

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

WILLIAM BASKERVILLE : Civ. No. 13-5881 (JAP)  
 :  
 v. : Crim. No. 03-836 (JAP)  
 :  
 : Hon. Joel A. Pisano  
 :  
 UNITED STATES OF AMERICA : NOTICE OF MOTION

PLEASE TAKE NOTICE that on a date to be determined by the Court, the United States by and through its attorney Paul J. Fishman, United States Attorney (Robert Frazer, Assistant United States Attorneys, appearing) will move before the Honorable Joel A. Pisano, United States District Judge, Newark, New Jersey, for an Order finding a limited waiver of the attorney-client privilege and compelling disclosure of certain attorney-client communications. The United States will rely upon the letter brief and form of order submitted herewith.

Respectfully submitted,

PAUL J. FISHMAN  
United States Attorney



By: ROBERT FRAZER  
Assistant U.S. Attorney



**U.S. Department of Justice**  
*United States Attorney*  
*District of New Jersey*

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February 3, 2014

Hon. Joel A. Pisano  
United States District Judge  
Clarkson S. Fisher Federal Building and U.S. Courthouse  
402 East State Street  
Trenton, New Jersey 08608

**Re: William Baskerville v. United States**  
**Civ. No. 13-5881 (JAP)**  
**Crim. No. 03-836 (JAP)**

Dear Judge Pisano:

The Government is in receipt of Petitioner's motion pursuant to 28 U.S.C. § 2255, in the above-referenced matter. Petitioner alleges, *inter alia*, that he received ineffective assistance of counsel both at the trial stage and the appellate stage. Accordingly, in order to prepare the Government's response to the pending motion, the Government will have to interview defense counsel to discuss matters that, in the absence of Petitioner's claims, may otherwise invoke attorney-client privileged information.

In an abundance of caution, the government seeks permission from the Court to interview petitioner's trial counsel, Carl J. Herman, Esq. and Kenneth W. Kayser, Esq., and appellate counsel, Mark A. Berman, for the purpose of gathering information pertaining to their former client's ineffective assistance claims. As the Court is aware, the Petitioner's allegations in this regard typically permit trial defense counsel to voluntarily disclose confidential client information reasonably necessary to refute the claim.<sup>1</sup> The enclosed order would permit the

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<sup>1</sup> Numerous federal courts of appeal have held that a habeas petitioner claiming ineffective assistance of counsel impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim. *See, e.g., United States v. Pinson*, 584 F.3d 972, 977 (10th Cir. 2009) *cert. denied* 130 S.Ct. 1548 (2010) ("When a habeas petitioner claims that he received ineffective assistance of counsel, he puts communications between himself and his attorney directly in issue, and thus by implication waives the attorney-client privilege with respect to those communications."); *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005) ("The implied waiver in habeas proceedings [is] the result of petitioner's assertion of his own counsel's ineffectiveness."); *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (en banc) ("It has long been the rule in the federal courts that, where a habeas petitioner raises a claim of ineffective assistance of counsel, he waives the attorney-client privilege as to all communications with his allegedly ineffective lawyer."); *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001) (holding that, by bringing an ineffective-assistance claim, § 2255 movant waives attorney-client privilege with respect to conversations that "bore on his attorney's strategic choices."); *Tasby v. United States*, 504 F.2d 332, 336 (8th Cir. 1974)("[Attorney-client] privilege is waived when a client attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that

Government to adduce this information from counsel, and enable the Government to prepare an adequate response to the Petitioner's pending motion.<sup>2</sup>

Accordingly, I have enclosed a proposed Order for the Court's review. If the proposed form meets with Your Honor's approval, kindly execute and have your deputy file the Order with the Clerk's Office.

Thank you for your consideration of this request.

Respectfully Submitted,

PAUL J. FISHMAN  
United States Attorney



BY: ROBERT L. FRAZER  
Assistant U.S. Attorney

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raises the specter of ineffectiveness or incompetence."); Laughner v. United States, 373 F.2d 326, 327 (5th Cir. 1967) ("[W]here, as here, the client alleges a breach of duty to him by the attorney, we have not the slightest scruple about deciding that he thereby waives the privilege as to all communications relevant to that issue.").

<sup>2</sup> Under the Model Rules of Professional Conduct, a lawyer may reveal information reasonably necessary to respond to allegations concerning the lawyer's representation of the client. Comment 5 to Model Rule 1.6 defines confidential information to include "not . . . only matters communicated in confidence by the client but also to "all information relating to the representation, whatever its source." *See*, MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt.[3] (2009). Hence, information relevant to an ineffective assistance of counsel defense would be covered by Rule 1.6. The self-defense exception to the duty of confidentiality permits a lawyer to disclose otherwise confidential client information to the extent he reasonably believes is necessary to "respond to allegations in any proceeding concerning the lawyer's representation of the client[.]" MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2009). Accordingly, defense counsel would be permitted to disclose only as much information as reasonably necessary to defend against the allegations. *See*, MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 14 (2009) (The exceptions to the confidentiality rule "permit[] disclosure only to the extent the lawyer reasonably believes necessary to accomplish one of the purposes specified . . . . [A] disclosure adverse to the client's interests should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."); Nat'l Mortgage Equity Corp. v. Mortgage Pool Certificates Sec. Litig., 120 F.R.D. 687, 692 (C.D. Cal. 1988) ("[D]isclosure [of confidential information] should be no greater than the lawyer reasonably believes is necessary to vindicate innocence."); Adelman v. Adelman, 561 So. 2d 671, 673 (Fla. Dist. Ct. App. 1990) (attorney only may reveal confidential information necessary to defend himself in a malpractice action); Fellows v. Keating, No. 3913, 1988 WL 32968, at \* 2 (Ohio Ct. App. Mar. 11, 1988) (attorney's disclosure of confidential information was not sufficiently necessary to defend against accusation that attorney failed to deliver certain documents to client).

CC: William Baskerville, *pro se*  
Carl J. Herman, Esq.  
Kenneth W. Kayser, Esq.  
Mark A. Berman, Esq.

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

WILLIAM BASKERVILLE	:	Civ. No. 13-5881 (JAP)
	:	Crim. No. 03-836 (JAP)
v.	:	
	:	<u>ORDER</u>
UNITED STATES OF AMERICA	:	

This matter having been opened to the Court by the United States (Paul J. Fishman, United States Attorney, by Robert Frazer, Assistant U.S. Attorney, appearing), upon notice to Petitioner William Baskerville, *pro se*, for an Order granting the United States permission to interview Petitioner's former defense counsel, Carl J. Herman, Esq., Kenneth W. Kayser, Esq., and Mark A. Berman, Esq. in connection with the United States's preparation of its response to Petitioner's pending motion to vacate, set aside, or correct his sentence pursuant to Title 28, United States Code, Section 2255, which alleges, *inter alia*, that petitioner received ineffective assistance of counsel both at the trial of stage and at the appeal stage, and it appearing that the United States's interview of trial and appellate counsel concerning any discussions they may have had with Petitioner regarding matters raised in the 2255 motion is necessary to the preparation of the United States's response to the pending motion, and for good and sufficient cause shown,

IT IS THE FINDING OF THIS COURT that:

1. Petitioner's claim of ineffective assistance of counsel impliedly waives the attorney-client privilege with respect to communications with petitioner's attorneys necessary to prove or disprove Petitioner's allegations. Accordingly, trial counsel for Petitioner, Mr. Herman and Mr.

Kayser, and appellate counsel for Petitioner, Mr. Berman, shall each submit to an interview by the United States's counsel for the purpose of providing all reasonably necessary information concerning Petitioner's claims of ineffective assistance of counsel.

2. The United States's interview of trial and appellate counsel is necessary to facilitate its response to, as well as this Court's consideration of, Petitioner's pending motion pursuant to 28 U.S.C. § 2255.

WHEREFORE, it is on this \_\_\_ day of \_\_\_\_\_ 2014,

ORDERED that the United States may interview Petitioner's former defense counsel, Carl J. Herman, Esq., Kenneth W. Kayser, Esq., and Mark A. Berman, Esq., who shall provide all reasonably necessary information for the United States to respond to the ineffective assistance of counsel allegations raised by their former client, Petitioner William Baskerville.

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HON. JOEL A. PISANO  
UNITED STATES DISTRICT JUDGE