

**UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND**

DAVID STAVELEY,	)	
	)	Criminal No. 20-cr-00074-MSM-LDA
	)	
v.	)	[Civil Action No. 22-cv-00315-MSM]
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

**UNITED STATES' MOTION REQUESTING AN ORDER
(1) FINDING A WAIVER OF ATTORNEY-CLIENT PRIVILEGE IN §2255
PROCEEDING AND PERMITTING PRIOR COUNSEL TO DISCUSS ISSUES
RAISED BY § 2255 PETITION AND
(2) CONTINUING THE RESPONSE DATE FOR THE GOVERNMENT'S
MEMORANDUM**

The Government now moves for an Order waiving the attorney-client privilege between Defendant/Petitioner, David Staveley (hereinafter “defendant” or “Staveley”), and his trial counsel, to permit the Government to respond to the allegations in his Motion filed pursuant to 28 U.S.C. § 2255 [ECF No. 79] as well as defendant’s related Motion to Strike Malicious Prosecution [ECF No. 81] and Motion Identifying Prejudice Egregious Performance - Ineffective Council [ECF No. 83], and continuing the response date for the Government’s Memorandum in Opposition.

PROCEDURAL BACKGROUND

On August 29, 2022, the defendant filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 (hereinafter “Def. Motion”). (Doc. No. 79, 20-cr-00074-MSM-LDA). Prior to that, on September 2, 2020, the defendant was indicted in a 7-count indictment for various crimes related to a bank fraud scheme that he had carried out with another person. Eventually, on May 17, 2021, the defendant pled guilty to counts 1 and 7 of the Indictment which charged him with bank fraud conspiracy and failing to appear in court as

required. On October 7, 2021, the Court sentenced the defendant to a total of 56 months of prison.

The defendant filed a timely appeal, but that appeal was dismissed by the First Circuit Court of Appeals without prejudice, however, to the “right of the defendant, should he so elect, to prosecute his ineffective assistance of counsel claims in a collateral proceeding under 28 U.S.C. § 2255.” Thus, the defendant filed the present §2255 motion, which raises a potpourri of issues including ineffective assistance of counsel, withholding evidence from the defendant, and false statements made to the defendant by the defendant’s then lawyer.

Defendant recounts various alleged errors by his attorneys in their representation of him, including allegations made by the defendant are (1) that one of his attorneys was “suffering from mental distress” and thus was unable to effectively represent him; and (2) that his attorneys did not review discovery with him prior to his plea of guilty.

Specifically, the defendant raises four grounds in his motion: (1) the failure of his attorneys to review discovery materials prior to him changing his plea; (2) the failure of counsel to see a continuance of his sentencing hearing and/or to vigorously contest allegations made at sentencing; (3) ineffective assistance in the preparation of his appeal documents; and (4) “counsel falsified documents/wire fraud.” Most of these allegations were directed primarily at attorney Jason Knight.

To respond to these allegations in the Motion, the Government needs to speak with the attorneys – and particularly Mr. Knight - that have represented the defendant, to discuss and review any communications and documentation regarding these allegations. Therefore, the Government first seeks an Order waiving the attorney-client privilege as to all communications and circumstances pertaining to the four Grounds raised in the Motion and second, an additional 60-day continuance from September 12, 2022 to November 12, 2022 to file its

Response to the Petition and the two related motions filed by the defendant.

ARGUMENT

A. Defendant/Petitioner Has Waived His Attorney-Client Privilege as to Claims Involving Communications with Prior Counsel

The defendant raises four grounds in his 2255 motion. In essence, however, he is primarily raising the issue of ineffective assistance of counsel, arguing his position from various factual bases (see, e.g., Ground 1, which alleges that defendant's counsel failed to review discovery materials prior to his plea of guilty). At present the defendant is proceeding *pro se*, as his Motion to Appoint Counsel (ECF No. 76) was denied on August 17, 2022. The various alleged bases for ineffective assistance of counsel are described in the 2255 Motion as Grounds One through Four, each identified and further described in subsections titled "Supporting Facts" or "Factual Support." All of these claims involve allegations that his attorneys – particularly attorney Knight – failed to provide effective assistance. Therefore, in order to properly respond to the defendant's claims, the government must speak with prior counsel about each of the alleged Grounds and the facts that supposedly support those grounds.

By alleging the ineffective assistance of counsel, Defendant/Petitioner has waived his attorney-client privilege with respect to communications, oral and written, with his attorney necessary to prove or disprove those claims. United States v. Scott, 450 F. Supp.3d 82, 83-85 (D. Mass. 2020); United States v. Goodwyn, 797 F. Supp. 2d 177, 182 (D. Mass. 2011) (citing United States v. Pinson, 584 F.3d 972, 977 (10th Cir. 2009)); see also Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967) (noting that "[t]he privilege is not an inviolable seal upon the attorney's lips. It may be waived by the client; and where, as here, the client alleges a breach of duty to him by the attorney, we have not the slightest scruple about deciding that he

thereby waives the privilege as to all communications relevant to that issue”).

Accordingly, the Court may find a waiver and direct defense counsel to submit to an interview with government counsel, or submit an affidavit, relating to the claims raised.

Goodwyn, 797 F. Supp. 2d at 182 (citing Pinson, 584 F.3d at 979). The government acknowledges that the waiver is not all-encompassing, and the Court’s order should be “no broader than needed to ensure the fairness of the proceedings before it.” Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003).

Given the nature of the defendant’s allegations, it is clear that he has waived his privilege with respect to communications that touch upon the four Grounds set forth in the Motion, and facts in support thereof. The defendant alleges that his trial counsel failed to review discovery materials with him prior to him changing his plea; failed to seek a continuance of his sentencing hearing and/or to vigorously contest allegations made at sentencing; ineffectively prepared his appeal documents; and that counsel falsified documents related to his fee arrangements with the defendant.

Absent a finding that his privilege has been waived upon such claims, and a corresponding Order allowing defense counsel to speak to Government counsel about these issues, it would be impossible to adequately respond to the defendant’s Motion. Therefore, in order to respond to these claims, undersigned counsel must necessarily speak with the defendant’s trial counsel about the issues raised.

B. The Court Should Issue an Order Permitting Prior Counsel to Speak with the Government.

Defendant thus has waived his attorney-client privilege for any and all communications, oral and written, he had with his counsel regarding the Grounds raised in his Motion and the facts alleged to support those grounds. Goodwyn, 797 F. Supp. 2d at 182 (citing Pinson, 584 F.3d at 979). As such, the Government respectfully requests that the Court issue an Order finding a

waiver by Defendant/Petitioner and permitting prior counsel to speak with Government counsel regarding the four Grounds set forth in the Motion, and the factual claims in support of each Ground.

The Government respectfully submits that such an Order would be in the interests of justice and would serve to further refine what, if any, issues remain which might require testimony at an evidentiary hearing, thereby conserving judicial resources. An interview and review of relevant records and/or an affidavit, would permit the Government to meaningfully respond to the alleged bases for the ineffective assistance of counsel claim, and permit the Court to assess the needs for an evidentiary hearing, and possibly limit the scope of the hearing after reviewing a responsive filing that includes information from prior counsel. A proposed Order is attached.

CONCLUSION

WHEREFORE, the Government respectfully requests that the Court issue an Order finding that Defendant/Petitioner has waived his attorney-client privilege, and instructing prior counsel, George West, Esq., Mark Josephs and Jeffrey K. Techentin, Esq., and Jason Knight, Esq., to consult and discuss with Government counsel the allegations contained in the § 2255 petition. Given the need for the government to interview prior counsel, the government requests that the Court extend the time for the government to file a response to the 2255 Petition [ECF No. 79] and related Motion to Strike Malicious Prosecution [ECF No. 81] and Motion Identifying Prejudice Egregious Performance - Ineffective Council [ECF No. 83] by 60 days, from September 12, 2022 until November 12, 2022.

CERTIFICATE OF SERVICE

I hereby certify that on 12th day of September, 2022 the within “**UNITED STATES’ MOTION**” was filed electronically and is available for viewing and downloading from the ECF system, and was mailed to:

David Staveley

/s/ Terrence P. Donnelly
TERRENCE P. DONNELLY
Assistant U.S. Attorney