

**IN THE CIRUCIT COURT FOR THE TWELFTH JUDICIAL CIRCUIT
WILL COUNTY, ILLINOIS**

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff,)	
)	Case No. 09 CF 1048
v.)	
)	Hon. Stephen White
DREW PETERSON,)	
)	
Defendant.)	

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**DEFENDANT’S MOTION TO DECLARE
725 ILCS 5/115-10.6 UNCONSTITUTIONAL**

NOW COMES the Defendant, Drew Peterson, by and through his attorneys, **Joel A. Brodsky and Reem Odeh of the law firm of Brodsky & Odeh and Andrew P. Abood of the Abood Law Firm**, and hereby submits this Motion to find and declare that 725 ILCS 5/115-10.6, is unconstitutional in violation of the Ex Post Facto provisions and the Confrontation Clauses of United States Constitution and the Constitution Of The State Of Illinois. In support of this motion states as follows:

STATEMENT OF FACTS

The States Attorney of Will County has stated that he intends to attempt to introduce hearsay evidence in the above entitled case pursuant to 725 ILCS 5/115-10.6. In order to properly prepare his defense, the Defendant requires that the issue of the constitutionality of 725 ILCS 5/115-10.6 be resolved at the earliest point in this litigation as is possible. Therefore, Defendant is moving to bring the issue of the constitutionality of 725 ILCS 5/115-10.6 before the Court.

On March 1, 2004, Kathleen Savio, the Defendant's ex-wife, was found in her bathtub dead. An autopsy was conducted right after the death, as well as an investigation conducted by the Illinois State Police. A coroner's jury thereafter determined the cause of Savio's death to be accidental drowning and the matter was closed.

When the Defendant's fourth wife disappeared in October of 2007, the public and press automatically assumed foul play. The public and press immediately began to scrutinize every part of the Defendant's life: his friends, his family, his coming and goings. They camped out at his home, and also began looking into the death of Kathleen Savio. Kathleen Savio's body was exhumed and 2 additional autopsies were conducted. One autopsy was conducted by a Dr. Baden, a forensic pathologist who was is a paid consultant and talking head for Fox Entertainment Network. The other autopsy was conducted by Dr. Bloom, who is associated with the Will County State's Attorney's Office. Dr. Baden announced on the Fox network that Savio's death was a homicide, but he refused to release his report. Then in February of 2008, the Will County State's Attorney publically announced, in a slightly more dignified fashion, that Dr.

Bloom had concluded that the manner of Savio's death was a homicide.¹ It appears that this new opinion was based not on the findings made during the autopsy of the exhumed corpse, which were identical to those made in the first autopsy conducted in 2004, but by the shroud of circumstances associated with Stacey Peterson's disappearance.

Having a newly minted homicide, but not the having evidence to prosecute anyone for it, the Will County State's Attorney decided to draft a new law. Concurrently with his special grand jury investigation into the disappearance of Stacy Peterson, and the death of Kathleen Savio he drafted and shepherded a change in the Rules of Evidence through the Illinois Legislature that would allow him to introduce otherwise inadmissible hearsay against Drew Peterson. In an October 22, 2008 press release, the State's Attorney made a statement regarding this new law and its connection to the death of Kathleen Savio and the disappearance of Stacy Peterson. The press release stated in relevant part:

Furthermore, it must be noted that *these two investigations . . . prompted me to draft a new law* that will enable prosecutors across Illinois to use a murder victim's cries for help as evidence at trial to convict her brutal killer. This common-sense legislation, which will become law in November, will enable prosecutors to bring previously inadmissible evidence to trial to ensure abusive murderers cannot profit from their wrongdoing. The new law will apply to crimes committed before its enactment.

The progress of the bill being pushed by Will County State's Attorney James Glasgow through the legislature was followed closely by the media and public and the legislation was soon dubbed "Drew's law." And although having a law bear your name is often a sign of prestige and respect, in this case it was a law specifically designed to convict Drew.

¹ However, the State's Attorney failed to inform the public that the second autopsy did not find anything new or that was previously overlooked, and that the second pathologists opinion was based on his belief that it was unusual for people to accidentally drown in a bathtub.

In December of 2008, the Illinois Legislature, in an act that now some legislators have stated they regret passed 725 ILCS 5/115-10.6. Drew's Law, or 725 ILCS 5/115-10.6, provides:

(a) A statement is not rendered inadmissible by the hearsay rule if it is offered against a party that has killed the declarant in violation of clauses (a)(1) and (a)(2) of Section 9-1 of the Criminal Code of 1961 [720 ILCS 5/9-1] intending to procure the unavailability of the declarant as a witness in a criminal or civil proceeding.

(b) While *intent to procure the unavailability of the witness is a necessary element* for the introduction of the statements, it need not be the sole motivation behind the murder which procured the unavailability of the declarant as a witness.

(c) The murder of the declarant may, but need not, be the subject of the trial at which the statement is being offered. If the murder of the declarant is not the subject of the trial at which the statement is being offered, the murder need not have ever been prosecuted.

(d) The proponent of the statements shall give the adverse party reasonable written notice of its intention to offer the statements and the substance of the particulars of each statement of the declarant. For purposes of this Section, identifying the location of the statements in tendered discovery shall be sufficient to satisfy the substance of the particulars of the statement.

(e) The *admissibility of the statements shall be determined by the court* at a pretrial hearing. At the hearing, the proponent of the statement bears the burden of establishing 3 criteria by a preponderance of the evidence:

(1) first, that the adverse party murdered the declarant and that the murder was intended to cause the unavailability of the declarant as a witness;

(2) second, that the time, content, and circumstances of the statements provide *sufficient safeguards of reliability*;

(3) third, the interests of justice will best be served by admission of the statement into evidence.

(f) The court shall make specific findings as to each of these criteria on the record before ruling on the admissibility of said statements.

(g) This Section in no way precludes or changes the application of the existing common law doctrine of forfeiture by wrongdoing.²

² 725 ILCS 5/115-10.6 (emphasis added).

An elementary analysis of the new law shows that it admits traditional hearsay statements which were, previous to the law's passage, inadmissible. The law to convict Drew, 725 ILCS 5/115-10.6, went into effect on December 8, 2008. Not surprisingly, on May 7, 2009, only five (5) months after the passage of 725 ILCS 5/115-10.6, and because of its unprecedented change in the historic exclusion of hearsay evidence, the State's Attorney obtained an indictment of the Defendant for Kathleen Savio's death. He felt that the hearsay evidence would sway a jury, and make obtaining a conviction against the Defendant possible.

In the more than five years since Kathleen Savio's death, there was no direct evidence of Defendant's involvement in her death. However, in the face of public outcry, the State's Attorney wrote a new law, the legislature adopted the law, and as a result of the passage of the law the State believed it finally had enough hearsay gossip, now disguised as admissible evidence, to bring an indictment against the Defendant.

LAW & ARGUMENT

I.

THE NEW LAW VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST PASSING AN EX POST FACTO LAW.

Article I, Section 16 of the Illinois Constitution provides "No ex post facto law . . . shall be passed."³ In his October 22, 2008 press release, the State's Attorney described the new hearsay law, 725 ILCS 5/115-10.6, as

common-sense legislation, which will become law in November, will enable prosecutors to bring previously inadmissible evidence to trial to ensure abusive murderers cannot profit from their wrongdoing . . . [and] will apply to crimes committed before its enactment.

³ Article I, Section 16 of the Illinois Constitution

In other words, on October 22, 2008, the Will County State's Attorney, in his own public press release, states that Drew's Law, 725 ILCS 5/115-10.6, will:

- (1) change the rules of evidence by letting into trial previously inadmissible evidence;
- (2) which will be disadvantageous to defendants charged with murder; and
- (3) will apply retroactively to crimes committed prior to the laws enactment.

On May 21, 2009, *just five months after the enactment of 725 ILCS 5/115-10.6* (or Drew's Law), the **Supreme Court of Illinois** reiterated and reaffirmed the long standing definition of what constitutes an *ex post facto* law.⁴ In *People v. Konetski*, the Illinois Supreme Court articulated:

The *ex post facto* clauses of the United States Constitution prohibit retroactive application of a law inflicting greater punishment than the law in effect when a crime was committed. Those constitutional provisions, therefore, restrain legislative bodies from enacting arbitrary or vindictive legislation and assure that a statute gives fair warning of its effect. ***A law is ex post facto if it is retroactive and disadvantageous to a defendant.*** A law is disadvantageous to a defendant if it criminalizes an act innocent when performed, increases the punishment for an offense previously committed, ***or alters the rules of evidence making a conviction easier.***⁵

Therefore, an Illinois law is a prohibited *ex post facto* law when it changes the rules of evidence, is retroactive, and disadvantageous to a defendant.⁶ Given the timing of the *Konetski*, *id* Opinion by Illinois Supreme Court Justice Kilbride, (Chief Justice Fitzgerald, and Justices

⁴ *People v. Konetski*, 2009 Ill. LEXIS 389. The timing of this decision is extremely significant for the case at hand. Following the passage of Drew's Law which changed the rules of evidence, the Supreme Court of Illinois explicitly stated that laws which change the rules of evidence to make conviction easier are *ex post facto* laws.

⁵ *People v. Konetski*, 2009 Ill. LEXIS 389, 34-35 (internal citations omitted)(emphasis added).

⁶ *Fletcher v. Williams*, 179 Ill. 2d 225, 230; 688 N.E.2d 635 (1997).

Freeman, Thomas, Garman, Karmeier and Burke all concurring in a 7-0 opinion), in conjunction with the pervasive media play given to the passage of Drew's Law, the statement by our Supreme Court is impossible to ignore. The language the Court choose to use in *Konetski* to reaffirm the long standing definition of what constitutes an *ex post facto* law is more than likely aimed directly at the issue of the constitutionality of 725 ILCS 5/115-10.6, in the context of the instant case.

The United States Constitution also contains a prohibition of *ex post facto* laws. Article I, Section 10 of the United States Constitution prohibits states from passing *ex post facto* laws.⁷ A simple axiom; so simple that the leading decision dates back to 1798. In *Calder v. Bull*,⁸ Justice Chase recognized that without context, the term *ex post facto* is unintelligible and means nothing.⁹ Additionally, Justice Chase recognized the concerns that a legislature might wield too much power if it could pass laws with applicability to past conduct (*ex post facto*). And as such, the opinion in *Calder* provided the context in which almost every subsequent United States Supreme Court decision on the issue of *ex post facto* has been grounded. The *Calder* decision articulated the following standard for a law violating the *ex post facto* provision of the United State Constitution:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law

⁷ Article I, Section 10 of the United States Constitution. The Illinois Constitution contains a similar prohibition against the legislature from passing a law that has *ex post facto* applicability. Because the two clauses are similar, when interpreting the *ex post facto* clause of the Illinois Constitution, the Supreme Court of Illinois also looks to the Supreme Court of the United States' interpretation of the federal clause. *Fletcher v. Williams*, 179 Ill. 2d 225, 229; 688 N.E.2d 635 (1997).

⁸ 3 U.S. 386, 390-91 (1798).

⁹ *Id.* at 390.

annexed to the crime, when committed. 4th. *Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.* All these, and similar laws, are manifestly unjust and oppressive.¹⁰

For over 200 years, the Supreme Court of the United States has reaffirmed and followed the guided principles of Justice Chase’s definition as “providing an authoritative account of the scope of the *Ex Post Facto* Clause.”¹¹

Following the *Calder*, the Supreme Court of the United States has added additional policy concerns associated with laws that are ex post facto. For example in *Weaver v. Graham*,¹² the Court recognized that the prohibition protected individuals in two distinct ways. First, individuals should be able to rely on the plain meaning of legislation and have fair warning when the meaning is going to change.¹³ Second, the prohibition on ex post facto laws is meant to “restrict governmental power by restraining arbitrary and potentially vindictive legislation.”¹⁴ After announcing its holding that a Texas amendment violated the *Ex Post Facto* Clause, the Supreme Court of the United States repeated Joseph Story’s observation regarding the Clause:

If the laws in being do not punish an offender, let him go unpunished; let the legislature, admonished of the defect of the laws, provide against the commission of future crimes of the same sort. The escape of one delinquent can never produce so much harm to the community, as may arise from the infraction of a rule, upon which the purity of public justice, and the existence of civil liberty, essentially depend.¹⁵

Other Supreme Court decisions have offered additional analysis providing that a law is *ex*

¹⁰ *Id.* at 390.

¹¹ *Stogner v. California*, 539 U.S. 607, 611 (2003).

¹² 450 U.S. 24 (1981)

¹³ *Id.* at 28.

¹⁴ *Id.*

¹⁵ *Carmell v Texas*, 529 U.S. 513, 552-53 (2000).

post facto if it is “retrospective . . . and disadvantage[s] the offender affected by it.”¹⁶ A law is retrospective when it applies to events which occurred before its enactment.¹⁷ The Supreme Court of the United States recognizes that the constitutional ban of *ex post facto* laws was designed to protect an individual’s “substantial personal rights,” and that there is a point where even a change in procedure will be sufficient to transgress the constitutional prohibition of *ex post facto* laws.¹⁸ Therefore, even laws labeled “procedural” must be scrutinized.¹⁹ But without dispute, a law that removes substantial protections provided to the defendant by existing law disadvantages the defendant.²⁰ Therefore, No matter the label, any retrospective law which “alters a substantial right” of the defendant is a violation of the *ex post facto* prohibition.²¹

For example, in *Stogner v. California*,²² the Supreme Court of the United States found a new criminal statute of limitations to substantially disadvantage the defendant.²³ Claiming an *ex post facto* violation, the defendant moved to dismiss his indictment under the new statute, which allowed for the prosecution of certain crimes following the expiration of the statute of limitations if various factors had been met.²⁴ The Court held that the statute violated the *ex post facto* clause as applied to the defendant because the statute threatened to inflict the type of harm that the clause sought to avoid, namely “unjust and oppressive” legislation. And further, that the statute fell “literally within the categorical descriptions of *ex post facto* laws set forth by Justice

¹⁶ *Weaver*, 450 U.S. at 29.

¹⁷ *Miller v. Florida*, 482 U.S. 432, 430 (1987).

¹⁸ *Beazell v. Ohio*, 269 U.S. 167, 171 (1925).

¹⁹ *Id.* at 46.

²⁰ *Collins*, 497 U.S. at 45.

²¹ *Miller*, 482 U.S. at 432.

²² 539 U.S. 607 (2003).

²³ *Id.* at 632-33.

²⁴ *Id.* at 609-10.

Chase.”²⁵ Although the Court determined the new statute fit in Justice Chase’s second category and, therefore, further analysis was not required, the Court alluded to the fact that the new statute might also fit into Justice Chase’s fourth category because it altered “the *legal rules of evidence*, and receives *less, or different*, testimony than the law required at the time of commission of the offense, *in order to convict the offender*.”²⁶

Likewise, in *Carmell Texas*,²⁷ the Court held an amended statute fell within Justice Chase’s fourth category and was, therefore, unconstitutional as applied to the defendant.²⁸ In *Carmell*, the Texas legislature changed the legal rules of evidence in order to convict the defendant.²⁹ In describing the rationale behind the fourth category, the Court stated:

*A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof. In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption . . . or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end. All of these legislative changes, in a sense, are mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction. There is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.*³⁰

Therefore, because the new statute fell within Justice Chase’s fourth category, the Court

²⁵ *Id.* at 611.

²⁶ *Id.* at 615 (emphasis in original).

²⁷ 529 U.S. 513 (2000).

²⁸ 529 U.S. at 552.

²⁹ *Id.* at 519.

³⁰ *Id.* at 532-33 (emphasis added).

held the amended statute to be unconstitutional as applied to the defendant.³¹

Additionally, in *Carmell*, the Supreme Court of the United States expanded on the case of *Sir John Fenwick*, which Justice Chase referenced in *Calder*. In *Sir John Fenwick*, Parliament was unable to convict Fenwick based on the existing laws.³² Because Parliament wanted to convict Fenwick, it passed a bill which would allow for his conviction.³³ Fenwick was then beheaded.³⁴ Despite the fact that the Court thought that “Fenwick could not truly claim to be ‘innocent,’” the Court called it a “profound unfairness” that Parliament would change the law in order to obtain a conviction. With cases such as that of *Sir John Fenwick* in mind, the *Ex Post Facto* Clause was included in the Constitution to prevent “similar[] acts of violence and injustice.”³⁵

Further, not only is “the retroactive application of criminal statutes . . . specifically prohibited by the ex post facto provisions of the United States and the Illinois Constitution,” retroactive application of criminal statutes is prohibited by “the rules of statutory construction.”³⁶

The Illinois legislature has codified a prohibition on retroactive laws:

No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to . . . any right accrued, or claim arising under the former law, or in any way whatever to affect any . . . right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall

³¹ *Id.* at 552.

³² *Carmell*, 529 U.S. at 528.

³³ *Id.*

³⁴ *Id.*

³⁵ *Calder*, 3 U.S. at 389.

³⁶ *People v. Thiem*, 82 Ill. App. 3d 956, 959; 403 N.E.2d 647 (Ill. App. Ct. 1st Dist. 1980)

extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act.³⁷

A “statute is characterized as retroactive if it ‘takes away or impairs vested rights acquired under existing laws.’”³⁸ Furthermore, as previously mentioned, the Supreme Court of Illinois has held that “a law disadvantages the defendant if it . . . alters the legal rules of evidence by making conviction easier.”³⁹

For example, in *People v. Ramsey*,⁴⁰ the Supreme Court of Illinois found an amended statute that substantially disadvantaged a defendant and made a conviction easier to be a violation of the *ex post facto* clause.⁴¹ The defendant appealed his murder conviction because the amended statute “altered the definition of insanity” and “increased the defendant’s burden of proof for an insanity defense.”⁴² The Court held that the amended statute violated the *ex post facto* clause because it “deprived the defendant of an affirmative defense” and the amendment “makes it easier for the State to secure a conviction” by requiring a higher standard of proof from the defendant.⁴³

On the other hand, those changes which do not substantially affect a defendant’s rights are not held to be *ex post facto* laws. For example, in *People v. Konetski*,⁴⁴ the defendant, a convicted sex offender, challenged an amended statute that reclassified his criminal status and required him to register for life rather than ten years.⁴⁵ Because a long line of case law

³⁷ 5 ILCS 70/4

³⁸ *People v. Thiem*, 82 Ill. App. 3d 956 (1980) (quoting 34 Ill. L. & Prac. Statutes § 193, at 154 (1958)).

³⁹ *People v. Franklin*, 135 Ill. 2d 78, 107 (1990).

⁴⁰ 192 Ill. 2d 154,(2000)

⁴¹ *Id.* at 158.

⁴² *Id.* at 156.

⁴³ *Id.* at 158.

⁴⁴ 2009 Ill. LEXIS 389

⁴⁵ *Id.* at 34.

established that registration for sex offenders does not constitute a punishment, (i.e. fine or imprisonment), the Court held that the defendant failed to satisfy the requirement that the retrospective law was disadvantageous to the defendant.⁴⁶ Also, the *Konetski* Court noted that the amendment that the defendant complained of actually allowed the defendant to petition to be relieved from sex offender registration after only five (5) years, thereby actually making the amendment advantageous for the defendant, and not disadvantageous.⁴⁷

Also, in cases where an amended statute does not disadvantage a defendant or affect only the defendant's rights, the courts have refrained from holding them to violate the *ex post facto* prohibition. For example, in *Collins v. Youngblood*,⁴⁸ the Court addressed whether a new law which effectively reduced the defendant's conviction violated the *ex post facto* prohibition. A defendant was convicted of aggravated sexual abuse and sentenced to both imprisonment and a fine.⁴⁹ The current Texas law did not authorize imposition of a fine as well as imprisonment.⁵⁰ Before the defendant's appeal was heard, the Texas legislature adopted a new law allowing courts to "reform an improper verdict that assesses a punishment not authorized by law."⁵¹ The trial court quickly reduced the defendant's sentence by removing the fine.⁵² The Supreme Court of the United States held that the Texas statute as applied to the defendant was not a violation of the *ex post facto* clause because it did not disadvantage the defendant in any way.⁵³

Likewise, in *Thompson v. Missouri*,⁵⁴ the Missouri legislature enacted a law allowing

⁴⁶ *Id.* at 38.

⁴⁷ *Id.* at 38.

⁴⁸ 497 U.S. 37 (1990).

⁴⁹ 497 U.S. at 39.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 52.

⁵⁴ 171 U.S. 380 (1898).

formerly inadmissible evidence to be introduced at trial.⁵⁵ The law allowed letters written by the defendant to be introduced for “comparison [with] a disputed writing.”⁵⁶ The Court held that the change did not violate the *ex post facto* prohibition because, “Nor did it give the prosecution any right that was denied to the accused. It placed the State and the accused upon an equality; for the rule established by it gave to each side the right to have disputed writings compared with writings proved to the satisfaction of the judge to be genuine.”⁵⁷ In *Thompson*, it was not an *ex post facto* law as it applied to both sides, and gave the defendant the same right to bring handwriting samples into evidence as it gave the state. However, unlike the statute in *Thompson*, the new Illinois hearsay law, 725 ILCS 5/115-10.6, only gives the State the right to bring this previously inadmissible hearsay into the courtroom and parade it as evidence. The Defendant is not given the same right. Therefore Drew’s Law is disadvantageous to the Defendant and is an *ex post facto* law in violation of the Illinois and Federal Constitutions.

a. Drew’s Law is Clearly Retrospective and Disadvantages the Defendant.

In this case, 725 ILCS 5/115-10.6, the new hearsay law is clearly retrospective. In the State’s Attorney’s own words, the “new law will apply to crimes committed before its enactment.” The new law became effective December 8, 2008. The offense the Defendant is charged with is alleged to have occurred in 2004. The new law in question clearly applies to events which occurred before the law was enacted.

Furthermore, the new law substantially disadvantages the Defendant. As the court is well aware, the general rule regarding hearsay is that it is not admissible. In fact, the admission of

⁵⁵ *Id.* at 381.

⁵⁶ *Id.*

⁵⁷ *Id.*

inadmissible hearsay evidence at trial requires reversal of a conviction unless the court determines its admission was *harmless beyond a reasonable doubt*.⁵⁸ Although there are exceptions to the general rule regarding the inadmissibility of hearsay, those exceptions are grounded on long standing *objective* and historically established basis, and many also require the declarant to be available for cross-examination. For example, the medical treatment exception is grounded on the premise that people are usually truthful with their doctor when seeking treatment. The excited utterance exception is grounded on the premise that in the heat of the excitement, the declarant acts in the moment and not out of manipulation. The dying declaration is grounded on the fact that a person who knows death is imminent tells the truth.

Here, 725 ILCS 5/115-10.6, requires that the declarant be unavailable, and that the statement be *subjectively* reliable. This is the exact reason the United States Supreme Court overturned *Ohio v. Roberts*⁵⁹ and twenty five (25) years of precedents, in *Crawford v. Washington*.⁶⁰ The *Crawford* court stated that the “indicia or reliability” test of *Roberts* for the admission of hearsay was an unworkable failure. *Crawford* pointed out example after example of where courts would find statements reliable for contradictory reasons, or establish amorphous eight (8) or nine factor tests (9) for determining reliability.⁶¹ However, despite *Crawford*’s rejection of the “reliability” test for hearsay, the States Attorney Of Will County and the Illinois legislature have made it a key part of Drew’s Law. 725 ILCS 5/115-10.6(e)(2), specifically requires a court to find the proffered hearsay to be subjectively reliable, in direct contravention of the reasoning of *Crawford*. Therefore the Defendant is disadvantaged because the law allows

⁵⁸ *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁵⁹ 448 U.S. 56 (1980)

⁶⁰ 541 U.S. 36 (2004)

⁶¹ *Id.* at 63

previously inadmissible hearsay into evidence where the witness cannot be cross-examined and a court has, in contravention *Crawford*, determined the statement to be subjectively reliable by a mere preponderance of the evidence.

Moreover, the statute itself and the policy reasons behind its passage in the legislature are circular at best. Here, it should be clear that the government has significant problems with bringing an indictment against Drew Peterson. It is a case with no eyewitness, no confession, no DNA, no sign of struggle in the deceased's home, no location in the home where an expert could conclude there was an assault, no specific time of death, no instrumentality of death, no sign of forced entry into the home, an initial autopsy establishing an accidental drowning, a coroner's inquest and death certificate that are consistent with a conclusion of an accident, and a second and third autopsy with no additional findings conducted on a body that had suffered significant water damage and decomposition. In addition, the Defendant has an alibi. Based on these essential facts, the State's Attorney goes to the legislature and says, I can't prove this case beyond a reasonable doubt with the evidence I have, so lower my burden of proof, and if I can prove that the Defendant killed Kathleen Savio by this lower burden of proof, then I get to introduce hearsay evidence which is not subject to cross-examination at trial that would be otherwise inadmissible. And that is exactly what the legislature did with passing this law.

Specifically, the statute now provides for a trial before the trial. And the first trial (pre-trial hearing), the state no longer has the burden of proving that the Defendant "murdered" Kathleen Savio beyond a reasonable doubt; the burden is a preponderance of the evidence. And if the State can show that the Defendant kill Kathleen Savio by a preponderance of the evidence, then it gets to introduce potentially damaging evidence at the second trial that it could not otherwise have admitted. This changes the quantum of proof to the great disadvantage of the

Defendant.

Similar to the unconstitutional amended statute in *Ramsey*,⁶² which changed the rules of evidence to “make it easier for the state,” in this case, the new law was passed in order make it easier for the State. Again, in the State’s Attorney’s own words, “a new law that will enable prosecutors across Illinois to use a murder victim’s cries for help as evidence at trial to convict her brutal killer,” and the new law “will enable prosecutors to bring previously inadmissible evidence” to trial.

As distinguished from the amended statute in *Collins*,⁶³ which effectively reduced the defendant’s sentence, the new law in this case does not reduce anything except the Defendant’s constitutional right to confront and cross-examine witnesses against him, which this Court must construe as a substantial disadvantage. Furthermore, unlike in *Thompson v. Missouri*,⁶⁴ where a new law was enacted that allowed formerly inadmissible letters written by the defendant to be admitted solely for the purpose of comparison with an unknown letter, the law in question here attempts to allow unreliable and historically inadmissible evidence in at trial. Moreover, unlike in *Thompson*, where a new law gave both sides equal ability to introduce evidence of handwriting examples, *Drew’s Law* strips only the Defendant of his constitutional right to confront and cross-examine witnesses in order to guarantee the reliability of the testimony or evidence. *Drew’s Law*, 725 ILCS 5/115-10.6, only gives this new ability to introduce hearsay evidence to the State, and denies it to the Defendant.

The statute in this case, 725 ILCS 5/115-10.6, only gives this new ability to introduce

⁶² 192 Ill. 2d 154,(2000)

⁶³ 497 U.S. 37 (1990)

⁶⁴ 171 U.S. 380 (1898).

hearsay evidence to the State, and denies it to the Defendant.

Because Drew's Law is retrospective and substantially disadvantages the Defendant, it must be struck down as unconstitutional.

b. The New Law Fits Squarely into the 4th Category of Ex Post Facto Laws Described by Justice Chase

The new law clearly fits into Justice Chase's fourth category because it "alters the legal rules of evidence . . . and receives . . . different testimony . . . in order to convict the offender." As seen in both *Strogner* and *Carmell*, when the laws at issue fit squarely into one of the categories, they have been held to be unconstitutional *ex post facto* laws. In this case, the new law fits squarely into Justice Chase's fourth category by changing the rules of evidence to allow different testimony in at trial to enable the State to more easily obtain a conviction.

Drew's Law fits squarely into Justice Chase's fourth category and, therefore, is clearly an impermissible *ex post facto* law.

c. Drew's Law Clearly Arbitrary and Vindictive Legislation.

In this case, just like in the case of *Sir John Fenwick*, the legislature changed the law at the State's Attorney's insistence because the government could not convict the Defendant. When looking at the time line, it is clear that the new law was passed to be used against the Defendant. In fact, the State's Attorney's own words dispel any doubt that the new law was written and enacted with the Defendant in mind. The State's Attorney blatantly stated that he drafted the new law in response to the case at hand. This is not how the State is supposed to operate. Allowing the State to change the law in order to obtain a conviction will do irreparable harm to the "purity of public justice, and existence of civil liberty."

After relentlessly attempting to find any admissible evidence by which it could obtain a

conviction against the Defendant, the State finally felt comfortable enough to seek an indictment once the legislature passed the new hearsay law. This new law was written and backed by current Will County State's Attorney Glasgow, the prosecutor in this case. After trying without success to gather sufficient evidence to charge Defendant, the State's Attorney and the Illinois legislature changed the law. With enactment of the new law, suddenly there was enough evidence to support an indictment of the Defendant.

Like the Court's assessment of the facts of *Sir John Fenwick*, there is a profound unfairness in allowing the State's Attorney to draft, and the legislature to enact, a law aimed at obtaining a conviction of a single individual, the Defendant, more easily. The administration of our legal system requires the State to play by its own rules and preserve the integrity of the system of public justice.

Drew's Law, 725 ILCS 5/115-10.6, is the exact type of legislation the founding fathers wanted to prohibit. Allowing the legislature to pass laws as needed to aid in prosecution of those deemed guilty in the court of public opinion will reek havoc on the judicial system. *Ex post facto* laws, such as Drew's Law, are constitutionally prohibited.

d. The New Law Threatens the Exact Type of Harm the Ex Post Facto Prohibition Sought to Avoid – Unjust and Oppressive Legislation.

Similar to *Stronger*, where the Court held that the change which allowed the defendant to be convicted despite the running of the statute of limitations constituted the exact type of unjust and oppressive legislation the *ex post facto* prohibition sought to prevent, the new law in this case is unjust and oppressive. Even without the State's Attorney's own words, the timeline alone shows the new law to be unjust and oppressive. Prior to the enactment of the new law, alleged statements made by a deceased individual similar to those in this case would be deemed

inadmissible hearsay.

The timeline and State's Attorney's statement makes this case similar to that of *Sir John Fenwick*, where the legislature changed the law in order to convict the defendant. Here, the state recognized that it would be unable to prove the elements of the crime charged under the historical rules of evidence. After much public pressure, the legislature gave the State's Attorney what he wanted. What's more, the State's Attorney blatantly stated that he drafted the new law in response to the investigation of the case at hand.

This Court must not allow similar acts of injustice to continue. To change the rules of evidence after the fact to allow unfronted, hearsay evidence which has a long standing, 200 year history of exclusion, clearly goes against the fundamental notions of justice. This Court must not allow similar acts of injustice and oppression to continue by admitting unfronted, hearsay evidence that has a well founded, established history of unreliability, and thus, exclusion. No matter the political or public pressure, the Court must remain impartial and protect the purity of the justice system. The new law threatens the exact type of harm the *ex post facto* prohibition sought to avoid.

II.
THE ILLINOIS STATUTE VIOLATES THE DEFENDANT'S
U.S. AND ILLINOIS CONSTITUTIONAL RIGHT TO
CONFRONT WITNESSES AGAINST HIM.

The Sixth Amendment to the United States Constitution provides “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Similarly, Article I, Section 8 of the Illinois Constitution provides “[i]n criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses

against him or her.” In *Crawford v. Washington*,⁶⁵ the Supreme Court of the United States spent an exorbitant amount of time discussing the historical background of the Confrontation Clause, which was promulgated to embody the early common law rule that admitted testimony from individuals not present at trial *only* if the defendant previously had a chance to cross-examine the witness.⁶⁶ The right to confront witnesses is a constitutional guarantee to ensure the evidence or testimony is reliable.

In *Crawford*, the Court overruled *Ohio v. Roberts*,⁶⁷ which admitted statements made by a unavailable witness only if the statements bore “adequate indicia of reliability.”⁶⁸ However, in *Crawford*, the Court held that the *Roberts* test “fail[ed] to provide meaningful protection from even core confrontation violations.”⁶⁹ Because there are many factors used for a court to determine the amorphous concept of reliability, the courts have reached opposite conclusions from similar facts.⁷⁰ In fact, courts have often placed the “same significance to opposite facts” when determining the reliability of statements.⁷¹ The statute here requires the same type of analysis that was overruled by *Crawford*. Specifically, the statute requires the court to make a determination regarding the reliability of the proffered statement in the context of the time, content, and circumstances under which it was made. As the Court noted in *Crawford*, the only true safeguard for reliability is the tool of cross-examination, which can only occur when the declarant is confronted.

⁶⁵ 541 U.S. 36 (2000).

⁶⁶ *Id.* at 49.

⁶⁷ *Id.* at 67 (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980)).

⁶⁸ *Roberts*, 448 U.S. at 66.

⁶⁹ *Crawford*, 541 U.S. at 63.

⁷⁰ *Id.* at 63.

⁷¹ *Id.*

a. The New Law Allows Testimonial Hearsay In Violation of Crawford v. Washington.

In *Crawford v. Washington*,⁷² the Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁷³ Allowing the judge to determine what statements are credible is “fundamentally at odds with the right of confrontation.”⁷⁴ In fact, the Court went so far as to say that “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”⁷⁵

Clearly then, testimonial statements from an unavailable witness are only admissible if “the defendant had a prior opportunity for cross-examination.”⁷⁶ Testimonial statements are those which “are an obvious substitute for live testimony, because they do precisely what a witness does.”⁷⁷ On the other hand, admission of non testimonial statements, or those made during an ongoing emergency, may be admissible without violating the Confrontation Clause.⁷⁸

However, the new Illinois statute unconstitutionally requires the Court to determine whether the statements the State seeks to admit have “sufficient safeguards of reliability”, in violation of *Crawford*. As clearly seen in *Crawford*, the only way to determine reliability is by cross-examination of the witness. Additionally, there is no way to know what factors the court would use to determine whether the statements are reliable. As seen in *Crawford*, when the Supreme Court of the United States criticized the unpredictability of the courts in determining

⁷² *Id.*

⁷³ *Id.* at 69.

⁷⁴ *Id.* at 61.

⁷⁵ *Id.* at 62.

⁷⁶ *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford*, 541 U.S. at 53-54).

⁷⁷ *Davis*, 547 U.S. at 830.

⁷⁸ *Id.* at 821, 833.

reliability, what the court deems reliable in one case, another court could deem unreliable. Such an arbitrary and capricious standard clearly strips the Defendant of his constitutional right guaranteed by the Sixth Amendment.

Crawford does not give an exhaustive list of what is unconstitutional testimonial hearsay, but it does give some guidance. The *Crawford* Court states that “pre-trial statements that the declarants would reasonably expect to be used prosecutorially”, and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a latter trial”, qualify as unconstitutional hearsay in violation of the Confrontation Clause of the Sixth Amendment.⁷⁹

The statute at issue here, 725 ILCS 5/115-10.6, contains no prohibition in line with *Crawford*. It would allow both testimonial hearsay along with non-testimonial hearsay. The statute does not distinguish between the two. It also uses the reliability test that the *Crawford* has declared unconstitutional. There is no difference in the statute. Therefore, it is unconstitutional as written, as it does not comply with the requirements set forth by the United States Supreme Court in *Crawford*.

b. The New Law Is An Unconstitutional Attempt To Apply The Doctrine Of Forfeiture.

Because the Sixth Amendment was meant to embody the common law right of confrontation, the Court held that the Sixth Amendment was subject only to “those exceptions established at the time of the founding.”⁸⁰ The common law has long recognized two exceptions to the right confront witnesses – dying declarations⁸¹ and forfeiture by wrongdoing.⁸²

⁷⁹ *Crawford* at 51

⁸⁰ *Id.* at 54.

⁸¹ The statements in questions were not made by a speaker who “was both on the brink of death and aware

In describing the doctrine of forfeiture, the United States Supreme Court in *Giles v. California* references *Lord Morley's Case*, a 1666 decision, where the court concluded that a “witness’s having been ‘detained by the means or procurement of the prisoner,’ provided a basis to read testimony previously given.”⁸³ After reviewing the history of cases invoking doctrine of forfeiture, the *Giles* Court held that “unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.”⁸⁴ However, in cases where the defendant may have caused a witness to be absent at trial, but there was no *intent* to prevent the witness from testifying at trial, the courts still exclude the testimony.⁸⁵ In fact, the Court compared this fact pattern to “the typical murder case involving accusatorial statements by the victim” when describing circumstances when testimony should be excluded.⁸⁶ Therefore, in order for a court to allow prior unconfronted statements by a witness unavailable to testify at trial because of the defendant’s action, the defendant must have *intended* to prevent the witness from testifying at trial.⁸⁷

While assessing the *reliability* of evidence is goal of the confrontation clause,⁸⁸ the doctrine of forfeiture is not an alternate way of assessing reliability.⁸⁹ Instead, the forfeiture doctrine extinguishes confrontational clause guaranties on “essentially equitable grounds” and has no bearing on the reliability of statements.⁹⁰

In *Giles*, the Supreme Court of the United States held that the state court must determine

that [sh]e was dying.” Therefore, this historical exception requires no more analysis.

⁸² *Giles v. California*, 128 S. Ct. 2678, 2682-83; 171 L. Ed. 2d 488, 495 (2008).

⁸³ *Id.* at 2683.

⁸⁴ *Id.* at 2684.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2687.

⁸⁸ *Crawford*, 541 U.S. at 62.

⁸⁹ *Id.*

⁹⁰ *Id.*

the defendant's intent when seeking to apply the forfeiture doctrine.⁹¹ In the *Giles* murder case, the defendant objected to the introduction of statements made by the victim three weeks earlier to a police officer.⁹² The lower courts applied a broad doctrine of forfeiture and reasoned that the defendant had "forfeited his right to confront [the witness] because he had committed the murder for which he was on trial."⁹³ In interpreting the common law doctrine of forfeiture, a conclusive reason for the Court's decision was the

common law's uniform exclusion of unfronted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony.⁹⁴

In reversing and remanding, the Court held that "abridging the constitutional rights of criminal defendants is not in the State's arsenal."⁹⁵ If the state court wanted to apply the doctrine of forfeiture, it must determine the intent of the defendant.⁹⁶

In this case, the state, through the use of 725 ILCS 5/115-10.6, is clearly trying to strip the Defendant of his constitutional right to confront witnesses and broaden the intent requirement of the provision set forth in *Giles*. The Illinois statute is an attempt to codify the common law doctrine of forfeiture. However, applying the forfeiture doctrine as codified in 725 ILCS 5/115-10.6 would expand the common law doctrine far beyond the scope articulated by the Supreme Court of the United States in *Giles*. The *Giles* Court found it conclusive that the common law has consistently excluded statements made by murder victims. In a "typical murder case" such as

⁹¹ *Id.* at 2693.

⁹² *Id.* at 2681.

⁹³ *Id.* at 2682.

⁹⁴ *Id.* at 2688.

⁹⁵ *Id.* at 2693.

⁹⁶ *Id.*

this, there must be a showing that the murder was intended to prevent the victim from testifying against the Defendant in a criminal case in order to admit statements made by the victim. However, the new statute specifically provides that the intent to make the witness unavailable does not have to be the sole motivation of the Defendant to admit the testimony. This is an attempt to unconstitutionally broaden the intent requirement of *Giles*.

What's more, it defies logic to argue that a person murdered another person to prevent the person from testifying at the murder trial of that same person. If the person was never murdered, then there would be no murder trial. A person cannot intend to prevent a witness from testifying at a trial which would not accrue until the murder takes place. In this case, there is simply no evidence of that. There were no pending criminal cases in which the victim was going to testify at against the Defendant.

Next the State will argue that the victim in this case was murdered with to prevent her from testifying in the ongoing civil divorce case between her and the Defendant, and that this justifies the admission of the hearsay statements both under the new Illinois hearsay statute and the doctrine of forfeiture by wrongdoing. However, this is an incorrect reading of *Giles*, and an attempt at an unconstitutional expansion of the doctrine of forfeiture contrary to that expressed by the Supreme Court in *Giles*. And, if the hearsay law (725 ILCS 5/115-10.6), does not pass muster under *Giles*, then it is not constitutional and it must be ruled so.

Nowhere does the *Giles* Court refer to forfeiture by wrongdoing as a result of an action that prevents a person from testifying in a civil proceeding. The *Giles* Court limits its discussion to preventing the reporting of a crime, interfering with a criminal prosecution, or testimony in an ongoing criminal proceeding. Civil cases are not mentioned. The maxim is “*inclusio unius est*

exclusio alterius”, (the inclusion of one thing implies the exclusion of another)⁹⁷ However, the hearsay law at issue in this case does not contain any such limitation. It allows hearsay if a defendant murdered a victim to prevent her testimony at a “criminal or civil proceeding.”⁹⁸ This goes way beyond anything allowed by the U.S. Supreme Court in *Giles*, and therefore is an unconstitutional expansion of *Giles* in violation of the right to confrontation guaranteed by the Sixth Amendment to the Constitution of the United States.

The new hearsay law, Drew’s Law, 725 ILCS 5/115-10.6, as written would allow gossip, innuendo, rumor, and back fence scandal to come into a court of law and masquerade as evidence. As lawyers and judges, we know how people act, and the wild and hurtful things they say and do in divorce cases. Often after the case is over they regret what they say and are ashamed of their behavior. Just because someone dies during the divorce case does not make the things they say any more reliable. The statements are the product of the same emotions, and are just as tainted.

The *Giles* Court talks about domestic abuse and forfeiture by wrongdoing, and then specifically **omits** to mention statements made in divorce or civil order of protection cases. The *Giles* Court only refers to criminal cases in applying domestic abuse to a forfeiture by wrongdoing situation. The maxim is “inclusio unius est exclusio alterius”, (the inclusion of one thing implies the exclusion of another). The approach of *Giles* is correct, and hearsay derived from civil proceedings has no place in a criminal trial, and the doctrine of forfeiture by wrongdoing only applies to preventing testimony in criminal cases. The fact that 725 ILCS 5/115-10.6 would allow the doctrine of forfeiture to work for statements to be made in civil cases renders it

⁹⁷ This rule of construction was reaffirmed by the appellate court just last year in *McHenry County Defenders, Inc. v. City of Harvard*, 384 Ill. App. 3d 265, 282 (Ill. App. Ct. 2d Dist. 2008)

⁹⁸ 725 ILCS 5/115-10.6

unconstitutional as an attempt to expand the doctrine of forfeiture beyond the limits of *Giles*.

Finally, the new law erodes the presumption of innocence. The only way the courts could allow the statements based on the new law are if the court determines that the Defendant is the reason that the witness is unable to testify. This would be extremely prejudicial in a trial for the murder of that witness. In essence, the court would allow evidence in because it determined that the Defendant killed the witness and then ask the jury to listen to this evidence and decide whether the Defendant killed the witness. It seems highly unlikely that the jury would be able to start with the presumption that the Defendant is innocent.

CONCLUSION

The Constitution provides the right to be free from *ex post facto* laws and the right to confront witnesses. The Illinois statute in questions violates both of these constitutional rights. The statute changes the rules of evidence in hopes of being able to obtain a conviction of the Defendant. Additionally, the law strips the Defendant of his right to confront witnesses in order to show the reliability of the testimony. Therefore, 725 ILCS 5/115-10.6 must be overruled as unconstitutional.

Respectfully submitted,

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Dated: August ____, 2009

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