

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

UNITED STATES OF AMERICA

v.

**JAMES DAVIS
JOHN GREEN**

**CRIMINAL ACTION
NO. 15-138**

**-01
-02**

OPINION

The question before the Court is a discrete one that lies at the crossroads of a constitutional right and an evidentiary privilege: Does a testifying witness' assertion of the attorney-client privilege yield to a criminal defendant's right to confrontation under the Sixth Amendment? In this criminal case, Defendants James Davis and John Green have jointly moved to cross examine a United States Government witness once more, contending that they were not afforded an adequate opportunity to question her bias. The witness received immunity from the Government in exchange for her testimony. According to Defendants, the inability to probe the witness' communications with her attorney regarding the circumstances surrounding her receipt of immunity violated the Confrontation Clause of the Sixth Amendment. For the reasons that follow, Defendants' joint motion shall be granted in part and denied in part.

Defendants Davis and Green are charged with, *inter alia*, conspiracy to commit honest services wire fraud and extortion under color of official right, 18 U.S.C. § 371, and substantive and conspiratorial honest services fraud. 18 U.S.C. §§ 1343, 1346, 1349. At trial, the Government called Barbara Deeley, a witness who received immunity in exchange for her testimony against Davis and Green. The Government introduced her immunity agreement into evidence, and Deeley testified to her understanding of its terms. After the Government

completed its direct examination of Deeley, counsel for Davis sought to inquire about her discussions regarding the immunity agreement with her attorney. Deeley asserted attorney-client privilege at different points of her cross-examination, and the Government similarly objected to that line of questioning.

The Court asked for briefing by the parties on squaring the Defendants' right to cross-examine with Deeley's invocation of the attorney-client privilege. Defendants, citing the Confrontation Clause of the Sixth Amendment, now seek to recall Deeley and cross-examine her about the communications she had with her attorney regarding the immunity agreement.

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI; *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). But the right of cross-examination is not unfettered. *United States v. Friedman*, 658 F.3d 342, 356 (3d Cir. 2011). "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). Accordingly, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

The principal question is whether, under the Confrontation Clause, the scope of Defendants' cross-examination was appropriately restricted to preclude testimony about

Deeley's communications with her attorney. The answer requires conducting a two-step inquiry: (1) did the restriction "significantly inhibit" Defendants' exercise of their right to inquire into Deeley's "motivation in testifying"; and (2) if the restriction did "significantly inhibit" the exercise of that right, is the restriction nonetheless a "reasonable limit?" *See United States v. Chandler*, 326 F.3d 210, 219 (3d Cir. 2003); *see also United States v. Silveus*, 542 F.3d 993, 1006 (3d Cir. 2008)

Here, the restriction on disclosing attorney-client communications did not "significantly inhibit" Davis's exercise of his right to confrontation because the jury had "sufficient other information before it . . . to make a discriminating appraisal of the possible biases and motivation" of Deeley. *Chandler*, 326 F.3d at 219 (internal quotation marks omitted).¹ When counsel for Davis cross-examined Deeley, he inquired about her obligation to tell the truth under the immunity agreement and the Government's expectations of her testimony. The immunity agreement was also published to the jury. Counsel for Davis probed Deeley's understanding of the immunity agreement, asking if she had read and understood all of its provisions. And, during her cross-examination, either Deeley or counsel for Davis read each of those provisions aloud. Based on counsel for Davis's extensive line of inquiry, then, the jury had an opportunity to hear Deeley's "subjective understanding of [her] bargain with the government" in testifying. *See id.* at 220. Thus, the cross-examination by counsel for Davis sufficiently addressed the issue of Deeley's bias in light of her immunity agreement, despite her assertion of the attorney-client privilege. *See id.*; *United States v. Rainone*, 32 F.3d 1203, 1207 (7th Cir. 1994) ("A trial judge does not violate the Constitution when he limits the scope of cross-examination for a good reason, and here as in the usual case desire to protect the attorney-client privilege was a good

¹ Because the restriction did not "significantly inhibit" Davis's right to confrontation, the second step of *Chandler* need not be addressed. *See* 326 F.3d at 219.

reason.”); *United States v. Coven*, 662 F.2d 162, 170 (2d Cir. 1981) (“It is clear that government witnesses have a right to assert the attorney-client privilege on cross examination.”). Davis’s request to recall Deeley or have her testimony stricken is, accordingly, denied.

By contrast, Green did not have an opportunity to exercise his right to confrontation as to Deeley. During her cross-examination, Defendants had the option of deferring questions about her bias as it related to her immunity agreement. Counsel for Green decided, at that juncture, to withhold his cross-examination of Deeley’s immunity agreement. Counsel for Green proceeded to cross-examine Deeley about other topics discussed during her direct examination. Green is therefore entitled, under the Confrontation Clause, to question Deeley’s bias on the limited issue of her immunity agreement with the Government without delving into privileged communications with her attorney. *See Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (holding that the attorney-client privilege “only protects disclosure of communications” and not “disclosure of the underlying facts”). Because counsel for Green may ask Deeley about the immunity agreement, Green’s request to strike Deeley’s testimony shall be denied. *See Coven*, 662 F.2d at 170-71.

Defendants alternatively contend that Deeley’s immunity agreement waived the attorney-client privilege. The attorney-client privilege “serves the interests of justice” and is therefore “worthy of maximum legal protection.” *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). The privilege belongs to the client, and only she may waive it. *Haines v. Liggett Group Inc.*, 975 F.2d 81, 90 (3d Cir. 1992). Deeley has not waived the privilege. Defendants have not pointed to any authority which holds that an obligation to supply complete and truthful information under an immunity agreement constitutes a waiver of the attorney-client privilege. Indeed, even if the immunity agreement is construed as a contract, nothing about its

plain language indicates a waiver of the attorney-client privilege; the immunity agreement at issue addresses only Deeley's Fifth Amendment privilege against self-incrimination. *See Steuart v. McChesney*, 498 Pa. 45, 49 (1982) ("When a written contract is clear and unequivocal, its meaning must be determined by its content alone. It speaks for itself and a meaning cannot be given to it other than expressed.") (quoting *E. Crossroads Ctr., Inc. v. Mellon-Stuart Co.*, 416 Pa. 229, 230 (1965)).

An appropriate order follows.

BY THE COURT:

/s/ Wendy Beetlestone

WENDY BEETLESTONE, J.

Date: 3/2/18