UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re Grand Jury Investigation	Case No. 21-gj-49 (BAH) Chief Judge Beryl A. Howell **UNDER SEAL**

MEMORANDUM OPINION AND ORDER

At a bond revocation hearing, on July 21, 2021, before U.S. District Judge Christopher Cooper in a criminal case against defendant Thomas Robertson, who is currently detained pretrial at the D.C. Department of Corrections ("DOC"), defendant's retained counsel, Mark Rollins, made representations to the Court to explain the belated timing of an argument asserted on defendant's behalf that included mention of counsel's recent meeting with his client where he "learned" information subsequently used to make the new argument. *See* Gov't's Mot. for Order Authorizing Review of Evidence Containing Attorney-Client Communications ("Gov't's Mot."), Ex. A, July 21, 2021 Hr'g Tr. at 18:1-9:13 ("Detention Hr'g Tr."), ECF No. 1-2. Now, the government seeks access to DOC recordings of phone calls between defendant and his counsel on five days shortly preceding the bond revocation hearing, [redacted] contending that defense counsel waived attorney-client privilege when he fleetingly referenced "learn[ing]" information from his client.[1] For the reasons set forth below, the government's motion is DENIED.

[1] Specifically, the government seeks to review "[t]he calls occur[ing] on July 13-15, 17 and 21, 2021." Gov't's Mot. at 9, ECF 1.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 13, 2021, defendant, a former police officer in Rocky Mount, Virginia, was arrested in the Western District of Virginia on a criminal complaint for offense conduct related to his alleged participation in the attack on the U.S. Capitol on January 6, 2021. Return on Arrest Warrant, *United States v. Thomas Robertson, et al.,* 21-mj-36-RMM; *see also* Rule 5(c)(3) Documents at 1, ECF No. 6. He was released on bond, subject to several conditions, including that he not violate any federal, state, or local laws and that he refrain from possessing a firearm or other dangerous weapon and relocate all firearms from his residence by January 15, 2021. Order Setting Conditions of Release (Jan. 14, 2021), Rule 5(c)(3) Documents at 8; *see also* Gov't's Mot. at 3. Two weeks later, on January 19, 2021, defendant appeared before a Magistrate Judge of this Court and his pretrial release conditions were reiterated, including that he was not to commit any new violation of federal, state, or local laws and that he was not to possess a firearm or other dangerous weapon. Order Setting Conditions of Release (Jan. 19, 2021), *United States v. Thomas Robertson, et al.*, 21-cr-34-CRC, ECF No. 12.

Notwithstanding these pretrial release conditions, on January 19, 2021—the same day defendant appeared before a Magistrate Judge of this Court—law enforcement executed a search warrant at defendant's residence and seized eight firearms. Gov't's Mot. at 3.

Defendant was subsequently indicted, on January 29, 2021, for his conduct on January 6, 2021 at the U.S. Capitol and charged with one felony count of obstruction of an official proceeding and aiding and abetting, in violation of 18 U.S.C. §§ 1512(c)(2), 2, and three misdemeanor charges: (1) entering and remaining in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(1); (2) disorderly and disruptive conduct in a restricted building or grounds, in violation of 18 U.S.C. § 1752(a)(2); and (3) disorderly conduct in a Capitol building,

in violation of 40 U.S.C. § 5104(e)(2)(D). Indictment, ECF No. 8. He was initially arraigned on the indictment by a Magistrate Judge of this Court, on February 2, 2021, and arraigned a second time, on February 25, 2021, before Judge Cooper, when defendant moved orally to modify his conditions of release to allow him to possess firearms. The Court reserved any ruling, leaving in place the prohibition on firearm possession. *See* Gov't's Mot. at 4; Minute Entry Feb. 25, 2021.

Meanwhile, after defendant's arrest and pretrial release, the Federal Bureau of Investigation ("FBI") began investigating allegations that defendant was "buying firearms and ammunition online and shipping these items in interstate commerce, in violation of 18 U.S.C. § 922(n), which makes it a crime for anyone under felony indictment to ship, transport, or receive firearms or ammunition in interstate or foreign commerce." Gov't's Mot. at 4. The FBI uncovered "emails indicating that the [d]efendant had shipped firearms to a Federal Firearms Licensee [("FFL")] in Roanoke, Virginia following his arrest in January and for several months thereafter." *Id.* at 5. On June 29, 2021, law enforcement—for a second time while defendant was on pretrial release—searched defendant's residence and found "firearms and parts of several explosive devices." *Id.*; *see also* Detention Hr'g Tr. at 6:8-8:12. On June 30, 2021, the government moved before Judge Cooper to revoke defendant's bond. Gov't's Mot. at 5.

At the bond revocation hearing, on July 21, 2021, defense counsel "argued, for the first time, that the [d]efendant did not possess the firearms held in his name at the FFL because he would have had to disclose, by checking a box on a form, that he was under felony indictment to do so, and that would prevent the FFL from releasing the firearms to him." *Id.* Specifically, question 21(b) on the Firearms Transaction Record form asks "if the applicant is 'under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year. . . ." *Id.* The FFL would have been required to ask the

defendant to sign the Firearms Transaction Record form "before he could take physical possession of the weapons," *id.* at 6, n.4, and, the defense argument goes, defendant consequently could not have taken possession of them, Detention Hr'g Tr. at 17:23-8:2 (defense counsel stating: "I just want to go into a little bit regarding the guns that were ordered because that is probably alarming to most people and to this Court. So those items, once they're ordered, he cannot take possession of them. So that's first and foremost.").

Defense counsel was asked by the Court whether this argument had been presented in the briefing on the government's motion for bond revocation, prompting the following critical exchange on which the government's pending motion for waiver of attorney-client privilege rests:

> THE COURT: So this was not in your brief, correct?
>
> MR. ROLLINS: No, this was not.
>
> THE COURT: Okay.
>
> MR. ROLLINS: This was something that I literally have learned over the weekend in talking to my client, that this form would have to be filled out and – in order for the transfer of that firearm.
>
> THE COURT: Okay. Please pass it up.

Gov't's Mot. at 7 (quoting Detention Hr'g Tr. at 19:5-13).[2] The Court granted the government's motion to revoke defendant's bond, and he remains in custody. *Id.* at 5.

[redacted]

[2] At the bond revocation hearing, defense counsel provided to the Court and the government a form entitled "Application to Make and Register a Firearm." Gov't's Mot. at 6, n.4. To transfer physical possession of the weapons to defendant, the FFL would have been required to have the defendant sign a different form, a "Firearms Transaction Record." *Id.*; *see also* Ex. A, Def's. Opp'n, ECF 2-1. Both forms pose the question, with slightly different wording, whether the applicant is under indictment. Gov't's Mot. at 6, n.4.

[redacted] As noted, the government seeks access to recorded jail calls between defendant and his attorney for five days preceding the July revocation hearing [redacted]

II. LEGAL STANDARD

"The attorney-client privilege is the 'oldest of the privileges for confidential communications known to the common law.'" *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757 (D.C. Cir. 2014) (quoting *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981))." It extends to cover "confidential communication between attorney and client if that communication was made for the purpose of obtaining or providing legal advice to the client." *Id.* (internal citations removed); *see also In re Grand Jury*, 475 F.3d 1299, 1304 (D.C. Cir. 2007) ("The attorney-client privilege applies only if, *inter alia,* the communication relates to a fact of which the attorney was informed by his client for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding." (internal quotations and citations removed)).

The responsibility of protecting this privilege lies with the holder: "the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant." *In re Grand Jury*, 475 F.3d at 1305 (quoting *In re Sealed Case,* 877 F.2d 976, 980 (D.C. Cir. 1989)); *see also S.E.C. v. Lavin*, 111 F.3d 921, 929 (D.C. Cir. 1997) (placing onus on "the holder [to] zealously protect the privileged materials, taking all reasonable step to prevent their disclosure"); *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) ("voluntary disclosure by the holder of such a privilege . . . waives

the privilege"). As the D.C. Circuit has stressed, it "is axiomatic that the attorney-client privilege is held by the *client*." *Nat'l Sec. Counselors v. Cent. Intelligence Agency*, 969 F.3d 406, 411 (D.C. Cir. 2020) (emphasis in original). "As a result, an 'attorney is given the power to claim the privilege on behalf of the client[,] but his betrayal of the client's secret is not treated as a waiver of the privilege.'" *Id.* at 411-12 (quoting 26A Charles Alan Wright et al., FEDERAL PRACTICE & PROCEDURE § 5724 (1st ed. 2020) and citing *Hanson v. USAID*, 372 F.3d 286, 294 (4th Cir. 2004) ("an attorney may not unilaterally waive the privilege that his client enjoys"); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984) (the privilege applies if "not waived by the client")).

The D.C. Circuit takes an "all-or-nothing approach" to waiver of the attorney-client privilege, *Protect Democracy Project, Inc. v. Nat'l Sec. Agency*, 10 F.4th 879, 891 (D.C. Cir. 2021), such that "voluntary disclosure of privileged material . . . to unnecessary third parties . . . 'waives the privilege, not only as to the specific communication disclosed but often as to all other communications relating to the same subject matter,'" *id.* (quoting *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997)). Thus, disclosure of the "substance" of privileged communications "before an investigative body at the pretrial stage," waives the attorney-client privilege, *United States v. White*, 887 F.2d 267, 271 (D.C. Cir. 1989), and such waiver "extends to all other communications relating to the same subject matter," *In re Sealed Case*, 877 F.2d at 980-81 (quoting *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982); *see also Permian Corp. v. United States*, 665 F.2d 1214, 1219 (D.C. Cir. 1981) ("the confidential status of . . . communications" is destroyed "by permitting their disclosure to the SEC staff"); *In re Subpoenas Duces Tecum*, 738 F.2d at 1370 (privilege is waived as to all "material that has been disclosed" to a government agency").

Federal Rule of Evidence 502 offers limited protections to parties who inadvertently disclose privileged information. The holder may continue to assert the privilege, but only if the holder "took reasonable steps to prevent disclosure" and "promptly [takes] reasonable steps to rectify the error." FED. R. EVID. 502(b).

III. DISCUSSION

The government contends that defendant impliedly waived his attorney-client privilege with respect to a "specific communication" when defense counsel disclosed publicly during the July 21, 2021 bond revocation hearing that he "literally ha[d] learned" certain information "over the weekend in talking to my client" about the form. Gov't's Mot. at 7–8. The government seeks permission to review recordings of jail telephone calls between defendant and his attorney on five days preceding the July 21 hearing for communications "discussing the form – to the extent they exist." *Id.* at 9.[3] The government views these communications, should "they exist," as "material and highly relevant [redacted]" to "establish the [d]efendant's intent and knowledge concerning the requirements of [18 U.S.C.] § 922(n)," *id.*, "which makes it a crime for anyone under felony indictment to ship, transport, or receive firearms or ammunition in interstate or foreign commerce," *id.* at 4. Put another way, the government's reasoning appears to be that establishing defendant's familiarity with the Firearms Transaction Record form, plus the specific question on that form about whether he was under felony indictment, which, if checked, would prevent the FFL from releasing the firearms to him, would show that he was aware of his violation of § 922(n) at a time when he also knew that he was under felony indictment.

[3] To ensure that the prosecuting team did not inadvertently gain access to communications protected by attorney-client privilege, the government states that "[t]he communications would first be identified and then excerpted by a filter team." Gov't's Mot. at 9.

Defendant counters that the government is looking for a breach of attorney-client privilege where none exists. He characterizes as "speculat[ion]" that defense counsel's statement at the hearing about "learn[ing] [of the form] over the weekend in talking to [his] client" implied that the defendant "'had told [him] that there was a form that he could not fill out because he was under felony indictment and therefore he could not transfer the firearms out of the FFL's physical possession.'" Def.'s Opp'n at 3, ECF No. 2 (quoting Gov't's Mot. at 8). Rather, counsel's statement "expressed research after [counsel] spoke to his client," *id.*, and "were arguments to the [c]ourt[,] not inadvertent waivers of privilege." *Id.* at 5.

Defendant has the better argument. Judge Cooper first asked defense counsel to confirm that the defense briefs did not address the argument raised orally, namely, that the Firearms Transaction Record would ultimately frustrate any attempts by defendant while under indictment to take possession of the firearms from the FFL. Gov't's Mot. at 7 (quoting Detention Hr'g Tr. at 18:1-19:13). In response, defense counsel explained the belated raising of this argument, stating, "This was something that I literally have learned over the weekend in talking to my client, that this form would have to be filled out." *Id.* While entirely possible that the impediment to the FFL's physical transfer of the firearms to defendant posed by the form came to defense counsel's attention, as the government suggests, by defendant informing his counsel that the state police-verified Firearms Transaction Record would indicate defendant was under felony indictment and effectively bar such transfer, defense counsel's brief explanation of the chronology for development of the new argument is so imprecise that defendant's spin on the colloquy with the Court is equally probable. Learning that the firearm purchase process involved a form, defense counsel could have tracked down the form, read the language barring receipt by

a person under indictment, and developed the new legal theory he presented at the hearing without further conversation with his client beforehand.

In short, defense counsel's statement to the Court is too vague, brief, and cursory to constitute an implied waiver of attorney-client privilege. Defense counsel simply stated that, in speaking with his client, he had "learned" that the FFL firearm transfer process involves filling out a form, without any specifics about precisely what defendant said about the form or what defendant actually knew or relayed about the questions on the form or, more generally, about the firearms purchase process.

The D.C. Circuit's decision in *United States v. White*, 887 F.2d 267, provides helpful, or even dispositive, guidance in assessing whether defense counsel's statement amounts to an implied waiver of the privilege held by his client. In *White*, the client commented "during a preliminary GSA investigation that his attorneys 'had thoroughly reviewed the decision to employ Finotti after . . . looking at the matter from nine different ways.'" *Id.* at 270-71. In finding that the district court erred in concluding this comment waived privilege, the D.C. Circuit pointed out that "[a] general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege," *id.* at 271, and that "[a]n averment that lawyers have looked into a matter does not imply an intent to reveal the substance of the lawyers' advice," *id.* Noting that the defendant had not "released any substantive information about his attorneys' review . . . and did not refer to any particular instance of review," the court held that no waiver was effected. *Id.* The D.C. Circuit summarized the standard for assessing an implied privilege waiver, stating: "Where a defendant neither reveals substantive information, nor prejudices the government's case, nor misleads a court by relying on an incomplete disclosure, fairness and consistency do not require the

inference of waiver." *Id.* Under this binding standard, defense counsel's comment at the July 2021 hearing does not come close to an implied privilege waiver. He revealed no precise "substantive information" about what defendant told him, and the hearing transcript does not suggest the Court was misled in any way.[4]

Counsel's general reference before the Court that he "literally [] learned over the weekend in talking to [his] client," something about a form's existence, does not now open the door for the government to sift through defendant's recorded calls with his attorney on five separate days. This situation is far different from other cases where an implied privilege waiver has been found, for example, when a defendant voluntarily discloses to the government not merely that he consulted with counsel or acted on advice of counsel, but the actual substance of legal advice detailing how the client may operate legally, *see United States v. Dallmann*, No. 1:19-cr-253, 2020 U.S. Dist. LEXIS 233640, at *29 (E.D. Va. Dec. 11, 2020), or when defense counsel disclosed to the government specific questions asked and comments made by the client regarding the transaction underlying the indictment, *see United States. v. Aronoff*, 466 F. Supp. 855, 860-61 (S.D.N.Y. 1979).

Rather, the instant situation is more akin to a generalized statement about communications between attorney and client that is so cursory and unspecific that no implied waiver of such an important privilege is warranted. *See, e.g., Mendillo v. Prudential Ins. Co. of Am.*, No. 3:12-cv-1383 (WWE), 2014 U.S. Dist. LEXIS 22451, at *17 (D. Conn. Feb. 20, 2014)

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[4] The government, in reply, accuses defendant of using "the attorney-client privilege as a sword and a shield," Gov't's Reply at 2, ECF No. 2, stating that "[h]e cannot waive the privilege for the purpose of advancing one argument (that Robinson did not possess the firearms), and then invoke it to oppose another (that he was aware of the indictment and felony charges against him)," *id.* Defense counsel's brief reference to learning about the Firearms Transaction Record form after speaking with his client hardly amounts to the use of the form's existence to gain strategic advantage over the government, particularly given that two separate searches of defendant's residence while he was on pretrial release uncovered firearms, in clear violation of his pretrial release conditions. Those hard facts present a significant "strategic advantage" for the government in an investigation of defendant's willful violation of release conditions that will be a challenge to overcome.

(finding no waiver of attorney-client privilege when client provided deposition testimony "in general terms about her conversations with Attorney," "her 'understanding' following a meeting with Attorney," "that she had conversations with Attorney," and "that Attorney [] was aware of her physical problems" since no disclosure was made "of specific and/or the significant substance of privileged communications"); *United States v. Gasparik*, 141 F. Supp. 2d 361, 371-72 (S.D.N.Y. 2001) (finding no waiver of privilege when defense counsel told jury that defendant "did not want to do anything illegal" but did "not reference[] a particular conversation" with defendant nor disclose "any confidential and privileged information"); *Libbey Glass, Inc. v. Oneida Ltd.*, 197 F.R.D. 342, 346 (N.D. Ohio 1999) (finding that testimony by defendant's executive about company's lawyers giving the "green-light" to a transaction and about the "legal ramifications of copying" competitor's glassware did not waive attorney-client privilege, noting that "[c]ourts have perceived a difference between an opaque reference to an attorney's advice and disclosure that illuminates the facts and analysis underlying that advice"); *United States v. Jackson*, 969 F. Supp. 881, 883 (S.D.N.Y. 1997) (finding no privilege waiver by defendant who stated that he had phoned an attorney "in an attempt to determine if what [he and his co-defendant] were doing was legal [but] . . . did not disclose the underlying statements to which he alluded [and] . . . did not make any statement revealing the substance of his remarks and questions to the lawyer").

For these reasons, the Court concurs with defendant that defense counsel's statement to the Court on July 21, 2021, made "arguments to the Court[,] not inadvertent waivers of privilege." Def.'s Opp'n at 5.

IV. ORDER

Upon consideration of the government's Motion for an Order Authorizing Review of Evidence Containing Attorney-Client Communications, ECF No. 1, the memoranda in support and opposition, and exhibits attached thereto, for the reasons set forth above, it is hereby

ORDERED that the government's motion for an order authorizing review of recorded phone communications from the D.C. Department of Corrections between defendant and his counsel on five days in July 2021 is hereby **DENIED**; and it is further

ORDERED that the parties are directed to confer and submit, within 14 days of issuance of this decision, a joint report advising whether any portions of this Memorandum Opinion may be unsealed to the public in whole or in part and, if so, proposing any redactions.

SO ORDERED.

Date: November 11, 2021

Beryl A. Howell

BERYL A. HOWELL
CHIEF JUDGE