

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

MICHAEL T. FLYNN,

Defendant

Crim. No. 17-232 (EGS)

JOINT NOTICE OF FILING

The United States of America, by and through the U.S. Attorney for the District of Columbia, and Michael T. Flynn, through his counsel, file this joint notice of filing. On February 27, 2020, the Court ordered the parties to file their joint proposed order setting forth the terms of the waiver of the attorney-client privilege and the authorization of disclosure of information with respect to Mr. Flynn's ineffective assistance of counsel claims by no later than 12:00 PM on March 6, 2020. The parties have met, conferred, and agreed on the terms of a joint stipulation, attached hereto as Exhibit A, setting forth certain agreed terms regarding Mr. Flynn's waiver of attorney client privilege, and the handling of information disclosed to the government by Mr. Flynn's former counsel at Covington & Burling LLP. The parties have further drafted a joint proposed order, consistent with the District of Columbia Rules of Professional Conduct Rule 1.6, and attached hereto as Exhibit B, authorizing Covington to take all actions reasonably necessary to respond to defendant Flynn's specific allegations of ineffective assistance of counsel, and requiring the government to treat any materials provided to it by Covington consistent with the terms set forth in the parties' joint stipulation and the previously-existing Protective Order (Doc.22).

Wherefore the parties request that the Court cause to be issued the joint proposed order attached hereto as Exhibit B.

Respectfully submitted,

/s/ Jocelyn Ballantine
TIMOTHY J. SHEA
U.S. Attorney for the District of Columbia

JOCELYN BALLANTINE
Assistant United States Attorney

/s/ Sidney Powell
SIDNEY POWELL
JESSE BINNALL
WILLIAM HODES
Attorneys for Defendant

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**STIPULATION REGARDING CLAIMS
OF INEFFECTIVE ASSISTANCE OF COUNSEL**

Michael T. Flynn (“Mr. Flynn”) and the government have agreed to stipulate to the terms outlined below.

1. On January 14, 2020, Mr. Flynn filed his initial Motion to Withdraw Plea of Guilty [Doc. 151]. On January 16, 2020, Mr. Flynn filed a Supplemental Brief in Support of Motion to Withdraw Plea of Guilty [Doc. 153]. On January 29, 2020, Mr. Flynn filed a Supplemental Motion to Withdraw Plea of Guilty [Doc. 160-2]. In these Motions, Mr. Flynn alleged that his former counsel at Covington & Burling LLP (“Covington”) provided ineffective assistance of counsel during its representation of him in this case.

2. On February 9, 2020, the government filed a Motion for an Order Confirming Waiver of the Attorney-Client Privilege and Authorizing Disclosure of Information [Doc. 164]. Mr. Flynn filed a brief Response the same day [Doc. 166], and the Court issued a Minute Order on February 10, 2020, directing the parties to meet and confer with respect to the government’s motion.

3. The parties have met and conferred and have agreed to enter into this Stipulation. The parties further agree that, in light of this Stipulation and the Proposed Order that the parties will jointly submit to the Court for approval, the government’s Motion [Doc. 164] is moot.

4. The parties stipulate and agree that, when defendant Michael T. Flynn filed his Motions claiming that Covington’s representation was constitutionally ineffective, Mr. Flynn waived the attorney-client privilege with respect to communications relating to the subject matter of his ineffectiveness claims. *See In re Sealed Case*, 877 F.2d 976, 981 (D.C. Cir. 1982) (“waiver of the privilege in an attorney-client communication extends to all other communications relating to the same subject matter”).

5. In light of Paragraph 4 of this Stipulation, Mr. Flynn agrees that the government may seek to interview (outside of his presence) his former counsel at Covington and other persons who worked directly with former counsel in connection with Covington’s representation of him.

6. The parties acknowledge that District of Columbia lawyers have an ethical duty of confidentiality under District of Columbia Rules of Professional Conduct Rule 1.6. The parties agree that a lawyer may use or reveal client confidences when required by a Court order. *See* D.C. Rule of Prof’l Conduct 1.6(e)(2). The parties further acknowledge that Rule 1.6(e)(3), and Ethics Opinion 364 of the District of Columbia Bar, *Confidentiality Obligations When Former Client Makes Ineffective Assistance of Counsel Claim* (Jan. 2013), set forth relevant guidance on the scope of a lawyer’s ethical obligations in responding to a former client’s allegations of ineffective assistance of counsel. *See also United States v. Straker*, 258 F. Supp. 3d 151, 156 (D.D.C. 2017) (“a lawyer’s discretion to voluntarily reveal protected information is limited to the extent to which the disclosure is ‘reasonably necessary to respond to specific allegations by the [former] client concerning the lawyer’s representation of the client’”) (quoting D.C. Rule of Prof’l Conduct 1.6(e)(3)).

7. The government agrees to limit its substantive communications with Covington to those matters reasonably necessary to respond to the specific allegations of ineffective assistance

of counsel raised by Mr. Flynn in his Motion to Withdraw Plea of Guilty [Doc. 151], his Supplemental Brief in Support of Motion to Withdraw Plea of Guilty [Doc. 153], and his Supplemental Motion to Withdraw Plea of Guilty [Doc. 160], and only to seek documents, records, declarations, affidavits, or statements related to the allegations raised therein.¹ Mr. Flynn acknowledges that D.C. Rule of Prof'l Conduct 1.6(e)(2) authorizes Covington to provide such information to the government, subject to the provisions of that rule.

8. The government agrees that any interviews of Covington attorneys or personnel that it conducts in connection with this inquiry pursuant to paragraph 5 of this Stipulation will be conducted in the presence of and transcribed by a certified court reporter, and that it will promptly provide a copy of that transcript to Mr. Flynn, through counsel. The government also agrees that it will promptly provide Mr. Flynn, through counsel, with all documents or records that are produced by Covington, all materials used in interviews of potential witnesses, and any adopted versions of declarations or affidavits created by or on behalf of a witness.

9. The government does not, by this agreement, waive its right to assert work product privilege over its own internal communications and draft materials.

10. The parties agree that all materials described in Paragraphs 7 and 8 of this Stipulation produced to the government by Covington, including verbatim transcripts, documents, records, declarations, affidavits, statements, or other writings, will be deemed "sensitive materials" and governed by and protected by the terms of the Protective Order earlier entered by the Court in this case until further agreement by the parties or order of this Court. [Doc. 22]. Any issues arising from this production, including any objection by Mr. Flynn that any of the material Covington

¹ The parties agree that if Mr. Flynn's ineffective assistance of counsel claims change during the course of the instant litigation, the government may speak with Covington and seek documents, records, declarations, affidavits, or statements related to the changed allegations.

provided, whether oral or written, falls outside of the scope of the Court's order authorizing disclosure under D.C. Rule of Prof'l Conduct 1.6(e)(2), will be addressed only in a motion filed under seal.

11. In any hearing on the record before the Court with respect to Mr. Flynn's claim that Covington was ineffective in its representation of him, Mr. Flynn will not object on the basis of the attorney-client privilege if the government seeks to introduce testimony or evidence (including documents) with respect to communications between Covington and Mr. Flynn that relate to the ineffective assistance of counsel claims in his Motions, unless said testimony or evidence falls outside of the scope of the Court's order authorizing disclosure under D.C. Prof'l Rule 1.6(e)(2).

12. The government agrees that it will not use any information or documents or records or any other writing that it obtains under this Stipulation for any purpose other than for further litigation of Mr. Flynn's motions to withdraw his guilty plea, and any further litigation on those motions, including any appeals and/or collateral attacks.

13. The parties agree that nothing in this Stipulation would prevent the government from prosecuting Mr. Flynn for perjury in connection with the litigation of his Motions to withdraw his guilty plea. In light of Paragraph 12 of this Stipulation, however, the government agrees that in any such prosecution, it will not use any information or other material that it obtained under this Stipulation. *Straker*, 258 F. Supp. 3d at 158.

SO STIPULATED.

/s/ Jocelyn Ballantine
TIMOTHY J. SHEA
U.S. Attorney for the District of Columbia

JOCELYN BALLANTINE
Assistant United States Attorney

/s/ Sidney Powell
SIDNEY POWELL
JESSE BINNALL
W. WILLIAM HODES

Attorneys for Defendant Michael T. Flynn

Dated: March 6, 2020

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[PROPOSED] ORDER

Upon consideration of the parties' joint stipulation addressing issues surrounding waiver of the attorney-client privilege with respect to the defendant's ineffective assistance of counsel claims and authorizing disclosure of information, it is hereby ORDERED that defendant Flynn's former counsel at Covington & Burling, LLP ("Covington"), and any other person acting under the direction of former counsel on the defendant's behalf, shall take all actions reasonably necessary to respond to defendant Flynn's specific allegations of ineffective assistance of counsel as set out in defendant's motions, including defendant Flynn's Motion to Withdraw Plea of Guilty (Doc. 151, filed January 14, 2020), Supplemental Brief in Support of Motion to Withdraw Plea of Guilty (Doc. 153, filed January 16, 2020), and Supplemental Motion to Withdraw Plea of Guilty (Doc. 160, filed January 29, 2020). Such actions shall include:

A. disclosing, as reasonably necessary, otherwise confidential or privileged information in communicating with government counsel about Covington's representation of defendant Flynn as it relates to defendant Flynn's specific allegations of ineffective assistance;

B. providing to government counsel any relevant documents in Covington's possession that are reasonably necessary to respond to defendant Flynn's specific allegations of ineffective assistance of counsel;

C. providing a declaration or affidavit, as reasonably necessary to address defendant Flynn's specific allegations of ineffective assistance;

D. testifying at any evidentiary hearing, if one is needed, as reasonably necessary to respond to defendant Flynn's specific allegations of ineffective assistance of counsel.

It is further ORDERED that any interviews of Mr. Flynn's former counsel shall be conducted in the presence of a certified court reporter; the government shall promptly provide to the defense a copy of the resulting transcriptions, as well as copies of all documents or records that are produced by Covington, all materials used in interviews of potential witnesses, and any adopted versions of declarations or affidavits created by or on behalf of a witness, as set forth in the joint stipulation between the parties. All information produced by Covington to the government pursuant to this Order shall be governed by the terms set forth in the parties' joint stipulation and the previously-existing Protective Order and shall be deemed "sensitive materials" until further agreement by the parties or order of this Court. (Doc.22).

It is further ORDERED that the government's use of any information provided by Covington, and any other person acting on defendant Flynn's behalf with former counsel in this case, is solely limited to obtaining and providing to the Court a declaration, an affidavit or testimony at an evidentiary hearing (if one is necessary) from these counsel, and any other person acting at the direction of former counsel on defendant Flynn's behalf in this case, in response to the claims of ineffective assistance of counsel in defendant Flynn's motions to withdraw his guilty plea, and to any further litigation on those motions, including any appeal of the Court's ruling on those motions, and any collateral attacks by defendant Flynn. It may not be used by the government in any other proceeding against Mr. Flynn.

It is further ORDERED that Covington shall consult Ethics Opinion 364 of the District of Columbia Bar, *Confidentiality Obligations When Former Client Makes Ineffective Assistance of*

Counsel Claim (Jan. 2013), for further guidance as to the scope of their ethical obligations in responding to defendant Flynn's allegations.

IT IS SO ORDERED.

The Honorable Emmet G. Sullivan
United States District Judge