a party to the action. It would defeat the purpose of the attorney client privilege if it could be used in the manner requested by the Petitioners and authorized by the trial court and the Court of Appeals. The privilege is in place to ensure that a client may speak with his attorney without any concern of his or her statements going any further than she intends or authorizes them to go. This includes any proceeding, not simply ones in which she is a defendant. Therefore, the trial court erred when it held that the statements could be used in the post-conviction relief proceedings. This Court should examine and rule on this issue of first impression.

2. **Failure to Recognize J.W.'s privileged communications in this instance will only serve to erode public confidence in the Alaska Public Defender Agency.**

There is another reason that J.W's privilege should be upheld, and that is because a failure to recognize his privilege will result in a further erosion of the public's confidence in public defenders, as an unauthorized third-party disclosure could be revealed to another party.

As it is, public defender agencies are notoriously underfunded and public confidence in their abilities is low.[48] Difficulties associated with trust and lack of resources has resulted in wrongful guilty pleas and excessive sentences.[49] The hallmark of the attorney client relationship is the trust exemplified in Rule of Evidence 511.

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[48] See "An Essay on the New Public Defender for the 21st Century" by Charles Ogletree, Jr., 1995 Law and Contemporary Problems, at http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4267&context=lcp.

[49] See https://www.aclu.org/racial-justice_prisoners-rights_womens-rights_immigrants-rights/inadequately-funded-public-defender-.

It seems counter-intuitive to say that J.W. cannot restore a privilege that he had no role in breaking. The public defender agency's agents revealed this information. Whether it is because they failed to train I2 or because I2 knowingly violated rules of privilege, the public defender is ultimately to be blamed for this breach. A ruling that allows client secrets to be utilized will will further erode the confidence that Alaskans have in the state's commitment to defending the indigent.

3. Where a non-lawyer Unlawfully Reveals the Secret of a Past Client to Her Employer, That Employer Should not Benefit from the Unlawful Revelation in Subsequent Litigation.

In this case, if J.W's statements are admissible in the Post-Conviction Relief proceeding, I2 would directly benefit from his own violation of J.W.'s attorney client privilege. The exclusionary rule is in place to deter exactly this type of behavior and it should be applicable in this case.[50] I2 learned of J.W.'s statements while he was an employee at the Public Defender Agency and is now attempting to use this information as an employee of AKIP. The privileged statement is fruit of the poisonous tree of I2's breach and should therefore be excluded. Admitting this evidence would run afoul of the policy of the exclusionary rule and destroy the attorney-client privilege.

4. Factual Findings Were Required to Be Made and Never Were

J.W. has advanced a position that the unauthorized disclosure remains protected, especially on the facts of this case, as an agent of the litigants, I2, is responsible for the violation and committed the violation so that the evidence could be used in this case.

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[50] *Wong Sun v. United States*, 371 U.S. 471 (1963).

However, the Court failed to make factual findings on the issue. As such, J.W. has requested that factual findings be made by the Court in this case.

Civil Rule 52 mandates that a Court, "…shall find the facts specially…" In this case, the Court presented competing versions of fact by I1 and I2, detailed those versions, and then failed to make findings, despite the conflict from the two men about whether or not I1 excluded mention of I2 in his meeting with I2 once I2 was identified as a member of the Alaska Innocence Project.

Resolution of this issue is essential to J.W.'s argument that the exclusionary rule should be utilized in this instance. The failure of a court to resolve disputed factual issues is an issue itself that would require remand.[51] J.W., therefore, requests that this Court issue an order requiring Judge Lyle to resolve the disputed factual issue and make actual findings.

STATEMENT OF CONCRETE REASONS WHY THE ISSUES HAVE IMPORTANCE BEYOND THIS CASE AND REQUIRE DECISION BY THIS COURT

This case presents multiple issues of first impression that are essential for the Court to resolve. They have not been presented to a court for review previously. The issues concern the bounds of confidentiality, the role of non-lawyer assistants not bound by the rules of ethics, and the consequences of an adverse ruling on the thousands of Alaskans represented by the Public Defender Agency in Alaska each year.

All Alaskans are entitled to competent representation when charged with a crime under both the Alaska and United States Constitutions. Alaska has recently adopted a new

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[51] See *Keating v. Traynor*, 833 P.2d 695 (Alaska 1992).

Rule of Professional Conduct, Rule 1.6 that governs the circumstances when a client confidence can be revealed. However, the rule does not appear to reach the circumstances described here—where the breach is accomplished by a non-attorney third-party who was at least indirectly involved with the representation. This new rule has never been interpreted, and should be in this instance.

There are also grave concerns about the possible consequence of such a ruling on the reputation of those who provide public defender-type services in Alaska, as we must be able to ensure that our clients will have the confidence that the attorneys and staff they communicate with on a regular basis take their confidences seriously and would not use them in later litigation that could benefit them and hurt the client. This issue has not previously been ruled on and other courts throughout Alaska and the country would benefit by a hearing and subsequent ruling by the Court.

This is a matter dealing with the revelation of client secrets that has never been heard before. Alaska has adopted some new provisions of its Rules of Professional Responsibility that require analysis here in a matter of first impression. Further, the reputation of the public defender is at stake here as well as the rights of indigent defendants. Alaska must meet its statutory and constitutional obligations in the quality of representation forced upon indigent defendants. These indigent defendants deserve and require representation where open and direct communications are encouraged between a client and his attorney. An adverse ruling here will only result in further distrust of the judicial system by those who have public representation foisted upon them.

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DATED on the 10th day of August, 2015, at Fairbanks, Alaska.

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Certificate of Typeface and Point Size

Then above Petition for Hearing is printed in 13-point (proportionately spaced) Times New Roman.

Jason A. Gazewood

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was provided via:
☐email ☒mail ☐ courier ☐ hand-delivery to the following:

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