UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s),

CASE NUMBER: 04-80372

HONORABLE VICTORIA A. ROBERTS

v.

D-1 CARL MARLINGA,
D-2 RALPH R. ROBERTS,
D-3 JAMES A. BARCIA,

Defendant(s).
_____/

AMENDED[1] OPINION AND ORDER DENYING DEFENDANT ROBERTS' MOTION TO SUPPRESS EVIDENCE OBTAINED IN BREACH OF THE ATTORNEY-CLIENT PRIVILEGE

I. INTRODUCTION

This matter is before the Court on Defendant Ralph Roberts' Motion to Suppress

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[1]This Amended Opinion is issued solely to correct three factual errors. In its February 22, 2005 Opinion, the Court incorrectly stated that Defendant James Barcia is charged with "conspiring" with Defendant Carl Marlinga, and that Defendants Marlinga and Ralph Roberts were charged with conspiracy in Counts I and II. In fact, Defendant Barcia is not charged with a conspiracy. He is charged with making a false statement to an agency of the United States and aiding and abetting (Count V), in violation of 18 U.S.C. §§1001(a) and 2(a), and exceeding limitations on contributions (Count VIII), in violation of 2 U.S.C. §§441a(a)(1)(A), 441a(a)(8), 437g(d), and 18 U.S.C. §2. Defendants Marlinga and Roberts are only charged with conspiracy to commit mail fraud in Count I. In Count II they are charged with the substantive offense of mail fraud. Also, in footnote 3, the Court incorrectly listed the year that charges were filed against James Hulet as 1991. Mr. Hulet was actually charged in 2001.

Evidence Obtained in Breach of the Attorney-Client Privilege. An evidentiary hearing was held on February 16, 2005. For the reasons stated, the motion is **DENIED**.

II. BACKGROUND

A nine-count indictment filed by the United States of America (the "Government") on April 22, 2004 charged Defendant Ralph Roberts ("Roberts") with conspiring to give Carl Marlinga ("Marlinga") campaign contributions in exchange for prosecutorial favorable treatment. Defendant James Barcia ("Barcia") allegedly acted as an intermediary between Marlinga and a third party to facilitate a separate *quid pro quo.* Roberts is charged in three counts (I, II, and VII). Barcia is charged in two counts (V and VIII). Marlinga is charged in all counts. All charges stem from Marlinga's unsuccessful bid for the United States House of Representatives. Roberts is a Macomb County, Michigan realtor and owner of Ralph Roberts Realty. Barcia is currently a member of the Michigan State Senate and former member of the United States House of Representatives. Marlinga is the former Macomb County Prosecuting Attorney.

Marlinga is alleged to have accepted campaign contributions from Roberts in exchange for Marlinga's assistance, in his official capacity as the Macomb County Prosecutor, in persuading the Michigan Supreme Court to grant a new trial to Jeffrey Moldowan.[2] Marlinga and Roberts are also alleged to have violated campaign finance laws when Marlinga accepted contributions from Roberts in excess of the $2,000.00 maximum. For these alleged acts, Roberts and Marlinga are charged in Count I with Conspiracy to Defraud and Deprive

[2]In 1991, Jeffrey Moldowan was convicted of assault with intent to commit murder, criminal sexual conduct, and kidnapping. *People v Moldowan.*

Citizens of their Intangible Right to the Honest Services of the Macomb County Prosecutor, Using the Mails, in violation of 18 U.S.C. §§1341, 1346, and 371; in Count II with Defrauding and Depriving Citizens of their Intangible Right to the Honest Services of the Macomb County Prosecutor, Using the Mails, in violation of 18 U.S.C. §§1341 and 1346; and, in Count VII with Exceeding Limitations on Contributions, Procuring, Commanding, and Counseling, in violation of 18 U.S.C. §2 and 2 U.S.C. §§441a(a)(1)(A), 441a(a)(8), and 437g(d).

Barcia is alleged to have engaged in a separate but similar *quid pro quo* scheme with Marlinga in the Macomb County Circuit Court case of *People v James Hulet.*[3] Marlinga allegedly offered assistance in negotiating a plea for Hulet in exchange for campaign contributions from Hulet's attorney. Barcia allegedly acted as an intermediary between Hulet's attorney and Marlinga, by making a campaign contribution to Marlinga from his federal campaign account without disclosing that it was on behalf of Hulet's lawyer. Hulet allegedly repaid Barcia by making a contribution in the same amount to Barcia's state campaign committee.

Evidence of the alleged Marlinga/Roberts conspiracy is derived, in large part, from statements made by Roberts and Marlinga during telephone conversations taped by Roberts. The taped conversations allegedly evidence the *quid pro quo* arrangement between Roberts and Marlinga and are extensively quoted in the indictment. *See* Indictment at ¶¶ 12, 18, 23, 25. The Government obtained the tapes through execution of a search warrant which is not

[3]In 2001, Hulet was charged with criminal sexual conduct in the first degree, three counts of delivery of a controlled substance to a minor, felony firearm, possession with intent to deliver a controlled substance, possession of MDMA (ecstacy), maintaining a drug house, and contributing to the delinquency of a minor.

challenged by Roberts. Because of the rather bizarre circumstances under which the Government came to know of the tapes and the fact that the Government obtained a search warrant based on that information, Roberts moves to suppress them under this Court's supervisory powers.

In August 2002, allegations of improprieties by Marlinga in the *Moldowan* case were widely publicized in the media. In September 2002, Roberts sought legal advice from attorney Frank Palazzolo ("Palazzolo") regarding the propriety of tape recording telephone conversations and because he anticipated that he would be questioned by federal investigators about his contacts with Marlinga. During his consultation with Palazzolo, Roberts disclosed the recordings between himself and Marlinga. Soon after, Palazzolo consulted with his law partner, William Buffalino ("Buffalino"),[4] regarding the issues raised by Roberts. Palazzolo consulted with Buffalino because Palazzolo is a transactional attorney who is unfamiliar with criminal investigations and Buffalino was experienced in such matters. Palazzolo believes that Buffalino spoke directly to Roberts about the tapes on subsequent occasions. Billing records entered into evidence indicate a meeting as late as February 11, 2003 between Palazzolo, Buffalino, and Roberts at the offices of Buffalino & Palazzola, P.C.

On February 26, 2003, Buffalino contacted the Chief Trial Attorney in the Macomb County Prosecutor's Office, Eric Kaiser ("Kaiser"). Buffalino told Kaiser that he represented Roberts. He then revealed that Roberts recorded conversations with Marlinga and that in one or more of those conversations Marlinga and Roberts discussed their alleged *quid pro quo*

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[4]Palazzolo and Buffalino were the sole shareholders in the firm of Buffalino & Palazzolo, P.C..

arrangement for campaign contributions in exchange for Marlinga's assistance in the *Moldowan* case. He stated to Kaiser his belief that the conversations were evidence of a conspiracy. Buffalino further said that Roberts gave him the tapes, that they were stored in his (Buffalino's) office, and that Roberts transcribed the tapes, but had not given him copies of the transcription. Kaiser urged Buffalino to turn the tapes and his client over to the FBI, in exchange for Roberts' immunity. Buffalino refused and said that he was thinking of, or was inclined to, destroy the tapes or return them to Roberts. Because Buffalino said that he was going out of town until February 28, 2003, Kaiser asked Buffalino to do nothing with the tapes until he returned and they had another opportunity to talk. Kaiser testified that Buffalino understood they would talk when Buffalino returned from out of town. Kaiser did not tell Buffalino he was going to federal authorities in the interim.

Kaiser contacted Federal Bureau of Investigation (FBI) agent Ronald Loch ("Loch") the next day and relayed Buffalino's disclosures. Loch was the lead federal investigator of Marlinga's involvement in the *Moldowan* case. He worked with Detective Sergeant David Kelly ("Kelly") of the Michigan State Police. Loch and Kelly first contacted Kaiser in November 2002 to find out what he knew of the *Moldowan* case. Kaiser did have knowledge: he had supervised the attorney who originally prosecuted the *Moldowan* case in 1991. After the interview, Loch served Kaiser with a subpoena to testify before the grand jury in December 2002. After Moldowan was acquitted in his second trial in early February 2003, Kaiser again met with Loch to answer questions about the *Moldowan* case. Although Loch describes having "significant contact" with Kaiser regarding the federal investigation of Marlinga's

handling of the *Moldowan* case, there is no evidence that Kaiser was ever a confidential informant or cooperating witness for the Government.

After speaking with Kaiser on February 27, 2003, Loch immediately contacted then Assistant U.S. Attorney Jonathan Tukel ("Tukel"), who was supervising the investigation. Loch and Tukel then had a telephone conference with Kaiser, who repeated what he had already told Loch. That same day, and based on the information Kaiser provided, Tukel, Loch, and Kelly drafted search warrants for Buffalino's law office and Roberts' home and office. Loch swore out the supporting affidavit. The attorney-client relationship was disclosed in the affidavit. Magistrate Judge Steven Whalen signed the warrants late that evening.

The following morning the tapes and transcripts were seized from the various locations, including Buffalino's office. Immediately before the seizure, Kaiser had a telephone conversation with Buffalino. Loch and Tukel were present. The conversation was taped, at Kaiser's request. There is no evidence that the Government scripted Kaiser's remarks, designed to let Buffalino know that Kaiser had gone to federal authorities, that they were interested in talking to Roberts about cooperating, and that the tapes would be seized from Buffalino's office soon.

It is not clear what prompted Buffalino to first disclose the tapes or why he chose to make the disclosure to Kaiser. The February 16, 2005 evidentiary hearing shed little light on this issue. At the time of the Buffalino disclosure, Loch and Kelly were aware that Buffalino had made campaign contributions to Marlinga which they regarded as suspicious. But, Buffalino was not then a target of any investigation related to Marlinga. Buffalino and Kaiser did have a long standing friendship, and Kaiser testified that Buffalino simply came to him for

advice.

Roberts states that he did not authorize Buffalino to disclose the existence or contents of the tapes to any third party, and that he expected that the information would be held in confidence per the attorney-client privilege. Palazzolo confirms that Roberts did not authorize disclosure. Because Loch's affidavit in support of the request for the search warrants was sealed by the Government until after the indictment issued, Roberts did not know that Buffalino was the Government's source for the tapes until sometime after April 22, 2004. Buffalino died in May 2004.

Roberts argues that Buffalino's disclosure constituted a breach of the attorney-client privilege that was or should have been apparent to the Government. Therefore, he requests that the Court exercise its supervisory powers to suppress the tapes and any evidence obtained as a result of the breach. Roberts contends that the Government's knowing use of privileged information to obtain the search warrants amounted to an interference with his attorney-client relationship in violation of his Fifth Amendment due process rights.

III. ANALYSIS

Because Roberts was unable to establish that the Government was more than a passive beneficiary of Buffalino's breach of the attorney-client privilege, his motion to suppress is denied.

A. ROBERTS HAD AN ATTORNEY-CLIENT RELATIONSHIP WITH BUFFALINO AND THE FACT OF THE TAPES WAS A PRIVILEGED COMMUNICATION

As a threshold matter, the Government conceded at the evidentiary hearing that Roberts had an attorney-client relationship with Palazzolo and Buffalino, and that Roberts'

disclosure of the existence of the tapes was a privileged communication.

The Sixth Circuit lists the essential elements of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Fausek v White, 965 F.2d 126, 129 (6th Cir. 1992)(citations omitted). The privilege protects "[c]onfidential information disclosed by a client to an attorney to obtain legal assistance . . . ." *Schenet v Anderson,* 678 F.Supp. 1280, 1281 (E.D. Mich. 1988). "An attorney's communications to a client may also be protected by the privilege, to the extent that they are based on or contain confidential information provided by the client, or legal advice or opinions of the attorney." *Id*. "The client, not the attorney, is the holder of the privilege. . . ." *Fausek v White,* 965 F.2d 126, 132 (6th Cir. 1992). Therefore, except in limited circumstances not relevant here, it is only the client who can waive the privilege.[5]

It is undisputed that Roberts sought legal advice from Palazzolo with the expectation that their discussion would remain confidential. Because Palazzolo and Buffalino were partners in the same firm, the Michigan Rules of Professional Conduct (MRPC) provide that Palazzolo was entitled to consult with and share Roberts' confidential communications with Buffalino, who was equally bound to honor the attorney-client privilege:

> Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers . .

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[5]The Government implies in its Brief that the crime-fraud exception may apply, but offered no evidence to support its assertion.

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MRPC 1.6, Comment. Palazzolo testified that Roberts also consulted directly with Buffalino about the tapes.

Palazzolo states in his affidavit and testified that Roberts sought advice "regarding the propriety of tape recording telephone conversations." Palazzolo Aff. at ¶3. Palazzolo states that Roberts also indicated that he "expected that he might soon be questioned by federal investigators regarding his contacts with Carl Marlinga" and that he disclosed the existence of the tapes "[a]s part of his effort to seek legal advice regarding the Marlinga investigation." *Id* at ¶¶ 3, 5. In light of the fact that the tapes were of conversations between Roberts and Marlinga and the subject matter of those conversations relate to the very case for which Marlinga and Roberts were being investigated, the fact that the tapes existed was clearly within the scope of the advice sought as described by Palazzolo. At a minimum, Roberts' disclosure constituted confidential information under MRPC 1.6(a)-(b):

> (a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
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> (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
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> (1) reveal a confidence or secret of a client;
> (2) use a confidence or secret of a client to the disadvantage of the client; or
> (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

The fact of the existence of the tapes was likely to be detrimental to Roberts and, therefore, was not to be disclosed without his permission. Therefore, Buffalino's disclosures to Kaiser without Roberts' permission was a breach of the attorney-client privilege.

B. THE TAPES THEMSELVES ARE NOT PRIVILEGED

Roberts admits that the tapes themselves are not privileged, since Roberts and Marlinga did not have an attorney-client relationship and the tapes do not otherwise qualify as privileged communications. *See Fausek,* 965 F.2d at 129 (listing the essential elements of the attorney-client privilege).

C. ROBERTS HAS NOT MET HIS BURDEN TO DEMONSTRATE A FIFTH AMENDMENT VIOLATION BY THE GOVERNMENT

Roberts contends that his Fifth Amendment due process rights were violated and urges the Court to either dismiss the indictment or suppress the tapes and other evidence seized because of Buffalino's disclosures. He asserts that the Government's knowing use of privileged information to obtain the search warrants amounted to intentional interference with his attorney-client relationship.

Roberts' specific contention is that Kaiser, an attorney himself, knew or should have known that the information he received from Buffalino was privileged. Roberts says the Government attorney, Tukel, who assisted Loch in obtaining the warrants, also violated his ethical obligation not to make use of information that he knew or should have known was disclosed in violation of privilege. Roberts points out that there is no indication that Buffalino, Kaiser, or any Government agent believed that Buffalino was authorized by Roberts to disclose the information. In fact, this was Loch's testimony---that no evidence has been

uncovered to suggest that Roberts authorized disclosure of his confidential communication by Buffalino.

As Roberts asserts, a claim by a defendant that the government, at the pre-indictment stage, intruded upon the attorney client privilege may be brought under the Fifth Amendment. *U.S. v Kennedy,* 225 F.3d 1187, 1194 (10th Cir. 2000); *Marshank,* 777 F.Supp. at 1518-1519. A defendant must prove both 1) that there was an intrusion into the privileged relationship, and 2) prejudice. *U.S. v Valencia,* 541 F.2d 618, 623 (6th Cir. 1976).

The second prong of the analysis is not disputed: prejudice is established because it appears that the tapes were the primary basis for the charges filed against Roberts. The Government does not challenge that it would not have otherwise been aware of or sought the taped conversations, and there is no evidence that it did or could have obtained them by other means.

The question before the Court is whether the first prong is met because the Government knowingly used privileged information to obtain a search warrant. It appears that this issue has not presented itself under the same circumstances in any published opinion in this or other circuits. That is, no court has addressed a situation where an attorney, with no prompting from the government, knowingly provides the government with privileged information that he believes implicates his client in a crime, and then the government, fully aware of the violation, uses the privileged information to obtain non-privileged evidence. Rather, it is most often the case that the government has in some manner solicited or acted in collusion with an attorney or the attorney's agent to breach the attorney-client privilege. *See Marshank, supra; Valencia, supra*.

A review of the most analogous cases suggests that the government's mere act of taking advantage of an attorney's breach of privilege does not amount to a constitutional violation. Thus, this Court's first obligation is to focus on the manner by which the Government obtained the privileged information, and whether the Government somehow participated in or solicited the breach, before concerning itself with how the information was used once obtained and whether the use prejudiced the Defendant.

For instance, in *U.S. v White,* 970 F.2d 328 (7th Cir. 1992), the defendants' bankruptcy attorney turned documents over to the Assistant United States Attorney ("AUSA") related to a bankruptcy filing that he prepared for defendants. Defendants were being investigated for bankruptcy fraud. The attorney himself was convicted in an unrelated bankruptcy matter, but had not been offered and did not receive any leniency from the AUSA in his sentence for turning over the documents. The AUSA had not asked the attorney for the documents. The attorney claimed that he turned them over because he did not believe that they contained any privileged information. Defendants appealed their subsequent convictions arguing that their attorney's disclosures were a breach of the attorney-client privilege, which led to evidence that was used against them and, therefore, violated their Fifth and Sixth Amendment rights.

The district court ruled against defendants, finding that even if there was a violation of attorney-client privilege (which the court found there was not), the government had not instigated it. The Seventh Circuit affirmed stating that, "[i]n the absence of government complicity, the convictions must stand even if [defendants' attorney] violated the attorney-client privilege." 970 F.2d at 335. The court stated that attorney-client privilege is merely a testimonial privilege that does not implicate constitutional rights unless there is government

misconduct and demonstrated prejudice. *Id*.

The Ninth Circuit in *Clutchette v Rushen,* 770 F.2d 1469, 1471 (9th Cir. 1985) also stated that "[s]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." As in *White*, the court went on to say that constitutional rights are only violated when there is purposeful governmental interference and prejudice. In *Clutchette*, it was the defendant's wife, working as an investigator for his attorneys, who turned evidence incriminating her husband over to the police. She came into possession of the evidence through her duties as an investigator. She told the police who she worked for and how she obtained the evidence. Although the court ultimately found that the evidence was not privileged under state law, in its analysis the court emphasized its finding that there had been no government misconduct. Even though the police used the information to bring charges against defendant, the court described the government's conduct as entirely passive, because it did not initiate contact with defendant's wife or encourage her to turn over the evidence.

The fact that the government did not engage in any misconduct and lack of prejudice were factors in a civil rights case that arose from an alleged violation of the Sixth Amendment right to counsel. In *Weatherford v Bursey,* 429 U.S. 545 (1977), an undercover officer was arrested and charged along with Bursey to maintain the officer's cover. Believing the officer to be only a co-defendant and unaware that he was a government informant, the defendant invited the officer into a meeting with him and his lawyer on two occasions prior to trial to discuss trial strategies. The officer did not anticipate being called to testify against the

defendant and did not tell any of what he heard to the prosecution or his superiors. At some point, however, the officer's cover was compromised and the decision was made that he would testify. However, he still did not disclose what he heard and he did not testify about the conversations. Bursey brought a civil rights action asserting that he was deprived of effective assistance of counsel and due process, in violation of the Sixth and Fourteenth Amendments. The district court rejected Bursey's claims and entered a judgment for the defendants. The Court of Appeals reversed, finding that the right to counsel is endangered whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship. The Supreme Court, however, reversed the Court of Appeals because there had been no purposeful intrusion by the officer and because nothing the officer learned was offered against Bursey at trial.

In light of *White, Cluchette,* and *Weatherford,* this Court finds that the Government must be more than a passive recipient of privileged information, even if the information comes to the Government because of a morally reprehensible violation of the attorney-client privilege by the attorney duty-bound to hold confidences. While Roberts was undisputedly prejudiced by Buffalino's disclosure, the Government did not actively solicit Buffalino or otherwise induce the breach of attorney-client privilege. Roberts focuses on what he calls the "knowing exploitation" by the Government of privileged information that it obtained innocently---that exploitation being the search warrant to obtain non-privileged evidence. However, the law does not allow the Court to shift the focus from *how* the privileged information was initially obtained and whether the Government was complicit in the breach of privilege. Indeed, in the absence of purposeful government involvement in the breach, the exploitation by the

Government of evidence it obtains in violation of the attorney-client privilege is constitutionally permissible. *See White, supra; Cluchette, supra;* and *Weatherford, supra*.

D. WHETHER ROBERTS WAS PREJUDICED BY EVIDENCE OBTAINED BY THE GOVERNMENT BECAUSE HIS ATTORNEY VIOLATED HIS PRIVILEGE IS NOT RELEVANT UNLESS ACTIVE INTRUSION BY THE GOVERNMENT IS FIRST SHOWN

Roberts must first show active intrusion by the Government, and then prejudice in order to prevail on his due process claim. However, in support of his request for suppression, Roberts leaps to cases where prejudice was the focus of the court's analysis rather than intrusion. For instance, citing *Bishop v Rose,* 701 F.2d 1150 (6th Cir. 1983), Roberts contends that the Government's knowing use of privileged information is an intentional interference with his attorney-client relationship, even though the Government did not solicit the information. Roberts' assertion, however, overstates the *Bishop* holding.

Defendant in *Bishop* was in custody at the county jail pending trial. While in custody, his attorney asked him to write out a narrative of his activities and whereabouts on the date of the alleged murder and robbery, in preparation for an alibi defense. At some point, employees of the county sheriff's department searched the defendant's cell because of the attempted escape of defendant's cellmate. During this undisputedly lawful search, the sheriff's employees came across defendant's written statement and confiscated it. They then copied the statement and turned it over to the Assistant District Attorney General. A week later, after defendant objected to its confiscation, the employees turned the statement over to defendant's attorney.

At trial, defendant objected to the government's use of the statement. The court ruled

that the government could not use it as direct evidence, but allowed the prosecutor to use it to impeach the defendant during cross-examination. Defendant was convicted and later filed a habeas petition alleging that his Sixth Amendment right to assistance of counsel was violated. The district court agreed, finding that the document was a confidential communication between defendant and counsel, and that delivery of the document to the prosecutor and its use at trial prejudiced defendant and denied him his Sixth Amendment right to assistance of counsel. Though it found that dismissal was not warranted, the district court granted defendant a new trial. The Sixth Circuit affirmed.

Roberts relies upon *Bishop* for the proposition that, even if a privileged document comes into a prosecutor's possession lawfully, a prosecutor's knowing use of a privileged document constitutes an unconstitutional interference with the defendant's attorney-client relationship. The *Bishop* Court, however, did not go that far. Based on evidence derived from an evidentiary hearing and the state court record, the court merely stated that there was support for the district court's finding that there was a Sixth Amendment violation. The district court's reasoning and specific findings with regard to what actions by the government constituted interference were not revealed, and the *Bishop* Court did not engage in its own analysis. Rather, the court focused its discussion almost exclusively on the prejudice prong of defendant's burden of proof. Therefore, *Bishop* is not persuasive authority in support of Roberts' position.

Roberts reliance upon *U.S. v Valencia, supra,* is likewise misplaced because the intrusion there was obvious: the government enlisted an attorney's secretary as an informant

to provide information on the attorney's clients. 541 F. 2d at 620-621. Consequently, the *Valencia* Court analysis focused on the extent to which the defendants were prejudiced and the appropriate remedy. Unlike *Valencia*, Roberts has not established that intrusion by the Government led to breach of the privilege. The fact that Roberts suffered prejudice is not alone sufficient to warrant dismissal or suppression.

E. THIS IS NOT A PROPER CASE FOR EXERCISE OF SUPERVISORY POWERS

While Roberts is correct that federal courts have exercised their supervisory authority to dismiss an indictment or suppress evidence because of government overreaching, he failed to show that the circumstances of this case warrant either remedy.

Federal courts have general supervisory authority over the administration of criminal justice. *McNabb v U.S.,* 318 U.S. 332, 341 (1943); *Elkins v U.S.,* 364 U.S. 206, 216 (1960). A court's supervisory powers are to be used to, "within limits, formulate procedural rules not specifically required by the Constitution or the Congress" in order to: 1) implement a remedy for violation of recognized rights; 2) preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; or 3) fashion a remedy designed to deter illegal conduct. *U.S. v Hastings,* 461 U.S. 499, 505 (1983). The parameters of a federal court's supervisory authority are not specifically defined. But courts have exercised this authority in myriad situations; often to sanction egregious acts of prosecutorial misconduct.[6] Whether exercise of the authority is appropriate in a given situation must be

[6] *See Marshank,* 777 F.Supp. at 1529; *U.S. v Omni International Corp.,* 634 F.Supp. 1414, 1440 (D. Md. 1986).

determined on a case-by-case basis. *Marshank,* 777 F.Supp. at 1529. For the reasons stated, Roberts has not established that his constitutional rights were violated, or any other compelling reason for the Court to exercise its supervisory authority.

F. THE WARRANT WAS OBTAINED IN ACCORDANCE WITH GOVERNMENT POLICIES, AND SUPPRESSION WOULD NOT BE AN APPROPRIATE REMEDY IN ANY CASE

The Code of Federal Regulations ("CFR") establishes guidelines for the federal government to obtain search warrants to seize materials from disinterested third parties. Warrant applications must be approved by an authorized attorney for the government, or in emergency situations, by a supervisory law enforcement officer:

> (a) Provisions governing the use of search warrants generally.
>
> (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought, and the application for the warrant has been authorized as provided in paragraph (a)(2) of this section.
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> (2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party unless the application for the warrant has been authorized by an attorney for the government. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of an attorney for the government, the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency, if the appropriate U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) is notified of the authorization and the basis for justifying such authorization under this part within 24 hours of the authorization.

28 C.F.R. § 59.4(a). Additional prophylactic measures are required when a warrant may

intrude upon professional, confidential relationships:

> (b) Provisions governing the use of search warrants which may intrude upon professional, confidential relationships.
>
> (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment, unless--
>
> (i) It appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;
>
> (ii) Access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and
>
> (iii) The application for the warrant has been approved as provided in paragraph (b)(2) of this section.

28 C.F.R. § 59.4(b)(1)(footnote omitted). Application for a search warrant to seize items in possession of a disinterested, third-party attorney must first be recommended by the U.S. Attorney (or, when appropriate, the Department of Justice), and authorized by a Deputy Assistant Attorney General, except in emergencies when the U.S Attorney (or, when appropriate, the Department of Justice) may authorize an application:

> (2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, or clergyman under the circumstances described in paragraph (b)(1) of this section, unless, upon the recommendation of the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, upon the recommendation of the appropriate supervisory official of the Department of Justice), an

> appropriate Deputy Assistant Attorney General has authorized the application for the warrant. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of a Deputy Assistant Attorney General, the application may be authorized by the U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, by the appropriate supervisory official of the Department of Justice) if an appropriate Deputy Assistant Attorney General is notified of the authorization and the basis for justifying such authorization under this part within 72 hours of the authorization.

28 C.F.R. § 59.4(b)(2).

Buffalino's statement that he was thinking of, or was inclined to, destroy the tapes, which purportedly contained evidence of a criminal conspiracy, created an emergency situation. Therefore, in accordance with 28 C.F.R. § 59.4(b)(2), Tukel sought authority from U.S. Attorney Jeffrey Collins. Because he was unavailable, Tukel got approval from the second in command, First Assistant U.S. Attorney Alan Gershel. Tukel admitted, though, that he likely did not notify the Deputy Assistant Attorney General of the authorization he had received within 72 hours as is required by 28 C.F.R. 59.4(b)(2). However, the fact that regulation procedures were not adhered to in every respect does not entitle Roberts to suppression of the evidence seized; a defendant cannot base a request for suppression on mere procedural violations of 28 C.F.R. §59.4:

> [A]n issue relating to the compliance, or the failure to comply, with the guidelines set forth in [part 59 of 28 C.F.R.] may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

28 C.F.R. 59.6(b).

G. CONCLUSION

Defendant Roberts has not demonstrated a Fifth Amendment due process violation

by the Government, or any other reason for this Court to exercise its supervisory powers. His Motion to Suppress Evidence Obtained in Breach of the Attorney-Client Privilege is **DENIED**.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT COURT

Dated: 2/28/05