UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

GOVERNMENT'S RESPONSE AND OPPOSITION TO PETITIONERS' MOTION FOR FINDING OF WAIVER OF WORK PRODUCT AND SIMILAR PROTECTIONS BY GOVERNMENT AND FOR PRODUCTION OF DOCUMENTS

Respondent United States of America, by and through its undersigned counsel, files its Response and Opposition to Petitioners' Motion for Finding of Waiver of Work Product and Similar Protections by Government and for Production of Documents, and state:

I. THE GOVERNMENT DID NOT WAIVE ITS CLAIM OF PROTECTION UNDER THE ATTORNEY WORK PRODUCT DOCTRINE

Petitioners maintain the Government waived its claim of attorney-client privilege, attorney work product, and other privileges, when it filed its opposition to petitioners' motion for partial summary judgment, and its cross-motion for summary judgment. Specifically, petitioners claim the Declaration of AUSA Marie Villafaña, submitted in support of the government's motion, referred to internal deliberations, thereby effecting a waiver of attorney work product protection. D.E. 414 at 4-9. Petitioners' motion should be denied because they misapprehend the government's argument, supported by AUSA Villafaña's declaration, that the decision not to notify additional victims of the non-prosecution agreement, after three victims were advised of the NPA and its terms, was an exercise of prosecutorial discretion. In 18 U.S.C.

§ 3771(d)(6), Congress commanded that, "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General of any officer under his direction." Consequently, the discretionary decision not to notify additional victims of the NPA, and risk likely impeachment by Epstein's attorneys if a criminal prosecution ensued, cannot be the basis of a finding that the government violated the CVRA.

The main thrust of petitioners' waiver argument is that, "[t]he Government cannot simultaneously assert work product protection over relevant documents concerning its internal deliberations while making representations regarding those deliberations to obtain summary judgment." D.E. 414 at 1. In Stern v. O'Quinn, 253 F.R.D. 663 (S.D.Fla. 2008), the district court identified two ways in which the attorney work-product doctrine could be waived. An "implied waiver" occurs when (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense. Id. at 676(citations omitted). A "disclosure waiver" occurs when a party discloses to third parties information otherwise protected in a way that "substantially increases the opportunity for potential adversaries to obtain the information." Id. at 681.

AUSA Villafaña explained her rationale for not sharing with the victims the U.S. Attorney's Office's efforts to obtain monetary compensation for the harm they had suffered. D.E. 403-10, ¶ 21. Had she done that, and the negotiations with Epstein were unsuccessful, "Epstein's counsel would impeach the victims and my credibility by asserting that I told victims they could receive money for implicating Epstein." Id.

The basis for AUSA Villafaña's decision was offered to demonstrate that it was the

product of an exercise of prosecutorial discretion, which should not be impaired under 18 U.S.C. § 3771(d)(6). The explanation did not "make the issue relevant to the case" since the CVRA does not provide a victim with the opportunity to obtain judicial review of the manner in which the Executive Branch exercises its prosecutorial discretion.[1] In United States v. Rubin, 558 F.Supp.2d 411 (E.D.N.Y. 2008), the district court addressed the limits of a victim's right to be heard under § 3771(a)(4), and stated, "[t]he right to be heard does not give the victims of crime veto power over any prosecutorial decision, strategy or tactic regarding bail, release, plea, sentencing, or parole." Id. at 424(citation omitted).

Similarly, in United States v. Thetford, 935 F.Supp.2d 1289 (N.D.Ala. 2013), Jack and Shirley Winslett had their boat stolen by Michael Thetford. A third party subsequently purchased the Winslett's boat. Thetford was criminally charged and entered into a plea agreement with the Government. The Winsletts sought to reopen the plea under § 3771(d), complaining that the Government had not seized the boat, or criminally charged the person who purchased it. Id. at 1285. In response, the district court observed, "the United States Attorneys, as officers under the direction of the Attorney General, retain broad prosecutorial discretion, and the CVRA does not transfer any of that discretion to victims." Citing to § 3771(d)(6), the court stated:

> In other words, the Government Attorneys – not the Winsletts – get to make the decision about whether the evidence is strong enough to establish a case beyond a reasonable doubt that the purchaser of the boat knowingly and intentionally received stolen property, as Federal law defines those terms, and whether to bring charges again him. Id.

[1] A prosecutor's decision to limit a witness' exposure to impeachment at trial comes well within the prosecutor's discretionary authority. In defining the contours of a prosecutor's absolute immunity, the Eleventh Circuit observed that, "[i]mmunity extends to a prosecutor's 'out-of-court effort to control the presentation of a witness' testimony' because that act is 'fairly within the prosecutor's function as an advocate.'" Mikko v. City of Atlanta, GA, 857 F.3d 1136, 1142 (11th Cir. 2017), citing Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993).

Referring to Rubin, the district court added that, "[n]ot only do victims not have a veto, they do not have the right to dictate government strategy or demand who to prosecute. Instead, the Government has the right, in exercising prosecutorial discretion, to recognize 'difficulties in proof of culpability.'" Id., citing In re W.R. Huff Asset Mgt. Co., 409 F.3d. 555, 564 (2nd Cir. 2005).

So too, does the Government have the right to decide that telling a victim that the Government is attempting to negotiate an agreement, which includes financial compensation for sexual abuse, is ill-advised because it would subject the victim and prosecutor to impeachment at any trial. In demonstrating that such a decision is an exercise of prosecutorial discretion, the Government does not open the door to an attack on the decision by petitioners, nor does it allow the Court to judicially review the merits of the decision.

The application of attorney work product doctrine in this case does not "deny the opposing party access to information vital to its defense." Stern, 253 F.R.D. at 676. In that case, plaintiff Stern was suing defendant O'Quinn, and O'Quinn's law firm, for defamation. O'Quinn had instituted an investigation of plaintiff Stern, which was conducted by Wilma Vicedomine and Don Clark. One of O'Quinn's defenses to the defamation claim was that he reasonably relied upon the investigations conducted by Vicedomine and Clark. Id. at 677-78. Because of this reliance, the court found that an implied waiver of work product protection occurred as to the investigation materials, as plaintiff had the right to examine the investigation materials to determine if O'Quinn's reliance upon them was reasonable.

Stern also relied upon Volpe v. U.S. Airways, Inc., 184 F.R.D. 672 (M.D. Fla. 1998), where the plaintiff sued defendant U.S. Airways for sexual harassment. U.S. Airways asserted as an affirmative defense that it intended to rely upon an internal investigation it had conducted

into plaintiff's complaints, as well as subsequent remedial action, to avoid liability.[2] 184 F.R.D. at 673. U.S. Airways produced to plaintiff the final report, but withheld the investigator's notes and other materials. The district court ordered production, noting that, "if defendant intends to rely on the investigation as a defense, plaintiff is entitled to test the *bona fides* of the investigation." Id.

The government's assertion that the decision not to tell more victims of the non-prosecution agreement was the product of an exercise of prosecutorial discretion, does not subject the discretionary decision to judicial scrutiny, when it otherwise would not be. In petitioners' opposition to the government's motion for summary judgment, they contend they are entitled to review documents for which attorney work product, attorney client, and other protections were invoked, "because the Government has placed its internal motivations in issue," (D.E. 416 at 30 n.5); the Government is relying upon its "internal deliberations" to obtain summary judgment (D.E. 416 at 34-35 n.6); and the Government "has also now placed its motivations in issue," (D.E. 416 at 47 n.9).

The doctrine of separation of powers severely limits the judiciary's ability to oversee the Executive Branch's exercise of prosecutorial discretion. "[J]udicial authority is … at its most limited when reviewing the Executive's exercise of discretion over charging determinations." U.S. v. Fokker Services, BV, 818 F.3d 733, 741 (D.C.Cir. 2016), citing Cmty. for Creative Non-Violence v. Pierce, 786 F.2d 1199, 1201 (D.C.Cir. 1986). Further, "decisions to dismiss pending criminal charges – no less than decisions to initiate charges and to identify which charges to bring – lie squarely within the ken of prosecutorial discretion." 818 F.3d at 742. The

[2] Presumably, U.S. Airways was relying upon the affirmative defense identified in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), where an employer avoids liability under Title VII if: (1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities if provided.

Seventh Circuit observed, "[h]ow the United States reaches its litigating positions, who said what to whom within the prosecutor's office, and so on, are for the Attorney General and the President to evaluate. The Judicial Branch is limited to assessing counsel's public deeds." In re United States, 298 F.3d 615, 618 (7th Cir. 2005).

In short, petitioners are not entitled to "test the bona fides" of the discretionary decision made by prosecutors, to refrain from telling additional victims of the terms of the NPA which provided for financial compensation for their sexual abuse by Epstein. Nothing in the CVRA provides for petitioners to challenge or attack the government's decision not to tell more victims about the NPA. Thus, petitioners cannot explore the government's "internal deliberations," or dissect its subjective motivations in reaching its decision, since the decision was the product of an exercise of protected prosecutorial discretion. Therefore, no implied waiver of attorney work product protection occurred.

There has also been no disclosure of documents for which the government has claimed protection under the attorney work product doctrine, attorney-client privilege, or any other privilege. The government's cross-motion for summary judgment was supported by twenty exhibits, A through T, none of which it had previously claimed was covered by a privilege. AUSA Villafaña's declaration refers to ten exhibits. D.E. 403-19 at 24. Petitioners' motion does not contain any specific reference to particular documents, for which a privilege was claimed, that was either disclosed or relied upon in either the government's motion, or AUSA Villafaña's declaration. Therefore, no waiver of any privilege by disclosure has occurred.

II. THE GOVERNMENT DID NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE

A party that voluntarily discloses part of a conversation covered by the attorney-client privilege waives the privilege as to the portion disclosed and to all other communications relating

to the same subject matter. Appleton Papers, Inc. v. EPA, 702 F.3d 1018, 1024 (7th Cir. 2012)(citation omitted). Petitioners' motion does not identify any particular document or attorney-client communication that the government relied upon in its summary judgment motion, for which it previously invoked the attorney-client privilege, which was disclosed in the government's motion.

Petitioners argue that the subject matter waiver doctrine applies. D.E. 414 at 3-4. This doctrine "provides that a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege." Cox v. Administrator, U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. 1994. The subject matter waiver doctrine does not apply since the government's assertion that the decision not to tell additional victims of the terms of the non-prosecution agreement was an exercise of prosecutorial discretion does not subject that decision to judicial scrutiny to determine if the decision was reasonable, or adequately supported by facts. The separation of powers doctrine and 18 U.S.C. § 3771(d)(6) precludes such review. There is no unfair prejudice to petitioners because the judicial review of exercises of prosecutorial discretion, through a CVRA action or otherwise, is not relief to which petitioners are entitled.

III. PETITIONERS' MOTION FOR AN ORDER DIRECTING RELEASE OF PRIVILEGED MATERIALS SHOULD BE DENIED

Petitioners ask this court to "direct the production to the victims of all documents that the Government has previously withheld based on work-product and similar protections." D.E. 414 at 9. This request should be denied because the protections afforded by the attorney work-product doctrine are broader than those provided by the attorney-client privilege. "Due to the sensitive nature of work-product materials and the policy behind maintaining their secrecy, generally speaking, when work-product protection has been waived, it is 'limited to the

information actually disclosed, not subject matter waiver.'" Stern v. O'Quinn, 253 F.R.D. at 683. The district court in Stern applied that principle and found that, "although several disclosures have occurred, any waiver of the work-product protection does not extend beyond those discrete documents." Id. at 684. In doing so, the court rejected Stern's argument that the waiver applied to the entire subject matter of O'Quinn's investigation of him. Simply stated, "the subject matter waiver doctrine does not extend to materials protected by the opinion work product privilege." Cox, 17 F.3d at 1422, citing In re Martin Marietta Corp., 856 F.2d 619, 625-26 (4th Cir. 1988).

Petitioners have not identified any documents, for which the government invoked privileges, and for which those privileges have been waived by the arguments raised in the government's cross-motion for summary judgment. Consequently, their motion should be denied.

DATED: August 25, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 25, 2017, the foregoing Response and Opposition to Petitioners' Motion for Finding of Waiver of Work Product and Similar Protections by Government and for Production of Documents, was filed with the Clerk of the Court and served on counsel on the attached service list using CM/ECF.

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