

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 14-20715-CR-COOKE

UNITED STATES OF AMERICA

vs.

SALO SCHAPIRO,
MARLENE CESAR, and
SONIA GALLIMORE,
Defendants.

_____ /

**Government's Opposition to Defendants' Motion to Dismiss,
to Disqualify the Prosecution Team, and For A Taint Hearing**

In his *Motion to Dismiss, to Disqualify the Prosecution Team, for a Taint Hearing and a Continuance* (DE 174), Defendant Schapiro seeks the extraordinary sanctions of dismissal of charges or disqualification of the trial team based on erroneous accusations and insinuations that the government and its agents acted in a purposeful, “covert[],” and “surreptitious[]” manner to obtain and review defense counsel’s work product for tactical advantage (see, e.g., id. at 1-2, 12-13).

Despite the charged language, this is not a case about an intrusion into the attorney-client relationship, eavesdropping, or sneaking into the defense camp. What is actually alleged, and what this case concerns, is an alleged violation of the work product doctrine.

The sole issue before the Court is whether the file name titles created by the defense late in the discovery process, or the patient files that SA Lindsey viewed,

can be considered protected opinion work product, and if so, whether there is any legal basis to sanction the United States based upon her exposure to them.

Simply, there has been no showing that the documents at issue were protected work product, and there is no basis for the sweeping remedies Defendant seeks. Work product protection does not apply to every selection, opinion or mental process of an attorney. While Defendant's argument conflates fact work product, which enjoys no protection or privilege, and opinion work product, which may be protected, he bears the burden of showing that work product protection covers each document at issue—and he has failed to do so. On the contrary, despite the unilateral actions of a third-party copy service vendor in providing the government with duplicate copies of the documents it copied for the defense, both the facts and the law establish that there has been no violation of the work product doctrine, no government intrusion into the defense camp, and certainly no willful or purposeful violation of any work product protections by either the prosecutors or the FBI agents in this case.

Moreover, the Defendant has suffered no prejudice as a result of the conduct he alleges. As Defendant himself acknowledges, there was no misconduct by the prosecutors in this case. What remains is mere speculation about other hypothetical cases, or the theoretical possibility that this occurred in other cases.

Because what happened here was not a violation of the work product

doctrine or Defendant's constitutional rights, there has been absolutely no prejudice. Thus, his motion should be denied.¹

I. FACTUAL BACKGROUND²

A. *The Government's Discovery Production and Its Identification of Specific Patient Files*

Defendant Schapiro was indicted in September 2014. Consistent with its discovery obligations, the United States promptly made available for inspection and copying over 220 boxes of materials that the government had selected and seized during its investigation pursuant to a search warrant executed at Biscayne Milieu. These documents were maintained at the FBI warehouse in Miramar, Florida. Given the numerous patient files and sheer volume of documents, the documents were neither scanned nor Bates-stamped by the government. Instead, the physical documents were made available on a continuing basis for inspection and copying in a large conference room located within the warehouse.

As part of the government's initial discovery production in October 2014, a detailed inventory of the 220 boxes seized from Biscayne Milieu's offices was also provided, as part of the exhibits used in the first two trials. (See Gov. Ex. 1). As this inventory makes clear, boxes of documents were given titles corresponding to

¹ While the government solely refers to Defendant Schapiro herein, the instant response applies equally to his co-defendants, who have joined his motion.

² These facts were presented to Defendant's counsel at a meeting on May 23, 2016.

the types of documents they contained, such as “Patient Admission Files and Preliminary Evals” (Box 13), “Daily Group Logs” (Box 81, 122), and “Initial Psych Evaluation” (Box 121). (Id. at 1, 6, and 8). This detailed inventory facilitated the defense’s review of the seized boxes. Indeed, based on this index, from the outset of discovery defense counsel Ms. Arteaga Gomez was able to call and/or e-mail FBI Special Agent (SA) Lindsey ahead of time to tell them which specific boxes she wanted set aside for her review when she got to the warehouse. (See Gov. Ex. 2, e-mails from defense to FBI) (composite).

Throughout the discovery process, while the defense requested and received copies of any documents it wanted, the government also provided to the defense a list of those specific patients as well as the physical files that the government believed were more relevant to the charges pending against the defendant. Beginning in late 2014 and continuing through February 2016, the government identified and provided to the defense the following patient names and files:

- a. In or around December 2014, the government provided the defense with several Haitian patient files that had been identified to the defense as government exhibits in the prior Biscayne Milieu trials.
- b. In or around July 2015, the government provided defense counsel by hand with a list of 188 patients whose files might possibly be discussed at trial. The government segregated these specific 188 patient files and made them available for defense review and copying. (September 2015 was the first time, after receiving the list of 188 names, that the defense came to the

Miramar facility to review documents.) (See Gov. Ex. 3 (filed under seal)).³

- c. On or about February 17, 2016, the government provided defense counsel a second list identifying seventy-nine (79) patients, again emphasizing that these were patients that might be discussed at trial. (See Gov. Ex. 4 (filed under seal)). Fifty-seven (57) patients on this second list already appeared on the government's earlier list of 188 patients; twenty-two (22) patients did not. FBI agents segregated these 22 additional patient files in a box to be copied for the defense.⁴

The lists of patients provided by the government to the defense were not the product of any defense identification of documents or any copying requests made by the defense; the content of those lists was generated completely independent of any defense actions.

B. The Defense Review and Copying of Discovery

Defense counsel reviewed the documents seized by the government on at least thirteen occasions since December 2014. To guarantee the integrity of the original evidence, a Special Agent of the FBI was physically present in the room and serving as document custodian during every defense inspection. Purposely, the agents always remained outside of earshot of defense conversations during these inspections. There has been no allegation that any agent eavesdropped on

³ Because it contains patients' names, Gov. Exhs. 3 and 4 are filed under seal.

⁴ Although SA Lindsey is not certain whether the defense specifically requested that the additional 22 files be copied, SA Lindsey believed that the defense would likely want the 22 files copied in preparation for trial. Consequently, on her own initiative, she included those files among materials to be copied for the defense by Imaging Universe, a government-contracted third-party copy vendor.

any defense conversation.

To identify the documents they wanted copied, the defense team identified the documents they selected with “post-it” notes identifying which search warrant box they came from (hereinafter referred to as “Box Location Post-It Notes”) so that the FBI could later return those originals to that same exact location after copying. To maintain the integrity of the original evidence and chain of custody for the selected documents, those documents would then be copied by a third-party government-contracted copy service. This arrangement is a common and standard practice in cases where voluminous discovery is made available for defense inspection and the defense elects not to copy everything. This procedure was followed for over one year by the defense, without complaint. Accordingly, both sides were continuously aware that FBI agents and a third-party vendor would be seeing, handling, and re-filing the discovery documents selected by the defense for copying.⁵ Moreover, as described earlier, the discovery process was here—as most are—fluid and cooperative, with the defense regularly asking agents to pull items for copying and with the government on its own identifying items for the defense to review and copy.

At the end of a defense visit to inspect documents, the documents selected

⁵ The government placed no limit on the number of defense inspections or the numbers of documents the defense could copy; the defense chose not to copy everything in the 220 boxes, and instead opted to copy a subset of the documents under the procedures that are described above.

for copying were placed in a box in the office of Cori Weiss, the chief administrator at the Miramar FBI warehouse. The copy vendor, Imaging Universe, would then pick up the documents to be copied from Ms. Weiss' office. Imaging Universe thereafter provided the defense with a CD that contained scanned, Bates-stamped copies of the documents requested. As has been noted by the defense (see DE 174 at 5), the file names for the scanned documents were created by Imaging Universe for most of the discovery process. Only toward the end of discovery did the defense write on post-it notes to tell the copy service what to name the files.

Once a copy job was complete, Imaging Universe returned the original physical documents to the Miramar FBI warehouse, where agents would use the Box Location Post It Notes to return original evidence to the boxes from which they were removed for copying. At no time did any agent or attorney track or log the documents as they were re-filed.

C. The Duplicate Discovery CDs

As will be discussed in more detail below, unbeknownst to the undersigned prosecutors, each time the original evidence was copied and returned to the Miramar FBI warehouse, Imaging Universe left the FBI a duplicate CD of what it had copied for the defense. These discs were provided unilaterally, free of charge by Imaging Universe, and were never requested by any agent, prosecutor, or anyone else on the government's behalf. Neither of the prosecutors in this case

were aware of the duplicate CDs until they were disclosed in late April 2016. Upon receiving the CDs from Imaging Universe, SA Lindsey, one of the case agents in the present matter, stored the CDs in an expansion/redwell folder for safekeeping. In total, SA Lindsey received 11 such CDs. The duplicate CDs were wholly unremarkable to SA Lindsey because the discs only contained copies of evidence already in the government's possession. Consequently, she never thought to tell the prosecutors on the case that the vendor was providing these duplicate CDs until April 21, 2016.

D. SA Lindsey's Limited Review of the Duplicate Discovery CDs

Contrary to defense insinuations, SA Lindsey did not catalogue, examine, or review the Imaging-Universe-provided discs over a 16-month period. Rather, SA Lindsey only reviewed some of the CDs for the very limited purpose described below, and only in March 2016.

In late-March 2016, the government needed to prepare a CD containing the 79 patient files that the government had identified to the defense in February 2016, see supra § I(A) at ¶ c, so that those patient files could be sent to the government's expert for review. SA Lindsey, aware that a small number of the 79 patient files had already been scanned for the government's use in the prior Biscayne Milieu trials, knew the government already had an electronic copy available of some of the 79 patient files. SA Lindsey also believed that digital copies of the remainder

of the 79 patient files were on the CDs provided by Imaging Universe since the government had provided the defense with those patient files during the defense discovery inspections. Rather than re-scanning the patient files that the prosecution team had thus far been reviewing in hard copy form, SA Lindsey looked for the *government-identified* patient files she was aware were on the CDs, and transferred the digital copies of those patient files onto her desktop computer to burn them onto a separate CD for the expert. SA Lindsey looked only for the digital patient files that were on her list of 79 relevant patients, and crossed each name off her list as she found the associated digital file.

SA Lindsey believes that she looked at only 4 out of the 11 CDs received from Imaging Universe in order to find the patient files on her list. She needed to review the 4 CDs because the patient files had been made available to the defense for inspection and copying over multiple dates, as described in §1A. SA Lindsey believes she looked at the following 4 CDs:

- A CD dated March 2016 which contained the 22 patient files added by SA Lindsey for copying after February 17, 2016;
- A CD dated September 2015 which contained copies of the 188 patient files that had been made available on or about that date;
- A CD dated January 2015 that contained patient files that SA Lindsey had set aside for the investigator for co-defendant Marlene Cesar; and
- A CD dated December of 2014, which SA Lindsey knew contained a good number of the Haitian patient files which SA Lindsey had provided to defense counsel for copying on or about that date.

SA Lindsey estimates that she looked at each of these CDs a few times in March

2016 because she was unable to complete her search of a CD for the sought files and copy the found files in one sitting.

SA Lindsey never reviewed the CDs again after this period in late-March 2016, and she had not reviewed the CDs before beginning her search for the 79 patient files. SA Lindsey searched the CDs for the pertinent 79 patient files by patient name, and she found the patient files that she sought by their electronic file names, which bore the pertinent patient's name and medical file number. She accessed no other documents but the patient files on her list, and she does not recall what other materials were on the 4 CDs. Her review of the CDs was confined to searching for the patient files on her list of 79 patients, and she looked only for the specific patient files she needed to assemble.

On April 1, 2016, SA Lindsey sent a CD containing scanned copies of the 79 patient files to the government's expert, Dr. Crocco, via Federal Express. (See Gov. Ex 5, 04/01/16 Fed Ex Receipt, filed under seal). The copies sent to Dr. Crocco were the exact copies of the patient files that she took off the CDs from Imaging Universe, and that she collected from the scanned copies the government already had from the prior Biscayne Milieu trials. In light of the recent allegations by the defense, the government re-scanned the 79 patient files itself, sent Dr. Crocco a new CD, and retrieved the other CD that SA Lindsey sent Dr. Crocco. The prosecutors furthermore told their expert not to review the CD sent by SA

Lindsey, even though all it contained were patient files. Dr. Crocco complied and had only looked at, she recalls, four patient files on the original CD before receiving this instruction.

E. *The Communications Involving Imaging Universe's Ignacio Montero*

On Thursday, April 21, 2016, Ignacio Montero, the owner and proprietor of Imaging Universe, sent an e-mail to Cori Weiss at approximately 12:12 AM. In this e-mail, he noted that, with respect to the copy job that he had just completed, defense counsel (i.e., Ms. Arteaga-Gomez) had asked him to remove all post-it notes from the originals and had further stated that the government should not receive a copy of the CD. Mr. Montero requested guidance:

I do not know what to say anymore, but I would like someone whether it is the AUSA on the case to be aware and moving forward I need to have a record for myself and would need a print order should your office want the copy of the disc as you know the price is \$15.00. I do not want it to jeopardize the case and it is for this reason that I am advising the AUSA, Agent to please advise moving forward so that my providing of a disc being paid by your office will not affect this case. Also, does the AUSA/Agent want our office to remove these post it notes as they are your office's originals and not opposing counsels.

(See DE 174, Ex. 1).

A subsequent investigation by the government has since revealed that Mr. Montero told Ms. Arteaga-Gomez at some point (i.e., at or near the date of the April 21 e-mail) that he was not providing a copy of any discs to the FBI, when in fact he was, albeit without the prosecutors' knowledge and without anyone from

the government ever requesting such a copy.

This April 21, 2016 e-mail from Mr. Montero was forwarded to SA Lindsey by Ms. Weiss, and SA Lindsey showed it to the prosecutors later that same day. As a result of SA Lindsey's email, the prosecutors in this case learned for the first time on April 21, 2016 that—without any request from an agent or prosecutor—Imaging Universe had delivered to the government CDs containing duplicates of the documents copied for the defense.

After reviewing the e-mail, on the afternoon of April 22, 2016, AUSA Jim Hayes, one of the prosecutors on the case, called Ms. Arteaga-Gomez and informed her that he had just learned that the government's copy vendor had been providing the government with CDs containing electronic duplicates of what the defense had copied, and that SA Lindsey had kept these copies in a folder on her desk. He further informed Ms. Arteaga-Gomez that he would tell the vendor to immediately cease providing such copies, and that he would destroy the existing copies immediately. Ms. Arteaga-Gomez instead requested that she be given the copied CDs. On May 3, 2016, the government delivered the duplicate CDs to defense counsel in a sealed evidence bag after assurances that the material would remain sealed in defense counsel's office safe. Mr. Hayes further informed Ms. Arteaga-Gomez and later Mr. Srebnick that neither he nor Department of Justice Trial Attorney Lisa Miller knew about these copies prior to being shown Mr.

Montero's e-mail to Cori Weiss, and that neither he nor Ms. Miller had ever reviewed the CDs.

On April 22, 2016, at 5:45 PM, AUSA Hayes e-mailed Ignacio Montero of Imaging Universe, and directly informed him that the government should not receive a CD of what defense counsel selected for copying, stating the following:

Thanks very much for your e-mail to Cori. I am the AUSA on the Biscayne Milieu case. We should NEVER be getting a copy of what the defense is copying in this case. Please do NOT send us any copies of what the defense copies. Thanks and have a great weekend!

(See Gov. Ex. 6.)⁶

On April 25, 2016, Ms. Arteaga-Gomez called Mr. Montero and asked him if anyone from the government had requested the duplicate CDs that he provided. While the defense proffers in its motion that Mr. Montero had responded that "an agent" had asked his employee Jackie Balzola for the CD, Mr. Montero cannot recall exactly what he told Ms. Arteaga-Gomez, but believes that he told her words to the effect that he would have to check with Jackie.⁷

⁶ Mr. Montero has further been instructed by the United States that he should not be providing a copy to the government *in any case* of what the defense selects for copying unless the defense is aware of it and does not object. There are many cases where the government and defense will agree that the government receive a copy for record keeping or evidence verification/receipt purposes.

⁷ The government's investigation has further revealed that Jackie Balzola was not working for Mr. Montero's company in April 2016, but Mr. Montero often referred to her or sent e-mails in her name to make it appear like he had full-time employees because he believed doing so created the impression that his company

After speaking with Ms. Arteaga-Gomez, Mr. Montero forwarded the e-mail he sent to Cori Weiss to defense counsel, and stated:

Here is the email I sent the FBI and this practice has been one that has been going on since 2006 that both Xpediacopy my old company and Imaging Universe have provided the U.S.D.O.J. in the majority of the cases where the government was not paying for the discovery services or were paying for half of the services.

(See DE 174, Ex. 1.) With this, Mr. Montero suggested it was his practice to provide a free copy to the government of any copy job he did, both at Imaging Universe and at his previous company; he did not state, however, that this was at the request of the government, because it was not.

F. Steps Taken By the Government

Concerned about the suggestion by Mr. Montero's e-mail that it had been his supposed practice to provide copies to the government of items not paid for by the government or for which the government only paid half, the United States Attorney's Office for the Southern District of Florida (the "Office") immediately directed Mr. Montero to stop and began an internal inquiry.

As part of its internal inquiry, the government has conferred with the individuals at the Office who directly dealt with Mr. Montero on occasion

was larger than it was. On one occasion in March 2016, Mr. Montero asked his girlfriend to pretend to be Jackie and to speak to Ms. Arteaga-Gomez on the telephone (which she did), but to refer all questions back to Mr. Montero.

regarding payment for services—Supervisory Administrative Services Specialist Sandra Ortiz and Deputy Administrative Officer Lazaro Feliciano. Both of them explained that the Office cannot directly negotiate any contract for print services with any third-party vendor, and are prohibited by law from doing so (see 44 U.S.C. § 501), so defense counsel’s suggestion at the hearing that these individuals “negotiated” the contract with Mr. Montero is incorrect; the contract was between Imaging Universe and the Government Publishing Office (GPO).

However, both Mr. Feliciano and Ms. Ortiz are familiar with the terms of the contract between Mr. Montero and the GPO. According to Mr. Feliciano and Ms. Ortiz, any additional courtesy copy provided by Mr. Montero was never part of the contract Imaging Universe (or its predecessor) had with the GPO on behalf of this Office, (see Gov. Ex. 7, contractual documents) (composite). In fact, unauthorized copies were in *direct contravention* of his contract’s express terms. (Id. at 15 and 18 of respective contracts).

Ms. Ortiz and Mr. Feliciano stated that they never requested or “negotiated” a copy CD from Mr. Montero. Both Mr. Feliciano and Ms. Ortiz recall an incident some seven or eight years ago when Mr. Montero provided a copy CD of *government* discovery. Mr. Montero apparently explained to them that his intent in providing the courtesy copy was to encourage the government to move from paper copies to digital. Ms. Ortiz and Mr. Feliciano told Mr. Montero that the copy CD

was not authorized by his contract with GPO, and that the government would therefore not pay for such a copy. Ms. Ortiz and Mr. Feliciano furthermore told Mr. Montero to stop providing a copy CD, and thought that this conduct by Mr. Montero had ceased.

The prosecutors, moreover, met with Mr. Montero, who is not a lawyer, to better understand what had happened. Mr. Montero attempted to explain that he first began providing supposed “courtesy” copies of discovery approximately eight years ago to encourage the Office to move from paper copies to scanned copies. He could not distinguish whether the courtesy copy of scanned materials involved government or defense discovery.⁸ When asked to estimate the number of times that he believed he provided courtesy copies of discovery where the defense had selected original documents for copying, he estimated about 3 or 4 times.

Since it learned of the events in this case, the Office has also begun a careful and thorough inquiry of attorneys and agents to determine if it was in fact the practice of Mr. Montero to provide courtesy copies of defense discovery. While the Office is continuing its efforts to uncover any like circumstances, and will alert any potentially involved parties, to date it has found that there was simply no

⁸ In the majority of instances, Mr. Montero was asked to copy the entirety of the government discovery provided to the defense in compliance with a court’s Standing Discovery Order, and such copies served to document the government’s discharge of its standard discovery obligations. Instances of voluminous discovery being made available to the defense and then selections being copied by a third-party vendor like Imaging Universe were infrequent and rare.

pervasive practice of receiving or recording defense discovery, and that it was not a widespread or institutionalized practice. Although a few matters have been identified where copy CDs were provided, it was either known and agreed to by the defense and the copy CD was maintained for record keeping purposes, or the prosecutors did not have a distinct memory of a copy CD being provided, and in any event, they never looked at any.

In addition, in the first Biscayne Milieu trial (United States v. Macli, 11-CR-20587-SCOLA), one defense counsel periodically brought their own scanner to the FBI Miramar warehouse and made copies of documents they selected themselves. On those occasions, Imaging Universe did not have to be used. Defendants bringing and utilizing their own copier/scanner when reviewing documents in hard copy evidently happened in several other cases as well which were prosecuted by the DOJ's Medicare Fraud Strike Force in this District. The inquiry has further revealed that no like copying by any third-party vendor took place in the Ft. Lauderdale, West Palm Beach nor Ft. Pierce branches of the Office (Mr. Montero's jobs were confined to Miami).

The government views this ongoing inquiry and subsequent steps as its obligation under the circumstances, and is working diligently to learn all of the facts in this matter.

As a result of its inquiry, the government has done the following:

- Mr. Montero was immediately instructed to cease providing copy CDs to the government of what the defense selected in this or any other case, and was further instructed by the Office to cease providing copy CDs of discovery to the government unless the defense was aware and did not object.
- The Criminal Chief for the Office, Joan Silverstein, sent an Office wide e-mail to see if what happened in this case occurred in any other cases, and followed up with all section chiefs.
- The United States Attorney's Office for the Southern District of Florida appointed a committee to capture every instance in which copy CDs of what the defense selects were provided to the government. Its specific purpose is to systematically find out if/when this happened before.

G. Prosecution's Case Preparation

The undersigned prosecutors on this case have been producing key documents that they identified as potential trial exhibits on an ongoing basis since the case was indicted. This includes Medicare data in electronic form, summary exhibits, and documents that were part of the 220 boxes seized by means of a search warrant, as well as the 79 patient files. For example, the government produced binders containing Medical Director Contracts and Medicare Billing Review Certifications signed by Dr. Schapiro to defense counsel on January 26, 2015, which were part of the 220 seized boxes. This is well before SA Lindsey accessed the 4 CDs, and well before the majority of copy CDs were even created.

The same is true regarding the identification and selection of potential government witnesses, which has been ongoing and continues to this day. The

identification of witnesses has been directed by the prosecutors, not the agents. The majority of any new witnesses identified and interviewed by the government took place after May 2, 2016, during trial preparation, and they were selected based on the fact that they worked directly with Dr. Schapiro or performed similar duties at Biscayne Milieu.

Finally, the prosecutors on this case began reviewing the 220 search-warrant boxes in earnest beginning the week of May 2, 2016, well after the prosecutors disclosed the copy CDs to defense counsel. Defense counsel had already made their intentions clear to raise the instant motion on April 25, 2016. SA Lindsey had no role in selecting documents from the search warrant boxes as possible exhibits — nor did any other FBI agents — other than retrieving documents as instructed by attorneys. Over the course of its 4 week review, the government identified 138 documents as proposed exhibits that had not been used in prior Biscayne Milieu trials. The government disclosed its proposed trial exhibits to defense counsel on May 27, 2016.

II. ARGUMENT

Defendant has continually acknowledged that the prosecutors in this case did nothing wrong and engaged in no misconduct. Yet in the same breath, Defendant argues that the entire prosecution team, including the very prosecutors who proactively brought this issue to his attention and engaged in no wrongdoing, should be sanctioned for a supposed work product violation resulting from (1) the unauthorized, unilateral actions of Ignacio Montero, a non-lawyer, third-party copy vendor, who took it upon himself—unbeknownst to the prosecutors—to provide copies of defense discovery selections to FBI agents; and (2) the innocuous actions of SA Lindsey, who accessed four of the defense disks in March—late in the discovery process, solely for the purpose of administrative convenience, at no one else's behest—and cannot even recall what she saw (if anything), other than the 79 patient files the prosecutors themselves specifically designated as key documents in the first place. Defendant does not suggest that any prosecution team member, aside from SA Lindsey, ever saw anything even approaching protected work product,⁹ and SA Lindsey only recalls seeing unprotected items: the patient files.

Defendant nonetheless persists in alleging that the work product doctrine has been violated, that his Fifth and Sixth Amendment rights have been violated (as a

⁹ No prosecutor and no other agent viewed any of the contents found on the duplicate discovery CDs made by Imaging Universe.

result of the work product doctrine violation), and that sweeping sanctions, not in any way tailored to match the conduct or the actors involved, should be imposed upon the whole prosecution team.¹⁰ These allegations lack merit entirely.

First, despite broadly painted accusations, Defendant has failed to carry his burden of demonstrating that the selected files and file names viewed by Agent Lindsey were protected opinion work product, as opposed to fact work product—which lacks legal protection. To the extent that any file names or document selections may have qualified for work product protection, counsel waived those protections—by its nature, the copy process involved a level of openness to which both sides consented. Hence, there has been no showing of a work product doctrine violation or any resulting prejudice.

Second, Defendant has failed to adequately allege a constitutional violation, much less a constitutional violation that has caused actual harm to his case. Perhaps recognizing that he cannot demonstrate prejudice as is required by this Circuit and the Supreme Court's standards, Defendant urges this Court to instead adopt a rule created by the D.C. Circuit in 1978, wherein a defendant need only show that the prosecution team *possesses* trial strategy or confidential information

¹⁰ While Defendant also asserts, in conclusory fashion, that the “integrity of the Rule 16 discovery process has been compromised” (DE 174 at 10), the government does not construe his motion as alleging a Rule 16 violation. To the extent that he intended to do so, his motion fails to include any cases in support of such a claim.

to show a detriment (DE 174 at 12 (citing Briggs v. Goodwin)). That rule is neither binding precedent nor good law in light of United States v. Morrison, 449 U.S. 361, 365-66 (1981).¹¹ There is no per se rule of dismissal when the government comes into possession of information the defense deems protected. As explained in greater detail below, Morrison and its progeny require, in the first instance, a finding of prejudice in each particular case. Mere possession of information fails to suffice; actual prejudice is required.

The primary point, however, is that there has not been any transgression. The conduct was neither institutional nor purposeful. From the moment these issues were discovered by the prosecutors and the Office, defense counsel was notified and serious attention has been, and is being, paid to this matter. At the end of the day, the conduct at the heart of this case was unintentional and ultimately innocuous, and it has resulted in no actual prejudice or intrusion into the Defendant's protected work product or defense, much less constitutional rights. The remedies he seeks are therefore unavailable, and his motion should be denied.

¹¹ The holding of Morrison has been expressly adopted in this Circuit by United States v Melvin, 650 F.2d 641, 644 (5th Cir. Fla. 1981), and United States v Bell, 776 F.2d 965, 972 (11th Cir. 1985), and thus the underpinning of defendant's motion has been explicitly rejected by the Eleventh Circuit.

***A. Defendant Has Failed to Carry His Burden of Establishing That
There Has Been a Violation of the Attorney Work Product Doctrine***

It is elemental that the “burden to demonstrate the applicability of the work-product doctrine falls on the shoulders of the party claiming the protection.” Stern v. O’Quinn, 253 F.R.D. 663, 674 (S.D. Fla. 2008). Because he has failed to adequately carry his burden of demonstrating that the materials on the CDs viewed by FBI SA Lindsey contained any protected opinion work product, the Court should deny Defendant’s motion on that basis alone. FBI SA Lindsey opened only 4 duplicate CDs for the limited purpose of accessing electronic copies of a limited number of specific patient files (79) that *the government—not the defense*—had specifically identified to the defense for trial purposes, and that the government had then set aside for copying. Those 79 files were not protected opinion work product, the selection of those 79 files was not protected opinion work product, and the file names on those 79 scanned files were not protected opinion work product.

The attorney work product doctrine is distinct from the attorney-client privilege and provides qualified protection for certain materials prepared by, or at the direction of, counsel in anticipation of litigation or for trial. United States v. Nobles, 422 U.S. 225, 236, 238 n.11 (1975). While the work product doctrine “applies to criminal litigation as well as civil,” the “[t]he privilege derived from the work-product doctrine is not absolute.” Nobles, 422 U.S. at 236, 239. Thus, while the work product doctrine can shield an attorney’s legal opinions and conclusions

from discovery, unlike attorney-client communications, work product is not *necessarily* privileged. See, e.g., Mfg. Admin. & Mgmt. Sys. v. ICT Grp., 212 F.R.D. 110, 112 (E.D.N.Y. 2002). Moreover, there is a difference between fact work product, which is not privileged and has limited protection, and opinion work product, which is more strongly protected. See, e.g., Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1429 (3d Cir. 1991) (“the work-product doctrine recognizes a *qualified* evidentiary protection, in contrast to the absolute protection afforded by the attorney-client privilege.” (emphasis in original)). Defendant deliberately ignores this distinction and conflates the two by referring to everything in this case as “work product” (meaning, “opinion work product”).

The inquiry into whether documents are subject to a privilege is a highly fact-specific one, see, e.g., In re Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000), and mere selection of documents for copying is not automatically protected. Ultimately, “[c]ommon sense and the practicalities of litigation define the limits of the work product doctrine.” In re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993). Furthermore, “[l]ike other qualified privileges, [the work product doctrine] may be waived.” Nobles, 422 U.S. at 239.¹²

¹² See also, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (work product protection waived by disclosure “inconsistent with the adversary system”); In re Chrysler Motors Corp., 860 F.2d 844, 846 (8th Cir. 1988) (voluntary disclosure of computer tapes to adversary during settlement negotiations resulted in waiver).

The general rule applicable to third-party documents in an attorney's possession is that they do not receive work product protection, although courts have recognized in limited circumstances that an attorney's selection of documents in preparation for trial can constitute work product. United States v. Horn, 811 F. Supp. 739, 746 (D.N.H. 1992); Sporck v. Peil, 759 F.2d 312, 315-16 (3d Cir. 1985). Yet, "[n]ot every selection and compilation of third-party documents by counsel transforms that material into attorney work product." In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 386 (2d Cir. 2003). Indeed, neither a lawyer nor a defendant's act of selecting some documents from a larger collection of discovery documents automatically creates work product protection. United States v. Walker, 243 F. App'x 621, 624 (2d Cir. 2007). Nevertheless, it is this selection-of-documents work product theory which is the linchpin of the Defendant's motion.

Courts, including courts in the Eleventh Circuit, have adopted a substantially more narrow interpretation than the Defendant advocates when they have addressed the selection-based opinion work product doctrine, holding that "not every item which may reveal some inkling of a lawyer's mental impressions, conclusions, opinions or legal theories is protected as opinion work product." In re Trasylol Products Liab. Litig., No. 08-MD-1928, 2009 WL 936597, at *4 (S.D. Fla. Apr. 7, 2009) (adopting In re San Juan Dupont Plaza Hotel Fire Litig., 859

F.2d 1007, 1015-16 (1st Cir. 1988), the dissent in Sporck, and collecting cases); see also In re Grand Jury Subpoenas, 318 F.3d at 386 (“we have repeatedly characterized [the selection and compilation theory] as a ‘narrow exception’ to the general rule that third-party documents in the possession of an attorney do not merit work product protection.”).¹³ District courts in this Circuit, like the First and Second Circuits, have required that a party raising a “selection based opinion work product” claim make a showing that the materials at issue carry a “real, non-speculative danger of revealing counsel’s thoughts.” Avant Garde Eng’g & Res. Ltd. v. Nationwide Equip. Co., No. 3:11-CV-525, 2013 WL 2106817, at *9 (M.D. Fla. May 15, 2013). See also In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d at 1015 (1st Cir. 1988) (“Whatever heightened protection may be conferred upon opinion work product, that level of protection is not triggered unless disclosure creates a real, non-speculative danger of revealing the lawyer’s thoughts.”); FTC v. Boehringer Ingelheim Pharm., Inc., 778 F.3d 142, 151 (D.C. Cir. 2015) (“Opinion work product protection is warranted only if the selection or request reflects the attorney’s focus in a meaningful way.”), cert. denied, 136 S. Ct. 925 (2016).

Here, the Defendant has failed to make any showing whatsoever that there is

¹³ See, e.g., Stern v. O’Quinn, 253 F.R.D. 663, 674-75 (S.D. Fla. 2008) (citing U.S. v. Moore, 485 F.2d 1165, 1166 (5th Cir. 1973), and collecting S.D. Fla. cases).

any “real, non-speculative danger” that the acts of which he complains have revealed or will somehow reveal defense counsel’s thoughts. Instead, the defendant’s entire motion rests on unsupported speculation and exaggeration, and conveniently ignores a reality noted by the Court at the May 31, 2016 hearing: prior to March 2016, both sides already long knew each other’s theory of the case.

1. *The Scanned Patient Files That SA Lindsey Viewed Are
Not Protected by the Attorney Work Product Doctrine*

The only defense-selected scanned materials that any member of the prosecution team viewed were the 79 patient files that were viewed by SA Lindsey when she searched for and copied those specific patient files. These 79 patient files came from a list created by the government and provided to the defense as possibly relevant for trial. In other words, there was no selection of those 79 patient files by the *defense*; rather, the government selected those patient files and gave the patient names and files to the defense. The defendant’s copying of the 79 government-selected and government-disclosed patient files simply does not reveal nor present any danger of revealing any protected thoughts of defense counsel, and the defense copying of those files is thus clearly not protected work product. “Where an attorney’s mental impressions are those that ‘a layman would have as well as a lawyer in these particular circumstances, and in no way reveal anything worthy of the description “legal theory,”’ those impressions are not opinion work product.” Boehringer Ingelheim Pharm., 778 F.3d at 153.

Moreover, the patient files themselves are not work product. It is black-letter law that underlying factual information, even when included in attorney-client communications, is not protected by either the attorney-client privilege or the work product doctrine. See, e.g., Walker, 243 F. App'x at 624 (2d Cir. 2007) (citing Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981)). The files were no secret. Everyone knew that the 79 patient files were relevant to the Defendant's case—because the government told the defense—and that the defense had copied those patient files, which the government had specifically identified, collected, and provided to the defense for copying. Thus, there is no work product protection applicable to the patient files that were viewed and copied by SA Lindsey.

The Court should thus reject the defense claim that the limited materials that SA Lindsey viewed enjoyed any work product protection.

*2. Defense Speculation About SA Lindsey's Supposed Review of
Materials Other than the 79 Patient Files Must Be Rejected*

a. File Names Did Not Lead to New Exhibits and Witnesses

Apparently recognizing that the 79 patient files that were actually viewed by SA Lindsey are not protected by the attorney work product doctrine, as he must, defendant argues that SA Lindsey violated the work product doctrine by “plac[ing] before her own eyes an index of the defendant's hand-selected documents significant to his defense” (DE 174 at 13).

In so arguing, the defense is simply asking the Court to accept its conclusory and wholly unsubstantiated allegations that defense counsel's selection of documents and the naming of scanned files, followed by SA Lindsey's later limited review of 4 CDs, has created a real, non-speculative danger of revealing defense counsel's thoughts.¹⁴ Yet not a single concrete example of how defense counsel's thought processes were supposedly revealed has been offered, aside from, presumably, whatever occurred at sidebar at the May 31, 2016 hearing—and Defendant is claiming that the supposed work product protection extends to a far larger body of documents. “Where it appears that the focus or framework provided by counsel is obvious or non-legal in nature, it is incumbent upon the party claiming opinion work product protection to explain specifically how disclosure would reveal the attorney's legal impressions and thought processes.” Boehringer Ingelheim Pharm., 778 F.3d at 153. When a district court “fail[s] to demand such a showing . . . and instead conclude[s] categorically that the contested documents were highly protected opinion work product,” that is “error.” Boehringer Ingelheim Pharm., 778 F.3d at 153.

¹⁴ See, e.g., In re Grand Jury Subpoenas, 318 F.3d 379, 381 (in FCPA case, affirming district court's conclusion that appellants failed to demonstrate a real rather than speculative concern that a law firm's production of its collection of Swiss bank records to the grand jury would necessarily reveal counsel's thought processes); see also Avant Garde, 2013 WL 2106817, at *9.

And just as importantly, work product must be asserted on a document-by-document basis. See, e.g., United States v. White, 970 F.2d 328, 334 (7th Cir. 1992); United States v. El Paso Co., 682 F.2d 530, 539 (5th Cir. 1982) (“the attorney-client privilege may not be tossed as a blanket over an undifferentiated group of documents”); Defendant has not done so. This failure mirrors his failure to adequately meet his burden in other respects.

To the extent that Defendant argues, as he did orally at the hearing by way of hypothetical, that SA Lindsey could tell from document file names or selection the identity of potential defense witnesses or exhibits, not a shred of evidence has been presented to support this factual scenario. The two undersigned prosecutors—and the two undersigned prosecutors alone—directed the selection of the government’s trial exhibits in this case based upon the seized search warrant evidence, Medicare applications, and other discovery, without meaningful input from any of the case agents. Likewise, the undersigned prosecutors were and are responsible for directing the agents to approach potential witnesses based upon the prosecutors’ review of other evidence and knowledge of the case. Defendant’s self-serving assumption that SA Lindsey, the sole member of the prosecution team who saw the defense CDs, has been directing the selection of exhibits and witnesses is a convenient fiction. The prosecutors, not the agents, have been selecting and making the decisions about the government’s exhibits and witnesses.

Moreover, what Defendant argued at the May 31, 2016 hearing, via hypothetical, is temporally impossible. The prosecutors in this case began to prepare for trial in earnest after this entire discovery issue came to light. The review of documents for potential new exhibits began the week of May 2, 2016. The interviews of so-called “new” witnesses began after this date as well. Defendant knows this only too well because the government has turned over 302 interview reports for these witnesses and recently provided a new draft witness list. The only arguably “new” witness identified to date was contacted in March 2016, and is a medical nurse who accompanied all psychiatrists at Biscayne Milieu when they made their rounds, and who noted problematic patients in the process. In fact, the prosecutors were directing the agents to contact this witness since late January 2016, but he was not first contacted until March 2016 because the agents had other tasks. The undersigned prosecutors made no use whatsoever of defense documents to ascertain that such a witness might be important. Indeed, it was obvious.

Furthermore, the Court should decline Defendant’s invitation to find that the government must have looked at defense discovery based upon a *post hoc ergo propter hoc* logical fallacy. The fact that the government is calling certain witnesses, and has identified certain new exhibits, for this trial, in a manner that is not identical to prior Biscayne Milieu trials, is in no way probative of whether there was a work product doctrine violation, an intrusion, prejudice, or anything

else untoward; rather, it shows the obvious fact that the government has been working on preparing its case as the trial date looms. Indeed, to defense counsel's credit, Defendant has chosen a remarkably different approach to litigating this trial as compared with the two prior Biscayne Milieu trials; for example, defense counsel has identified five sub-specialist experts instead of electing to call one. As this Court noted: in this case the defense is "actually putting on a case." The government agrees. And based on that, the government's approach has changed. It is unreasonable to expect the government to react to a novel defense strategy—and an extraordinarily able defense counsel—by selecting the same witnesses and exhibits as it did in prior trials against different people with different attorneys. And it is preposterous to assert the existence of new witnesses and exhibits as proof of an impropriety. Finally, Defendant wanted more time, and obtained numerous continuances. In response, the government has used the extra time to refine and strengthen its case.

Certain new exhibits, for example, include Defendants' personnel files and scores of other documents bearing their names and signatures, including staff meeting minutes, time sheets, contracts, medical records, and oversight records. As it does in any case, the government has been tailoring its proof to the specific Defendant's conduct, its theory of the case. Moreover, even if the facts were as Defendant has wrongly assumed, the identity of witnesses or exhibits may only

receive limited work product protection because they are inevitably created to be disclosed at trial. Cf. Long v. Anderson Univ., 204 F.R.D. 129, 136 (S.D. Ind. 2001). All of these factors preclude a finding that file names, even if they contained names of potential witnesses or exhibits, could receive any work product protection under the circumstances here. Walker, 243 F. App'x at 624.

Similarly, the Defendant's argument that it is significant that the CDs viewed by SA Lindsey contained files with certain *names* chosen by the defense does nothing to advance the Defendant's cause, irrespective of any discussions at sidebar on May 31, 2016. As an initial matter, by their own admission, it was not until the very end of the discovery process that the defense even began naming the scanned files. During the bulk of discovery, it was the copy service, Imaging Universe, that named the files, and Imaging Universe's choice of file names clearly does not reveal defense counsel's mental impression nor constitute protected defense work product. Accordingly, it appears that the only CD that SA Lindsey opened that had files named by the defense would be the single March 2016 CD.¹⁵ As to that one CD, the defense has again failed to meet its burden of showing how any of the file names on that CD—or any other CD—amounted to protected opinion work product. Yet even if the file names in some way reflected or

¹⁵ The undersigned prosecutors remain completely unaware of the content of the discussions at sidebar, but would argue that unless Defendant presented the March 2016 CD to the Court for *in camera* review, no work product protection could possibly exist over file names, as Mr. Montero would have chosen them.

summarized the contents of the files themselves, mere summaries of documents that are not privileged (such as documents selected and seized by the government during the execution of a search warrant) do not create work product protection. See, e.g., Walker, 243 F. App'x at 624.

b. Defendant Waived Any Protections

The file names that the defense now claims are so revealing were left on post-it notes attached to files and documents in government offices to be handled by FBI agents when they refiled those documents after copying. It simply defies credulity that—without alerting anyone—defense counsel would leave “post-it” notes containing counsel’s mental impressions in the form of strategic file names in government offices on documents that the defense knew would be re-handled by FBI agents. While the defense motion mentions a conversation with Mr. Montero regarding a defense request that he remove post-it notes from scanned documents, it appears that the only conversation to that effect occurred in April 2016. And while—throughout the discovery process—defense counsel repeatedly reached out to the prosecutors regarding discovery requests, to seek Medicare data in different formats, and for other reasons, no complaints were made regarding the discovery process utilized at the warehouse or specifically, post-its.

This pattern of defense conduct is indicative of a waiver of any possible work product protection. See Nobles, 422 U.S. at 239. “Work-product protection

is waived when protected materials are disclosed in a way that substantially increases the opportunity for potential adversaries to obtain the information.” Stern v. O’Quinn, 253 F.R.D. 663, 681 (S.D. Fla. 2008) Here, prior to April 2016, defense counsel made little or no effort to protect whatever work product or thought process they now contend their file names possess. As recited above, they placed post-it notes with the supposed names and mental impressions on the files and then left the materials at the FBI warehouse with an agent and with the third party vendor, knowing that FBI agents would later see and handle those very files and documents. Moreover, prior to April 2016, defense counsel made no mention of the file name post-it notes to either the government or the copy service and never requested that steps be taken to protect that information (which was not necessarily obvious in light of the other post-it notes on the files).

Under such circumstances, not only is the defense argument concerning intrusion into protected work product less credible, any potential work product protection should be deemed waived. See, e.g., In re Atlantic Fin. Mgmt. Sec. Litig., 121 F.R.D. 141, 145 (D. Mass. 1988) (finding that disclosing party lacked legitimate expectation of confidentiality where he obtained no written or oral assurances of confidentiality after providing materials to a state entity); cf. Horn, 811 F. Supp. at 748. And it is black letter law that “[d]isclosure of work-product materials to an adversary waives the work-product privilege.” Doe No. 1 v. United

States, 749 F.3d 999, 1008 (11th Cir. 2014).

c. Scanned Documents Other Than the 79 Patient Files

To the extent that the defense is arguing that SA Lindsey viewed defense-selected documents other than the 79 patient files and that those documents somehow constituted work product, there is simply no evidence to support that contention. SA Lindsey only viewed the 79 patient files in late March 2016, she did not view any other scanned document, and she neither ever noted nor remembers anything about the file names of any other scanned documents that may have been on the CDs that she reviewed. To this day, no individual on the prosecution team has any idea what files are on the four CDs that SA Lindsey reviewed other than the government-identified patient files. And defense counsel's strenuous suppositions otherwise are not fact, and should not be taken as such.

Whatever other documents beyond the 79 patient files supposedly on the CDs, defense still has the burden of demonstrating a real and non-speculative danger that defense thoughts were revealed. He cannot. First, the documents copied by the defense contained non-privileged facts. Additionally, the theory of defense—lack of criminal intent—was already long known to the government. Finally, the defense was well aware, based on the long standing practice as it inspected and copied the government's documents, that their selection of documents was by no means secret, such that nothing was revealed. As noted

above, the defense knew from the beginning that after they selected discovery files or documents for copying, FBI agents would later handle and re-shelve these same files so that the chain of custody was maintained and the original evidence was properly stored.¹⁶ Throughout the entire course of discovery, the defense knew it had to mark the items with box location post it notes and that an agent for the government would be re-filing the documents.¹⁷ Yet, the defense never objected to this process even though it clearly and openly divulged to the government the files that it selected for copying. In fact, the defense never requested any alternative process nor made any request of the government that might have disclosed a bona fide or even speculative defense concern that defense counsel's file selections might have betrayed protected defense mental impressions. To the contrary, the defense regularly contacted SA Lindsey and asked that specific items be pulled for its review prior to counsel's visits to the warehouse. Knowing this is fatal to their

¹⁶ To the extent that Defendant argued at the May 31, 2016 hearing that he assumed that a non-case agent would re-shelve the evidence, any such expectation was unreasonable in light of the agent's and Defendant's course of dealing.

¹⁷ The defense's contention that "[t]he documents in those boxes were randomly placed in the boxes" (DE 174 at 2) is simply untrue—and the defense knows it. The documents seized during the search at Biscayne Milieu were placed in the boxes based on where they were found at Biscayne Milieu, and FBI agents indexed the contents of the boxes, labeled the boxes with descriptions of the contents, and the government furnished the defense with the index to those boxes. Indeed, the defense used the government's index to the boxes to request that the government make particular boxes available for inspection by the defense during particular defense visits to the FBI's Miramar warehouse.

position, the best defense can do is argue that they thought someone else was reshelving the documents besides the agents tasked with maintaining integrity during their document review.

As in United States v. Walker, these circumstances—where defense-selected documents simply extracted or summarized non-privileged data from non-privileged documents, where selected documents did not reveal defense counsel’s mental processes because the defendant’s defense of lack of criminal intent was not secret and had been revealed long ago, and where the significance of the documents selected by the defense would have been as obvious to a prosecutor or agent working on the case as to defense counsel—do not convert the defense selection of documents or the documents that were selected for copying and scanning by the defense into privileged work product. See Walker, 243 F. App’x at 624 (finding that these types of documents, recovered from search warrant at the defendant’s home, even if selected by the defendant himself and made during the course of pretrial preparation, do not obtain work product protection).

Defendant’s oral arguments analogizing SA Lindsey’s accessing the CDs to a choice to break into an office or a secret briefcase is misleading for many reasons—primarily, because such analogies presuppose malicious intent and bad faith action, both of which are utterly lacking here, and cannot be presumed. A briefcase/office analogy also masks the fact that defense counsel agreed to a

process that involved limited secrecy, and the government disclosed the existence of 79 patient files as key documents in the case. Finally, these ill-fitting analogies imply that everything in the disk/briefcase would be protected opinion work product—it would be like asking the Court to find that simply because something is in an office or a briefcase, it must mean that it is protected opinion work product. That is not the law. The existence of work product protection is a deeply fact-bound inquiry, and it falls on Defendant to establish work product protection for each allegedly privileged document.

Here, there is no reasonable basis for the defense to now claim that the materials they selected for copying, and the names of such files, were either protected work product or revealing of defense strategy. Accordingly, the extreme sanctions he seeks are entirely unwarranted.

B. The Facts of This Case Are Distinguishable And Far Less Egregious Than Those in Horn, And Even Horn Did Not Result In Dismissal.

Defendant strives to liken his case to Horn, and at the same time argues the facts here are somehow worse than *Horn*. Horn, however, involved much more serious conduct than the facts here; it is not even close. While Horn was found to have involved an intrusion into protected work product, this case involves no such intrusion nor protected work product.

In Horn, the court determined that the lead prosecutor — not a case agent, but the lead prosecutor — engaged in “serious misconduct” by disobeying the

court's own orders and reviewing and copying documents that "provided an important insight into defense tactics, strategy, and problems." Horn, 811 F. Supp. at 750-51. The prosecutor directed a paralegal to track what the defense was copying, and refused to return the copies when defense counsel requested them; the prosecutor even used defense documents in witness preparation. Id. at 741-42. By contrast, in this case the prosecutors did the exact opposite. Nothing was tracked or logged, no documents were used to prepare a witness, and the instant the prosecutors learned what was going on they informed defense counsel and returned the copies. The difference could not be starker. Also, in Horn, defense counsel directly spoke to the prosecutor and attempted to keep things secret in the discovery process, rather than just choosing to rely on the copy vendor. Id. In contrast, defense counsel never informed the prosecutors of any objection or request seeking to safeguard their so-called opinion work product.

The defendant is attempting to squeeze a round peg into a square hole by his over-reliance on Horn. In this case, the government made no intrusion into protected attorney work-product, and there was no prejudice. Moreover, even though Horn found misconduct and prejudice, it squarely held that dismissal was not the appropriate remedy. Id. at 751-52. The conduct was "very serious," but dismissal of an indictment is not permitted in the absence of "outrageous" conduct.

Id. Horn, the very cornerstone of Defendant's argument, rejects his request for dismissal.

C. The Court Must Decide What Happened in This Case

The government submits that the question for the Court is what happened in this case, and not in any other historical cases. Absent a finding of prejudice to the defendant in this case, the remedies he requests are not warranted. And there is no prejudice to defendant in this case.

The notion that the defendant may be entitled to relief if he can prove a systematic practice involving other cases in the past, is unsupportable. First, as noted at some length, the government's receipt of CDs with defense-selected documents was a rare occurrence. Such CDs were not authorized or requested by the government, and their receipt by the government was inadvertent. Thus, there was no misconduct at all, and certainly not repeated misconduct.

In addition, in United States v. Williams, in the grand jury context, the Supreme Court ruled that the failure to disclose substantial exculpatory evidence to the grand jury did not warrant dismissal of an indictment, and that the Court's supervisory powers could not extend beyond a particular case even if this practice was repeated. 504 U.S. 36, 54-55 (1992); see also Bank of Nova Scotia, 487 U.S. 250, 256 (U.S. 1988) (“[A] district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant.”);

Morrison, 449 U.S. at 365-66 (finding of prejudice in the particular case at bar is required before an indictment can be dismissed). Dismissal of an indictment is unavailable as a remedy absent a finding that a defendant in this case suffered actual harm.

D. The Relief The Defense Seeks Is Entirely Unwarranted Given The Lack of Prejudice and the Harmless Nature of the Alleged Conduct

Here, Defendant has failed to meet the basic elements of any claim of a work product doctrine violation, or a Fifth or Sixth Amendment violation, and he is thus not entitled to any relief. This is particularly true given that no case has held that mere exposure to unprotected documents compiled and named by the defense amounts to a work product, or constitutional, or any other violation. There was no work product intrusion, no invasion of the defense camp, and no misconduct. And Defendant has suffered no prejudice.

Disqualification is an extraordinary remedy, “reserved for situations of prior representation, conflicts of interest, prosecutorial misconduct, and other unethical attorney behavior.” United States v. Stewart, 294 F. Supp. 2d 490, 494 (S.D.N.Y. 2003).¹⁸ Even Horn, 811 F. Supp. at 751-52, which involved egregious

¹⁸ See also Walker, 243 F. App’x at 624 (finding defendant did not suffer any prejudice, and affirming denial of motion for disqualification, where documents at issue could not have provided insight into defense strategy or relationship between defendant and attorney); United States v. Chong, 58 F. Supp. 2d 1153, 1160 (D. Haw. 1999) (“Because there has been no prejudice and no prosecutorial misconduct, the Court finds that disqualification is not justified”).

misconduct by the lead prosecutor in the case, did not result in dismissal of the indictment. Instead, the relief in that case was tailored to match the conduct: only the offending prosecutor was disqualified, and not the entire prosecution team.

Defendant's theory of constitutional violations twists the language of binding precedents. For example, his motion devotes an entire block-quoted page to a passage from Briggs v. Goodwin, the D.C. Circuit case holding that mere possession of confidential information may be enough to merit a sanction. That case is no longer good law after Morrison, and it never had the power to bind this court in any event. There is no automatic rule of dismissal based on allegations; prejudice must be shown whether assessing a work product or alleged Fifth or Sixth Amendment violation. "Absent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate even though the violation may have been deliberate." Morrison, 449 U.S. at 365-66.¹⁹

Additionally, Morrison held that, even if a defendant's rights were violated, and even if he had actually been prejudiced, the law does not allow dismissal of an indictment if a lesser sanction will remedy the constitutional violation. Id.; see

¹⁹ See also United States v. Ofshe, 817 F.2d 1508, 1516 (11th Cir. 1987) (where government surreptitiously bugged defendant's communications with his lawyer, court rejected defendant's argument that an infringement upon the attorney-client privilege required automatic dismissal, absent any prejudice).

also Bank of Nova Scotia, 487 U.S. at 256.²⁰

The Defendant posits several constitutional and legal theories of violations at once, and mixes them together and cherry-picks from each in an effort to devise a single defense-favorable standard for dismissal.²¹ His attempts should be rejected. This case does not present a Fifth Amendment violation, because the conduct in this case does not rise to the “outrageous” conduct necessary to establish a Fifth Amendment violation. In general, for the government’s conduct to give rise to a Fifth Amendment violation, “the law enforcement technique [at issue] must be so outrageous that it is fundamentally unfair and shocking to the universal sense of justice mandated by the Due Process Clause.” Ofshe, 817 F.2d at 1516. Per the Eleventh Circuit, this doctrine “is to be invoked only in the rarest and most outrageous of circumstances.” Even if it were true that the defense selection of documents amounted to protected work product, the minimal review of defense-copied documents that occurred in this case does not qualify as such outrageous circumstances, especially where there was no prejudice and no

²⁰ United States v. Wellborn, 849 F.2d 980, 985 (5th Cir. 1988) (“A district court exceeds the proper bounds of its power to order dismissal of an indictment with prejudice when it fails to consider whether less extreme sanctions might maintain the integrity of the court without punishing the United States for a prosecutor’s misconduct.”).

²¹ Defendant’s attempts are yet another round peg-square hole argument that fails because these doctrines are not co-extensive “[t]he attorney-work-product doctrine is based on public policy, not constitutional grounds.” In re Grand Jury Proceedings, 601 F.2d 162, 169 n.2 (5th Cir. 1979).

misconduct.

It is well-established that a criminal defendant has the burden to show prejudice to obtain dismissal of an indictment if the defendant's attorney-client relationship was violated. United States v. Sander, 615 F.2d 215, 219 (5th Cir. 1980); United States v. Melvin, 650 F.2d 641, 644 (5th Cir. 1981); see also United States v. Bell, 776 F.2d 965, 972 (11th Cir. 1985) ("Even assuming ... that there was a violation of [the defendant's] [S]ixth [A]mendment right to counsel, dismissal of the indictment would still be inappropriate absent demonstrable prejudice to the defendant."). In this case, however, the government was not privy to any attorney-client communications and in no way violated Defendant's Sixth Amendment right to effective assistance of counsel. Moreover, because Defendant has failed to establish any form of prejudice, he is not entitled to the remedies he seeks.

And dismissal of an indictment with prejudice, as Defendant seeks here, requires even more. See, e.g., United States v. Pabian, 704 F.2d 1533, 1540 (11th Cir. 1983) ("the few unwitting and inadvertent gestures by the prosecutor did not constitute misconduct and cannot support dismissal of this indictment."); Morrison, 449 U.S. at 364 (1981) (even assuming Sixth Amendment was violated by agents' action of meeting with defendant without her counsel's knowledge or permission and seeking her corroboration in a related investigation, dismissal of the indictment

was unjustified, absent a showing of prejudice); United States v. McKenzie, 678 F.2d 629, 631 (5th Cir. 1982) (even in the case of the most “egregious prosecutorial misconduct,” the indictment may be dismissed only “upon a showing of actual prejudice to the accused.”); cf. United States v. Holloway, 778 F.2d 653, 658 (11th Cir. 1985) (finding no misconduct in case involving allegations of improper intimidation of witnesses, and holding that “[t]he facts presented by the defendant, even if assumed to be true, do not constitute misconduct which warrants dismissal of the indictment”).

Defendant’s contention that the severe sanction of dismissal with prejudice is warranted because “the government-contracted copy service mislead [sic] Ms. Arteaga-Gomez in order to cover-up the office-wide policy”— indeed, that this case is somehow more deserving of relief because of the private copy vendor’s actions—should be rejected outright. First, Defendant relies upon Levy, 577 F.2d 200, 208 (3d Cir. 1978), which diverges from the law in this Circuit and ignores significant Supreme Court precedent decided in more recent years, both of which require a finding of prejudice for relief. See Morrison, 449 U.S. at 364-66; Williams, 504 U.S. at 54-55.²²

²² Since the conduct here is not outrageous or even misconduct, the fact that courts in this Circuit (and across the country) have routinely declined to dismiss cases involving “reprehensible,” “troub[ling],” and egregious conduct on the grounds that the defendant failed to show any prejudice exposes the ludicrousness of Defendant’s requests. See, e.g., Ofshe, 817 F.2d at 1515-16 (deeming conduct

Here, SA Lindsey acted in good faith, Defendant did not suffer prejudice, and there was no misconduct.²³ It was the government that discovered the vendor's practice of providing duplicate copies of discovery, and the defense only learned about that practice because prosecutors promptly and affirmatively informed the defense about it and thereafter returned the duplicate CDs. Additionally, prior to reviewing the CDs, SA Lindsey already knew what the CDs contained, given that she herself collected and furnished to the defense the patient files sent to be copied by the vendor. The prosecution to this day does not even know what—other than the 79 patient files for which SA Lindsey searched—the

“reprehensible” but declining to dismiss indictment in case where Chicago AUSA used defendant's attorney as informant and enlisted defendant's attorney to wear body bug to surreptitiously record attorney-client conversations with defendant, unbeknownst to the Miami AUSA assigned to defendant's pending case in Florida; though attorney-client communications were recorded, the court emphasized the lack of demonstrable prejudice in its decision because “during the recorded conversation, the only information related to the pending case concerned the motion to suppress which was part of this public record, thus there was no prejudice”).

²³ Defense counsel's attempt to characterize SA Lindsey's conduct as some prolonged, bad faith, willful intrusion is belied by the facts. To the contrary, SA Lindsey accessed only a small number of the 11 discs in late-March 2016, and then only for administrative convenience. She only reviewed the files in order to find copies of files that the government had already identified to the defense so she would not have to have them copied again. Significantly, SA Lindsey had never accessed nor reviewed any of the CDs' content before then, and she was the person who brought the issues in the copy vendor's April 2016 email to the prosecutors' attention. Without SA Lindsey's actions and candor, neither the prosecutors nor defense counsel would likely have learned about the circumstances underlying the defense's motion. Her actions are plainly inconsistent with bad faith.

discs contained. SA Lindsey never noted and does not recall any of the other file names that she may have encountered when she reviewed the CDs, and she certainly never discussed anything about the contents of the CDs other than the 79 patient files with anyone on the prosecution team.

Finally, the Court should reject Defendant's proposal for a "taint" hearing and for the government, as in Kastigar, to bear the burden of proving that it has and will not use the so-called "illegally obtained work-product" (DE 174 at 15).²⁴ Defendant again seeks an extreme remedy without any support. To the extent it has come up, other courts have rejected similar requests by defendants to graft Kastigar's burden-shifting holding onto entirely dissimilar contexts.²⁵ Other than noting that Kastigar announces a rule of burden-shifting to the government, Defendant has provided no support for his attempt to lead this Court into ignoring long-standing precedent that holds that the proponent of the attorney-client or work

²⁴ Kastigar held, in relevant part, that "[o]ne raising a claim under [an immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 461-62.

²⁵ See United States v. Deluca, 11-cr-221-Orl-28 (KRS), 2014 WL 3341345 (M.D.Fla. Jul. 18, 2014); see also e.g. United States v. Warshak, 631 F.3d 266, 292-95 (6th Cir. 2010) (noting that, not even in dicta, "no other appellate court appears to have joined us in suggesting that Kastigar is implicated whenever investigators come into possession of materials subject to the attorney-client privilege," and that a Kastigar hearing is not required in the absence of documents produced by compelled testimony).

product violation bears the burden of proof. The Court should deny his request due to his failure to assert any cognizable violation of the right against self-incrimination (as he argues); let alone a basis to expand Kastigar's holding

III. CONCLUSION

For the reasons set forth above, the Court should deny Defendant's motion to dismiss and for disqualification and a taint hearing without a hearing.

Respectfully submitted,

WIFREDO A. FERRER
UNITED STATES ATTORNEY

By: /s/ James V. Hayes
James V. Hayes
Assistant United States Attorney
Court No. A5501717
99 Northeast 4th Street
Miami, Florida 33132-2111
Tel: (305) 961-9181
Email: James.Hayes3@usdoj.gov

Lisa H. Miller
Florida Special Bar No. A5502054
Trial Attorney -DOJ
Criminal Division, Fraud Section
1400 New York Ave., NW
Washington, DC 20005
Tel: (202) 679-1430
Email: Lisa.Miller4@usdoj.gov

CERTIFICATE OF SERVICE

I, James V. Hayes, hereby certify that on June 2, 2016, a copy of this pleading was served on all parties via the Court's electronic filing system.

/s/ James V. Hayes
Assistant United States Attorney