UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Johnson

JANE DOES #1 AND #2,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES' RESPONSE TO SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ [DE94]

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files this Response to the Supplemental Briefing of Attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz (DE94). The Court asked the United States to address the Intervenor Attorneys' argument that special concerns or rules should apply to the disclosure and use of documents prepared and exchanged during plea negotiations between the Intervenors (on behalf of Jeffrey Epstein) and the U.S. Attorney's Office. The Intervenor Attorneys seek to preclude the unsealing of certain documents already filed with the Court as well as the use of their contents, and the discovery and use of additional plea negotiation documents and information.

For the reasons set forth herein, the United States agrees that the Petitioners are attempting to use plea negotiations "against" Jeffrey Epstein, in violation of the Federal Rules of Evidence, and that the work product privilege is not automatically waived by disclosure in the context of confidential plea negotiations. Thus, the Court must determine, on a document-by-document basis, whether a document contains attorney work product and, if so, whether that work product privilege

has been waived. The United States further agrees that, in light of the Supreme Court's guidance on the Sixth Amendment Right to Counsel, the protections provided to civil mediation proceedings should extend to confidential plea negotiations where a non-party seeks to use statements made during those negotiations against either party.

BACKGROUND

The Court is very familiar with this matter, having handled the civil suits filed against Jeffrey Epstein pursuant to the Non-Prosecution Agreement and this actions filed by Jane Does #1 and #2 against the United States. For purposes of this Supplemental Briefing, the relevant facts are that, through the civil litigation between the Jane Does and Jeffrey Epstein, the Jane Does obtained portions of correspondence and draft agreements between counsel for Jeffrey Epstein and counsel for the United States that were exchanged during the course of confidential[1] plea negotiations. To the knowledge of the government, the Jane Does have only received the portions of the correspondence written by government attorneys – all of the writings of Mr. Epstein's attorneys, excepts for a few short portions by Jack Goldberger – have been redacted. The Intervenor Attorneys ask that the Court order that the Jane Does cannot use the unredacted portions and deny their motion to use those documents in support of their claims.[2] The Intervenor Attorneys further ask that the Jane Does be barred from delving further into the confidential plea negotiations.

At the hearing on August 12, 2011, the Court heard oral argument from Attorney Black, who

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[1]The United States uses the term "confidential" plea negotiations as a term of art. By definition, all plea negotiations are confidential and, pursuant to Rule 11, are not to be made part of the Court record until a final agreement is reached and a guilty plea is entered.

[2]Pursuant to S.D. Fla. Local Rule 5.4(c), this would require that DE52 be destroyed or returned to counsel for the Jane Does and that DE63 and DE64 be destroyed or returned to counsel for the United States and that DE48 remain in the Court file only in its redacted form.

suggested that the ban on discovering and using plea negotiations was broader than what is simply stated in Rule 410 of the Federal Rules of Evidence and Rule 11 of the Federal Rules of Criminal Procedure. The Court ordered supplemental briefing, and the Intervenor Attorneys have raised a number of arguments in their supplemental briefing: (1) that the plea negotiations may not be used against Mr. Epstein pursuant to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f); (2) that because the Jane Does are seeking inadmissible evidence, they bear a burden of showing a proper basis for discovery; (3) that the plea negotiations are irrelevant because the Jane Does are not entitled to invalidate the Non-Prosecution Agreement; and (4) that the documents and information should be privileged under a common law plea negotiations privilege. In addition, in their initial briefing and at oral argument, the Intervenors argued that the communications were governed by the attorney work-product privilege.

ARGUMENT

A. The Petitioners Appear to Be Seeking to Use the Plea Negotiation Documents Against Jeffrey Epstein; However, This Argument Is Premature.

With regard to the Intervenors' first argument, the United States agrees that the Jane Does have made clear that their ultimate goal is to have the Non-Prosecution Agreement set aside and to have Jeffrey Epstein prosecuted. Thus, although the United States is the named Respondent, the Petitioners have made clear that their true target is Jeffrey Epstein: "The victims very specifically advised Epstein more than one year ago that they would be filing U.S. Attorney correspondence in this case in an effort to invalidate his non-prosecution-agreement." (Pets.' Resp. to Epstein Mot'n for Limited Intervention, DE96 at 1.) As such, the Intervenors correctly note that "any statement made in the course of plea discussions with an attorney for the prosecuting authority [the U.S. Attorney's Office] which do not result in a plea of guilty" cannot be used against Jeffrey Epstein.

Fed. R. Evid. 410(4).

On today's date, September 26, 2011, the Court granted in part the Petitioners' Motion seeking a finding of violations of the Crime Victims' Rights Act ("CVRA"), but deferred ruling on the merits pending completion of discovery and denied the Petitioners' Motion to Have Their Facts Accepted as True. (*See* DE99 at 13-14.) Accordingly, it is premature to speculate as to how the Petitioners will try to "use" the information currently within their possession. The United States suggests, for the reasons set forth below, that the parties enter into a Protective Order governing the use and filing of such material until such time as the matter is ripe.

B. The Intervenors' Objection to Discovery Before Any Has Been Served Is Premature.

The Intervenors' second argument also is premature. In it, they argue that because they *anticipate* that the Jane Does will seek the discovery of inadmissible plea negotiations, the Court should made some sort of ruling requiring the Jane Does to make a showing of a proper basis for the discovery. As noted above, today the Court issued an Order wherein it allowed the Petitioners limited discovery via document requests and requests for admissions from the U.S. Attorney's Office. (DE99 at 11.) Rather than impose a preliminary restriction, the United States recommends that the Court require Petitioners to serve a copy of all discovery requests on the Intervenors so that they may interpose any objections and have those objections ruled upon prior to the United States serving any of its responses.

C. The Attorney Work-Product Privilege Applies to These Communications.[3]

In a federal criminal case, the parties are prohibited from obtaining via discovery "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigation or prosecuting the case," and "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense[.]" Fed. R. Crim. P. 16(a)(2), (b)(2)(A). In a federal civil case, the parties are prohibited from obtaining via discovery documents and tangible things that were prepared in preparation for litigation (including previous litigation), especially "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). Thus, the Federal Rules have codified the common law protections for attorney work product.

Here, the Jane Does are seeking to use and to gain additional access to: (1) correspondence between counsel for Jeffrey Epstein and the U.S. Attorney's Office regarding plea negotiations; (2) internal communications between attorneys at the U.S. Attorney's Office and the Justice Department and among the prosecution team; and (3) internal communications among attorneys for Jeffrey Epstein and among the defense team. Internal communications have unquestionably retained their attorney-client and work-product privileges, which will be asserted in response to document

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[3]The Intervenors also argue that the Court should find that the documents and information are irrelevant because the Petitioners are not entitled to invalidate the Non-Prosecution Agreement. In the Court's Order of September 26, 2011, granting in part the Petitioners' Motion for finding violations of the CVRA, the Court did not address the United States' argument that there is no remedy available for the Petitioners due in part to their failure to seek a prompt resolution of the case. However, in light of the Court's Order, it would seem that this issue is better resolved in a Motion for Reconsideration or on appeal of that ruling rather than in this Supplemental Briefing. Accordingly, the Intervenors' third argument is not addressed herein.

requests.

The issue here relates to communications between a criminal defendant and a prosecuting authority in the context of plea negotiations.[4] In such a context, obviously there is no attorney-client relationship and, thus, no attorney-client privilege. But, in the context of a defendant's attempts to persuade a prosecutor that he did not commit a federal offense or that a prosecutor should exercise prosecutorial discretion in a particular way, *both* parties will engage in a free and frank discussion that necessarily requires, in order to be fruitful, a disclosure of mental impressions, charging strategy, and documents and things prepared in anticipation of litigation – in other words, documents and information covered by the attorney work product privilege. Obviously the disclosure of those documents and information will waive that privilege as to those documents and information *for the purposes of the plea discussions* and as to the two parties to the plea discussions – the question presented here is whether the disclosure waives the privilege as to the rest of the world.[5] A variety of constitutional provisions, Rules, and cases suggest that the disclosure does not.

First and foremost, as reiterated by the Supreme Court last term, the Supreme Court has

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[4]The documents that have been lodged with the Court and that are cited in the Petitioners' redacted pleading consist primarily of drafts of plea agreements and criminal Informations corresponding to the draft plea agreements and non-prosecution agreements, along with correspondence related to those drafts as well as the performance of the final agreement. The documents contain only the text of communications by government attorneys, but they were *not* obtained from the U.S. Attorney's Office or the U.S. Department of Justice. Rather, they were obtained from counsel for Jeffrey Epstein pursuant to Jane Doe #1's civil suit against Mr. Epstein, to which the United States was not a party. Thus, the United States has never had the opportunity to litigate this particular issue.

[5]Unlike with the attorney-client privilege, a disclosure of a document covered by the attorney work-product doctrine only waives the work-product privilege as to the item actually disclosed, not all other documents of the same character or discussing the same topic. *See, e.g., Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997); *Duplan v. Deering Milliken, Inc.*, 540 F.2d 1215, 1223 (4th Cir. 1976); *In re United Mine Workers of America Employee Benefit Plans Litig.*, 159 F.R.D. 307, 310-12 (D.D.C. 1994).

"long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, ___ U.S. __, 130 S. Ct. 1473, 1485 (2010) (citation omitted). This includes the "critical obligation of counsel to advise the client of 'the advantages and disadvantages of a plea agreement.'" *Id.* at 1484 (citation omitted). In *United States v. Nobles*, 422 U.S. 225 (1975), the Supreme Court first expressed how the work product privilege coincided with the Sixth Amendment:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

Id. at 238. The Court also noted that the work-product doctrine applied both to the files of the defense counsel *and* to the prosecution. *Id.* fn. 12.

In *Nobles*, the Court noted that, even in criminal cases, the work-product privilege was not absolute, but, when it is deemed waived, especially when the waiver impinges upon a defendant's Sixth Amendment right to counsel, it should be "quite limited in scope" to minimize the effect upon that constitutional right.[6] *See id.* at 240-41.

> The central concern in determining whether disclosure to a nonparty (governmental or otherwise) waiver work product protection was summed up concisely by *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981): "to effect a forfeiture of work product protection by waiver, disclosure must occur in circumstances in which the attorney cannot reasonably expect to limit the future use of the otherwise protected material." *Doe* thus established reasonableness of the disclosing party's expectation of confidentiality as the touchstone for determining whether work product privilege was waived.

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[6]In *Nobles*, the Court determined that, when defense counsel elected to put his investigator on the witness stand at trial, he must turn over the investigator's report pursuant to *Jencks*, but defense counsel can redact the report to only disclose that portion of the report that relates to the investigator's testimony.

E.I. Du Pont De Nemours and Co. v. Kolon Indus., Inc., 2010 WL 1489966, *5 (E.D. Va. Apr. 13, 2010); *see also Nutramax Labs., Inc. v. Twin Labs. Inc.*, 183 F.R.D. 458, 464 (D. Md. 1998) (same). Obviously by disclosing the information to the U.S. Attorney's Office, the Intervenor Attorneys intended that they use the information in considering whether or not to resolve the matter by a pre-indictment plea, and vice-versa. The issue here, though, is whether it was reasonable for the Intervenor-Attorneys, and the U.S. Attorney's Office, to assume that their communications would remain confidential as between themselves. In light of Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410 as well as the general confidentiality surrounding plea negotiations and grand jury proceedings, it was reasonable for both parties to assume that their communications would remain confidential.

Although the undersigned has not found any Eleventh Circuit cases that address this issue, the other Circuits that have addressed the issue have done so inconsistently. The First Circuit has held that a company may maintain even its attorney-client privilege and work-product privilege in materials that it discloses to the U.S. Attorney's Office during pre-indictment presentations and ongoing plea negotiations. *See In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.)*, 348 F.3d 16, 27-28 (1st Cir. 2003). In *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), the Third Circuit decided that Westinghouse's disclosure of work product materials to the Securities and Exchange Commission and the Justice Department during their investigations of Westinghouse "waived the work-product doctrine as against all other adversaries." *Id.* at 1429.

In the *Westinghouse* decision, there was no discussion of the Sixth Amendment. Nor was there any discussion of the policy reasons why plea discussions are treated as confidential and are not admissible at trial. In *United States v. Fell*, 372 F. Supp. 2d 773, the district court ruled that a

proposed plea agreement to mandatory life imprisonment was not admissible by the defense during the penalty phase of a death penalty case:

> The Court's decision to exclude evidence concerning the plea negotiations also finds strong support on policy grounds. The Court is mindful of the danger that the admission of plea negotiations can discourage settlement efforts. "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L.Ed. 2d 427 (1971). The Supreme Court has declared that plea bargaining "is to be encouraged." *Id.* This means that the Court should take care to avoid admitting evidence that would deter plea bargaining. Admitting the proposed plea agreement in this case would clearly discourage plea bargaining. DOJ policy requires local prosecutors to forward any proposed plea agreement to the Attorney General for approval. Thus, whenever a United States Attorney recommends leniency in a capital case there is the possibility that his or her recommendation will be overruled by the Attorney General. United States Attorneys would be discouraged from proposed plea deals if the defense could show any rejected plea agreements to the jury. "[J]ust as the accused may be dissuaded from trying to make a deal by the prospect that failure will be costly, so might the prosecutor be less willing to bargain for the same reason." Christopher B. Mueller and Laird C. Kirkpatrick, 2 Federal Evidence 149 (2d ed. 2004).

United States v. Fell, 372 F. Supp. 2d 773, 784 (D. Vt. 2005), *aff'd* 531 F.3d 197, 219-220 (2d Cir. 2008) ("the draft agreement's inclusion of the unadopted statements of the prosecutors lacked evidentiary value and . . . it would distract the jury from an independent assessment of the mitigating factors[;] in addition, admission of the draft would authorize a confusing and unproductive inquiry into incomplete plea negotiations.").

"[A] concern inherent in the work product rule [is] that since an attorney's work is for his client's advantage, opposing counsel or adverse parties should not gain the use of that work through discovery." *In re John Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981). As is required by the Sixth Amendment, a criminal defense attorney must exert his best efforts to convince the prosecuting authority to dismiss charges and/or to exercise leniency. In doing so, the attorney must be allowed to disclose legal analysis or assessment of the credibility of witnesses or other evidence without fear

that such work product will be used against his client in the future by another adversary. The attorney knows that his disclosure to the prosecutor will not be used directly against his client during the prosecution. Likewise, the prosecutor, in his or her efforts to convince the target to enter a guilty plea, should be entitled to make disclosures to the target that will not be forever after considered part of the public realm. A ruling to the contrary would chill plea negotiations.

D. The Reasoning Underlying the Common Law Mediation Privilege Applies With Greater Force to Plea Negotiations

In their Supplemental Briefing, the Attorney Intervenors discuss a series of common law privileges, including a "mediation privilege" that has been recognized by the Second Circuit, the Central District of California, and the Western District of Pennsylvania, relying on a decision of Judge Marcus. As quoted by the Intervenors, mediation "afford[s] to litigants an opportunity to articulate their position[s] and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the opposing positions." *Sheldon v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000). In other words, the parties are allowed to disclose documents and information normally covered by the attorney work product privilege without fear of waiver.

The reasons set forth in the cases for a "mediation privilege" apply with even more force to plea negotiations, which have constitutional ramifications that do not appear in civil suits. Unlike disputes that are subject to civil mediation, criminal cases involve decisions regarding a defendant's life and liberty. In plea negotiations, the need for "counsel to discuss matters in an uninhibited fashion" is even more important. *See Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979). Likewise, where a defendant is facing the loss of liberty, he has an even

greater "need for confidentiality and trust between participants in a [plea negotiation] proceeding."

Folb v. Motion Picture Inc. Pension & Health Plans, 16 F. Supp. 2d 1164, 1175 (C.D. Cal. 1998).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 27, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. According to the Court's website, counsel for all parties are able to receive notice via the CM/ECF system.

s/A. Marie Villafaña

A. MARIE VILLAFAÑA
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SERVICE LIST

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United States District Court, Southern District of Florida

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