

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
UNITED STATES OF AMERICA)	
)	
v.)	Crim No. CR-08-360 (RMU)
)	
PAUL A. SLOUGH,)	Judge Ricardo M. Urbina
NICHOLAS A. SLATTEN,)	
EVAN S. LIBERTY,)	
DUSTIN L. HEARD,)	
DONALD W. BALL,)	
)	
Defendants.)	
_____)	

**JEREMY RIDGEWAY’S RESPONSE TO GOVERNMENT’S NOTICE
TO COURT REGARDING POTENTIAL CONFLICT-OF-INTEREST ISSUE**

Jeremy P. Ridgeway, by and through undersigned counsel, respectfully submits this brief in response to the Government’s Notice to the Court Regarding Potential Conflict-of-Interest Issue (“Conflict Notice”) [# 47] and the Defendants’ Responses thereto: the “Coffield Response” [# 48] and the “Defendants’ JDA Response” [# 49], and in support thereof states as follows:

I. INTRODUCTION

The Government’s notice advises the Court of potential conflicts of interest relating to (1) Mr. Coffield’s prior representation of Mr. Ridgeway in this matter, and (2) the oral joint defense agreement in which the Defendants and Mr. Ridgeway previously participated, and which we understand remains operative between the Defendants (hereinafter, “the JDA”).

Before addressing the specifics of the three briefs filed to date, we note that undersigned counsel has prepared this submission under significant constraints. We have engaged in a detailed review of this Circuit’s law governing attorney client privilege, work product, the common-interest doctrine, and JDAs. While the law governing privilege and work product

issues is robust, there is a paucity of authorities in this Circuit concerning common interest and joint defense issues and, as a result, we are concerned about the possibility of divulging potentially protected information in a public pleading. No opinion from any court of the D.C. Circuit has yet to clearly articulate whether the parties, terms, and related facts are, in fact, privileged information protected by the JDA or, alternatively, public information that is disclosable. At least one opinion, however, suggests that such information is probably not protected from disclosure. See United States v. Hsia, 81 F. Supp. 2d 7, 11 n.3 (D.D.C. 2000) (expressing doubt that “either the existence or the terms of a [joint defense agreement] are privileged”).

The Defendants’ JDA Response purports to identify the parties, terms, dates, and other related facts concerning the oral JDA in this case (see Defendants’ JDA Resp. at 3-5); thus the Defendants appear to have waived any objection to the public disclosure of these issues. See Hsia, 81 F. Supp. 2d at 11 n.3. Nevertheless, out of an abundance of caution, undersigned counsel has taken great care in this brief to avoid disclosing any parties, terms, dates or other related facts concerning the oral JDA that were not previously broached in the Defendants’ JDA Response until we receive guidance from the Court.

II. MR. COFFIELD’S PRIOR REPRESENTATION OF MR. RIDGEWAY

We believe that it is impossible for us to reply to the representations made in the Coffield Response [# 48] in a public pleading and that any discussion or review of documents relating to Mr. Coffield’s relationship with Mr. Ridgeway must occur *ex parte* and *in camera*, per Mr. Coffield’s suggestion. (Coffield Resp. at 3.) Nevertheless, however, we believe that a resolution of the potential conflict of interest issue raised by Mr. Coffield’s prior representation of Mr. Ridgeway in this case is possible and would satisfy the Court and protect the interests of both Jeremy Ridgeway and every Defendant.

III. THE JOINT DEFENSE AGREEMENT

A. The Relevant Facts

As we have previously stated, we believe that we are substantially limited in our ability to address the full panoply of factual issues attendant to any analysis of the terms and obligations of the parties to the JDA in this case. Once we receive guidance from the Court as to what may be disclosed in public pleadings versus in camera, we will submit a supplemental brief that fully addresses the potential JDA issues in this case, should the Court request such a pleading.

That having been said, we set forth below an executive summary of what undersigned counsel believes to be the relevant facts concerning the JDA in this case. Please note that (a) the list below is an aggregation of information (i.e., we do not mean to imply that all of the listed items were discussed in one meeting) and (b) we recognize that the Defendants have differing interpretations and recollections concerning certain issues and have done our best to identify what we believe to be the areas of disagreement for the Court's convenience:

1. Formation. On or about December 2007, prior to sharing any privileged information, counsel for Mr. Ridgeway and counsel for others who were involved in the Government's investigation of the incident at Nisour Square on September 16, 2007, acting on behalf of their respective clients, entered into an oral JDA.¹
2. Common Interest. Counsel entered the JDA based upon the belief that the parties to the JDA shared a common interest and such an interest would be best served by a coordinated legal strategy, the discussion and analysis of which was essential to the effective representation of their individual clients.
3. Privilege and Work Product Protections. Counsel agreed that each party would protect from disclosure all communications and/or work product that occurred under the auspices of the JDA or was shared pursuant to the JDA.
4. Withdrawal. Counsel agreed that if any client irreversibly committed to resolving his case (i.e., if any client formally entered a guilty plea), that client, through his counsel, would take reasonable steps to withdraw from the JDA immediately, but continue to protect all communications and/or work product covered by the JDA.²

¹ To avoid confusion, this is the same JDA that we refer to throughout this brief.

² We acknowledge that the Defendants have a different interpretation; their belief is that the terms of the JDA required a party to withdraw at the outset of any dialogue with the Government for purposes of exploring

5. Waiver. At no point in time did the parties ever agree that a party's withdrawal from the JDA would waive the withdrawing party's rights, protections or remedies pursuant to the JDA, including the continuing duty of each of the remaining JDA members to maintain the confidentiality of all communications and/or work product previously shared by the withdrawing party.
6. Disqualification / Limitations on Cross-Examination. To the extent that the parties discussed the ramifications of withdrawal for purposes of potential disqualification and/or the ability of remaining members' counsel to cross-examine the withdrawing member, such discussion was informed by the reasonable understanding that such agreement was predicated upon the assumption that counsel for the remaining JDA members could cross-examine the withdrawing member without use of any communications and/or work product that was shared by the withdrawing party.³
7. Attorney-Client Relationship. The existence of the JDA did not create a formal attorney-client relationship between any counsel and anyone other than the client of that counsel, but did create a duty not to use any party's protected communications and/or work product, directly or indirectly, in a manner adverse to that party.⁴

On November 14, 2008, counsel for Mr. Ridgeway informed the other members of the Joint Defense Group that Mr. Ridgeway was interacting with the Government for purposes of a potential resolution to his case and that we had discussions with the Government about the incident as part of those interactions. In response, counsel for the other members of the Joint

whether cooperation was possible and desirable. We believe that there are important reasons why this interpretation is factually inaccurate and legally dubious, but out of an abundance of caution, will not articulate those reasons until we receive the Court's guidance as to the parameters of this inquiry. See Kiely v. Raytheon Co., 914 F. Supp. 708, 713-14 (D. Mass. 1996) (rejecting a party's interpretation of JDA which would force a witness to disclose to joint defense group the witness' interactions with prosecutors prior to a guilty plea, or create similar impediments to dialogue with the government, as an unenforceable contract based on public policy).

³ Defendants represent that "counsel for Mr. Ridgeway has previously and expressly acknowledged that the information he elected to share with the defense group under the JDA could be used by remaining counsel in cross-examining Mr. Ridgeway." (JDA Resp. at 5-6 n.4.) We strongly disagree with this assertion. We are constrained, however, in explaining the full basis for our disagreement until we receive the Court's guidance as to the parameters that are operative in resolving the conflict-of-interest issues, because this discussion could potentially raise privilege issues as well as other concerns. We also believe that there may have been uncertainty vis-à-vis potential disqualification, but again will refrain from furnishing the full basis for our belief until we receive the Court's guidance.

⁴ While we agree that "it was always the option of counsel, acting with the client's authority, to contribute or withhold any particular information from other members of the Joint Defense Group," (JDA Resp. at 4 n.3), we do not believe that this informs the duty of confidentiality that arose under the JDA, including the remaining JDA members' continuing duty of confidentiality vis-à-vis Mr. Ridgeway.

Defense Group requested a meeting to discuss Mr. Ridgeway's interactions with the Government.

On November 17, 2008, Winston honored the request of the other members of the Joint Defense Group for a meeting and hosted counsel for members of the group at our Washington, D.C. office.⁵

On November 18, 2008, Mr. Ridgeway irreversibly committed himself to the resolution of his case by formally entering a guilty plea, thereby withdrawing from the Joint Defense Group.

B. External Sources May Not Be Used To Create Additional JDA Terms

The Joint Defense Group appears to suggest that the terms of the JDA (including any interpretation regarding waiver) are informed and influenced by their years of experience in criminal law, the fact that they have participated in numerous JDAs in the past, and the representation that terms of the JDA in this case "were well-established, accepted, and standard terms used in all joint defense agreements in which we have been involved." (Defendants' JDA Resp. at 4-5.)⁶ We respectfully disagree.

First, any waiver under the JDA—whether to the privilege, disqualification, or limitation on cross-examination—implicates each client's Sixth Amendment rights and, as a result, every waiver must be knowing, intelligent and voluntary. See Cuyler v. Sullivan, 446 U.S. 335, 344-47 (1980) (waiver must be knowing); Minebea Co., Ltd. v. Papst, 228 F.R.D. 13 and 228 F.R.D. 34, 35-36 (D.D.C. 2005) (in a case involving privilege assertions pursuant to a JDA, held that

⁵ We maintain that this meeting was protected under the JDA; the Defendants disagree. (See JDA Resp. at 4 (stating that Mr. Ridgeway withdrew from the Joint Defense Group on November 14, 2008).) In light of this disagreement, we request that the Defendants refrain from disclosing the contents of the November 17, 2008 meeting with any third parties until the Court, or the parties, have resolved the question.

⁶ We agree that "[e]ach lead attorney involved in the JDA in this case is an experienced criminal defense lawyer." (JDA Resp. at 4.) The undersigned can also add that, prior to this case, each core member of the Winston team representing Mr. Ridgeway had substantial experience with joint defense and common interest agreements and was readily conversant with the legal and practical issues that often arise in the JDA and common interest settings.

waiver of attorney-client privilege requires action that is “deliberate and voluntary”); see also United States v. Fumo, 504 F. Supp. 2d 6, 30 (E.D.Pa. 2007) (waiver of attorney-client privilege pursuant to JDA must be “knowing, intelligent and voluntary,” which requires, *inter alia*, that each client be specifically aware of the foreseeable prejudices of the waiver of the privilege and the potentially detrimental consequences of those prejudices); United States v. LeCroy, 348 F. Supp. 2d 375, 382-383 (E.D. Pa. 2004) (waiver in JDA setting must be knowing and voluntary). In light of this Sixth Amendment requirement, we respectfully submit that it would be error for this Court to rely upon anything other than the specific, explicit representations made during the JDA, as informed by the party’s course of conduct in this case.

Second, we respectfully disagree with the claim that the purported terms of the JDA in this case “were well-established, accepted, and standard terms used in all joint defense agreements in which we have been involved.” (Defendants’ JDA Resp. at 4-5.) To the contrary, undersigned counsel has been involved in one or more joint defense agreements with one or more of the lead counsel in this case where there was *not* any express waiver of the privilege upon withdrawal.

Third, we cannot agree with the premise that there is a “well-established, accepted, and standard” set of terms (such as those suggested by the ABA) serves as a default assumption for all JDAs, including the JDA in this case. In contrast, a cursory review of publicly available materials yields numerous examples of JDA formulations and understandings that contradict the Defendants’ interpretation:

- “Courts generally have presumed that the confidentiality of the joint defense privilege functions to prohibit lawyers cross-examining former members to the agreement who have become government witnesses using joint defense shared communication. This presumption conforms to the fiduciary model of the joint defense doctrine and ensures the confidentiality of communication among joint defense participants. Co-defendants would be reluctant to enter into joint defense agreements if, becoming a government witness, the former member's statements

could be revealed. Therefore, the information received within the joint defense agreement should not be used to cross-examine former members.”⁷

- **“PRESERVATION OF PRIVILEGES.** It is generally assumed that a party supplying privileged information pursuant to a joint defense agreement retains the right to prevent disclosure of such information by the other participants even after a joint defense agreement is terminated. Because cooperating with the government, and even testifying against a former joint defense member, is generally not deemed ‘actually adverse’ to the interests of other joint defense members, it does not trigger a waiver of the privilege. Instead, even when one defendant agrees to cooperate with the government and testify against his co-defendants, the assumption is that joint defense information will remain privileged, and will not be useable against the producing party.”⁸

- **“ESSENTIAL ELEMENTS OF A JOINT DEFENSE AGREEMENT.** The basic elements of a joint defense include:
 - Consent among all members to the agreement;
 - A clear understanding that communications with co-defendants are covered by the joint defense privilege; and
 - An understanding that no privileged information can be disclosed by a party to the joint defense agreement to anyone outside the agreement without the consent of all members.”⁹

- “A joint defense agreement should contain the following provisions: . . .
 - Negotiations with adverse parties cannot be barred, but the agreement can provide that a party who enters into an agreement with an adversary will so notify the remaining co-parties.
 - Parties expressly should be barred from using shared information in a manner adverse to any co-party.
 - Should a party withdraw from the cooperative group, communications between that party and the other members (as well as any work product shared by or with the withdrawing party) will not be deemed to have lost any applicable protection. . . . The agreement also should provide that counsel is free to continue to represent the remaining group.”¹⁰

⁷ Amy Foote, Joint Defense Agreements in Criminal Prosecutions, 12 GEORGETOWN J. OF LEGAL ETHICS 377, 389 (1999).

⁸ Daralyn J. Durie, Drafting the Joint Defense Agreement (with Sample Provisions), online at http://d2d.ali-aba.org/_files/thumbs/rtf/DURIE-PLIT0203_thumb.pdf. This article is illustrative, as it is the very first result produced by a Google search of the phrase “sample joint defense agreement.”

⁹ Ruth D. Kahn (Steptoe & Johnson LLP), Relationships with Co-Counsel: The Joint Defense Privilege, ABA Newsletter on Products, General Liability & Consumer Law (Spring 2007), available online at <http://www.steptoel.com/assets/attachments/3264.pdf>.

¹⁰ This quote is taken from an article that was published by the venerable law firm of Morgan, Lewis & Bockius LLP and is hosted on that firm’s web site (see http://www.morganlewis.com/pubs/44F2D0A3-8E99-4613-9C396618F6358EB0_Publication.pdf).

In sum, we think that there is little basis—factually or legally—for this Court to interpret the parameters of the JDA based upon anything other than the composition of the members, express representations that were made at the time, and any course of dealings during the JDA that would reasonably shape one’s understanding of the JDA. See LeCroy, 348 F. Supp. 2d at 384-85 (holding that modifications to JDA “may be implied from a course of conduct in accordance with its existence”).

C. Mr. Ridgeway Has Not Waived His Protections Under the JDA

We disagree with the Defendants’ contention that “the JDA provided for precisely the situation we now encounter” and “did not restrict any counsel in his cross-examination of any defendant who withdrew from the JDA.” (Defendants’ JDA Resp. at 6.) In contrast, while we believe that there came a point in time when the Joint Defense Group acknowledged the fact that one party’s withdrawal would not force the remaining counsel to be disqualified, this was based upon the reasonable understanding at the time that remaining counsel would be able to effectively cross-examine the former member without reliance upon his JDA communications and/or work product.¹¹ Given these facts, we believe that there is ample room for a global resolution of the potential conflict of interest issues in this case that would protect each client while satisfying the Court and addressing the Government’s concerns.

United States v. Henke, 222 F.3d 633 (9th Cir. 2000), addressed a context that is—*potentially*—quite similar to what could arise down the road in this case.¹² In Henke, a witness who was formerly part of a joint defense agreement with the defendants learned of their plan to

¹¹ Out of an abundance of caution, we have not included all of the details that we believe support the reasonableness of our view, but will do so once we receive guidance from the Court.

¹² As a point of clarification, we believe that the Henke court’s formulation of an “implied attorney-client relationship” should not be read to suggest that a JDA creates a formal, comprehensive attorney-client relationship between each attorney and each defendant. The “implied attorney-client relationship” discussed in Henke stands for the proposition that “the duty to protect confidential information divulged under a joint defense agreement may extend beyond the duty not to disclose and include a duty not to use the information gained in a manner adverse to the interests of the client.” United States v. Stepney, 246 F. Supp. 2d 1069, 1081-83 (N.D. Cal. 2003).

disclose protected joint defense information to the Court. Id. at 637-38. In response, counsel for the former JDA member notified counsel for the defendants that the former member had not waived any of his privileges pursuant to the JDA and would not consent to the planned disclosure. Id. at 638. Defense counsel subsequently determined that they could not put on an effective defense without the planned disclosure and filed a motion to withdraw which was rejected by the district court. Id. A mistrial was declared and, during the new trial, defendants' counsel determined that they could not ethically cross-examine the former JDA member and elected not to cross him. Id. We submit the Henke case would support a potential global resolution of the potential conflict-of-interest issues in this case if such a resolution ensured that counsel for the Defendants "could avoid reliance on the privileged information and still fully uphold their ethical duty to represent their clients." Id.

The Defendants' assertion that "Mr. Ridgeway waived any privilege he may assert when he agreed to plead guilty and testify against his former colleagues," (Defendants' JDA Resp. at 7), and reliance upon United States v. Almeida, 341 F.3d 1318 (11th Cir. 2003), is incorrect.

First, the "implied waiver" rule of Almeida permits a court to retroactively waive a party's protections under a JDA through judicial fiat based upon cherry-picked, and out-dated state common law principles that the party had no notice of. Simply put, the concept of an "implied waiver" enunciated in Almeida is utterly incompatible with federal common law (which governs principles of privilege) and the well-settled Constitutional principle that a waiver must be knowing, intelligent and voluntary. Compare id. at 1325-26 (finding an "implied waiver[]" but failing to engage in *any* discussion concerning how such an "implied waiver[]" is "knowing" or "intelligent"), with Cuyler, 446 U.S. at 344-47 (waiver must be knowing); Fumo, 504 F. Supp. 2d at 30 (knowing and intelligent waiver requires client's specific awareness of the foreseeable prejudices of the waiver of the privilege and the potentially detrimental

consequences of those prejudices); LeCroy, 348 F. Supp. 2d at 382-383 (waiver in JDA context must be knowing); Stepney, 246 F.Supp.2d at 1077 (observing that “the Supreme Court has long held” that waiver must be knowing).¹³ In fact, the Almeida Court expressly recognized that an implied waiver based on an oral JDA would not “allow[] each defendant the opportunity to fully understand his rights prior to entering into the [JDA]” and urged attorneys seeking shelter under Almeida to secure a written waiver in advance of the JDA, presumably to comport with the Constitutional requirement that such waivers be knowing, intelligent and voluntary. See Almeida, 341 F.3d at 1326 n.21 (“In the future, defense lawyers should insist that their clients enter into written joint defense agreements that contain a clear statement of the waiver rule enunciated in this case, thereby allowing each defendant the opportunity to fully understand his rights prior to entering into the agreement.”).

Second, any adoption of the Almeida “implied waiver” rule by this Court would entail the necessitate application of the principle that JDA communications “do not get the benefit of the attorney-client privilege in the event that the co-defendant decides to testify on behalf of the government in exchange for a reduced sentence.” See id. at 1326. This would produce a dramatic—and unsupportable—change in this Court’s jurisprudence. There is no principled way to limit the reach of the rationale solely to those who plead guilty to a lesser offense—Almeida’s tortured logic would apply with equal force to any scenario where a potential defendant cooperates with prosecutors in the hopes of getting a better deal or a complete pass. Thus, adoption of the Almeida implied waiver would fundamentally alter incentives to cooperate with the government and, in particular, would destroy the incentives of corporations to cooperate with investigations because the price of cooperation would be the waiver of their privilege.

¹³ For example, in United States v. Brown, 2007 WL 1655873 (D.D.C. June 7, 2007), the colloquy expressly contemplated the prospect that a party could plead guilty, see id. at *2, but Judge Kollar-Kotelly determined that such risks were remote, held that the relevant defendants had “voluntarily, knowingly, and intelligently waived their rights with respect to any potential conflict that may arise,” and permitted counsel to remain in the case. Id. at *5.

Third, the two state law principles relied upon in Almeida are relics of an era prior to the development of the modern body of Constitutional law governing waiver issues. Prior to the Eleventh Circuit's opinion in Almeida, neither Alderman v. People, 4 Mich. 414 (Mich.1857) (cited in Almeida at 1325), nor Jones v. State, 3 So. 379 (Miss. 1888) (cited in Almeida at 1325-26), was relied upon by *a single federal court* over the life of our Nation to support the finding of an implied waiver of attorney-client privilege when an accomplice turned states evidence. To the contrary, each federal court that considered the state common law based "implied waiver" rationale prior to Almeida rejected it out of hand. See United States v. Fair, 1953 WL 1767 (CMA), 10 C.M.R. 19, 25-26 (C.M.A. 1953) (explicitly rejecting Alderman and Jones and explaining that the implied waiver rule would eviscerate the foundations of the attorney-client privilege); United States v. Boyce, 1952 WL 2655 (ABR), 8 C.M.R. 434, 442 (A.C.M.R. 1952) (holding that "there was no waiver, express or implied, of the privilege" where alleged accomplice turned state's evidence and explicitly supporting authorities contrary to Alderman and Jones).

Fourth, this Court's privilege analysis must be informed by principles of federal common law. See Fed. R. Evid. 501 ("[T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."). Almeida makes no attempt to reconcile its reliance on state privilege common law with Rule 501 or federal common law. Nor could it, because a substantial body of federal common law supports the conclusion that cooperation does not waive the privilege. See, e.g., United States v. O'Malley, 786 F.2d 786, 793-94 (7th Cir. 1986) (cooperation with the government does not waive privilege); Bonton v. Ercole, 2008 WL 3851938, at *12-*13 (E.D.N.Y. Aug. 18, 2008) (rejecting argument that service as government witness for purposes of securing an improved sentence waives privilege); United States v. W.R. Grace, 439 F. Supp.

2d 1125, 1143 n.17 (D. Mont. 2006) (“Grace has not waived its privilege by allowing the individual Defendants access to the documents pursuant to a joint defense agreement. Co-defendants sharing information pursuant to such an agreement retain the right to assert the attorney-client privilege over the information shared.”); United States v. Zolp, 659 F. Supp. 692, 722 (D.N.J. 1987) (“Even in the unique circumstances of this case, in which the attorney to whom the communications were made is a defendant against whom the witness may testify, the [co-defendant turned cooperator] witness does not waive the privilege simply because he takes the stand.”); United States v. James, 555 F. Supp. 794, 798 n.4 (S.D.N.Y. 1983) (holding that cooperator did not waive privilege and noting that “[t]he defense's argument that Barnes has waived his attorney-client privilege by entering into an agreement to cooperate with the government is not convincing”); In re Grand Jury Subpoena, 406 F. Supp. 381, 394 (S.D.N.Y. 1975) (“How well could a joint defense proceed in the light of each co-defendant’s knowledge that any one of the others might trade resultant disclosures to third parties as the price of his own exoneration or for the satisfaction of a personal animus?”).

CONCLUSION

In making this submission, counsel for Jeremy Ridgeway believes that he has illuminated aspects of the potential conflict-of-interest concerns raised by the Government and responded to by counsel for the Defendants, and remains willing to address any further issues as deemed necessary by the Court.

Dated: January 27, 2009

Respectfully submitted,

/s/

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