UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
- v -	:	02 Cr. 395 (JGK)
AHMED ABDEL SATTAR, a/k/a "Abu Omar," a/k/a "Dr. Ahmed," YASSIR AL-SIRRI, a/k/a "Abu Ammar," LYNNE STEWART, and MOHAMMED YOUSRY,	:	
Defendants.	:	

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE INDICTMENT

PRELIMINARY STATEMENT

The Government respectfully submits this memorandum of law in opposition to defendant Ahmed Abdel Sattar's motion, joined by defendants Lynne Stewart and Mohammed Yousry, to dismiss the Indictment on the ground that they are being deprived of their constitutional right to effective assistance of counsel. In particular, Sattar argues that he is being deprived of open and free communication with his attorney because of the Government's unwillingness to reveal whether his conversations with his attorney at the Metropolitan Correctional Center ("MCC") are the subject of ongoing electronic surveillance. In the alternative, Sattar seeks to be released on bail to ensure that his communications with counsel will not be monitored. Defendants Stewart and Yousry have joined in that motion on the ground that the Government's refusal to provide these assurances effectively precludes a joint defense

agreement, which they claim is necessary to an effective defense.

As discussed below, the joint motion should be denied in its entirety. The defendants are seeking special assurances relating to the absence of court-authorized monitoring that no other criminal defendants (or members of the public at large) are ever provided. There is absolutely no statutory or case authority that supports the defendants' argument that they are entitled to notice of ongoing court-authorized electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 ("Title III") or the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-11 ("FISA"). Such electronic surveillance, in order to be effective, must be covert, and both Title III and FISA make clear that interceptees are not entitled to notice during the pendency of monitoring. Moreover, contrary to Sattar's contention, the statutory framework creates no exemption for communications between an attorney and a client which, based upon an ex parte showing by the Government under Title III or FISA, can be the proper subject of monitoring pursuant to court order. A criminal defendant has no Sixth Amendment right to use the attorney-client relationship as a shield to facilitate ongoing criminal activities and, thus, court-authorized electronic surveillance of attorney-client conversations to detect such criminal activity (or activities under FISA jurisdiction) is constitutionally permissible and (if it is occurring) should not be rendered useless by requiring notice to the defendants.

BACKGROUND

On April 8, 2002, a Grand Jury sitting in the Southern District of New York charged Sattar and co-defendants Yassir Al-Sirri, Lynne Stewart, and Mohammed Yousry in a five-count indictment (the "Indictment"). Counts One and Two charge all four defendants with conspiring to provide, and providing, material support and resources to a foreign terrorist organization - namely, the Islamic Group ("IG") - in violation of Title 18, United States Code, Section 2339B. Count Three charges Al-Sirri and Sattar with soliciting crimes of violence, in violation of Title 18, United States Code, Section 373. Count Four charges Sattar, Stewart, and Yousry with conspiring to defraud the United States, in violation of Title 18, United States Code, Section 371. Count Five charges Stewart with making false statements, in violation of Title 18, United States Code, Section 1001.

The Indictment alleges, among other things, that Sattar, through his frequent telephonic contact with IG leaders around the world, operated as a communications center for IG. It is further alleged that, in this capacity, Sattar provided material support and resources to IG by coordinating the communication and dissemination of information relating to IG activities. In particular, the Indictment alleges, among other things, that Sattar relayed messages between IG leaders abroad and the imprisoned spiritual leader of IG, Sheikh Abdel Rahman, through visits and telephone calls by Sheikh Abdel Rahman's interpreter (defendant Yousry) and attorney (defendant Stewart).

On April 9, 2002, defendants Sattar, Stewart, and Yousry were arrested. At the arraignment, the Government represented to the Court that the case was based, in part, on evidence obtained pursuant to court-authorized FISA electronic surveillance, including intercepts from Sattar's telephones and certain prison visits between defendant Stewart and Sheikh Abdel Rahman.

On April 24, 2002, at a pre-trial conference, counsel for Sattar requested assurances in court from the Government that conversations between defendant and his counsel at the MCC would not be the subject of monitoring by the Government. The Government indicated that it would not provide such assurances and provided a letter to counsel, and the Court, summarizing the Government's position on the issue. The Court directed the parties to try to reach a resolution of this issue.

On April 25, 2002, Stewart sent a letter to the Government seeking even broader disclosure from the Government with respect to Stewart, including the following: (1) whether there is ongoing court-authorized monitoring under FISA, Title III, or any other basis of the telephones in Ms. Stewart's office; (2) whether there is any such monitoring on the office telephone of Stewart's attorney, Susan Tipograph, Esq.; (3) whether there is any monitoring at the law offices located at 351 Broadway, 3rd Floor, New York, New York, which includes Ms. Stewart's offices and offices of other attorneys; and (4) whether Ms. Stewart's visits with any of her incarcerated clients, both federal and state, are being recorded, videotaped, or monitored. (A copy of the letter is

annexed as Exhibit A to Stewart's Memorandum.)

The Government subsequently advised counsel for Sattar and Stewart that the Government's position remained the same - it would not be able to provide any assurances as to the existence or absence of ongoing court-authorized monitoring.

On June 3, 2002, Sattar filed a motion to dismiss the Indictment because of the Government's failure to provide the requested assurances or, in the alternative, requested that he be released on bail. On June 14, 2002, defendant Stewart filed papers in support of Sattar's motion. In particular, Stewart seeks to have the Court impose the following relief: (1) the Government should be ordered to disclose the existence of any monitoring to the Court; (2) the Court should appoint a special master to receive the fruits of any such monitoring, or should itself receive that material; (3) the Court should then turn over this information to the defense so that it can litigate taint issues; and (4) the Court should enter an order forbidding the Government from any and all interference with the attorney-client relationship. Stewart further argues that, if the Government refuses to comply with these directives, or has failed to do so in the past, the Indictment should be dismissed. In support of this position, Stewart argues that the absence of the requested assurances makes a joint defense agreement impossible.

On June 14, 2002, Yousry submitted a letter to the Court joining the motion to dismiss the Indictment and claiming, like Stewart, that the Government's refusal to give such assurances

to Sattar effectively precludes co-defendant meetings or joint defense agreements, thereby depriving Yousry of effective assistance of counsel.

ARGUMENT

Sattar argues that the Government's unwillingness to provide him with special assurances that he is not the subject of monitoring "denies [him] his right to free and unfettered communication with counsel." (Sattar Brief, at 6). Sattar adds that "without this right the Government has assured Mr. Sattar that he will be deprived of his constitutional right to effective assistance of counsel." (Id.). Defendants Stewart and Yousry make similar claims in their respective submissions.

As set forth below, the joint motion is without merit. First, both Title III and FISA clearly provide that court-authorized monitoring pursuant to those statutes is to be conducted without notice to the interceptees during the period of monitoring. Second, consistent with this statutory framework, courts faced with similar motions have rejected attempts by individuals to compel disclosure of ongoing monitoring based upon a claim of potential interference with the attorney-client relationship. Third, the generic Sixth Amendment cases cited by defendants Sattar and Stewart are inapposite. A criminal defendant has no Sixth Amendment right to use the attorney-client relationship as a shield to facilitate ongoing criminal activity. Therefore, if the Government is able to make such a showing and obtain court authorization to monitor conversations between a

defendant and his attorney (or make the requisite showing under FISA), the Government is entitled to conduct such monitoring without notice to that defendant even during the pendency of a criminal case. Fourth, there are procedural safeguards in place, assuming such monitoring were taking place, to ensure that a defendant is not deprived of effective assistance of counsel. Finally, no sanctions against the Government, including the drastic sanction of dismissal of the Indictment, are appropriate based upon the sheer speculation that the Government could use this lawful tool at some future time in an improper manner.

I. BOTH TITLE III AND FISA PROVIDE FOR COURT-AUTHORIZED MONITORING WITHOUT NOTICE TO THE INTERCEPTEES DURING THE MONITORING PERIOD

While the defendants argue that the Government has some obligation to disclose ongoing electronic surveillance, there is absolutely no provision in Title III or FISA suggesting that such an obligation exists under any circumstances. In fact, as discussed below, the statutory framework established pursuant to Title III and FISA makes abundantly clear that, without exception, such court-authorized monitoring is to be covert.

Pursuant to Title III, a judge can authorize the Government to intercept communications of an individual if the judge determines that the statutory requirements, including the existence of probable cause, have been met. See 18 U.S.C. § 2518(3). The effective use of this important law enforcement tool is contingent upon the Government's ability to monitor communications pursuant to court authorization without notice to

any of the targets of the investigation. Accordingly, Title III contains numerous safeguards to ensure that the Government can gather such interceptions in a covert manner without notice to any of the participants. First, the judge is permitted to enter the authorization order ex parte. Id. Second, the judge is required to seal the applications, orders, and contents of the interception. See 18 U.S.C. §§ 2518(8)(a) and (b). Third, there are no provisions under which the Government must provide notice during the pendency of monitoring. Moreover, while notice to interceptees is generally required no later than 90 days after the termination of the period of the authorization order or extensions thereof, the judge can postpone such notification upon an ex parte showing of good cause. See 18 U.S.C. § 2518(8)(d). Finally, the statute criminalizes unauthorized disclosure of such communications. See 18 U.S.C. § 2511(1).

Similar safeguards exist in the FISA statutory framework. FISA established a statutory scheme by which the Executive Branch can conduct electronic surveillance for foreign intelligence purposes. An application for authority to conduct such surveillance, other than under some extremely limited exceptions, must be submitted to the United States Foreign Intelligence Surveillance Court in writing upon oath or affirmation by a Federal officer.[1] FISA surveillance must also be approved by the Attorney General of the United States based upon a finding that it satisfies

[1] Under extremely narrow circumstances, the Attorney General can authorize FISA surveillance without a court order. See 50 U.S.C. §§ 1802, 1805(e).

the criteria and requirements of FISA, including that the target is a foreign power or an agent of a foreign power and the facility for which monitoring is sought is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C. § 1804(a). Upon such a filing, the judge hearing the case can authorize electronic surveillance if the judge makes certain specified findings, including that there is probable cause to believe that the target of the electronic surveillance is a foreign power or agent of a foreign power. 50 U.S.C. §§ 1805(a)(3)(A), (5).

Like Title III, FISA contains specific provisions designed to ensure that the electronic surveillance will be covert. First, FISA requires that the court order authorizing the electronic surveillance be entered ex parte. 50 U.S.C. § 1805(a). Second, there is no provision requiring notice under any circumstances to a target or an intercepted party during the period of interception. In fact, unlike Title III, even after the period of authorization has expired, notification is required to interceptees only under very narrow circumstances. 50 U.S.C. § 1806; see generally United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982) (with respect to FISA, "Congress recognized the need for the Executive to engage in and employ the fruits of clandestine surveillance without being constantly hamstrung by disclosure requirements").

While the defendants seek to create a special, non-statutory exemption for attorney-client communications, no such

exemption exists anywhere in the applicable statutes or case law. In United States v. Gotti, 771 F. Supp. 535 (E.D.N.Y. 1991), for example, the Court rejected the claim that a more stringent standard be applied, in the Title III context, to the Government's efforts to obtain authorization to intercept attorney-client conversations:

> This is surely not the first case in which attorney-client communications have been electronically intercepted nor, I am saddened to believe it will be the last. . . . In addition to the countless cases in which conversations between attorneys and clients have been intercepted and challenged unsuccessfully, it is worth noting that the statutes authorizing electronic surveillance which were enacted with a sensitive concern for constitutional rights make no special provision for privileged communications beyond requiring that the interception be minimized. See 18 U.S.C. § 2518(5). The absence of such a provision may bespeak a recognition by Congress that doctors and lawyers have been known to commit crimes.

771 F. Supp. at 543-44 (quotations and citations omitted).[2]

While defendant Stewart cites 18 U.S.C. § 3504(a) to support her position that disclosure is required, such reliance is clearly misplaced. Section 3504 requires that, upon a claim by a party in a proceeding that evidence is inadmissible because it is the primary product of an "unlawful act," the opponent is required to affirm or deny the occurrence of the alleged unlawful act. Section 3504(a), however, is inapplicable to the instant motion for

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[2] In this District, courts have previously authorized Title III interceptions of attorneys upon a proper showing by the Government. See, e.g., United States v. Stiso, 97 Cr. 812 (DC) (Title III authorization to intercept conversations in a law office and to monitor an attorney's telephones); United States v. Defede, 98 Cr. 373 (LAK) (Title III authorization to intercept conversations in a Garment Center law firm).

three principal reasons. First, Section 3504(a) is triggered by the proposed use of evidence in a proceeding. In the instant case, the Government has not sought to use evidence of any purported post-arrest electronic surveillance in a proceeding. Second, Section 3504(a) only requires the Government under a proper showing to affirm or deny the existence of unlawful electronic surveillance, whereas defendants in the instant case seek disclosure of all ongoing electronic surveillance, whether lawful or unlawful. Third, Section 3504(a) deals with evidence that has already been gathered and provides no right to notice of ongoing or future evidence-gathering by the Government. Thus, Section 3504(a) simply provides no support for the relief being sought in this case.

Accordingly, the plain language of both Title III and FISA clearly permit the Government, without exception, to conduct court-authorized monitoring of an individual without notice to that individual during the period of monitoring. Defendants provide no statutory or other basis for concluding that, now that they are criminal defendants, they are entitled to notice under such statutes and are thereby effectively exempt from covert monitoring.

II. COURTS HAVE REJECTED SIMILAR REQUESTS FOR DISCLOSURE OF ONGOING ELECTRONIC SURVEILLANCE

As discussed below, the Government is aware of two decisions, including one unreported decision in this District, where courts have considered similar motions for disclosure of ongoing electronic surveillance. In both cases, despite claims that such surveillance would interfere with an ongoing attorney-

client relationship, the motions were rejected.

In United States v. Joseph Defede, et al., 98 Cr. 373 (LAK), Judge Kaplan was confronted with a similar motion by an attorney charged as a defendant in a broad racketeering indictment. The indictment in Defede charged several defendants, including the Acting Boss of the Luchese Organized Crime Family, with numerous offenses relating to the extortion of Garment Center companies. Part of the proof in Defede was based upon court-authorized electronic surveillance under Title III, inside offices of a Manhattan law firm, that had been conducted over a period of several months in 1996. An attorney in that law firm was charged as one of the defendants in the indictment and, following his arrest, sought to have the Government voluntarily disclose whether it was continuing to monitor conversations within the law firm. (A copy of that request is annexed hereto as Exhibit A.) One of the grounds relied upon by the defense in seeking such a representation from the Government was that defense counsel planned to meet with his client in the law firm office to review discovery and discuss the ongoing criminal case and that, if monitoring was being utilized, the Government would be privy to defense preparation. After the Government refused to voluntarily disclose this information, the defendant made a motion to the Court seeking an order compelling the Government to make such a disclosure. In an Order, dated September 23, 1998, Judge Kaplan denied the motion and held, without further elaboration, "[t]here is no basis for ordering disclosure of any undisclosed evidence of electronic

surveillance or continuing electronic surveillance of this defendant, his law office, or the garment center in general."[3] (A copy of the Order is annexed hereto as Exhibit B.)

In ACLU Foundation of Southern California v. Barr, 952 F.2d 457 (D.C. Cir. 1992), the D.C. Circuit rejected a similar motion under FISA. In ACLU Foundation, nonresident aliens brought an action seeking declaratory and injunctive relief on the basis of alleged illegal surveillance under FISA. These aliens were alleged to belong to an international terrorist group known as the Popular Front for the Liberation of Palestine and had been placed in deportation proceedings. Id. at 460. It was revealed during the deportation proceedings that several aliens had been the subject of electronic surveillance pursuant to FISA. In their complaint, the plaintiffs sought, among other things, an injunction prohibiting alleged ongoing electronic surveillance "on information and belief." Id. One of the grounds which formed the basis for the complaint was an allegation that attorney-client conversations were being intercepted and, thus, violated FISA's "minimization" requirements and the due process clause of the Fifth Amendment. Id. at 467.

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[3] While Stewart argues that the Government "seems to surround itself with the mystique of national security" (Stewart Motion, at 2), that claim has no support in the record. The Government has not urged a national security exception to the defendants' disclosure request; rather, as illustrated by the Government's opposition to the same request in Defede four years ago, the Government's position is that this type of disclosure is simply not appropriate regardless of the subject matter of the potential ongoing criminal or intelligence investigation.

The D.C. Circuit noted that one of the issues raised by the aliens' complaint was "whether FISA entitles the government to refuse to reveal ongoing foreign intelligence operations." Id. Addressing that issue, the Court held that "[t]he government makes the point, with which we agree, that under FISA it has no duty to reveal ongoing foreign intelligence surveillance." Id. at 469 n.13. The Court reasoned that, "[i]f the government is forced to admit or deny such allegations [regarding ongoing foreign security surveillance], in an answer to the complaint or otherwise, it will have disclosed sensitive information that may compromise critical foreign intelligence activities." Id. at 468.

Moreover, the Court rejected the claim by the aliens, similar to the argument asserted by Sattar, that such potential ongoing electronic surveillance, by its very nature, violated their constitutional rights:

> Aliens like others are entitled to due process but the government's overhearing of attorney-client conversations relating to the deportation proceedings does not in itself violate the Fifth Amendment any more than the government's overhearing of attorney-client conversations relating to the defense of a criminal prosecution in itself violates the Sixth and Fourteenth Amendments. The Supreme Court in Weatherford v. Bursey, 429 U.S. 545, 97 S. Ct. 837, 51 L.Ed.2d 30 (1977), held that the constitutional right to counsel in a criminal case is violated only if the intercepted communications are somehow used against the defendant, that is, only if the defendant has been prejudiced in connection with the underlying proceeding.

Id. at 472 (emphasis in original).

Accordingly, consistent with the unambiguous statutory framework and the decisions in Defede and ACLU Foundation, the Court should find that the Government cannot be compelled to

disclose the existence or non-existence of ongoing electronic surveillance and the Government's failure to do so does not, by itself, violate prospectively Sattar's Sixth Amendment right to effective assistance of counsel.

III. The Generic Sixth Amendment Cases Cited by the Defendants Are Inapposite

Given the complete absence of any statutory or case authority to support his unprecedented claim for special assurances under Title III and FISA, Sattar relies upon cases supporting the general proposition that private communications between an attorney and a criminal defendant are essential to effective assistance of counsel. (Sattar Brief, at 2-3). Sattar then argues that, if the Government refuses to assure him of the absence of monitoring, the Indictment should be dismissed because the lack of private communications will deprive him of effective assistance of counsel.

Sattar's reliance on such case authority to support a dismissal of the Indictment is simply misplaced. It is axiomatic that communications between an attorney and his or her client are not entitled to absolute protection; rather, if an individual is using the attorney-client relationship to facilitate criminal or fraudulent activity, the Government is entitled to pierce that relationship. In particular, "it is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct." In re

Grand Jury Subpoena Duces Tecum Dated September 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984) (citations omitted). As the Supreme Court has explained:

> The attorney-client privilege is not without its costs. Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection - the centrality of open client and attorney communication to the proper functioning of our adversary system of justice - ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the seal of secrecy between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime.

United States v. Zolin, 491 U.S. 554, 562-63 (1989) (quotations and citations omitted) (emphasis in original); see also United States v. Cintolo, 818 F.2d 980, 996 (1st Cir. 1987) ("[W]e emphatically reject the notion that a law degree, like some sorcerer's amulet, can ward off the rigors of the criminal law. No spells of this sort are cast by the acceptance of a defendant's retainer.").

These cases clearly demonstrate that the Government is entitled not only to investigate the improper use of the attorney-client relationship to further ongoing criminal activity, but also to utilize legal means, including court-authorized electronic surveillance of criminal communications between an attorney and his client, to gather evidence of such crimes when they exist. In fact, while citing a series of Sixth Amendment cases in other contexts, Sattar nonetheless recognized that exceptions to this alleged absolute right to unfettered attorney-client conversations

do exist. See, e.g., Sattar Brief, at 3 ("In certain circumstances the courts have held that a defendant's right of uninterrupted consultation with his attorney may be restrained."); Sattar Brief, at 3-4 ("Unless there exists some legitimate law enforcement purpose, any denial of a defendant's right to openly communicate with counsel. . . constitutes a per se violation of the defendant's constitutional rights.") (emphasis added).

If the Government were compelled to disclose to Sattar whether the Government has obtained court-authorization under Title III or FISA to monitor his conversations in jail with his attorney, Sattar would then have a potential safe-haven from which to continue to conduct criminal activities, including terrorism, while in prison. Such a ruling would provide an absolute assurance to Sattar that, in the absence of notification by the Government that he was being monitored pursuant to Title III or FISA, he could use prison visits and telephone calls with his current attorney, a future attorney, or any other member of his legal team (including a paralegal), to facilitate criminal activity through that relationship, either wittingly or unwittingly, without the possibility of detection by the Government through monitoring. Under such circumstances, Sattar would be receiving an unprecedented assurance from the United States Government that has not been given to any other defendant, whether incarcerated or on bail, or to any members of the public at large. Moreover, such a ruling would result in an anomalous situation where jail would be a safer place for Sattar to utilize his attorney, or legal team, to

further ongoing criminal activity, than being at liberty, where all his conversations, including conversations with his attorney, could be subject to court-authorized monitoring.

The Court need look no further than the Indictment in the instant case to see the adverse law enforcement consequences that could result from such a ruling. If at some point during the pendency of Sheikh Abdel Rahman's case, his attorneys had made a motion seeking this type of relief and were successful, the Government would have been unable to obtain FISA court-authorization to monitor several of the prison visits by Sheikh Rahman's attorneys without notice to the defense. Without the use of that legitimate and court-authorized law enforcement tool, the Government would have lost important evidence, as alleged in the Indictment, demonstrating that Sheikh Abdel Rahman, with the assistance of defendants Stewart and Yousry, was using the guise of the attorney-client relationship to facilitate his continued involvement in the Islamic Group from a United States jail.

The problematic nature of Sattar's position is further illustrated by the even broader requests for disclosure made by co-defendant Stewart. While Sattar suggests in the alternative that the Court should release him on an appropriate bond to insure that future conversations with his attorney will not be monitored, co-defendant Stewart's motion demonstrates that such relief would not necessarily alleviate the concerns raised by Sattar. Indeed, Stewart, who has been released on bail, joins in Sattar's request but seeks much broader representations from the Government to

include: (1) whether there is court-authorized monitoring under FISA, Title III, or any other basis of the telephones in Ms. Stewart's Office; (2) whether there is any such monitoring on Ms. Tipograph's office telephone; (3) whether there is any monitoring at the law offices located at 351 Broadway, 3rd Floor, New York, New York, which includes Ms. Stewart's offices and offices of other attorneys; and (4) whether Ms. Stewart's visits with any of her incarcerated clients, both federal and state, are being recorded, videotaped, or monitored. Stewart's broad requests represent a glimpse as to where Sattar's argument would lead, if it were adopted by the Court and carried to its logical extreme. The Government would then be placed in the untenable position of having to make endless representations that telephones, offices, and all other locations where attorney-client communications could potentially take place, were not subject to court-authorized monitoring. As with Sattar's request, such a result would seriously undermine law enforcement's ability to conduct criminal investigations, especially where the attorney-client relationship is being used to facilitate criminal activities.

Accordingly, the cases cited by Sattar do not support the dismissal of an indictment based upon the mere fact that the Government has the potential ability to obtain court-authorization to monitor his communications with his attorney; rather, the crime-fraud exception to the attorney-client relationship demonstrates that the Government has the right to pierce that relationship, including through court-authorized electronic surveillance, where

it is being used to further criminal activity. Simply put, no constitutional rights are undermined by the existence of such authority.

IV. Safeguards Exist to Protect Defendants' Sixth Amendment Rights Even if Monitoring of Attorney-Client Communications is Occurring

Sattar argues that the safeguards that exist in connection with the potential monitoring of attorney-client conversations are insufficient to protect the defendant's constitutional right to effective assistance of counsel. (Sattar Brief, at 4-5). Stewart and Yousry make a similar argument in connection with their unwillingness to enter a joint defense agreement under the current circumstances. As discussed below, the defendants' claim that there is an unconstitutional chill on the attorney-client relationship is unfounded.

First, monitoring of attorney-client or any other communications under Title III or FISA (except under narrow circumstances) requires court authorization. Accordingly, the defendants are being afforded the protection of judicial scrutiny before any such monitoring could take place Under Title III, in order to obtain court authorization to conduct electronic surveillance of prison visits, the Government would be required to show, among other things, probable cause to believe that Sattar is engaged in ongoing criminal activity from jail and probable cause to believe that he is using, or will use, attorney prison visits in connection with the commission of a crime. Under FISA, the Government would have to establish, among other things, probable

cause to believe that Sattar was operating from jail as a foreign power or agent of a foreign power. Therefore, unless Sattar is using the attorney-client relationship to conduct criminal activity or is operating as a foreign power or an agent of a foreign power from the MCC, he should have no reason to be concerned that a court would authorize the Government to intercept such communications.

Second, both Title III and FISA have minimization requirements. See 18 U.S.C. § 2518(5); 50 U.S.C. § 1801(h) and 1805(a)(4). Thus, even if Sattar were subject to court-authorized monitoring, the Court would be required to order that the Government comply with the minimization requirements set forth in the respective statutes.

Finally, even assuming privileged communications were intercepted, the Government would establish a "wall" to prevent dissemination of any privileged information to the agents and prosecutors involved in the prosecution of the case against the defendants.[4]

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[4] To the extent that Stewart attempts to impose additional procedural safeguards (including a Special Master) in connection with ongoing electronic surveillance, those requests should be denied. First, as with the rest of her claims, Stewart cites no statutory or case authority to support her position that these safeguards are appropriate or even necessary in the context of electronic surveillance. Second, as noted above, the judicial oversight mandated under both Title III and FISA adequately address the concerns raised by defendants. See generally United States v. Belfield, 692 F.2d 141, 148 (D.C. Cir. 1982) ("In FISA the privacy rights of individuals are ensured not through mandatory disclosure, but through its provisions for in-depth oversight of FISA surveillance by all three branches of government. . . "). Finally, the delay that would result from implementation of Stewart's proposed procedures, and the additional layers of review, would substantially hinder the

These safeguards provide more than sufficient protection for Sattar's ability to communicate freely with his attorney with respect to the defense of this case. Sattar's subjective fears and his unreasonable refusal to avail himself of communications with counsel, because of his purported distrust of the safeguards in place to protect his Sixth Amendment rights, simply cannot be used to support a constitutional claim of deprivation of his right to effective assistance of counsel. See United States v. John Doe #1, 272 F.3d 116, 122 (2d Cir. 2001) (Sixth Amendment does not "guarantee a 'meaningful relationship' between the defendant and his counsel") (quoting Morris v. Slappy, 461 U.S. 1, 13 (1983)); United States v. Roston, 986 F.2d 1287, 1292-93 (9th Cir. 1983)) (finding that "any breakdown between [the defendant] and his . . . counsel was entirely [defendant's] fault"). Similarly, any voluntary decision by Stewart or Yousry to refuse to enter into a joint defense agreement because of fear of monitoring, even where such monitoring is court-authorized, cannot constitute grounds for a Sixth Amendment violation.

V. DEFENDANTS MUST SHOW PREJUDICE TO BE ENTITLED TO ANY RELIEF

Even in the absence of the above-referenced safeguards, the defendants would not be entitled to dismissal of the Indictment, or any other relief, based on a claim that the monitoring of attorney-client communications constitutes a per se Sixth Amendment violation. As set forth below, while the

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ur[illegible]ity of any ongoing, court-authorized electronic surveillance.

defendants seek dismissal of the Indictment because of the sheer specter of an unspecified future Government intrusion into the attorney-client relationship, it is well-established that relief is available only when there is a showing of prejudice from a demonstrated past intrusion.

As the D.C. Circuit noted in ACLU Foundation, supra, the Supreme Court has held that the fact that the Government has, during the course of an undercover operation, obtained the substance of attorney-client communications between a criminal defendant and his attorney does not, by itself, establish a per se Sixth Amendment violation depriving the defendant of a fair trial. See Weatherford v. Bursey, 429 U.S. 545, 550-51 (1977). Instead, the defendant must show the communications were used against him or that he was prejudiced by such interceptions. Id. at 558.

The holding in Weatherford has been consistently applied in this Circuit. In United States v. Ginsberg, 758 F.2d 823, 832-33 (2d Cir. 1985), the defendant claimed that the presence of a Government informant at pre-trial conferences and his mingling with the defendants constituted a Sixth Amendment violation. The Second Circuit, citing Weatherford, held that "[w]here the presence of the government's agent or informant at the defense conference is either unintentional or justified by the necessity of protecting the informant's identity, there can be no violation of his sixth amendment right without some communication of valuable information derived from the intrusion to the government: absent such communication, there exists no realistic possibility of either

prejudice to the defense or benefit to the government." Id. at 833. Thus, the Second Circuit found that "a defendant must allege specific facts that indicate communication or privileged information to the prosecutor and prejudice resulting therefrom." Id.; see also United States v. Schwimmer, 924 F.2d 443, 447 (2d Cir. 1990) ("we have held that, unless 'the conduct of the Government has...been...manifestly and avowedly corrupt,'... a defendant must show prejudice to his case resulting from the intentional invasion of the attorney-client privilege") (quoting United States v. Gartner, 518 F.2d 633, 637 (2d Cir.), cert. denied, 423 U.S. 915 (1975)).

Given that stringent standard, the defendants' sheer speculation regarding the potential in the instant case for the Government to intercept legitimate attorney-client communications with their counsel certainly does not provide a proper basis for finding a Sixth Amendment violation, much less the drastic relief sought by the defendants.

Exhibit A

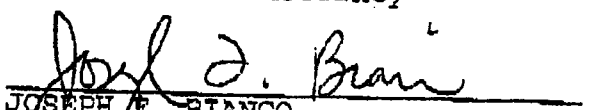
CONCLUSION

For all the foregoing reasons, defendants' joint motion for dismissal of the Indictment, or for the alternative relief sought, should be denied in its entirety.

Dated: New York, New York
June 21, 2002

Respectfully submitted,

JAMES B. COMEY
United States Attorney

By: 

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