IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	§	
v.	§	Criminal Case No. 2:17-cr-00563-JD
KENNETH SMUKLER,	§	
Defendant.	§	

DEFENDANT KENNETH SMUKLER'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR AN EVIDENTIARY HEARING ON THE GOVERNMENT'S DELIBERATE INTRUSION INTO PRIVILEGED COMMUNICATIONS

The attorney-client privilege is one of the most sacred and oldest privileges recognized by the legal system. Yet without any notice to Mr. Smukler or this Court, the government trampled on this privilege, interviewing Karl Sandstrom, Esquire, about his protected communications with Mr. Smukler. It did so on the purported basis of a privilege waiver by candidate Marjorie Margolies—which the government knew or should have known was an ineffective and invalid waiver both as to the privilege held by Marjorie 2014, the campaign committee, and the privilege held by Mr. Smukler. And now confronted with the defects in its waiver, the government's belated attempt to avail itself of the crime-fraud exception cannot retroactively excuse the deliberate and improper intrusion into privileged communications for the purpose of obtaining an indictment against Mr. Smukler.

Mr. Smukler respectfully requests that the Court conduct an evidentiary hearing into the government's intrusion into privileged communications and determine the proper remedy for the

government's misconduct.[1] The remedy should appropriately neutralize the taint created by the government's prejudicial and intentional intrusion into privileged materials, including the suppression of evidence and the disqualification of the prosecution team.[2]

FACTUAL BACKGROUND

Marjorie Margolies was a candidate in the 2014 Democratic primary for Pennsylvania House District 13's congressional seat. Marjorie 2014 was the authorized principal campaign committee designated to support Ms. Margolies's candidacy. Ex. 1 (Marjorie 2014 Statement of Organization). The committee was formed in May 2013, with Jennifer May as the Treasurer. *Id.* Ms. Margolies was not an employee of the campaign committee.[3]

In April 2014, the campaign learned that one of Ms. Margolies's primary opponents, Daylin Leach, had complained to the FEC that Marjorie 2014 had spent general election funds on consultants and vendors for the primary election. Ex. 2 (Leach Complaint). That complaint named four respondents: Marjorie 2014, Ms. Margolies, Ms. May, and Mr. Smukler. *Id.*

According to the government's notes from a proffer session, on April 24, 2014, Mr. Smukler called Karl Sandstrom, Senior Counsel, at the prominent election law firm Perkins Coie. Ex. 3 (FBI 302 of Sandstrom Interview) (filed under seal). They spoke about the issues presented by the complaint for the campaign as well as the funds that Mr. Smukler's companies had received from the campaign. *Id.* The campaign publicly announced that it was hiring

[1] As the Court is aware, in his Supplemental Memorandum in Support of Defendant Smukler's Motion to Dismiss the Indictment for Vindictive Prosecution (ECF 68), Mr. Smukler raised the government's improper invasion of the privilege as further evidence in support of vindictiveness. The facts set forth here further expand on the factual points raised in that Memorandum.

[2] At the hearing, Mr. Smukler will seek testimony from Mr. Sandstrom and FBI Agents Jonathan Szeliga, Jason Huff, William Bezak, and Carmen DiMario. Agents DiMario, Huff, and Bezak all were involved in questioning Mr. Smukler at his home, including discussion of privilege. Agents Bezak and Szeliga participated in the interview of Karl Sandstrom, Esquire.

[3] All payments by Margolies 2014 are required to be on the committee's FEC reports. No salary payment to Ms. Margolies appears on those reports.

Perkins Coie later that day. On April 25, 2014, Jennifer May, the treasurer for Marjorie 2014, signed an engagement letter with Perkins Coie, engaging Mr. Sandstrom to provide legal representation related to "Campaign finance advice" for Marjorie 2014. Ex. 4 (Marjorie 2014/Perkins Coie Engagement Letter).

FEC complaints, like that from Daylin Leach, must comply with certain requirements and the FEC will not take action on deficient or insufficient complaints. *See, e.g.*, Ex. 5 at 7 (FEC Guide for Respondents). Accordingly, there was no obligation to respond to the complaint that Leach filed with the FEC unless and until the FEC requested a response. As it turned out, the FEC did request a response, and on May 5, 2014, the campaign committee received a letter from the FEC about the Leach complaint indicating that the FEC had docketed the complaint and requesting a response within 15 days of receipt of the letter. Ex. 6 (FEC Request for Response). The letter also enclosed a designation of counsel form. *Id.* at USA00759996. The designation of counsel form was executed many weeks later, on July 11, 2014. Ex. 7 (FEC Designation of Counsel Form). Mr. Sandstrom submitted a response to the Leach complaint on July 22, 2014, explaining that the complaint did not allege facts that constitute a violation of any statute or regulation. Ex. 8 (Sandstrom Letter to FEC). The FEC ultimately dismissed the Leach complaint in August 2015. Ex. 9 (FEC Opinion in MUR 6811).

The FBI 302 of the interview with Mr. Sandstrom confirms this timeline. According to the 302, Mr. Sandstrom discussed with the government his contacts with Mr. Smukler in late April 2014 and after the primary election ended in May 2014. Then, the 302 reads "[l]ater, SANDSTROM was engaged by MARJORIE 2014 to respond to the FEC complaint." Ex. 3 at 2. In other words, prior to that "later" engagement, Mr. Sandstrom had been providing legal advice that was not in connection with the submission to the FEC responding to the Leach complaint.

It was not until after July 11, 2014—when he submitted the designation of counsel—that Mr. Sandstrom began work on the submission to the FEC responding to the Leach complaint.

In a letter dated January 12, 2018, in response to Mr. Smukler's request that the government confirm that it recognized that the communications between Mr. Smukler and Mr. Sandstrom were protected by the attorney-client privilege and had used a search process that respected that privilege,[4] the government acknowledged that Mr. Sandstrom "represented Mr. Smukler." Ex. 10 at 3 (Letter from Eric Gibson & Jonathan Kravis, U.S. Dep't of Justice, to Jon R. Fetterolf, Esq. (Jan. 12, 2018)). In that letter, the government wrote:

> Mr. Smukler's laptop and hard drive were searched pursuant to a warrant. Mr. Smukler's email account was searched pursuant to his consent. For these searches, law enforcement filtered the contents for any communications with Karl Sandstrom, Esq. by running keyword searches for "Sandstrom," "Perkins," "Coie," and "Perkinscoie." Those communications were not reviewed by the investigative team. The investigative team was (and is) not aware of any other attorney who represented Mr. Smukler on this or any other matter as of the dates of those searches. No member of the investigative team has viewed any privileged communication to or from Mr. Smukler.

Id. Notwithstanding that direct representation that privileged materials were being protected, one month later, without notice to Mr. Smukler, the government interviewed Mr. Sandstrom and discussed with him the contents of his privileged communications with Mr. Smukler. Ex. 3. The government also appears to have subpoenaed documents from Mr. Sandstrom, Ex. 3 at 3 (noting

[4] Counsel's December 22, 2017 letter to the government stated as follows: "Similarly, Mr. Smukler's laptop, hard drive and e-mail accounts contained attorney-client privileged materials, including but not limited to communications with counsel pertaining to the subject-matter areas set forth in your search warrant. Please describe what process the government undertook to ensure that no individuals involved in the government's investigation or prosecution of this matter reviewed privileged materials in the process of determining what documents and electronic materials were responsive to the categories set forth in your search warrant. We are not aware that Mr. Smukler was asked to identify potentially privileged communications in advance of the government's searching his computer, hard drive, or e-mails." Ex. 11 at 4 (Letter from Jon R. Fetterolf, Esq. to Eric L. Gibson & Jonathan Kravis, U.S. Dep't of Justice (Dec. 22, 2017)).

emails from "SANDSTROM subpoena production"), and may have reviewed the privileged communications that were originally filtered out of the investigative team's review of Mr. Smukler's laptop, hard drive, and email.

The government justified its interview of Mr. Sandstrom on the grounds that it had supposedly obtained a waiver of Marjorie 2014's attorney-client privilege. The letter purporting to confirm the privilege waiver, dated January 30, 2018 (only 18 days after the government confirmed to Mr. Smukler that privileged communications were being protected), was sent from Perkins Coie attorney Marc Elias, who represents Ms. Margolies, to Barak Cohen, another Perkins Coie attorney representing Mr. Sandstrom (himself a Perkins Coie attorney). Ex. 12. (Letter from Marc E. Elias, Esq., to Barak Cohen, Esq. (Jan. 30, 2018)). The letter purports to provide a limited privilege waiver, waiving privilege "solely as relating to legal work performed by [Mr. Sandstrom] in connection with an FEC filing submitted by [him] on behalf of Ms. Margolies's campaign in 2014 for a seat in the U.S. House of Representatives." *Id.* Notably, approximately six weeks later, Ms. Margolies received immunity from prosecution. Ex. 13 (Letter from Louis D. Lappen, U.S. Attorney, Eastern District of Pennsylvania, to Marc E. Elias, Esq. (Mar. 15, 2018)). As described below, however, this waiver was invalid as Ms. Margolies lacked the authority to waive the campaign committee's attorney-client privilege and, even if the waiver was invalid, the government went well beyond its limited confines. In addition, as the government is well aware, Ms. Margolies cannot waive the attorney-client privilege between Mr. Smukler and Mr. Sandstrom that the government previously confirmed existed.

LEGAL STANDARDS

The Third Circuit has held that a district court should hold an evidentiary hearing into the government's alleged misconduct if the defendant makes a "colorable claim" for relief. *See*

United States v. Voigt, 89 F.3d 1050, 1067 (3d Cir. 1996) (holding that the district court should have held an evidentiary hearing into the government's intrusion into the attorney-client relationship because defendant's "moving papers raised enough of a specter of ethical impropriety on the Government's part to warrant closer scrutiny"); *see also United States v. Brink*, 39 F.3d 419, 424 (3d Cir. 1994) (remanding for an evidentiary hearing where defendant "raised a colorable claim that the government violated his constitutional right to counsel"). A claim is "colorable" if it consists "of more than mere bald-faced allegations of misconduct." *Voigt*, 89 F.3d at 1067.

In order to raise a "colorable claim" of a Fifth Amendment violation pertaining to the government's intrusion into the attorney-client relationship, the defendant must demonstrate an issue of fact as to: (1) the government's awareness of an ongoing personal attorney-client relationship; (2) deliberate intrusion by the government into that relationship; and (3) actual and substantial prejudice to the defendant. *Voigt*, 89 F.3d at 1067; *see also United States v. Nieves*, Crim. Case No. 97–46–1, 1997 WL 447992, at * 5 (E.D. Pa. July 24, 1997).

Notably, even where the conduct does not rise to the level of a constitutional violation, the Court also has inherent "supervisory power" through which it can sanction the government's intrusion into privileged communications. *Nieves*, 1997 WL 447992, at * 6. "That power allows a court, within limits, to formulate procedural rules not specifically required by the Constitution or Congress." *Id.* (internal quotation marks and alterations omitted). "One purpose of the supervisory power is 'to secure enforcement of better prosecutorial practice and reprimand of those who fail to observe it.'" *Id*. (quoting *United States v. Osorio*, 929 F.2d 753, 763 (1st Cir. 1991)). In *Nieves*, the court employed its supervisory authority to suppress evidence that the government obtained after it was aware of the attorney-client relationship at issue in that case,

with the goal of "encourag[ing] 'better prosecutorial practice' while alleviating the prejudice" to the defendant. *Id.*

ARGUMENT

I. Marjorie Margolies Did Not Have the Authority to Waive the Campaign Committee's Attorney-Client Privilege.

The government interviewed Mr. Sandstrom on the basis that the candidate, Ms. Margolies, had purportedly waived Marjorie 2014's attorney-client privilege. But Ms. Margolies's purported waiver is invalid because she did not have the authority to waive Marjorie 2014's privilege. A privilege belonging to an "inanimate entity," rather than an individual, can only be waived "by individuals empowered to act on behalf of the [entity]." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *see also* Statement of Policy Regarding Treasurers Subject to Enforcement Procs., FEC, 11 CFR pt. 111 (Jan. 3, 2005) ("[P]olitical committees are artificial entities that can act only through their agents, such as their treasurers . . . ."). Here, the person from whom the government obtained a purported waiver—Ms. Margolies—did not have the legal authority to give that waiver.

Campaign committees are creatures of statute. The Federal Election Campaign Act ("FECA" or "the Act") makes clear that the candidate exists separate and apart from the authorized campaign committee. The Act does not empower the candidate to make decisions on behalf of the committee. To the contrary, the Act and its implementing regulation make clear that the candidate is considered to be an "agent" of the committee only with respect to receiving contributions, obtaining loans, and making disbursements. 52 U.S.C. § 30102(e)(2); 11 CFR § 101.2. By specifying those three limited purposes for which a candidate serves as an agent of the committee, the Act makes clear that the candidate is *only* an agent of the committee for those

three purposes and is *not* an agent of the committee for any other purpose. Therefore, the candidate would not have authority to waive the committee's attorney-client privilege.[5]

In a recent filing, the government cited *United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 119 F.3d 210, 215 (2d Cir. 1997), as purportedly "upholding waiver of attorney-client privilege by [a] candidate for conversations between campaign counsel and campaign manager regarding campaign matters." *See* Gov't Resp. to Def.'s Suppl. Mem. in Supp. of Mot. to Dismiss for Vindictive Prosecution 3 (Apr. 18, 2018), ECF 76. But the campaign at issue in that case was for the office of president of the International Brotherhood of Teamsters. *Teamsters*, 119 F.3d at 211. The union campaign at issue was not a creature of FECA and, therefore, the question of who could waive that campaign committee's privilege was subject to different—and inapposite—analysis.

In short, Ms. Margolies did not have the authority to waive the privilege on behalf of Marjorie 2014. Thus, when the government interviewed Mr. Sandstrom about his communications on the basis of that purported waiver, the government impermissibly and intentionally exposed itself to privileged information.

II. Even if Ms. Margolies Effectively Waived the Privilege for the Campaign Committee, the Government's Interview of Mr. Sandstrom Went Far Beyond the Limited Waiver.

Even if the Court deemed that Ms. Margolies's purported waiver of the attorney-client privilege on behalf of the campaign committee was effective (and it should not), the government knowingly went well beyond the confines of that limited waiver. As confirmed by her Perkins Coie attorney, Ms. Margolies agreed only to a limited waiver of the attorney-client privilege "*solely* as relating to legal work performed by Karl J. Sandstrom, Senior Counsel, Perkins Coie

[5] The only individuals with the ability to waive and assert the campaign's privilege are Jennifer May, the campaign's treasurer, and Mr. Smukler.

LLP *in connection with an FEC filing* submitted by Karl Sandstrom on behalf of Ms. Margolies's campaign in 2014 for a seat in the U.S. House of Representatives." Ex. 12 (emphases added). The filing referred to in the waiver is the July 22, 2014 letter that Mr. Sandstrom sent to the FEC responding to the complaint filed by Daylin Leach. Ex. 8. This limited waiver was intended to waive privilege for only certain of the advice that Mr. Sandstrom gave, as Mr. Sandstrom was retained for a broader representation than simply to make that FEC submission. *See* Ex. 4 (retainer letter engaging Mr. Sandstrom "in connection with Campaign finance advice").

But the FBI 302 documenting the government's interview of Mr. Sandstrom reflects that the government and Mr. Sandstrom went well beyond discussing Mr. Sandstrom's "legal work ... in connection with" the July 22, 2014 submission to the FEC. Ex. 3. Indeed, as set forth above, the legal work "in connection with" the July 22, 2014 submission to the FEC did not commence until July 11, 2014 when Mr. Sandstrom executed the designation of counsel form. *See supra* pp. 2-4. (Counsel expects that Mr. Sandstrom's testimony will confirm this timing.). Yet the FBI 302 reflects detailed discussion of Mr. Sandstrom's legal advice to Mr. Smukler and the campaign committee from late April 2014 during the primary election and in May 2014 after Ms. Margolies lost the primary. *See* Ex. 3. As a result, the discussion touched on subjects clearly not "in connection with" the July 22, 2014 submission to the FEC.

Ms. Margolies's purported waiver did not authorize the government to obtain any privileged information from Mr. Sandstrom beyond his work on the July 22, 2014 submission to the FEC. Thus, she did not waive privilege over any communications prior to July 11, 2014 or over advice that was not connected to the July 22, 2014 submission to the FEC. Accordingly, the

government's interview of Mr. Sandstrom—which related to his legal work in April and May 2014 and to subjects not connected to the July 22, 2014 submission to the FEC—was improper.

III. The Government Recognized that Mr. Smukler Had A Personal Attorney-Client Relationship with Mr. Sandstrom and Mr. Smukler Never Waived His Own Privilege.

A. Mr. Smukler had a personal attorney-client relationship with Mr. Sandstrom.

Even were the Court to recognize Ms. Margolies' waiver as valid (which it should not), Ms. Margolies cannot waive Mr. Smukler's individual attorney-client privilege that protects his communications with Mr. Sandstrom. In addition to representing the campaign, Mr. Sandstrom also gave legal advice to Mr. Smukler in a personal capacity, including about Mr. Smukler's own businesses. Existing record evidence of this personal legal relationship is in both the FBI 302 reflecting Mr. Sandstrom's proffer to the government as well as the statements that Mr. Smukler made to FBI agents during the search of his house—not to mention the government's own recognition of that fact. At the hearing, Mr. Smukler will seek testimony from Mr. Sandstrom to further establish that this relationship existed. Mr. Smukler has not waived any attorney-client privilege that attached to those communications.

The government previously recognized that Mr. Sandstrom "represented Mr. Smukler," and, as a result, the government had "filtered the contents [of Mr. Smukler's laptop and hard drive] for any communications with Karl Sandstrom" so such privileged communications would not be reviewed by the investigative team. Ex. 10 at 3. Furthermore, that Mr. Smukler and Mr. Sandstrom had a personal attorney-client relationship was clearly asserted by Mr. Smukler during the search of his home and recognized by the FBI agents executing the warrant. *See, e.g.*, Ex. 14 ("[Agent:] Who told you that that certain amount of money needed to go back into the campaign? [Smukler:] My lawyer [Karl Sandstrom]. [Agent:] Ok, again, not getting into

privilege and what your lawyer told you . . . ."); Ex. 15 ([Smukler:] "Black and Blue was required to refund money based upon my counsel…based upon what my counsel told me."); Ex. 16 ([Smukler:] "Look let me just say this, I spoke to my counsel…I know you don't want to talk about this…spoke to my counsel. I told…I told him…I spoke to him prior to moving the 75 and I spoke to him between moving the 75 and the next one, right?"); Ex. 17 ("[Agent:] But calling him [Mr. Sandstrom] as a witness, he's not gonna say that. [Smukler:] I don't know what he's gonna say…he's probably gonna assert a privilege. [Agent:] You're hiding behind this lawyer. [Smukler:] I assume he'll assert a privilege. [Agent:]: It's your privilege.").[6]

B. Under *Bevill*, Mr. Smukler retains a claim of privilege over his communications with Mr. Sandstrom prior to the campaign committee's formal retention of Mr. Sandstrom.

The government likely will point to *In re Bevill, Bresler & Schulman Asset Management Corp*., as indicating that Mr. Smukler cannot assert a personal claim of attorney-client privilege as to communications with the campaign's counsel when the campaign (supposedly) has waived its privilege. 805 F.2d 120, 123 (3d Cir. 1986). But even assuming the campaign has properly waived, that case does not help the government as it would like.

In fact, *Bevill* actually makes clear that the government has impermissibly intruded on privileged communications between Mr. Sandstrom and Mr. Smukler. In *Bevill*, the district court agreed that individual officers retained a personal claim of privilege over their communications with the law firm that became corporate counsel which occurred before the law firm was formally engaged by the corporation. *Id.* at 123. The court held that, during that time

[6] Exhibits 14-17 are audio clips contained on a CD that was sent to the Court's chambers. Enclosed on that CD is also the full-length recording of the FBI Agents' interview of Mr. Smukler in his home.

period, "the corporate communications were indistinguishable from those that related to their personal legal problems." *Id.*[7]

The court then set forth a five-factor test to evaluate whether the individual officers had a personal claim of attorney-client privilege over communications with corporate counsel "*after* the counsel ha[d] been retained by the corporation." *Id.* at 124 (emphasis added); *see also United States v. Blumberg*, Crim. Action No. 14-458 (JLL), 2017 WL 1170851, at *4 (D.N.J. Mar. 27, 2017) ("The *Bevill* test applies once counsel has been retained to represent the company."); *Montgomery Acad. v. Kohn*, 82 F. Supp. 2d 312, 316 (D.N.J. 1999) ("The [*Bevill*] court found that communications to counsel by the officers prior to retention of the law firm by the corporation were privileged, but those made after retention by the corporation may not have been privileged once the corporation has waived the privilege."); *id.* ("If anything, [*Bevill*] supports Kohn's claim that statements she made to [the lawyer] prior to [the lawyer's] formal retention by the Board are privileged.").

Here, although the campaign committee announced that it was hiring Mr. Sandstrom on April 24, the campaign committee did not formally engage Mr. Sandstrom until the next day, on April 25, 2014. Thus, *Bevill* makes clear that, at the very least, the initial communications with Mr. Sandstrom on April 24, 2014—when both Mr. Smukler and the committee were prospective clients owed duties of confidentiality (and both were named in the Leach complaint as

[7] The timeline in *Bevill* was as follows. The law firm of Hellring Lindeman was "initially consulted on Monday, March 25, 1985." *Id.* at 122. "On that date and during the week of March 25, 1985," the law firm was consulted by individual officials of the corporation "on a confidential and privileged basis for the purpose of personal representation as well as corporate representation." *Id.* On "Sunday, March 31, 1985," the law firm was "retained" to represent the corporation and "and to consider further the matter of representation for the individuals and other corporations." *Id.* "Within a few days of March 31, 1985 [the law firm] advised each individual official to retain separate and individual counsel." *Id.* at 123. The corporation subsequently waived its privilege to allow the law firm to testify, and the individuals objected on grounds of attorney-client privilege.

respondents)—are privileged. Yet the FBI 302 reflects that the government interviewed Mr. Sandstrom in some detail about that the initial telephone call between Mr. Smukler and Mr. Sandstrom on April 24, 2014. Ex. 3.

C. Under any applicable legal test, Mr. Sandstrom represented Mr. Smukler in his personal capacity.

Throughout the time period when Mr. Sandstrom was advising Mr. Smukler, Mr. Smukler was wearing multiple hats. He was the general consultant for Marjorie 2014, but he was also the CEO of his various companies, including Black and Blue Media and InfoVoter Technologies. Although certain of Mr. Sandstrom's advice was directed to Marjorie 2014, Mr. Sandstrom also gave legal advice to Mr. Smukler, as CEO of those companies, about what those companies should do with regard to certain monies and payments. *See, e.g.*, Ex. 15 ([Smukler:] "Black and Blue was required to refund money based upon my counsel . . . based upon what my counsel told me."). Further, Mr. Smukler expects that Mr. Sandstrom's testimony will confirm that Mr. Sandstrom did not inform Mr. Smukler that he should retain individual counsel or give Mr. Smukler any *Upjohn* warning. In other words, Mr. Sandstrom gave advice to Mr. Smukler, as CEO of his companies, as to refund payments, without raising any conflict or other issues. Under such circumstances, it was reasonable for Mr. Smukler to believe that Mr. Sandstrom was representing his interests when Mr. Sandstrom gave advice about what his companies should do.

Given these facts, Mr. Sandstrom and Mr. Smukler had, at the very least, an implied attorney-client relationship. *See In re Jones & McClain, LLP*, 271 B.R. 473, 477-78 (W.D. Pa. 2001) (An implied attorney-client relationship is shown if: "(1) the alleged client sought legal advice and assistance from the alleged attorney; (2) the advice sought was within the professional competence of the alleged attorney; (3) the alleged attorney agreed, either expressly or by implication, to provide such advice; and (4) the alleged client reasonably believed that the

alleged attorney was representing the alleged client."); *United States v. Trombetta*, Crim. No. 13-227, 2015 WL 4406426, at *17 (W.D. Pa. July 20, 2015) (similar); *see also Home Care Indus., Inc. v. Murray*, 154 F. Supp. 2d 861, 868 (D.N.J. 2001) (finding an implied attorney-client relationship where law firm failed to advise a corporate officer that he might need to procure separate counsel); *Montgomery Acad.*, 82 F. Supp. 2d at 318 (holding that "[r]easonable belief is the proper legal standard for assessing whether an implied attorney-client relationship existed").

Furthermore, to the extent that the five-factor *Bevill* test applies,[8] under that test, Mr. Smukler has a personal claim of privilege over the communications between himself and Mr. Sandstrom that relate to legal advice given to Mr. Smukler in his individual capacity and in his capacity as CEO of his companies. *Bevill*, 805 F.2d at 125 (observing that nothing precludes corporate officers from asserting "their personal privilege as to matters not related to their role as officers of the corporation"); *see also Transcon. Refrigerated Lines, Inc. ex rel. Young v. New Prime, Inc.*, No. 1:13-CV-2163, 2014 WL 2471936, at *7 (M.D. Pa. June 3, 2014) (where law firm initially represented individual but later began to represent company's corporate interests, the individual may not invoke the attorney-client privilege over communications that impacted

[8] It is not clear that *Bevill* is the appropriate test for these circumstances given that Mr. Smukler was not just the general consultant for Marjorie 2014, but also the CEO of his separate companies and receiving advice as such. Furthermore, unlike in *Bevill*, Mr. Smukler was never advised to retain separate counsel. *Bevill*, 805 F.2d at 123 (noting that, after being retained by the corporation, the law firm "advised each individual official to retain separate and individual counsel"); *Home Care Indus.*, 154 F. Supp. 2d at 868 (finding an implied attorney-client relationship where law firm failed to advise corporate officer that he might need to procure separate counsel); *see also NewSpring Mezzanine Capital II, L.P. v. Hayes*, Civ. Action No. 14-1706, 2014 WL 6908058, at *2 (E.D. Pa. Dec. 9, 2014) (expressing uncertainty that the Third Circuit intended to require the application of *Bevill*'s five-part test in every case); *United States v. Balsiger*, No. 07-CR-57, 2013 WL 3490873, at *7 (E.D. Wis. July 10, 2013) (criticizing the *Bevill* test as "requiring clarity and precognition that may not be possible or within the individual's control" because "under *Bevill* the individual when approaching corporate counsel must make it 'clear' that he is seeking individual advice, when the individual and attorney's prior interactions or history may make an express, clear statement unnecessary" and "the individual's privilege under *Bevill* rests on the attorney's responsibility for thinking through conflict issues").

company's corporate interests but may assert privilege over communications involving personal interests).

The *Bevill* test requires a corporate officer seeking to assert a personal attorney-client privilege with respect to communications with corporate counsel to show that: (1) he approached counsel for the purpose of seeking legal advice; (2) when he approached counsel he made it clear that he was seeking legal advice in his individual rather than in his representative capacity; (3) corporate counsel saw fit to communicate with the officer in his individual capacity, knowing that a possible conflict could arise; (4) conversations between the officer and corporate counsel were confidential; and (5) the substance of his conversations with corporate counsel did not concern matters concerning the company or its general affairs. *Bevill*, 805 F.2d at 123.

The evidence already in the record demonstrates Mr. Smukler can satisfy this test or, at the very least, is entitled to an evidentiary hearing. Clearly, Mr. Smukler approached Mr. Sandstrom for the purpose of seeking legal advice. *See generally* Ex. 3. At the time that he approached Mr. Sandstrom, Daylin Leach had named the campaign and Mr. Smukler as respondents in the FEC Complaint. Ex. 2. And, later, when Mr. Sandstrom gave Mr. Smukler advice about what Mr. Smukler's companies should do, *see, e.g.*, Ex. 15, he was giving advice to Mr. Smukler in his individual capacity (or in his capacity as CEO of his companies)—and should have been aware that a possible conflict could arise, although he will testify that he never flagged that possibility to Mr. Smukler. The communications between Mr. Smukler and Mr. Sandstrom were confidential. And as Exhibit 15 illustrates and Mr. Sandstrom will also testify, their communications included conversations about whether Mr. Smukler and his companies should undertake certain payments and their liabilities and exposure—the communications were not only about the campaign's affairs. *See, e.g.*, *In re Grand Jury Procs.*, 156 F.3d 1038, 1041 (10th

Cir. 1998) (holding that "if the communication between a corporate officer and corporate counsel specifically focuses upon the *individual officer's* personal rights and liabilities, then the fifth prong of *In Matter of Bevill* can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company," noting that, for example, "a corporate officer's discussion with his corporation's counsel may still be protected by a personal, individual attorney-client privilege when the conversation specifically concerns the officer's personal liability for jail time based on conduct interrelated with corporate affairs"). Because Mr. Sandstrom's advice concerned Mr. Smukler and his companies' actions and liabilities, the *Bevill* test is satisfied and Mr. Smukler has a personal claim of privilege over communications between Mr. Smukler and Mr. Sandstrom. In its interview of Mr. Sandstrom, the government trampled that privilege, interviewing Mr. Sandstrom about legal advice that he gave to Mr. Smukler in his personal capacity.

D. Mr. Smukler Has Made a Colorable Claim of Government Misconduct and Is Entitled to an Evidentiary Hearing

Mr. Smukler has made a "colorable claim" that the government's intrusion into privileged communications violated his rights and has raised an issue of fact as to: (1) the government's awareness of an ongoing personal attorney-client relationship; (2) deliberate intrusion by the government into that relationship; and (3) actual and substantial prejudice to the defendant. *Voigt*, 89 F.3d at 1067; *Nieves*, 1997 WL 447992, at * 5. (Of course, even where the intrusion does not rise to the level of a constitutional violation, a court may still fashion a remedy for the prosecutorial misconduct. *Nieves*, 1997 WL 447992, at * 6.).

First, the government was indisputably aware of the ongoing attorney-client relationship between Mr. Sandstrom and both Marjorie 2014 and Mr. Smukler. There is ample evidence of this awareness. The FBI Agents searching Mr. Smukler's house clearly were aware of Mr.

Sandstrom's representation of Mr. Smukler. *See* Exs. 14-17. The government itself acknowledged that attorney-client relationship in its January 12, 2018 letter. *See* Ex. 10 at 3. Lastly, the government knew to seek a waiver of the attorney-client privilege (even though they did so improperly). Thus, there is no question that the government was aware that communications between Mr. Sandstrom and Mr. Smukler were privileged—and that both Mr. Smukler and the campaign were privilege-holders. But, to the extent that the Court believes that additional evidence is necessary on this point, Mr. Smukler will seek testimony from Mr. Sandstrom, as well as Agents DiMario, Huff, and Bezak who were involved in questioning Mr. Smukler at his home, including discussions of the issue of privilege.

Second, the government deliberately intruded into the relationship—it obtained an invalid waiver of privilege from Ms. Margolies, *see* Ex. 12,[9] exceeded the scope of that clearly delineated limited waiver, and never obtained any waiver from Mr. Smukler, despite its previous recognition that Mr. Sandstrom represented Mr. Smukler. To the extent that the Court believes that the evidence in the record is insufficient on this point, Mr. Smukler requests that he be permitted to call the FBI Agents Jonathan Szeliga and William Bezak who interviewed Mr. Sandstrom to elicit testimony on their awareness of the privileged nature of Mr. Smukler's communications with Mr. Sandstrom, the scope of the limited waiver, and the deliberate nature of the intrusion into the privilege.

Third, the prejudice to Mr. Smukler is substantial and actual. Indeed, it may have caused his indictment on Counts Six through Eleven (the counts that charge Mr. Smukler with offenses arising from his involvement with Marjorie 2014). The government presented evidence derived

[9] This purported waiver may well have been induced with the promise of immunity. Ms. Margolies gave her purported limited waiver on January 30, 2018. Ex. 12. Approximately six weeks later, the government offered her immunity from prosecution so long as she testified before the grand jury (which she did on March 20, 2018) and cooperated in providing information to the government. Ex. 13.

from its improper intrusion into privileged communications to the grand jury: FBI Agent Szeliga testified to the grand jury about what Mr. Sandstrom told the government about his communications with Mr. Smukler. Ex. 18 (Jonathan Szeliga Testimony to Grand Jury (Mar. 20, 2018)) (filed under seal); *see also* Ex. 19 (Jennifer May Testimony to Grand Jury (Feb. 27, 2018)) (testifying about Mr. Sandstrom's legal advice based on the (mis)understanding that the campaign had already waived privilege) (filed under seal). The grand jury indicted Mr. Smukler on March 20, 2018, the same day that Agent Szeliga testified about Mr. Sandstrom's privileged communications. Mr. Smukler clearly suffered actual and substantial prejudice as a result of the grand jury being informed about privileged communications with Mr. Sandstrom. *Nieves*, 1997 WL 447992, at *6 ("A criminal Indictment surely constitutes actual and substantial prejudice." (internal quotation marks omitted)).

Accordingly, as a result of the government's misconduct, Mr. Smukler is entitled to relief or, at the least, an evidentiary hearing. At that evidentiary hearing, the Court should hear evidence on the government's misconduct and determine the appropriate remedy. Mr. Smukler submits that such remedy should include the suppression of any tainted evidence, *see, e.g.*, *United States v. Haynes*, 216 F.3d 789, 796-97 (9th Cir. 2000) (affirming district court's decision to suppress tainted evidence obtained from the intrusion into an attorney-client relationship), and the disqualification of the prosecutorial and investigative team. *See, e.g.*, *Shillinger v. Haworth*, 70 F.3d 1132, 1143 (10th Cir. 1995); *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992) (removing lead prosecutor from case), *rev'd in part*, 29 F.3d 754 (1st Cir. 1994); *see also United States v. Morrison*, 449 U.S. 361, 365 (1981) (holding that, in the face of a constitutional violation, the proper remedy is "to identify and then neutralize the taint by tailoring relief

appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial" and "deny[] the prosecution the fruits of its transgression").

E. The Government Cannot Save Its Improper Intrusion into Privileged Materials by Now Claiming that the Crime-Fraud Exception Applies

Now that Mr. Smukler has challenged the government's intrusion into privileged communications, the government has belatedly claimed that the crime-fraud exception applies and excuses its conduct. Ex. 20 at 1 (Letter from Eric L. Gibson & Richard Pilger, U.S. Dep't of Justice, to Jon R. Fetterolf, Esq. (April 25, 2018)) ("Moreover, even if the privilege waiver in this case was somehow insufficient (and it is not), your clients' communications with the campaign lawyer would be subject to the crime-fraud exception because the evidence clearly demonstrates that Mr. Smuckler [sic] used those communications to further the crimes with which he is charged in the superseding indictment.").

That is not how the crime-fraud exception works. Before the government may review privileged material via the crime-fraud exception, the government must make a showing to the court that the exception applies and receive the court's permission to review the material. Indeed, the case law requires that a factual showing be made before even the court may review the privileged material *in camera*. *See United States v. Zolin*, 491 U.S. 554, 572 (1989) (holding a showing of a factual basis for crime-fraud should precede any *in camera* review to determine whether the crime-fraud exception applies); *see also In re Grand Jury Investigation*, 445 F.3d 266, 274 (3d Cir. 2006) (holding that the government has the burden to make a prima facie showing to the court that the crime-fraud exception applies); *In re Grand Jury Investigation*, 810 F.3d 1110, 1113–14 (9th Cir. 2016) (holding that it was error for the district court not to review documents *in camera* before deciding whether they should be produced under the crime-fraud exception); *In re Antitrust Grand Jury*, 805 F.2d 155, 168-69 (6th Cir. 1986) (holding that

district court's determination that documents should be produced pursuant to the crime-fraud exception without reviewing them *in camera* was plain error). Put simply, the Court must authorize the use of the crime-fraud exception based on a factual showing made by the government; the government may not review privileged material and then, *after* its review, use the crime-fraud exception as a belated excuse for its intrusion into privileged communications.

CONCLUSION

For the foregoing reasons, Mr. Smukler requests that the Court hold an evidentiary hearing regarding the government's improper intrusion into privileged information and determine the proper remedy to neutralize the taint resulting from the government's misconduct, including but not limited to suppressing any evidence that derived from the government's interview of Mr. Sandstrom and disqualifying any members of the prosecution and investigative teams who were exposed to privileged information.

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Respectfully submitted,

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